



Institute of Actuaries of Australia

# **Trends in Large Common Law Personal Injury Claims**

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## **Trends in Large Common Law Personal Injury Claims**

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### **Summary of Findings**

The largest court awards made for personal injury over the last decade have been at historically high levels. The highest award made in each year has averaged \$11.2 million in the ten years to 2002, compared to \$4.3 million in the previous ten years. Factors leading to higher awards in the last ten years include:

- Improved survival of more seriously injured individuals
- Expansion in the heads of damage awarded and the elements of loss compensated; the compensation better reflects the true needs of the individuals
- Unusual individual circumstances, in some cases.

Examination of the largest CTP claims paid over the same ten years (NSW, Qld and WA data combined) indicates superimposed inflation has been running at what would be considered “normal” long-term levels of 3-6% per annum.

The needs component continues to be the main driver of the total claim amounts.

Recent tort reforms are not expected to have a significant impact on the largest common law claims.

### **Background**

The work described in this paper was undertaken as an investigation of trends in common law payments made to the very seriously injured over the last ten years.

We examined the experience of two groups:

- The largest court awards made to catastrophically injured individuals
- Payments to seriously injured claimants in the common law CTP systems in New South Wales, Western Australia and Queensland (including court verdicts and settlements). For NSW and Queensland the data related to the current schemes only, which commenced in 1989 and 1994 respectively.

We did not analyse any information from non-common law CTP jurisdictions.

The main aim of the work was to understand the key drivers of large payments for personal injury and the reasons for the changes over the last decade.

In relation to court awards, this paper represents a partial update of work which was carried out ten years ago and analysed trends in court awards over the 20-year period to 1992 (we could not do a complete update due to a reduction in the availability of information on court awards). That work was described in a paper presented to the Institute of Actuaries of Australia's Fourth Accident Compensation Seminar in May 1993. The main findings of that work were:

- Awards to the very seriously injured had exhibited significant levels of superimposed inflation (7-8% per annum), mainly due to increases in the amounts awarded to cover the injured person's needs. This superimposed inflation was expected to continue
- A new class of injured claimant had emerged – the ventilator-dependent quadriplegic, with very high levels of care required. This had resulted in a jump in the size of the largest awards made.

## Components of the Awards

The three main components of awards for damages for personal injuries are:

### Needs

This represents the cost of care for the injured person since the date of injury. For very seriously injured claimants the major part of this component is usually the cost of care provided by medical and other attendants. The needs component also includes the costs of medical treatment, home and vehicle modifications and equipment such as wheelchairs.

### Loss of Earnings

This compensates the claimant for his or her loss of earning capacity due to injury. It includes loss of earnings (including superannuation) up to the date of settlement/trial and lost future earning capacity.

### Pain and Suffering

This is awarded to compensate claimants for non-economic loss resulting from their injuries. These losses include the pain and suffering associated with the injury as well as any loss of amenities, such as loss of use of limbs.

## Restrictions Impacting Claim Payments

Reforms to the CTP schemes will have impacted on the claim payments made. In particular, over the period examined there have been:

- Caps on general damages in the NSW and WA schemes
- Caps on the income used in calculations of future economic loss (NSW, Queensland)
- Discount rates set at specific levels (5% for NSW CTP, 6% for WA, 5% for Qld CTP).

The recent tort reforms will impact on common law awards more broadly.

## Trends in Court Awards

### Information

We used two main sources of data:

- CCH's "Australian Torts Reports", which shows full details of the composition of each award
- "Comparable Verdicts in Personal Injury Claims", published by the Law Book Company and edited by Britts.

