# Australian Lawyers Alliance, Queensland Conference
# Royal Pines Resort
## Friday, 17 February 2006, 11:45am
## "Tort Law Reform in Queensland: was it necessary, is it fair and who has benefited from it?"

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**The Hon P de Jersey AC,**
**Chief Justice**

I am pleased to have been invited to deliver this address, and I wish you all well for a stimulating conference. The Queensland Branch is adept at convening useful conferences as displayed at last year's excellent national event in Cairns. I am privileged to be present with such well-motivated and forward thinking practitioners.

The assigning of my particular topic further illustrates the determination of the Alliance to keep this important subject before the public. I have previously addressed it in a public forum, as have some other Chief Justices around the nation.

It is consistent with the charter of the Australian Lawyers Alliance that you would want to keep the issue on the agenda. The Alliance is to be commended for its 10 year history of protecting and promoting justice, freedom and the rights of the individual. Its position paper relevantly declares, "the rights of individuals in Australia have been seriously eroded in recent years on all fronts. Governments at both State and Federal level have chipped away at the common law, which provides the basis for the legal rights of individuals who have suffered injury as the result of someone else's wrongdoing. Other, equally fundamental rights have been progressively limited by statutes…". I applaud the Alliance's primary focus on "protecting the rights of ordinary people against the legal tactics of the State and big corporations".

Two Queensland statutes of recent years have significantly interfered with the awarding of compensation to those who have suffered injury because of the actionable fault of another. They are the *Personal Injuries Proceedings Act* 2002 and the *Civil Liability Act* 2003. I will come in a moment to some of the particular restrictions they have wrought. Those restrictions fall to be assessed against what had previously been accepted as axiomatic – that is, that a person injured through the fault of another should be adequately

compensated by that other. In the ordinary course of human affairs, it has been insurance companies which have come to foot those bills. And it was insurance companies which rather stridently led the charge for reform which led to the establishment of the (Ipp) Negligence Review Panel, with its "riding instructions", leading in September 2002 to the recommendations for reform which crystallized in legislation from State to State – including, in Queensland, the legislation just mentioned.

I have spoken previously on the question whether this reform was necessary. Some change was justified, although legislation was not necessarily the only way of securing it. I have mentioned a discernible shift in court decisions over recent years towards according more primacy to individual responsibility for those engaged in ordinary day-to-day activities. The tripping cases tend to exemplify this, for example *Ghantous v Hawkesbury Shire Council* (2000) 206 CLR 512, which constrained Callinan J to make the memorable statement (p 639): "it is not unreasonable to expect that people will see in broad daylight what lies ahead of them in the ordinary course as they walk along". In *Cole v South Tweed Heads Rugby League Football Club Ltd* (2004) HCA 29, para 18, Gleeson CJ referred in this general context to the need to avoid "an unacceptable burden upon ordinary social and commercial behaviour, and an unacceptable shifting of responsibility for individual choice". That said, these changes were legislatively ordained, and many of them are plainly acceptable.

For example, few would criticize the legislative redefinition of foreseeable risk as being a risk of harm which is "not insignificant": the not "far fetched or fanciful" criterion of *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47 had come generally to be accepted as far too generous.

Also, one would not reasonably begrudge medical practitioners the effective restoration of the test in *Bolam* (1957) 2 All ER 118, subject to the reservation that the professionally held peer view not be irrational (*Civil Liability Act* 2003 s 22), and the newly shaped criterion is unarguably consistent with the public interest. Confusion had abounded within

the ranks of the medical profession, whether justified or not, after *Rogers v Whitaker* (1992) 175 CLR 479, and substantial reversion to the *Bolam* test was reasonable to allay that concern.

The legislation unobjectionably also reflects the increasingly expressed view that liability should not attach where an entity has failed to warn of a risk which is obvious, especially in the context of dangerous recreational activities. A different result would probably therefore have ensued today in *Nagle v Rottnest Island Authority* (1993) 177 CLR 423, given that plaintiff's obvious foolhardiness in diving into a pool of uncertain depth.

Winston Churchill counselled "there is nothing wrong with change, if it is in the right direction". Those are some examples of the beneficial changes effected by this nationally led legislation.

But in other respects, the legislation has brought about marked erosion of what I earlier presented as a fundamental right to adequate compensation for injury negligently occasioned by another, and the reasonableness of that is more regularly being questioned.

That right to compensation – in an amount not generous, not parsimonious, but adequate – is a simple corollary of an individual's right to personal safety and security – a state not to be fractured by others. Our right to personal freedom is of course subject to our correlative responsibility not to deny or diminish the freedom of others, and that extends, in broad terms, to embrace the physical integrity of the human body. The question arises whether that erosion of a fundament right to compensation for the results of the fault of another, was necessary or fair.

