

17.1 NEGLIGENCE - A FAULT-BASED SYSTEM

When a person or his or her property is harmed, the court may be required to use the law of negligence to decide who is responsible. **By using principles of the law of negligence, the court determines which party is at fault.**

If it was decided, on the other hand, that everyone injured in motor vehicle accidents, for example, should be compensated irrespective of who is to blame, this would be a no-fault system. All that would then remain would be for someone to decide how much monetary compensation should be paid to car accident victims.

Traditionally, the principles of negligence have been used to limit which accident victims will succeed in a claim (liability) and to determine the extent of their monetary compensation (quantum). However, **in some areas, governments have decided that all accident victims should receive compensation irrespective of fault.** This has occurred particularly where the payments to victims have been funded by government sponsored schemes (for example, compulsory insurance by employers to provide workers' compensation) or by government intervention (for example, social security).

Increasingly, the issue of whether or not the tort of negligence (where the fault of a party to the action must be proved) is the best means of accident victims obtaining compensation, has been placed under the public spotlight.

Some of the **advantages** of the fault system of the law of negligence are:

1. To provide compensation

The law of negligence is primarily for the compensation of persons who are injured in our society through the careless activities of others. In the absence of any negligence laws people injured, through no fault of their own, remain uncompensated and left to their own resources or left to the safety net of the social security system.

2. To distribute losses according to who was at fault

The law of negligence seeks to transfer the loss suffered by a person in an accident to the person who has caused the loss. This 'individual liability theory' has traditionally focused on the conduct of the defendant. We now, however, live in an increasingly complex technological society. The causes of negligence can be very complex and involve a number of parties and difficult technical questions.

3. To deter unsafe behaviour

Negligence laws are applied to deter members of the community from acting without due regard for the safety of others by placing upon them a heavy personal responsibility and cost for failing to meet accepted standards of behaviour. Personal accountability for one's actions is common to all members of society.

It has, however, been argued that the deterrence function of the law of torts has now been diminished because, in most cases, the defendant will have third party liability insurance.

On the other hand there have been a lot of **public concerns** about some features of the fault-based system of the law of negligence. These include:

1. The cost of operating the system of courts.

2. The length of time from when the injury occurs until the final determination at a trial is sometimes very long.

In particular, advertising by lawyers and 'Santa Claus' court judgments have been a focus for arguments against the current fault-based system.

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Practical application

The Sunday Mail

'No win, no pay' curbs urged as liability spirals

Matthew Hart

Insurers have called for greater policing of lawyers' advertising to help curb the national crisis in public liability insurance.

Insurance Council of Australia president, Graham Jones, yesterday said "no win, no pay" advertising by personal injury lawyers was often misleading and encouraged claims which otherwise might never have been made.

The comments came as Australia's assistant Treasurer, Helen Coonan, warned that the Australian lifestyle was under threat from the crisis in public liability insurance.

In the 2000 year, Australian insurers lost a total \$537.8 million in managing and paying out claims on public liability insurance.

Mr Jones said the number of claims arising from slips, trips and falls and motor vehicle accident-related whiplash and soft tissue damage, which could result in payouts of up to \$20,000 for each case, had jumped in recent years, putting pressure on insurance premiums.

"When you see signs on the side of the highway saying, 'If you've got a pain, you've got a claim', they border on being inappropriate," he said. Lawyers have always been able to advertise, but Mr Jones said it had only been in the past five to seven years that many firms had embraced the marketing tool.

He said he had no objections to people who were genuinely injured by negligence seeking compensation, but warned that Australia was becoming a more litigious society which saw compensation claims as an easy way to get money.

Shine Roche Gowan managing partner and Australian Plaintiff Lawyers Association Queensland president, Stephen Roche, said accidents caused claims, not "no win, no pay" advertising. "I'll stop advertising for business when insurance companies stop advertising for business.

"Lawyers were criticised for not being businessminded during the 1980s. Now, the criticism seems to be that we are too business oriented and the bottom line is that lawyer advertising isn't responsible for increasing premiums."

Mr Roche said Queensland still had a bad safety record in relation to work practices and public liability. "Taking legal action is a fundamental right of yours and mine to pursue," he said. "The current system reinforces the sense of responsibility. Where is the incentive to have a footpath fixed if there is no chance of being held responsible for it?"



