

## **Tort Law Reform in Australia: Speech to the Australian Plaintiff Lawyers Association Queensland State Conference, 7 February 2003, Hyatt Regency, Sanctuary Cove**

### **1. Introduction**

This afternoon is my opportunity to contribute to the debate on the topical question of tort law reform. A recent article in the *New York Times* described “reform” as “a capacious and loaded term usually used by defendants.”<sup>1</sup> It is, then, with a sense of trepidation that I broach the subject at a conference of plaintiff lawyers. I expect that many of you will have firm opinions on the question of tort reform, and even within this Association I expect there is range of differing views on the subject. I look forward to hearing those views as the conference progresses.

Much has been said in the past year about a crisis in tort law said to be caused by over-litigious plaintiffs and lawyers, resulting in sky-rocketing insurance premiums that put at risk the continuation of ordinary functions in society such as medical treatment and community events.<sup>2</sup> Calls for reform of the tort system have reached such a high pitch that the governments of every state and territory in Australia have moved to implement new legislation.

This whirlwind of legislative action will bring about substantial changes to the law of negligence, for the most part in a fashion that reduces the quantum of damages available to plaintiffs who are injured by negligent defendants. The stated

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<sup>1</sup> Adam Liptak, “Shot in the Arm for Tort Overhaul” *New York Times*, 17 November 2002.

<sup>2</sup> See for example J.J. Spigelman, “Negligence: The Last Outpost of the Welfare State” (2002) 76 *Australian Law Journal*: 432-451; Kieran Tapsell, “Turning the Negligence Juggernaut” (2002) 76 *Australian Law Journal*: 581-594; Chris Merritt, “A-Gs to Take Role in Tort Reform” *The Australian Financial Review*, 7 June 2002.

justification for these reforms is that Australia cannot afford a tort system that results in damages awards so numerous or so large that defendants are unable to meet the payouts, and where the risk is unable to be spread due to rising insurance premiums.

## **2. Are We Facing a Tort Law Crisis?**

I intend to begin this afternoon by considering the question, “Is there a crisis in tort liability?” That is an assumption on which much of the debate is predicated and yet the question is not an easy one to answer. To begin with it is difficult to find reliable statistics on changes in the amount of litigation in Australian courts, or the size of damages payouts.<sup>3</sup> A more pressing difficulty, however, is that a decision on whether tort liability is out of control really depends on one’s opinion about whether responsibility for loss and injury is being ascribed to the appropriate people and in the appropriate amounts. One way of viewing a perceived increase in litigation is that more people have access to justice and are able to vindicate their rights against people who have caused them harm. On this view, an increase in the number of claims by plaintiffs is a sign that we are progressing toward a more fair and just society.

This view, however, is far from popular in the community at the present time. Anecdotal evidence of unfair decisions by judges<sup>4</sup> and pressure from various lobby groups has led to the ascendancy of the view that the threat of tortious liability is choking our society. People are angered by law suits that they consider to be frivolous or an abuse of process.

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<sup>3</sup> Henry Ergas, “Flaws and Fallacies but Too Few Facts” *The Australian Financial Review*, 6 September 2002.

The American Tort Reform Association website has a special section devoted to what it terms “loony lawsuits”. One such action involved a man claiming \$250,195 because his cat was electrocuted and died. The sum included \$195 for veterinary fees and \$250,000 because the cat was a good luck charm that would have gained him \$250,000 had she lived. The authors of the website list this case as an example of wasted time and money, demonstrating the need for reform of the tort system. What is not stressed is that the unfortunate cat-owner is representing himself, and, of course, has not the slightest chance of winning the sum he is claiming.<sup>5</sup> Certainly, we cannot conclude that litigiousness is on the rise, either in the US or in Australia, by reference to isolated cases, or worse still, by reference to imaginary cases as they are portrayed in *Ally McBeal*, or the ABC’s latest legal drama *MDA*.

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<sup>4</sup> Evan Whitton, “Lawyers, Funds and Money” *Sydney Morning Herald*, 26 September 2002 states, “Just two lunatic precedents affecting negligence have made trillions for lawyers.” He does not identify either of the lunatic precedents. Is one of them *Donoghue v Stevenson*?

