

A Personal Journey through the Law of Torts

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1. Introduction

In August 1965 I arrived in Melbourne by sea from South Africa to take up a position in the Law School of the University of Melbourne. Australia was still more under the influence of the UK than the USA and there were three terms a year, not semesters. As soon as the third term began, I started teaching the law of torts. I have taught it every year since, interrupted only by some sabbatical years, most of which I spent working on one aspect or another of torts. This essay will try to set out who and what influenced my thinking on the subject when I began to teach it, what brought about changes and what my current thoughts are. As will be seen, the changes in my thinking have been relatively few and I still strongly adhere to the philosophy I developed soon after starting out. The world may have changed and, though others have adapted their views to the different era, nothing that has happened has persuaded me of the need to change where I stand on most of the fundamental issues. The essay that follows will be intensely personal and very anecdotal.

2. Experience in South Africa

After completing a BA at the University of the Witwatersrand in Johannesburg, I studied for the LLB degree, which was a postgraduate degree in South Africa, at the same university. Like almost all the students in the class, I served articles of clerkship at the same time as undertaking the degree; both took three years. The firm that I was articled to had several insurance companies as clients and I obtained some knowledge of the actual treatment of claims for damages before I studied any of the theory, because *delict* —the equivalent of torts— was a final year subject. First, I learnt that nearly all cases are settled. Only one case with which I was involved went to trial in the Supreme Court. It involved a fire at a petrol station. The counsel whom we briefed was a young advocate (barrister) called Arthur Chaskalson, who later founded the Legal Resource Centre, which assisted many of those oppressed under the apartheid regime. He subsequently became the first President of the Constitutional Court and then Chief Justice of the ‘new’ South Africa. What I remember particularly from that case was an attempt to establish the position where the fire started in relation to the petrol pumps through an illiterate witness who could not understand the relationship between a drawing of the forecourt and actual reality. I had never previously realised that illiteracy, which was widespread in South Africa, does not extend only to an inability to read and write, but also to making sense of maps.

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Another case that I remember probably did end in settlement. One of our clients insured the Johannesburg General Hospital and I recall attending a conference at the hospital relating to a medical negligence claim. Lawyers, medical practitioners and insurers sat around a large table while an orthopaedic surgeon demonstrated how he had performed an operation. What struck me was that he used a great deal more force than I had thought was required for human surgery. In recent years I have taught postgraduate courses to classes consisting of a mix of health professionals and lawyers and the health professionals have had much to teach the lawyers.

The delict course that I studied in the final year of my LLB degree, like all South African law, was theoretically based on Roman-Dutch law. The law of delict drew its inspiration from two Roman actions, the *actio legis Aquiliae* and the *actio injuriarum*. There was some minor reference to so-called quasi-delicts, like the *actio de pauperie*. However, the text book we used was RG McKerron, *The Law of Delict: A Treatise on the Principles of Liability for Civil Wrongs in the Law of South Africa* (4th ed, 1952). I suspect that this had more affinity with English than Roman-Dutch law. We were taught by Paul Boberg, who had taken over the course from Maurice Millner. Millner, whose colourfully written case notes on delict enlivened the *South African Law Journal* and who taught me the law of sale of goods in an equally entertaining fashion, showed how easy it was to convert from South African law to English law when, having emigrated to the United Kingdom, he published *Negligence in Modern Law* (1967) to general acclaim. In the delict course at Wits, I made my acquaintance with *Donoghue v Stevenson*,¹ where Lord Atkin's 'neighbour principle' was apparently the embodiment of the Aquilian action. The *actio injuriarum* had, according to the way I learnt it, been adapted by the courts so that it corresponded in great part with the English law of defamation. When I later learnt of the English *scienter* action, it did not seem at all strange after what I knew of the *actio de pauperie*.

All this, I later found out, was very different from what was being taught in the Afrikaans universities. On a recent visit to South Africa, I spent a couple of hours browsing through the delict text book now used at the University of the Witwatersrand, an edited translation of one in Afrikaans.² This reflects very little of the 'new' South Africa. Presumably it is distilled from the approach developed in the period from 1960 to 1990, when Afrikaner nationalism dominated and the courts sought to extirpate the English influence. *Donoghue v Stevenson* is not cited anywhere in it. In my early years as an academic, when I myself was teaching at the University of the Witwatersrand, I wrote a section of the *Annual Survey of South African Law*, in which I was strongly critical of a decision of the Appellate Division of the Supreme Court of South Africa banishing the English law of nuisance from South Africa's jurisprudence.³ I was writing from a position of familiarity with the one and ignorance of the alternative.

1 [1932] AC 562.

2 I think it was Johann Neethling et al, *Law of Delict* (4th ed, 2001).

3 Harold Luntz, 'Law of Property (including Mortgage and Pledge)' in HR Hahlo (ed), *Annual Survey of South African Law 1963* (1964) 277 at 304–308, discussing *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (AD).

By the time I came to study delict, I was already in my last year as an articled clerk and permitted to appear in the magistrates' court. My first case was an ordinary 'crash-and-bash' motor accident, in which our client was exercising its right of subrogation to recover the costs it had laid out in having the insured's car repaired. The advocate on the other side, no doubt aware that I was a neophyte, put it to the lay client in the witness box that he had suffered no loss because the insurance company had paid for the repairs. He then submitted to the magistrate that the action must fail. Fortunately, I knew that as a matter of law, insurance was not taken into account in such circumstances and was able to cite authority for this from an insurance text book that I had brought to court. The lay client was greatly impressed and no doubt pleased that on the real legal issue, the other driver was found to have been at fault. Practical insights like this made the course that I studied much more meaningful than it is to full-time students who do not have the opportunity to see the law in action in this way. Of course, at that time I was not able to stand back and ask, as I did as an academic many years afterwards, whether the law is wise to allow insurers rights of subrogation.⁴

Although this particular case was trivial, it taught me one thing that was reflected in many more important ones that I merely read; namely, that the outcome of litigation is often not dependent on the merits or the law, but on the forensic tactics adopted, which may in turn be dependent on the experience and skill of the legal representatives the parties are able to afford. Several other lessons that emerged from the tiny number of cases in which I appeared in the Johannesburg magistrates' court, which no doubt apply in most jurisdictions, are: that even where the law is on one's side, the judicial officer may refuse to apply it; that the result of a case often depends on the judicial officer who happens to preside, which may be a matter of luck; that an appeal against every 'perverse' decision is not practicable, usually being too costly; and that the evidence that comes out in the witness box is often significantly different from what one's client has told one in the office.

3. *Oxford and Introduction to Fleming's Ideas*

My first opportunity to stand back and reflect a little more on the law came when I obtained a scholarship to study for the BCL at the University of Oxford. At that time, only Oxford graduates were permitted to take the BCL in one year. The rest of us had to prove our competence in a preliminary year. We were divided into those from a common law background, who had to study Roman law, and those from a civil law background, who had to study the common law. My good fortune was to be classified as coming from a Roman-Dutch background and so to be placed in the common law stream. At the end of the first year, a single examination tested us on contract, tort and crime and another on jurisprudence. During the two years at Oxford, I attended lectures not only by the 'great men' — such as Herbert

4 Harold Luntz, 'The Collateral Source Rule Thirty Years On' in Peter Cane & Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (1998) at 377. Compare Australian Law Reform Commission, *Insurance Contracts* (1982) at 184–193.

Hart, Rupert Cross, John Morris and Tony Honoré — but I also had the benefit of one-to-one tutorials from the then young Brian Simpson, Tony Guest and Lennie Hoffmann. These taught me to think critically and to sharpen my analysis. Others whose lectures on torts-related topics I attended included Guenter Treitel, Peter Carter, Donald Harris and Douglas Payne. The last named was one of the first people I saw after my arrival in Australia from South Africa. On the way to Melbourne, our ship called at Fremantle. My wife and I were met by one of my BCL classmates, David Malcolm (now Chief Justice of Western Australia). He took us to the University of Western Australia for lunch with Douglas Payne, who had moved from Oxford to WA. In Oxford his lectures had not been popular, but I thought that they gave me a valuable grounding in the common law.

