An America's Cup for Tort Reform? Australia and America Compared

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The issue of tort reform has descended from Ivory Towers to populist politics. A few years ago no one could have predicted that “tort reform” would become political argot and a stirring election slogan. Some in the United States see the tort crisis and the stimulus for reform as somehow uniquely American. This Article shows instead that many advanced, industrialized societies are discussing tort reform initiatives actively. The precise nature of the problems, the reasons for reform, and the shape of solutions will be fashioned by indigenous culture, tradition, and the uncertainties of politics. In the common-law world, however, a number of countries are sufficiently similar to provide valuable mutual lessons.

The importance of tort reform suggests that decision makers take a wider, comparative viewpoint. Through comparison, we may better understand our own dilemmas and the reasons for them. Moreover, the operation of reforms in other common-law countries may be transplanted successfully to the United States.

This Article addresses those people, primarily in the United States and Australia, who are interested in these matters of legal change. Both countries can learn lessons that may aid in the choice of appropriate roads to reform.

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Part I describes the forces in tort law that have resulted in calls for reform. Different types of reforms have emerged, and foreign reforms vary. We argue that those most worthy of examination have been developed in countries with similar political and legal traditions. The initiatives, wrong turns, and failings of American and Australian lawmakers should be of particular mutual interest. The formulation of a catalog of goals is an essential task in thinking about reform.3

Part II provides an introduction to Australian endeavors. We seek to explain both the willingness of Australia to consider far-reaching reform and the reasons why the Australian reform has, in its implementation, disappointed expectations. The reforms now adopted in the states of Victoria, South Australia, and, most recently, New South Wales are closely examined. The New South Wales reforms are particularly noteworthy, because the legislation enacted against a background of recommendations by the New South Wales Law Reform Commission set forth a well-reasoned and vigorous case for abolition of the common law and replacement by a state-organized compensation scheme.

Part III proposes a positive program for reform. Considering political and theoretical objections to, on the one hand, statist reform and, on the other, ad hoc and piecemeal change, we present an elective no-fault scheme that borrows from both contractual and legislative guises. This suggestion builds on a body of scholarship and practical reforms propounded by the senior author.4 Part III tests the adaptability of elective no-fault to the Australian context. We conclude that these elective no-fault schemes fit comfortably and have a number of advantages over the currently existing common-law situation and over other proposed reforms.

In the end, we hope to convey to the reader the value of a wider vantage point in the present tort debate. Comparative work tempered by an appreciation of differences in social and


3. See Keeton, Compensation for Medical Accidents, 121 U. PA. L. REV. 590, 603 (1973) (setting forth desiderata of a compensation scheme); infra notes 31-38 and accompanying text.

political conditions may well lead us to make more informed, balanced, and humane decisions in restructuring tort law.\footnote{5}

\section{Common Law Tort Reform in Comparative Perspective}

The law of torts has changed remarkably over the last thirty-five years. From a narrow, private law focus, tort law has achieved high public and political profile. With this have come calls for reform, sometimes grafted upon the extant law, and at other times, demands for more radical schemes. Appropriate reform requires a careful articulation of the goals of that reform, strengthened by an appreciation of the relevant overseas experiments.

\subsection{The Challenge and Pattern of Tort Reform}

Torts scholars should be resting uneasily in their beds. Tort law is complex and exciting and, at the same time, perplexing and worrying. The potency of the law of negligence has induced tort liability to protect new interests: the law of torts has invaded the domain of contract law.\footnote{6} The overt instrumental goals

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\begin{itemize}
\item The high rate of social change prevalent or aimed at in nearly all contemporary societies seriously challenges the skills and abilities of statesmen, lawyers and social scientists . . . . This is one of the more significant areas where the comparative social study of law can make a significant contribution to the solution of social problems.
\end{itemize}
in tort law encourage courts to grant compensation on a wide scale by way of third-party liability insurance to the victims of accidents and misfortunes.\textsuperscript{7} Mass and toxic tort litigation involve occurrences far beyond the original focus of the law—namely, simple interaction between two, or at least among very few, parties. This expansion in the scope of tort law by itself significantly weakens any argument that tort law is merely private law.\textsuperscript{8} In truth, tort law has thrown off any pretense that it is purely a regime of private law and has been revealed as public law. In other words, most scholars regard tort law, on the whole, as a form of public regulation. Professionals' conduct, for example, is molded not only by extensive regulatory licensing, but also by common-law tort liability rules.\textsuperscript{9} Also, industry must try to conform its practices to the discipline of products liability law in addition to that of complex regulatory regimes.\textsuperscript{10}

Although the public-law face of tort law has not always been apparent, it has been present since the Industrial Revolution made human lives more interdependent. Nineteenth century courts saw that liability rules attaching to workers and their employers influenced the cost of production. Whether one accepts or rejects the thesis that the defenses of common employment, contributory negligence, and voluntary assumption of risk subsidized the growth of industry, liability rules undoubtedly imposed costs.\textsuperscript{11} This development revealed the public character of liability in the industrial setting, which in turn facilitated the

\begin{itemize}
\item \textsuperscript{9} See D. Partlett, \textit{Professional Negligence} (1985).
\end{itemize}
subsequent enactment of workers' compensation no-fault legislation throughout the Western world. Some observers at the time perceived this public character in other areas of tort law and reasoned that the no-fault pattern would find acceptance for accidents generally. Large tracts of tort law, however, continued to possess a private-law appearance.

The history of the reform of tort law has been punctuated with reforms—some accepted, others rejected—where various spheres of the law's operation were seen as possessing sufficient public character to call for public regulation. For example, injuries arising out of the operation of motor vehicles came to be regarded as not merely a matter for vindication of rights between individuals. The use of motor vehicles caused many accidents and required compensation, quite apart from tort law, for accident victims. The magnitude of the problem required recognition of its public character and eventuated in a public resolution in favor of no-fault legislation.

Present day tort scholars are condemned to restless nights because the judicial muscle and imagination that expanded liability to govern technological risks also has exposed a serious public policy nerve. From a public policy viewpoint, we must ask whether the multifaceted judicial task can reach prompt, adequate, and acceptable conclusions. More concretely, the courts applying the law of torts pursue diverse goals of compensation and deterrence, goals accomplished in an individualized and haphazard way. Attorneys represent individuals, or classes of individuals, in adversarial proceedings generating both considerable costs and unreliable information upon which courts must ground their conclusions. Juries, if matters go that far, balance the costs and benefits crudely. Issues of product design and technological risk seem inappropriate for a common-law system designed at its inception for the resolution of more mundane accident interactions. In economic terms, the error costs of the

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common-law system are inordinate. The adaptability of the common law to even approach within cannon shot the resolution of modern day tort problems speaks volumes for its strengths. But the common-law approach is like the panda’s thumb: it performs tasks but does so inefficiently. If we could design a panda, we might give it a more useful thumb. Because we have some power to design tort liability rules, we should attempt to formulate and establish a more efficient system.

Reform suggestions have come in different forms. The most recent suggestion attempts to ameliorate the symptoms of the malfunctioning tort system. We may refer to this approach as the “ad hoc” phenomenon. This new wave of tort reform proposals reacts to costly or unavailable insurance. This reform limits levels of damages, proscribes punitive damages, modifies rules of contribution between tortfeasors and collateral benefits, and regulates contingency fees. These reforms are designed to reduce the level of tort litigation and hence minimize exposure of persons to tort liability. The widespread acceptance of this type of


reform attests to its political appeal. Such reform gives a legislature the appearance of responding to a crisis by virtue of its individual rhetorical appeal, yet in fact leaves the common law a little enfeebled. On closer examination, this legislation works unfairly to the advantage of the powerful groups recommending it and, more importantly, may adversely affect those who most deserve and need compensation.\footnote{J. O'Connell & C. Kelly, supra note 16, at 97-105; see Wade, An Evaluation of the "Insurance Crisis" and Existing Tort Law, 24 Hous. L. Rev. 81 (1987); see also Fein v. Permanente Medical Group, 38 Cal. 3d 137, 167-78, 695 P.2d 665, 687-95, 211 Cal. Rptr. 368, 390-97 (1985) (Bird, C.J., dissenting).} It may also significantly undermine the deterrence function of the law.\footnote{R. Posner, Economic Analysis of the Law 154-57 (1986). Abolishing the collateral source rule may allow the potential tortfeasor to avoid the full cost of his negligent actions, and hence negligent actions will be engaged in at a greater than optimal level. For criticism of the rule, see Fleming, The Collateral Source Rule and Contract Damages, 71 Calif. L. Rev. 56 (1986).}

A second type of tort law reform manifests itself as a type of pressure valve. This reform provides for a compensation scheme under which victims of accidents falling within certain classes are compensated on a no-fault basis. Common-law liability is left in place.\footnote{For a discussion of add-on, no-fault auto laws and the (expensive) experience under them, see O'Connell & Joost, Giving Motorists a Choice Between Fault and No-Fault Insurance, 72 Va. L. Rev. 61 (1986). For more on the comparative expansion of first party coverage payable without reference to fault and the effect of no-fault insurance on tort liability claims, see O'Connell & Baker, Compensation for Injury & Illness: An Update of the Conard-Morgan Tabulations, 47 Ohio St. L.J. 913 (1986); O'Connell & Guinivan, An Irrational Combination: The Relative Expansion of Liability Insurance and Continuation of Loss Insurance, 49 Ohio St. L.J. (1988) (forthcoming).}

The efficacy of this reform has been tested in the area of industrial accidents in England and Australia. In both England and Australia, a worker injured in the course of his employment may obtain no-fault benefits under workers' compensation legislation and also sue the employer for common-law damages. Particularly in Australia, where the laws are more generous in granting workers' compensation benefits than in England, the courts have been conservative in expanding the scope of common-law liability.\footnote{Atiyah, Res Ipsa Loquitur in England and Australia, 35 Mod. L. Rev. 337 (1972) (contrasting the strict Australian view of res ipsa loquitur with the English view). English courts have more willingly relaxed the rigors of this system because of the relatively lower no-fault benefit obtainable under the applicable workers' compensation. See McGhee v. National Coal Bd., [1972] 3 All E.R. 1008 (H.L.) (adopting a probabilistic causation model). But cf. Hotson v. East Berkshire Area Health Auth., [1987] 1 App. Cas. 750 (H.L.) (division among their Lordships on probabilistic causation as it applies to a loss of chance).} This development contrasts starkly with motor vehicle cases where proof of fault has become highly attenuated over the years. More recent suggestions for reform in
this area attempt to build mechanisms to encourage resort to the compensation fund rather than to the exercise of the right to sue at common law.26 These schemes refine the add-on, no-fault automobile schemes that were created in the late sixties and early seventies throughout much of the common-law world.27

A third variation recognizes the dominant public law character of tort and, to a greater or lesser extent, substitutes a right to recover against a public fund for the claim in tort. The apotheosis of this reform is the New Zealand National Compensation Scheme, which expunges the right to claim at common law for personal injury and, in lieu thereof, creates a right to obtain no-fault compensation from a state-administered fund.28 This scheme broadens the availability of compensation to victims of accidents, abandoning the so-called "forensic lottery." At the same time, the scheme reduces the cost of receiving compensation. No provision is made for full common-law compensation. In keeping with a socially administered scheme, the level of economic losses is restricted, and, with limited exceptions, noneconomic losses—pain and suffering and loss of enjoyment of life—are excluded.