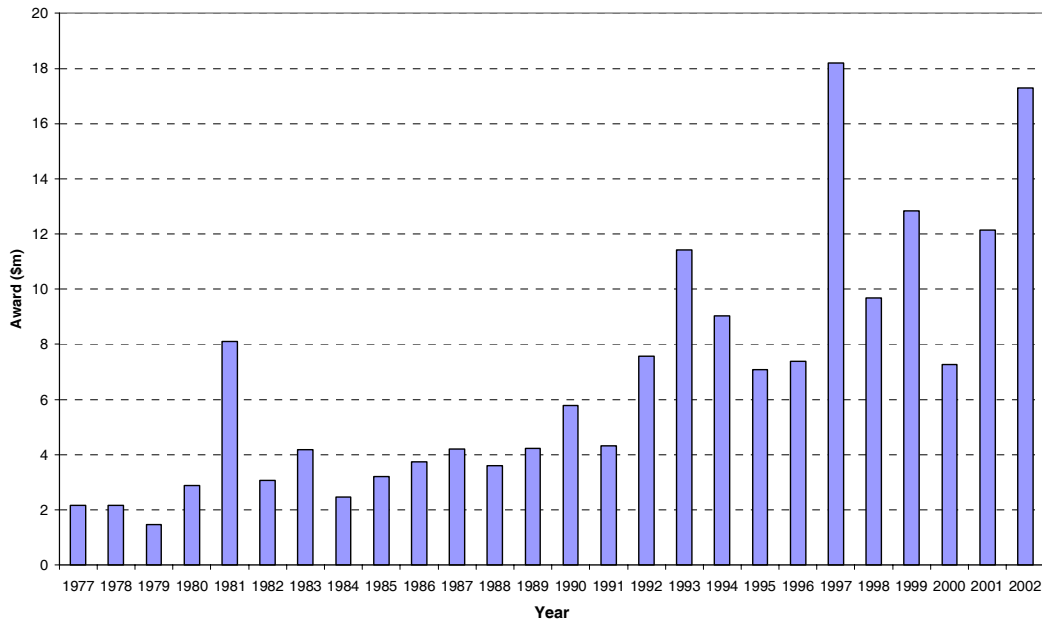
We analysed the court awards as follows:

- We looked at the largest award in each year over a 25-year period
- For the years 1993 to 2002 inclusive, we examined the largest award for quadriplegia and the largest award for brain damage in each year – 19 very large awards in total (no reported award for quadriplegia 1999)
- We inflated all payments to current dollar values (using wage inflation), in order to make year-to-year comparisons more meaningful
- For awards where contributory negligence applied – we considered the award net of this.

## Largest Awards Over 25 Years

In Figure 1 we show the 25-year history of the highest court award in each year.

**Figure 1 – Highest Court Awards Over 25 Years**



The largest awards are a reasonably volatile series, being strongly dependent on claimants’ individual circumstances. It is therefore difficult to comment on “trends” in the largest award.

The awards over the last ten years have been at historically high levels:

- The average for the ten-period 1993-2002 is \$11.2 million, compared to \$4.3 million for the period 1983-1992
- Seven of the awards over the ten years 1993-2002 exceed the highest award prior to 1993
- The four largest awards ever have been made over the last six years.

Increases in awards can be driven by a number of factors:

- Over time, medical developments increase the likelihood of survival of individuals whose injuries would have proved fatal in earlier times; these individuals have greater dependency levels than claimants of the past, and hence greater needs for attendant care and other special requirements
- Expansion of the heads of damage for which awards are made
- Greater amounts being awarded are made under a given head of damage.

At around 1992/93, there were two developments which took awards to levels not seen before:

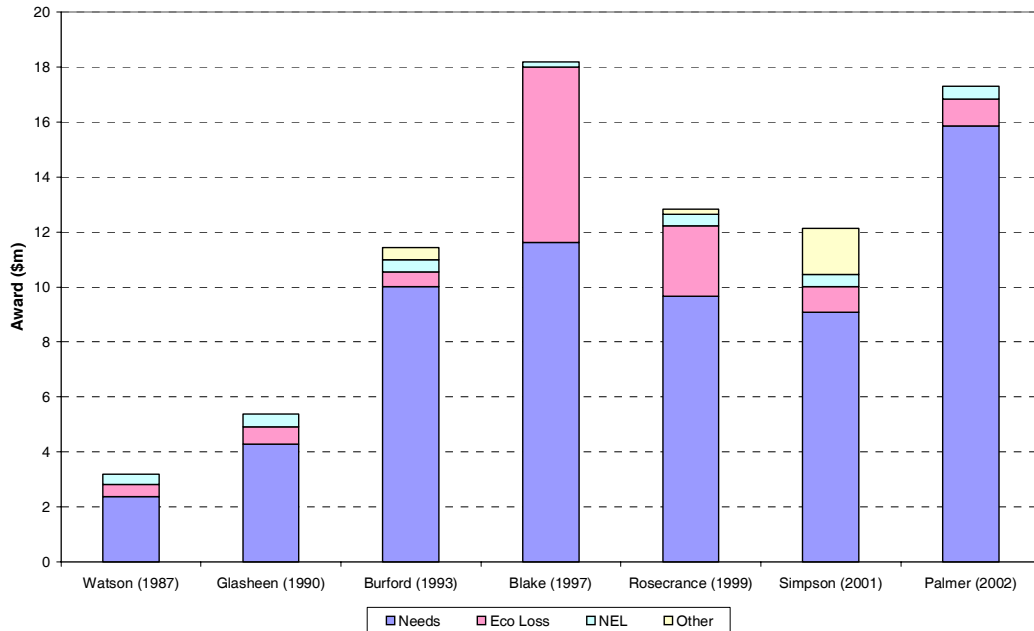
- A new category of claimant emerged – the ventilator-dependent quadriplegic. Prior to this time the injuries suffered by these individuals would have proved fatal
- There was an expansion in the elements of loss compensated by common law awards. For example, awards began to include amounts for the costs of funds management, for the extra costs of annual holidays for claimants, and for computer purchase and maintenance. These now represent “standard” entitlements.

In our 1993 paper we estimated the rate of superimposed inflation over the period 1977 to 1992 at around 7-8% per annum; this was based on the experience of the top 20 claims on each year (this level of data is not available for more recent years).

Figure 2 compares a number of individual awards:

- Watson (1987) and Glasheen (1990) represent “typical” awards of the late 1980’s; both claimants became quadriplegics as teenagers
- Burford (1993) is a ventilator-dependent quadriplegic, after an accident as a young girl. Her award set a new precedent in size at the time
- The other awards shown represent the four largest awards ever made, up to 2002.

Figure 2 – Examination of Individual Awards



Some comments on the four recent very large awards (all amounts converted to current dollar values):

- Actor Jon Blake (1997) was awarded \$18.2 million, after allowance for 35% contributory negligence (gross award \$28.0 million). The gross award included \$9.8 million of economic loss damages, an unusually large amount relating to Blake’s potential future film earnings. This award had been reduced on appeal from an initial gross award of over \$56 million, including over \$37 million for loss of future earnings
- Rosecrance (1999). The claimant here is a US associate professor injured in a Northern Territory car accident. The amount allowed for needs came to A\$9.7 million (converted from \$US), and over A\$2.5 million was allowed for economic loss
- Simpson (2001). Due to very high dependency, arising from severe cerebral palsy, the needs component was very large
- The award made to Palmer (2002) included over \$2 million for past expenses relating to very long hospital stays, and over \$12.5 million for future care; the claimant’s high dependency requires 24-hour care by experienced nurses.

In relation to the components of the largest awards, our observations are:

- The needs component drives the total amount of the awards. Up to the late 1980's/early 1990's, the needs component of the largest awards typically lay in the range \$2-4 million. Over the last ten years, \$10 million is more typical
- The economic loss component is typically in the range \$500,000 - \$1 million, with Blake and Rosecrance being notable exceptions
- Non-economic loss represents a relatively minor component of the largest awards, with a maximum amount of \$300,000-\$400,000.

Within the needs component, it does appear that there has been a trend to make awards of larger amounts for some heads of damage, and to make awards for an increasing range of special needs. For example:

- Simpson and Palmer were each awarded over \$250,000 or more for additional holiday costs, and each received \$120,000 or more for motor vehicle expenses
- Simpson was awarded \$95,500 for hydrotherapy, over \$170,000 for educational tutoring, over \$370,000 for a case manager and \$500,000 for home building and architectural costs
- Palmer was awarded over \$400,000 for environmental control (set-up and maintenance).

