CIVIL JUSTICE RESEARCH CENTRE
A PROJECT OF THE LAW FOUNDATION OF NEW SOUTH WALES

AWARDS MADE UNDER THE MOTOR ACCIDENTS ACT 1988

Deborah Worthington
and Marie Delaney

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Charter of the Civil Justice Research Centre

The Civil Justice Research Centre was established by the Law Foundation of New South Wales in 1989.

The principal purpose of the Civil Justice Research Centre is to help make the processes for resolving civil disputes in New South Wales more efficient, more cost effective, and more accessible to the public.

The Centre examines the policies that shape the civil justice system, the behaviour of the people who participate in it, the operation of its institutions and its effects on the community's social and economic systems.

The Centre adopts an interdisciplinary approach to the study of public policy issues. It widely disseminates the results of its work to government officials, legislators, judges, unions, business, consumer affairs, legal and research communities, and to the general public.

Foreword

In commissioning the Civil Justice Research Centre to conduct research into awards made by judges and arbitrators under the Motor Accidents Act, the Motor Accidents Authority was seeking to fill certain information gaps which existed in relation to the operation of the Motor Accidents Scheme. Specifically, in the midst of considerable debate about the Scheme, there was no empirical information available about how judges and arbitrators were applying the Motor Accidents Act in determining levels of compensation.

This report therefore sets out to provide this information. It describes, firstly, the amounts being awarded by judges and arbitrators under the Act and the insurers' expectations in relation to those amounts. It then explores some of the reasons which might account for differences in the amounts being awarded, and differences between the awards being made by judges and arbitrators and the insurers' assessments.

The report shows that, typically, amounts awarded by judges and arbitrators for non-economic loss were higher than assessments made by insurers. The findings suggest a number of factors which could account for these differences, but also indicate that there is much consistency in the way that judges, arbitrators and insurers are interpreting the Act.

The way that people are compensated for injuries sustained in motor accidents is an important outcome of the civil justice system. If we are to assess the performance of the civil justice system, outcomes must be measured and reported on. Thus, the examination of civil justice outcomes is a necessary part of the Civil Justice Research Centre's research agenda. It is hoped that, by providing objective, empirical data on system outcomes, any public debate that arises over civil justice issues will be balanced, and that policy makers will be in a better position to plan reforms to the system.

Gillian McAllister
Executive Director

Executive Summary

Background

In 1989, with the introduction of the Motor Accidents Act, major changes occurred to the management of motor vehicle personal injury claims in New South Wales. Since then there has been much debate about the effect of this Act on the level of awards made to people injured in motor vehicle accidents. In particular, insurers have raised concerns that the Act is being interpreted differently from what they expected and that awards by judges and arbitrators are more generous than anticipated.

Section 79 of the Act introduced several mechanisms to limit the award of damages for non-economic loss. A cap was placed on the maximum amount that could be awarded, at present this amount is $222,000. In addition, s79(1) introduced a verbal threshold and s79(5) allowed for an amount of $18,500 to be deducted from all awards of less than $68,820.

The present study was designed to take a close look at the awards for non-economic loss being made by judges and arbitrators and to provide a better understanding of how the Act has operated since its introduction. Particularly, the study compares the judiciary's interpretation of the Act, as evidenced in their awards, with insurers' interpretations as evidenced in their assessments.

Methodology

The research design called for an analysis of all claims that had received an award since the Act commenced. Insurers' claim files were the most accessible source of data with which to address the research concerns as they could provide details of insurers' assessments and awards made by judges and arbitrators.

As there was no central register of claims that had received an award, both the Courts and insurers were used to identify claims. The claims identified by the Courts were matched against the Motor Accidents Authority (MAA) Claims Register to identify the managing insurer and claim number in each case. A letter sent to insurers requested access to the claim files selected and assistance in

identifying any additional claims. While most insurers were in a situation of having no objective method of selecting claims, several insurers could systematically identify claims that had received an award.

The final sample of 342 claim files included claims from all 14 licensed insurers. Seventy-nine of these claims were from the Courts' databases and 263 from insurers. District Court claims accounted for 86% of the final sample, Supreme Court 11% with the remaining 3% from Local Court/Magistrates Court.

Research Objectives

The purpose of the research was to focus on the award of damages for non-economic loss. The objectives were to:

- Describe both the level of awards made by judges and arbitrators and the level of assessments made by insurers.
- Compare the awards of judges and arbitrators with the assessments of insurers.
- Identify any variation in either awards, insurers' assessments, or the difference between the two, in terms of:
  - injury type;
  - jurisdiction;
  - hearing or arbitration;
  - number of claims heard by judges and arbitrators;
  - court location;
  - date procedure took place; and
  - other damages awarded.

The Results

Awards for Non-Economic Loss

Awards for non-economic loss (NEL) are described in terms of the percentage of the maximum amount which may be awarded (NEL%).

The mean NEL% awarded for the claims in the survey was 22%. This is equivalent to a net amount of $30,340, a gross amount of $48,840. Most claims, 78%, received awards that were between 10% and 29% of a most extreme case.

Variation was found to exist between the mean NEL% awarded for each injury type. Claims for multiple injuries had the highest mean NEL%, sprain and strain injuries involving the neck, back or shoulders, the lowest. There was little dispersion in the award of NEL% for sprain and strain injuries, open wounds were widely dispersed.

Variation in the mean NEL% awarded was found between jurisdictions. Not surprisingly, awards in the Supreme Court were higher and more widely dispersed than awards in the District Court.

The mean NEL% awarded was higher in claims where damages for either economic loss or out-of-pocket expenditure formed a component of the total award.

There was no statistically significant variation in the mean NEL% awarded for hearing or arbitration, judge/arbitrator, court location, or between the four years 1991/92 to 1994/95. The lack of any idiosyncratic variability in relation to these factors tends to indicate that the provisions of s79 are being consistently interpreted by judges and arbitrators.

Assessments for Non-Economic Loss

Whilst processing a motor accident claim, an insurer may make a number of assessments as to the likely award for NEL%. For the present study, the final assessment prior to the procedure used to determine the claim was recorded.

The mean NEL% assessed by insurers was 19%. This was lower than the mean NEL% awarded which was 22%. This difference may indicate that judges and arbitrators are interpreting the provisions of s79 differently from insurers. However, it may also reflect a tendency on the part of insurers to under assess NEL%, either for actuarial purposes or otherwise.

Like NEL% awards, variation was found to exist between the mean NEL% assessed for each injury type, jurisdiction, and whether other heads of damage formed a component of the total award. Also like NEL% awards, there was no statistically significant variation in the mean assessments for hearing or arbitration, judge/arbitrator or court location.

These findings tend to indicate that the provisions of the Act in relation to s79 are being consistently interpreted by insurers, as was the case with judges and arbitrators.

Unlike NEL% awards, however, which remained fairly stable over the four years 1991/92 to 1994/95, NEL% assessed was higher in 1993/94 and 1994/95 than in the two earlier years.

A Comparison of Awards and Insurers' Assessments

To undertake a comparison of awards and assessments the difference between NEL% awarded and NEL% assessed was calculated for each case. For example, if a judge determined the claimant's injury to represent 15% of a most extreme case, and the insurer assessed the amount to be 10%, the difference would be 5%. If the award was 15% and the assessment 20%, the difference would be –5%.

Overall, the mean difference between NEL% awarded and NEL% assessed was 3.5%. That is, awards were typically $7,770 higher than assessed by insurers.

A number of factors were examined to see if there was any variation in the difference between NEL% awarded and NEL% assessed. The findings suggest that judges and arbitrators may be interpreting the provisions of s79 differently from insurers in relation to a number of factors. These were:

Injury type

It was found that in claims for more severe and less frequent injury types, such as those for open wounds, fractures and multiple injuries, insurers' interpretation of s79, as evidenced by their assessments, was significantly lower than that of judges and arbitrators, as evidenced by their awards.

Other damages awarded

Where future economic loss was a component of the total award, insurers' interpretation of s79 was significantly lower than that of judges and arbitrators.

Year of procedure

The difference between awards and assessments, and in the proportion of claims in which the award was more than assessed, has decreased over time. This suggests that while awards were initially more generous than anticipated by insurers, their assessments have become more reflective of awards as time has passed.

Despite these differences in interpretation, there are many indications that the provisions of the Act in relation to s79 are being interpreted consistently by both judges and arbitrators, and insurers. The mean difference between NEL% awarded and NEL% assessed was similar regardless of:

- jurisdiction;
- procedure;
- judge/arbitrator; or
- court location.

Conclusion

The findings of this study address concerns raised by insurers that judges and arbitrators are "generous" in their interpretation of the provisions of the Act in relation to the award of damages for non-economic loss.

Prior to this study, very little was known of the relationship between insurers' assessments and Court awards, other than that they should be related and that insurers' assessments would tend to be lower than awards.

Overall, the difference between awards and assessments was not great, but the study has explored this further by describing the difference in terms of a number of factors. Awards for non-economic loss were higher in earlier years, indicating that awards were more generous than anticipated by insurers, claims awarded future economic loss were also higher than anticipated, as were those for the more severe and less frequent injury types.

This study cannot determine whether the differences found are due wholly to the implementation of the Motor Accidents Act. Nor can it estimate the costs of these differences on the motor accident compensation scheme as a whole. Such an analysis would require fully comparative information to be available regarding the administration of claims prior to the implementation of the Act.

The results provide, however, an indication of how the Act is operating in relation to the award of damages for non-economic loss. This, and further information, can assist in addressing concerns regarding what is contributing to increases in the costs associated with compensating motor accident victims.

Acknowledgments

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1

Introduction

1.1 Background

In 1989, with the introduction of the Motor Accidents Act, major changes occurred to the management of motor vehicle personal injury claims in New South Wales. Since then there has been much debate about the effect of this Act on the level of awards made to people injured in motor vehicle accidents. In particular, insurers have raised concerns that the Act is being interpreted differently from what they expected and that awards by judges and arbitrators are more generous than anticipated.

The Civil Justice Research Centre (CJRC) conducted this study to provide the Motor Accidents Authority of New South Wales (MAA) with independent empirical research on the level of awards actually being made under the Act.

The research focussed on the amounts awarded for non-economic loss, though it also provides some investigation into awards for other heads of damages. By profiling cases that have received awards, the research provides a better understanding of how the Act has operated. It can also assist the ongoing development of appropriate policy and practices in relation to the Act.

