AUTOMOBILE ACCIDENT COMPENSATION IN AUSTRALIA

ANALYSIS OF A THEORY FOR THE DIVERSITY AMONGST THE STATE SCHEMES

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ABSTRACT

There are different notions of justice that support different reasons for compensating people injured in automobile accidents. The ' traditional ' method of compensating such persons is the tort system, which involves accident victim proving that fault of some other person caused their injury. This system is not a compensation scheme per se, but a means of shifting losses in accordance with community expectations. This system was criticised during the 20th-century for its inequity, expense and delay. Alternative compensation systems developed which supplement or replace tort as a means of access to compensation. These are divided into 'hybrid' systems – add-on, threshold and choice no-fault – and 'pure' no-fault. There are numerous arguments for and against each system and no one scheme has emerged as the system of choice internationally. In Australia, which is a Federation of states and territories, each jurisdiction has a separate scheme. The majority are fault based but with variations in benefit structures. There is also an add-on no-fault system in Tasmania, a threshold no-fault system in Victoria and a pure no-fault scheme covering residents of the Northern Territory. This pattern of diversity could be expected because of reluctance to embrace change when alternatives are not universally viewed as superior. Chapman and Trebilcock argue that the diversity signifies political instability that is not seen in other areas of law such as workplace injuries, products liability and medical malpractice. They hypothesise that because appreciation of facts surrounding automobile accidents and core values within communities across a Federation such as Australia should be similar, the probable reason for diversity is the existence of majority voting cycles and sequence dependent outcomes. A critical analysis of Chapman and Trebilcock's reasoning shows that their basic premise is faulty. An examination of the evidence from the structure of each

Australian scheme, and the scheme reviews and debates on points of change during the period from 1970 to date, demonstrates that in relation to Australian automobile accident compensation schemes, Chapman and Trebilcock's theory is probably wrong, and the diversity is a result of rational democratic political processes.

CHAPTER 1

INTRODUCTION

While many a tort student has been assigned the task of comparing the relative strengths and weaknesses of fault and no-fault accident compensation systems [1] there has been less consideration of the actual mechanisms of selection of such schemes. The evidence suggests that many see no-fault systems as being clearly superior to the common law alternative.[2]

And yet in the real world of automobile accident compensation there exists a mixture of systems, which indicates that the question of choice is not so simple as a theoretical comparison of the different systems suggests. In Australia, for example, whilst fault-based systems predominate,[3] these systems exhibit marked differences in the way benefits are calculated.[4] In this country there is also a threshold no-fault system, an add-on no-fault system and a 'pure' no-fault system.[5] A reasonable explanation for the dominance of fault-based systems with a minority of states diverging from the norm might be that there are conservative political processes at work in most of the states and territories and the reasons for changing to a no-fault system are perhaps not so compelling for most that they displace the reasons for retaining a fault-based system. Such an explanation would imply a democratic political process and rational lawmaking across the federation.

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[1] M.A. Robinson's 1987 book (Robinson M..A., 1987, *Accident Compensation in Australia-No-fault Schemes* Legal Books, Sydney) grew out of an honours dissertation on this subject.

[2] See eg *ibid.* See also such major studies as the Woodhouse Report and the NSW Law Reform Commission Report "A Transport Accidents Scheme for NSW" cited herein.

[3] There are modified fault-based systems in NSW, Queensland, Western Australia and South Australia, a pure fault-based system in the ACT and also a pure fault system for accidents involving non-residents in the Northern Territory. What is meant by 'modified fault' is tort based schemes where there has been some statutory modification from the way that, for instance, liability is determined or damages calculated at common law.

However Bruce Chapman and Michael Trebilcock in their 1992 article "Making Hard Social Choices: Lessons From the Auto Accident Compensation Debate"[6] postulate a different theory for what they see as political instability in federations such as the United States, Canada and Australia, using an examination of debates over the choice of the optimal regime for handling automobile accident compensation as an extended case study.[7] They reject explanations for diversity between systems based on divergent views of the facts of accidents or the need to compensate, or differences in the mix of values across jurisdictions. This is because they believe that in federations like Australia for example, such views and values will be roughly equally distributed. They cite as evidence for this view policy convergence across jurisdictions in areas of law such as medical negligence, products liability and workers' compensation.[8]

Their own explanation for policy divergence across jurisdictions in the area of automobile accident compensation is that majority voting cycles and sequence dependent outcomes amongst those voting on the form of such systems lead to random selection of systems across jurisdictions.[9] If this explanation is correct, differences in automobile accident compensation schemes between jurisdictions in a federation are attributable either to an irrational artifact of the voting process, or alternatively to cynical manipulation of the decision making process on the part of agenda setting

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[4] See Chapter 6 herein.
[5] In Victoria, Tasmania and the Northern Territory respectively.
[6] Chapman B. and Trebilcock M., 1992, 44 *Rutgers Law Review* 797.
[7] *ibid.* pp799, 801-3.
[8] *ibid.* p803-4.
[9] *Majority voting cycles* can occur when voters are considering three or more alternatives, none of which is preferred by a majority of voters, and the alternatives are considered pairwise, eg A as against B, B as against C and C as against A. Where there is no majority preference, the voting process cycles endlessly unless some arbitrary stop is made. *Sequence dependent outcomes* can occur where the course of a voting cycle is predictable, there is a restriction on revisiting previously rejected alternatives and the voting agenda can therefore be manipulated to achieve the outcome preferred by the agenda setter.

minorities. They extrapolate from the findings of their extended case study of automobile accident compensation to wider issues that arise across the legal and public policy making landscape.[10]

Because Chapman and Trebilcock's theory provides such a unique and disturbing explanation for the existence of differences in automobile compensation systems between states, this work examines it in depth to determine the extent to which it fits the available evidence, so that judgments can be made about what implications it has for lawmaking in Australia. If the lawmaking process around Australia in relation to automobile accident compensation is indeed as arbitrary or manipulable as Chapman and Trebilcock suggest then this would have profoundly disturbing social implications, not the least of which would be that *any* non-conformity across the federation's legal systems could signal a failure of the democratic process.

A failure of the democratic process across the federation in such an important area of social choice as automobile accident compensation may signal a more general failure of this process. A conclusion that Chapman and Trebilcock are correct may therefore require an examination of all areas of law where there is policy diversity between states to determine the extent to which the diversity is due to a process of cycling or manipulation. This in turn would raise questions about the desirability of interfering with the change process in some way to avoid arbitrary or manipulated outcomes.[11] This study of Chapman and Trebilcock's theory therefore represents an important step in the critical analysis of the social change process in Australia.

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[10] Chapman and Trebilcock *op cit.* p799.

[11] Chapman and Trebilcock propose that a "non-arbitrary choice sequence" be imposed for choosing among the various policy options that are typically available in automobile accident compensation law in order to avoid arbitrary results-see *ibid.* p869.

There are five essential steps in the examination of Chapman and Trebilcock's theory as it relates to automobile accident compensation:

1. The theoretical groundwork as to why we compensate must be examined;
2. The extent of diversity in Australian automobile accident compensation must be established;
3. Chapman and Trebilcock's theory must be examined and critically analyzed;
4. A test of Chapman and Trebilcock's theory must be developed;
5. The theory must be tested against available data.

The first step, of establishing the theoretical groundwork by looking at why we compensate, is carried out in Chapters 2-5. The various alternative compensation systems are examined in depth, so that their relative strengths and weaknesses, and the reasons to choose one over another, can be clearly understood.

Secondly, the extent of diversity that has developed in automobile accident compensation systems in Australia is considered in Chapter 6 in order to ascertain a) the extent of such diversity and b) any significant features which might provide clues as to whether Chapman and Trebilcock's theory has any veracity. Thirdly, Chapman and Trebilcock's theory is examined and then critically analyzed in Chapters 7 and 8 to see if it is internally coherent and logically consistent. Fourthly, a test of Chapman and Trebilcock's theory is developed in Chapter 9 which takes into account the availability of probative data; and finally in Chapter 10 the theory is tested against such data as there are so that conclusions can be drawn about how closely the theory conforms to the reality as represented by the data, and thus whether the various automobile accident compensation schemes in Australia are the result of a conscious lawmaking process, or are accidental results of a political anomaly.

The appraisal of the alternative compensation systems carried out as the first step in this study shows that none of them are immune from criticism. All of them have benefits and drawbacks that are examined in the following Chapters of this work. The tort system,[12] for example, attracted increasing criticism over the course of the twentieth century for its inequities, expense and delay.[13]

The problem for legislators in this area is that the various alternatives to the tort system have also attracted criticism. These alternatives basically consist of an array of schemes that exhibit varying degrees of replacement of tort damages by compensation provided on a no-fault basis. Although such alternatives to the oft-criticized tort system are available, none of them has become a standard, either nationally or internationally.[14] This could be because all of them have been criticized to some extent for failure to meet expectations, leaving conservative legislatures unwilling to risk change.

Because there has not only been vehement criticism of fault-based accident compensation systems around the world over the years, but also criticism of the more popular alternatives, it could be expected that a variety of schemes would be found across jurisdictions. It could also be expected that one of the main features of most schemes would be modification to overcome the most often criticized features of the particular system. The examination in Chapter 6 of the schemes currently operating in the Australian states and territories showed that this is generally the case.

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[12] That is the system of determining entitlement to compensation based on establishing negligence on the part of some party. The terms 'tort', 'fault-based' and 'common law' are used interchangeably throughout this work to refer to this system.

[13] See for example the NSW Law Reform Commission's report "A Transport Accidents Scheme for NSW" *op cit*.

[14] In Australia, tort-based systems prevail. Out of 8 states and territories, 5 have a fault-based scheme, two retain a component of tort and only the Northern Territory scheme could be considered a 'pure' no-fault scheme, and only then in respect of injuries to territory residents.

The fact that all of these schemes exhibit features designed to overcome the perceived drawbacks of the various systems suggests that a conscious effort has been made to modify the schemes to render them less open to the type of criticisms previously outlined. This in turn suggests that the ultimate form of the Australian schemes has been arrived at less arbitrarily than Chapman and Trebilcock's theory would suggest. However, it still does not fully explain why some states and territories have chosen to change to a no-fault variant scheme, whilst the majority of states have elected to retain fault as the basis for entitlement to compensation. The third step, of examining and critically analyzing Chapman and Trebilcock's theory outlined above in more depth, is therefore necessary to see if it provides a plausible explanation as to why a few states have moved away from the norm, whilst most have not.

The application of the test developed in Chapter 9 to the available data, the results of which are set out in Chapter 10, demonstrates that Chapman and Trebilcock's theory does not accord with the reality of Australia's automobile accident compensation landscape and is therefore probably wrong. The import of this is that change and diversity in the Australian schemes has not been a result of voting artifacts or agenda manipulation but of rational democratic political activity. A countervailing argument to Chapman and Trebilcock's theory, that the complicated pattern of diversity and convergence seen in Australian automobile accident compensation systems since the 1970's is most likely due to innate conservatism coupled with individual attempts over time to mitigate some of the worst problems associated with fault-based systems, is implicit from this study's findings. The analysis of the data in this section of the paper is also important from a legal historical point of view as it contributes to the understanding of the development of policy in this area over the past three decades. No attempt has been made to examine, other than briefly, the few other theories that might

explain the diversity, because they also present a view of diversity based on the legitimate exercise of political will, rather than irrational and arbitrary voting processes.

In summary, the objective of this thesis is to examine the theory 'tested' by Chapman and Trebilcock in their extended case study of automobile accident compensation systems and to determine whether Chapman and Trebilcock's theory adequately or correctly explains the diversity of such compensation systems in Australia.

This thesis focuses on two specific areas. In the first instance it contributes to a legal historical understanding of policy making decisions in Australia in regard to the movement from the position taken on automobile vehicle accident compensation in the various states prior to the nineteen-seventies to the current positions of diversity across the various Australian states. Secondly this thesis contributes substantially to an understanding of the basis of legal and public policy making and the process of social change in Australia.

As a postscript, during the final months before submission of this work there has been a "public liability crisis" in Australia, with calls for a review of the law of negligence nationally and in most states. The individual nature of proposed resolutions of this "crisis" by various states supports this research in that there is a demonstrable range of values and a lack of consensus across jurisdictions as to the best method of solving the perceived problem. It will be interesting to view the debate as it continues to develop, in light of the findings of this study.

CHAPTER 2

COMPENSATION AND THE REQUIREMENTS OF JUSTICE

Introduction

It has been said that it would "generally be universally accepted that compensation should be provided efficiently in those cases where justice demands it".[1] The problem with such a statement is that it begs questions about who compensation should be provided to, who should provide it, what is meant by 'efficient' and what is meant by 'justice'.

It has also been said that "there are ... likely to be differing views about the relative weights to be accorded to justice and efficiency goals when they are in conflict"[2] and "it is possible to categorize compensation systems according to whether 'causation' or 'needs' is the major determinant for compensation"."[3]

'Causation' and 'needs' could thus be seen as two dominant paradigms of 'justice' in the context of accidents, injuries, disabilities and compensation.[4] But this is an oversimplification of what is a complicated area of social philosophy. There has been a longstanding and complex academic debate, particularly amongst lawyers from common law countries,[5] as to whether or not justice requires that

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[1] *Compensation and Professional Indemnity in Health Care-Interim Report,* February 1994, Commonwealth Department of Human Services and Health p 39.
[2] *ibid.*
[3] *ibid.*
[4] *ibid.*
[5] See for example The Columbia Report (Committee to Study Compensation for Automobile Accidents 1932, *Report to the Columbia University Council for Research in the Social Sciences*; Ison T.G. 1967, *The Forensic Lottery*, Staples Press, London; the New Zealand and Australian Woodhouse Reports *op cit* and Sugarman S. 1989, *Doing Away With Personal Injury Law,* Quorum Books, New York on the 'anti tort' side of the argument,

compensation for personal injury should be based on an injured person establishing fault on the part of some other person. This debate has been particularly intense in the vexed area of automobile accident compensation and has been characterized by a lack of any universally accepted answers to the abovementioned four questions. The reason for this seems to be that there are different theories about the interplay between justice and compensation requirements.

Some Theories Of Justice And Compensation

The question 'what is just?' has occupied many minds over a considerable period of time.[6] The answer often seems to be specific to the social context in which the question is asked. Notions of justice are linked with concepts of 'rights' - the development of theories of justice has necessitated an examination of individual and collective rights, and these are mostly specific to the society being examined.

There are many different notions of what justice is and this is reflected, on a practical level, in the individual legal systems extant throughout the world, and in the differing compensation systems that exist in different countries .[7]

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and the works of Landes and Posner, Danzon, Swann and McEwin *op cit* on the 'pro tort' side-there are many hundreds of authors on either side of the line, but perhaps more on the 'anti tort' side.

[6] For example, Aristotle's *Nicomachean Ethics*, which is the starting point for most discussions about theories of justice, was written in 350 B.C.E.

[7] Cane P., 1993, *Atiyah's Accidents, Compensation and the Law*, 5th Edn, Butterworths, London. For some works on justice theory see Barry B., 1989, *Theories of Justice*, Harvester Wheatsheaf, London; Roemer J.E., 1996, *Theories of Distributive Justice*, Harvard University Press, Cambridge Massachusetts; Arthur J. and Shaw W.H., 1991, *Justice and Economic Distribution*, Prentice Hall, New Jersey; and Cohen M., Nagel T., and Scanlon T. (eds), 1980, *Marx, Justice, and History*, Princeton University Press, Princeton New Jersey. See also Rawls J., 1999, *A Theory Of Justice*, Oxford University Press, Oxford and Nozick R., 1974, *Anarchy, State and Utopia*, Basic Books, New York.

There is also confusion as to the social role played by compensation and how it 'fits in' with the different notions of justice. Compensation can broadly be seen as involving the distribution of wealth defined in terms of money to persons who are adjudged to deserve it, most often in an attempt to restore the status quo and in this way compensation can be seen as an end result of 'commutative justice'.[8] It is also, in any state-organized compensation system, a function of 'social justice' in that it involves the distribution of benefits.[9]

In fact, the term 'compensation' can have a number of meanings,[10] most of which involve the concept of making good a loss, when seen from the focus of an injured person. However, in the context of personal injuries, it is obviously not possible to 'make good' some losses in monetary terms[11] which has fueled the argument surrounding what is 'just' compensation.

The initial question at this juncture is " Why is it just that any person has a right to compensation?". The starting point in the theoretical analysis that is required to answer this question is the notion of 'corrective justice' as explained by Aristotle.[12]

Corrective justice bears on transactions between parties. It treats the position of all peoples as being equal anterior to a transaction, and it restores this antecedent equality by transferring resources from defendant to plaintiff so that a gain realized by the former[13] is used to make up a loss suffered by the

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[8] Campbell T., 1983, *Justice*, Macmillan, London, p18.
[9] *ibid.* p19.
[10] See Cane P *op cit.* p4.
[11] See the argument in Luntz H., 1990, *Assessment of Damages for Personal Injury and Death*, 3rd Edition Butterworths , Sydney p4. There are obviously cases where it is difficult to see how a loss can be made good in *any* terms eg loss of a limb such as a leg.
[12] *Nichomachean Ethics* V2-4. See Gordley G., "Tort Law in the Aristotlean Tradition" in Owen D.G., (ed), 1995, *Philosophical Foundations of Tort Law*, Clarendon Press, Oxford p131.
[13] Professor Luntz comments that most accidents do not result in a "gain" to the defendant. The question of what is a "gain" (e.g. through being able to "profit" by negligent behaviour such as speeding etc.) is a complex one

latter.[14] Expressed another way, if one person injures another by an act of injustice, the injury is wrongful, and rectification in some form is required.[15]

Aristotle distinguishes this notion of 'corrective justice' from the notion of 'distributive justice', referring to the distribution of benefits to social groups.[16] Justice sometimes also involves settling disputes arising from the merits or demerits of individual actions and sometimes involves wider questions about the general situations of individuals and groups.[17] Thus, whilst it is possible on one level to distinguish between individual, or 'commutative' justice and social, or 'distributive' justice, both involve issues of distribution of benefits and burdens.[18]

Justice does not always mean 'fairness' in any popularly accepted sense (i.e. the notion that people must always receive favourable outcomes from particular transactions). It is even possibly the case that justice, or the claims of justice, may sometimes be in conflict with common humanity, or generous beneficence[19] in that despite a person being 'deserving' because of some need it may not be efficient in an economic sense or by reason of established legal rules to compensate them. In this sense, justice and efficiency may share at least some common elements.[20] It is thus that 'causation' and 'needs' can be seen, not as paradigms, but as conceptions of justice - they are not patterns or examples but rationalizations enunciating the evaluative criteria deployed to determine that certain types of

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which is beyond the scope of this work. Suffice it to say that proponents of corrective justice do argue that there is a balance which is upset when the negligence of a defendant leads to loss on the part of the plaintiff.

[14] Weinrib E. "Towards a Moral Theory of Negligence Law" in Bayles M.D. and Chapman B (eds), 1983, *Justice, Rights and Tort Law*, D. Reidel Publishing Co., Boston p124.

[15] Posner R.A., 1983, *The Economics of Justice*, Harvard U.P., Cambridge, Massachusetts p73.

[16] Campbell T., *op* cit. p88.

[17] *ibid.*

[18] *ibid.* pp18-19.

[19] *ibid.* p35.

[20] See generally Posner R.A. *The Economics of Justice op cit.* but this view has been criticised as being 'morally indecent' see Campbell T., *op cit.* p149. See also Wright R.W., 1995, "Right Justice and Tort Law" in Owen D.G. *op cit.* p159 at p182.

situation are just or unjust.[21] In other words they are tools that have been used in different systems to determine the boundaries of justice and the entitlement to compensation in various circumstances.

In Australia, as in the United States, there are various compensation 'systems' amongst different states, where the philosophy and mechanisms of compensation are widely diverse. This might suggest that there may be separate ideas of justice operating on a state specific basis, and yet there are important similarities in the systems.[22] However, it would appear, disturbingly, that within systems there is a degree of ignorance and confusion on the part of politicians and the public as to the basis of compensation.[23]

If justice is defined as the way in which individuals ought to be treated in the social context (which involves notions of both commutative and distributive justice) then causation and needs would be distinct but not mutually exclusive justifications for the awarding of compensation. To complicate matters, it has already been seen that efficiency can be a part of justice (as can morality also be) although it is more often associated with matters of utility.[24] There is never an unlimited pool of compensation funds, and justice may require that the available funds be distributed efficiently in fairness to all.

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[21] *ibid.* p4.
[22] This will be examined in the latter part of this paper; it will be submitted that there are different views of justice operating in different Australian states despite theories to the contrary-see e.g. Chapman B. and Trebilcock M.J. 1992, "Making Hard Social Choices: Lessons From The Auto Accident Compensation Debate", 44 *Rutgers Law Review* p797.
[23] Cane P. *op cit.* p348 and see also Chapter 10 herein.
[24] Campbell *op cit.* p21.

Thus, it may not be considered 'just' at all to compensate people for injury and illness in a very poor society in which people die of starvation or malnutrition, because of the drain on resources that such a system may represent, and the distortion in the distribution of scarce resources.[25]

In wealthy societies, such as Australia, it may be considered 'just' to compensate - but only up to a certain point, and for a variety of reasons limitations have been placed on the award and amount of the compensation in the various states, these limitations being part of the 'legal justice' of society in the sense that they are the formal rules for determining the distribution of compensation.[26]

In most cases, to compensate someone is to provide them with something that is intrinsically desirable. Compensation by way of money is obviously an exercise in distribution, and a compensation 'system' therefore necessarily involves organized, or patterned, distribution.[27]

Of course, compensation, especially for personal injuries, can never be 'perfect', but only 'fair'[28] and so the aim of such compensation is to bring a person up to some baseline of well-being.[29]

The fact is, however, that in the area of compensation for injuries sustained in automobile accidents in different states of Australia, not only is this baseline different, but so is the basis for the awarding of compensation. This not only raises the question as to whether Australia is a 'just' society in the sense of equity of outcome for injured persons but clearly demonstrates the confusion in this country surrounding the interplay between notions of justice and compensation discussed above.

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[25] Cane P. *op cit.* p350.
[26] See Chapters 6 and 10.
[27] See Goodin R.E. 1989, "Theories of Compensation", 9 *Oxford Journal of Legal Studies* 56 at p59.
[28] Luntz *op cit.* p5.

These different laws regarding compensation in Australia have been described as "ad hoc" and "piecemeal",[30] although all conform to a basic pattern in that they are either based on the common law method of compensating, or on the various no-fault alternatives to the common law. These methods of compensating are briefly described below.

It may be that, rather than supporting a widespread diversity of theories of justice, the existence of different compensation systems in countries such as Australia reflects a naivety and a profusion of ideologically driven rationalizations for compensating ill and injured people.[31] There is evidence to support this view, which is examined in the later Chapters of this work.

The different ideas about justice and compensation have led to the development of different methods, or systems, for compensating victims of automobile accidents. These systems are broadly described in the next section.

The different compensation systems can be grouped under 3 broad types; firstly tort (used interchangeably herein with the terms 'common law' and 'fault-based'); secondly no-fault; and thirdly hybrid fault/no-fault systems. Each of these systems is broadly described below.

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[29] Goodin *op cit.* p59.
[30] Malkin I. 1990, "Unequal Treatment of Personal Injuries", 17 *Melbourne University Law Review* p685.
[31] Which may accord with a Marxist analysis of 'Justice'-see Campbell *op cit.* p182.

The Tort System

It has been said that compensation is the principal aim of the law of torts,[32] at least as far as this is possible by payment of money,[33] although some would argue that this assessment of tort's main aim describes a preoccupation rather than an aim.[34]

The tort system will compensate plaintiffs who can show that they have been 'wronged' in the relevant sense by the defendant.[35] Such wrong may be caused negligently, recklessly, or intentionally;[36] however the most frequent reason for compensating injuries is negligence. Thus tort discriminates between different accident victims according to the notional culpability of the defendant.[37]

Under a 'pure' tort system (i.e. one that has not been modified by statute), those plaintiffs who can satisfy a court that, on the balance of probabilities, some other person has failed to meet the required standard of care as a result of which the plaintiff has suffered damage are the only persons who will receive compensation from that court.[38] Therefore only a percentage of persons will receive any compensation at all and of those that do receive compensation a further percentage will have their

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[32] See Trindade F. and Cane P., *op cit.* p2.
[33] *ibid.*
[34] Clark K.J. 1993, "Sixty Years of Torts: Lessons for the Future", 29 *Tort and Insurance Law Journal* 1 at p6 and also see Fleming J.G., "Is there a Future for Tort?" *op cit.* p137.
[35] See Wright R.W. *op cit* and also the exposition on this subject in *Compensation and Professional Indemnity in Health Care op cit.* p40.
[36] See Cane P. *Atiyah's Accidents, Compensation and the Law op cit.* p26.
[37] See Fleming J.G., 1984, "Is There a Future for Tort?", 58 *ALJR* 131 at p137.
[38] Most cases (well over 90% in New South Wales, for example) settle without a rigorous examination of fault taking place. The question is whether in such cases the level of compensation is ever commensurate with the degree of fault, or indeed is even adequate. Whilst Professor Luntz comments that damages in tort cases are measured by the extent of the plaintiff's loss and do not bear any necessary correlation to the degree of the defendant's fault, the writer's personal experience has been that there are many factors which influence the quantum of settlements, not least of which is the plaintiff's (and their lawyers) fortitude. When cases proceed to trial though, there is a more thorough examination of relative fault which does affect the damages outcome.

compensation reduced because they will be found to have behaved in such a way that they contributed to their own injuries in some measure ('contributory negligence').[39]

Of course, tort is 'judge-made' law, and has grown 'organically' in the sense that it has changed in response, or reaction, to social movements and pressures. Over time, the courts have taken into account two main factors in deciding which injuries and losses should be compensated; firstly, the conduct of the defendant, and secondly the nature of the interests invaded by the defendant.[40] The courts will also consider the conduct of the plaintiff in deciding how much compensation a successful plaintiff will receive.[41]

The chances of success in a tort action are dependent on been able to attribute responsibility for a person's damage to an identifiable agent whose 'fault' can be proved.[42] However, the tests of 'fault' and 'wrongdoing' (most often expressed as being 'negligence') are highly specialized and are largely divorced from any sense of moral culpability.[43]

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[39] A court hearing a tort action may find that a plaintiff is at least partly to blame for his or her own injuries. If this is the case, then a reduction may be made to any damages awarded to take into account contributory negligence on the plaintiff's part. This is perhaps more correctly described as 'comparative negligence'- contributory negligence was a complete defence to an action in tort prior to the various states following the English lead and legislating to allow for a deduction to be made from a damages award in accordance with the percentage of negligence contributing to those damages which a Court attributes to a plaintiff.

[40] See Trindade and Cane. 1985, *The Law of Torts in Australia*, Oxford University Press, Melbourne p3.

[41] This is the concept of 'contributory negligence' which was a complete defence to a claim at Common Law but which is now not a bar to success on the part of a plaintiff after various legislative enactments; see generally Trindade and Cane *op cit.* p428ff.

[42] Fleming J.G., "Is There a Future for Tort?" *op cit.* p137.

[43] See Robinson M.A. 1987, *Accident Compensation in Australia-No-fault Schemes,* Legal Books, Sydney p6. This is especially true for automobile accidents and will be discussed in more detail later in this work, but a good example is where a driver who inadvertently pushes slightly into an intersection causes a car to swerve and crash resulting in massive injuries to the other driver, whereas a driver travelling at twice the speed limit whilst drunk may cause no injuries at all.

In fact, the test of fault as developed by the courts, and particularly in the area of automobile accidents, has become more and more strict, so that it has become progressively easier for plaintiffs to establish some degree of negligence on the part of the defendant and thus to recover damages.[44]

Under tort based compensation systems, the amount of compensation ('damages') is an actual assessment by a judge or jury of the injury or loss suffered by the plaintiff as a result of the tort.[45] The purpose of the assessment is, as far as it is possible to do so via an award of money, to restore the status quo ante.[46]

Damages are awarded for the plaintiff's pain and suffering ('general damages' - otherwise described as 'non-economic loss')[47] and also for those losses capable of precise calculation ('special damages' e.g. past wage loss, physical expenses and the like).[48] An attempt is also made to quantify the plaintiff's likely future losses such as future wage loss, loss of superannuation benefits, future care costs etc.

The system of assessing damages at common law is fraught with problems, most of which arise out of the minute nature of the assessment together with the stated aim of putting the plaintiff back in the same position as prior to the injury as far as is possible.[49] For example, the amount of general

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[44] All that is needed is a 'Scintilla' of negligence on the defendant's part-see eg Stein JA in *Etri and Anor v Eid and Anor* (1 December 1998 NSW Court of Appeal Unreported-[Online] see Austlii [1998] NSWSC 620). However, the High Court, in an obvious endeavour to stem the tide, found that it was still necessary to prove fault on the part of a driver in a tort claim for negligence in a motor accident; see *Derrick v Cheung* (2001) 181 ALR 301.

[45] Trindade and Cane *op cit.* p241 and p384. Most Australian jurisdictions now exclude jury trials in automobile accident cases.

[46] *ibid.* p241.

[47] Especially in the 'modified' tort systems-eg see Motor Accidents Act 1988 (NSW) Section 79.

[48] Trindade and Cane *op cit.* p242.

[49] *ibid.* p384 citing *British Transport Commission v Gourley* [1956] A.C. 185; See generally Luntz H., 2002, *Assessment of Damages for Personal Injury and Death, 4th Edn*, Butterworths, Australia p5-6.

damages to be awarded to a successful plaintiff is, in theory, open ended and dependent on the whim of the tribunal determining the claim.[50]

Common law jurisdictions tend to develop a 'tariff' for general damages; that is there is an endeavour to introduce some semblance of uniformity through precedent, and a large part of the lawyer's skill in such jurisdictions is the ability to predict with some degree of certainty the likely award within a range that the plaintiff may achieve.

No-fault Compensation

As the name implies, no-fault compensation does not require an injured person to prove fault in order to obtain compensation.

Often called 'no-fault liability', no-fault schemes provide for statutory compensation to be paid to persons who can establish that they meet the compensation criteria of the particular scheme. These criteria can be wide[51] or narrow[52] dependent on the nature of the scheme and the intention of its framers.

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[50]See Bovbjerg R.R., Sloan F.A., and Blumstein J.F.1989, "Valuing Life and Limb in Tort: Scheduling 'Pain and Suffering'", 83 *Northwestern University Law Review*, p908 particularly at pp917ff. Professor Sappideen makes the comment that courts on appeal "frequently" overturn awards of damages as excessive and not supported by legal principle, however in the writer's experience appeals on quantum are rarely successful in New South Wales (see e.g. *Brien and Anor v Palmby* (1999) NSWSC 190). Of course, many of the statutory modifications to the fault based systems outlined in Chapter 6 are designed to prevent outlandish damages verdicts.

[51] "Injury by accident", as in the New Zealand Scheme.

[52] Such as in some Medical Compensation Schemes-see *Professional Indemnity Review op cit.* p56.

The number of jurisdictions around the world that have a pure no-fault system for compensating personal injuries arising out of automobile accidents is relatively small.[53]

All of these schemes are statutory; they have not grown 'organically' as has the law of tort, but have been designed specifically to compensate certain groups of injured persons in defined circumstances. It should also be noted that such schemes have compensation as their primary goal;[54] that is their major distinction from tort-based systems of liability, which can have a number of aims.[55]

No-fault compensation schemes emphasize 'horizontal equity'; in other words, there is equality of outcome between persons of the same level of disability,[56] largely regardless of the conduct of any person.[57] They also usually stress community responsibility for accidents, which are seen as being relatively random, unavoidable consequences of life in an industrialized, interdependent society. Therefore, as society is the collective beneficiary of the economic activities carried on in it, so should it bear collective responsibility for the costs.[58]

No-fault schemes relating to injuries received in automobile accidents are necessarily limited because they restrict the ambit of compensation to persons injured by a particular cause, and also because many use devices such as thresholds, both verbal and monetary, to restrict the number of cases in

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[53] Association Internationale du Droit des Assurances, 1994, *Motor Insurance in the World*, Milan p50-51. Only nine jurisdictions are mentioned as having a no fault system, although the authors appear to have overlooked Tasmania and the Northern Territory, as well as those American states which have some element of no-fault automobile accident compensation.
[54] In most cases it will be the only goal.
[55] However ill defined in practice-see the detailed discussion of tort-based systems in Chapter 4.
[56] Trebilcock M.J. 1989, "Incentive Issues in the Design of 'No-fault' Compensation Systems", 39 *University of Toronto Law Journal* p19 at p22.
[57] *ibid.* - In many automobile accident no-fault schemes such as that extant in the Northern Territory there is some sanction against drunk driving that may affect the compensation outcome.
[58] *ibid.* p23.

which compensation is payable.[59] In addition there is a limited pool of funds available to be shared amongst all automobile accident victims who are eligible to receive compensation under such schemes.

In Australia, the Northern Territory is the only state that has such a scheme, and this scheme is limited to Territory residents who are injured in or as a result of an accident that occurs in the Territory or in or from a Territory motor vehicle.[60] As is common to such schemes, in the Northern Territory the right of residents to bring a common law action is foreclosed.

Hybrid Systems

There are also extant in various parts of the world, including Australia, various combined fault/no-fault systems for compensating those injured in automobile accidents.[61] The usual way in which such systems operate is that persons are able to obtain compensation for any injury suffered in the manner covered by the operational section of the scheme. However, a subset of those injured persons is able to commence a common law action against a driver 'at fault'. It is also usual for such systems to require an election by the injured person; they cannot obtain no-fault benefits and maintain a common law action.

The main effect of such 'hybrid' systems is that more people are compensated, although benefits tend to be less overall[62] than those received by a successful plaintiff at common law. Most of these systems are 'add-on' schemes where limited no-fault benefits are available to all but in the alternative the

[59] Trebilcock M.J., "Incentive Issues in 'No-fault' Compensation" *op cit.* p47.
[60] *Australian Torts Reporter*, CCH, Sydney, Loose Leaf Service p27-643.
[61] Trebilcock M.J., "Incentive Issues in 'No-fault' Compensation" *op cit.* p47.

plaintiff is able to bring an action for common law damages. However there are also 'threshold' no-fault schemes such as that which exists in Victoria where no-fault benefits are available to most and a suit is also permitted at Common Law if the victim crosses a threshold which can be either verbal (e.g. to obtain access to common law damages in Victoria, a victim must establish that they have a 'serious injury' as defined) or monetary (e.g. a certain limit on medical expenses).

There is also a special type of hybrid system known as 'choice no-fault'. Briefly, such systems allow a motorist to choose whether to be insured for first or third party risks - in other words whether to insure for liability for oneself or liability to others. Such systems will be described in more detail in the next section but are of interest because they have attracted some academic support and attention also from the Western Australian government.

Conclusion

The last section examined the three major methods of compensating automobile accident victims. The first of these, tort, is the 'traditional' method of compensating such victims. The other compensation methods have been designed to supplement or replace tort in varying degrees. Their *existence* implies that there are some who are dissatisfied with the tort system. This in turn must mean that for some people there are drawbacks to the tort system that outweigh any perceived benefits, which has led to the search for a 'better' or more 'just' compensation system. To assist in understanding the impetus for this search, the next Chapter critically examines the main benefits claimed for the tort system. It then analyses the major criticisms of tort that have been made over the course of the last century.

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[62] Dewees D., and Trebilcock M.J. 1992, "The Efficacy of the Tort System and its Alternatives: A Review of Empirical Evidence" 30 *Osgoode Hall Law Journal*, p57 at p78.

CHAPTER 3

THE BENEFITS AND DRAWBACKS OF THE TORT SYSTEM

There have been numbers of arguments made in support of the retention of fault as the basis of determining compensation over the years. As time passes, most of these arguments seem less and less plausible. This can be demonstrated by the following critical examination of the major arguments in support of fault.

Arguments For The Retention Of Fault-based Compensation Systems

There are five areas of argument traditionally used in support of the retention of fault-based compensation systems: rights, deterrence, morality, therapy and insurance. These are considered in turn below.

1. Rights[1]

One of the most often articulated (and criticized) arguments for the retention of tort based compensation delivery systems is that they preserve people's 'rights'.[2] It has been alleged by proponents of common law compensation in the area of automobile accident injuries that the right to sue for common law damages is seen 'by the public' as 'a basic inalienable human right' and 'an essential part of a democratic society'.[3] This argument rejects the consideration of compensation as a

[1] Professor Sappideen argues that the argument concerning "rights" to compensation in this section is pragmatic rather than principled. This may well be the case, but the argument still stands.
[2] See fn5 below.
[3] See for example "Public Opinion says 'No' to No-fault" 1986, 60 *Law Institute Journal* p634 and also the arguments by the Liberal and National Party MPs in the debate over the introduction of a pure no-fault scheme in Victoria in 1986 which are analysed in Chapter 10. See also Miles D., 1983, "The Lack of Consultation in Total No-Fault Compensation" 57 *Law Institute Journal* 961 at pp962-3.

costing exercise based on social efficiency. Instead it stresses the entitlement of each individual to be treated with dignity and as an entity of intrinsic moral worth.[4]

In keeping with this approach it has also been argued that the removal of the right to sue, and in particular the right to sue in respect of 'compensation for loss of quality of life' (that is non-economic loss) is 'socialistic' and is widely publicly deplored,[5] raising the "... spectre of Big Brother" which is "implicit in the destruction of a person's right to sue for damages and his right to a judicial determination of those damages".[6]

A brief examination of the systems of compensation extant in societies of various political persuasions shows that such arguments cannot be substantiated. For example, the 'no-fault' systems of 'objective liability' for personal injuries arising out of automobile accidents applies in many 'democratic' countries.[7] The obverse side of the coin is that liability for automobile accident injuries based on fault appertained in the former republics of the Soviet Union[8] which demonstrates that the argument that the right to sue a motorist at fault is essentially 'democratic' and that its removal is 'socialistic' is wrong. In fact, state control is prevalent in countries of many different political colours throughout the automobile accident compensation world because of the way in which compulsory

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[4] See Hutchinson A.C., 1985, "Beyond No-Fault" 73 *California Law Review* 755 at p759 and also Robinson G.O., and Abraham K.S., 1992, "Collective Justice in Tort Law" 78 *Virginia Law Review* 1481.
[5] See fn2.
[6] For a sample of the large body of writing in this area see Murphy G.A. 1985, "The Case Against No-fault Accident Compensation" *Queensland Law Society Journal*, p317 at p319; Habush R.L., 1987, "The Tort System Under Fire: Don't Fix What Ain't Broke" 34 *Federal Bar news and Journal* p119; Stewart L.S., 1986, "The Tort Reform Hoax" July 1986 *Trial* p89; Tubbs M.C., 1983, "NSW Accident Compensation Scheme: No Fault or No Rights?" 8(3) *Legal Services Bulletin* p209. For a more sophisticated exposition of the "rights" argument see Wright R.W. *op cit.* p179-180.
[7] Such as Spain, Finland, Algeria, Paraguay and New Zealand, as well as in Australia's Northern Territory. In Denmark, Germany, Greece, Austria, the Czech Republic, Hungary, Iceland, Norway, the Slovak Republic, Sweden, Switzerland, India, Iraq, Israel, Kuwait, Namibia, Brazil, Chile, Costa Rica and Mexico, 'objective liability' exists for both personal injuries and material damage arising out of automobile accidents - see AIDA *Motor Insurance in the World op cit.* p51.
[8] *ibid.* p50.

third party insurance is managed.[9] The right to sue is often circumscribed by legislation in democratic states.[10]

Although it has been argued that the right to receive damages for injuries received as a result of the fault of another has been "a fundamental principle of justice for more than 100 years",[11] in New South Wales for instance this right has been modified by statute with regard to injuries received in automobile accidents since 1942 and every state in Australia introduced such statutes within a decade commencing in 1936. The right to recover damages from the Compulsory Third Party insurance fund was restricted at that time to those who could prove fault on the part of an owner or driver of an automobile 'arising out of the use of' that vehicle.

As various writers have argued, the restriction of the fault inquiry to drivers and owners of motor vehicles leads to basically artificial findings[12] and is often unhelpful in discovering and deterring the 'real' causes of automobile accidents.[13] It is likely that many people under a system such as that in New South Wales do not sue those who might have been the root cause of their injury (such as a negligent car manufacturer or highway authority), because it is easier to try and establish 'fault' on the

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[9] *ibid.* p51.

[10] A good example of this is the amendment to the definition of 'injury' in the New South Wales Motor Accidents Act 1988 to restrict suits to those injuries most closely connected with actual driving. The Act had previously defined injury to mean personal or bodily injury caused by the fault of the owner or driver of a motor vehicle in the use or operation of the vehicle and the courts had previously interpreted this widely to allow victims to sue in circumstances where there was only a tenuous connection with a vehicle - see Motor Accidents Act 1988 (NSW) S31-pre December 1995 amendments.

[11] "The Society's No-Fault Transport Injury Compensation Proposals" 1984, 22 *NSW Law Society Journal* p208.

[12] It has long been recognized by crash researchers that all crashes are a multi-faceted chain of events which when combined lead to 'failure' in the system. In respect of such 'system failures', it is apparent that 'contribution', 'lack of care' or 'negligence' of the individual is only one aspect of the continuing concentration in an investigation on individual fault which provides "a very effective conceptual smokescreen to prevent the identification and introduction of effective counter measures" - see Jamieson Foley, 1993, "1,000 Cases Later-Interstate Experience" *Legal Liability of Road Authorities* Australian Institute of Traffic Planning and Management Seminar Walkerville, Adelaide p3. See also Johnstone G., 1992, "A Coroner's Perspective on Death and Injury Prevention", *Law Institute Journal* p705 at p706 and particularly *ibid* citing Wigglesworth E., 1991, "Railway Level Crossings: What's Wrong with the Present System?" *Australian Road Research Board Conference*, Adelaide.

part of a driver of an automobile which leads to access to the compensation fund. Thus, the 'fundamental principle of justice' has been skewed away from an objective analysis of fault and the exercise of a 'basic inalienable human right' has historically been reduced by statute to a search for a faulty driver.

It is doubtful whether one can properly describe the right to sue for fault in respect of automobile accidents as a fundamental principle of justice or as a basic inalienable human right. The allegation that the community generally has a strong moral belief that persons injured as a result of the fault of another should have the right to receive damages[14] ignores the fact that many people are ignorant of such rights. In fact, it has been said that no one can really be sure what the popular sense of justice does in fact demand.[15]

Studies in the area have been confusing[16] with several showing that people simply do not understand automobile accident compensation systems, at least until they have become a claimant themselves and that fault, including moral fault, does not necessarily imply liability.[17]

It is therefore difficult to support with cogent evidence the claim that the right to sue a person at fault for damages in respect of an automobile accident is a basic inalienable human right, and this may be

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[13] Such as road conditions, unsafe cars etc.
[14] "The Society's No-Fault Transport Injury Compensation Proposals" *op cit.* p208.
[15] Cane P., *Atiyah's Accidents op cit.* p530. This has not stopped politicians in debate invoking the principle in support of the retention of fault-based systems however-see particularly the 1986 Victorian Debates *Supra.*
[16] *ibid.* Citing the results of Michigan and Ontario studies which showed that a substantial minority of people injured in road accidents did not favour awards for pain and suffering.
[17] Harris D.R. et al, 1984, *Compensation and Support for Illness and Injury* Clarendon Press, Oxford p160-see also Wright T. et al 1998, *Claiming under the Motor Accidents Scheme*, Law Foundation of NSW, Sydney p18-19. See also the Woolcott Research Report *op cit* and California Citizens Commission on Tort Reform, 1977, *Righting the Liability Balance* 10, 141 cited in Pedrick W.A., 1978, "Does Tort Law Have a Future?" 39 *Ohio State Law Journal* 782 at p787.

one reason why a significant percentage of injured persons who could sue for their injuries choose not to do so.[18]

Under a fault-based system such as that which exists in New South Wales, the person considered to be at fault is sued in name only. Any damages to be paid will come from third party insurers, and suing the person 'at fault' is only the 'gate' by which injured persons may or may not gain access to compensation funds.[19] In jurisdictions with compulsory third party insurance there is no transaction, and no adjustment of rights, between an injured person and their actual injurer in the sense required by corrective justice. There is simply a search for some technical fault on the part of a driver other than the victim, which triggers access to the compensation fund.

Therefore, if such a fundamental human right as the right to sue for damages exists, then with regards to automobile accidents in Australia, it is a hollow and misunderstood right, much modified by statute.

The impetus for statutory modifications to the common law in the area of automobile accidents has mostly come from the compulsory third party insurers.[20] These entities presumably behave rationally in an economic sense, and it has been the case that modifications to the common law have been made with a view to reducing and controlling costs[21] which means that the 'inalienable rights' of automobile accident victims to sue for damages have been subverted because of the inability of liability insurance

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[18] Keys Young Pty Ltd, 1993, *Survey of People Injured in Road Accidents*, prepared for the NSW Motor Accidents Authority, p (ii).
[19] See generally Keeler J.F., 1988, "The Crisis of Liability Insurance", 1 *Insurance Law Journal* p182-see also the 1984 amendments to the Motor Vehicle (Third Party Insurance) Act (NSW) 1942 which provided that the Government Insurance Office was to be sued in any action for damages arising out of the use of a motor vehicle rather than the 'fictitious' suing of the driver considered to be at fault.
[20] *ibid.* p253.
[21] *ibid.*

to cope with developments in the common law.[22] In effect there are no such inalienable rights, or if there are they are secondary to the operational efficiency of insurance schemes. Therefore arguments for the retention of tort based on their existence are untenable.

2. Deterrence

The existence of compulsory insurance is pertinent to a 'traditional object'[23] of the common law: - deterrence. Most proponents of the common law would put forward deterrence as being one of its major benefits. It is argued that tort law can play a role in preventing accidents by awarding damages or 'punishing' a wrongdoer. There are two levels to this argument. The more simplistic is that the threat of a damages award will be a consideration that people will take into account before embarking on a certain course of behaviour.

Thus, Fleming says that "an order against a tortfeasor served as a punishment for him and a warning to others; it was, in a sense, an adjunct to the criminal law designed to induce antisocial and inconsiderate persons to conform to the standards of reasonable conduct prescribed by law".[24]

On a more sophisticated level, economists argue that tort internalizes the costs of accidents to wrongdoers, who make a rational decision based on the comparative costs of allowing or avoiding a set of circumstances that might lead to an accident.[25] It has been argued that deterrence in both the legal and economic sense rests on the same notion, namely, that people will be encouraged to act

[22] *ibid.* p253-256-a good example of this is the awarding of damages for the gratuitous provision of voluntary services; see *Griffiths v Kerkemeyer* (1977) 139 CLR 161.
[23] *ibid.* p254.
[24] Fleming J.G. 1977, *The Law of Torts,* 5th Edn, Law Book Company, Sydney p3. The significance attached to the element of deterrence operated, of course, on the assumption that an adverse judgment would be paid out of the defendant's own pocket – *ibid.*

more safely if the reverse can cost them money.[26] This is one basis for the argument that 'pure' tort law is 'efficient'.

The major problem with economic theories of negligence and deterrence is that they envisage a transaction between rational actors who have virtually full knowledge of the costs and benefits associated with their behaviour.[27] This paring down of reality may allow for a model which is predictive;[28] however such models are mostly useful in examining pricing behaviour rather than the complexities of automobile accident compensation. In that regard it is likely that the causes of automobile accidents are so complex that an endeavour to restrict the focus to 'the injurer' and 'the injured' obscures those causes and hinders the search for the 'true' least cost avoider.

There is defensiveness on the part of legal economists to the body of scholarship that deals with the concept of deterrence in terms of behavioural or physiological psychology.[29] Whilst it may be that economic analysis is predictive and based on logic and rigorous assessment, the research into the psychology of deterrence and the empirical evidence as to the psychology of accidents raises issues which the economic models deal with only peripherally.[30]

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[25] For a classical treatment, see Calabresi G. 1965, "The Decision For Accidents", 78 *Harvard Law Review* p713.
[26] Stoljar S. 1973, "Accidents, Costs and Legal Responsibility", 36 *The Modern Law Review* p233 at p240.
[27] See eg Brown J.P.1973, "Toward an Economic Theory of Liability", 2 *The Journal of Legal Studies* p323. As Englard points out, the lack of information and inevitable policy issues render such models inapplicable in the real world see Englard I. 1980, "The System Builders: A Critical Appraisal of Modern American Tort Theory", 9 *Journal of Legal Studies* 27 at p55 fn127.
[28] As Posner points out to his critics-see Posner R., 1985, "Can Lawyers Solve the Problems of the Tort System", 73 *California Law Review* p747 p750-751.
[29] See e.g. *ibid.*
[30] Most likely because the architects of such models strive to be predictive by working backwards from the particular to the general and thus framing the equation to reach the right answer.

The economic analysis of liability also focuses on wealth maximization and largely ignores the moral dimension that is implicit in common law compensation systems.[31] Such analysis concentrates on the potential source of compensation funds rather than the ethics of deterrence.[32]

Not only do empirical studies at best provide ambiguous evidence as to the efficacy of general deterrence[33] but the whole rationale for imposing liability under for example Posner's general economic theory of law has been criticized as not taking into account recognized social values.[34]

Whilst it may be the case that the price of liability insurance, when determined by risk, provides an incentive to alter driving behaviour (even to the extent of preventing a person from driving)[35] the main factors which determine the pricing of compulsory liability insurance (such as sex, age and location of domicile) arguably have nothing whatever to do with driver behaviour.[36]

In the absence of risk rating based on driving experience, and given narrow premium prices (i.e. nobody is priced out of the market) then where compulsory third party insurance exists in an automobile accident compensation system, the existence of liability based on fault logically does not

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[31] Trindade and Cane., 1985, *The Law of Torts in Australia*, OUP, Melbourne p518-9 and see also Englard *op cit.* p50.
[32] *ibid.*
[33] Clayton A., "Tort Law, Deterrence and Economic Theory" Appendix A to *Compensation and Professional Indemnity in Health Care op cit* p320. Professor Sappideen has recommended a reference here to the Harvard Medical Practice study-see Brennan R.A., Leape L.L., Laird M.M., Herbert L., Localio A.R., Lawthers A.G., et al, 1991 "Incidence of Adverse Events and Negligence in Hospitalized Patients: Results of the Harvard Medical Practice Study" *New England Journal of Medicine* p324ff.
[34] Englard I., *op cit.* p56.
[35] Or by driving uninsured if the relevant criminal penalty is less than the cost of insuring and the chance of being penalised is less than even, especially if a person is 'judgement proof'.
[36] Leatherberry W.C.1975, "No-fault Automobile Insurance-Will the Poor Pay Again?" 26 *Case Western Law Review* 101 at p122. Professor Luntz comments here that in most Australian jurisdictions even age and sex are not relevant to premium pricing and location of domicile is of limited relevance.

lead to significant deterrent effects. The existence of such insurance, besides ensuring that a 'deserving' victim is compensated, is designed to cushion any major deterrent effect.[37]

As Landes and Posner point out, the tort system of compensation for automobile accidents is a costly insurance mechanism in itself.[38] They argue that the existence of insurance does not render the tort system inefficient as a means of deterrence[39] and maintain that its significance has been misunderstood.[40] However, in basing their opinion on the so-called 'empirical' evidence as to the effects of the change from tort liability to no-fault in the area of automobile accidents they narrow their focus too much. They also ignore a range of incentive effects, which many of the writers in the area do not appear to have considered. For example in stressing the pricing of insurance and the forcing of younger drivers off the road, the wider incentive effects of compulsory insurance (e.g. the lack of incentive to take care produced by the knowledge of the existence of such insurance) and the implications of narrowing of the liability examination to the 'driver and driver' situation are largely ignored.

Therefore, no matter how radical the analysis of liability rules, most of the theorists in this area could be described as being ultimately conservative.[41]

What many of the legal economists fail to consider is whether certainty of compensation combined with the narrower liability examination leads road authorities, car manufacturers and the like to take risks and/or to cut costs. In other words, the existence of liability insurance lets such accident causers

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[37] Because 'risk averse' people will tend to insure (Landes W., and Posner R. 1985, *The Economic Structure of Tort Law*, Harvard University Press p56) and non risk rated compulsory insurance means that risk averse, risk neutral and risk taking persons are all protected largely to the same extent against tort liability for automobile accident injuries.
[38] Landes and Posner *op cit.* p 58.
[39] *ibid.* pp10-11.
[40] *ibid.*

'off the hook' both because the existence of such a source of compensation makes any moral dilemma easier to resolve and also because the court has a ready source of compensation and this might reduce the vigilance with which the analysis of liability is carried out.

It is Calabresi who best deals with the real causes of accidents in his theory of general deterrence (most aptly in its guise as 'resource allocation').[42] However, he like others in the field in focusing on 'efficiency' in the distribution of losses arising out of accidents also fails to deal with the empirical evidence as to causation in automobile accidents and the psychological and moral aspects of deterrence.[43]

In his view, when dealing with deterrence of activities that have some social usefulness but that cause accidents (such as driving), the first step towards deciding how much of these activities is wanted can in a substantially free enterprise society, best be determined by the market.[44]

However, the 'market', which is so important in Calabresi's view, is far from a perfect one, and can be skewed in unexpected, and mostly unexamined, ways. For example, in the common law as it was for many years in Australia, the doctrine of non-feasance ensured that an apparently prominent cause of automobile accidents, the failure of a road authority to take positive steps to rectify a dangerous situation, did not even enter the loss allocation equation. The cost of accidents involving such non-feasance was removed from the road authorities, which are ' prime cost causers', and was either passed on to the social security system or left to fall on the victim, thus creating an externality. Such

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[41] Englard I., *op cit.* p31-32.
[42] Calabresi G., "Fault, Accidents and the Wonderful World of Blum and Kalven" *op cit.* p220; Calabresi G. 1961, "Some Thoughts on Risk Distribution and the Law of Torts", 70 *Yale Law Journal* 499 at p500.
[43] See Englard I., *op cit.* p38-39.
[44] Calbresi G., "The Decision for Accidents" *op cit.* p743.

is anathema to legal economists[45] and there was therefore a systemic failure to 'optimize' the number of accidents in a common law liability system encompassing the doctrine of non-feasance.[46]

Deterrence does not only apply to defendants; theoretically under a fault-based system all people are 'symbolically' constrained to take care for their own safety, primarily by devices such as 'volenti non fit injuria' (voluntary assumption of risk) and contributory or comparative negligence.[47] 'Deterrence' can therefore be understood as a complicated system of positive and negative incentives.

There are, theoretically, incentives applicable to all people under a fault-based system to, for example, drive carefully so that they will (a) not suffer harm and (b) not cause harm to others and thus suffer a penalty in the form of a damages award and (c) not bear the costs of any accident caused or contributed to by their own negligence. Thus optimal deterrence of socially inappropriate behaviour can only be achieved by confronting prospective tortfeasors with the full social cost of their potential wrongdoing.[48]

Of course, in a fault-based motor accident system with compulsory third party insurance, no person is confronted with the full social cost of their 'wrongdoing'. The only persons who are confronted with anything approaching any of the social costs of their behaviour are drivers who are found to be fully

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[45] See eg Calabresi G., "Fault, Accidents and the Wonderful World of Blum and Kalven" *op cit.* p222; Landes and Posner *op cit.* p13.

[46] This doctrine was overturned by the High Court just before the completion of this work in the case of *Brodie v Singleton Shire Council* (2001) 206 CLR 512, and replaced by general negligence. However, there have been calls for governments to legislate to reinstate it; see e.g. Gibbs Sir H.,2002, "Living With Risk in Our Society" *Australian Academy of Technological Sciences and Engineering*, Occasional Paper No. 7 [Online] Available at:http://www.atse.org.au/publication/occasional/occ-gibbs.htm.

[47] Stapleton J., 1995, "Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence", 111 *Law Quarterly Review* p301 at p305.

[48] Trebilcock M.J. 1987, "The Social Insurance-Deterrence Dilemma of Modern American Tort Law: A Canadian Perspective on the Liability Insurance Crisis", 24 *San Diego Law Review* p929 at p966.

at fault or who cannot establish fault on anyone else's part in respect of an accident and who suffer injuries themselves.

3. Morality

It could be argued that there is an overriding moral sense inherent in humanity which demands that people get what they deserve, and deserve what they get.[49]

The argument runs that whilst the psychological theories might enhance the understanding of hard coded behaviour exhibited by the bulk of normal human beings, the super-ordinal moral sense exists despite, or perhaps because of, this hard coded behaviour and demands a fault-based liability system.[50]

This argument is easily disposed of, because tort based automobile accident compensation systems are patently amoral.[51] There is no correlation between the degree of 'desert' and the degree of 'fault'. To take an extreme example, were a driver to be frightened or incensed to the point of suffering a heart attack as a result of the dangerous or aggressive behaviour of a fellow road user, and thus collide with a roadside object, there is unlikely to be a finding of liability in tort against that other road user, no matter how dangerous the behaviour, as the coronary is likely to be seen as an intervening incident. No matter how bad the injuries of the driver suffering the coronary, they are unlikely to receive any tort damages, and the only moral censure is likely to come from observers of the incident.

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[49] Lloyd-Bostock S. 1979, "The Ordinary Man, and the Psychology of Attributing Causes and Responsibility" 42 *Modern Law Review* p143.
[50] Owen D.G. 1975, "Deterrence and Desert in Tort", 73 *California Law Review* 665 at p666. See also Honoré A., 1995, "The Morality of Tort Law-Questions and Answers" in Owen D.G. *op cit.* p73.
[51] See Brown C. 1985, "Deterrence in Tort and No-Fault-The New Zealand Experience", 73 *California Law Review* 976 at p978. Professor Sappideen calls for a different example from the one which follows as "not all

By contrast, a driver may creep forward into an intersection, causing an incoming driver to swerve slightly, lose control of their vehicle, and suffer horrendous injuries. That driver crossing the line is likely to be found fully liable for all of those injuries, and whilst there will be an insurer (in all Australian tort based jurisdictions at least) interposed between the defendant driver and the threat of impecuniosity via a damages award, that driver may have to live with the stigma of a legal finding of responsibility for those horrendous injuries.[52] This is only one of many examples of the 'unfairness' of tort based automobile accident compensation systems, and this is a well-documented feature of such systems.[53]

Not only does the existence of liability insurance act as a moral 'cushion' for 'negligent' drivers, but also the apparent ignorance of a large part of the population of the details of compensation systems militates against tort being an effective moral, as well as a psychological, deterrent.[54]

In addition, tort based systems send economic 'messages' to potential tortfeasors that would seem to conflict with conventional morality. For example, killing a person in an automobile accident is likely

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would agree with your conclusion". With all due respect, it is a very good example of how desert and fault do not necessarily correlate in a tort based system.

[52] Even though there may be a contributory negligence finding. See also Sugarman S. 1985, "Doing Away With Tort Law", 73 *California Law Review* p555 at p560. The writer has seen several examples in actual cases of drivers who were incredulous at, and highly upset by, adverse "technical" findings of liability. It is likely that such drivers did not expect such technical findings, and thus they do not add to the deterrent effect of the tort system.

[53] See for example Owen *op cit.* p668; Fleming J., 1967, "The Role of Negligence in Modern Tort Law", 53 *Virginia Law Review* p815 at pp817-818.

[54] Sugarman *op cit.* pp565-6. Professor Sappideen recommends a reference here to the Harvard Medical Practice study and the Australian Professional Indemnity Review *op cit.*, arguing that these studies suggest that medical practitioners at least were very sensitive to the potential for claims, consistently overrated the risk and reported that they took defensive measures to prevent claims. With all due respect, it is likely that the position regarding medical practitioners is different than that of most drivers because, firstly, medical indemnity insurance in Australia, not being compulsory or cheap, is much different from compulsory third party insurance which is both, and secondly doctors have a professional reputation (and significant income) to protect from adverse findings and attendant publicity.

to lead to a much smaller verdict or settlement than seriously injuring them, and injuring a non-earning child is likewise less likely to lead to a significant verdict than injuring a high earning adult.[55]

With regards to automobile accidents in Australian tort jurisdictions and tort based automobile accident compensation systems in other countries, the 'real' defendant plays little part in proceedings with the insurer defending and most often settling the matter.[56] It is therefore possible in New South Wales for instance for a defendant to be totally unaware of court proceedings, and for the matter to proceed to verdict with no involvement of the named defendant whatsoever.[57] It is difficult to see, in such circumstances, how there could be a significant deterrent effect attributable to a potential liability finding based on tort-filtered morality.

Morality is likely to deter antisocial behaviour apart from the tort system in any event.[58] It has been argued that many people's own moral sense - their pride in doing right and the accompanying embarrassment of doing wrong - would protect others from harm.[59]

4. Therapy

It has long been argued that fault-based systems can delay rehabilitation as plaintiffs seek to maximize their likely verdict.[60] There is therefore an incentive not to recover substantially until after a

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[55] *ibid.* p572.
[56] Brown C., "Deterrence in Tort and No-Fault" *op cit.* pp978-9. But see fn 52 above.
[57] The provisions of the Motor Accidents Compensation Act 1999 allow for the insurer to have total control of the matter and for service on the named defendant to be dispensed with if he or she is unable to be located.
[58] Sugarman *op cit.* p561.
[59] *ibid.* p563.
[60] See eg Ison T.G. "The Therapeutic Significance of Compensation Structures" *op cit.* p 628.

verdict or settlement.[61] This may lead to illness behaviour and to a genuine worsening in the health of a particular plaintiff.[62]

However a successfully prosecuted tort claim could arguably have significant benefits for a plaintiff. It has been argued that tort law's agenda for both deterrence and compensation are therapeutically driven. These 'agenda' are allegedly injury avoidance and restoration of the injured.[63]

Tort law attempts specific and general deterrence, through its message of tort sanctions, to decrease the level of injury in society.[64] It also seeks to restore the injured as far as is possible through the awarding of damages.[65]

The arguments relating to deterrence and injury avoidance have been dealt with above. Basically it is highly doubtful that a tort system provides any meaningful measure of deterrence in relation to automobile accidents.

There is now sufficient research to come to some firm conclusions about the effect of fault-based compensation on the restoration of the injured.[66] Earlier studies had equivocal results[67] with some studies showing an association of the reduction of post-accident psychopathology with a shorter time between accidents and settlement. Others showed an association between length of time after

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[61] *ibid.*
[62] The evidence for this would seem to be overwhelming-see generally The Royal Australasian College of Physicians 2001, *Compensable Injuries and Health Outcomes* [Online] at http://www.racp.edu.au/afom
[63] Shuman D.W., 1993 "Making the World a Better Place Through Tort Law? Through the Therapeutic Looking Glass", Vol X *NYLS Journal of Human Rights* p739 at p744.
[64] *ibid.* p743.
[65] *ibid.*
[66] *ibid.* p757.
[67] *ibid.*

settlement and demonstration of less severe symptomatology after the accident.[68] Still other studies appeared to show no substantial evidence that symptoms disappear or lessen once compensation is awarded.[69]

Other studies showed that the litigation process appears to have little or no effect on the prolongation of psychic distress exhibited by victims.[70] There is even some anecdotal evidence to the effect that delays in adjudication or settlement of claims increase recovery of injured persons for whatever reason.[71]

It is possible that plaintiffs who receive compensation from defendants after a determination of fault experience a beneficial restoring effect; this may be for a number of reasons, as follows:

(i) They may experience a sense of empowerment from exposing a wrong or asserting power over the injurer through the judicial system;

(ii) They may experience an opportunity to vent resentment;

(iii) They may experience a sense of vindication from societal condemnation of the defendant;

(iv) They may experience a sense of altruism based on a belief that the lawsuit has prevented injury from happening to others.[72]

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[68] *ibid.* Citing Binder R.L. et al, 1991, "Is Money a Cure? Follow-up Of Litigants in England", 19 *Bulletin of the American Academy of Psychiatry and Law* p151 at p154-5.
[69] Ison T.G., 1986, "The Therapeutic Significance of Compensation Structures", 64 *The Canadian Bar Review* p 605 at p616.
[70] Glesser G., Green B. and Winget C. "Prolonged Social Effects of Disaster: A Study of Buffalo Creek" cited in Gallanter M., 1986, "The Day After the Litigation Explosion", 46 *Maryland Law Review* p3 at p10 fn29.
[71] Ison T.G., "Therapeutic Significance of Compensation Structures" *op cit.* p622.
[72] Shuman D.W., "Making the World a Better Place Through Tort Law" *op cit.* p756.

Unfortunately these ideas have not been fully empirically tested.[73]

It is clear that (a) most people do not understand compensation systems to any degree until after they are involved in them[74] and (b) most cases are settled without any adjudication and with the parties contractually bound to keep the details of the settlement secret.[75] This means that the abovementioned reasons why fault-based systems could have a restorative effect are unlikely to operate in the majority of cases.

There is now substantial research in the area that shows that delays in compensation are often associated with a worsening of symptoms.[76] This research best corresponds with the importance of celerity emphasized by behaviour theorists in the modification of the behaviour of injurers.[77] It also represents a strong argument for the abolition or modification of the method of awarding damages in fault-based motor accident compensation systems because of the delays associated with such systems.