A hypothesis which is harder to test is that higher levels of attendant care are allowed today for claimants than would have been allowed in the past. However it is likely to be the case. In the case of Palmer the future attendant care awarded was made up of:

- Fulltime nursing care allowance (two nurses): \$7.6 million
- Allowance for an additional carer: \$974,000
- Allowance for third nurse for tracheotomy: \$613,000
- Gratuitous care: \$452,000.

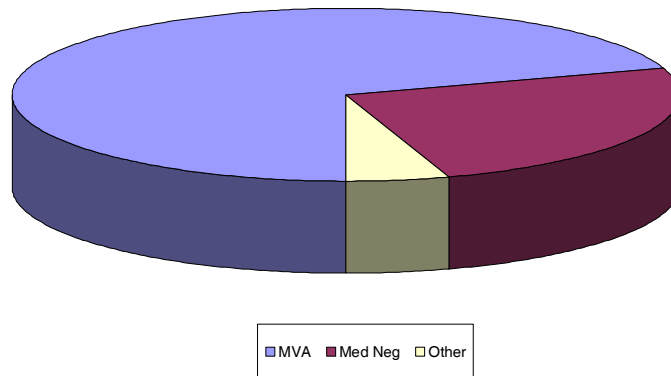
Overall it does appear that the recent very large awards represent more comprehensive compensation for the very seriously injured, and in particular increased recognition of the range of special needs of these claimants.

## Cause of Injury

Most of the very large awards relate to motor vehicle accidents. Medical negligence claims (in particular relating to injuries sustained before or at birth) are also reasonably prominent.



Figure 3 – Large Awards by Cause



With the predominance of CTP claims among the largest awards, it is instructive to carry out more detailed analysis of the CTP experience. This is described in the remainder of the paper.

## Trends in CTP Claims

### Information

We received data from the NSW, WA and Queensland CTP schemes, as follows:

- Information on all claims over \$500,000 finalised in the period 1993 to 2003 inclusive (for the Queensland scheme, there were no payments over \$500,000 before 1997; the new scheme commenced in 1994)
- Detailed information for each claim including age at accident and payments by head of damage.

We analysed the experience as follows:

- We inflated all payments to current dollar values (using wage inflation), in order to make year-to-year comparisons more meaningful
- We combined the data from the three States
- For detailed analysis, we excluded legal costs from the payments (plaintiff and defendant legals); both the data provided and the levels of legal costs varied quite a lot by State.

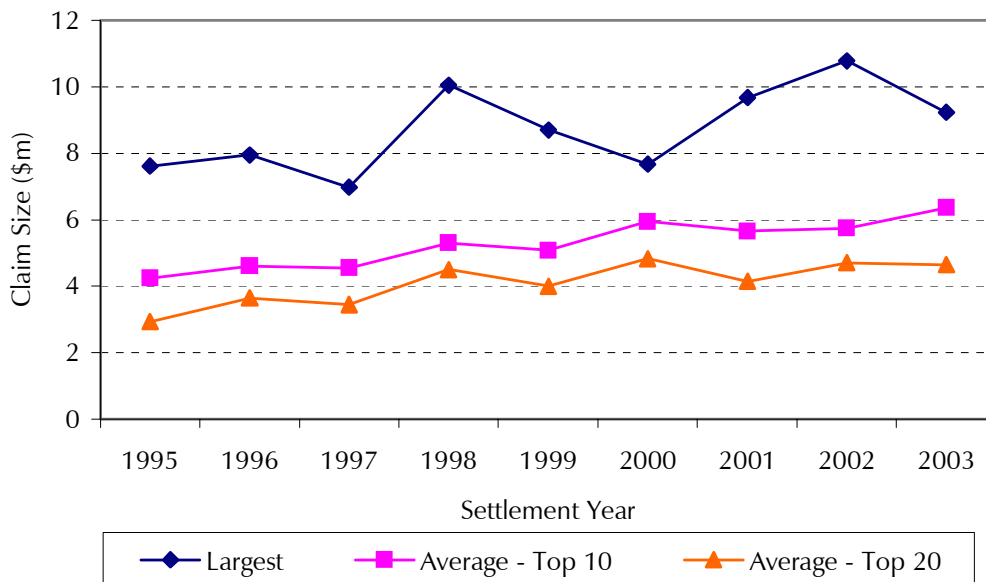
## Size of Claims Over Time

Figure 4 shows, for each settlement year:

- The largest CTP finalisation in each year
- The average of the ten largest CTP finalisations in each year
- The average of the twenty largest finalisations.