Note that, in a measure, this reform maintains its tort link by basing compensation payments on lost income, though it imposes a cap. This places the reform at odds with the conception of a social welfare scheme based upon needs and reflects a fear that significant deterrence through internalization of the costs of accidents is lost once the link between action and extent of injury is broken. The third party insurance heritage may also be perceived. The well-paid, who pose the greatest actuarial risk to the fund, pay the same premium as the less wealthy. In this way, the poor subsidize the wealthy. The scheme also reflects its torts roots by compensating for accidents. Critics point out that a


27. See O'Connell & Joost, supra note 24; see also the former Victorian add-on auto no-fault scheme, Motor Accidents Act, 1973 Vict. Acts 8429.

compensation scheme should not only include victims of accidents but also victims of illness and other misfortunes. A recent monumental English study shows that illness rather than accidents accounts for most of the personal economic dislocation arising from disabilities. 29

The menu of possible reforms does not end here. Elective no-fault has been proposed that could be implemented with or without legislative intervention. 30 This scheme builds upon the second type of reform identified above. For present purposes, it is enough to note that this reform leaves the common law in place but forecloses or limits resort to it in the event that timely no-fault compensation is offered. This reform, with its emphasis upon individual choice making, has distinct advantages. These advantages over other suggested reforms are both theoretical and, in terms of political acceptability, practical.

B. The Dilemma of Choice

A smorgasbord is arrayed before those concerned with questions of tort reform. We may select dishes ranging from modest tinkering to complete overthrow. The difficulty of choosing and then implementing reform should not be underestimated. Although the Rand Corporation, among others, has contributed valuable work, a thorough knowledge of the dimensions of the problem is still a distant goal. 31 Even as new dimensions of the problem are revealed, the reformer must guard against nirvana


30. See infra notes 143-82 and accompanying text.

The real world of torts with all its warts cannot be compared with the idealized reformed world. Reformers must therefore meet a considerable burden of predicting the cost that may be generated by their reforms. The greater the degree of reform, the more difficult prediction becomes. Reformers must also be aware of political stumbling blocks to change. Here, again, the more significant the reform, the greater the resistance. Powerful constituencies contend: insurers, industries, labor unions, the welfare lobby, and lawyers. They speak strongly and form disparate viewpoints in the political fora. One may expect reform, then, to resemble a crazy quilt of compromise as it emerges from this Babel.

This dilemma should leave reformers to somber reflection. In particular, we regard as an essential starting point the articulation of objectives of any reform. Fifteen years ago, Professor (now Judge) Robert Keeton recognized the desirability of generalized objectives that a "good compensation system might serve." He saw that a consequence would be to "identify consensus." It seems useful then to list the desiderata of any system that may attract a fair degree of consensus, and then to measure reform proposals against those desiderata. The objectives proposed by Keeton, in our opinion, form a useful starting point.

First, a good system of compensation will be equitable, and it will be so from each of three different perspectives—between those who receive its benefits and those who bear the burden of its costs, among different beneficiaries, and among different cost-bearers.

Second, the system will contribute to the protection, enhancement, and wise allocation of society's human and economic resources.

Third, the system will compensate promptly. It will meet economic burdens as they occur, and it will provide for medical and other rehabilitative services as they are needed.

33. One should be aware of the tendentious quality of the debate on both sides. Reports favoring change avoid possible pitfalls of reform, and those espousing the status quo often turn a blind eye to present shortcomings. The conservative presumption of maintaining the status quo with its known costs has considerable power when the costs of adjustment to change are considered.
34. Keeton, supra note 3, at 600.
35. Id. at 602.
Fourth, the system will be reliable. It will give assurance of financial responsibility for the payment of compensation determined to be due, and the determinations of entitlement to benefits and responsibility for costs will be predictable.

Fifth, the system will distribute losses rather than impose or leave crushing burdens on individuals.

Sixth, the system will be efficient, minimizing waste and overhead.

Seventh, the system will avoid inducements and, if feasible, provide affirmative deterrents to antisocially risky conduct.

Eighth, the system will minimize inducements to exaggeration and fraud and opportunities for profit from such conduct. This is essential to the integrity and equity of the system and to cost control as well.36

With this template for consideration of reform proposals, by what means may reformers reach a conclusion on each of the eight grounds?37 A significant scholarly tradition on this point has grown in the United States. Theoretical and empirical work has enriched our appreciation of the issues.38 This Article suggests that an instructive source for reformers in the United States is found in initiatives adopted and proposed in differing legal systems.

C. Foreign Patterns of Reform

We have already mentioned the New Zealand reform and some proposed expansions upon it. As momentum for reform gathers, we expect that other models may also be usefully examined.39 Such work must account for the dangers as well as the benefits of comparative work. Models adopted elsewhere may ill

36. Id. at 603.
37. We are inclined to assure the reader that the coincidence of the number eight with the Buddha's eightfold path does not clothe the aims with any transcendental qualities beyond their own merit. For an introductory discussion of the Buddha's eightfold path, see G. PARRINDER, A DICTIONARY OF NON-CHRISTIAN RELIGIONS 204 (2d ed. 1981).
fit the American or Australian foot. Some European civil law countries, for example, arguably have done more to bring the law of accidents within a framework of the social insurance system. One may speculate that the legal, bureaucratic, or administrative culture of those countries facilitated that reform. England is a notable European exception in its failure to adopt tort-law reform.40

The common-law tradition exerts a considerable independent pressure inhibiting reform. Tort law has, at its base, a strong individualistic, liberal premise that seems to enjoy a broad social acceptance.41 Although it is useful to look at reforms in civil law countries, it may therefore be more enlightening to focus on developments in those countries possessing a common-law tradition.

This fact perhaps explains the fascination with the New Zealand reform. Undoubtedly a country strongly in the camp of the common law, New Zealand has nonetheless adopted a far-reaching reform in abolishing the common law of torts and replacing it with a right for the victims of accidents to claim from a fund established by the state.42 Much may be gained from an examination of the New Zealand National Compensation Scheme, a reform that needs even further study. However, some significant differences may make the reform a less apposite point of comparison. New Zealand is accustomed to planned social experiment; it had established the rudiments of a welfare state well before most others of the Western world.43 Its population is ho-

40. In the United Kingdom, a commission studying liability and compensation recommended relatively interstitial reform of the common-law system. ROYAL COMM’N ON CIVIL LIABILITY AND COMPENSATION FOR PERSONAL INJURY, REPORT, 1978 CMND. 7054.

One insightful way to view the differences between countries is in terms of general legal societal types—gemeinschaft, gesellschaft, and a third, the bureaucratic-administrative society. See Kamenka & Tay, Social Traditions, Legal Traditions, in LAW AND SOCIAL CONTROL 3, 5, 6-26 (E. Kamenka & A. Tay eds. 1980).

41. See J. RAZ, THE MORALITY OF FREEDOM (1986) (explicating liberal theory in a democratic society); P. STARR, SOCIAL TRANSFORMATION OF AMERICAN MEDICINE 240-42 (1982) (suggesting that it was largely the classical liberalism of America that inhibited the acceptance of significant state involvement in health care, when other western but less classically liberal states, like Germany, had accepted a state role in the late nineteenth century).


mogeneous and well-educated. A politically unitary state with a strong tradition of parliamentary sovereignty, it has a highly egalitarian political ethos. Income is relatively evenly distributed.\textsuperscript{44} It is not heavily industrialized, having depended largely upon efficient primary economic activity, especially agriculture. In most of these respects, New Zealand differs markedly from the United States and even Australia.

Ironically, comparative models more worthy of attention in the United States generally have been neglected. Reformers should turn to reform suggestions and implementation of these suggestions in Australia or Canada. Like the United States, both nations have federal structures.\textsuperscript{46} Their populations, although smaller than the United States, exceed considerably that of New Zealand.\textsuperscript{46} They have experienced significant post-World War II immigration from Southern and Western Europe and Asia, giving them an ethnic diversity resembling the United States.\textsuperscript{47} They have a proportionally large industrial base. Their legal traditions go beyond that of the common law. Both have a tradition of constitutional government including judicial review of legislative action.\textsuperscript{48} Their systems possess formal and informal checks and balances, inhibiting overreaching legislative action. In other words, in contrast to New Zealand, and like the United States, parliamentary sovereignty is confined in Australia and Canada.\textsuperscript{49}


\textsuperscript{46.} In 1986, Australia was estimated to have a population of 16 million, Canada had a population of 25.5 million, and New Zealand had a population of 3.26 million. 1 COUNTRIES OF THE WORLD AND THEIR LEADERS YEARBOOK, at 210, 346, 898 (1988) [hereinafter COUNTRIES OF THE WORLD].

