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Is Private Law Tort Adjudication a Public Good? The Case of Dissipation of Damages

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Abstract

Lump sum compensatory damages awarded through court adjudication are regarded as the proper result of tort personal injury litigation delivering corrective justice to worthy plaintiffs and delivering public statements of moral blameworthiness. In this article, we show that the problem of premature dissipation of lump sum compensation is a problem of 'private' tort law and also of the public aspect of private tort law. We argue that the theoretical account that corrective justice for personal injury occurs by the delivery of lump sum damages is heavily compromised by how rarely plaintiffs are likely to receive what might be considered a full measure of damages compared to the wrong and harm suffered. In addition, the reality that those 'reduced' damages are delivered via confidential settlement diminishes the public aspects of tort law. We show that the premature dissipation of lump sum damages by injured plaintiffs is a wicked problem caused by many intersecting factors including aspects of tort law (common law and statutory); institutional factors; the impact of early settlement of claims; treatment of legal costs; the interaction between tort law and other systems such as social security; and factors personal to plaintiffs.

Keywords: private law; damages; vanishing trial; negligence

Academic Editor: Patricia Easteal

Received: 8 July 2025
Revised: 9 September 2025
Accepted: 1 October 2025
Published: 5 October 2025

Citation: Vines, Prue, and Kylie Burns. 2025. Is Private Law Tort Adjudication a Public Good? The Case of Dissipation of Damages. *Laws* 14: 72. https://doi.org/10.3390/laws14050072

1. Introduction

The classic personal injury tort case in common law jurisdictions such as the United Kingdom and Australia involves a wrong for which the plaintiff takes the defendant to court, establishes the elements of the case, defeats defenses, and then is awarded damages calculated on the basis of *restitutio in integrum*. The rule is that 'a plaintiff who has been injured by the negligence of the defendant should be awarded such a sum of money as will, as nearly as possible, put him in the position as if he had not sustained the injuries'.[1] What does this mean? It is evident from the position of many plaintiffs who have received damages awards on this basis, that the lump sum calculated does not do this. The damages awarded do not prove to be adequate and do not last for the lifetime of the injured person. In this article we consider a range of reasons why the amount of damages received is so often not sufficient. We investigate what this means for the idea that a tort trial is the best way to receive 'corrective justice' in the sense that the plaintiff is vindicated and receives a payment which rebalances the situation between plaintiff and defendant. We have referred to 'restitutio in integrum' but it is clear to everybody that damages cannot

[1] *Todorovic v Waller* (1981) 150 CLR 402 at 412 per Gibbs CJ and Wilson J; *Stewart v Metro North Hospital and Health Service* [2025] HCA 34.

actually put people back in the position they were in before the harm was done. This is why phrases such as 'so far as money will do so'[2] are used. Damages can only really restore lost money; pain and suffering are not in fact cured by money, but we generally accept that as compensation because there is no alternative.

This is the basis on which we regard tort law as depending on the theory of corrective justice, and it is for this reason that we are concerned when plaintiffs receive damages awards that are demonstrably insufficient to put the plaintiff in a position approaching that they were in before. We also seek to consider how the various changes to the law of damages and how tort litigation is carried out may be affecting the role of private tort law as a public good.

We argue that both the private and public roles of private law are required in order for the law of tortious personal injury, which is our focus, to operate as it should. In this paper we define the private role of private law as the aspects of the law which concern the individual, particularly the individual plaintiff—this includes the rules that apply to both plaintiff and defendant, how the rules reach an outcome including the assessment of damages, and the compensatory nature of damages. We define the public role of private law as those aspects of private law which flood out into the community—that includes the impact of the legal rules on law and order in general, the workings of the doctrine of precedent in relation to that legal rule, and the way the development of those rules reflect an underlying morality which helps to guide strangers' relationships with each other. Of course, it also includes the institutions which are used to allow this to happen and which are provided by government. As Australians we focus mostly on the Australian law and process to illustrate the problem.

Our argument about the problem of successful plaintiffs running out of the damages which were supposed to put them back into the position they would have been in had the accident not happened, proceeds by attempting to thread these strands together. In Part 2 we discuss the nature of private tort law as a public good. In Part 3 we outline how damages for personal injury may prove inadequate and how damages may be prematurely dissipated by plaintiffs. We argue that people run out of their damages for a range of reasons. In Part 4 we show that damages as assessed are inadequate because both the common law and the civil liability legislation regimes in Australia systematically depress the amounts awarded. In Part 5 we consider the rise in confidential settlements, sometimes called 'the vanishing trial'. This is driven partly by the importance of insurers in running the compensation system and by a systematic and institutional desire to reduce litigation, including through compulsory pre-trial alternative dispute resolution regimes. This results in reduced amounts paid to plaintiffs with the legal reasons why they are paid hidden from view. In Part 6 we investigate other factors which can cause early dissipation of lump sum damages such as the impact of legal fees, including 'no win no fee' arrangements, which remove a significant part of the compensation amount; the interface of the tort system with other systems such as social security and the National Disability Insurance Scheme ('NDIS'); and we also consider factors personal to plaintiffs including their patterns of expenditure and their innate vulnerability including as a result of their injuries.

When lump sum damages awarded or given in settlement of a tort action run out prematurely, this is a serious problem for the injured person. However, importantly from our perspective, it also may negate the idea that the tort system produces corrective justice. We also argue that the confidential settlement process itself not only helps to depress compensation but is destructive of the important public role of tort law, which is to

[2] In *Admiralty Commissioners v. S.S. Valeria (Owners)* [1922] 2 A.C. 242, 248, Lord Dunedin stated: "... in calculating damages you are to consider what is the pecuniary sum which will make good to the sufferer, so far as money can do so, the loss which he has suffered as the natural result of the wrong done to him."

establish the rules of interpersonal relationships for society, using the doctrine of precedent. Where there is no judgment, there can be no rules, and we cannot know whether precedents are being followed.

2. Tort Law as a Private and Public Good

It is often asked why private law such as tort law is important and what its role is. It clearly differs from criminal law in which the state has a direct interest in maintaining law and order. What is the interest of the state or the public in private law? Part of this interest is in law and order. We normally think of criminal law as being where this interest is managed, but private law also operates to manage disputes, reduce feuds, and maintain law and order. Private law is often defined as the law concerning disputes between individuals and it is characterized as allowing the private parties to use the public institutions and space to resolve their dispute. It can, of course, also include disputes between individuals and public bodies, but generally this is only possible where the public body is acting like a private individual such as an employer.

Much of private law theory has focused on the interest of the parties in the litigation. Corrective justice theory is a major example. Corrective justice theory does not emphasize asking what the public view of the private law is or what the public consequences of a private legal dispute may be. It is far more concerned with considering the moral perspectives of the parties to the case. Fundamentally, Aristotle (Aristotle n.d., Book V ch VII) saw corrective justice as an equalization after wrongdoing:

> 'So it is the office of a judge to make things equal, and the line, as it were, having been unequally divided, he takes from the greater part that by which it exceeds the half, and adds this on to the less.'

The wrong committed by B took something from A which could only be corrected by B replacing it. The wrong was therefore equalized in a way which re-positions the parties' balance in relation to each other. Ernest Weinrib (Weinrib 1983, 2001), as one of the major proponents of corrective justice (with Coleman 1983; Alexander 1987; Schwartz 1991; Schroeder 1990; Owen 1992; Honore 1999), is concerned with responsibility for wrongs, so that moral rights are the basis of torts such as trespass and negligence. The injury to the moral right creates the injury which must be corrected.

Restoration of the plaintiff's right can take two forms: the qualitative and the quantitative. The qualitative form restores to the plaintiff the very thing that is the subject matter of the right, thereby allowing the plaintiff to have and enjoy 'its specific qualitative character'. In such cases, the law gives specific relief, such as specific delivery of a unique or unusual chattel, specific performance of a contractual obligation, or an injunction against a private nuisance or trespass. The quantitative form restores to the plaintiff, through an award of damages, the monetary equivalent of the injury. One of the tasks of the law of remedies, of course, is to work out which of these forms of restoring the plaintiff's right is available in what circumstances—an issue that different jurisdictions handle in different ways. Nonetheless, in accordance with corrective justice, both forms of restoration exemplify the continuity of right and remedy (Weinrib 2012, p. 84).

