

Personal Injury Compensation Background Briefing Paper

Background

A person who is injured by the carelessness of another should receive fair compensation. Injured people may require surgery or ongoing medical treatment. They may be unable to work, pursue their hobbies or play their favourite sports.

Money may not fix everything, but as far as possible, fair compensation should put an injured person's life back to the way it was before an accident. Currently the system in NSW does not do that.

Most personal injury compensation cases in New South Wales fall into three categories:

- *public liability* - responsibility of property owners to the general public (in supermarkets and at country fairs).
- *workers accidents* – protecting employees injured in the workplace.
- *motor vehicle accidents* – for those injured by negligent motor vehicle drivers.

Between 1999 and 2002, the New South Wales Government made sweeping changes to workers' compensation, motor accident, and civil liability legislation. It wanted to reduce the number of 'minor' claims. Harsh tests were introduced, making it more difficult to receive compensation for injuries and caps were used to restrict the amount of compensation received.


This means if someone is injured as a result of the carelessness of another person they must demonstrate a severe injury in order to meet or exceed the required threshold (based on a percentage level of bodily impairment). The amount of compensation to which the injured person is entitled is then subject to a maximum limit.

To assess an injured person's level of "whole person impairment" and their entitlement to fair compensation, the NSW Government adopted the American Medical Association "Guides to the Evaluation of Permanent Impairment" ("**AMA Guides**"). This was despite advice in "the Guides" themselves that the "criteria should not be used to make financial awards or direct estimates of disabilities".

What has happened so far?

The NSW Upper House conducted an inquiry in 2005, in response to mounting evidence of injured people being unable to access fair compensation. The inquiry was





wide ranging and received in excess of 60 submissions from many organisations, including the Law Society of New South Wales and New South Wales Bar Association.

In December 2005 the Committee released its report calling for an overhaul of the injury compensation system. The bi-partisan Committee made the following unanimous findings:

“The Committee is very concerned that inconsistencies in access to compensation under the personal injury laws in NSW mean that individuals who suffer injury are treated differently according to whether their injury occurred at work, in a motor vehicle accident or in a public place...

“...the Committee believes that there is scope for greater consistency and cohesion across the three areas of personal injury compensation laws in NSW. In the Committee’s opinion, the inconsistencies between the different systems of personal injury compensation create numerous anomalies and injustices and are contrary to community expectations.”

In June 2006 the Government tabled its response to the Committee’s report, arguing that any moves to implement its key recommendations would “destabilise the balance between the rights of injured people to compensation and the ability of the community to pay”.

How has the community suffered?

- Individuals have lost their right to compensation when they are injured as a result of someone else’s carelessness.
- Insurer profits have soared, as compensation payouts have plummeted.
- The number of injured people eligible for fair compensation has dropped by 64% in NSW.
- The costs of caring for injured people have shifted from insurers to the public health system, with a \$12 million increase in Medicare costs in NSW since the changes to injury compensation laws.
- There have been only minor reductions in the cost of insurance premiums.

What is a threshold?

A threshold is the level of personal bodily impairment that an injured person must reach to receive compensation for their injuries.

Why are the thresholds unfair?

Thresholds are used to arbitrarily determine whether a person should be compensated for their injuries, without any regard to the impact of an injury on a person’s way of life. People with serious injuries impacting on their capacity to work, play sport or enjoy family life are often excluded from receiving fair compensation on the basis of a numerical assessment of their disability.

This is compounded by the inconsistencies between the different thresholds in personal injury schemes, which are nonsensical and contrary to community expectations. Entitlements differ depending on whether you are injured at work, in a public place or in a car accident.



What are the three types of thresholds?

Motor vehicle accidents

No compensation will be awarded for pain and suffering unless the degree of injury is greater than 10% “whole person impairment” using the AMA Guide. However, the Guide has been modified by the Motor Accidents Authority, so that pain is not included in the assessment, psychological injury cannot be added to physical injury and many debilitating injuries will not meet the threshold. For example, a person assessed as suffering 10% bodily impairment and 10% psychological impairment cannot add the percentages to overcome the threshold. Nor can they claim for their lost quality of life, due to constant medication requirements for ongoing pain.

