

By Tina Cockburn

# Responsibility, values and the courts' role



The December 2002 edition of this journal was called 'Tort Reform?' In her editorial, Professor McDonald wrote:

'It has been a tumultuous year in 2002 for the regime of civil liability in Australia. Driven by an insurance "crisis", of dubious and contentious origin, civil liability in a wide range of situations has come under scrutiny by both federal and state governments... Whether the community will be well served by the 2002 reforms remains to be seen, but it is doubtful whether either legislators or electors have appreciated the full implications of the mooted reforms.'

Civil liability legislation was introduced following the 2002 Review of the Law of Negligence, which included recommendations to 'develop and evaluate principled options to limit liability and quantum of awards for damages'. However, despite a call for a national response, the recommendations were hastily enacted, to varying extents, by non-uniform legislation across Australia. Although it has been suggested that the civil liability legislation 'represents a piece of law reform which seems itself to call somewhat urgently for reform',<sup>1</sup> it is clear that this legislation is now the 'proper starting point for the relevant inquiry' for courts determining negligence claims.<sup>2</sup> Accordingly, a body of law is gradually being developed which considers the application and statutory interpretation of the legislative provisions.

And so, in October 2012, the authors of a leading Australian tort law text wrote:

'In our opinion, the so-called tort reform legislation that was enacted in all Australian jurisdictions 10 years or so ago, with exasperating variations, was based on false premises and was misdirected. ... litigation requiring the courts to interpret and apply this legislation has proliferated, to little if any social advantage.'<sup>3</sup>

Congratulations to the hard-working *Precedent* editorial committee for drawing together articles by leading academics and practitioners which consider a broad range of issues concerning the civil liability law reforms. Common themes include: uncertainty as to the scope and application of the legislation; inconsistency across Australia due to the lack of uniformity in the legislation; the interaction between the civil liability legislation and other legislation (particularly the *Australian Consumer Law*); the extent to which the legislation codifies, modifies, limits or restricts the common law of negligence; and the impact of the legislation on procedural matters, including the onus of proof.

The first group of articles consider aspects of the negligence action in a post-civil liability act environment: for example,

if and when a duty of care is owed to traumatised rescuers (Handford); factors relevant to determining whether a duty of care has been breached, and the standard of care owed by defendants including professionals, public authorities and others (Villa), such as doctors (Vallance); statutory tests of causation (Leiman); statutory changes to the *volenti* defence, particularly in relation to the voluntary assumption of obvious risks (Mullins); and the 'relatively unknown and unused' apology provisions (Vines). Two specific categories of claims are then considered: the complex laws governing negligently caused personal injury in the course of recreational activity (Dietrich) and occupiers' liability (Lauritsen-Damm). Next, there is a discussion of the scope of the legislation, and the increased focus on pleading intention, in addition to negligence, so as to maximise damages awards (Madden and Cockburn). The edition concludes with articles considering procedural matters: proportionate liability legislation in commercial litigation (Long); and access to information about treatment of patients under FOI legislation (Piper).

Given the complexity and uncertainty inherent in the legislative provisions, our courts will have a continuing and important role to play. In particular, various legislative provisions require open evaluation of normative considerations such as whether or not and why responsibility should be imposed on the negligent party. Evidence of community welfare considerations and community values will guide these determinations as to the appropriate balance to be struck between personal responsibility and the attribution of blame in any given case. Indeed, the current appeal in *Wallace v Kam* provides a unique opportunity for the High Court to provide further guidance in relation to these important issues. The decision in that case will be keenly anticipated by those with an interest in the ongoing development of the reformed law of negligence in this country. ■

**Notes:** Discussed by Michael McHugh, *Sydney Law Review Torts Special Edition* (2005), Introduction. **2** *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420. **3** Harold Luntz, David Hambly, Kylie Burns, Joachim Dietrich and Neil Foster, *Torts: Cases and Commentary*, LexisNexis Butterworths, Sydney: 7th edn, 2013, preface.

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