1.1.1 The Legislation

The Motor Accidents Act took effect on 1 July 1989 and has been in operation for over five years. Prior to the drafting of the new Act a Committee of Review, formed by the Attorney General's Office, considered various options for the new legislation. A major area of concern for the Committee was the large number of claims for minor injuries that received general damages (now called non-economic loss) under the previous Act.[1] The following comment from the report of the Committee explains this concern:

> "It is clear that the cost of the common law third party system lies in the general damages awarded for minor injuries. General damages awarded for injuries such as bruising, lacerations and in particular soft tissue whiplash has proved to be a major drain."[2]

One intention of the new Act was to limit awards of non-economic loss in minor injury cases, focussing instead on people more seriously injured in motor vehicle accidents.[3] To accomplish this the Act introduced several gate keeping mechanisms.

Section 79 of the Act put a cap on the amount awarded for non-economic loss. At present this is $222,000.[4] In addition, s79 introduced a verbal threshold and a deductible to limit awards for non-economic loss. The next section discusses these two new mechanisms.

1.2 Mechanisms to Limit the Award for Non-Economic Loss

1.2.1 A Verbal Threshold

Section 68 of the Motor Accidents Act 1988 defines non-economic loss as: pain and suffering; loss of amenities of life; loss of expectation of life; and disfigurement. Section 79 of the Act outlines the steps in the assessment of non-economic loss.

To limit access to non-economic loss for minor injuries, a requirement under s79 is to satisfy a verbal threshold of "significant impairment". According to s79:

> "No damages shall be awarded for non-economic loss of an injured person unless the injured person's ability to lead a normal life is significantly impaired for a continuous period of not less than six months by the injury suffered in the accident."[5]

Once this verbal threshold is satisfied an assessment is made as to the amount to be awarded for non-economic loss.[6] It is first necessary to determine the percentage the injury bears to a most extreme case. Under the Act, injuries are assessed between zero and 100% of a most extreme case. Generally a person with quadriplegia is considered 100%.

The percentage determined is equivalent to a gross dollar amount with a maximum amount, or most extreme case, of $222,000 gross. For every percentage there is a corresponding gross dollar amount. For example, 22% of a most extreme case corresponds to an amount of $48,840 gross.

1.2.2 The Deductible

A further provision of the Act reduces amounts paid for claims that meet the threshold but are determined to be less extreme cases. In these cases the Act specifies an amount to be deducted from the gross dollar amount. This deductible, as it is referred to, operates under ss79(4) and (5) as follows:

s79(4) If the amount of non-economic loss is assessed to be $18,500 (8%) or less, no damages for non-economic loss shall be awarded.

s79(5) If the amount of damages to be awarded for non-economic loss in accordance with ss1–3 is more than $18,500 (8%) but less than $68,820 (31%) the following deductions shall be made from the amount:

(a) If the amount of damages is less than $48,840 (22%) – the amount to be deducted is $18,500;

(b) If the amount of damages is not less than $48,840 (22%) the amount to be deducted is $18,500 or $18,500 reduced by $1000 for every $1000 by which the amount of damages exceeds $48,840.

As an example of the deductible, the gross amount for an injury assessed at 22% of a most extreme case is $48,840. This is subject to a deduction of $18,500 leaving a net amount of $30,340 awarded for non-economic loss. Where the gross amount equals or exceeds $68,820 (31%) the deductible ceases to apply.

Appendix 1 presents the table of percentages of a most extreme case and the corresponding gross and net dollar amounts for 1994/95. These amounts are indexed and adjusted each year by the provisions of s80 of the Act.

1.3 Implementing the Act

To date 59% of claims made under the Act have been finalised. Eighty-six percent of these claims settled without litigation.[7] Of the 14% of litigated claims the majority settled out of court, with only a small number progressing to a determination before an arbitrator or judge.

As with any legislation, the judiciary has the important role of interpretation and application. In the case of the Motor Accidents Act this includes deciding the amounts awarded for non-economic loss where insurers and claimants do not reach settlement. These decisions then set precedents for future awards and for settlement negotiations between insurers and claimants.

Due to delays, and a backlog of claims in the courts, it was not until 1992 that many claims came before judges under the Motor Accidents Act. With the increasing number of judgements there was more opportunity to observe how judges were interpreting the Act.

1.4 Insurers' Concerns

According to the MAA, insurers have expressed concern regarding the interpretation of the Act by judges and arbitrators, referring to an alleged generosity of awards and an "erosion of the deductible". The following comment by a defendant lawyer explains this perspective:

> "The phrase (not mine) which seems to best describe the changing approach to minor claims is of an "erosion of the deductible" in that:
>
> (i) Small claims, which should be excluded, are being allowed, whether by settlement or judicial determination; and
>
> (ii) The amount of damages in cases at the lower end of the range of operation of the deductible is being calculated so as to overcome the effect of the deductible.
>
> It seems to be increasingly difficult to settle minor whiplash claims for less than 15% of a most extreme case."[8]

1.5 Research Approach

The MAA commissioned the present study to assist in addressing insurers' concerns. Clearly the ideal research approach would have been to compare settlements and awards for non-economic loss made under the Act with settlements and awards made before the implementation of the Act. However, this comparison was not possible as there was no way of ensuring that the mix of cases presently in litigation would be similar enough, for the purpose of comparison, to claims litigated before the Act.

Similarly, while insurers had the specific concern of the erosion of the deductible, this was a difficult concept to measure validly. That is, to identify if judges and arbitrators are calculating awards to overcome the effect of the deductible would require some case specific knowledge of the subjective processes by which they determine the percentage of a most extreme case. As court files do not contain such information it would be difficult to assess empirically.

Lacking an ability to both compare claims made before the introduction of the Act, and to investigate subjective processes, the study employed an alternative empirical method. It was decided to compare the judiciary's interpretation of the Act, as evidenced in the awards, with insurers' interpretation of the Act, as evidenced in their assessments of the value of claims.

Some difference was expected between assessments and awards as insurers' assessments are likely to fall on the low side of court awards. Also, it was expected insurer assessments would over time conform more closely to the pattern of court

awards. However, information about the extent to which they differ and the characteristics of claims that impact on this can help shed light on differences in interpretation of the Act.

1.5.1 Research Objectives

The first objective of the present study was to describe the level of awards and assessments made by judges, arbitrators and insurers under the Act. In particular the study was to look at the award of damages for non-economic loss.

Second the study was to compare assessments made by insurers with court awards made by judges and arbitrators.

The third objective was to identify any variation in awards, insurers' assessments and the differences between awards and assessments. The study explored a variety of factors that may have been associated with any variation. These factors were:

- injury type;
- jurisdiction;
- hearing or arbitration;
- number of claims heard by judges and arbitrators;
- court location;
- date procedure took place; and
- other damages awarded.

1.5.2 Sample Design

The research design called for an analysis of all claims that had received an award by either a judge or arbitrator since the Act commenced.

Following discussions with the MAA it was decided that insurers' claim files would be a valuable and accessible source of data with which to address the research objectives. As well as providing full details of awards made, the files would contain comments from insurers and their legal representatives concerning the value of the claim, detailed assessments of awards and their opinions regarding the award itself.

It became apparent that collecting the relevant claim files would prove a difficult task as there was no central register that could easily identify the claims that had received an award. The Courts could provide only an incomplete list of claims filed in Sydney after June 1992 as the only two databases were located in the Sydney registries of the New South Wales Supreme Court and New South Wales District Court.[9]

Likewise, most insurers had no consistent or systematic method for identifying such claims, though some were able to use computerised systems to assist in the task of identifying their own claims.

An alternative method, combining the two sources of claims, those from the Courts and those from insurers, was used to collect the sample of claims included in the study.

1.5.3 Case Selection

The claims identified by the Courts were matched against the MAA Claims Register to identify the managing insurer and claim number in each case.[10] The Courts identified some 200 claims though the final sample included only 79 of these. Of the claims not included, approximately 40 were found to have settled before an award was made, while others could not be easily identified by either the MAA database or insurers.

A letter sent to insurers requested access to the claims identified by the MAA Claims Register and also, for assistance in identifying any additional claims. While most insurers were in a situation of having no objective method of selecting claims, several insurers could systematically identify claims that had received an award.

1.6 Final Sample

The study recorded information from all identified claim files except those where there was no decision as to non-economic loss, such as when there was a verdict for the defendant or where the plaintiff had died.

The final sample of 342 claim files included claims from all 14 licensed insurers. Seventy-nine of these claims were from the Court databases and 263 from insurers. District Court claims accounted for 86% of the final sample, Supreme Court 11% with the remaining 3% from Local Court/Magistrates Court.

1.7 Data Collection

Following discussions with several claims managers and the review of a small number of claim files, a data coding sheet was designed and tested. Information collected from the files included details of the award, defendant assessments (including those of the insurer, solicitor and counsel), offers of settlement made by the plaintiff and defendant, other descriptive information such as injury type,

body part, date of trial or arbitration, location of court and the presiding judge or arbitrator. Also recorded were any relevant written comments about the outcome of the claim. Appendix 2 provides a copy of the coding sheet.

Not all the information was available for each of the 342 claims provided to the CJRC. Therefore the "total" figures in the tables provided do not always relate to the full sample of matters, but rather the number that had the relevant information.

1.8 Some Considerations of the Research Approach

1.8.1 Scope of the Research

While the total number of claims in the sample exceeds expectation, and some insurers attempted to identify files, not all claims could be identified and not all files could be found. Because the sample is incomplete there is no attempt to generalise the findings of this research beyond the claims used.

Secondly, the report is concerned only with judges, arbitrators and insurers' interpretation of the Act. It is important to remember that there are other interpretations of the Act, such as those of plaintiffs, which were not sought in the present study. Whether these other groups' views on the interpretation of the Act are different from the ones explored in the study could be a subject for future research.

1.8.2 Interpreting the Findings

Another limitation of the study was that it could not determine the effect the Act has had on changes in the relationship between insurers' assessments and court awards. Because it was not possible to compare awards to those made prior to the Act, it is not known whether the Act has widened or narrowed the difference between insurers' assessments and awards that existed before the Act.

1.8.3 Potential Bias

There are several considerations of the data in terms of possible bias. As two sources were used to identify relevant claim files it was important to know whether the claims from the Courts and those from insurers differed in any systematic way. Statistical tests were undertaken to identify any variation in the claims. No variation was found, which suggests claims from the two sources were not systematically different.[11]

Another area of possible bias may have been across claims from the 14 different insurers. Claims were tested to see if there was any variation between the average amounts awarded for non-economic loss across insurer. No variation was identified which tends to indicate a general consistency in the nature of the claims across insurers.[12]

Finally, the difference between the amount awarded for non-economic loss and insurers' assessments was tested to see if there was any significant difference between insurers. Differences may have occurred because insurers used different methods to make their assessments of the likely value of the claim.[13] A statistically significant difference was found between insurers.