Stephen Perry has modified corrective justice by outcome responsibility theory (Perry 1992, 1995, 2001). Outcome responsibility is the view that the outcome of a transaction is more significant than the nature of the transaction—this is particularly true of actions on the case like negligence for which damage is the gist of the action, and where the same action might amount to negligence or not amount to negligence because of its outcome (Waldron 1995). The fundamental moral purpose of tort law is therefore seen as corrective justice, as exemplified by a form of equalization which is effected by damages; and this is articulated through the creation of judgments which have their power through the doctrine

of precedent. For our purposes, it is particularly significant that corrective justice theory sees the payment of damages as the way to create corrective justice:

Through the notion of damages, injury takes the form of something repayable: a monetary amount is debited against the defendant's moral account with the plaintiff, and the payment of this sum discharges the defendant's liability and wipes the ledger clean (Weinrib 1994, p. 288).

Corrective justice theory in its discussion tends to focus on the wrongdoer and the wronged in a dyad and, except for consideration of the doctrine of precedent as expressive of the moral basis of the law, ignores the wider group which might be affected by the rules and therefore develop some system of social rather than individual responsibility. Corrective justice's emphasis on the parties means that the doctrine of precedent is mostly considered with respect to an individual's benefit (in the form of vindication or compensation) rather than society or the common good as the endpoint. Despite this, it is based on analysis of judgments as precedent, and it is our argument that the development of precedent is a major part of the public good provided by private law.

By contrast, civil recourse theory argues that what private law is really about is offering plaintiffs the opportunity to demand remedies from those who wrong them (Zipursky 2014), giving a right to redress which does not include punishment in the form of punitive damages (Goldman and Zipursky 2020); the public sphere gives those parties public institutional ideas and spaces to assist. Again, this appears to de-emphasize the public importance of private law, and indeed Zipursky and Goldman see themselves as fighting against a public theory of tort law (Goldman and Zipursky 2020). Although there is greater acknowledgement of the public side of private law, the emphasis remains on the individual parties' needs and desires

As civil recourse theory reminds us, private law court dispute resolution takes place within public spaces and places—that is within the courts which are provided by the state as a venue and process to manage private disputes—but it has a substance which is sometimes ignored in this case. That substance is created by the law itself, in the form of case law and legislation. These are considered in the process of adjudication and, in coming to a judgment, are applied to the particular parties. This law is then applicable across society on the basis of the doctrine of precedent and the rule of law.

> 'The public function of the civil courts is to provide authoritative statements of what the law is, who has rights and how those rights are to be vindicated. The norms and behaviors contained within the law radiate out from public statements in court and influence the behavior of citizens in daily interactions.' (Genn 2012, p. 16).

Furthermore, the process of judging is public in most cases, so society in general is aware of the substance of the law (even though the ordinary member of society may be vague about this substance). The precedents created guide later actions. This can only happen where the law is publicly known. Hazel Genn has argued that this is part of 'the role of the state in preventing the abuse of private power' (Genn 2012, p. 20). She argues that the diversion towards private settlement compromises legal rights and makes it 'impossible to know whether the processes or the outcomes for parties are fair' in law (Genn 2012, p. 17). This is partly because these settlements are confidential. The loss of precedent might create further problems:

> 'A disputed point of law could give rise to lawsuits indefinitely, so long as they all settle. But when a judgment makes clear what behavior is or is not lawful, that clarity can increase efficiency by directing would-be defendants how to act'.[3]

Private law, as created by legislation and the judiciary, is also something which is accountable because of its public nature. Case determinations are scrutinized by the legal profession and by the media, and concern, where it exists, is publicly ventilated. Much of tort theory has focused on the individuals who are the party to the system and what they seek or need—vindication, compensation, corrective justice, and so on. But the public aspect of tort law is also important for the development of rules of society. The judgment in a case which later becomes the precedent is an essential element of this public aspect. Dagan, Dorfman, and Rosen-Zvi argue that in this way private rights of action are fundamental to both justice and democracy (Dagan et al. 2025). They note that a plaintiff may be not only a person seeking vindication but also the representative of a class of people whose needs should be taken account of in the developing society (Dagan et al. 2025, p. 5), and again, the judgment is a central part of this public aspect of private law.

We argue, therefore, that negligence law, as private law, has a significant social role to play and that when lump sum compensation is prematurely dissipated, this suggests that something is wrong in either the private role of negligence (vindication and compensation or redress for the plaintiff contributing to something like corrective justice) or in the public role of negligence, in the form of the doctrine of precedent or perhaps both. We argue further, below, that the increasing push for mediation or ADR as mandatory before litigation may be exacerbating the problem which may be seen as playing out in inadequate damages awards in settlement.

3. Is Lump Sum Compensation Adequate and Does Compensation Run Out?

As we discuss further below, in Part 4, when people receive damages in tort for a personal injury in common law countries such as Australia and the United Kingdom,[4] they typically receive a lump sum amount calculated once and for all and meant to last their lifetime. There is limited empirical research available about the adequacy of compensation payments, how injured people manage their monetary compensation in the longer term, and how long compensation payments last (Burns 2026).[5] Accordingly, there is no definitive quantitative empirical evidence about how frequently compensation recipients run out of tort law compensation funds prematurely and the risk factors associated with premature dissipation. However, there is good reason to believe that a significant number of people awarded compensation for personal injury prematurely run out of the lump sums they are awarded. A number of recent Australian studies have investigated why plaintiffs whose lump sums have been calculated according to the common law or Civil Liability legislation processes, ostensibly on the basis of putting the plaintiff back in the position they would have been in had the accident not occurred, appear to run out of funds well before the age at which their compensation was supposed to be replaced by the pension, in Australia now 67 years (Vines et al. 2017; Burns and Harrington 2020; Vines 2020; Grant et al. 2017). The findings of these studies show that premature dissipation of lump sum damages is a wicked problem which is contributed to by an interaction between legal, structural, systemic, and institutional factors and factors personal to the compensation

[3] (Bronsteen 2009, pp. 1138–39), quoted in (Genn 2012, p. 18).

[4] Compensation is typically delivered differently where a claimant has access to a no-fault scheme of compensation. For a discussion of the need for empirical research to evaluate the effectiveness of tort law and no-fault compensation schemes, see Grant and Luntz () and Burns (2026).

[5] Luntz and Harder (2021, pp. 102–4) summarise the existing evidence.

recipients including spending choices (both wise and unwise). Other specific factors which influence premature dissipation include initial under-compensation, the effects of social security legislation, the effects of early settlement, and legal costs.

Given the lack of longitudinal empirical studies and available public data on how injured people manage and spend compensation over time, these Australian studies consider a subset of cases where injured people attempt to access social security benefits following dissipation of their compensation funds. In Australia, people who access compensation for personal injury may be precluded from accessing social security benefits (such as unemployment benefits, aged pensions, disability support pensions, and carer payments[6]) for many years. We discuss the difficulties and complexities of the interfaces between tort law and social security legislation below, in Part 6. If those people run out of compensation funds prematurely, they may then become destitute and reliant on family, friends, and charitable resources for survival. The Australian social security legislation allows a review and appeal to shorten the compensation preclusion period from social security benefits in 'special circumstances'.[7] The Australian studies consider social security preclusion appeal cases in the Administrative Appeals Tribunal ('AAT'),[8] where appellants have provided details of how and why they have run out compensation funds as part of their argument that they have special circumstances which should result in earlier access to social security payments.

In 2017, Grant et al. reported two content analysis studies of AAT preclusion appeal cases. The first content analysis study considered 248 AAT preclusion appeal cases formally decided by the AAT between 2004 and 2014 where the appellants had received common law damages. Most claimants were male, with the most common injuries being work and motor vehicle injuries (Grant et al. 2017, pp. 306–7).[9] Most claimants were not legally represented—only 23% had representation (Grant et al. 2017, p. 308). The average time from common law resolution (i.e., award or settlement resulting in damages) to AAT decision was '2.9 years (median 1.9 years, range 0.5–17.4 years)' (Grant et al. 2017, p. 309, Table 4). Many claimants had spent their compensation funds, meant to last a lifetime, within a very short time. Only one third of claimants had their preclusion period waived or altered (Grant et al. 2017, p. 308, Table 10, 310). The study noted that the results could be considered a 'partial window on a serious problem' only reflecting the likely smaller number of people who had had the capacity to take legal steps to prosecute multiple levels of review and appeal. There could be many more claimants who had dissipated their lump sum compensation, were precluded from social security benefits, and had grounds to ask for waiver or reduction in preclusion from social security benefits, but who took no steps to do so (Grant et al. 2017, p. 312).