While in Oxford I read the standard text books, including Sir John Salmond and Robert Heuston, *Salmond on the Law of Torts* (12th ed, 1957), which I did not find much different from *McKerron*. But I was also introduced to John Fleming, *The Law of Torts* (1957). In his first chapter I recognised the law that I had seen practised, as opposed to the law I had been taught. I shall return to that after referring to one other event during my time in Oxford.

In January 1961 the Privy Council decided *The Wagon Mound (No 1)*.⁵ Arthur Goodhart, then Master of University College, for whom it was the successful culmination of a long campaign to establish foreseeability of harm as the criterion of liability for negligence, gave a lecture on the case, which I attended. As McHugh J was to say many years later, in relation to a passage in the judgment of the Privy Council,⁶ '[n]ot everyone has shared Lord Simonds' view that it is not consonant with current ideas of justice and morality that a defendant should be liable for all the consequences of a trivial act of negligence so long as they are direct.'⁷ Tony Honoré, for one, disagreed.⁸ I was in the Honoré camp, though I have since come to distinguish between property damage, as was at issue in that case, and personal injury because of the relative ease with which one can insure against property damage and because most such claims are really subrogation actions.⁹ One thing that must have influenced me was Fleming's book.

Fleming was obviously in the course of producing his book when he delivered his inaugural lecture on 3 October 1956 at what was then Canberra University College (later the Australian National University). He called it *Accident Law and Social Insurance* and I recently came across it for the first time. Reading it now, almost 50 years after its delivery, I find little to disagree with. The great themes of the book are all there. The law of torts has become essentially a system of accident compensation. The intentional torts, though important from a civil liberties point of view, do not occupy much of the time of the courts. The action for negligence predominates. Accidents are inevitable in our society and though we may strive to

5 *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound (No 1))* [1961] AC 388.

6 *Id* at 422.

7 *Nader v Urban Transit Authority of New South Wales* (1985) 2 NSWLR 501 at 537.

8 See now HLA Hart & Tony Honoré, *Causation in the Law* (2nd ed, 1985) at lxvi–lxvii.

9 See Harold Luntz & David Hamby, *Torts: Cases and Commentary* (5th ed, 2002) at 350.

diminish them, there are much better mechanisms for doing so than the supposed deterrent effect of the law of torts. The law of torts is there to allocate the losses that flow from the inevitable accidents. Insurance has transformed the way the losses are allocated.

Society has no interest in the mere shifting of loss between individuals for its own sake. The loss, by hypothesis, has already occurred, and whatever benefit might be derived from repairing the fortunes of one person is exactly offset by the harm caused through taking that amount away from another. The economic assets of the community are not increased, and expense is incurred, in the process of re-allocation.¹⁰

During the 19th century, fault on the part of the defendant was seen as a good reason for shifting the loss. However, the growth of third party liability insurance and vicarious liability has largely removed the deterrent effect of an award of damages against the defendant, because the tortfeasor seldom pays the damages personally. These mechanisms also mean that in practice losses are being transferred to people who are themselves free of fault. While there may be other good reasons to shift losses from injured people to enterprises and their insurers, requiring that the shift depend on the fault of a wrongdoer makes little sense and incurs unnecessary costs. In order to allocate the losses fairly, the nature of ‘fault’ has changed and no longer carries a notion of moral blameworthiness. Fourteen years later, Patrick Atiyah spelt out these points with great clarity in his ‘indictment’ of the fault system on six counts, demonstrating conclusively that, from the plaintiff’s point of view, it was often not fair to require proof of fault as a necessary constituent of the remedy. At the same time, it was sometimes unfair to defendants that ‘fault’ should be a sufficient criterion of liability.¹¹

In that context, Fleming in his inaugural lecture posed the crucial question:

The progress of society is linked to the maintenance and continuance of industrial operations and fast methods of transport, and must therefore suffer the harms associated with them. The question is simply, who is to pay for their cost, the hapless victim who may be unable to pin conventional fault on any particular individual, or those who benefit from the accident-producing activity?¹²

In particular, my practical experience would have endorsed the following:

[I]t must be remembered that a vast proportion of all claims, having a background of insurance, are settled out of court without resort to formal trial. Insurance companies prefer to settle for a reasonable sum rather than litigate, and it is only when claims are regarded as completely without foundation or wholly excessive that the matter is entrusted to court adjudication.¹³

10 John Fleming, *Accident Law and Social Insurance: Inaugural Lecture Delivered at the Canberra University College on 3rd October 1956* (1956) at 1.

11 Patrick Atiyah, *Accidents, Compensation and the Law* (1970) at 449–477. See, more recently, James Goudkamp, ‘The Spurious Relationship between Moral Blameworthiness and Liability for Negligence’ (2004) 28 *MULR* 343.

12 Fleming, above n10 at 7.

13 *Id* at 19.

I would also have concurred entirely with the penultimate sentence of the lecture:

If our future is to remain linked to a free enterprise economy, the advantage seems to lie in a continued growth of 'sponsor' or 'enterprise' liability, along the lines long charted by workmen's compensation and the vicarious liability of employers.¹⁴

4. *Workers' Compensation*

In the delict course that I studied, workers' compensation was not mentioned. We were taught cases like *Paris v Stepney Borough Council*,¹⁵ in which workers sued their employers at common law, as though they applied in South Africa. In fact, South Africa had a scheme along the lines of those found in North America, which made workers' compensation the exclusive remedy and prohibited action against the employer. In a society where most workers exposed to injury were black, who had no trade unions to look after them, there must have been little litigation in the area and the subject was not one noticed at the university. I discovered it during the period between completing my LLB and leaving to take up my scholarship at Oxford, a period when I continued to work as an attorney (solicitor). My father was employed to drive a van, delivering bread. He had a young black assistant who would take some of the loaves from the van on a bicycle to deliver to some of the customers. The young man fell off the bicycle one day and was injured. My father asked me to help him and the firm allowed me to take on the matter pro bono. I obtained some pittance for him, but his gratitude was enormous.

When I came to Melbourne, I was astonished at the plethora of case law on workers' compensation. The Victorian Parliament was going through one of its regular bitterly fought changes to the scheme. Completely new to a political debate of this sort, I tried to make some sense of the subject and published my first article, 'Workers' Compensation and a Victorian Amendment of 1965'.¹⁶ In the concluding section, I drew attention to the haphazard way in which some people were able to reap the benefits of workers' compensation, while others were excluded by virtue of some minor difference of circumstance. To illustrate this, I used a series of coupled letters of the alphabet in which one member of the couple recovered workers' compensation and the other did not. The examples were mostly drawn from the case law. The cases turning on functionally insignificant differences continued to arise and I was soon able to extend my examples through the whole alphabet.¹⁷ In the latest edition of the case book I have shortened the list again, pointing out merely that it could be extended almost endlessly.¹⁸

14 Id at 22.

15 [1951] AC 367.

16 (1966) 40 *ALJ* 179.

17 See Harold Luntz, David Hambly & Robert A Hayes, *Torts: Cases and Commentary* (2nd ed, 1985) at 33–34.

18 Luntz & Hambly, above n9 at 64 and 65, 66.

I probably did not realise when I obtained the compensation for my father's assistant that the money did not come directly from the employer, but from a statutory fund based on the Canadian model and later adopted, for instance, under the WorkCover schemes of Victoria and South Australia. Had I done so, I might have disagreed with the final sentence of Fleming's lecture.