There are other ways in which fault-based compensation systems might have anti-therapeutic effects besides the inherent delay in compensating. For example, such systems nearly always involve the plaintiff in a series of medical examinations by doctors with differing compensation philosophies.

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[73] *ibid.* p755.
[74] And even then the level of understanding is dubious-see e.g. Wright et al *op cit.* p26.
[75] Shuman "Making the World a Better Place" *op cit.* p753 citing Fitzgerald B.T., 1990, "Sealed v Unsealed: A Public Court System Going Secretly Private" 6 *Journal of Law and Politics* p 381 at pp381-384. Under S45 of the NSW Motor Accidents Act 1988 there was a statutory duty on participating insurers to attempt settlement of matters.
[76] *ibid.* p757 and see in particular The Royal Australian College of Physicians, 2001, Compensable Injuries and Health Outcomes [Online] at http://www.racp.edu.au/afom
[77] *ibid.*

This may cause psychological damage.[78] It can also add to the conviction of the plaintiff that there is something organically wrong, particularly where a plaintiff is referred to a psychiatrist.[79]

plaintiffs who are seen by a number of doctors may experience anger and anxiety, especially if they perceive themselves as being disbelieved.[80] A diagnosis of malingering can lead to a psychological disorder and a diagnosis of 'functional overlay' can become a self- fulfilling prophecy.[81]

A compensation claim can also have a distorting effect on the way treating doctors diagnose; it may also lead to 'over-diagnosis' and physically intrusive diagnostic techniques being used.[82]

Another way in which fault-based systems can be anti-therapeutic is inherent in the adversarial process. The plaintiff has it constantly emphasized that there are people who may be working against his or her interest.[83] Not only can this lead to psychiatric disability, but also to 'ethical corruption'. This is caused by pressure to exaggerate and invent to improve a case.[84]

Fault-based systems can damage not only plaintiffs but defendants and other parties as well.[85] An example of this is where a child sues a driver for injuries and the mother is joined as a joint tortfeasor for negligently failing to take care of her child.[86]

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[78] Ison T.G., "Therapeutic Significance of Compensation Structures" *op cit.* p620 citing Keiser L. 1968, "The Traumatic Neurosis".
[79] *ibid.* p621.
[80] *ibid.* p618.
[81] *ibid.*
[82] *ibid.* p636.
[83] *ibid.* p624.
[84] *ibid.*
[85] *ibid.* p626.
[86] *ibid.* The writer has considerable experience of this practice, which is designed to pressure parents into settling by reinforcing feelings of guilt arising out of accidents.

Fault-based systems also discourage early return to work. As already discussed they provide a financial disincentive, through the usual methods of calculating non-economic loss, to prolong absence from work.[87] The litigation system may also impede re-employment. Some employers may decline to employ people engaged in litigation and this can impede rehabilitation.[88] Rehabilitation can also be impeded by the lack of communication caused by the adversarial process as well as the vested interests of defendant's insurers in the formal rehabilitation process.

The concentration on the aetiology of injury in fault-based systems can also lead to a decrease in diagnostic classifications used to facilitate specialization and economies of scale in treatment. This can further hinder rehabilitation.[89]

5. Tort As A System Of 'Insurance'

One of the benefits that have been claimed for fault-based motor accident compensation systems is that they are efficient insurance mechanisms.[90] What is here meant by 'insurance mechanisms' is a system of spreading losses and internalizing costs of the activity of 'driving' used in its widest sense.

The answer to this claimed benefit is quite simple; fault-based compensation systems are poor loss distribution mechanisms for a number of reasons.

Firstly, tort law artificially restricts loss distribution by channelling the loss spreading through litigants even though other parties, such as government authorities or manufacturers of motor vehicles

[87] Ison T.G. "Therapeutic Significance of Compensation Structures" *op cit.* p628.
[88] *ibid.* p625. Professor Sappideen calls for evidence here. The writer is citing Ison's work which deals mainly with the Canadian experience, however it is submitted that extrapolations are valid with respect to Australia.
[89] *ibid.* p633.

can spread the loss more widely.[91] Secondly, 'pure' tort law awards damages for all losses regardless of how trivial they may be.[92] An efficient insurance system will provide for the insurance buyer to pay for such losses via deductibles. As there are no such deductibles in most tort-based systems, they are not efficient insurance systems. Thirdly, tort provides cover in respect of non-economic losses when it is doubtful that people would normally buy coverage for such losses.[93]

Fourthly, optimal insurance requires the rationalization of all sources of coverage to minimize premium costs and prevent over-insurance.[94] However, tort based motor accident compensation systems do not always do this because the 'collateral source rule' may restrict the deduction from tort awards of indemnity payments otherwise receivable.[95]

When coupled with delay and underinsurance, particularly with regard to economic losses in large claims[96] it can be seen that tort is not an efficient insurance mechanism

It can be seen from the preceding analysis that the arguments in favour of retaining fault as the basis of the determination of entitlement to compensation are, mostly, logically insupportable (particularly those based on considerations of morality). Apart from these hollow claims made for tort-based systems, there are also a number of specific criticisms that are outlined below.

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[90] See Dewees D., and Trebilcock M.J. 1992, "The Efficacy of the Tort System and its Alternatives: A Review of Empirical Evidence", 30 *Osgoode Hall Law Journal* p57 at p69, Trebilcock M.J. 1993, "Law and Economics" 16 *Dalhousie Law Journal* 360 at p370.
[91] Weinrib E. 1992, "Thinking About Tort" 26 *Valparaiso University Law Review* p717 at p721.
[92] See Dewees D., and Trebilcock M.J. *op cit.* at p69.
[93] *ibid.* Professor Luntz suggests a reference here to Croley S.P., and Hanson J.D., 1995, "The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law" 108 *Harv L Rev* 1787 arguing that the view that "consumers do not want damages for pain and suffering is mistaken.
[94] *ibid.*
[95] *ibid.* Professor Luntz has helpfully pointed out that this last point is more applicable in jurisdictions other than Australia, where the rule has been considerably modified by statute; see Luntz H., 1998, "The Collateral Source Rule Thirty Years On" in Cane P. and Stapleton J. (eds), 1998, *The Law of Obligations: Essays in Celebration of John Fleming*, Clarendon Press, Oxford p377.

Specific Criticisms Of The Tort System

There are 10 specific areas of criticism of the tort system. These are that it limits the number of people compensated, requires uncertain forecasting of future events, overcompensates minor claims, creates moral hazard, reinforces illness behaviour, is costly, creates actuarial difficulties, under compensates the seriously injured, leads to misuse of lump sum awards by plaintiffs and is beset by delay in paying compensation. These are dealt with in turn below.

1. Limitations On The Number Of People Compensated

The most often perceived problem with fault-based compensation is that only a very limited number of injured people receive any compensation,[97] leaving large numbers of injured people to carry their own losses. Of those that do receive any compensation, a significant number have their damages reduced because of 'contributory' or 'comparative' negligence,[98] which means that they have to seek compensation from other sources such as social security, which may not be adequate to replace lost income etc. This not only leads to externalization of some of the costs of driving, but offends the sense of fairness of those whose major concern is distributive justice.

The selection of those who are to receive compensation is fortuitous; those who can prove fault and damage may receive full compensation, those who cannot prove one or the other receive nothing. This

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[96] *ibid.*

[97] See for example Pearson, 1972, *Report of the Royal Commission on Civil Liability and Compensation for Personal Injury*, Cmnd 5304, Trindade and Cane *op cit.* p648 citing the Pearson Royal Commission findings and also Luntz H., 2002, *Assessment of Damages for Personal Injury and Death,* 4th Edn, Butterworths, Australia p16.

[98] See Atiyah P. 1980, "No-fault Compensation: A Question That Will Not Go Away", 54 *Tulane Law Review* p271 at 284.

is the fundamental nature of the 'forensic lottery',[99] which many consider to be unfair because of the large numbers of victims who are excluded from compensation despite their need. Even those victims who do receive damages from a court do so only after a complex series of calculations designed to estimate future events and in most cases to reduce their damages accordingly.[100]

2. Uncertainty

In any personal injury or death action involving loss extending beyond the date of the trial it is necessary to estimate two matters; (i) what would have happened if not for the injury and; (ii) what will now happen.[101] It has been argued that necessary speculation on the latter in particular makes the task of the tribunal unnecessarily difficult if not impossible.[102]

The forecasts that are criticized fall into two groups. First are those relating to the general financial situation involving particularly the prevailing tax and social security rates that are used to arrive at the plaintiff's net annual income.[103] There is then a projection into the future that is truncated at a point at which it is calculated that earnings loss will no longer be suffered, and implicit in this calculation is an assumption about the expected level of inflation.[104]

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[99] See generally Ison T.G. 1967, *The Forensic Lottery,* Staples Press, London, 1967. Professor Sappideen calls for statistics here, however the point being made is a general one and it is submitted that statistics are not necessary.

[100] For example, the standard reduction of a lump sum for 'vicissitudes' (in New South Wales for example lump sums are usually reduced by 15% to take into account the chance of events occurring such as the early death of the Plaintiff) and the application of 'discount rates' (awards for future loss are discounted by some amount-usually 3% at common law or more recently 5% by statutory modification-to take into account the Plaintiff's advantage in having such future sums awarded now rather than in the future and being able to invest them early).

[101] Luntz *op cit.* p17.

[102] *ibid.*

[103] Lewis R. 1988, "Pensions replace Lump Sums", 15 *Journal of Law and Society* p392 at p401-the Social Security rates are not as relevant in Australia where such income is not taken into account in calculating loss of earnings.

This exercise requires speculative answers to a number of questions about the timing of the restoration (if any) of the plaintiff's earning capacity, the type of work the plaintiff will be able to undertake and the likely rates of pay, the possible duration of the plaintiff's career, the likely complications in the plaintiff's medical condition, the continuing need for medical services and the likely extent of the plaintiff's life.[105] Many if not most of these forecasts will be wrong.[106]

A successful plaintiff is therefore likely to be over or under compensated, with research showing that minor injuries are mostly overcompensated, whereas those with major injuries tend to be under compensated.[107]

3. Overcompensation Of Minor Claims

Tort's tendency to overcompensate minor claims has been regarded as a particular problem in most Australian jurisdictions for some time.

Many of the modifications to the common law method of assessing damages have been ostensibly designed to deal with this problem of overcompensation of minor claims. For example, under the New South Wales Motor Accidents Compensation Act, there is a threshold on damages for non-economic loss and the relevant legislation requires some incentive to settle such claims quickly and cheaply

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[104] *ibid.* Inflation is allowed for in the adoption of the discount rate applied to awards for future income loss- see *Todorovic* v *Waller op cit.*.
[105] *ibid.*
[106] *ibid.* And see also Luntz *Damages op cit.* citing *Lim v Camden and Islington Area Health Authority* [1980] AC 174 (HL) at p183 and *Todorovic v Waller op cit.* at p457-8 per Aickin J. See also Luntz H. 1985, "The Case For No-Fault Accident Compensation", *Queensland Law Society Journal* p167 at p170-171.
[107] Luntz *Damages op cit.* p19 particularly fn22.

with the express objects of the system being to exclude minor claims in order to protect system funds so that they are available for the more seriously injured.[108]

The main reason for the 1995 changes to the New South Wales legislation was that the number and cost of minor claims[109] had increased and the cost of those claims had also increased in comparison to total costs over the years from 1989/90 to 1993/94.[110] As claims costs were rising for all claims, there was a situation developing where there may have been a " significant impact on the scheme".[111] This experience has been common to several of the Australian state schemes and attempts to rectify the problem will be examined in more depth in later Chapters.

4. Moral Hazard

Another problem with the common law method of compensation is the lump sum damages award, which creates a 'moral hazard' in that it discourages genuine attempts at rehabilitation and encourages fraudulent attempts to obtain compensation.

In a common law action, where there is the possibility of a substantial lump sum payment, there is a disincentive for a plaintiff to seek rehabilitation or to appear to recover from an injury. Such systems provide a tangible reward for the successful feigning of injury, and such rewards may be substantial enough to support an 'industry'.[112]

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[108] See the objects of this Act cited in Chapter 3.
[109] Defined by injury severity.
[110] Motor Accidents Authority of NSW 1995, *The Incidence and Cost of Minor Claims as at December 1994* p14.
[111] *ibid.* - reading between the lines there may not have been enough money to go around.
[112] *Sydney Morning Herald* 7 September 1996 (article about the Pangallos). Also see Roux M.J. 1988, "Whiplash-an Ethical Dilemna for doctors and Lawyers", 2 *Law Institute Journal* p301. Professor Sappideen refers here to the position at Workers' Compensation and the lack of evidence that moral hazard would be avoided if there were no lump sum. It is intuitive that the possibility of significant lump sum damages may

5. Reinforcement Of Illness Behaviour

Even if there is no conscious attempt to 'beat the system' as described above the tort system may have a reinforcing effect on a plaintiff's injuries. It could be said that such forms of compensation can actually make people behave as if they are sick because they are encouraged to focus on their injuries and disabilities throughout the progress of their claim.[113] How such behaviour is viewed depends on one's perspective; from the point of view of a claims manager or defendant's lawyer, a plaintiff whose complaints persist despite a lack of objective physical signs is a 'malingerer'; to the plaintiff's lawyer, he or she is suffering from an emotional illness that is ultimately compensable.[114]

The argument runs that the tension between views of the plaintiff's injuries creates a 'pyramid of misunderstanding'[115] which may lead to 'personality regression'[116] on the plaintiff's part caused by "the ugliest levels of claims and counterclaims, and accusations and counteraccusations to which personal injury contests can descend".[117]

Whether such illness behaviour is a function of the compensation system is open to doubt. The research in the area is equivocal, with some studies suggesting that people with minor injuries tend to recover completely once they receive compensation, whereas other studies have demonstrated completely different findings.[118]

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encourage false claims, hence the recent statutory changes in the public liability area throughout Australia which severely curtail access to non-economic damages for minor claims.

[113] Ison T.G., "Therapeutic Significance" *op cit.* p628.

[114] See O'Brien P. 1988, "In Reply", 2 *Law Institute Journal* p301.

[115] Miller M.H., and Fellner C. 1968, "Compensable Injuries and Accompanying Neurosis: The Problem of Continuing Incapacity Despite Medical Recovery", *Wisconsin Law Review* p184 at p185.

[116] *ibid.* p191.

[117] *ibid.*

[118] Thompson W.A.R. 1982, "Accident Neurosis" 22 *Med.Sci.Law* p143.

Some research has shown, contrary to expectation, that there are no significant effects of either litigation or representation on persons having worker's compensation claims.[119] There is however a common belief that many compensation claimants are malingering. But malingering is hard to define and even harder to detect.[120] The reality may be that a subgroup of susceptible individuals with a particular type of pre-morbid personality may be made functionally worse after an accident by the cumbersome operation of various elements of the tort system. [121]

6. Costs Of Assessment Of Damages

The number of people injured in automobile accidents increases with population increase. The costs of individually assessing fault in those cases that actually get to court and the costs associated with assessing damages where a plaintiff is able to establish primary negligence also increase with the number of cases and as methods of assessing damages become more sophisticated.

The tort system is expensive in a number of ways. Firstly the costs of retaining a lawyer are very expensive, and can actually deter many people from pursuing their legal rights.[122] In addition, in Australia the usual practice in civil litigation is that costs follow the event. This means that the unsuccessful party pays some proportion of the other side's legal costs in most cases. The effect of this is that a well-resourced litigant (such as an automobile insurer) can increase the stakes in litigation to a point where an individual is forced to abandon a case or settle on distinctly

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[119] Peck C.J., Fordyce W.E., and Black R.G. 1978, "The Effect of the Pendency of Claims for Compensation Upon Behaviour Indicative of Pain", 53 *Washington Law Review* p251.
[120] Rogers R., and Cavanaugh J.L. 1983, "'Nothing But The Truth'-a Re-examination of Malingering", *Journal of Psychiatry and Law* p443.
[121] See Miller and Fellner *op cit.* and also Thomson *op cit.*
[122] Access to Justice Advisory Committee 1994, *Access to Justice*, Canberra p384.

unfavourable terms.[123] In addition, a successful litigant will receive only a proportion of their costs.[124] Costs can be a significant proportion of a gross verdict. For example, in New South Wales legal costs represent about 30% of gross verdicts.[125]

Secondly there are also less obvious costs inherent in the system. Not only is expert medical evidence often called on each side, there is also evidence called from other service providers such as providers of domestic services, occupational therapists, builders (for example in cases where a plaintiff alleges that injuries caused by an accident necessitate alterations to the plaintiff's dwelling), and other 'experts'[126] who are called to give evidence regarding the full past loss and future needs of a particular plaintiff and who charge significant costs which may be only partially recoverable. These 'hidden' costs of running a tort case can thus be exorbitant.[127]

There is also a huge cost involved in running the whole court system, with judges, court and registry staff, reporters etc. Whilst there is generally an assumption that the broader community benefits from the court system,[128] in the context of automobile accident compensation the number of cases litigated is simply 'clogging the courts'.[129]

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[123] *Ibid.* p 169.

[124] In most cases only "party/party" costs (ie those reasonably incurred in progressing the matter as between the parties) will be recoverable, whereas what a lawyer actually charges the client ("solicitor/client costs") may be considerably greater.

[125] Worthington D. and Baker J. 1993, *The Costs of Civil Litigation*, Law Foundation of NSW, Sydney p27. Defendants' costs were even higher. In this regard see also the figures cited in Fleming *The Law Of Torts* 9th Edn *op cit.* p445.

[126] The NSW and Commonwealth Evidence Acts allow for a very wide definition of 'expert'.

[127] Fleming J.G., 1998, *The Law of Torts* 9th Edn *op cit.* p445.

[128] Access to Justice Advisory Committee, *Access to Justice*, *op cit.* p149.

[129] Fleming JG., *The Law of Torts* 9th Edn *op cit.* p446. It is estimated that automobile accident compensation cases made up about 60% of all new cases commenced in the Sydney District Court in the years 1993-95-see McLachlan D. *DCJ.* 1996, "The Judiciary (I): Key Issues" *Proceedings of the Public Seminar on the Motor Accidents Scheme*, NSW Parliament, Legislative Council Standing Committee on Law & Justice p155. Professor Sappideen notes here the use of references to arbitration in e.g. the District Court in New South Wales where over 90% of claims are finalized without further hearing.

7. Actuarial Difficulties

The common law courts in Australia must now take into account the probability of an event occurring in the future in awarding damages.[130]

Leaving aside for the moment the question of assessing probability of an event occurring as zero, this feature of the law may lead to an increase in the amounts awarded to successful plaintiffs. Previously, if there was less than a 50 percent chance of an event occurring, the likelihood was that the plaintiff would effectively remained uncompensated in respect to that event. Now courts must assess the probability of such events occurring and make awards accordingly.[131]

Such consideration, apart from increasing the possibility of a discrepancy between the basis of the award and reality, is likely to have two main effects. Firstly, cases are likely to become longer and more expensive to run as it becomes more lucrative to spend resources on establishing the probability of even outlandish future possibilities; secondly awards will become more difficult for actuaries to predict, which will create problems for liability insurers.[132]

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[130] See eg *Malec v Hutton* (1990) 169 CLR 638. Professor Luntz makes the point that this case represents a restatement by the High Court of a principle which has been part of the law for centuries. Professor Sappideen questions how often such future contingencies cause difficulties, given that most motor vehicle claims settle quickly. The point remains that the development of the law in this area makes prediction by actuaries more difficult as each case is completely restricted to its facts and averaging potential income loss across all cases becomes very problematic because of the number of potential "outliers" such as the *Jon Blake* case.

[131] Professor Luntz makes the point here that a distinction should be drawn between loss of chance, which may or may not be sufficient damage to satisfy one of the necessary elements of the tort of negligence (compare *Gregg v Scott* [2002] EWCA Civ 1471 with *Mouratidis v Brown* [2002] FCAFC 330), and the taking into account of contingencies or "vicissitudes". The point remains that cases are lengthened as a result of courts considering such matters and actuaries have great difficulty in predicting outcomes based on such nebulous considerations.

[132] It has been argued that the 'idea' of no-fault motor accident insurance took hold in America when "...actuarial opinions could offer reassurance that costs would not rise and indeed would probably decline..." O'Connell J. 1976, "An Alternative to Abandoning Tort Liability: Elective No-Fault Insurance for Many Kinds of Injuries", 60 *Minnesota Law Review* 501 at p539.

8. Undercompensation Of Seriously Injured Plaintiffs

Despite increasingly large awards, it has been argued that common law compensation systems do not provide adequate compensation for seriously injured plaintiffs.[133]

In most cases, claims are settled, presumably with a discount for issues such as liability or doubts as to the likely assessment of damages.[134] Seriously injured plaintiffs who settle are therefore likely to receive less than 'full' damages.[135]

Even when matters proceed to hearing, the difficulty in calculating the effects of e.g. inflation on a lump sum award means that such awards are likely to be inadequate.[136] As previously stated herein, research has demonstrated that awards for catastrophically injured people are often exhausted within a relatively short period of time.[137]

9. Misuse Of Lump Sum Awards By Plaintiffs

plaintiffs can also dissipate awards; the community will then be required to provide support through the Social Security and Medicare systems.[138]

This raises questions about the interaction between compensation systems and governmental welfare support systems that have been of concern in Australia for some time.[139]

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[133] NSWLRC 1982, *Accident Compensation* Issues Paper IP, Sydney p25.
[134] *ibid.* And see also *Pearson Report* Cmnd 5304, 1972 paras 407-11 and Luntz "The Case for No-Fault Accident Compensation" *op cit.* p169-because most such settlements contain secrecy provisions, details are usually unavailable.
[135] NSWLRC "Accident Compensation" Issues Paper *op cit.* p25.
[136] *ibid.* p25-26.
[137] Freeth S.1993. *Quadriplegia: A Long Experiment with Yourself*, Paraquad Research Project, Sydney p46.

In an attempt to resolve some of these issues and to stop the 'bleed' from federal funds the Australian government has legislated in an endeavour to ensure that persons who received compensation for economic loss and/or medical expenses reimburse the Commonwealth out of compensation funds.[140]

This legislation does not however stop plaintiffs in fault-based jurisdictions who received lump sum awards from dissipating those awards. When this is combined with the unpredictability of awards and their likely inadequacy due to changing circumstances an unsatisfactory situation arises where seriously injured people are forced back to the Commonwealth government welfare programmes for medical care expenses.[141]

10. Timeliness Of Awards

One of the most often criticized features of the lump sum awards typically found in tort systems is the length of time necessary to make an individual assessment.[142]

Such awards were never designed to be a system to finance payment of the urgent and immediate needs of victims but to ultimately allocate the costs of accidents.[143]

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[138] NSWLRC "Accident Compensation" *op cit.* p 25 and also see Freeth *op cit.* p46.
[139] Brennan T., and Deeble J. 1993, *Compensation and Commonwealth Health and Community Service Programmes*, Department of Health, Housing, Local Government and Community Services Discussion Paper, AGPS, Canberra pp 4-5.
[140] See Social Security Act 1991, Health and Other Services (Compensation) Act 1995.
[141] Brennan and Deeble *op cit.* p16.
[142] See eg Blum W.J., and Kalven H., Jnr. 1964, "Public Law Perspectives on a Private Law Problem-Auto Compensation Plans", 31 *University of Chicago Law Review* p641 at p709.
[143] *ibid.*

Seriously injured plaintiffs may therefore often be forced to wait years before they receive any compensation from the fault-based accident compensation systems to meet their needs. This fact may translate into an attractive incentive to settle early and to accept a discount on the prospective 'worth' of a claim in order to receive prompt payment.[144]

Whilst waiting for an award or settlement, a seriously injured plaintiff will most likely be using the Medicare and social security systems to 'make ends meet'. Once a matter is settled a complicated administrative framework comes into play to ensure recovery of such payments by the Commonwealth.[145]

If there is a discount of a final settlement for reasons of timeliness, then there must be an increased likelihood of the plaintiff being forced to return to the welfare system due to dissipation or insufficiency of funds. Such outcomes highlight the problems of under compensation of seriously injured persons and the potential complications caused by inter-governmental cost shifting.[146]

Conclusion

This chapter has examined the four major areas of benefit claimed by supporters of the retention of tort law in the area of automobile accident compensation. All of these arguments have been used in Australian jurisdictions in the past three decades by such supporters to try and preserve tort law as the dominant liability theory in automobile accident law. And yet the previous analysis has shown that arguments based on 'rights' are hollow; that arguments based on deterrence are weakened by the

[144] For evidence of the delay in New South Wales courts see Callinan R., 2002, "Court Delays in NSW: Issues and Developments" Parliamentary Briefing Paper 1/2002 [Online] at http://www.parliament.nsw.gov.au/prod/web/PHWebContent.nsf/PHPages/ResearchBf012002.
[145] See fn 136.

existence of compulsory liability insurance and perverse costs incentives; and arguments based on morality are demonstrably wrong.

The obverse side of the coin is that there are ten cogent criticisms of the tort system examined in this chapter, including its unfairness, uncertainty, costliness and tardiness in delivering benefits, which it might be considered would make tort's abolition in relation to automobile accidents a compelling priority. Yet despite strident calls for its removal,[147] the tort system has been slow in going. In fact, it still exists to some degree in every automobile accident compensation system in Australia.

Why should this be so? A plausible explanation is that the replacement mechanisms are also susceptible to criticism to the extent that there is uncertainty in the legislative mind as to whether, and if so to what extent, the tort system should be replaced. A lack of consensus about how to frame a system which avoids the problems of tort is likely to lead to confusion and diversity as different jurisdictions consider the need for change at different times.

The next three chapters examine the benefits and drawbacks of those compensation systems designed to supplement or replace tort to determine the extent to which they are likely to be subject to the type of criticism which would lead to confusion on the part of those seeking to replace tort, and ultimately to diversity between state systems.

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[146] Brennan and Deeble *op cit.* p17.

[147] See for example Robinson M.A. *op cit.*, the Woodhouse reports (Woodhouse Sir A.O., 1972, *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Enquiry*, New Zealand Government Printer, Woodhouse Sir A.O., 1974, *Compensation and Rehabilitation in Australia: Report of the National Committee of Enquiry*, Australian Government Publishing Service, Canberra) and NSW Law Reform Commission, 1985, *A Transport Accidents Scheme for NSW*, Report No. 43, Sydney.

CHAPTER 4

BENEFITS AND DRAWBACKS OF NO-FAULT AUTOMOBILE ACCIDENT COMPENSATION SYSTEMS

1. Introduction

No-fault schemes have been the subject of many hyperbolic claims over the past few decades relating to their superiority over other forms of compensation, some of which have come from fairly 'respectable' sources. The best example comes from the Australian Woodhouse report, which set out the 'general beneficial principles' underlying no-fault schemes as follows:

(a) Community Responsibility. The community as a whole should support and encourage physical and economic rehabilitation of all who are injured and sick for reasons of:

(i) Humanity

(ii) Self- interest (the return of productive persons to work)

(iii) Practicality (those who are incapacitated have made earlier contributions or have been ready to contribute).

(b) Rights Universally Enjoyed. The primary aim of such schemes is to provide cover for everybody, in respect of personal incapacity.

(c) Incentive. The encouragement of the recovery of bodily health and vocational utility in a minimum of time through rehabilitation.[1]

It has been asserted that the following benefits will flow from the introduction of such systems:

(a) Efficiency and the provision of adequate compensation at the lowest cost to the community because of lower legal and administrative expenses.[2]

(b) Provision of fair compensation for losses sustained, set at realistic levels consistent with community responsibility.

(c) Prompt compensation and provision of secure and continuing compensation entitlement to the long term seriously disabled.

(d) Maximization of the opportunities for rehabilitation and, to this end, integration of compensation and rehabilitation.

(e) Minimization of formality and conflict in compensation delivery.

(f) Revelation of the 'true costs' of automobile accidents to the community and the way that such costs are borne.

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[1] Summary of the Principles of the Woodhouse Report (Woodhouse Sir A.O., 1974, *Compensation and Rehabilitation in Australia: Report of the National Committee of Enquiry*, Australian Government Publishing Service, Canberra) in Trindade and Cane *op cit.* p722ff.

(g) Justice and safeguarding of the rights of all accident victims.[3]

If no-fault schemes in practice lived up to the expectations arising out of such principles, it is difficult to understand why they have attracted such a degree of criticism and why all automobile accident compensation systems are not no-fault. The best explanation for this is that the aforementioned 'beneficial principles' when closely examined do not appear to be immune from criticism similar to that made of tort based compensation systems.

2. Critical Analysis of Claimed Benefits Of No-Fault Compensation Schemes

Community Responsibility

The idea that the community as a whole should support and encourage physical and economic rehabilitation of all who are injured and sick for reasons of humanity is a noble one. It ignores however several important political considerations such as how much the community as a whole is

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[2] This is a point of much contention and the state parliamentary debates about it will be examined in Chapter 10 of this paper.

[3] Summarised from Sackville R. 1983, "Accident Compensation: The New South Wales Law Reform Commission's Reference" in *Accident Compensation: The Prospects for Reform* Seminar by University of NSW Faculty of Law in conjunction with the NSW Law Reform Commission August 1983 p16-17. See also JUSTICE report 1974, *No-fault on the Roads*, Stevens and Sons, London p34ff. Professor Luntz comments that there are other benefits in public education ("drink, drive, you're a bloody idiot), prevention (elimination of accident black spots), the provision of acute and rehabilitative hospital services etc that have been initiated by the single public insurer under the no-fault system in Victoria. He argues that such benefits are not obtainable under a competitive private insurer system because of the "free rider" problem. With all due respect to Professor Luntz, in a system such as that which obtains in New South Wales, where there is a co-ordinating statutory authority (the Motor Accidents Authority), such benefits are realistically obtainable, and are therefore not exclusive to a no-fault system.

prepared to pay for compensation,[4] and how the costs of automobile accidents (or any accidents) are to be allocated within the community.

Economists argue that if costs are not allocated to their activities, then externality and resulting inefficiencies arise.[5] Whilst it might be argued that all members of society benefit from the activity of motoring, no-fault is still 'inefficient' in a strict economic sense because costs are spread very widely across the automobile owning population and are not allocated to the specific activity of driving.

Some Communitarians argue that considerations of humanity outweigh any notions of efficiency or social utility. However, taken to its logical extreme, such an argument would lead to the banning of automobile driving altogether if it is expected that at least some accidents are inevitable. Motoring is not banned however because it is beneficial to large numbers of people in society and so the allocation of costs becomes inevitable. The question is whether costs can be allocated in such a way that the community best encourages physical and economic rehabilitation of all who are injured and sick.

It is interesting to note here the contrast between the common law based compensation systems and no-fault systems in relation to loss shifting. At common law, losses are left to lie where they fall unless there is a good reason (i.e. fault) to shift them.[6] No-fault plans start with the opposite premise: it is an important social objective to shift personal injury losses of the accident victim.[7]

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[4] Blum and Kalven "Ceilings Costs and Compulsion" *op cit.* p359. These authors make the interesting point that when discussing the costs of no-fault motor accident plans, most people focus on what the costs associated with the existing tort system are, and the aim of most proposed plans is to reduce this tort based cost to the motorist, rather than the community as a whole.

[5] See eg the works of Guido Calabresi and Richard Posner cited herein.

[6] Blum and Kalven "Ceilings, Costs and Compulsion" *op cit.* p378.

[7] *ibid.*

The concept of the community's self-interest thus comes into play. The community as a whole presumably has a vested interest in the return of productive people to work and in maintaining people as producing and/or consuming units. The cost of returning injured people to work is therefore a major consideration of any motor accident compensation scheme.[8]

Rights Universally Enjoyed

Subsumed under this principle is the underlying theme of 'horizontal equity'.[9] This means that people with equivalent needs should receive equivalent benefits.

The tort system creates a normatively indefensible 'accident preference' whereby those injured by the negligence of others may receive full compensation. Those who are injured in other circumstances must rely on their own resources or on meagre social welfare benefits.[10] It is argued that there is no reason for treating persons with similar injuries and disabilities differently and that there should therefore be not only no-fault compensation in respect of automobile accidents injuries but that an 'integrated', 'comprehensive' or 'universal' social insurance policy should be put in place on the basis of ethical considerations.[11]

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[8] Perhaps the major consideration. Professor Sappideen asks here how no-fault schemes return persons to productive work. The answer to this is that most such schemes not only provide specific encouragement for a return to work through rehabilitation schemes etc. They also taper off earnings related benefits to create an incentive to return to work. Professor Sappideen also asks why social security does not achieve such ends. The answer is that it is not designed to, but rather provides a subsistence level benefit to those who cannot work.

[9] Trebilcock M.J. 1989, "Incentive Issues in 'No-fault' Compensation", 39 *University of Toronto Law Journal* p19 at p20.

[10] *ibid.*

[11] *ibid.* p20-21. See the New Zealand and Australian Woodhouse Reports for a full explication of this point of view. See also Miller A.L. 1982, "Should Social Insurance Pay Compensation for Pain and Suffering?" 31 *International and Comparative Law Quarterly* p550.

This notion of horizontal equity often includes 'progressive' ideas requiring a degree of wealth distribution. The basis of the principle is 'communitarian'; in other words there is an acceptance that most accidents are the inevitable by-product of the activities of an industrialized, interdependent society (eg such as motoring).[12] As such, society as a whole should be responsible for the negative outcomes of such activities, and schemes should be funded in such a way that wealth flows 'downwards' from those with greater agglomerations of money to those with less. The antithesis of this principle is the idea that the costs of accidents should lie with the 'least cost avoider' in order to promote economic efficiency.[13]

Proponents of the 'universal rights' theory have traditionally ignored more complicated analyses of accident compensation systems that deal with incentives and insurance effects. The tendency instead is to highlight the failure of the tort system to achieve 'perfect' distributive justice by compensating all of those who are injured as a result of the activities of 'modern' societies.[14]

The fact that a significant percentage of persons who are seriously injured in road accidents in particular go uncompensated has been used on many occasions over the years to justify calls for the introduction of no-fault motor accident compensation systems.[15]

There are two significant problems with such views. Firstly, most no-fault compensation schemes do not adequately address the question of how to compensate those who were non-earners as at the time

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[12] See Dewees and Trebilcock "The Efficacy of the Tort System" *op cit.* p60.
[13] See for example the various works of Guido Calabresi cited herein.
[14] For an early example of views on the subject see Marx. 1954, "Compensation Insurance for Automobile Accident Victims: The Case for Compulsory Automobile Compensation Insurance", 15 *Ohio State Law Journal* 134 at p158. See also generally the New Zealand and Australian Woodhouse Reports and NSWLRC 1984, *Accident Compensation: A Transport Accidents Scheme for NSW* Report No. 43, Sydney.
[15] See for example Bradshaw K. 1981, "Community Concern", 11 *Australian Social Welfare Impact* p4-5. There are many other examples too numerous to cite here but for a very recent view see Gardner D., 2000, "Automobile No-Fault in Quebec as Compared to Victoria" 8 *Torts Law Journal* 89 at p102.

of their accident. Secondly, unless there is a flat rate of compensation for all those injured regardless of their pre accident earnings, then such schemes do not redistribute wealth evenly and in fact may be 'regressive' in that the low earning premium payer subsidizes the high earning victim who has an identical (or maybe even lower) premium.

In addition, there is a further philosophical dilemma for those who propound the 'rights universally enjoyed' theory. In most no-fault motor accident compensation schemes there will be some upper limit placed on the amount of damages that can be awarded. Therefore, most such schemes discriminate against the more seriously injured who will not receive 'full' compensation for their losses whereas those whose loss falls closer to the median are more likely to be fully compensated.[16]

It is also possible that, in applying an 'egalitarian' approach to the pricing of premiums and thereby failing to allocate the costs of accidents to bad drivers in any meaningful sense, such schemes make the roads more dangerous.[17] As has been said, "major distributional initiatives always have undesirable consequences".[18]

Whilst it is comforting to think that the whole of society bears equally the burden of the costs of automobile accidents, the reality is that the careful drivers subsidize the risk takers (and perhaps the accident prone).

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[16] Blum W.J., and Kalven H. Jnr. 1973, "Ceilings, Costs and Compulsion in Auto Accident Compensation", *Utah Law Review* p341 at p348-349.

[17] If the conclusions drawn by, for example, Gaudry, Landes and McEwin are correct-see Gaudry M., 1992, "Measuring the Effects of the No-Fault 1978 Quebec Automobile Insurance Act with the DRAG Model" in Dionne G. (ed), 1992, *Contributions to Insurance Economics*, Kluwer Academic Publications, Boston, Landes E.M., 1982, "Insurance, Liability and Accidents: A Theoretical and Empirical Investigation of the Effect of No-Fault on Accidents" XXV *Journal of Law and Economics* p49, McEwin I., 1989, "No-Fault and Road Accidents: Some Australasian Evidence" 9 *International Review of Law and Economics* p13.

There is an argument that because of the way the compensation pool is structured in no-fault systems, the urban, less well to do motorist with a large family benefits from flat rate premiums at the expense of other motorists.[19]

However there are also elements of such misallocation and subsidization in tort-based systems, particularly where there is compulsory third party insurance with a great degree of regulation.[20] There are other incentives in those systems to drive carefully (such as the risk of an uncompensated loss) that are mostly missing in 'pure' no-fault systems.

Positive Incentives

It may be argued that in a properly functioning no-fault compensation system, recovery will be promoted through rehabilitation strategies that ensure a return to health and vocational utility in minimum time.

This of course depends on the particular system. Opponents of no-fault systems argue that they have a considerable moral hazard problem. There are said to be disincentives in such systems where compensation is virtually automatic. The way that such problems are normally dealt with is by allowing for only partial compensation of wage losses. This can lead to financial hardship, which is no incentive to rehabilitation.

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[18] Epstein R.A. 1991, "A Clash of Two Cultures: Will the Tort System Survive Automobile Insurance Reform?" 25 *Valparaiso University Law Review* p173 at p201.
[19] Blum and Kalven "Ceilings, Costs and Compulsion" *op cit.* p364.
[20] Epstein R.A., *op cit.* p200.

It is also possible that victims develop a 'compensation mentality' where they rely for their support on the rehabilitation system and are reluctant to leave it. Thus forced separations occur which are also disincentives to rehabilitation.[21]

There is certainly evidence that in no-fault compensation systems, as in tort-based ones, those with compensable injuries have poorer health outcomes than those with non-compensable injuries.[22]

The timeliness of rehabilitation and the return to vocational utility are very system specific. If a no-fault compensation system is functioning efficiently then it will be more effective than a tort based system in returning a person to the workforce as rehabilitation and compensation are virtually immediate - there is no waiting for stabilization of injuries or court delays before the rehabilitation procedure can commence.

In such a system it is also much easier to monitor the progress of rehabilitation. This is a concept that is alien to tort-based systems where the adversarial nature of the system coupled with the lump sum payment method creates a strong disincentive to timely rehabilitation.

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[21] See Chapter 3 p37ff.

[22] The Royal Australasian College of Physicians Health Policy Unit 2001, *Compensable Injuries and Health Outcomes* [Online] at http://www.racp.edu.au/afom. Professor Sappideen comments here that it may be possible that non-compensable injuries are ones in which there are personal relationships; that might explain why home injuries do not usually result in a compensation claim-she refers to Harris et al, *Compensation and Support for Illness and Injury opcit.* This may be so, but does not really go to the point about different health outcomes between compensable and non-compensable injuries.

Costs Efficiency

One of the benefits claimed for such schemes is that they are 'efficient' and provide adequate compensation at the lowest cost to the community because of lower legal and administrative expenses.

At the outset, such schemes do not meet the criteria for efficiency set by most economists, as they tend to externalize costs.[23]

Whether or not the compensation provided by such schemes is 'adequate' depends largely on legislative imagination coupled with the size of the compensation pool. This in turn depends on a stark political factor i.e. at what level the relevant controlling authority is prepared to set premiums.

There is a long-standing argument regarding what is adequate compensation and there have been a number of theories advanced as to how compensation in such schemes should be calculated. For example, those who subscribe to the insurance theory of compensation argue that compensation in such systems should be equal to the amount of insurance that sophisticated first party insurance buyers would purchase for themselves.[24]

Many such theorists conclude that such hypothetical insurance buyers would not purchase insurance for non-economic loss if given the chance and so compensation for such losses should be excluded

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[23] See generally Calabresi G. 1970, *The Costs of Accidents: A Legal and Economic Analysis* Yale University Press - Most such schemes do not pay "full" compensation and so some of the costs are borne by injured persons.

[24] See the works of Schwarz (e.g. Schwarz G.T., 1990, "The Ethics and the Economics of Tort Liability Insurance" 75 *Cornell Law Review* p313 and Shavell (Shavell S., 1992, "Liability and the Incentive to Obtain Information About Risk" 21 *Journal of Legal Studies* p259) *supra*. There are some who believe this approach to be ill conceived eg see Smith-Pryor E. 1993, "The Tort Law Debate, Efficiency, and the Kingdom of the Ill: A Critique of the Insurance Theory of Compensation", 79 *Virginia Law Review* p91.

from compensation schemes. The economic reasoning behind this conclusion is that in respect of non-pecuniary losses the marginal utility of money decreases post injury and such compensation systems, which are de facto insurance systems, should therefore restrict non-economic loss payments.[25] However this reasoning has been roundly criticized by advocates for disabled groups in particular who argue that its basic premise (that the marginal utility of money decreases post injury) is completely erroneous.[26]

It has been cogently argued that the marginal utility of money does not decrease post injury[27] and as the level of compensation in such schemes is not properly cognizant of the views of the disabled (and because of discriminatory social attitudes and structures may never be) then compensation in such systems may never be 'adequate'.[28]

In the real world many no-fault compensation schemes (such as workers' compensation schemes) provide some payment for pain and suffering or the like, and most Australian automobile compensation schemes allow for compensation of non-economic losses to some extent.

There is also some debate as to whether such schemes do provide compensation at the lowest cost to the community. It is argued that because of lower legal and administrative costs such schemes are cheaper.[29] However, intuitively this view is difficult to sustain if one considers that there is most

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[25] See e.g Schwartz *ibid.* but see Croley S.P. and Hanson J.D., 1995, "The Nonpecuniary Costs of Accidents: Pain-and Suffering Damages in Tort Law" 108 *Harv L Rev* 1787.
[26] *ibid.*
[27] *ibid.* p107ff.
[28] *ibid.* Generally.
[29] See for example "Proposal 202 Contingency Fee Limits: Overview of Pure No-Fault Auto Insurance Initiative" [Online] copy on file with author. Professor Sappideen has called for actual figures on administrative costs here. The writer understands that such figures are not publicly available in Australia. A proxy would be interstate premium level comparisons, which show that, apart from the Queensland scheme, the premium costs in no-fault jurisdictions are consistently lower than in fault based states. Professor Sappideen comments that if compensation were managed administratively rather than utilizing the common law processes, this would also

likely a limited total compensation pool based on a maximum politically acceptable premium paid by a limited group of motorists.[30]

It has also been demonstrated empirically that some no-fault accident compensation schemes have been more expensive than their tort predecessors.[31] The evidence in this regard is equivocal though; studies in the United States have shown that no-fault schemes have a higher net pay out ratio than traditional tort schemes.[32] Other studies have shown that no-fault laws have lowered bodily injury liability costs but have made little demonstrable difference as far as total bodily injury related loss costs are concerned.[33]

Most studies into the costs of no-fault schemes come from the United States where there is no 'pure' no-fault motor accident compensation scheme currently operating.[34]

However, in a 'pure' single insurer no-fault scheme, where compensation is presumably restricted, there are limited legal costs and without the expenses associated with compensation (such as multiple medical examinations etc) then it is logical that average costs of claims will be lower than in tort based or hybrid schemes.[35]

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result in reduced costs. This is no doubt partially true, although it must be remembered that in general, many more people receive compensation in the no-fault jurisdictions.

[30] Blum W., and Kalven H. Jnr, "Ceilings, Costs and Compulsion" *op cit.* p246.

[31] See O'Connell J., and Joost R. 1986, "Giving Motorists a Choice Between Fault and No-fault Insurance", 72 *Virginia Law Review* p61.

[32] Chapman and Trebilcock *op cit.* p818 citing US Department of Transportation 1985, *Compensating Auto Accident Victims* p83 as well as a number of other studies eg Carroll S.J. and Kakolik J.S. 1991, *No-Fault Automobile Insurance: A Policy Perspective*, Rand, Santa Monica p11. However the Quebec no-fault scheme has been shown to be cheaper than its predecessor-see Gardner D., 2000, "Automobile No-Fault in Quebec as Compared to Victoria" 8 *Torts Law Journal* 89.

[33] Johnson J., Flanigan B. and Winkler D. 1992, "Cost Implications of No-fault Automobile Insurance", *Journal of Risk and Insurance* p116; Lilly C. and Webb B. 1983 "No-fault: A Review of its Cost" 2 *Journal of Insurance Regulation* p176.

[34] Nordman E. 1998, "The History of No-fault Insurance" 16 *Journal of Insurance Regulation* p457.

There have been recent moves in the United States away from no-fault schemes towards choice plans because of apparent increases in costs associated with such schemes.[36]

It has been argued that no-fault schemes increase the overall costs of the automobile insurance system, and that restrictions on the right to sue do not offset the higher costs of no-fault.[37]

It is thus debatable that no-fault systems provide compensation at the lowest cost to the community.[38] If the introduction of no-fault systems does, as some suggest,[39] lead to an increase in the number of fatal accidents then the cost to the community is actually very great.

Fair Compensation

The next claimed benefit for no-fault motor accident compensation systems is that they provide fair compensation for losses sustained, set at realistic levels consistent with community responsibility. Because no-fault schemes are usually designed and implemented as an integral system, whether any particular scheme can lay claim to this alleged benefit depends on the individual details of the scheme.

Whether no-fault systems provide 'fair' compensation is problematic. Supporters of fault-based systems argue that paying everybody who is injured compensation at the same level regardless of corrective justice notions or prior earnings history is patently unfair.[40]

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[35] See Gardner D. *op cit.* p95.
[36] Nordman E. *op cit.* p457.
[37] "Insurance Premiums in No-fault States" Study prepared by the Proposition 103 Enforcement Project-Internet Article, copy on file with author.
[38] Kleffner A.E., and Schmit J.T. 1999, "Automobile Insurance in Canada: A Comparison of Liability Systems" 18 *Journal of Insurance Regulation* p34.

Whether levels of compensation in such systems are realistic also depends on the specific system and whether there is a responsibility on the part of the community to set 'realistic' levels of compensation and the limits of that responsibility is also problematic.

There is some support for the argument that tort based compensation is a 'responsible' method of compensating those who are injured in automobile accidents by definition.[41]

It could also be said that tort's high levels of compensation are realistic if it is conceded that corrective justice is of significant value and that an attempt to restore a 'wronged' individual as far as possible is an important social goal.

It appears however that 'realistic' when applied to no-fault compensation systems means less than the 'full' compensation that tort can provide. In some sense the use of the term 'realistic' is euphemistic and signals the abolition or restriction of damages for non-economic losses such as pain and suffering.

Because of the interplay in Australia between 'safety net' type social security programmes, bilateral compensation sources and health insurance programmes it would be difficult to set compensation at a level which federal and state governments and injured victims would all agree as being realistic. There is no general claim therefore able to be made for no-fault systems as to fair or realistic compensation with one's political agenda being likely determinative in that regard.

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[39] See for example McEwin R.I., *op cit.* as well as the Landes and Gaudry studies *supra*. See also the explanation herein at pp100, 102.

[40] "Fair" liability rules have been defined as those which fully compensate a victim for their damages-see Spitzer M. 1977, "An Economic Analysis of Sovereign Immunity in Tort", 50 *California Law Review* p515. Professor Sappideen suggests mention here of the New Zealand accident no-fault compensation system, which is anecdotally referred to as the "no compensation system".

[41] See the various works of Blum and Kalven cited herein.

Timely And Secure Compensation

A further benefit claimed for no-fault systems is that they compensate promptly and provide secure and continuing compensation entitlements to the long term seriously disabled.

Once again this is system specific. However in no-fault systems such as those that exist in Victoria, Tasmania and the Northern Territory compensation is 'prompter' than in the fault-based systems in states such as New South Wales and Queensland where there are elaborate legislated claims procedures[42] and incentives on insurers to delay payments of compensation in large claims.[43]

In most no-fault motor accident compensation systems the compensation entitlement is without question and the degree of entitlement is calculated according to formulae that are simpler and more certain than esoteric common law damages calculations.

No-fault systems also usually provide ongoing compensation as distinct from common law lump sum damages. Therefore compensation is secure in the sense that there is no likelihood of the 'frittering away' of a large lump sum as can occur with a common law damages award. Whilst there has been some attempt to introduce "structured settlements" in large common law cases to obviate such problems, the taxation treatment of such settlements up to date has made them relatively unpopular.

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[42] Despite specific provisions in the legislation such as S48 of the NSW Motor Accidents Act 1989 which imposed a specific duty on the insurer to resolve claims as expeditiously as possible.

[43] So that the insurer obtains the benefit of interest on the monies before the compensation is paid. The insurer however may not have the full use of the monies themselves because of the practise of "reserving" i.e. assets are liquidated to cover expected claim costs. Professor Sappideen comments that there would be an advantage if the interest rate payable at common law is less than the rate in the money market.

Maximization Of Rehabilitation Opportunities

The next claimed benefits for no-fault automobile accident compensation systems is that they maximize the opportunities for rehabilitation and thus integrate compensation and rehabilitation.

This theoretical benefit is more applicable to major claims for serious injury. In relation to minor claims (where same are covered by the scheme) it has been demonstrated that there is a disincentive to return to work.[44]

This is one of the major criticisms of such schemes. Because entitlement to benefits is virtually automatic, and because there is not the intense scrutiny of individual claims as in common law systems, it is easy for a 'welfare' mentality to develop. It then becomes difficult to wean claimants off the system. Rehabilitation is thus discouraged depending on the extent of compensation. Usually the framers of such schemes attempt to deal with this problem by limiting the amount of compensation for wage loss available to a claimant.[45] This is especially so in minor claims.

Such schemes are however usually better able to link compensation with rehabilitation, not because they maximize the opportunities for rehabilitation but because the rehabilitation is directly funded and controlled by the administrative body; rehabilitation is thus taken out of the hands of the individual claimant and becomes a function of the compensating authority and associated medical boards etc.

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[44] Transport Accidents Commission Seminar March 1997 paper on the New Zealand Scheme-copy on file with author.

[45] For example in the Northern Territory, New South Wales and Victorian schemes, where the maximum amount for loss of weekly earnings is limited. Another example is the Minnesota scheme in the US where at time of writing, wage loss benefits in the no-fault system were 85% of lost wages up to $250.00 per week, which is comparatively miserly. Professor Sappideen recommends an examination of comparative rates for workers' compensation here; with all due respect, such a comparison is not really germane to the point being made.

This process can be dehumanizing. The claimant loses control of the processes of their own rehabilitation. They are at the mercy of the authority in terms of the nature and extent of rehabilitation. There is often little or no avenue of appeal[46] and victims can become compensation dependent. This is a similar outcome to the aforementioned 'welfare mentality'.

Therefore, no-fault compensation schemes can minimize rehabilitation by providing a steady income and a sympathetic ear. This does not happen in common law compensation schemes where the lump sum is the only source of income. Once it is expended then the claimant must either return to work or resort to the social security system.

Minimization Of Formality And Conflict In Compensation Delivery

It is not clear why the minimization of formality is beneficial. If victims of automobile accidents genuinely suffer a dignitary loss then informal treatment may serve to exacerbate such loss rather than to assuage anger and anxiety. Formal procedures, on the other hand, may give the victim both a sense of certainty about what is happening and also a dignity, which may be lacking in a less formal system.[47] In any event formality is, in some sense, a matter of fine distinction. Whilst no-fault systems do not have the trappings associated with the common law,[48] compensation is determined and delivered in accordance with a 'formal' set of standard procedures.

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[46] See Transport Accidents Commission Seminar March 1997 *op cit.*

[47] Professor Sappideen calls for evidence that litigants feel more satisfied with a formal process rather than an informal process. She also calls for citation of studies on mediation versus court procedure. The writer is aware of many such studies, most of which emanate from proponents of the mediation process and raise the same question as with the point raised about proponents of no-fault. The witer does not intend to argue that litigants *do* feel more satisfied with a formal court procedure but rather that some of them *might*, and that informality is not superior to its obverse as a given.

[48] Such as bewigged and robed counsel and judiciary or centuries old court procedure.

It should also be remembered that in fault-based systems most matters are settled 'informally'; very few ever reach the courtroom and those that do provide information via an informal filtering system that serves to determine the range of outcomes in those matters which settle prior to trial. In other words there is a 'grapevine' which exists mostly involving legal practitioners which provides a framework of information by which other practitioners can advise their clients in the settlement process.[49]

No-fault compensation systems do, however, serve to minimize conflict in compensation delivery when compared to fault-based systems which being adversarial are based on conflict.

This is not to say that there is no conflict in no-fault systems.[50] Such systems are largely bureaucratic in nature and may involve decisions on the part of officers of the compensation authority in areas such as entitlement to and extent of benefits. The question of the continued entitlement to benefits can be an especially vexed one and in many such systems these decisions can be challenged before quasi-judicial administrative tribunals.[51]

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[49] Professor Sappideen comments that this is more than a grapevine and that settlements are bargained in the light of what is perceived to be a tariff reflecting recent court decisions-which is what the writer meant. She refers to Genn H. G. and Beinart S, 1999, "Paths to Justice: What People Do and Think About Going to Law" Hart, London.

[50] Transport Accidents Commission Seminar March 1997 *op cit.*

[51] *ibid.*

Revelation Of The True Costs Of Automobile Accidents

The penultimate benefit claimed for no-fault motor accident compensation systems is that they reveal the 'true costs' of automobile accidents to the community and the way that such costs are borne.

Economists would be apt to disagree with the whole of this proposition. Rather than reveal the 'true costs' of automobile accidents, no-fault systems tend to obscure such costs. One of the ways in which these systems do this is by leaving the costs of minor injuries where they lie and by minimizing or not paying at all claims for non-economic loss. The costs of motoring are therefore externalized and there is no 'optimization' of costs which is the ideal condition sought by economists.[52]

Another way that such systems obscure costs is by restricting the amount of compensation available for non-economic loss so that compensation beneficiaries either suffer a lower standard of living[53] or are forced to live on collateral sources of income or on the social security system to survive.

If the introduction of such systems leads to an increase in fatal accidents as claimed then such systems will increase the costs of accidents in social terms, which is inconsistent with the claim that they reveal true accident costs.

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[52] Professor Sappideen points out that it might be argued that, relative to fault based systems, no-fault systems more closely reflect costs engendered. It is clear that more people are compensated under no-fault schemes than fault based ones but, with respect, this is not precisely the point. The writer is examining the question as to whether the claim that no-fault schemes reflect the "true" costs of accidents to the community is sustainable. There is much more to this question than simply how many people are compensated under each system.

[53] Unless the marginal utility of money decreases dramatically as a result of the accident.

Because such systems encourage anonymity of victims and do not have the informational goals of the tort system, in a sense they may hide the costs of motor accidents from the wider community who never are informed of important decisions or individual awards.

In addition, because such systems arguably offer little or no deterrence, they shift costs (such as non-economic losses) onto seriously injured victims and effectively 'hide' them from the general community.

What can be said of no-fault compensation systems is that they spread the financial costs of accidents in a largely arbitrary fashion.[54] In most cases the cost of risk taking in such systems is spread over the whole motoring population, and as the administrative costs of proper risk rating are likely to be higher than the rewards for the underwriter, then again the 'true' costs of accidents are obscured.

Justice And The Safeguarding Of Rights

The last of the summarized benefits of no-fault systems is that they are 'just and safeguard the rights of all accident victims'.

It has been strongly argued that such systems remove rights of victims of automobile accidents, and particularly those who are injured through no-fault of their own.[55] In all such systems, the right to sue for injuries suffered in automobile accidents is restricted or removed. In many of these systems, there is no right to compensation for non-economic losses such as pain and suffering. There is also no right to full damages for economic loss but there is in most such systems an automatic right to

[54] For example see Blum and Kalven "The Empty Cabinet of Dr Calabresi" *op cit.* p243.

compensation when threshold conditions are met and this is a right enjoyed by all rather than the more limited common law right to sue an injurer at fault. Rather than safeguard the rights of those injured in automobile accidents, it could thus be said that no-fault systems provide a different set of rights.

Most such systems have problems with the compensation of people who were non-earners at the time of the accident and provide a flat rate of compensation. They therefore do not 'adequately' compensate high earners for their losses whilst the tort-based systems provide high earners who sue successfully with 'full' compensation for lost earnings.

These systems also apparently encourage, subsidize and protect risk takers.[56] There is no sanction against those who drive dangerously inherent in the compensation system. There may be some disincentive to engage in dangerous driving if the premium paid by drivers is fully risk rated; however such risk rating does not often occur in these systems. Thus they do not safeguard 'traditional' rights such as the right to enforce a civil sanction against an injurer, but instead alter the relationships between the injurer, the injured and the larger social group. The question then becomes whether this alteration of traditional relationships is 'just'.

As has been said, "if a proposal (for a motor accident compensation system) fails to satisfy a sense of justice in the allocation of costs, it will ... be decisively impeached regardless of how fully it may achieve its other goals".[57] Thus, if justice is defined in relation to automobile accident compensation systems as payment to all injured victims on the basis of a mandatory all embracing compensation formula then such systems could be viewed as being 'just'. In other words, justice is achieved through

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[55] See for example the position taken by the Liberal Party during the Victorian Transport Accidents Debates in September 1986 *supra*.
[56] Blum and Kalven "The Empty Cabinet of Dr Calabresi" *op cit.* p243 and see also Trebilcock M.J., "Incentive Issues in No-fault Compensation" *op cit.* p29-30.

the equal treatment of all persons within the scheme as long as they can establish that they have suffered loss as a result of an automobile accident. This is justice in a distributive or 'horizontal equity' sense.[58]

If one has a more complex notion of justice however then the shifting of loss merely on the basis of injury may seem to be unsatisfactory. Adherence to notions of 'corrective' justice and the idea that justice requires the proper allocation of burdens as well as benefits leads to the view that no-fault motor accident compensation systems may be unjust.

3. Conclusion

This discussion of the claimed benefits of replacing tort with no-fault compensation systems suggests that, in a number of ways, the benefits claimed may not materialize.

For instance, most no-fault systems allocate accident costs to the pool of automobile owners rather than the broader community. Also, rather than conferring universal rights, such systems can be regressive in that low earning premium payers subsidize the high earning injured where there is a flat premium structure but structured benefits based on actual income loss.

Such systems can create moral hazard problems and disincentives to effective rehabilitation by encouraging a pension mentality and failing to give enough attention to potentially fraudulent cases. They are also prone to be costly because most victims receive payment and are arguably unfair in that 'innocent' victims receive the same benefits as their injurers. Some of the claimed benefits, such as

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[57] *ibid.* p242.
[58] See Trebilcock "Incentive Issues in "No-fault" Compensation" *op cit.* p29.

minimization of formality and revelation of the 'true' costs of accidents, would be dubious even if fully supported by evidence.

Because the somewhat hyperbolic benefits claimed for no-fault systems do not stand up well to critical analysis, it is understandable that there would be reluctance on the part of legislatures (particularly those with a strong conservative constituency) to completely abandon existing tort based systems. After all, tort still attracts a modicum of support from those concerned with 'rights', deterrence and the minimization of fraud (see the previous Chapter). And yet the problems associated with tort as a means of compensating automobile accident victims are undoubted. It could thus be expected that such legislatures (where the impetus for change was strong enough) would seek out a compromise, some hybrid system which combines the best features of both tort and no-fault whilst minimizing their problems. The next Chapter examines the benefits and drawbacks of hybrid systems that combine elements of tort and no-fault systems.

CHAPTER 5

HYBRID COMPENSATION SYSTEMS

There are many potential variations and combinations of automobile accident compensation systems and examples of such combinations can be seen throughout the world.[1] In Australia such systems have one common feature and that is that it is possible to obtain either tort or no-fault damages in defined circumstances for injuries received in automobile accidents.

Add-On and Threshold No-Fault[2]

There are two main types of such systems; 'add-on' systems where the tort action remains intact with limited no-fault benefits for pecuniary losses which are set off against tort damages to prevent double recovery, and 'threshold' no-fault schemes which provide no-fault benefits for most injuries and where the right to sue for tort damages for non-pecuniary loss is abolished in less serious cases.[3]

In Australia, there is an element of compulsory third party insurance in every motor accident compensation scheme. So far, there has been little effort to promote voluntary first party insurance as

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[1] Cane P "Atiyah's Accidents" *op cit.* p416.
[2] Professor Luntz has commented that it is confusing considering both add-on and threshold no-fault systems under a common heading, whilst separately considering choice no-fault, which has not as yet been introduced in any Australian jurisdiction. Chapman and Trebilcock however consider all the hybrid schemes under the one heading, and the writer has been informed that at least two states are seriously considering the introduction of a choice no-fault scheme at present.
[3] *ibid.*

there has been in the United States in the past.[4] Governments have seen fit to introduce schemes, which give motorists little choice in the way compensation is paid. Schemes whereby motorists have a choice between types of insurance will be examined in the next section of this paper.

The various hybrid systems have been seen to be inferior to either tort or no-fault depending on which of a range of categories is being used to evaluate an individual scheme.

Hybrid schemes are seen as compromises and the question is whether, when the totality of possible aspects of automobile accident compensation systems is taken into account, hybrid systems 'score' more highly than either pure tort or pure no-fault systems[5] in the sense of being favoured by a majority of people over either of those systems.

In the ranking of any such scheme against the others, a great deal turns on how individuals weight particular values and how these weighted values are distributed in the community.[6]

It is difficult to attribute to hybrid systems separate benefits such as are claimed for tort and no-fault systems. This is because hybrid systems *are* compromises between the two ends of the compensation spectrum and must therefore be evaluated against other systems as composites of competing values.[7]

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[4] Such as the various Keeton and O'Connell plans cited herein and also Calabresi G. 1971, "The New York Plan: A Free Choice Modification", 71 *Columbia Law Review* p267.
[5] See generally Chapman and Trebilcock "Making Hard Social Choices" *op cit.*
[6] *ibid.* p829.
[7] *ibid.* generally and particularly at p829.

In an important article, Chapman and Trebilcock[8] argue that the diversity of automobile accident systems is explained by processes of evaluation in the cyclical nature of the ranking procedure and the existence in a given Society of values for 'individual responsibility', 'distributive justice' and 'administrative and premium costs'.[9] Chapman and Trebilcock's work is extensively evaluated in the latter part of this work.[10] However, for the moment it is of interest to note that hybrid systems are seen to score highly in terms of 'distributive justice' and 'individual responsibility' but are scored low on administrative and premium costs.[11] They score highly on 'distributive justice' because virtually everybody who is injured in an automobile accident receives at least some compensation once they cross the necessary threshold.

Such systems are scored relatively highly in terms of 'individual responsibility' because they retain some measure of tort-based liability. Therefore they allegedly create appropriate incentives to minimize the sum of accident and avoidance costs by forcing motorists to take cost justified precautions to reduce the likelihood and severity of injuries.[12]

There is also an interesting argument that because such systems provide a 'floor' of compensation, they alleviate the pressure on judges to bend liability rules to find for plaintiffs in order to give them compensation. Such systems therefore promote the aims of tort of vindication and information.[13]

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[8] *ibid.*
[9] *ibid.*
[10] See Chapters 7 and 8 herein.
[11] Chapman and Trebilcock, *op cit.* p828. It should be noted that it is 'add-on' no-fault that is being evaluated.
[12] *ibid.* p806.

It could be argued that the hybrid systems embody principles both of individual and social responsibility.[14] They may allow a victim of an automobile accident adequate financial support from a no-fault fund, and also allow suits against a tortfeasor for intangible loss in the case where fault can be proved.[15]

On a political basis it could also be argued that retention of tort rights may allow the introduction of a comprehensive no-fault scheme with relatively low flat rate benefits, giving all the disabled a floor of support whilst enabling those able to make a claim to gain higher tort benefits.[16]

On a practical level, anecdotal evidence suggests that the level of satisfaction with such systems in Australia is high, and they have been subjected to less legislative interference than have the common law based systems.[17]

On a theoretical level, an explanation for this phenomenon is that, if the ability to make a tort claim does satisfy some sense of dignitary loss, then the combination of a threshold tort claim with no-fault benefits may be both therapeutic and morally defensible. There is an argument that in the case of

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[13] Conard A.F. 1964, "The Economic Treatment of Automobile Injuries", 63 *Michigan Law Review* p279 at p307- this argument has some problems in Australia at Common Law, where unsuccessful plaintiffs are ordered to pay defendant's legal costs in most cases.

[14] Cane P., 1993, *Atiyah's Accidents, Compensation and the Law*, 5th Edn, Butterworths, London. *op cit.* p403 citing Klar L.N. in Steel and Rogers-Magnet 1983, *Issues in Tort Law*, Toronto p18.

