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# Tort Law reform – Is it a Mirage?

## A paper delivered at the Bundaberg District Law Association Conference at Heron Island 21-23 February, 2003

Tort reform has been a hot topic for a number of years. The *WorkCover Queensland Act* or some equivalent of it has limited a plaintiff's common law right to damages now for about five or six years. The so-called "insurance crisis" which peaked, at least in public hysteria, over the last year is just its latest manifestation.

What interests me however is whether the current round of so-called reforms in fact make much difference to the personal injuries environment or whether they might best be described as window dressing.

The basis of the current round of reforms is the report of the panel chaired by Justice David Ipp which was commissioned by the council of the Federal and State attorneys general to review the law of negligence. The revue was, in a sense, an artificial exercise because the panel's terms of reference included the statement that:

> "The award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another."

That statement and the terms of reference generally seem to have been prefaced on two assumptions. Firstly that more plaintiffs have been succeeding in personal injury claims and/or that damages awards have been increasing and secondly that the first assumption has made insurance against liability for personal injury unaffordable.

Were a proper inquiry into the law of negligence being conducted it should have been left to the panel to determine the accuracy or otherwise of the stated premise.

The artificiality of the exercise was highlighted by David Ipp himself in a paper recently delivered to a conference of Supreme Court and Federal Court judges in Adelaide where after noting the social chaos caused by the increasing cost and unavailability of third party liability insurance to diverse groups such as obstetricians, neurologists, schools, kindergartens, country fetes and dances, pony clubs and the like, Justice Ipp went on to say:

> "There is no conclusive evidence that the state of the law of negligence bears any responsibility for this situation."

This view expressed by Justice Ipp does not correspond on all points with the opinion on this topic of Chief Justice Spigelman of the Supreme Court of New South Wales in an article entitled; *Negligence: The Last Outpost of the Welfare State* in [2002] 76 ALJ 432. Chief Justice Spigelman refers to an increasing uneasiness expressed by judges across a broad spectrum of superior courts in relation to the direction taken in personal injury claims particularly during the 1990's. At page 441 Chief Justice Spigelman writes:

> "Lawyers tend to continue to refer to the test as being one of 'reasonable forseeability'. I cannot see that 'reasonableness has anything to do with a test which only excludes that which is 'far fetched or fanciful'. The test appears to be one of 'conceivable forseeability', rather than 'reasonable

forseeability'." [ I will later return to see whether the proposed reforms really address this concern.]

Responding to Justice Ipp's paper at the recent conference Justice Geoff Davies of our Court of Appeal attempted to demonstrate that the need for reform was waning as the judicial pendulum swung back in favour of the defendant and the alleged increase in awards was a furphy. Tables 1 and 2 below were used to illustrate this proposition.[1] In my view, these tables show only that fewer case getting to the High Court succeed. They do not demonstrate any necessary retreat from the liberal pro-plaintiff standards earlier set. They may show no more than that the position of defendants is not getting worse at the same rate it was in earlier years. Without analysing the individual cases it is impossible to tell.

| Year | Torts cases | Pro-Plaintiff | | Pro-Defendant | |
|---|---|---|---|---|---|
| 1987 - 1999 | 96 | 63 | 66% | 32 | 33% |
| 2000 | 9 | 2 | 22% | 6 | 67% |
| 2001 | 11 | 2 | 18% | 9 | 82% |
| 2002 | 7 | 1 | 14% | 6 | 86% |

**Table 1** – Results of torts cases in the High Court

| Year | PI Cases | Pro-Plaintiff | | Pro-Defendant | |
|---|---|---|---|---|---|
| 1987 - 1999 | 40 | 32 | 82% | 8 | 20% |
| 2000 | 9 | 2 | 22% | 6 | 67% |
| 2001 | 8 | 2 | 25% | 6 | 75% |
| 2002 | 7 | 1 | 14% | 6 | 86% |

**Table 2** – results of personal injury cases in the High Court

The second proposition sought to be established by the figures set out in Table 3 is again of limited utility. Table 3 shows to my mind the unreliability of statistics. Obviously the outcome is affected by particular significant specific payouts, as evidenced by the jump to $550,877 in 1994 compared with the figures for the years either side of it.

| Year | Average Damages |
|---|---|
| 1988 | $258,016 |
| 1989 | $58,174 |
| 1990 | $108,029 |
| 1991 | $198,522 |
| 1992 | $364,379 |
| 1993 | $133,139 |
| 1994 | $550,877 |
| 1995 | $157,284 |
| 1996 | $250,987 |
| 1997 | $196,376 |
| 1998 | $175,271 |
| 1999 | $120,471 |
| 2000 | $216,201 |

[1] Tables 1, 2 and 3 are extracted from a paper "Negligence: Where Lies the Future" delivered by the Hon Justice GL Davies at the Supreme and Federal Court Judges' Conference, Adelaide, 23 January 2003.