\textsuperscript{47.} For comments on the decreasing percentage of persons of British extraction in Australia and resulting growth in ethnic diversity, see A. BANKS & W. OVERSTREET, \textit{Political Handbook of the World} 514 (1981); COUNTRIES OF THE WORLD, supra note 46, at 210; Blainey, \textit{Australia: A Bird’s-Eye View}, 114 DAEDALUS, Winter 1985, at 1, 24-26.

\textsuperscript{48.} See supra note 45.

\textsuperscript{49.} We make no attempt to take account of Canadian developments in this Article. Our task, rather, is to describe Australian initiatives so that experience of reform may be more accessible to Americans. For discussions of Canadian law, see Hutchinson, \textit{Beyond No Fault}, 73 CALIF. L. REV. 755 (1985); Ison, \textit{The Politics of Reform in Personal Injury Compensation}, 27 U. TORONTO L.J. 385 (1977); McLaren, \textit{The Theoretical and Policy Challenges in Canadian Compensation Law}, 23 OS戈OEDE HALL L.J. 609 (1985); O’Connell & Tenser, \textit{North America’s Most Ambitious No-Fault Law: Quebec’s Auto Insurance Act}, 24 SAN DIEGO L. REV. 917 (1987); Trebilcock, supra note 15. Recently the
II. TORT REFORM IN AUSTRALIA

In Australia, tort reformers—parliamentarians and lawyers, both academic and practicing—have engaged in a robust debate about desirable measures to alter or reshape the liability system. This debate alone, with its slightly different presuppositions of government's role in society, is worthy of consideration in the United States. But more, the debate has finally precipitated statutory reform, the outlines and impact of which are highly relevant in the current debate in the United States. We undertake to describe these matters and give an assessment of the strengths, weaknesses, and political idiosyncrasies of the Australian developments.

A. Of the Australian Tort Reform Ship, Its Crew, and Political Rocks

At the outset, a caveat: In many ways, Americans should find the Australian initiatives relevant in thinking about the American reform agenda. Legislative action of planned reform, however, does not fit so easily with the American political and economic psyche. The United States was born in the libertarian age that lionized individual freedom; Australia was born in the Benthamite age that sanctified rational utilitarian planning.110 In this respect, the United States possesses the genes of the eighteenth century, Australia of the nineteenth century. Americans are leery of legislative intervention; Australians are much more accepting of it. Compensation schemes thus appear more natural on the Australian political landscape. In spite of this, the tort reform drive in the United States has a Benthamite character: the greater social good is to follow from legislative strictures on the common law. If Bentham, within this narrow sphere, has come of age in the United States, we are encouraged to take reformers to a place that Bentham has dominated. If such reform falters in Australia, it appears much more chimerical in the United States.

Australian tort law does not face problems of the same degree as United States tort law. Superficial reasons may be cited.

50. For an excellent exposition of this heritage, see Collins, Political Ideology in Australia: The Distinctiveness of a Benthamite Society, 114 DAEDALUS, Winter 1985, at 147.
Strict liability for defective products has never been accepted. Incentives to litigate are suppressed because contingency fees are unethical, and losing litigants must bear part of the successful party's costs, including attorneys' fees. Juries are relatively rare; most cases proceed before a single judge. Also, Australian courts, in contrast to the English and American, have been reluctant to ease the burden of proof of causation. Punitive exemplary damages are available only for intentional torts and even then only on a finding of contumelious disregard of the plaintiff's rights. On the cultural level, the vindication of rights through litigation is not ingrained in Australian attitudes. The absence of a constitutional bill of rights has dampened the courts' role in the protection of individual rights. Again in Benthamite fashion, the courts show a distinct deference to the legislature in delineating new regimes for protection of rights.

Within this defendant's pleasure dome, at least in relative terms, how did the demand for tort reform arise? In contrast to the demand for tort reform in the United States, the demand in Australia did not arise out of impossibly high insurance premiums or lack of available coverage. It sprang rather from a view that a more efficient system of compensation would release funds which could be more equitably spread to the victims of accidents that inevitably occur in modern industrialized societies. At the same time, the promise of reduced compulsory exactions to fund the scheme evoked more mercenary sympathies. The post-World War II generation of Australian and English legal scholars proposed these views from an overt social welfare

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51. Donoghue v. Stevenson, 1932 A.C. 562, and Australian Knitting Mills Ltd. v. Grant, 50 C.L.R. 387 (Austl. 1933), continue to rule as foundation negligence cases. However, the prospect of legislation imposing strict liability looms. The Australian Law Reform Commission has received a reference from the Attorney General to report on the desirability of legislative reform for defective products. In the United Kingdom, E.E.C. guidelines on product liability have obliged reform to a strict liability regime. For comments, see Stapleton, Products Liability Reform—Real or Illusory?, 6 OXFORD J. LEGAL STUD. 392 (1986).

52. For the English view, see supra note 25. For the Australian view, see Tubemakers of Australia v. Fernandez, 10 A.L.R. 303 (Austl. 1976).


54. See South Australia v. Commonwealth, 65 C.L.R. 373 (Austl. 1942). But the Australian High Court has construed broadly § 92 of the Australian Constitution on interstate trade so as to protect some interests from state regulatory interference.

55. Australian courts are prepared to utilize existing common law actions to protect liberty interests. For example, Australian courts have employed the torts of battery, assault, and false imprisonment, but they have been unwilling to manufacture an action to protect privacy. See Victoria Park Racing & Recreation Grounds v. Taylor, 58 C.L.R. 479 (Austl. 1937).
They perceived the tort system as a mechanism to provide compensation to accident victims. They then pointed out its inequity and arbitrariness. Tort law appeared a vestige of another age, a curious anomaly in the modern welfare state. In casting it aside, post-World War II reformers focused on the design of schemes. They assumed that government, as society’s agent of equity, should play the central part. More than in the United States, those who might have questioned the desirability of reform risked being branded as antediluvian or, still worse, as cynical supporters of the interests of trial lawyers and insurance companies.

The New Zealand scheme emerged from an established South Seas social laboratory. Australia hailed it as an admirable model. Those proposing such a scheme totally dominated the intellectual debate of the 1960’s and early 1970’s. Little coherent defense of the tort system was proffered. Hence the adoption of a New Zealand-like scheme, perhaps even more ambitious in covering both accidents and illnesses, seemed only to await an Australian federal government with a social welfare sympathy. Indeed, adjustments in torts courses at Australian law schools anticipated the development.

The Australian Labor Party was elected to government in 1972 with a strong platform of social change including the implementation of a National Compensation Scheme. Sir Owen Woodhouse, a New Zealand Court of Appeals judge and the prime architect of the New Zealand Scheme, was invited to head an Australian inquiry to prepare a comprehensive report and draft legislation. He and his colleagues prepared a comprehensive report, worthy to this day of close examination.

In outline, the “Woodhouse Report” recommended a nationwide scheme for compensating victims of accidents and illnesses. It argued for abolition of the right to pursue at common law an action for damages for personal injury. No-fault compensation was to be paid on a periodic basis, calculated primarily upon the demonstration of lost earning capacity. Permanently incapacitated employed persons presented the easiest case. They would receive up to eighty-five percent of their preaccident or sickness income. Special provisions covered the self-employed, the unemployed, youths, and those performing domestic duties. Although


the compensation provisions received the most prominence, the report also recommended new structures and funding for rehabilitation services and accident prevention.

But for a quirk of Australian parliamentary and constitutional law and convention, American tort scholars would probably have had another social experiment to discuss. Like Congress in the United States, the Australian Parliament is bicameral; legislation must pass both the House of Representatives and the Senate. The House of Representatives, where the government by definition has a majority, passed legislation adopting the Woodhouse Report. Party discipline ensured the passage of government business by a majority. In the Senate, however, the Labor government did not enjoy a majority. The opposition shunted the bill to a Senate Select Committee where it languished, not to be introduced before November 11, 1975, when the Governor-General, Sir John Kerr, in an extraordinary and controversial decision, prorogued Parliament without advice of the government. The bill lapsed and was not resuscitated when the opposition Liberal Party coalition handily won government in the ensuing election.58

Many in Australia continued to carry a torch for tort reform.59 The Australian Labor Party returned to power in 1983. Its platform included, as an “ultimate objective,” “an integrated Commonwealth-State nationwide scheme which ensures speedy compensation at reasonable levels for all persons injured in any kind of accident.”60 This platform embodied a legacy of skepticism

58. For a description of these events, see G. BARWICK, SIR JOHN DID HIS DUTY (1983); J. KERR, MATTERS FOR JUDGMENT: AN AUTOBIOGRAPHY (1979).
59. A notable proponent was Senator Gareth Evans, who later became Attorney General. Senator Evans had been on the faculty of law at the University of Melbourne School of Law.
60. NEW SOUTH WALES LAW REFORM COMM’N, 1 ACCIDENT COMPENSATION FINAL REPORT 1: A TRANSPORT ACCIDENTS SCHEME FOR NEW SOUTH WALES 101 (1984). The Labor Government’s platform contained, in part, the following proposals:

It seems apparent that the common law fault principle cannot be eliminated in all fields overnight. Accordingly, Labor will adopt a step-by-step approach in which the three major problem areas—motor accidents, industrial accidents, and ‘other accidents’ (including criminal, sporting and domestic injuries)—are tackled successively rather than all at once.

Labor’s ultimate objective is to have an integrated Commonwealth-State nationwide scheme which ensures speedy compensation at reasonable levels for all persons injured in any kind of accident. . . .