The second content analysis study, reported by Grant et al., involved a sub-sample of AAT preclusion appeals involving 'very serious injuries in motor vehicle collisions'[10], where early dissipation would 'have the most severe impact on claimants, due to their extensive lifetime care and support needs' (Grant et al. 2017, p. 317). The study considered 25 AAT preclusion cases decided between 1989 and 2014 with an average age of injury of 38.3 years (range of 18 to 57 years). These more serious cases had a larger average preclusion period of 11.8 years (Grant et al. 2017, p. 317). This study also found that 'rapid

[6] These are referred to as the compensation affected payments. See Social Security Act 1991 (Cth) s 17.

[7] Social Security Act 1991 (Cth) s 1184K.

[8] The Administrative Appeals Tribunal ('AAT') became the Administrative Review Tribunal ('ART') in 2024. Appeals to the AAT occur after internal review stages by the relevant government department.

[9] The study also noted (at 309) that, unsurprisingly, appellants had much longer preclusion periods than those imposed on compensation recipients more broadly. Awards received by claimants in the study range from AUD 25,000 to AUD 5.36 million, with a median award of AUD 299,120. See Table 2.

[10] These cases involved a traumatic brain injury and/or a spinal injury.

dissipation' was occurring 'particularly when the age and potential lifespan of claimants' was considered' (at p. 316). The average time between compensation payment and AAT decision date (which would be later than the dissipation date) was 3.6 years. Just under half of the preclusion appeals were unsuccessful, presumably leaving these individuals with no financial support. This study also coded the cases for indications of reasons for early dissipation of lump sum compensation. It found a range of factors, including low lump sum settlements, discounts for contributory negligence, repayments of debts including medical and legal costs, repayments of government benefits, difficulties in self-management of funds, spending on homes and vehicles, loans and gifts to others, and addiction to drugs, alcohol, and gambling (Grant et al. 2017, pp. 317–19).

A further study in 2017 by Vines et al. undertook a file review study of matters between 2012 and 2014 concerning the lived experience of lump sum compensation recipients who had sought advice from the Welfare Rights Centre of New South Wales, a 'specialist community legal center' in Sydney Australia. All the cases involved social security preclusion periods (Vines et al. 2017). This study analyzed 69 'major cases', of which 58 files were available for analysis. Similarly to Grant et al.'s first content analysis study, the majority of cases concerned claimants who were male and injured in work and motor vehicle accidents.[11] This study found that 30% of claimants had run out of compensation 'within one year of receiving it' and a further '32% ran out within two to three years' (at 371, Table 3). The study found a range of reasons which contributed to premature dissipation of the compensation lump sum including legal system factors which resulted in under-compensation of damages; interface issues with other systems of government support such as social security; the impact of settlement, legal costs, mental health, and gambling issues; vulnerability which impacted the capacity for decision-making and self-management of funds; house and car purchases; and loans to family and friends (Vines et al. 2017, pp. 374–94).

In a 2020 study, Burns and Harrington studied 83 AAT preclusion appeals between 2013 and 2017 and identified 39 cases (53% of appeal cases) where claimants had spent some compensation funds on purchase of housing (Burns and Harrington 2020) The purchase of modest housing might ordinarily be thought to have been a prudent spending choice. The study identified housing as a major item that compensation funds may be spent on, contributing to premature dissipation of damages meant to last a lifetime. (Burns and Harrington 2020, p. 113). Like the studies discussed above, most claimants were male (82%) and most cases concerned workplace injury (61.4%). The study identified a range of factors which appeared (in addition to housing costs) to contribute to dissipation of the lump sum compensation including insufficient compensation given the severity of the injury.[12] The amount of compensation reported actually received by the claimant 'after costs and other deductions, was often significantly less than the original lump sum.'[13] The study found the cost spent on housing was 'frequently a large proportion of the overall lump sum.'[14] For example, in a case identified in the study a 'claimant settled for a lump sum of $ 1,025,000, actually received $ 516,236.65 and spent $ 409,000 on housing.' (Burns and Harrington 2020, p. 114). Preclusion periods were either varied or waived in only 32 percent of cases, presumably leaving claimants with no social security access and little

[11] (Vines et al. 2017, p. 371). In total, 78% of claimants were male and 67% of cases concerned workers' compensation claims, with 26% involving motor accident claims. Table 2.

[12] (Burns and Harrington 2020, p. 113). For example, the study identified a case where a claimant who suffered quadriplegia was awarded AUSD1.657 million.

[13] (Burns and Harrington 2020, pp. 113–14). For example, the study identified a case where a claimant reported to the AAT notionally receiving AUD 950,000 but actually receiving 'after deductions and costs over $400,000 less'. Another claimant with severe injuries reported settling for AUD 1.49 million but only receiving after costs and deductions AUD 649,000.

[14] (Burns and Harrington 2020, p. 114). See also 120 in reference.

choice but to sell their house asset (Burns and Harrington 2020, p. 115). While many argue one of the benefits of awarding tort law lump sum damages to injured plaintiffs is that they can purchase a home, the expenditure of compensation on a home (where damages do not include provision for a home purchase) may be very unwise and contribute to very premature dissipation of compensation damages and to preclusion from social security benefits (Burns and Harrington 2020, p. 118).

In summary, the Australian studies revealed that dissipation of lump sum damages is not a rare event and typically does not occur only (or perhaps in many cases, mainly) as a result of poor spending choices by compensation recipients.

4. Tort Law and Legal Systems Factors: How Damages Are Awarded in Court

As we have discussed above, there appear to be a multitude of factors that contribute to premature dissipation of lump sum damages. Factors which are associated with the principles of tort law and the legal system make a major contribution. The calculation of damages is so reduced by the process of ensuring that there is not an excess of damages, that damages are often inadequate to deal with the life of the plaintiff after the court case. Indeed, this is the major reason why plaintiffs who have been given lump sums run out of their compensation lump sums. This seems to be a wrong in itself, but one of the contributors to this problem is the vanishing trial, which means that there is no judgment available to the public about how the dispute was resolved. This is a problem not only for the individual parties, but also for the development of the law of torts in its public role. We turn to the process of awarding damages next.

We argue that the process of awarding damages for personal injury at common law itself reduces compensation. We will consider that and then consider how the civil liability regimes in Australia reduce it further because of the caps and thresholds created by the tort reforms in that legislation.

At common law in a personal injury case, the court is supposed to decide on compensation on the basis of restitutio in integrum. That is, putting the plaintiff back into the position which they would have been in had the accident not happened.[15]

Damages are determined on a once and for all basis, as a lump sum, and once the compensation is awarded, the court is unconcerned with how the plaintiff actually spends it.[16] Many plaintiffs who have more serious injuries will have permanent and significant disability which results in a future need for compensation and support over a lifetime. This may include future care and support, future medical expenses and future loss of earnings. The very nature of judicial calculation of future damages involves speculation (even when informed by expert evidence) on many variables such as how long a plaintiff may live, whether their current level of disability will remain stable or increase or diminish, whether informal support from family and friends will continue, whether medical and care costs will increase exponentially over time, the rate of return of investment funds over time, and what a plaintiff may have earned and their future prospects. The speculative nature of the exercise of future damages calculation in itself raises a real risk that contemporary calculation of damages at trial may prove inadequate in the longer term (Luntz et al. 2021, pp. 98–99). Damages awards in some Australian cases involving young catastrophically injured plaintiffs who required intensive support and care for life which were considered very high at the time they were awarded, now seem very likely to have been very insufficient (Luntz et al. 2021, pp. 594–601). A more recent example of an award which seemed

15 *Livingstone v Rawyards Coal Co (1880)* 5 App Cas 25, 39.
16 *Todorovic v Waller* (1981) 150 CLR 402, 412 per Gibbs CJ and Wilson J.

inadequate is that of Mr. A.E. who was permanently and severely injured in his arms at the age of 39 and could not care for himself. He eventually received a lump sum of AUD 399,500. This was supposed to last approximately 25 years. Mr. A.E. spent almost all his money buying and repairing a house in a small country town for himself and his wife. He was cognitively damaged by substance abuse and very unlikely to be able to manage a lump sum anyway. He ran out of money in approximately two years (Vines et al. 2017, p. 380).