[15] *ibid.*

[16] *ibid.* Professor Sappideen questions why a social security system should not be utilized, rather than providing a "floor" through a no-fault system. The answer is that a social security system does not specifically allocate any costs to the activity of driving through premium costs.

[17] Professor Sappideen makes the comment here that such anecdotal evidence does not sit well with the arguments in Chapter 10 that the general public has little knowledge of compensation systems. It must be pointed out that most of the evidence of ignorance comes from the tort based states and in any event there is considerable anecdotal evidence that the Victorian no-fault scheme in particular is well regarded by the public.

more serious injury, non-economic loss awards are an acknowledgment of the indignity of the injury rather than for pain and suffering.[18]

The tort action within such a system therefore has intrinsic value as a means of assuaging feelings of indignity or outrage in those who are seriously injured as a result of 'fault' whilst those who cannot establish fault still receive compensation for economic losses. The problem with such an argument is that in pure tort systems a significant percentage of cases settle,[19] which indicates that the 'indignity' factor may not be a primary motivator (although it may be that the mere fact of being able to sue is 'therapeutic'). In any event such systems maintain the 'lottery' aspects of tort.

A 'two level' arrangement whereby welfare underwriting for all accidents is supplied by social security leaving the tort system 'on top' can also have the advantage of permitting society to make independent judgments on the setting of welfare payment levels and the setting of corrective justice damage levels.[20] Such an arrangement highlights the basic compatibility between awards for pain and suffering as recognition of the dignitary aspects of accident injuries and a liability system keyed to fault.[21]

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[18] Blum and Kalven "Ceilings, Costs and Compulsion" *op cit.* p357; Blum and Kalven "The Empty Cabinet of Dr Calabresi" *op cit.* p269. Professor Sappideen points out here that whilst an add-on system may serve some purpose for satisfying a dignitary loss, there is evidence from medical negligence claims that an apology may have a very powerful effect on whether a claim is made. She also points out that motor vehicle accidents are quite different involving a single incident caused mostly by strangers, but medical negligence cases suggest that often it is not compensation that is driving the issue but the need for someone to say sorry.

[19] For example, in the District Court of New South Wales which hears the majority of personal injury cases in the state, the settlement rate for motor accident cases averages out at about 80%-see Eyland A. and Wright E., "Two Courts, Two Civil Initiatives, One Purpose" [Online] at http://www.aija.org.au/ac01/EylandWright.pdf at p12.

[20] Blum and Kalven "The Empty Cabinet of Dr Calabresi" *op cit.* p270.

[21] *ibid.*

Hybrid systems may therefore allow a situation to exist where most of the costs of an activity such as motoring are internalized whilst ensuring that there is no significant group which is denied compensation, whereas there are significant externalities in both tort and pure no-faults systems.

Whilst such considerations may explain the apparent popular appeal of hybrid systems, they continue to attract criticism from academic writers. The main problem with such systems is seen to be the fact that they retain aspects of the tort system and tort is seen to be inefficient and not to meet its stated goals.[22]

Another perceived shortcoming of hybrid systems is that they provide high levels of compensation to the less seriously injured who will be compensated for virtually all of their economic losses, whereas the seriously injured and long term disabled may suffer because the no-fault benefits are usually subject to a ceiling and the common law, with all its vagaries, must be used to top up compensation wherever possible.

The costs of such systems are also apparently higher than either pure tort or no-fault schemes because not only do they provide limited no-fault benefits for all but also a tort recovery is possible for those whose injuries carry them over a certain threshold and who can establish fault.

Add-on schemes in particular have been criticized as being not 'genuine' because they replace tort liability only in small degrees.[23]

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[22] See Cane P., "Atiyah's Accidents" *op cit.* p403.
[23] Atiyah "No-fault Compensation" *op cit.* p279 particularly at fn21.

The preceding discussion shows that hybrid systems might attain a degree of acceptance as replacements for pure tort systems but they are not immune from criticism, mainly because they *are* compromises between tort and no-fault and as such may be prone to some of the faults inherent in each system.

As compromises, they may also not satisfy those who prefer either the tort or no-fault systems for their claimed benefits. A potential solution to this problem is to allow consumers to choose for themselves whether to be covered by a tort or a no-fault system. The next section examines the benefits and drawbacks of such 'choice' systems.

Choice Systems: A Special Case

A special case, which falls loosely within the category of 'hybrid' systems, is the 'choice' system. Such systems, that offer motorists registering vehicles a choice between first and third party insurance, were pioneered in the United States by Professor Jeffrey O'Connell.[24]

Under most of the variations of such systems, drivers can elect to be insured under either a tort based system or a specified no-fault plan. Those who opt for tort retain traditional tort compensation rights

[24] see eg O'Connell J. 1976, "An Alternative to Abandoning Tort Liability: Elective No-fault Insurance", 60 *Minnesota Law Review* p501ff; O'Connell J., and Joost R. 1986, "Giving Motorists a Choice Between Fault and No-fault Insurance", 72 *Virginia Law Review* p61. One choice not offered by these schemes is the choice not to insure.

and liabilities. Those who choose no-fault neither recover, nor are liable to others, for non-economic losses for less serious injuries incurred in automobile accidents.[25]

Such systems have been proposed as a response to policy concerns previously outlined which affect tort and no-fault systems. No-fault insurance can offer cost savings and speedier, more certain compensation. However, instituting a no-fault system has, in practical terms, meant the restriction or abolition of tort rights and in the United States several legislatures have been unwilling to make this trade off.[26]

A choice system is therefore seen as having strong logical appeal.[27] Drivers who value tort compensation rights would preserve those rights whilst those who favoured the speedier, certain benefits and possible cost savings of a no-fault system could have same without the rights of either group being infringed.[28]

The way that such systems work is relatively simple; each owner of a motor vehicle is free to choose whether to buy liability or no-fault insurance. If they choose no-fault insurance, the owner, any resident member of his or her family, and any occupant of the owner's car is compensated for their medical expenses, any wage losses, and any other economic loss resulting from an automobile

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[25] Carroll S. 1997, *Effects of a Choice Automobile Insurance Plan*-Statement submitted to the Joint Economic Committee of the United States Congress March 1997-[online] Available at: http://www.rand.org/publications/CT/CT/H/.
[26] *ibid.* This has also happened in Australia eg in modifications to the failed "Transcover" system in New South Wales. Professor Sapideen asks why choice systems are speedier and cheaper than no-fault schemes. The answer is that they are probably not and, with respect, there appears to have been a misreading of the argument here.
[27] *ibid.*
[28] *ibid.*

accident.[29] Each insured is compensated up to the limits set forth in the relevant insurance policy and is precluded from suing the person who caused the accident, or obtaining any damages from that person or their insurance company.[30] There is, in the 'classic' model of such a system, no compensation available for any non-economic losses such as pain and suffering.[31]

If the owner of the motor vehicle chooses fault or liability insurance, tort liability and tort damage rules apply.[32] If such a person, any resident member of their family, or any occupant and of the car could prove that they were injured in a automobile accident as a result of the fault of another person, they could recover their medical expenses and any other economic loss and, in addition, a sum for their pain and suffering and other non-economic loss.[33]

If such a person is sued by an eligible litigant who alleges that the liability insured's fault caused an injury, the liability insured would be defended by their insurance company which would be obliged to pay any lawful claims against the insured up to the dollar limits of the policy.[34] Therefore, each motor accident victim will receive the same compensation that they would under either a mandatory tort or no-fault system, depending on which system is chosen.[35]

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[29] Joost R.H. 1989, "Choosing the Best Auto Insurance Choice System" 26 *San Diego Law Review* p1033 at p1038.
[30] *ibid.*
[31] *ibid.*-for reasons of containing costs in the no-fault system.
[32] *ibid.*
[33] *ibid.*
[34] *ibid.*
[35] *ibid.* p1038-9.

There is a complication that arises in such systems when there is a collision between a motorist with liability insurance and one with no-fault insurance. Under choice plans,[36] the accident victim who has liability insurance cannot sue one with no-fault insurance. The proposed solution is that the liability insured makes a claim against his or her own insurer. The victim would recover exactly the same elements of damage, under the same conditions and the same money as they would under a 'normal' tort based compensation system.[37]

The mechanism of this so-called 'connector insurance' was deemed necessary to avoid giving a tort insured an undeserved windfall at the expense of the person with no-fault insurance who may be forced to purchase some form of liability insurance if they were able to be sued. This would make no-fault a more expensive option if a person were forced to purchase both forms of insurance.[38]

This mechanism would have an 'evening' effect on premiums for those insured for liability because although liability insurance policy costs might rise because of the large number of motorists who choose no-fault (and who are therefore similar to 'uninsured motorists' as far as the insurer is concerned) the liability premiums would consequently decrease because none of these no-fault insureds could claim against motorists carrying no-fault insurance.[39]

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[36] eg the "O'Connell-Joost Plan" *ibid.* p1039.
[37] *ibid.*
[38] *ibid.*
[39] O'Connell J. 1989, "No-fault Insurance: Back By Popular (Market) Demand?", 26 *San Diego Law Review* p993 at p995.

BENEFITS OF CHOICE SYSTEMS

Logical And Philosophical Appeal

It has been argued that giving motorists a choice of coverage has strong logical appeal. This is because, in principle, cost sensitive drivers could realize the alleged savings that would result from electing the no-fault option without infringing on the rights of drivers who valued their tort compensation rights over cost reductions.[40]

Philosophically, those who believed strongly in a tort-based system would still have the option of obtaining damages calculated in accordance with common law doctrines. If they were injured by a driver who had also chosen liability cover, they would have the satisfaction of proceeding to suit exactly as they would have under a 'pure' tort system.

However, if they were injured by a driver with no-fault cover, they would either need to bring a 'quasi suit' against their own insurer which, whilst it may lead to a similar outcome, may not be so philosophically satisfying to someone committed to tort based motor accident compensation, or both parties may retain tort rights, which is unsatisfying for those who choose no-fault and may lead to increased costs.

If, as predicted, the numbers choosing the liability alternative were significantly less than those choosing no-fault, then there would not be a significant philosophical problem in any event, which

would accord with findings to the effect that people care more about premium costs than they do about the type of compensation system in place for paying victims of automobile accidents.[41]

Another philosophical benefit claimed for choice based systems is that they permit persons to decide for themselves what kind of motor accident insurance they want, rather than surrendering the decision to politicians. Thus, efficiency is enhanced by expanding the range of consumer choice and by creating competition between two systems in the marketplace.[42]

Reduction In Costs

Proponents of choice systems claim as their major benefit that they reduce motor accident insurance costs.[43] The way that they do this is by allowing motorists a comparison between the no-fault and liability systems.

As the no-fault system usually proposed as part of the choice system excludes benefits for pain and suffering, and pain and suffering payments are seen as being the major components of damage payouts in minor claims, then eliminating such benefits makes this part of the scheme more affordable. Even the increased number of claims in no-fault allegedly will not offset the significant savings achieved by eliminating non-economic losses.

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[40] Carroll S., "Effects of a Choice Automobile Insurance Plan" *op cit.*
[41] Joost R., *op cit.* p1056 and particularly at p1062 citing research which accords with that carried out in the UK by Harris et al to the effect that few people fully understand motor accident compensation systems. See also Wright et al *op cit.* p26.
[42] O'Connell J., and Joost R. 1986, "Giving Motorists a Choice Between Fault and No-fault Insurance" 72 *Virginia Law Review* p86 at p89.
[43] eg see generally Carroll S., "Effects of a Choice Automobile Insurance Plan" *op cit.*

Coupled with this, the large costs associated with proving fault are also eliminated, and the no-fault option is therefore seen as providing cover at lower rates.

For those that choose liability cover, the numbers of people who can successfully sue, (taking into account that those who choose no-fault cover cannot sue) is greatly reduced and therefore liability premiums are also much lower under a choice system.

It is predicted that most people will opt for no-fault rather than liability coverage[44] and so over time premiums for those within the system should reduce dramatically.[45]

Costs To The Poor

It is particularly argued that choice based compensation systems would advantage poorer motorists. This is because the poor who now have liability insurance[46] really get nothing for it because they would be judgment proof without it.[47] In buying no-fault insurance, they gain their own protection for their money,[48] whilst not needing to buy liability insurance to protect any assets they might have.[49]

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[44] some authors predict that up to 90% of motorists would choose no-fault.
[45] Carroll S., *op cit.*
[46] being forced to buy it in Australia because it is compulsory
[47] Sugarman S. 1989, "Foreword: Choosing Among Systems of Auto Insurance for Personal Injury", 26 *San Diego Law Review* p977 at p986.
[48] *ibid.*
[49] O'Connell J., Carroll S., Horowitz M., and Abrahamse A. 1993, "Consumer Choice in the Auto Insurance Market", 52 *Maryland Law Review* p1016 at p1040.

If insurance of some kind is compulsory (and some have argued that in order to give complete freedom of choice then the choice not to be insured should be allowed) and if, as predicted, a system of choice is cheaper than a tort based motor accident compensation scheme, then the poor are better off through paying lower premiums.

A Choice System May Lead To The End Of 'Cycling'

A choice plan may represent a major social benefit in that it may end the continual cycling through various automobile accident compensation schemes which it is argued has allegedly occurred in Australian, Canadian and American jurisdictions in the latter part of this century.[50]

Instead of persons with widely differing value systems forming shifting political alliances and working through choice sequences, individuals are left to choose which of several policy alternatives should apply to them in the event that they are involved in an automobile accident.[51]

Different individuals, and even different individuals involved in the same accident, can be subject to different compensation regimes depending on the individual choices they have made.[52]

This is seen by some as being more attractive than other compensation options that are imposed on individuals as a result of collective action.[53] As every premium payer is able to make their own

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[50] See Chapman and Trebilcock *op cit.* Note: it is a central tenet of this thesis that changes in the various schemes are not due to majority voting cycles but to a range of factors.
[51] Chapman and Trebilcock *op cit.* p867.
[52] *ibid.*
[53] *ibid.*

choice as to the type of compensation system they would participate in, there would be no need for a politically imposed system that would not suit a significant minority.

A Choice System Would Make Liability And No-Fault More Fair And Efficient

Real choice in the marketplace between liability and no-fault insurance without artificial inequities such as government set prices etc. may lead to efficient no-fault protection.

In order to compete with liability insurance, no-fault would have to offer generous benefits at a lower price.[54] This would induce well-informed motorists to trade off pain and suffering payments for cheaper premiums.[55]

No-fault insurers would be better able to predict actuarially expected levels of loss (based on their knowledge of their own insureds). Premiums would therefore be set more efficiently and society would have a more efficient measure of actual losses from automobile accidents.

Those choosing the no-fault option may insure in any event with respect to their own pain and suffering. Once again this would mean lower premiums based on insurer knowledge of their own insureds and the loss of the need to take into account unpredictable risks and injuries.

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[54] O'Connell J., No-fault Insurance: Back by Popular (Market) Demand?" *op cit.* p1001.
[55] Sugarman S., "Choosing Among Systems of Auto Insurance for Personal Injury" *op cit.* p979.

A better knowledge of risks by insurers may lead to more efficient risk rating of individual drivers, which may act as a disincentive, and therefore a deterrent, to dangerous driving through a system of no claim bonuses etc.[56]

This may balance out one of the criticisms of choice, which is that it creates an 'adverse selection'; that is high risk drivers would gravitate towards no-fault away from the liability system, making no-fault premiums more expensive and externalizing the costs of their driving onto the lower risk drivers in the tort pool.

If no-fault insurance were fully, or substantially, risk rated then the aforementioned adverse selection problem would not be significant. However, this is based on a high level of insurer information - if there is not such a high-level of information, or if obtaining information is expensive and reflects in premiums, then there might be less choice of no-fault.

If high-risk drivers were to flock to the no-fault option as predicted[57] then the costs of no-fault would probably increase. However, if the liability system were one of 'inverse liability' where the liability insured driver obtains benefits from his own insurer, then the price of tort-based insurance would remain static (or fall because most of the bad drivers have left the system). This may initially lead back into a 'cycling' situation but presumably the systems would eventually obtain equilibrium with costs largely internalized. This would be 'efficient' in economic terms.

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[56] Chapman and Trebilcock *op cit.* p867-8. Professor Sappideen asks here how realistic is risk rating with individual drivers as distinct from groups and seeks statistics. The point here is that in a choice system without a flat premium rate, individual risk rating would not only be realistic but probably inevitable. The problem would be in ensuring that high risk drivers were able to afford insurance by spreading them between insurers in some way, or creating a special scheme to cover them.

A Choice System Minimizes Unnecessary Insurance

The choice system could lessen unnecessary levels of insurance. Those choosing no-fault compensation would not need any liability insurance in respect of the same accident.[58]

Those choosing liability insurance would either bear their own loss in the event of an accident that was their own fault, or rely on sources of compensation such as social security/Medicare or private personal insurance. If most of the high risk drivers choose no-fault, then personal injury insurance for those choosing liability insurance should be cheaper as large numbers of people would be insured via no-fault in respect of automobile accident injuries which represent a major contribution to personal injuries generally. These people would thus be removed from the relevant risk pool.

In any event, if no-fault compensation proves to be popular and cheap then this would be a foreseeable and potentially efficient outcome of a choice system.

A Choice System Would Mean Less Uninsured Motorists

Since liability insurance is of little personal value to a motorist who does not own substantial property, it is argued that it would be good public policy to allow motorists to choose an alternative type of motor vehicle insurance that does have value to them.[59]

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[57] Trebilcock M.J., "Incentive Issues in No-fault Compensation" *op cit.* p52.
[58] O'Connell J., "No-fault Insurance" *op cit.* p1010.

If insurance premiums for no-fault are relatively low, and if people are able to choose a type of insurance that has value to them then this may increase the rate of voluntary compliance.[60] This in turn would lead to lower premiums in both no-fault and liability systems as there would be less payout to uninsured accident victims.[61]

A Choice System Would Educate People In The Fundamental Details Of Compensation Systems

Research has shown that many people do not understand compensation systems.[62] Giving motorists a choice between compensation systems may lead to them seeking to educate themselves in order to make proper, informed choices.

It may also lead to insurers advertising and explaining the detailed 'benefits' of the competing systems so that people are more aware of what each system actually entails. This may in turn cause motorists to focus on the 'real' costs of motor accident compensation, rather than just premium costs, as is presently the case.[63]

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[59] Joost R., "Choosing the Best" *op cit.* p1037. Professor Sappideen asks whether choice systems have been adopted "elsewhere", which the writer takes to mean other than in the U.S. The answer as far as Australia is concerned is that both South Australia and Western Australia are considering the introduction of such systems according to anecdotal evidence.
[60] *ibid.*
[61] *ibid.* at fn22.
[62] eg Harris et al *op cit.*; Wright et al *op cit.* and also the research cited by Joost *op cit.*
[63] See eg O'Connell J. 1976, "An Alternative to Abandoning Tort Liability: Elective No-fault Insurance for Many Kinds of Injuries", 60 *Minnesota Law Review* p501 at p512.

A Choice System Would Be Better For Business

There are many businesses which own large car fleets. For such businesses insurance premiums can be a significant business cost. It has been argued that tort based motor accident insurance systems are a hidden tax on businesses that add to bottom line costs[64]. It is also argued that reform that reduces litigation and offers consumers more choice can reduce business costs and improve benefits for employees.[65]

A Choice System Would Lead To The End Of Tort Based Compensation For Automobile Accidents

Proponents of choice systems have as an aim (often unstated or understated) the supplanting of tort based compensation systems by no-fault systems.[66]

It is argued that the main reason that tort based insurance still exists is because of the political power of a relatively small group with vested interests - the legal (and sometimes the medical) professions. By taking the choice of systems away from politicians and giving it instead to the motoring public, the opportunity for these vested interests to apply leverage to achieve their aims is lessened or got rid of altogether.

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[64] *Senators Introduce Measure to Reduce Auto Insurance Costs* American Insurance Association Press Release, Washington D.C,. April 18 1997 [Online] Available at: http://www.AIDC.org/press/041897.htm
[65] *ibid.*
[66] See Sugarman S., "Choosing Among Systems of Auto Insurance" *op cit.* p978.

A far-reaching no-fault plan may therefore practically come into effect through the accumulation of individual decisions made outside the legislature.[67] For those who see no-fault compensation systems as being cheaper, more efficient and more 'just' this would be a highly desirable outcome. However, for those who support the retention of tort as the basis for determining access to compensation for those injured in automobile accidents it may be anathema.[68]

Choice Will Lessen The Costs Of Adjustment To Change

The change from a liability to a no-fault system may involve considerable cost, both in monetary and emotional terms.[69] A choice system would lessen those costs by allowing the market to determine the balance between systems.

PROBLEMS WITH CHOICE-BASED SYSTEMS

The preceding section looked at the claimed benefits that would flow from the introduction of a choice based system. The following section analyses the major criticisms of such systems.

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[67] *ibid.*
[68] eg see Carr L.J. 1989, "Giving Motorists a Choice Between Fault and No-fault Insurance: An Economic Critique", 26 *San Diego Law Review* p1087 at p1093.
[69] O'Connell J., and Partlett D. 1988, "An America's Cup for Tort Reform", 21 *Journal of Law Reform* p443 at p452 and particularly fn33.

The Lack Of Any Real Choice: Collective Irrationality[70]

It is argued that, whilst it is true that elective no-fault allows the individual some sort of right to make their own choice regarding the accident law that will govern them, the decision to allow this option to be available to individuals in the first place must be made collectively.[71]

Furthermore, because of the serious risk of adverse selection, with high-risk drivers electing the no-fault option because of lower premiums, lower risk drivers would be forced out of the tort pool by increased premiums. This would come about because of the need for the lower risk drivers to claim on their own insurers (because the high risk drivers who cause accidents are in the no-fault pool and cannot be sued). Thus lower risk drivers are also forced into the no-fault pool by increasing premiums.[72] It is also argued that the high cost of 'connector' insurance will force drivers to take up no-fault insurance.[73] The end result is that the tort pool unravels and is entirely replaced by no-fault insurance; this outcome is brought about by individually rational choices but is viewed as a collectively irrational result.[74]

Thus choice systems are seen as a device for choosing individually something which would not be chosen in a 'collectively rational political process' where there is a "non-arbitrary choice sequence for

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[70] Chapman and Trebilcock *op cit.* p867.
[71] *ibid.* and also at p868.
[72] *ibid.* p868.
[73] See Misko F. Jnr "Automobile Litigation (Including Uninsured Motorist Claims and No-fault Insurance)" [Online] Available at: http://www.complexlitigation.com
[74] Chapman and Trebilcock *op cit.* p868.

choosing amongst the various policy options that are typically available in motor accident compensation law".[75]

However, based on Chapman and Trebilcock's theory, the most likely outcome after the prescribed choice sequence is retention of tort law or add-on no-fault, depending on whether those concerned primarily with the costs of premiums in a motor accident compensation system are prepared to run the risk of reform.[76]

But tort and add-on no-fault systems are likely to be expensive in terms of premiums, and the predicted outcome based on the support of those most concerned with premium costs is perverse.[77] The choice based systems do narrow the choices available; it is not clear that they would be imposed by anyone or why they represent a different procedure for choosing a motor accident compensation option.[78] If a choice based system were offered as one option in the political cycling envisaged by Chapman and Trebilcock, it would be susceptible to the same form of collective imposition as any of the other systems.

[75] *ibid.* p868-9.
[76] *ibid.* p864.
[77] *ibid.* p866 and particularly fn107.
[78] As alleged by Chapman and Trebilcock *ibid.* p867.

Choice Plans Limit Available Choices

It is argued that choice plans may limit compensation options by forcing poorer people in a low benefits no-fault system to buy no-fault coverage at a putatively elevated price,[79] whilst also giving up their rights to both economic and non-economic damages which they would have under tort law.[80]

Poorer people would not have the option of retaining their present system and purchasing more benefits, or simply spending their money exactly as they are presently spending it.[81] If the minimum tort coverage was set low enough, it may cost less than no-fault coverage and poorer people would buy it to save money, abandoning no-fault coverage that they may need and buying liability coverage that they do not.[82] Thus the poorest people may be coerced into opting for an emasculated tort system whilst the well off may reap a real saving in insurance premiums because they would most likely choose no-fault coverage with immunity from suit.[83]

In response to this, it has been argued that in tort based systems poorer motorists who are capable of inflicting large losses pay little or nothing into the insurance mechanism whilst retaining the right to claim for huge amounts against those who injure them. This is seen as a basic injustice in that the poor in tort systems are often unwilling or unable to redeem others' rights to both non-economic and economic damages.[84]

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[79] Because of increased benefits.
[80] Little J.W. 1989, "Reducing Non-Economic Damages by Trick", 26 *San Diego Law Review* p1017 at pp1021-2.
[81] *ibid.*
[82] *ibid.*
[83] *ibid.* p1023.
[84] O'Connell J., "No-fault Insurance" *op cit.* p1012. This is not applicable in Australia where unlimited coverage is compulsory in those jurisdictions with a tort based system.

In reality, the poor in any motor accident compensation system will have restricted choices; in most cases they will be forced to choose the cheapest option. It is envisaged that in the long run no-fault cover will be the cheapest option in a choice based system.

The ostensibly cheapest option, which the poor sometimes choose, is not to insure at all even where this is illegal, because premiums are too expensive. If they are in a tort based compensation system there is some incentive to do this because they are judgment proof if they injure someone else (leaving aside the question of criminal sanctions) but may be awarded significant damages if someone else injures them. The only problem for such people is if they are injured in an accident in which they are at fault or one in which no driver can be held to have been at fault. Social security systems will provide subsistence level benefits only in such cases.

In a choice based system, if most drivers choose no-fault and the premiums are priced at a very affordable level as expected then there will be some incentive for the poor to buy no-fault insurance to protect themselves in situations where they, or alternatively no-one, is at fault in an accident in which they are injured. The choice based system will thus have provided a positive choice to the poorest motorist that they may not have had under a liability system.[85]

[85] *ibid.* p1004-5; Joost "Choosing the Best" *op cit.* p1037.

Free Choice Is Socially Harmful

It is argued that when a consumer chooses between fault and no-fault auto-insurance there are external effects on other consumers.[86]

There are two distinct externalities that are important in the choice between fault and no-fault. One involves the necessary change in liability rules in opting for one system over the other; the other is due to the operation of an insurance market with a choice between first and third party insurance.[87]

The first externality allegedly means that a choice between fault and no-fault allows individual economic agents a choice of whether they will be 'responsible' for bare 'negligent' actions or whether they will be relieved of their responsibility for those external costs imposed on 'innocent' third parties.[88] Those most likely to act negligently and cause accidents will logically choose not to be liable for their actions and will choose no-fault. This will result in increased accident rates, which is socially sub-optimal.[89]

It could be said that people with liability insurance already have immunity from suit to all intents and purposes and that if one does not object to liability insurance one should not object to choice no-fault systems.[90]

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[86] Carr J.L. 1989, "Giving Motorists a Choice Between Fault and No-Fault Insurance: An Economic Critique" 26 *San Diego Law Review* p1087 at p1088.
[87] *ibid.* p1088-9.
[88] *ibid.*
[89] *ibid.*
[90] *ibid.* and particularly at fn4 citing Brown C. 1989, "A Choice of Choice: Adding Post Accident Choice to the Menu of No-fault Models", 26 *San Diego Law Review* p1095.

It is argued that the latter argument confuses elimination of responsibility for an accident with insuring against such a risk and that what no-fault does is to completely eliminate financial responsibility for the harm 'negligent' drivers impose on 'innocent' accident victims.

The corollary is that when such an externality exists, the state must decide on the legal rules that should apply to everyone and which lead to a socially optimal situation. The state should adopt a legal rule that minimizes the costs of accidents plus the costs of accident avoidance, which would be economically efficient.

There are a number of problems with this view. Firstly, it is a vast over simplification; automobile accidents, as previously seen, do not occur between morally reprehensible 'negligent' drivers and 'innocent' ones (if they did the doctrines of contributory and comparative negligence would never have developed). Often both drivers in a two-car accident will be injured and will be 'at fault' to some extent.

Automobile accidents are extremely complicated events and tort liability of itself is unlikely to have any deterrent effect on the occurrence of accidents.[91]

Even if it did hold true that such an externality would be created by a choice system, the problem could be dealt with simply by effectively risk rating those who chose the no-fault option. Thus the premium paid by a 'high risk' driver in the no-fault system would reflect that driver's statistical risk to

the pool regardless of whether or not they 'caused' a particular accident. This would create a situation where there was less of an externality than in a liability system, because the costs of all accidents in which the risky driver is involved are reflected in the premiums paid and are thus internalized to motoring in the no-fault pool. Under a fault-based liability system the injury costs to the 'negligent' driver may be borne in part by general revenue funded Social Security systems and thus by people who may not be directly involved in motoring, creating a significant externality.

It has already been demonstrated that it is not likely to be anything intrinsic to no-fault compensation systems which causes the apparently statistically demonstrable increase in accidents and fatalities which occur; it is more likely the incentive effects of lower premiums leading to increased amounts of driving by risky drivers which is the problem.[92] Presumably, if liability premiums become cheaper under a choice system (because the high-risk drivers choose no-fault and thus the likelihood of being in any accident where one might be adjudged at fault decreases) then the less risky drivers would no longer be paying 'unfairly' part of the costs associated with risky drivers included in premiums not properly risk rated. Once again an externality will have been reversed.

The second alleged externality comes about because in a choice system, a fault plan will be better able to identify high-risk drivers than the no-fault plan.[93] This is because the fault plan records payouts of accidents where the insured is negligent whereas the no-fault plan simply records payouts involving accidents in which the insured driver makes a claim.[94] Because identification and attribution of fault

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[91] See the section on tort and deterrence herein.
[92] Arlen *ibid.* p1113 citing the Gaudry study (*op cit.*) of automobile accidents in Quebec.
[93] Carr J.L., *op cit.* p1091.
[94] *ibid.* Professor Sappideen comments here that even if risk rating for individuals might be more difficult outside a fault based system, there is plenty of evidence of how insurers risk rate particular groups in e.g. property damage

is expensive high-risk drivers will be charged higher premiums (assuming that the fault-based liability system is risk rated) and will therefore tend to select the no-fault option.[95] Average premiums in the no-fault insurance pool will therefore eventually increase and thus impose an externality on lower risk drivers.[96]

There is allegedly another aspect to this problem and that is that those choosing no-fault will have an incentive to claim on private and public health insurance in an endeavour to forestall premium increases.[97] This in turn will place strain on overburdened rehabilitation systems and may hinder early intervention, resulting in greater levels of disability and ultimately increasing costs of accidents.[98]

In addition, this and the previously mentioned externality will allegedly make it difficult to price the fault and no-fault options and will make the administration of a choice based scheme very cumbersome if not impossible.[99] With consumers switching from one insurance pool to the other as premiums vary, this may make the insurance cycle worse than it is already.[100]

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covered by comprehensive insurance. She asks whether experience with workers' compensation is useful in this respect. With all due respect, the point being made here is that high-risk drivers will eventually be priced out of the fault system into the no-fault pool in a choice system, thus increasing costs for the no-fault pool drivers and eventually driving up premiums because more accidents will be covered by the no-fault system. The experience at workers' compensation is not germane in this situation.

[95] *ibid.*
[96] *ibid.*
[97] *ibid.*
[98] *ibid.* p1092.
[99] *ibid.* p1092-3.
[100] *ibid.* p1093.

Choice Plans Will Lead To More Accidents

A forecast end result of the aforementioned first externality is that choice based systems will lead to more accidents. This is because:

i) The number of drivers will increase;

ii) The frequency of driving will increase; and

iii) The drivers on the road can be expected to use less care.[101]

This is a significant cost that must be taken into account before deciding whether to adopt such a system.[102]

Whilst an eventual move to a cheaper system through choice may lead to more accidents through more kilometres being driven, the simple answer to any such problem is to effectively risk rate. In addition, per capita accident and fatality rates have been consistently dropping in Australia in all systems over the past decade. This is unlikely to reflect less distance being driven by risky drivers and in fact most likely represents a combination of a number of factors including safer vehicles, safer roads, random breath testing and successful public education campaigns. The continued concentration on such effective accident preventing measures would most likely lead to further drops in fatality rates which would offset any negative effects of the introduction of a choice based system.

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[101] Arlen J.H., "Compensation Systems and Efficient Deterrence" *op cit.* p1114. Professor Sappideen asks whether it would be useful here to point to the evidence relating to the reduction in Third Party premiums in e.g. NSW without corresponding increase in fatalities, however as NSW has a flat rate compulsory premium the point is not valid.

[102] *ibid.*

A Choice System Allows Drink Drivers The Option Of Being Relieved Of The Responsibility For The Harm They Cause To Others[103]

It is argued that where there are 'substantial externalities' such as allegedly occur as with automobile accidents then it makes no sense to allow economic agents to choose the liability rule under which they operate.[104]

A socially sub-optimal result will obtain as the choice system causes high-risk drivers to choose the no-fault plan thus imposing costs on low risk drivers. The good drivers would thus subsidize the bad drivers and the very bad drivers, such as those who drive drunk, would have an incentive to take care removed.[105]

There is no a priori reason why bad drivers will choose no-fault.[106] Whilst arguments such as those above assumed that it will be less costly for bad drivers to choose no-fault, there is no compelling reason why this should necessarily be so.[107]

As regards the specific case of drunk drivers, three points can be made, as follows:

i) Under liability insurance, drunk drivers may not pay for the harm they cause others.[108]

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[103] Carr J.L. *op cit.* p1093.
[104] *ibid.*
[105] *ibid.* p1093-4.
[106] O'Connell J., "No-fault Insurance" *op cit.* p1008.

ii) The problem can be rectified within a no-fault system by allowing for liability in the case where a driver is under the influence of drugs and/or alcohol.[109]

iii) The compensating authority or company might be allowed a right of subrogation against such drivers - if so such a procedure should be mandatory rather than discretionary.[110]

In other words, it is insurance per se without subrogation that allows very bad drivers such as drunk drivers or those affected by other drugs to avoid the full measure of responsibility for the injuries that they may cause.[111] Such injuries should not go uncompensated nor do they in most automobile accident compensation systems. The providing of a disincentive through allowing liability in the limited circumstance of drunk driving, or permitting subrogation and limiting personal benefits, are simple and expedient methods of preventing such drivers from relieving themselves from responsibility for their actions in a choice based system.

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[107] *ibid.*-bad drivers also may not consider themselves such and thus choose liability insurance based on mistaken premises.
[108] *ibid.*-in New South Wales the previous legislation allowed for subrogation in certain circumstances against such drivers (see Motor Accidents Act 1988 S22) which was rarely, if ever, used in the author's experience. In the new legislation there is a right of subrogation against "unauthorized" drivers (Motor Accidents Compensation Act 1999 S20).
[109] *ibid.*
[110] *ibid.*
[111] *ibid.* p1009.

Choice Systems Are Pushed By Insurance Companies To Increase Profits

It is alleged that in the United States, insurance companies are funding research which shows that choice based systems would lead to significant savings for consumers.[112] It is alleged that insurers support choice based systems as part of a "perpetual public relations campaign"[113] to bolster the industry's image. The primary reason for this is alleged to be that insurers see choice based systems as inevitably leading to no-fault. This development will lead to lower systemic costs (mainly by cutting legal costs) allowing insurers to charge a larger profit component as part of premiums.

It is further alleged that many ostensibly reputable organizations in the United States such as the Rand Corporation[114] and the University of Wisconsin[115] are part of a conspiracy to foist no-fault onto consumers via devices such as choice proposals at the behest of the insurance industry. It is alleged that there are serious problems with the data and methodology of studies (some of which are cited in this paper) that are used as evidence for the argument that choice based systems can significantly reduce motor accident insurance premiums.[116]

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[112] See for example The Consumer Project *Insurance Propaganda-Insurance Companies Use Shrewd Tactics to Salvage Their Tarnished Image*, [Online] Available at http://www.consumerwatchdog.org.public_hts/corporate/propagan.htn

[113] *ibid.*

[114] The Consumer Project *Rand Tries to Push No-fault Insurance*, [Online] Available at http://www.consumerwatchdog.org/public_hts/corporate/rand.htm

[115] The Consumer Project *University of Wisconsin Participates in Insurance Propaganda*, [Online] Available at http://www.consumerwatchdog.org/public_hts/corporate/wisconsin/

[116] The Consumer Watchdog *Rand Tries to Push No-fault Insurance, op cit.*

Some of those pushing this 'insurance company conspiracy' theory appear to support "... The right to obtain compensation for pain and suffering, a comerstone of American civil justice...".[117] It is clear that in order to keep costs down, any automobile accident compensation system must limit or abolish such payments. If it is the case that insurers are pushing choice in order to increase profit margins within the structure of accident premiums, is difficult to see why anybody would choose the no-fault option if it was not more cost-effective. If it was to be more cost-effective and people chose no-fault as a result then the argument would seem to be a hollow one.

In any event, it would be open to any government in a state with a choice based system to regulate the amount of profit that insurers could take from the system, which would obviate the problem entirely.

Conclusion

This Chapter has demonstrated that although choice systems might have strong logical and philosophical appeal, they have also, like the other methods of compensating automobile accident victims, attracted considerable criticism. Much of this criticism, not all of which is warranted, is attributable to the fact that choice systems retain elements of both fault and no-fault systems, and this seems to be a problem with hybrid systems generally.

[117] *ibid.*-this is suspiciously akin to the rhetoric of lawyers opposed to no-fault systems, and is not only historically incorrect, but empty as well.

Those seeking change in the way that victims of automobile accidents are compensated are therefore faced with a dilemma. Whilst the tort system has defects that are "fundamental and urgent",[118] none of its potential replacements will be unanimously endorsed. This is likely to have two practical effects; firstly, those seeking to retain tort based systems may concede some modifications in elements of the system which will ameliorate some of the more pressing problems, rather than seeing any replacement of the system. These changes might include the introduction of limits and thresholds on damages, which make the system cheaper and eliminate minor claims, as well as the introduction of time limits and mandatory conferences designed to reduce systemic delays and promote early settlement. Secondly, it is likely that before there is any significant change to a system, the political process is likely to favour a review of the existing scheme and the alternatives to canvass the available options for change.

It could be expected that as different jurisdictions consider the need for change at different times, the lack of a clear consensus in the theory which has been examined in the preceding Chapters will lead to diversity as scheme reviews draw individual conclusions as to the best way to compensate automobile accident victims. Because of both its many problems and the probable effect that compulsory insurance has in altering its impact, a shift away from pure tort as a method of compensating is highly likely. It could also be expected that as innovations are tried and accepted, there will be evidence of borrowing of successful ideas between systems.

[118] Fleming J.G., 1998, *The Law of Torts*, 9th Edn, *op cit.* p445.

The next Chapter examines the automobile accident compensation systems currently operating in each Australian state in order to ascertain whether this expected pattern of diversity with borrowings and a shift away from pure common law has actually occurred.

CHAPTER 6

THE DIVERSITY IN AUSTRALIAN AUTOMOBILE ACCIDENT COMPENSATION LEGISLATION[1]

There is no system for compensating victims of automobile accidents that has emerged as a clearly preferred alternative.

The tort system in particular has attracted considerable criticism for its expense, delay and unfairness to those who cannot prove fault. However, at the other end of the spectrum pure no-fault schemes have not been immune from criticism, interestingly also primarily for expense and unfairness.

The schemes which have developed over time in the various states and territories of the Australian federation range along the spectrum between the two extremes of pure tort and pure no-fault, as different legislatures sought at different times to grapple with the problems associated with automobile accident compensation delivery which have been identified in previous chapters. There are similarities between the schemes, as successful innovations spread across the jurisdictions by a process of osmosis, but also diversity as different solutions to the problems associated with individual systems are formulated over time. This pattern of diversity and convergence is much more complicated than a simple diversity in liability theory. This indicates that the reasons for its development are more complex than the voting paradox postulated by Chapman and

Trebilcock[2] as being the most likely explanation for divergences between schemes in a federation such as Australia.

This chapter describes and compares the automobile accident compensation legislation currently operating in each Australian state and mainland territory. It is a snapshot of the state of the schemes at the time of writing.[3]

Each legislative system is described using the following broad categories:

1. Liability Theory (i.e. fault, 'pure' no-fault, add-on no-fault or 'threshold' no-fault), and coverage;

2. Restrictions on cover and exclusions, insurers' rights of recovery and time limits;

3. Methods of determining compensation including limits and thresholds;

4. Stated objects or preambles.

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[1] Professor Sappideen comments that a chart would have been useful in this chapter to show state differences on particular issues. The writer did consider such a chart, but concluded that the number of variables involved would have made such a chart impractical and confusing.

[2] See Chapter 7.

[3] The recent history of the schemes will be examined in Chapter 10.

Reasons for Selection of the Four Categories

Liability theory was chosen as a descriptive category because it is the basis on which commentators such as Chapman and Trebilcock (whose work is the subject of much of this paper and whose theory for diversity is described in the next Chapter) differentiate between systems. In other words it is the main criterion by which they measure diversity between systems. An examination of the legislated coverage in combination with an assessment of liability theory will indicate the comparative breadth of the schemes. This provides a measure of the intentions of the legislatures regarding the scope of the schemes and demonstrates whom the schemes are designed to compensate. Significant divergence between the schemes in this area, and/or particular intricacy in prescribing coverage, implies a conscious attempt to fit coverage and liability theory to some majority-held position within a jurisdiction. Divergences in coverage are also indicative of differences in views as to the need to compensate different categories of victims. Given the diversity in theory described in previous Chapters, divergence and intricacy are to be expected as jurisdictions move away from 'traditional' common law because of the extent of theoretical and practical criticism of such systems outlined in previous chapters.

The second category provides a measure of the extent to which the designers of the schemes have sought to shift accident costs either back to victims or on to some other person or scheme such as the Commonwealth Social Security scheme or the various Workers' Compensation systems. Once again divergences in this category indicate differences in views as to the need to compensate various groups. Complexity and

divergence in this area are harder to predict because cost shifting and statutory grants of subrogation rights to insurers are likely to be governed by practical rather than theoretical considerations. However because this is an area where practical concerns are likely to be of paramount importance (mainly because of their impact on costs), similarities between schemes could be expected to result from borrowing of useful innovations.

The third category provides a comparison of the way that entitlement to, and amount of, benefits is determined in each scheme. An examination of this category is particularly interesting because it provides a good measure of how far each scheme diverges from 'traditional' common law. It also indicates the relative significance for scheme designers of costs, as compared to distributive justice, concerns. It could be expected that diversity will also be found in this area because of the operation of the theoretical debate examined in previous chapters. However, similarities could also be expected between schemes within this category because of copying of useful and efficient elements.

Consideration of stated objects or preambles attached to the legislation provides an insight into the actual intentions of the framers of the schemes. The existence of coherent objects will be evidence that a scheme is not just an arbitrary result of some political process but that there was a conscious position developed by the legislature in framing the scheme. Conversely, the lack of any cogent statement of intention might indicate that the particular scheme is not a result of the development of a position, but an arbitrary or inevitable historical result of the political process.

Liability Theory And Coverage

There is obvious variation between the various state and territory schemes in terms of liability theory, in the sense of the spectrum between "pure" tort and "pure no-fault". There is one 'pure' tort system in the ACT, four different 'modified' tort schemes (in New South Wales, Queensland, Western Australia and South Australia), a 'threshold' no-fault scheme in Victoria, an 'add-on' no-fault scheme in Tasmania and a 'pure' no-fault scheme covering Northern Territory residents. The schemes therefore cover a broad spectrum between the two 'poles' of tort and no-fault. However, every Australian state has legislation that provides for compulsory third party liability insurance, and most of the schemes provide some avenue of access to common law damages to at least some people. This is evidence of a countrywide reluctance (which was predicted in previous Chapters) to venture completely away from fault-based compensation, indicating a degree of conservatism across the federation. It also means that there is at least some degree of convergence between all of the systems. However, in every state where the tort system still operates as the 'primary' compensation system (except for the ACT which is a territory with a relatively small population), it has been modified in various ways[4] which is evidence of a move across the spectrum signifying a perceived need to try and correct tort's previously demonstrated faults without completely abandoning it as a means of compensating auto accident victims.

[4] Which will be examined throughout this Chapter.

Thus, the relatively new system operating in New South Wales[5] is a fault-based compulsory third party scheme with several unusual features, such as mandatory referral of most claims to an administrative assessment procedure, where procedure is inquisitorial and fault can be determined extra judicially, before litigation can be commenced. The scheme also contains an element of 'no-fault' in that an insurer *must* accept 'provisional liability' with respect to the treatment expenses of injured passengers and pedestrians up to a limit of $500.[6] At time of writing, Queensland has a new 'modified' common-law based compulsory third party scheme that diverges from tort in several respects including the way damages are calculated, although liability is still based on fault that is determined by the court. The Western Australian automobile accident compensation system is a 'modified' fault-based compulsory third party insurance scheme with the main variation from 'pure' common law being in the way damages are calculated although this scheme also has a 'no-fault' provision regarding payment for emergency medical treatment.[7] The South Australian scheme is also a fault-based compulsory third party insurance system with a highly modified method of calculating damages and provision for payment of hospital and medical expenses on a 'no-fault' basis.[8] The main ways in which these schemes diverge from 'pure' tort will be examined later in this Chapter.

The Australian Capital Territory has a 'traditional' fault-based compulsory third party insurance scheme,[9] where a successful plaintiff can be awarded full common law

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[5] The Motor Accidents Compensation Act 1999, assented to 5 October 1999.
[6] *ibid.* Sections 50 & 51.
[7] Motor Vehicle (Third Party Insurance) Act 1943 Section 12.
[8] Motor Vehicles Act 1959 Sections 110-111.
[9] Motor Traffic Act 1936 Sections 49ff.

damages. It is the only "stand alone" scheme of this type now operating in the whole of Australia.

By way of contrast to the systems which have retained tort as the primary method of compensation, the system operating in Victoria since 1986,[10] a 'threshold' no-fault scheme, pays benefits on a no-fault basis to most persons injured in automobile accidents and permits a right of suit at common law to those who can establish that they have met the requirements of the verbal threshold which is 'serious injury' as defined.[11] However, similar to the abovementioned states, the way that damages are calculated in the tort based part of the scheme has been highly modified by the legislation.

Also contrasting to some extent with the modified fault-based schemes mentioned above is Tasmania's automobile accident compensation scheme that is a relatively 'pure' fault-based compulsory third party scheme with an 'add-on' no-fault component available only to Tasmanian residents. This scheme is the longest surviving of all the state schemes[12] and is in many respects closer to the tort systems than the Victorian scheme because it retains tort virtually in its entirety with the available no-fault benefits being quite limited.

A most interesting departure from tort based automobile accident compensation is the Northern Territory automobile accident compensation scheme[13] that provides 'pure' no-

[10] Transport Accidents Act 1986.
[11] *ibid.* Section 93.
[12] Once again excluding the ACT.
[13] Contained in the Motor Accidents (Compensation) Act 1979.

fault benefits to Territory residents whose right to sue is abolished.[14] However, a limited right to sue at common law is permitted to non-residents injured in automobile accidents in the Territory. This scheme was enacted as a direct response to the type of theoretical and practical problems associated with tort based compensation which have been examined in previous Chapters, and the legislature was prepared to stand alone in completely abandoning fault as the primary means of determining access to the compensation fund, despite strident criticism of the pure no-fault scheme from various interest groups.[15]

It can therefore be seen that, as expected, there is a degree of diversity in terms of liability theory between the state schemes, which ranges across a spectrum between fault and no-fault. However, such diversity could hardly be described as 'massive', because the majority of the schemes retain tort to at least some degree, which indicates that there has been a reluctance to abandon the tort system despite the trenchant criticism of it and its practical failings.

There is significant variation between the schemes in terms of coverage, which is surprising because one would expect that the type of coverage provided by the schemes would be reasonably uniform on the basis that all the scheme framers were trying to achieve approximately the same ends. It is apparent from the differences in coverage however that there have been different views as to the need to compensate held in some states over time. The coverage provided by the schemes tends to vary in accordance with variations in liability theory, and it may be that the desire to expand or otherwise

[14] *ibid.* Section 5(1).
[15] See Chapter 10.

modify a scheme's coverage is linked to the decision to either retain tort or depart from it to a significant extent.

The coverage in most schemes has been restricted by statute to narrow the class of persons who are able to obtain compensation under the schemes.[16] This is a response to common law developments, which gradually expanded the traditional cover of fault-based compulsory third party schemes (injuries "caused by or arising out of the use of" a vehicle) so that injuries suffered in a variety of circumstances only tenuously connected with the use of automobiles were compensated.[17]

The New South Wales scheme provides what appears to be fairly standard cover for the modified tort based systems. This cover extends to owners and drivers of registered vehicles in respect of injury and death to third parties caused by the fault of the owner or driver of the vehicle in "the use or operation" of the vehicle with coverage closely confined to injury or death caused by: (i) the driving of a vehicle; or (ii) a collision, or action taken to avoid a collision, with a vehicle; or (iii) the vehicles' running out of control; or (iv) such use or operation by a defect in the vehicle.[18] Cover is also specifically extended to registered vehicles whether or not they are on a road.[19] This is a point of divergence with other state schemes that restrict cover to vehicles on "streets" or "public roads". The effect of this close ambit of cover under the scheme is that it is only the immediate costs of injury associated with vehicle driving *per se* that are

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[16] Each schemes cover is examined individually below.
[17] To the extent that an unsafe system of work was found to be a fault in the use of a vehicle-see *NRMA Insurance Ltd* v *NSW Grain Corporation: NSW Grain Corporation* v *Jamieson* (1995) NSW Supreme Court (Unreported).
[18] Motor Accidents Compensation Act 1999 Section 3.
[19] *ibid.* Section 10.

covered. These are borne by vehicle owners (as well as partially or totally unsuccessful plaintiffs), and not necessarily by the drivers who cause accidents.

Similarly, the relevant Queensland act applies to personal injury caused "by, through or in connection with" a motor vehicle if the injury is a result of (i) the driving of the motor vehicle; or (ii) a collision, or action taken to avoid a collision, with the motor vehicle; or (iii) the motor vehicle running out of control; or (iv) a defect in the motor vehicle causing loss of control of the vehicle that is being driven, and is caused, wholly or in part, by a wrongful act or omission in respect of the motor vehicle by a person other than the injured person.[20] Again, there is a high degree of internalization of injury costs to vehicle owners and those who cannot successfully establish fault.

The Western Australian legislation[21] provides that when any motor vehicle is on a road there is required to be in force in relation to the motor vehicle a contract of insurance entered into by the owner of the motor vehicle under which the owner insures against any liability which may be incurred by the owner or any person who drives the motor vehicle in respect of the death or bodily injury to any person "directly caused by, or by the driving of", the motor vehicle[22] which is similar to, but slightly wider than, the cover in the two aforementioned states. This is interesting as the Western Australian scheme is arguably the least 'modified' of the modified tort schemes and there has been an apparent reluctance to impose the sort of significant restrictions on traditional tort scheme coverage which has been seen in New South Wales and Queensland.

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[20] Motor Insurance Act 1994 Section 5.
[21] Motor Vehicle (Third Party Insurance) Act 1943.

The relevant South Australian policy covers all liability that may be incurred by the owner or other person in respect of the death of, or bodily injury to, any person "caused by, or arising out of the use of", a motor vehicle[23]. The death or bodily injury will be regarded as being caused by or arising out of the use of a motor vehicle only if it is a consequence of a) the driving of the vehicle; or b) the vehicle running out of control; or c) a person traveling on a road colliding with the vehicle when the vehicle is stationary, or d) action taken to avoid such a collision.[24] The cover provided in respect of vehicle accidents is thus very similar to that in New South Wales and Queensland, except that the scheme was extended to specifically cover train accidents in October 1991.[25]

The ACT legislation provides that all registered vehicles must be covered by a policy insuring the owner and driver of the vehicle against all liability for the death of, or bodily injury to, any person "caused by or arising out of the use of" the motor vehicle in any part of the Commonwealth.[26] The term "arising out of the use of" gives a wide discretion to a court determining the question of liability to connect an injury to any form of vehicle 'use' thus providing victims with the opportunity to benefit from the insurance fund in a wide range of circumstances,[27] and represents typical coverage in a traditional 'pure' tort scheme. The cover is therefore not so closely confined to the driving of vehicles as is the cover in the 'modified' common law states, which can lead to possible externalities, for example in 'loading' cases where the injury costs might be

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[22] *ibid.* Section 4(1).
[23] Motor Vehicles Act 1959 Section 104.
[24] *ibid.* Section 99.
[25] Wrongs Act 1936 Section 35A(7).
[26] Motor Traffic Act 1936 Section 54.
[27] "That is a phrase [which is] very well worn in this area and has been given a wide ambit because it is often the nexus between injury and recovery, practical recovery. That is why courts have normally given it ample construction." per Kirby J., *McDonnell v Darwin City Council and Anor* D13/1998 24 March 2000, [Online] Austlii High Court of Australia Transcripts.

more properly allocated to another form of insurance such as Workers' Compensation or other types of liability insurance.

The cover under the tort liability section of the relevant Tasmanian legislation is similar to that in the modified common law schemes in that the Motor Accidents Insurance Board is bound to indemnify a person owning or using a motor vehicle for any "non-contractual liability" incurred by that person in respect of the personal injury to a person caused by a motor accident involving the motor vehicle in Tasmania.[28] The Act defines "personal injury caused by a motor vehicle" to mean personal injury which is a direct result of (a) a collision, or action taken to avoid a collision, with a motor vehicle, whether stationary or moving; or (b) that motor vehicle moving out of control; or (c) the driving of that vehicle[29] which is similar to the modified tort schemes.

However, the no-fault statutory benefits payable under the legislation are limited to situations where: (a) a resident of Tasmania suffers personal injury as a result of a motor accident occurring in the State; or (b) a person suffers personal injury as the result of a motor accident occurring in Tasmania and caused by a motor vehicle registered in Tasmania; or (c) a resident of Tasmania suffers personal injury caused by a Tasmanian registered vehicle and as a result of a motor accident occurring in another State or Territory of the Commonwealth.[30] This attempt to closely tie the operation of the scheme to the state of Tasmania is similar to provisions in the Northern Territory

[28] Motor Accidents (Liabilities and Compensation) Act 1973 Section 14(1).
[29] *ibid.* Section 2(4).
[30] *ibid.* Section 23(1).

legislation. The effect of these provisions (which are probably unconstitutional)[31] is to confer greater benefits to residents than non-residents and to significantly restrict cover in comparison to a traditional tort-based system.

A similar position obtains in the Northern Territory. In the case of a Territory residents who dies or suffers injury in or as a result of accident which occurred in the Territory or "in or from a Territory motor vehicle" statutory benefits are payable to the person if they are injured or to their spouse or dependants in the case of their death.[32] "Accident" is defined in the Act to mean an occurrence resulting in the death of or injury to a person caused by, or arising out of the use of, a motor vehicle on a public street or, if within the Territory but not on a public street, by a motor vehicle registered in the Territory or another Territory or State.[33] Non-residents however are not covered by the scheme and must sue in tort.

By way of complete contrast Victoria's legislation provides vastly different coverage. Persons injured as a result of "transport accidents" (defined as incidents directly caused by the driving of a motor car, motor vehicle, railway train or tram)[34] are entitled to compensation under the scheme if the accident occurred in Victoria or if the accident occurred in another state or territory, a "registered vehicle" was involved and at the time of the accident, the person was either a resident of Victoria or the driver or passenger in

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[31] Davies M. 1994, "The Constitutional Validity of Residence Requirements in No-Fault Transport Accident Compensation Schemes" 3 *Torts Law Journal* 275.
[32] Motor Accidents (Compensation) Act 1979 Section 7.
[33] *ibid.* Section 4(1).
[34] Transport Accidents Act 1986. Section 3-'Incident' is widely defined to include incidents involving motor vehicles, railway trains or trams that are out of control, or involving a collision between a pedal cycle and an open or opening door of a motor vehicle, as well as those involving pedal cycles and motor vehicles whilst the cyclist is on the way to or from work.

a registered motor vehicle.[35] Compensation is also provided to dependants of people who die as a result of transport accidents.[36] The legislation provides an indemnity to owners and drivers of registered vehicles for any liability in respect of an injury or death of a person "caused by or arising out of the use of" the vehicle in Victoria, or in another State or Territory.[37] Indemnity is also provided to operators, owners and drivers of railway trains or trams, and managers of railways and tramways, in respect of injury or death caused by or arising out of the use of a railway train or tram in Victoria.[38] This gives the Victorian no-fault scheme a much wider compass in many respects than any similar state scheme both in terms of the type of vehicles covered and the circumstances in which injury is suffered, and overall the no-fault scheme provides the widest cover of any in Australia.

It can be seen from the above that diversity in scheme coverage mirrors to some extent the diversity in liability theory. The coverage in the modified common law jurisdictions is similar across jurisdictions, but varies by degree from the relatively conservative modifications in the Western Australian system to the more radical New South Wales system. The restricted cover in these schemes indicates a desire to narrow the cover from that which had previously developed at common law. This connotes a similarity in values and aims as well as a degree of borrowing between those states. The cover is closely confined to the activity of driving in the modified tort states, whereas in the more 'pure' tort system in the ACT the cover is much more wide open to judicial interpretation. Where a scheme involves a greater degree of supplementation or

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[35] *ibid.* Section 35(1).
[36] *ibid.* Section 35(2).
[37] *ibid.* Section 94.
[38] *ibid.*

replacement of tort, the coverage is invariably different from that which is 'standard', usually being limited to the citizens of the particular state (as in the Tasmanian and Northern Territory no-fault schemes). The cover provided by the Victorian no-fault scheme is much different and wider than that provided by any of the other schemes. This shows that moving away from the broad common law cover was not the only factor in the design of cover for this scheme.[39] However, it clearly was one factor given the restriction of the definition of "transport accident" to incidents *directly* caused by the driving of motor vehicles, trains and trams.

Restrictions On Cover And Exclusions, Rights Of Recovery And Time Limits.

The examination of the schemes under this category discloses evidence of the way in which scheme framers have sought both to shift costs back to victims and on to other schemes. Once again it elucidates different views amongst the state legislatures about the classes of victims that should receive, or more correctly should be excluded, from obtaining compensation. It also demonstrates how the legislatures have attempted to provide disincentives to poor driving behaviour, such as street racing and driving whilst under the influence of alcohol or drugs, by either excluding certain persons from cover or providing rights of recovery against them by insurers. This clearly shows that there is recognition of the failure of tort of itself to provide such disincentives without parliamentary intervention. In other words the examination of who is *not* covered by a particular scheme provides insight into the overall intentions of the designers relating to the deterrent effects of the systems. It also demonstrates that none of the no-fault

[39] As Professor Luntz points out, this relates to the no-fault scheme only. The tort part of the scheme maintains the traditional broad coverage in terms of indemnity for the driver.

schemes are entirely free of the notion that rights to compensation should be divorced from any determination of fault. An examination of exclusions under the schemes further demonstrates the level of concern to ensure that the schemes remain focused on injuries from the driving of *registered* automobiles, rather than all motorized and mobile machinery such as agricultural implements. It could readily be anticipated that there would be a reasonably uniform approach in the various states to providing disincentives to the worst forms of driving behaviour. However it is difficult to foresee any such common approach to the question of the exclusion of injuries where no premium has been paid in respect of the 'responsible' vehicle (e.g. unregistered tractors not being driven on public roads).

The consideration of the time limits imposed on claimants in the various schemes provides evidence as to how each state protects the insurance pool from 'long tail' claims (i.e. those claims not made for some time after an accident, for which no allowance has been made in setting premiums). It also indicates the extent to which claimants are forced quickly to choose between litigating or relying on e.g. the no-fault component of a scheme (where such exists and has different time limits to the fault-based part of the scheme) thus avoiding some of the delays inherent in the tort system.

The various state schemes exhibit broad similarities in terms of exclusions from cover and recovery rights. There is a pattern of restriction of cover in circumstances where compensation is available under some other scheme, making the automobile accident compensation scheme the 'last resort' in terms of compensation for victims of automobile accidents. Thus several state schemes have some form of exclusion relating

to claims which would be covered by Workers' Compensation or similar legislation, which means that employers and/or governments, who can pass on costs of insurance through prices and by legislation, are burdened with injury costs of those claims rather than car owners, who may not be able to. For instance, in New South Wales liability to pay compensation under Workers' Compensation legislation to a worker employed by the owner or driver of a vehicle, and liability incurred by an owner or driver solely under any agreement, are specifically excluded from cover under the automobile accident compensation scheme.[40] There are similar provisions in Victoria,[41] Tasmania,[42] The Northern Territory[43] and the ACT.[44]

There are also broad similarities in the way that the schemes deal with the worst or most dangerous forms of driving behaviour. The right to compensation of those engaging in such behaviour is mostly either excluded or limited, or is the subject of a right of recovery on the part of insurers. As stated above, this represents a clear recognition in the tort-based states of the lack of inherent deterrence in the system, and also interestingly introduces an element of 'fault' into the no-fault schemes in that available compensation can be limited where drivers are found to have contravened certain standards.

For example, the New South Wales Act shifts costs back to injured persons by providing for a complete defence of 'volenti non fit injuria' (voluntary assumption of

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[40] Motor Accidents Compensation Act 1999 Section 15. This section excludes cover for accidents covered under numerous statutory schemes.
[41] Transport Accidents Act 1986 Section 37.
[42] Motor Accidents (Liabilities and Compensation) Act 1973 Section 14(3).
[43] Motor Accidents (Compensation) Act 1979 Section 10.
[44] Motor Traffic Act 1936 Section 54(2).

risk) in the case of the driver, and any passenger over the age of 18, of any vehicle engaged in "motor racing" defined as either an organized motor sports events or an activity which is an offence under Section 4B of the Traffic Act 1909. The legislation also provides for a mandatory finding of contributory negligence in circumstances where:

a) The injured or deceased person is convicted of an alcohol or other drug related offence, unless the court is satisfied that the commission of the offence did not contribute to the accident in any way;

b) The injured or deceased person (not being a minor) was a voluntary passenger in a vehicle when the driver's ability to drive was impaired by consumption of alcohol or any other drug and the injured person was, or ought to have been, aware of the impairment;

c) The injured or deceased person was not wearing a seat belt or protective helmet when required to do so.[45]

In Victoria limited compensation is payable under the no-fault scheme where an injured driver has been convicted of culpable driving causing death or of various alcohol or other drug-related offences in relation to the accident (unless the injured person can satisfy the commission that the alcohol or drug did not contribute in any way to the accident).[46] The Commission is also not liable to pay full compensation to persons

[45] Motor Accidents Compensation Act 1999. Section 138(2).
[46] Transport Accidents Act 1986. Section 39(2).

injured whilst taking part in organized races or speed trials.[47] There are also restrictions on indemnity under the third party insurance scheme against common law damages under the Act in respect of unauthorized drivers[48] (e.g. car thieves), those who are convicted of a serious indictable offence arising out of an accident and those who are intoxicated.[49]

The Act also provides for a mandatory one-third reduction of compensation for loss of earning capacity where a person injured in a transport accident was driving a vehicle and had a blood alcohol concentration greater than 0.05g/100mls; a two-thirds reduction where the concentration was up to 0.24g/100mls with no compensation payable if the concentration was 0.24 or more.[50] This introduces an element of 'fault' into the no-fault scheme, although the determination of any reduction is much more objective than under the common law, and provides a significant disincentive to drink driving. The stepped reduction of benefits is different than other no-fault schemes such as that in the Northern Territory, which provides for a complete exclusion from benefits where an injured driver's blood alcohol concentration is 0.08g/100ml or more. This means that the Victorian legislature was more forgiving of low range alcohol concentrations than the Northern Territory legislature, and fewer costs of alcohol-related accidents in Victoria are passed on to injured persons or the Social Security system.

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[47] *ibid.* Section 41.
[48] *ibid.* Section 102(1).
[49] *ibid.* Section 102(2). This of course will not affect the right of victims of unauthorized or intoxicated drivers to recover benefits.
[50] Transport Accident Act *op cit.* Section 40(1).

The Queensland legislation does not have the same level of statutory restrictions on cover exhibited by other schemes, although under the common law damages can be restricted by courts where there has been contributory negligence. The legislation does provide rights of recourse on behalf of insurers against unauthorized drivers, and against drivers whose inability to exercise effective control of a vehicle is caused by consumption of alcohol and/or drugs where the costs reasonably incurred on a personal injury claim are reasonably attributable to an inability to exercise effective control of a vehicle,[51] which means that similar considerations regarding fault and deterrence as in the other states have exercised the legislative mind.

The South Australian legislation contains several restrictions on cover and recovery rights. For example, the Act gives a right of recovery to an insurer in circumstances where an insured person has contravened or failed to comply with a term of the relevant policy by intentionally or recklessly driving or doing or omitting to do something in relation to a motor vehicle; or by driving a motor vehicle whilst so intoxicated as to be incapable of exercising control of the vehicle, or by driving with a blood alcohol concentration of 0.15g/100ml or more.[52] Where an accident was partly attributable to any injured person's negligence and that person had a blood alcohol concentration of 0.08mg/100mls or more or their ability to drive the vehicle was impaired as a result of consumption of alcohol or another drug, then a court must reduce their damages by a minimum of 25%.[53] If the blood alcohol concentration is greater than 0.15mg/100mls or more or the driver was so much under the influence of intoxicating liquor or a drug as to be incapable of exercising effective control of the vehicle, the minimum reduction is

[51] Motor Insurance Act 1994. Section 58.
[52] Motor Vehicles Act 1959 Section 124A.