As presently contemplated, the proposed Commonwealth-State model will involve successive adoption of the following steps:

(i) no-fault motor accident compensation scheme to be introduced, accompanied by abolition of common law claims arising from such accidents;

(ii) increase workers’ compensation benefits under existing statutory system to match bench-marks set by motor accident scheme;
about grandiose governmental schemes left by the Whitlam Labor Government of the 1970's and, as a consequence, considered a more modest and less centralized reform program appropriate. The government therefore encouraged the states to introduce reforms on a uniform basis. Instead of a full frontal attack on the tort system and the immediate substitution of a state-run compensation system, the government considered a staggered process more appropriate. Initially, a transport accidents scheme would displace the common law in that arena. Then, a workplace accidents scheme would further supplant the common law. Finally, the scheme could be extended to all accidents. The times for the execution of a uniform cooperative scheme were propitious. All the Australian states with the exception of Queensland and Tasmania were controlled, in the mid 1980's, by Australian Labor Party governments.

It should not be assumed that all supporters of the Labor Party were solidly behind the efforts to reform tort law. Labor unions in Australia are singularly important in placing their powerful support behind the Labor Party. But on this issue, the unions were equivocal and, in some instances, hostile.

A vital raison d'etre for unions remains the aid rendered by union representatives, through affiliations with law firms, to union members in obtaining generous compensation for injuries, often minor injuries. Australia’s powerful trade unions feared that a no-fault scheme would destroy benefits fought for over a long period by unions. Unions naturally opposed no-fault schemes to the extent that they dilute the cumulative benefits under the common law, workers’ compensation legislation, and industrial awards bargained for separately.

Common-law liability tends to overcompensate the victims of minor accidents. Insurance companies face heavy costs of investigation and settlement of claims that are reduced by quick and relatively generous compensation payments for minor injuries. Most union members will suffer minor injuries, and accordingly, it is very much to the advantage of the union hierarchy to encourage and support this system. The relatively few victims of more serious accidents will, because of their injury, likely lose their employment and thus leave the union in any case. Unions

(iii) extend workers’ compensation to 24-hour-a-day cover for earners, with abolition of common law claims;
(iv) 24-hour-a-day cover for non-earner non-road accident victims.

Id.

62. 5 N.S.W. Parl. Deb. 797 (1953).
have secured very generous rights through bargaining, at least for those suffering less than catastrophic injury. Australian workers may not always appreciate that those of them injured on the job enjoy rights, in having recourse both to no-fault and the common law, that outstrip those of their North American cousins who find themselves restricted to their no-fault rights. But it is naive to expect that an epidemic of altruism would infect unions in Australia. The formidable combination of the professional bar and many powerful unions has had a profound influence on the reform process and its eventual product.

B. Australian Reform

The Australian path to tort reform has been tortuous. The achievement of a uniform comprehensive scheme along the lines of the Woodhouse Report remains distant. Some halfway houses have been reached in the individual states, but not in the order anticipated in the federal government's platform.

1. New South Wales proposals—The government in the oldest state of Australia initially proposed to follow the ordained route in its planning. In 1981, the Attorney General of New South Wales called on the New South Wales Law Reform Commission to inquire into, report on, and make recommendations concerning the adoption of a no-fault compensation scheme as a first step, respecting injuries arising from the use of motor vehicles or other forms of transportation. The commission set forth a number of reasons to justify the initially limited focus on transport accidents. In that kind of accident:

1) large numbers of victims were involved and injuries were generally severe;
2) current arrangements failed to give adequate compensation and evoked community criticism;
3) elsewhere in Australia, auto no-fault had been introduced;
4) liability insurance was growing increasingly more costly; and
5) compensation could be made available from the ready source of funds already financing liability insurance. 63

The Commission recommended a no-fault transport scheme that would abolish the common law for transport accidents. Workers' Compensation legislation existing at that time would remain in force. The Commission's Report is a very thorough document that articulates in detail the reasons for, and the structure of, a no-fault scheme. 64

The crucible of politics, however, produced a different legislative package in 1987. The state legislature adopted a transport accidents scheme 65 along with a revamped workers' compensation scheme. 66 These reforms abolished common-law rights and remedies for injuries arising under the terms of the legislation. 67 Quite remarkably, however, the Transport Accidents Compensation Act of 1987, entering into force on July 1, 1987, though adopting the bulk of the New South Wales Law Reform Commission recommendations, rejected its central plank: The statute retains fault as the determinant of entitlement to compensation. 68 The retention of fault contrasts with the Workers' Compensation reform, which now resembles the American model establishing an exclusive no-fault code.

63. NEW SOUTH WALES LAW REFORM COMM'N, supra note 60, at 9-10. Point 5 is also made by Blum & Kalven, Ceilings, Costs, and Compulsion in Auto Compensation Legislation, 1973 Utah L. Rev. 341, 379.
64. See supra note 60.
66. Workers Compensation Act 1987, No. 70 (N.S.W.).
67. Transport Accidents Compensation Act § 40(1):
No right to or claim for damages or compensation or any other benefit (pecuniary or non-pecuniary) shall lie, otherwise than as provided by this Act, against any person for or in respect of the death of or bodily injury to a person caused by or arising out of a transport accident occurring on or after 1 July 1987.
Workers Compensation Act § 149(1):
A worker is not entitled to recover damages, otherwise than under this Act—(a) from the worker's employer; (b) from any person who is vicariously liable for the acts or omissions of that employer; or (c) from any person for whose acts or omissions that employer is vicariously liable.
68. Transport Accidents Compensation Act § 31(1):
If an injured person is able to prove, in accordance with the civil law, that another person is (in the capacity of the owner or driver of a motor vehicle or other form of transportation or conveyance to which this Act applies) liable, in whole or in part, for the bodily injury suffered by the injured person, the injured person is entitled to benefits under this Act.

For commentary, see Phegan, The Scheme in Context—TransCare to TransCover, in CONTINUING LEGAL EDUCATION SEMINAR: THE NEW TRANSPORT ACCIDENT COMPENSATION SCHEME (University of Sydney; June 20, 1987) [hereinafter CONTINUING LEGAL EDUCATION SEMINAR].
By jettisoning the no-fault concept but adhering to other recommendations, the New South Wales legislation, termed the "TransCover" Scheme, takes an entirely idiosyncratic course, destined to subvert its own goals. The scheme provides that, to make a good claim for compensation, an injured person must prove "in accordance with the civil law, that another person is . . . liable, in whole or in part, for the bodily injury suffered by the injured person." This determination is not, in the first place, made by a court. Rather, the Government Insurance Office (GIO) performs this function, in addition to a panoply of other administrative and supervisory functions. The GIO hears claims and then has the duty to "advise and assist persons in the preparation and making of claims for benefits." At the same time, the GIO must undertake the apparently conflicting task of investigating the claim, while ensuring that it is "not dealt with in an adversary manner." The GIO also looks to its fiscal responsibilities in matching income with outgo.

Plainly, determining and supervising entitlements requires Solomonic wisdom. Indeed, one wonders how the GIO can determine fault, combined with the permissible defense of contributory negligence, without judicial antecedents. Uncertainty will abound, and an accompanying increase in the cost of claims disposition will result. Transaction costs, the vice visited upon the common law, will return to stalk the TransCover Scheme.

The TransCover Scheme calculates compensation for wage loss on the basis of either total or partial disability. Subject to proof of fault, the Scheme entitles a totally disabled wage earner to benefits of eighty percent of earnings to a maximum of $500 per week. A partially disabled earner, fit to do at least some work, is entitled to wage loss benefits calculated at eighty percent of the difference between preaccident or postaccident earn-

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70. Transport Accidents Compensation Act § 12.

71. Section 155.

72. Section 157.

73. Section 158(1)(a)-(b). For criticism see Ferguson, The Presentation of Claims—The Role of the Legal Profession, in CONTINUING LEGAL EDUCATION SEMINAR, supra note 68.

74. Section 37 permits reduction of compensation for loss of earning capacity or compensation in respect of permanent impairment.
ings, subject to the same maximum of $500 per week.\textsuperscript{76} The GIO redetermines the extent of disability from time to time.\textsuperscript{76}

The Scheme requires all hospital, medical, and associated costs to be paid in full, once again subject to considerations of fault.\textsuperscript{77} Impairment of a physical function may attract a lump sum payment,\textsuperscript{78} calculated on the degree of permanent impairment. A one hundred percent impairment in a person twenty-five years or less of age will yield a lump sum payment of $120,000. The legislature intended that these determinations be medically based upon material including the American Medical Association's "Guides to the Evaluation of Permanent Impairment."\textsuperscript{79}

This aspect of the Scheme prompts criticism. The use of similar impairment tables in the United States workers' compensation scheme has led to a disproportionate amount of litigation and expense.\textsuperscript{80} The presence of such noneconomic categories is questionable when viewing the scheme in insurance terms. The cost of replacing earnings to the level of the prescribed ceiling, together with medical expenses, including rehabilitation, will be great. It should not be forgotten that very significant governmental subsidization of health care in Australia may hide the real cost of the compensation system. The New Zealand Scheme has managed to suppress rapid apparent increases in compensation and death benefits because, among other reasons, the government's health care system bears the medical costs. In fact, real hospital and medical costs almost doubled in the first eight

\begin{itemize}
  \item \textsuperscript{75} Section 79.
  \item \textsuperscript{76} Section 82.
  \item \textsuperscript{77} Section 47.
  \item \textsuperscript{78} Section 103.
  \item \textsuperscript{79} Section 106.
  \item (1) The regulations may make provision for or with respect to the basis on which the degree of a permanent impairment shall be assessed.
  \item (2) Regulations made for the purposes of subsection (1) may provide for the adoption, wholly or in part and with or without modification, of—
    \begin{itemize}
      \item (a) the publication entitled "Guides to the Evaluation of Permanent Impairment" published by the American Medical Association;
      \item (b) any adaptation of the publication referred to in paragraph (a) by any government department or instrumentality within Australia;
      \item (c) the publication entitled "Guide to the Assessment of Rates of Veterans' Pensions" prepared by the Commonwealth Repatriation Commission; or
      \item (d) any other standard or set of criteria for assessing the degree of a permanent impairment published by any person other than the GIO.
    \end{itemize}
  \item \textsuperscript{80} 2 A. LARSON, WORKMEN'S COMPENSATION LAW §§ 57.14, 57.15 (1986). See generally M. BERKOWITZ & J. BURTON, PERMANENT DISABILITY BENEFITS IN WORKERS' COMPENSATION (1987).
\end{itemize}
years of the New Zealand Scheme's operation; lump sums for noneconomic loss trebled.\textsuperscript{81}