1. Look carefully at both of the advertisements accompanying this article that have been used by lawyers to attract clients. For each of these advertisements, what is the main message that the legal firm is trying to drive home to the public? [K]
2. In your opinion, are each of the advertisements an appropriate way for law firms to attract business? [E]
3. Is the slogan, 'If you've got a pain, you've got a claim', an appropriate way for a law firm to advertise its services? [E]
4. What position is held by Mr Graham Jones? [K]

Practical application

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5. According to Mr Jones, in what ways are advertising by personal injury lawyers misleading? [K]
6. Are there more positives or negatives associated with the fact that advertising by personal injury lawyers, in the words of Mr Jones, "... encouraged claims which otherwise might never have been made."? [E]
7. Is it surprising to you that Mr Stephen Roche points out in the article that, "Taking legal action is a fundamental right of yours and mine to pursue"? Why or why not? [E]
8. Which of the two following arguments is the strongest in your mind: Mr Roche's argument that a negligence system, which allows aggressive marketing and "no win, no pay" deals by lawyers, encourages a sense of responsibility OR Mr Jones' argument that an increased number of compensation claims are now being made simply "... as an easy way to get money" because of "no win, no pay" advertising by personal injury lawyers? [E]

In the 1990s in Queensland, lawyers were allowed to advertise their services to the community through television, radio, newspapers and other media outlets. This has provided members of the community with a greater awareness of their legal rights to remedies, particularly compensation, in the event of their suffering injuries or loss in accidents.

The advertising of legal services for personal injuries litigation was justified by lawyers as a means of providing consumers with information which is necessary for making informed decisions. Lawyers have a duty to properly advise clients about the prospects of success of commencing negligence court actions. This advice should enable clients to make prudent decisions about whether to sue for negligence.

In some cases, lawyers advise clients not to proceed with a negligence claim if the fault of another person or organisation is less than likely to be proved to the satisfaction of the judge or jury. In other cases, clients are advised to pursue claims for compensation when they otherwise would have been ignorant of their right to sue or may have left it too late to commence a court action against a negligent person or organisation.

There has been extensive criticism of unrestricted advertising. This criticism resulted in the passage of the *Personal injuries proceedings (legal advertising) and Other Acts Amendment Act 2006* (Qld). This Act severely restricts the advertising of personal injury services by the legal profession in the following manner:

- a. It restricts anybody advertising personal injuries services if the advertisement encourages or induces a person to make a claim for personal injuries.
- b. When advertising his or her personal injuries service a lawyer must only state the name and contact details of the practitioner or his or her legal practice. However, the business name of the legal practice cannot contain words such as 'No win, no fee lawyers'; 'Sue now pay later lawyers'; 'Home visit lawyers'; or 'We come to you lawyers'.
- c. The advertisement cannot contain a "No win, no fee" statement.
- d. Photographs of the lawyer named in the advertisement are prohibited.
- e. Statements about the basis on which the lawyer is prepared to provide personal injuries services are also prohibited (this does not include information provided on a website). Prohibited statements include 'Competitive rates'; 'Home consultations by arrangement'; and 'We can come to you'. Slogans and mottos are also prohibited. These include 'Industry leaders'; 'Call our legal help line'; and 'You can relax – we have you covered'.



▶ WHAT DO YOU THINK?

After considering the previous Practical application and changes to advertising, do you think the changes are an improvement to our legal system or not? [E]

'SANTA CLAUS' COURT JUDGMENTS

There is a common perception that courts have traditionally tended to inflate the award of damages. However, the *Civil Liability Act 2003 (Qld)* has made substantial changes to the level of damage that courts can award. We refer to this later in this chapter.

Not all plaintiffs are ultimately successful in their negligence court actions, as highlighted by the following appeal decisions of the Queensland Court of Appeal and the High Court in relation to a young man, Mr Borland, who was left a quadriplegic after leaping from the back fence of a friend's house into a shallow canal.

This was an appeal by the homeowners, Mr and Mrs Makauskas, who, although not at home at the time of the accident, had been found 70% responsible for the accident by a Supreme Court jury in the original hearing. Mr Borland, a friend of the couple's son, was found 30% responsible by the jury.

The jury had found that Mr and Mrs Makauskas breached their duty of care by not erecting warning signs of the dangers of diving into the canal, and by having a fence which, by having a ledge on top of it, could have invited someone to climb on top of it from the home's pool area and dive off in an attempt to reach the canal.