50%.[54] This stepped reduction is similar to that in the Victorian scheme. Similarly, if an adult person is a voluntary passenger in a vehicle being driven by an intoxicated person and was or should have been aware of the driver's alcohol consumption then a deduction of 25% must be made.[55] A similar deduction must be made where an injured person was not wearing a seat belt,[56] or a safety helmet where required[57] or was traveling voluntarily outside the passenger compartment of a vehicle,[58] which is similar to provisions in the other states.

The Tasmanian no-fault scheme excludes payment of benefits where the personal injury was caused by, or arose out of, the use of an automobile in the commission, or furtherance of the commission, of an offence of dishonesty or violence and the injured person was a party to the use of the vehicle for that purpose. In addition, the Act excludes the payment of medical or disability benefits where an injured person is convicted of manslaughter, causing death by dangerous driving, an offence under Section 32 (1) of the Traffic Act 1925, an offence under Section 4 of the Road Safety (Alcohol and Drugs) Act 1970, or a like offence in another State or Territory.[59] Medical or disability benefits are also excluded for unlicensed drivers[60] (which provides a significant deterrent to driving whilst unlicensed) and indemnity for liability is excluded for personal injury to a person taking part in a motor vehicle race.[61] No-fault benefits are also excluded where personal injury was caused by a motor vehicle in a motor

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[53] Wrongs Act 1936 Section 35A(1)(i).
[54] *ibid.* Section 35A(6).
[55] *ibid.* Section 35A(1)(jb).
[56] *ibid.* Section 35A(1)(j).
[57] *ibid.* Section 35A(1)(ja)-where this is causally connected with the injury.
[58] *ibid.* Section 35A(1)(ja).
[59] Motor Accidents (Liabilities and Compensation) Act 1973 Section 24(2).
[60] *ibid.*
[61] *ibid.* Section 14(4).

vehicle race.[62] Rights of recovery are granted against owners or drivers who are convicted of murder or manslaughter, causing death by dangerous driving, or of offences under the Traffic Act or Road Safety (Alcohol and Drugs) Act or similar offences in other States or territories arising out of the use of the motor vehicle.[63] There is a mandatory minimum 15 percent reduction of damages for failure to wear a seat belt.[64] This is similar to the Western Australian scheme, although the level of mandatory reduction is less than in that scheme.

The Northern Territory scheme excludes from benefits for permanent impairment and loss of earning capacity those drivers who are injured in an accident and who are under the influence of alcohol or of a drug or who had a blood alcohol concentration of 0.08g/100ml or more.[65] Also excluded from such benefits are those who are injured in an accident in respect of which they are convicted of manslaughter, an offence against Section 154 of the Criminal Code, dangerous driving or a similar offence outside the Territory.[66] Unlicensed drivers and those taking part in a race or other competition or trial are also excluded from benefits.[67] The legislation also excludes from entitlement to benefits those who were using a motor vehicle without consent, or in the commission of indictable offences, or whilst resisting the arrest of themselves or some other person, or whilst attempting to inflict injury on themselves or some other person[68].

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[62] See Division III Part VI of the Police Offences Act 1935.
[63] Motor Accidents (Compensation) Act 1979 Section 18(3).
[64] *ibid.* Section 22(3) and (4).
[65] *ibid.* Section 9.
[66] *ibid.*
[67] *ibid.*
[68] *ibid.* Section 10.

The ACT legislation provides a right of recovery by the insurer against a driver who breaches the provisions of the Act or of the Motor Traffic (Alcohol and Drugs) Act 1977 where a court is satisfied that the breach contributed in a material degree to the insurer's liability to pay damages.[69] The Act also provides a right of recovery against unauthorized drivers. Such drivers are also not entitled to recover any sum paid or payable in respect of their liability for death and bodily injury (but any amount necessary to satisfy that liability must be paid by the authorized insurer to the person to whom the liability was incurred).[70]

A clear pattern emerges from the above evidence. All states have sought to introduce exclusions into their schemes that provide a level of deterrence against the worst forms of driving behaviour. This means that despite jurisdictions such as the Northern Territory being avowedly no-fault, determination of entitlement to compensation can still be affected by a finding of 'fault' in relation to the worst forms of driving behaviour.

Most states have legislated so that the responsibility to register and insure vehicles is met and the insurance pool is protected to some extent from uninsured drivers. In New South Wales there is a complete right of recovery by the relevant insurer against vehicle thieves and other non-premium payers. This right covers any moneys or costs paid by an insurer against a person using or operating a vehicle without the authority, or reasonable grounds for believing that they had the authority, of the owner.[71] The Act also provides for recovery by the Nominal Defendant against the owner and/or driver of

[69] Motor Traffic Act 1936 Section 63.
[70] *ibid.* Section 67.

an uninsured or unidentified vehicle.[72] In Victoria, no compensation is payable where any person is injured or died as a result of the driving of unregistered vehicles on private land.[73] In addition, the Transport Accident Commission can recover damages paid out against owners or drivers of unidentified or unindemnified vehicles under the Act,[74] similar to the provisions of the New South Wales legislation allowing the Nominal Defendant to recover against those who do not pay premiums or who do not stop at accidents. In Queensland, the Nominal Defendant has a right of recovery against the owner or driver of an uninsured vehicle[75] and there is a specific right of recovery against any person who defrauds or attempts to defraud an insurer.[76] Similar to other schemes the Act only applies to uninsured vehicles if a motor vehicle accident happens on a road or in a " public place ",[77] which leaves the victim or the Social Security system to bear the costs of most off-road accidents.

In Western Australia, the Commission may recover monies paid from the owner and/or driver of an uninsured motor vehicle causing death or bodily injury[78] and can recover from, or refuse to indemnify, an unauthorized driver.[79] In South Australia there is a right of recovery by the insurer against an unauthorized driver,[80] and a right of recovery by

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[71] Motor Accidents Compensation Act 1999. Section 20.
[72] *ibid.* Section 39(1). Professor Sappideen recommends a note of the key common law provisions giving rise to the statutory limitations, however the writer is of the view that this would not further the examination of the statutory limitations themselves, which are in the main not based on particular common law decisions.
[73] Transport Accidents Act 1986. Sections 41A, 41B.
[74] *ibid.* Section 96.
[75] Motor Insurance Act 1994. Section 60.
[76] *ibid.* Section 59(2). Professor Luntz has pointed out, however, that such theoretical rights of recovery are in practice usually worthless.
[77] *ibid.* Section 5(2).
[78] Motor Vehicle (Third Party Insurance) Act 1943 Section 8(3); Section 14.
[79] *ibid.* Section 15.
[80] Motor Vehicles Act 1959. Section 123.

the Nominal Defendant against the driver of an uninsured vehicle.[81] The Act also provides for recovery against claimants who give false or misleading information to the insurer in connection with a claim.[82]

In Tasmania, the relevant Act provides for recovery of no-fault benefits from owners of uninsured vehicles,[83] drivers convicted of various offences[84] and from "non indemnifiable persons".[85] In addition, no benefits under the no-fault scheme are payable where a personal injury was caused by an uninsured trail bike, farm bike or beach buggy and the injured person was the owner or driver or where the person injured is the owner or driver of a vehicle on which a premium has not been paid and the injury was caused by the vehicle.[86]

In the ACT, the insurer is given the right under the legislation to recover from the owner of a vehicle the amount of any judgment or settlement and costs where there has been a false statement, misrepresentation or non-disclosure in obtaining the third party policy, or where there has been a breach by the owner of any term, condition or warranty of the third party policy or of any provision of the Motor Traffic Act or the Motor Traffic (Alcohol and Drugs) Act 1977.[87] However, in any such recovery action, a court must be satisfied that any false statement, misrepresentation or non-disclosure was of such a nature as to influence a prudent insurer in determining whether or not to accept a

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[81] *ibid.* Section 116(7).
[82] *ibid.* Section 124 (bb).
[83] Motor Accidents (Liabilities and Compensation) Act 1973 Section 28(2).
[84] *ibid.* Section 28B(5).
[85] *ibid.* Section 28C(2).
[86] Motor Accidents (Liabilities and Compensation) Act 1973 Section 24(1).
[87] *ibid.* Section 62(c)(i) and (ii).

proposal for insurance.[88] If the action is in respect of the breach or failure to comply with the provisions of the previously mentioned legislation, then the court must be satisfied that the breach or failure was such that it contributed "in a material degree" to the circumstances in which the authorized insurer agreed to pay or became liable to repay the monies.[89] This gives the court a broad discretion in relation to potential recoveries by insurers, which reflects the common law basis of the scheme. There is a further right of recovery from the owner and/or driver of an uninsured vehicle.[90]

The exception to the above is the Northern Territory, where there are no recovery rights conferred on the relevant insurer under the legislation. This is interesting and reflects to some extent the 'pure' no-fault nature of the scheme as it applies to Territorians. Thus there are no circumstances where *indemnity* will not be granted to territory residents, although they will not always be entitled to benefits, and this represents a significant difference from the situation pertaining in the tort based states and territory.

The above are areas where the schemes are broadly similar. However, several of the states have unique exclusions or recovery rights, demonstrating that whilst they have much in common, individual legislatures have had differing views as to what they are endeavouring to achieve in the formulation of their schemes.

For example, in New South Wales the insurer has the right to recover an excess of up to $500 from an insured person who is found to be more than 25% at fault in respect of an

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[88] *ibid.* Section 62.
[89] *ibid.*
[90] *ibid.* Section 87.

accident.[91] It has presumably been added to provide a disincentive to careless driving and clearly represents a view by the legislature that the tort liability system does not of itself provide sufficient disincentive to poor driving behaviour. However its existence has not been greatly publicized,[92] neither would attempting to enforce such a small excess be a commercial proposition in New South Wales because of the costs involved in running such small matters,[93] and therefore it has presumably failed to have the desired effect. Anecdotal evidence suggests that insurers hardly ever exercise this right, which supports the contention that it is not commercially viable to do so. There is a similar provision in South Australia where the legislation provides that where an insured person is more than 25% liable for an accident, the insurer can recover an excess of up to $300.[94] It is also unlikely that this provision, if enforced, would provide much of a disincentive to poor driving because the excess is so small and the costs of enforcing it would be so high that its effect would be negligible. However, the existence of these excesses provides evidence that the legislatures have turned their minds to the problem of lack of deterrence within these fault-based schemes. The fact of the small size of the excesses is probably recognition that making insurance compulsory and imposing large excesses, except in the case of the most reprehensible driving behaviour, would be politically unpalatable.

Another divergence from the norm is the Queensland scheme, which does not apply to personal injury caused by, through or in connection with -

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[91] Motor Accidents Compensation Act 1999 Section 21(1).
[92] A search of the extensive list of MAA publications on the internet failed to turn up any mention of the provision.
[93] See *Report of the Steering Committee Reviewing Motor Vehicle Compulsory Third Party Insurance in the A.C.T., op cit.* p90 and particularly fn160.
[94] Motor Accidents Act 1959 Section 124AB.

(a) A tractor, backhoe, bulldozer, end loader, fork lift, industrial crane or hoist, or other mobile machinery or equipment; or

(b) An agricultural implement; or

(c) A motor vehicle adapted to run on rail or tram tracks; or

(d) An amphibious vehicle; or

(e) A motor vehicle of a class prescribed by regulation;

unless the accident out of which the injury arises happens on a "road" as defined.[95] This restricts the ambit of the scheme as well as shifting costs in industrial or agricultural accidents either back to the victim or on to the Workers' Compensation or Social Security systems and is a point of departure from the other schemes in the width of the exclusory provision.

The Western Australian Act contains a unique provision restricting the liability of the Commission where an uninsured spouse is partly responsible for the injuries of their spouse and some other person is also partly responsible. In that situation the Commission is liable only to the extent of the negligence of that other person and is not

[95] Motor Insurance Act 1994 Section 5(3)-the definition includes land dedicated to public use as a road, toll roads, bridges, culverts, fords, detours, car ferries, public car parks and parking stations.

liable for that proportion of the liability attributable to the uninsured spouse.[96] This shifts some accident costs back onto the victim because of the fault and uninsured status of their spouse, rather than any fault of the victim. Apart from being unfair, this provision provides an incentive to persons to make sure their spouses are insured, or to avoid traveling with them. No other state legislature has seen the need to restrict compensation in this way.

The South Australian scheme specifically excludes from cover death or bodily injury caused by or arising out of the use of a motor vehicle which is a conditionally registered tractor or farm machine and which does not occur on a road.[97] This is somewhat like the Queensland scheme but only excludes accidents caused by certain agricultural machinery. It would exclude many rural injuries, the costs of which would be borne by the victim.

The peculiarities exhibited by these schemes are in keeping with the notion that whilst there has been obvious borrowing between schemes, there has also been a significant degree of individual development over time.

Perhaps the most strident criticism of the traditional tort method of compensating automobile accident victims is delay, in the time taken to commence matters, to bring matters to trial and to deliver needed compensation to the injured. One would therefore expect that in order to overcome this problem, legislatures in those states where tort has been retained would introduce measures designed to speed up the compensation

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[96] Motor Vehicles (Third Party Insurance) Act 1943 *op cit.* Section 8A.
[97] Motor Vehicles Act 1959 *op cit.* Section 99(4).

process. The no-fault systems, which have been designed to replace tort in varying degrees, would be expected to have time limits designed to speed up the process. Also, because automobile compensation schemes are systems of insurance and are based on insurance principles, measures designed to limit 'long tail' exposure (i.e. claims for old injuries) and the potential for fraudulent claims could also be expected in both tort based and no-fault systems.

This expected pattern can in fact be found in most of the various tort based state schemes. For example, in New South Wales, the legislation forces an injured person to make an early decision as to whether to make a claim by providing that a claim must be made within six months of a motor accident or of the death of a person arising from a motor accident.[98] This not only ensures that the whole process is commenced with alacrity but also deters potential fraud by ensuring that the time between accident and claim is not so long that enquiries into potential witnesses, possible medical evidence etc become fruitless. A late claim can be made if the claimant has a full and satisfactory explanation for the delay but the court must dismiss proceedings commenced in respect of a late claim if is satisfied that the claimant does not have a full and satisfactory explanation for the delay.[99]

In Queensland, an intending claimant must give notice of an accident to an insurer within one month of first consulting a lawyer about the possibility of making a claim[100] or within nine months after an accident or the first appearance of symptoms, whichever

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[98] Motor Accidents Compensation Act *op cit.* Section 72.
[99] *ibid.* Section 73.
[100] Motor Insurance Act 1994 Section 34.

is the earlier, before commencing court proceeding.[101] Where the claim relates to injury caused by an unidentified vehicle notice must be given within 3 months of the accident. If notice is not given to the Nominal Defendant within nine months after the accident, the claim is barred[102] which deters potentially fraudulent claims.

In Western Australia the time limits under the relevant Act are not as definite as under some other state schemes. A person proposing to claim damages must give the Commission a notice in the prescribed form "as soon as practicable after the occurrence giving rise to the claim" of an intention to claim, otherwise court proceedings cannot be commenced or maintained.[103] However even in this state, where notice has been given, but proceedings have not been commenced within six months after the accident, the Commission can apply to the court for an order that an action be commenced,[104] which is obviously designed to allow the Commission to speed up the process where a claimant is being tardy. Where a court makes an order fixing a time within which an action must be commenced but the action is not commenced within that time and no application for extension of time has been made, the claimant's claim and any rights in respect of it are "forever barred and extinguished".[105]

In the ACT, the legislation provides that where an owner or driver cannot be served, then proceedings can be commenced directly against an authorized insurer if notice of intention to claim is given to the authorized insurer or Nominal Defendant within three

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[101] *ibid.* Section 37.
[102] *ibid.* Section 37(4).
[103] Motor Vehicle (Third Party Insurance) Act 1943 Section 29(1).
[104] *ibid.* Section 29(4).
[105] *ibid.* Section 29(7).

months of the accident occurring.[106] There is a similar provision regarding accidents caused by uninsured and identified motor vehicles.[107] Otherwise time limits are dealt with under the relevant Limitations statute, which gives to the court a broad discretion in relation to determining whether or not an action may continue. This is in keeping with the 'pure' tort based nature of this scheme.

By way of contrast, the South Australian scheme does not contain strict statutory time limits such as those in, for example, the New South Wales scheme. A claimant must give notice to the Nominal Defendant "as soon as reasonably practicable" after it becomes apparent that a vehicle causing an accident is unidentifiable or uninsured,[108] but failure to do so will only result in dismissal of an action by the court if it is satisfied that the failure has prejudiced the conduct of the defence and the justice of the case requires a dismissal.[109]

The position in the no-fault states is also broadly as expected. In Victoria, claimants have one year from the date of death or accident, or after an injury manifests itself, to make a claim; however the Commission may accept a claim up until three years after the accident, death or injury manifests itself.[110] Whilst this gives claimants much more latitude in time for making claims than in most of the 'modified tort' schemes, where the time for making a claim varies between three and six months after an accident, the way that damages are calculated under this scheme, with an assessment of disability

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[106] Motor Traffic Act 1936 Section 61(3) and (4)-this period may be extended by the insurer or Nominal Defendant-see *ibid.* Section 61(4A).
[107] *ibid.* Section 85(5).
[108] Motor Vehicles Act 1959 Sections 115(3), 116(4).
[109] *ibid.* Sections 115(4), 116(5).
[110] Transport Accidents Act 1986 Section 68.

being made eighteen months after an accident, has the effect of limiting delays within the system in any event. The time limits provided are still sufficient to prevent long tail claims and to deter fraud.

In Tasmania, no tort action can be brought against the Board in respect of injuries caused by an unidentified vehicle unless notice is given to the Board within three months after the accident occurred.[111] This is a shorter limit than any of the similar limits in other states and means that a decision to litigate must be made very soon after an accident occurs.

Under the no-fault provisions of the scheme, a claim must be made within three years of the accident occurring, but this period can be extended to six years if it is just and reasonable to do so.[112]

A claim for a benefit under the Northern Territory legislation must be made "as soon as practicable" after an accident.[113] The Board may refuse to consider a claim made later than six months after the date of an accident, and must refuse to consider a claim made more than three years after the accident[114] except in the case of special hardship.[115] These limits are similar to time limits provided by the 'modified tort' states' legislation.

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[111] Motor Accidents (Liabilities and Compensation) Act 1973 Section 16(2)-this can be extended to 9 months or beyond by application to the court-see *ibid.* and Section 16(2A).
[112] *ibid.* Sections 24(4), 24(5).
[113] Motor Accidents (Compensation) Act 1979 Section 31(1).
[114] *ibid.* Section 31(3).
[115] *ibid.* Section 33(1).

Methods Of Determining Compensation Including Limits And Thresholds

This category provides a good measure of how each scheme diverges from the 'traditional' common law method of determining entitlement to, and amount of, damages. An examination of the schemes under this category provides an understanding of how far the legislatures have been prepared to go in endeavouring to remedy some of the major problems associated with tort such as uncertainty of outcome and overcompensation of minor injuries by providing for standardization of compensation for similar injuries and the limitation of compensation for small claims. This in turn indicates the extent to which victims of automobile accidents are left to bear their own losses. It demonstrates the relative importance of the distributive justice and costs values within specific schemes by allowing a comparison of such factors as maximum and minimum amounts of compensation that can be awarded to victims, and the types of limits and excesses that are imposed under the schemes. It is obviously the best category for use in comparing schemes in terms of outcome for victims. Because of the differences already examined under the liability theory and coverage headings above, there is an expectation that the schemes will exhibit diversity in this area as well, particularly as each legislature endeavours to separately deal with typical problems with fault-based compensation examined in Chapter 3 such as delay, overcompensation of minor claims, uncertainty, actuarial difficulties and costliness. That this is patently the case is demonstrated by the following examination of the schemes, which proceeds on a state-by-state basis for ease in understanding the significant differences between the schemes in this area.

The New South Wales scheme departs in a number of significant ways from the common law. These departures restrict the level of damages that would otherwise be available on a 'pure' common law assessment. The scheme retains fault as the basis for liability, but provides a simplified administrative method of determining both liability and damages. Resort to litigation is actively discouraged. Obviously costs concerns have had a major effect on the form of the scheme, and it is substantially different from any of the other schemes in the provision of a formalized alternative dispute resolution process. There are also differences in the way that damages are calculated which are examined below.

Under the scheme, an injured person first makes a claim on the relevant insurer in respect of damages sustained in an accident.[116] The insurer is then under a duty to try to resolve the claim "as justly and expeditiously as possible".[117] Rather than an injured person being able to commence court proceedings immediately, the scheme provides for mandatory alternative dispute resolution in most cases.[118] In this process, a "claims assessor" who is an officer of the Motor Accidents Authority determines claims. The assessor, who proceeds inquisitorially[119] rather than hearing adversarial argument, can make a non-binding determination of liability[120] and a decision on damages that is binding on the insurer only.[121] Medical issues are referred to a medical assessor who can issue a certificate as to degree of permanent impairment,[122] whether an injury has

[116] Motor Accident Compensation Act 1999 *op cit.* Sections 72, 78.
[117] *ibid.* Section 80(1).
[118] *ibid.* Section 90.
[119] *ibid.* Section 100(1).
[120] *ibid.* Section 95(1).
[121] *ibid.* Section 95(2).
[122] *ibid.* Section 131.

stabilized and whether treatment is reasonable and necessary.[123] If a claimant rejects an assessment, or if the claim is certified as being exempt from assessment[124] a claimant may proceed to court. However the Act provides costs penalties where the assessment is rejected and damages awarded by the court do not exceed the assessed damages.[125] These modifications to the common law have been designed to discourage litigation and encourage early resolution by simplifying and standardizing the way that medical issues are treated and by replacing expensive court procedures with a first line administrative non-adversarial determination of claims.[126]

Whilst the New South Wales scheme has retained fault as the basis for awarding compensation, it has diverged significantly from the common law in the way that damages are calculated. The common law discretions have been severely limited, and a concerted effort has been made to abolish minor claims entirely. Thus no compensation is available for non-economic loss unless a threshold is met; that is, the degree of impairment of an injured person caused by an accident is certified by a medical assessor to be greater than 10 percent.[127] This excludes quite serious injuries such as broken limbs that heal over time leaving little impairment and most 'soft tissue' type injuries. Where a claim exceeds the 10 percent threshold, damages for non-economic loss are

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[123] *ibid.* Section 61.
[124] *ibid.* Section 108-it is envisaged that only claims involving complex legal issues such as a complete denial of liability or an allegation that a claim is false or misleading will be certified as exempt-see Bowen D., "The Role of Alternative Dispute Resolution in Compulsory Insurance Schemes"-paper delivered at 3rd IEC Conference, Sydney, 17-18 November 1999, copy on file with author.
[125] Motor Accidents Compensation Act 1999 Section 151(2).
[126] These measures have apparently been highly effective with anecdotal evidence suggesting that only a handful of cases have proceeded to litigation under the new Act
[127] Motor Accidents Compensation Act 1999. Section 131-the assessment is made in accordance with guidelines based on the American Medical Association's Guides to the Evaluation of Permanent Impairment, 4th Edition.

calculated by reference to the common law "tariff".[128] However the maximum amount that can be awarded for non-economic loss is $273,000 and this amount is indexed.[129] The aim of this variation from the common law position has obviously been to contain scheme costs and restrict unpredictably high awards, with the bulk of dignitary losses in minor claims being borne by the victim.

The scheme restricts damages for psychiatric or psychological injury; no regard is to be had to any such injury when assessing degree of impairment unless the assessment of the degree of impairment is made solely with respect to the result of a psychiatric or psychological injury.[130] This means that if a person suffers an orthopaedic injury such as a spinal fracture and also a psychiatric injury in an accident, compensation can only be awarded for the back injury. However, if that person had suffered only psychiatric injuries in the accident those injuries would potentially be compensable. This is a clear departure from the common law, designed to prevent the use of difficult to test allegations of psychological injury being used to bolster damages in minor claims, and to restrict damages awards to cases where there is an objectively demonstrable loss of function by reference to clear guidelines.

The emphasis in the awarding of damages for non-economic loss is on only the more serious long-term injuries. Minor injuries where there is no demonstrable economic loss are totally excluded from the scheme. This is clearly a cost saving measure to keep

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[128] Balla A., 2002, *NSW Motor Accidents Practitioners Handbook*, CCH, Sydney, Loose Leaf Service para 10-480.

[129] Motor Accidents Compensation Act 1999 Section 134. The maximum amount was $284,000.00 as at 4/2/03.

[130] *ibid.* Section 133(3). Professor Sappideen recommends a note of the common law decisions relating to principles for awards of damages here. However, the writer intends only to compare the schemes across

premiums at a manageable level, in keeping with the stated aims of the scheme examined below.

The Act provides that no damages are payable for loss of earnings or of earning capacity for the first five days (whether or not consecutive) during which the claimant suffered the loss because of the injury.[131] There is a similar provision in the Victorian scheme and it has the effect of shifting most economic loss costs onto the victim or the victim's employer because in the majority of cases time off work does not exceed 5 days and so the victim either takes some form of leave or loses pay. This represents a significant potential saving to the scheme but a real impost to the victim in many cases.

Another cost saving departure from the common law position is that awards for past and future loss of earnings, deprivation or impairment of earning capacity and loss of expectation of financial support are limited to a maximum net weekly figure of $2,500.[132] This makes maximum awards under this heading much more predictable. In order for a claimant to achieve an award for future economic loss, they must establish that the assumptions on which the award is based accord with the claimant's most likely circumstances "but for the injury".[133] A court making such an award is required to adjust the amount of damages by reference to the percentage possibility that the events concerned might have occurred.[134] This removes the wide discretion on the part of

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jurisdictions, and to introduce the numerous common law decisions here would, with respect, cloud the issue.

[131] *ibid.* Section 124.
[132] *ibid.* Section 125.
[133] *ibid.* Section 126(1).
[134] *ibid.* Section 126 (2) and (3).

courts awarding sums to compensate for future economic losses developed in cases such as *Malec v Hutton.*[135]

If a claimant is awarded a lump sum for loss or impairment of earning capacity, loss of expectation of financial support or for the future value of domestic, nursing and attendant services or a liability to incur future expenditure then a 5 percent discount rate must be applied to such sum[136] to account for the plaintiff receiving now and being able to invest monies which would have been received in the future, whereas the standard common law discount rate is only 3 percent.[137]

There are also restrictions on the maximum weekly amount that can be awarded for voluntary domestic services[138] and any economic loss award must be reduced by the amount of any entitlement to or payment of compensation for expenses under the Victims Compensation Act 1996 and also in respect of any payments made to or on behalf of the claimant "by an insurer"[139] which appears to mean that the 'collateral source rule' (the common law rule that a court assessing damages must not take into account payments from income insurance and the like) has been partly abolished in relation to New South Wales automobile accidents. These are all restrictions which narrow the compass of damages from that available at common law and which shift costs to the victim and away from the scheme.

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[135] *op cit.*
[136] Motor Accidents Compensation Act 1999 Section 127.
[137] *Todorovic v Waller op cit..*
[138] Motor Accidents Compensation Act 1999 *op cit.* Section 128.
[139] *ibid.* Section 130.

The Victorian scheme, by way of contrast to the New South Wales scheme, provides a complex method of determining no-fault benefits based on statutory formulae, as well as limited recourse to common law damages. The scheme provides no-fault non-pecuniary loss benefits to those who have injuries leading to an impairment of the whole person assessed as being more than 10 percent, and permits a right of suit at common law to those who are 'seriously injured'. The method of determining entitlement to, and amount of, compensation under both the no-fault and fault components of the Victorian scheme is so complex that it is obviously not an arbitrary result of a political process.[140] The interplay between the fault and no-fault components has been carefully designed, with an evident compromise between distributive justice and costs concerns.

The way that compensation benefits are calculated under the no-fault scheme is manifestly different from the way that damages for non-economic loss are calculated in the fault-based schemes. It is also different from the way that damages are calculated under the Tasmanian and Northern Territory no-fault schemes (see below). The Transport Accident Commission must determine the degree of impairment of each person who is injured as a result of a transport accident and who appears to the Commission to be, or likely to be, entitled to an impairment benefit. This is done 18 months after the accident or whenever an injury stabilizes, whichever is the later, or in the case of a minor when the person turns 18 if this is more than 18 months after the accident or stabilization of the injury.[141] This is different from common law schemes, where damages are generally assessed at time of trial. Except in the case of psychological injury or hearing loss, which are determined according to special

[140] See Chapter 7.
[141] Transport Accidents Act 1986 *op cit.* Section 46A.

guidelines,[142] determinations of impairment are made in accordance with the American Medical Association's Guides to Permanent Impairment (Fourth Edition).[143] In assessing impairment, the Commission must not have regard to any psychiatric or psychological injury, impairment or symptoms arising as a consequence of, or secondary to, a physical injury,[144] which is similar to the current New South Wales scheme but different to the other Australian schemes.

Where impairment is assessed as being more than 10 percent, the Commission must assess an impairment benefit in respect of the injured person[145] calculated in accordance with a statutory formula.[146] This benefit cannot be paid before the expiration of 18 months after the accident or manifestation of an injury.[147] This means that no benefit is payable if impairment is assessed as being 10 percent or less which is similar to New South Wales. However as the benefit is paid regardless of fault, more victims of automobile accidents will obtain benefits than in New South Wales where drivers must prove fault to access benefits.[148]

The no-fault provisions of the scheme provide benefits for loss of earning capacity, which are also calculated in accordance with statutory formulae. For an earner who suffers total loss of earnings, a weekly benefit of 80% of pre-accident earnings is paid

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[142] *ibid.* Section 46A (3) and (6).
[143] *ibid.*
[144] *ibid.* Section 46B. Professor Sappideen asks whether this is "fair". Whilst it may not be, the writer wishes merely to note the provision without expressing any opinion as to its fairness or otherwise.
[145] *ibid.* Section 47(1).
[146] The formula is $\frac{A-B}{C}$ x $61,940 where A is the degree of impairment, B is 10% and C is 90%.
[147] *ibid.*
[148] In 2002, $534million was paid to 42,584 people in Victoria. In NSW, whilst there are no comparable figures, there were 15,447 claims in the 1998/99 financial year, and total estimated payment for that year was $750.8million.

for the first 18 months after an accident up to a maximum of $621 with a minimum of $304.[149] Thereafter, the payment becomes 80% of pre-accident earning capacity,[150] the maximum weekly payments being $504 and the minimum $270.[151] Where there is partial loss of earnings, an injured person receives 85% of the difference between current weekly earnings and pre-accident weekly earnings (with a maximum of $621 and a minimum of $304 for the first 18 months)[152] and thereafter 85% of the difference between post-accident earning capacity and pre-accident earning capacity with a maximum of $504 and a minimum of $270.[153] Where a person receives an impairment benefit but does not receive a payment for loss of earning capacity, the commission must pay an annuity on an amount also determined in accordance with a formula.[154] After 18 months, adult non-earners who suffer loss of earning capacity are entitled to weekly payments, which are the same as they would have been entitled to as an earner less an amount calculated in accordance with another statutory formula.[155]

This method of calculating economic loss benefits is also unique to the Victorian no-fault scheme and is a much more precise method of determining such benefits than the

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[149] *ibid.* Section 44.

[150] Calculated in accordance with the formula $A \times \frac{B}{C}$ where A is the amount net of tax which the commission determines was the reasonable pre-accident earning capacity, B is the Victorian average weekly earnings at the time of calculation and C is the average weekly earnings figure at the end of the financial year preceding the accident

[151] *ibid.* Section 49.

[152] *ibid.* Section 45.

[153] *ibid.* Section 50.

[154] $\frac{A-B}{C}$ x $144,500 x $\frac{75-D}{50}$ where A is the degree of impairment, B is 10%, C is 90% and D is the age of the person between a minimum of 25 years and a maximum of 75 years.

[155] A x $\frac{B}{C-D}$ where A is the amount to which the person would have been entitled as an earner, B Is the number of years before the person attains pension age during which the person is reasonably likely not to be employed, C is the pension age of the person and D is the age of the person in whole years.

common law method used in, for example, Queensland or the ACT, which allows a wide discretion on the part of the court. There are strict limits on damages in the Victorian scheme, and some of the benefits are reduced over time for those who are less than 50% impaired, passing some costs of the disabled back to the victim or on to the Social Security scheme. This is evidence that concern for costs has been an overriding factor in the formulation of the scheme.

The scheme also provides for payment of the reasonable costs of accident rescue services, medical services, hospital services and ambulance services.[156] However where a person is injured as result of an accident the Commission is not liable to pay the first $389 of the reasonable cost of medical services,[157] which shifts some of the medical costs of accidents onto the federal Medicare system.[158] This is further evidence of the importance of costs concerns to the scheme's framers. The scheme also provides a death benefit to a surviving spouse of an earner who dies as a result of a transport accident,[159] with deductions in accordance with a formula if there is more than one surviving spouse. Provision is also made for dependent children.[160]

The common law section of the scheme has a verbal threshold; the legislation provides that injured persons can sue if the injury arising out of a transport accident is a "serious

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[156] *ibid.* Section 60.
[157] *ibid.* Section 43(1)(a).
[158] For a general discussion of the problems this creates see "Compensable and Non-Compensable People With Disabilities: Equal Needs-Unequal Assistance" Commonwealth Department of Human Services and Health Discussion Paper, August 1995.
[159] Calculated in accordance with the formula $103,210 x $\frac{(125 - A)}{100}$ where A is the age of the earner in whole years (with a maximum of 75 and a minimum of 25).
[160] *ibid.* Section 59.

injury".[161] An injury is deemed to be serious if the degree of impairment is assessed by the commission as being 30% or more,[162] which sets the threshold at a very high level and excludes all but the most serious injuries from common law damages. If the degree of impairment is assessed as being less than 30%, a person may not bring proceedings for the recovery of damages unless the commission is satisfied that the injury is serious and consents in writing to the bringing of proceedings or a court gives leave to bring proceedings.[163] Once the threshold is crossed, damages are calculated under all heads in accordance with common law principles, but with restrictions that are outlined below.

The statutory limits on benefits under the no-fault section of the scheme have already been examined above. They represent a clear departure from the common law method of calculating damages. The only reductions from no-fault benefits are in respect of reduction of compensation for loss of earning capacity for drivers whose blood alcohol level exceeds a prescribed amount (see above).

The common law part of the scheme also contains several modifications to the way that damages are usually calculated at common law. For instance, the legislation provides that the maximum amount that can be awarded for pain and suffering under the fault-based part of the scheme is $332,810 and the minimum is $33,280[164] which is a broad compass when compared with most of the other schemes; however it must be remembered that access to common law is restricted to only the most serious cases.

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[161] *ibid.* Section 93.
[162] *ibid.* Section 93(2) and (3).
[163] *ibid.* Section 93(4) and (6).
[164] *ibid.* Section 93(7)(b).

From any such amount awarded must be deducted any impairment benefit paid by the Transport Accident Commission pursuant to the no-fault provisions of the scheme.[165]

Under the common law scheme the maximum amount that can be awarded for "pecuniary loss" is $748,830 and the minimum amount $33,280.[166] This is the only Australian scheme which sets both a minimum and maximum amount for such awards Any amount awarded must be reduced by the amount of any compensation paid by the Commission for loss of earning capacity.[167] Damages are only available for pecuniary loss suffered 18 months or more after an accident.[168] No damages can be awarded for medical and similar expenses, housekeeping or domestic services either paid or voluntary, which are picked up by the no-fault part of the scheme.[169] This is different from the other common law based schemes which all make allowance for full damages awards under these heads. The damages available are therefore in some cases more limited than those available to successful plaintiffs under 'traditional' schemes such as that in the ACT.

A discount rate of 6% must be applied to any lump sum awarded in respect of damages for future economic loss such as impairment of earning capacity, loss of expectation of financial support or liability to incur future expenditure.[170] This is twice the common

[165] *ibid.* Section 93(11)(b).
[166] *ibid.* Section 93(7)(a).
[167] *ibid.* Section 93(11)(a).
[168] *ibid.* Section 93(10).
[169] *ibid.* Section 93(10)(b) and (c).
[170] *ibid.* Section 93(13).

law rate of 3%[171] and represents a significant costs saving to the scheme where a lump sum damages award for future loss is made.

All of the restrictions under the Victorian scheme are in keeping with the stated object of reducing the cost of transport accidents to the Victorian community. However, it could perhaps better be said that costs of transport accidents are reduced for those who are not the victim of accidents themselves, because in a number of cases the injured will be forced to bear some of their own accident costs.

The Queensland system is a relatively 'pure' common-law fault-based one. Generally, where matters are not settled between the claimant and insurer[172] they proceed to court where liability is determined. The full range of common law damages will be available to the plaintiff who is completely successful in establishing fault. There are deductions from damages for contributory negligence, failure to mitigate loss etc in accordance with common law principles.

Recent amendments to the scheme have limited damages for loss of earnings or of earning capacity to a rate of 3 times average weekly earnings per week.[173] The discount rate was also increased by statute to 5%,[174] damages for loss of consortium and servitium were restricted[175] and damages for gratuitous services have also been

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[171] See *Todorovic v Waller op cit.* -although most states have amended the discount rate for automobile accidents by statute.
[172] The act provides for mandatory settlement negotiations-see Motor Insurance Act 1994 *op cit.* Sections 37(1)(b) and 41(2).
[173] Motor Insurance Act 1994 Section 55A.
[174] *ibid.* Section 55B.
[175] *ibid.* Section 55C.

restricted.[176] There are also restrictions on interest rates payable on damages for past economic loss and recovery of costs where only small awards of damages are made.[177]

Western Australia also has a 'modified' common law based compulsory third party system where liability and damages are determined by the court, with various statutory limitations on damages.

The scheme has a monetary threshold, that is no damages can be awarded for non-economic loss if the damages assessed under this head are $10,500 or less.[178] If the amount assessed is more than $10,500 but less than $33,000 then $10,500 is deducted from the amount of damages that is awarded.[179] If the loss is assessed at more than $33,000 but less than $40,000, the damages amount to be awarded is the excess of the amount so assessed over $10,500 - [amount so assessed - $35,000].[180] The maximum amount that can be awarded is $219,000[181] but only in a "most extreme case".[182] Otherwise the amount to be awarded for non-economic loss is a proportion, determined according to the severity of loss, of the maximum amount.[183] This is similar to the scheme in New South Wales under the Motor Accidents Act 1988 that was in force from 1989 to 1999 and in fact the Western Australian scheme was based on that earlier New South Wales scheme.[184] The theory behind the limiting of damages in this way is

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[176] *ibid.* Section 55E.
[177] *ibid.* Sections 55E, 55F.
[178] Motor Vehicle (Third Party Insurance) Act 1943 *op cit.* Section 3C(4).
[179] *ibid.* Section 3C(5).
[180] *ibid.* Section 3C(6).
[181] *ibid.* Section 3C(1).
[182] *ibid.* Section 3C(5).
[183] *ibid.* Section 3C(2).
[184] See the discussion of the Western Australian scheme in Chapter 10.

to exclude minor injuries from the scheme altogether and to ensure that the worst injuries receive the greatest proportion of damages.

The only restrictions on economic loss under this scheme are limits on awards for damages for the value of gratuitous domestic, nursing and attendant services provided by a member of the same household or family as the injured person.[185] No damages can be awarded if the services would have been provided even if the person had not suffered the bodily injury,[186] or if the value of the services is less than $5,000.[187] Otherwise, if the services are provided for not less than 40 hours per week, the amount of damages is not to exceed the amount calculated on a weekly basis at the rate of the Australian Statistician's estimate of average weekly total earnings of all employees in Western Australia.[188] If the services are provided for less than 40 hours per week, the amount of damages awarded cannot exceed the amount calculated at an hourly rate of one fortieth of the aforementioned weekly rate of average weekly earnings.[189]

In what is a recognizable pattern in almost every Australian fault-based scheme, the modifications to the common law under this scheme are designed to contain costs and render awards more predictable, making it easier to calculate premiums that will cover expected losses.

In South Australia, which also has a modified common law based system, automobile accident compensation claims are also determined by the court applying the common

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[185] *ibid.* Section 3D(1).
[186] *ibid.* Section 3D(2).
[187] *ibid.* Section 3D(6) and (7).
[188] *ibid.* Section 3D(3).

law. There are a number of significant restrictions on damages, examined below, which represent divergences from the traditional common law method of calculating damages.

The scheme has a verbal threshold. Under the scheme, no damages can be awarded for non-economic loss unless the injured person's ability to lead a normal life was significantly impaired by the injury for at least seven days, or alternatively the person incurred medical expenses of a prescribed minimum amount (currently $1400).[190]

If damages are to be awarded for non-economic loss, they must be assessed by assigning to the total non-economic loss a numerical value from 0-60 and then multiplying the number by a prescribed amount,[191] which is another unique way of calculating damages. The maximum damages available for non-economic loss under this scheme are therefore much less than under most of the other schemes, because of the low prescribed maximum. No damages can be awarded for mental or nervous shock unless the person injured was present at the scene of the accident, was the driver or passenger in a vehicle involved in the accident and who was physically injured, or was a parent, spouse or child of a person killed, injured or endangered in the accident.[192]

The act provides that no interest can be awarded on damages for non-economic loss,[193] which is a departure from the common law as applied in, for example, Queensland or the ACT, which allows such interest

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[189] *ibid.* Section 3D(5).
[190] Wrongs Act 1936 *op cit.* Section 35A(1)(a).
[191] *ibid.* Section 35A(1)(b).
[192] *ibid.* Section 35A(1)(c).

The scheme provides that no damages can be awarded for loss of earning capacity in respect of the first week of the incapacity,[194] which is similar to the New South Wales and Victorian schemes and represents a passing of accident costs back to the victim. The maximum amount that can be awarded for future earning capacity is $2 million.[195] A discount rate of 5% must be applied to lump sums for future loss,[196] and no damages can be awarded to compensate for the cost of investment or management of the amount awarded[197] which is another point of departure from the common law.

No damages can be awarded in respect of gratuitous services provided to injured person except those provided by a parent, spouse or child of that person,[198] and any such amount cannot exceed State average weekly earnings. This is a variation on the method of providing for such services in the other schemes, which do not restrict damages to services provided by immediate relatives.

By way of contrast to the tort based schemes, the Tasmanian scheme is an 'add-on no-fault' scheme, which means that people injured in automobile accidents are entitled to no-fault benefits (if they meet the necessary criteria) and have unrestricted access to common law. The no-fault component of the Tasmanian scheme represents a unique method of determining entitlement to and amount of damages in Australian automobile accident law. The benefits available under the scheme are moderate, which is one of the reasons why premiums are relatively low in that state. Overall the benefits are so low

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[193] *ibid.* Section 35A(1)(k).
[194] *ibid.* Section 35(1)(d).
[195] *ibid.* Section 35A(1)(da).
[196] *ibid.* Section 35A(1)(e).
[197] *ibid.* Section 35A(1)(f).
[198] *ibid.* Section 35A(1)(g); Section 35A(2).

and the categories of those who can receive them so restricted that concern for costs was obviously more important than distributive justice concerns to scheme framers.

Under the no-fault provisions of the Tasmanian scheme, the Motor Accidents Insurance Board determines whether a person is to be paid a benefit and the amount of any benefits.[199] The only benefits available under the no-fault provisions are disability benefits and death benefits. There are no benefits payable for non-economic loss as there are under all of the other schemes. A disability allowance is payable to the following groups of persons who are injured in automobile accidents:

(a) An employed person's allowance; or

(b) A self-employed person's allowance; or

(c) A housekeeping allowance.[200]

A person is entitled to an employed person's allowance if they were engaged in an employment or occupation for remuneration or profit or were traveling from their residence to their place of work at the time the accident.[201] The allowance is payable for a maximum of five years after the accident at a rate of 80 percent of average weekly earnings with a minimum of $40 per week for a non-dependent.[202] Any income earned

[199] Motor Accidents (Liabilities and Compensation) Act 1973 *op cit.* Section 28(1).
[200] *ibid.* Part V Reg 1(2).
[201] *ibid.* Reg 2(1).
[202] *ibid.* Regs 2(3), 2(4) and 2(8).

during the period when the person receives an employment allowance will be deducted from the allowance.[203]

The self-employed person's allowance is similar to the employed person's allowance. It is payable to persons who at the time of their injury were carrying on a business for profit and who, as a result of their injuries, engaged another person to carry on the business.[204] It is paid at the rate of 80 percent of any remuneration paid to the person engaged to carry on the business, for a maximum period of five years after the accident.[205]

A housekeeping allowance is payable to injured persons who normally carried out household duties at the time of the accident.[206] The allowance is payable for the period within two years following an accident during which the person is wholly disabled from carrying out normal household duties.[207] It is payable at the rate of 80 percent of the amount paid to a person who carries out household duties normally carried out by the injured person.[208] Where an injured person employed a person to carry out housekeeping duties prior to the accident, they are only entitled to 80 percent of the amount expended on extra household duties[209] carried out by that person as a result of the accident.

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[203] *ibid.* Reg 2(7).
[204] *ibid.* Reg 3(1).
[205] *ibid.* Regs 3(2), 3(3) and 3(4).
[206] *ibid.* Reg 4(1).
[207] *ibid.* Reg 4(2).
[208] *ibid.* Reg 4(3).
[209] *ibid.* Reg 4(4).

Death benefits are payable by way of lump sum; $25,020 for a person with one or more dependants who is not the spouse of a head of the household and who is under 65[210] and $17,020 for such a person who is over 65.[211] Where the spouse of the head of household dies, a lump sum of $3,000 is payable for a person under 65 and $2,000 if the person is over 65.[212]

Under the no-fault provisions of the scheme, medical benefits are payable for all treatment expenses reasonably incurred,[213] including medical, surgical and dental treatment, nursing and rehabilitation expenses, the cost of special appliances and travel to places of treatment.[214] There is an upper limit on such expenses of $200,000 except in those cases where an injured person is in receipt of "daily care"[215] meaning that the person will need treatment, therapy, nursing services, assistance, supervision, rehabilitation services or other care for at least 2 hours per day for an indefinite period[216] which is paid for by the Motor Accident Insurance Board.

This method of determining entitlement to, and quantum of, damages is unique to the Tasmanian scheme. The damages available under the no-fault scheme are much more modest than under the other Australian schemes, particularly the Victorian or Northern Territory no-fault schemes. Entitlement to and amount of benefits is tied to employment status and a major proportion of accident costs, particularly long term costs, are passed

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[210] Motor Accidents (Liabilities and Compensation) Regulations 1980 Division 2 Reg 2(1).
[211] *ibid.* Part IV Reg 1(2).
[212] *ibid.* Reg 2.
[213] *ibid.* Part II Reg 1(1).
[214] *ibid.* Reg 1(3).
[215] *ibid.* Reg 2.
[216] Motor Accidents (Liabilities and Compensation) Act *op cit.* Section 27A(1).

back to the victim or on to the Social Security system because of the 5 year limit on payment of benefits.

No disability allowance is payable for the first seven days following an accident[217] which is a bigger excess of this type than that which applies in any other scheme. In addition, no allowance is payable unless, within 20 days of the accident, the injured person is wholly disabled from engaging in the usual occupation, or ordinary household duties in the case of a housekeeping allowance.[218] A significant proportion of accident costs is thus passed back to the victim or on to other schemes such as the Social Security system as no allowance is made for partial loss of earning capacity.

The damages available at common law in Tasmanian courts for automobile accident injuries are restricted by statute, with a 7 per cent discount rate being applied to economic loss damages, *Griffiths v Kerkemeyer* damages being abolished and limitations being imposed in the aforementioned case of "daily care". Where a court is satisfied that person requires daily care, no amount in respect of that care is included in the damages[219] and the Motor Accident Insurance Board pays medical benefits to the injured person.[220] The act provides that payments of no-fault benefits are to be deducted from common law damages awards,[221] which is similar to the Victorian scheme.

The Northern Territory scheme obviously diverges from the common law in a number of respects, not least of which being that Territorians need not establish fault or go to

[217] Motor Accidents (Liabilities and Compensation) Regulations Reg 5(1).
[218] *ibid.* Reg 5(2).
[219] *ibid.* Section 27A(3).
[220] *ibid.* Section 27A(2).

court in order to obtain benefits. The types of benefits available loosely conform to those at common law, although the method of calculation is different. For those from outside the Territory the common law holds sway in relation to the determination of the entitlement to and amount of damages.

Under the no-fault provisions of the Northern Territory scheme, the right to and the amount of any benefits is determined by the Board of the Territory Insurance Office.[222]

Non Territorians involved in accidents with vehicles not registered in the Territory may sue at common law and their damages are determined by the Court in accordance with the common law.

The scheme provides for lump sum benefits to residents of the Territory who suffer permanent impairment as a result of an accident, who survive the accident for more than three months and who are assessed by the Board as having not less than 5% impairment of the whole person under the American Medical Association Guides to the Evaluation of Permanent Impairment.[223] Benefits are payable on the assessed percentage of the "prescribed amount" (which is 208 times average weekly earnings at the time that the payment is made).[224] Where the percentage impairment is less than 15% damages are calculated in accordance with a table contained in the Act.[225] This is a unique method of calculating non-economic loss payments in Australia and is significantly different from that in the Victorian or Tasmanian no-fault schemes.

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[221] *ibid.* Section 27(1).
[222] Motor Accidents (Compensation) Act 1979 *op cit.* Section 12(1).
[223] *ibid.* Section 17(1); Motor Accidents (Compensation) Rates of Benefit Regulations 1984 Reg 3A (1).
[224] *ibid.* Section 17(1) and (3).

The scheme also provides for lump sum compensation in the case of death resulting from a motor vehicle accident; up to 156 times average weekly earnings.[226] A weekly benefit of 10 percent of average weekly earnings is also payable for each dependent child up to a maximum of 10 children.[227]

Injured adults whose capacity to earn income is reduced as a result of an injury are entitled to compensation for loss of earning capacity.[228] The amount payable is the difference between the amount that the Board determines the person is reasonably capable of earning (taking into account unemployment benefits) and 85% of average weekly earnings in the territory.[229] If a person becomes a full-time patient in a hospital or rehabilitation institution for a period that is likely to exceed six months, the Board can suspend the whole or part of the payments and can make payments to any dependants the person might have.[230] No such benefits are payable until a person obtains the age of 15 years or while a person is a full-time student.[231] For single persons between the ages of 15 and 21 a reduced benefit is payable determined on a sliding scale according to age.[232] This method of calculating economic loss damages is also unique to this scheme. Under the act, a person may "commute" benefits for loss of earning capacity to a lump sum, which is discounted by the Board at a rate of 6%,[233] and any such payment is a full discharge of the obligations of the Territory Insurance Office.

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[225] *ibid.* Section 17(2).
[226] *ibid.* Section 22(1).
[227] *ibid.* Section 23.
[228] *ibid.* Section 13(1).
[229] *ibid.* Section 13(2) and (3).
[230] *ibid.* Section 13(4).
[231] *ibid.* Section 14(1).
[232] *ibid.*
[233] *ibid.* Section 16(2).

The scheme provides that benefits are payable for all treatment expenses reasonably incurred[234] except hospital expenses and attendant care services, which are limited to an amount per hour calculated at 2% of average weekly earnings up to a maximum of 28 hours per week,[235] a further unique feature of the scheme. The scheme also provides benefits for the cost of providing necessary appliances and the reasonable costs of necessary alterations to residences, motor vehicles and articles of personal use. Benefits are also provided for special facilities and equipment necessary for rehabilitation that, apart from the no-fault aspect, is similar to awards available under the common law.[236]

The scheme operating in the Australian Capital Territory is the only 'pure' tort scheme remaining as the primary automobile accident compensation system in any Australian jurisdiction. Actions for damages in respect of injury caused by or arising out of the use of automobiles in the ACT are determined solely by the courts, applying the common law.

Under the scheme, hospital medical and surgical costs are payable directly by the third party insurer to the institution or practitioner involved, up to a limit of $100 per person treated,[237] but there are no other statutory limitations on damages awards.

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[234] *ibid.* Section 18(1).
[235] *ibid.* Sections 18(2A), 18A.
[236] *ibid.* Section 19.
[237] Motor Traffic Act 1936 (ACT) *op cit.* Sections 75, 76.

Objects And Preambles

Some of the schemes have express objects, which allow an insight into the purposes of the framers of the schemes and the relative importance of different values. Others have preambles or long titles, which provide limited evidence of such purposes and values.

In the most populous states of New South Wales, Victoria and Queensland the recurring themes in the objects are control of premium costs, speedy determination of compensation claims and the promotion of early and effective rehabilitation and treatment. These objects de-emphasize monetary compensation, which has been one of the cornerstones of traditional tort based systems.[238] This therefore represents a significant movement away from traditional tort system values.

Nowhere in any of the objects is there any mention of deterrence or individual determination of claims, two further cornerstones of classical tort. Instead there is an emphasis on economy and predictability, which is incomprehensible in terms of tort theory but perfectly understandable in the context of good insurance practice. To a great extent, the objects highlight the nature of the schemes as discrete insurance systems, rather than the simple adjuncts to the tort system designed to ensure that claims were not defeated by impecuniosity, such as the earliest compulsory third party schemes undoubtedly were.

The New South Wales scheme has the following express objects:

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[238] Miller S. 2000, "Transaction Cost and Government Engineering in Motor Accident Insurance Scheme Design: A New South Wales Experiment" 12 *Insurance Law Journal* 1.

(a) To encourage early and appropriate treatment and rehabilitation to achieve optimum recovery from injuries sustained in motor accidents, and to provide appropriately for the future needs of those with ongoing disabilities;

(b) To provide compensation for compensable injuries sustained in motor accidents, and to encourage the early resolution of compensation claims;

(c) To promote competition in the setting of premiums for third-party policies, and to provide the Motor Accidents Authority with a potential role to ensure against market failure;

(d) To keep premiums affordable, recognizing that third-party bodily insurance is compulsory for all owners of motor vehicles registered in New South Wales;

(e) To keep premiums affordable, in particular, by limiting the amount of compensation payable for non-economic loss in cases of relatively minor injuries, while preserving principles of full compensation for those with severe injuries involving ongoing impairment and disabilities;

(f) To ensure that insurers charge premiums that fully fund their anticipated liability;

(g) To deter fraud in connection with compulsory third-party insurance.[239]

The majority of the objects deal with premiums. This is evidence that premium costs are very important politically in New South Wales and this is reflected in the parliamentary debates on the introduction of the scheme.[240] The emphasis is on early rehabilitation and speedy resolution of claims.

There is no object that deals with deterrence, or individual determination of entitlements, although object (b) reflects the fault-based nature of the scheme with its emphasis on 'compensable' injuries. The last object, which relates to the deterrence of fraud, is interesting because it has long been argued that the individual determination of entitlement to compensation in a tort based system is best suited to the deterrence of fraud. However by de-emphasizing the adversarial nature of proceedings and providing for assessment of impairment by medical panels rather than partisan experts, the scheme has removed two of the strategic linchpins by which tort systems allegedly controlled fraud.

The first object is consistent with the values of distributive justice but it is questionable how well the scheme can meet this object because the necessity to establish fault automatically excludes a significant percentage of those injured in automobile accidents from 'early and appropriate treatment and rehabilitation'. It is also difficult to understand how the scheme could provide 'full' compensation to those with serious injuries given the need to establish fault and when there are so many limitations on

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[239] Motor Accidents Compensation Act 1999 (NSW) *op cit.* Section 5(1).
[240] See Chapter 10.

damages. It is therefore predictable that in order to meet these objects, a no-fault scheme that substantially covers the most severe injuries will be introduced in the future.[241]

The objects of the Victorian scheme are as follows:

(a) To reduce the cost to the Victorian community of compensation for transport accidents;

(b) To provide, in the most socially and economically appropriate manner, suitable and just compensation in respect of persons injured or who die as a result of transport accidents;

(c) To determine claims for compensation speedily and efficiently;

(d) To reduce the incidence of transport accidents;

(e) To provide suitable systems for the effective rehabilitation of persons injured as a result of transport accidents.[242]

The emphasis in these objects is on costs, efficiency and effective rehabilitation, as could be expected from a threshold no-fault scheme. Interestingly the objects are similar to those in the New South Wales scheme, which for the time being retains fault as the

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[241] Such a move has been mooted in the recent past-see Parliament of NSW Legislative Council Standing Committee on Law and Justice *Report on the Inquiry Into the Motor Accidents Scheme Interim Report* December 1996 Recommendation 35 p143 and the discussion immediately preceding.
[242] Transport Accidents Act 1986 *op cit.* Section 8.

basis of determination of entitlement to compensation. Effective rehabilitation and treatment mean less emphasis on monetary compensation, which in turn may lead to less reliance on the tort system to provide recompense.

The Victorian objects speak of 'suitable' and 'just' compensation; what this means is not entirely clear but presumably refers to the interplay between the fault and no-fault components of the scheme and the fact that most injured people receive some compensation under the scheme and the most seriously injured can also sue drivers considered to be at fault. If there is a further move in New South Wales away from tort, it is possible that Victoria will abandon its tort remnant in order to stay in step and to more fully meet this object.

The specific objects of the Queensland scheme are as follows:

(a) To continue and improve the system of compulsory third party motor vehicle insurance, and the scheme of statutory insurance for uninsured and unidentified vehicles, operating in Queensland;

(aa) to establish a basis for assessing the affordability of insurance under the statutory insurance scheme and to keep the costs of insurance at a level the average motorist can afford:

(b) To provide for the licensing and supervision of insurers providing insurance under policies of compulsory third-party motor vehicle insurance;

(c) To encourage the speedy resolution of personal injury claims resulting from motor vehicle accidents;

(d) To promote and encourage, as far as practicable, the rehabilitation of claimants who sustained personal injury because of motor vehicle accidents;

(e) To establish and keep a register of motor vehicle accident claims to help the administration of the statutory insurance scheme and the detection of fraud;

(f) To promote measures directed at eliminating or reducing causes of motor vehicle accidents and mitigating their results.[243]

Again the pattern is displayed in these objects of concern for costs, encouragement of speedy claim resolution and promotion of rehabilitation. These objects are all at variance with tort's emphasis on minute dissection of individual claims. It could be anticipated that if there is a costs crisis in this scheme sufficient to trigger a review, a further move away from tort such as has occurred in New South Wales might be promoted.

The relevant legislation in Western Australia, unlike that of the States mentioned above, does not contain express objects. The long title of the act that follows, however, gives limited guidance as to its legislative purpose:

"An Act to require owners of motor vehicles whilst on a road, to be insured against liability in respect of deaths or bodily injuries directly caused by, or by the driving of, such motor vehicles, whether caused on or off a road, to make certain provisions in relation to such insurance and in relation to the awarding of damages in respect of such bodily injuries, and for other purposes."[244]

The long title emphasizes the compulsory third party aspect of the scheme and the fact that it is based on fault and provides insurance against liability which vehicle owners are required to purchase. However, as the scheme is based on a former New South Wales scheme, any costs crisis may trigger calls for a further move away from tort to bring Western Australia into line with the more populous states.

The South Australian scheme, comprising as it does two pieces of legislation, has no specific objects in either Act neither does either Act contain a preamble or long title which sets out the purposes of the legislation and which would assist in gauging the intentions of the legislature. However, as this scheme also contains limits and restrictions that distinguish it from traditional tort, it too may move further along the continuum in the event of a significant increase in scheme costs.

The objects of the Tasmanian scheme are as follows:

(a) To provide for the payment of compensation in respect of personal injury resulting from a motor accident;

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[243] Motor Accidents Insurance Act 1946 *op cit.* Section 3.
[244] Motor Vehicle (Third Party Insurance) Act 1943 Long Title.

(b) To allow the contribution of funds to any or all of the following programs:

(i) Programs designed to reduce the incidence of motor accidents in Tasmania.

(ii) Programs designed to enable better and more effective care and treatment of persons who suffer personal injury is a result of a motor accident.[245]

These objects are much simpler than those in the New South Wales and Victorian schemes; however the emphasis on care and treatment is in keeping with the movement in the more populous states. There is no mention of costs at all which is evidence that they were not a major concern in the framing of the scheme, and the premium costs in Tasmania are much lower than in most of the other states.[246] The object of contributing funds to programs designed to reduce motor accidents represents recognition of the potential benefits of publicly funded road safety programs and there is a similar object in the Victorian scheme, but notably not in any of the tort-based schemes.

The Northern Territory scheme has no specific objects. The preamble to the legislation is as follows:

"an Act to establish a no-fault compensation scheme in respect of deaths or injury in or as a result of motor vehicle accidents, to prescribe the rates of benefits to be paid under

[245] Motor Accidents (Liabilities and Compensation) Act 1973 *op cit.* Section 3A.
[246] Tasmania's premium was the second lowest in Australia in September 2000-per MAIB Press Release of 27 September 2000 at www.maib.tas.gov.au

the scheme, to abolish certain common law rights in relation to motor vehicle accidents, and for related purposes."[247]

This preamble clearly shows the intention of the framers of the scheme to introduce a no-fault system; however gives little guidance as to the relative importance of various values to the framers of the scheme. However as the scheme already provides for speedy resolution of claims, emphasis on rehabilitation and control of costs, and because tort actions have been abolished, there was no need to remind courts of the legislation's purposes.

The ACT legislation does not contain any express objects or preamble setting out the purposes of the Act. This is not surprising as the scheme is a relatively unmodified common law one that has changed little since its inception. There has thus been no need to flag for the courts or others the legislative intent behind the scheme, as it is presumably fully understood. It remains to be seen whether this scheme will continue to exist in the face of pressure for change from the much more populous surrounding state of New South Wales, which encloses this territory.

Conclusion

The description of the Australian schemes under the various headings above shows that there is a wide diversity between them as was predicted in previous chapters. This diversity is not just in liability theory or even in the manner in which damages are calculated. There is diversity in scheme coverage, with the New South Wales scheme

[247] Motor Accidents (Compensation) Act 1979 *op cit.* Long Title.

covering liability in the 'use or operation' of a registered vehicle whether on or off the road, the Victorian scheme covering automobile, train and tram accidents, the Queensland scheme covering personal injury caused 'by, through or in connection with' a motor vehicle, the Western Australia scheme covering liability for death or personal injury 'directly caused by, or by the driving of', a motor vehicle, the South Australian scheme covering liability for injury 'caused by or arising out of the use of' a motor vehicle and also liability for train accidents, the Tasmanian no-fault scheme covering personal injury 'caused by' a motor vehicle, the Northern Territory no-fault scheme covering injuries to Territorians occurring 'in or from territory motor vehicles' and the ACT scheme having coverage similar to that under the South Australian scheme.

The Acts also vary widely as to what is not covered, with the Queensland Act for example specifically excluding injuries caused by various types of agricultural and industrial machinery. Some states provide for excesses to be payable in certain circumstances. In most states insurers have the right to recover against drunk drivers who cause injury to others. In the no-fault schemes such drivers are also excluded from benefits to some degree on the basis of their blood alcohol readings whereas in most of the fault-based schemes they are only precluded from benefits to the extent that fault can be established against them. Time limits also vary widely across the jurisdictions in relation to how long a claimant has to make a claim or to bring proceedings before a court.

There is considerable variation between the schemes in how benefits are calculated. The no-fault schemes have set methods of calculating damages (which are often very

complex, as in the case of Victoria). All the fault schemes except for the ACT impose restrictions on non-economic and economic loss damages. Several of the Acts have thresholds below which no damages are awarded, with all of these thresholds being different, and the outcome for similar injuries in different states can therefore be significantly different.[248] This variation in the way that damages are calculated is strong evidence that there are differences across states in relation to the balancing of distributive justice and scheme costs.

The variation between objects and preamble is quite interesting, with the framers of the New South Wales, Victorian and Queensland schemes having similar objectives but endeavouring to achieve them in different ways. The objects in these states, which stress rehabilitation, the speedy resolution of claims and containment of costs, represent a de-emphasizing of the traditional tort position of full monetary compensation. If the preambles of the Western Australian and Northern Territory schemes are any guide, the framers of those schemes approached the question of automobile accident compensation from entirely different directions with the emphasis in Western Australia on the compulsory third party nature of the scheme and in the Northern Territory on abolishing common law rights and regulating benefits; however change might be expected in Western Australia if there is increasing pressure on costs in the scheme.

In conclusion, there is much diversity between the schemes, not just in liability theory and methods of calculation of damages but also in areas such as coverage, exclusions, time limits and rights of recovery. The position of injured persons, and drivers involved

[248] For an analysis of these differences in treatment as at the end of the 1980's see Malkin I., "Unequal Treatment of Personal Injuries" (1990) 17(4) *Melbourne University Law Review* p685.

in automobile accidents, can be greatly different depending on the location of an automobile accident. The extent of diversity between states in these many areas suggests that there have been different mixes of values over time across the jurisdictions.

