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Résumé de l'article

Le présent texte présente d'abord brièvement le champ d'application des divers régimes australiens d'assurance automobile sans égard à la responsabilité. Il expose ensuite les indemnités prévues par ces divers régimes pour pallier les pertes de nature économique. Cela comprend le remboursement des frais d'hospitalisation, des soins médicaux et infirmiers, de réadaptation et les autres besoins découlant des blessures subies dans un accident d'automobile ; la valeur des soins et services rendus à domicile ; la perte de revenus qui en résulte ainsi que les indemnités de décès. Les indemnités pour préjudice moral (habituellement non prévues par ces régimes) ne seront pas analysées. L'auteur conclut en proposant que la plupart des indemnités pour pertes de nature économique soient coordonnées avec le système australien de sécurité sociale, et que le rôle véritable d'un régime d'indemnisation sans égard à la responsabilité soit de compenser la détérioration permanente de l'état de santé de la victime, puisque aucune indemnité n'est payable à ce titre par le régime de sécurité sociale.

Compensation for Loss of an Economic Nature : An Australian Perspective

Harold LUNTZ*

This paper first describes briefly the scope of the no-fault motor accident schemes which operate in Australia. It then sets out and evaluates the benefits payable under each for losses of an economic nature. These are benefits for hospital, medical, nursing, rehabilitation and like needs created by injuries in a motor accident; for informal nursing services and assistance in the home, the need for which is similarly created; for loss of earning capacity resulting from such accidents; and for death so resulting. It does not deal with benefits for loss of a non-economic nature, such as pain and suffering (for which, as such, compensation is not generally payable under the schemes) and impairment. It nevertheless concludes that most benefits for loss of an economic nature should be integrated with the Australian social security system and that the true role of a no-fault scheme is to compensate for permanent impairment, since there is no general disability benefit payable under the social security system.

Le présent texte présente d'abord brièvement le champ d'application des divers régimes australiens d'assurance automobile sans égard à la responsabilité. Il expose ensuite les indemnités prévues par ces divers régimes pour pallier les pertes de nature économique. Cela comprend le remboursement des frais d'hospitalisation, des soins médicaux et infirmiers, de réadaptation et les autres besoins découlant des blessures subies dans un accident d'automobile; la valeur des soins et services rendus à domicile; la perte de revenus qui en résulte ainsi que les indemnités de décès. Les indemnités pour préjudice moral (habituellement non prévues par ces régimes) ne seront pas analysées. L'auteur conclut en proposant

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que la plupart des indemnités pour pertes de nature économique soient coordonnées avec le système australien de sécurité sociale, et que le rôle véritable d'un régime d'indemnisation sans égard à la responsabilité soit de compenser la détérioration permanente de l'état de santé de la victime, puisque aucune indemnité n'est payable à ce titre par le régime de sécurité sociale.

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1. No-fault motor schemes in Australia

Australia has three no-fault motor accident schemes in operation: in the Northern Territory, Victoria and Tasmania. They constitute three different models of such schemes[1]. In 1984 the Law Reform Commission of

1. They constitute one of each of the three types identified by J. O'CONNELL, « Operation of No-Fault Auto Laws : A Survey of the Surveys », (1977) 56 *Neb. L. Rev.* 23, at 26-27, viz « modified », « add-on » and « pure ». See also B. CHAPMAN and M.J. TREBILCOCK, « Making Hard Social Choices : Lessons from the Auto Accident Compensation Debate », (1992) 44 *Rutgers L. Rev.* 797, at 809-810. Australia does not have the fourth type referred to by Chapman and Trebilcock, for the creation of which O'Connell was largely responsible, « elective ».

New South Wales (NSWLRC) proposed a « pure » no-fault scheme for transport accidents in that State[2], the most populous in Australia. The Federal Government that came to office in 1983 hoped that the NSWLRC's version, which was then still embryonic, would become a model for all Australian jurisdictions. However, it was not enacted even in its State of origin[3] and it has not spread elsewhere, though it provided some inspiration for Victoria.

1.1 Northern Territory

Since 1 July 1979, there has operated in the sparsely populated Northern Territory[4], a scheme for the payment of no-fault benefits for Territory residents[5] injured in a motor accident[6] within the Territory or « in or from a Territory motor vehicle » that is outside the Territory[7]. For such residents, the benefits are the sole remedy available within the Territory, the common law action having been abolished entirely[8]. A Territory resident injured in a motor accident in the Territory would not be able to sue on a common law cause of action outside the Territory, even if the court otherwise had

2. NEW SOUTH WALES LAW REFORM COMMISSION, *Report on a Transport Accidents Scheme for New South Wales*, Sydney, New South Wales Law Reform Commission, October 1984, L.R.C. 43/1 and 43/2.
3. For two years, from 1987 to 1989, a scheme called Transcover was in force in New South Wales (N.S.W.). This adopted many of the Law Reform Commission's proposals in relation to benefits, but did not abrogate the need to prove fault before an injured person became entitled to them. After a change of government, it was repealed and replaced by a common law scheme with restricted damages : see *Motor Accidents Act* 1988 (N.S.W.).
4. The Northern Territory (N.T.) is 1,346,200 square kilometres (519,771 square miles) of vast open spaces. It represents about a sixth of the Australian continent but has about one per cent of the Australian population, under 200,000 people.
5. The definition of a Territory resident is in the *Motor Accidents (Compensation) Act* 1979 (N.T.), s. 4 (1) and differs slightly according to whether the accident occurred within or outside the Territory. In some instances, persons about to take up residence in the Territory may be treated as though they were resident within the Territory at the time of the accident : *id.*, s. 8.
6. Defined as « an occurrence [...] caused by or arising out of the use of a motor vehicle [...] which results in the death of or injury to a person » : *id.*, s. 4 (1). There is an exception in the case of an unregistered vehicle where the event occurs elsewhere than on a public street : *ibid.*
7. *Ibid.*
8. *Id.*, s. 5 (1) (a). When first enacted, the legislation preserved a right to elect to sue for non-economic damages subject to an upper limit. This option was removed from 1 July 1984. However, the full Federal Court has recently held that the widow and children of a man killed in the course of a motor rally could rely on various provisions of the federal *Trade Practices Act* 1974 (Cth) in pursuing a claim based on misleading or deceptive conduct and not the actual driving of the vehicle : *Pritchard* v. *Racecage Pty. Ltd.*, (1997) 142 A.L.R. 527.

jurisdiction, because of the conflict of laws rules adopted by the High Court of Australia[9]. Thus, for Territory residents injured in motor accidents in the Territory, the scheme may be described as a « pure » no-fault scheme. Non-Territory residents injured within the Territory are not eligible for no-fault benefits, though they retain the right to sue at common law, subject to an upper limit in relation to non-economic loss of the maximum no-fault benefit for loss of this type, which is 208 times average weekly earnings in the Territory[10].

1.2 Victoria

The second most populous State, Victoria[11], was the first Australian jurisdiction to introduce a no-fault motor accident scheme. This pioneering effort came into force on 12 February 1974[12]. It was a pure « add-on » scheme with very limited no-fault benefits and unrestricted access to common law. In 1986 the then State government moved to replace it with a pure no-fault scheme[13], but was frustrated by the lack of a majority in the upper house of Parliament. As a result of a political compromise[14], the no-fault benefits for some injuries were limited as compared to what had been proposed and the right to sue at common law was retained for those whose injury could be classified as « serious », though restrictions were placed on the damages which could be recovered in surviving common law actions[15]. Where a person is killed, the dependants may bring an action under the Victorian equivalent of Lord Campbell's Act[16], again subject to a limit on the amount of damages recoverable[17]. Thus the scheme became a « modified » no-fault one, in which a « threshold » has to be surmounted before a

9. *Breavington* v. *Godleman*, (1988) 169 C.L.R. 41 (action in Victoria by Territory resident in respect of accident in Territory barred except as to non-economic loss, which at that time was still recoverable in the Territory). The lack of a uniform *ratio decidendi* in this case led to further appeals to the High Court (though not involving no-fault motor accident provisions), which ultimately affirmed the requirement of actionability both according to the *lex loci delicti* and the *lex fori*: *McKain* v. *R.W. Miller And Company (South Australia) Pty. Limited*, (1992) 174 C.L.R. 1 ; *Stevens* v. *Head*, (1993) 176 C.L.R. 433. Canadian readers may justifiably prefer the solution adopted by the Supreme Court of Canada in *Tolofson* v. *Jensen*, [1994] 3 S.C.R. 1022.
10. *Motor Accidents (Compensation) Act* 1979 (N.T.), ss. 5 (1) (b) and 17 (3).
11. Population about 4.4 millions.
12. *Motor Accidents Act* 1973 (Vic.).
13. VICTORIA, *Transport Accident Compensation Reform: Government Statement*, Melbourne, Govt. Printer, 1986.
14. See *Humphries* v. *Poljak*, [1992] 2 V.R. 127, at 131.
15. *Transport Accident Act* 1986 (Vic.), s. 93.
16. *Wrongs Act* 1958 (Vic.), Part III.
17. *Transport Accident Act* 1986 (Vic.), ss. 93 (8) and (9).

common law action may be pursued. That threshold is automatically overcome if the injured person is assessed as being impaired to the extent of 30 per cent or more of the whole person according to the American Medical Association's *Guides to the Evaluation of Permanent Impairment*[18]. An injured person who falls below the 30 per cent threshold may still sue if the Transport Accident Commission, the body which administers the scheme, issues a certificate that the person is seriously injured or if a court gives leave to sue on the ground that it is satisfied that the person has suffered a « serious injury »[19]. Although the Act contains a definition of « serious injury »[20], the courts have not surprisingly had a lot of difficulty in interpreting it[21].