<sup>5</sup> There is a great fear in the community that we are heading towards an American style of litigation culture. However, the initial premise in this fear is unfounded. The legal system of the United States does not permit unbounded tort liability any more than our own does. Tort liability in the United States is restricted by the need to prove negligence by the defendant and causation of the injury to the plaintiff, just as it is in our system. In addition, US judges are every bit as willing as Australian judges to limit the duty of care to prevent what they perceive to be indeterminate liability. For example, the Supreme Court of California denied recovery to a man who saw his de facto spouse negligently killed by a car driven by the defendant: *Eldon v Sheldon*, 758 P.2d 582 (Cal. 1988). The New Jersey Supreme Court in 1999, refused to apply a standard of reasonable care to informal recreational sports, reasoning that: “something is terribly wrong with a society in which the most commonly accepted aspects of play – a traditional source of a community’s conviviality and cohesion – spur litigation.” *Crawn v Campo*, 643 A.2d 600, 607 (N.J. 1994); see also *Knight v Jewett*, 834 P.2d 696, 710 (Cal. 1992) Similarly, in denying that a school owes a duty of care to pupils in relation to adverse educational outcomes, the Court of Appeal of California declared that the existence of a duty of care “is initially to be dictated or precluded by considerations of public policy.” *Peter W v San Francisco Unified School District* 131 Cal. Rptr. 854 at 859 (Cal. Ct. App. 1976) Our own High Court has not been willing to accept that broadly-based reasons of policy should be invoked to exclude the recognition of a duty of care, or for that matter to find that the duty exists. See *Perre v Apand* (1999) 198 CLR 180 at 199-200 per Gaudron J; at 211-212 per McHugh J; cf. Kirby J at 275; *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 419-420 per Kirby J.)

To the extent that reliable statistical information is available, it tends to show that litigation is in fact decreasing in Australia. For example, a report released by the Australian Plaintiff Lawyer's Association in February 2002, using data obtained from the Court Registries in South Australia, Tasmania, Queensland, New South Wales and the ACT, found that overall litigation levels were decreasing.<sup>6</sup> In addition, the 2000/2001 Annual Report of the Productivity Commission suggests that the level of litigation decreased at an average rate of 4 percent per annum in the preceding three years. Neither of these studies is able to demonstrate that personal injuries claims are on the rise.

A report commissioned by the Federal Treasury from Trowbridge Consulting, and using statistics from Insurance Statistics Australia, shows that the number of claims per premium under insurance contracts was relatively flat from 1993 to 2000, with a slight decrease in the number of claims in 1999 and 2000.<sup>7</sup> However, the report also shows that the size of those claims has increased from an average of \$5000 in 1990 to over \$15,000 in 2000.<sup>8</sup> The statistics on levels of litigation are unfortunately inconclusive. The most that can be said is that the widespread view that litigation is rapidly increasing is not supported by the statistical data.

If litigation levels are not rising, then what is the cause of the increased cost of public liability insurance in Australia? Two events have been suggested as possible reasons: the collapse of HIH in early 2001 and the attacks on the World Trade Centre in

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<sup>6</sup> R. Davis, "Exploring the Litigation Explosion Myth" (2002) 49 *Plaintiff*: 4-5.

<sup>7</sup> Trowbridge Consulting, "Public Liability Insurance: Analysis for Meeting of Ministers" 26 March 2002, p13.

<sup>8</sup> Trowbridge Consulting, "Public Liability Insurance: Analysis for Meeting of Ministers" 26 March 2002, p 16.

September 2001.<sup>9</sup> Each of these extraordinary events is widely regarded as having impacted upon the insurance industry. In addition, insurance markets are renowned for their cyclical nature, with extended periods of stable or reducing premiums, followed by shorter periods of rapidly increasing premiums.<sup>10</sup>

The answer to the question of whether we have a tort law crisis in Australia ultimately falls to be answered along ideological lines. For instance, some argue that the possibility of large numbers of plaintiffs bringing successful suits against those involved in a particular activity or industry is a sufficient argument for restricting liability in that activity or industry.<sup>11</sup> Others take the view that the potentially large numbers of persons who might be injured is precisely the reason why the law should impose a duty of care upon the operators.<sup>12</sup>

### 3. Justification for Tort Law

In this climate, it is useful to review the value to a modern society of maintaining a robust system of tortious liability. The founding principle of the modern law of tort is derived from the epochal judgment of Lord Atkin in *Donoghue v Stevenson*:<sup>13</sup> “You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.”