There are also differences in objectives between similar schemes, and similarities in objects between strikingly different schemes. In fact there are some marked similarities between the schemes despite the diversity. The various schemes could be seen as different loci along a continuum where the starting point is represented by traditional tort based compensation and 'pure' no-fault is at the other extreme. This accords with the viewpoint expressed in previous chapters that the major problems associated with traditional tort are likely to lead to pressure for change, and the different degrees of movement along the continuum could be explained by uncertainty resulting from the vulnerability to criticism of the various alternatives to tort, coupled with the fact that consideration of change has occurred at different times in individual jurisdictions. This suggests a dynamic political process occurring over time with values shifting at different rates across jurisdictions.

However, there is still no precise explanation as to why some states have decided not to 'tip over the line' and abolish fault-based liability, whereas others have substantially or completely abandoned it. The next chapter outlines the theory developed by Chapman and Trebilcock to explain why there is such policy diversity in automobile accident compensation in federations such as Australia.

CHAPTER 7

CHAPMAN AND TREBILCOCK'S THEORY FOR THE DIVERSITY OF AUTOMOBILE ACCIDENT COMPENSATION SYSTEMS

Introduction

The last Chapter demonstrated the extent of the diversity between automobile accident compensation systems across the Australian states and territories.

It was argued in the earlier part of this work[1] that this diversity could be expected because of the considerable problems associated with tort as a system of compensation, allied with the vulnerability to criticism of the part of any of the replacement systems to the extent that they may not be clearly preferred alternatives. The last chapter showed that most schemes have shifted away from the traditional tort compensation model, but in varying degrees, which supports this argument.

However, rather than accepting this diversity as a result of the democratic process, Chapman and Trebilcock see it as an example of unstable policy formation caused by the choice between multiple normative criteria. They say that "In many areas of legal or public policy-making, social choices concerning the optimal legal or policy arrangements must confront the problem of multiple normative criteria. Typically, these criteria are legitimate and coherent in their own right and command significant adherence, although not necessarily similar rankings, from major segments of the

population. However, each of these criteria will often lead to widely divergent rankings of alternative policy options".[2] In their view, the "...pattern of substantial interjurisdictional convergence with respect to workplace injuries, medical malpractice, and product-related injuries, and substantial interjurisdictional divergence with respect to auto-related injuries, creates a major puzzle".[3] Using automobile accident compensation as an "extended case study", they develop a unique theory to explain why a federation such as Australia experiences diversity between automobile accident compensation systems whilst exhibiting relative homogeneity in other forms of compensation scheme such as Workers' Compensation and Medical Malpractice.[4] This theory, which is explained in more detail below, is that the diversity most likely stems from the operation of majority voting cycles, leading to sequence dependence and arbitrary outcomes within decision-making bodies. Chapman and Trebilcock suggest that "...whereas in these other accident contexts [of medical malpractice, product-related and work-related injuries] either the compensation proponent's value ranking...or the individual responsibility proponent's value ranking...would have little normative salience, in the automobile accident context both of these value rankings continue to be normatively important and easy to rationalize given the empirical evidence on how automobile accidents are caused. Thus, in a way that is not possible in these other accident contexts, it would always be possible for automobile accident law, given the additional presence of concern over premium costs, to cycle over tort law and no-fault policy options, or at least to settle somewhat arbitrarily on one of these options. This final settling point would depend only on the sequence in which the options were

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[1] See Chapter 6.
[2] Chapman and Trebilcock *op cit.* p799.
[3] *ibid.* p804.
[4] That there actually is such homogeneity is disputed-this is dealt with in depth in the next chapter.

considered politically".[5] To date, theirs is the only major theory that attempts to explain the existence of the diversity between jurisdictions in a federation in the area of automobile accident compensation by reference to a specific anomaly of the voting process and sequence dependent outcomes rather than by reference to phenomena such as 'political forces'.[6]

This theory is based on a precise chain of reasoning, an understanding of which is central to the appreciation of the latter part of this work. This reasoning has two distinct steps; firstly an examination and rejection of explanations for the diversity based on the existence of differences in the facts, appreciation of facts or differences in values between similar jurisdictions and secondly the development of an explanation based on the existence of majority voting cycles and sequence dependence leading to arbitrary outcomes. The rest of this Chapter sets out to summarize the reasoning behind Chapman and Trebilcock's theory as it applies to automobile accident compensation in some detail, so that the critical analysis of their theory in the following Chapters is rendered comprehensible.

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[5] Chapman and Trebilcock *op cit.* p849-50.

[6] e.g. Harrington S.E., 1994, "State Decisions to Limit Tort Liability: An Empirical Analysis of No-Fault Automobile Insurance" 61 *Journal of Risk Management* p276. Harrington's theory is that whether a state opts for a fault-based or no-fault system is determined by the relative influence of lawyers and the medical profession. If the medical profession is the more numerous and influential then the particular state is more likely to have a no-fault system, whereas if lawyers are more numerous and influential then a fault based system can be expected. Professor Sappideen has recommended a reference here to the Civil Liability Act 2002 (NSW). This work was completed before that Act was passed. The history of this new legislation is beyond the scope of this work.

The First Step: Rejecting Alternate Explanations for the Puzzle

Chapman and Trebilcock's starting premise is that "...one might reasonably suppose that if a majority of citizens in different jurisdictions share similar values, or similar distributions of values, with respect to a given policy issue and apply these values to a similar set of facts, they are likely to arrive at similar policy choices".[7] Therefore "...in order to explain different policy choices across different jurisdictions, such as we observe in auto accident compensation regimes, it seems likely that one or more of the following hypothesized scenarios would need to obtain".[8]

The hypothesized scenarios that Chapman and Trebilcock posit might explain the diversity in automobile accident policy choices across jurisdictions are as follows:

(i) The underlying facts relating to the pathology of accidents, or the need to compensate for their consequences, differ from jurisdiction to jurisdiction, although citizens espouse similar values, or a similar distribution of values, from one jurisdiction to the next.

(ii) While the underlying facts regarding the pathology of accidents or the underlying need for compensation do not objectively differ from one jurisdiction to the next, the citizens in different jurisdictions entertain a different appreciation of the facts, even though they bring to bear a similar set of values on them.

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[7] Chapman and Trebilcock *op cit.* p804.
[8] *ibid.*

(iii) The same facts and the same appreciation of the facts may obtain from one jurisdiction to the next, but citizens have a different set of values, or a different distribution of values from one jurisdiction to the next.[9]

However, they reject each of these hypotheses as implausible;[10] the first because "...it seems quite implausible that in federal systems like the U.S., Canada and Australia, either the underlying pathology of accidents or the underlying need for compensation for their consequences will vary significantly across what are in most other respects often very similar economies and communities".[11]

The second hypothesis is rejected on the basis that "...it seems difficult to believe that substantial differences in the appreciation of similar underlying facts are likely to persist across jurisdictions for extended periods of time. The experience with near universal adoption of administrative compensation schemes for workplace injuries, and the preservation of the tort system for medical malpractice and product-related defects, seem to belie the persistence of radically different appreciations of similar facts in the accident compensation area".[12]

The third hypothesis is rejected because Chapman and Trebilcock see it as implausible that citizens in different jurisdictions entertain different sets of values or different distributions of values specifically with respect to auto accidents,[13] given that in federations such as Australia social, economic and demographic characteristics do not

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[9] *ibid.* pp804-5.
[10] *ibid.* p805.
[11] *ibid.*
[12] *ibid.*

typically vary sharply across the jurisdictions that have made diverging policy choices.[14] They argue that "The close convergence of policy outcomes with respect to workplace injuries, medical malpractice and product related injuries across many different jurisdictions would seem to be inconsistent with any suggestion that there are sharply diverging values on these matters from one jurisdiction to the next".[15]

The rejection of these hypotheses forms the first step in Chapman and Trebilcock's explanation for the diversity because it is pivotal to the outcome of their case study. If their rejection of any of the alternative hypotheses is not correct, or if it can be shown empirically that one or more of the hypotheses might be valid, then the explanation of their 'puzzle' based on majority voting cycles and sequence dependence is not logically necessary.

The Second Step: Developing an Alternative Explanation for the Diversity

After rejecting the previously mentioned three hypotheses for the divergence in auto accident compensation systems Chapman and Trebilcock attempt to break down and examine the components that are involved in the formation of the various policy choices in an endeavour to better understand their puzzle.[16] They then develop their own theory, based on the existence of majority voting cycles, to explain the existence of the diversity. Firstly, they discuss what values are implicated in the choice amongst alternative automobile accident compensation schemes. Next, they delineate the basic

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[13] *ibid.*
[14] *ibid.*
[15] *ibid.*
[16] *ibid.*

automobile accident compensation policy options available and select a model of each for comparative purposes. Thirdly, they discuss "...what facts seem reasonably uncontroversially established with respect to the central characteristics of alternative policy options, and upon which facts citizens presumably bring the identified values to bear in making their choice among these options".[17] Then they attempt to rank the various policy options with respect to each of these values in light of the facts about each option and attempt to show why attempts at reconciling these rankings in collective choice processes are likely to lead to arbitrary and unstable policy choices as a result of a majority voting cycle. They conclude with a description of how redesigning collective choice processes may be warranted if non-arbitrary and stable policy choices are to be achieved.[18] The next section outlines Chapman and Trebilcock's examination of the three values across which they believe decision makers will want to optimize when attempting to choose between automobile accident compensation systems.

The Values

Chapman and Trebilcock examine what values they think are implicated in the choice amongst alternative auto accident compensation schemes.[19] They identify three major classes of substantive values, set out below, that emerge from the academic literature discussing tort law.[20] They argue that "...although those values have often been presented as competing normative theories of tort law, many individual citizens

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[17] *ibid.* p805-6.
[18] *ibid.* p806. The consideration in this work of Chapman and Trebilcock's conclusions in relation to redesigning collective choice processes is minimal, given the findings of this study outlined in Chapter 10.
[19] *ibid.*
[20] *ibid.*

probably assign some positive weight to all three values and thus, in choosing an optimal auto compensation scheme, may want to optimize across all three values simultaneously".[21] The three values they describe are as follows:

Individual Responsibility - including both the deterrent objectives stressed by those scholars who evaluate legal doctrine in terms of incentives, and corrective justice, which deals with moral obligation and the correction of past injustices.[22]

Distributive Justice - proponents of this value emphasize the needs created by motor vehicle accidents, which are seen as an inevitable by-product of inherently dangerous activities or momentary acts of inadvertence to which all are prone. They emphasize horizontal equity, the similar treatment of all persons similarly financially impacted by accidents and evaluate the tort system and its alternatives against their capacity to spread risk and provide meaningful compensation or low-cost insurance expeditiously to victims so as to minimize the financial impact on their lives and to facilitate rapid and effective rehabilitation.[23]

Administrative and Premium Costs - in contrast to the distributive justice value, proponents of this value support the minimization of private and social transaction costs, and also premium costs, associated with automobile accident insurance which is typically compulsory. Chapman and Trebilcock argue that proponents of premium cost reductions can be viewed as supporting the value of optimal insurance which is likely to (a) exclude coverage for non-economic losses on the grounds that insureds are not

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[21] *ibid.*
[22] *ibid.* pp806-7.

likely voluntarily to pay for such coverage themselves;[24] (b) to exclude coverage for small economic losses particularly where moral hazard problems may be significant; and (c) to tailor premiums for economic losses to the income profile of individual insureds to avoid 'regressive cross-subsidization' (i.e. well off persons paying the same premiums as the poor but obtaining greater benefits if injured because of damages awards replacing their higher incomes).[25]

The next section briefly outlines the different models of scheme which Chapman and Trebilcock use in their analysis of the way in which the interplay of values is likely to affect decisions between different automobile accident compensation schemes.

The Choices

The next step in Chapman and Trebilcock's examination of the components of their puzzle is a review of the empirical evidence regarding tort and alternatives to the traditional tort system in terms of the previously identified three values. They characterize these alternatives as either supplementing the traditional system (add-on no-fault schemes which provide no-fault benefits as well as retaining the right to sue in tort) or replacing it (threshold, elective and pure no-fault).[26]

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[23] *ibid.* pp807-8.
[24] *ibid.* p808 citing Priest G. 1987, "The Current Insurance Crisis and Modern Tort Law", 95 *Yale Law Journal* 1421 at pp1546-7.
[25] *ibid.* p809.
[26] *ibid.* Threshold no-fault schemes provide no-fault benefits plus a limited right to sue, usually determined by monetary (eg a certain level of expenses or income loss) or verbal (eg 'serious injury') thresholds. Elective no-fault systems allow drivers to elect to be in either the tort or no-fault systems-for a full explanation of how the latter systems work see O'Connell J., and Joost R., "Giving Motorists a Choice Between Fault and No-Fault Insurance" *op cit* p61 and Chapter 5 of this work.

The authors select a 'strong form' of each of the alternatives as a model to test against the three values.[27] They say that "The choice of these four alternative models to the tort system is appealing as an analytical matter, first because the benefit packages are so similar, while other characteristics differ in important respects, which facilitates empirical comparison of the likely implications of the choice of one model relative to another, and second, because the benefit packages are also very similar to those widely in place in workers' compensation regimes in the U.S. and in Canada, which facilitates a comparison of the value choices entailed".[28]

The next section examines the implications for the proponents of the three values that Chapman and Trebilcock believe the empirical evidence is likely to have relating to automobile accident compensation. It also examines the way that the authors expect those proponents to rank the schemes in light of that evidence.

The Facts and the Likely Rankings

The authors briefly review what the empirical evidence indicates may be the likely implications of the adoption of one regime relative to another[29] and review the empirical evidence relating to how the different schemes perform as against the three basic values. The authors use the results of this review of the evidence as the basis for ranking the traditional tort system and the four systemic no-fault alternatives against the three basic values in order to demonstrate their point that there is unlikely to be a clear

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[27] *ibid.*
[28] *ibid.* p811.
[29] *ibid.* 812.

majority position across proponents of the different values.[30] They come to the following conclusions about how the different schemes perform against each of the three values:

Individual Responsibility

With respect to the deterrent effects of the tort system the authors briefly examine the studies in the United States and Canada relating to the safety effects of moving from a third-party tort liability insurance system to some form of first party no-fault compensation system.[31] They conclude that the US evidence is "hopelessly ambiguous"[32] but that Canadian and Australian evidence suggests that a move from a tort to a no-fault-based system leads to an increase in fatal accidents attributable to incentive effects of reduced costs and increased insurance levels, as well as reduced driver care.[33]

With respect to the corrective justice strand of the individual responsibility value, the authors say that in relation to automobile accident compensation "...the tort system...appears to perform relatively well, at least compared with other areas of tort such as medical malpractice".[34] This is because a higher proportion of auto accident victims with valid claims actually bring suit and that the tort system fares relatively well in that regard.[35] The authors consider that the proportion of uninsured and under

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[30] *ibid.*
[31] *ibid.*
[32] *ibid.*
[33] *ibid.* p813. This evidence is examined in more detail in the next chapter.
[34] *ibid.*
[35] *ibid.*

insured motorists (which is not a factor in Australia because of the existence of nominal defendant schemes and compulsory policy limits in relevant states) would "...significantly influence the likelihood that victims with valid claims will in fact be fully compensated".[36] They go on to note, however, that "...the over-compensation of small claims and under-compensation of large claims...are at variance with the corrective justice ideal".[37]

By way of contrast with add-on no-fault schemes, they argue that "...Threshold, pure and elective no-fault schemes systematically shield many or all negligent drivers from costly consequences their actions have for others";[38] however, add-on schemes, while preserving the right to sue in all cases, encourage drivers to settle small claims on a no-fault basis so that despite the apparent exposure to liability, "...in the absence of a right of subrogation being exercised by the insurer, negligent drivers are absolved from the consequences of their actions".[39] Taking all these arguments into account they rank the schemes under this value as follows:

1. Tort
2. Add-on no-fault
3. Threshold no-fault
4. Elective no-fault
5. Pure no-fault.[40]

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[36] *ibid.*
[37] *ibid.*
[38] *ibid.* p814.
[39] *ibid.*

The authors' ranking is based on considerations of deterrence and corrective justice. From a deterrence point of view they argue that "As one progresses through the various no-fault options more and more cases are taken out of the tort system and fewer and fewer wrongdoers are forced to bear the costs they inflict on others through their wrongdoing, thus attenuating incentives to adopt optimal levels of care towards others".[41] Whilst they recognize that risk rating for first party no-fault premiums can internalise many of the self inflicted costs of careless driving, they say that "...costs inflicted on others will not be reflected in these premiums and incentives to take care to avoid injury to oneself will be more muted under no-fault than tort where a large proportion of self inflicted costs of careless driving are borne by the victim".[42]

The authors rank the options from a corrective justice perspective along similar lines as the ranking that arises out of their consideration of deterrence. They reason that tort allocates "...[accident] costs to wrongdoers when they inflict injury on others and denies recovery to victims whose own conduct is faulty",[43] and thus tort "most fully comports with corrective justice rationales".[44] Add-on no-fault "...preserves a substantial component of tort so that the same argument applies *mutatis mutandis*",[45] but some claims may be redirected to the no-fault component of the scheme. If there is abolition of the collateral benefits rule[46] then some accident costs may be borne by first

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[40] *ibid.*
[41] *ibid.* p823.
[42] *ibid.*
[43] *ibid.* This ignores the existence of Compulsory Third Party Insurance, which shields wrongdoers from the consequences of their actions, especially where there is a flat premium structure-see Chapter 3 of this work which deals, *inter alia*, with the effects of such insurance on the tort system.
[44] *ibid.*
[45] *ibid.*
[46] A rule to the effect that a negligent defendant should not have the benefit of the 'thrift and foresight' of the plaintiff or benevolence on the part of third parties and therefore there is no setting off of collateral

party or social insurance and thus "...will be neither fully internalised to faulty drivers nor even to driving activities at large".[47]

The threshold no-fault option is ranked third under the individual responsibility value by the authors because " ...it is even less sensitive to corrective justice considerations, by removing a higher percentage of cases from the tort system and thus shielding negligent drivers from the consequences of their wrongdoing".[48] There is also externalisation of "...a significant percentage of traffic accident costs beyond driving activity altogether through abolition of the collateral benefits rule".[49]

Elective (or 'choice') no-fault is ranked fourth because in the model chosen by the authors "...negligent drivers, whichever pool they elect into, will not be liable to third parties",[50] "...extensive risk rating of both no-fault and tort policies will internalise a substantial fraction of accident costs to high-risk drivers",[51] abolition of the collateral benefits rule "...will externalise some traffic accident costs to sources unrelated to driving activities"[52] and the right to contract out of fault and individual responsibility is "problematic from a corrective justice perspective".[53]

Pure no-fault is ranked last because "...it abandons any attempt to internalise costs to wrongdoers on an individualized basis and, depending on the risk rating regime for

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benefits accruing to the plaintiff-for a more thorough explanation see eg Trindade F. and Cane P. *The Law of Torts in Australia, op cit.* p400ff.

[47] Chapman and Trebilcock *op cit.* p823.
[48] *ibid.*
[49] *ibid.*
[50] *ibid.*
[51] *ibid.* p823-4.
[52] *ibid.* p824.
[53] *ibid.*

first-party no-fault premiums that is adopted, may heavily attenuate internalisation of accident costs to wrongdoers or riskier classes of drivers through premium structures" and may lead to "...externalisation of traffic accident costs beyond driving activity altogether" if pure no-fault benefits were made secondary to other non-traffic related forms of first-party or social insurance.[54]

Distributive Justice

Chapman and Trebilcock argue that "This value is sensitive to three factors: the percentage of all traffic victims covered for personal injuries by the compensation regime, the adequacy of coverage, and the timeliness of payments".[55] The authors note that the evidence from the United States and Canada over a significant period shows that somewhat less than half of the persons injured in traffic accidents receive any compensation from the tort system.[56] In the United States there is the added factor of uninsured motorists.[57] Evidence also shows that awards are regularly reduced because of comparative negligence rules.[58]

Evidence also shows that tort suits are dominated by relatively minor injuries, which the authors argue is consistent with the tort principle of full recovery for all losses.[59]

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[54] *ibid.*
[55] *ibid.*
[56] *ibid.* In Australia the evidence suggests that the figure is between one third and forty percent-see eg Amery C., et al 1998, "CTP Utilisation Comparison of Australian Scheme Experience" *Accident Compensation Conference* and also Wright et al *op cit.* p17.
[57] *ibid.* pp814-5.
[58] *ibid.* p815-Comparative negligence is termed 'contributory negligence' in Australia.
[59] *ibid.*

However, tort under-compensates victims with large economic losses according to U.S. data.[60]

The authors also note the evidence showing that tort promotes wasteful over-insurance and double recovery where the collateral source rule is retained. This rule provides that the existence of, for example, income insurance is ignored when calculating damages, which can lead to a 'windfall' for a prudently insured victim.[61] Data shows recovery from more than one source in a significant percentage of cases in the United States.[62]

The tort system is also prone to delay[63] whereas the evidence shows that first party plans display a marked ability to initiate a stream of payments to accident victims much more quickly than the third-party tort liability insurance system.[64] They therefore argue for the following likely rankings under this heading:

1. Add-on no-fault
2. Threshold no-fault
3. Pure no-fault
4. Elective no-fault
5. Tort.[65]

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[60] *ibid.* This accords with evidence in Australia eg see Freeth S. 1993, *Quadriplegia: A Long Experiment With Yourself*, Paraquad, Sydney pp44-8.
[61] See Trindade and Cane, *op cit.* p400ff.
[62] Chapman and Trebilcock *op cit.* p816.
[63] *ibid.* p817.
[64] *ibid.*
[65] *ibid.* p824.

The authors rank add-on no-fault first, because most traffic accident victims are covered.[66] They say that "By preserving tort claims in all cases, the right to sue wrongdoers for residual economic losses is preserved for that subset of traffic victims with valid negligence claims".[67] Threshold no-fault is ranked second "...because most victims are covered and a small subset retains the right to sue for residual economic losses and for non-pecuniary losses, as long as the severity of their injuries exceeds the threshold and they otherwise have valid negligence claims".[68]

'Pure' no-fault is ranked third because, whilst most victims are covered, claims for non-economic loss are typically tightly constrained and residual economic losses are not covered.[69] Elective no-fault is ranked fourth, because in the model chosen an assumed adverse selection risk (which means that most of the bad drivers will choose the no-fault system because it will probably be cheaper and provide them with some cover if they have an accident) will cause many drivers to leave the tort pool for the no-fault pool, so that most, but not all, victims will be covered for pecuniary losses, whether at fault or not.[70]

The traditional tort regime ranks last "...because a third or more of traffic victims are not covered by the regime at all, (or covered only minimally)".[71]

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[66] *ibid.* p825.
[67] *ibid.* p825.
[68] *ibid*
[69] *ibid.* If timeliness of payments is added as a factor, the authors' ranking of pure and threshold no-fault would be reversed-*ibid.* p826.
[70] *ibid.*
[71] *ibid.*

Administrative and Premium Costs

The authors argue that U.S. evidence shows that no-fault schemes exhibit a comparative advantage over the tort system with respect to administrative costs.[72] However, US data also suggest that on average, no-fault states have higher automobile injury insurance premiums than those in pure tort states.[73] There is considerable difference though among jurisdictions dependent on the relationship between maximum no-fault benefits payable and the degree to which access to the tort system is precluded and/or no-fault benefits are integrated with tort compensation.[74]

Add-on schemes are quite costly because they add an additional layer of compensation to the tort system.[75] Evidence from the US shows that threshold states have mixed premium cost performance based largely on the relationship between no-fault benefits and the stringency of the tort threshold.[76]

The authors conclude from their summary of the empirical evidence that "...the principal area of empirical controversy remains the uncertainty as to the deterrent properties of the tort system relative to no-fault alternatives. Analogously, from a corrective justice perspective, there remain concerns that no-fault regimes vindicate corrective justice values less completely in failing to internalize accident costs to wrongdoers as fully. The extent to which these concerns can be met by extensive use of

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[72] *ibid.* p818.
[73] *ibid.* p819. The experience is largely the reverse in Australia, although precise comparisons between states are impossible because of lack of comparable statistics-see eg *Report on the Inquiry into the Motor Accident Scheme*, Interim Report of NSW Legislative Council Standing Committee on Law & Justice *op cit.* pp70-72.
[74] *ibid.*
[75] *ibid.*

risk rating systems remains unclear".[77] However the authors concede that "On the two other measures of performance (distributive justice and administrative and premium costs), it seems clear that no-fault compensation regimes can be designed that outperform the tort system".[78] Their proposed rankings under this heading are therefore as follows:

1. Pure no-fault
2. Threshold no-fault
3. Elective no-fault
4. Tort
5. Add-on no-fault.[79]

According to the authors, the Administrative and Premium Costs value "...is sensitive to two factors; the percentage of premium dollars consumed in administrative and transaction costs, and premium costs".[80]

Pure no-fault is ranked first in terms of both administrative and premium costs because theoretical and empirical evidence suggests that pure no-fault schemes "...deliver compensation to victims at lower administrative costs than the other options",[81] and because exclusion of non-pecuniary damages and small claims for economic losses leads to lower premiums.[82]

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[76] *ibid.* p826.
[77] *ibid.*
[78] *ibid*
[79] *ibid.* p826.
[80] *ibid.*
[81] *ibid.*
[82] *ibid.* p827.

Threshold no-fault is ranked second for both administrative and premium costs, because "...a high percentage of cases are resolved outside the tort system on a no-fault basis, although the costs of litigating the application of the threshold are an offsetting factor"[83] and because in the model selected by the authors "...some traffic accident costs are externalized to non-traffic related forms of first-party and social insurance by virtue of the scheme providing only secondary coverage".[84]

The authors rank elective no-fault third because they assume that most drivers will elect into the no-fault option and those that do not will deal with their own insurers on a first party basis with respect to claims thus saving on administrative costs.[85]

Add-on no-fault is ranked fourth in terms of administrative costs because "...while a significant percentage of cases are presumably resolved expeditiously and at low cost on a no-fault basis, the right to sue in tort is preserved in all cases (and may be aggressively exercised, given the "cushion" of the no-fault benefits), with attendant administrative costs".[86] It is ranked last in terms of premium costs because "There is some evidence that payment of most economic losses on a no-fault basis encourages more aggressive litigation strategies with respect to [residual economic and non-pecuniary losses]".[87] Chapman and Trebilcock also believe that "...the premium effects

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[83] *ibid.* p826.
[84] *ibid.* p827.
[85] *ibid.* p826-827.
[86] *ibid.* p826.
[87] *ibid.* p827

of enhanced add-on will dominate any administrative cost savings relative to the tort system".[88]

Tort is ranked "obviously enough" last in terms of administrative costs because issues of liability and quantum are required to be determined in every case.[89] However the authors do not appear to have considered the argument that only a percentage of accident victims can claim in tort systems and many cases are settled early before significant costs are incurred.[90] They rank tort fourth for premium costs because non-pecuniary losses account for a significant proportion of premium dollars but add-on is still likely to be more expensive because of the factors outlined above.[91]

Composite Evaluation of the Rankings

The next step in the chain of reasoning of the authors is to consolidate their evaluation; this yields a matrix that is reproduced below.[92]

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[88] *ibid.*
[89] *ibid.*
[90] See eg Worthington D. and Baker J. *The Costs of Civil Litigation,* Law Foundation of NSW, Sydney p7.
[91] Chapman and Trebilcock *op cit.* p827.
[92] *ibid.* p828.

COMPOSITE EVALUATION OF OPTIONS

	TORT	ADD-ON NO-FAULT	THRESHOLD NO-FAULT	PURE NO-FAULT	ELECTIVE NO-FAULT
Individual Responsibility	1	2	3	5	4
Distributive Justice	5	1	2	3	4
Administrative and Premium Costs	4	5	2	1	3

The authors argue that "The obvious implication that emerges from this matrix is that the rankings diverge widely within particular values and across values" and conclude that "In making social choices, a great deal turns on how particular values are weighted by individuals and how these weighted values are distributed in the community".[93] They argue that the above matrix shows that none of the various schemes is clearly superior over all three values.[94]

[93] *ibid.*
[94] *ibid.*

They also conclude that "...the ultimate policy choices are unavoidably social and political,[95] in the sense that normative weights must be attached to the competing values we have identified...Presumably, if a majority of citizens in a given jurisdiction subscribe to the same rank ordering of values in a given context, a clear and stable policy choice is likely to emerge. This may explain the consensus on no-fault administrative compensation schemes for workplace accidents, on the one hand, and the preservation of a pre-eminent role for tort law in medical malpractice and product-related accidents on the other".[96] As will be seen, the authors argue that there are no such majoritarian value rankings in the area of automobile compensation.

CHAPMAN AND TREBILCOCK'S SOLUTION TO THE PUZZLE OF DIVERSITY DESPITE CONSENSUS ON FACTS AND VALUES

The authors pose the question as to how any diversity in automobile accident policy outcomes could result across similar jurisdictions if there were majoritarian value rankings.[97] They say that "Diversity of outcome would mean that politically decisive majorities in the different jurisdiction must be fundamentally different"[98] (which is by the authors' own admission similar to the argument the authors have previously rejected as implausible that people in otherwise similar jurisdictions have fundamentally different values).[99] They also reject as implausible the idea that there might be a pivotal 'swing vote' in each jurisdiction with the distribution of values across the rest of the population being more or less the same because "...we should surely expect that if there

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[95] *ibid.*
[96] *ibid.*
[97] *ibid.* p830.
[98] *ibid.* p830-1.

was a diversity of values held by such a diversity of small but politically decisive majorities across different jurisdictions, then the same diversity of outcome that characterizes automobile accident law would also characterize other areas of accident law such as work-place accidents, product-related accidents, and medical malpractice".[100] In the authors' view, it is much more likely that if there were a politically decisive majoritarian value ranking, then that ranking would tend to be the same across jurisdictions in which people generally hold similar values.[101] They say that "...this is the probable explanation for the similar policy choices that we observe across jurisdictions in the work-place injury, product injury, and medical malpractice areas".[102]

In answer to this conundrum, Chapman and Trebilcock argue that "...what is required is an explanation for policy diversity across jurisdictions that does not depend on some implausible diversity in the values held by the people in these otherwise very similar jurisdictions".[103] They therefore postulate that none of the various value rankings is held by a majority in a given jurisdiction, but that the distribution of minority rankings or values is more or less the same across the different jurisdictions considering automobile accident compensation law.[104] They argue that this best explains the diversity of policy outcomes observable in automobile accident law.[105] This argument is presented as follows:

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[99] *ibid.* p831.
[100] *ibid.*
[101] *ibid.* p831-2.
[102] *ibid.* p831.
[103] *ibid.*
[104] *ibid.* p832.
[105] *ibid.*

"Imagine that the voters in a given jurisdiction are evenly divided among the three different values and, therefore, among the three different value rankings arrayed in our table. Suppose that they are attempting to decide which of the options to choose on the basis of majority rule and, therefore, to assure a majority in any given choice, they are comparing the different options two at a time. Given five options there are, therefore, the following ten possible pairwise comparisons or choices:

(1) Tort law, Add-on no-fault;

(2) Tort law, threshold no-fault;

(3) Tort law, pure no-fault;

(4) Tort law; elective no-fault;

(5) Add-on no-fault, threshold no-fault;

(6) Add-on no-fault, pure no-fault;

(7) Add-on no-fault, elective no-fault;

(8) Threshold no-fault, pure no-fault;

(9) Threshold no-fault, elective no-fault;

(10) Pure no-fault, elective no-fault.

The results of a majority vote on each pairwise comparison assuming each voter votes according to his or her particular minority-held ranking, are as follows:

(1) Tort law is majority preferred to add-on

(2) Threshold no-fault is majority preferred to tort law

(3) Pure no-fault is majority preferred to tort law

(4) Elective no-fault is majority preferred to tort law

(5) Add-on no-fault is majority preferred to threshold no-fault

(6) Add-on no-fault is majority preferred to pure no-fault

(7) Add-on no-fault is majority preferred to elective no-fault

(8) Threshold no-fault is majority preferred to pure no-fault

(9) Threshold no-fault is majority preferred to elective no-fault

(10) Pure no-fault is majority preferred to elective no-fault

It is easy to see from these results that no policy option is preferred exclusively by all of the majorities. That is, for any given policy option, there is always some further option which is preferred by some majority. Because it appears to be impossible for the majority to do anything but choose a minority preferred alternative, the sorts of rankings which are displayed in our composite evaluation table are said to generate a 'majority voting paradox'. Alternatively, since it is sometimes thought that no self-respecting majority would ever settle on a minority preferred alternative in such situations, the method of majority voting is doomed here to generate an unending 'majority voting cycle'. Put this way, we can see how this analysis might bring us closer to an understanding of why in some jurisdictions…there may be an absence of a stable political equilibrium in the policy choices that politically decisive majorities make when dealing with automobile accident law."[106]

[106] *ibid.* p831-3.

Sequence Dependence

Furthermore, Chapman and Trebilcock argue that policy choice outcomes in this area are most likely 'sequence dependent'; that is that different jurisdictions settle on different policy options and do not cycle because if a jurisdiction comparing the different schemes does so 'pairwise' then the order in which they are considered will determine the final outcome.[107] The authors use the following example to demonstrate the argument:

"Take, for example, the cycle that is embedded in the majority voting results (1), (2) and (5) above. If the jurisdiction considers (2) first, i.e., a choice between a threshold regime and tort law, then the jurisdiction will choose the threshold regime, at least if the majority has its way. But now if the same jurisdiction considers choice (5), then it will choose to move on from the threshold regime to the add-on regime. Now, of course, the jurisdiction is tempted to return to the tort law from an add-on regime; that is, after all, what is meant by the majority voting cycle. But suppose that there is some sort of constraint preventing the jurisdiction from reconsidering a previously considered alternative that has already been rejected by the majority. Such a constraint could be a product of institutional design, or could simply reflect the real social and private costs involved in any reconsideration of previously rejected alternatives. In that case, the majority preference in choice (5), or the add-on regime, will be the *final* choice in the sequence of choices over these three alternatives, i.e., tort law, the threshold regime, and the add-on regime".[108]

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[107] *ibid.* p833.
[108] *ibid.*

The authors go on to point out that if the jurisdiction considered the choices in the order (1) then (2) however, threshold no-fault would be the most likely outcome, and "We can even imagine a sequence of choices, namely choice (5) followed by choice (1), in which tort comes out the winner".[109] It can thus be seen that the final outcome depends on the order in which the options are considered.

This sequence dependency, the authors argue, could explain the difference in policy outcomes between states. They say that "...if a single jurisdiction can generate this disparity of outcomes according to the choice sequence, it is easy to see how different jurisdictions, despite the similarities there might otherwise be in the options they are considering, the facts they are confronting, and the values they are advancing, would nevertheless choose differently *given the different sequences* in which the alternatives for choice were presented for a majority's consideration".[110]

This argument, at first blush, might seem artificial and apparently dependent on a highly stylised method of majority voting and an equal distribution of votes across the three salient values.[111] The authors endeavour to deal with this criticism by pointing out that they could have referred just as easily to the preferences of some politically decisive set or coalition.[112] As they say, "Our point would then be that coalitions could form out of the individuals whose rankings of the options are those displayed on our composite evaluation table. Thus, the final outcome would be determined by the sequence in

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[109] Chapman and Trebilcock *op cit.* p834.
[110] *ibid.* p835.
[111] *ibid.*
[112] *ibid.*

which the different possible political coalitions considered the alternatives".[113] In other words there is no need for an exactly even distribution of voters across the whole jurisdiction; just a roughly equal distribution of values within some group which has the political power to determine the ultimate choice of compensation system.

The authors also note that it might be argued that in any political jurisdiction dominated by just two parties there logically cannot be a cycle over just two platforms.[114] The authors deal with this objection by pointing out that this ignores the fact that any one party, before it puts its platform before the voters, must determine what that platform will be.[115] At this point, they argue, there are usually several options, each with several constituencies,[116] and in such a situation the final choice of outcome may be sequence dependent.[117] The authors demonstrate how sequence dependence could "naturally" lead to a majority voting cycle in a jurisdiction facing the instability of choice over tort law, the add-on regime and the threshold regime under majority voting. They expect that first "...some dissatisfaction with tort law would emerge among those within the jurisdiction who are most concerned about compensation and premium costs. They would form a politically decisive coalition to choose the threshold regime over tort law, since that regime is preferred to tort law on both the compensation and premium cost criteria...Confronted with a move to the threshold regime, those concerned most with individual responsibility as a value would, however, be tempted to propose the add-on regime as an alternative. They would be supported in this by those most concerned about compensation, and it seems likely that this coalition would be politically decisive

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[113] *ibid.* p836.
[114] *ibid.* fn82.
[115] *ibid.* p836.
[116] *ibid.*-this assertion is tested in Chapter 10 of this work.

for the add-on regime...But the add-on regime is anathema to those most worried about high premium costs and, therefore, we would expect that, without constraints on the reconsideration of previously rejected alternatives, these people would seek to form a coalition with the deterrence sympathizers to restore tort law. From here, of course, the cycle would be in danger of beginning anew with the same coalitions".[118]

As the authors point out, for their argument to proceed as presented, "...the value rankings which we display must be held by at least some politically influential groups or individuals over at least one set of three possible policy options".[119] The entire profile of rankings over the three options displayed in the authors' composite evaluation must be present among the voters if the voting cycle is to occur in the manner described.[120] In other words, the particular profile of values, or value rankings, is necessary but not sufficient for the existence of a majority voting cycle.[121] If it is likely that all of the values are present and similar in similar jurisdictions, why then should there be a pattern of diversity in automobile accident compensation but not in other areas of law? The authors allow that in the areas of medical malpractice, products' liability and workplace accidents, it is possible that the same profile of values and value rankings is present as in the area of automobile accident compensation.[122] However, as the authors say, "One has only to imagine that one of the value rankings, such as the compensation proponent, might dominate the other two so much that no coalition between those two could possible upset that dominant ranking's most preferred

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[117] *ibid.*
[118] *ibid.* p836-7.
[119] *ibid.* p837.
[120] *ibid.* p838.
[121] *ibid.*
[122] *ibid.*

choice".[123] The authors see two different possible explanations for stability and uniformity in policy outcomes either within or across jurisdictions on a given issue leading to the same political result. They say that "First, it could be that one of the three value rankings which is necessary for the voting cycle to occur is just not present as a matter of fact within the population of voters in a jurisdiction. Second, it could be that while all of the three value rankings are present, one of them is politically uninfluential as compared to the other two rankings. While the first explanation emphasizes the necessity of the three rankings for the cycling argument, the second emphasizes their lack of sufficiency. At the political level, however, the two explanations mean more or less the same thing for all practical purposes. What is implied by stability and uniformity of policy outcomes on a given issue is the absence, *in any politically decisive sense*, of one of the three value rankings…".[124] They conclude that in the areas of products liability, medical malpractice and work-related injuries the normative salience of at least one of the three value rankings is undermined, preventing a majority voting cycle from occurring,[125] whereas in the area of automobile accident compensation, there is no such undermining, with all of the values being equally salient. They go on to speculate as to why one or more of the three value rankings might be absent in a politically decisive sense in the areas of products liability, medical malpractice and workplace injuries. Their arguments in that regard can be summarized as follows:

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[123] *ibid.*
[124] *ibid.* p841.
[125] *ibid.* p847.

Products Liability

The authors argue that in the product liability area, whilst there has been a move away from negligence towards strict liability in many jurisdictions, there is still in most cases some kind of individualized determination of a defendant's fault. They say that "While, increasingly, there has been a movement away from a negligence standard towards strict liability in many jurisdictions, product liability litigation still entails something comparable in many respects to the individualized determination of a defendant's fault that we see in negligence".[126] They argue that this is most likely so because the largest number of product related accident cases involve products that are not inherently dangerous or frequently defective but which attract high variation in the care with which consumers use the products.[127] Therefore the individual responsibility ranking is likely to be well represented across the voting population.[128] Correspondingly, "... if one feels that an individual consumer's use of the product was in large part responsible for the accident which occurred, and that the product generally can be used quite safely, one is naturally less worried about the prospect of such an accident and less demanding of the automatic compensation for injury that a no-fault scheme provides, especially if the costs of paying for such a compensation scheme are likely to be built into the product's price as a mandatory insurance premium".[129] The authors therefore expect that "...the usual concerns about compensation are likely to be muted"[130] and therefore "...not all three of the value rankings which are necessary for the majority voting cycle to occur will be politically salient in the context of products liability, and we should

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[126] *ibid.* p841.
[127] *ibid.*
[128] *ibid.* pp841-2.
[129] *ibid.*

expect the jurisdiction to be able to settle on that policy option which, although it would be worst for the compensation value *if* that value were salient in its usual form, is not worst for either of the other two value rankings which *are* salient and which concern the issues of individual responsibility and premium costs respectively. That policy option, of course, is tort law...".[131]

Medical Malpractice

In the area of medical malpractice, because patients are usually sick or injured before turning to a doctor or hospital for help, if they are still sick or injured after treatment is finished then "...there is often ambiguity as to whether (the) infirmities are symptomatic of the earlier problem that brought the person to the doctor or hospital in the first place, or whether they are a consequence of some intervening medical treatment and, therefore, relevant for a possible claim in medical malpractice".[132] The authors argue that in the case of both products liability and medical malpractice, "...the concern that the appropriate activity be held responsible for the injury which occurred, either to produce efficient deterrence or as a matter of fairness in the allocation of responsibility, will tend to push voters towards preserving a forum for case-by-case determinations of what actually caused the injury".[133] They argue that this "...explains why tort law continues to be the option of choice over no-fault schemes in both the products liability and medical malpractice contexts".[134]

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[130] *ibid.* p842.
[131] *ibid.* p842-3.
[132] *ibid.* p843.
[133] *ibid.* p844.

Workplace Injuries

Compensation for workplace injuries is, according to the authors, almost universally handled by no-fault compensation plans.[135] The majority of workplace injuries are best explained by the inherent danger of the workplace or a momentary act of inadvertence on the part of the worker, employer or fellow workers which is unlikely to be responsive to the deterrent properties of the tort system.[136] This suggests to the authors that "...the compensation value will unambiguously put the no-fault alternatives ahead of the tort alternative in its ranking of the policy options" and that "...the tort law alternative will have little purchase on the individual responsibility proponent".[137] Therefore the authors expect firstly that no voting cycle will occur and secondly that the policy alternative to prevail will be that which is not worst for either of the compensation and premium cost values.[138] This will be one of the no-fault systems, although the authors admit that "...nothing in the analysis to this point can explain why the politically influential value rankings that go to compensation and premium costs would decide one way rather than the other between these two no-fault alternatives".[139]

After examining the reasons why one or more of the three values might be more or less politically salient in the areas of products liability, medical malpractice and workplace injuries, thus allowing for policy stability, Chapman and Trebilcock turn their minds to why each of the values is likely to have equal weight in the area of automobile accident

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[134] *ibid.*
[135] *ibid.* p845.
[136] *ibid.*
[137] *ibid.*
[138] *ibid.*
[139] *ibid.* p846.

compensation, thus leading to majority voting cycles. Their argument in that regard can be summarized as follows:

Why Automobile Accident Compensation is Different

In the context of automobile accidents, the authors argue, none of the above arguments undermining the normative salience of at least one of the three values necessary for the occurrence of a majority voting cycle, has the same application.[140] Thus the systematic concern in medical malpractice law that, without individualized determinations of causal responsibility, we cannot be sure that the injury which is the source of complaint is truly a medical one "...is not a pervasive worry in the case of the typical automobile accident; we can be reasonably certain, without much need for extensive individualized determinations of causal responsibility, that a given injury is a consequence of automobile driving. Thus, in this respect at least, we would not expect the compensation value ranking...which puts the no-fault alternatives ahead of the tort law alternative, to be totally displaced or dominated by the concern for individualized determinations of causal responsibility...".[141] However, "...general recognition of the empirical fact among many voters (who are also likely to be drivers) that all drivers commit momentary acts of inadvertence at least some of the time, and that these errors might at any time result in an accident for which one might be held negligently responsible, contrasts with the view that these same voters will have (of) the facts which explain the vast majority of product related accidents...Thus, while these voters will want to preserve the individualized determination of causal responsibility that is characteristic

[140] *ibid.* p847-cf Chapter 8 herein.
[141] *ibid.*

of tort law in this latter context, this sort of concern...will not be enough to displace in the automobile accident context the traditional compensation value ranking that puts the no-fault alternatives ahead of the tort law".[142] Chapman and Trebilcock say that "... If this were the end of the matter, then we would expect that automobile accident law would be dominated by the no-fault choices that are ranked first by the compensation theorists and which are not too expensive in terms of premium cost concerns".[143] However, this would suggest to the authors that the individual responsibility value ranking has no normative salience in the automobile accident area at all. They argue that "While it is true that some voters will recognize that they too commit the usual driving errors and these could convert at almost any time into driving accidents, other voters and drivers will tend to see bad drivers as the major cause of most automobile accidents, something like the way these voters would view product-related accidents as caused by eccentric consumers".[144] The authors argue that the facts regarding the causes of automobile accidents tend to support this view, and that it is therefore "...hard to think that for many voters the individual responsibility value will not remain normatively salient and, therefore, it seems plausible that these voters will continue to rank the tort law alternative, with its individualized determinations of personal responsibility, ahead of the no-fault alternatives".[145] Therefore "...once we recognize the almost ubiquitous concern for premium costs that must also be part of any public policy choice, in the automobile accident context, we should anticipate normative salience for all three of the value rankings...Thus, in contrast to (products liability,

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[142] *ibid.* p848.
[143] *ibid.*
[144] *ibid.*
[145] *ibid.*

medical malpractice and workplace injury law) we should expect to find a majority voting cycle and, therefore, consequent policy diversity or instability".[146]

In the final sections of their paper, Chapman and Trebilcock endeavour to deal with the problem of whether there is any way to design a set of institutions to avoid the majority voting cycle they describe by preventing one of the essential value rankings from having any direct influence on policy choice.[147] They also engage in a detailed criticism of elective (or choice) no-fault schemes.[148] However, consideration of these matters is beyond the scope of this work, especially in view of the findings of this study, outlined in Chapter 10, to the effect that majority voting cycles have not been responsible for the diversity between jurisdictions in Australian automobile accident compensation.

Conclusion

This chapter has summarized Chapman and Trebilcock's theory as it relates to the diversity of policy outcomes in automobile accident compensation across similar jurisdictions. This explanation does not accord with the expectation of diversity arising from the consideration in previous chapters of the claimed benefits and drawbacks of the tort system and its replacements, which is puzzling in itself. It also does not explain the areas of congruence in the schemes in the most populous Australian states where there is an emphasis on rehabilitation, fast claims resolution and costs control within tort based systems.

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[146] *ibid.*
[147] *ibid.* p851.
[148] *ibid.* p867ff. The authors' arguments against choice no-fault are examined to some degree in Chapter 5.

Chapman and Trebilcock's theory is heavily reliant on certain assumptions (for example that there is stability in areas of law such as product liability, medical malpractice and workplace accident law). More importantly, they assume that there is a roughly equal distribution of the same values within and across jurisdictions in a federation. It is necessary to analyze those assumptions in order to come to any conclusions as to whether their theory is helpful in explaining the diversity in automobile accident compensation systems in a federation such as Australia. The next Chapter therefore critically examines Chapman and Trebilcock's theory in terms of internal consistency and in light of empirical evidence and academic opinion on the subject of automobile accident compensation.

CHAPTER 8

A CRITICAL ANALYSIS OF CHAPMAN AND TREBILCOCK'S THEORY FOR THE DIVERSITY OF AUTOMOBILE ACCIDENT COMPENSATION SYSTEMS

The last Chapter described in some detail Chapman and Trebilcock's theory for the diversity of policy outcomes exemplified in automobile accident compensation systems across federations containing similar jurisdictions. This Chapter critically analyses the argument on which their theory is based.

Initial Premise

Chapman and Trebilcock say that "As a starting premise, one might reasonably suppose that if a majority of citizens in different jurisdictions share similar values, or a similar distribution of values, with respect to a given policy issue and apply these values to a similar set of factual phenomena, they are likely to arrive at similar policy choices".[1] They cite as support for this premise similarities between jurisdictions in the areas of products liability, medical malpractice and workplace injuries.[2] They argue that "...it seems quite implausible that, in federal states like the U.S., Canada, and Australia, either the underlying pathology of accidents or the underlying need for compensation for their consequences will vary significantly across what are in most other respects

[1] Chapman and Trebilcock *op cit.* p804.
[2] *ibid.* p805.

often very similar economies and communities".[3] Also they say "...it seems difficult to believe that substantial differences in the appreciation of similar underlying facts are likely to persist across jurisdictions for extended periods of time. The experience with near universal adoption of administrative compensation schemes for workplace injuries, and the preservation of the tort system for medical malpractice and product-related defects, seem to belie the persistence of radically different appreciations of similar facts in the accident compensation area".[4] Finally, they argue "The close convergence of policy outcomes with respect to workplace injuries, medical malpractice, and product-related injuries across the many jurisdictions would seem to be inconsistent with any suggestion that there are sharply divergent values on these matters from one jurisdiction to the next".[5]

As the authors are careful not to closely define 'similar', the premise begs a number of questions. How is 'similarity' of values, facts and policy outcomes measured? The premise itself relies on value judgments and this failure to closely define 'similarity' makes it impossible to properly test. For example, to some who are not 'sophisticated' voters (in the sense that they do not understand all the nuances of the different possible types of compensation systems), a threshold no-fault system and an add-on no-fault system may seem like similar policy outcomes, because both involve access to no-fault benefits for injured persons plus access to the tort system, albeit restricted to some degree in the case of threshold systems. In other words similarity (or its opposite) is in the eye of the beholder. Even in Chapman and Trebilcock's theory, as the authors admit, the value rankings leading to the choice of add-on or threshold no-fault are not

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[3] *ibid.*
[4] *ibid.*

transparent, at least in the area of workers' compensation,[6] which means that the reasons for the preponderance of add-on systems in Australia is not entirely clear to them. Some people may even view all automobile accident compensation systems as 'similar' because, in Australia at least, they all involve compulsory insurance payable by owners (rather than users) of motor vehicles and provide compensation if certain criteria are met (injury arising in some way out of use of an automobile, or certain other means of transport).[7]

Yet the automobile accident compensation systems in Australia exhibit profound differences, which were examined in Chapter 6. These differences are not just in liability theory (e.g. tort or no-fault), which is the area of diversity that the authors concentrate on, but also in coverage, method of determining entitlement to compensation, exclusions and restrictions and several other areas. The authors' initial premise is therefore hard to test and although it may seem self-evident to the authors, it is really a matter of perspective and how 'difference' is measured.

The Validity of Discarding all Three Alternative Hypotheses

The authors' 'puzzle' only arises because of their rejection as implausible of three hypotheses, which they say might explain the diversity of policy outcomes in the area of automobile accident compensation. Briefly, these hypotheses are:

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[5] *ibid.*
[6] *ibid.* p845-847.
[7] See Motor Accidents Compensation Act 1999 (NSW) Section 3: Transport Accidents Act 1986 (Vic) Section 3; Motor Accident Insurance Act (Qld) Section 4; Motor Vehicle (Third Party Insurance) Act 1943 (WA) Section 7; Motor Vehicles Act 1959 (SA) Schedule 4 and Section 99(3); Motor Accidents (Liabilities and Compensation) Act 1973 (Tas) Section 2(4); Motor Accidents (Compensation) Act Section 1; Motor Traffic Act (ACT) Section 54(1).

1. Differences in the pathology of accidents or the need to compensate for their consequences exist across similar jurisdictions, but similar values or distributions of values obtain from one jurisdiction to the next;

2. Similar facts regarding the pathology of accidents or the underlying need to compensate for them exist but citizens entertain a different appreciation of the facts, even though they bring to bear a similar set of values on them;

3. The same facts and the same appreciation of the facts obtain from one jurisdiction to the next but citizens from one jurisdiction to the next have a different set, or a different distribution, of values.[8]

Differences in the Pathology of Accidents and the Need to Compensate

The authors' rejection of the first hypothesis *might* be sound on logical and empirical grounds. The underlying facts relating to the pathology of accidents and the need to compensate for them should be substantially the same across Australia because the cars are similar, the roads are broadly similar, the road rules are similar[9] and the people are similar. However, there is evidence that the propensity to claim in respect of automobile accidents is different in different Australian states.[10] This could mean that there are

[8] Chapman and Trebilcock *op cit.* p804-5.
[9] Australian road rules are in the process of harmonisation-see the National Road Transport Commission website at www.nrtc.gov.au
[10] See Amery et al "CTP Utilisation Comparison of Australian Scheme Experience" *op cit.* As noted by Professor Sappideen, there could be a number of reasons for this, including degrees of urbanization, language capabilities etc. Whilst this is a fascinating area, it is beyond the scope of this work.

different compensation 'needs' (whether physical or psychological) across states. This problem needs much further investigation before any firm conclusions can be drawn about the validity of Chapman and Trebilcock's rejection of the first hypothesis; however there is sufficient evidence to cast doubt on their 'out of hand' rejection of this hypothesis.

Different Appreciation of the Facts of Accidents

Their rejection of the second hypothesis is even more troublesome. The authors suggest that similar people in similar jurisdictions would have a similar appreciation of the underlying facts regarding the pathology of accidents or the underlying need for compensation. However, there is evidence of significant differences in public opinion between some Australian states and territories on major road safety issues such as speed, fatigue and the wearing of seat belts,[11] which means that there may be a different appreciation of the facts regarding the pathology of accidents across jurisdictions.

There is also significant divergence in the way compensation is calculated across the Australian states and territories, which is indicative of differences in views as to the need to compensate different classes of victim.[12]

The authors argue that some voters will view accidents as being a general consequence of automobile driving whereas some will tend to see bad drivers as the major cause of

[11] TAVERNER Research Company "Community Attitudes to Road Safety" Department of Transport and Regional Services, Australian Transport Safety Bureau, Community Attitudes Survey Wave 12, pg 2. Professor Sappideen comments that this information should be in the text, however the findings of the Taverner survey are detailed and specific and can be viewed in the report cited.

most accidents.[13] This is part of the basis for their argument that in the area of automobile accident compensation each of the three values of individual responsibility, distributive justice and premium costs has normative salience for part of the voting population. In other words, there is no dominant concern that will sway a majority to vote for a particular system. But if some of the population think that accidents are a general consequence of driving, yet others think that bad drivers are responsible for most accidents, this implies a significant variance in opinion as to accident causation and it cannot be stated with certainty that it is implausible that similar people in similar jurisdictions might have a different appreciation of the underlying facts regarding the pathology of accidents.

No doubt the authors would argue that the distribution of such differing views across jurisdictions should be similar but this does not accord with the evidence, and one would have to examine the reasons that different people form such differing views before finally rejecting the second hypothesis as unsound.[14]

The authors point out that the empirical evidence relating to the safety effects of moving from a third-party tort liability insurance system to some form of first party no-fault compensation system is "hopelessly ambiguous" in the United States. Studies from Canada and Australia have also reached different conclusions regarding why such change may lead to an increase in fatal accidents.[15] The existence of this ambiguity,

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[12] See Chapter 6.
[13] Chapman and Trebilcock *op cit.* p847-8.
[14] Professor Sappideen notes here that differing views might be shaped by the law rather than vice versa. She comments that this was noted by the NSW Law Reform Commission in their report *A Transport Accidents Scheme for NSW op cit.*
[15] *ibid* p813.

and diversity of views regarding its significance, is some evidence for the proposition that people in similar jurisdictions could have a differing appreciation of the facts regarding the pathology of accidents.

Finally, there is evidence to support the contention that there is a degree of ignorance, complexity and confusion regarding the general operation of automobile accident compensation systems.[16] This ignorance has been displayed not only by claimants within the system, but also by parliamentarians debating, and ultimately voting on changes to, such systems.[17] It is surprising that those who have been involved in such a system as claimants would display ignorance of its workings and even more so that parliamentarians who are presumably extensively briefed on all the issues should admit to a degree of confusion. The existence of such confusion could be explained by robust political debate by proponents of the various rankings, or it might even reflect a lack of concern, or a failure of public education regarding such systems. Whatever the reason, to argue that it is intuitively implausible that similar people in similar jurisdictions have a different appreciation of the underlying facts regarding the need for compensation is untenable in the light of the evidence of ignorance and confusion.

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[16] See eg Harris D.R., et al, *op cit.* p160; Wright T. et al, *op cit.* pp18-19. See also the speeches by Elizabeth Kirby MLC at NSW Parliamentary Debates 7 December 1988 p 4585 and NSW Parliamentary Debates 16 November 1995 pp3327 and 3875 and also the speech by Fred Nile at NSW Parliamentary Debates 16 November 1995 p3882. There was firm evidence in the study carried out by Woolcott Research in NSW in October 1998 that the motoring public did not have a good understanding of the existing scheme and held inconsistent views about the system-see Woolcott Research 1998, *Exploration of Awareness and Attitudes Towards the Current CTP Scheme and its potential Alternative* ("The Woolcott Report").

[17] See the speeches of Elizabeth Kirby and Fred Nile *ibid.* See also the anecdote regarding the ignorance of a parliamentarian about the area recounted in Concannon M., "Greenslips Overhaul: An Overview of the Pressures for Change on the NSW Motor Accidents Scheme" in *Green Slips Overhaul III Current Developments 1998*, Sydney, p3.

Different Sets, or Distributions, of Values

It is Chapman and Trebilcock's rejection of the third hypothesis, however, which is the most troubling. They argue that it is implausible that citizens in different jurisdictions entertain different sets or distributions of values with respect to automobile accident compensation.[18] They cite close policy convergences in the areas of workplace injuries, medical malpractice and product related injuries across different jurisdictions as evidence that sharply different values in these matters do not exist from one jurisdiction to the next.[19] In other words, consensus or stability implies a politically dominant value or set of values whilst a lack of stability implies the absence of any such dominant value.

What the authors fail to take into account, however, is the dimension of time. The assertion that it is implausible that citizens in different jurisdictions entertain different sets or distributions of values with respect to automobile accident compensation can be disproved if considered longitudinally.

Values do change over time; if that were not so then every facet of social life across the various jurisdictions would be virtually identical and largely static, which is obviously not the case. In fact, this changing of values over time can clearly be seen in the area of workers compensation in Australia. This is one of the areas of law cited by the authors in the course of their argument for its uniformity and stability in contrast to the position that obtains in automobile accident compensation law. The reality is that various

[18] Chapman and Trebilcock *op cit.* p805.
[19] *ibid.*

Australian states moved from tort based compensation to some form of no-fault compensation over a relatively lengthy period.[20] This movement was not absolutely uniform but was part of a gradual worldwide trend.[21] The various schemes have not remained static over time either and there has recently been a degree of turmoil in different systems in Australia, which will be examined later in this chapter.[22]

The area of products liability is another cited by the authors in the course of their argument for its stability. There are a mixture of statutory and common law remedies available to plaintiffs in the various states,[23] and whilst the tort system did hold sway in the states for a very lengthy period in this area, it has been supplemented recently by a national statutory scheme, based on European Economic Community laws,[24] which provides strict liability in defined circumstances.[25] The question of liability is still determined on an individual basis in most cases, but the focus has gradually shifted from the producer to the product itself.[26] This is therefore another example of an area of law, which has changed over time, albeit in different ways than workers' compensation or automobile accident compensation.

In the area of automobile accident compensation, as the authors point out, the tort system enjoyed a pre-eminent role in most industrialized jurisdictions until about 1970.[27] From about 1970 onwards 'massive' diversity in policy choices emerged.[28] In

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[20] For a very brief history of this movement see Atkins G. and Whittle D., 1998, "The Role of Common Law in Workers' Compensation in Australia" *Accident Compensation Seminar.*
[21] *ibid.*
[22] See p251ff.
[23] eg The Sale of Goods Act 1923 (NSW)
[24] A Directive on Product Liability, 25 July 1985.
[25] See Trade Practices Act 1974 (as amended) Pt VA and particularly Section 75AD.
[26] *ibid.*
[27] Chapman and Trebilcock *op cit.* p800.

Australia, Victoria adopted an add-on no-fault system in 1973 and Tasmania soon followed. The Northern Territory adopted an add-on no-fault scheme in 1979 and a 'pure' no-fault scheme for its own residents in 1984. If, as the authors think, it were implausible that people in similar jurisdictions hold different values, why would almost half the jurisdictions in Australia decide to vote to abandon the tort system during the 1970's? What was the decisive factor in putting change on the agenda in the first place?

Given the long period of stability in Australian automobile accident compensation during which the tort system was the only one operating, in the authors' own terms the best explanation for the diversity which occurred is that one of the values or value rankings which was not previously normatively salient in those jurisdictions that changed became important in a politically decisive sense,[29] and this happened relatively suddenly. In other words, there was something that changed either about the existing systems or the people in the jurisdictions in question to the extent that the question of moving away from the tort system was successfully put to a vote. This fact of systemic change may therefore be evidence in itself of a change in values or value rankings in those states rather than evidence supporting the authors' contentions. It is logical that if values change once, they can change again and thus the timing of the consideration of change becomes important in evaluating explanations for the authors' 'puzzle' and their rejection of the third hypothesis.

When considering the authors' rejection of the third hypothesis, it is important to look at the historical background to the changes to automobile accident compensation that

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[28] *ibid.*
[29] Chapman and Trebilcock *op cit.* p841.

occurred during the 1970's because this gives an indication as to why values might have shifted to the extent that change came onto the agenda.

These changes did not occur in an informational vacuum, neither was there a static body of opinion regarding the relative merits of various forms of automobile accident compensation at the time. In fact there was a vigorous and sometimes heated worldwide debate amongst academics and others about personal injury compensation and the relative merits of the tort system and its alternatives as methods for compensating motor accident victims which began in the 1930's and which was in full flower in the 1970's.[30] Several commentators produced works during the period from the late 1960's onwards supporting the tort system on various grounds such as economic efficiency.[31] Others fiercely denigrated the tort system for its unfairness, waste and delay.[32] A number of influential studies were carried out which concluded that the tort system should be abandoned as a means of compensating those injured in, *inter alia*, automobile accidents[33] and on the basis of one such study, New Zealand entirely

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[30] Some good examples are: "Committee to Study Compensation for Automobile Accidents" Report to the Columbia University Council for Research in the Social Sciences (1932) ("The Columbia Report"), Conard et al., 1964, *Automobile Accidents Costs and Payments*, University of Michigan Press, Ison T.G. *The Forensic Lottery*, *op cit.*, O'Connell J, and Wilson W.H., 1969, *Car Insurance and Consumer Desires*, University of Illinois Press, 1969, Calabresi G., *The Costs of Accidents: A Legal and Economic Analysis*, *op cit.*

[31] eg Posner R., 1983, *The Economics of Justice* Harvard University Press, Cambridge Massachusetts, Landes W. and Posner R., 1987, *The Economic Structure of Tort Law*, Harvard University Press.

[32] eg Ison T.G. *op cit.*, Sugarman S., 1989, *Doing Away with Personal Injury Law* Quorum Books, New York, Woodhouse Sir A.O., 1972, *Compensation for Personal Injury in New Zealand,*: Report of the Royal Commission of Inquiry NZ Govt Printer to cite just a few of a very large number of works.

[33] See eg Columbia Report *op cit.*, US Dept of Transport, 1970, *Automobile Accident Litigation: A Report of the Federal Judicial Centre to the Department of Transportation* US Govt Printing Service, Washington, Woodhouse *ibid.* and also Woodhouse Sir A.O., 1974, *Compensation and Rehabilitation in Australia: Report of the National Committee of Inquiry* AGPS, Canberra, Pearson *Royal Commission on Civil Liability and Compensation for Personal Injury, op cit.*

abandoned the tort system as a means for compensating for personal injuries generally.[34]

It was against the background of this intellectual turmoil and strong promotion of no-fault alternatives by leading academics that several Australian states put automobile accident compensation on the agenda in the 1970's. As the authors give no credence to this historical background of intense debate, their rejection of the hypothesis that similar people in similar jurisdictions might have a different set, or a different distribution, of values must be called into question because it is clearly plausible that different voters in similar jurisdictions considering the same question *at different times* will have different sets or distributions of values.

If the authors' rejection of the first hypothesis needs further study and their rejection of the second and third hypotheses is problematic, then their 'puzzle' begins to unravel. There may be several plausible explanations for the diversity in automobile accident compensation systems seen across jurisdictions in a federation such as Australia. For example, it is possible that the end result of the choice process, rather than being sequence dependent as the authors argue, is time dependent in the sense that as values change over time, and at different rates, the position in time when change is considered is at least partially determinative of the outcome.

[34] See the Injury Prevention, Rehabilitation and Compensation Act 2001 (NZ).

Logical Difficulties With Chapman and Trebilcock's Analysis of the Problem: Values and Rankings

The next question is whether the authors' own hypothesis for the diversity is inherently plausible. Their theory is founded on the proposition that there are three major classes of substantive values to which many citizens probably assign some positive weight, and across which such citizens may want to optimize when choosing an automobile compensation scheme:[35] Individual Responsibility; Distributive Justice; and Administrative and Premium Costs. They argue that there is no single dominant value in relation to automobile accident compensation which would lead the different jurisdictions to eventually settle on one of the alternatives, and so jurisdictions voting on compensation systems are likely to cycle through the alternatives until each arbitrarily settles on one.