One insurer that contributed a large number of claims to the sample was found to have a lower than average difference between the award and assessment.[14] If an adjustment had been made for this difference, the results may have indicated a slightly larger difference than that stated in the report. However to be conservative, and as details of the full population of claims receiving awards were not available, no adjustment was made. Similarly no adjustment was made for the variation across judges and arbitrators.

1.9 Organisation of this Report

Section 2 of the report provides a description of the claims in the survey. They are described in terms of the following factors: injury type, jurisdiction, procedure, judge/arbitrator, court location, date of procedure, and other damages awarded.

In Section 3 the awards for non-economic loss are examined. These are described in terms of the percentage of a most extreme case which may be awarded. Variations in the awards are examined using the same factors as above.

Section 4 looks at insurers' assessments of non-economic loss while Section 5 compares the amounts awarded with insurers' assessments. Both these sections once again explore factors that may be related to the difference.

1 The previous Act referred to is the Motor Vehicle (Third Party Insurance) Act 1942.

2 Attorney General's Department, *Motor Accidents: The Act and Background Papers, 1988,* p.108.

3 Ibid, p.101.

4 All dollar amounts are at 1994–1995 financial year rates. Section 80 of the Act allows for indexation of amounts relating to non-economic loss.

5 Amendments to the Act on 1 September 1994 changed s79 from "is significantly impaired" to "has been or in the near future is likely to be significantly impaired".

6 Appropriate amounts are set out in a schedule. A copy of this schedule can be found in Appendix 1.

7 Motor Accidents Authority, Claims Register as at December 1994.

8 Learoyd, Mary Jane, *The Defendant's Position,* paper presented at the Motor Accident Litigation Seminar held in Sydney, April 1995, LAAMS Pty Ltd.

9 The computerised systems in these registries were designed for administration rather than the collection of statistical data about claims, making it difficult to get a complete list of the relevant claims.

10 Section 67 of the Act provides for the establishment of a claims register to be maintained by the MAA. Insurers are required to provide details of claims to the MAA to be included on this register.

11 Analysis of variance on Court database claims and insurers' claims by non-economic loss and the difference between non-economic loss awarded and insurers' assessments: $f(1,338)=1.165$ $p=0.281$, $f(1,338)=0.442$ $p=0.516$ respectively.

12 $f(4,335)=0.624$ $p=0.645$.

13 One insurer uses a computer program, some insurers assess best/worst, while others use a most likely assessment.

14 $f(4,335)=3.10$ $p=0.02$.

2

The Nature of the Claims in the Survey

This section describes the nature of the claims in the survey in terms of injury type, jurisdiction, procedure, judge/arbitrator, court location, the date of procedure and other damages awarded. A total of 342 claims were included in the sample.

2.1 Injury Type

Injury type was classified using information available at the time the hearing or arbitration took place. In most cases, medical assessments and medico-legal reports focussed on a particular injury as the most serious. This formed the basis of the classification. If however, more than one serious injury was identified, a multiple injury classification was used.

Most of the claims in the survey were for sprain and strain injuries: 43% for injuries of either the neck, back or shoulders, and 10% other body parts. Twenty-seven percent of claims were for fractures, only 5% for open wounds and 8% concerned multiple injuries (Table 2.1).

Table 2.1. Type of injury

Injury type	Number of claims	%
Fracture	94	27
Sprains and strains (neck, back or shoulder)	148	43
Sprains and strains (other)	33	10
Open wound	16	5
Multiple injuries	26	8
Other injuries	25	7
Total	**342**	**100**

2.2 Jurisdiction

The claims in the survey were heard in three jurisdictions. Most, 86%, were heard in the District Court of New South Wales, 11% were heard in the Supreme Court of New South Wales. A small proportion of claims, 3%, were heard in either the Local Court of New South Wales or the Magistrates Court of the Australian Capital Territory (Table 2.2).[15]

Table 2.2. Jurisdiction in which claim heard

Jurisdiction	Number of claims	%
Supreme Court	38	11
District Court	295	86
Local Court/Magistrates Court	9	3
Total	**342**	**100**

2.3 Hearing or Arbitration

Thirty percent of the claims had a hearing, 70% an arbitration (Table 2.3).

Table 2.3. Hearing or arbitration

Procedure	Number of claims	%
Hearing	101	30
Arbitration	241	70
Total	**342**	**100**

In 67 claims (20%) an application for either an appeal (following an initial hearing) or re-hearing (following an initial arbitration) was made. Only in 17 of these claims had a second procedure occurred at the time the study took place. These claims all involved re-hearing following arbitration.

2.4 Number of Claims Heard by Judges and Arbitrators

Forty-six judges and 80 arbitrators were identified during the course of the survey. As most of these had been involved in only one, or a small number of the claims, the analysis is based on the following categories: those that had heard less than five claims, five to ten claims, more than ten claims, and more than twenty claims.

Most claims, 59%, were determined by a judge or arbitrator who had heard less than five of the claims in the sample. Only one judge was in the more than 20 claims category: 36 claims were heard by this judge (Table 2.4).

Table 2.4. Number of claims heard by judge/arbitrator

Judge/arbitrator	Number of claims	%
Heard less than 5 claims	196	59
Heard 5–10 claims	75	22
Heard 11–20 claims	26	8
Heard > 20 claims	36	11
Total	**333**	**100**

2.5 Court Location

Most claims, 68%, were heard in Sydney. However, 15% were heard in Parramatta, 1% in Newcastle, 2% in Wollongong, and 14% in other country locations (Table 2.5).[16]

Table 2.5. Location of court at which claim determined

Court location	Number of claims	%
Sydney	234	68
Parramatta	51	15
Newcastle	3	1
Wollongong	7	2
Other country	47	14
Total	**342**	**100**

2.6 Date Procedure Took Place

The claims in the survey were heard and determined by procedures that took place between 1991 and 1995. A small number of claims, 4%, were heard in 1991/92. Twenty-six percent were heard in 1992/93. Most claims, 46%, were heard in 1993/94 and 24% in 1994/95 (Table 2.6).[17]

Table 2.6. Year of procedure

Year of procedure	Number of claims	%
1991/92	14	4
1992/93	89	26
1993/94	158	46
1994/95	81	24
Total	**342**	**100**

2.7 Other Damages Awarded

Each of the claims in the survey was eligible to receive an award of damages for non-economic loss. In addition to damages for non-economic loss, damages for economic loss or out-of-pocket expenditure may have formed a component of the total award.

Damages for past economic loss (PEL) were a component of the total award in 61% of the claims in the survey, as were damages for future economic loss (FEL). Damages for past out-of-pocket expenditure (POP) were a component of the total award in 92% of the claims in the survey, damages for future out-of-pocket expenditure (FOP) in 38% (Table 2.7).

Table 2.7. Other damages awarded

Damages	Number of claims	%
Past economic loss		
a component	209	61
not a component	133	39
Future economic loss		
a component	207	61
not a component	135	39
Past out-of-pocket expenditure		
a component	316	92
not a component	26	8
Future out-of-pocket expenditure		
a component	130	38
not a component	212	62
Total	**342**	**100**

15 Only three claims were heard in the Australian Capital Territory.

16 The claims in the survey were heard in 25 other country locations.

17 Years are taken from 1 July to 30 June of the subsequent year. Only three of the claims in the survey were heard during 1995.

3

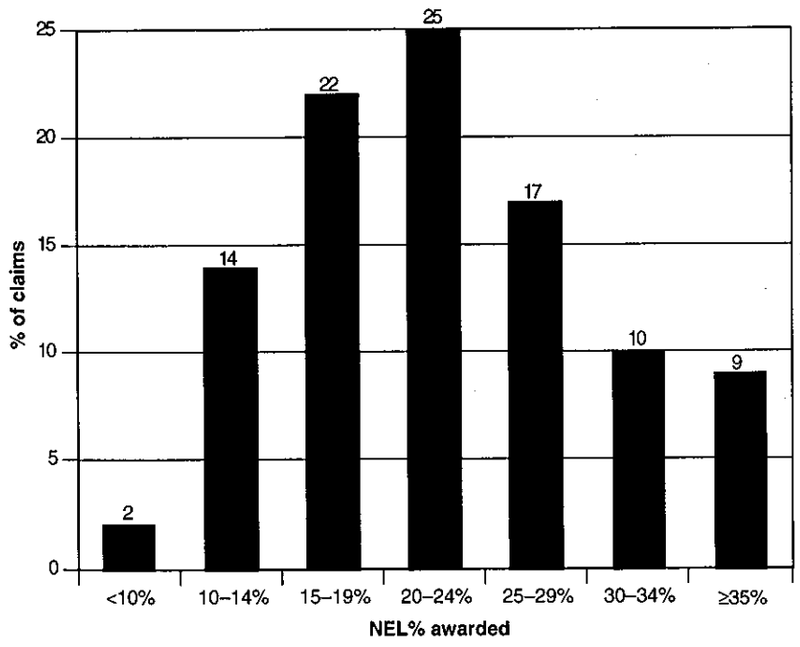
Awards for Non-Economic Loss

The primary objective of the study was to describe the level of awards made under the Act. This section focuses on awards for non-economic loss (NEL) described in terms of the percentage of the maximum amount which may be awarded (NEL%).[18] Using the NEL%, as opposed to the actual dollar amount, provides a consistent comparison between awards over time as the actual dollar amount is indexed and adjusted each year.

3.1 Awards for Non-Economic Loss

The mean NEL% awarded for the claims in the survey was 22%.[19] This is equivalent to a net amount of $30,340, a gross amount of $48,840.[20] Figure 1 illustrates the percentage of claims receiving the varying categories of award.

Figure 1. NEL% awarded



Only 2% of claims (eight claims) received a NEL% award that was less than 10% of a most extreme case. In seven of these claims the judge or arbitrator was not satisfied that the "verbal threshold" was met. In one further claim this threshold was satisfied, but as the claimant's non-economic loss was assessed as 5% of a most extreme case, no damages were awarded.

Most claims received awards that were between 10% and 29% of a most extreme case: 78% of the claims fell in this category. Only 9% of claims received awards of 35% or more. Two of these received the maximum proportion of a most extreme case, that is 100%. Both were claims for quadriplegia.