First let me give some examples of the more arguably unjust intrusions into that basic right.

An obvious example is the cap on general damages. Section 62 of the *Civil Liability Act* sets a maximum of $250,000. The actual amount to be allowed falls to be calculated by resort to a table based on the "scale value of the injury". Once the court has determined the "scale value of the injury", which involves going through an evaluative process, the amount then to be allowed for general damages is ascertained arithmetically, a simple multiplication. There is in that latter process no scope for individual discretionary judgment. The process vaguely resembles the regularly criticized "grid sentencing" employed in some criminal jurisdictions.

Further, the maximum of $250,000 is reserved for what s 61(1)(b) terms "the gravest conceivable kind" of case, terms which appear to focus on the ultimately extreme case, the worst imaginable case. It would relate, for example, to the gravest conceivable kind of quadriplegia, the gravest conceivable kind of extreme brain injury with substantial insight remaining, or the gravest conceivable instance of total sight and hearing impairment. It is not even moot that in many cases, making what would generally be considered adequate allowance for pain and suffering, loss of the amenities of life, loss of expectation of life, in such extreme cases, would, especially with a young victim, warrant an award for general damages of much more than that maximum.

As a matter of interest, the $250,000 Queensland maximum is substantially less than in some other jurisdictions. The amount applicable in New South Wales, for example, is $350,000. Allowing for the national thrust which impelled this legislation, one may query the justification for that discrepancy. Further, that amount of $250,000 has remained unaltered since the commencement of the legislation in April 2003, without allowance for subsequent inflationary trends.

Those aspects aside, many would say the real vice of this cap is that it leaves catastrophically injured claimants grossly under compensated, unable to afford the treatment, support and other aids to rehabilitation a court would find reasonably necessary.

Another example I advance as probably obvious is the cap on damages for past and future economic loss. The amount to be awarded falls to be calculated now on the basis of no more than three times average weekly earnings per week. The term "average weekly earnings" is defined as the "seasonally adjusted amount of Queensland full-time adult person's ordinary time earnings as declared by the Australian Statistician…". The limitation is established by s 51 of the *Personal Injuries Proceedings Act* and s 54 of the *Civil Liability Act*. The computation of true compensation does not ignore the particular circumstances of the victim: otherwise, "amends" are not made; the victim is not restored, so far as money can achieve, to his or her own particular pre-injury situation.

Is it clearly warranted that a defendant's insurer need no longer take the plaintiff as he or she is; that there should be an effectively discriminatory approach which ignores the enhanced capacity of some within the community to, say, maintain themselves and contribute to the maintenance of their families and often others in the community as well? The question arises, of course, why a defendant and thereby the defendant's insurer should escape the ordinary consequence of negligently destroying or diminishing an earning capacity which happens to be of substantially greater proportion than the average. Why as a matter of policy should that injured person lose out, with a windfall converse benefit flowing to the insurer?

Yet another arguably obvious example is the limitation on the award of damages for gratuitous services, now dependant on the provision of such services for at least six months and at least six hours per week. This is an arbitrary limitation. Its application would mean that an injured claimant who needs substantial daily assistance from, say, a spouse, for only five months following the accident, loses out, albeit the spouse may have had to give up work to provide that necessary and beneficial care.

Other criticisms may be mounted. Limitations established by s 56 of the *Personal Injuries Proceedings Act*, in relation to the costs of proceedings leading to awards of up to

$50,000, would I think mean in practice that many of those claims would not realistically be pursued. Well settled members of the community should not discount in any blasé way the importance to a victim of humble financial means of a pay-out of that order. It was said insurers tended to pay out these small claims to "clear their books", the suggestion being some claims were not meritorious. Probably that was sometimes the case. But to structure a process where meritorious claims at this lower level become impracticable, for reasons of costs, plainly will work injustice.

The assessment of damages has traditionally proceeded as an evaluative process carried out by a court fully informed of the relevant facts, and appreciating the interrelationship of many of those factual considerations. The new legislative provisions introduce an inflexibility which is antithetical to that. The calculation of general damages under s 62 of the *Civil Liability Act* provides a prime example of that. In addition, schedule four of the Civil Liability Regulation, which prescribes the range of injury scale values, on which general damages fall to be calculated, is not only a limiting and prescriptive tabulation, but is in some respects incomplete, and has proven difficult and complex of application for, I understand, both claimants, lawyers and insurers. I draw on an example given this week in the Court of Appeal to illustrate that limiting effect: pain and suffering for a symptomatic herniated disc would previously often sit around $50,000: now the scale would reduce it to the order of $10,000.