Chapman and Trebilcock's Ranking of the Systems Against the Values

The authors rank five different automobile accident compensation systems against the three values of Individual Responsibility, Distributive Justice and Administrative and Premium Costs. They do this by testing them against selected criteria such as deterrence, corrective justice, adequacy and timeliness of payments etc in order to demonstrate that there is no compensation system that is clearly preferable for proponents of all three values. The five systems ranked are tort, add-on no-fault, threshold no-fault, elective no-fault (which no state in Australia has yet adopted as an option for compensating victims of automobile accidents although several US states

have introduced such systems) and pure no-fault. The basis for the rankings is the authors' (selective) examination of the empirical evidence relating to automobile accident compensation. The authors use their rankings to argue that there will be no clear winner when proponents of the three values consider the various compensation theories. It is therefore necessary to test the validity of the authors' examination of the evidence and the arguments behind the ranking process to see if this argument holds true.

Ranking the Systems in Terms of Individual Responsibility

Under the Individual Responsibility heading, the authors evaluate the five systems against two criteria, 'deterrence', the effect of the particular system in deterring accident producing behaviour and internalizing accident costs to injurers, and 'corrective justice', which is the imposition of an obligation to restore injured persons as nearly as possible to their pre-injury status.[36] They conclude that proponents of the individual responsibility value will rank the options as follows:

(1) Tort;

(2) Add-on no-fault;

(3) Threshold no-fault;

(4) Elective no-fault;

(5) Pure no-fault.[37]

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[35] Chapman and Trebilcock *op cit.* p806 and also pp848-9.
[36] *ibid* pp806-7.
[37] *ibid* p822.

Ranking Schemes in terms of Deterrence and Incentives: Some Problems

As evidence supporting their ranking of the options in terms of deterrence the authors cite US, Canadian and Australian studies into the effect on numbers of fatal accidents of the change from a tort system to a no-fault system of compensating those injured in automobile accidents. Whilst conceding that the US evidence in this regard is "hopelessly ambiguous"[38] they appear to accept that the work of Gaudry and Devlin in Canada and McEwin in Australia shows that the policy move to no-fault leads to an increase in fatal accidents[39] (these studies have been criticized on a number of bases and this criticism will be dealt with under a separate heading below).

The authors attempt to explain this apparent increase in fatal accidents in the jurisdictions which have changed to no-fault by arguing that as one progresses through the various no-fault options, more and more cases are taken out of the tort system, and fewer and fewer wrongdoers are forced to bear the costs they inflict on others through their wrongdoing, thus attenuating incentives to adopt optimal levels of care towards others.[40] This assumes a high level of conscious (or subconscious) risk avoidance behavior on the part of drivers in fault-based systems which is difficult to accept in the face of the fact that most accidents are the result of momentary inadvertence with little time between thought and action[41] and that the best predictors of accident likelihood are factors such as distances traveled.[42] In addition, according to the authors, the incentive

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[38] *ibid* p812.
[39] *ibid* p812-813.
[40] *ibid* p823. This is an often made point-see eg Arlen J.H., 1993, "Compensation Systems and Efficient Deterrence", 52 *Maryland Law Review* 1093 at p1108-9.
[41] Shuman D.W., "The Psychology of Deterrence in Tort Law" *op cit.* p128.
[42] See eg Graham J.D., 1988, *Preventing Automobile Injury: New Findings From Evaluation Research* Auburn House, Boston p43.

to avoid injury to oneself will be more muted under a no-fault system. Whilst this argument might be logical to an economist, it is doubtful that people are more prepared to run the risk of injury or death because they have an increased chance of being compensated; the argument devalues the price that drivers are likely to put on life and health, or rather overvalues the sufficiency of money as a replacement for them.[43] Those proponents of the Individual Responsibility value ranking the systems might therefore doubt that the no-fault systems are significantly less likely to deter because of muted personal incentives to take care.

The authors also argue that risk rating in no-fault systems, although it can internalize some of the self inflicted costs of careless driving, will not reflect costs inflicted on others in premiums,[44] which lessens the deterrent effects of such systems. The implication is that the individual responsibility proponent will accordingly rank no-fault schemes lower than the tort system. This argument assumes a high level conscious decision-making process on the part of drivers to base their driving behaviour on economic considerations, rather than the self-preservation instinct (or its opposite in some cases).

It also raises the point that the existing Australian tort based systems do not reflect accident costs in premiums. None of the tort based systems in Australia have fully risk-rated (i.e. based on a driver's accident experience) premiums and all of them provide for

[43] See Englard *op cit.* p45 and also Sugarman "Doing Away With Tort Law" *op cit.* p562. Professor Sappideen comments here that young males under 25 are higher risk takers, whereas drivers over 55 are a higher risk group-the point remains that these factors have little to do with *individua*l driving behaviour.
[44] Chapman and Trebilcock *op cit.* p823.

compulsory third party insurance.[45] What risk rating that exists is based on factors such as age, sex and place of domicile, which arguably have little to do with individual driving behaviour.[46] Therefore none of these systems provides significant economic disincentives to poor driving behaviour. This means that none of the Australian tort based schemes allocate accident costs to errant drivers as such. Rather, accident costs are spread widely through the car *owning* population. This is because it is car owners, rather than drivers, who pay premiums when they register vehicles. Those comparing the Australian systems would be unlikely to find significant differences in the deterrent effects of the existing tort systems compared with the no-fault systems on the basis of the effects of premium pricing. They would also be likely to take into account the fact that what economic incentives there are apply to owners of vehicles rather than drivers. Therefore the authors' argument in support of their rankings based on a consideration of deterrence and incentives is questionable.

Deterrence, Rationality, and Psychological Theories

The authors' argument in support of their ranking of the compensation alternatives in terms of deterrence closely conforms with the theoretical argument put forward by various writers in the field of Law and Economics which holds that tort internalizes the costs of accidents to wrongdoers, who make rational decisions based on the comparative costs of allowing or avoiding a set of circumstances which might lead to an accident.[47] An extension of this argument is that deterrence in both the political and economic

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[45] See Swan *op cit.* p99.
[46] Leatherberry W.C., 1975, "No-Fault Automobile Income-Will the Poor Pay Again?" 26 *Case Western Reserve Law Review* 101 at p122.

sense rests on the same notion, namely that people will be encouraged to act more safely if the reverse can cost them money.[48]

The major problem with such theories is that they envisage a transaction between rational actors who have full knowledge of the costs and benefits associated with their behaviour.[49] Such analysis proceeds on the basis that people rationally pursue the goal of wealth maximization.[50] In the context of behaviour surrounding the driving of motor vehicles and in relation to the possible deterrent effects of tort in particular, this rationality is difficult to prove, and there is a plausible argument to the contrary based on prevailing theories of human behaviour.

For example, it has been argued by Shuman that evidence from the study of cognitive psychology reveals that human decision-making is systematically flawed, and faulty information processing is the norm, with people likely to either overestimate risks and avoid desirable behaviour, or underestimate such risks and behave unsafely.[51] Similarly he sees the insights of behavioural psychology as suggesting that the tort system's use of delayed punishment rather than immediate positive reinforcement is not an effective means of shaping desirable behaviour[52] because people respond much better to positive incentives rather than to negative effects such as the notional 'punishment' eventually handed down as a verdict in tort.

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[47] For a classical example see Calabresi G., 1965, "The Decision for Accidents", 78 *Harvard Law Review* p713.
[48] See eg Stoljar S., 1973, "Accidents, Costs and Legal Responsibility", 36 *Modern Law Review* 233 at p240.
[49] See eg Brown J.P., 1973, "Toward an Economic Theory of Liability", 2 *The Journal of Legal Studies* 323.
[50] Shuman D.W., 1993, "The Psychology of Deterrence in Tort Law", 42 *Kansas Law Review* p115.
[51] *ibid.* pp160 and 166. Professor Sappideen comments that there are illustrations of this in the medical negligence area for the Professional Indemnity Review *op cit.* See fn 117.

Shuman also argues on the basis of social learning theory that tort would have to exhibit a high level of information dissemination to be an effective deterrent.[53] For effective deterrence to occur, the effects of a verdict must be well known. However most tort actions settle prior to hearing,[54] with the quantum of settlement generally unknown because of non-disclosure agreements.[55] Given the previously mentioned levels of confusion and ignorance apparently displayed by participants and legislation framers,[56] a consideration of social learning theory leads to the conclusion that tort is unlikely to provide a high level of deterrence.

Shuman notes that the organic and biological psychological theories, which posit that human behaviour is a function of the physical and/or chemical structure and functioning of the brain, are almost completely at odds with the idea that tort can have other than a limited capacity to deter unsafe behaviour[57] because they downplay the role of conscious thought as a motivator of human action. Moreover, psychodynamic psychological theories, with their emphasis on conflict, are at odds with theories that tort based systems provide deterrence because such theories tend to provide *justification* for tortious behaviour.[58]

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[52] *ibid.* pp151-159 and 166.
[53] *ibid.* p166.
[54] See Wright et al *op cit.* p74. These are NSW figures but the consensus in the literature seems to be that the number of matters settled in tort based systems approaches, and even exceeds, 90 percent-See eg Lazar G., 1998, "Factors Implicated in Rising Costs: The Insurer's Perspective" *CTP Claims Management Symposium*, Sydney p 4 and Galvin B. "CTP Initiatives on Legal Costs in Western Australia" *ibid.* para 2.2.5.
[55] Shuman D.W., 1993, "Making the World a Better Place Through Tort Law? Through the Therapeutic Looking Glass", Vol X *NYLS Journal of Human Rights* 739 at p753.
[56] See eg. the Woolcott Report and the speeches of the Hon Fred Nile and the Hon Elizabeth Kirby *op cit.*
[57] Shuman D.W. "The Psychology of Deterrence in Tort Law" *op cit.* p166.

Finally, Shuman notes that as psychoanalysis emphasizes the unconscious forces that reflect the contradiction inherent in the dual nature of humanity as biological animal and social being, it arguably also does not sit well with economic theories of deterrence based on rational action.[59]

Shuman's work shows that an argument exists based on various opinions as to the root causes of human behaviour which conflicts with both the authors' 'rational actor' approach and also the notion that tort can act as an effective deterrent in most circumstances. The existence of this argument casts doubt on the certainty with which the authors rank the schemes under the deterrence heading, because the authors' ranking proceeds on the basis that tort does provide an effective deterrent and that its deterrent effects will be assumed by proponents of the individual responsibility value. However the evidence from Shuman's study of psychological theories casts doubt on torts effectiveness as a deterrent.

Problems with the 'Safety Effect' Studies

As mentioned above, the North American empirical studies cited by the authors in support of their ranking under the deterrence heading have been criticized in terms of both methodology and basic assumptions.[60] Whilst the Australian studies by McEwin[61]

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[58] *ibid.* p150.
[59] *ibid.* p148.
[60] See eg Sugarman S., "Doing Away With Tort Law" *op cit.* p598, particularly at fn 152 and generally O'Connell J., and Levmore S., 1983, "A Reply to Landes: A Faulty Study of No-Fault's Effect on Fault?", 48 *Mo. Law Review* 649.
[61] McEwin R.I., 1989, "No-fault and Road Accidents: Some Australasian Evidence" 9 *International Review of Law and Economics* 13.

and Swan[62] have not received the same critical attention, some of their basic assumptions can also be questioned. For example both treat the automobile accident compensation system operating in the Northern Territory as a 'pure' no-fault system whereas the no-fault component applies only to Territory residents.[63] Therefore, conclusions drawn as to the effects of the introduction of the scheme on the rates of fatal accidents might be questionable. The other two Australian 'no-fault' compensation systems, in Victoria and Tasmania, both retain a substantial tort component. The authors cite the existence of a residual component of tort in such systems as an explanation for the ambiguity in the US evidence relating to the safety effects of moving from a third-party tort liability system to some form of first party no-fault compensation system[64] and so any conclusions drawn from the introduction of the systems in Victoria and Tasmania about safety and deterrence are also open to some doubt.

Tort, Morality and Deterrence

The authors' rankings under the individual responsibility heading do not take into account the arguments, based on moral grounds, that tort is amoral and does not deter[65] or that it creates perverse incentives.[66] For example, the most outrageous driving behaviour may lead to a minor accident with few or no injuries, whereas a major accident with multiple fatalities may be caused by a slight degree of negligence.[67] In addition, the death of a child due to negligent driving may lead to a much smaller

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[62] Swan P., 1984, "The Economics of Law: Economic Imperialism in Negligence Law, No-fault Insurance, Occupational Licensing and Criminology?" *The Australian Economic Review*, 3rd Qtr, p92.
[63] Motor Accidents (Compensation) Act 1979 Section 5(1).
[64] Chapman and Trebilcock *op cit.* p812.
[65] Brown C., 1985, "Deterrence in Tort and No-Fault: The New Zealand Experience", 73 *Cal. Law Review* 976.
[66] Sugarman S., "Doing Away With Tort Law" *op cit.* pp565-6.

verdict than injuring a high earning adult.[68] It is therefore difficult to accept that tort operates as a significant moral deterrent and those ranking the systems on the basis of morality would be more likely to rank the tort system lower because it favours the wealthy over the poor.

Despite the foregoing, the authors would probably argue that there is a *perception* in the jurisdictions under consideration that tort provides a measure of deterrence and that this perception plays a part in a ranking by voters of the alternatives to the tort system when any consideration of same takes place. Whether the empirical evidence supports such an argument will be considered in chapter 10.

Ranking the Schemes in Terms of Corrective Justice

The authors argue that the tort system performs relatively well with respect to the corrective justice strand of the individual responsibility value, because a high proportion of automobile accident victims with valid claims actually bring suit and achieve some measure of compensation.[69] They argue that the various no-fault alternatives systematically shield many or all negligent drivers from the costly consequences that their actions have for others.[70] When ranking the options, the authors reason that tort allocates accident costs to wrongdoers when they inflict injury on others and denies recovery to those whose own conduct is faulty, and thus tort "most fully comports with

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[67] *ibid.* p560.
[68] *ibid.* p572.
[69] Chapman and Trebilcock op cit. p813.
[70] *ibid.* pp813-814.

corrective justice rationales".[71] The authors then rank add-on, threshold, elective and pure no-fault in descending order as they envisage increasing levels of costs externalization as one moves through these options.[72]

However, there is no tort-based system in Australia that does not have a compulsory third-party insurance regime funded by vehicle registrations which protects drivers in most circumstances from damages payouts consequent on their negligence. It is vehicle owners, and not drivers per se, who are burdened with the costs of this third-party insurance. Tort in those jurisdictions with compulsory insurance does not allocate costs to wrongdoers necessarily but spreads the loss to vehicle owners. Not only does this dampen any deterrent effect that a tort system might have[73] but also there is little concept of corrective justice in the sense of the restoration of antecedent equality through transfer of resources[74] or through rectification of an act of injustice[75] in systems where the 'real' defendant is an insurance company.[76] A party 'at fault' may not even know that they have been found to be liable or even that they had been joined to proceedings in such a jurisdiction if the insurer is defending the matter and handles all aspects of proceedings. The authors' ranking of the different systems under the corrective justice heading may therefore be theoretically sound but practically

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[71] *ibid.* p823.
[72] *ibid.* pp823-4.
[73] See Posner R.A., 1992, *Economic Analysis of Law* 4th Ed., Little Brown and Co., Boston p202 but cf Landes W.M., and Posner R.A., *op cit.* p13. Englard argues that Posner has difficulty fitting insurance into his theories of the economic efficiency of tort-see Englard I., 1980, "The System Builders: A Critical Appraisal of Modern American Tort Theory", 9 *Journal of Legal Studies* 27 at p55 and particularly fn 125.
[74] Weinrib E., 1983, "Towards a Moral Theory of Negligence Law" in Bayles M.D., and Chapman B. (eds), *Justice, Rights and Tort Law*, D Reidel Publishing Co., Boston p124.
[75] Posner R.A., *The Economics of Justice*, *op cit.* p73.
[76] A prime example of the recognition of this is the Motor Vehicles (Third Party Insurance) Amendment Act 1984 (NSW) which removed the "last vestige of the fiction that the injured person is actually taking proceedings against the negligent party"-NSW Parliamentary Debates 10 May 1984 p587 per Mr Sheahan, Minister for Environment and Planning.

insupportable because where this situation exists there are unlikely to be strongly held views regarding restoration of equality between parties or rectification of justice because, in reality, neither of these things is occurring.

Distributive Justice

Under this heading the authors test the schemes against three factors; percentage of all vehicles covered, adequacy of coverage, and timeliness of payments. They rank the options as follows:

(1) Add-on no-fault;

(2) Threshold no-fault;

(3) Pure no-fault;

(4) Elective no-fault;

(5) Tort.

It is hard to fault the authors' reasoning for their rankings under this value although it may be argued that those vitally concerned with horizontal equity[77] would reverse the positions of add-on no-fault and pure no-fault, putting pure no-fault first because it treats everybody equally whereas add-on no-fault creates two classes of claimant; those that receive no-fault benefits only and those that have the additional right to claim in tort.

There is also an argument based on moral grounds that any theory of distributive justice must make provision for a theory of corrective justice, on the basis that to maintain a just distribution of holdings, it is necessary to follow the requirements of corrective

justice, which remedies unjust departures from the prevailing distribution of holdings.[78] If tort law leads the other systems in terms of corrective justice then there may be other ways of ranking the options under this value that are equally valid, such as ranking the tort system more highly. This would perversely mean that there is a possibility of tort being majority preferred over other options because both the Individual Responsibility *and* Distributive Justice proponents may prefer it to the no-fault alternatives.

Administrative And Premium Costs

The authors rank the systems under this heading against two factors; the percentage of premium dollars consumed in administrative and transaction costs, and actual premium costs. The results of their rankings are as follows:

(1) Pure no-fault;

(2) Threshold no-fault;

(3) Elective no-fault;

(4) Tort;

(5) Add-on no-fault.

The authors cite US evidence showing that no-fault schemes exhibit a comparative advantage over the tort system with respect to administrative costs, but that premium costs in no-fault states are higher on average than in pure tort states.[79]

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[77] See Trebilcock M.J., "Incentive Issues in the Design of 'No-Fault' Compensation Systems", *op cit.* p22.
[78] Coleman J.L., "Moral Theories of Torts: Part II" in Bayles and Chapman *op cit.* pp66-67.
[79] Chapman and Trebilcock *op cit.* pp819-20.

In Australia, there are no strictly comparative figures regarding administrative costs because the schemes are all different in structure and funding. Premium costs in the various states are also difficult to compare because of the extent of government regulation, wide differences in benefits[80] and funding levels.[81] However, recent figures (such as they are)[82] show no correlation between type of compensation scheme and cost of premiums. The New South Wales threshold tort system, for example, had a significantly higher premium than any other state scheme in 1996, whereas the add-on scheme in Tasmania had the second lowest premium, which is not in accordance with the authors' expectations that add-on systems will generally be more expensive than tort systems. In any event, premium setting is dependent on such a complex range of factors[83] that the argument for the authors' rankings is impossible to test empirically within the context of available Australian data.

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[80] See Chapter 10 herein and also Malkin I. *op cit.* generally.

[81] In Queensland, Western Australia, Tasmania and the ACT premiums are fixed by regulation. In the other states premiums are overseen and subject to approval by government bodies.

[82] See eg figures cited in NSW Parliament Standing Committee on Law and Justice report "Proceedings of the Public Seminar on the Motor Accidents Scheme 19 April 1996" *op cit.* Appendix A.

[83] *ibid.* Professor Sappideen asks whether there is a relationship between premiums and the number of accidents, and comments that one would expect higher accident numbers in jurisdictions with higher populations. This may be so, but there are also more vehicles and more premium payers in such states, and the accident rates are generally the same across the federation except for the Northern Territory, which has a disproportionately high rate of serious accidents and deaths.

Some General Conclusions about the Authors' Rankings

The authors' rankings under all three values are those that one would expect from 'Law and Economics' scholars. They assume that voters will rank the various systems rationally in terms of economic incentives, for example their rankings in terms of corrective justice based on cost allocation that the authors expect from the different systems. They do not consider factors that may be taken into account when ranking the tort system against its various alternatives such as the 'tort as an inalienable right' argument[84] that asserts that the right to sue an injurer in tort is an ancient right[85] that should not lightly be given up. People who subscribe to this view would be likely to rank the systems similarly to the way in which the authors rank them under the individual responsibility value, but may be so averse to considering any alternative to the tort system that they may not want to rank the alternatives at all.[86] If these people were in the majority (although the authors argue that they will not be) then no voting cycle could occur in that jurisdiction, because the distributive justice value would not be politically important enough to put a change in liability theory on the agenda.

The authors concede, after consolidating their evaluations that in making social choices, a great deal turns on how individuals weight particular values and how these weighted values are distributed in the community.[87] This means that the choices are unavoidably social and political in the sense that normative weights must be attached to the

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[84] See eg 1986, "Public Opinion says "No" to 'No-fault', 60 *Law Institute Journal* p634-5; Murphy G.A. 1985, "The Case Against No-Fault Accident Compensation", *Queensland Law Society Journal* 317 at p319 and the arguments put forward by the Victorian Liberal and National Party parliamentarians generally during the Transport Accidents Act debates in 1986 (discussed in detail in Chapter 10 hereof).
[85] NSW Law Society 1984, "The Society's No-Fault Transport Injury Proposals", *NSW Law Society Journal* p298.
[86] See eg Murphy G.A. *op cit.*

competing values,[88] and this is reasonably self evident. The authors argue that majoritarian value rankings are likely to lead to clear and stable policy choices[89] and that the presence of diversity across jurisdictions means a lack of a politically decisive majority value ranking.[90] This means that because the empirical evidence examined in Chapter 10 indicates that there are politically decisive majority value rankings in some Australian jurisdictions in relation to automobile accident compensation then the authors' theory becomes implausible.

Swing Votes and Majoritarian Values

After developing their rankings, the authors return to the problem of the existence of diversity in the area of automobile accident compensation and their initial 'puzzle'. They reject the notion that politically decisive majorities in different jurisdictions might hold fundamentally different values, similar to their rejection of the third hypothesis that people in general have a similar appreciation of the facts and pathology of accidents but might hold different sets or distributions of values.[91] The problem with this argument is the same as that associated with a rejection of the third hypothesis; it does not take into account the changing of values over time and its validity is therefore questionable.

The authors also reject as implausible the idea that there may be a pivotal 'swing vote' in each jurisdiction on the basis that this would likely be reflected in other areas of law such as products liability and medical malpractice. In their view, any politically

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[87] Chapman and Trebilcock *op cit.* p829.
[88] *ibid.*
[89] *ibid.*
[90] *ibid.*

decisive majoritarian value ranking would tend to be the same across similar jurisdictions and would be reflected in the policy outcomes, and they see no evidence of this. However, there is Australian evidence, which is examined in the next section, of broad policy changes indicative of majority value rankings in automobile accident compensation.

The historical evidence from Australia shows that there were broad policy changes across the jurisdictions in automobile accident compensation during the Twentieth century. For example, all state jurisdictions in Australia introduced compulsory third-party insurance in similar form in the period from 1934 to 1949.[92] The three states that voted to change their automobile accident compensation systems in the 1970's all moved to an add-on no-fault system. Only Victoria and the Northern Territory have changed the basis of their compensation systems since then, the Northern Territory moving to a pure no-fault system for its own residents in 1984 and Victoria moving from an add-on to a threshold no-fault system in 1986. New South Wales, Queensland, Western Australia, South Australia and the Australian Capital Territory have all retained fault as the basis for the award of damages, although all have introduced or have considered measures, such as limits and thresholds on damages, designed to contain costs.[93] The fact that most of the states retain a tort-based system is in itself evidence contrary to Chapman and Trebilcock's proposition that none of the various value rankings is held by a majority in those jurisdictions, and that there must be a similar

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[91] *ibid.*
[92] Castles A., 1957, "Compulsory Automobile Liability Insurance in Australasia" 6 *American Journal of Comparative Law* 257 at p261.
[93] See Chapter 10.

distribution of minority rankings across the jurisdictions.[94] It rather suggests that there is a majority view in favour of the individual responsibility ranking in a majority of states, with different costs concerns dictating the amount of damages available to successful plaintiffs.

Whilst Chapman and Trebilcock are of the opinion that there are a 'wide variety' of schemes in Australia,[95] and in terms of the levels of compensation which might be awarded for the same injury in different jurisdictions there are,[96] in terms of the broad liability theory description used by the authors themselves (tort, add-on no-fault etc.) there are not. There are five fault-based schemes (six if the 'dual' nature of the scheme in the Northern Territory is taken into account), one add-on, one threshold and one 'pure' no-fault scheme. If there are politically decisive majorities in some of the jurisdictions (i.e. those that have retained a fault-based system) then majority voting cycles are unlikely to be occurring in those jurisdictions. The evidence regarding whether politically decisive majorities have determined the form of any of the Australian automobile accident compensation systems will be examined in Chapter 10.

Logical Problems With Chapman and Trebilcock's Solution to the Problem

Voting Cycles and Two Party Systems

One of the potential problems that Chapman and Trebilcock acknowledge with their theory is the existence of jurisdictions dominated by just two parties. If there are two

[94] Chapman and Trebilcock *op cit.* p832.
[95] *ibid.* p803.

major platforms then logically there cannot be a majority voting cycle because at least three options are needed for such a cycle to occur.[97] Two parties, or coalitions of parties dominate all of the state legislatures in Australia and therefore there should not be any majority voting cycles in the parliaments voting on changes to compensation systems. The authors endeavour to circumvent this problem in their theory by arguing that sequence dependent outcomes may be occurring at the policy platform formulation stage, where several constituencies may be supporting different options.[98] If there is no evidence of voting cycles or sequence dependent outcomes in the formulation of policy on automobile accident compensation or where there is evidence of a politically decisive majority that dominates in formulating such policy, then there can be no majority voting cycle. The evidence for majority voting cycles and sequence dependence in the formulation of party policy in Australian states and territories will also be examined in detail in Chapter 10.

Voting Cycles: The Necessity and Sufficiency of the Rankings to the Theory

The authors concede that for their argument to go through as presented, the entire profile of value rankings over the three values must be present among the voters if the voting cycle is to occur in the manner described.[99] They note that the existence of the profile of values is necessary, but not sufficient, for the existence of a majority voting cycle.[100] If there is evidence showing that the entire profile of value rankings does not exist in a particular jurisdiction, or that one of the values is not as important politically

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[96] See Chapter 10 and also Malkin I. *op cit.*
[97] Chapman and Trebilcock *op cit.* p835 fn 82.
[98] *ibid.*
[99] *ibid.* p832.

as the others, then a majority voting cycle should not be occurring and this will be one of the keys in the empirical test of the validity of the authors' theory which is developed in Chapter 9. If there is nevertheless change in the jurisdiction then some process must be taking place other than a majority voting cycle.

With respect to the sufficiency of the existence of the profile of rankings over all three values for majority voting cycles to occur, Chapman and Trebilcock concede that it is possible that in the areas of medical malpractice, products' liability and workplace accidents, the same profile of value rankings may be present as in the area of automobile accident compensation,[101] however there may be a very dominant value ranking,[102] and stability implies the absence of one of the three values in a politically decisive sense.[103] This part of the authors' theory is plausible, because if there is one politically dominant value then there is unlikely to be destabilizing conflict about the optimal form that an automobile accident compensation system should take. Conversely, if there is little or no destabilizing conflict in a jurisdiction over the form which accident compensation should take, then it is likely that one of the three values is not considered important enough to support the change process.

An examination of the evidence for the existence of such conflict will form part of the test of the authors' theory. As an aside, it is likely that if any value is not decisive it will be either the individual responsibility or the distributive justice value, because as the

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[100] *ibid.* p838.
[101] *ibid.*
[102] *ibid.*
[103] *ibid.* p841 but cf Lupia A. and McCubbin M.D., "Who Needs Institutions? How Exogenous Forces Stabilize Social Choices" [Online] Available at: http://weber.ucsd.edu/~alupia/SCT98.html p5 copy on file with author.

authors cogently explain, there will inevitably be concern for premium costs in any public policy choice,[104] which means that the premium cost value should be relatively constant across jurisdictions.

Pathology of Accidents: Is Automobile Accident Compensation Really Different?

In support of their argument that a stable compensation system implies political dominance of one of the values, the authors examine accident causation in the areas of product liability, medical malpractice and workers' compensation and attempt to contrast the position in these areas with that in automobile accident compensation. In the area of products liability, they argue, it is likely that the individual responsibility value will be well represented across the voting population because the largest number of product related accident cases involve products that are not inherently dangerous or frequently defective but which attract a high variation in the care with which consumers use the products.[105] This will lead to some kind of individualized determination of a defendant's fault.[106] Correspondingly, if one is satisfied that most products related accidents are caused by specific circumstances arising out of a particular individual's product use, then one is less likely to demand automatic compensation such as is provided by a no-fault scheme.[107]

The authors note the move towards absolute liability in US product liability law, which they say is arguably due to compensation considerations, but see "judicial and statutory

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[104] *ibid.* p848-9.
[105] *ibid.* p841.
[106] *ibid.*
[107] *ibid.* p841-2.

counter actions" as "driving [product liability law] back to traditional preoccupations with more narrowly conceived forms of product 'defects'".[108] They also argue that the 'state of the art' defence (i.e. a product was as safe as it could be on the current state of technical knowledge) explicitly recognized in the European Community Product Liability Law Directive (and also the Australian legislation-see Section 75AK(1)(c) of the Trade Practices Act 1974 which is considered further below) serves a similar end.[109] The position in Australian product liability law is different to that in the US and does not provide a valid contrast with automobile accident compensation law.

Victims of defective products in Australian states may have a wide range of potential actions such as a contractual action against a vendor or manufacturer or a statutory action under, for example, the Sale of Goods Act, 1923 (NSW) which provides strict liability without a contributory negligence defence where a plaintiff can show that goods are not of merchantable quality or are not fit for the purpose for which they were sold.[110] There is no trend in Australia driving product liability back to traditional views regarding product defects, as the authors see happening in the US.

In Australia, the federal government enacted a national product liability law based on the European Economic Community Product Liability Law Directive in 1992.[111] This law currently stands side-by-side with the existing state common law and statutory actions in respect of damage caused by products and gives injured persons a range of possible actions against a range of parties such as vendors, importers and

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[108] *ibid.* p842.
[109] *ibid.*
[110] eg Sale of Goods Act 1923 (NSW) Section 19.
[111] Part VA of the Trade Practices Act, 1974 was enacted with effect from 9 July 1992.

manufacturers.[112] There is still an individualized determination of liability in most cases,[113] but the Act provides strict liability where a product is found to be defective.[114] The focus is therefore not so much on the defendant's fault but on the product itself. Although individual responsibility is still important (the Act provides that in considering whether a product is defective regard is to be had to what might reasonably be expected to be done with or in relation to the product and also provides a 'state of the art' defence)[115] the statutory enactment of such a strict liability regime is indicative that the individual responsibility value implied by a pure tort system has been diluted in Australian products liability law, in the sense that there is no need for a plaintiff to prove that conduct causing an injury failed to meet a predetermined standard.

Therefore, in Australia at least, product liability law is not the stable, settled fault-based system that the authors suggest. There are a number of different remedies available at both state and federal level involving common law negligence and statutory strict liability. The area should not be contrasted with automobile accident compensation for its stability, as the authors seek to do, but rather noted for its complexity. It is therefore not a suitable area for comparison and contrast with automobile accident law.

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[112] An importer or brander of goods can be deemed to be a 'manufacturer' pursuant to Section 75AB of the Act.

[113] But class actions are now possible in Australia-see Part IVA of the Federal Court of Australia Act.

[114] Section 75AD of the Trade Practices Act *op cit.*-a product is defective if its safety is not such as persons generally are entitled to expect. Professor Sappideen notes here that it is frequently argued that the Trade Practices Act claim is a strict liability claim only in a very limited sense, because the claim imports factors not unlike a negligence claim, such as foreseeability (what one might reasonably expect) and the state of the art defence. With all due respect, the Act does not import a reasonable foreseeability standard-the test of an unsafe product in S75AC of the Act depends on what persons generally are "entitled to expect" which in the writer's submission is an entirely different standard.

[115] *ibid.* Section 75AC(2)(e) and Section 75AK(1)(c).

Medical Malpractice

The authors argue that in relation to medical malpractice, individual determinations of liability obtain because it is difficult to ascertain whether an injury or illness is symptomatic of the original medical problem or whether it is iatrogenic[116] (caused by medical treatment). They argue that compensation in this area is therefore logically dependent on proof of causation. They expect that there will be concern that the appropriate activity be held responsible for the injury that occurred, either to provide efficient deterrence or as a matter of fairness in the allocation of responsibility.[117] This creates a resistance to no-fault because of a perception that it would have a significant economic impact.[118]

However, there have been moves in the US towards compensating on the basis of a partial codification of health care negligence rather than strictly according to whether individual plaintiffs can establish fault. This involves the concept of 'accelerated compensation events' or 'designated compensation events' which are a predetermined list of conditions where medical experts consider the adverse patient outcome was avoidable with good patient care.[119] Once one of them is shown to exist, entitlement to compensation flows automatically.[120] An Australian federal government review has recommended that the feasibility of using such a method of compensation be explored

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[116] Chapman and Trebilcock *op cit.* p843-this is a well recognised view see eg Weiler P., 1994, "Medical Malpractice on Trial" p140 cited in "Compensation and Professional Indemnity in Health Care" *Review of Professional Indemnity Arrangements for Health Care Professionals* Interim Report, AGPS, Canberra ("Professional Indemnity Review").
[117] Chapman and Trebilcock *op cit.* p844
[118] Professional Indemnity Review *op cit.* p57.
[119] *ibid.* pp53-4.
[120] *ibid.* p54. Professor Sappideen comments here that Accelerated Compensation Events are usually obvious cases of fault likely to be settled quickly, and that they don't help in more difficult situations.

in Australia,[121] with the benefits of introducing such a system seen to be in terms of both distributive justice and administrative costs.[122]

There have also been numbers of reviews and calls for review of the medical malpractice compensation system at state and federal level in Australia in the past five years[123] that have included calls for compensation on a no-fault basis. This is evidence that values are changing in relation to medical malpractice in this country, and that there is not the degree of settlement in medical malpractice law in Australia that the authors assume that there is. It is also not, therefore, a suitable area for comparison and contrast with automobile accident law.

Workplace Injuries

The authors assert on the basis of their examination of products liability and medical malpractice that the normative salience of the usual compensation value ranking is directly related to the confidence with which voters can judge, without the benefit of a case-by-case determination, that a given injury is truly a consequence of some particular activity. They say that further support for this argument can be found in the fact that compensation for workplace injuries is almost universally handled by no-fault compensation plans.[124] They argue that in the majority of cases, it is either the inherent

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[121] *ibid.*
[122] *ibid.*
[123] See Professional Indemnity Review *op cit.* and generally Tjiong R., "Medical Indemnity Reform" [Online] Available at: http://www.unitedmp.com.au/tort/mja96-5.html and Tjiong R., "Tort Reform" [Online] Available at: http://www.unitedmp.com.au/tort.html and also see Law Reform Committee of Victoria "Legal Liability of Health Service Providers" [Online] Available at: http: //www.Insureform.org.au/liability/title.html. At time of publication NSW had just introduced legislation limiting the maximum liability of medical practitioners.
[124] Chapman and Trebilcock *op cit.* p845.

danger of the workplace or a momentary act of inadvertence on the part of the worker, his employer or fellow workers which best explains how the accident occurred and this is unlikely to be responsive to the deterrent properties of the tort system.[125] This means, according to the authors, that the compensation proponent will unambiguously put the no-fault alternatives ahead of the tort law alternative in their ranking of the policy options and also suggests that the tort law alternative will have little purchase on the individual responsibility proponent.[126] Therefore, the policy alternative which should prevail is that which is not the worst for either the compensation or premium costs values,[127] and that will be one of the no-fault alternatives, most usually in the US threshold no-fault,[128] and add-on no-fault in Australia.[129]

However the authors do not acknowledge in their argument the fact that the basis of compensation for workplace injuries changed gradually in most jurisdictions from negligence in the late nineteenth century to no-fault during the first few decades of the Twentieth century. The first no-fault workers compensation laws originated in Germany in 1884. Britain passed workmen's compensation laws in 1897; however these laws allowed a worker to waive state awards and sue their employers, who were individually liable.[130]

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[125] *ibid.*
[126] *ibid.*
[127] *ibid.*
[128] *ibid.* p846.
[129] *ibid.*
[130] Professor Sappideen notes here that the first common law claim against an employer in the U.K. was *Priestly v Fowler* in 1837-she notes further that most claims were defeated by the defences of *volens*, contributory negligence and common employment which were, to some degree, circumvented by limiting the role of *volens* (*Smith v Charloes Baker* [1891] AC 325) and the action for breach of statutory duty in 1898 (*Groves v Wimborne*) and later the creation of a non-delegable duty in *Wilson & Clyde Coal v*

The US was slow to enact laws, which were passed on a state-by-state basis, with Maryland being the first state to enact legislation in 1902 and Mississippi the last in 1948.[131] The early schemes in the US were limited in scope[132] and there was considerable variation between the different state schemes.[133] It has been argued that the 'rapidity' of adoption of such laws in the US reflected a common economic interest between workers and employers to reduce the overall costs of workplace injuries,[134] and was due also to uncertainty on the part of both employers and employees regarding the law of negligence in the area of workplace injuries.[135] A close analysis has revealed that as employer liability expanded, the probability of enacting a workers compensation statute in the particular state increased.[136] It has been argued that this does not reflect a decrease in the normative salience of tort law, or an increase in the importance of the compensation value, so much as a political trade-off between organized labour and employers due to overriding costs concerns on both sides.[137] This uneven development in the area and gradual rejection of the tort system in the US does not accord with the authors' view that this is a settled area of law supporting their theory regarding stability caused by political dominance of certain values. The stability developed over time, which supports the notion of changing values and shifting political alliances forming the basis of a gradual movement for change. It will be argued in Chapter 10 that such a

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English [1938] AC 57. Consequently workers compensation gave a remedy when there was little by way of recovery at common law.

[131] Illinois Industrial Commission "History of Illinois' Workers' Compensation Law" [Online] Available at: http://163.191.183.110/agency/iic/history.htm

[132] *ibid.*

[133] *ibid.*

[134] Fishback P.V., and Kantor S.E., 1998, "The Adoption of Workers' Compensation in the U.S. 1900-1930", *Journal of Law and Economics* p305 and see also Friedman L.M., 1973, *A History of American Law*, Simon and Schuster, New York p587.

[135] Fishback *ibid.* pp316, 323.

[136] *ibid.* p323 and see p331.

[137] *ibid.*

shifting of values over time could be partly responsible for the variety displayed in automobile accident compensation in Australia.

This shifting of values over time in the area of workplace injuries is further demonstrated by the situation in Canada that was broadly similar to that in the US (although ultimately the Meredith report in Canada was to influence all of the provinces' workers' compensation schemes).[138] The first Canadian legislation dealing with workplace injuries was enacted in British Columbia in 1891. This act was based on the principle that an employer was only liable for workplace accidents that arose directly from that employer's negligence.[139] It was not until sometime after the two year Meredith Royal Commission in Ontario (1912-1914) that no-fault compensation was introduced.[140] In Saskatchewan, the Workmens' Compensation (Accident Fund) Act 1911 gave workers the right to sue their employers at common law with access to limited compensation under the Act if they were unsuccessful in the courts.[141] It was not until 1930 after another royal commission that the Saskatchewan Workmens' Compensation Act, which embodied the five 'Meredith Principles' of no-fault compensation, collective insurance, security of payment, autonomy of action and exclusive jurisdiction, came into force.[142] There is therefore evidence of a gradual change in attitudes in Canada in the area of workplace injuries leading to the stability that the authors describe, rather than any rapidly spreading change across jurisdictions.

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[138] Ison T.G., 1996, "A Historical Perspective on Contemporary Challenges in Workers' Compensation", 34 *Osgoode Hall Law Journal* 807 at p808.
[139] Chaklader A., 1998, "History of Workers' Compensation in B.C." [Online]-Internet article-copy on file with author.
[140] *ibid.*
[141] Saskatchewan Workers' Compensation Board *1995 Annual Report* [Online] Available at: http://www.websask.com/pubs/annual95/wcb61a3.htm

This pattern of gradual change in the adoption of no-fault workplace injury schemes is also similar in Australia. Workers' Compensation acts were introduced by South Australia in 1900, Queensland in 1905, New South Wales and Tasmania in 1910, Western Australia in 1911 and Victoria in 1914.[143] However, common law rights were retained in all states[144] and these rights were vigorously defended by the trade union movement, with workers' compensation legislation in the early days simply imposing strict liability on employers, for government determined benefits, for injuries suffered by workers in dangerous occupations.[145] There was a more than two decades history of attempts at change, with four unsuccessful attempts to introduce legislation in New South Wales (the first in 1889) and at least six such attempts in Victoria.[146] This is further evidence in support of the idea that values changed unevenly over time in the area and there are still significant variations between the schemes, with two different systems of workers compensation operating side-by-side in Victoria for a significant period of time,[147] and numerous calls for reform of state systems over the years.[148] There has also been a gradual restriction on the right to sue in some jurisdictions, particularly since the late 1980's.[149]

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[142] *ibid.*
[143] McEwin R.I., "Compulsory Workers' Compensation: Worker Right or Unnecessary Restriction?" [Online] Available at: http://www.hrnicholls.com.au/nicholls/nichvol5/vol58com.htm
[144] *ibid.*
[145] *ibid.*
[146] *ibid.*
[147] Workers' Compensation Act 1958, Accident Compensation Act 1985-see generally CCH *Australian Workers' Compensation Guide* CCH Australia Ltd, Sydney, Loose Leaf Service.
[148] See eg McEwin, "Compulsory Workers' Compensation" *op cit.* and also Atkins G., and Whittle D., 1998, "The Role of Common Law in Workers' Compensation in Australia" *Accident Compensation Conference* p27.
[149] *ibid.* and see "Australian Workers' Compensation Guide" *op cit.* at pp 32,000; 38,500 and 56505. At time of writing, a new threshold no-fault scheme had just been introduced by the Labor government in NSW in the face of a vigorous negative campaign from the union movement, which wanted to retain the existing add-on no-fault system.

In summary, the history of compensation for workplace injuries in the US, Canada and Australia has been one of gradual change over an extended period, and not one of settled stability as the authors imply. It has been argued that this change (in the US at least) has not been due to the increasing importance of the compensation value, but to an accommodation between the vested interests driven by uncertainty in the liability system and concern over costs on all sides. The authors' assumption of stability in these areas and their endeavour to contrast this notional stability with the 'unstable' position in automobile accident compensation is simply not supported by the historical evidence.

Automobile Accidents

The authors argue, in the context of automobile accidents, that none of the arguments regarding the undermining of the normative salience of at least one of the three values necessary for the occurrence of a majority voting cycle has the same application as in the areas of products liability, medical malpractice or workplace injuries.[150] They assert that all three values will have normative salience; the compensation value because any given injury can be characterized as being a general consequence of driving and because it has been demonstrated that all drivers make mistakes which may lead to an accident;[151] the individual responsibility value because some will tend to see bad drivers as the major cause of most accidents[152] and the premium cost value because it is always important in public policy choices.[153] The existence of all three values, it should be noted, can be shown mathematically to be a necessary condition for a voting cycle to

[150] Chapman and Trebilcock *op cit.* p847.
[151] *ibid.*
[152] *ibid.* p847-9.
[153] *ibid.* p848-9.

occur.[154] The authors' reasoning is therefore circular; all three values must be present because voting cycles are probably occurring, and voting cycles are occurring because all three values are probably present. The evidence in Chapter 10 suggests, however, that voting cycles have not occurred. Therefore, using the authors' own reasoning all three values are probably not of equal importance politically in Australian jurisdictions.

The Changing Nature of Fault in Australian Automobile Accidents

In contrasting the area of automobile accident compensation with the other areas of law, the authors do not deal with the evidence which supports the proposition that within Australian states retaining a tort based liability system, the courts had begun to set such an extremely high standard of care for drivers (probably because of the existence of compulsory insurance)[155] that it could be argued that there was almost a strict liability or even 'quasi no-fault' approach to the question of negligence. Thus comments from the bench such as that of Clarke JA in *GIO (NSW) v Ergul (1993)* Aus Torts reports 81-252 that "since the advent of compulsory insurance and consequential notions of risks sharing, the courts have in substance elevated the 'reasonably prudent driver' to the role of the perfectionist". In *Etri and Anor v Eid and Anor* (Supreme Court of NSW 1 December 1998 unreported) Stein JA made the comment that "... of course the plaintiff need only show a scintilla of negligence in the driver [in order to establish liability]". In the case of *Scheib v Abbott* (1998) 26 MVR 285 the court went so far in extending the standard of care owed by a driver to a pedestrian that the case has been described as "an

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[154] *ibid.* p838.
[155] Fleming J., 1998, *Law of Torts* 9th Edition *op cit.* p19 and see also *Nettleship v Weston* [1971] 2 QB 691 at p699.

apparent move away from a previous line of cases based upon the concept of fault".[156] In the cases of *Stoeckil v Harpers* [1971] 1 SASR 172, *Shepherd v Zilm* (1976) 14 SASR 257 and *Antonow v Leane* (1989) 53 SASR 60 the South Australian courts developed the concept of 'defensive driving' to the extent that it could more rightly be said that there was a duty to engage in 'protective driving'.[157] Whilst the High Court has recently attempted to stem the tide in the case of *Derrick v Cheung op cit.*, by finding that it is still necessary to find fault on the part of a driver in order to make an award for damages in negligence arising out of an automobile accident, the instances in which the courts have been prepared to find fault are still very wide.

This means that if courts in tort jurisdictions set extremely high standards for drivers to the extent that a plaintiff in those jurisdictions need only show a 'scintilla' of negligence in order to succeed in establishing primary liability and if courts are expanding liability because of the existence of compulsory insurance, then it could be argued that the normative salience of the individual responsibility value is eroding in those jurisdictions at a 'grass roots' level. All of the schemes could effectively have similar outcomes in terms of who is compensated and ultimately the differences between the systems in terms of liability theory could be much narrower than the authors assume because tort itself is growing 'organically' towards a 'no-fault' position.

In addition, the authors do not mention that since the 1970's there has been a prevalent opinion amongst many commentators to the effect that a gradual move to no-fault

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[156] Lazar G., 1998, "Factors Implicated in Rising Costs: The Insurers' Perspective" *CTP Claims Management Symposium* p2-some courts have shown consternation at attempts to draw general principles from this and similar cases-see eg *Harper v Blake* [1999] NSWCA 224 and *Albert v The Nominal Defendant* [1999] NSWCA 73.

compensation in the area of automobile accident compensation is inevitable.[158] This is mainly because of the very argument raised by the authors as central to the compensation value proponents, and that is that motor accidents are an inevitable by-product of driving in a modern society, for which point there is some empirical support.[159] It is implausible that this body of academic opinion would have no effect on the way voters view the question of change in automobile accident compensation, and many of the academic works have been cited in a number of the reports and parliamentary debates which are examined in Chapter 10. It is also unlikely to have the same effect at the same time on the debate in each jurisdiction as to what form automobile accident compensation should take. There is evidence, which will be further examined in Chapter 10 of this work, that such opinion *has* had a varying effect on debates in different jurisdictions as to what form automobile compensation should take.

It could also be argued, contrary to the authors' theory as to what is causing the diversity in motor accident compensation systems in Australia, that the individual responsibility value does have normative salience and is therefore politically dominant. The evidence for such an argument is that several jurisdictions have maintained a fault-based system despite prevailing academic opinion favouring the change to no-fault compensation and it could therefore be that the compensation value is not considered important enough to set up the conditions necessary for a change or for cycling to occur.

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[157] Bollen, *Motor Vehicle Law South Australia*, LBC, Adelaide, Loose Leaf Service.

[158] For a brief selection of a huge body of work see eg Fleming, 1998, *The Law of Torts* 9th Edn *op cit.*; Cane P., 1993, *Atiyah's Accidents, Compensation and the Law*, 5th ed., Butterworths, London; Sugarman S., "Doing Away With Tort Law" *op cit.*, Robinson M.A., 1987, *Accident Compensation in Australia: No-Fault Schemes*, Legal Books, Sydney.

[159] eg see Lascher E.L. Jr and Power M.R., 1997, "Expert Opinion and Automobile Insurance Reform: An Empirical Assessment", 16 *Journal of Insurance Regulation* p197.

This argument will be stronger if evidence from those jurisdictions does not demonstrate support for the theory that majority voting cycle is occurring.[160]

The Ultimate Artificiality of the Second Step in the Theory

Finally, the authors concede that their theory is dependent on the existence of a special set of conditions; for cycling to occur, there must be at least three alternatives for consideration.[161] There must also be pairwise comparisons between alternatives and, for results to be sequence dependent, there must be some form of restriction on re-visiting previously considered alternatives.[162] If all of these conditions are present, the fact that the authors' extended case study relating to automobile accident compensation is really a specific example of a well-known mathematical paradox becomes evident.[163] If evidence shows that the necessary conditions for cycling to occur are not present in Australian jurisdictions then the authors' theory cannot stand in relation to automobile accident compensation schemes in those jurisdictions. An alternative explanation for the 'puzzle' must then be sought.

If the authors are correct, then not only must voters compare three or more alternatives, and do so pairwise, but those voters must also fail to be 'transitive', in the sense that where the situation x>y>z pertains (where x, y and z are, say, tort, add-on no-fault and

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[160] See Chapter 10 hereof.
[161] Chapman and Trebilcock *op cit.* p851.
[162] *ibid.* p834.
[163] See Saari D.G., "The Symmetry and Complexity of Elections" *op cit.* p3. Bruce Chapman in a later article attempts to extend the application of the theory that voting paradoxes are responsible for policy diversity to the whole area of accident law-see Chapman B., "Pluralism in Tort and Accident Law: Toward a Reasonable Accommodation" in Postema G.J., 2001, *Philosophy and the Law of Torts*, Cambridge University Press, New York p276.

pure no-fault) the voters do not prefer x>z.[164] According to the authors, this lack of transitivity must be the same in every jurisdiction because it is implausible that voters in similar jurisdictions have differing perceptions of the pathology of accidents or the need for compensation, and they will also maintain similar values.[165] The authors' theory thus describes a state of social instability where collective intent is irrelevant to final outcome, which is determined by sequence and which is open to agenda manipulation. But the authors undervalue two important points; firstly their theoretical model explaining the diversity allows no complexity to make people uncertain about the consequences of their actions in voting on changing automobile accident compensation systems.[166] Secondly, their model includes no scarcity of resources (e.g. money, time or political will) of the type that makes holding another vote or implementing a new policy expensive.[167] In other words there might be good reason for strong resistance to any change that does not have demonstrable benefits in terms of costs. This might explain why there is a preponderance of fault-based automobile accident compensation systems in Australia each of which has a different method of calculating damages; the only question, which can 'safely' be put on the agenda, is how to contain system costs within the existing environment.

It is also implausible that all jurisdictions in a federation would be subject to continual unstable policy formation in the area of automobile accident compensation without some attempt to force a majority position that was *not* sequence dependent, because presumably there is a sufficient level of political sophistication in at least some of the

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[164] Saari "The Symmetry and Complexity of Elections *op cit.* p4.
[165] Chapman and Trebilcock *op cit.* pp850-6.
[166] Lupia A., and McCubbin M.D., "Who Needs Institutions? How Exogenous Forces Stabilize Social Choices" [Online] Available at: http://weber.ucsd.edu/~alupia/SCT98.html p5.

jurisdictions such that voters would become aware that cycling and sequence dependence were occurring. If factors of complexity and scarcity were present in the choice process, then this would adequately explain the diversity of policy outcomes in the area of automobile accident compensation without the need to impose the authors' 'collective irrationality'. In fact, the authors' explanation of the reasons for the lack of a dominant value in the area of automobile accident compensation[168] could even be seen as a description of complexity which may lead to diversity through shifting alliances,[169] rather than inevitably leading to cycling with sequence dependent outcomes. In other words there might be some interest groups combining in different ways in individual jurisdictions shaping the face of change in order to achieve desirable outcomes for themselves, which should become apparent on an examination of the available evidence.

Conclusion

This chapter has briefly critically examined the authors' theory for the diversity in motor accident compensation systems in similar jurisdictions, and questioned several of the assumptions on which it is based. The theory has been shown to have some internal inconsistencies and to make some assumptions about the stability of areas of law other than automobile accident compensation such as workplace injuries, medical malpractice and products liability that are not well founded. The rejection by the authors of the three hypotheses alternate to their theory is also questionable which casts doubt on whether the authors' puzzle is really puzzling at all. The next task in the analysis of the authors'

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[167] *ibid.*
[168] Chapman and Trebilcock *op cit.* pp847-9.

theory is to develop a test that can be used to measure the theory against the available Australian evidence, and then to carry out that test to determine the validity of the theory. In the next chapter a test will therefore be developed which can be used to further measure the validity of Chapman and Trebilcock's theory.

[169] See Chapter 7 herein.

CHAPTER 9

TESTING CHAPMAN AND TREBILCOCK'S THEORY

The validity of Chapman and Trebilcock's theory, by its nature, is difficult to test without direct evidence of voting results within relevant decision-making bodies. This Chapter proposes a means of testing the theory, so far as it relates to automobile accident compensation in Australia, against available data sources.

As previously seen, Chapman and Trebilcock's theory effectively has two interrelated steps; firstly, a rejection of three hypotheses[1] which might explain the diversity which exists but which are alternate to their theory, secondly, the positing of a theory to the effect that majority voting cycles and sequence dependent outcomes in the various states best explain the diversity in policy particularly exemplified in automobile accident compensation systems.[2] Their argument is that the existence of majority voting cycles combined with some form of constraint preventing jurisdictions from reconsidering previously rejected alternatives can lead to sequence dependent outcomes.[3] Therefore the diversity of policy outcomes in automobile accident law can be explained by different sequences in which the alternatives for choice have been presented for voter consideration in the different jurisdictions.

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[1] Which are that there are differences in underlying facts relating to the pathology of accidents or the need to compensate for them, but similar values; different appreciations of the facts despite the same or similar facts and values; or similar facts and appreciation of the facts but different values-see Chapman and Trebilcock Op Cit pp804-5. See also Chapters 3 and 4.

[2] Ibid p836.

[3] Ibid-this is well-documented public choice theory-see eg Levmore S., 1989, "Parliamentary Law, Majority Decision Making and the Voting Paradox" 75 *Virginia Law Review* p971.

This two step theory cannot stand if either aspect is incorrect because (a) if there are different facts, different appreciations of the facts or different values obtaining across the various state jurisdictions within Australia then the puzzle is explained and there is no need for the second part of the theory; and (b) if available evidence does not support the theory that majority voting cycles and sequence dependence have been occurring in those jurisdictions then there must be some other explanation for the diversity.

In order to properly test the validity of Chapman and Trebilcock's theory, both steps must therefore be evaluated as far as possible against available empirical evidence.

THE FIRST STEP IN THE THEORY

The first step in the theory, rejecting the various hypotheses relating to differences in facts, compensation needs and values is difficult, if not impossible, to directly test. Observations have been made in previous Chapters regarding values changing over time.[4] Significant changes in automobile accident compensation systems in Australia have occurred over a period spanning three decades commencing with changes in Victoria in 1973. Without the benefit of contemporaneous surveys of decision makers' views, or records of voting patterns within the parliamentary parties deciding on changes to automobile accident compensation systems,[5] it is not possible to know

[4] See also Levmore S., 1999, "Voting Paradoxes and Interest Groups" 28(2) *The Journal of Legal Studies* 259 at p280.

[5] As part of this study letters were written to every state and territory branch of the Labor and Liberal parties seeking access to the records of the parliamentary parties when they were in government and there was a change to the existing automobile accident compensation system. However no such access was forthcoming and in many cases there were apparently no such records ever in existence.

whether voters, particularly those in the major political parties voting on change, held the same or similar appreciation of the facts relating to automobile accidents or the need to compensate for them or similar values or distributions of values at any given point in time. To test the first aspect of Chapman and Trebilcock's theory, it is therefore necessary to ascertain whether there is any indirect evidence supporting a view as to the validity of the first step in the theory.

For the purposes of this section of the thesis, it is assumed that the 'actual' facts relating to accidents have been the same or similar across jurisdictions during the period when automobile accident compensation schemes have been in operation because of basic similarities across Australia in road construction, road rules, vehicles, driving age and numerous other factors.[6] This part of the discussion is therefore confined to a consideration of the indirect evidence relating to the *appreciation* of facts relating to accident causation and the need to compensate as well as examining the distribution of values associated with automobile accident compensation.

For the purposes of this discussion the search for such indirect evidence is restricted to the period immediately surrounding 'major'[7] changes to the various state and territory systems which occurred from the 1970's onwards (as the schemes were all similar until 1973). The main reason for restricting the evidence in this way is a concession to workability given the lengthy time period involved. However, it is also logical that the

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[6] Professor Sappideen comments here that it might be that a number of factors could be relevant and lead to different accident rates, such as weather, car numbers, driver age, lighting and road conditions. With all due respect, such factors are likely to vary across and within states and the point being made is that it is the *appreciation* of these factors, rather than their incidence, which is likely to vary across jurisdictions.

[7] In the sense of either a change in liability theory or a significant change in the level of benefits and/or the way in which they are calculated. The only exception to this is the consideration of the 1999 ACT scheme review where detailed reasons were given for <u>not</u> making significant changes to the scheme.

most meaningful evidence would be found at times when scheme change was on the agenda (see below). The search is also confined for the most part to publicly available sources that contain indications of how and why the voters in the parties assessed the facts and need for compensation arising out of automobile accidents at the time that changes to existing systems were on the agenda. These sources are:

(a) Parliamentary Debates;

(b) The schemes themselves;

(c) Scheme Reviews and Royal Commissions.

An analysis of the available records of parliamentary debates associated with major changes to state and territory schemes provides evidence of the values of the major participants in the changes. This allows an assessment of whether there have been any clear majority positions that have led to scheme changes.

The structure of the schemes themselves, many of which contain express objects, also provides clues as to the values of those framing them. As already seen in Chapter 6, conclusions can be drawn about the values important to scheme framers from the way in which the schemes deal with coverage and benefit structures. The variety demonstrated in the coverage, benefit structures and objects of the various Australian schemes is strong *prima facie* evidence that values have varied across states during the time period being examined. However, an important rider should be added and that is that if

Chapman and Trebilcock are correct then the final structure of the schemes may be an arbitrary result of the voting procedure.[8]

An examination of scheme reviews and royal commissions informing system changes and the reaction to them provides insights into the intellectual input to the change process. This is particularly so where reasons have been given in the parliamentary debates for rejecting, adopting wholesale or receiving with amendment the recommendations of such reviews and commissions. Chapman and Trebilcock do not deal with scheme reviews and royal commissions in formulating their theory, which means that they miss a whole dimension when evaluating change. This discussion, however, picks up that dimension as part of the analytical framework used to test the authors' theory.

The next question is what is significant evidence in determining the validity of the first step in the theory. If the first step in Chapman and Trebilcock's logic is correct, the following should be found in the parliamentary debates from each state and territory:

> (a) The same or similar arguments in each state relating to the causes of automobile accidents, because the appreciation of the facts of accidents will be similar;
>
> (b) The same or similar arguments relating to the need to compensate victims of automobile accidents, because the need to compensate should not vary significantly across jurisdictions;

[8] Chapman and Trebilcock *op cit* p839.

(c) A similar range of expressed values encompassing individual responsibility, compensation and premium costs concerns because the existence of roughly even numbers of voters across all three of these 'value rankings' as Chapman and Trebilcock describe them, is both likely to be found and logically necessary for majority voting cycles to occur;

(d) A high level of information/knowledge on the part of important participants related to automobile accident compensation, because otherwise if there is any significant degree of failure to consider the major issues prior to making changes there is the possibility of divergences in values, which would not accord with Chapman and Trebilcock's theory.

If the views on the need to compensate and the values, or distribution of values are similar across jurisdictions it could be expected that the schemes themselves would also be similar in terms of coverage and outcome for victims with the main differences being in liability theory attributable to the tension between individual responsibility and compensation proponents. As Chapman and Trebilcock point out, concern for premium costs is almost ubiquitous[9] and therefore as all three value rankings should be present in roughly equal measure in all jurisdictions the differences between schemes should be minor and explicable in terms of a voting paradox such as that described by Chapman and Trebilcock. The fact, established in Chapter 6, that the coverage and outcome for

[9] *ibid* p849.

victims is significantly different across jurisdictions[10] is a strong indication that there is some other process occurring. This warrants the testing of Chapman and Trebilcock's theory in the manner proposed.

TESTING THE SECOND STEP IN THE THEORY

To test the second step in Chapman and Trebilcock's theory, the same sources used in testing the first step in the theory are analyzed for signs of majority voting cycles and sequence dependent outcomes, such as any indication of the ranking process occurring involving more than two scheme types.

At first glance this should be an easier task than testing the first step; the parliamentary debates contain records of all major speeches and debates relating to automobile accident compensation legislation. The details of amending motions, voting sequences and speaker's rulings are mostly transparent and so the existence of voting cycles should be immediately obvious.

Chapman and Trebilcock acknowledge though that, in any political jurisdiction dominated by two parties, a voting cycle should not be possible over just two party platforms. They deal with this objection to their theory by pointing out that parties must determine what their platform will be before presenting it to the voters. They argue that the cycling and consequent sequence dependency might occur at this policy formulation

[10] Differences in coverage and benefit structures have already been examined in Chapter 6. The patterns of diversity noted do not support Chapman and Trebilcock's assertion that views on the need to compensate and distribution of values are the same across the whole of Australia.

stage.[11] If this is correct, a simple examination of the parliamentary debates in those jurisdictions dominated by two parties or coalitions of parties is not sufficient to test their theory if the debates themselves do not adequately explain the reasoning behind the governing party's position. Where there is insufficient hard evidence as to how party positions were arrived at the theory is impossible to test directly, but it can be tested indirectly through the same sort of secondary evidence used to test the first step in the theory.

This evidence is found in statements made in the course of parliamentary debates relating to the introduction of automobile accident compensation systems, and in the reviews and royal commissions informing the debates. If Chapman and Trebilcock's theory is correct, the following secondary evidence should be found in those sources;

(a) Changes in stated party positions before one is settled on, because of cycling occurring within parties or coalitions;

(b) An absence of any clearly stated majority position in relation to liability theory because any such position should hinder or prevent cycling from occurring according to Chapman and Trebilcock's own theory;

(c) Definite signs of ranking of more than two alternative schemes at any one time, with pairwise comparison of alternatives, because this is a necessary condition for cycling to occur;

[11] *ibid* p835 fn 82.

(d) Similar issues being ventilated in parliamentary debates on scheme changes, and similarity of arguments and recommendations across jurisdictions in the scheme reviews informing those debates, because the facts, appreciation of the facts and distribution of values should all be similar;

(e) Expressions of surprise or dissatisfaction at policy outcomes with calls for changes to voting procedures or to institute referenda to force a 'proper' majority outcome;[12]

(f) Evidence of high levels of activity from vested interest groups such as lawyers, health professionals, victim support groups and insurers because where there are competing alternatives with no majority preferred outcome then investment by such groups may lead to the success of their preferred position.[13]

A test of the second step in the theory therefore involves examining the available data for any of the above 'signs'. The more signs that are found in the evidence from a jurisdiction, the more likely it is that Chapman and Trebilcock's theory is correct.

[12] See Levmore S., "Parliamentary Law, Majority Decision Making and the Voting Paradox" *op cit* pp 1012-1016.

[13] See Levmore S., "Voting Paradoxes and Interest Groups" *op cit* p271-2. Chapman and Trebilcock argue (*op cit.* p840 fn 86) that varying levels of political influence of such groups should also be reflected in other areas of law such as products liability, medical malpractice and workers' compensation. However, this ignores the possibility that interest groups such as lawyers may have no possibility of

THE DEFINITION AND RELEVANCE OF CHANGE POINTS TO THE TEST OF THE THEORY

Testing Chapman and Trebilcock's theory involves examining voluminous primary and secondary data, a full historical analysis of which would be too extensive for the scope of this study. It is therefore pertinent for the purposes of this paper to restrict the search for significant data to those periods in time contiguous with changes to the automobile accident compensation systems in the different jurisdictions. This limits the data to be tested to manageable proportions. In addition, if there are majority voting cycles and sequence dependent outcomes occurring then evidence of this should be strongest at those points when change comes onto the agenda prior to and around the time that change actually occurs.

Thus to test Chapman and Trebilcock's theory, 'change points' will be examined. Change points are defined for the purposes of this thesis as those periods immediately preceding a substantial change to the automobile accident compensation system in any state or territory. These change points are the periods in which the type of political process expected by Chapman and Trebilcock are likely to occur within the major parties.