3.2 Variation in Awards for Non-Economic Loss

A number of factors were examined to see if there was any variation between the mean amounts awarded for NEL%. The factors examined were: injury type, jurisdiction, procedure, judge/arbitrator, court location, date of procedure, and the other damages awarded. Statistical tests were used to assess the significance of any difference between the means.[21]

3.2.1 Injury Type

Table 3.1 presents the mean NEL% awarded, by injury type. The mean NEL% was different for different injury types.[22] Claims for multiple injuries had the highest mean NEL%, 32%. This is equivalent to a net, or gross amount of $71,040. Sprain and strain injuries involving the neck, back or shoulders had the lowest mean NEL%, 17%. This is equivalent to a net amount of $19,240, a gross amount of $37,740.

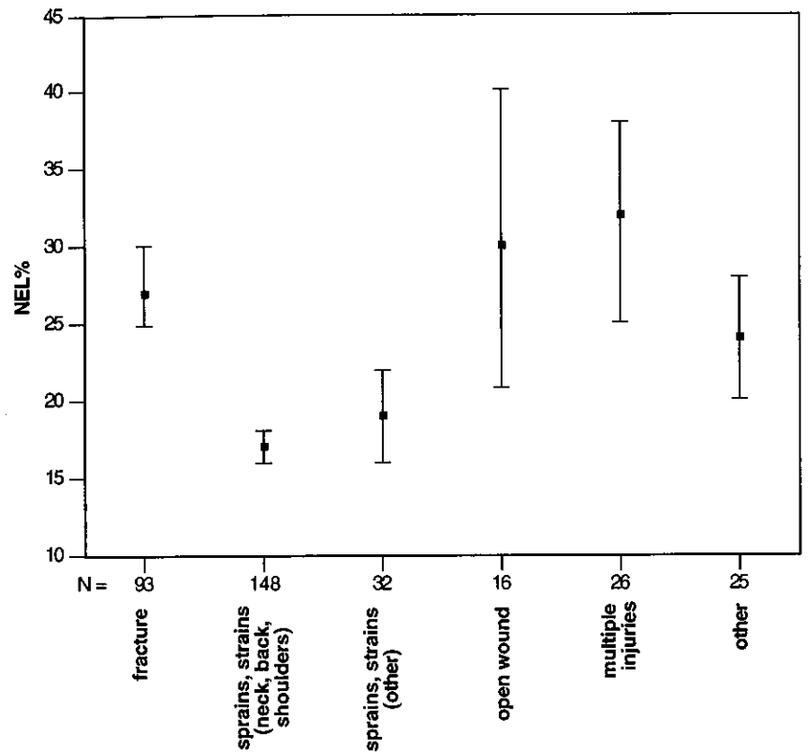
Table 3.1. NEL% by injury type

Injury type	NEL% mean
Fracture	27
Sprains and strains (neck, back or shoulder)	17
Sprains and strains (other)	19
Open wound	30
Multiple injuries	32
Other injuries	24
All claims	**22**

Table 3.1 is represented graphically in Figure 2. The small square presented on each of the bars indicates the mean NEL% awarded. The width of the bar estimates the dispersion of NEL% for that injury type.[23]

There was little dispersion in the award of NEL% for strain and sprain injuries, particularly those concerning the neck, back or shoulders. Open wounds had the widest dispersion.

Figure 2. NEL% by injury type



3.2.2 Jurisdiction

The mean NEL% awarded was different in each of the three jurisdictions (Table 3.2).[24] In the Supreme Court the mean NEL% was 37% ($82,140 net, $82,140 gross), in the District Court it was 21% ($28,120 net, $46,620 gross). For Local Court/Magistrates Court claims the mean NEL% was 12% ($8,140 net, $26,640 gross).

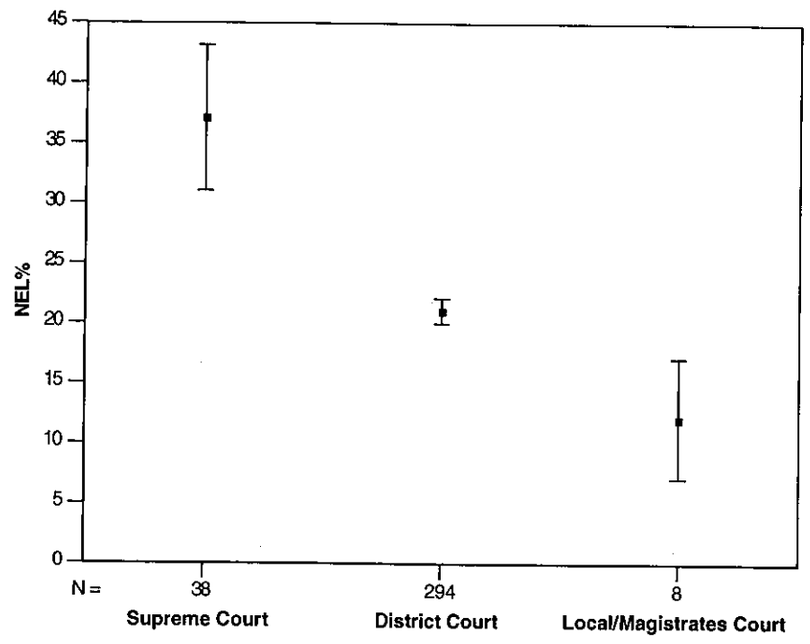
These differences were to be expected as both the District Court and Local Court are courts of limited jurisdiction. Claims for amounts not exceeding $250,000 may be brought in the District Court, while the Local Court has an upper jurisdiction of $40,000.[25] The latter Courts would therefore be more likely to hear claims relating to lower levels of injury severity.

Table 3.2. NEL% by jurisdiction

Jurisdiction	NEL% mean
Supreme Court	37
District Court	21
Local Court/Magistrates Court	12
All claims	**22**

Table 3.2 is represented graphically in Figure 3. The small square presented on each of the bars indicates the mean NEL% awarded. The width of the bar estimates the dispersion of NEL% for that jurisdiction.

Figure 3. NEL% by jurisdiction



Awards in the Supreme Court were widely dispersed as were those in the Local Court/Magistrates Court. In contrast, awards in the District Court varied little. This tends to indicate both a consistency in the severity of injuries brought before the latter court and a consistency in the awards of judges and arbitrators within this jurisdiction.

3.2.3 Hearing or Arbitration

There was no statistically significant difference in the mean NEL% awarded at hearing and the mean NEL% awarded at arbitration (Table 3.3).[26]

Table 3.3. NEL% by procedure

Procedure	NEL% mean
Hearing	24
Arbitration	22
All claims	**22**

3.2.4 Number of Claims Heard by Judges and Arbitrators

While individual judges and arbitrators may vary in their assessment of NEL%, it would appear that there is a consistency between awards overall. No statistically significant difference was found between the categories of court personnel in terms of the mean NEL% awarded (Table 3.4).[27]

Table 3.4. NEL% by number of claims heard by judges and arbitrators

Judge/arbitrator	NEL% mean
Heard less than 5 claims	23
Heard 5–10 claims	22
Heard 11–20 claims	22
Heard > 20 claims	22
All claims	**22**

3.2.5 Court Location

There was no statistically significant difference between Sydney, Parramatta, Newcastle, Wollongong and other country court locations in terms of the mean NEL% awarded (Table 3.5).[28] This suggests a general consistency between court locations, both in terms of the level of awards made for non-economic loss and in the severity of the injuries determined.

Table 3.5. NEL% by location of court

Court location	NEL% mean
Sydney	22
Parramatta	23
Newcastle	18
Wollongong	19
Other country	23
All claims	**22**

3.2.6 Date Procedure Took Place

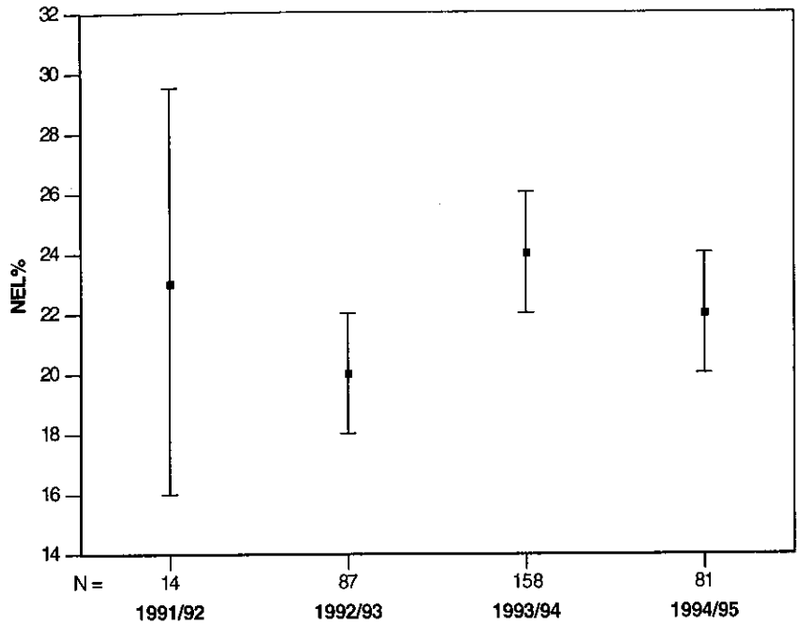
Table 3.6 presents the mean NEL% awarded for each of four years based on the date of the hearing or arbitration. There was no statistically significant difference between the years in terms of the mean NEL% awarded.[29] This suggests that awards have remained fairly stable over the time period.

Table 3.6. NEL% by year of procedure

Year of procedure	NEL% mean
1991/92	23
1992/93	20
1993/94	24
1994/95	22
Total	**22**

The width of the bars in Figure 4 estimates the dispersion of NEL% awards. Clearly, during 1991/92 there was much dispersion. As the width of the bars narrows in following years, it would appear that there is a settling of the scheme over time. This may suggest that judges/arbitrators have become more consistent in their interpretation of the Act.

Figure 4. NEL% by year of procedure



3.2.7 Other Damages Awarded

Table 3.7 presents the mean NEL% awarded for claims in which the total award included various other heads of damages and claims where it did not.

Where damages for PEL were a component of the total award, the mean NEL% was 25%. Where damages for PEL were not a component, the mean NEL% awarded was lower, 19%.[30] The mean NEL% awarded where FEL was a component was 25%, it was 18% where FEL was not a component.[31]

Where damages for POP were a component of the total award, the mean NEL% awarded was 23%. Where damages for POP were not a component, the mean NEL% awarded was lower, 17%.[32] The mean NEL% awarded where FOP were a component was 26%, it was 20% where FOP was not a component.[33]

The higher mean NEL% awarded for claims where economic loss and out-of-pocket expenditure were a component of the total award suggests that the award of such damages is more likely in claims involving more serious injuries.