In this manner, instead of society as a whole making itself responsible for the cost of repairing the casualties of accidents through welfare grants, the burden can be allocated with greater discrimination to that segment of the public which reaps the benefits of the accident-producing activity and, by the same token, may fairly be expected to underwrite its losses.¹⁹

In 1987–1988 I conducted a review for the Commonwealth of the law of seafarers' compensation, which had become very outdated. I was assisted by a former student of mine at Melbourne, Alan Clayton. We interviewed those on both sides with an interest in the outcome and produced a discussion paper and then a report.²⁰ We strongly recommended the establishment of an industry fund for the payment of compensation, instead of the system of employer's liability that had prevailed. Although the legislation that followed, the *Seafarers Rehabilitation and Compensation Act* 1992 (Cth) rejected this (and other) recommendations in our report, I was subsequently appointed Deputy Chair of the Seafarers Rehabilitation and Compensation Authority, which oversaw the operation of the scheme, and served as such for five years. A few years earlier, I had assisted the Victorian Government with the development of the *Accident Compensation Act* 1985 (Vic) and later for about two and a half years served as a part-time senior member of the Workcare Appeals Board, which gave me an insight into the sorts of claims made under such schemes. Very few disputes before the appeals board related to traumatic injury; nearly all concerned back, shoulder, knee and other joints, where the issue was mostly whether the continuing condition that rendered the worker unfit for the previous heavy labouring was due to the employment or natural degeneration. The method by which the Board went about its work has been described by its chairman.²¹

5. *Academic Apprenticeship*

I should now go back in time. After completing my BCL in Oxford, I returned to the University of the Witwatersrand for three years as a senior lecturer. Delict was one of the courses I taught. More significantly, I learnt to write for academic publications under the tutelage of Bobby Hahlo and Ellison Kahn. The very small faculty was responsible for the production of the *South African Law Journal* and the *Annual Survey of South African Law*. All members of staff were expected to

19 Fleming, above n10 at 22.

20 Australia, Department of Social Security, *Seamen's Compensation Review: Discussion Paper* (1987); Australia, Department of Social Security, *Seamen's Compensation Review: Report* (1988).

21 Julian Gardner, 'The Victorian Workcare Appeals Board: An Investigatory Model' (1993) 1 *TLJ* 154.

write case notes for each issue of the *SALJ* and one or more chapters of the *Annual Survey*. There are over a dozen case notes that I wrote for the *SALJ* during the period, nearly all on delict or damages. While Paul Boberg was on leave, I wrote the chapter on the Law of Delict for the 1962 *Annual Survey*. This stood me in good stead when I later wrote the chapter on the Law of Torts in the *Annual Survey of Australian Law* in almost every year from 1976 to 1994.

Ellison Kahn taught me the importance of ‘house style’ and perfect proofreading. As General Editor of the *Torts Law Journal* since its inception in 1993, I have tried to emulate his work, though I am unable to do as he did and check every reference in the library.

6. *Teaching Torts in Melbourne*

On the ship from South Africa to Australia, I prepared for the task of teaching torts by again reading Fleming’s book, this time the 3rd edition (1965). It had not initially been well received in Melbourne. The first edition had been reviewed so unfavourably in the *Melbourne University Law Review* by EG Coppel that the editors had thought it necessary to give Fleming a right of reply.²² Coppel was later to conduct a Royal Commission for the Victorian government inquiring into compulsory motor accident third party insurance, in which he expressed an inability to understand the concept of no-fault.²³

On arrival in Melbourne, I took over a class from a teacher who had left the Law School and who, I was told, had spent the first two terms discussing *Rylands v Fletcher*!²⁴ The centenary of Lord Blackburn’s formulation of the rule in the lower court²⁵ was to take place the following year and, though it could be seen as an example of enterprise liability, it was not truly a case demonstrating how the law of torts applied in modern day practice. I plunged immediately into the law of negligence. The book we were using was the second edition (1962) of the first Australian case book, W L (Bill) Morison, *Cases on Torts* (1955), ‘[p]ublished at the request of the Australian Universities Law Schools Association’. In that edition Morison was joined by Norval Morris and Robin Sharwood. Morris having left the University of Melbourne for Chicago just before I arrived, my colleague Cliff Pannam replaced him as co-author of the third edition (1968). This book starts with the intentional torts and negligence plays a relatively minor role. It is very much a black letter book. As the years progressed, I felt increasingly dissatisfied with it. I would start teaching at the beginning of each year from towards the middle of the book and try to relate the law to the real world. Two models eventually presented themselves to me as much more in keeping with my own aims.

In 1970–1971 I took sabbatical leave in North America, the first semester at Queen’s University in Ontario and the second at the University of California at

22 (1957) 1 *MULR* 272 and 274.

23 Victorian Royal Commissioner EG Coppel, *Royal Commission on Motor Car Third-Party Compulsory Insurance*, Report (1960).

24 (1868) LR 3 HL 330.

25 *Fletcher v Rylands* (1866) LR 1 Ex 265.

Berkeley. With a young family, and even though the Australian dollar was much stronger than either the American or Canadian currency, I could not afford to live in America without supplementing my income. Accordingly, I took teaching positions at both institutions. The post at Berkeley was arranged for me by John Fleming, with whom I had corresponded and who was himself to spend the semester on sabbatical leave. Fortunately, he did not go to Europe for some weeks after my arrival and I was able to meet him in person. In view of the large influence he had on my thinking, I was particularly pleased, though greatly astonished, when in 2000 I was awarded the inaugural Professor John G Fleming Memorial Award for Torts Scholarship.

While I was overseas Patrick Atiyah published his *Accidents, Compensation and the Law* (1970), the first in Weidenfeld & Nicolson's Law in Context series. Shortly after my return, I attended the annual conference of the Australasian Law Schools Association (as ALTA was then called) in Adelaide. At the conference, Atiyah put forward his model for teaching an accident compensation course instead of the traditional torts course. At first I was sceptical as to the feasibility of this, given the requirements for admission to the profession, but of its merits I had no doubt. It was one of the inspirations for the case book that I produced with David Hambly and Robert Hayes, *Torts: Cases and Commentary* (1980). The other model for the case book was the one produced by Bob Hepple and Martin Matthews, *Tort: Cases and Materials* (1974). Bob Hepple had taught me at Wits, though not torts. He had escaped to England, where he went on to an eminent career (he is now Sir Bob). There was no doubt that his approach to the law of torts accorded with my own. We did not abandon the traditional intentional torts completely, though I left the writing of those chapters largely to my co-authors. Negligence, however, was in the forefront and dominant throughout. I wrote a long introductory chapter, seeking to place the law of torts in its social context and emphasising its actual operation. It also drew attention to the alternatives to the law of torts for compensating victims of accidents.

7. *Becoming Convinced of the Alternative*

The period when I started teaching at Melbourne was a remarkable one in other jurisdictions. It saw the publication on three continents of three similar critiques of the common law tort system and recommendations for its replacement by a comprehensive system of compensation insurance. The critiques and proposals were contained in the *Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand* (Woodhouse Royal Commission, 1967); Terence Ison's *The Forensic Lottery* (1968), published in England before Terry's move to Canada; and, in the United States, an article by Marc A Franklin, 'Replacing the Negligence Lottery: Compensation and Selective Reimbursement'.²⁶ In North America (and South Africa) the common law had been replaced for work-related accidents by workers' compensation, while in the United Kingdom (and Australia) workers' compensation provided an alternative

²⁶ (1967) 53 *Va LR* 774.

remedy. The debate which led to the introduction of workers' compensation had been fought in the nineteenth century and the early part of the twentieth. As already mentioned, I had developed an interest in the subject. In the period to which I am now referring there appeared a little book by David Hanes, *The First British Workmen's Compensation Act, 1897* (1968), which reminded us of that debate in England.²⁷ That debate had shown the inadequacy of the common law, particularly as a result of what Fleming called the 'unholy trinity' of defences — contributory negligence, voluntary assumption of risk and common employment — to provide compensation to workers for their injuries. It also showed the need to make industry pay its way by including some part of the value of those injuries in the costs of production.

The movement to extend the principles of workers' compensation to no-fault motor accident schemes went back at least to the 1930s.²⁸ It emphasised the artificiality of deciding where fault lay in a collision between fast moving vehicles; that the decision often depended on reconstructing flawed memories; that the deterrence of careless driving was to be found in fear for one's own safety and in the widespread enforcement of criminal penalties; and, as with workers' compensation, that inevitable injuries should be seen as part of the cost of motoring. The arguments were revived by the publication of Robert E Keeton and Jeffrey O'Connell, *Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance* (1965). The province of Saskatchewan in Canada had enacted such a scheme a few years earlier. The Keeton-O'Connell plan gave birth to the first such scheme in the United States, in Massachusetts, just as I visited that country for the first time. But the three proposals in 1967–1968 went much further.