The no-fault coverage in Victoria has a history of contraction. When first enacted the legislation was based on the fairly standard Australian formula for compulsory coverage of third party liability, a formula which applies also to the Northern Territory no-fault scheme. This provides for

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18. The second edition of this work is currently prescribed (*Transport Accident (Impairment) Regulations* 1988 (No. 255), reg. 6 (1)), though the *Guides* are now in their fourth edition.
19. *Transport Accident Act* 1986 (Vic.), ss. 93 (4) and (6).
20. *Id.*, s. 93 (17) defines « serious injury » for the purposes of the section as meaning:
(a) serious long-term impairment or loss of a body function; or
(b) permanent serious disfigurement; or
(c) severe long-term mental or severe long-term behavioural disturbance or disorder; or
(d) loss of a foetus.
In *Turner* v. *Love*, (1995) 21 M.V.R. 31 (Vic. A.D.) it was said that paras (a) and (b) of this definition were derived from the Michigan statute, but the source of para (c) was not traced. Although the court in this case took the view that « severe » in para (c) is a word of similar import to « serious », more recently the court has expressed the opinion that it is a word of stronger force: *Mobilio* v. *Balliotis*, (Vic. C.A., 10 November 1997, not yet reported). See also *Ingram* v. *Ingram*, [1996] 2 V.R. 435 (C.A.); *Transport Accident Commission* v. *Dennis*, (1997) 25 M.V.R. 421 (Vic. C.A.).
21. See, *e.g.*, *Ninkovic* v. *Pajvancek*, [1991] 2 V.R. 427 (consequences of impairment must be serious and long-term for plaintiff in form of disablement from work or interference with enjoyment of life); *Humphries* v. *Poljak*, [1992] 2 V.R. 129 (A.D.) (consideration of five representative cases); *S.L.R. sub nom Fleming* v. *Hutchinson*, (1992) 66 A.L.J.R. 211 (test of seriousness to be satisfied only when injury can be described as more than « significant » or « marked », so that barrier is more rather than less substantial; elements of fact, degree and value judgment, rather than principle, involved); *Petkovski* v. *Galletti*, [1994] 1 V.R. 436 (A.D.) (lamenting fact that applications for leave taking form of full-blown trial lasting up to five days); *Cropp* v. *Transport Accident Commission*, (1997) 25 M.V.R. 503 (Vic. C.A.) (differing on whether appellate court should interfere with decision at first instance). Unusually for Victoria, the Court of Appeal sat as a bench of five for the appeal in *Mobilio* v. *Balliotis*, (Vic. C.A., 10 November 1997, not yet reported) in an attempt to clarify the issue.

cover if death or injury is caused by or arises out of the use of a motor vehicle. The *Transport Accident Act* 1986 (Vic.) specifies that a person who is injured as a result of a « transport accident » is entitled to compensation[22]. As indicated, initially « transport accident » was defined as meaning « an incident caused by or arising out of the use of a motor vehicle, railway train or tram »[23]. In the context of compulsory third party motor vehicle insurance, the phrase « caused by or arising out of the use of a motor vehicle » was interpreted widely by the courts[24]. Similar generous interpretation of the phrase in the present context[25] led to the introduction of a requirement that the injury be « directly » caused or « directly » arise out the « driving » (no longer the « use ») of the vehicle[26]. The interpretation given to this phrase[27] too was apparently seen by the legislature as overly generous. It then enacted the current definition, which omits incidents « arising out of » the driving, even if they do so « directly », and requires that they be « directly *caused* by the driving »[28].

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22. Section 35 (1).
23. Section 3 (1).
24. *E.g. Brewer* v. *Incorporated Nominal Defendant*, [1980] V.R. 469 (F.C.) (plaintiff injured when struck by rock deliberately thrown at vehicle in which she was passenger by occupant of another car) ; *Dickinson* v. *Motor Vehicle Insurance Trust*, (1987) 163 CLR 500 (child left unattended by father in motor car injured when young brother set fire to car while playing with matches). However, this latter case was distinguished in the context of the Northern Territory no-fault scheme in *Augusto* v. *Territory Insurance Office*, (1990) 66 N.T.R. 1, where the vehicle was parked at the child's home. Similarly, in *Abbott* v. *Transport Accident Commission*, [1991] 2 V.R. 116 (A.D.), after consideration of the leading compulsory third party insurance cases on the phrase, no-fault cover was held unavailable in Victoria where the vehicle was used as a winch.
25. See, *e.g.*, *May* v. *Transport Accident Commission*, [1989] V.R. 981 (F.C.) (child gassed while sleeping on back seat of car being repaired at service station). The most important cases are collected in *Transport Accident Commission* v. *Hoffman*, [1989] V.R. 197 (F.C.). Several involved collisions between bicycles and parked motor vehicles.
26. *Transport Accident (Amendment) Act* 1988 (Vic.), s. 4 (1) (c) (i).
27. *Transport Accident Commission* v. *Treloar*, [1992] 1 V.R. 447 (A.D.) (one person injured when stepping off stationary bus held not covered, while the other could have been because place where driver stopped unsafe ; coverage of woman strapping her son into back seat of vehicle when it ran away down her driveway dependent on whether she, as driver, had put the gear selector in the wrong position or whether it had jumped from one position to another without her intervention !). See also *Transport Accident Compensation Commission* v. *Jewell*, [1995] 1 V.R. 300 (A.D.) (injury when testing ignition found to arise directly out of driving ; accepted that whatever is « caused » by driving will also « arise out » of driving, but not vice versa).
28. *Transport Accident (General Amendment) Act* 1994 (Vic.), s. 5 (1). This Act, by s. 5 (2), added the following subsection : « (1A) For the purposes of the definition of 'transport accident' [...] an incident includes an incident — (a) involving a motor vehicle, a railway train or a tram which is out of control ; (b) involving a collision between a pedal cycle and an open or opening door of a motor vehicle. »

All persons, not only Victorian residents, are covered by the scheme if the transport accident occurs in Victoria[29]. There is extended coverage for Victorian residents if they are injured outside Victoria in an accident involving a Victorian vehicle[30]. Non-residents are covered outside Victoria if at the time they are driving, or passengers in, Victorian vehicles[31].

Unlike the insurers who for many years administered the compulsory third party motor vehicle insurance system based on the common law, the body administering the no-fault scheme in Victoria — initially the Motor Accidents Board ; subsequently its successor, the Transport Accident Commission — has been prominent in :

1) establishing hospital and other facilities for the treatment of victims of motor accidents during the acute and immediately post-acute stages of their injuries ;

2) providing rehabilitation services[32] ; and

3) undertaking safety measures — notably, graphic television advertisements based on slogans such as « If you drink then drive, you're a bloody idiot » ; the provision of « booze buses » (vehicles equipped to perform random breath tests) and speed cameras ; and the elimination of « accident black spots » (sites of multiple accidents which may have been contributed to by bad road design) — which have been

29. *Transport Accident Act* 1986 (Vic.), s. 35 (1) (a).

30. *Id.*, s. 35 (1) (b) (i). Although the section speaks of a « registered motor vehicle », the definition of this phrase in s. 3 (1) includes an unregistered vehicle that is usually kept in Victoria. See *Transport Accident Commission* v. *Odey*, [1998] 1 V.R. 278 (C.A.) (car registered in Western Australia, kept in Victoria ; driver covered when accident in South Australia).

31. *Id.*, s. 35 (1) (b) (ii). The exclusion of an injured pedestrian who is an Australian citizen resident in another State might raise the issue of whether the legislation contravenes s. 117 of the Australian *Constitution*, which provides that « a subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State » : see M. DAVIES, « The Constitutional Validity of Residence Requirements in No-Fault Transport Accident Compensation Schemes », (1994) 2 *Torts L. J.* 275. The author also questions on this ground the validity of the provisions of the Northern Territory scheme confining benefits to residents of the Territory, though the Northern Territory is not a State.

32. These have come in response to criticism of their lack in VICTORIA, *Report of the Board of Inquiry into Motor Accident Compensation in Victoria*, Melbourne, Govt. Printer, 1978, Chap. 7 [hereinafter : « Minogue Report »]. See R.P. SCHAFFER, « The Minogue Report on Motor Vehicle Accident Compensation ; Fault-No-Fault Revived », (1979) 53 *A.L.J.* 200, at 201-203.

outstandingly successful in the reduction of the road accident rate in Victoria[33].

Partly because the falling road toll has reduced the number of claims and partly because of efficient management and good investment, the TAC has been able to avoid the blowout of costs that are said to plague many compensation systems. The levy on motorists, which is exacted at the time of annual registration of the vehicle and covers third-party liability for bodily injury (not property damage) and the no-fault scheme, has remained stable for a number of years. The only risk-rating that occurs for private motor vehicles differentiates between vehicles that are ordinarily garaged in the Melbourne metropolitan area and those that are ordinarily garaged elsewhere. For the former, the current levy is $A 272 per annum, which compares very favourably with the current rates for a similar vehicle in Sydney[34], where the motor vehicle insurance scheme covers only liability to pay common law damages, modified in many respects[35], and no no-fault benefits are payable.

1.3 Tasmania

The smallest Australian State[36] introduced a no-fault motor accident scheme almost simultaneously with the first such scheme in Victoria[37]. It has continued in much the same form ever since. Like the Victorian scheme in its first dozen years, it is an add-on scheme, access to the common law

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33. See the information on Road Safety on the Commission's website at http://www.tac.vic.gov.au/; H. LUNTZ, « Some Aspects of the Relation between Insurance and Prevention in the Area of Transport », in T.J. LARSON and A. CLAYTON (eds.), *Insurance and Prevention*, Stockholm, 1994, p. 47, at pp. 57-59; M. CAMERON and S. NEWSTEAD, « Mass Media Publicity Supporting Police Enforcement and its Economic Value », Paper presented to Public Health Association of Australia 28th Annual Conference Symposium on Mass Media Campaigns in Road Safety, Melbourne, September 30, 1996; available on http://www.general.monash.edu.au/muarc/media/media.htm); P. VULCAN, M. CAMERON and S. NEWSTEAD, « Road Trauma in Perspective », Paper presented to Vehicle Accidents their Cause — Reconstruction — Law Conference, Melbourne, Monash University Department of Civil Engineering, July 28 and 29, 1995, available on http://www.general.monash.edu.au/muarc/roadtoll/roadtoll.htm); P. VULCAN, « The Road Toll in Victoria — An Objective Analysis », Paper presented to Road Safety Forum, Melbourne, August 25 and 26, 1993. Websites visited in February 1998.
34. Insurers in New South Wales in 1997 were offering this insurance to regular drivers over 25 of vehicles less than 10 years old at rates from $A 366 to $A 510. Younger drivers of older vehicles have to pay about $A 500.
35. *Motor Accidents Act* 1988 (N.S.W.), Part 6.
36. Population less than half a million people.
37. *Motor Accidents (Liabilities and Compensation) Act* 1973 (Tas.). The no-fault scheme commenced under this legislation on 1 December 1974.

being unrestricted, though most benefits cease if a judgment for damages is obtained and payments already made reduce the damages[38]. Insurance premiums for compulsory third party liability insurance, despite the additional no-fault benefits at no extra cost, are the lowest in Australia[39].