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Case Study

Borland v Makauskas & Anor [2000] QCA 521

Facts: The respondent (formerly the plaintiff, Mr Borland) was staying at the home of the appellants (formerly the defendants, Mr and Mrs Makauskas) for a couple of nights with their son and daughter, while the appellants were away in New Zealand. The appellants' home was at Broadbeach Waters on the Gold Coast. The back boundary of the property formed a common boundary with a bank of a canal. The living area of the house opened out to a verandah which overlooked a swimming pool and beyond to the canal. The top of the back fence was approximately 900mm (three feet) above the deck surrounding the pool and about three metres above the one metre beach leading to the shallow water at the edge of the canal.

After consuming a substantial amount of alcohol until dawn, the appellant fell asleep on a lounge in the living area of the house at about 6.30am. On his own admission, he was very drunk. He was woken up by several mates and was still partially inebriated. After being "given a hard time to get up", he immediately jumped or dived from the verandah rail of the house into the pool where he skylarked for up to 15 minutes. While he was in the pool, an esky lid or little foam kickboard blew



from the pool deck into the canal. When he saw the object, it was floating about five to ten feet from the shore.

The respondent got out of the pool, walked over to the fence and, using the ledge on top of the lattice as a step, he stepped up onto the flat railing on top of the fence. He stood on top of the fence for a couple of seconds and saw where the object was in the canal. Deciding he could make it out into the deep water, which he knew was about ten feet out, he yelled "Yahoo" and dived into the canal. He fell short of the deep water and crashed head-first into the shallow floor of the canal.

Case Study continued

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Legal issue:

1. Did the appellants breach their duty of care to the respondent by:
 - a. failing to warn the respondent, whether by signposting or otherwise, of the danger of the shallow waters of the canal and the consequent risk of injury from diving from the fence into the canal; and
 - b. leaving in place the fence which, by reason of its location and the manner of its construction (especially the flat ledge on top) served as an invitation to jump or dive from it into the canal below?
2. Did the respondent know of the danger, fully appreciate the risks of the danger, and voluntarily accept the risk of the dive?
3. Did the respondent's own negligence contribute to his injuries and, if so, to what extent as a percentage of 100%?

Decision:

Queensland's Court of Appeal allowed the appeal of the appellants, Mr and Mrs Makauskas, deciding that they had not breached their duty of care to the respondent, Mr Borland. It was "blindingly obvious" to anyone standing on the deck that it was impossible to dive from the top railing of the fence into water deep enough to

1. What were the reasons given by the Court of Appeal for allowing the appeal made by the homeowners? [K]
2. What did the High Court judges think of Mr Borland's application for special leave to appeal? [K]
3. In your opinion, which was the fairer decision – the jury's decision (ordering the homeowners to pay Mr Borland \$2 million in compensation) or the Court of Appeal's decision (that Mr Borland should not receive any compensation and should pay the homeowners' legal costs)? You should carefully consider the fairness of each decision in the interests of the accident victim, the homeowners and the community generally. [E]

do so with safety. It was unreasonable to expect a householder to take steps, such as erecting a warning sign or building a higher fence, to avoid all forms of outrageous behaviour on the part of an entrant. The respondent had voluntarily accepted the risk of his actions and had caused the accident himself (100% contributory negligence).

An application to the High Court by Mr Borland for special leave to appeal was refused. Chief Justice Gleeson stated:

'I thought that one of the strangest parts of the case was the suggestion that there should be a warning sign. If householders had to put signs warning of dangers which could face people who behave as carelessly as your client behaved in the present case, most of us would live in houses mainly occupied by signs.'

Further, according to Justice Kirby: 'One must be respectful of your client because of his profound injuries, but the same problem the Chief Justice raised with you earlier is still there in relation to your complaint about the design. Essentially, if your argument is right, then a message goes out that you have to put barbed wire or spikes or something else on all fences, which is not really a very sensible result. What is wrong with having a ledge on a fence? It is a very common thing in suburban Australia.'

It was partly the view that the courts were becoming more friendly towards plaintiffs and partly the agitation by the insurance community, as they increased insurance premiums for professional indemnity insurance, that prompted an Australia-wide review of the law of negligence.

THE IPP REPORT AND SUBSEQUENT CHANGES TO THE LAW

The Federal Government announced a review of the law of negligence on 2 July 2002. It was chaired by the Honourable Justice David Ipp. The committee delivered sixty one recommendations for reforms to the law of torts in Australia. These recommendations were to be considered, and acted upon, by each of the state governments of Australia. The Queensland Government's response to the recommendation was the passage of the *Civil Liability Act 2003* (Qld).