Damages are divided into heads of loss, commonly into economic or pecuniary losses and non-economic or non-pecuniary losses. Economic losses include past out-of-pocket expenses, loss of earnings to the date of the trial, future economic losses such as loss of earning capacity, and new likely expenses caused by the injury. These will all be scrutinized extremely carefully so that, for example, in relation to loss of earning capacity, the court will remove from the sum the expenses that will no longer be incurred because the plaintiff is not working—the costs of uniforms, travel to and from work—and similarly, during the 'lost years', when the plaintiff will be dead because of the injury she has received, the court will be careful to deduct from that sum again the amount the plaintiff would have spent on her own maintenance during those years. Take, for example, the well-known case of *Sharman v Evans* in which Ms. Evans' injuries in a motor accident when she was 20 rendered her quadriplegic, with brain stem injuries, trauma-induced epilepsy, severely impaired respiratory function caused by the brain damage, and with damage to her larynx which meant that she was unable to speak. It was difficult to assess her likely future earning capacity and how long she would live was unclear. The trial judge had been unable 'to assign anything like precise money sums to the different heads of damages'.[17] This sentence in the judgment alone shows the problematic nature of the assessment, and we would submit that reducing the amount (which is what the High Court did) would be equally problematic. The damages award made at trial was AUD 300,547.50 which was then the largest compensation award ever made. The insurers appeal to the NSW Court of Appeal was dismissed, and the insurers appealed to the High Court. Ms. Evans wished to live at home rather than in hospital. There had been a great increase in the cost of nursing care which would be greater if she lived at home. Inflation at the time was also increasing. Gibbs and Stephen JJ were concerned about over-compensation:

> 'Both principle and authority (*Skelton v Collins* (1966) 115 CLR 94) establish that where as here, there is included in the award of damages for future nursing and medical care the plaintiff's entire cost of future board and lodging there will be overcompensation if damages for loss of earning capacity are awarded in full without regard for the fact that the plaintiff is already to receive as compensation the cost of her future board of lodging, a cost which but for her injuries, she would otherwise have to meet out of future earnings.'[18]

What they meant was that when they awarded an amount to cover future medical care, they should delete from it the amount that would have had to be paid from future earnings for board and lodging if the accident hadn't happened, to avoid over-compensation. What would have been spent on food and lodging if not in hospital had to be deleted because it was unreasonable for her to live at home because it was more expensive.

It took until July 2025 for the position in *Sharman v Evans* to be rethought by the High Court of Australia. Mr. Stewart was catastrophically injured by the medical negligence of a hospital. At trial (and the Court of Appeal agreed) the judge held, in accordance with *Sharman v Evans*, that damages covering the cost of nursing and medical care in a rented

[17] *Sharman v Evans* (1977) 138 CLR 563 per Gibbs and Stephen JJ at 572.
[18] *Sharman v Evans* (1977) 138 CLR 563, 572.

home of his own where his dog and his son could stay with him was unreasonable when compared with the cost of him staying in an institution without them. The High Court said the trial judge erred in making that decision. 'The evaluation of the reasonableness of Mr. Stewart's response was not discharged by balancing only the health benefits against the increased cost. In his circumstances the choice of home care by Mr. Stewart was a reasonable means of repairing the consequences of the tort.'[19] It should be noted that, unlike in *Sharman v Evans*, there was evidence that Mr. Stewart's condition had been deteriorating in the institution and therefore where he lived was not only a matter of his amenity. Furthermore, before the negligent action, Mr. Stewart lived in a house where his son and dog visited him regularly. He would not be restored to the position that he would have been in if the tort had not occurred if he were made to live in an institution where they could not visit.

If the plaintiff's life expectancy has been reduced, a nominal amount for that is normally awarded, and all the costs they will not need to meet, such as uniforms for work, housing, a car, etc., will be deducted from the sum awarded.[20]

Where the plaintiff has needs which did not exist before, such as for the widening of doors in the house for a wheelchair, only moderate sums will be allowed in order not to punish the defendant.[21] Generally there is also a discount rate applied to the award for economic loss (on the basis that the value of money is greater now than later) and a further discount for the vicissitudes of life which is applied to the award for loss of earning capacity. The vicissitudes of life, for some reason, are regarded as only negative—that is, it considers the possibility of one being hit by a bus rather than winning the lottery. The discounts applied to economic losses have a significant impact on the amount of damages—once an amount has been determined for the pecuniary losses, it is then discounted by an amount (now 5% in most Australian jurisdictions). So, for example, if the pecuniary damages amount has been assessed as AUD 520,000, a discount of 5% will reduce the sum to AUD 333,150. That will in turn then be reduced by a discount for the vicissitudes of life. If this is 15%, the sum will be reduced to AUD 283,177. This is a significant reduction in the amount of damages awarded for economic loss. It is arguable that these discount rates are problematic in the level to which they reduce the amount received by the plaintiff and relieve the defendant of obligation. As Murphy J said in *Todorovic v Waller* [7].[22]

> 'With the present death and injury rates, awards based on full restitution may be an unacceptable burden upon the community, particularly upon vehicle owners and industrial concerns, through the insurance system.
>
> 8. One way to reduce the burden is to transfer some or all of the social costs to the injured persons and their dependants. This has been the preferred judicial method, achieved (a) by unjustifiable discount rates (reaching even 8 per cent) applied to earnings and expected medical expenses which the courts pretend will not increase with inflation (b) by ignoring general increases in wages due not to inflation, but to increases in productivity, (c) by miserable awards for pain and suffering for catastrophic injuries, and perhaps the worst (d) by declining to implement the direction in compensation to relatives legislation to award damages proportioned to the injury... For many years... in serious personal injury cases the social function of the courts has been to depress damages. This has transferred much of the cost of serious road or industrial accidents (which

[19] *Stewart v Metro North Hospital and Health Service* (2025) HCA 34, [4].
[20] *Herring v Ministry of Defence* (2003) EWCA Civ 528; *Sharman v Evans* (1977) 138 CLR 563.
[21] *Skelton v Collins* (1966) 115 CLR 94; *Lim v Camden HA (1980) AC 174; CSR Ltd v Eddy* (2005) 226 CLR 1.
[22] *Todorovic v Waller* (1982) 150 CLR 402, 453.

> would otherwise be borne by insurance companies and ultimately the public) to the injured person. The principle of restitution has been theory, not practice.'

He argued that the discounts were excessive.

Non-economic losses include the pain and suffering inflicted on the plaintiff. They may perhaps be awarded an amount for knowing that they will have lost years, and amenities, of life, as well as the capacity to do hobbies and things they used to do. Generally, these are small amounts, although sometimes the non-economic losses were relatively generous. In *Sharman v Evans*, Gibbs and Stephen JJ said,

> 'But when a non-pecuniary detriment is in question the injunction against "perfect" compensation means rather more. It cannot refer to the exclusion of all question of punishment of the wrongdoer; the word "compensation" standing on its own would be sufficient to do this; rather is it designed to remind that the maiming of a plaintiff and its consequences cannot wholly be made good by an award of damages and that the recognition of this fact is to be no occasion for any instinctive response that no amount is too large to atone to the plaintiff's suffering. Such a response will be unfair to the defendant.'[23]

The fact that in the United Kingdom, total deprivation of sensitivity will increase the damages awarded,[24] while in Australia it will decrease the damages,[25] shows how arbitrary some of these decisions are.

What this adds up to at common law is an amount of damages that has already been carefully depressed, reduced because this is a civil matter, not criminal, and punishment is not appropriate. It is hard to see this as restitutio in integrum.