The Tasmanian scheme has retained the standard coverage of death or bodily injury resulting from an accident, defined as « an occurrence caused by or arising out of the use of a motor vehicle »[40]. As elsewhere, this phrase has given rise to dispute and expansive judicial interpretation[41]. Residents are covered inside the State in respect of all such accidents and outside the State for accidents arising out of the use of a vehicle registered in the State[42]. Non-residents are covered only in respect of accidents within the State arising out of the use of a vehicle registered in the State[43].

2. Benefits of an Economic Nature

2.1 Introduction

This paper deals only with benefits of an economic nature. It describes and evaluates the benefits under all three schemes for hospital, medical and rehabilitation expenses; informal nursing services and assistance in the home; loss of earning capacity; and death (i.e. funeral expenses and dependants' benefits). The Tasmanian scheme provides no other sort of benefits[44], but the other two do provide impairment benefits of a non-economic nature[45]. It is clear that under the Victorian scheme, at least, the long-term

38. *Id.*, s. 27. An exception is made for benefits for daily care; where the court certifies that such care will be needed, no damages may be awarded for such care, but the benefits under the scheme continue: s. 27A.
39. In 1996 they were $A 168 per annum.
40. *Motor Accidents (Liabilities and Compensation) Act* 1973 (Tas.), ss. 23 (1) and 2 (1).
41. *E.g. Motor Accidents Insurance Board* v. *Haines*, (1995) 21 MVR 489 (Tas. S.C.) (claimant fell as he was standing on step of truck to take something out of cab).
42. *Motor Accidents (Liabilities and Compensation) Act* 1973 (Tas.), ss. 23 (1) (a) and (c).
43. *Id.*, s. 23 (1) (b). Although s. 2 (1) defines « registered » as including registration under a law of any jurisdiction requiring such registration, the context of the present provision must confine it to Tasmanian registered vehicles. Again, the Constitutional validity of discriminating against Australian citizens resident in other States must be questioned: see M. DAVIES, *loc. cit.*, note 31.
44. The disability allowance payable under the Tasmanian scheme (*Motor Accidents (Liabilities and Compensation) Regulations* 1980 (Tas.), Schedule 2, Part V) is of three types (an employed person's allowance, a self-employed person's allowance and a housekeeping allowance: cl. 1 (2)); all three are clearly of an economic nature.
45. *Motor Accidents (Compensation) Act* 1979 (N.T.), s. 17 (lump sums of up to 208 times average weekly earnings—just under $A 150,000 in 1997—according to percentage of impairment of whole person as ascertained by reference to the American Medical

benefits of an economic nature are seen as primary, since the annuity part of the impairment benefit is not payable in any week in which a payment for loss of earning capacity is payable[46].

At common law, of course, the aim of damages is to put the plaintiff back into the position occupied before the injury, so far as money can do so[47]. Damages are assessed once and for all and have to be paid as a lump sum[48]. As Lord Scarman, speaking for the House of Lords, said :

> The award is final ; it is not susceptible to review as the future unfolds, substituting fact for estimate. Knowledge of the future being denied to mankind, so much of the award as is to be attributed to future loss and suffering — in many cases the major part of the award — will almost surely be wrong. There is really only one certainty : the future will prove the award to be either too high or too low[49].

No-fault schemes do not suffer in this way. Although we cannot know for sure what position the injured person would have occupied if the injury had not occurred, we can at least wait for the future to unfold and pay the benefits accordingly, which is what all three schemes allow, at least for their benefits of an economic nature[50]. All three schemes do permit redemption or commutation of some periodical benefits, subject to restrictions[51]. In the Northern Territory, where the Board initiates the commutation of small benefits, payments may be resumed after commutation if circumstances

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Association's *Guides to the Evaluation of Permanent Impairment*) ; *Transport Accident Act* 1986 (Vic.), ss. 47 and 48 (lump sums of up to approximately $A 66 000 in 1997 — indexed annually — and an annuity of up to approximately $A 155 000 in 1997 — also indexed annually — based on the injured person's age, both dependent on percentage of impairment under same *Guides*, provided it is at least 10 per cent).

46. *Transport Accident Act* 1986 (Vic.), s. 48 (3).
47. *Livingstone* v. *Rawyards Coal Company*, (1880) 5 App. Cas. 25, at 39 (H.L.) ; *Cullen* v. *Trappell*, (1980) 146 C.L.R. 1, at 11 ; *Todorovic* v. *Waller*, (1981) 150 C.L.R. 402, at 412 (per Gibbs C.J. and Wilson J.), at 427 (per Stephen J.), at 442 (per Mason J.), at 463 (per Brennan J.).
48. *Fournier* v. *Canadian National Railway Company*, [1927] A.C. 167 (P.C.) ; *Todorovic* v. *Waller*, (1981) 150 C.L.R. 402, at 412.
49. *Lim* v. *Camden & Islington Area Health Authority*, [1980] A.C. 174, at 183. See also the criticism of lump-sum awards in *Andrews* v. *Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, at 236-237 (per Dickson J.).
50. *Motor Accidents (Compensation) Act* 1979 (N.T.), s. 13 (6) ; *Transport Accident Act* 1986 (Vic.), s. 73 ; *Motor Accidents (Liabilities and Compensation) Act* 1973 (Tas.), s. 23 (5).
51. *Motor Accidents (Compensation) Act* 1979 (N.T.), ss. 15 (1) (small benefits may be commuted by Board where periodical payments so small that it is administratively inefficient to continue to pay them) and 16 (at unrestricted discretion of Board whether to commute on application of person receiving benefit) ; *Transport Accident Act* 1986 (Vic.), s. 56 (certain benefits, which would ordinarily be payable only after 18 months, if totalling less than five per cent of average weekly earnings) ; *Motor Accidents (Liabilities and Compensation) Act* 1973 (Tas.), s. 28A (only after 12 months).

change so as to warrant further payments [52]; this is not so if the commutation was in response to an application by the person receiving the benefit[53]. Similarly, under the other two schemes, liability to pay ceases on redemption[54]. Indeed, if we do not attempt to put people back into the positions they occupied before they were injured, but instead pay compensation according to needs as they arise, which is what is suggested below, « perfect » compensation, which it was said was impossible at common law[55], becomes much more attainable.

2.2 Hospital, Medical and Rehabilitation Expenses

Since 1 July 1975 Australia has had a « universal » health insurance scheme, called initially « Medibank » and then « Medicare »[56]. In so far as it provides for the payment of medical expenses outside public hospitals, it is the sole responsibility of the federal government. The scheme also provides for the choice of free hospital care for all Australians, but the administration of this falls mostly to the States, who receive (inadequate) funding from the Commonwealth under the Medicare Agreement, a series of which has been negotiated between the federal and State governments[57]. There is no entitlement to funding for services such as physiotherapy outside public hospitals.

When first instituted Medibank was intended to cover *all* hospital and medical services, including those provided in circumstances where compensation was payable[58]. However, this regime lasted only until 1 October 1976. The federal government which came to office in 1976 determined that the costs should be shifted to the various compensation schemes, most of which are State run. Amendments to the *Health Insurance Act* 1973 (Cth) excluded from the coverage of the legislation medical expenses incurred in

52. *Motor Accidents (Compensation) Act* 1979 (N.T.), s. 15 (2).
53. *Id.*, s. 16 (3).
54. *Transport Accident Act* 1986 (Vic.), s. 56 (2) (applies only to certain benefits; medical and like expenses may not be redeemed and continue in any event); *Motor Accidents (Liabilities and Compensation) Act* 1973 (Tas.), s. 28A.
55. *E.g. Rowley* v. *London & N.W. Railway Company*, (1873) L.R. 8 Ex. 221, at 231 (Ex. Ch.) (per Brett J.); *Lee Transport Company Ltd.* v. *Watson*, (1940) 64 C.L.R. 1, at 13-14 (per Dixon J.); *Andrews* v. *Grand & Toy Alberta Ltd., supra*, note 49, at 242 (per Dickson J.).
56. See the *Health Insurance Act* 1973 (Cth).
57. The present agreement is due to expire in the middle of 1998. Negotiations for a new agreement were under way between the Commonwealth and the States at the end of 1997.
58. See the NATIONAL COMMITTEE OF INQUIRY, *Report of the National Committee of Inquiry into Compensation and Rehabilitation in Australia*, Canberra, Australian Govt. Publishing Service, 1974, para. 372 (a) [hereinafter: « Woodhouse Report »].

circumstances where compensation is payable[59]. Provisional payments may be made where entitlement to compensation is not yet established, but these are repayable on recovery of compensation. Recently, the federal government decided to pursue more vigorously from insurers and their equivalents reimbursement of past medical insurance and nursing home benefits. Under the *Health and Other Services (Compensation) Act* 1995 (Cth.), a no-fault scheme that paid medical expenses would come within the definition of « reimbursement arrangement ». Medicare benefits are not payable where the injured person has been reimbursed for the medical expenses and if a benefit in respect of such expenses is paid, the amount is repayable to the Commonwealth[60]. A system requiring compensation-payers to give notice of claims and payments was put into place to ensure recovery[61]. These notices have a further role to play in that they are necessary for identifying which of the insurance payments that the claimant has received were in respect of services that were in consequence of the injury (or disease) for which compensation is being claimed. The legislation also makes provision for agreements between compensation-payers, such as insurers, and the relevant government agency, the Health Insurance Commission (HIC), to recover payments in bulk and for a waiver of recovery in individual cases when such an agreement is in force[62].

