Mr James Sheller

Would you support no-fault compensation?

If you posed the question to most people as to whether we should have a system of no-fault compensation for the catastrophically injured the answer would be undeniably "yes". Some of you may have seen the Current Affairs program last night which addressed the plight of the catastrophically injured who aren't entitled, or weren't entitled, to compensation.

In those cases, those people are generally looked after by family members and to the extent that Medicare can offer them assistance, Medicare. But neither is particularly adequate and the effect on family members of looking after catastrophically injured persons day in and day out is understandably horrible. It is very easy to state affirmatively that we should have such a system. I give you an example from the law, that only reinforces that proposition.

Some real cases

A young girl called Rosie Cheung was about 21 months of age back at about Christmas 1994, when she wandered away from the yard of a family friend into the traffic at Victoria Avenue at Chatswood, where she was struck by a car driven by a woman called Rosalie Derrick. As you can imagine she suffered severe injuries. Mrs Derrick was driving at about 10 to 15 kilometres per hour below the speed limit. The severe injuries that the little girl suffered no doubt also culminated in some pretty emotional consequences for Mrs Derrick, the innocent driver.

Ms Cheung, through her family, sued for damages and was successful in the District Court. The driver unsuccessfully appealed that decision to the Court of Appeal. The Court of Appeal said that the trial judge's finding in favour of the little girl was one which it was able to make. It was a value judgment which the trial judge could make. It also found that the driver, though not morally responsible, was legally responsible for this accident.

The case made its way to the High Court. It is very unusual for a motor accident case to make its way to the High Court, the first such case in 30 years. All the High Court judges found that the driver was not morally responsible but also was in no way legally responsible, so a seven-year odyssey through the damages lottery by the little girl and her family had ended up in her receiving nothing. No one would consider that that outcome, be it right at law, a desirable outcome both in terms of the fact that there is no compensation at the end of the day, and that much by way of expense has been incurred along the way.

Ms Cheung's case is very straightforward. We have every sympathy for a young girl who doesn't know wrong from right, who stumbles out onto a busy road and suffers severe injuries as a result. Another example, I suppose, which supports such a system of no-fault compensation for the catastrophically injured is to go to the web site of an organisation called 'Young People in Nursing Homes'. It is a frightening concept to think that there are young people living in nursing homes as a consequence of brain injury, and living alongside the elderly and the demented. The fact that there are people in those circumstances perhaps suggests that we should be doing more by way of providing compensation in a no-fault scheme. So those examples support the yes case, but it can be tougher if we look at other examples.

What if we think about Mr Swain, who is currently before the High Court trying to win back $3.75 million dollars worth of damages from Waverley Council, which arises from his rather fateful and famous dive into the surf at Bondi Beach. He received that sum of money from a jury in the Supreme Court. He lost it in the Court of Appeal and he is now trying to regather it in the High Court and the clever money suggests that he will. Mr Swain may be a person we have a little less sympathy for than the little girl, because there was some evidence that he was under the influence of alcohol and drugs, evidence which ultimately wasn't accepted, but evidence nevertheless, and this contributed to his accident which left him a quadriplegic. Does our no-fault compensation scheme extend to people who contribute to their own serious injury? Does it extend to people whose injuries arise from other degrees of foolhardiness?

An important case in 2001 was a case involving Mr Beck. He was a teacher leading a school excursion down at the

snow. He took his students tobogganing. As a result of that act, tobogganing, he was left a quadriplegic. The court hearing his case determined that he was at least partly responsible for his injuries. Another recent case from the Court of Appeal involved a gentlemen called Mulligan who dived forward into a submerged sandbar from a standing position in thigh deep water. The court determined that his claim failed altogether. In a sense he was entirely responsible for what had happened to him. Likewise Mr Vairy, who was rendered quadriplegic after diving off a rock platform into the sea at a Central Coast beach. He received about $5 million in damages when his case was heard in the Supreme Court. The Court of Appeal took that sum away, saying that he was entirely responsible.

Do we distinguish between the victims?

While we may be happy to have a system for people who are entirely innocent in connection with the severe injuries they suffer, what do we do with those who are either partly responsible or entirely responsible? Do we say to those people well, look, we will still compensate you but to a lesser extent? Common cases of persons injured who are not entitled to compensation at all are negligent drivers. The negligence of a driver may be losing control on a slippery surface without even driving in excess of the speed limit; no compensation for that person. Then we can graduate upwards to serious driving offences which give rise to severe injury.

We may even have people who are partaking in something as hazardous, as dangerous, as criminal, as street racing, who suffer severe injuries, or persons partaking in a criminal enterprise who suffer severe injuries. Do we include those people in our no-fault compensation scheme, or do we discount their negligence and exclude them if they have acted in a matter that is criminal? It is important when deciding whether to have such a scheme or not, to define who we are going to include or who we are going to exclude.

The costs involved

There is a strong case for not having a scheme at all. The simple reason is money. No one can readily measure what such a scheme may cost. I would suggest probably about $500 million a year. Getting to that figure is not difficult if you look at some of the most extreme cases of catastrophic injury which the courts have dealt with in the last few years.

Calandre Simpson, who was born with cerebral palsy as a result of the admitted negligence of her obstetrician, received about $14 million in damages when her case went to trial in the Supreme Court. On appeal that sum was reduced to about $ 11 million. $6 million of that was for her care, nursing and attendant care. Lisa Palmer, who suffered catastrophic injuries as a result of a car accident that left her a ventilated quadriplegic, probably the most serious injury one could imagine, received from a Supreme Court judge compensation in excess of $16 million. About $10 million of that was for nursing and attendant care.