We have excluded years prior to 1995 due to the immaturity of the NSW scheme (and we note again that no Queensland claims exceeded \$500,000 until 1997, due to the new scheme's introduction only in 1994).

**Figure 4 – CTP: Trend in Top 20 Finalisations**



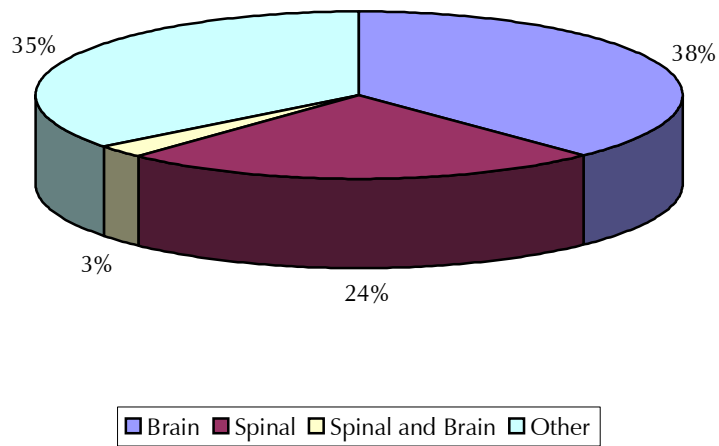
The size of the largest claim each year is (as expected) the most volatile series.

Each of the lines shows a trend upwards over the period, representing superimposed inflation since the amounts have all been adjusted for wage inflation. The level of superimposed inflation over the period is 3-5% per annum; this would be considered “normal” levels of superimposed inflation for bodily injury claims.

### Type of Injury

Figure 5 shows the types of injuries which make up the largest 20 claims each year. Brain and spinal injuries are the two largest groups, together making up about two-thirds of the claims.

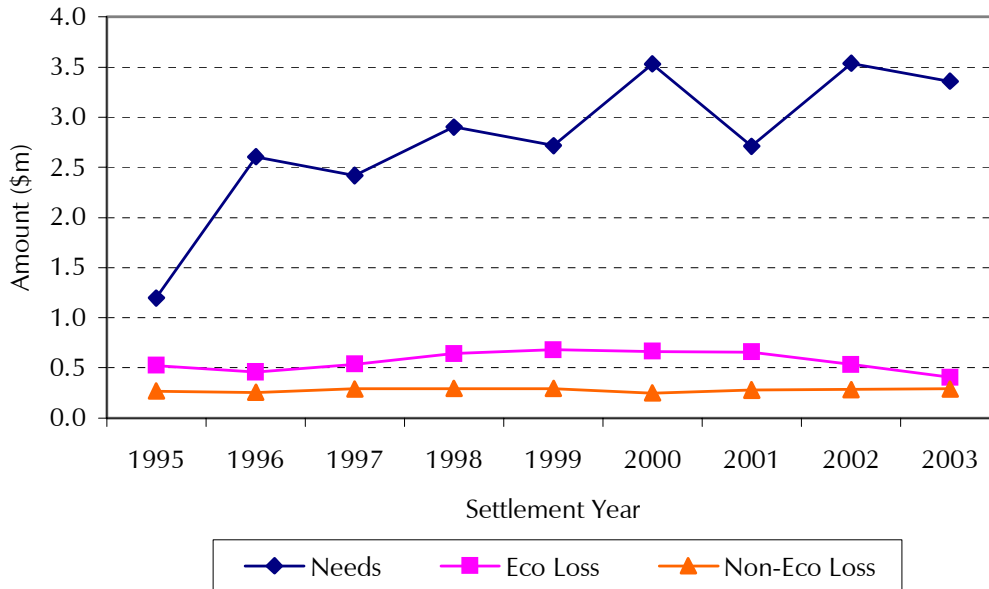
**Figure 5 – CTP Large Claims: Type of Injury**



### Components of Large CTP Claims

Figure 6 shows the average amounts represented by the major claim components of the top 20 CTP claims each year.