Table 3.7. NEL% by other damages awarded

Damages	NEL% mean
Past economic loss	
a component	25
not a component	19
Future economic loss	
a component	25
not a component	18
Past out-of-pocket expenditure	
a component	23
not a component	17
Future out-of-pocket expenditure	
a component	26
not a component	20
Total	**19**

3.3 Summary

This section has described awards for non-economic loss in terms of the percentage of the maximum amount which may be awarded. Both the size of such awards overall and variation between the mean amounts awarded were considered.

The mean NEL% awarded was 22%. This is equivalent to a net amount of $30,340, a gross amount of $48,840. Most claims, 78%, received awards that were between 10% and 29% of a most extreme case.

Variation was found to exist between the mean NEL% awarded for each injury type. Claims for multiple injuries had the highest mean NEL%, sprain and strain injuries involving the neck, back or shoulders, the lowest. There was little dispersion in the award of NEL% for sprain and strain injuries, open wounds were widely dispersed.

Variation in the mean NEL% awarded was found between jurisdictions. Not surprisingly, awards in the Supreme Court were higher and more widely dispersed than awards in the District Court.

The mean NEL% awarded was higher in claims where damages for either economic loss or out-of-pocket expenditure were a component of the total award.

There was no statistically significant variation in the mean NEL% awarded for hearing or arbitration, judge/arbitrator, court location, or between the four years 1991/92 to 1994/95. The lack of any idiosyncratic variability in relation to these factors tends to indicate that the provisions of s79 of the Act are being consistently interpreted by judges and arbitrators.

The next section looks at the interpretation of s79 by insurers, as evident in their assessments as to the likely award of NEL%.

18 These findings are based on awards following hearing or arbitration *not* the changes in these amounts that may have occurred following appeal or re-hearing (see Section 2.3).

19 The mean, or arithmetic average, is computed by adding up all the awards and dividing by the number of awards.

20 For details of how the deductible operates in calculating the gross and net amounts for non-economic loss see Section 1.2.

21 Analysis of variance.

22 Kruskal-Wallis 1 way ANOVA. Chi-square=94.70, df=5, p=0.00.

23 The figure shows the estimated dispersion of the population from which the data was drawn using a 95% confidence interval.

24 Kruskal-Wallis 1 way ANOVA. Chi-square=50.69, df=2, p=0.00.

25 The jurisdiction of the District Court was raised from $100,000 in July 1993. Most of the claims in the survey were commenced prior to this change. The jurisdiction of the Local Court was raised from $5000 on 1 November 1991.

26 f(1,338)=1.34 p=0.25.

27 f(4,326)=0.20 p=0.94.

28 f(4,335)=0.39 p=0.82.

29 f(3,330)=2.59 p=0.053.

30 t(338)=4.22 p=0.00.

31 t(338)=5.93 p=0.00.

32 t(338)=2.40 p=0.00.

33 t(338)=4.92 p=0.00.

4

Insurers' Assessments

Whilst processing a motor accident claim, an insurer may make a number of assessments as to the likely award for NEL%. For the present study, the final assessment prior to the procedure used to determine the claim was recorded. These assessments were made either by the insurer or their solicitor. Typically, final assessments were made approximately one month before the hearing or arbitration.[34]

Assessments were recorded without any deductions for contributory negligence that may have been anticipated. Where the insurer's assessment was given as a range, the midpoint of this range was used.

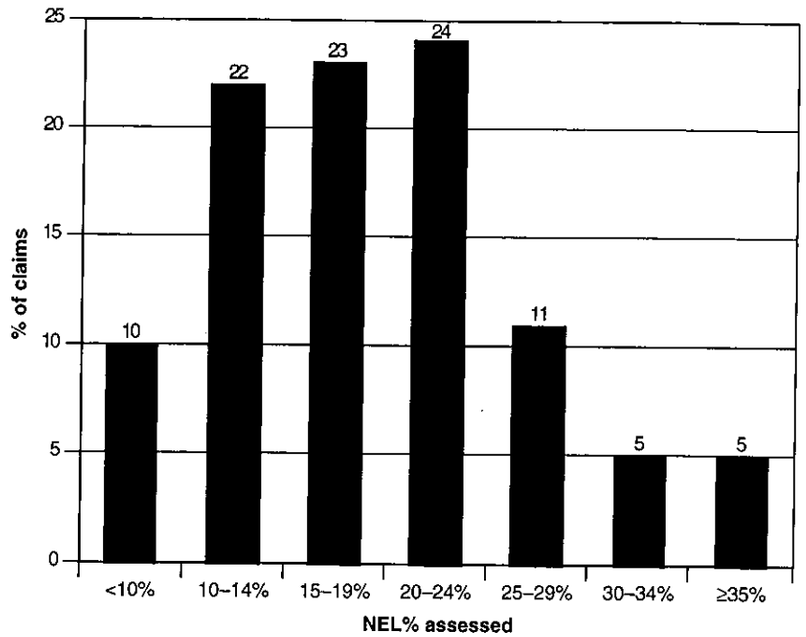
In a small number of claims, 17, the NEL% was not provided as it was assessed to be less than 9% and the deductible would not allow the award of damages. In such circumstances, a figure of 5% is allowed for the purpose of the analysis.

4.1 Insurers' Assessments of Non-Economic Loss

Overall, the mean assessment for NEL% was 19%. This is equivalent to a net amount of $23,680, a gross amount of $42,180.

Only 10% of claims received an assessment for NEL% that was less than 10% of a most extreme case. Most claims, 69%, received an assessment that was between 10% and 24% (Figure 5).

Figure 5. Insurers' assessments of NEL%



4.2 Variation in Assessments for Non-Economic Loss

A number of factors were examined to see if there was any variation between mean assessments for NEL%. The factors examined were: injury type, jurisdiction, procedure, judge/arbitrator, court location, date of procedure and other damages awarded.

4.2.1 Injury Type

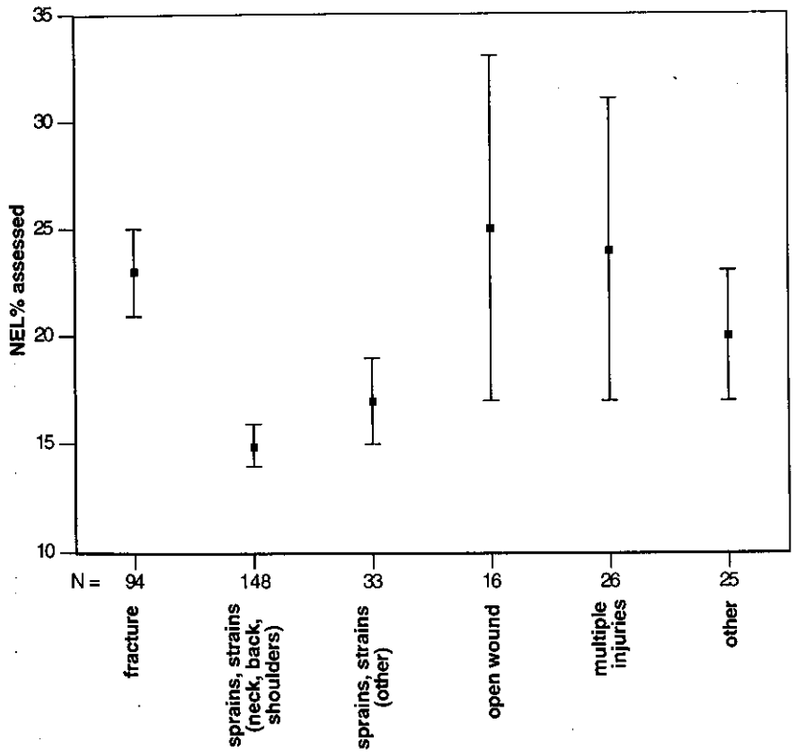
Table 4.1 presents the mean NEL% assessed, by injury type. The mean was different for different injury types.[35] Claims for open wounds had the highest mean NEL% assessed, 25%. This is equivalent to a net amount of $43,000, a gross amount of $55,500. Sprain and strain injuries involving the neck, back or shoulders had the lowest mean NEL%, 15%. This is equivalent to a net amount of $14,800, a gross amount of $33,300.

Table 4.1. Insurers' assessments of NEL% by injury type

Injury type	NEL% assessed mean
Fracture	23
Sprains and strains (neck, back or shoulder)	15
Sprains and strains (other)	17
Open wound	25
Multiple injuries	24
Other injuries	20
All claims	**19**

Table 4.1 is represented graphically in Figure 6. There was little dispersion in the award of NEL% for strain and sprain injuries, particularly those concerning the neck, back or shoulders. Open wounds had the widest dispersion.

Figure 6. Insurers' assessments of NEL% by injury type



4.2.2 Jurisdiction

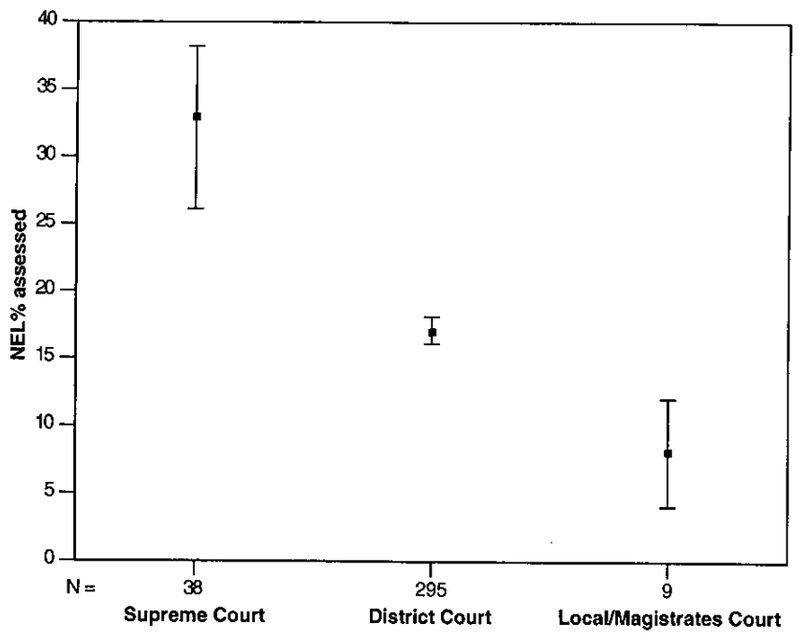
The mean NEL% assessed was different in each of the three jurisdictions (Table 4.2).[36] In the Supreme Court the mean assessment was 33% ($73,260 net, $73,260 gross), in the District Court it was 17% ($19,240 net, $37,740 gross). For Local Court/Magistrates Court claims the mean assessment was 8% ($0 net, $17,760 gross).