The *Civil Liability Act* (Qld), implementing the Australia wide torts reforms, has not only restricted the level of damages that a court can award but has also in many respects raised the hurdle for establishing **liability**. In this regard you will recall from Chapter 16:



Ch 16
Negligence

- ▶ a reduction in the burden on doctors and other professionals by virtue of s21(1);
- ▶ changes to the law surrounding obvious risks and dangerous recreational activities;
- ▶ the amendments with respect to contributory negligence, with the defendant now being able now to defeat claims completely; and
- ▶ the level of contributory negligence that is automatically imposed for plaintiffs travelling with intoxicated drivers.

Furthermore, with respect to the damages that can actually now be awarded by a trial judge, you will have seen in Chapter 16:

- ▶ the restriction on the courts ability to award any exemplary, punitive or aggravated damages;
- ▶ general damages being awarded on a scale with a mathematical formula applied to give the value of the damages; and
- ▶ future economic loss being restricted by s54 to ‘three times the average weekly earnings’.

These changes and others point to a more restrained role in the courts’ ability to exercise a discretion in awarding damages.

Another effect of the *Civil Liability Act* is that no legal fees can be awarded for any claims of less than \$30,000. This figure also includes the costs of any medical reports necessary to establish the level of incapacity suffered by the plaintiff. The effect of this provision will be that a large number of less wealthy people, with real but relatively minor claims, will not be represented.

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Practical application

The Sunday Mail

Compo system unfair

Kay Dibben

A District Court judge says a Queensland law that restricts compensation for injury victims is an ‘unfair system’.

Judge John McGill, SC, told an insurance law conference the Civil Liability Act was a ‘pretty grubby set of regulations’.

Judges must use a set scale to assess injury damages in a system introduced by the State Government in 2003.

Judge McGill said it was designed to reduce the amount of general damages awarded, particularly in the case of less serious injuries.

Previously, judges assessed damages for pain and suffering and loss of amenity under common law.

Judge McGill was particularly critical of the method judges were forced to use to assess damages for psychiatric injury, describing it as ‘thoroughly unsatisfactory’.

“Matters covered by the various classes of impairment are only concerned with the effect on a person’s ability to do things,” he said.

He said psychiatric injury may adversely affect a person greatly without having any significant impact on the ability to do things.

“A Plaintiff may be thoroughly miserable, but able to carry out the ordinary functions of life, and under this system such a person gets effectively no damages,” Judge McGill said.

He said other Queensland judges had commented that general damages were much less than they would have been at common law.

Practical application

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A person who suffered multiple injuries in a car accident received damages of \$26,000 under the new regulations. A judge said he would receive \$50,000 under common law.

Within that range no legal costs or medical report costs could be covered and unemployed people, pensioners and children with serious disabilities from injury were disadvantaged.

Lawyer Damian Scattini said the legislation was targeted at claims less than \$30,000 and 'kicking the underdog in the guts'.

1. How did the judge describe the system for compensation for injury victims? [K]
2. What did the judge say was the effect of the set scale to assess damages? [K]
3. Can you think of a reason why the government might disallow the payment of any legal fees and/or medical reports for claims under \$30,000? [K] [I]
4. Do you think it's fair that for claims under \$30,000 no legal fees or costs of medical reports are payable by the defendant? [E]

The above matters are not the only reforms implemented because of the review. In Chapter 16 we refer to medical negligence. We now illustrate changes to such negligence effected by the reforms.

MEDICAL NEGLIGENCE

One of the concerns which instigated the review of the law of torts was the level of the standard of care required of a doctor. There were two main approaches to determining whether a doctor had breached his or her standard of care and, thus, was negligent. The first of these was based on the English decision of *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118. In this case Mr Bolam, a patient at an English hospital, underwent electro-convulsive therapy. The staff, however, did not either manually restrain him as he underwent the therapy or give him any drugs to relax his muscles to prevent him from causing himself harm. He suffered fractures and sued the hospital. The court found that there was no breach of a duty of care by the staff. The test applied (known as the *Bolam* principle) was set out by McNair J:

A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art ... merely because there is a body of opinion that would take a contrary view.

In *Bolam*'s case there was a responsible body of medical opinion which agreed with the practice adopted by the staff of the hospital. Consequently, there was no negligence.