**Table 3** – Average damages per public liability claim

My personal experience is limited in two ways. I have only been a judge for three years and the cases that now get to court result in a judgement are only those where the conflict between the parties is such as to make them incapable of settlement. usually this means the defendant believes it has a good chance of winning.

I have delivered judgement in 18 personal injury cases. The plaintiff has been wholly or largely successful in 12. 50/50 in 1 and wholly or largely unsuccessful in 5. I have no idea what these figures prove except perhaps that I'm an erratic judge.

The conclusion to which this somewhat lengthy introduction leads me is that the current round of reforms are driven by populist political motives and it is best not to expect too much of them. These subdued expectations are manifested in the *Civil Liability Bill* 2002 now in the consultation draft stage.

*The Civil Liability Bill* 2002 is intended to add to rather than replace existing legislation. The *Personal Injury Proceedings Act* 2002 will be substantially amended to delete the provisions limiting certain damages so that they are contained within the *Civil Liability Act* and adding provisions to the PIPA concerning limiting the period for the commencement of actions by children for medical negligence to the earlier of six years after the day the child's parent or guardian knew or ought reasonably to have known that the injury had occurred and that it was attributable to negligent conduct on the part of the medical practitioner or 1 year after the parent or guardian first consults a lawyer about the possibility of seeking damages and identifies the proposed defendant. Limiting the reduced limitation period for children to a single interest group is not, in my opinion, a particularly meritorious approach. Uniformity across the range of claims should be seen as a desirable end in itself. If the current mood is to limit child claims it should be a general limitation.

The lawyer consulted about a possible claim is then required to give a notice to the proposed defendant and the failure to give the notice will by s20C(3) constitute unprofessional conduct or practice.

The consequence of missing this limitation is unclear to me. s20D entitles a defendant to apply to have the claim stopped if the notice is not given within time. I am unsure whether this means that the intending claimant need not seek an extension of time and the onus is on the defendant. I am in the happy position of being able to hear argument from both sides before venturing an opinion. In any event, under s20E the Court has a very wide discretion to extend time although the new provisions are in addition to, rather than in substitution for the provisions of the *Limitation of Actions Act* so that after three years from the child obtaining its majority the current provisions would govern any extension of time application. This is one example, however, of the fragmentation of the law in relation to different types of negligence actions. It is not the only one.

I don't propose to go through all of the provisions of the bill. I haven't the time, neither would you find it very interesting. I have a number of copies of the consultation draft if you wish to read it. Some things are worthy of note either because they are new, odd or in the words of Sir Humphrey Appleby, "courageous".

In the "courageous" category is the attempt in s9 to define negligence. The definition applies only to personal injury claims and is equally applicable to claims framed in tort, contract or under some statutory provision. It is odd because it defines

negligence by stating what is not, rather than what is, negligent. The proposed section is as follows:

**9. General Principles**

(1) A person is not negligent in failing to take precautions against a risk of personal injury unless –
   (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known); and
   (b) the risk was not insignificant; and
   (c) in the circumstances, a reasonable person in the person's position would have taken the precautions.

(2) In deciding whether a reasonable person would have taken precautions against a risk of personal injury, the court is to consider the following (among other relevant things) –
   (a) the probability that the personal injury would occur if care were not taken;
   (b) the likely seriousness of the personal injury;
   (c) the burden of taking precautions to avoid the risk of personal injury;
   (d) the social utility of the activity that creates the risk of personal injury.

You might be forgiven for wondering what all this means. Whether it addresses Chief Justice Spigelman's concern that the risk be "reasonably foreseeable" and not "conceivably foreseeable" remains to be seen. Although the categorisation of a risk as insignificant probably eliminates more than would the description "far fetched or fanciful" I venture to suggest that it does not eliminate much more. The arguments from defendants concerning the social utility of their activities should be both illuminating and entertaining.

