



**A Review of the Civil Liability Act and Tort Reform in
Queensland
Opening Plenary Forum Discussion
Queensland Law Society Personal Injuries Conference 2007
Friday 29 June 2007 9:00am**

**The Hon Paul de Jersey AC
Chief Justice of Queensland**

I thank the Queensland Law Society for the opportunity to speak here this morning. The topic of the forum, A Review of the Civil Liability Act and Tort Reform in Queensland, is of considerable importance, and interest, to many in the community, not just our present company.

The tort reform we have experienced in recent times reveals the influence political, economic and social forces can have on the development of the law. To quote from a recently published textbook *The Law of Torts in Australia*:

“Personal injuries law is unlikely to be a subject of constant political and social debate; but events of recent years suggest that from time to time, tort law will emerge, from the shadowy world of courts and the offices of insurance companies and lawyers, into the bright light of the political and legislative process. In Australia at least, there has been a significant politicisation of personal injuries law, ushering in a new era, which is likely to continue for the foreseeable future, in which tort law is the cause of occasional but vigorous political debate and contestation.”¹

The public has played a large role in recent debates surrounding tort law reform. That is unsurprising. For all its complexity for lawyers, the law relating to personal injuries is a topic on which many members of the public feel themselves “well-qualified to express opinions”.² This is to be expected in relation to areas of law based on concepts of reasonableness, and taking reasonable care to avoid foreseeable risks. Most members of the community consider themselves to be reasonable people; they are people who ride the Clapham omnibus, the Bondi tram, or, in more local formulation, the Beenleigh or Cleveland train, against whom propositions of reasonableness may hypothetically be tested.

* I am indebted to my Associate, Ms Claire Gabriel, for her draft of this address.

¹ Trindale, Francis et al (2007) *The Law of Torts in Australia* 4th Edn Oxford UP, p23

² Ipp, Justice David “Policy and the Swing of the Negligence Pendulum”, paper delivered on 15 September 2003 at Government Risk Management Conference, Perth, p1



**A Review of the Civil Liability Act and Tort Reform in Queensland
Opening Plenary Forum Discussion
Queensland Law Society Personal Injuries Conference 2007
Friday 29 June 2007 9:00am**

Public opinion has always played a role in the development of the modern law of negligence. In *Donoghue v Stevenson*, Lord Atkin observed that liability for negligence is “based upon a general public sentiment of moral wrongdoing for which the offender must pay”.³ This was later described as the “sovereign principle” of negligence.⁴ If you will tolerate some parochialism, no doubt Lord Atkin was familiar with public sentiment in Queensland, his Lordship having been born here in Brisbane.

It is 75 years last month since the House of Lords delivered its decision in *Donoghue v Stevenson*. Given its status and importance to tort law, it is interesting to note it was a 3:2 decision. We can only speculate what the law might be today had the minority view prevailed. The neighbour principle was an idea whose time had come. The law of negligence has come a long way since the case of the snail asserted, but (much to the consternation of law students) never actually proven, to have rested within the bottle of ginger beer, but the public aspect of negligence law remains strong. It is important the law be broadly acceptable, and accepted, by members of the public, even if some may disagree with the outcome in individual cases.

Matters which take lawyers considerable time to research and prepare, and judgments which consume weeks, perhaps months, in the formulation, may be assessed by members of the public in a matter of minutes – after their reading a newspaper report, or seeing a news story on television. As Justice Ipp has observed, “all negligence cases arise in the ordinary course of human endeavour and there is a general belief that the assessment of negligence is nothing more than common sense, an attribute that not a few members of the public think is lacking in several judgments of courts around the country.”⁵

I have previously expressed concern that extraordinary jury awards in other jurisdictions may have skewed perceptions and fuelled an unwarranted drive for law reform in

³ *Donoghue v Stevenson* [1932] AC 562, 580

⁴ *The Wagon Mound* [1961] AC 388, 426

⁵ Ipp, Justice David “Policy and the Swing of the Negligence Pendulum”, paper delivered on 15 September 2003 at Government Risk Management Conference, Perth, p1



**A Review of the Civil Liability Act and Tort Reform in Queensland
Opening Plenary Forum Discussion
Queensland Law Society Personal Injuries Conference 2007
Friday 29 June 2007 9:00am**

Queensland, a non-jury personal injury jurisdiction. It is of course the larger claims which come to be reported in the media, not the smaller day to day cases likely to occupy much more of a personal injuries practitioner's time. Many if not most of those smaller cases may now be uneconomic for an injured claimant to pursue. The larger claims reported in the media from time to time are often just that – claims, which may never have any prospect of succeeding, and may be dismissed at an early stage.