The new system for recovery of health benefits from the compensation-payer, which commenced operation on 1 February 1996, rapidly ran into difficulty. In December 1994 the government had estimated that approximately 73,000 compensation cases were finalised each year, and that cost savings (to the government) of $A 40 million per annum would flow from the new arrangements at a cost of $A 9.4 million. In New South Wales the estimate of 25,000 cases in the first year was greatly exceeded when almost twice that number of notices was received in the first three months[63]. Consequently, delays occurred in processing the notices. Until a certificate was received from the relevant government department, settlements (and judgments) could not be paid out. Often large sums had to be held back for

59. *Health Insurance Act* 1973 (Cth), s. 18 (medical benefits) and s. 35A (which applied to daily bed payments for hospital treatment), as inserted in 1976. At the same time s. 59 of the *National Health Act* 1953 (Cth) was re-enacted to apply the same principle to nursing home benefits. Section 35A was subsequently repealed by the *Health Legislation Amendment Act* 1986 (Cth) as part of the Commonwealth's « deregulation » of private hospitals and the termination of daily bed payments for patients in such hospitals.
60. *Health and Other Services (Compensation) Act* 1995 (Cth), s. 7.
61. Described by D.I. CASSIDY, « Health and Other Services (Compensation) Act 1995 », (1996) 70 *A. L. J.* 473.
62. *Health and Other Services (Compensation) Act* 1995 (Cth), Part 3, Division 3.
63. There was a similar experience in Queensland.

trivial or, in the end, non-existent amounts thought to be owing to the Health Insurance Commission[64]. An amending Act[65] had to be rushed through to overcome the problem with lump sum payments.

Similarly, the policy is to shift the cost of hospital services to compensation-payers. To give effect to this policy, the Medicare agreement between the Commonwealth and the States, which requires the States to provide free hospital services to all eligible persons who choose to use the services, makes an exception which entitles the States to charge those who have an entitlement to compensation[66]. These charges are then passed on to the schemes under which compensation is paid.

In consequence of this attitude by the Commonwealth the Victorian Act makes provision for payment by the scheme administrators of reasonable ambulance, hospital, medical, nursing, and like expenses, including home care, which result from injuries sustained in motor accidents[67]. Tasmania, too, provides for the payment of ambulance costs ; medical, surgical or dental treatment ; and nursing or other care[68]. In the case of the Northern Territory, however, by agreement with the Commonwealth public hospital services are provided free of charge to persons entitled to compensation under the no-fault motor accident scheme[69]. Section 18 (1) of the *Motor Accidents (Compensation) Act* 1979 (N.T), therefore, provides for payment of all medical and rehabilitation expenses reasonably incurred *other than* for (a) accommodation and treatment as a public patient in a public hospital, (b) accommodation as a private patient in a public hospital, and (c) single room accommodation in a private hospital (in the latter two instances, expenses for *treatment* are not excluded). Further, the recognition of the importance of rehabilitation means that in all three jurisdictions payments are made for training, education or care required for rehabilitation[70]. Victoria and Tasmania also refer expressly to the provision and maintenance of

64. See HANSARD, *House of Representatives*, 22 August 1996, p. 3610.
65. *Health and Other Services (Compensation) Amendment Act* 1996 (Cth.).
66. The agreement is made pursuant to the *Health Insurance Act* 1973 (Cth.), s. 24 and is in force from 1 July 1993 to 30 June 1998 (a new agreement is in the course of negotiation). Clause 10 of the present agreement excludes « a compensable patient » from those entitled to receive public hospital services without any charge.
67. *Transport Accident Act* 1986 (Vic.), s. 60.
68. *Motor Accidents (Liabilities and Compensation) Regulations* 1980 (Tas.), Schedule 2, Part II, cl. 1.
69. See T. BRENNAN and J. DEEBLE, *Compensation and Commonwealth Health and Community Services Programs (A Discussion Paper)*, Canberra, June 1993, paras. 3.11-3.12.
70. *Motor Accidents (Compensation) Act* 1979 (N.T.), s. 18 (2) (b) ; *Transport Accident Act* 1986 (Vic.), s. 60 (1) (a) (implicit in definition of « rehabilitation service » in s. 3 (1)) ; *Motor Accidents (Liabilities and Compensation) Regulations* 1980 (Tas.), Schedule 2, Part II, cl. 1 (3) (b).

aids and appliances[71]. Similarly, the Northern Territory and Victoria expressly provide for modifications to a home or a motor vehicle[72]. Victoria also offers some extras, such as reasonable travelling or accommodation expenses incurred by a parent in visiting a dependent child in hospital[73]. In the case of Tasmania, the hospital, medical, nursing, rehabilitation and like benefits are subject to a limit of $A 200,000[74]. There is no upper limit in the other two jurisdictions, though Victoria has a threshold (or « excess ») so that, subject to exceptions in the case of the more seriously injured, the first $A 389 (indexed)[75] of expenses for medical (not hospital) services has to be borne by the injured person[76].

As Murphy J said in *Jaensch* v. *Coffey*:

> In an efficient system, operating against the background of a national health scheme, [medical and hospital costs] should not be claimable (either at common law or under statutory compensation schemes).
>
> A coherent system to deal with assistance to personal injury victims will not be advanced by a proliferation of further remedies which aim at providing for medical and hospital costs which would otherwise be covered under the national health scheme[77].

In a federation like Australia, it seems impossible to achieve such a sensible arrangement. From the point of view of the victims of motor accidents, at least in the Northern Territory and Victoria they can be assured of having all their reasonable needs for hospital, medical and like services resulting from their accidents met, for life if necessary.

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71. *Transport Accident Act* 1986 (Vic.), s. 3 (1) (definition of « rehabilitation service »); *Motor Accidents (Liabilities and Compensation) Regulations* 1980 (Tas.), Schedule 2, Part II, cl. 1 (3) (c).
72. *Motor Accidents (Compensation) Act* 1979 (N.T.), s. 19 (b); *Transport Accident Act* 1996 (Vic.), s. 3 (1) (definition of « rehabilitation service »).
73. *Transport Accident Act* 1986 (Vic.), s. 60 (2).
74. *Motor Accidents (Liabilities and Compensation) Regulations* 1980 (Tas.), Schedule 2, Part II, cl. 2. The limit is waived in the case of medical benefits for persons requiring daily care. It appears that such persons must be able to establish liability at common law: *Motor Accidents (Compensation) Act* 1979 (N.T.), s. 27A (2).
75. There is provision for annual indexation of most amounts and payments under the *Transport Accident Act* 1986 (Vic.), in s. 61. Some figures, like this one, are indexed to average weekly earnings in Victoria; others are indexed to the consumer price index. Indexation can have the effect only of increasing the amounts; any reduction in the index is to be ignored until a subsequent increase: s. 61 (6).
76. *Id.*, s. 43 (1) (b). Since this excess is not compensable, part of it may be reimbursed under Medicare.
77. *Jaensch* v. *Coffey*, (1984) 155 C.L.R. 549, at 556. See also the proposals of the LAW REFORM COMMISSION OF NEW SOUTH WALES, *op. cit.*, note 2, paras. 13.54-13.76.

2.3 Informal Nursing Services and Assistance in the Home

At common law until the 1970s it was thought to be impossible to award damages for voluntary care provided by relatives and friends to injured people[78]. A change in attitude by the courts led to plaintiffs in both Australia and England becoming entitled to recover damages, on the principle that the defendant's conduct had created a need for the services and that it was irrelevant that the need was met by the provision of voluntary services[79]. Some State courts were reluctant to award damages on this principle when the services were rendered as part of the « ordinary currency of family life and obligation »[80]. More recently, the House of Lords has rejected this basis for recovery in England, preferring to see the loss as the loss of the service provider, with the victim obliged to hold the recovered damages in trust for that person[81]. The High Court of Australia, however, adheres to the principle and is adamant that the damages recoverable would ordinarily be the reasonable cost of procuring the services on a commercial basis[82]. Australian legislatures have responded by enacting legislation to place limits on or to abolish completely damages for gratuitous services rendered to the victims in common law actions[83].

Two of the three no-fault schemes, however, ensure that at least some compensation is paid for victims in need of nursing care, even where the needs are met voluntarily by relatives or friends. In the Northern Territory they are far from generous: the victim must have suffered a permanent

78. Australian cases are collected in H. LUNTZ, *Assessment of Damages for Personal Injury and Death*, 3rd ed., Sydney, Butterworths, 1990, para. [4.6.2].
79. *Griffiths* v. *Kerkemeyer*, (1977) 139 C.L.R. 161 ; *Donnelly* v. *Joyce*, [1974] Q.B. 454 (C.A.).
80. *E.g. Kovac* v. *Kovac*, [1982] 1 N.S.W.L.R. 656 (C.A.). A similar phenomenon occurred in Canada: *cf. DeSousa* v. *Kuntz*, (1989) 42 B.C.L.R. (2d) 186 (C.A.).
81. *Hunt* v. *Severs*, [1994] 2 A.C. 350. See also LAW COMMISSION, *Damages for Personal Injury: Medical, Nursing and Other Expenses*, London, Law Commission, 1996, Consultation Paper No. 144, para. 3.44 (the Commission is not committed to the trust concept recognised in *Hunt* v. *Severs*, but affirms the view that the loss is that of the provider).
82. *Van Gervan* v. *Fenton*, (1992) 175 C.L.R. 327 ; *Kars* v. *Kars*, (1996) 187 C.L.R. 354. See also *Nguyen* v. *Nguyen*, (1990) 169 C.L.R. 245 (a Lord Campbell's Act case in which a father himself provided services to his children that had previously been supplied by his wife who had been killed).
83. In a dissenting judgment in *Van Gervan* v. *Fenton*, (1992) 175 C.L.R. 327, at 346, Deane and Dawson JJ noted this response as a warning that « an over-generous approach by the courts to compensation based upon the need for services which are provided gratuitously may be seen to conflict with the interests of the community as a whole ». As we shall see, Tasmania, which abolished such damages entirely (*Common Law (Miscellaneous Actions) Act* 1986 (Tas.), s. 5), reintroduced compensation for such losses under its no-fault scheme, but only for those who can prove fault !

impairment for two years or one likely to endure for more than two years[84], and the amount recoverable is only $A 10 per hour for a maximum of 20 hours per week[85]. In Victoria where a person who is injured or killed was before the accident engaged mainly in housekeeping duties or the care of a child, someone may be engaged at the expense of the scheme to perform those duties for up to five years at the equivalent of average weekly earnings for up to 40 hours a week[86]. The same rate applies to someone whose injuries necessitate nursing or domestic services, these benefits not being limited to five years[87]. Tasmania pays compensation without limit to persons needing « treatment, therapy, nursing services, assistance, supervision, services for rehabilitation or other care for at least two hours a day for an indefinite period », but only where liability at common law is established and medical expenses are payable as a result of the injury[88]. As we shall see below, Tasmania does pay a disability allowance to someone who normally carried out household duties and is disabled from doing so.