23 years ago in *Wyong Shire Council v Shirt*[2] in a passage that to my knowledge has never been questioned discussed foreseeability of risk in these terms:

> "A risk of injury which is quite unlikely to occur, such as that which happened in *Bolton v Stone*[3] **[which you might recall was the passer by struck on the head by a six from the adjoining cricket ground]**, may nevertheless be plainly foreseeable. Consequently, when we speak of a risk of injury as being 'foreseeable' we are not making any statement as to the probability or improbability of its occurrence, save that we are implicitly asserting that the risk is not one that is far-fetched or fanciful. Although it is true to say that in many cases the greater the degree of probability of the occurrence of the risk the more readily it will be perceived to be a risk, it certainly does not follow that a risk which is unlikely to occur is not foreseeable.
>
> In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. if the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and

[2] (1979-1980) 146 CLR 40 at 47

[3] [1951] AC 850

> inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position."

In short, the test has always been whether the degree of risk justified the expense or inconvenience of taking the suggested remedial steps. Save for now having to consider the social utility of the defendant's activities I am not sure that the process will change with the new legislation. In saying this I am not denying that there have been instances in recent times where the limitations on the defendant's obligation to guard against risks that are not far fetched or fanciful have been ignored. These things have always been cyclical. I think the general trend is towards imposing a higher onus on plaintiffs in any event.

The danger of imposing a rigid statutory definition for negligence in personal injury cases and not in other negligence cases is that with the ordinary development of the common law over time the correlation between the two may cease. Examples of the difficulty are forseeable in that the risk is at least not far fetched or fanciful and probably not insignificant. A claim for both economic loss and personal injury with the common law applying to the former and the statutory definition to the latter might arise where a property is sprayed with fertilizer negligently contaminated by dangerous chemicals resulting in both personal injury to the farmer and damage to his crop resulting in economic loss.

The second arm of the action for negligence has always been causation. Again the drafters of the bill have included a definition which reflects the recommendations of the Ipp report:

**11 General Principles**

(1) A decision that negligence caused a particular personal injury comprises the following elements –
  - (a) the negligence was a necessary condition of the occurrence of the personal injury ("**factual causation**")
  - (b) it is appropriate for the scope of the negligent person's liability to extend to the personal injury so caused ("**scope of liability"**).

(2) In deciding in an exceptional case, in accordance with established principles, whether negligence that can not be established as a necessary condition of the occurrence of personal injury should be accepted as establishing causation, thecourt is to consider (among other relevant things) whether or not and why responsibility for the personal injury should be imposed on the negligent party.

(3) If it is relevant to the deciding of factual causation to decide what the person who suffered personal injury would have done if the negligent person had not been negligent –
  - (a) the matter is to be decided subjectively in the light of all relevant circumstances, subject to paragraph (b); and
  - (b) any statement made by the person after suffering the personal injury about what he or she sould have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

(4) For the purpose of deciding the scope of liability, the court is to consider (among other relevant things) whether or not and why responsibility for the personal injury should be imposed on the negligent party.

The entirely new and odd feature of this definition is to determine liability by reference to "appropriateness".

Subsection (4) does little to clear the fog of determining when it is appropriate to extend liability to a defendant.

Of some concern is the exclusion from evidence of any statement by plaintiffs as to what they would have done if the defendant had not been negligent unless it is against interest. As drafted this prevents plaintiffs in, for example, a failure to warn case against a medical practitioner, giving evidence as to what their conduct would have been had they received the proper warning. The rationale for excluding such evidence is the perceived difficulty in "counteracting hindsight bias" and preventing the judge's view of the credibility of the plaintiff being determinative of this issue regardless of the circumstantial evidence. As to that, contemporaneous statements might be expected to have significant probative value and it is part of the normal function of a court to determine issues of fact and assess the reliability of evidence given in hindsight.

The provisions about obvious risk have been well canvassed in the media and the legislation, surprisingly, reasonably corresponds with the *Courier Mail's* assertions. In effect a person cannot claim for injury as a result of something which was an obvious risk. A risk may be obvious even though not observable. One shouldn't pick up fallen power lines for example. The exclusion does not apply to a risk created by reason of a failure to maintain, repair replace, prepare or care for something unless the failure is itself an obvious risk.

s21 of the bill imposes a statutory duty on a doctor to warn of a risk he or she reasonably ought to know the patient wants even if the patient doesn't ask for it.

Ambulance officers or others administering aid in the course of a duty to enhance public safety are protected when the aid is provided in good faith in an emergency situation.