Adding on noneconomic recovery to compensation for economic losses may therefore threaten financial viability. Only careful—and expensive—monitoring will avoid cost escalation. Significantly, insurance policies involving life, health, and fire insurance uniformly eschew coverage for noneconomic loss. A narrow exception is disability insurance; this exception is "narrow" because it makes available only relatively small liquidated amounts for loss of limbs and other bodily functions. One explanation for such reluctance to reward noneconomic loss relates to the violation of the principle of indemnity on which insurance depends for its solvency and integrity.\textsuperscript{82} That principle states that the value of insurance benefits should not exceed the loss to the insurance payee. Otherwise, the payee is encouraged to incur the loss. Because psychic loss is so subjective, any attempt to measure it—even by a so-called objective means based on degree of disability—can be manipulated by the insurance payee.\textsuperscript{83} In effect, non-liability insurers do not sell coverage for noneconomic loss because they fear its uncontrollable effects on claim frequency and accident claim costs. They probably rightly infer that, in a voluntary market, insurance buyers would not choose to pay the substantial extra premiums needed to cover the prospect of such noneconomic loss.\textsuperscript{84}

Reasons beyond fiscal viability can be identified. Mandatory, even if small, amounts for noneconomic loss for serious injuries may be viewed as derisory. They may affront the polity even more than a candid refusal to pay such amounts at all.\textsuperscript{85} The desire to provide noneconomic compensation is perhaps under-

\textsuperscript{81} Woodfield, Insurance, Incentives and the Privatization of Social Welfare, 3 C.I.S. Pol'y Rep. 11 (1987) (the officially estimated cost of private medical treatment in 1986 of $24.5 million was overly sanguine; $98 million was in fact expended); see Crumpton, An Evaluation of the New Zealand and Victorian Schemes (Aug. 1983) (unpublished seminar given at the University of New South Wales).

\textsuperscript{82} O'Connell, A Proposal to Abolish Defendants' Payment for Pain and Suffering in Return for Payment of Claimants' Attorneys' Fees, 1981 U. Ill. L. Rev. 333, 344-48; see also S. Shavell, Economic Analysis of Accident Law 229-31 (1987). Shavell notes that "insurance coverage is intended mainly to remedy pecuniary needs created by losses, not to compensate for disability due to losses." Id. at 231.

\textsuperscript{83} O'Connell, supra note 82, at 343-44.


standable because the scheme is promoted as an equitable replacement of present common-law damages. But its inclusion, in our view, creates a considerable risk to the long-term financial viability of the scheme.

The TransCover Scheme includes detailed provisions for nonearners,86 for the young,87 and for the dependents of persons killed as a result of transport accidents.88 A medical review panel hears appeals.89 Matters not relating to medical assessment are appealed to the New South Wales District Court.90

The basic reason for the adoption of this scheme was to contain increasing cost that had begun to induce marked increases in compulsory motor vehicle liability insurance premium rates. This scheme purported to control costs.91 Herein lies the reason for the retention of fault.92 Fault provides a sieve for claims, effectively reducing the numbers of successful claims, in turn reducing the apparent cost of the scheme. The cost is "apparent," because it seems that the administration costs must rival, and probably initially surpass, those of the common law. Fault has survived along with the defense of contributory negligence. In addition, total exclusion from benefits awaits those who fail to report accidents or who have incurred the injury in the commission of a crime.93 Partial exclusion may follow from, among other things, conviction for a number of offenses under the Motor Traffic Act 1909, for drunken driving, and for failure to wear a seat belt.94

In a similar way, the TransCover Scheme exacerbates litigation costs where substantive rights depend upon definitions of compensable events. Recall the considerable difficulties in defining the meaning of "the course of employment" in the workers' compensation field.95 The task of defining "death of or bodily injury to a person caused by or arising out of a transport accident"96 will not be as difficult as determining fault. However, the scheme is partial and does not cover all injury and illness. Incen-

86. Transport Accidents Compensation Act §§ 51, 68-78.
87. Section 84.
88. Sections 123-143.
89. Sections 180, 184.
90. Sections 184, 186.
92. Section 31; see Phegan, supra note 68, at 5.
93. Sections 34-35.
94. Section 38.
96. Section 40.
tives to litigate will arise to classify the injury circumstances ei-
ther as governed by the common law or the statutory regime. As witnesed in the American law, the choice will depend on how the litigant is advantaged.

This overview touches the surface of schemes that bristle with definitional issues calling for legal battle. It is something of a chimera in our complex rights-accented society to imagine that the institution of the courts can be completely bypassed, especially if fault remains the talisman. If anything, we may more realistically expect voluntary arrangements to be more successful than those bureaucratically imposed.

2. Victoria and South Australia proposals—In contrast to the New South Wales approach, Victoria and South Australia attacked tort reform in reverse order: industrial accident reform legislation predated motor traffic accident reform legislation. Both states were motivated by the burdensome cost of insurance premiums to cover an employer's potential liability. In Australia, in contrast to the United States, the no-fault workers' compensation schemes did not provide exclusive rights; injured workers could still have recourse to an action at common law against an employer. Such a cumbersome workers' compensation system provoked cries for relief from industry. With heavily labor-intensive industry under severe cost pressures in the 1980's, these cries echoed down the political corridors. Faltering industry and increasing unemployment rates had immediate political consequences. The legal academic community, seeing an opportunity to rekindle the reform process that had been stalled for so long, provided an important pro-reform ally. As a result, both Victoria and South Australia moved to trim the cost in schemes


99. O'Connell & Joost, supra note 24; see also supra note 49.


made appropriately palatable for labor union acceptance—a vi­tal strategy because unions cherished the availability of com­mon-law relief. This bias on the part of labor unions has impli­cations for tort reform in the United States.

Both Victoria in 1985102 and South Australia in 1986103 en­acted legislation that provides more generous no-fault workplace benefits than previously applicable, but at the same time, se­verely curtails resort to the common law. The legislation in Vic­toria limits an injured worker’s tort claim to nonpecuniary dam­ages, except for wrongful death and accidents occurring during employment involving travel.104 The South Australian legislation similarly restricts an injured worker’s tort claim to nonpecuniary damages. These damages, if awarded, must not exceed 1.4 times105 the amount payable under the no-fault provision for compensation of noneconomic loss.106 This no-fault, noneconomic amount is calculated according to a schedule that sets forth a percentage disability taken from a table of maiming injuries. The maximum recovery allowed under the no-fault scheme for a disability occurring in 1986 was $60,000. Hence, the maximum obtainable at common law for such disabilities in 1986 was $84,000. For example, total and incurable paralysis lists at one hundred percent. Wrongful death is especially treated where the employee was, or ought to have been, covered by third-party motor vehicle insurance, and a common-law action without re­striction may be brought.107

The scheme compensates the partially or totally incapacitated South Australian worker on the basis of weekly payments for loss of income in the following way: First, if the worker is inca­pacitated for less than one year, the entitlement will equal the worker’s notional weekly earnings if totally incapacitated. “No­tional weekly earnings” are the worker’s average weekly earnings as adjusted by inflation or pay increases.108 If partially incapac­i­tated, the worker’s entitlement equals the difference between the worker’s notional weekly earnings and the weekly earnings that the worker earns or could earn in suitable substitute em­ployment.109 Second, if the period of incapacity exceeds one

106. Section 43.
107. Section 54(2).
108. Section 3.
109. Section 35(1)(a).
year, the worker is entitled to payments of up to eighty percent of the worker's notional weekly earnings. If partially incapacitated, the worker's entitlement equals eighty percent of the difference between the worker's notional weekly earnings and the weekly earnings that the worker earns or could earn in suitable employment that the worker has a reasonable prospect of obtaining.

The Victorian legislation entitles, but also limits, a totally incapacitated worker to eighty percent of "pre-injury average weekly earnings" or $400, whichever is less. The statute prescribes a minimum payment to protect low income earners. A partially incapacitated worker is entitled to compensation so long as an actual or deemed drop in income exists. In this case, the worker is entitled to eighty-five percent of the difference between the current weekly earnings and the worker's "pre-injury average weekly earnings" or $400, whichever is less. This, in effect, places a ceiling upon the recovery that an injured worker may make.

Provisions under both states' legislation exist for administrative review of payments. South Australia's full income replacement for the first twelve months deserves brief comment. This provision is imprudent because it entrenches an incentive to claim for minor injuries. If anything, the bias should be reversed—the catastrophically injured should be favored. Political compromise explains this revision. The unions had negotiated benefits with employers under industrial awards that would establish in the Australian industrial system a catalog of employment terms and conditions enforceable through a system of industrial courts. In other words, deference to the political potency of union interests explains this provision. It is part of the sugar-coating that, in our view, will ultimately have detrimental consequences for the health of the scheme.

In both Victoria and South Australia, prior to this new legislation, an employer's private insurance policies covered workers' compensation liability. Both states have placed a portion of the blame for the cost of the old system on the private insurers. Accordingly, the new legislation eschews the use of private insurers. Instead, an employer in the ordinary case must pay a levy to a governmental body established pursuant to the legislation.