Table 4.2. Insurers' assessments of NEL% by jurisdiction

Jurisdiction	NEL% assessed mean
Supreme Court	33
District Court	17
Local Court/Magistrates Court	8
All claims	**19**

Table 4.2 is represented graphically in Figure 7. Assessments, like awards, were widely dispersed in both the Supreme Court and the Local Court/Magistrates Court. The dispersion of assessments in the District Court was narrow.

Figure 7. Insurers' assessments of NEL% by jurisdiction



4.2.3 Hearing or Arbitration

There was no statistically significant difference in the mean NEL% assessed for claims determined at hearing and the mean NEL% assessed for claims determined at arbitration (Table 4.3).[37]

Table 4.3. Insurers' assessments of NEL% by procedure

Procedure	NEL% assessed mean
Hearing	18
Arbitration	21
All claims	**19**

4.2.4 Number of Claims Heard by Judges and Arbitrators

No statistically significant difference was found between the categories of court personnel in terms of the mean NEL% assessed (Table 4.4).[38]

Table 4.4. Insurers' assessments of NEL% by number of claims heard by judges/arbitrators

Judge/arbitrator	NEL% assessed mean
Heard less than 5 claims	20
Heard 5–10 claims	17
Heard 11–20 claims	20
Heard > 20 claims	18
All claims	**19**

4.2.5 Court Location

There was no statistically significant difference between Sydney, Parramatta, Newcastle, Wollongong and other country court locations in terms of the mean NEL% assessed (Table 4.5).[39]

Table 4.5. Insurers' assessments of NEL% by location of court

Court location	NEL% assessed mean
Sydney	19
Parramatta	18
Newcastle	14
Wollongong	12
Other country	19
All claims	**19**

4.2.6 Date Procedure Took Place

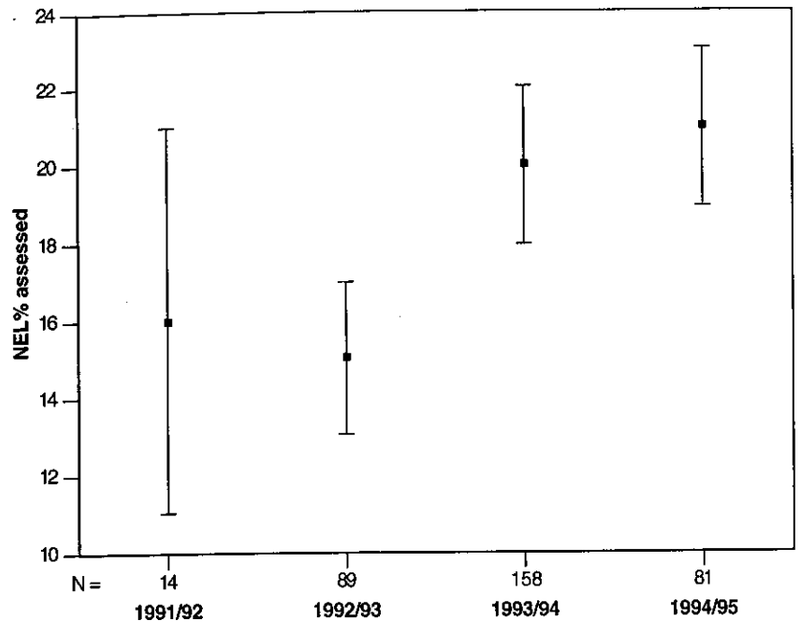
Table 4.6 presents the mean NEL% assessed for each of four years based on the date of the hearing or arbitration. The mean NEL% assessed was higher in 1993/1994 and 1994/1995 than in the two earlier years.[40]

Table 4.6. Insurers' assessments of NEL% by year of procedure

Year of procedure	NEL% assessed mean
1991/92	16
1992/93	15
1993/94	20
1994/95	21
Total	**19**

The width of the bars in Figure 8 estimates the dispersion of the assessments for each of the four years. As was the case with awards, there was much dispersion in NEL% assessed during 1991/92.

Figure 8. Insurers' assessments of NEL% by year of procedure



4.2.7 Other Damages Awarded

Table 4.7 presents the mean NEL% assessed for claims in which the total award included other heads of damages and claims where it did not.

Where damages for PEL were a component of the total award, the mean NEL% assessed was 21%. Where damages for PEL were not a component, the mean NEL% assessed was lower, 16%.[41] The mean NEL% assessed where FEL was a component was 21%, it was 16% where FEL was not a component.[42]

Where damages for POP were a component of the total award, the mean NEL% assessed was 19%. Where damages for POP were not a component, the mean NEL% assessed was 15%.[43] The mean NEL% assessed where FOP was a component was 22%, it was 17% where FOP was not a component.[44]

Table 4.7. NEL% assessed by other damages awarded

Damages	NEL% mean
Past economic loss	
a component	21
not a component	16
Future economic loss	
a component	21
not a component	16
Past out-of-pocket expenditure	
a component	19
not a component	15
Future out-of-pocket expenditure	
a component	22
not a component	17
Total	**19**

4.3 Summary

This section has described insurers' assessments as to the likely award for non-economic loss. Both the size of assessments overall and variation between mean amounts assessed were considered.

The mean assessment was 19%. This was lower than the mean NEL% awarded which was 22%. This difference may indicate that judges and arbitrators are interpreting the provisions of s79 differently from insurers. However, it may also reflect a tendency on the part of insurers to under assess NEL%, either for actuarial purposes or otherwise.

Like NEL% awarded, variation was found to exist between the mean NEL% assessment for each injury type, jurisdiction, and whether other heads of damage formed a component of the total award. Also, like NEL% awarded, there was no statistically significant variation in the mean assessments for hearing or arbitration, judge/arbitrator or court location.

These findings tend to indicate that the provisions of the Act in relation to s79 are being consistently interpreted by insurers, as was the case with judges and arbitrators.

Unlike NEL% awarded, however, which remained fairly stable over the four years 1991/92 to 1994/95, NEL% assessed was higher in 1993/94 and 1994/95 than in the two earlier years. This provides some indication that insurers are interpreting the provisions of s79 differently from judges and arbitrators.

The next section will explore differences in the interpretation of s79 further by providing a more detailed comparison of the awards of judges and arbitrators with the assessments of insurers.

34 The median duration from the recorded assessment to the procedure was 34 days.

35 Kruskal-Wallis 1 way ANOVA. Chi-square=57.52, df=5, p=0.00.

36 Kruskal-Wallis 1 way ANOVA. Chi-square=62.09, df=2, p=0.00.

37 f(1,340)=3.42 p=0.07.

38 f(4,328)=1.30 p=0.27.

39 f(4,337)=1.04 p=0.39.

40 f(3,338)=6.04 p=0.00.

41 t(338)=4.22 p=0.00.

42 t(338)=5.93 p=0.00.

43 t(340)=1.71 p=0.08.

44 t(340)=4.63 p=0.00.

5

A Comparison of Awards and Insurers' Assessments

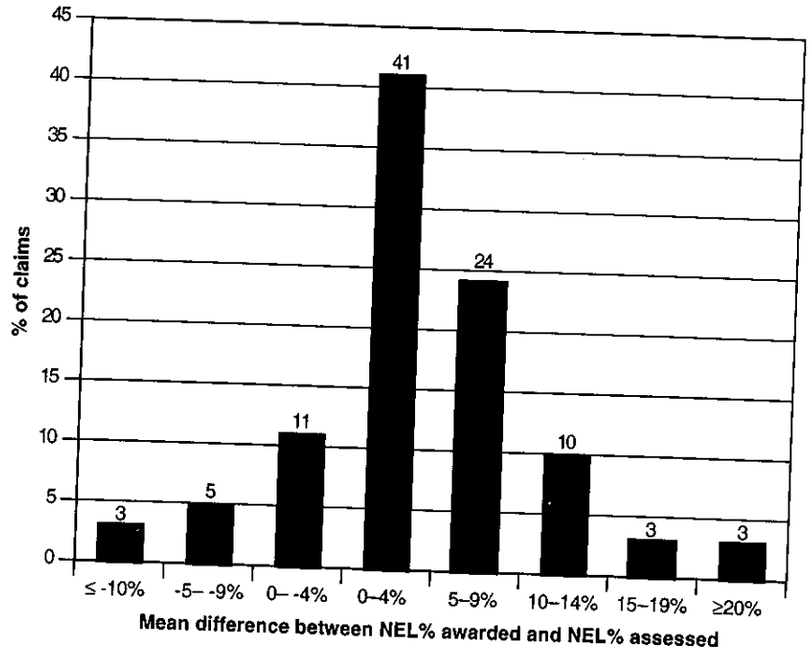
To undertake a detailed comparison of awards and assessments the difference between NEL% awarded and NEL% assessed was calculated for each case. For example, if a judge determined the claimant's injury to represent 15% of a most extreme case, and the insurer assessed the amount to be 10%, the difference would be 5%. If the award was 15% and the assessment 20%, the difference would be –5%.

The difference between NEL% awarded and NEL% assessed was looked at from two perspectives. Firstly, an analysis in terms of the mean difference between the two was undertaken. Then, a number of factors were examined to see if there is any variation in the mean difference.

5.1 The Difference Between Awards and Insurers' Assessments

Overall, the mean difference between NEL% awarded and NEL% assessed was 3.5%. That is, awards were typically $7,770 higher than assessed by insurers.[45] Figure 9 illustrates the proportion of claims falling in each of the varying categories.

Figure 9. The mean difference between NEL% awarded and NEL% assessed



5.2 Variation in the Difference Between Awards and Insurers' Assessments

A number of factors were examined to see if there was any variation in the difference between NEL% awarded and NEL% assessed. The factors examined were injury type, jurisdiction, procedure, judge/arbitrator, court location, date of procedure and other damages awarded.