The obvious residual concern is that injured people deserving adequate compensation are missing out, with jeopardy to their treatment, rehabilitation, and general wellbeing and lifestyles. What will probably occur, is occurring, at least with those more seriously disabled, is supplementary resort to the public health system, with the consequence that some of the financial burden is effectively transposed from insurer to tax payer. How could that be justified?

Last year I expressed serious reservation whether the so-called "insurance crisis" which led to the Ipp reforms was substantially caused by anything other than lack of prudent

financial planning and forecasting by insurance companies, including premiums set uncommercially low for competitive reasons. The President of the Law Council of Australia, Mr John North, recently referred to current high levels of profitability in insurance companies. Many commentators have highlighted what has appeared to be minimal reduction in insurance premiums. Many remain to be convinced that the reduced financial burden on insurers, consequent upon these legislative changes, is benefiting anyone other than those insurers themselves.

Yet on the other side, as Mr North reportedly suggested on 3 February this year, these and corresponding laws are preventing over 40% of claimants from pursuing their common law rights. The reality is that the rights of all claimants have been diminished, and in the case of extremely seriously injured claimants, probably dramatically.

As a matter of interest, in the District Court of Queensland, whose civil jurisdiction extends to $250,000, civil lodgments dropped 13% from 2000-2001 to 2001 to 2002. The rate of decline from 2000-2001 to 2004-2005 was as high as 34%. Much of that would be referable to these legislative changes.

I do not propose today to recount the history which preceded this legislation: whether criticism of the role of the courts was justified; whether governments were unduly influenced by insurers; whether the Negligence Review Panel chaired by Justice Ipp did indeed conduct a review, or was sent down a largely preordained track. I expressed some views on some of those subjects at the LawAsia conference in March last year.

To the extent court judgments are said to have fuelled the drive for change, I have been concerned whether extraordinary jury awards in other jurisdictions may not have operated to skew the ultimate result adversely to claimants in this non-jury personal injury State. *Swain v Waverley Municipal Council* (2005) HCA 4, the recent case where the High Court restored the trial judgment favourable to the injured surfer, was of course at first instance a jury verdict.

But the critical point for the present is the need for active reconsideration of whether the so-called reforms have proven justified, or should be wound back. I am pleased that the Attorney-General of Queensland has continued the process of review set up by her predecessor, with submissions from interested parties. I have read the submission of the Queensland Law Society, the thrust of which I would support. It is in my respectful view important that that process be pursued to a conclusion.

Recent events in this State offer a good illustration of how the community can become dissatisfied with a system which interferes with well-established, reasonable rights and expectations. I refer to what was perceived as the need for the special compensation plan – laudable though it otherwise was – released by the government in September last year for the treatment of claims arising from events at the Bundaberg Hospital. Ideally, the system already legislatively in place should have been sufficiently streamlined to facilitate the expeditious, reasonable determination of those claims at compensation levels which would readily be accepted as appropriate. The courts would certainly have done their best to fast-track those claims to avoid delay. The practical difficulty, I understand, was that the complication of the present pre-hearing framework meant that the processing of the claims would have taken a substantial period of time, and that the statutory limitations on the amount of compensation available may have meant inadequate ultimate compensation for alleged victims. That special arrangements were felt necessary for that class of claimants plainly raises the query – what of others within the community, without a voice or media support, currently disadvantaged by this legislation?

I earlier flagged a mild concern whether Queensland claimants are not now being prejudiced because of past jury verdicts and awards in other jurisdictions. There is another local feature of arguable significance.

It is interesting to note the strong financial positions in this State of WorkCover and the Compulsory Third Party Scheme. The former is not affected by the *Civil Liability Act*, and

any savings to the CTP scheme as a result of these reforms have yet to register. I understand WorkCover Queensland has the lowest employer premiums in Australia, a cost-effective and efficient scheme which delivers what is accepted as reasonable compensation to injured Queensland workers. The apparent strength of the financially secure CTP scheme in this State is not the result of these reforms.

Acknowledging the health of those systems, which account for the vast bulk of claims, one queries why – at least in this State – these new limitations were ever necessary for the residue of claims, and why they should have been engrafted onto an otherwise apparently healthily operating motor accident system.

Now whether or not our legislation remains in its current form is of course a matter for the parliament and the executive government. That does not in this case exclude the articulation of a push for reconsideration, including at judicial level – and perhaps understandably so at that level especially, where the courts were, I believe unjustifiably, presented as the "whipping boys" for reform. This legislation was, as we know, part of a national scheme. Having participated three and four years ago at its inception, Queensland's involvement is presumably not entrenched, and I have to say that I am reassured to discern an emerging acknowledgement that the time is ripe for its reconsideration.