Chapter 2 Part 2 allows for proportionate liability in the case of claims for economic loss, damage to property or damages for contravention of the *Fair trading Act* but not for personal injury. In other words, if two tortfeasers are equally liable to a plaintiff in an economic loss claim the plaintiff can only obtain judgement for half the damages against each. In a personal damages claim the plaintiff can still recover the whole amount against either. Apportionment is after reducing the claim for any contributory negligence. In apportioning liability the court may also have regard to the proportionate liability of someone who is not a party to the action and s31 allows successive actions where one tortfeaser is not joined to the first action. Previously there would be an estoppel from re-litigating the same issues.[4] It also creates another situation where the law of negligence will be different depending on the nature of the claim, ie whether for personal injury on the one hand or economic loss or property damage on the other.

[4] *Port of Melbourne Authority v Anshun* (1980-1981) 1467 CLR 589.

Chapter 2 Part 3 restores the immunity of road authorities from claims for non-feasance and thus overturns the decision of the High Court in *Brodie v Singleton Shier Council*[5].

Section 40 of the Bill excludes liability if the person suffering the injury was engaged in conduct that constitutes an indictable offence. The exclusion of liability for damages for criminal behaviour applies to "civil liability of any kind for personal injury damages or damages for loss of or damage to property". Liability is excluded if the court is satisfied that the incident that resulted in the injury or loss or damage to property, "happened while the person who was injured … was engaged in conduct that is an indictable offence", and where "the person's conduct contributed materially to the risk of the personal injury or damage to property".

The section also provides an exception where the court is satisfied that the circumstances of the case are exceptional and the exclusion would operate harshly and unjustly.

As drafted, the provision is capable of applying to any driver of a motor vehicle against whom there is a finding of contributory negligence, where the facts supporting that finding support a further finding of dangerous driving by the plaintiff. Particulars of contributory negligence amounting to dangerous driving are unexceptional. Thus, where those particulars are made out that would constitute a complete defence. The saving proviso applies only to exceptional circumstances. Contributory negligence by a driver is not *prima facie* in that category.

I do not want to deal with damages other than in one respect. We are now well used to the type of limits imposed by this bill. They are familiar from the *WorkCover Queensland Act*, PIPA and the *Motor Accident Insurance Act*. Not much changes. There is some change in interest awards which are to be based on the 10 year treasury bond rate.

The big change is in the calculation of general damages. Section 56 provides for damages to be assessed by reference to an injury scale value. I do not see this as having any necessary connection with the WRI's calculated for the purposes of the *WorkCover Act*. They seem to me to be a subjective calculation of where on a scale of 1 to 100 a particular plaintiff's injury fits. The worst conceivable injury – 100, is to be assessed at $250,250.

Let us try and put some perspective on this. The 18 general damages assessments I have made so far average $52,778. To my knowledge, the highest award for general damages to date was in a matter of *Mercantile Mutual v Winterton*[6] where the Court of Appeal reduced the trial judge's award of $200,000 to $150,000. The plaintiff was a young woman with a serious head injury, significant consequential physical and speech difficulties, insight but no capacity for living alone. She must have come close to the worst case scenario.

The highest award I have made was $110,000 to a man in late middle age with an horrific outcome from an unsuccessful laminectomy. Because of his age I would regard his injury at about 75% on the scale. he was impotent, incontinent, lacked bowel control and had continuous back pain. He had been a fit and active man still boxing and running into his fifties. At 75% he would get $171,250. My average assessment of $52,000 amounts to 36 – 37 on the scale. $52,000 is about average

[5] (2001) 206 CLR 512
[6] [2000]QCA 249

for a bad back that significantly affects the ability to work. The damages seem about right. It follows from these figures that I cannot see these changes disadvantaging plaintiffs. The problem of course is in fixing the quantum of damages in the statute without any automatic adjustment mechanism. This is certainly contrary to the recommendations of the Ipp report. Assuming usual legislative reluctance to increase payouts that might adversely affect government departments and WorkCover change is likely to be slow and the real value of awards likely to erode with time. I think this is a very unhealthy proposal.

What is achieved overall by this much heralded legislation. Apart from some fragmentation of the law of negligence, limited protection for emergency service providers, a watered down version of the *Bolam*[7] test for professional negligence and some limited proportionate liability (but not in personal injury cases) I do not think the legislation results in any major change which is likely to have any material effect on insurance premiums. The real limitations on damages have been in place in the bulk of personal injury claims – those relating to work or motor vehicle accidents – for some time. On the other hand there is little actual detriment in it for individual plaintiffs in the majority of cases. To my mind it is largely window dressing designed to restore public confidence in the system of injury compensation. Perhaps that is sufficient justification in itself for this type of legislation.

[7] *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582. The likelihood of an irrational or bizarre opinion being held by a significant number of respected practitioners is mitigated by the court's power to ignore irrational opinions.