

2005 Policy document



The Strength of Common Law

A principal objective of the Australian Lawyers Alliance is to ensure that people who have been injured by the wrongful conduct of others are able to recover adequate compensation for those injuries. We believe that the common law system of awarding compensation to accident victims is the most appropriate mechanism to dispense justice and deter wrongdoings in these circumstances.

The Australian Lawyers Alliance is opposed to no-fault schemes, which award compensation regardless of whether the person who caused the accident was at fault. We also oppose welfare-based compensation schemes, in which accident victims are forced to rely on social security payments, and are denied a right of redress before the courts. As a mechanism for dispensing compensation, common law is superior to these alternatives for four reasons.

First, a victim's entitlement to compensation under the common law is calculated according to their loss: the compensation should be sufficient to restore them to the position in which they would have been, had the accident not occurred. Empirical studies have demonstrated that no-fault and welfare-based schemes fail to provide anywhere near this level of compensation. As a result, these schemes are hopelessly inadequate as a means of providing accident victims with the assistance they require.

Second, common law deters people engaging in conduct that poses an unreasonable risk of injury to others. By requiring wrongdoers to pay compensation to those whom they intentionally or negligently injure, the common law performs an important social and regulatory function: encouraging the adoption of reasonable safeguards to protect others. Especially for governments and corporations – which typically obey only the imperative of their own bottom line – common law provides an economic incentive to avoid injury or damage to others: it's cheaper to control risk than to pay out damages. Under a no-fault or welfare based system of compensation, this regulatory effect simply evaporates.

Third, the common law system of awarding compensation discharges a vital role in revealing latent risks to society. Because the common law mechanism involves a causal analysis of the injury or damage, it assesses the adequacy of existing safety precautions and risk of injury. Discovery and proof of the detrimental effects of cigarette smoke and asbestos would have been delayed by many years had sufferers of smoking and asbestos-related illnesses not sued cigarette and asbestos manufacturers. No-fault and welfare-based schemes do not analyse why injuries occur, and so do not expose public hazards to analysis, scrutiny and regulation.

Fourth, no-fault and welfare-based schemes are inflexible, 'one size fits all', statutory systems that do not treat people according to their individual needs and circumstances. Consequently, they are invariably unfair to some accident victims. However, the common law system of awarding compensation commensurable with the injury suffered, which has been developed over hundreds of years, is far more flexible, and can be adapted to suit the particular parameters of each case.

The Australian Lawyers Alliance will always support the justice, flexibility and transparency of common law solutions to compensation issues over alternatives that are based on the cheaper or faster outcomes of inflexible statutory schemes.