After the Ipp Committee Report in 2002, legislative tort reforms were introduced in all Australian jurisdictions. Far from increasing damages awards, these reforms reduced them by the twin mechanisms of caps and thresholds (Ipp Committee 2002). Damages for lost earning capacity were further reduced by caps requiring the court to disregard any amount above three times the average weekly total earnings of all employees in the jurisdiction.[26] High income earners, therefore, may lose a considerable amount compared with the damages which would have put them back into the position they were in before the accident occurred. The Ipp Committee appears to have taken the view that higher income earners may protect themselves by insurance from losses of their income and therefore it was unnecessary to protect them by giving them full compensation (Madden and Cockburn 2012).

One plaintiff argued that the cap meant that their damages were capped at an amount above three times average weekly earnings, but the Victorian Court of Appeal held that the plaintiff was not entitled to any portion of the loss that he could have recovered at common law because the cap applied to both his before injury and after injury earning capacity. Although he had suffered a loss of earnings of AUD 4000 per week, his after-injury earning capacity remained above three times actual weekly earnings. He was therefore not entitled to any damages for lost earnings.[27] NSW, Qld, and NT[28] also require the court to determine what the plaintiff's most likely future circumstances would have been if the accident had not happened—for example, the likelihood of promotion—and to award damages for future economic loss only on this basis, then determine the percentage possibility that

[23] *Sharman v Evans* (1977) 138 CLR 563, 584.
[24] *Lim Poh Choo v Camden & Islington Area Health Authority* (1980) AC 174.
[25] *Skelton v Collins* (1966) 115 CLR 94.
[26] Equivalents: Civil Law (Wrongs) Act 2002 (ACT) s 98; Personal Injuries (Liabilities and Damages) ('PILDA') Act (NT) s 20; Civil Liability Act ('CLA') 2003 (Qld) s 54; CLA 1936 (SA) s 54; CLA 2002 (Tas) s 26; Wrongs Act 1958 (Vic) 28F; CLA 2002 (WA) s 11.
[27] Madden and Cockburn 2013, 9, referring to *Tuohey v Freemason's Hospital* (2012) VSCA 80.
[28] CLA 2002 (NSW) s 13; PILDA Act (NT) s 21; CLA 2003 (Qld) s 55.

this might have occurred anyway and adjust the award accordingly. Other limits were applied to damages—for example, damages for gratuitous attendant care services were not recoverable unless they have been required for at least six hours per week for at least six months, and the amount is capped at the average weekly earnings of all employees in the jurisdiction, and the hourly rate is set at 1/40 of that amount.[29]

The threshold in NSW for a claim for non-economic loss is 15% of a most extreme case (note that the controversial proposal for workers' compensation in NSW in June 2025 was to lift this to 25%).[30] If the person is regarded as having less than 15% of the pain and suffering, lost amenities, etc., than a person who has quadriplegia, or third degree burns over 80% of their body, for example, they are not entitled to any award. If they do meet the 15% threshold, the amount available to them for non-economic loss or general damages is capped at an amount which is indexed to inflation.[31] A person who meets the 15% threshold will be entitled to 1% of the maximum. Going up to, say, 20% of the most extreme case, they will be entitled to 3.5% of the maximum and only at 33% will they be entitled to 33% of the most extreme case.[32] This extremely tapered scale makes the determination of the percentage of the most extreme case which a plaintiff is presenting extremely fraught. For example, in one case, an award was made based on a severity of 33%, giving an award of 33% of the maximum, being AUD 171,500. The appellant argued that the proper figure should be 25%, which would reduce the award to AUD 33,780.[33] The civil liability legislation also prohibits the paying of interest on damages for non-economic loss and NSW, Qld, and NT prohibit interest on damages for gratuitous attendant care and for the plaintiff's loss of capacity to provide gratuitous care to dependants.[34]

The tort reform process of 2002–2003 did not abolish the discounts for present value and vicissitudes either. Even where the damages have been based on a capped loss (that is, the loss has been greater than was awarded), the discount for vicissitudes of life is still applied.[35] The court in NSW, for example, despite the High Court's pointing out several times that 'all vicissitudes are not harmful'[36], ordinarily applies a 15% discount for vicissitudes to the award for loss of earning capacity. It is striking that in one case, *Wynn v NSW Insurance Ministerial Corporation*,[37] the three courts which assessed the discount rate for vicissitudes assessed them variously as 5% (trial judge), 28% (Court of Appeal—this included two years expected to be away from the workforce to have two children), and with the High Court coming in at 12.5%. It will be recalled that these amounts reduce the damages lump sum considerably.

The civil liability legislation allowed for 'structured settlements' and indeed, in NSW, requires lawyers to advise clients that this is possible.[38] This would mean that the plaintiff's award would be paid regularly over a period of years rather than in a lump sum. Despite this requirement, it appears that such advice is rarely given. The awarding of a lump sum

[29] CLA 2002 (NSW) s15; Civil Law (Wrongs) Act 2002 (ACT) No Equivalent Provision ('NEP'); PILDA Act (NT) s 23; CLA 2003 (Qld) s 59; CLA 1936 (SA) s 58; CLA 2002 (Tas) s 28B; Wrongs Act 1958 (Vic) s 28I; CLA 2002 (WA) s 12.

[30] https://www.nsw.gov.au/ministerial-releases/workers-compensation-reform-passes-key-hurdle#: The Workers' Compensation Legislative Amendment Bill 2025 (NSW) was progressing through the NSW Parliament at time of writing. (accessed 30 September 2025).

[31] CLA 2002 (NSW), s 16; CLA 2002 (Tas) s27.

[32] CLA 2002 (NSW) s 16; Civil Law (Wrongs) Act 2002 (ACT) no equivalent provision; PILDA Act (NT) ss25–27; CLA 2003 (Qld) ss 61,62; CLA 1936 (SA) s 52; CLA 2002 (Tas) s 27; Wrongs Act 1958 (Vic) s 28G; CLA 2002 (WA) ss 9,10.

[33] *Berkeley Challenge Pty Ltd v Howarth* (2013) NSWCA 370, per Basten JA at [5] observing that 'some unrealistic level of precision is required of the trial judge in assessing the proportion of a most extreme case.'

[34] CLA NSW s 18(1); NT PILDA s 29; Qld s 60(1); and SA CLA s 56—no interest awarded on non-pecuniary loss.

[35] See *Doughty v Cassidy* (2004) QSC 366.

[36] For example, *Bresatz v Przbilla* (1962) 108 CLR 541 at 544 per Windeyer J.

[37] (1995) 184 CLR 485.

[38] CLA NSW s 22.

requires the plaintiff to be able to manage a relatively large sum of money. The evidence is that the ability to do this is relatively unusual—financial literacy in Australia is reported as poor (HILDA 2018; ANZ 2014)—and is likely to contribute to the dissipation of the lump sum. What is clear is that, for these plaintiffs, corrective justice is not being achieved.

5. The Vanishing Trial: Settlement and Its Effect on Lump Sum Damages Amounts

(a) Settlements and insurance

In Part 4 we showed the effect of damages judgments and how they can lead to a reduction in damages. In this part, we consider how the apparent increase in settlements, sometimes called 'the vanishing trial' may exacerbate this reduction, while also possibly interfering with the development of precedent because settlements are nearly always confidential. We stated above that a judgment in the tort of negligence has multiple facets which have private and public value. It declares that someone is at fault or not, and if it declares fault (which vindicates one party), it also outlines the boundaries of the compensation to be awarded, which is what is used to correct the wrong in the corrective justice sense and outlines the social behavior that is to be expected. We also note that insurers are extremely important in the tort system. Insurers use the doctrine of subrogation to control the decision-making in the trial process for their client. This allows them to steer the process and in many cases, insurers appear to seek to settle claims rather than go to judgment.