The report commissioned by the Law Council of Australia and released last year, *National Trends in Personal Injury Litigation: Before and After 'Ipp'* by Professor E W Wright, confirmed that “contrary to widespread belief, litigation rates had not, generally, been increasing in the period leading to the Ipp Review”.⁶ The report also showed that the rate of claims in Queensland was appreciably below the national average prior to the reforms, and in 2005 stood at less than one personal injuries claim filed per 10,000 head of population:⁷ hardly the ‘litigation explosion’ some claimed.

Despite the local reality, given publicity, cases from jurisdictions outside Australia will also inevitably influence the public's perception of tort law. In recent weeks, the so-called \$64 million ‘pants suit’ has been receiving some media attention.⁸ For those who have not seen the published articles, it is reported that a plaintiff, a US judge no less, was claiming \$64 million (Australian) from his drycleaners for, as the media would have it, losing his trousers. There are many poor puns which could be made, probably have been made, in relation to this story, the plaintiff suing the pants off the drycleaner, etc, but the actual case, it seems, is a little more complicated, with the bulk of the amount claimed actually a penalty for alleged breaches of consumer protection laws, resting in a claim that the plaintiff was misled by a sign that promised “satisfaction guaranteed”. Sanity eventually prevailed, with the claim dismissed earlier this week. While not strictly a personal injuries claim, and certainly not as Australian law would understand it, stories like these

⁶ Professor E W Wright *National Trends in Personal Injury Litigation: Before and After 'Ipp'* (26 May 2006), p3

⁷ Professor E W Wright *National Trends in Personal Injury Litigation: Before and After 'Ipp'* (26 May 2006), pp14, 20

⁸ <http://www.smh.com.au/articles/2007/06/13/1181414335201.html?from=top5>, accessed 19 June 2007



**A Review of the Civil Liability Act and Tort Reform in Queensland
Opening Plenary Forum Discussion
Queensland Law Society Personal Injuries Conference 2007
Friday 29 June 2007 9:00am**

nevertheless enter the public imagination as examples of excesses of the law which should be curtailed.

An aversion to what is termed ‘American-style litigiousness’ was one of the factors pivotally influencing the tort law debate of some years ago. A case cited by many as exemplifying a ‘sue for anything’ mentality and disavowal of individual responsibility is that of the woman scalded by McDonalds coffee while driving. Despite seeming a frivolous claim for which the plaintiff should perhaps have taken responsibility, again it seems the facts are considerably more complex than is popularly understood. The Consumer Attorneys of California report⁹ that far from suffering momentary pain as a result of the hot coffee, the plaintiff, a 79 year old grandmother, suffered third degree burns to six percent of her body. She required skin grafts, and spent eight days in hospital. The car, in which the plaintiff was a passenger, was stationary at the time.

During discovery, it apparently emerged that the respondent had received hundreds of complaints and claims from other people scalded by its coffee over the previous ten years. It was also found that the respondent actively enforced a requirement that its coffee be held at substantially higher temperatures than would normally be expected, despite the numerous complaints. The plaintiff was held to have contributed to the injury. The jury award was reduced on appeal, and the parties eventually settled the matter privately. Extrapolation of these matters certainly adds a much more reasonable tone to what is popularly understood to be one of the ‘law gone mad, what’s the world coming to’ cases.

Justice McHugh suggested in 2002 that “negligence law will fall – perhaps it already has fallen – into public disrepute if it produces results that ordinary members of the public regard as unreasonable”.¹⁰ The community will often regard large awards of damages as unreasonable, especially where the claimant should have exercised more common sense and individual responsibility. The observation by Justice Callinan (notably before the clamour for reform) that “it is not unreasonable to expect that people will see in broad

⁹ <http://www.caoc.com/CA/index.cfm?event=showPage&pg=facts>, accessed 19 June 2007

¹⁰ *Tame v New South Wales* (2002) 211 CLR 317 at 354



**A Review of the Civil Liability Act and Tort Reform in Queensland
Opening Plenary Forum Discussion
Queensland Law Society Personal Injuries Conference 2007
Friday 29 June 2007 9:00am**

daylight what lies ahead of them in the ordinary course as they walk along”¹¹ has obvious, common sense, public appeal.

