Negligence and insurance premiums

Recent changes in Australian law

The following is the Spencer Mason Trust Lecture, delivered by the Hon JJ Spigelman AC, Chief Justice of New South Wales, in Auckland on 27 May 2003.

My invitation to deliver the Spencer Mason Trust Lecture was accompanied by a request that I develop aspects of an address I gave just over a year ago entitled 'Negligence: The last outpost of the welfare state'[1]. The basic thrust of that address was the recognition that the law of negligence in Australia, in its practical application, had become unsustainable. The subtitle was intended to suggest that, notwithstanding the fact that the system required proof of fault, the practical operation of the system appeared to find fault quite readily, perhaps too readily.

The judiciary cannot be indifferent to the economic consequence s of its decisions.

Other than in specific fields, for example, traffic accidents in Victoria, Australia never developed a no-fault system of accident compensation for personal injury of the character which has existed in New Zealand in an evolving form since the original Woodhouse Report of 1967 was adopted. The trade-off between universal compensation at some level and generous compensation for only some, has been resolved differently in Australia.

In my address last year I noted that, about two decades ago, there commenced a series of ad-hoc statutory interventions with the operation of tort law both in terms of liability and damages designed to limit the amount being paid out. Although these changes never displayed the degree of coherence that the distinctive New Zealand system does display, the necessity for frequent legislative intervention is not entirely dissimilar to what I understand has had to occur by amendment of New Zealand's scheme from its original form culminating in the *Accident Compensation Act 1982*, and thereafter further amendments culminating in the *Injury Prevention, Rehabilitation & Compensation Act 2001*.

Much of this, albeit by way of critical reaction, is a tribute to the ingenuity of the legal profession. This process has not yet seen its course in either of our countries.

When assessing the efficacy of statutory reform, I am reminded of the attempt by the City of New York to control its burgeoning litigation bill by adopting a law to the effect that the city could not be sued for a defect in a road or sidewalk unless it had had fifteen days notice of the specific defect. The plaintiff lawyers, or, as they call themselves, trial lawyers of New York City established the BAPSPC, the Big Apple Pothole and Sidewalk Protection Committee. The function of this committee was to employ persons to continually tour the streets and footpaths of New York to note each and every blemish and, forthwith, to give the City of New York precise details of each defect. Regular reports cataloguing the notices which had been given to the city were available for sale to trial lawyers[2].

At any one time the total cost of curing the defects of which the city had been given notice was several billion dollars. Needless to say the city has never successfully defended a case under the fifteen days notice law. I am confident that Australian and New Zealand lawyers lose little by way of invidious comparison with their American cousins on the scale of creativity.

Pressure on insurance premiums

In Australia the primary focus of attention with respect to tort law reform has been insurance premiums rather than the cost to the taxpayer. As a matter of substance the distinction between these two sources of revenue for purposes of compensating injured persons is not as strict as may first appear. I have expressed this on one occasion, if I maybe permitted the sin of self-quotation, in the following way:

The Big Rocking Horse of Gumeracha is closed due to the high cost of insurance premiums. *Photo: Darren Seiler / News Image Archive*

> The judiciary cannot be indifferent to the economic consequences of its decisions. Insurance premiums for liability policies are, in substance, a form of taxation (sometimes compulsory but ubiquitous even when voluntary) imposed by the judiciary as an arm of the state. For many decades, there has been a seemingly inexorable increase in that form of taxation by a series of judicial decisions, on substantive and procedural law.[3]

There is a further reason why the private/public distinction has become blurred. Even though no overriding system of the character administered by the Accident Compensation Corporation exists in Australia, in the major areas of litigation – involving motor vehicle and workplace accidents - some form of governmental underwriting has often emerged, administered by bodies similar to your corporation. Such bodies develop the same defendant's shop mentality as is common among litigators representing insurance

companies, with the peculiar advantage that they have a more direct route to influencing the legislative process.