Insurance plays a role in tort law that is often underappreciated (Abraham and Sharkey 2025; Merkin and Steele 2013). In the twentieth century there was a major shift when insurance became commonplace. In the nineteenth century, losing a case usually meant ruin for the loser. This massive difference is blunted by the presence of insurance within our legal systems. Insurance means that the loser of the case is far less likely to be ruined than they would have been in the nineteenth century. However, it is still true that clear imbalances between litigants exist which do impact on the law. Although the law applied to them is applied regardless of whether they are insurers or individuals, insurers are usually frequent litigants who are familiar with the possible moves which may be made by court officials or other parties (Baker 2005), and who may well be backed by significant funds. An uninsured individual may not be a frequent litigant and may well be mystified by the process in, for example, tortious matters (Galanter 1974) (this may also apply to their knowledge of mediation). Despite this imbalance, it is true now to say that in the tort system, particularly in personal injury matters, insurers are actually a vital part of making the system work (Abraham and Sharkey 2025; Lewis et al. 2006; Baker 2005; Stapleton 1995; Abraham 2008). In short, without insurance, this system would be unlikely to operate at all. The insurance system makes damages possible in many cases when otherwise they would not be received. In negligence law, damages are supposed to be compensatory, but they are not awarded unless it is proved that the defendant was at fault, and that the fault caused the harm to the plaintiff. This combined vindicatory and compensatory function lies at the base of the tort.

Approximately 80–90% of civil trials, and particularly personal injury claims filed, are settled (Resnik 2006; Spencer 2011; Martin 2018; Travis Schultz 2020). In general, in common law jurisdictions at least, there appears to be a decreasing trend, for personal injury claims in particular, going to trial. There is now significant scholarship revolving around 'the vanishing trial' (Galanter 1974, 2006; Kritzer 2004; Genn 2012; Miller 2018; Engstrom 2018; Stipanowich 2004; Burbank 2004, p. 585). There appears to be some evidence, in England and Wales at least, that the drop in trials has now leveled out (Mulcahy and Teeder [2021] 2022). With the rise in file management in many courts and increasing requirements

for pre-litigation mediation,[39] this is only increasing. Evidence of rates of settlement increasing exists in USA, UK, Australia, and Canada. The Pearson Report estimated that 86% of personal injury cases in the UK were settled without issuing a claim, 11% after proceedings are commenced but before trial, and 3% after setting down (Smith et al. 1995).[40]

Smith et al. observed that three out of four tort cases filed in the 75 most populous counties in the US never reached the courtroom (Smith et al. 1995). Galanter observed that while the number of tort cases going to trial in 1938 was about 18%, this had dropped to 1 in 46 or 2.2% in 2002 (Galanter 2006). In Canada, it has been said that less than 3% of cases receive any type of final adjudication (British Columbia Justice Review Task Force 2006). In Pleasence's study, 5 out of the 762 'ordinary' cases went to trial (Pleasence 1998, p. 12). In the medical malpractice field, 96% of cases may be settled before or after filing (British Columbia Justice Review Task Force 2006). In Australia, David Spencer saw a significant drop in cases filed in the second half of 2003 after amendments to the Civil Liability Acts became effective (Spencer 2011; see also Martin 2018; Travis Schultz 2020).

Most of these nations are common law nations. A recent study compared rates of settlement across 23 countries and found large variation, with the USA having the highest rate of settlement of civil cases, above 95%, and Australia and the United Kingdom having a rate of settlement above two-thirds (although this has often been put higher) (Chang and Klerman 2022). This study appears to have only looked at claims in the District Court in Sydney, ignoring the Supreme Court and the Federal Court, which hear many personal injury cases. It is therefore likely to have underestimated the settlement rate. By contrast, countries like France or Italy had very low rates of settlement. It may be that something in the common law influences this. Mulcahy and Teeder's recent study notes differences between the USA and England and Wales (Mulcahy and Teeder [2021] 2022).

It should be noted that it is very difficult to compare these statistics across nations and courts. Many courts count 'trials' but it is not clear whether these include filings but not full trials or the other way around. When a case is sent to compulsory mediation, it may or may not be classified as a trial. The classification of cases differs across courts and jurisdictions (Mulcahy and Teeder [2021] 2022). Comparison is difficult. Despite all this, the evidence of trial rates dropping appears fairly clear.

(b) Settlements and loss of precedent

What is the effect of increasing settlement of cases? Settlement may advantage either the plaintiff or defendant or both because it saves the cost and time of actual litigation, which is often a serious expense. Many processes have been added to reduce litigation; we do not want unnecessary litigation and we are aware that litigation causes harms which are often best avoided (Vines and Akkermans 2020). Many plaintiffs may also consider that a smaller settlement sum is a 'bird in the hand' which can respond to immediate financial insecurity, reduce litigation stress, and minimize the risk of loss of the action and consequent costs. However, while appreciating this immediate potential 'benefit' to a plaintiff, the longer-term effect of settlement may nevertheless be under-compensation and undermining of the public and private role of tort law. The public role of private law is best expressed in the process of judging and the creation of precedents, as was discussed above, in Part 2, where we noted that a significant problem created by an increase in settlements with confidentiality clauses (as most have) is that outside the parties no-one knows on what

[39] For example, mandatory mediation e.g., Personal Injuries Proceedings Act 2002 (Qld); Civil Procedure Act 2005 (NSW) s 26. See (Resnik 2004; Genn 2012).

[40] The (Pearson Report 1979): In the United Kingdom, 74% and 83% of personal injury claims in England and Wales, and Northern Ireland, respectively, did not reach judgment after full hearing (Harris 1984). See also (Lewis and Morris 2012, pp. 570–71) ("Of course it has always been the case that the great majority of claims are settled informally. . .Now even more cases are being settled at an early stage."); (Lewis et al. 2006, p. 166); (Hyde 2018).

legal basis the matter was settled. The court's role as law-setter is abrogated, with the result that uncertainty may develop about the content of the law and its moral underpinnings.

Insurers' drive to confidential settlements exacerbates the problem in two ways—(a) the confidentiality of the settlement and the vanishing trial creates a situation where no-one knows what the law is and (b) the familiarity insurers have with the law and procedures means it is easier for them to negotiate a sum in their favor as they are the 'repeat players' in the system (Galanter 1974). The drive is not only from insurers. As Mulcahy has noted, there is a significant push from the court system itself away from litigation and towards mediation. She notes that 'the resolution of civil disputes is increasingly being conceptualized as an exclusively private affair best resolved by the parties rather than being considered in the public arena of the trial.' (Mulcahy 2013, p. 60). This is partly because in mediation there may be pressure from insurers to reduce the damages received, but also because the confidential nature of the settlement contributes to the loss of precedents available to compare damages awards with.

This means that more and more cases are settled without a judicial determination about the wrong and liability, and therefore without determination of the rule to be applied (Galanter 2006; Kritzer 2004). The vindicatory part, when the court declares that the defendant is liable because they were at fault, is a critical part of the private law system. The judgment is a statement of the law which vindicates the plaintiff and sets out the compensation which will offer the corrective justice. At the same time, tort law, when stated by the judge, also operates as public regulation and as an instrument of social justice (Kaplan et al. 2025). This is what may be being threatened by the vanishing trial.

The perception of settlements may also influence propensity to sue, but only preliminary data is available at present. It appears that public perception is likely to be that a settlement indicates responsibility on the part of the defendant (Bregant et al. 2021), but while these are confidential, insurers do not seem concerned. It may also be that plaintiffs who receive a settlement compensation sum without a statement of wrongdoing or apology by the defendant wrongdoer may not perceive that they have individually received corrective justice.[41] The theoretical assumption discussed in Part 2, that a lump sum of money can equate to justice for an individual, may itself be flawed.

6. Other Factors Associated with Early Dissipation of Lump Sum Damages

(a) The impact of legal fees and lawyer behavior

In Part 3 we discussed the evidence that plaintiffs who receive lump sums are likely to find that funds have dissipated well before the end of the expected period they were to cover. Another factor that appears to contribute to this early dissipation is lawyer fees. Lawyers' fees are a significant barrier to suing (Coumarelos et al. 2012), and for this reason, in Australia, 'no win, no fee' arrangements, and in the United Kingdom, contingent fee arrangements, are common.[42] There is evidence that, despite the positives of contingency fees apparently making it easier to sue, there are significant disadvantages. These include that they could incentivize lawyers to settle cases, and that clients frequently do not understand the agreement so that 'claimants display confusion, and require clarification, regarding what constitutes a win, circumstances other than a win in which lawyers can change legal fees, how legal fees are calculated and the disbursements that need to be

[41] (Burns 2026). See also Robbennolt (2025) on the interaction between psychology and dispute resolution and the complex factors which may impact whether plaintiffs perceive they have received justice through the dispute resolution and settlement process.