There are many reasons why a severely injured person might prefer to receive the care and assistance of a relative or friend, rather than a stranger. These have been recognised in the courts in cases where damages have been sought[89]. On the other hand, severe injuries often place a strain on relationships, which may not last[90]. As the New South Wales Law Reform Commission recommended, the disabled person should have the option of engaging a family member or non-family provider, who should be entitled to equivalent remuneration[91]. No-fault schemes should make such provision.

2.4 Loss of Earning Capacity

All three no-fault motor accident schemes pay benefits for loss of earning capacity, but do so on very different principles. The benefits under the Northern Territory's scheme are not related to the injured person's previous earnings, whereas the benefits under the other two schemes, like

84. *Motor Accidents (Compensation) Act* 1979 (N.T.), s. 18A.
85. *Motor Accidents (Compensation) Rates Of Benefit Regulations* 1984, reg. 4A.
86. *Transport Accident Act* 1986 (Vic.), s. 60 (1) (b).
87. *Id.*, s. 60 (1) (c).
88. *Motor Accidents (Liabilities and Compensation) Act* 1973 (Tas.), s. 27A ; *Motor Accidents (Liabilities and Compensation) Regulations* 1980 (Tas.), Schedule 2, Part II, cl. 1A.
89. See, *e.g.*, *Hodges* v. *Frost*, (1984) 53 A.L.R. 373, at 379-380 (Fed. Ct. of A., F.C.) ; *Hunt* v. *Severs*, [1993] Q.B. 815, at 831 (C.A.).
90. See R. GRAYCAR, « Before the High Court — Women's Work : Who Cares ? », (1992) 14 *Sydney L. Rev.* 86, at 102-103 ; *id.*, « Hoovering as a Hobby and Other Stories : Gendered Assessments of Personal Injury Damages », (1997) 31 *U.B.C. L. Rev.* 17, at 33.
91. LAW REFORM COMMISSION OF NEW SOUTH WALES, *op. cit.*, note 2, para. 10.26.

damages at common law, are earnings-related. A major problem that confronts any compensation system that is based on cause — as no-fault motor accident schemes are — is the extent to which a loss of capacity to earn is due to the particular cause, in this case a motor accident, and is not due to economic conditions generally. Very few injured persons lack all capacity to earn, but when unemployment is high, as it has been in Australia for the last 20 years or so, those who suffer from a partial disability find it very difficult to obtain employment commensurate with their retained capacity. A no-fault scheme which reduces the benefits where there is such a retained capacity, even if the injured person fails to obtain employment, lends itself to harsh administration in some cases.

2.4.1 Northern Territory

Provided the injured person had some earning capacity before the accident[92] which has been reduced, residents of the Territory are entitled to compensation under the Northern Territory's scheme of 85 per cent of average earnings of wage earners in the Territory, less any amount that they are capable of earning in the most profitable employment available to them in their injured condition[93]. Smaller percentages are payable to unmarried persons between the ages of 15 and 20 who are not full-time students[94]. The payments may continue until age 65 or the person becomes eligible for the Commonwealth old age pension[95]. The calculation of average weekly earnings and the amount payable to the injured person are both after deduction of income tax that would have been payable[96]. This is similar to the position at common law in Australia[97] ; by designating the benefits as compensation for loss of earning capacity, the Northern Territory legislature presumably hopes that the benefits themselves will not be subject to income tax even

92. In *McMillan* v. *Territory Insurance Office*, (1988) 57 N.T.R. 24, it was held on the facts that an Aboriginal woman had none. However, the court affirmed a previous decision, *McMahon and Tapau* v. *The Board of the Territory Insurance Office*, (N.T.S.C., 2 February 1984, unreported), that, unlike the position at common law (*Graham* v. *Baker*, (1961) 106 C.L.R. 340), the loss of earning capacity need not have been productive of economic loss, so that a person who had never exercised an earning capacity might still recover compensation for loss of the capacity.

93. *Motor Accidents (Compensation) Act* 1979 (N.T.), s. 13. It is not known how the reduction for what the injured person is capable of earning in the most profitable employment available is interpreted in practice.

94. *Id.*, s. 14.

95. *Id.*, s. 13 (5).

96. *Id.*, s. 13 (2).

97. *Cullen* v. *Trappell*, (1980) 146 C.L.R. 1. Damages are calculated net of tax in England, too (*British Transport Commission* v. *Gourley*, [1956] A.C. 185 (H.L.)), but in Canada the calculation is based on gross earnings, as recently reaffirmed in *Cunningham* v. *Wheeler*, [1994] 1 S.C.R. 359.

though they are payable periodically[98]. It has also attempted to shift some of the cost to the Commonwealth by providing that the amount a person is capable of earning includes an amount payable under any other law in respect of an inability to find employment[99]. This latter provision has proved futile, since the Commonwealth has now enacted legislation which provides :

> If :
>
> (a) a law of a State or Territory provides for the payment of compensation ; and
>
> (b) the law includes a provision to the effect that a person's compensation under the law is to be or may be reduced or cancelled if the person is qualified for or receives payments under this Act ; this Act applies as if the person had received under the law the compensation that the person would have received under the law if the provision referred to in paragraph (b) had not been enacted[100].

Since the two types of unemployment benefit payable under the *Social Security Act* 1991 (Cth.) are both within the definition of « social security benefit » in s. 23(1) of that Act and therefore are « compensation affected payments » as defined in s. 17(1), the periodic payments of compensation are taken into account in reduction of the social security benefits[101].

2.4.2 Victoria

The Victorian Act also relies on the distinction between loss of earnings and loss of earning capacity. For the first 18 months after the accident[102], the injured person is entitled to benefits for loss of earnings[103]. Since these are based on the injured person's own pre-accident earnings, complicated definitions are necessary to cover different types of earner and to confine the calculations to earnings from personal exertion[104]. In the ordinary case the benefits will be, in the case of total loss of earnings, 80 per cent of the injured person's pre-accident earnings and, in the case of partial loss of earnings, 85 per cent of the difference between pre- and post-accident

98. *Cf.* Federal Commissioner of Taxation v. *Slaven*, (1984) 1 F.C.R. 11 (Fed. Ct. of A., F. C.).
99. *Motor Accidents (Compensation) Act* 1979 (N.T.), s. 13 (3). The relevant Commonwealth benefits for unemployment are the newstart and mature age allowances : *Social Security Act* 1991 (Cth.), Parts 2.12 and 2.12A.
100. *Social Security Act* 1991 (Cth.), 1163B.
101. *Social Security Act* 1991 (Cth.), 1168.
102. At about 18 months there must be a review of the person's eligibility ; if the review is not completed, the payments must continue until it is : *Transport Accident Act* 1986 (Vic.), s. 46.
103. *Id.*, ss. 44 (total) and 45 (partial).
104. *Id.*, ss. 4-6.

earnings[105]. The fact that less than 100 per cent of previous earnings is paid presumably is intended to provide an incentive to return to work if the person is able to do so. The different percentages recognise that there are some costs, such as transport to and from work, which are saved when a person ceases to work entirely. Both these amounts are subject to adjustment in cases which are out of the ordinary. Thus the amounts payable are subject to a floor and a ceiling: a minimum amount is laid down for low earners, based on the number of dependants, if any, though even in such cases 100 per cent of the injured person's pre-accident earnings may not be exceeded; and an upper limit of approximately average weekly earnings is laid down. There are also upper age limits[106]. All these calculations are based on pre-tax earnings, on the assumption that income tax will be payable on the benefits, as was expressly held to be required under the original Victorian scheme[107]. To save administrative expenses in minor cases, the benefits are not payable for the first five days on which earnings are lost, except in the case of acute financial hardship[108].

After 18 months, if the incapacity for work persists, the injured person becomes entitled to benefits for loss of earning capacity[109]. These are not based on the actual pre-accident earnings of the injured person, but on the « the amount the Commission determines as the weekly amount the earner had the capacity to earn before the accident in employment reasonably available to the earner in view of the earner's training, skills and experience »[110]. Similarly, what the victim is now able to earn is no longer based on actual current earnings alone, but takes account of what he or she is now capable of earning. This is expressed as the

> the amount the Commission determines as the weekly amount [...] the earner has the capacity to earn, despite the injury, in employment reasonably available to the person having regard to the nature of the injury and the degree of impairment; and
>
> (b) the potential for rehabilitation and the person's ability to undertake rehabilitation; and

105. *Id.*, ss. 44 and 45.
106. *Id.*, s. 53.
107. *Tinkler* v. *Federal Commissioner of Taxation*, (1979) 29 A.L.R. 663 (Fed. Ct. of A., F.C.).
108. *Transport Accident Act* 1986 (Vic.), s. 43. The days for which payments are not made need not be consecutive: *Transport Accident Commission* v. *Jones*, [1993] 1 V.R. 417 (A.D.).
109. *Transport Accident Act* 1986 (Vic.), ss. 49 (total) and 50 (partial).
110. See *id.*, ss. 49 (5) and 50 (5). There are some qualifications relating to apprentices and other young people where earnings depend on the attainment of a particular age: ss. 49 (6) and (7).