The Woodhouse Royal Commission had started its life as an inquiry into the workers' compensation scheme in New Zealand, which had become somewhat antiquated. It recognised that the needs of workers are the same whether they are injured at work or at home or during recreation. It also recognised that workers were supported by those currently out of the workforce, who also needed compensation when injured. It drew attention to the many flaws of the tort system of compensation, including its long delays and high costs. The method of compensating at common law, by means of a lump sum that required impossible predictions and seldom proved sufficient, was also targeted. Boldly exceeding its terms of reference, the Commission recommended the replacement of the common law, workers' compensation and other systems by a comprehensive accident compensation scheme based on five principles: community responsibility, comprehensive entitlement, complete rehabilitation, real compensation and

27 See also Peter Bartrip & Sandra Burman, *The Wounded Soldiers of Industry: Industrial Compensation Policy, 1833–1897* (1983). Two of my sabbatical leaves were spent at the Centre for Socio-legal Studies in Oxford, where I met the authors of this book. One of them, Peter Bartrip, was working on a further history, which I read in manuscript. It was published as Peter Bartrip, *Workmen's Compensation in Twentieth Century Britain: Law, History and Social Policy* (1987).

28 Committee to Study Compensation for Automobile Accidents, Columbia University, Council for Research in the Social Sciences, *Report* (1932).

administrative efficiency. I read the report while travelling by train between Melbourne and Perth to the AULSA conference in August 1968 and was completely convinced. The emphasis on community responsibility explains why I said above that I would now disagree with the final sentence of Fleming's inaugural lecture.

I was particularly receptive to the criticism of the lump-sum method of awarding damages. In 1967, South Australia had enacted legislation allowing for interim awards and later final assessments²⁹ and when the adoption of such a provision in Victoria was rejected by the Chief Justice's Law Reform Committee, of which I had become honorary secretary, I filed a dissenting report.³⁰ I did have some minor successes while secretary of the CJLRC. One was to persuade it to recommend legislation that became the first occupiers' liability statute in Australia,³¹ just before the High Court in *Australian Safeway Stores Pty Ltd v Zaluzna*³² rendered the statute unnecessary by itself sweeping away the old rigid distinctions between categories of entrants and absorbing this branch of the law into the general principles of negligence. Another was to reform the law of damages for wrongful death. The wrongful death damages package included providing for the non-survival to the estate of damages for future loss of earning capacity,³³ broadening the range of persons who can claim under Lord Campbell's Act to all 'dependants' (widely defined)³⁴ and removing the attribution of contributory negligence of the deceased to the claimants.³⁵ This last point, which was modelled on the position in New South Wales, has survived the recent spate of 'tort law reform' in Victoria, but not in its state of origin.³⁶

I read *The Forensic Lottery* (1967) when I was due to spend the first semester of my 1970–1971 sabbatical at Queen's University, where author Terry Ison was then teaching. It seems that though he met and spoke to the members of the Royal Commission, he and they had arrived at their criticism of the common law and their solutions independently. I cannot remember when I read Franklin's article and, as I have never met or corresponded with him, I do not know if he too reached similar conclusions independently. Stephen Sugarman, a successor of John Fleming in teaching torts at Boalt Hall, the Law School of the University of California at Berkeley, where I had spent the second semester of my 1970–1971 sabbatical, later wrote *Doing Away with Personal Injury Law: New Compensation Mechanisms for Victims, Consumers, and Business* (1989). I did not meet him until 1996.

When I mentioned to one of my colleagues at Melbourne (who is today the Honourable Mr Justice Maurice Cullity of the Ontario Superior Court of Justice) that I found the prospect of teaching at Berkeley daunting, he flippantly replied,

29 *Supreme Court Act* 1935 (SA) s30B.

30 *Damages by Way of Periodical Payments* (1968).

31 Now the *Wrongs Act* 1958 (Vic) Pt IIA.

32 (1987) 162 CLR 479.

33 *Administration and Probate Act* 1958 (Vic) s29(2)(c)(iii).

34 *Wrongs Act* 1958 (Vic) s17.

35 *Wrongs Act* 1958 (Vic) s27(4).

36 *Civil Liability Act* 2002 (NSW) s5T.

‘[a]s long as you can spell Calabresi, you’ll be all right.’ Guido Calabresi was already making his mark with his application of economic analysis of law to the fields of tort. Before I arrived in Berkeley, he published *The Costs of Accidents; a Legal and Economic Analysis* (1970) and I set it as a subject for a presentation by a student in my class. The second word of the title is often misprinted as ‘cost’, but it is important to note the plural, since the insight which the book provided was that there are primary, secondary and tertiary costs of accidents. The book taught that the elimination of all accidents is an impossible goal and that the aim should be to minimise the sum of the costs of accidents, their avoidance and the administration of meeting the other costs.

Later, economic analysis of law was to sweep the American academy, particularly after the publication of Richard Posner’s *Economic Analysis of Law* (1972). Unlike Calabresi’s work, the analysis emanating from the Chicago school and its disciples never impressed me. In my BA degree, I had completed two courses in economics and so was equipped with the rudiments to understand the theory. As I had done as an undergraduate, I questioned most of the assumptions on which the economic analysts of this school based their conclusions, finding many of them completely unrealistic. I found support for my view in the criticism of economic analysis by Patrick Atiyah in a chapter of *Accidents, Compensation and the Law*,³⁷ which was reinforced when I sat in on Atiyah’s seminars on the topic in Oxford during a later sabbatical. In each edition of my case book I have retained a passage from a later article by Atiyah, in which he wrote:

Once it had been thoroughly and convincingly demonstrated that the torts system was, by any comparable standard, highly inefficient in practice, new legal and economic theorists appeared on the scene to assure us that it was, nevertheless, extremely efficient in theory.³⁸

Similarly, in later years I found myself unable to sympathise with the corrective justice theorists, such as Ernest Joseph Weinrib, *The Idea of Private Law* (1995). Again, it seemed to me that they showed little understanding of the way the torts system worked in the real world.

My own knowledge of the ‘real world’ was not confined to the small amount of practice in South Africa. My second sabbatical, in 1976–1977, was spent at the Centre for Socio-Legal Studies in Oxford. The head of the Centre was Don Harris, who as a young fellow of Balliol had lectured to me during my BCL course and sparked my interest in the theory of the law of damages, which later led me to writing my book *Assessment of Damages for Personal Injury and Death*, the first edition of which appeared in 1974. My purpose in visiting the Centre for a whole year was to learn more about the actual process of recovery of damages in relation to different types of accidents, as well as to start work on the case book, the first edition of which was published in 1980. The members of the Centre, from diverse

37 (1970) at 566–600

38 Patrick Atiyah, ‘No-Fault Compensation: A Question that will not Go Away’ (1980) 54 *Tulane LR* 271 at 279.

disciplines — such as sociology, economics, psychology and statistics, as well as law — were at that time working on a large empirical survey the results of which were analysed and published in Donald Harris et al, *Compensation and Support for Illness and Injury* (1984). I returned to the Centre for my next sabbatical, in 1984, the year of publication of the work, though it had to some extent been overtaken by the survey conducted for the Royal Commission on Civil Liability and Compensation for Personal Injury, *Report* (1978) (the Pearson Commission). Both these studies confirmed, and did not contradict, what I had learnt from reading between the lines of hundreds of cases on damages for personal injury.

I have also experienced through direct involvement certain aspects of class actions under the American tort system. In 1994 I served on the ‘Foreign Fracture Panel’ appointed by the Federal District Court for the Southern District of Ohio to devise formulae for compensation of foreign residents in the settlement of a class action. I have described this in ‘Heart Valves, Class Actions and Remedies: Lessons for Australia?’³⁹ Then, in 1999, having been engaged as an expert on the law in Australia, I sat through a week’s hearings of the bankruptcy application by Dow Corning in Midland, Michigan, in relation to the global settlement of claims arising out of breast implants.⁴⁰

From all this, it was clear that the Woodhouse Royal Commission in New Zealand in 1967 was right to castigate the common law system for providing compensation haphazardly to a lucky few after long delays and at great expense. Further, the common law did little for deterrence and often retarded rehabilitation. The only sensible solution was to sweep it all away and replace it with a comprehensive social insurance scheme that would not discriminate as to the causes of injury, that would meet people’s needs swiftly and adequately and would devote resources to prevention of accidents through other means and to social and vocational rehabilitation.