111. Section 93(1).
Employers pay this levy according to a percentage of the aggregate remuneration paid to workers.\textsuperscript{112} To some extent, the legislation recognizes the need to create incentives for safety by penalizing "dangerous industries"\textsuperscript{113} and rewarding safe employers.\textsuperscript{114} The legislation in Victoria does not allow an increase in the rate levels before September 1990.\textsuperscript{115} This aspect causes disquiet, because it signals that rate-setting may become a political pawn instead of a reflection of the riskiness of particular categories of industry. If so, rate-setting would undermine the provisions for safety promotion.\textsuperscript{116} The shorter political horizon would substitute for the longer market-oriented actuarial risk.\textsuperscript{117}

The legislation in Victoria and South Australia predictably attempts to minimize the participation of the courts. Designated government officials make determinations of eligibility subject to internal appeal.\textsuperscript{118} Both acts, however, preserve avenues of appeal, limited to questions of law, to their respective supreme courts.\textsuperscript{119}

In the motor vehicle accident area, Victoria has recently introduced a no-fault scheme. This scheme replaces and repeals an earlier no-fault scheme that provided limited add-on no-fault benefits.\textsuperscript{120} The Transport Accident Act of 1986 became effective January 1, 1987.\textsuperscript{121} If a transportation accident subsequent to that date causes personal injury, the victim may bring an action at common law only where the injury is defined as "serious."\textsuperscript{122} The Act provides that the no-fault benefits for total loss of earnings are either eighty percent of the preaccident weekly earnings or calculated on a scale of payments determined by numbers of dependents, whichever is greater.\textsuperscript{123}

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\textsuperscript{113} 1985 Vict. Acts 10191, § 188(1); 1986 S. Austl. Acts 124, § 16(9).
\textsuperscript{115} 1985 Vict. Acts 10191, § 187(5).
\textsuperscript{120} Motor Accidents Act, 1973 Vict. Acts 8429.
\textsuperscript{121} Transport Accident Act, 1986 Vict. Acts 111.
\textsuperscript{122} Section 93.
\textsuperscript{123} Sections 44(1) & (2).
weekly payment must not exceed either $430 or one hundred percent of preaccident earnings. If partial loss of earnings has occurred, the benefit is eighty-five percent of the difference between the current weekly earnings and preaccident weekly earnings or determined according to a scale by numbers of dependents. If a person has suffered a total loss of earnings, the same upper limit applies—$430 or one hundred percent of lost earnings. In addition, an injured person who suffers a degree of impairment of more than ten percent may claim an "impairment benefit" according to a formula turning upon the degree of impairment, with one hundred percent impairment leading to a stipulated payment of $40,580. The injured person may receive this benefit by way either of a lump sum or periodic payment. Detailed and specific provisions cover minors, nonearners, dependent spouses, surviving children, and others. All monetary amounts are indexed to inflation based on projected increases in average weekly earnings. The Act also covers the cost of medical services.

Under the Victorian Transport Accident Act, only those suffering "serious injury" have recourse to the common law. Serious injury is defined as an injury indicating a degree of impairment of thirty percent or more, including wrongful death. If an action is brought, the Act limits potential damages. Damages for pecuniary losses and pain and suffering cannot be awarded if the total assessed for both is less then $20,000. The Act prohibits recovery of pain and suffering damages exceeding $200,000 and pecuniary damages in excess of $450,000. It caps total damages in wrongful death actions at $500,000.

The Act allows for appeals from administrative determinations made pursuant to the Act. This scheme, unlike that established under the earlier Accident Compensation Act, centralizes the collection of levies and the payment of compensation in a governmental body, dubbed the Transport Accident Commis-

124. Sections 45(1) & (2).
125. Section 47.
126. Section 61.
127. Section 60.
128. Section 93(3).
129. Sections 93(7)(a)(i) & (b)(i).
130. Section 93(7)(b)(ii).
131. Id.
132. Section 93(9).
133. Sections 77-83.
The Commission also has safety and rehabilitation functions. The South Australian legislation, on the other hand, drastically reduces recovery of damages for motor accidents, without providing attendant no-fault benefits. No damages may be awarded for noneconomic loss unless the injury significantly impaired the person's ability to lead a normal life for a period of at least seven days or resulted in medical expenses of at least $1,000. This approach, as applied in 1987, awards noneconomic losses on the statutory formula that produces a maximum of $60,000. The legislation prohibits damages for mental or nervous shock, except where the plaintiff was actually present at the accident or was a parent, spouse, or child of the victim.

C. Some Lessons

The Australian reforms, like the present American ad hoc reform phenomenon, respond in a shallow way to apparent accident cost increases. They demonstrate little real concern for those most disadvantaged by accidents—the catastrophically injured. Most obvious are a group of reforms designed to directly lower damage awards to successful plaintiffs. Two High Court of Australia decisions fueled damage awards, resulting in increased third-party premium rates for automobile and workers' compensation. In these cases, the High Court exhibited a genuine concern that damages should be tailored with the goals of tort law in mind. But the political pressure of a large class of premium payors ignored such arguments.

State legislatures reflected more deeply when considering the schemes discussed above. Nonetheless, political expediency ruled the day. The shortcomings of the schemes were not thoroughly considered. For example, the schemes adopt a system of

134. See § 12 for a complete list of functions.
135. Wrongs Act Amendment, 1986 S. Austl. Acts 126, § 35. This $1,000 amount could change.
periodic payments under which accident victims arguably become mendicants of the state. They lose independence and, with it, a vital incentive to rehabilitation. The low ceilings provided in the Australian reforms also trench upon the middle class victim who may witness a severe reduction in his circumstances. Although purchasing insurance may ameliorate this problem, it seems ironic that a state compensation scheme enacted with the aim of equitable and adequate compensation for accident victims should stimulate a significant private insurance market. To be sure, victims of catastrophic injury will have coverage for long-term medical needs. But if, as is likely, medical costs increase exponentially, then the quality of health care will also suffer unless national health care funding is radically increased. In this way, the Australian reforms do not meet the often repeated criticism that the common-law system favors the mildly over the catastrophically injured. Instead, the Australian reforms compound the sin.

Ideally, a rational inquiry should open the way for consideration of all vying interests, and the weight of good sense and logic should lead to beneficial reform. The Australian experience gives pause to those who argue for such an ideal. The report of the New South Wales Law Reform Commission on a Transport Accident Scheme for New South Wales provides a case study. The partial adoption of the report's recommendation of a comprehensive no-fault scheme for auto accidents undermined the very goals of the recommendations. That this befalls reform in Benthamite Australia indicates that it would occur to a much greater degree in the United States.

A lesson to be extracted from the Australian experience is that optimal reform must account for all contending interests. Successful reform may be more realistically achieved if a structure of rules can be fabricated whereby parties may have more freedom to choose desirable compensation agreements. This approach not only makes reform achievable, but also makes the reform, once adopted, more likely to be acceptable to the community. Keep in mind that if no-fault insurance could be structured to compete side-by-side with tort liability insurance, the state agency would be compelled to administer efficiently and keep up-to-date, adequate benefits. In a changing society, we should beware of legislative reforms that unduly restrict choice.

139. See J. Fleming, supra note 12, at 377; see also P. Cane, supra note 56, at 291-312.
140. See supra note 24.
and change. Of all possible choices, an elective no-fault scheme is more likely, over time, to conform to Professor Keeton's desiderata. 141

Mindful of our predictions that the Australian legislation possesses flaws, we now set forth an alternative. We are encouraged that the New South Wales legislation provides for a Review Committee, signaling that the book of reform is not closed. 142

III. A PROPOSAL FOR REFORM

An examination of the Australian reform experience may play a valuable role in the formulation of any proposal for reform. The controversy between the merits of no-fault versus fault-based compensation schemes raises the possibility of allowing both types of compensation to compete side-by-side with one another under elective programs.

A. An Elective No-Fault Scheme

This Part sets forth contractual and legislative schemes that may avoid many of the pitfalls of comprehensive state-directed schemes and of ad hoc short-sighted reform measures. These schemes of reform would fit both within the United States and Australia. Indeed, in Australia we speculate that the flaws of the Victorian, South Australian, and New South Wales legislation may force some reformulation along the lines suggested. In the United States, we hope that more mature consideration of tort reform measures may encourage adoption of the type of measures outlined. Because the no-fault alternative has already been aired before American legal audiences, 143 this Part concentrates on how the reform would operate in Australia. Nevertheless, our discussion is material for American reformers. Its "outside" review and summarization should be instructive in showing how an elective no-fault system may function.

The proposed elective no-fault reform would allow governments to initiate no-fault changes interstitially and selectively—even electively. The fact that state-owned insurance

141. See supra note 36 and accompanying text.
142. Transport Accidents Compensation Act 1987, No. 101 (N.S.W.), §§ 204-205. A similar review is contemplated under the Workers Compensation Act 1987, No. 70, § 8 (N.S.W.).
143. See supra note 4.
companies, as authorized insurers, write almost all third-party personal injury motor vehicle liability insurance in Australia greatly facilitates an elective form of no-fault insurance at least for motor accidents. For example, even without enabling legisla­
tion, the Government Insurance Office of New South Wales (GIO) could offer its insured drivers a no-fault motor vehicle policy calling for no-fault benefits of the type recommended by the Law Reform Commission. The GIO could pay benefits for personal injury to insured persons and their relatives residing in the same household. In return, the insured persons and all their dependent no-fault beneficiaries would, at the time of purchasing the policy, waive any rights to sue any GIO-insured motor vehicle driver in tort for personal injury.144

B. A Contractual Elective No-Fault Scheme

Because the GIO of New South Wales obtains the benefit of avoiding payment of tort damages to the no-fault insured drivers and their relatives under a contract waiving potential tort claims, these savings could fund the payment of no-fault benefits to no-fault insured persons. The United States' no-fault experience demonstrates that payment of no-fault benefits is, in gross, much less costly to an insurer than payment of tort damages. Thus, no-fault benefits should cost no more—and probably substantially less—than tort liability insurance. At whatever comparative cost, an insured person would have the option of deciding which form of insurance better suits her needs: no-fault or fault-based.

A proposal for elective no-fault may come in various forms. For example, it could expand the spectrum of insurance offerings. The insurer could offer: (1) a no-fault package that adds on no-fault benefits, with no restraint on suing in tort apart from deducting benefits already paid under no-fault; (2) a no-fault package with benefits comparable to those under the New South Wales Law Reform Commission's Report, with a concomitant contractual waiver of tort rights; or (3) regular tort liability coverage.