(c) the earner's training, skills and experience ; and

(d) the age of the earner [...][111]

On the assumption that compensation for this loss will not be taxable, the calculations of both pre- and post-accident earning capacity are based on figures which are reduced by reference to the tax that would have been payable on the amounts if they had been earned. Otherwise the benefits are the same as for the first 18 months, viz 80 per cent of earning capacity for total loss and 85 per cent of the difference between pre- and post-earning capacity for partial loss, but calculated on post-tax earning capacity in each instance. There are similar floors and ceilings, but again all the relevant amounts are reduced to allow for tax. There is a minimum of 10 per cent partial loss of earning capacity, below which such payments are not made[112].

Where the injured person is assessed as impaired to an extent of 50 per cent of the whole person or more under the American *Guides*, the benefits may continue so long as the incapacity lasts until normal retiring age ; but if the impairment assessment, which is carried out about the end of the first 18 months, is less than 50 per cent, then the benefits cease after three years or when the total of these benefits reaches roughly $A 100,000 (indexed), whichever first occurs[113]. The cessation of benefits after three years and the upper limit of earnings-related payments for persons who are not at least 50 per cent impaired was inserted in the legislation as part of the compromise which saw the retention of the right to sue at common law in the case of « serious injury » when the government of the day was unable to have its proposals for a pure no-fault scheme passed by the Legislative Council (the upper house in Victoria) in 1986. Although it is commendable that the more seriously injured should have their benefits continue indefinitely, the point at which the line is drawn poses a very severe test. For instance, amputation of the thumb, index, middle and little fingers of the preferred hand would just take one over the threshold, whereas amputation of the same digits of the non-preferred hand would fall below it[114]. Even 100 per cent impairment of a leg is classified as only 40 per cent impairment of the whole person[115]. For a person thus impaired, these benefits cut out after three years or when the monetary limit is reached. Although impairment of at least 30 per cent of the whole person carries an automatic right to sue, this right is subject to

111. *Id.*, s. 50 (5).
112. *Id.*, s. 52.
113. *Id.*, s. 53.
114. AMERICAN MEDICAL ASSOCIATION, *Guides to the Evaluation of Permanent Impairment*, 2nd ed., Chicago, American Medical Association, 1984, Tables 10 and 20.
115. *Id.*, Table 44.

the need to find someone at fault and to all the vagaries of the common law action. Fortunately, the medical, rehabilitation and like benefits continue even for those who fall below the 50 per cent threshold.

A person who has been assessed at 50 per cent or more impairment cannot be compelled to undergo a reassessment more frequently than once in five years[116]. Unlike the weekly payments for loss of earnings, the payments for loss of earning capacity are not indexed, though the impairment annuity is[117].

Under the heading 2.3, we have already noticed that where a person who is injured or killed was before the accident engaged mainly in housekeeping duties or the care of a child, the scheme will pay for someone to perform those duties for up to five years at the equivalent of average weekly earnings for up to 40 hours a week[118]. This may be seen as compensation for loss of working capacity in the home. However, in the Act it is included among the medical and rehabilitation expenses. This means that unlike the benefits for loss of earning capacity, the benefits for loss of this capacity to work in the home may continue even after total payments to the injured person exceed $A 100,000 or beyond three years, even if the person is less than 50 per cent impaired or is over retirement age.

There are also other provisions in the *Transport Accident Act* for compensating non-earners. A payment related to the degree of their impairment is payable to minors who are at least 10 per cent impaired after the first 18 months until they reach the age of 18, when they become eligible for the benefit for loss of earning capacity[119]. Under section 51, non-earners other than minors at the time of their injury are entitled to have their earning capacity assessed after the first 18 months in the same way as earners — *i.e.* their pre-accident capacity to earn in employment reasonably available to them in view of their training, skills and experience — but receive a benefit reduced by a formula which takes account of the period that they would probably have spent out of the paid workforce. This benefit is otherwise assessed in the same way as the loss of earning capacity benefit for earners and is subject to the same restrictions and limits. During the first 18 months, non-earners may be eligible for the housekeeping or child-care benefit mentioned in the previous paragraph.

116. *Transport Accident Act* 1986 (Vic.), s. 55.
117. *Id.*, s. 61.
118. *Id.*, s. 60 (1) (b).
119. *Id.*, s. 54.

2.4.3 Tasmania

Three types of disability allowance are payable under the Tasmanian scheme: an employed person's allowance, a self-employed person's allowance and a housekeeping allowance[120]. Only the employed person's allowance is directly earnings-related. This allowance is paid only to persons between 18 and 65[121]; there are no age limits to the other two types. To qualify for the employed person's allowance, the claimant must demonstrate a fairly close attachment to the paid workforce[122]. None of the allowances are payable for the first seven days beginning on the day of the accident[123]. The person must have become wholly disabled from carrying on his or her normal occupation or carrying on ordinary household duties within 20 days of the accident[124], a restriction which appears extraordinarily harsh. For all three allowances there is an initial relevant period of 104 weeks from the accident. During this period, to be eligible for an allowance, persons must, as a consequence of their injuries, be wholly disabled from engaging in their usual employment, occupation, business or household duties, as the case might be; in addition, employed persons must actively seek work or be certified as unfit and self-employed people must have made arrangements for another person to conduct the business[125]. Nothing is payable for any partial disability, though it is contemplated that an employed person may obtain remuneration from another occupation, in which case such remuneration is deducted from the allowance[126]. The housekeeping allowance ceases after a maximum of 104 weeks. The other two may continue for up to a further 156 weeks — making seven years in all — but only if the injured person is wholly disabled from engaging in *any* employment or occupation that would be suitable in the light of the person's education, training, experience or ability. This is obviously a very difficult criterion to satisfy.

The level of benefits is 80 per cent of:

1) In the case an employed person, pre-injury average weekly earnings, subject to a very low floor[127];

120. *Motor Accidents (Liabilities and Compensation) Regulations* 1980 (Tas.), Schedule 2, Part V, cl. 1 (2).
121. *Id.*, Schedule 2, Part V, cl. 2 (1) (c).
122. *Id.*, Schedule 2, Part V, cl. 2 (1) (c) (ii) (employed for remuneration for at least 26 weeks in previous 12 months).
123. *Id.*, Schedule 2, Part V, cl. 5 (1) (a).
124. *Id.*, Schedule 2, Part V, cl. 5 (2).
125. *Id.*, Schedule 2, Part V, cll. 2 (3) (a), 3 (2) (a) and 4 (2).
126. *Id.*, Schedule 2, Part V, cl. 2 (7).
127. *Id.*, Schedule 2, Part V, cl. 2 (4)-(6).

2) in the case of a self-employed person, the remuneration paid to a substitute to carry on the business[128]; or

3) in the case of the housekeeping allowance, the remuneration paid to someone who undertakes the duties that would normally have been carried out by the injured person[129].

Although the Act permits regulations to be made for the variation of payments[130], there appears to be no current provision for indexation of benefits during the period while they are being paid.

2.4.4 Comment

Premiums for motor vehicle insurance against liability for personal injury in Australia, and the levies for the no-fault schemes in the three jurisdictions where they exist, are not related to income, or even to the value of the vehicle. Thus benefits which are earnings-related are regressive in that higher earners receive comparatively more benefits than lower earners, but both pay equivalent premiums. This objection cannot be levied against the Northern Territory scheme, where benefits for loss of earning capacity are based on average weekly earnings not of the individual but of the community. The Victorian scheme limits its regressiveness by maintaining a low ceiling on the benefits for loss of earnings and loss of earning capacity. Nevertheless, there are many below-average earners who contribute to the scheme by paying the same premiums as average and above average earners, yet who, if they are injured, receive a lower level of benefits than others who may receive up to average weekly earnings[131]. The Tasmanian scheme makes no attempt at all to mitigate its regressive features.

This regressiveness is a feature of the common law system of awarding damages. In that context it has been strongly criticised. Not only are common law damages regressive in the sense thus far discussed, but since their aim is to restore the injured person to the position he or she would have been

128. *Id.*, Schedule 2, Part V, cl. 3 (3).

129. *Id.*, Schedule 2, Part V, cl. 4 (3). If the injured person employed someone before the accident to perform such duties, then it is only 80 per cent of the amount expended for *additional* duties: cl. 4 (4).

130. *Motor Accidents (Liabilities and Compensation) Act* 1973 (Tas.), s. 23 (6).

131. There are also passengers, pedestrians and cyclists who are not themselves motor car owners and who therefore pay no premiums at all, but who benefit from the scheme if they are injured.

in if the injury had not occurred[132], they reproduce existing inequalities in society, favouring the rich against the poor, men against women, ethnic majorities against ethnic minorities[133]. The fact that society values the work of one person more highly than another, and so pays higher wages to the former, provides no justification for distributing funds collected from the community at large in greater measure to the one than the other when neither is working[134]. Even if the tort system were justified in adopting the principle of *restitutio in integrum*, notwithstanding that damages are almost never paid by the actual wrongdoers, that alone is not a reason for a no-fault scheme to do likewise. In any event, the common law does not really adhere to the principle of *restitutio in integrum* even in theory, let alone in practice[135]. To provide a person with a lump sum to replace earnings that would have been paid periodically is not restitution ; nor is there restoration to the original position when sums that need to be *earned* by labour are replaced with sums that need not be worked for. That most people would prefer to receive their income without working for it is inherent in the notion of « moral hazard », which leads insurers and designers of no-fault schemes of all kinds to limit benefits only to a percentage of the sums which would have been earned if the person had not been injured. Even at common law, where payment of damages is by way of a lump sum, which is supposed to have no anti-rehabilitative effect once paid, the commitment to « full compensation » is not carried out in practice. New South Wales courts today regularly deduct 15 per cent from their estimation of future loss of earning capacity

132. *Livingstone* v. *Rawyards Coal Co*, (1880) 5 App. Cas. 25, at 39 (H.L.), applied to personal injury in cases such as *British Transport Commission* v. *Gourley*, [1956] A.C. 185 (H.L.) ; *Cullen* v. *Trappell*, (1980) 146 C.L.R. 1, at 11 ; *Todorovic* v. *Waller*, (1981) 150 C.L.R. 402, at 412 (per Gibbs C.J. and Wilson J.), at 427 (per Stephen J.), at 442 (per Mason J.), at 463 (per Brennan J.).