8. *Developments in Australia 1954–1986*

A. *No-fault Motor Accidents*

Meanwhile, the debate over no-fault motor accident compensation had spread to Australia. As early as 1954, Mr EG (Gough) Whitlam apparently raised the issue with the Australian Labor Party. In 1959 he brought the matter up in Parliament⁴¹ and was also reported as having said outside Parliament:

The victims of road accidents might be more justly and promptly compensated during their incapacity or bereavement if the Commonwealth Department of

39 Nicholas Mullany (ed), *Torts in the Nineties* (1997) at 72–101.

40 For a review of my evidence and that of the other experts on foreign law, see *In re Dow Corning Corp* 244 BR 634 at 659–62 (1999); on appeal, 255 BR 445 at 514–520 (D Mich, 2000) (affirming the decision in relation to the foreign claimants); on further appeal, 280 F3d 648 at 662 (CA, 6th Circ, 2002) (again affirming the decision in relation to the foreign claimants); cert denied: *Class Five Nevada Claimants v Dow Corning Corp*, 537 US 816 (2002).

41 Edward Gough Whitlam, Australia, House of Representatives *Parliamentary Debates (Hansard)*, 29 September 1959 at 1485–6.

Social Services made periodical payments equivalent to their prior earnings, irrespective of negligence.⁴²

Years later, I participated in the debate to a small degree, appearing at one forum along with Mr Ken Marks QC (later Marks J), the principal author of a booklet, *No Fault Liability* (1972), which put forward proposals by the Victorian Bar Council, the Law Institute of Victoria and the Victoria Law Foundation. Those proposals, which in my view did not go far enough and were designed to preserve the lucrative income of the legal profession from the existing system, resulted in the Victorian legislature enacting an ‘add-on’ scheme that provided limited compensation on a no-fault basis for all motor accident victims without impeding access to the common law for those who could prove fault.⁴³ This scheme came into operation on 12 February 1974, some six weeks before the comprehensive scheme that was enacted in New Zealand after the Woodhouse Royal Commission and which commenced operation on 1 April 1974.⁴⁴ Towards the end of the year a scheme similar to the Victorian one came into operation in Tasmania, after I had made at least one trip to the island to speak to law reformers there.⁴⁵ Later, the Northern Territory enacted a scheme, which initially preserved the common law only for capped non-pecuniary loss and then abolished that too, so that no-fault compensation became the exclusive remedy for Territory residents.⁴⁶ I was also twice invited to Queensland to debate against Mr Gerry Murphy the merits of no-fault, but had no success in persuading that State to move from its attachment to the common law.

One objection put to me during that debate was that legislative schemes were constantly subject to political interference, whereas the common law was in the hands of independent judges. Even at that time I was able to point to examples of legislative interference with the common law. For instance, when the High Court in *Todorovic v Waller*⁴⁷ held that future losses should be discounted at 3 per cent, a compromise figure that at least three of the judges thought too high, legislatures increased it to 5 per cent, 6 per cent or even 7 per cent, thereby reducing the recovery of the most seriously injured. Anyone who has seen what legislatures have done to the common law since 2001 can no longer possibly think that the common law is any more protected from political interference than legislative compensation schemes.⁴⁸

In 1970 Mr Whitlam had met Woodhouse J in New Zealand and been persuaded of the wisdom of a broader comprehensive compensation scheme.⁴⁹ In a speech to the Labor Party in 1971 he referred to New Zealand being about to

42 (1959) 33 ALJ 124.

43 *Motor Accidents Act* 1973 (Vic).

44 *Accident Compensation Act* 1972 (NZ).

45 *Motor Accidents (Liabilities and Compensation) Act* 1973 (Tas).

46 *Motor Accidents (Compensation) Act* 1979 (NT).

47 (1981) 150 CLR 402.

48 Compare Peter Underwood, ‘Is Ms Donoghue’s Snail in Mortal Peril?’ (2004) 12 *TLJ* 39.

49 Edward Gough Whitlam, *The Whitlam Government 1972–1975* (1985) at 636; Geoffrey Palmer, *Compensation for Incapacity: A Study of Law and Social Change in New Zealand and Australia* (1979) at 133.

‘enjoy’, as a result of the Woodhouse report, ‘comprehensive “no fault” protection against the consequences of accidents of every kind’.⁵⁰ In other speeches he picked up my alphabetical examples of the arbitrary distinctions made by workers’ compensation legislation. His policy speech for the 1972 election promised that, on election, the ALP would establish a National Compensation scheme, which would ‘reduce hardships imposed by one of the great factors for inequality in society — inequality of luck’.⁵¹ One of his first acts on taking office in 1972 was to obtain the approval of the New Zealand Prime Minister to the release of Owen Woodhouse from his judicial duties so that he could head an inquiry into the implementation of such a scheme in Australia. I have written for a New Zealand audience a brief description of the course of that inquiry, the reaction to it and the aftermath.⁵² There is no need to repeat all of that here. Several themes from the Report⁵³ will be taken up later in this paper. Suffice it to say here that a comprehensive accident compensation scheme has never been implemented in Australia.

The failure of the Woodhouse proposals in Australia did not still the no-fault debate in the motor accident field. Its emphasis on rehabilitation was taken up the next time the issue was looked at in Victoria.⁵⁴ Some years after the failure of the Woodhouse scheme, a former colleague of mine at the University of Melbourne, Ronald Sackville (later Sackville J), became chair of the New South Wales Law Reform Commission. He obtained a reference on transport accident compensation, with which I assisted to a small degree. Another colleague from Melbourne, Marcia Neave, became director of research and she gathered an enthusiastic and highly competent team to prepare the Commission’s background papers and report.⁵⁵ Once again, it demonstrated on the basis of empirical research the flaws in the common law system, both as to liability and as to the method of payment in a lump sum, clearly evaluated the alternatives and recommended a no-fault scheme as the exclusive remedy for transport accidents, with fine detail as to the benefits to be paid. No New South Wales government has ever had the courage to implement it in full. An attempt to introduce the scheme as Transcover,⁵⁶ but retaining the fault element, was as doomed to failure as a production of *Hamlet* without the prince.

The Victorian government, however, was willing to accept most of its principles.⁵⁷ Unfortunately, the government lacked a majority in the Legislative

50 Edward Gough Whitlam, ‘Traffic Injury Compensation’, ALP Seminar on Traffic Collisions, Terrigal, NSW, 31 October 1971.

51 Whitlam, above n49 at 637; Palmer, above n49 at 133.

52 Harold Luntz, ‘Looking Back at Accident Compensation: An Australian Perspective’ (2003) 34 *Victoria U of Wellington LR* 279.

53 Australia, National Rehabilitation and Compensation Committee of Inquiry, *Compensation and Rehabilitation in Australia: Report of the National Committee of Inquiry* (1974).

54 See Victoria, Board of Inquiry into Motor Vehicle Accident Compensation in Victoria, *Report of the Board of Inquiry into Motor Vehicle Accident Compensation in Victoria* (1978).

55 New South Wales Law Reform Commission, *A Transport Accidents Scheme for New South Wales* (1984).

56 *Transport Accidents Compensation Act* 1987 (NSW), repealed by the *Motor Accidents Act* 1988 (NSW) s5.

57 Victoria, *Transport Accident Compensation Reform: Government Statement* (1986).

Council and had to accept a compromise, which saw some of the long-term benefits reduced for the less seriously injured and the retention of the common law for those who could prove fault and could surmount a threshold.⁵⁸ The establishment of the Transport Accident Commission to administer the scheme has led to Victorian motorists enjoying far more stable and almost always lower levies on private motor vehicles than the premiums paid by New South Wales motorists. This is clearly demonstrated by a chart produced by the Australian Competition and Consumer Commission,⁵⁹ which was intended to show the effects of competition in the New South Wales motor insurance industry and merely used the Victorian TAC as a comparator without drawing the obvious inference to which the graph points. At the same time, everyone injured in a motor accident in Victoria has medical and rehabilitation expenses met for life, whereas in New South Wales many miss out. Thus in *Derrick v Cheung*⁶⁰ the High Court, emphasising the need to prove fault, denied compensation to a young child who ran on to the road and was run down. This has been followed in subsequent cases⁶¹ and no doubt in the rejection of many claims.