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<sup>9</sup> Peter Semmler QC, “Law Changes Will be Unfair to Victims” *The Australian Financial Review*, 29 November 2002. See also Rob Davis, “Vested Interest Key to Liability” *The Australian Financial Review*, 13 December 2002.

<sup>10</sup> Trowbridge Consulting, “Public Liability Insurance: Analysis for Meeting of Ministers” 26 March 2002, p 16.

<sup>11</sup> See for example *Pulka v Edelman*, 358 N.E.2d 1019 (N.Y. 1976), (declining to hold that a parking garage owes a duty of care to prevent drivers from running down pedestrians on the ground that New York has “countless parking garages and lots”.)

<sup>12</sup> Richard L. Abel, “Judges Write the Darndest Things: Judicial Mystification of Limitations on Tort Liability” (2002) 80 *Texas Law Review*: 1547-1576 at 1551.

<sup>13</sup> [1932] AC 562 at 580.

Is this memorably-expressed principle a recipe for a society in which people do not take responsibility for themselves, or is it a principle that ensures the just distribution of the burden from loss and injury? There are three factors that make an efficient system of tort liability a valuable component of Australian society. First, it ensures compensation for the victims of negligence; secondly, it provides an incentive for safe behaviour by potential tortfeasors, reducing the overall loss to society from negligently inflicted harm; and thirdly, it allows for the cost of negligently inflicted harm to be distributed amongst those who undertake risky activities, removing the financial burden from the person injured and from the rest of society.

**a) Compensation for Injured Plaintiffs**

In the debate over tort reform, little attention has been given to the idea that a person who suffers injury as a result of another's negligence is entitled to be compensated. This is, however, the primary justification for a system of tortious liability. It is regarded as just and reasonable that a person who suffers a broken arm or leg in a car accident, is forced to pay medical expenses, is left out of pocket because he or she cannot work, and also suffers from considerable pain, is entitled to be compensated by the person who negligently caused the injury. Our legal system has left behind the more brutal notion that injured people must accept their fate with sturdy hearts, and instead has insisted that careless people should pay for the consequences of their negligence. Innocent plaintiffs are unable to protect themselves from the consequences of another's lack of care; would-be tortfeasors can protect themselves from liability by avoiding negligent acts or omissions. This is a moral principle

indispensable to the law of negligence. As Justice Deane stated in *Jaensch v Coffey*<sup>14</sup> “the general underlying notion of liability in negligence is “a general public sentiment of moral wrongdoing for which the offender must pay.””.

I have heard nothing in the current debate on tort reform which calls into question this fundamental premise. It is a fair and just notion that has secured a place in public consciousness, and has over one hundred years of common law precedent to commend it to modern jurists.<sup>15</sup> At the same time as securing justice for the injured, this principle contains within itself the main limitation upon the liability of defendants – their liability is limited to loss that is a foreseeable result of their negligence.

#### **b) Deterrence of Negligent Behaviour**

The second justification for tort law is that it operates to deter negligent behaviour and to encourage people to take appropriate steps to ensure the safety of others who will be affected by their actions.<sup>16</sup> One result of the current emphasis upon liability for negligence is that employers, professionals and community groups are becoming increasingly aware of their obligations under the law; the prospect of a large negligence payout means that they cannot afford to remain ignorant. Unfortunately, we lack good empirical evidence about the effect of liability rules on the behaviour of tortfeasors.<sup>17</sup> However, I presume it is not too optimistic to think that some potential

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<sup>14</sup> (1984) 155 CLR 549, quoting *Donoghue v Stevenson* [1932] AC 562 at 580.

<sup>15</sup> See *Heaven v Pender* (1883) 11 QBD 503 at 509 per Brett MR (who became Lord Esher).

<sup>16</sup> Richard L. Abel, “Judges Write the Darndest Things: Judicial Mystification of Limitations on Tort Liability” (2002) 80 *Texas Law Review*: 1547-1576 at 1547; Wendy E. Wagner, “What’s It all About, Cardozo?” (2002) 80 *Texas Law Review*: 1577-1593 at 1586.

<sup>17</sup> Richard L. Abel, “Judges Write the Darndest Things: Judicial Mystification of Limitations on Tort Liability” (2002) 80 *Texas Law Review*: 1547-1576 at 1548) See Gary T. Schwartz, “Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?” (1994) 42 *UCLA Law Review* 377.

defendants take steps to make their activities safer. Indeed, their insurers often require it.