Many members of the community will feel little sympathy for those who ‘blame and claim’; for those who might, for example, trip over an easily identifiable defect in the pavement, or dive into unknown depths, and then seek large amounts of compensation from a public purse. At the same time, without any contradiction, many would also consider it unacceptable for those who have negligently caused an injury not to be held accountable for their actions, or for a seriously injured person to be inadequately compensated, go without treatment, or be left seriously out of pocket as a result of another’s negligence. As my colleague Justice Atkinson has observed, our legal system, and, I would suggest, the majority of the public, “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”.¹² With apologies to Walt Whitman, public opinion is infinitely large and constantly shifting; it contains multitudes.

As we all know, a great deal of complexity underlies personal injuries law, despite its easy translation into items in the popular press. Complex factors, too, led to the reform of civil liability law some five years ago. A range of issues inspired the thrust for change: you would be familiar with them and the social and political debates surrounding the introduction of the reforms. Tort law emerged “into the bright light of the political and legislative process”, and public sentiment was ultimately expressed through legislative change. But did our parliaments, our elected representatives, accurately gauge the public view in this instance?

The collapse of the HIH insurance group and the provisional liquidation of the major medial indemnity organisation UMP provided impetus for change, and the term “insurance crisis” became a catch-cry in the debate. Medical professionals and many community organisations, sports clubs, volunteer groups and other organisations grappled with the

¹¹ *Ghantous v Hawkesbury Shire Council* (2000) 206 CLR 512, 639



**A Review of the Civil Liability Act and Tort Reform in Queensland
Opening Plenary Forum Discussion
Queensland Law Society Personal Injuries Conference 2007
Friday 29 June 2007 9:00am**

prospect of dramatic increases in insurance premiums. The financial problems of these two major insurers was often attributed to increased litigation and higher damages awards in the courts.

Many, including me, have commented that the reality was more complex, with the collapse of the two insurers attributable to various factors, including the cyclical nature of the insurance industry, under-provision for claims and inadequate prudential reserves, premiums set uncommercially low, increases in reinsurance costs following the events of September 11, and the downturn in investment returns. Others, like Harold Luntz, have published statistics showing the High Court was of its own accord changing direction, prior to the introduction of the reforms, moving towards what may be seen as a more personal responsibility orientation in personal injuries appeals.¹³

The Panel appointed by Commonwealth, State and Territory governments was given a tight timeframe, only approximately three months, within which to conduct its review of the law of negligence and provide a report, which it did in September 2002. The Panel took as a starting point for conducting its review “the general belief in the Australian community that there is an urgent need to address these problems”, the problems being a perception that it had become too easy for plaintiffs to succeed, and damages awards were too high.¹⁴ I do not propose to discuss today whether the Panel did indeed conduct a review as such of the law of negligence, or whether it came to largely preordained conclusions.

The Panel acknowledged a lack of verifiable data and empirical evidence, noting that “a consequence of the dearth of hard evidence in the areas in which decisions are called for, is that the Panel’s recommendations are based primarily on the collective sense of fairness of its members...”.¹⁵ The majority of submissions the Panel received were “based merely on anecdotal evidence, the reliability of which [was] not tested”.¹⁶ Such an

¹² Atkinson, Justice Roslyn “Tort Law Reform in Australia: Speech to the Australian Plaintiff Lawyers Association Queensland State Conference” (7 February 2003), p 6

¹³ See eg “Torts Turnaround Downunder” (2001) 1 *Oxford University Commonwealth Law Journal* 95

¹⁴ *Review of the Law of Negligence Final Report* (Sept 2002), p25-6

¹⁵ *Review of the Law of Negligence Final Report* (Sept 2002), p32

¹⁶ *Review of the Law of Negligence Final Report* (Sept 2002), p32



**A Review of the Civil Liability Act and Tort Reform in Queensland
Opening Plenary Forum Discussion
Queensland Law Society Personal Injuries Conference 2007
Friday 29 June 2007 9:00am**

approach, coupled with the short timeframe, had obvious limitations, and it is at one level concerning that Parliaments proceeded to take the significant legislative action they did based on what the Panel admitted was evidence of a restricted and largely anecdotal nature.

You will be familiar with the substance of the changes made in response to the Panel's review, some of which are plainly acceptable. Legislation was enacted in all Australian jurisdictions, surprisingly uniform in approach, finding form in Queensland in the *Civil Liability Act 2003*. Prior to the review, the Parliament of this State had also enacted the *Personal Injuries Proceedings Act 2002*.