133. See, *e.g.*, R.L. ABEL, « A Critique of Torts », (1990) 37 *UCLA L. Rev.* 785 ; J. CASSELS, « Damages for Lost Earning Capacity : Women and Children Last ! », (1992) 71 *Can. B. Rev.* 445 ; E. GIBSON, « The Gendered Wage Dilemma in Personal Injury Damages », in K. COOPER-STEPHENSON and E. GIBSON (eds.), *Tort Theory*, North York, Capters University Publications, 1993, p. 185 ; P. CANE, *Atiyah's Accidents, Compensation and the Law*, 5th ed., London, Butterworths, 1993, pp. 127-131.

134. See, further, H. LUNTZ, « Keeping Professors in the Comfort to Which They Have Grown Accustomed », (1995) 3 *Torts L. J.* 1 (Editorial Comment).

135. « The principle of restitution has been theory, not practice » : *Todorovic* v. *Waller*, (1981) 150 C.L.R. 402, at 453 (per Murphy J.). Among the factors to which his Honour attributed the failure of practice to achieve restitution were artificially high discount rates and ignoring increases in real earnings due to productivity gains. Other factors include excessive reductions for contingencies, particularly in the case of women : see *infra*, note 138.

for « vicissitudes » or « contingencies »[136], thereby bringing common law damages under this head into line with the proposal to pay 85 per cent of lost earnings as part of a national comprehensive no-fault scheme in the report of the National Committee of Inquiry into Compensation and Rehabilitation in Australia (the « Woodhouse Committee »)[137]. Women suffer even more on account of « vicissitudes » under such common law damages awards[138].

As the New South Wales Law Reform Commission (NSWLRC) pointed out, there are three broad models for a no-fault scheme[139]. The first, the « welfare » model is based on needs and would pay income maintenance benefits at a flat rate. The second, the « disability » model would pay compensation assessed by reference to the degree of physical impairment. The third, the « restitution » model, would seek to put injured people back into the position they would have been in if they had not been injured. The Commission concluded that « [n]o single model should be adopted exclusively as the basis for assessing compensation for transport accident victims »[140]. Although recognising the regressive nature of the restitution model, and that there are problems with the assessment of actual losses, the Commission believed it was necessary to retain elements of it in proposals to replace the common law that were confined to the transport area, where the common law had traditionally played a major role. It believed that the integration of compensation and social security, which favoured the welfare model based on needs, was best achieved as part of a more comprehensive reform, embracing areas where the common law had been relatively unimportant[141]. In its proposals for a transport accident scheme for New South Wales, it nevertheless sought to modify the principle of full restitution in several ways[142]. First, it wished to tailor the benefits to maximise incentives

136. *E.g.*, in the latest decision to hand, *Mortimer* v. *Burgess*, (1997) 25 M.V.R. 463 (N.S.W. C.A.), the Court of Appeal rejected an argument that less should have been deducted because the plaintiff, a police officer, was in secure employment.

137. Woodhouse Report, *op. cit.*, note 58, para. 529. This level was approved by the AUSTRALIA SENATE STANDING COMMITTEE ON CONSTITUTIONAL AND LEGAL AFFAIRS, *Report on the Clauses of the National Compensation Bill* (1975), Canberra, Govt. Printer, 1976, para. 1.23, recommendation (7).

138. R. GRAYCAR, « Damaged Awards : the Vicissitudes of Life as a Woman », (1995) 3 *Torts L. J.* 160 ; *id.*, « Hoovering as a Hobby and other Stories : Gendered Assessment of Personal Injury Damages », (1997) 31 *U.B.C. L. Rev.* 17.

139. See NEW SOUTH WALES LAW REFORM COMMISSION, *op. cit.*, note 2, vol. 1, pp. 121-128. *Cf.* the three models for a coherent compensation system put forward by K.S. ABRAHAM and L. LIEBMAN, « Private Insurance, Social Insurance and Tort Reform : Towards a New Vision of Compensation for Illness and Injury », (1993) 93 *Colum. L. Rev.* 75.

140. NEW SOUTH WALES LAW REFORM COMMISSION, *op. cit.*, note 2, para. 5.52.

141. *Id.*, para. 5.54.

142. *Id.*, para. 5.55.

for rehabilitation. As already noted, any system of periodical payments that does replace earnings will almost certainly not do so at 100 per cent of earnings lost because of the « moral hazard » that would see people preferring to receive the benefits rather than returning to work when capable of doing so. Secondly, the NSWLRC sought to mitigate the unfairness of the common law system to persons who happen to be outside the paid workforce at the date of the accident by requiring only a loose attachment to the paid workforce to qualify as an « earner » and using criteria other than actual earnings as the measure of earning capacity[143].

Despite these and other attempts by the Commission to soften the effects of the restitution model, it is suggested that it would have been better to abandon that model and to opt instead for a combined welfare and disability model[144]. Under such a model income support would be provided at a flat rate at some suitable percentage of average earnings in the community. This would enable it eventually to be integrated with the social security system operating in Australia, though it would be preferable that unlike that system it not be means-tested. Since most people who are earning have arrangements for sick leave with their employers, and non-earners do not need an immediate replacement, the benefit should not commence to be payable until after a short waiting period of perhaps a week or two, unless there is exceptional hardship[145]. In recognition of the fact that people have mortgage and similar commitments commensurate with their incomes and that first-party income-maintenance insurance is comparatively rare — though increasingly superannuation schemes, which are now mandated in Australia, include a disability component — it may be that an earnings-related supplement should be paid in the short term, for no more than, say, six months.

2.5 Death Benefits

The NSWLRC noted that critics of earnings-related compensation point out that it is especially difficult to justify paying compensation to the families of persons who are killed that is based on the earning capacity of

143. NEW SOUTH WALES LAW REFORM COMMISSION, *op. cit.*, note 2, chap. 7.

144. The disability benefit would be related to the degree of impairment and would ideally not be means-tested either (*cf.* the disability support pension payable to blind people under the *Social Security Act* 1991 (Cth.), s. 95). Although essentially a form of non-pecuniary compensation and therefore outside the scope of this paper, the disability benefit would in part compensate for some of the hidden costs of disability, such as increased transport expenses.

145. *Cf. Transport Accident Act* 1986 (Vic.), s. 43.

the deceased[146]. The Commission believed that benefits should be payable on death, but that they should be structured so as to allow the dependants of the deceased in the period following the death to make the necessary adjustment to their lives and to encourage able-bodied members of the family to become self-supporting[147]. It recommended payment of a lump sum based on a multiple (130) of average weekly earnings in the community and additional periodical benefits for a surviving spouse with child-care responsibilities and other cases of special need, the latter for a maximum of five years, surprisingly based not on need but on the deceased's earnings, to a maximum of 75 per cent of average weekly earnings after tax[148]. Dependent children, in addition to sharing in the lump sum, were to be entitled to a weekly benefit related to average weekly earnings, not the earnings of the deceased[149]. The existing no-fault motor accident schemes in Australia, however, for the most part sensibly provide for benefits on death which are not earnings-related. Victoria, however, constitutes an exception when the deceased leaves a spouse.

2.5.1 Dependants' Benefits

The Northern Territory provides for payment of an amount representing 156 weeks of average earnings in the Territory, as a lump sum, for the benefit of the deceased's spouse and children, if any[150]. The proportion in which the spouse and children share the amount are set out in a Table in the Act[151]. In addition to this benefit, weekly payments of 10 per cent of average Territory earnings are to be paid for the benefit of each dependent child under the age of 16 (or 21 if disabled or a full-time student), up to 10 children[152]. If there is no spouse and no children, the same lump-sum amount is payable to a parent or both parents, if they normally resided with the deceased[153]. A person who is a full-time patient in a hospital and likely to remain so, may be treated as having died[154].

In Victoria, too, a lump sum is payable to a surviving spouse and it too is not earnings-related. However, it is related to the age of the deceased, the maximum amount being payable if the deceased was 25 or less. It decreases

146. NEW SOUTH WALES LAW REFORM COMMISSION, *op. cit.*, note 2, para. 5.45.
147. *Id.*, para. 12.74.
148. *Id.*, paras. 12.76-12.77.
149. *Id.*, para. 12.78.
150. *Motor Accidents (Compensation) Act* 1979 (N.T.), s. 22 (1) (b).
151. *Id.*, s. 22 (3).
152. *Id.*, s. 23 ; and see the definition of « dependent child » in s. 4 (1).
153. *Id.*, s. 24.
154. *Id.*, s. 21.

on a sliding scale until the minimum is reached if the deceased was 75 or more. The maximum is similar to the lump sum in the Northern Territory[155]. Weekly benefits are payable to a surviving spouse or spouses. The payments are 80 per cent of the weekly earnings the deceased would have been able to make in the year following the death. They are subject to the same floor and ceiling as benefits paid to injured people for loss of earnings during the 18 months after the accident. They continue for five years or until the spouse attains the pension age, but may continue thereafter if the spouse still has a dependent child[156]. Weekly benefits and an education allowance which are not earnings-related are payable to dependent children when there is no surviving spouse of the deceased[157]. No benefits for death are payable in Victoria to the parents of a person who dies.

Tasmania provides for lump sums alone for dependants on death. They are not earnings-related and indeed are rather meagre. If a head of a household dies and is survived by one dependant and is under 65 at the date of death, then $A 25,020 is payable ; if the deceased was over 65, the amount is $A 17,020. These amounts are increased by $A 4,540 for each additional dependant[158]. Although even for the death of a head of a household, the amount payable is not large, the death of the spouse of the head of the household produces for the survivors significantly less, viz $A 3,000 or $A 2,000 depending on whether the spouse was under 65 or not[159]. As might be expected, despite attempts to define who is the head of a household, at least one dispute has arisen, leading to Supreme Court proceedings to resolve the issue[160]. Dependent parents of a single person may qualify in Tasmania if there are no dependent children[161]. Almost to add insult to injury, the small amounts payable on death are reduced by any disability allowance received by the deceased prior to death[162].

