



## The New South Wales Bar Association

### WHAT DOES 'NO FAULT' REALLY MEAN UNDER THE NEW SCHEME?

*While the new CTP system proposed by the Government is said to be based on the principle of no fault, in reality it's a conceptually inconsistent and flawed 'limited fault' scheme. The most effective way to contain premiums and maintain decent protection for innocent accident victims is to retain, but streamline, the current CTP scheme.*

#### Fault vs No-Fault

Each year the NSW CTP insurers collect around \$1.8 billion in premium. This isn't enough to properly or fully compensate all those injured in motor vehicle accidents. Payments have to be rationed.

Until now the primary rationing mechanism has been to make payment to innocent accident victims and exclude those who cause accidents (a fault based scheme). The Government proposes changing this so that all accident victims receive payments, albeit significantly less in payments. NSW will change from looking after innocent accident victims moderately well to paying very restricted benefits to almost everyone.

The rationale for this change is set out on page 8 of the issues paper where it is said the motor vehicle accidents can occur even when no one is breaking the road rules "*the weather and unfamiliar road and poor light conditions can also be factors*" [the argument is legally incorrect – failure to drive having regard to the weather and prevailing road and traffic conditions is a breach of the Road Rules].

#### Proposed Scheme is Really a 'Limited Fault' Scheme

The issues paper identifies four examples of drivers who cause accidents:

- The mum with squabbling children who runs off the road;
- The experienced driver who misjudges a corner on an unfamiliar road;
- A farmer who swerves to avoid an animal and hits a tree;
- A motorcyclist who comes off a bike while cornering in the wet.

These are all drivers who could have been more careful and driven more appropriately to the circumstances. The Government wants to see them compensated for their injuries whilst cutting the benefits for anyone who is injured by their negligent driving.

The Government's position is conceptually inconsistent. Contained within the Bill is a provision that excludes the driver from recovering where there has been a serious criminal offence. Page 12 of the issues paper skims over the point by referring to reckless or dangerous

driving as an exclusionary factor for benefits. The reality is the exclusion has a much lower threshold – negligent driving causing injury.

This means (under the Government's proposed scheme) that if mum also injures one of the children (and is charged by police) then she is excluded from any benefits. So too if she hits another car rather than running off the road, or if she injures a pedestrian. If anyone else is injured and she is charged then she is excluded from benefits.

The Government's scheme should at least be consistent. If it wants mothers who inadvertently cause accidents due to squabbling children to recover benefits then that should be irrespective of whether another person is injured (in addition to mum) or not.

Also bear in mind that this momentary inadvertence by mum as she leaves the road due to squabbling children poses a grave risk to everyone else. The criminal law could send the same mum to jail if her inattentive driving saw a pedestrian killed as she runs off the road. How would you feel if it was your child who was injured or killed when a distracted driver ran off the road? How would you feel if your child was receiving vastly less compensation than the mum who caused the accident because your child has 9% Whole Person Impairment and the mum has a marginally higher 11% Whole Person Impairment?

### **Unintended Consequences**

The Government's proposed scheme has the bizarre and capricious consequence that mum (or the farmer or motorcyclist) will recover benefits if they injure themselves due to momentary inadvertence but recover no benefits if someone else is injured and police press charges.

The act of casual inadvertence is the same; the injuries to the driver are the same – what's the rationale for denying benefits just because somebody else got injured? It was all still an accident.

An unintended consequence of the proposal is that there will now be an incentive for insurance companies to prompt and promote police prosecutions. Insurers want to maximise profits by avoiding claims. You will see insurers prompting police investigations if the ensuing charge will help the insurer deny liability for statutory payments to the driver at fault.

If the Scheme was truly no fault and therefore genuine about extending benefits to all those who inadvertently cause accidents, then the charge of "*negligent driving causing grievous bodily harm*" would not be a disqualification from the recovery of benefits.

Better still, preserve the current fault based scheme and focus on the delivery of benefits to accident victims rather than the careless driver who causes accidents.

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