**Figure 6 – Major Components of Top 20 CTP Claims**



The needs component dominates, and for this group of claims has increased from an average of about \$2.5 million per claim to about \$3.5 million since 1996 (over the same period, the average needs component for the top ten claims, not shown here, increased from \$3.5 million to \$4.5 million).

The average amount awarded for economic loss has been relatively stable at around \$0.5 million over the period. We note that there are AWE-based limits on the weekly economic loss awards in NSW and Queensland.

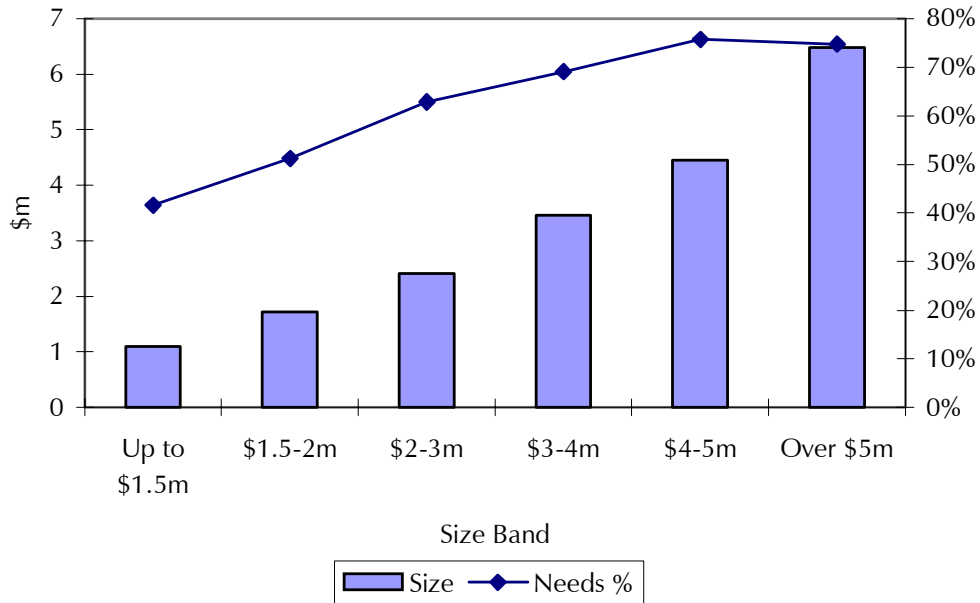
The average non-economic loss component has also been stable at \$250,000-\$300,000; once again we note the existence of limits on general damages in the NSW and WA schemes.

The other individual components of claim payments are minor.

### Needs Proportion vs Claim Size

With the needs component being the major driver of claim costs, we investigated the relationship between claim size and the needs proportion. Figure 7 demonstrates the results.

Figure 7 – Needs Proportion vs Claim Size



The proportion relating to needs increase from a little over 40% for claims up to \$1.5 million to around 75% for the largest CTP claims. This conclusion of course relates to the fact that the very largest claims are paid to the most seriously injured individuals, who are likely to need care for the rest of their lives. Broadly speaking:

- CTP claimants receiving settlements over \$5 million include quadriplegics, many with brain injuries as well, as well as those with the most severe brain injuries; these are types of injury which result in high levels of dependency
- The group receiving settlements in the range up to \$1.5 million includes paraplegics, individuals with moderately serious brain injuries and a range of other injuries.