Work Accidents

Under the no-fault scheme, a worker is entitled to benefits based on their level of impairment. Once their level of impairment reaches 10%, the worker can claim a lump sum, up to a maximum of \$50,000 – which will only be awarded in the worst case, such as quadriplegia or severe brain injury.

A worker injured by a negligent employer has limited rights to sue their employer for negligence. The worker’s injuries need to meet the 15% whole person impairment threshold using the AMA 5th Edition. The 15% yardstick really means that a person needs to be catastrophically injured to qualify. For example a young man with a prolapsed disc requiring surgery and effectively preventing him from performing any labouring work again will probably not meet the 15% threshold.

Even if a negligently injured worker meets this threshold, taking legal action means they forfeit any entitlement for future medical expenses and care. This is a major disincentive for those seriously injured by a negligent employer. No other State forces workers to make this choice.

Workers who meet the 15% threshold will probably never exercise their rights to recover their full loss of wages. As a result, injured workers are relegated to accepting a small lump sum for pain and suffering together with weekly payments which, in most circumstances, are little more than social security entitlements. Evidence suggests that the average payment to disabled workers is as little as \$11,000 – \$13,000 for a life-long disabling injury.

Civil liability

For civil liability cases, a threshold of 15% of “a most extreme case” applies with a sliding scale of damages up to 33%, where full damages may be claimed. The “most extreme case” is a relatively fairer means of assessing injury than use of the ‘whole person impairment’ test, as it allows judicial consideration of the actual impact of an injury, rather than an arbitrary assessment of impairment.

A lack of accountability

This situation is made worse because judgements made about the level of impairment are made by bureaucratic authorities and their doctors.

In respect of motor vehicle and work accidents, there is limited scope to test these findings or to take into account the views of treating doctors or specialists (.i.e. doctors who have in-depth knowledge of their patient’s degree of impairment and trauma).



Access to compensation

It is now clear that thresholds and other legislative changes have prevented more than 64% of people injured in NSW from accessing fair compensation under the *Civil Liability Act* alone. This figure is almost certainly higher for motor accidents and work accidents, due to the more restrictive thresholds applying under those schemes.

The Government's reforms mean that only people with very serious injuries meet the thresholds.

What is an award for non-economic loss?

An award for non-economic loss is compensation for the pain and suffering caused by an injury, as opposed to economic loss (loss of wages or future income). This is designed to compensate an individual for their lost quality and enjoyment of life, such as incapacity to engage in sport, family activities, recreational pursuits and other things as a result of their injuries.

What is personal responsibility?

Central to balancing fairness and community cost in personal injury is determining the relevance of fault and personal responsibility for damages. When somebody behaves carelessly and injures another person they should be held responsible for that carelessness. The community expects people to take care of themselves, and equally expects people to take care of others. For example, employers should provide safety equipment. Employees should obey directions. Personal responsibility cuts both ways and laws should reflect this.

How can the system be improved?

- The Government should adopt a uniform approach across all personal injury compensation schemes so that a person's right to compensation doesn't hinge on where the injury occurred. The inconsistencies between the different schemes of personal injury damages in NSW are unfair and create numerous anomalies. There should be one scheme and one test for all.
- Any test must take into account the effects on the individual – thresholds that depend on AMA guides are arbitrary and do not reflect the real effect of the injury.
- Arbitrary rules should be removed – restrictions such as elections for injured workers are capricious and unfair.
- All disputes in relation to personal injury injuries, whatever their circumstances, should be determined according to a uniform set of rules by established courts in New South Wales. This would allow fairness and consistency. Such decisions must be made by independent judicial officers of the Court who are free from influences of bureaucrats, politicians and insurers.