[42] Solicitors Act 1974 (UK) s 57; Vic Legal Services Board and Commissioner 2015.

paid even if a case is won.' (Scollay 2020, p. 216; Victorian Legal Services Board and Commissioner 2015, pp. 1–2).

The Vines et al. study in 2017 (see also Vines 2020), discussed above, in Part 3, considered the cases of some 40 people who had run out of their lump sum and approached social security for help. The average age of claimant was approximately 40 and the average lump sum was about AUD 4–500,000. This amount was generally supposed to last to retirement age. The study found that legal fees were often quite a high proportion of the lump sum. For example, in one case, the amount awarded was AUD 1,020,733.70 and the legal fees left AUD 597,348.01 remaining of the lump sum. Legal fees were in many cases 30 to 40% of the lump sum awarded or settled and in one case, they were 62% of the sum awarded (Vines et al. 2017; Vines 2020). In Part 6, below, we discuss the presumption in social security that 50% of a lump sum is the amount awarded for lost earnings or lost earning capacity. This is most likely to happen when there has been a settlement. The Vines et al. study of 2017 found that in the absence of a judgment, there is often no statement of what the heads of damages were. When lawyers inform social security (as required) of the amount awarded to the plaintiff, they rarely inform social security of the sum remaining after legal fees are taken out—rather, the whole amount is reported. The lump sum preclusion period is calculated based on 50% of that whole amount unless the heads of damages have been articulated. Where the legal costs are paid separately on a 'plus costs' basis and they are not determined at the time of settlement, Departmental policy is to exclude this amount from a lump sum, and this advantages the claimant considerably, but few personal injury lawyers appear to know this (Vines 2020).

Lawyers contribute to the problem of dissipation, at least in Australia (Vines 2020), not only by the size of their fees but also because they may be siloed—personal injury lawyers may not be familiar with social security law and therefore report to social security in a way which is not advantageous to their clients. This appeared to be the case in the Vines study (Vines 2020). The lawyers could report the net rather than the gross award, but rarely did so. Similarly, lawyers are required to inform clients of the possibility of a structured settlement (Vines 2020), which would be far less likely to dissipate, but it appears that this rarely occurs. Lawyers might push harder in a settlement to make sure that it includes an amount sufficient to cover financial advice for the client, which might reduce the dissipation. Lawyers also might argue harder for higher amounts for their clients in order to get as close as possible to restitutio in integrum. They also need to give clients better initial advice about the likely compensation as clients reported being told about the likelihood of quite a high sum and then finding that on settlement, the sum was a great deal lower. Lawyers also need to warn their clients about the lump sum preclusion period in a way that sticks (Vines 2020). Vines et al.'s study found that lawyers said they had warned clients about this, but clients said they had not (Vines et al. 2017). Clearly the advice had not been sufficient or clear enough for the clients to hear it.

(b) The interface of the tort system with other systems

As Burns has argued, there is a significant need for further research on how interactions between tort law and other systems including government systems of support affect injured people (Burns 2026). One system interaction we discussed above, in Part 5, was the impact of settlement. In Australia, compulsory alternative dispute procedural rules[43] create pressure on plaintiffs to settle their claims early. While the aims of compulsory alternative dispute resolution such as 'lower litigation costs' and 'efficient and affordable public administration of civil justice' are noble, their impact can nevertheless be to reduce the damages the plaintiff receives for their injury (Burns 2026).

[43] For example, the Personal Injuries Proceedings Act 2002 (Qld); Civil Procedure Act 2005 (NSW) s 26.

The interaction between tort law and social security law in Australia can also be a significant factor which contributes to an injured person's lump sum tort damages running out prematurely (Grant et al. 2017; Vines et al. 2017; Burns and Harrington 2020; Vines 2020).

As we discussed in Part 3, in Australia, where an injured person receives damages or a compensation payment in settlement of their tort action, they may (unless special circumstances can be shown) have to repay social security benefits they received following their injury.[44] They may also be precluded from accessing social security income support payment for lengthy periods of time.[45] The impact of this is that the injured person may need to resort to using portions of the damages compensation notionally calculated for costs such as lifetime care and support or future medical costs for income support if they cannot work due to their injury and they have exhausted future economic loss damages (Grant et al. 2017; Vines et al. 2017; Burns and Harrington 2020; Vines 2020).

The way the social security legislation calculates the preclusion period for settlements for personal injury claims can compound this problem. In most cases,[46] the Australian social security legislation deems that 50% of the lump sum compensation paid to the injured person is attributable to loss of income (the '50% rule') and calculates the preclusion period on the basis this amount is available for income support.[47] This 50% rule applies even where only minor amounts of the lump sum paid notionally included an amount for loss of income—for example, because the plaintiff was very close to retirement age or where very major components of the compensation was for lifetime care and support such as might be the case for a young and catastrophically injured plaintiff. In addition, often an all-inclusive lump sum settlement may include a significant but unspecified allowance for the plaintiff's legal costs. The plaintiff's legal costs (which may well exceed the amount for costs notionally included in the settlement lump sum) are deducted and paid to the plaintiff's lawyers before the plaintiff receives their compensation amount. As we discuss above, the deduction for legal costs can very significantly diminish the final amount of compensation that the injured person actually receives. However, again, this is compounded by the manner in which the social security legislation calculates the preclusion period, which is generally (where there is an all inclusive lump sum settlement) based on the lump sum compensation amount before legal costs are deducted. The impact of this is that the injured person may be precluded from social security for lengthy periods based on an assumption that they had access to funds for income support which they never actually received. The pernicious and unfair operation of social security legislation is not generally held to be a 'special circumstance' which is accepted by the relevant government agency or the AAT/ART as a ground to reduce or waive the preclusion period (Grant et al. 2017; Vines et al. 2017; Burns and Harrington 2020; Vines 2020).

The interaction between the tort law system and the National Disability Insurance Scheme ('NDIS') in Australia may also lead to diminished damages compensation available to injured people.[48] People under 65 who have a permanent and significant disability because of tortiously caused injury can also potentially access the NDIS which provides lifetime disability care, support, and services. The NDIS does not automatically exclude

[44] Social Security Act 1991 (Cth) s 1182–1184AE.

[45] Social Security Act 1991 (Cth) ss 1169–1170.

[46] Social Security Act 1991 (Cth) applies to both settled claims (with or without liability) for damages that is wholly or partly made in respect of loss of earning or lost capacity to earn, whether or not a consent judgment was entered by a court and where the payment is made 'in whole or in part, related to a disease, injury or condition.' See Social Security Act 1991 (Cth) s 17(2)–(3).

[47] Social Security Act 1991 (Cth) s 17(3)–(4) refers to this as the 'compensation affected part of a lump sum compensation payment'.

[48] For a discussion of the interaction between the tort law and compensation recovery in the NDIS, see (Luntz 2013). See also (Burns 2026).

recipients of compensation lump sums from accessing support from the NDIS.[49] However, similarly to the situation that arises regarding social security, people who have received a compensation lump sum may have to repay money expended on past NDIS supports.[50] Their future NDIS supports can also be significantly reduced on the basis that they have received a compensation payment which included a component for future disability supports.[51] This reduction in NDIS supports may lead to injured people needing to utilize damages payments which were intended to be used for income support for their care costs. Similarly to social security, NDIS participants can request the NDIA to wholly or partially disregard their compensation payment on the basis of 'special circumstances'.[52] However, a range of factors cannot, of themselves, constitute 'special circumstances', including the nature of the disability and 'settlement for a lower amount due to the risks of litigating the case'.[53]

(c) Factors personal to plaintiffs including their patterns of expenditure

As we discussed in Part 3, there are many 'wicked' and often intersecting reasons that the lump sum compensation received by an injured person does not last.[54] Many of these reasons are legal and institutional factors which we have discussed above, including in Parts 4 and 5. There are also other factors personal to a compensation recipient which may contribute (sometimes less and sometimes more) to lump sum dissipation in particular cases. Some of these factors outside the control of an injured person which may contribute to premature dissipation of lump sum compensation include issues such as fraud by a carer, family, or friends; excessive increases in the costs of care and medical costs over time; unexpected declines in heath; poor advice or management by financial advisers or managers; and decline in investment markets (Grant et al. 2017; Vines et al. 2017; Burns and Harrington 2020; Vines 2020).