Not only have motorists in Victoria paid less than motorists in New South Wales, but the Victorian government has reaped many dividends from the TAC. In addition, without the free rider problem that discourages competing insurers from addressing such issues, the TAC has spent large sums on road safety. It has led the world with its dramatic education programs and advertising; it has provided funds to the police for random breath-testing vehicles and speed cameras, and to road authorities for the elimination of 'black spots'. Victoria has benefited so that at all relevant times the road fatality rate per 100 million kilometres driven has been lower in Victoria than in New South Wales⁶² and the rate per 10,000 population has also been almost always lower after being virtually identical in 1973.⁶³ Similarly, the TAC and its predecessor, the Motor Accidents Board, established road trauma acute hospital facilities and rehabilitation units, which no private insurers had done in Victoria in the years before the first no-fault scheme came into operation.⁶⁴

58 See *Transport Accident Act 1986* (Vic).

59 *Second Insurance Industry Market Pricing Review* (2002) at 87 see figure 3.10.

60 (2001) 181 ALR 301.

61 *Harper v Blake* (1999) 29 MVR 389 (NSW CA); *Viet Hong Lieng v Delters* (2002) 36 MVR 401 (NSW CA); *Dennis v Keep* [2002] NSWCA 227 (Unreported, Heydon JA, Foster AJA & Bergin J, 11 July 2002); *Spanwick v Laguzza* (2002) 35 MVR 501 (NSW CA); *Knight v Maclean* [2002] NSWCA 314 (Unreported, Meagher & Heydon JJA & Young CJ, 23 September 2002).

62 Department of Transport and Regional Services and Australian Transport Safety Bureau, *Road Crash Data and Rates Australian States and Territories 1925 to 2002* (2003) at Table 19.

63 *Id* at Table 17.

64 See generally, Board of Inquiry into Motor Vehicle Accident Compensation in Victoria, above n54. See also my paper Harold Luntz, 'Some Aspects of the Relation between Insurance and Prevention in the Area of Transport' in Tore Larsson & Alan Clayton (eds), *Insurance and Prevention* (1994) at 47.

B. *The Woodhouse Report — Safety and Rehabilitation*

The approach of the TAC accords with that recommended by the Woodhouse Committee of Inquiry into Compensation and Rehabilitation in Australia.⁶⁵ It put safety (or prevention) in the forefront. It has been shown repeatedly that a systems approach is much more effective in reducing accidents than imposing liability on individuals, even if insurance did not blunt the deterrent effect. Aviation is often cited as an example. The airline industry, shielded from the full effects of the common law by the Warsaw Convention in 1929, though subject to some strict liability, went from being ‘extra hazardous’ to one of the safest. This was achieved through mechanisms such as ‘incident reporting’, research and technological change that limited the scope for human error, rather than attempting to influence human behaviour as a result of the imposition of damages awards dependent on proof of fault. The truth of this has recently been acknowledged in relation to medical adverse events.⁶⁶ The establishment of bodies such as the National Occupational Health and Safety Commission, the Australian Transport Safety Bureau and the Australian Institute of Health and Welfare has improved the possibilities of research into the true causes of accidents, but had the Woodhouse Report been implemented, data would have been collected at a central source, which would have enabled appropriate measures to be taken to reduce the incidence of accidents of every type.

The Woodhouse Committee placed rehabilitation after safety, but still ahead of compensation. Meares J, the second member of the Committee, was particularly interested in this and was largely responsible for the second volume of the Report, which dealt with this topic. Many reports, before and after, drew attention to the woeful inadequacy of rehabilitation facilities in Australia. The next decade saw workers’ compensation and motor accident systems give much greater attention to these needs.⁶⁷ A comprehensive system could have done even more.

C. *The Woodhouse Report — Compensation*

Despite the priority given to safety and rehabilitation, the success of which in the long run would have diminished the need for compensation, the immediate task of the Woodhouse Committee was to devise a comprehensive compensation scheme for accidents to implement the Whitlam Government’s manifesto. Some representatives of the legal profession called for the retention of the common law alongside any comprehensive scheme, in much the same way as was adopted in the first no-fault motor schemes in Victoria and Tasmania. It was clear, however, that the flaws of the common law insurance schemes — their expense, delays,

65 See National Rehabilitation and Compensation Committee of Inquiry, above n53.

66 See, for example, Linda Kohn, Janet Corrigan & Molla Donaldson (eds), *To Err Is Human: Building a Safer Health System* (2000).

67 See Colin Phegan, ‘From Compensation to Care — A Change of Direction for Accident Victims?’ (1985) 10 *Adel LR* 74; Marcia Neave, ‘The Place of Rehabilitation in Accident Compensation Schemes’ (1985) 10 *Adel LR* 98; Alan Clayton, ‘Attack upon the Citadel: Reform of Australia’s Anti-rehabilitation Statutes’ (1986) 3 *Journal of Occupational Health & Safety — Australia New Zealand* 351.

concealment of the true causes and anti-rehabilitative effects — made this impossible. The Woodhouse Committee demonstrated that when properly measured over time, the periodical benefits proposed matched the lump sums that the common law awarded for only a small minority of accidental injuries. Occasionally today, it is proposed that as a solution to our recurring insurance ‘crises’, we should adopt a comprehensive scheme such as has now been operating for over 30 years in New Zealand. One then often encounters criticism on the basis of the alleged inadequacy of the benefits in that country. The comparison that is almost always made is between the benefits for non-pecuniary loss, entirely overlooking the continuing and certain benefits for loss of earning capacity. Over a lifetime, the earnings-related benefits paid in New Zealand are likely to be much, much higher than lump-sum damages for loss of earning capacity calculated with a discount rate of 5 per cent – 7 per cent per annum (depending on the jurisdiction) and reduced by 15 per cent for ‘contingencies’ (as in NSW). Even if one improperly confines one’s attention to non-pecuniary loss alone, the comparison between the New Zealand scheme and the common law is not unfavourable to New Zealand in the case of the most severe injuries when considered, as it should be, prior to any accident from behind a veil of ignorance. Non-pecuniary damages might at common law amount to \$400,000 (and they are now lower in most Australian jurisdictions). However, there is at best a 25 per cent chance (probably even less) of recovering such a sum when one becomes a quadriplegic through, say, diving into the sea or a creek. In economic terms, this makes the lump sum worth only \$100,000, which is the same amount (plus indexation) as is available in New Zealand for all who suffer catastrophic injuries. Further, the New Zealand lump sum cannot be reduced for contributory negligence as happens in many common law cases.⁶⁸

I wrote a little book, *Compensation and Rehabilitation* (1975), reviewing the Report of the Committee. It was sympathetic to the aims of the Report and its recommendation for replacement of the common law, but was critical of some of the minor details. Perhaps I was over-influenced by the common law perspective in not criticising the Report’s acceptance of the need to replace a high percentage of lost earnings. My view on this changed as a result of contrary views from several sources. One was John Keeler’s review of the Report.⁶⁹ Another was the submission of the Social Welfare Commission to the Senate Standing Committee on Constitutional and Legal Affairs after the Bill to give effect to the recommendations of the Report had passed the House of Representatives and been referred to that Committee by the Senate.⁷⁰ A third was a lecture given by Richard Downing, then head of the Institute for Social and Economic Research at

68 Compare *Swain v Waverley Municipal Council* (2005) 213 ALR 249.

69 (1975) 5 *Adel LR* 121; see also his subsequent review of Geoffrey Palmer, *Compensation for Incapacity: A Study of Law and Social Change in New Zealand and Australia* (1979) in (1981) 7 *Adel LR* 527.