Briefly, some of the most significant changes introduced by our *Civil Liability Act* included: a \$250,000 cap on general damages; a cap on damages for past and future economic loss of no more than three times average weekly earnings per week; an arbitrary limit on the award of damages for gratuitous services; no liability for failure to warn of obvious risks; no liability for injuries arising from obvious risks of dangerous recreational activity; codification of the test for determining negligence; and the effective restoration of the *Bolam*¹⁷ test, subject to the reservation that the professionally held peer view not be irrational.

Some of the changes introduced here erode the fundamental right to true or even adequate compensation for the results of the negligent fault of another, and deny the fundamental complexity and individual nature of personal injuries cases. The maximum allowable general damages of \$250,000 (notably, less than that allowed in some other jurisdictions, and unaltered since the legislation was introduced in 2003) is reserved for the "gravest conceivable kind" of case. In some cases, especially with a young victim, adequate allowance for pain and suffering, loss of the amenities of life, and loss of expectation of life, would otherwise warrant an award for general damages of much more than that maximum.

¹⁷ [1957] 2 All ER 118



**A Review of the Civil Liability Act and Tort Reform in Queensland
Opening Plenary Forum Discussion
Queensland Law Society Personal Injuries Conference 2007
Friday 29 June 2007 9:00am**

The Injury Scale Values grid by which damages are arithmetically calculated under the *Civil Liability Regulation* introduces an inflexibility which eschews much of the evaluative process previously carried out by judges fully informed of the relevant circumstances of the individual plaintiff before them. This inflexibility diminishes the scope for individual corrective justice and reduces the chances of restoring a plaintiff to the pre-accident position; amends are not made.

I noted with interest a recent article in *Lawyers Weekly* which considered the damages which might have been payable to Benjamin Cox had his case arisen in Queensland rather than New South Wales.¹⁸ You might recall Mr Cox suffered persistent and serious bullying at primary school, including an attempted strangulation. The judge found the school had failed to exercise reasonable care to prevent the attacks on Mr Cox, and the psychiatric conditions from which Mr Cox, 18, now suffered were unlikely to abate. He was unlikely to form any relationships, and he was unemployable. He was awarded \$213,000 for pain and suffering, and damages for past and future economic loss.

The article notes that, in Queensland, the same injury, if classified as an “extreme mental disorder” under the *Civil Liability Regulation* would be given an injury scale value of 41 to 65, equating to damages in the range of about \$70,000 to \$136,000. If Mr Cox’s injury were classified as a “serious” instead of “extreme” mental disorder, the injury scale value would be 11 to 40, producing damages of about \$12,000 to \$68,000. In the result, a Queenslander in the same position would be likely to receive substantially less in general damages than Mr Cox received in New South Wales. The obvious unfairness of this is stark, especially considering that a push for national consistency was one of the motivations for this law reform.

(As an aside, it is interesting to note that the media coverage of the case, as I recall it, was largely sympathetic to the victim. Public attention turned to what schools should be doing to address the problem of bullying, the case enhancing awareness of a social problem,

¹⁸ O’Connor, Mark “Compensation Law Review Needed in Queensland” *Lawyers Weekly* (23 May 2007), <http://www.lawyersweekly.com.au/articles/21/0C04CA21.asp?Type=56&Category=841>



**A Review of the Civil Liability Act and Tort Reform in Queensland
Opening Plenary Forum Discussion
Queensland Law Society Personal Injuries Conference 2007
Friday 29 June 2007 9:00am**

and creating an impetus for other schools to address possibly negligent behaviour of their own. Providing an incentive for safe behaviour is one of the objectives underlying tort law.)

The *Personal Injuries Proceedings Act 2002* includes limitations in relation to the costs of proceedings leading up to awards of less than \$50,000. This means it will often not be worthwhile for a claimant to pursue smaller claims. I have noted in the past that structuring a process this way, where meritorious claims at the lower level become impracticable, by reason of costs, will work injustice. It is a false and arrogant assumption that the field of citizens to whom \$50,000 means something, is small enough to be safely overlooked.

Restricting rights to claim compensation may mean that injured persons do not have access to rehabilitative services, and are unable to work, or afford proper medical and ongoing care. The individual may instead have to rely on social security payments and the already overstretched public health system. Tort reform does not mean there are fewer injured people. Where there is a person or organisation who or which has negligently occasioned the injury, I suggest a reasonable person would expect that negligent party should properly compensate the victim, rather than the community suffering a consequent burdening of public resources.