By reason of the extent to which insurance is effectively underwritten by the taxpayer, there has emerged a new role for the state as 'insurer of last resort'. This role has expanded over recent years in Australia to include government underwriting of most of the obligations of one of our largest insurers HIH, which became insolvent; government guarantees of the major medical insurer when it became clear that it could not meet its obligations, now extending to a government supported national scheme for medical indemnity; guarantees by government after a major reinsurer withdrew from the market for 'insurance' with respect to building defects and insolvency of builders and proposals for government underwriting of risks associated with terrorism.

As I indicated last year, it took many years for the government role as 'lender of last resort' to take the institutional form of the contemporary central bank. The institutional form of the 'reinsurer of last resort' function is still developing, in Australia's case with all the usual contortions of federalism, which provide us with so much legal entertainment.[4]

Insurance companies had come to be regarded as a bottomless pit or even a magic pudding.

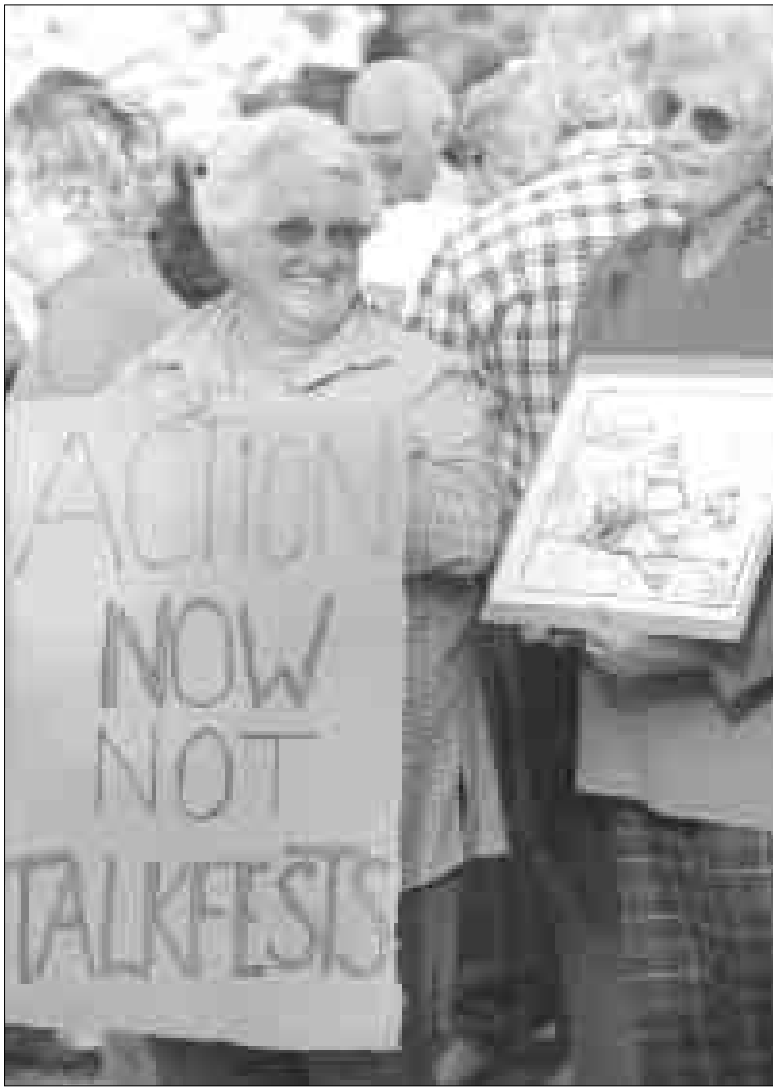
The distinction between private insurance and public taxes, as the source of revenue for compensation payments, is becoming increasingly blurred.