70 Australia, Parliament, Senate, Standing Committee on Constitutional and Legal Affairs, *Inquiry into the Clauses of the National Compensation Bill 1974 (Hansard)*, 28 February 1975, 397–415, esp at 399–403.

Melbourne University and also Chairman of the Australian Broadcasting Corporation.⁷¹ I realised then that, in Geoffrey Palmer's words, earnings-related compensation led to 'redistribution in the wrong direction',⁷² was discriminatory against those not in the workforce or temporarily out of it — particularly women, children and the congenitally disabled — and was inconsistent with other social welfare benefits. I have since become a passionate advocate against earnings-related benefits at common law or under any substitute.⁷³ Essentially, I would compensate for needs, not losses. There is obviously room for disagreement on what amounts to needs and whether there is need for income support where there are alternative sources available, but I also believe that social insurance benefits should not be means tested. This is too large an issue to argue here.

This change of mind and consideration of the broader issues lay in the future. Having made a submission to the Senate Committee while it was considering the National Compensation Bill 1974 (Cth), I was invited by the Committee to assist it with the more technical elements. I spent some time in the Old Parliament House, Canberra, working on the submissions to the Committee and the wording of the Bill, with one ear to the intercom system, which was broadcasting the debates in the House on the 'loans affair' that was leading to the fall of the Whitlam Government. My work was ultimately published by the Committee as an Appendix to its own report.⁷⁴ That report recommended that the Bill be withdrawn and redrafted. The main reason for this brings us to another matter that has so far not been mentioned, the relationship of accident to sickness.

D. Incapacity from Sickness

In the foundation document of the welfare state in the United Kingdom, Sir William Beveridge wrote: '[a] complete solution is to be found only in a completely unified scheme for disability without demarcation by the cause of disability.'⁷⁵ The Woodhouse Royal Commission in New Zealand was aware of this, but confined its recommendations to accidents, with a long-term goal of extending the scheme to sickness. Patrick Atiyah in *Accidents, Compensation and the Law* (1970) drew attention to the much larger numbers of people affected by illness and disease than by accidents and was then in favour of using the industrial injuries scheme that had replaced workers' compensation in the United Kingdom

71 Richard Downing, *Social Reconstruction, Social Welfare and Self-Reliance*, George Judah Cohen Memorial Lecture 1974 (1975) at 19.

72 Palmer, above n49 at 387. See also the paper by Stephen Sugarman in this thematic issue under the heading 'III. Income Replacement: Progressive v Regressive'.

73 See Harold Luntz, *Assessment of Damages for Personal Injury and Death* (4th ed, 2002) at 13–41 and 301–321; Harold Luntz, 'Damages for Personal Injury: Rhetoric, Reality and Reform from an Australian Perspective' (1985) 38 *Current Legal Problems* 29; Harold Luntz, 'Keeping Professors in the Comfort to Which They Have Grown Accustomed' (1995) 3 *TLJ* 1; Harold Luntz, 'Compensation for Loss of an Economic Nature' (1998) 39 *Le Cahiers de Droit* 491.

74 Commentary on the clauses of the National Compensation Bill 1974 (Cth), published in part as chapter 18 of the Report of the Senate Committee on Constitutional and Legal Affairs, *The Clauses of the National Compensation Bill* (1975).

75 *Social Insurance and Allied Services* (Cmd 6404, 1942) at 38–39.

as a model for all disability. When the Whitlam Government instituted the Inquiry into Compensation and Rehabilitation in Australia, it announced its commitment to the introduction of a scheme for accidents. Once the inquiry was underway, it extended its terms of reference, directing it to inquire also into whether and how the scheme should cover the rehabilitation and compensation of every person who suffers physical or mental incapacity or deformity by reason of sickness or congenital defect. This was to include death resulting from such sickness or defect.⁷⁶ The Committee did integrate incapacity from sickness and congenital conditions into its recommended scheme, though there were certain differences. For instance, there was to be a longer waiting period before payment of compensation commenced in the case of a person incapacitated by sickness (three weeks) than in the case of a person who suffered personal injury (one week).⁷⁷ The Senate Committee had evidence that the accident part of the scheme could be implemented at no greater cost than the existing compensation schemes, but that the sickness part would require finding large additional funds.⁷⁸ There were also constitutional concerns. It recommended that the accident scheme be implemented first and the sickness part be delayed for further consideration thereafter.⁷⁹ The Bill was redrafted to take account of this and other recommendations of the Senate Committee and was ready for reintroduction into the House of Representatives on 11 November 1975, the day the Whitlam government was dismissed by the Governor-General.

Jane Stapleton chose to address the issue of compensation for disease for her DPhil thesis at Oxford University under the supervision of Patrick Atiyah.⁸⁰ I had the good fortune to act as one of the examiners of the thesis during my visit to the Centre for Socio-Legal Studies and to meet Jane for the first time. It remains a challenge to all of us to find a way to deal with the much more significant problem of incapacity due to disease. While eventually incapacity due to sickness should undoubtedly be integrated with a comprehensive accident compensation scheme, I do not believe that we should postpone providing a remedy for the problems presented by the common law; we should immediately move to replace the common law insurance schemes with a much more efficient, non-discriminatory and less harmful accident scheme. Many diseases already come within the torts system, despite the difficulty of linking them to any particular 'accident'.⁸¹ The growth in litigation in the medical field means that sickness and congenital

76 Report, above n53 at para 23.

77 Id at para 377.

78 See the later Report of the Working Party of Officials, *Financial Aspects of the National Rehabilitation and Compensation Scheme* (1975).

79 Senate Committee on Constitutional and Legal Affairs, *The Clauses of the National Compensation Bill* (1975) at para 1.23.

80 Jane Stapleton, *Compensation for Disease* (1984). See also Jane Stapleton, 'Compensating Victims of Disease' (1985) 5 *Oxf J of Leg Stud* 248; Jane Stapleton, *Disease and the Compensation Debate* (1986).

81 Compare *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32, noted by Jane Stapleton, 'Lords A'leaping Evidentiary Gaps' (2002) 10 *TLJ* 276.

incapacity are often the subjects of tort awards of damages.⁸² The costs involved in such awards must now be included in the total expenditure by the community, reflected in the Commonwealth's subsidy to the medical indemnity funds,⁸³ which would allow further diversion to a more sensible replacement compensation scheme.

On the subject of disease, the torts system is sometimes given credit for having revealed problems such as those with asbestos and tobacco. In fact, the torts system has failed to cope with either of those problems⁸⁴ and it is political pressure and changes in cultural attitudes that have brought compensation to non-employees and have limited the use of these products. Once again, a comprehensive compensation scheme is much more likely to bring to light future problems of this nature and to find methods of dealing with them, whether by legislation, regulation, criminal sanctions, increased levies, education of the public or other measures.

9. Other Torts

All that I have said does not mean that I see no role for the law of torts. The intentional torts such as false imprisonment can be valuable, even if far from perfect,⁸⁵ in protecting civil liberties.⁸⁶ They certainly do so much better than negligence.⁸⁷ Some, like conspiracy, intimidation and interference with contract, can also be hindrances to freedom of association and the trade union movement. Defamation, while protective of reputation, can be a significant restraint on freedom of speech. Whether the common law has struck the right balance is debatable.

One issue on which I have changed my mind over the years is whether there is a place for exemplary damages. In the first edition of *Assessment of Damages for*

82 For example, *Chappel v Hart* (1998) 195 CLR 232; *Diamond v Simpson (No 1)* (2003) Aust Torts Reps 81–695 (NSW CA); *Gavalas v Singh* (2001) 3 VR 404; *Rufo v Hosking* [2004] NSWCA 391 (Unreported, Hodgson & Santow JJA & Campbell AJA, 1 November 2004). Compare *Gregg v Scott* [2005] 2 WLR 268.