### Age at Accident

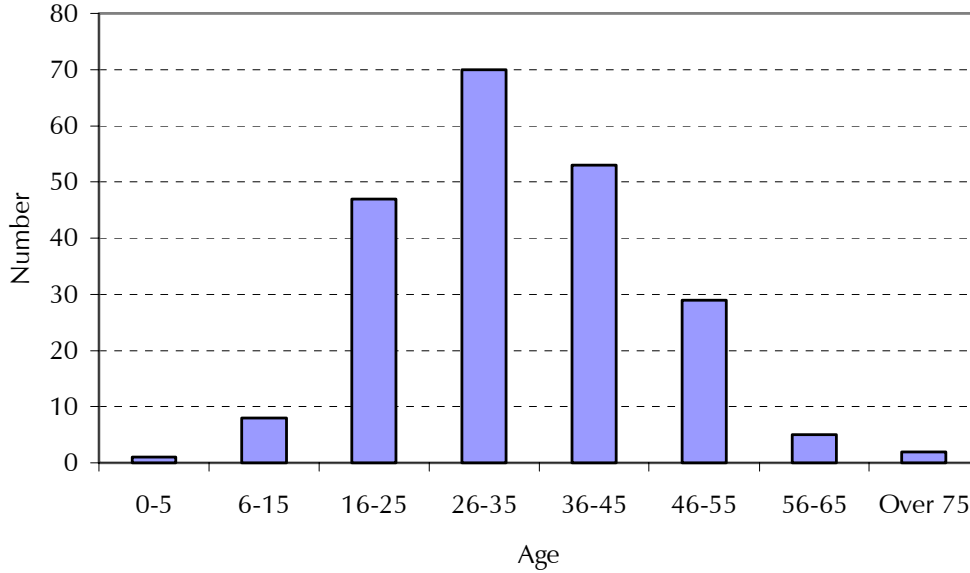
Very large awards naturally tend to be associated with young claimants. This is because it is the combination of high dependency and young age (and, as a result, higher life expectancy) which gives rise to large awards.

In Figure 8 below we show the age distribution of the largest 20 CTP claims in each year; young people are over-represented, compared to the population. For example:

- Claimants under 35 represent 59% of the group of very large claims, compared to 50% of the population

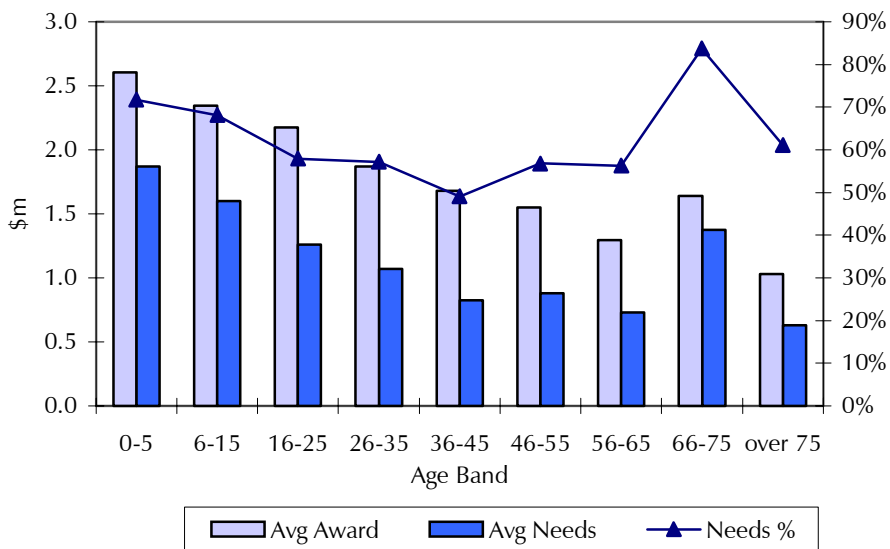
- Only 1% of the claimants are over 65, compared to 12.5% of the population.

**Figure 8 – CTP Top 20 Claims: Age at Accident**



The average claim cost and the cost components vary with the age of the claimant. In Figure 9 below we show the average total claim payment, average needs component and needs proportion by age at accident.