These factors are also largely outside the control of the injured person. There are other 'personal' factors such as unwise spending which we note below, where it might be considered that a compensation recipient is blameworthy for excessive and unwise spending. However, innate vulnerability and diminished financial and decision-making capacity as a result of injury may themselves contribute to poor financial choices.

For example, in *ZZXM and CEO NDIA (NDIS)*[55] the applicant fell about 3 m when a balcony collapsed. She was catastrophically injured, becoming quadriplegic. The balcony was on a house belonging to her mother's partner. He was insured but the insurers denied

[49] Participants in the NDIS do have to satisfy the relevant Government Agency they meet the requirements of having a significant and permanent disability with major significant functional impact, and they will need NDIS supports for life to assist in social and economic participation. See National Disability Insurance Act 2013 (Cth) ss 21–25.

[50] National Disability Insurance Act 2013 (Cth) Chapter 5 Part 2 and Part 3.

[51] National Disability Insurance Act 2013 (Cth) Act s 35 (2) and (4). See also National Disability Insurance Scheme (Supports for Participants—Accounting for Compensation) Rules 2013).

[52] National Disability Insurance Act 2013 (Cth) 116. See also National Disability Insurance Scheme (Supports for Participants—Accounting for Compensation) Rules 2013 (Cth); Compensation Operational Guideline—Special Circumstances 13.1—https://www.ndis.gov.au/our-guidelines (accessed on 30 September 2025). These may include financial hardship, fraud/theft, the circumstances of the compensable event, the participants health, administrative error by the NDIA, and incorrect or insufficient legal advice (13.2.1, 13.3.1). This decision is ultimately reviewable to the ART. See also *ZZXM v CEO National Disability Insurance Agency* (2024) ARTA 24 [19]–[24] where Senior Member Bean discussed what constitutes 'special circumstances' for the purposes of the National Disability Insurance Act 2013 (Cth) 116.

[53] *Hoolachan and National Disability Insurance Agency* (NDIS) (2025) ARTA 715; Compensation Operational Guideline—Special Circumstances 13.1—https://www.ndis.gov.au/our-guidelines [13.2.2, 13.3.2] (accessed on 30 September 2025).

[54] For example, see the recent NDIS and social security ART appeal cases *Usher and National Disability Insurance Agency* (NDIS) (2025) ARTA 59; *ZZXM v CEO National Disability Insurance Agency* (2024) ARTA 24; *WQCR and Secretary, Department of Social Services (Social security second review)* (2025) ARTA 157; *Armitage and Secretary, Department of Social Services (Social services)* (2025) ARTA 649.

[55] *ZZXM v CEO National Disability Insurance Agency* (2024) ARTA 24.

liability and he was already having monetary difficulties. This made suing him extremely difficult and caused serious rifts in the family. After several years, a mediation took place but because it was during the COVID-19 pandemic, the negotiations were conducted by telephone while the applicant was alone and without her lawyers. Her lawyers had calculated that the applicant needed between AUD 8 and 9 million to manage her disabilities and advised the applicant to seek AUD 18 m, but the strains on her relationships and mental health caused her to accept AUD 3 m instead, which was approximately 16% of what was needed. Once she received this, NDIS asked her to repay AUD 449,540, being the amount she had been paid by NDIS while waiting for her matter to be finalized. That would reduce the compensation payment considerably and she would not be able to meet her monthly needs. Fortunately, the tribunal agreed that she did have 'special circumstances' and reduced the amount she had to repay to AUD 150,000. There was also a lump sum preclusion period of many years for social security which was not addressed by the tribunal, although it was clear that she was likely to run out of her lump sum within about 7 years. 'Special circumstances', generally, are not established by the fact that the applicant has run out of funds.[56]

As we discussed above, in Part 3, there are also decisions by many compensation recipients which appear to be quite prudent, and there was no evidence that ZZXM had been imprudent in any way. Decisions by compensation recipients which appear blameless include buying a modest house or lower-cost motor vehicle which nevertheless can make a major contribution to lump sums running out very prematurely.[57] Many compensation recipients also repay loans or make gifts to family and friends who have supported them prior to their compensation payment (Grant et al. 2017; Vines et al. 2017; Burns and Harrington 2020; Vines 2020). While these payments may sometimes be excessive, they are often not particularly unreasonable. Of course, compensation recipients may also make unwise spending choices such as spending excessive money on overseas holidays, drugs, alcohol, entertainment, and sexual services (Burns and Harrington 2020), although the Australian studies discussed in Part 3 showed less of this than might be expected. Importantly, the nature of the injury (for example acquired brain injury) and mental health consequences of suffering injury may themselves contribute to injured people who are vulnerable experiencing a premature dissipation of their damages award (Grant et al. 2017; Vines et al. 2017; Burns and Harrington 2020; Vines 2020).

7. Conclusions: Drawing the Threads Together

In this article, we have drawn together a multiplicity of threads to show that the problem of dissipation of lump sum compensation is a problem of 'private' tort law and also of the public aspect of tort law. We have argued that the theoretical account that corrective justice occurs by the delivery of lump sum damages is heavily compromised by how rarely plaintiffs are likely to receive what might be considered a full measure of damages compared to the wrong and harm suffered. In addition, the reality that those 'reduced' damages are often delivered via confidential settlement diminishes the public aspects of tort law.

We have shown that aspects of tort law (common law and statutory), institutional factors, the impact of settlement of claims, treatment of legal costs, the interaction between tort law and other systems such as social security and the NDIS, and factors personal to plaintiffs all contribute to the problem of dissipation. The very method of assessing damages in common law judgments has been exacerbated by tort reforms which cap

[56] Eg, *Re O'Neill v Department of Education, Employment and Workplace Relations* (2009) AATA 619.
[57] See for example the study by (Burns and Harrington 2020) on purchase of housing with lump sums.

damages awards and create damages thresholds. Both these processes reduce damages awarded. The long process often required for a trial, even where there is settlement, can contribute to the problem by creating debts which have to be repaid as soon as the sum is received. The vanishing trial, contributed to by a strong push to mandatory alternative dispute resolution and managed courts, means that many more cases are settled without judicial reasoning or a court judgment. The importance of insurers may exacerbate this push to settlement. Where the insurers are repeat players and the plaintiffs are not, it may be easier for insurers to settle for smaller amounts than would be proper compensation for the plaintiff. Both plaintiffs and insurers may also have fewer precedents to refer to and less ability to maintain a sense of what an appropriate level of compensation level may be. Lawyers may also contribute to the problem by being siloed and therefore not able to advise their personal injury clients about social security issues such as the lump sum preclusion period. Lawyers also need to consider how their fees impact on the social security decision-making process and make the effort to ensure that their practices assist rather than damage their clients. Lawyers' fees may be too high, but it is certain that they particularly need to consider the vulnerability of their clients in terms of their ability to manage finance and ensure that does not exacerbate the likelihood of premature dissipation, whether by including an amount for financial management in the sum, or by advising the client to take a structured settlement.

This is indeed a wicked problem. But it is a wicked problem made up of myriad smaller problems, many of which could be remedied. The failure to prevent premature dissipation of lump sums is an example of the failure of tort goals in both the compensation and vindication (private) aspect of torts, but also in its public role of providing wider moral standards of how the community ought to care for injured people.

Author Contributions: Conceptualization, P.V. and K.B.; writing—original draft preparation, P.V. and K.B.; writing—review and editing, P.V. and K.B. All authors have read and agreed to the published version of the manuscript.

Funding: This research received no external funding.

Institutional Review Board Statement: Not applicable.

Informed Consent Statement: Not applicable.

Data Availability Statement: The original contributions presented in this study are included in the article. The data used in this article is all referred to in the references cited.

Conflicts of Interest: The authors declare no conflicts of interest.

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