In terms of what should be found at these 'change points', Chapman and Trebilcock describe the following political process, which they expect would occur in a jurisdiction confronting the 'instability of choice' over tort law, the add-on regime and the threshold

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shifting strongly held views regarding certain areas of law and thus invest few resources in attempting to change those areas.

regime. Firstly, they expect that some dissatisfaction with tort law will emerge among those in the jurisdiction who are most concerned about compensation and premium costs. They would form a politically decisive coalition to choose the threshold regime over tort law, since the threshold regime is preferred to tort law on both the compensation and premium costs criteria in Chapman and Trebilcock's analysis. However, the authors expect that those most concerned with individual responsibility, when confronted with a move to the threshold regime, would be tempted to propose the add-on scheme as an alternative. The authors argue that they would be supported in this by those most concerned about compensation, and this coalition is likely to be politically decisive for the add-on regime. However, such a regime is anathema to those worried about high premium costs and so the authors expect that, without constraints on the reconsideration of previously rejected alternatives, this group would seek to form a coalition with the deterrence sympathizers to restore tort law. From here the cycle would be in danger of beginning anew with the same coalitions.[14]

If Chapman and Trebilcock are correct in their hypothesis that such voting cycles determined the form that automobile accident compensation has taken across the Australian states, there should be evidence of processes such as that described above occurring immediately prior to any change occurring in individual states schemes, but with evidence of some political interference to prevent repeated cycling.

Chapman and Trebilcock point out that it was not until the decade between 1970 and 1980 that diversity in automobile accident compensation systems began to emerge in

[14] Chapman and Trebilcock *op cit* pp 836-7.

Australia.[15] Prior to that time, all of the Australian systems were Compulsory Third Party insurance schemes covering liability in negligence of owners and drivers of vehicles. The search for primary and secondary data thus properly commences at the time when change first began to appear in the automobile accident compensation landscape and encompasses all such change up until the present.

The first significant change in automobile accident compensation occurred with the passing of the Motor Accidents Act 1973 in Victoria that introduced an add-on no-fault system in that state. Tasmania passed similar legislation in 1973. Victoria then changed to a threshold no-fault scheme in 1986. In 1979 the Northern Territory introduced a 'pure' no-fault system covering territorians only. The other States and the ACT all retained fault as the basis for determining liability but New South Wales, Queensland, Western Australia and South Australia made substantial changes in the way damages were calculated. The last such change was the amended scheme introduced in Queensland in 2000. Testing Chapman and Trebilcock's theory therefore necessarily involves an examination of primary and secondary evidence at change points from the time of the first move away from the status quo in Victoria right up until the changes which occurred in Queensland in 2000.

There are some problems in formulating a test of Chapman and Trebilcock's theory because of the nature and availability of the data that must be examined. However a test has been developed in this chapter that is based on expected findings within the available secondary sources of evidence. The concept of 'change points' has also been developed as a limiting factor to restrict the testing of data to manageable proportions.

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[15] *ibid* p800.

In the next chapter the test is applied to the available evidence to determine the validity of the authors' theory.

CHAPTER 10

APPLYING THE THEORY TO THE EVIDENCE

Introduction

In the last Chapter a test of Chapman and Trebilcock's theory as it relates to automobile accident compensation in Australia was proposed. To test the first step in the theory involves examining various secondary sources of evidence for signs that there have been similar arguments relating to the causes of automobile accidents and the need to compensate automobile accident victims in the different states and territories.[1] It will also be necessary to assess the extent to which there are roughly equal divisions amongst proponents of the key values of individual responsibility, compensation and costs across the various Australian jurisdictions over the time frame being examined.

To test the second step in the theory, that political instability and differences between states in terms of their automobile accident compensation systems can be explained by the existence of majority voting cycles and sequence dependent outcomes, will involve examining the same secondary data sources for evidence of the existence of any such voting cycles, or of the conditions necessary for their existence.[2]

The period to be examined will be from 1970 to date, as this is the period of greatest change among Australian automobile compensation schemes. The evidence to be examined will be constituted by

[1] For the purposes of this paper it will be assumed that the facts relating to automobile accidents do not vary across jurisdictions.
[2] Such as an attempt to rank or vote on 3 or more alternative schemes.

parliamentary debates relating to any significant scheme changes in a state or territory, as well as any reports, reviews or Royal Commissions forming the basis of any such changes.[3]

THE FIRST STEP IN THE THEORY

(a) Arguments Relating to the Causes of Automobile Accidents

If Chapman and Trebilcock are correct in rejecting the hypothesis that citizens in different jurisdictions entertain a different appreciation of the facts of accidents, even though they might bring to bear a similar set of values on them,[4] then it could be expected that as a result there would be evidence in the debates, reviews etc of the same or similar arguments relating to the causes of automobile accidents because of the similar appreciation of the facts of accidents.

In general, the evidence does not support Chapman and Trebilcock. Whilst many of the scheme reviews and debates over scheme changes do not contain any arguments or clearly stated views relating to the causes of accidents,[5] there are a wide range of views expressed in others about what causes accidents. These can be divided roughly evenly into two broad groups; first, those that believe that accidents are an inevitable by-product of modern motoring and/or problems with the road

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[3] A list of the debates, reviews etc can be found in Annexure A to this paper. The review of evidence is restricted to state and territory schemes; reference to proposed federal schemes or federal party policy will only be made in passing, and only where relevant to the decision making process in an individual state or territory.

[4] Chapman and Trebilcock *op cit.* p 804.

[5] This is especially true of some of the later reviews and debates, particularly in those states where no change is being made to liability theory-see eg the 1994 debates in Western Australia, the "Shelley Miller Review" in NSW (see Miller S. QC., 2000, "Transaction Costs and Governance Engineering in Motor Accident Insurance Scheme Design: A New South Wales Experiment" 12 *Insurance Law Journal* 1) or the 2000 Queensland debates *op cit.*

environment itself as well as the increasing numbers of vehicles on the roads; and secondly those who are of the view that accidents are a result of 'faulty' (or even morally reprehensible) driving.[6]

As could be expected, in those reviews and debates that have advocated, or actually led to, a move away from a fault-based to a no-fault system, variations on the first view prevail. This view is expressed most strongly in those reviews and debates where a move to a pure no-fault system has been recommended or actually implemented. Thus, for example, in the March 1984 debates which led to the Northern Territory adopting Australia's only pure no-fault automobile accident compensation scheme, the government argued that accidents could be caused by a range of factors, including not only inattention, poor driving and alcohol consumption, but also driver illness, animals wandering onto the road, and poor road design and maintenance. It was argued that the fault-based system's compensation of only a third or so of those injured in automobile accidents was therefore inequitable.[7] In the New South Wales Law Reform Commission's comprehensive review of automobile accident compensation "A Transport Accidents Scheme for New South Wales",[8] which argued strongly in favour of a pure no-fault scheme in this state, the commissioners took the view that automobile accidents are among the inevitable hazards of modern life, and that it was unrealistic to assume that motorists can drive safely at all times.[9] Similar to views expressed in the Northern Territory debates above, the commissioners thought that the concentration on driver fault could

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[6] Chapman and Trebilcock concede that this dichotomy is likely to be found, but they see the divergence in views to be roughly even across jurisdictions-*op cit.* p248-9. They do not consider that these views may have varying numbers of adherents in important decision making positions in different jurisdictions making suspect their rejection of the hypothesis that there are different appreciations of the facts of automobile accidents in different jurisdictions.

[7] Northern Territory Parliamentary Debates Wednesday 7 March 1984 p282-3. The government cited a briefing paper that made the distinction between the majority of accidents caused by "technical fault" and those few caused through "moral fault". This paper argued that protection under the no-fault scheme should be less for those who increased the hazard of accidents through consumption of alcohol and/or drugs-see Northern Territory Parliamentary Debates 13 June 1984 p 665.

[8] New South Wales Law Reform Commission Report No. 43 (1984) *Report of the Law Reform Commission: A Transport Accidents Scheme for New South Wales,* NSW Government Printer, Sydney.

[9] *ibid.* p58-9. Evidence was cited that even "good" drivers make many mistakes over a given period of time-see *ibid.* p 59.

discourage remedial work on the part of 'corporate bodies' to produce a less risky road environment.[10]

In Victoria in 1986 in a discussion paper entitled "Victoria-Transport Accident Compensation Reform"[11] the Labor Government argued that the fault concept was not relevant to modern Australian society "where accidents to which no-fault or blame attaches occur regularly".[12] They developed this theme in the debates that followed where they (unsuccessfully) attempted to introduce a pure no-fault scheme. It was argued that automobile accidents were a by-product of a modern technological society and that the investigation of notional fault in relation to automobile accidents was "counterproductive to accident prevention" because it "begs questions of how we can make our roads safer and our traffic systems safer".[13]

By way of complete contrast, there are several examples of the view that accidents are caused by bad or 'faulty' drivers, all of which are associated with dominant political groups supporting the retention of the fault-based system. A good example is the opposition conservative coalition's position in the 1986 Victorian debates mentioned above.[14] They argued that 'bad' driving that could be curbed by the retention of a fault-based compensation system caused many accidents.[15] Perhaps the most striking example of such a position however is that of the New South Wales Transcover Review Committee. The committee, which was commissioned by the new conservative Liberal

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[10] *ibid.* p60 citing a submission to the Commission by D. C. Herbert, Superintendent of the Traffic Accident Research Unit.
[11] *Victoria-Transport Accident Compensation Reform* -Government Statement, May 1986.
[12] *ibid.* p27.
[13] See the speech of Mr Hill at Victorian Parliamentary Debates 18 September 1986 p665. See also Victorian Parliamentary Debates 8 May 1986 p2022.
[14] The opposition was "dominant" politically in that it held the numbers in the state's upper house to defeat the government's preferred pure no-fault scheme and force a compromise threshold no-fault system.
[15] See the speech of Mr Stockdale of the Liberal Party at Victorian Parliamentary Debates 28 October 1986 p1557-8 citing the research of R. Ian McEwin (*No-fault and Motor Vehicle Accidents-op cit.*) to the effect that the introduction of no-fault increased the incidence of accidents.

Government in New South Wales in 1988 to review the state's unique and unusual automobile accident compensation system[16] was of the view that the system of liability based on fault encouraged "a continual awareness of the need for the exercise of reasonable care".[17] They also thought that fault was the measure of conduct which causes accidents 'unnecessarily' and which therefore makes the costs of accidents more expensive, creating an incentive to drive carefully to keep car ownership costs down.[18] They expressly rejected the 'moral relativism' behind the idea that many automobile accidents are inevitable, and that the legal concept of fault in the negligence action is therefore meaningless.[19]

Apart from the two aforementioned groups of opinions regarding the causes of motor vehicle accidents, there is another view amongst certain groups of politicians that is similar to, but distinct from, the latter idea that automobile accidents are *actually* caused by bad driving. This is that *the community believes* that accidents are so caused, and so in order to 'give the voting public what they want' the fault system should be retained, at least in part. Examples of such a view can be found in the report of the Victorian 'Delays Committee' in 1971,[20] in the Motor Accident Act debates in New South Wales in 1988,[21] in the 1999 Queensland scheme review,[22] in the review of the NSW scheme

[16] This system, which will be described in more detail later in this paper, was fault-based but with the question of liability being determined extra-judicially by officers of the Government Insurance Office who were also charged with the task of advising claimants as to their rights and entitlements, which created a clear conflict of interest.
[17] NSW Attorney General's Department (1989) *Motor Accidents: The Act and Background Papers* NSW Government Printer, Sydney.
[18] *ibid.* p75.
[19] *ibid.* p89.
[20] Delays Committee, 1971, *Report to the Chief Secretary on Delays in the Settlement of Third Party Insurance Claims* Melbourne.
[21] NSW Parliamentary Debates 29 November 1988 p3828.
[22] CTP Review Committee, 1999, *Review of Queensland Compulsory Third Party Insurance Scheme* Queensland Government Printer. The review committee garnered some evidence from market research "focus groups" which tends to support this view-see *ibid.* P 92.

conducted by Shelley Miller QC in 1999[23] and in the parliamentary debates which followed the Miller Review.[24]

The above demonstrates that the arguments relating to the causes of automobile accidents have not been similar across Australian states since 1970, and that therefore Chapman and Trebilcock's rejection of the hypothesis that people across federal jurisdictions hold similar appreciations of the facts relating to the pathology of accidents is not correct.

(b) Arguments Relating to the Need to Compensate Victims of Automobile Accidents

Chapman and Trebilcock reject the proposition that citizens in different jurisdictions in a federation such as Australia could entertain a different appreciation of the underlying need for compensation over an extended period of time. However, the evidence supports a somewhat different conclusion.

As with the question of the causes of automobile accidents, the views about the need to compensate tend to form into roughly defined groups, but these are less distinct than those relating to accident causes. One such group is those who were primarily motivated by distributive justice concerns and who believed that all victims of automobile accidents should be compensated on equal terms, regardless of their previous income or occupation. The New Zealand and Australian Woodhouse Commissions heavily influenced most of these groups, with their principles of 'Rights Universally Enjoyed', and 'Real Compensation' (which meant that compensation payments should be 'adequate' but limited in order to provide an incentive to return to work). In this group there was less emphasis

[23] See Miller S. *op cit.* p 5 citing Woolcott Research, 1998, *Exploration of Awareness and Attitudes Towards the Current CTP Scheme and its Potential Alternatives.*
[24] See NSW Parliamentary Debates 22 June 1999 p1038. Interestingly, it appears that the government thought that one effect of its new scheme might be that this view would change-see *ibid.* p 1038-9.

on individual entitlement and more of a focus on 'comprehensive' or 'universal' compensation for all automobile accident victims. Of course all those falling within this group favoured the introduction of some form of no-fault scheme.

A good example is the 1972 report of the Tasmanian Law Reform Committee (the 'Neasey review').[25] This committee argued that the main objective of a compensation system was to eliminate economic and social hardship by providing full compensation "or as near to it as reasonably possible" for economic losses suffered by all accident victims, and to do so without delay.[26] Similar views were expressed in Victoria in the 1971 'Delays Committee Report'[27] which was one of the reports which led to that state's add-on no-fault scheme, and in the 1979 Northern Territory 'Bradley Report',[28] which preceded the territory's change to an add-on scheme. But the zenith of this group was clearly the New South Wales Law Reform Commission's report "A Transport Accidents Scheme for New South Wales".[29] There the commissioners argued that the need to compensate victims of automobile accidents arose out of the acceptance by the community of a certain number of road injuries and fatalities as a trade-off for the social and economic advantages of a swift and comprehensive transportation system.[30] There was therefore a social obligation to minimize as far as possible the human suffering and social and economic costs associated with transport accidents.[31] This was not a corrective, or an individually restorative process[32], but a social

[25] Law Reform Committee of Tasmania, 1972, *Recommendations for the Establishment of a No-Fault System of Compensation for Motor Accident Victims* The Committee, Hobart.
[26] *ibid.* p28 and see also p68. The influence of the New Zealand Woodhouse Royal commission on this committee is clear-see eg the citations at *ibid.* pp15, 30, 49ff and 70.
[27] *op cit.* p7-8.
[28] Third Party Insurance Committee, 1979, *Northern Territory Inquiry into Accident Compensation*, Darwin.
[29] *op cit.*
[30] *ibid.* p134.
[31] *ibid.*
[32] *ibid.* p138.

goal best served by realizing an injured person's "potential for functional recovery" as far as possible through rehabilitation, regardless of fault.[33]

There is another group whose views are similar in many respects to the first group mentioned above, but which thought that compensation on a no-fault basis should be limited to those who suffered 'serious injury', however defined. For example, the 1972 Victorian 'Arnold Report'[34] favoured no-fault compensation for a range of losses for up to 2 years following an accident, but the committee thought that "tiny claims" should be excluded.[35] Similar views were expressed in a 1986 New South Wales Government Green Paper entitled "NSW Transport Accident Scheme Options for Reform"[36] and in the following Transcover debates in New South Wales in 1987.[37] The no-fault component of the Victorian Transport Accident Scheme also belongs in this category. In the lengthy debates in Victoria in 1986 that led to the introduction of Australia's only threshold no-fault scheme, it was argued that benefits should be targeted specifically to meet the needs of the seriously injured[38] and that compensation for minor injuries should be removed to remove incentives for fraud.[39] Another scheme review that belongs in this group is that carried out in 1996-8 by the New South Wales Legislative Council Standing Committee on Law and Justice. This committee focused on the needs of the seriously injured throughout the review process,[40] and recommended that those with very

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[33] *ibid.* pp134, 137.
[34] Arnold, V.H., 1972, *Report of the Committee to Investigate Compensation of Road Accident Victims Irrespective of Fault*, Government Printer, Melbourne.
[35] *ibid.* p6. Interestingly, this report also favoured lump sum compensation in certain cases as having "therapeutic value"-see *ibid.* p10.
[36] *NSW Transport Accident Compensation Scheme Options for Reform,* NSW Government Green Paper, September 1986.
[37] NSW Parliamentary Debates 14 May 1987 p12228. Whilst Transcover was a fault-based system, its benefits structure was taken from the recommendations of the NSW Law Reform Commission in its report *A Transport Accident Scheme for NSW.*
[38] Victorian Parliamentary Debates 8 May 1986 p2022.
[39] *ibid.* 30 September 1986 p721.
[40] See the speech of the Chairman of the committee, the Hon. Bryan Vaughan MLC, at NSW Parliamentary Debates 28 October 1998 p22ff.

serious injuries should receive compensation for their long-term care needs without regard to fault,[41] whilst those with less serious injuries should be subject to the restrictions on benefits which were contained in the existing fault-based scheme.[42]

Yet another group consists of those who favoured the retention of the common law but thought that various degrees of restriction should be placed on benefits payable at both the upper and lower ends of the compensation spectrum. A striking example of this view can be found in the prelude to the changes to the South Australian scheme that were made in 1986. In the Daniell report[43] in 1985 it was recommended that non-economic loss awards be highly curtailed, that discount rates for future economic losses should be increased and that a deductible should be introduced to restrict claims for minor economic losses.[44] It was also argued that the class of persons able to claim under the scheme should be restricted so that there was a "clearly narrower" statement of the risks covered by the scheme.[45] The need to compensate victims of automobile accidents was seen as being subservient to the need to control and centralize the payment of benefits so that the costs of the scheme were kept down.[46]

In the parliamentary debates that followed the Daniell report, it was argued that the community was prepared to accept limits on the levels of compensation paid in order to reduce the pressure on premiums.[47] The justification for such limits was that small claims were very costly to administer

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[41] New South Wales Legislative Council Standing Committee on Law and Justice *Report on the Inquiry into the Motor Accidents Scheme- (Third Party Insurance)* Second Interim Report, December 1997 p30.
[42] New South Wales Legislative Council Standing Committee on Law and Justice *Report on the Inquiry into the Motor Accidents Scheme- (Third Party Insurance)* Interim Report, December 1996 p157ff.
[43] State Government Insurance Commission,1985, *Compulsory Third Party Insurance Fund Enquiry*, Adelaide.
[44] *ibid.* p6.
[45] *ibid.* p24-5.
[46] See *ibid.* p4-this was in keeping with the review's terms of reference, which were restricted to identification and resolution of causes of deterioration of the compensation fund.
[47] South Australian Parliamentary Debates Vol 3 1986-7 p2409.

and often provided victims with "seemingly excessive" payments for minor injuries.[48] In the same state in 1998 the ruling conservative liberal government took these views a step further, arguing that those with minor soft tissue injuries should bear their own non-economic losses,[49] that high net worth individuals should carry their own economic losses over a certain amount[50] and that the categories of those able to claim compensation for 'nervous shock' should be curtailed. [51] By way of contrast, the opposition criticized the government's views as "callous" and "economically rationalist" and thought that there was a requirement for a more "compassionate and understanding" approach to the compensation needs of injured automobile accident victims.[52]

In 1988, the new conservative Liberal government in New South Wales expressed the view that within a fault-based system, compensation for those with minor injuries should be limited in order to curtail costs.[53] They therefore introduced a threshold to contain such claims.[54] Over the ensuing years, as this threshold 'eroded', changes were made to try and further contain such claims.[55] In 1999, the Miller review which preceded the introduction of the current scheme accepted (apparently as a matter of political expediency) that there should be a significant curtailment of compensation for non-economic loss for less serious injuries as well as a cap on damages for loss of earnings in order to contain premium costs.[56] In the following parliamentary debates, the government argued that compensation for minor injuries was not affordable and that benefits for both economic and non-

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[48] *ibid.* p2410.
[49] South Australian Parliamentary Debates 4 June 1998 [Online] at http:www.parliament.sa.gov.au:8080/ISYSquery/IRL6D24.temp/1/doc
[50] $2 Million upper limit in total at the time the change was made-see *ibid.*
[51] *ibid.*
[52] South Australian Parliamentary Debates 11 August 1998 [Online] at http:www.parliament.sa.gov.au:8080/ISYSquery/IRL6D24.temp/2/doc
[53] NSW Parliamentary Debates 29 November 1988 p3827.
[54] *ibid.* p3833. Damages for non-economic loss were also capped under the legislation.
[55] See S79A of the Motor Accidents Act, 1988 which was inserted into the legislation in 1995 with the following specific object: "The object of this section is to limit the amount of damages for Non-economic loss in cases of claims relating to relatively minor injuries, in order to achieve the object of the Act of more fully compensating those with more severe injuries at a cost the community can afford to meet".
[56] *op cit.* p13

economic loss should be restricted in order to discourage minor claims.[57] It was also argued that economic loss should be capped and that those on high incomes should privately insure those incomes.[58]

Similar views were expressed in Western Australia in 1993[59] and in Queensland in 2000.[60] A clear pattern can thus be seen emerging in states that have retained fault as the only basis of determining entitlement to compensation. In those states, thresholds and upper limits have been placed on damages that restrict the availability and extent of compensation. Since the fault system by its nature already excludes a significant percentage of automobile accident victims who cannot prove fault, the class of persons who can obtain compensation in those states retaining a fault-based system is gradually shrinking.

Chapman and Trebilcock are clearly wrong about the same views being held across Australian jurisdictions regarding the need to compensate victims of automobile accidents. Views have ranged across time and across jurisdictions from those held by proponents of universal no-fault compensation for automobile accident victims in Tasmania and Victoria in 1973 to the restrictive views of entitlement to compensation expressed in New South Wales in 1999 and Queensland in 2000.

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[57] NSW Parliamentary Debates 3 June 1999 p905.
[58] *ibid.* p904-5.
[59] See Western Australian Parliamentary Debates 1 December 1993 p8588-9.

(c) A Similar Range of Expressed Values Encompassing Individual Responsibility, Compensation and Premium Costs Concerns.

If Chapman and Trebilcock are correct then citizens across jurisdictions should not have different sets, or distributions, of values encompassing Individual Responsibility, Compensation and Premium Costs.[61] If this is so, then the arguments used in the various reviews, commissions and debates relating to scheme changes should demonstrate a broadly similar mix of these values.

However, the various scheme reviews, debates etc do not reflect a similarity in the mix of these values across jurisdictions, especially when also viewed across time, and as argued in previous chapters this failure to take account of changing values over time appears to be a major flaw in Chapman and Trebilcock's theory.[62] Of course, in many cases the reviews or scheme changes examined in this work were quite narrow in scope, and so there was little call for a detailed explication of the values that informed the decisions made. However, there is ample evidence that different groups in different states have held different mixes of values at different times when considering whether to make changes to automobile accident compensation schemes. There is also to be found a degree of parochialism around Australia, with parliamentarians in some states and territories emphasizing the distinct nature and values of their own jurisdiction rather than acknowledging any similarities in values or outlook between states.[63]

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[60] See Queensland Parliamentary Debates 16 May 2000 p1040. See also the concerns expressed regarding promotion of "inappropriate" claims at Queensland Parliamentary Debates 31 May 2000 p1423.
[61] See Chapman and Trebilcock *op cit.* p 805.
[62] See generally Chapter 8.
[63] See in particular the Bradley Report in the Northern Territory (Third Party Insurance Committee), 1979, *Northern Territory Inquiry Into Accident Compensation* and also the Queensland scheme reviews and debates *op cit.*

There is also evidence that different groups *in the same state or territory* have emphasized different values at different times. An excellent example of this is the various reviews and debates that have taken place in New South Wales since the New South Wales Law Reform Commission's report "A Transport Accidents Scheme for New South Wales".[64] The Commissioners, in that report, made it perfectly obvious that for them the individual responsibility value did not hold much political salience. They argued that the fault principle had lost a great deal of its "original meaning", that most drivers are "highly imperfect"[65] and are unlikely to be deterred from that imperfect behaviour by the tort system,[66] and that automobile accidents are an inevitable byproduct of a modern transportation system.[67] For the commissioners, the compensation value was much more important, and there is a focus on distributive justice throughout their report. For instance, they argued that the principle of "comprehensive entitlement"[68] (i.e. the equal treatment of equal claims) should be the basis of compensation for automobile accident injuries in New South Wales and "an objective to be pursued vigorously by policy makers in Australia".[69] They were influenced in this view by three major considerations: firstly, the "civilized reasons of humanity" which dictated that accident compensation victims should not be denied compensation because of the circumstances in which their accidents happened to occur; secondly the idea that the use of automobiles or public transport services creates a risk of death or serious injury which is an unavoidable part of everyday life; and thirdly, the fact that compensation for automobile accident victims is financed by compulsory third party insurance, the cost of which is met by the community as a whole.[70] The commissioners largely sidestepped the costs issue, arguing that "it is impossible to identify the 'correct' level of resources

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[64] *op cit.*
[65] *ibid* p59.
[66] *ibid* p60-61.
[67] *ibid* p134.
[68] Which arises out of the Woodhouse Reports *op cit.*
[69] *A Transport Accident Scheme for New South Wales op cit* p137.
[70] *ibid.* p138.

that should be applied to compensate victims",[71] their objective being "to create an equitable compensation scheme for victims of transport accidents, within the range of costs the community can reasonably be expected to bear".[72]

By way of contrast, the Motor Accident Act debates in the same state in 1988, just a few years later, reflect a completely different mix of values on the part of the ruling conservative parties, especially with regard to the tort system and the Individual Responsibility value. The government introduced mandatory findings of contributory negligence in certain circumstances to place "responsibility for conduct on all road users".[73] A provision was introduced requiring persons responsible for accidents to assist the insurer in its defence to prevent them from "expiating their guilt" by becoming "witnesses for the plaintiff".[74] Compensation was seen as a function of individual need, and lump sum compensation a means of promoting victim independence, rather than being a function of the system. Only such compensation as was "realistic" and "fair" and which could be "afforded by the community" was to be paid.[75] The costs of the system were crucial. The new scheme was designed to restrict the number of future claims, to control "superimposed inflation" (the increase in scheme costs over and above the usual inflation rate) and to limit the cost of claims overall to "manageable proportions".[76]

Although it has always been important, the Administrative and Premium Costs value has increasingly become crucial in New South Wales automobile accident compensation, largely at the expense of Distributive Justice concerns. The Motor Accidents Act was amended in 1995 to further

[71] See *ibid.* p137, 522.
[72] *ibid* p522.
[73] NSW Parliamentary Debates 29 November 1988 p3833 and see also Debates 7 December 1988 p4579.
[74] *ibid.* 28 November 1988 p3831.
[75] *ibid.* pp3828-3831.
[76] *ibid.* p3830.

restrict benefits payable in minor claims because of evidence that the proportion of reported injuries converting into claims for compensation had increased from 42% to well over 60% "with no sign of stability".[77] This developing trend threatened "the continued viability of the scheme in that cost pressures that it introduces are leading to premiums which are not affordable or to a system which is not fully funded".[78] By the time Shirley Miller QC was asked to review this revised scheme in 1998, distributive justice concerns were definitely secondary to costs considerations. Thus Ms Miller expressed the view that "highly industrialized countries may now be moving toward the view that a reasonable amount of funds applied to rehabilitation could well constitute full compensation".[79] In the debates that followed in 1999, it was argued by government members that premium costs would increase significantly "if we continue down the path of pretending that the only interest holders under this legislation are accident victims"[80] which stands in stark contrast to the views expressed by the Law Reform Commission in the same state in 1986. Government members also acknowledged that the new scheme introduced could have been more generous, but the perception based on research such as the Woolcott Report was that the public had "overwhelmingly" indicated a preference for "reasonable" premium costs and a fault-based system.[81]

This focus on costs at the expense of distributive justice has also been particularly apparent in South Australia, where damages available to successful plaintiffs have been relatively severely curtailed by legislation. The government introduced restrictions such as a $60,000 limit on non-economic loss damages and a threshold of 7 days disability or medical expenses of more than $1,000, increased discount rates for future losses, restricted benefits for gratuitous services and abolition of payments

[77] NSW Parliamentary Debates 16 November 1995 p3321.
[78] *ibid.*
[79] Miller S. QC (2000), 'Transaction Cost and Governance Engineering in Motor Accident Insurance Scheme Design: A New South Wales Experiment ' 12 *Insurance Law Journal* 1.
[80] NSW Parliamentary Debates 22 June 1999 p1017.
[81] *ibid.* p1038.

for loss of earning capacity for the first week of disability.[82] The justification for imposing such limitations was that small claims were costly to administer and often provided victims with "seemingly excessive" payments in respect of minor injuries.[83]

A similar move to restrict payment of compensation to victims, particularly those with less serious injuries, because of costs concerns has also developed in Queensland[84] and Western Australia,[85] which indicates a national trend to correct one of the major criticisms of fault-based systems, that they overcompensate minor claims.

But most surprising is the virtual absence of stated support for the individual responsibility value from any scheme reviews or parliamentary debates over the past 30 years, apart from the Victorian opposition's position in 1986,[86] and the Transcover review[87] and subsequent parliamentary debates in New South Wales in 1988.[88] According to Chapman and Trebilcock it is unlikely that the Individual Responsibility value will not have normative salience. They argue that there will be voters, and drivers, who will tend to see bad drivers as the major cause of most automobile accidents and who will continue to rank the tort law alternative, with its individualized determinations of personal responsibility, ahead of the no-fault alternatives.[89] But apart from the instances just mentioned in Victoria in 1986 and New South Wales in 1988, outspoken support for the Individual

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[82] South Australian Parliamentary Debates 1986-7 p2797.
[83] *ibid.* p2409-these restrictions were supported by both sides of parliament and substantially extended in 1998 to exclude "minor" soft tissue injuries from non-economic loss benefits. Restrictions were also placed on maximum income loss awards-see South Australian Parliamentary Debates 4 June 1998 [Online] at www.parliament.sa.gov.au:8080/ISYSquery/IRL6D24.temp/1/doc
[84] See Queensland Parliamentary Debates 16 May 2000 p1037.
[85] See Western Australian Parliamentary Debates 1 December 1993 p8588, 6 April 1994 p11487.
[86] See Victorian Parliamentary Debates 10 September 1986 p117-8 and Debates 28 October 1986 p1558.
[87] *op cit.* p90.
[88] NSW Parliamentary Debates 29 November 1988 p 3828. Professor Sappideen recommends a note here in relation to the recently enacted Civil Liability Act 2002 (NSW) which was passed after the completion of this work. However, that Act relates to public liability matters and not to automobile accidents, which are governed by the provisions of the Motor Accidents Compensation Act 1999 (NSW).
[89] Chapman and Trebilcock *op cit.* pp848-9.

Responsibility value is conspicuously absent.[90] There are probably two interrelated reasons for this. The first is the existence of compulsory third party insurance in all Australian jurisdictions, which, in the context of a fault-based system, means that the person responsible for the accident is never liable to pay damages to an injured victim.[91] The second is that the standard of care that common law courts in Australia have required of drivers is now so high that it approaches perfection,[92] which is of course unattainable. The prospect of any significant deterrent effect of a fault-based system in such circumstances is therefore realistically nil, and even where there have been expressions of support for the Individual Responsibility value as in the examples mentioned above, these have been largely confined to the corrective justice aspects of this value.[93] This is not to say that the Individual Responsibility value has had no importance at all in Australia over the last 30 years, but it has received little mention (except negatively) in the majority of reviews and debates and in those states that have retained fault the argument tends to run that this retention is in accordance with community expectations, rather than because of reasoned support for tort liability based on theoretical considerations.[94] This shows that it has been conservatism, rather than vote cycling, which has maintained fault-based liability in the majority of Australian states and territories.[95]

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[90] There were 30 scheme reviews and sets of parliamentary debates considered in this study, 16 of which could be seen as in some way supporting retention of fault-based systems and 14 as supporting the introduction or retention of a no-fault system. It could be expected that there would be some solid arguments from proponents of the Individual Responsibility value found in the 16 reviews and debates where retention of fault was supported that fault-based systems should be retained because they played some valuable social role. However, apart from those mentioned, there is no such argument, merely an assumption that such systems should be maintained on the basis of "community expectations" (see for example the parliamentary debates in NSW in 1999 mentioned above). The inference to be drawn from this is that in those states the Individual Responsibility Value is either so politically salient that it is unnecessary or considered unproductive to debate it, or alternatively that it is of little importance, and that there are other factors, such as political conservatism or powerful vested interests, working to maintain fault as the basis for entitlement to compensation in those jurisdictions. This latter point bears some further study that is beyond the scope of this work.

[91] Although in NSW and South Australia the driver at fault may be theoretically liable to pay an excess to the relevant insurer and there may also hypothetically be a right of subrogation on an insurer's part against a driver found guilty of various offences.

[92] See eg *Etri and Anor v Eid and Anor* and similar cases cited in Chapter 8.

[93] See eg Victorian Parliamentary Debates 10 September 1986 where it was argued that it was in accordance with community expectations that the "innocent" should be given priority in access to compensation.

[94] See eg *ibid.* and also NSW Parliamentary Debates 22 June 1999 pp1038, 1042. There is also evidence that the Northern Territory government preferred an add-on no-fault scheme over a pure no-fault one in 1979 on the basis of a McNair-Anderson survey showing that a substantial proportion of the population of the Territory

(d) High Levels of Information/Knowledge on the Part of Important Participants Related to Automobile Accident Compensation.

If it was the case that there was any significant degree of ignorance of the major theoretical issues involved in automobile accident compensation on the part of those investigating or voting on them, then the possibility would exist that divergences in values or understanding of issues across the federation could occur. In such circumstances Chapman and Trebilcock's rejection of the hypotheses that there could be different appreciations of the facts, or similar appreciations of facts but differing values, across jurisdictions could be wrong.

The evidence shows that there have been only a few instances in the scheme reviews and debates over the past 30 years where it could be said that there have been high levels of information/knowledge about the issues and values involved in the choice of liability theory. This is not to say that there has not been a great deal of detail about scheme benefits and the like contained in some of the reviews and debates but the discussion of theoretical issues relating to liability has on the whole been very rudimentary, even in those states which have moved to a no-fault system of some type.[96]

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favoured retention of limited Common Law rights-see Northern Territory Parliamentary Debates 29 May 1979 p1512.

[95] This is amply demonstrated in the Australian Capital Territory. In a review of the automobile accident compensation scheme in 1994, the reviewing committee gave six main reasons for the retention of a fault-based system. Summarized, these are as follows: 1) It is not appropriate for governments to force people to insure themselves against injury; 2) The community could not be confident that there were clear benefits to changing to a no-fault system; 3) A no-fault system would probably cost more; 4) A no-fault scheme would shift medical costs from the Commonwealth to the Territory; 5) No-fault schemes play no "preventative" role in terms of the "total road safety environment" because premium payers have no real influence; and 6) There would be cross-border anomalies with New South Wales, which maintained a fault-based scheme, if a no-fault system were to be introduced-see *Report of the Steering Committee Reviewing Motor Vehicle Insurance in the ACT* 1994.

[96] For instance, in the debates that led to the passing of the add-on no-fault scheme in Victoria in 1973, government members announced that the legislation was "very technical" and that any attempt to explain it in detail "would tend to obscure the overall scheme" (Victorian Parliamentary Debates 28 March 1973 p4649).

There have been some notable exceptions to this. For example, the 1972 publication "No-fault Liability"[97] in Victoria displays levels of research into the question of liability unmatched until the 1984 Law Reform Commission study in New South Wales.[98] The latter study comprehensively examined the major issues relating to automobile accident compensation at the national and international level and took submissions from a wide range of individuals and organizations.[99] The 1979 parliamentary debates introducing an add-on no-fault scheme to the Northern Territory also demonstrated a sophisticated understanding of the major issues involved in the compensation debate.[100] However, it was only in the 1986 Transport Accident Act debates in Victoria that there was anything like a full debate of the issues concerned by opposing speakers.[101] No other parliament has properly examined, for example, the evidence relating to the effect on accident rates of the introduction of a no-fault system, or the inequitable response of the common law to single vehicle accidents in rural areas where head injury could obscure facts. The thorough debating of most of the major issues by the Victorian Parliament in 1986 probably explains why there has been relative stability in that state's automobile accident compensation scheme ever since.

The majority of state and territory reviews and debates however are devoid of detailed argument about liability theory, and there is evidence from early debates where there has been a change to no-fault that the parliamentarians voting on the schemes may not even have fully understood the

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This suggests that the members themselves did not fully understand the legislation being introduced, which is extraordinary given that this was the first no-fault automobile accident scheme introduced in Australia.

[97] *op cit.*

[98] "A Transport Accident Scheme for New South Wales" *op cit.*

[99] Over a period of 3 years the Commission published 3 reports, an issues paper, a working paper, 2 research papers, 2 consulting papers and 3 consulting actuaries' reports, as well as producing 13 unpublished background reports. The commissioners received 185 submissions, and conducted extensive research in Australia and overseas on all aspects of automobile accident compensation-see *ibid* Vol 1 ppvii-viii.

[100] See Northern Territory Parliamentary Debates 8 March 1979 p1112-3.

[101] See e.g.Victorian Parliamentary Debates 30 September 1986 p732, 28 October 1986 p1558.

issues.[102] In many later debates there is virtually no mention of the question arising in the course of the design of schemes by parliamentary parties. There is also some evidence that indicates a degree of ignorance and confusion on the part of some legislators voting on schemes.[103] It is possible that the levels of understanding of the relevant issues amongst parliamentarians are generally as low as those demonstrated in the general populace. This could explain why different state parliaments have moved in different directions over the years in this area. It would also explain the apparent differences in the values exhibited from time to time across different states.

From the above discussion, it is clear that Chapman and Trebilcock's rejection of the three alternative hypotheses which might explain the "puzzle' they set for themselves is at least superficial, and most probably wrong. There are strong indications that there have been changing values across states over time, and this fact of itself provides an adequate explanation for the diversity found amongst the automobile accident compensation systems.

THE SECOND STEP IN THE THEORY

(a) Numerous Changes in Party Positions

If Chapman and Trebilcock are correct, and majority voting cycles have occurred within parties and coalitions across Australia deciding on liability theory in relation to automobile accident compensation, it could be expected that this would be reflected in frequent changes in party positions as changes are made to States and Territories automobile accident compensation systems.

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[102] See e.g. Victorian Parliamentary Debates 11 April 1973 p5360 where it was stated that any attempt by government members to explain the new scheme in detail "would tend to obscure the over all scheme".

[103] For instance, in the 1995 scheme debates in NSW several members of minor parties expressed concern at the amount and complexity of information that they had to deal with.

The limited evidence from the parliamentary debates examined in this study, however, shows that this is not the case. The best method of analyzing this evidence is to consider each state and territory separately so that longitudinal trends become apparent.

New South Wales

New South Wales has had a fault-based compulsory third party system since 1942. The first major change to the system occurred in the middle of 1984 when the Labor government introduced changes designed to reduce premiums.[104] One of these changes was the replacement of the right to sue a party considered to be at fault with a provision to the effect that the government insurer was to be the sole defendant in all automobile accident cases.[105] Nevertheless, the system remained fault-based, despite the fact that federal Labor policy at this time was that a national no-fault system should be introduced by means of individual state governments adopting such schemes in all areas of personal injury law, commencing with automobile accident law.[106] It is apparent that some Labor members in Parliament wanted to see the introduction of a no-fault scheme of some type.[107] However, it was thought that "the community" would not support the introduction of a no-fault scheme at this time.[108] Also, the New South Wales Law Reform Commission had not as yet handed down its report and the

[104] See NSW Parliamentary Debates 10 May 1986 p586. These changes included increasing the statutory discount rate on payments for anticipated future economic loss, abolishing interest on general damages and limiting payments for gratuitously provided domestic services.
[105] NSW Parliamentary Debates 23 May 1984 p1414.
[106] See "Reminder To Government On No-Fault Compensation Plans" *Australian Law News* October 1984 p30. For an excellent (albeit jaundiced) summary of the history of Australian Labor Party's policy in the area see the speech of Mr Alan Stockdale of the Victorian Liberal Party at Victorian Parliamentary Debates 10 September 1986 p120ff.
[107] See the speeches of the Attorney General Mr Landa and the Hon Mr McIlwaine at NSW Parliamentary Debates 22 May 1984 p1324-5.
[108] See the speech of Mr Landa *ibid.*

Labor government was adopting a 'wait and see' approach whilst changing the existing system in an effort to reduce costs.[109]

The New South Wales Law Reform Commission handed down its comprehensive report "A Transport Accidents Scheme For New South Wales"[110] in October 1984. This report unequivocally championed a change to a pure no-fault automobile accident compensation system in New South Wales.[111] But the next major development in the area was not until September 1986 when the Labor government released a Green Paper entitled "New South Wales Transport Accident Compensation Scheme-Options For Reform". This paper was produced in an atmosphere where there was perceived to be a financial crisis requiring "urgent attention" and limiting options for reform to "those that can be implemented quickly".[112] The view was expressed that no-fault schemes were costly, would require a changing community attitude and could not be implemented quickly,[113] and so the favoured option was a fault-based scheme with benefits modeled on those recommended for a pure no-fault scheme by the New South Wales Law Reform Commission.[114]

In 1987 the Labor government introduced "Transcover", a scheme modeled on the modified fault-based system favoured in the aforementioned Green Paper. This system abolished the common-law method of assessing damages, and introduced bureaucratic determination of fault whereby officers of the Government Insurance Office determined all aspects of entitlement to benefits. Government members expressed regret that a no-fault scheme could not be introduced,[115] but there was a clear

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[109] NSW Parliamentary Debates 23 May 1984 pp1415, 1425.
[110] *op cit.*
[111] See *op cit.* p138 and also p170ff.
[112] Green Paper *op cit.* Overview pp1 and p8 and also p37.
[113] *ibid.* p8.
[114] *ibid.* p6.
[115] See NSW Parliamentary Debates 14 May 1987 p12,229 and Debates 28 May 1987 p12,906.

statement by the government that "New South Wales simply cannot afford the substantial additional cost of a no-fault scheme".[116]

In 1988, there was a change of government with a conservative coalition led by the Liberal party winning power. One of the key election promises of this new government was the reintroduction of the right to bring common law actions for damages arising out of automobile accidents.[117] A review committee was formed to consider various alternatives schemes, but as the government had expressed a commitment to return to a modified common-law system[118] there was no serious consideration of any alternative that contained an element of no-fault.[119] Unsurprisingly the committee formed the opinion that the modified common-law system was preferable to all the other alternatives[120] and the new government enacted such a scheme at the end of 1988.[121]

The Labor Party was returned to power in 1994. The Motor Accident Act was amended in 1995 to curtail benefits in an attempt to contain costs[122] and to restrict the class of persons to whom benefits were payable to those who could prove the requisite connection between injury and the activity of motoring.[123] The changes were supported by all parties and the government made it plain that there was "no issue of basic principle...involved".[124] The government also announced that there would be a thorough review of the scheme.[125]

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[116] NSW Parliamentary Debates 14 May 1987 P12,229.
[117] NSW Attorney General's Department, 1989, *Motor Accidents: The Act and Background Papers*, NSW Govt Printer, Sydney, Foreword p9.
[118] See the foreword by the incoming Attorney General, Mr John Dowd (as he then was) –*ibid.* pi.
[119] *ibid.* p3.
[120] *ibid.* Introduction p1.
[121] Motor Accidents Act 1988.
[122] NSW Parliamentary Debates 16 November 1995 p3320-1.
[123] *ibid.* p3322.
[124] NSW Parliamentary Debates 23 November 1995 p3882.
[125] *ibid* p3881.

Subsequently, the Legislative Council Standing Committee On Law And Justice reviewed the scheme over the next three years. Although it produced a number of voluminous reports, this committee made scant reference to the question of liability. There was a flagging of a debate between the Insurance Council of Australia on the one hand, which supported retention of a fault-based system, and victim's support and medical services groups on the other, which supported the introduction of a no-fault system.[126] The committee ultimately took the view that those with the most serious injuries should receive compensation for their long-term care needs without regard to fault,[127] but supported the existing legislation for those with less serious injuries.[128]

In 1998 an electoral commitment was made by the Labor Party government to reduce the scheme's premium by an average of $100. A survey of motorists carried out in 1998 indicated that many thought that the right to sue at common law should be preserved.[129] The government commissioned a Canadian barrister, Shirley Miller QC, to conduct a scheme review. Ms Miller set up a 'working group' with members from vested interest groups such as lawyers, health practitioners, victim support groups and insurers, to consider the scheme. Individual members of this group were asked to "accept rather than debate" the assumption that the public view of the scheme was as expressed in the findings of the Woolcott report,[130] and it was a given that a no-fault scheme would not be considered.[131] The scheme which was subsequently recommended mandated alternative dispute resolution before resort could be had to litigation, and contained thresholds on access to damages and

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[126] Legislative Council Standing Committee on Law and Justice, *Interim Report,* December 1996 p126ff-see also the same committee's *Second Interim Report*, December 1997 p17-18 where the insurers' adherence to a fault-based system is criticized without any substantial argument being raised.
[127] *Second Interim Report ibid.* p30 and also see Chairman's Foreword at piii.
[128] *Interim Report op cit.* p157.
[129] Woolcott Research, 1998, *Exploration of Awareness and Attitudes Towards the Current CTP Scheme and its Potential Alternatives* cited in Miller S. QC, 2000, "Transaction Costs and Governance Engineering in Motor Accident Insurance Scheme Design: A New South Wales Experiment" 12 *Insurance Law Journal* 1.
[130] Miller *ibid.* p10 and also at Schedule 1 p23.
[131] *ibid.* p10.

limits on damages for non economic and economic losses designed to curtail the number and potential size of claims.[132]

In 1999 the Labor Party government largely adopted the recommendations of the Miller review. In echoes of the debates over the 1984 scheme changes, some Labor Party members of Parliament indicated their preference for a no-fault system, but the government's position was that the community wanted a fault-based system,[133] and that costs considerations prevented the government from introducing a no-fault scheme.[134] However, the new scheme was seen as 'transitional' with regular reviews being a legislated feature of the system.[135] It was expected that the scheme would cause a "culture change" which would allow the government to revisit the question of introducing a limited no-fault scheme for children and the catastrophically injured in the future.[136]

The above demonstrates that there have not been frequent changes in position in the parties in New South Wales in relation to liability theory. The Conservative parties have always favoured retention of a fault-based scheme. Whilst individual members of the Labor Party have expressed support for the introduction of a no-fault scheme, the line taken by the parliamentary party has always been that the community would not accept such a scheme and that costs considerations would also prohibit such change, attractive though it may be for some. Therefore, New South Wales has always had a fault-based scheme with frequent changes in benefit structures because of costs considerations.

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[132] *ibid.* p13.
[133] NSW Parliamentary Debates 22 June 1999 p1038.
[134] *ibid.* p1000.
[135] NSW Parliamentary Debates 28 June 1999 p1488.

Victoria

The history of change in automobile accident compensation in Victoria in the years since 1970 has been quite different from that in New South Wales, and reinforces the view that ideas and values can vary significantly across the jurisdictions in a Federation such as Australia.

Victoria had a fault-based compulsory third party insurance system since 1939. In 1970 the Conservative government commissioned a report into the delays in settlement of automobile third party insurance claims.[137] This committee was of the view that a pure no-fault scheme was the preferred method of compensating automobile accident victims but that "the community" would not support such a scheme.[138] It therefore recommended the introduction of an add-on no-fault scheme, which it saw as "the first installment in the establishment of a proper and adequate system of financial compensation which can be expanded by the community in the future".[139] In 1972, after joint publication by the Law Institute and Bar Association of Victoria of a book entitled "No-Fault Liability"[140] which recommended consideration of the adoption of an add-on no-fault scheme in Victoria, the same government commissioned a further study to report on the feasibility of introducing a no-fault scheme in the state.[141] The committee, which was chaired by the government statist and actuary, Mr Victor H. Arnold, made the assumption based on its terms of reference that the tort system would remain intact,[142] and recommended an add-on scheme be introduced.[143] In 1973 the government introduced an add-on scheme into the Parliament, arguing that the tort system

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[136] NSW Parliamentary Debates 22 June 1999 p1402.
[137] *Report to the Chief Secretary on Delays in the Settlement of Third Party Insurance Claims*, Melbourne, 1970-71 ("The Delays Committee").
[138] *ibid.* p8.
[139] *ibid.* p10.
[140] Hawthorne Press, Melbourne, 1972.
[141] *Report of the Committee to Investigate Compensation of Road Accident Victims Irrespective of Fault*, Government Printer, Melbourne, December 1972 ("The Arnold Report").
[142] *ibid.* p16.

was "still satisfactory in many ways"[144] but acknowledging that in various circumstances the tort system did not adequately compensate victims.[145] The Labor Party opposition supported the scheme in principle, but criticized the government for introducing a state specific scheme when the federal Labor government planned to introduce an Australia wide pure no-fault accident compensation scheme.[146]

Sir John Minogue reviewed the scheme in 1979.[147] Whilst he saw the existing system as having some shortcomings,[148] he recommended its retention on "pragmatic" grounds.[149] The scheme therefore remained largely unchanged until 1986. In that year, the Labor Party government published a statement outlining a pure no-fault scheme, which it intended introducing into the Parliament.[150] This scheme was to provide limited benefits on a no-fault basis to the more seriously injured[151] whereas those with minor injuries were to bear their own losses,[152] as were those on higher incomes who had suffered high levels of notional economic loss.[153] The existing system was heavily criticized for its cost, delay and favouring of those with minor injuries,[154] whereas the proposed system would be "consistent with the community's expectations both about the level of premiums

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[143] *ibid.* p2-a significant minority argued for a threshold system, but the majority rejected this.
[144] Victorian Parliamentary Debates 28 March 1973 p4649.
[145] *ibid.*
[146] Victorian Parliamentary Debates 11 April 1973 p5362.
[147] Minogue, Sir J., 1979, *Report of the Board of Inquiry into Motor Vehicle Accident Compensation in Victoria,* Government Printer, Melbourne (Report No. 24 Victorian Parliament Legislative Assembly Votes and Proceedings 1978-79 Vol. 4).
[148] See *ibid.* p73-74.
[149] *ibid.* p86.
[150] *Victoria-Transport Accident Compensation Reform*, Government Statement, May 1986.
[151] *ibid.* p14 and see also p89.
[152] *ibid.* p157.
[153] *ibid.*
[154] See e.g. *ibid.* pp3, 11, 56, 117.

and the stability of that premium level"[155] and was the most "equitable and efficient" scheme.[156] The notion of retaining fault as the basis of entitlement to compensation was completely rejected.[157]

However, when the government attempted to introduce this scheme into the Parliament in 1986, it met with insurmountable opposition. The Conservative parties held the numbers in the house of review, and were vehemently opposed to a pure no-fault scheme,[158] even though they supported the retention of no-fault in the form of a threshold scheme.[159] The opposition's support for the retention of some degree of fault was based on both deterrence and corrective justice grounds – it was argued that keeping tort would "reduce death and injury on the roads, maximize the protection of the public interest, maximize the right of the innocent Victorians to be protected from the irresponsible actions of other road users and protected from being robbed of their well-being and security".[160] Also, the "negligent or reckless driver who caused injury to himself or other road users" should not receive the same level of benefits as "innocent victims of the negligent road user",[161] as this would offend community expectations of morality and fair play.[162] Because there was an impasse, the parties were forced to compromise, because both sides were of the view that a change to the existing scheme was necessary to contain costs.[163] The resulting scheme, a high threshold no-fault scheme with minimum and maximum limits on common-law damages, can be seen as a true 'least worst' alternative, one that the parties saw as being superior to any that they could have arrived at on their own.[164] This scheme remains relatively unchanged to the present-day.

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[155] *ibid.* p117.
[156] *ibid.*
[157] See e.g. *ibid* pp49, 67.
[158] Victorian Parliamentary Debates 10 September 1986 p126, 28 October 1986 p1558.
[159] The Labor Party government accused the opposition of having a "doctrinaire commitment" to the common law-see Victorian Parliamentary Debates 30 September 1986 p712-3.
[160] Victorian Parliamentary Debates 28 October 1986 p1558.
[161] *ibid.* 10 September 1986 p126.
[162] *ibid* p127 and see also p146.
[163] See Victorian Parliamentary Debates 8 May 1986 p2025, 10 September 1986 p117, 3 December 1986 p2679.
[164] *ibid.* 3 December 1986 p2684.

The history of automobile accident compensation in Victoria is therefore not one of frequent changes in party position, but of gradual development of a position, and compromise based on political expediency, which has remained stable for the past 15 years.

Queensland

Queensland has had a fault-based compulsory third party insurance scheme since 1936. There was a comprehensive review of this scheme carried out by the Queensland Treasury during the period from 1990 to 1994.[165] Whilst the review documents are not publicly available, there was no consideration given to changing the underlying philosophy of the scheme.[166]

In 1994, following the scheme review, the Labor Party government introduced a modified fault-based scheme. The changes to the existing scheme were designed to promote rehabilitation, speed up claims and contain costs.[167] Both the government and the Conservative opposition made clear statements in support of retention of common law.[168]

In 1999 the Labor government appointed a committee to examine the fundamentals of the Queensland scheme including scheme design, affordability for the motorist and appropriate role for the government in the scheme.[169] This committee consulted widely and took submissions from a

[165] Queensland Parliamentary Debates 16 February 1994 p 6902.
[166] Telephone conversation between the author and staff of the Queensland Motor Accidents Insurance Commission, 13 March 2001.
[167] Queensland Parliamentary Debates 16 February 1994 p 6902-3 and see also Queensland Parliamentary Debates 23 February 1994 p7196.
[168] See Queensland Parliamentary Debates 16 February 1994 for the government position, 23 February 1994 p7193 for the opposition's view.
[169] Queensland CTP Review Committee, 1999, *Review of Queensland Compulsory Third Party Insurance Scheme*, Queensland Government, Brisbane p4.

number of organizations, as well as discussing the issues with visiting overseas experts.[170] The committee's position on no-fault systems was equivocal. Whilst indicating that it had sought to "preserve the existing common-law system to the maximum extent",[171] the committee was "very supportive of some form of no-fault cover".[172] The reason for this equivocation seems to have been that market research carried out as part of the review indicated a community concern that a no-fault scheme may lead to compensation been available for 'poor' drivers and that containment of premium costs was the most important issue for the public.[173] The committee therefore adopted a 'wait and see' approach to the issue of no-fault which appears to have been based on the argument that the introduction of defined, income based benefits to at-fault drivers would create administrative difficulties and raise issues of equity between claimants.[174] The committee was much more definite in its recommendation that benefits should be restricted and rehabilitation promoted in order to contain scheme costs.[175]

In 2000 the Labor Party government introduced changes to the existing scheme that limited available benefits in various areas and restricted legal costs recoverable in respect of minor claims.[176] The government's position on liability theory was that the scheme should be altered to ensure its continued affordability, but that common-law should be retained as far as possible.[177] The opposition basically supported this position.[178]

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[170] *ibid.* p5.
[171] *ibid* p1.
[172] *ibid.* p70.
[173] *ibid.* p88-92.
[174] *ibid.* p69.
[175] *ibid.* p15.
[176] Queensland Parliamentary Debates 16 May 2000 p1040.
[177] *ibid.* 31 May 2000 p1428.
[178] *ibid.* p1416.

The situation in Queensland has therefore been that there has been no significant change in party positions in relation to liability over the past 30 years.

Western Australia

Western Australia, which has had a fault-based Compulsory Third Party insurance scheme since 1943, has had only one significant change to its automobile accident compensation system in the past three decades. In 1994, the Conservative government changed the existing compulsory third party compensation scheme by introducing damages thresholds designed to limit compensation for minor claims.[179] Those changes were clearly based on the New South Wales scheme in existence at the time.[180] The rationale for their introduction was concern over depletion of insurance funds and rising scheme costs.[181] There is some evidence that a choice no-fault scheme was considered and rejected by the government as impractical.[182] It appears that members of the backbench were concerned about equity aspects of the scheme, and this disquiet apparently caused a watering down of the proposed threshold;[183] however there is no evidence of any serious opposition to the principle of liability based on fault or any proposed changes to the government's position in that regard.

South Australia

South Australia has had a fault-based compulsory third party compensation system since 1936. In 1985 the State Government Insurance Commission conducted a detailed review of the South

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[179] Western Australian Parliamentary Debates 31 March 1994 p11216.
[180] *ibid.* 1 December 1993 p8589-it was intended that in interpreting the legislation Western Australian courts should apply relevant NSW case law-see *ibid.*
[181] *ibid.* 1 December 1993 p 8588ff, 5 April 1994 p11346-7.
[182] *ibid.* 5 April 1994 p11346-7.
[183] *ibid.* 31 March 1994 p11216, 5 April 1994 p1132, 11340 and 11346.

Australian scheme because of an anticipated large loss to the insurance fund.[184] This report identified four major contributing factors to deterioration in the fund:

1. Inadequacy of premiums;
2. Changes in common law/court decisions;
3. Attitudes of the public;
4. Government intrusion.[185]

The report's authors acknowledge that because of compulsory third party insurance, so-called 'guilty' motorists did not pay victims' damages for costs, neither did they pay their own costs. In their view, the reality was that common-law liability arising out of traffic accidents had become purely a matter of how much money a victim could obtain from a fund made up of compulsory contributions by motorists.[186] They therefore proposed that there be put in place a "driver fault chart" or "barometer of responsibility" which would be used to make a prima facie assessment of liability in defined situations, [187]thus leading to speedier settlements and reductions in costs.[188] The review's authors thought that the eventual abolition of common-law liability and the substitution of statutory no-fault compensation "may well be regarded as inevitable"[189] but saw the introduction of a no-fault scheme as having costs problems, especially because the federal government was unlikely to give credit for substantial savings to the Social Security system derived from payments by such a state

[184] State Government Insurance Commission, 1985, *Compulsory Third Party Insurance Fund Enquiry* ("The Daniell Report"), Adelaide p4.
[185] *ibid.* p4-5.
[186] *ibid.* p99.
[187] *ibid p21-22.*
[188] *ibid.* p23
[189] *ibid.* p99.

scheme of medical, hospital, disability and nursing care benefits.[190] The authors also recommended relatively severe restrictions on most heads of damages in order to curtail costs.[191]

In 1986 the Labor Party government changed the existing scheme by introducing most of the cost-cutting recommendations made in the Daniell report.[192] However, there was no mention at all in the parliamentary debates of the recommendations in that report regarding "driver fault charts" or "barometers of responsibility". The government though announced that it was in the process of setting up a study to examine the administrative and financial implications of establishing a no-fault scheme,[193] but this review never came to fruition.

The next major change to the scheme did not occur until 1998. In the year a Conservative Liberal government introduced changes to the scheme designed to control scheme costs.[194] These changes included the removal of benefits for minor claims, introduction of a ceiling for economic loss and the narrowing of the scope of the scheme in terms of those able to claim damages for "nervous shock".[195] Whilst these changes were criticized from within the government and by the Labor Party opposition because of their effects on distributive justice[196] there was no suggestion by any party in the debates that there should be a change in liability theory.

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[190] *ibid.* p99-100.
[191] *ibid.* p5-6.
[192] South Australian Parliamentary Debates 1986-7 Vol 3 pp2409, 2411, 2661, 2787, 2799.
[193] *ibid.* p2409.
[194] South Australian Parliamentary Debates 4 June 1998 [Online] at http://www.parliament.sa.gov.au:8080/ISISquery/IRL5D7E.temp/1/doc.
[195] *ibid.*
[196] See the speech of Mr Redford at South Australian Parliamentary Debates Thursday 9 July 1998 [Online] at http://www.parlaiment.sa.gov.au:8080/ISISquery/IRL6D24.tmp/8/doc. For the Labor Party and Democrat positions see South Australian Parliamentary Debates Tuesday 11 August 1998 [Online] at http://www.parliament.sa.gov.au:8080/ISISquery/IRL6D24.temp/3/doc.

Tasmania

Tasmania had a compulsory third party compensation system from very early in the piece, the relevant legislation being passed in 1934.[197]

In 1969 the Labor government referred the examination of "...the problem of providing compensation for persons injured in accidents arising out of the use of motor vehicles, and the feasibility of providing an alternative or an addition to the...tort liability system" to the Tasmanian Law Reform Committee.[198] The majority of committee, which was strongly influenced by the New Zealand Woodhouse Royal Commission,[199] supported the introduction of a pure no-fault system on distributive justice grounds.[200] A strong minority, which consisted of the Chief Justice and the Master of the Rolls of the Supreme Court of Tasmania, as well as members of the insurance community invited to participate in the consultation process, supported the introduction of an add-on no-fault system.[201] The ultimate conclusion of the committee was that "...the level of no-fault compensation to be provided...is essentially a policy question to be determined by the government".[202]

In 1973 the Labor Party government introduced an add-on no-fault scheme into the Parliament. Whilst, unfortunately, there is no parliamentary record available for this period, it is apparent that

[197] Traffic Act 1925 as amended by Statute Law Revision Act 1934.
[198] Law Reform Committee of Tasmania, 1972, *Recommendations for the Establishment of a No-Fault System of Compensation for Motor Accident Victims* ("The Neasey Report") Hobart.
[199] *ibid.* pp15, 24, 30, 49ff and 70.
[200] *ibid.* p64, 70.
[201] *ibid.* p64.
[202] *ibid.* p82.

both major parties supported in principle the introduction of such a scheme.[203] The scheme introduced remained largely unchanged for 18 years.

In 1991, the Labor Party government introduced an amendment to the scheme whereby long-term care needs for the very seriously injured were to be provided on a pure no-fault basis.[204] This was to be "... the first stage of a program to assist persons injured in motor vehicle accidents and is in accordance with [the government's] social welfare reforms".[205] However, there have been no further major changes to the scheme, which has been one of the most stable in Australia over the past three decades.

Northern Territory

The Northern Territory had a fault-based compulsory third party compensation system from 1949 to 1979. In that year, the Conservative Country Liberal Party formed the view that the existing premium, which was already significantly higher than in any of the other Australian schemes, was not adequate to meet the claims arising. This was blamed on developments in the common law that threatened the community's capacity to pay common-law damages.[206] After receiving a report from the government statistician to the effect that a pure no-fault scheme would substantially reduce costs, the government took two steps:

1. Proposed a pure no-fault scheme and introduced a bill to enable public discussion;[207]

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[203] Hobart *Mercury* Thursday 17 May 1973.
[204] Tasmanian Parliamentary Debates 20 June 1991 p986.
[205] *ibid.* 15 May 1991 p1582.
[206] Northern Territory Parliamentary Debates 8 March 1979 p1111.

2. Formed a seven-person committee to examine the scheme and to report to the government on ways and means of improving the scheme in the public interest.[208]

The review proceeded on the assumption that costs of the existing scheme were too high and that a new scheme must keep premiums to a "reasonable level".[209] The majority of the committee recommended that the government's proposed pure no-fault scheme be altered to an add-on no-fault one. This recommendation appears to have been heavily influenced by the views of the Northern Territory Law Society[210] and by the results of a McNair Anderson survey commissioned by the review committee, which showed that a majority of people surveyed preferred an add-on no-fault scheme with relatively generous benefits.[211]

The committee's discussion of the 'philosophy' of compensation systems was very rudimentary, and ignored most of the major studies (such as the New Zealand Woodhouse report), which had been carried out prior to this report.[212] The majority thought that retention of some level of common law was important because of the "meticulous care and attention" it gave to the victims of another's negligence.[213] The minority, which included the government statistician, thought that common law was inequitable, slow and regressive and should be completely abandoned.[214] The report was markedly parochial, with various claims that the Northern Territory was different from all the other

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[207] *ibid.*Thursday 8 March 1979 p1109ff.
[208] Third Party Insurance Committee, 1979, Northern *Territory Inquiry Into Accident Compensation* ("The Bradley Report") Darwin.
[209] *ibid.* pp2, 4.
[210] *ibid.* p29-30.
[211] Northern Territory Parliamentary Debates 29 May 1979 p1531.
[212] Bradley Report *op cit.* p15-16.
[213] *ibid.* p30.
[214] *ibid.* Minority Statement of Dissent p9.

jurisdictions in Australia.[215] However, is clear from the summary of submissions and comments that there was strong support for an add-on no-fault system in the Territory at the time.[216]

The government implemented many of the recommendations of the Bradley committee but modified them to the extent that common-law damages were much more restricted than those recommended.[217] The Chief Minister flagged the difficulties in formulating policy in this area when he spoke of "...the agonizing required of government...in seeking a balance between the every-man-for-himself and the state-meeting-every-need extremes of philosophy".[218] The Scheme introduced was a political compromise, with the government indicating a view that scheme change was a matter of fitting policy to the prevailing social attitudes and needs.[219]

The resultant add-on scheme operated for five years. In 1984 the Country Liberal Party government abolished all access to common-law benefits. It was stated that the rationale for retention of a limited right to sue in the 1979 act was "vocal opposition [to a pure no-fault scheme] from a relatively small segment of the community" which led the government "in a spirit of compromise" to agree to retain a residual element of common-law damages.[220] However, this element of the scheme had proven so costly that the government decided to abolish it,[221] roundly criticizing the contradictions inherent in a fault-based compulsory third party compensation system in the

[215] Submissions were taken and interviews conducted in the territory and there are several references in the report to the Territory being "special" and different to the other states in various ways-see e.g. *ibid.* pp7, 18, 54-5.
[216] See *ibid.* Appendix 7 "Summary of Submissions and Comments".
[217] Northern Territory Parliamentary Debates 8 March 1979 p1113.
[218] *ibid.* p1114.
[219] *ibid.* 29 May 1979 p1528.
[220] *ibid.* 7 March 1984 p283.
[221] *ibid.*

process.[222] A pure no-fault scheme was introduced, which has remained basically unchanged until the present.