**Figure 9 – Claim Costs vs Age**



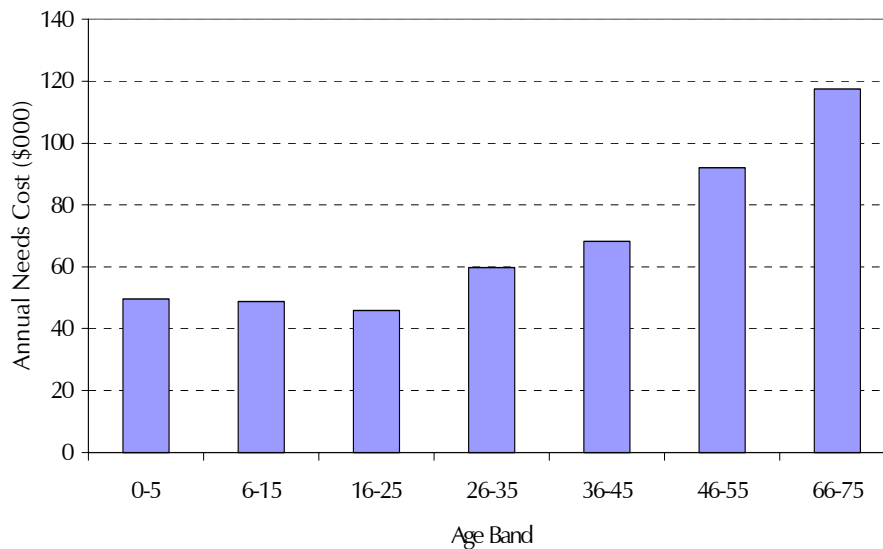
The figure demonstrates that:

- For ages up to 65, both the average total claim payment and the average needs component reduce with age (at ages over 65, there are only 13 claims)
- Until age 45, the needs proportion steadily reduces with age.

These trends reflect the fact that, all other things being equal, the total cost of needs for a younger claimant are greater because of their longer life expectancy.

We also investigated whether there is an apparent standard “needs cost per year of remaining life” amount for the largest claims. For claims over \$3 million, we calculated the average needs payment per year remaining to age 80 (ie. divide the needs payment by 80 less the age at accident; this is on the basis that the expectation of life is not significantly reduced for these claimants). Figure 10 shows the results.

**Figure 10 – Annual Needs Cost for Claims Over \$3m**



There does appear to be some sort of standard “needs cost per year” of \$50,000-60,000 at ages up to about 45. At older ages, the needs cost per year rises. An annual amount of \$50,000 is equivalent to around 48 hours’ care per week at a rate of \$20 per hour.

## Impact of Tort Reform

The recent tort reforms are largely directed towards reducing the cost of relatively minor claims; the thresholds for general damages represent the most significant element of the reforms.

However some of the reforms are expected to have an impact on the quantum of the very largest claims. These include:

- Reduction in the discount rate applied to future costs (some states) – will affect care costs and future economic loss
- Limitations and thresholds on gratuitous care allowances
- Limitations on economic loss amounts – the limits are set at levels where only the very highest awards (such as Blake) will be affected. Limits already exist in NSW, Queensland, SA and Victoria.

We do not expect, however, that the effect on the size of very large claims will be significant – depending on the jurisdiction, we expect reductions in the order of 0-15%.

The changes to the law in respect of negligence and personal responsibility will affect court attitudes, and the prevailing claims “climate”. Very large claims are expected to be affected to some extent, along with other claims; for example, contributory negligence may be found more frequently. The effects in monetary terms are unlikely to be large, however, and are difficult to estimate.

The tort reforms are also expected to have an abating effect on superimposed inflation for personal injury claims, at least in the short term.

## Conclusions

The largest court awards made for personal injury over the last decade are at historically high levels. Factors leading to higher awards in the last ten years include:

- Improved survival of more seriously injured individuals
- Expansion in the heads of damage awarded and the elements of loss compensated; the compensation better reflects the true needs of the individuals
- Unusual individual circumstances, in some cases.

Examination of the largest CTP claims paid over the same ten years (NSW, Qld and WA data combined) indicates superimposed inflation has been running at what would be considered “normal” long-term levels of 3-6% per annum.

The needs component continues to be the main driver of the total claim amounts.

Recent tort reforms are not expected to have a significant impact on the largest common law claims.



Our analysis has looked at the size of the largest claims only. Other factors may also produce superimposed inflation in accident compensation schemes and personal injury liability portfolios. These factors include the proportion of large claims, as well as the frequency and cost of smaller claims.

## **Acknowledgements**

We are very appreciative of the participation of the NSW, WA and Queensland CTP schemes, and are grateful to the NSW and Queensland insurers who allowed their data to be used in this study.