Where does this leave us? There are mixed reports about the success of the changes in reducing insurance premiums, one of the main stated aims. A Queensland government MP recently commented that, in his view, “the insurance industry as a whole still has a long way to go to satisfy its side of the bargain that it struck with national and state governments back in 2002”. The Member called upon the insurance industry to “have a close look at the impact that the tort law reforms have had on its business”, as “premiums have not dropped by as much as they should have”.¹⁹ I have previously questioned whether the only alleviating financial consequence of the reforms has been to reduce the financial exposure of insurance companies.

¹⁹ *Hansard*, 13 March 2007, p 914 per Neil Roberts MP



**A Review of the Civil Liability Act and Tort Reform in Queensland
Opening Plenary Forum Discussion
Queensland Law Society Personal Injuries Conference 2007
Friday 29 June 2007 9:00am**

The questionable impact on insurance premiums aside, the plight of those injured through the fault of another and unable to obtain adequate compensation is deserving of serious attention, and perhaps in particular, our attention as lawyers. As Justice Kirby has commented in another context, lawyers' training "makes them sensitive to injustice. This is why lawyers, more than most, have an obligation to speak up".²⁰ As practitioners we are of course bound to uphold the law, but that does not exclude our articulating a push for reconsideration of legislation when appropriate, and I have previously encouraged concerned practitioners to do so.

I have stated my own position plainly on a number of occasions – there is a need for active reconsideration of whether the reforms have proved justified, or should be rolled back. I understand the Department of Justice and Attorney-General has been conducting a review of the *Civil Liability Regulation* and in particular the injury scale values. I am pleased that our Attorney, even as a backbencher, has been concerned with, as he said, "enabling fairer access to justice to those who are amongst the most disadvantaged in our society – that is, injured Queenslanders".²¹ In February this year, the Attorney indicated a willingness to reconsider the legislative changes, and stated that "there's a basic right of a human being to seek damages for a wrong done to them, and the laws did away with that in a lot of cases, especially the smaller claims".²² In response, the Premier said that the government was willing to check whether the reforms were still working, particularly in the context of insurance premiums, but warned that lawyers should not expect the laws to be significantly relaxed, and "ambulance chasers shouldn't get too excited".²³

An increase in personal injury claims is of course in some lawyers' financial best interests, and as a result, lawyers' claims of altruism will often fall on deaf ears. For my own part, I can say that courts don't really need the business. In adjudicating upon negligence

²⁰ Kirby, Justice Michael (23 November 2005) "The Commonwealth Star of Liberty" (address to the College of Law Spring Graduation Ceremony), p 10

²¹ *Hansard*, 7 June 2005, p 1821

²² Quoted in Odgers, Rosemary "Compo Law Overhaul" *Courier Mail* (19 February 2007), p3

²³ Quoted in Odgers, Rosemary "Insurance scrutiny – Beattie agrees to probe premiums but warns off 'ambulance chasers'" *Courier Mail* (20 February 2007) p 12



**A Review of the Civil Liability Act and Tort Reform in Queensland
Opening Plenary Forum Discussion
Queensland Law Society Personal Injuries Conference 2007
Friday 29 June 2007 9:00am**

though, the open court process “satisfies a deep need of society, namely the public exposure of negligent conduct, irrespective of the political importance or economic or social standing of the defendant”.²⁴ When those injured by another’s negligence are denied access to justice, an opportunity to vindicate their rights and proper compensation, it is in all our best interests to push for this to be remedied.

I am encouraged by the Attorney’s stated willingness to consider whether any further reform is needed to personal injuries law, and would welcome further moves in this direction. The law of torts has well and truly emerged into the bright light of the political and legislative process. To adopt the title of this forum, I suggest that the time is well and truly ripe for an active review and reconsideration of certain aspects of the *Civil Liability Act* and tort law reform in Queensland.

But I am also clear about this: that will not happen unless those influentially involved in the field – like you and I – maintain the impetus, and do not flag because of a perception little immediate progress is being made.

In Queensland, we have not been shy to stand apart from the rest of the Federation on issues strongly felt, and maybe, one day soon, this will be seen to be such an issue. It is, after all, about ensuring basic justice for ordinary citizens, and no amount of high-sounding analysis of corporate financial fortunes or misfortunes should ever be allowed to obscure that reality.

²⁴ Ipp, Justice David “The Politics, Purpose and Reform of the Law of Negligence” (17 May 2007), paper delivered to conference of Australian Insurance Law Association, p 3