144. For a discussion of this proposal, including the issue of how minors could be bound to the no-fault choice, see O'Connell, Transferring Injured Victims' Tort Rights to No-Fault Insurers: New "Sole Remedy" Approaches to Cure Liability Insurance Ills, 1977 U. ILL. L.F. 749, 790 n.136. For another elective no-fault auto insurance proposal, utilizing uninsured motorists coverage, see O'Connell & Joost, supra note 24.
In the usual motor vehicle accident, passengers and driver proceed against another insured driver. Rarer cases include actions against parties other than drivers of vehicles. Manufacturers of cars and component parts form a category of possible third-party defendants. Under the elective no-fault scheme, a common-law action would lie against these other categories. Preaccident waivers of tort rights against motorists may encourage a search for other third-party defendants.

We consider encouraging actions against these defendants desirable. Because of greater difficulties in bringing actions against, for example, manufacturers and road designers, these defendants probably are comparatively unrepresented in today's litigation. Targeting them more frequently as defendants in common-law actions may well cause them to invest more heavily in safety. These defendants are arguably in a better position than motorists to take the most meaningful safety precautions. Our scheme has the benefit, not shared by the New South Wales reform, of heightened emphasis on the common law in an area where it is more likely to fulfill its role of encouraging safety.

A more complex scheme could apply to any insurer, not just one with a governmental monopoly on automobile coverage, and could apply to liability for any kind of accident, not just those involving automobiles. Under this scheme, an insurer could sell first-party, no-fault coverage for wage and health benefits, while providing that once the no-fault payment is made, the no-fault insurer succeeds to the rights of the no-fault beneficiary against any tortfeasor, including rights to pain and suffering. Unlike the simple contractual arrangements above, this version of the scheme is complicated by recondite law relating to assignment of bare rights of action. "[E]quity did not allow the assignment of a bare right of action, whether legal or equitable . . . on the ground that it savoured of or was likely to lead to maintenance." Courts, however, will enforce such an assignment if the contract of insurance constitutes "a genuine commercial interest" in a chose in action that arises independently of the arrange-

147. Id. at 441-50.
149. Trendtex Trading Corp., 1982 A.C. at 703; see also Tunkl v. Regents of Univ. of Cal., 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963).
The chose in action—the right of action—under our scheme is the quid pro quo for the granting of no-fault compensation rights. It arises independently of any arrangement to maintain the action and hence is enforceable.

Arguably, under a scheme involving assignment of a cause of action, many insureds could not make a truly informed choice, at the time of purchasing insurance, between fault and no-fault insurance, given the complexity of tort law and insurance. The potential for confusion of insureds may even cause a court to render such a no-fault choice not binding on an injury victim who turns out to have a clear case under tort liability.

Australian courts would subject such agreements to close scrutiny. Moreover, they could employ the doctrine of unconscionability as a basis for setting aside contracts. A court may set aside a contract at the behest of an underprivileged or misinformed promisor. Factors that may persuade a court to set aside the contract include a plaintiff's lack of information, a plaintiff's reliance on a misapprehension brought to the notice of the defendant, and a plaintiff's inexperience with matters and language of a commercial nature.

The Canadian case of *Pridmore v. Calvert* is directly relevant to a waiver of rights in the insurance context. In this case, the plaintiff executed a release of liability in favor of the defendant insurance company soon after an accident. The court set aside the release on the basis of the doctrine of inequality of bargaining power. The court emphasized the unequal information possessed by the parties, especially at a time soon after the accident before the plaintiff could acquire independent legal advice. Another case viewing the relationships between insurer

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153. 54 D.L.R.3d 133 (1975).
154. *Id.* at 144; cf. Tunkl v. Regents of Univ. of Cal., 60 Cal. 2d 92, 338 P.2d 441, 32 Cal. Rptr. 33 (1963).
155. *Pridmore*, 54 D.L.R.3d at 141-44.
and insured also emphasized the crucial element of independent advice. Australian courts would consider such cases under the unconscionability doctrine or alternatively, if a relationship were established and continued, under undue influence. In any event, independent advice under Australian as well as Canadian law destroys the basic ingredients of unconscionability and dispels a presumption of undue influence.

The elective, no-fault scheme of reform, therefore, may well require the opportunity of independent legal advice. But to provide it to each insurance buyer at the time she buys insurance would be cumbersome and expensive. In addition, the uncertainties in judicial attitude may dissuade an insurer from this innovative path.

Two strategies may circumvent these possible stumbling blocks. First, given the political will, legislation could authorize insureds to enter into elective no-fault arrangements of the type suggested. The legislation could definitively establish guidelines for the fairness of the election, for example, stipulating the extent and nature of information to convey to the insured. The legislation could describe the class of persons covered in an insurance policy. It could also provide that the election of a policy binds those persons and, at the same time, allows them to enforce the no-fault contract against the insurer. The disadvantage of this strategy lies in the usually cumbersome and, as we have seen, unpredictable nature of having legislation enacted. Furthermore, such legislation will naturally be viewed as controversial because it may appear, by undermining traditional common-law rights, to favor strong insurance companies over weak individual claimants.

Another method, fully consistent with freedom of choice, to surmount these difficulties could allow the insurer to bind itself by a preaccident guarantee to tender such no-fault benefits, but bestow upon the accident victim a postaccident choice to reject

159. See supra notes 57-62 and accompanying text.
such benefits and sue in tort. Such a scheme would probably withstand any judicial scrutiny, because no one loses any common-law rights unless, after the accident, a victim with advice as to the available rights under tort and no-fault schemes surrenders a fault-based claim in return for no-fault benefits. Consequently, the accident victim could not argue unconscionability of the contract or unlawful assignment of the cause of action.

This exception, however, raises the possibility of adverse selection against the insurer. If a victim could choose after an accident whether to press a fault-based or a no-fault claim, those with valid fault-based claims would more likely press them, and those without fault-based claims would collect no-fault benefits. As a result, an insurer would not have the benefit of a surrender of fault-based claims to provide income to pay no-fault benefits. For this reason, reform along these lines should reserve the obligation to tender no-fault benefits for very serious cases—for example, those with losses of, say, $25,000 or over. Given the marked preference of most seriously injured victims for certainty of benefits as opposed to the risks of a tort suit, most of them—even those with a good chance of tort recovery—would likely prefer immediate, certain no-fault benefits to an uncertain, dilatory tort recovery. For those with serious injuries, the gamble and delay of proving liability and of having damages reduced by contributory negligence militates in favor of a no-fault choice. Moreover, those afflicted with serious injuries will recognize that once liability is proved and damages have been awarded, the possibility of unforeseeable changes in their lives renders those damages of dubious value when compared with a flexible periodic payment system tailored to changing needs.

A scheme allowing the accident victim a postaccident choice between fault and no-fault claims will be more expensive than one providing such a victim with only a preaccident choice. A preaccident choice allows even victims with small claims who are generously compensated under the pain and suffering component to have their tort claims foreclosed, thus releasing more funds to pay no-fault claims. A postaccident choice, on the other hand, gives those with relatively small claims much less incentive to surrender their tort claims. The rational small claimant, given the chances of a very generous settlement of his claims, will engage in the forensic lottery of the tort claim. Allowing this

postaccident choice, then, will result in fewer savings from elimination of a multitude of smaller claims with their comparatively large pain and suffering component.

This elective, no-fault scheme is not novel. The 1978 Report of the Board of Inquiry into Motor Vehicle Accident Compensation in Victoria urged a variant of the victims' postaccident election. The Report recommended such an elective device as a means of compensating for wage loss beyond the two-year wage loss limit under the former Victoria Motor Vehicle Act.\(^{162}\) Indeed, Mr. Hanlon, Q.C., counsel in the Victorian inquiry, reiterated such a variant in 1983:

\[\text{At the end of the period of 104 weeks (or two years) of payments a person desirous of and eligible for continuation of payments should appear before the Motor Accident Appeal Tribunal and seek an extension of their [sic] no-fault entitlement. This application, if granted, would involve the destruction of whatever common law right existed to compensation arising out of the incident which caused the disability and the person would have to signify to the Motor Accident Appeal Tribunal at the time of making the selection that was understood and accepted. On the other hand, the issue of proceedings at common law for damages would by itself destroy all rights to Motor Accident Board payments in excess of the existing [no-fault] limit.}\]

This would lead to a situation in which the award of an unlimited no-fault payment is a replacement of common law damages . . . . If it meant eventual disuse of the common law system then that would be at the wish of the citizens, expressed by the use to which they put the system, and far more acceptable than the outright destruction of it, in the hope that what one was doing was better than what one was destroying. It offers also the capacity to deal with the problems thrown up by the movements towards change as they arose and in a practical fashion rather than . . . creating the possibility that one set of problems is eradicated and replaced by another set equally intractable [under a new scheme replacing traditional tort law]. This, in my view, would be a far better way to proceed into the future since it offers the

advantage of allowing us to make decisions about persons' rights based on our observations of what they, themselves, value more highly. It does not rely upon the judgment, however brilliantly informed, of an academic lawyer or even a politician of the best interests of their fellow citizens.\footnote{163}

Also illustrating the acceptability of this idea, workers' compensation legislation in the state of Victoria included, in a different form, an election requirement of this kind up to 1953.\footnote{164} Subsequently, legislation gave claimants a right to proceed both at common law and under the Act.\footnote{165} A number of High Court decisions describe the problems experienced by the workers' compensation system, especially up to 1938.\footnote{166} The Act was amended in 1938 to provide for an express election by the claimant. Considering the great concern in Australia relating to the rising cost of compensation for industrial accidents,\footnote{167} it is a propitious time to consider strategies that will lessen the burdens on employers but remain fair to injured employees. The reason stated at the time of the 1953 reform, that election imposed a hardship on a worker, would carry less weight today when the high costs of the 1953 reform are realized.