If this is so, it is a key benefit of tort law, resulting one hopes in fewer lives damaged by avoidable injuries, and an overall saving to the community in terms of lost productivity and the costs of care. The element of deterrence is absent from a system of no-fault liability, an alternative to tortious liability which is raised in discussion from time-to-time.<sup>18</sup> A no-fault system may have some unique advantages over the present system, such as decreased administrative and legal costs, and compensation based on loss rather than causation by negligence. The cost of a no-fault system and the removal of the risk of loss to the government or a government-backed insurer are factors that might make it difficult to introduce such a system. However, this is a topic for another occasion. It suffices to say for present purposes that the current system has a part to play in contributing to safer work and community environments.

### **c) Loss-Spreading**

The tort system operates to shift the burden of losses from innocent plaintiffs to negligent defendants. It allows that loss to be distributed, through insurance policies, amongst the entire group of citizens who participate in dangerous but socially valuable activities.<sup>19</sup> If compensation is denied to plaintiffs, accident costs do not disappear. Instead those costs must be borne by plaintiffs, or more often by the community as a whole through the welfare system.

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<sup>18</sup> Ashley Crossland, "Negligence Review Fails to Cut the Cost of Proving Fault" *The Australian*, 4 October 2002. See also Harold Luntz, *Assessment of Damages for Personal Injury and Death*, 4<sup>th</sup> Edition (Sydney: Butterworths, 2002).



It has been argued that the availability of insurance is a factor that has caused the scope of tortious liability to expand. Chief Justice Spigelman of the New South Wales Supreme Court has opined that: “Judges may have proven more reluctant to make findings of negligence, if they knew that the consequence was likely to bankrupt the defendant and deprive him or her of the family home.”<sup>20</sup> However, one could equally say that if insurance were not available judges might have been more likely to restrict liability arbitrarily and deprive plaintiffs of desperately needed compensation.

The High Court has rejected the idea that the availability of loss-spreading insurance is a valid criterion in determining the existence of a duty of care.<sup>21</sup> In theory, judges are expected to disregard the existence of insurance in considering liability. This is a task which I think judges can be trusted to undertake with the appropriate degree of objectivity. After all, judges are required to make hard decisions every day of the week. It is really at the level of policy analysis of the tort system that loss-spreading is a relevant factor, and it ought to be taken account of by state governments in the current round of reforms.

## **5. The Current Reforms**

These reforms are the next matter I intend to address.

### **a) Ipp Review of the Law of Negligence**

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<sup>19</sup> Richard L. Abel, “Judges Write the Darndest Things: Judicial Mystification of Limitations on Tort Liability” (2002) 80 *Texas Law Review*: 1547-1576 at 1547.

<sup>20</sup> J.J. Spigelman, “Negligence: The Last Outpost of the Welfare State” (2002) 76 *Australian Law Journal*: 432-451 at 433.

In mid-2002, the Federal Government announced that it was commissioning a review of the law of negligence in Australia and appointed Justice David Ipp as Chairman of the Committee. In September of 2002, the Committee handed down its recommendations, complete with a comprehensive analysis of tort law in Australia. The recommendations were restricted by the terms of reference to liability for personal injury or death. The Review proposed that the changes to the law be incorporated in a single statute to be enacted in each State. The recommendations, 61 in total, touch upon standard of care, causation, foreseeability, contributory negligence, mental harm, non-delegable duties, vicarious liability, professional negligence and damages among other things. It is interesting to note that the Review recommended that joint and several liability should not be replaced with proportionate liability. The proposed Queensland legislation, which I will shortly discuss in more detail, nevertheless includes provisions introducing proportionate liability.<sup>22</sup>

## **b) Civil Liability Bill**

In response to the Ipp Review, each of the States is currently reviewing its tort law to determine whether the recommendations should be implemented. The first state to move was NSW, with Premier Bob Carr stating, in response to calls for uniform national legislation, “I think that it’s better that NSW, the largest state, simply moves in and sets a benchmark... and defy other jurisdictions to catch up with us.”<sup>23</sup> The NSW legislation was assented to on 28 November 2002. It was criticized by

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<sup>21</sup> *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 230 per McHugh J.

<sup>22</sup> *Civil Liability Bill 2002*, Part 2 Proportionate Liability.