A recent and important study prepared by Annie McCluskey of the University of Western Sydney looked closely at the care needs that have been provided for persons who have received compensation for severe brain injury. What is interesting is that the most appropriate care arrangements, which often represent the significant component of any loss for the catastrophically injured, the most desirable form of that care was a rotating set of carers working 8- to 12-hour shifts. Ms McCluskey calculated the cost of that care as from $250,000 to $300,000 per year.

The Transport Accident Commission in Victoria keeps some statistics about major injury claims which are received each year. There are about 150 to 200. 50 per cent are head and associated brain injuries, 40 per cent spinal cord. The lifetime cost for those claims can range anywhere between $550,000 and $16 million. They pay out about $100 million a year for major injuries. If we translated those figures to New South Wales and assumed that say 25 per cent of catastrophic injuries are car-related, and the Transport Accident Commission deals only with car related accidents, then an amount of $500 million a year is probably reasonable

Where will the money come from?

The question is: where is the $500 million going to come from? Presumably increased insurance premiums are not the answer. It will be odd, if we just had the Civil Liability Act introduced into the State, designed as it is to reduce premiums, to say that we should introduce a system which increases them. In fact, the Civil Liability Act itself has the effect of reducing the damages entitlements of the catastrophically injured. Whether that was intended or not I don't

know, but by introduction of a higher discount rate, which is something one applies to future losses, those losses are less under the Civil Liability Act than they were before. So, for example, Mr Beck's case, the teacher I described before, if he had been under the Civil Liability Act, which he wasn't, his damages would have been reduced by about $2 million.

One can assume that insurance premiums, or increasing them, is not going to be the answer. One can assume that, particularly at this time of year with an election approaching, that increased tax is not going to be the answer. There is probably not going to be a levy on insurers likewise, to support this fund.

If we look at the no-fault schemes in place at the moment we might get a bit of a clue as to how the no-fault compensation scheme that we want for the catastrophically injured may arise. In effect, a no-fault based scheme provides levels of compensation which meet an injured person's needs, but only to the extent that the community can afford, whereas a fault based scheme is purely focussed on compensating need, without regard essentially to what is affordable A simple proposition governs the no-fault compensation schemes. To compensate more people you offer less compensation.

New Zealand's Accident Compensation Scheme

The most comprehensive no-fault scheme is just across in New Zealand, operated by the Accident Compensation Corporation. That scheme celebrates 30 years this year. It covers all New Zealanders and visitors and covers irrespective of circumstances. However its effectiveness is the subject of incessant and impassioned debate. For example, someone under that scheme who has lost income as a result of an accident is only entitled to be compensated to the extent of 80 per cent of their pre- accident earnings, ie no-fault of their own, but they have to bear 20 per cent of that loss. In fact, if you go to the Accident Compensation Corporation web site and look under the heading "What Am I Entitled to" the following appears: "The ACC can help you as an injured person with the cost of medical or dental treatment, compensation for earnings, a lump sum, or an independence allowance."

It doesn't say it will meet the reasonable expenses you may incur as a result of your accident. It doesn't say it will indemnify you or cover you in full. All it says is it can help you. The maximum sum, the lump sum, allowed under that scheme is $100,000, that is if you are a paraplegic or worse. Any of the existing schemes in New South Wales for fault based injuries would probably see you get $250,000 or more for that type of injury. In New Zealand, if you have your leg amputated below the knee, your lump sum benefit is under $14,000. You are also entitled to an independence allowance over and above your loss of earnings, but the maximum amount for that is $66 per week. So the compensation on offer in a no-fault scheme is modest, in the interests of compensating all, and there is an ongoing debate as to the funding of that scheme and whether it will at some time potentially collapse.

Australian no-fault schemes

In Australia we have some no-fault schemes. A no-fault scheme operates in the Northern Territory for motor accidents. It is interesting because it excludes certain persons, either completely or at least to some extent. For example, if you are driving a car and you have an accident and your blood alcohol level exceeds 0.08 you are not entitled to any damages for loss of earnings or for any pain and suffering. If you are driving a vehicle for the purpose of criminal enterprise or endeavouring to escape from arrest and you get injured in an accident, you get nothing. The maximum income, or loss of income you are entitled to be compensated for under that scheme is about 85 per cent of average weekly earnings. The maximum damages available for pain and suffering is approximately $150,000, again significantly lower than what we have in our fault-based scheme.

I have mentioned the Transport Accidents Commission in Victoria. It likewise provides coverage, to an extent, on a no-fault basis, but if you can establish fault you are allowed to go outside that scheme and recover common law damages. While we might have started with a "yes" to the proposition that we should have a no-fault scheme, it is important to look at some of the complications I have directed you towards in terms of entitlement and cost, and that may form the basis why successive generations of governments in New South Wales have effectively said no to such a scheme. To suggest it will happen will involve, I suspect, a reallocation of the existing compensation dollar in part away from injured persons.

There will be an attempt to reduce transactional costs, ie legal costs in particular, but something more will be required

than the tort reform program that is encapsulated in the Civil Liability Act recently introduced, which is really only geared to insurance premium reduction rather than an allocation of resources away from injured persons generally to those who are catastrophically injured.

About Mr James Sheller

James Sheller came to the Bar in March 2004. Prior to that he was a solicitor with Phillips Fox for nine years. He acted in a large number of claims in the Dust Diseases Tribunal between 1997 and 2004. He also acted in numerous personal injury claims, from the trivial where he was undoubtedly acting for defendants, to the catastrophic. He has written extensively and has been involved in a number of presentations and workshops in connection with the introduction of the Civil Liability Act 2002.