Even without legislative intervention, the following strategy seems feasible. An employer could contractually guarantee a worker disabled for more than six months the option of trading his common-law right for a substantial augmentation (say up to seventy-five percent of his actual wage loss) of the relatively low workers' compensation wage loss payment occurring after the six-month disability period has elapsed. Once again, the fact that severely injured workers are risk-averse would induce many—even with arguably valid, but disputable, tort claims—to opt for the certainty of lesser no-fault payment over the uncertainty of larger tort payment. This strategy avoids the problem of adverse selection. Such devices may readily extend beyond

\footnote{164. See Workers' Compensation Act 1928 § 12, V Vict. Stat. 1410-11 (1929).}
\footnote{165. See Workers' Compensation Act 1958 § 63, VIII Vict. Stat. 1083 (1958).}
\footnote{166. See, e.g., O'Connor v. S.P. Bray Ltd., 56 C.L.R. 464 (Austl. 1937).}
the liability of employers and drivers. Reform under workers' compensation may prompt other classes of persons having a pattern of exposure to liability to seek insurance coverage that would afford no-fault benefits to those making these types of claims. These classes may include occupiers of premises, health care providers, and manufacturers.

The area of school and athletic injuries, exciting some attention in Australia and the United States in recent years, provides another example of innovative coverages bypassing tort liability. The rugby scrum, like the American football line, is a classic injury-producing machine. The senior author has drafted an insurance contract based on a preaccident commitment to make a postaccident tender of net economic loss within ninety days in return for a waiver of tort liability. Forty-eight states in the United States have adopted this approach for serious high school athletic injuries, entailing cases where actual medical expenses and wage loss exceed $25,000. The scheme, commencing with the academic year 1983-84, now operates under the auspices of the National Federation of State High School Athletic Associations. To date, of fifty-nine seriously injured athletes, fifty-four have accepted no-fault benefits and concomitantly waived their tort rights.

We admit to a reservation about the universal feasibility of the scheme suggested. When one moves beyond accidents with relatively simple causation or from manifestly dangerous activity, such as automobile and most workplace accidents, difficulties loom large in defining the insured event. For example, injuries arising from consumer products, medical treatment, or toxic substances present such problems. Under a no-fault automobile insurance policy, the motorist is compensated for injuries "arising out of the ownership, operation, maintenance or use of a motor vehicle." But to compensate any patient "for conditions arising in the course of medical treatment" or to compensate any consumer "for injuries arising from the use of a product" is not similarly feasible. In medical malpractice cases, for instance, difficulty arises from having to determine whether the patient was

168. See, e.g., Luntz, Compensation of Injuries Due to Sport, 54 AUSTL. L.J. 588 (1980).
170. Id. at 137-38.
171. A similar plan formulated by O'Connell covering claims for injuries from electric current provided by public utilities has been implemented.
injured in the course of treatment or whether she suffers from the condition for which she went to the health care provider in the first place. After all, the health care provider can hardly be asked to pay every patient whose condition declines after treatment.174 Similarly, with respect to products it seems unrealistic to ask a publisher or bookseller to compensate anyone injured by tripping over a book.175 To tax the creation of all risk is imprudent social policy.176 Nevertheless, the difficulties posed under the suggested scheme in defining the insurable event are not insuperable. Granted all the difficulties of turning back to legislation, a modest legislative intervention will overcome the scheme's difficulties.177

C. An Elective Legislative Scheme

Under the latest version of an elective legislative reform, a provider of goods or services facing a personal injury claim would have the option of offering a claimant within, say, a maximum of 180 days, periodic payment of the claimant's net economic loss. That would be prompt payment compared to what the tort system offers. Such payment would cover any further medical expenses, including rehabilitation and wage loss, not already covered by any other health or disability insurance payable to the claimant. It would also call for a reasonable hourly fee

for the claimant's lawyer. These benefits are lavish compared to those under most health insurance policies in the United States; few health insurance policies, for example, cover costs of rehabilitation.

The new laws would also provide that, though the claimant has a choice of whether or not to accept an offer, if the claimant rejects the offer, he may go to court only subject to certain restrictions. These restrictions may include:

1. The prescription of a more stringent standard of proof than the usual civil standard of preponderance of the evidence; \(^{178}\)

2. The specific authorization of the defendant to offer to finance a second opinion from another lawyer, who cannot be the plaintiff's trial counsel and who cannot have any financial interest in the plaintiff's case, as to whether rejecting the defendant's early offer is in the plaintiff's interest; \(^{179}\)

3. The allowance of recovery of noneconomic losses only if the plaintiff establishes a "substantial" amount of such damages. This restriction would limit rejections of the offer to cases where noneconomic loss, including any punitive damages awarded, exceeds the plaintiff's economic loss. A formula could define "substantial." For instance, a plaintiff could collect noneconomic damages only if they were at least four times greater than his economic loss; \(^{180}\) and

4. If the plaintiff does not prevail in the subsequent litigation, the requirement that the plaintiff pay the defendant's costs, including legal fees, incurred after rejection of the offer, with the plaintiff's counsel who brought the action jointly and severally liable for this obligation. \(^{181}\)

In contrast to other proposals for tort reform, this approach strikes a fair balance by requiring that the defendant provide something in exchange for its stronger shield against liability and, as a corollary, that the claimant receive something in exchange for giving up the opportunity to pursue litigation. The proposal thereby preserves the tort rights of those victims who do not receive the benefit of an offer of settlement. Only a victim rejecting the offer of payment of net economic loss, properly

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180. The risk of this approach, of course, is that it might be an incentive for a jury to increase its findings of the amount of noneconomic loss in order to render effective its award.
181. For the initial presentation of the latest version of the "early offers" plan, see O'Connell, *Balanced Proposals for Product Liability Reforms,* 48 Ohio St. L.J. 317 (1987).
deemed by society as fair compensation in the typical case, is restricted with respect to the amount or manner of recovery.

All the elective no-fault schemes discussed above have the advantage of exposing actors to an internalization of the cost of their activities. If they engage in dangerous activities, they will face the prospect of larger insurance premiums than safe operators will face. A properly functioning insurance market, within limits imposed by the costs of pooling risks and information, will police changes in accident rates. Here lies a distinct relative advantage over the administrative rate-setting under the New South Wales, South Australian, and Victorian legislation. Rate-setting under the elective no-fault scheme would be governed by usual commercial and actuarial considerations. These considerations, however, rank with political exigencies in administrative rate-setting. Although deterrence through the market system may never be finely calibrated, it provides a viable alternative to the straitjacket of administrative discretion. Elective no-fault proposals leave in place one of the common law's greatest advantages—its capacity to generate information about accident-producing activities as they develop and change over time.

Compensation law, however, seeks to achieve other meaningful objectives not as elusive as deterrence, including administrative efficiency and loss distribution. No-fault achieves administrative efficiency because it reduces payment to lawyers, adjusters, and other third parties in the system. It achieves loss distribution because it leaves fewer accident victims and their families without resources. If we seek an acceptable amalgam of these goals, together with felt needs for individual recourse, elective no-fault has much to commend it. We claim no nirvana. But elective no-fault may constitute improvement over the present mayhem in the American tort system and a less bureaucratic road for Australian endeavors.

CONCLUSION

We have examined various contemporary strategies for addressing the torts crisis. These reforms, as they are normally called, each spawn their own set of problems. The prevalent American ad hoc phenomenon of tort reform has a capacity to

work great harm to those most deserving of relief and succor. Yet this mode of reform is the most politically acceptable and appealing in the United States.¹⁸³

Australian experience exhibits a willingness to contemplate broad systemic and systematic reform. But the actuality brought about primarily by political compromise, when all interests are aggressively represented, is far from the ideal. Admittedly, no-fault schemes contain flaws. Faith in the administrative process may open up decision-making to political considerations detrimental to accident victims. From a social welfare viewpoint, these schemes may palliate without confronting deeper problems such as wealth loss arising from illness and safety in the workplace and on the road.

It is imperative to move beyond the present reforms. We suggest that both American and Australian tort systems adopt elective no-fault either through contract or legislation.¹⁸⁴

Our suggestions treat accident victims more equitably and relieve defendants of the worst absurdities of the common law. At the same time, they preserve the market incentive advantages of a decentralized system. They also are flexible enough to serve the needs of a dynamic society.

We cannot achieve perfect implementation of Robert Keeton's desiderata through any institutions run by humans.¹⁸⁵ But we should strive to develop schemes that in practical terms will, as closely as possible, fulfill these ends. The possibilities for change are abundant, models for reform numerous, interests at play contentious, and risks of taking incorrect turns significant. Kant taught us that the "ought" implies "can":¹⁸⁶ We must temper our judgments about what ought to be done by knowledge of

¹⁸³. See supra note 21. For a discussion of the differing approaches of encouraging early offers by defendants and on the coordination of such contractual and statutory approaches, see O'Connell, Neo-No-Fault Remedies for Medical Injuries: Coordinated Statutory and Contractual Alternatives, 49 LAW & CONTEMP. PROBS., Spring 1986, at 125.

¹⁸⁴. It may indeed be imperative for reformers to provide no-fault benefits in order to preserve tort reform from constitutional law attack. See Fein v. Permanente Medical Group, 474 U.S. 892, dismissing appeal from 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985) (White, J., dissenting) (arguing that a substantial federal question was presented in the challenge to California's tort reform legislation on the issue of whether a compensation scheme should be enacted as a quid pro quo for the replacement of common-law or state-law remedies). For an informative summary of the constitutional issues see Smith, Medicine and Law: AIDS, Constitutional Challenges to Tort Reform and Medical Malpractice, 23 TORT & INS. L.J. 370 (1988); see also Leavitt, Liability Insurance Crisis: The Regulatory Response, 91 DICK. L. REV. 919 (1987).

¹⁸⁵. See supra note 36 and accompanying text.

¹⁸⁶. See I. KANT, ON THE OLD SAW: THAT MAY BE RIGHT IN THEORY BUT IT WON'T WORK IN PRACTICE (E. Ashton trans. 1974).
what it is possible to do. Tort reform therefore should be informed by sensitive comparative work that weighs political possibilities and prudent policies. If we can share the technical secret of the winged keel on “Australia II,” the victorious yacht in the 1982 America’s Cup, we also can benefit from our comparative efforts to improve the lot of the accident victim.