<sup>23</sup> Chris Merritt and Annabel Hepworth, “Tort Reforms Cut Basic Rights: Academics” *The Australian Financial Review*, 24 September 2002.

academics for being poorly drafted and having the potential to increase litigation because of confusion over the meaning of some provisions.<sup>24</sup>

Queensland has announced plans to implement similar reforms to those in NSW. A consultation draft of the Queensland Civil Liability Bill was released by the Office of the Attorney General on 6 December 2002. The Bill contains a number of clauses that tinker with the principles of negligence and causation and, if the Bill passes into law, will no doubt require the attention of the courts. One question that immediately comes to mind is whether aspects of the Bill replace the common law, or merely supplement it. Upon a reading of the Bill, there are numerous clauses that might present other interesting questions of interpretation.

For example, clause 9 of the *Civil Liability Bill* sets out general principles for determining whether a person was negligent in failing to take precautions against a risk of personal injury. At present, the law in Australia on whether a risk is foreseeable, such that a person is under a duty to take reasonable steps as a precaution against it, is derived from *Wyang Shire Council v Shirt*.<sup>25</sup> That case held that a risk that is not “far-fetched or fanciful” is foreseeable, even if the risk is remote in the sense that it is extremely unlikely. Clause 9(1) contains a slightly altered formula:

“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 reasonably to have known);and

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<sup>24</sup> Chris Merritt and Annabel Hepworth, “Tort Reforms Cut Basic Rights: Academics” *The Australian Financial Review*, 24 September 2002.

<sup>25</sup> (1980) 146 CLR 40.

- b) the risk was not insignificant; and
- c) in the circumstances, a reasonable person in the person's position would have taken the precautions."

This clause reflects a recommendation made in the Ipp Report that "it cannot be negligent to fail to take precautions against the foreseeable risk of harm unless that risk cannot be described as 'not insignificant'". This recommendation contains no less than six negatives which are reflected in the proposed bill. Given that a double negative is capable of causing confusion or uncertainty in meaning, one can safely predict that the meaning of this string of negatives will lack clarity.

At present, one can only speculate as to the difference in meaning from the Wyong test and the way in which this formulation ought to be or will be applied.

Clause 22 of the Bill would alter the standard of care expected from professionals, such as medical practitioners. It is not clear precisely what occupations will be covered by that term and why those who might not be considered professionals should be excluded. Clause 22 states that a professional will not incur liability in negligence if the professional acted in a manner that was widely accepted by a significant number of respected practitioners in the field, unless the court considers that the peer professional opinion is irrational. This appears to be an attempt to reintroduce the *Bolam Test*<sup>26</sup> of peer acceptance, a test that was rejected by the High Court in *Naxakis v Western General Hospital*.<sup>27</sup> The proposed statutory test does not apply to the duty to warn of a risk associated with the provision of a professional service, the situation

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<sup>26</sup> *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 at 122  
<sup>27</sup> (1999) 197 CLR 269 at 275-276 per Gaudron J; at 285-286 per McHugh J; at 297-298 per Kirby J.

that arose in *Rogers v Whitaker*.<sup>28</sup> The application of the new statutory test will almost certainly require some judicial interpretation, in particular as to the meaning of “irrational” peer opinion.

Interesting questions are also raised by Clause 11(1) of the Civil Liability Bill which lists two factors as the elements necessary to prove causation. The first is that “the negligence was a necessary condition of the occurrence of the personal injury.” The second is that “it is appropriate for the scope of the negligent person’s liability to extend to the personal injury so caused.” Further, in sub-clause (2) of clause 11, the court is called upon to consider “whether or not and why responsibility for the personal injury should be imposed on the negligent party.”

These incantations appear to require the court to undertake a discretionary exercise in deciding whether, in all the circumstances, it is fair that the defendant should be found to have caused the plaintiff’s injury. It is difficult to see how a judge’s opinion on whether it is “appropriate” for a defendant to be held liable is relevant to the question of whether the defendant’s act or omission caused an injury. Causation is a factual question, not a question of whether liability is “appropriate”. Unfortunately, in a Bill introduced to alleviate perceived problems of uncertain liability, and increasing legal costs, this clause seems to introduce an ill-defined judicial discretion, apparently invoking each individual judge’s sense of justice or fairness. As Justice McHugh states in *Perre v Apand Pty Ltd*:<sup>29</sup> “[M]ost people who have been or are engaged in day-to-day practice of the law at the trial or advising stage prefer rules to indeterminate standards.” When a notion as broad as what is “appropriate” is

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<sup>28</sup> *Rogers v Whitaker* (1992) 175 CLR 479.