5.2.1 Injury Type

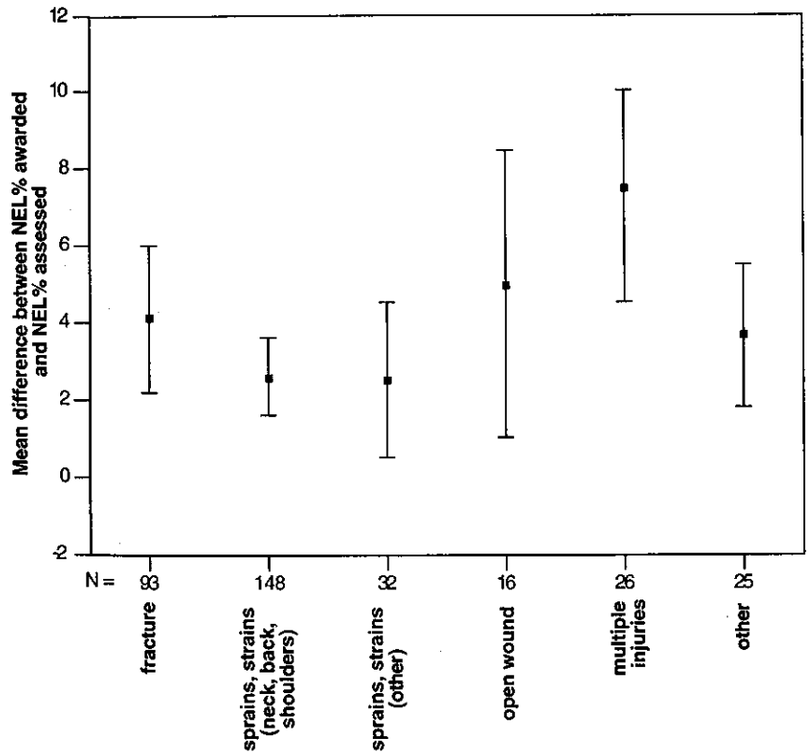
Table 5.1 presents the mean difference between NEL% awarded and NEL% assessed, by injury type. There was a statistically significant difference between different injury types.[46] Claims for multiple injuries had, on average, the greatest difference between award and assessment, 7.5%. This indicates that insurers were more likely to under estimate awards for such injuries. Sprain and strain injuries had the least difference: 2.6% for injuries involving the neck, back or shoulders, and 2.5% for other sprain and strains.

Table 5.1. Difference between NEL% awarded and NEL% assessed, by injury type

Injury type	NEL% mean difference
Fracture	4.1
Sprains and strains (neck, back or shoulder)	2.6
Sprains and strains (other)	2.5
Open wound	5.0
Multiple injuries	7.5
Other injuries	3.7
All claims	**3.5**

Table 5.1 is represented graphically in Figure 10. The small square presented on each of the bars indicates the mean difference between NEL% awarded and NEL% assessed. The width of the bar estimates the dispersion of the difference for that injury type.

Figure 10. Difference between NEL% awarded and NEL% assessed, by injury type



The dispersion of the difference between NEL% awarded and NEL% assessed was greatest for open wounds. Sprain and strain injuries concerning the neck, back or shoulders were the least dispersed.

5.2.2 Jurisdiction

There was no statistically significant difference between the Supreme Court, District Court or Local Court/Magistrates Court in relation to the difference between NEL% awarded and NEL% assessed.[47] This indicates that insurers were able to estimate the awards in each jurisdiction with similar consistency.

5.2.3 Hearing or Arbitration

Awards determined at arbitration did not differ from those determined at hearing in terms of the difference between NEL% awarded and NEL% assessed.[48] Once again, regardless of the procedure used to determine the claim, it would appear that awards were able to be estimated with similar consistency.

5.2.4 Number of Claims Heard by Judges and Arbitrators

Based on the number of claims heard, there was no variation between judges/arbitrators in terms of the difference between NEL% awarded and NEL% assessed.[49]

5.2.5 Court Location

There was no statistically significant difference between claims heard in Sydney, Parramatta, Newcastle, Wollongong or other country locations in terms of the difference between NEL% awarded and NEL% assessed.[50] However, a comparison of Sydney with all other locations indicated that there was a tendency for a greater difference between NEL% awarded and NEL% assessed when claims were heard at non-Sydney locations, 5.1%, than Sydney, 3.4%.[51] While this suggests that insurers may be better able to estimate awards from Sydney, this finding was not statistically significant.

5.2.6 Date Procedure Took Place

Table 5.2 presents the mean difference between NEL% awarded and NEL% assessed for each of four years. In each of the years presented, the mean difference between NEL% awarded and NEL% assessed was greater than zero. This indicates that for each year, awards were, on average, more than assessed by insurers. There was also a gradual narrowing of the difference over time.

Table 5.2. Difference between NEL% awarded and NEL% assessed, by financial year

Financial year	Mean
1991/92	6.6
1992/93	4.7
1993/94	3.9
1994/95	1.0

For claims heard in 1991/92 the mean difference between NEL% awarded and NEL% assessed was 6.6%. This difference then decreased over time: 4.7% in 1992/93, 3.9% in 1993/94, and 1.0% in 1994/95.[52]

The mean difference of 6.6% equates to a dollar amount of $14,430.[53] That is, in 1991/92, awards were typically $14,430 higher than assessed by insurers. This decreased to $9,990 in 1992/93, $8,880 in 1993/94 and $2,220 in 1994/95 (Figure 11).

Figure 11. Difference between NEL% awarded and NEL% assessed in dollar amounts

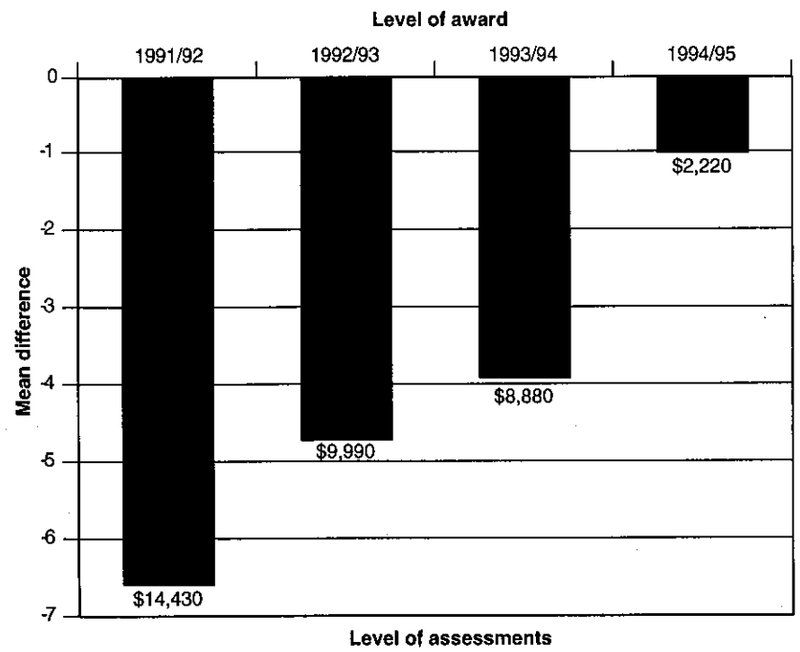
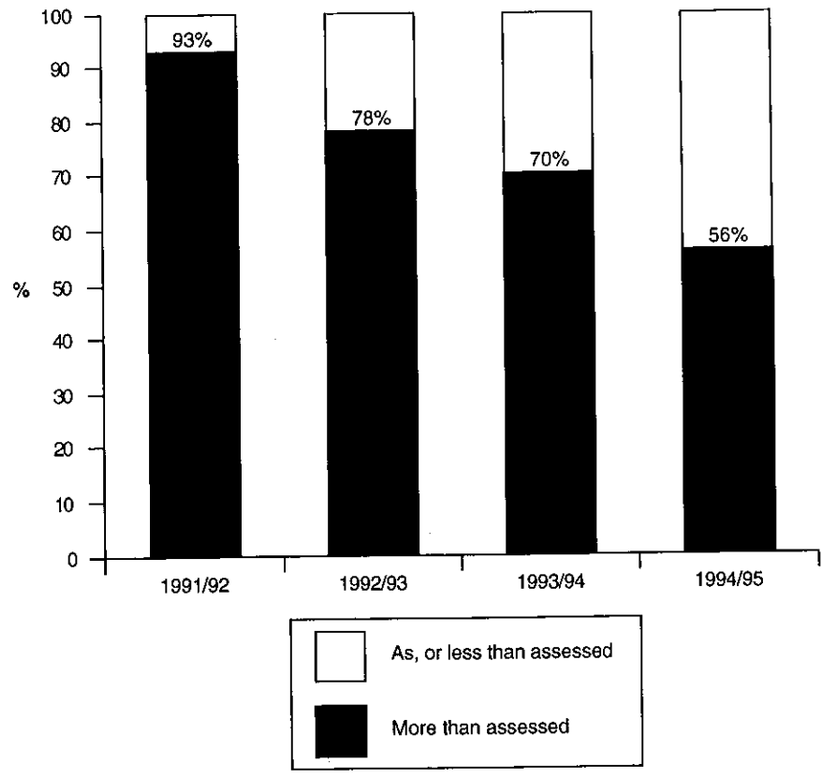


Figure 12 illustrates the proportion of claims in which the award was either as assessed, less than assessed, or more than assessed. Of the claims heard in 1991/92, 93% had an award that was more than assessed by the insurer. In 1992/93, this proportion reduced to 78%, 70% in 1993/94, and 56% in 1994/95.[54]

Figure 12. The proportion of claims with awards more than assessed, as, or less than assessed

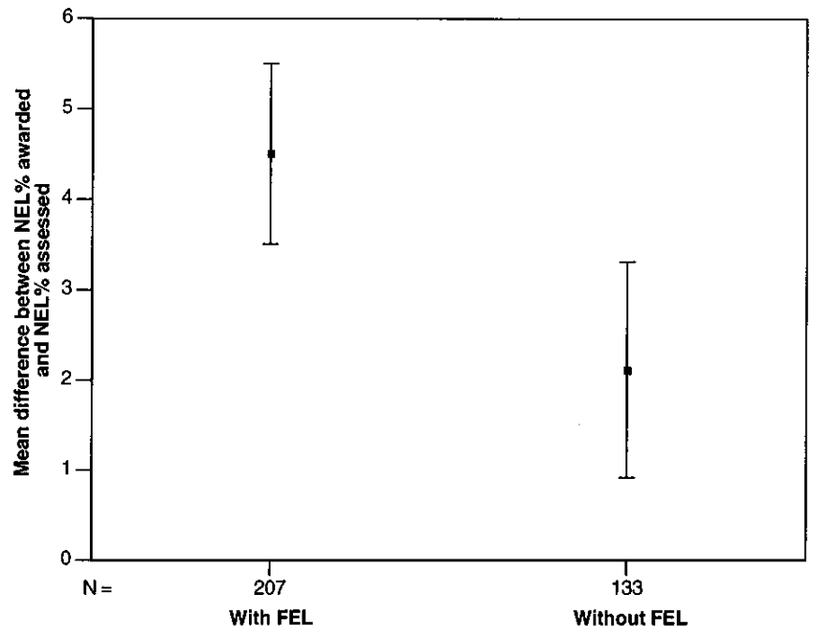


5.2.7 Other Damages Awarded

There was no statistically significant difference between claims where PEL was a component of the award and claims where it was not in terms of the mean difference between NEL% awarded and NEL% assessed.[55] This was also the case for POP[56] and FOP[57].