The second approach which developed in Australia is best seen in the case of *Rogers v Whitaker* (1992) 175 CLR 479. In that case the High Court held that Dr Rogers had breached his duty of care and so was negligent. The High Court came to this conclusion even though there was evidence that a respectable body of medical practitioners would have acted as Dr Rogers had when he failed to warn Mrs Whitaker. If *Rogers v Whitaker* had been decided on the same principle as *Bolam*, then the court would have held that there was no breach of duty of care. The High Court held that it is the courts that must decide whether there has been a breach of duty of care and it is not sufficient to discharge a duty of care simply because a responsible body of medical practitioners skilled (in this case in the art of ophthalmia) determined that the doctor wasn't negligent.



Ch 16
Duty of care

The Ipp Report recommended a compromise of the two positions. As a result of that recommendation the law has now been set out clearly in s22 of the *Civil Liability Act*.



Section 22 is as follows:

- (i) A professional does not breach arising from the provision of a professional service if it is established that the professional acted in a way that (at the time the service was provided) it was widely accepted by peer professional opinion by a significant number of respected practitioners in the field as competent professional practice.
- (ii) However, peer professional opinion can not be relied on for the purposes of this section if the court considers that the opinion is irrational or contrary to a written law.

This reform is generally regarded as tending to reduce the liability of doctors. You can see from the above clause that the *Bolam* principle is contained in sub-section one. However the Act allows Queensland courts not to accept the *Bolam* principle if the court considers that the opinion is **irrational** or **contrary to a written law**.

17.2 THE ROLE OF INSURANCE

As a result of the huge potential liability in the event of being sued for negligence, it is natural that many people and organisations will insure against such risk. Not only is insurance beneficial to potential defendants in the sense that there is protection against financial loss, it is also beneficial for plaintiffs as there is an assurance that there will be a substantial insurance fund from which to satisfy the court judgment.

Insurance can be of two types: **first party insurance** (insuring yourself against any loss you cause yourself) and **third party insurance** (insuring yourself against the loss you caused to others). First party insurance indemnifies the insured for a loss suffered, irrespective of negligence, and provides direct compensation on a no-fault basis.

Examples of first party insurance include house insurance and car insurance. On the other hand, under third party liability insurance, the insurer agrees to meet the liability which the insured may incur towards another. Examples of third party insurance policies include public liability insurance; employers' liability insurance; professional indemnity insurance taken out by lawyers, accountants and other professional people; and third party motor vehicle insurances.

While the principles of negligence have traditionally transferred the loss from the victim to the wrongdoer, a widespread increase in insurance has caused the loss to be spread across a wide cross-section of the population. Where a defendant against whom damages have been awarded has insurance, an adverse judgment is not simply shifted from one person to another, but distributed among all policy holders carrying insurance on that type of risk. The policy holders pay an annual sum (called a premium) to pay the insurer for the insurance cover. When there are a large number of successful claims in a particular area, the cost of premiums is pushed up so that the insurance scheme remains viable.

There are two forms of compulsory insurance arising as a result of legislation in Queensland of which you should be aware. These are:

1. *Motor Accident Insurance Act 1994* (Qld); and
2. *Workers Compensation and Rehabilitation Act 2003* (Qld)



1. Motor Accident Insurance Act

The growth of motor vehicle ownership and the damage it causes to property and lives is such that, in Queensland (as in most western countries), **compulsory third party** (liability) insurance is paid at the time the motor vehicle is registered. This compulsory insurance scheme is operated under the provisions of the *Motor Vehicle Insurance Act*. Under the scheme, every owner of a motor vehicle registered in Queensland must insure himself or herself against claims for **personal injuries** made by **third parties**, such as passengers, other drivers and pedestrians. There is even a state-funded organisation, called the **Nominal Defendant**, which is set up to compensate those people who are injured through another's carelessness, where the vehicle driven by the careless person is not registered and not insured, or in situations where a person is injured by a vehicle that cannot be identified (such as 'hit and run' cases).

The insurance company providing third party insurance stands behind a negligent driver and the loss he or she has caused to someone else. This insurance cover even extends to the situation where the driver is intoxicated. The insurance does not cover the damage a driver may cause to another vehicle. It only covers the death and bodily injury to another person.