All three schemes include among the dependants who may benefit from the provisions not only spouses who were lawfully married to the deceased, but also *de facto* spouses. The definitions of who qualifies as a *de facto*

155. *Transport Accident Act* 1986 (Vic.), s. 57.
156. *Id.*, s. 58.
157. *Id.*, s. 59.
158. *Motor Accidents (Liabilities and Compensation) Regulations* 1980 (Tas.), Schedule 2, Part IV, cl. 1.
159. *Id.*, Schedule 2, Part IV, cl. 2.
160. *Motor Accidents Insurance Board* v. *Hodgetts*, Tas S.C., April 28, 1997 (Zeeman J.), unreported.
161. *Motor Accidents (Liabilities and Compensation) Act Regulations* 1980 (Tas.), Part 1, cl. 10 (1) (b) (ii).
162. *Motor Accidents (Liabilities and Compensation) Regulations* 1980 (Tas.), Schedule 2, Part IV, cl. 3.

spouse vary somewhat, though it seems that, unlike the equivalent of Lord Campbell's Act in Victoria[163], in no case may people of the same sex as the deceased be included[164]. In the Northern Territory alone provision is made for persons married by aboriginal tribal custom[165]. Despite these provisions, only Victoria expressly provides a formula for the sharing of dependants' benefits where there is more than one spouse who survives the deceased. This formula is dependent on the number of years each spouse was a dependent spouse of the deceased[166].

2.5.2 Funeral Expenses

At some time, the expense of burying or cremating every human being has to be incurred. Logically, where a person is killed, the principle of restitution would require only that the person bearing the expense be reimbursed with the *accelerated* cost of the funeral. Nevertheless, ever since statute has permitted the recovery of funeral expenses[167], the courts have awarded the full reasonable costs of funerals where fault on the part of another is shown. The only concern has been to keep in check extravagant rites and memorials[168]. The three no-fault schemes adopt a similar policy.

In the Northern Territory the actual cost of the funeral is reimbursed, subject to an upper limit of 10 per cent of the annual equivalent of average weekly earnings, a figure which is about $A 3,500 at the end of 1997[169]. Victoria merely requires that the costs of burial or cremation be incurred in Australia and that they be reasonable[170]. In addition, this scheme offers « the reasonable costs incurred in Australia of family counselling services provided to family members by a medical practitioner or registered

163. *Wrongs Act* 1958 (Vic.), s. 17 (2), now defines « dependants » for the purposes of s. 17, which is derived from the original *Fatal Accidents Act* 1846 (U.K.), as meaning « such persons as were wholly mainly or in part dependent on the person deceased at the time of his death or who would but for the incapacity due to the injury which led to the death have been so dependent ».

164. *Motor Accidents (Compensation) Act* 1979 (N.T.), s. 4 (1), definition of « spouse », paras. (c) and (d) ; *Transport Accident Act* 1986 (Vic.), s. 3 (6) ; *Motor Accidents (Liabilities and Compensation) Regulations* 1980 (Tas.), Part I, cl. 1.

165. *Motor Accidents (Compensation) Act* 1979 (N.T.), s. 4 (1), definition of « spouse », para. (e).

166. *Transport Accident Act* 1986 (Vic.), s. 57 (3).

167. Most Australian jurisdictions have legislation modelled on the *Law Reform (Miscellaneous Provisions) Act* 1934 (U.K.), though some permit recovery under the local equivalent of Lord Campbell's Act.

168. See H. LUNTZ, *Assessment of Damages for Personal Injury and Death*, 3rd ed., Sydney, Butterworths, 1990, Chap. 9, Sec. 6.

169. *Motor Accidents (Compensation) Act* 1979 (N.T.), s. 22 (1) (a).

170. *Transport Accident Act* 1986 (Vic.), s. 60 (1) (d).

psychologist not exceeding $1,500 [indexed] in respect of that death »[171]. Tasmania allows for all the costs and expenses reasonably incurred for the actual burial or cremation, subject to an upper limit of $A 2,100 for burial and $A 1,600 for cremation. The cost of providing or erecting a gravestone is expressly excluded in this jurisdiction[172].

Conclusion

This paper has looked at the benefits of an economic nature provided under the three no-fault motor accident schemes operating in Australia. It has compared the benefits payable under each for hospital, medical and like expenses ; informal nursing and assistance in the home ; loss of earning capacity ; and on death. It has not sought to compare these schemes with any models in other parts of the world, though it is probable that the Quebec scheme and those found in the other Canadian provinces and in the United States could offer valuable insights. Nor has any attempt been made to compare the no-fault motor schemes with other no-fault categorical schemes such as workers' compensation, or the one comprehensive no-fault accident scheme in the world, that of New Zealand[173]. It might be noted, however, that the coverage of workers' compensation schemes in Australia in recent years has been cut back, as has the comprehensive scheme in New Zealand, and the benefits, too, have suffered from governments determined to reduce costs. Workers' compensation schemes, at least, have a comparatively powerful lobby group in the trade union movement to agitate for the preservation of hard-won rights. The victims of motor accidents are not organised and wield little influence. Lest it be thought that this is an argument for the preservation of the right to sue at common law for injuries sustained in motor accidents, one can easily refute it by pointing to the fact that several States in Australia that do not have no-fault schemes have in recent years imposed severe limits on the recovery of damages for injury arising out of the use of motor vehicles[174].

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171. *Id.*, s. 60 (1) (ca).
172. *Motor Accidents (Liabilities and Compensation) Regulations* 1980 (Tas.), Schedule 2, Part III.
173. *Accident Rehabilitation and Compensation Insurance Act* 1992 (N.Z.), replacing the *Accident Compensation Act* 1972 (NZ) and its successor, the *Accident Compensation Act* 1982 (N.Z.).
174. *Motor Accidents Act* 1988 (N.S.W.), Part 6 ; *Wrongs Act* 1936 (S.A.), s. 35A ; *Motor Vehicles (Third Party Insurance) Act* 1943 (W.A.), ss. 3A-D. The legislation in New South Wales frankly states that « The objects of this Part are : (a) to control the amount of damages that may be awarded to a claimant for the purpose of ensuring that the scheme under this Act is affordable [...] » : s. 68A. *Cf.* also the more general legislation in Queensland, the *Supreme Court Act* 1995 (Qld.), Division 4, which requires deduction

With regard to hospital, medical and like expenses, one would like to see these completely integrated with a national health scheme that bore the expenses in the first instance and did not attempt to shift the costs to the no-fault schemes on an individual basis. If it was thought that this would prevent motoring bearing its full economic cost and so lead to a misallocation of resources, an estimate of the annual cost could be obtained by appropriate sampling methods and the cost transferred by means of taxation or bulk payment agreements. Something along these lines seems to have been achieved in relation to hospital costs in the Northern Territory, but otherwise Commonwealth-State relations make such a solution unlikely. In any event, Commonwealth provision for disability services and rehabilitation, though growing, is still far from adequate, and all schemes need to continue to make provision for such matters, including for informal nursing care and domestic assistance by relatives and friends. It would be desirable for all to adopt Victoria's allowance for reasonable travelling or accommodation expenses incurred in visiting a dependent child in hospital[175].

In relation to income-support, too, it would be desirable to integrate no-fault benefits with Commonwealth social security. Apart from the usual problem of Commonwealth-State financial relations, the major difficulty here is that most of the Commonwealth social security benefits are not universally available, but are stringently means-tested, taking account not only of the applicants' incomes and assets, but also those of their spouses. It would be desirable for the no-fault schemes to offer flat-rate benefits at a similar level of support, but without the means testing. Such benefits need not start for a short period, to save undue administrative expense. Possibly, income-related benefits could be paid for a limited period thereafter, to allow for the injured person to make necessary adjustments, but in the long term there is no convincing justification for basing compensation on what the injured person was earning beforehand. To encourage rehabilitation, there should be only a phased reduction for what the injured person earns after the accident; tests of what the person is *capable* of earning, which lend themselves to harsh administration in times of high unemployment, should not be used.

On death arising out of a motor accident, a lump sum to allow for adjustment is appropriate, supplemented by income support for those dependants too young or for other reasons unable to enter the workforce.

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of tax and use of a comparatively high discount rate, both provisions originally enacted at a time when the courts were acting, or threatening to act, differently; and the *Motor Accident Insurance Act* 1994 (Qld.), Part 4, imposing express obligations of co-operation and mitigation on the injured person, subject to sanctions.

175. *Supra*, note 73.

Again, this should be at a level similar to social security, but without the means-testing. Reasonable funeral expenses (and counselling fees) should be provided in the same way as medical and rehabilitation expenses.

If it is accepted that hospital, medical and like expenses, income support and death benefits should all ultimately be integrated with a universal social security system, it might be thought that there is no role left for a no-fault motor accident scheme. Undoubtedly, there is much to be said for the view that people's needs are the same whether they are injured by a motor car or in any other way, or indeed if they are disabled by sickness or congenitally[176]. It is hard to justify a preference for the victims of the motor car, though attempts are sometimes made to do this on the basis of ease of collection of premiums and the fact that the community is used to paying such levies[177]. One can hope that the types of benefits discussed in this paper will before too long be provided to everyone who is in need, whatever brought about that need. However, it is unlikely that in the near future Australian social security will pay a disability pension unrelated to economic losses to all who are impaired from any cause, be it accidental, congenital or as a result of sickness, though in the long run that is what one might aspire to. It is suggested that in the absence of any general disability pension that is not intended for income support or replacement, no-fault schemes of all varieties should concentrate on paying mainly periodical benefits for impairment. Since such a disability pension is usually seen as primarily intended to compensate for non-economic loss, this paper has not gone into the details of such a benefit. However, it should not be overlooked that disability brings with it increased costs of living and a disability pension can also be seen as having an economic component in making up for these hidden costs.

176. See, generally, the Woodhouse Report, *op. cit.*, note 58 ; T.G. ISON, *The Forensic Lottery : A critique on Tort Liability As a System of Personal Injury Compensation*, London, Staples P., 1967 ; T.G. ISON, « Human Disability and Personal Income », in L. KLAR (ed.), *Studies in Canadian Tort Law*, 2nd series, Toronto, Butterworths, 1977, Chapter 15 ; P. CANE, *op. cit.*, note 133 ; S.D. SUGARMAN, *Doing Away with Personal Injury Law*, New York, Quorum Books, 1989.

177. *E.g.*, P.S. ATIYAH, *The Damages Lottery*, London, Butterworths, 1993, pp. 185-188.