Where FEL was a component of the award, the mean difference between NEL% awarded and NEL% assessed was 4.5%. This was higher than the mean difference when FEL was not a component of the award, 2.1% (Figure 13).[58] This suggests that judges and arbitrators may be interpreting the provisions of s79 differently from insurers when FEL is a component of the award.

Figure 13. Difference between NEL% awarded and NEL% assessed by future economic loss a component of award



5.3 Summary

This section has compared awards for non-economic loss with insurers' assessments as to the likely award.

Overall, the mean difference between NEL% awarded and NEL% assessed was 3.5%. That is, awards were typically $7,770 higher than assessed by insurers.

A number of factors were examined to see if there was any variation in the difference between NEL% awarded and NEL% assessed. The findings suggest that judges and arbitrators may be interpreting the provisions of s79 differently from insurers in relation to a number of factors. These were:

Injury type

It was found that in claims for more severe and less frequent injury types, such as those for open wounds, fractures and multiple injuries, insurers' interpretation of s79, as evidenced by their assessments, was significantly lower than that of judges and arbitrators, as evidenced by their awards.

Other damages awarded

Where FEL was a component of the total award, insurers' interpretation of s79 was significantly different from that of judges and arbitrators.

Year of procedure

The difference between awards and assessments, and in the proportion of claims in which the award was more than assessed, has decreased over time. This suggests that while awards were initially more generous than anticipated by insurers, their assessments have become more reflective of awards as time has passed.

Despite these differences in interpretation, there are many indications that the provisions of the Act in relation to s79 are being interpreted consistently by both judges and arbitrators, and insurers. The mean difference between NEL% awarded and NEL% assessed was similar regardless of:

- jurisdiction;
- procedure;
- judge/arbitrator; or
- court location.

The findings of this study address concerns raised by insurers that judges and arbitrators are "generous" in their interpretation of the provisions of the Act in relation to the award of damages for non-economic loss.

Prior to this study, very little was known of the relationship between insurers' assessments and Court awards, other than that they should be related and that insurers' assessments would tend to be lower than awards.

Overall, the difference between awards and assessments was not great, but the study has explored this further by describing the difference in terms of a number of factors. Awards for non-economic loss were higher in earlier years, indicating that awards were more generous than anticipated by insurers, claims awarded future economic loss were also higher than anticipated, as were those for the more severe and less frequent injury types.

This study cannot determine whether the differences found are due wholly to the implementation of the Motor Accidents Act. Nor can it estimate the costs of these differences on the motor accident compensation scheme as a whole. Such an analysis would require fully comparative information to be available regarding the administration of claims prior to the implementation of the Act.

The results provide, however, an indication of how the Act is operating in relation to the award of damages for non-economic loss. This, and further information, can assist in addressing concerns regarding what is contributing to increases in the costs associated with compensating motor accident victims.

45 Mean NEL% awarded 22.5% ($49,950) less 3.5% is 19% ($42,180): $49,950 less $42,180 is $7,770. Dollar difference is equivalent regardless of whether calculations are based on net or gross amounts.

46 Kruskal-Wallis 1 way ANOVA. Chi-square=11.18, df=5, p=0.048.

47 f(2,337)=0.09 p=0.24.

48 f(1,338)=1.42 p=0.24.

49 f(4,326)=1.49 p=0.20.

50 f(4,335)=1.14 p=0.34.

51 f(1,338)=3.3 p=0.07.

52 f(3,330)=5.2 p=0.00.

53 Mean NEL% awarded 22.5% ($49,950) less 6.5% is 16% ($35,520): $49,950 less $35,520 is $14,430.

54 Chi-square=14.9, df=3, p=0.02.

55 t(338)=1.02 p=0.31.

56 t(338)=1.23 p=0.22.

57 t(338)=0.42 p=0.68.

58 t(338)=3.13 p=0.02.

APPENDIX 1

Percentage of most extreme case

%	Amount $	Deductible $	Net $	%	Amount $	Deductible $	Net $
100	222,000	0	222,000	50	111,000	0	111,000
99	219,780	0	219,780	49	108,780	0	108,780
98	217,560	0	217,560	48	106,560	0	106,560
97	215,340	0	215,340	47	104,340	0	104,340
96	213,120	0	213,120	46	102,120	0	102,120
95	210,900	0	210,900	45	99,900	0	99,900
94	208,680	0	208,680	44	97,680	0	97,680
93	206,460	0	206,460	43	95,460	0	95,460
92	204,240	0	204,240	42	93,240	0	93,240
91	202,020	0	202,020	41	91,020	0	91,020
90	199,800	0	199,800	40	88,800	0	88,800
89	197,580	0	197,580	39	86,580	0	86,580
88	195,360	0	195,360	38	84,360	0	84,360
87	193,140	0	193,140	37	82,140	0	82,140
86	190,920	0	190,920	36	79,920	0	79,920
85	188,700	0	188,700	35	77,700	0	77,700
84	186,480	0	186,480	34	75,480	0	75,480
83	184,260	0	184,260	33	73,260	0	73,260
82	182,040	0	182,040	32	71,040	0	71,040
81	179,820	0	179,820	31	68,820	0	68,820
80	177,600	0	177,600	30	66,600	1,500	65,100
79	175,380	0	175,380	29	64,380	3,500	60,880
78	173,160	0	173,160	28	62,160	5,500	56,660
77	170,940	0	170,940	27	59,940	8,500	51,440
76	168,720	0	168,720	26	57,720	10,500	47,220
75	166,500	0	166,500	25	55,500	12,500	43,000
74	164,280	0	164,280	24	53,280	14,500	38,780
73	162,060	0	162,060	23	51,060	16,500	34,560
72	159,840	0	159,840	22	48,840	18,500	30,340
71	157,620	0	157,620	21	46,620	18,500	28,120
70	155,400	0	155,400	20	44,400	18,500	25,900
69	153,180	0	153,180	19	42,180	18,500	23,680
68	150,960	0	150,960	18	39,960	18,500	21,460
67	148,740	0	148,740	17	37,740	18,500	19,240
66	146,520	0	146,520	16	35,520	18,500	17,020
65	144,300	0	144,300	15	33,300	18,500	14,800
64	142,080	0	142,080	14	31,080	18,500	12,580
63	139,860	0	139,860	13	28,860	18,500	10,360
62	137,640	0	137,640	12	26,640	18,500	8,140
61	135,420	0	135,420	11	24,420	18,500	5,920
60	133,200	0	133,200	10	22,200	18,500	3,700
59	130,980	0	130,980	9	19,980	18,500	1,480
58	128,760	0	128,760	8	17,760	18,500	Nil
57	126,540	0	126,540	7	15,540	18,500	Nil
56	124,320	0	124,320	6	13,320	18,500	Nil
55	122,100	0	122,100	5	11,100	18,500	Nil
54	119,880	0	119,880	4	8,880	18,500	Nil
53	117,660	0	117,660	3	6,660	18,500	Nil
52	115,440	0	115,440	2	4,440	18,500	Nil
51	113,220	0	113,220	1	2,220	18,500	Nil

APPENDIX 2
Coding sheet

CJRC MAA Determination of Non Economic Loss Project — Cover sheet

1 Claim identification

Claim number

Insurer

2 Data collection

Coder

Date coded

3 Claim information

Injury

Body part

4 Where there is no claim# sticker

Date of accident

Role in accident

Date of birth

Sex

Date Statement of Claim

1 Procedure: ☐ Arbitration = 1 Hearing = 2 Rehearing = 3

2 Insurer/solicitor final estimate

Date of estimate ☐☐☐☐☐☐

		Low/actual	High
Non economic loss	$	☐☐☐☐☐☐	☐☐☐☐☐☐
Non economic loss	%	☐☐	☐☐
Past out of pockets	$	☐☐☐☐☐☐	☐☐☐☐☐☐
Future out of pockets	$	☐☐☐☐☐☐	☐☐☐☐☐☐
Past economic loss	$	☐☐☐☐☐☐	☐☐☐☐☐☐
Future economic loss	$	☐☐☐☐☐☐	☐☐☐☐☐☐
Contributory negligence	%	☐☐	☐☐

Best/worst 1 ☐

Most likely 2 ☐

3 Defendant counsel final estimate

Date of estimate ☐☐☐☐☐☐

		Low/actual	High
Non economic loss	$	☐☐☐☐☐☐	☐☐☐☐☐☐
Non economic loss	%	☐☐	☐☐
Contributory negligence	%	☐☐	☐☐

Best/worst 1 ☐

Most likely 2 ☐

4 Defendant final offer

Date of offer ☐☐☐☐☐☐

Non economic loss $ ☐☐☐☐☐☐

Non economic loss % ☐☐

Gross amount (inc costs) $ ☐☐☐☐☐☐

Contributory negligence % ☐☐

5 Plaintiff final offer

Date of offer ☐☐☐☐☐☐

Non economic loss $ ☐☐☐☐☐☐

Non economic loss % ☐☐

Gross amount (inc costs) $ ☐☐☐☐☐☐

Contributory negligence % ☐☐

6 Award

Date of procedure ☐☐☐☐☐☐

Name of judge/arbitrator ☐☐

Defendant solicitor firm ☐☐

Court ☐ Supreme = 1 District = 2

Location ☐☐

Non economic loss $ ☐☐☐☐☐☐

Non economic loss % ☐☐

Past out of pockets $ ☐☐☐☐☐☐

Future out of pockets $ ☐☐☐☐☐☐

Past economic loss $ ☐☐☐☐☐☐

Future economic loss $ ☐☐☐☐☐☐

Contributory negligence % ☐☐

7 Provide comments by the insurer/solicitor which confer their opinion of the award made for:

Non economic loss

Other heads (specify)

Total award

REFERENCES

Attorney General's Department, *Motor Accidents: The Act and Background Papers, 1988.*

Learoyd, MJ, *The Defendant's Position*, paper presented at the Motor Accident Litigation Seminar held in Sydney, April 1995, LAAMS Pty Ltd.