The principles of negligence are applied to these types of cases. This means that cover under third party motor vehicle liability insurance does not extend to people who have been injured as a result of their own negligence if they are totally to blame for the accident. These negligence court actions that relate to personal injuries caused by motor vehicle accidents are commonly referred to as **Personal Injuries (P.I.) cases**.

The issue of negligence in motor vehicle accidents is generally based on two key questions: **liability** (who is most at fault?) and **quantum** (what amount of damage has been suffered by the parties to the dispute?). In determining the question of liability, blame for the accident is apportioned between one or more drivers or other road users (for example, cyclists or pedestrians). A driver might be 70% to blame for injuring a passenger in his vehicle, while the passenger, if she was not wearing a seatbelt, might be 30% responsible for her own injuries.

Based on the quantum (amount) of damages that can be proved to have been suffered by each party in the accident, one party either agrees (if the matter is settled before trial), or is ordered, to pay a specified amount of damages (compensation) to the other party. For example, based on the 70:30 apportionment of liability in favour of the injured passenger in the example in the previous paragraph, the negligent driver would be ordered to pay \$70,000 to the injured passenger if the passenger has suffered personal injuries of \$100,000.

It should be noted that motor vehicle insurance schemes in Victoria, Tasmania, the Northern Territory, Canada and some states of the United States of America compensate road accident victims irrespective of fault. In some cases, however, the amount of compensation available to the injured person is limited by statute.

In New Zealand, a comprehensive no-fault scheme of compensation exists in respect of not only personal injuries resulting from traffic accidents but also from industrial accidents and even some criminal injuries.

2. Workers Compensation and Rehabilitation Act

It is often argued that the State or society as a whole should absorb the burden of loss which falls on one member of society, thereby maximising loss distribution by spreading the risk across every member of society. The two main ways this can occur are through the social welfare system and insurance.

An example of insurance in action is **compulsory workers' compensation**. It was increasingly felt that each industry itself should bear the cost of its accidents by writing off the costs as an overhead charge for its operations and ultimately distributing these amongst its consumers. Liability for compensation was placed on employers who eventually became obliged to insure themselves against the risk by compulsory workers' compensation insurance. Thus, **the first form of social insurance** was introduced, entitling casualties of accidents in the course of employment to compensation, regardless of whether the employer was at fault.

Under the Act, a worker who is injured in an accident at work has two main options: a workers' compensation claim to **WorkCover Queensland** (called a **statutory claim**) and a **common law court action** for negligence or for breach of contract. The workers' compensation scheme in Queensland does not take away the workers' right at common law to sue the employer in negligence or for breach of contract. However, if a worker decides to proceed at common law and is successful, he or she must pay back any money paid to him or her under the statutory claim.

Statutory claims to WorkCover Queensland do not involve proving any fault on the part of another worker or the employer. They are also paid to the worker irrespective of whether he or she is at fault or not. All that is required is that the injury happened at work (or travelling to or from work). These claims include weekly payments as replacement of lost income while a worker is unable to work. In the event that the worker suffers permanent impairment (expressed as a percentage) then they include lump sum payments, as well as hospital, medical and rehabilitation expenses. These payout amounts are highly standardised and are prescribed (stated as fixed amounts) by parliament in schedules to the Act.

Statutory claims differ from awards of damages at common law. For example, the prescribed payments take no notice of the components of common law damages such as pain and suffering, loss of enjoyment of life, and past and future economic loss. In a case of serious injury, a worker will often recover much more in a common law negligence claim than the maximum prescribed amount of statutory claim but he or she **has to establish negligence on the part of the employer**. If a worker has his **work-related impairment** assessed at 20% or more, the worker can accept the lump sum payment for his or her statutory claim and still sue for damages in his/her common law claim. If the worker is assessed at less than 20% then he/she must either elect to take the lump sum statutory claim or sue for damages in his/her common law claim.

Despite the lure of a potentially higher common law payout, however, a majority of injured workers decide not to bring a common law action for negligence or breach of contract. Court actions are usually expensive, drawn out and a successful result cannot be guaranteed. Instead of, in effect, gambling on a bigger payout from a court action, workers generally prefer to make a relatively quick claim to WorkCover Queensland without having to prove fault and justify their own actions.

REVIEW

1. What are some advantages of the fault-based system of negligence?
2. What restrictions have been placed on advertising by lawyers?
3. What is the *Bolam* test?
4. What is third party liability insurance?
5. What is the nominal defendant?
6. Set out the two types of workers' compensation claims.