<sup>29</sup> (1999) 198 CLR 180 at 212; see also per Kirby J at 263.

introduced to the equation of liability it may be more difficult for practitioners to predict the outcome of a case, making settlement of cases more difficult and leading to an increase in litigation, the precise outcome the Bill is intended to prevent.

It is proposed to introduce this Bill in partial replacement of well-established and understood principles of law for determining breach of duty and causation of damage. One suspects that the imposition of statutory regulation may cause greater confusion and uncertainty in relation to the rights and responsibilities of people in the community, and therefore lead to an increase in litigation with parties requiring the court to interpret the new rules and explain their operation. Over the past fifteen years in Australia, the most perplexing and controversial legal problem has not been the rules for negligence and causation but the principles for imposition of the duty of care, especially in novel cases such as those involving economic loss.<sup>30</sup> The new bill does not address this subject, rather throwing doubt and dilemma into the otherwise certain areas of the law relating to personal injury.

## **Conclusion**

The clear advantage of the common law is its flexibility. In response to difficulties in the operation of the tort law system, the tide in Australian courts has turned away from the expansion of liability. This is evident in the recent summary by the High Court of the decision in *Donoghue v Stevenson*:<sup>31</sup>

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<sup>30</sup> See *Perre v Apand Pty Ltd* (1999) 198 CLR 180.

<sup>31</sup> *Sullivan v Moody* (2001) 207 CLR 562 at 577 per curiam.

“In *Donoghue v Stevenson*, the House of Lords, by a majority of three to two, held that [...] a duty was owed by the manufacturer of a beverage to a consumer of the beverage where the manufacturer sold the product to a distributor and it was ultimately sold to the consumer in circumstances such that the consumer could not discover a defect in the beverage by inspection.”

Limiting the ratio of *Donoghue* is one symptom of the broader movement to halt the expansion of tort liability. For better or worse, that process has been underway in Australian courts for several years, with judges restricting liability within determinate boundaries.<sup>32</sup> A recent study of the High Court shows a turnaround between 1999 and 2000 in the number of cases decided in favour of defendants.<sup>33</sup> Between 1987 and 1999, around two thirds of tort appeals in the High Court were decided in favour of plaintiffs. In 2000, the statistics were reversed, with two thirds of cases decided in a pro-defendant manner.<sup>34</sup> The High Court has also stressed repeatedly that it is necessary to avoid liability “in an indeterminate amount for an indeterminate time to an indeterminate class.”<sup>35</sup> The common law system has shown its ability to adjust to changed circumstances in a flexible rather than doctrinal way.

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<sup>32</sup> See for example *Woods v Multi-Sport Holdings Pty Ltd* (2002) 186 ALR 145; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 176 ALR 411.

<sup>33</sup> Harold Luntz, “Torts Turnaround Downunder” (2001) 1 *Oxford University Commonwealth Law Journal*: 95-106 at 96 (from 1987 to 1999, the High Court delivered 96 judgments in the law of torts. 63 judgments were pro-plaintiff (66%) and 32 were pro-defendant (33%). In 2000, the High Court decided nine torts cases, all personal injury appeals. 6 were pro-defendant (67%) and 2 were pro-plaintiff (22%). See also J.J. Spigelman, “Negligence: The Last Outpost of the Welfare State” (2002) 76 *Australian Law Journal* 432 at 433.

<sup>34</sup> Harold Luntz, “Torts Turnaround Downunder” (2001) 1 *Oxford University Commonwealth Law Journal*: 95-106 at 96.

<sup>35</sup> *Perre v Apand* (1999) 198 CLR 180 at 199 per Gaudron J; at 221 per McHugh J; at 267-268 per Kirby J; at 299 per Hayne J; at 322 per Callinan J, quoting *Ultramares Corporation v Touche* 225 N.Y. 170, 179 (1931) per Chief Judge Cardozo. See also *Bryan v Maloney* (1995) 182 CLR 609 at 618 per Mason CJ, Deane and Gaudron JJ.

If the mantle of tort reform is to be taken up by Parliaments around Australia, one hopes that it will not be done without due regard for the impact on the rights of ordinary citizens who may be injured by another's negligence. After all throughout the 1990s, there was a concerted effort by courts, governments and lawyers to increase access to justice. Let's hope that the current round of reforms is not a backlash response to the modest gains that have been made.