83 For example, *Medical Indemnity Act 2002* (Cth), as variously amended.

84 Compare the unsuccessful smoking class action in *Philip Morris (Australia) Ltd v Nixon* (2000) 170 ALR 487 and the individual litigation in *British American Tobacco Australia Services Ltd v Cowell* (2002) 7 VR 524. Asbestos litigation in the United States has forced many suppliers into bankruptcy and there have been many moves at the federal level to limit it. In Australia, see *Bale v Seltsam Pty Ltd* (Queensland Court of Appeal, Fitzgerald P, McPherson JA & Helman J, 23 August 1996), discussed by Elizabeth Handsley, 'The Asbestos Worker's Wife: Excluded by Science' (1997) 5 *TLJ* 154; cf *CSR Ltd v Young* (1998) Aust Torts Reps 81–468 (NSW CA). Note the difficulties in imposing legal liability on solvent members of the James Hardie Group referred to in D F Jackson QC, *Report of the Special Commission of Inquiry into the Medical Research and Compensation Foundation* (2004) at 12.6–12.12. For the English equivalent of *Bale v Seltsam* see *Maguire v Harland & Wolff Plc* [2005] EWCA Civ 01.

85 Compare *State of Victoria v Horvath* (2002) 6 VR 326; Fergus Shiel, 'No Money and No Justice for Woman Bashed in Raid on Home', *The Age* (29 June 2004) at 5.

86 Compare Don Harris, 'Can the Law of Torts Fulfil its Aims?' (1990) 14 *NZULR* 113; John Fleming, 'Is There a Future for Tort?' (1984) 58 *ALJ* 131.

87 For example, *Cran v State of New South Wales* (2004) Aust Torts Reports 81–737 (NSWCA). Special Leave Refused [2005] HCATrans 21 (4 February 2005).

Personal Injury and Death,⁸⁸ I followed Harry Street, *Principles of the Law of Damages*,⁸⁹ in calling for the abolition of such damages. Cases like *Henry v Thompson*⁹⁰ and *Adams v Kennedy*⁹¹ against the police have shown that, in the words of Lord Cooke in the context of the New Zealand scheme, they can be a useful weapon in the legal armoury and should not be abandoned without compelling reason.⁹² The New Zealand legislature certainly thought that they are not incompatible with a comprehensive compensation scheme.⁹³

I have said nothing in this paper about the law of negligence in relation to pure economic loss. The possibility of recovery for such loss effectively started with *Hedley Byrne & Co Ltd v Heller & Partners Ltd*⁹⁴ when I was already teaching delict. I have watched the subject develop ever since and do not claim to have any answers. The *Trade Practices Act 1974* (Cth) s52 and its equivalents in the Fair Trading Acts of the States have supplanted much of the law of negligent misrepresentation. No national insurance scheme is required for other pure economic losses. All I can do is to remind the reader that Fleming's view that the law of torts is concerned with the allocation of losses that inevitably occur in society must apply here too.

10. Conclusion

The insurance 'crisis' in 2001–03 demonstrated the prescience of the Senate Committee on Constitutional and Legal Affairs when it stated:

The committee believes that unless significant changes are made to existing remedies for injury, most of which are financed by insurance, their cost will become too high to be financed by insurance premiums and governments will be required to provide supplementary financial assistance. It seems logical to the committee that, if governments are to be required to give financial assistance in this area, it is an appropriate time to consider new approaches to the provision of more equitable and comprehensive coverage at the lowest possible cost.⁹⁵

I have written elsewhere how the response to the inability of many community organisations to obtain insurance at all or at reasonable cost after the collapse of the HIH Insurance Group provoked 'wrong questions' and 'wrong answers'.⁹⁶ The

88 (1974) at 43.

89 (1962) at 34–36.

90 [1989] 2 Qd R 412.

91 (2000) 49 NSWLR 78.

92 *Donse-laar v Donselaar* [1982] 1 NZLR 97 at 106–7 (Cooke P).

93 *Injury Prevention, Rehabilitation, and Compensation Act 2001* (NZ) s319. Compare *Daniels v Thompson* [1998] 3 NZLR 22, affirmed *W v W* [1999] 2 NZLR 1; *A v Bottrill* [2003] 1 AC 449, noted by Rosemary Tobin, 'Exemplary Damages in New Zealand: The End of the Story?' (2003) 11 *TLJ* 20 and Alison Todd, 'Outrageous Negligence' (2004) 12 *Tort L Rev* 8.

94 [1964] AC 465.

95 Report, above n79 at para 1.22.

96 Harold Luntz, 'Reform of the Law of Negligence: Wrong Questions - Wrong Answers' (2002) 25 *UNSWLJ* 836.

answer lies not in a 'more principled' approach to the law of negligence.⁹⁷ Decisions of the High Court in cases such as *Brodie v Singleton Shire Council*,⁹⁸ abolishing the immunity from liability for non-feasance by highway authorities, and *Tame v New South Wales; Annetts v Australian Stations Pty Ltd*,⁹⁹ abrogating the restrictive rules for recovery of damages for psychiatric injury, may be seen as adopting such a principled approach. These decisions have, however, exacerbated the problems of fact-finding in individual cases¹⁰⁰ and have provoked legislative backlashes.¹⁰¹ Patrick Atiyah, who has become an even more forceful critic of developments in the common law, has lost faith in the welfare state and now wishes to eliminate common law liability without any proper replacement except for no-fault motor accident compensation. I have sought to respond to this view.¹⁰² I adhere to the view I have expressed in article after article, urging the adoption of a national compensation scheme or, as I would prefer to call it, a social insurance scheme.¹⁰³ A key feature of such a scheme would be separation of safety (prevention or deterrence) and compensation, both of which the common law seeks to achieve at the same time, neither of them adequately. I have also published my views on the benefits that should be paid under a compensation scheme.¹⁰⁴ There is room for difference of opinion on the details of any scheme. On the principles, however, the two Woodhouse reports were right in putting safety first, emphasising secondly both vocational and social rehabilitation, and then basing compensation on community responsibility and comprehensive entitlement, to be provided with administrative efficiency.

97 See James Spigelman, 'Negligence: The Last Outpost of the Welfare State' (2002) 76 *ALJ* 432.

98 (2001) 206 CLR 512.

99 (2002) 211 CLR 317.

100 A selection of the cases interpreting *Brodie* from 2004 alone includes *Boroondara City Council v Cattanaich* [2004] VSCA 139 (Unreported, Winneke P, Chernov JA & Bongiorno AJA, 20 August 2004); *Greater Shepparton City Council v Davis* [2004] VSCA 140 (Unreported, Winneke P, Chernov JA & Bongiorno AJA, 20 August 2004); *Sutherland Shire Council v Henshaw* [2004] NSWCA 386 (Unreported, Sheller, Hodgson & Bryson JJA, 10 December 2004); *Moyne Shire Council v Pearce* [2004] VSCA 246 (Unreported, Batt & Chernov JJA & Gillard AJA, 22 December 2004); *Ryde City Council v Saleh* (2004) Aust Torts Reports 81-757; *Temora Shire Council v Stein* (2004) 134 LGERA 407. The possible misinterpretation of *Brodie* by some New South Wales judges and the Court of Appeal in Victoria awaits resolution in the High Court: see the difference of opinion as to whether special leave should be given to appeal from *Parsons v Randwick Municipal Council* [2003] NSWCA 171 (Unreported, Sheller, Beazley & Ipp JJA, 9 December 2003) in [2004] HCATrans 542 (10 December 2004).

101 See, for example, *Civil Liability Act* 2002 (NSW) ss30 and 45.

102 See Harold Luntz, 'Book Review of Patrick Atiyah, *The Damages Lottery*' (1997) 5 *TLJ* 287.

103 For example, Harold Luntz, 'Compensation for Injuries Due to Sport' (1980) 54 *ALJ* 588; Harold Luntz, 'Proposals for a National Compensation Scheme' (1981) 55 *Law Inst J* 745; Harold Luntz, 'National Compensation Scheme: A Further Contribution' (1982) 56 *Law Inst J* 35; Harold Luntz, 'The Case for No-Fault Accident Compensation' (1985) 15 *Qld Law Soc J* 161; Harold Luntz, 'Guest Editorial: Medical Indemnity and Tort Law Reform' (2003) 10 *J of Law & Med* 385.

104 Harold Luntz, 'The Benefits to Be Paid under a Statutory Accident Compensation Scheme' [1983] *Oracle* 37; Harold Luntz, 'Compensation for Loss of an Economic Nature' above n73 at 491.