It can therefore be seen that in the Northern Territory there has also been gradual development of a position of liability theory, rather than numerous arbitrary changes leading to an irrational result.

Australian Capital Territory

The ACT has had a compulsory third party automobile compensation scheme since 1936. Although the scheme has never been substantially changed, it has been reviewed six times since 1972.[223] The latest review stated six clear reasons for **not** changing to a no-fault system. These could be summarized as follows:

1. It was not appropriate for governments to force people to insure first party. Therefore a third party system should be maintained with a recommendation that insurers be compelled to offer optional first party insurance;

2. The community could not be confident that there were worthwhile advantages to be gained from the introduction of no-fault;

3. The cost of the scheme would be likely to be greater;

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[222] *ibid.*

4. The community could be disadvantaged because medical expenses paid by the Commonwealth medical scheme would have to be picked up by the scheme;

5. Unlike workers' compensation schemes, which are no-fault because employers controlled the working environment, the premium payers in automobile accident compensation schemes cannot influence the "total road safety environment" and there is therefore no "preventive" role for such schemes;

6. Introducing a scheme that was fundamentally different to the New South Wales scheme would create difficulties and anomalies such as cross-border switching of registration, and would be likely to limit the number of insurers wishing to compete for compulsory third party business.[224]

Given the Australian Capital Territory's special demographic position, it is hardly surprising that reasons such as the above had compelled stability within that Territory's scheme.

It is obvious from the above evidence that there have not been numerous changes in party positions in relation to automobile accident compensation across the Australian states and territories. It is also clear that each state has adopted a highly individual approach to the formulation of its scheme,[225] and that the positions that have developed are a result of rational processes rather than irrational voting cycles. A good example of this is the history of change in Victoria, where the move from add-on to threshold no-fault was forced by a compromise between two strongly held party positions, rather

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[223] *Report of the Steering Committee Reviewing Motor Vehicle Compulsory Third Party Insurance in the ACT* 1994 p2. Many of these reports have not been published-see *ibid.* Appendix J pJ-2.
[224] *ibid.* p46-50.
[225] Despite borrowings between e.g. Western Australia and NSW.

than any 'chopping and changing' by an individual party. In most of the states that have remained fault-based, the party positions have remained relatively static. The likelihood that Chapman and Trebilcock's theory about cycling is correct therefore appears remote. This conclusion is reinforced in the next section, which examines the question as to whether the reports and parliamentary debates from around the time that schemes have changed exhibit clear majority positions.

(b) An Absence Of Any Clearly Stated Majority Position In Relation To Liability Theory.

If Chapman and Trebilcock's theory is correct that majority voting cycles have led to policy instability across Australia in the area of automobile accident compensation over the past three decades, then it could be expected that there would be a lack of clear majority positions developing in the scheme reviews and parliamentary debates around the time of scheme changes. This is simply because the development of such a position should hinder or prevent voting cycles from occurring. Conversely, if majority voting cycles have been occurring, then it could be expected that prior to scheme changes being made, review committees and parliamentary parties would have difficulty in arriving at, and cogently expressing, majority positions because of differences of opinion over value rankings. Confusion and equivocation would be a not unexpected result.

Contrary to the expected outcome, most (although not all) the scheme reviews and parliamentary debates examined in this study demonstrate the development of a clear majority position, or at least have promoted a 'least worst' alternative which should not be possible if Chapman and Trebilcock are correct. This is not to say that the outcomes have been consistent; various views had been expressed at different times, and this fact will be examined in more detail in the section dealing with issues below. However, the diversity of views can be seen as a further indication that the first part of

Chapman and Trebilcock's theory is not correct and that there are several examples of differing values being expressed over time. A state–by–state examination of the reviews and parliamentary debates coinciding with scheme changes follows.

New South Wales

The first major scheme change in New South Wales occurred in 1984, when the Labor Party government modified the scheme to curtail certain benefits and to make the government insurer the sole defendant under the scheme. Whilst two government members during the relevant debates indicated that they would have preferred to see common law compensation abolished and a no-fault scheme introduced,[226] the clearly expressed government position was that costs needed to be brought down quickly, and that there would be no change in liability theory because the New South Wales Law Reform Commission was conducting a review of the scheme at that time.[227]

The Law Reform Commission handed down its report in late 1984.[228] The commissioners had a clearly stated majority position, which was that fault had lost its 'original meaning' in relation to automobile accidents[229] and that because society in general could be identified as the 'cause' of accident producing activities, the responsibility for compensating accident victims should fall on the community as a whole.[230] Scheme costs, although a factor, were not determinative at all of the form of scheme that the commissioners recommended.[231] This position left no room for support of

[226] NSW Parliamentary Debates 23 May 1984 p 1324-5.
[227] *ibid.* pp1415, 1425.
[228] *A Transport Accidents Scheme for New South Wales op cit.*
[229] *ibid.* p58-9.
[230] *ibid.* p138.
[231] See e.g. *ibid.* p522.

anything but a pure no-fault scheme, and the commissioners enthusiastically and unanimously embraced such a system.[232]

The Labor Party government's 1986 Green Paper took an entirely different position however. By this stage the existing scheme was exhibiting a costs crisis.[233] Therefore, various options for reform were presented which were ranked primarily according to their effect on costs.[234] The preferred system was a highly modified common-law scheme, which paid benefits similar to those recommended by the Law Reform Commission for a pure no-fault scheme but which retained fault. Under the scheme, fault was to be determined not by a court but by officers of the Government Insurance Office, who also determined the appropriate level of benefits to be paid.

This scheme was introduced into the Parliament by the Labor Party government in 1987. There was much criticism of the common law during the debates by government members.[235] However, according to the government, "New South Wales simply cannot afford the substantial additional cost of a no-fault scheme".[236] It is clear from the debates that the perceived choice for the government was between a pure no-fault and a fault-based scheme. The scheme implemented, which was named "Transcover", was basically a no-fault scheme with a bureaucratic determination of fault grafted onto it as a 'gate keeping mechanism' to restrict the numbers of those able to claim benefits so that costs would be kept to a minimum.

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[232] *ibid.* p137.
[233] NSW Government Green Paper, 1986, *NSW Transport Accident Compensation Scheme-Options For Reform*- see Overview and also pp1, 19, 37.
[234] *ibid.* p26ff.
[235] See e.g. NSW Parliamentary Debates 14 May 1987 p12228.
[236] *ibid.* p12229, 28 May 1987 p12906.

When a Conservative coalition government was elected in 1988, it immediately implemented a review of Transcover.[237] The new government had a strong ideological commitment to the reintroduction of the right to bring common law actions for damages arising out of automobile accidents.[238] This review was something of a rubber stamp of the government's position. Even though the committee considered five "options for change",[239] there was no serious consideration of the two no-fault alternatives because they "...were beyond the government's policy of restoring common law...".[240] Unsurprisingly, the majority of the committee supported the third option, which involved a substantial reintroduction of common law with private insurer underwriting of the scheme.

The Conservative government maintained its strong ideological commitment to common law in the parliamentary debates that followed the Transcover review.[241] Government members clearly indicated that no-fault schemes were not seriously considered because of the government's policy to return to a common law based scheme.[242]

A Labor Party government was returned to power in 1994 and in 1995 amended the scheme to reduce the available benefits without altering the underlying philosophy of the scheme. It also instituted a parliamentary review of the scheme. The bipartisan Legislative Assembly Standing Committee On Law And Justice carried out a substantial scheme review over the period from 1996

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[237] *Motor Accidents: The Act and Background Papers op cit.*
[238] *ibid.* Foreword pi.
[239] Those five options were i) a modified version of the existing Transcover scheme; ii) modified common law with a single funds administrator; iii) a substantial re-introduction of common law with private insurer underwriting; iv) an add-on no-fault scheme; and v) a pure no-fault scheme-see *ibid.* p2-3. It should be noted that this committee made recommendations but did not vote-see *ibid.* Foreword pii.
[240] *ibid.* p3 and also p89.
[241] NSW Parliamentary Debates 29 November 1988 p3828.
[242] NSW Parliamentary Debates 7 December 1988 p4516.

to 1998 and made a number of recommendations for changes in the scheme.[243] Despite recommending the introduction of a presumption of liability in the case of injured children under the age of 10,[244] and a no-fault long-term care scheme for the small numbers of catastrophically injured automobile accident victims,[245] the committee accepted as a given that the system was to substantially remain a fault-based one.[246] There was only the most rudimentary discussion of the fault/no-fault debate in the committee's reports.[247]

When the scheme was reviewed again by Shirley Miller QC in 1999, there was again an assumption that the scheme would remain fault-based[248] and the working group set up by Ms Miller was asked to accept that the public wished to maintain a fault-based scheme.[249] The 1999 parliamentary debates that followed confirmed that the Labor Party government had a clear majority position, which was that a no-fault scheme, although desirable on distributive justice grounds, was politically and economically unacceptable to the community.[250] The government hoped that by de-emphasizing litigation, by means of the mandatory alternative dispute resolution provisions of its new legislation, a "culture change" would occur. This would allow the government to revisit the question of introducing a no-fault scheme at a later date.[251]

Thus the evidence from New South Wales demonstrates a number of clearly expressed majority positions arising at different times over the past 15 years. Whilst the New South Wales Law Reform

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[243] There were 82 recommendations made in the course of the committee's Interim, Second Interim and Final reports. Most of these recommendations were highly technical in nature and dealt with matters of scheme finance and prudential regulation.
[244] NSW Legislative Assembly Standing Committee on Law and Justice Interim Report *op cit.* p111ff.
[245] NSW Legislative Assembly Standing Committee on Law and Justice Second Interim Report *op cit* p30.
[246] Interim Report *op cit* p183.
[247] See Interim Report p128ff and Second Interim Report p17-18.
[248] Miller S, QC *op cit.* p10.
[249] *ibid* and see also *ibid* Schedule 1 p23.
[250] NSW Parliamentary Debates 22 June 1999 p103.
[251] *ibid.* p1042.

Commission's position stands out as being diametrically opposed to the most often expressed position that the New South Wales scheme should remain fault-based, it is worth noting that this position was not held or adopted by any major political party in the period examined.

Victoria

By way of contrast with the position in New South Wales, all of the scheme reviews and parliamentary debates from around the time of scheme changes in Victoria have demonstrated a majority position in favour of some form of no-fault scheme. In 1971, the Delays Committee recommended that an add-on no-fault system should be introduced into Victoria to reduce delays in payment of compensation to accident victims. This committee preferred a pure no-fault system on distributive justice grounds, but thought that the community would not accept it.[252]

In 1972 the Bar Association and Law Institute of Victoria published the book "No-fault Liability". This publication admitted the potential feasibility of introducing an add-on no-fault scheme to Victoria, although its premise is not entirely clear.[253] Also in 1972, the Arnold committee, which had a number of members in common with the Delays Committee, reported that it was feasible to introduce an add-on no-fault scheme into Victoria.[254] A minority of the committee favoured a threshold no-fault scheme,[255] but this was rejected by the majority on the basis that such schemes were "arbitrary and unjust" and transgressed the assumption behind the terms of reference that any scheme introduced would be an add-on no-fault one.[256]

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[252] Delays Committee Report *op cit.* pp8, 10.
[253] This is probably because the authors, in a strikingly honest insight, allow that "...members of the legal profession have for years benefited greatly from the existing system so that their thoughts on the matter are likely to be confused by personal interest"-see "No-fault Liability" *op cit.* p27.
[254] Arnold Committee Report *op cit* p2
[255] *ibid.* p16.
[256] *ibid.*

In 1973, the Conservative government's clearly stated position was to introduce an add-on no-fault system to remedy the perceived deficiencies of delay and limited distributive justice in the existing system.[257] The government indicated its support for the retention of a fault-based component in the scheme.[258] This was despite calls from the Labor Party opposition to delay scheme changes pending the anticipated introduction of a national accident compensation scheme by the Federal Labor government based on the recommendations of the Woodhouse royal commission.[259]

Sir John Minogue reviewed the scheme in 1979 and considered whether a pure no-fault scheme should be introduced. His view was that the add-on system should be retained on the "pragmatic" ground that a pure no-fault scheme would seriously disadvantage some victims by the "deprivation of their common law rights".[260]

In 1986, the Labor Party government released its discussion paper outlining its proposed pure no-fault scheme. This paper clearly sets out the advantages of such a scheme in terms of distributive justice and costs.[261] The Law Institute and Conservative opposition were promoting a threshold no-fault system at this time that was criticized by the government as being less fair and more costly than its own preferred scheme.[262] That same year in the Parliament, the respective merits of a pure no-fault and threshold no-fault scheme were again debated. The government maintained its strong support for a pure no-fault system, but the Conservative opposition was vehemently opposed to the complete abolition of fault on various grounds, including those of the promotion of deterrence and

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[257] Victorian Parliamentary Debates 28 March 1973 p4649.
[258] *ibid.*
[259] *ibid.* 11 April 1973 p5371. As previously discussed, this national scheme never eventuated.
[260] Minogue Report *op cit.* p86.
[261] Discussion Paper *op cit.* p117.
[262] *ibid.* p67-8.

corrective justice.[263] Both sides claimed the political high ground based on interpretation of answers to questions in qualitative surveys of public opinion.[264] In the end the government was first to compromise because it did not have the numbers in the Upper House, and a threshold scheme was introduced.

The evidence from Victoria is that there has been a strong majority view in favour of a no-fault scheme. The Labor party has at times supported a pure no-fault scheme, but the Conservative parties have favoured retention of fault. The latter position has been the dominant one during the period examined.

Queensland

The strength of the majority position in favour of a fault-based system in Queensland is undoubted. In the major treasury review of the Queensland scheme finalized in 1994, there was apparently no consideration given to changing the underlying philosophy of the scheme.[265] In the parliamentary debates that followed, both the government and the opposition made clear statements in favour of the retention of common law.[266]

When the scheme was reviewed again in 1999,[267] the review committee undertook a very rudimentary examination of "accident compensation philosophy".[268] Whilst the committee

[263] Victorian Parliamentary Debates 10 September 1986 p126, 28 October 1986 p1558.
[264] *ibid.* 10 September 1986 p145-7, 30 September 1986 p714.
[265] Telephone conversation with staff of Queensland Motor Accident Insurance Commission *op cit.*
[266] For the government's position, see Queensland Parliamentary Debates 16 February 1994 p6904. For the opposition's, see Queensland Parliamentary Debates 23 February 1994 p7193.
[267] *Review of Queensland Compulsory Third Party Insurance Scheme op cit.*
[268] *ibid.* p23.

expressed some support for an add-on no-fault scheme on Distributive Justice grounds,[269] in its recommendations it sought to "preserve the existing common law system to the maximum extent" because of concerns that a no-fault system would create administrative difficulties and equity issues.[270]

In the 2000 parliamentary debates on changes to the scheme, the government presented a move away from fault as a negative development.[271] The scheme remains fault-based, but with limits on benefits and restrictions on minor claims such as those found in previous New South Wales schemes.

Western Australia

Western Australia has also exhibited a strong majority position in favour of fault. The only substantial changes to the Western Australian scheme were made in 1994. These changes were made as a result of costs concerns,[272] and there is no suggestion in the debates of any serious proposal to move away from a fault-based scheme. In fact, such a move was apparently dismissed as impractical.[273] It also appears that some government members wanted the scheme to remain unchanged, but were forced to agree to changes because of the scheme's financial problems.[274] The changes made in 1994 brought the scheme into line with the modified common law scheme that existed in New South Wales prior to 1999.[275] This is similar to the case with the 2000 Queensland changes and demonstrates a degree of conservatism in the states involved.

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[269] *ibid.* p70.
[270] *ibid.* p69-70.
[271] Queensland Parliamentary Debates 31 May 2000 p1428.
[272] Western Australian Parliamentary Debates 1 December 1993 p8588, 6 April 1994 p11487.
[273] *ibid.* 5 April 1994 p11347.
[274] *ibid.* p346-7.
[275] *ibid.* 1 December 1993 p8589.

South Australia

South Australia is another state where there has been a majority position in favour of fault in the scheme reviews and debates around the time of scheme changes. The 1985 Daniell report[276] recommended a radically restricted fault-based system in order to contain scheme costs.[277] The committee thought that introducing a no-fault scheme would cause costs problems.[278] A simplified method of determining fault was recommended which was designed to reduce litigation costs.[279]

When the Labor Party government introduced changes to the scheme in 1986, they made many of the changes recommended in the Daniell report.[280] The government indicated that it would be setting up a study to examine the administrative and financial implications of establishing a no-fault scheme.[281] However, as in a number of other states it appears that concern for costs outweighed distributive justice considerations in precluding the government from putting a change to no-fault on the agenda.[282]

In 1998, the Conservative government introduced restrictions on scheme benefits designed to overcome various common law developments.[283] The government's clearly stated reason for this change was to curtail costs.[284] Whilst there was some disquiet in government ranks about the effect

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[276] *op cit.*-as this committee consisted of only 2 people, there was a good chance of a majority forming.
[277] *ibid.* p5.
[278] *ibid.* p99-100.
[279] *ibid.* p21-2.
[280] South Australian Parliamentary Reports 1986-7 p2545.
[281] *ibid.* pp2409, 2799.
[282] *ibid.* p2409-10.
[283] See South Australian Parliamentary Debates 4 June 1998 *op cit.*
[284] *ibid.*

on distributive justice of the changes,[285] there was no suggestion from any quarter of a change to the fault-based nature of the scheme.

Tasmania

Tasmania is one state where it is difficult to assess whether there have been majority positions expressed at times of change. A majority of the Law Reform Committee, which reported to the government in 1972,[286] thought that a pure no-fault system should be introduced into Tasmania.[287] However, a strong minority of senior judicial officers promoted an add-on system on conservative grounds.[288] The committee's ultimate position was that "the level of no-fault compensation to be provided... is essentially a policy question to be determined by the government".[289]

Because there was no record of Tasmanian parliamentary debates in 1973, there is little information available about the decision-making process that led the government to adopt an add-on no-fault scheme. However, it is clear that the major parties supported an add-on system.[290] It is also significant that the Neasey report examined the schemes operating in the mainland States,[291] and the add-on scheme adopted in Tasmania was quite similar to that adopted in Victoria, the closest mainland State, not long before.

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[285] See the speech of Mr Redford-South Australian Parliamentary Debates Thursday 9 July 1998 *op cit.*
[286] The Neasey Report *op cit.*
[287] *ibid.* pp64, 70. This view was apparently heavily influenced by the New Zealand Woodhouse Royal Commission-see *ibid.* p70.
[288] *ibid.*p64.
[289] *ibid.* p82-see also *ibid* Schedule C pC-2.
[290] *The Mercury* Thursday 17 May 1973.
[291] Neasey Report *op cit.* p31ff and also p63.

In 1991 the government abolished the right to sue in respect of long-term care for the most seriously injured. This amendment to the scheme had strong support from both sides of politics.[292] This indicates that there is a strong concern for distributive justice in Tasmania on all sides of politics. The stability of the scheme and the lack of any serious disagreement about changes also indicate that voting cycles are probably not occurring in that State.

Northern Territory

The tension in the Northern Territory around the time of change in the late 1970's and early 1980's was between add-on and pure no-fault. The Bradley report of 1979 contains a strong majority position in favour of an add-on no-fault system as being the best means of compensating automobile accident victims at an acceptable premium level.[293] The majority of the committee thought that corrective justice was important, and that "innocent victims" should be entitled to "better compensation".[294] There was also a clear, and cogently argued, minority position that tort should be discarded altogether because of its social inequity and open-ended effect on premiums.[295]

It is harder to fathom the government's position in the debates that followed the Bradley report in 1979. Some of the report's recommendations were taken up, but access to common law was restricted to limited general damages only. There are strong indications that the government was influenced by the findings of the McNair Anderson survey to the effect that the community would prefer an add-on scheme with more generous no-fault benefits than those suggested by the Bradley

[292] Tasmanian Parliamentary Debates 20 June 1991 p985.
[293] Bradley Report *op cit.* p4-7. This position was influenced by the results of a McNair Anderson survey showing that Territorians preferred an add-on system-see *ibid.* p42.
[294] *ibid.* pp5, 16.
[295] *ibid.* Statement of Dissent pp1, 7-8. The minority was led by Mr Sid Caffin, the retired Government Actuary whose initial advice to the government to introduce a pure no-fault scheme led to the government's draft bill and the constitution of the Bradley Committee-see Northern Territory Parliamentary Debates 8 March 1979 p1111.

committee.[296] But it is obvious that the decision between an add-on and a pure no-fault scheme was not an easy one for reasons previously cited.[297] What apparently tipped the balance in the end was the support of the legal profession for retention of some common law benefits.[298]

In 1984, the government abolished the limited common law benefits available under the scheme because of costs concerns.[299] The government clearly stated its support for a pure no-fault scheme in the territory, and was obviously proud of its own decision.[300] The government's original position, to establish a pure no-fault scheme for Territorians, thus ultimately held sway, and has remained unchanged ever since.

Australian Capital Territory

The ACT has the only pure common law scheme left in Australia. There have been at least six reviews of the scheme since 1972, four of which recommended retention of a fault-based scheme.[301]

In the latest published review of the scheme in 1994, the review committee's clearly stated majority position was that the existing system should be retained.[302] Six clear reasons were given for this, which have already been summarized above. Whilst the committee indicated that they understood the arguments that had led other states to adopt no-fault schemes,[303] considerations such as the work required to introduce such a scheme, the small ACT premium pool and the committee expression of

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[296] Northern Territory Parliamentary Debates 29 May 1979 p1531.
[297] *ibid.* 8 March 1979 p1111.
[298] Northern Territory Parliamentary Debates 7 March 1984 p283. The majority of the Bradley Committee were lawyers.
[299] *ibid.*
[300] *ibid.* 12 June 1984 p587.
[301] *Report of the Steering Committee Reviewing Motor Vehicle Compulsory Third Party Insurance in the ACT,* 1994 p2 and also see Appendix J pJ-2.
[302] *ibid.* p151.

a desire to see competition introduced to the scheme "cautioned" the committee from pursuing the idea of a no-fault scheme further.[304]

There have been clearly expressed majority positions in relation to liability theory in most of the scheme reviews and debates around Australia since 1970. Significantly, clear reasons have been given where governments making changes to schemes have not accepted recommendations on liability emanating from reviews. This was the case in New South Wales in 1987 when the Labor Party government introduced the fault-based Transcover scheme despite the strong recommendations of the 1984 New South Wales Law Reform Commission report. The reasons given for not adopting the recommended pure no-fault scheme were those of cost and lack of community acceptance. This seems to be a recurring theme in those states that have retained fault,[305] and is completely at odds with the expected chaotic position that arises out of an acceptance of Chapman and Trebilcock's theory.

(c) Definite Signs Of Ranking More Than Two Alternative Schemes, With Pairwise Comparison Of Alternatives.

The examination of the schemes in terms of this criterion is particularly interesting. It should be noted at the outset that it is a necessary condition of Chapman and Trebilcock's theory that there be ranking of more than two alternatives with pairwise comparisons.[306] It should also be noted that Chapman and Trebilcock hypothesize that schemes will always be ranked against the three values of

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[303] *ibid.* p50.
[304] *ibid.* p51.
[305] See also e.g. the 1994 debates in Western Australia and the 1999 scheme review in Queensland.
[306] Chapman and Trebilcock *op cit.* p838.

Individual Responsibility, Distributive Justice and Administrative and Premium Costs.[307] In other words, all three values will always have roughly equal 'political salience'.[308]

The interesting finding that arises out of the study is that there is almost no evidence that the Australian schemes have been ranked in this way.

The Early Changes To Add-On No-Fault

For example, in the 1970s, when there was a move towards introduction of no-fault in Victoria, Tasmania and the Northern Territory, the political salience of the Individual Responsibility value in comparison to the Distributive Justice value was questionable. The Delays committee in Victoria,[309] which was convened specifically to report on distributive justice issues in the existing tort scheme (primarily delays in compensating victims) held the view that the fault system did not promote individual responsibility[310] and thought that fault should not be a feature of an 'ideal' compensation system.[311] The reason given for retaining tort in an add-on system was the view that this accorded with community expectations.[312] The Arnold committee did not deal with the question of individual responsibility at all, but assumed that an add-on no-fault system would be introduced if feasible.[313] When the add-on scheme was introduced into the Parliament in 1973, there was no mention of

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[307] *ibid.* p848-9.
[308] *ibid.*
[309] *op cit.*
[310] The committee commented on the "meaninglessness" of the negligence action and annexed to their report the whole of the criticism of tort by Atiyah in Chapter 25 of "Accidents, Compensation and the Law" *op cit.*
[311] Delays Committee *op cit.* p4 para 6.
[312] *ibid.* p 8. The 1972 joint Victorian Bar Association/Law Institute publication "No-Fault Liability" also operated on the assumption that "the public" held a strong philosophical attachment to the fault concept-see pp 30, 32ff.
[313] Arnold Report *op cit.* p16.

individual responsibility, merely a statement by the government that the tort system "...is still satisfactory in many ways".[314]

According to Chapman and Trebilcock, an add-on system is anathema to those who are most concerned with costs. However, both the Delays committee and the Arnold committee conceded that the introduction of an add-on no-fault system would increase scheme costs.[315] Neither committee viewed such a rising costs as a major impediment to the introduction of an add-on no-fault scheme.[316]

The Conservative government that introduced the add-on no-fault scheme in 1973 was not concerned about potential increases in scheme costs that an add-on system might bring, and in fact argued that scheme costs might eventually fall because of increased efficiencies in the system.[317] Throughout the genesis of this add-on scheme, there is no indication of cycling over three or more alternatives. It is clear that a decision was made to move away from a pure tort system quite early. The Delays committee pondered the relative merits of a pure as against an add-on no-fault scheme and opted for an add-on scheme on politically expedient grounds, rejecting pure no-fault as being unacceptable to the community.[318] The debate in the Arnold committee seems to have been between supporters of an add-on and a threshold no-fault system, with the add-on supporters forming a majority on grounds of 'justice'.[319] In the Parliament, the government's support for an add-on scheme was based on its remedying of the specific problems of delay, failure to compensate those not able to prove fault and dispersal of compensation funds in legal costs, which were seen as inherent in the tort system.[320]

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[314] Victorian Parliamentary Debates 28 March 1973 p4649.
[315] Delays Committee Report *op cit* pp5, 10; Arnold Report *op cit.* p13.
[316] See e.g. Delays Committee Report *op cit.* p10.
[317] Victorian Parliamentary Debates 11 April 1973 p5370.
[318] Delays Committee Report *op cit.* p8.
[319] Arnold Report *op cit.* p16.
[320] Victorian Parliamentary Debates 28 March 1973 p4649, 11 April 1973 p5299.

There is no evidence that any alternative scheme was considered by the government and this is probably because of the perception that the community would not support a pure no-fault scheme.

In Tasmania the history is similar, although not as clear-cut. The Law Reform Committee was unsure of tort's deterrent effects,[321] and there was a degree of uncertainty about the importance of individual responsibility and what part it should play in the formulation of a compensation scheme,[322] but there was general agreement that pure tort should not be retained for reasons related to distributive justice such as delay, uncertainty, failure to promote the rehabilitation of those unable to prove fault etc.[323] Costs were not of overwhelming concern to the committee.[324] The majority of the committee supported a pure no-fault scheme on distributive justice grounds and was heavily influenced by the New Zealand Woodhouse Royal Commission.[325] The influential minority of senior judicial officers recommended an add-on system with retention of tort for reasons of conservatism rather than ideology.[326]

Whilst it is impossible to properly gauge the government's position in introducing the add-on scheme with the limited material available, it is notable that costs and the nature of benefits were a major consideration.[327] It is also notable that both sides of politics supported introduction of an add-on system[328] and there is no sign of any dissent relating to preference for alternative systems that would indicate a cycling process occurring.

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[321] Neasey Report *op cit.* p12-13.
[322] *ibid.* p70.
[323] *ibid.* p18-20.
[324] *ibid.* p76, particularly at para 115.
[325] *ibid.* pp28, 70.
[326] *ibid.* p77-the minority thought that it was "desirable not to institute immediately too drastic a departure from traditional methods".
[327] *The Mercury* Thursday 17 May 1973 and Thursday 7 June 1973.
[328] *ibid.*

The position in the Northern Territory in 1979 was somewhat similar, although the catalyst for change was different. There the government was very concerned about costs. It introduced a draft pure no-fault scheme for discussion on the advice of the retired government actuary and set up the Bradley committee which was asked to assume that the motoring public could no longer afford the existing system of third party insurance.[329]

The majority of the Bradley committee, consisting in the main of members of the legal profession, recommended that the government's draft pure no-fault scheme be amended to an add-on one, on the basis that "innocent victims… should be entitled to better compensation but not to the exclusion of all the other victims".[330] They argued that public submissions had disclosed a consistent desire to look after innocent victims more than those that caused the accident.[331] The minority, which included Mr Sid Caffin, the retired government actuary who had recommended that the government introduce a pure no-fault scheme, strongly disagreed with both the majority's interpretation of the submissions[332] and of the majority's suggested approach generally.[333] The majority, despite the committee's terms of reference, did not see costs as being a dominant concern, stating "one must not lose sight of the victim in an effort to try and save a few pennies for the motorist".[334]

As already seen, the government found the decision between a pure and an add-on no-fault scheme a difficult one,[335] but was ultimately swayed by vested interests,[336] and a political concern that the

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[329] Bradley Report *op cit.* p2.
[330] *ibid.* p16. The add-on scheme recommended by the majority seems to have been drawn directly from the Northern Territory Law Society's preferred scheme-see *ibid.* p29-30.
[331] *ibid.* p42.
[332] *ibid.* Minority Statement of Dissent p7.
[333] *ibid.*
[334] Bradley Report *op cit.* p14.
[335] Northern Territory Parliamentary Debates 8 March 1979 p1114.
[336] *ibid.* 7 March 1984 p283.

community would not accept a pure no-fault scheme.[337] This was despite heavy criticism by the government of common law based systems.[338]

The evidence thus amply demonstrates that in the states that moved to an add-on no-fault system in the 1970s, there is unlikely to have been cycling because the processes informed are not those necessary for cycling to occur. In the three states, a decision was made to abandon the pure tort scheme and then the form that an alternative scheme should take was debated.[339] In each case, the decision to move to an add-on scheme was a conservative one, based on perceptions of committee acceptance of change, rather than an arbitrary one based on different ranking of a number of alternatives.

The Changes In Victoria And The Northern Territory In The 1980's

The change from an add-on to a pure no-fault system in the Northern Territory in 1984 was entirely devoid of any evidence of the sort of ranking which might have led to cycling. The government was very concerned about the costs of the residual fault component of the scheme[340] and highly critical of fault-based schemes in general.[341] It is obvious that by this time the individual responsibility value had lost any political salience for the government that it might once have had.[342]

A similar change almost occurred in Victoria in 1986. In that state, the Labor Party government was keen to replace the existing add-on system with a pure no-fault scheme, arguing that there were

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[337] Northern Territory Parliamentary Debates 29 May 1979 p1512.
[338] *ibid.* 8 March 1979 p1113.
[339] Chapman and Trebilcock argue that this is the way that rational choices should be made-see Chapman and Trebilcock *op cit.* p855ff.
[340] Northern Territory Parliamentary Debates 7 March 1984 p283.
[341] *ibid.*

"fundamental costing and equity problems in the continuation of a system based on the fault principle".[343] The Conservative opposition and the Law Institute were promoting a threshold no-fault system at the time, which the government criticized as having all the problems associated with fault, whilst being more costly than a pure no-fault system.[344] The opposition in its turn heavily criticized the government scheme on the basis that it dropped fault when retention of the common law promoted individual responsibility.[345] However, the opposition conceded that access to common law would have to be restricted because of costs concerns.[346] Because the opposition had the numbers in the Upper House, it forced the government to compromise and a threshold scheme was introduced. Clearly, there were only two alternatives being ranked in this situation. Whilst all three values played a part in the ranking process, the end result came about through a political compromise, and not because of a cycling process.

The Fault-based States

The position regarding the fault-based states is more difficult to discern. Is it possible that the retention of fault arose out of ranking and cycling as described by Chapman and Trebilcock? In other words could irrational decision-making processes have led to a non-decision? The best answer is 'probably not'. Certainly in most States there appears to have been a clear decision to retain fault at the time that scheme changes are being considered, without the ranking of multiple alternatives that Chapman and Trebilcock describe.

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[342] *ibid.* Interestingly, the Labor Party opposition supported limited common law rights despite the Federal Labor Party's position on a national no-fault scheme.
[343] Victorian Government Statement *op cit.* p11-the costs of the existing system were described as "intolerable"-*ibid.* p3.
[344] *ibid.* p67-8.
[345] Victorian Parliamentary Debates 28 October 1986 p1558.
[346] *ibid.* 3 December 1986 p2678.

For example, in Western Australia in 1994 a review of the scheme was triggered by costs concerns. The government introduced a modified common law scheme that reduced benefits in various areas, that was clearly based on the New South Wales scheme operating at the time. In the debate about the new scheme, there are only oblique references to individual responsibility, but considerable debate about the interplay between distributive justice and costs.[347] It appears that a change to a no-fault scheme may have been considered at some stage by the government and rejected as impractical.[348] But there are no signs that a ranking of different schemes occurred when the government was formulating its scheme changes.

In Queensland, there is no doubt that there has been a conscious rejection of a move away from fault. The 1994 scheme review apparently gave no consideration to changing the underlying philosophy of the scheme.[349] Both the government and opposition made clear statements of support for retention of the common law.[350] There is evidence in the 1999 scheme review that the review committee was in favour of the introduction of "some form of no-fault cover".[351] However, the committee did not consider, or rank, any such schemes against the fault system in terms of the three subject values, but instead recommended retention of fault because its researches indicated public antipathy towards a no-fault scheme.[352] In 2000, the government introduced a number of restrictions on damages into the existing scheme to control costs, but indicated a clear intention to retain as much of the common law as possible,[353] presenting any move towards no-fault as a negative development.[354] There is no

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[347] See eg Western Australian Parliamentary Debates 1 December p8588, 31 March 1994 p11199ff.
[348] *ibid.* 5 April 1994 p11347.
[349] Conversation with staff of Queensland Motor Accident Insurance Commission staff *op cit.*
[350] Queensland Parliamentary Debates 16 February 1994 p6904, 23 February 1994 p7193.
[351] CTP Review Committee Report *op cit.* p70.
[352] *ibid.* p92.
[353] Queensland Parliamentary Debates 31 May 2000 p1428.
[354] *ibid.*

evidence of detailed comparison of alternative schemes by the government, and the opposition broadly supported the scheme changes.[355]

By way of contrast, the Daniell committee in South Australia examined a large number of alternatives to that state's fault-based system. However, the committee apparently ranked these alternatives only in terms of their ability to reduce costs,[356] which is in keeping with its terms of reference.[357] Whilst critical of arguments in favour of fault,[358] the committee argued against the introduction of a no-fault scheme on costs grounds[359] even though it thought that an eventual move to no-fault was "probably inevitable".[360] Its ultimate recommendation was the introduction of a system where fault was determined by reference to an objective chart similar to those used by insurers to assess fault in automobile property damage claims.[361]

There is no evidence in the parliamentary debates which followed of any ranking taking place, with the government only amending the scheme's benefits by reducing them to contain costs and making no changes to the underlying philosophy. The reason that there was no such ranking appears to be that the government planned to set up a study to examine the administrative and financial implications of establishing a no-fault scheme.[362] However, this study never came to fruition and the scheme was not substantially changed again until 1998, when scheme benefits were reduced considerably.[363] Once again, at this time there was no sign of any ranking of schemes, although

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[355] *ibid.* p1416.
[356] See e.g. Daniell Report *op cit* pp92, 96, 99.
[357] *ibid.* p4.
[358] *ibid.* p99.
[359] *ibid.* p99-100.
[360] *ibid.* p99.
[361] *ibid.* p21-2.
[362] South Australian Parliamentary Debates 1986-7 Vol 3 p2409 and see also p2797.
[363] South Australian Parliamentary Debates 4 June 1998 *op cit.*

there was obvious tension in government ranks in relation to the interplay of distributive justice and costs concerns in the revised scheme.[364]

The situation in New South Wales over the past three decades has been infinitely more complex. When the first significant scheme change was made in 1984, there was no ranking of schemes and consequent cycling. This is because the Labor Party government was waiting for the report of the New South Wales Law Reform Commission before making alterations to liability theory, whilst amending the scheme to try and keep costs down in accordance with an electoral promise.[365]

The Law Reform Commission did rank alternatives. It comprehensively examined the whole question of automobile accident compensation including many possible alternative schemes. But its starting premise was that "the failure of the common law to compensate all victims is almost universally recognized as a deficiency requiring remedial action".[366] The committee's view was that society as a whole was the cause of accident producing activities and therefore the responsibility for compensating accident victims should fall on the community as a whole.[367] This view leaves no room for arguments relating to individual responsibility, and so the commissioners specifically rejected the validity of all hybrid schemes.[368]

The Labor Party government's 1986 discussion paper[369] also ranked several alternative schemes. These were two relatively expensive pure no-fault schemes, an add-on no-fault scheme suggested by the New South Wales Law Society, and a scheme that paid limited benefits similar to those

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[364] South Australian Parliamentary Debates 9 July and 13 August 1998 *op cit.*
[365] New South Wales Parliamentary Debates 10 May 1984 p586.
[366] *A Transport Accident Scheme For New South Wales op cit.* p57.
[367] *ibid.*
[368] *ibid.* p170ff.
[369] *op cit.*

recommended by the Law Reform Commission for a pure no-fault scheme but with retention of fault, which was to be determined bureaucratically by officers of the Government Insurance Office.[370] But this discussion paper was released in an atmosphere of costs 'crisis'[371] and the criteria against which the schemes were ranked related to costs and potential speed of implementation.[372] The pure no-fault schemes were thus rejected because they could not be implemented quickly, and the add-on scheme suggested by the Law Society was almost summarily dismissed as being too expensive.[373] Whilst agenda manipulation obviously occurred here in the sense that the form of the schemes being ranked appears to have been determined by the preferred outcome, there was obviously no cycling occurring.

When the Transcover scheme was debated in Parliament in 1987, the focus was on costs, even at the expense of distributive justice. The system introduced had the limited benefits of a no-fault scheme without the universal entitlement to compensation as the usual trade-off. There is no indication of the government ranking alternative schemes against all three values. It stated that it was retaining fault to keep costs down[374] and that "New South Wales simply cannot afford the substantial additional cost of a no-fault scheme".[375] There is no indication from the debates that the individual responsibility value was of particular importance in the government's deliberations over the scheme at all, and the major concession made to distributive justice was the statement by the government leaders in both houses that it was unfortunate that costs considerations prevented the introduction of

[370] *ibid.* p6. This last scheme was ultimately enacted as "Transcover".
[371] *ibid.* Overview p1 and also p31.
[372] *ibid.* Overview p8 and also p26ff.
[373] *ibid.* Overview p6.
[374] See e.g. NSW Parliamentary Debates 14 May 1987 p12229.
[375] *ibid.* The government claimed to have received actuarial advice that a no-fault scheme would cost up to 43 percent more than an "equivalent" fault-based scheme-see NSW Parliamentary Debates 29 May 1987 p13408.

a no-fault scheme. As the scheme was arguably much less generous than the one it replaced,[376] it appears that costs was ultimately the dominant value in the government's scheme selection.

The committee that was formed to review Transcover after the Conservative government came to power in 1988 also ranked five "options for change".[377] In addition, the alternatives were ranked against criteria that roughly translate to the three values of Individual Responsibility, Distributive Justice and Administrative and Premium Costs.[378] However, the committee's position in relation to liability theory was constrained by the government's commitment to a return to common law.[379] Thus, the two no-fault options "were beyond the government's policy of restoring common-law damages and were prepared for identification purposes only".[380] In other words they were not seriously considered. Only fault-based options were effectively ranked, and unsurprisingly the option of common law with private insurer underwriting received the committee's imprimatur.[381]

It is quite obvious from the speeches in the Parliament in 1988 that the new government had a strong ideological commitment to the fault principle.[382] Government members clearly indicated that they had not seriously considered any no-fault schemes because of the government's policy to return to a common law based scheme,[383] which means that cycling cannot have occurred.

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[376] NSW Parliamentary Debates 2 June 1987 p13241ff.
[377] These 5 options were (i) a modified version of Transcover; (ii) modified common law with a single funds administrator; (iii) a substantial re-introduction of common law with private insurer underwriting; (iv) add-on no-fault; and (v) pure no-fault-see *Motor Accidents: The Act and Background Papers op cit.* p2-3.
[378] These criteria were Benefits, Affordability, Fraud Prevention, Administration, Rehabilitation, Dispute Resolution and Accident Awareness and Prevention-see *ibid.* p37.
[379] *ibid.* p89.
[380] *ibid.* p3.
[381] *ibid* p89.
[382] See e.g. NSW Parliamentary Debates 29 November 1988 p3828.
[383] NSW Parliamentary Debates 7 December 1988 p4576.

When the Legislative Assembly Standing Committee on Law and Justice reviewed the scheme from 1995 to 1998, they did not engage in any formal ranking process and there is only cursory mention in the committee's report of the fault/no-fault debate.[384] The committee was motivated by distributive justice concerns to recommend a no-fault long-term care scheme for the most seriously injured,[385] and a presumption of liability in cases involving small children.[386] Apart from these matters the committee thought that the fault-based philosophy of the scheme should remain unchanged.

The next scheme review conducted by Shelley Miller QC in 1998 did not feature any ranking of schemes, and cycling was not possible because the working group was asked to assume that the scheme would remain fault-based.[387] This review was triggered by costs concerns[388] and highlighted an interesting conflict between costs and distributive justice concerns, which led Ms Miller to express the view that "...highly industrialized countries may now be moving toward the view that a reasonable amount of funds applied to rehabilitation could well constitute full compensation". [389] It is obvious that costs concerns ultimately triumphed in this conflict because the recommended scheme had a relatively high threshold and limitations on various heads of damages designed to restrict potential verdicts.

This conflict between distributive justice and costs is also demonstrated in the parliamentary debates following the Miller review. The government acknowledged that it was cutting benefits and retaining fault in order to reduce premium costs, and argued that this was in line with public expectations.[390] It

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[384] See Interim Report *op cit.* p128ff, Second Interim Report *op cit. p17-18.*
[385] Second Interim Report *op cit.* p30.
[386] Interim Report *op cit.* p111ff.
[387] Miller S. QC, *op cit.* p10-cycling would not have been possible in any event as according to a member of the working group who shall remain anonymous, the working group did not vote at all but simply passed comment on the facilitator's recommendations.
[388] *ibid.* p7-9.
[389] *ibid.* p22.
[390] NSW Parliamentary Debates 22 June 1999 p1038.

also argued that it was striking a "difficult and delicate balance" between maintaining most of the features of common law access, the rights of victims to relatively generous settlements, and low premiums.[391] These are, of course, roughly commensurate with Chapman and Trebilcock's three values. This means that in essence the government was arguing that its scheme was a 'least worst' alternative but the measures introduced provoked outrage from the opposition and minor parties on the basis that they were miserly.[392] However, there was no sign of ranking of this scheme against any alternatives and a reasoned determination to make no change to liability theory, which suggests that no cycling took place when this scheme was being promulgated by the parliamentary Labor party.

The conclusion that can be drawn from the above evidence is that schemes have often been ranked by reviewers and legislators over the years prior to changes being made, but seldom in the way that Chapman and Trebilcock envisage. This is because different values have been given different weights in particular times and places.

(d) Similar Issues Being Ventilated In Parliamentary Debates On Scheme Changes And Similarity Of Arguments And Recommendations Across Jurisdictions In The Scheme Reviews Informing The Debates

If Chapman and Trebilcock are correct, this study should reflect a thirty-year history of cycling over the same issues and arguments in scheme reviews and debates around the country. Their presupposed similarities in values and appreciation of facts should also ensure that any new ideas or issues spread swiftly and relatively evenly across the whole population.

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[391] *ibid.*
[392] See e.g. the speech of Dr A. Chesterfield Evans *ibid.* p1032.

Of course, the 'issues' that arise in any consideration of automobile accident compensation can be viewed as similar depending on the breadth of one's definitions. There must be certain commonalities in a discussion of the area, including automobiles, injuries, compensation and insurance. The question is whether any different issues arise under these more broad headings, or whether there are varying points of focus that could indicate differences between jurisdictions in terms of values or appreciation of facts.

An examination of the reviews at times of change over the past three decades shows that there have been many different points of focus, and a number of distinct and separate issues have arisen. One only has to look at the terms of reference of many of these reviews and the way that individual committees have interpreted their particular brief to see that different specific issues have arisen that have been the catalyst for the review process. The perceived problems that the review committees have set out to solve have often been quite different, and to a large extent the way that the problem for solution has been framed has determined the ultimate outcome.

To take some illustrative examples, the Arnold Committee in Victoria in 1972 was given the task of assessing whether it was 'feasible' to introduce an add-on no-fault scheme into Victoria.[393] In 1984, the New South Wales Law Reform Commission was given a very wide brief to examine accident compensation generally, but chose to confine its investigations to transport accident compensation.[394] The Transcover Review Committee in 1988 was given the task of reviewing a number of alternative schemes in light of the conservative government's commitment to return to a common law based scheme.[395] The Miller Working Group in 1999 was asked to find an acceptable method of reducing the premium by $100 within the bounds of a scheme that retained fault but

[393] Arnold Report *op cit.*
[394] *A Transport Accidents Compensation Scheme For New South Wales op cit.* p (i)-(iv) and p10ff.

reduced resort to litigation.[396] Each of these groups proceeded to review the subject schemes within an entirely different framework, and the range of issues raised and consequently the solutions offered were substantially different. This has been the real pattern across the country over the past thirty years,[397] and reinforces one of the ideas underpinning this work that ideas and values have changed gradually over time.

Partly because issues raised and dealt with in the scheme reviews have been different, the arguments in parliamentary debates subsequent to the reviews have also been different. Governments have also independently raised new issues in relation to scheme changes. For example, the government in Victoria in 1973 argued that it was changing from the existing fault-based scheme to an add-on no-fault one primarily because of distributive justice concerns.[398] The Western Australian government in 1994 claimed that it was forced to modify the existing common law by reducing benefits because defalcations by the previous government had led to a dispersal of the insurance pool.[399] The New South Wales government in 1999 argued that it was not only trying to cut the average premium by $100 per annum but also to change the litigious "culture" in the state by mandatory referral of claims to an alternative dispute resolution process.[400]

It seems that whereas in the 1970's distributive justice was the dominant concern in the several states that changed to a no-fault scheme, since that time the issue of costs in most states has become the

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[395] *Motor Accidents: The Act and Background Papers op cit.* Foreword.
[396] Miller S. *op cit.*
[397] Further examples could be drawn from the Bradley Report in the Northern Territory where the feasibility of introducing a pure no-fault scheme was examined, or the NSW Labor government's 1986 discussion paper which sought the speediest and cheapest solution to the problem of rising premium costs. But perhaps the best example apart from those above is the 1994 ACT review, which raised very specific issues such as the importance of maintaining a scheme similar to that in the economically dominant surrounding state of NSW.
[398] Victorian Parliamentary Debates 28 March 1973 p4649.
[399] Western Australian Parliamentary Debates 1 December 1993 p8588ff.
[400] See e.g. NSW Parliamentary Debates 3 June 1999 p904, 22 June 1994 pp995. 1039, 1044, 28 June 1999 p1469, 29 June 1999 p1499, 1523.

most important.[401] The question as to whether a change in liability theory should be made has been quite secondary in the debates since the 1970's and has often been dismissed with brief comments and vague references to future scheme reviews.[402] Concentration on costs, with subsequent recommendations to restrict scheme benefits, has meant that much of the argument in parliamentary debates over scheme changes has related to the interplay between costs and distributive justice concerns. This type of tension has led to modification of some schemes during the course of their passage through parliament to dampen the effect of proposed benefit cuts.[403]

Finally, in some Australian states there has been a definite perception that issues in the automobile accident compensation debate are state specific.[404] It is a distinct possibility that such views are widely held across the nation and is in fact reflective of the nature of a federation. This is most likely the reason why a study of the reviews and debates over the past thirty years reveals a history of the raising of many new issues and robust debate on a range of topics, rather than one of constant cycling over the same issues and arguments.

(e) Expressions Of Surprise Or Dissatisfaction At Policy Outcomes With Calls For Changes To Voting Procedures Or To Institute Referenda To Force A Majority Outcome.

It is difficult to believe that if majority voting cycles have occurred in the scheme reviews or in parliamentary parties formulating changes to automobile accident compensation, there would not be

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[401] Costs were cited as a major factor in the scheme reviews in NSW in 1986 and 1999, Queensland in 1994 and 1999, Western Australia in 1994 and South Australia in 1986 and 1998.

[402] e.g. see South Australian Parliamentary Debates Vol 3 1986-7 p2409, NSW Parliamentary Debates 28 June 1999 p1488.

[403] This happened in Western Australia in 1994, South Australia in 1998 and New South Wales in 1999.

[404] See e.g. the Bradley Report *op cit.* pp18, 54-5 and also the Statement of Dissent at p7. See also the Queensland Parliamentary Debates 16 May 2000 p1040 where the government argued that one of the reasons for restricting benefits was to nullify common law developments from other states such as the method of calculating damages for economic loss used by the court in the *Jon Blake* case.

some signs of dissatisfaction with the choice process, as distinct from dissatisfaction with the result. It is also difficult to accept that agenda manipulation could occur on a widespread basis without leaving some sign, by way of protest or at least some adverse comment, in the record of the reviews or in the parliamentary debates.

In fact, there have been no expressions of surprise, and few overt expressions of dissatisfaction with policy outcomes, in the reviews and debates examined in this study.

In the 1970's, when three states changed to an add-on no-fault system, each such change was preceded by at least one substantial scheme review. In several of those reviews there was a dissenting position. For instance, a minority of the Arnold Committee in Victoria favoured the introduction of a threshold, rather than an add-on, no-fault scheme.[405] A minority of the Neasey Committee in Tasmania in 1973 favoured an add-on scheme over the pure no-fault scheme recommended by the majority,[406] and a minority of the Bradley Committee in the Northern Territory favoured a pure no-fault scheme over the majority recommended add-on one.[407] Interestingly, in each case the minority view eventually triumphed, but at the time in each case there was no criticism of the process by which decisions were made. The existing records of parliamentary debates from this time are also free of any evidence that might lead to the conclusion that there was any concern over voting processes or agenda manipulation.

In the later reviews and debates, which have occurred primarily in those states that have retained fault, there have been fewer expressions of dissent, and none of that dissent has been expressed in terms of dissatisfaction with the processes of change, but rather with the nature, or often the alleged

[405] Arnold Report *op cit.* p15-16.
[406] Neasey Report *op cit.* p77.

over-exuberance, of change where benefits are cut in order to restrain scheme costs.[408] A good example of dissent from the nature of change is to be found in the parliamentary debates over scheme changes in New South Wales in 1984. The Labor party government modified the scheme to limit benefits but retained fault. Two government members, including the Attorney General, spoke out in favour of the introduction of a no-fault scheme.[409] However, this seems to be a mild reproof aimed at the majority of the party for its timidity in failing to embrace change, rather than an expression of surprise or dissatisfaction at a perverse voting outcome. Even in the intense debates in Victoria in 1986, when a political compromise was forced on the government, all parties eventually expressed qualified support for what was ultimately a 'least worst' outcome.[410]

In the absence of any hard evidence of surprise or dissatisfaction with the voting process, particularly in the relatively politically sophisticated environment of the state and territory parliaments, the conclusion is inescapable that majority voting cycles are unlikely to have occurred in the Australian jurisdictions.

(f) High Activity Levels On The Part Of Vested Interest Groups

If the processes of change in relation to automobile accident compensation are capricious, irrational or subject to agenda manipulation then it might be expected that vested interest groups would be highly active if they perceived that there would be a significant prospect of obtaining a real advantage from lobbying, or alternatively that they would simply give up because it was too hard to predict the eventual outcome of the change process.

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[407] Bradley Report *op cit.* Statement of Dissent.
[408] See e.g. the 1994 Western Australian debates and the 1998 South Australian debates *op cit.*
[409] NSW Parliamentary Debates 23 May 1984 p1324-5.
[410] See e.g. Victorian Parliamentary Debates 3 December 1986 p2684.

The debate about what form automobile accident compensation schemes should take was almost exclusively the preserve of lawyers, doctors and insurers up until the 1980's. These were the groups most often represented on review committees in the 1970's,[411] and perhaps because of this the reviews often contained paternalistic statements about victims and benefits[412] as the social and intellectual move to no-fault appears to have come from within these groups.

By the mid 1980's, most reviews were much broader in compass and were taking submissions from large numbers of vested interest groups.[413] However, it is a moot point as to whether this wider consultation, although obviously considered appropriate by the community, has ultimately had much effect on scheme design. Again taking New South Wales as an example, the Legislative Council Standing Committee on Law and Justice review took submissions from a number of victim support groups, most of which favoured the introduction of a no-fault scheme.[414] It was the insurers and the legal profession who were opposed to no-fault.[415] Whilst the review committee recommended a limited no-fault long-term care component be added for the most seriously injured, a move toward no-fault was vetoed by the government on the grounds of costs and community expectations.[416] Instead, the scheme was tightened considerably with a relatively high threshold on damages for non-economic loss being introduced and upper limits being set on economic loss awards. There is some evidence that the government bowed to pressure from the scheme's private underwriters in that

[411] There was a preponderance of lawyers and persons associated with the insurance industry on the Arnold, Neasey and Bradley committees.
[412] See e.g. the Neasey Report *op cit.* p28.
[413] The NSW Law Reform Commission, for example, received 185 submissions from diverse groups and held consultations with many of them. Interestingly, those submissions subjected to the most rigorous critical analysis by the Commission were those that favoured the retention of fault-see *A Transport Accident Scheme For New South Wales op cit* Chapter 3.
[414] See e.g. *Proceedings of the Public Seminar op cit* p17ff and p55ff.
[415] See e.g. *Second Interim Report op cit.* p17-18.
[416] NSW Parliamentary Debates 22 June 1999 p1038.

regard.[417] Such economic pressure seems to have been significant in other states' scheme designs as well.[418]

For example, there is evidence in the 1994 Australian Capital Territory scheme review of similar pressure being applied by economic interests to maintain the status quo as far as liability theory was concerned. The ultimate reason given by the review committee for retaining fault related to promoting private insurer competition in the scheme.[419] Lawyers and insurers, who made up two of the five major interest groups involved in the review, also supported the retention of fault.[420]

The 1986 South Australian Parliamentary Debates demonstrate that the statutory insurer and the legal profession played the major part in the decision to change the scheme to restrict benefits.[421] In the 1994 Western Australian Debates the statutory insurer's well-being was central to the government's scheme changes.[422] The 1998 South Australian scheme debates also demonstrate the influence of major economic interests,[423] and in the 1999 Queensland scheme review, once again the drive to retain fault and restrict benefits came from insurers.[424]

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[417] Many of the changes made to the scheme, such as restrictions on benefits and mandatory referral of claims to medical panels, could be seen as being "pro insurer" and several proposed amendments by the Democrats which could be construed as being "anti insurer" were negatived by the government-see generally the committee stage of the bill at NSW Parliamentary Debates 29 June 1999.

[418] As a sidelight, it also appears that the Motor Accidents Authority, which oversees the scheme, had become a significant bureaucratic interest group in its own right-see NSW Parliamentary Debates 28 June 1999 p1486ff.

[419] *op cit.* p46-50.

[420] *ibid.* p32-3.

[421] South Australian Parliamentary Debates Vol 3 1986-7 p2409.

[422] Western Australian parliamentary Debates 1 December 1993 p8588, 31 March 1994 p11201ff. The Law Society opposed the restrictions on distributive justice grounds, and was part of a movement that forced the government to moderate the changes-see Western Australian Parliamentary Debates 31 March 1994 p11209, 5 April 1994 pp11332, 11400.

[423] In this case the taxi and hire car industries-see South Australian Parliamentary Debates Thursday 9 July 1998 *op cit.* In this case also the lawyers played a moderating role-see *ibid.* And also South Australian Parliamentary Debates 11 August 1998 *op cit.*

[424] *Review of Queensland Compulsory Third Party Insurance Scheme op cit.* p63.

The later evidence thus demonstrates high activity levels on the part of numbers of interest groups. However, the groups that appear to be successful in the fault-based states (in the sense that their preferred position has been reflected in policy) have been insurers and similar economic interests, and to a lesser extent lawyers.[425] Of course, in the various no-fault schemes the victims' groups have already achieved many of their aims and in those states there is no private insurance underwriting with all schemes being underwritten by a sole government insurer, which goes a long way to explaining why the schemes have been relatively stable.

The main conclusion that can be drawn from this evidence is that there continues to be high activity levels on the part of vested interest groups when there is a scheme review, but most of the reviews in the last decade have occurred in the fault-based states, probably because of lobbying by economic interests concerned at scheme costs. Thus, whilst victims' groups continue to be active in such reviews, obviously in the expectation that they can influence the outcome, there has not been a significant shift towards no-fault in the majority of states. This of itself is a powerful argument against the cycling theory, and once again highlights the political nature of scheme design in most states.

Conclusion

The evidence from the scheme reviews and parliamentary debates at points of change shows that Chapman and Trebilcock's theory is probably wrong insofar as Australian automobile accident compensation is concerned. There is no hard evidence of the sort of ranking of alternatives or voting paradoxes occurring which are necessary to the theory. To the contrary, there is substantial evidence

[425] Lawyers were heavily criticized in the 1999 debates in NSW (see e.g. the second reading speech of the Police Minister, Mr Whelan at NSW Parliamentary Debates 1999 p1679ff) and their role in the current scheme has

of changing ideas and values over time across the country, with different states and territories having distinct sets of dominant concerns about compensation at different times. The evidence shows a drive to no-fault fuelled by distributive justice concerns, and a relaxed attitude to scheme costs, in three jurisdictions in the 1970's. After that there has been a conservative reluctance to make any such change in the majority of states, on the basis of the type of political concerns about lack of acceptance of no-fault schemes that were predicted in earlier chapters. The evidence is that scheme changes have been made rationally on the basis of majority opinions. Decisions not to change liability theory have also been made rationally, and mainly on the basis of political, rather than theoretical, grounds.[426] In many cases, the intricate theoretical debate over the relative merits of fault and no-fault systems, which is set out in earlier chapters of this work, has been given fairly cursory treatment in the reviews and debates.

One of the most telling points against Chapman and Trebilcock's theory is that there has ostensibly been no quarrel in either the reviews or debates with the processes of change. Whilst there have been expressions of dissent, these have turned on points of substance rather than process.

In the fault-based states, there has been major tension between the need to contain ever-rising scheme costs and the concern to provide an adequate level of compensation where necessary. This tension has led to increasingly frequent scheme reviews[427] with subsequent divergences in the schemes as different methods are tried to reduce costs. This pattern will most likely continue for the

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effectively been downgraded.

[426] This is amply demonstrated in the 1994 ACT scheme review-see *Report of the Steering Committee Reviewing Motor Vehicle Compulsory Third Party Insurance in the ACT*, 1994, Canberra, p44ff.

[427] Both the NSW and Queensland schemes now have built-in scheme reviews with the Queensland scheme having an economic "trigger" in the form of an "affordability index"-see Queensland Parliamentary Debates 16 May 2000 p1037.

foreseeable future, unless the government's anticipated 'culture change' occurs in New South Wales. If this state were to adopt a no-fault scheme, the chances are that the rest would eventually follow.

CHAPTER 11

CONCLUSION

The diversity of automobile accident compensation systems in Australia cannot be explained by the existence of majority voting cycles. Chapman and Trebilcock's theory then, with its implication for policymaking in a democratic federation such as Australia, is not sustainable. The basic conditions necessary for the formation of such cycles, such as consideration of more than two alternative systems with pairwise ranking of systems and non-transitive preferences, have not occurred in any of the Australian automobile accident compensation scheme reviews or parliamentary debates on the subject. They have probably not occurred at all as the evidence discloses no definite signs of them. The systems that now exist around the country are the result of majority positions developed through rational democratic political processes, rather than the arbitrary outcome of voting system anomalies.

The electorate in the majority of states is basically conservative. Whilst fault based automobile accident compensation systems were roundly criticised by (mostly academic) commentators over much of the twentieth century, there has been a reluctance to fully embrace no-fault alternatives in Australia.[1] This reluctance can be attributed to concerns that these alternatives do not exhibit clear advantages over the existing systems such that change has been attractive.

[1] A prime example is the 1994 ACT scheme review *op cit.*

The different jurisdictions in Australia have displayed differing mixes of values over time. Broadly speaking, there was more concern for social issues such as Distributive Justice in the 1970's, whereas in the 1990's costs became the major focus in most of the fault based jurisdictions, and changes were made to automobile accident compensation systems with the stated aim of overcoming costs pressures. Distributive Justice concerns operated mainly in those states as a moderating influence to soften the impact of proposed changes. Interestingly, those schemes in which common-law was partially or completely supplanted by a no-fault system have experienced much less major change to the way benefits are calculated than those schemes that largely retained common-law. There is scope for further research as to why this is so.

There has been little support for the Individual Responsibility value even in the majority of states retaining fault as the basis of entitlement to compensation. Instead there is an assumption that 'the community' supports the retention of fault for reasons involving notions of corrective justice. This raises the issue however, that even where such assumptions are supported by research[2] there is also evidence of ignorance and confusion in the community about the operation of automobile accident compensation schemes.[3] In other words the community expectations that have ensured the preservation of fault in the majority of states appear to be based on misconceptions of how such systems actually work. This in turn highlights the point that the level of information about major theoretical issues contained in the reviews and debates concerning automobile accident compensation has been quite low in many cases.

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[2] See e.g. Woolcott Research, 1998, Exploration of Awareness and Attitudes Towards the Current CTP Scheme and its Potential Alternative, Sydney.

[3] *ibid.*and see also Wright T., Eyland A., & Cox J., 1998, *Claiming Under The Motor Accidents Scheme*, Law Foundation of NSW, Sydney at pp8, 26.

Therefore another potentially fruitful area of research which arises as a result of this study is the proper assessment of levels of public understanding across jurisdictions of the nature and operation of automobile accident compensation systems in Australia, and whether this understanding is greater in the states which have some form of no-fault system. One result of such research might be that a greater degree of national harmony could be achieved through thorough public education about the issues.

There have been high levels of activity on the part of interest groups such as lawyers, the medical profession, insurers and victims support groups during times of system change. It has been suggested that the influence of such groups may be determinative of liability theory adopted in a particular jurisdiction. There is certainly scope for further research into correlations between the relative political strengths of such groups and the form of compensation system in each jurisdiction in Australia.

This work has provided some insight into the workings of law making within the Australian Federation. Federations by their nature present different mixes of ideas, values and political structures. Many would no doubt see it as inefficient that there are different automobile accident compensation systems in each state and territory that provide different outcomes to victims dependent on their domicile or the location of their accident.[4] There is certainly scope for further debate as to whether the introduction of a national automobile accident compensation scheme is desirable to eliminate anomalies, waste and potential injustice to Australian accident victims.

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[4] See Malkin I. *op cit.* Since that article was written, the schemes have diverged even further. Professor Sappideen recommends a note here of the Civil Liability Amendment (Personal Liability) Act 2002

THE END

(NSW), the enactment of which demonstrates the power of lobby groups, in particular the insurance industry.

ANNEXURE A

REPORTS AND DEBATES CONSIDERED AS PART OF THIS STUDY

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MAKING HARD SOCIAL CHOICES: LESSONS FROM THE AUTO ACCIDENT COMPENSATION DEBATE

Bruce Chapman and Michael J. Trebilcock[*]

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ANNEXURE B

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