At the time I gave my paper last year there was already a discernible sense of crisis in certain areas of the law of negligence, particularly focused on public liability and the liability of the medical profession. In the months after I delivered my paper that sense of crisis reached something of a fever pitch, in the course of which there were virtually daily reports about the social and economic effects of increased premiums: the abolition of charitable and social events, ranging from dances to fetes to surfing carnivals, even Christmas carols; the closure of children's playgrounds, horse riding schools, adventure tourist sites, even hospitals; the early retirement of medical practitioners and their refusal to perform certain services, particularly obstetrics; the inability of other professionals to obtain cover for certain categories of risk led to similar withdrawal of services, for example, engineers advising on cooling tower maintenance could not get cover for legionnaires disease, building consultants could not get cover for asbestos removal, agricultural consultants could not get cover for advice on salinity; many professionals were reported to have disposed of assets so as to be able to operate without adequate, or even any, insurance.

A sudden explosion in insurance premiums or, in many cases, a refusal by insurance companies to offer cover on any reasonable terms or even at all, caused widespread concern. Many of the changes over the previous two decades had been explicitly determined by a desire to reduce insurance premiums.[5] Insurance companies had come to be regarded as a bottomless pit or even a magic pudding. The political will to limit the amounts required to be paid by way of premiums was reinforced by the direct calls on the public purse that had become institutionalised or implicit.

I am quite satisfied that the underlying cause was the practical application of the fault based tort system in the context of adversary litigation. This had produced outcomes which the community was no longer prepared to bear. What brought the issue to a head, however, were developments in the insurance industry.

There is a cyclical element to the insurance business, as there is in any industry. By 2002, what had for many years been



Public liability insurance protests by tourist operators in Mansfield demanding action on public liability insurance premiums. *Photo: News Image Archive*

a buyers' market in insurance had become a sellers' market. At an international level there had been a series of natural disasters which had drawn down the capital of insurance companies, particularly that of reinsurers. The events of 11 September 2001 in New York exacerbated this process. This coincided with the end of the share market boom which further reduced the capital available to insurance companies. Quite quickly, demand exceeded supply in the global reinsurance market. This was immediately reflected in premiums and in decisions as to what kinds of businesses to write and where.

In Australia this development was accentuated by problems of our own making. One of the biggest general insurers, HIH,

particularly active in the professional negligence and public liability market, collapsed. It appears that one reason for the collapse was that HIH had been aggressively underpricing in a number of areas of insurance in order to increase market share. In a sense, the increased insurance premiums that should have emerged gradually over the course of a decade or so, came all at once when this particular insurer was removed from the market.

Acute pressures emerged in the professional indemnity insurance market as international insurers withdrew from, and others refused to enter, a market perceived by some as especially unfriendly towards insurance companies. These perceptions were affected by the breadth of liability arising from a literalist interpretation of the *Trade Practices Act 1974* (Cth). They were also affected by a similar approach to interpreting sec 54 of the *Insurance Contracts Act 1984* (Cth) which has rendered the restrictions inherent in a claims made and notified policy virtually irrelevant.[6] This is the traditional kind of policy offered to cover professional indemnity and they had become difficult to price or to make decisions about provisions.

The choice was often quite stark. In an obstetrics case, for example, litigation was always between an injured child and a bucket of money. It is no surprise to know that the bucket rarely won. Under its no-fault scheme, New Zealand has avoided the worst of this.

In the particular case of medical insurance, the old system of a mutual operation, in which reserves were determined on the basis that there was no contractual obligation to provide cover, notwithstanding the universal expectation that that would occur, was finally accepted to be inadequate. As a result Australia's largest medical indemnity insurer – covering some 50 per cent of Australian practitioners - was faced with insolvency and has been saved by the financial support of the Commonwealth Government. The government further assumed certain unfunded liabilities of all the medical insurers, to be recouped by a levy; it has assumed liability for 100 per cent of a claim above a certain amount – the blue sky factor; it has ensured the availability of run off cover for retired doctors – the long tail factor; the government will also subsidise premiums in certain fields of practice where the damages are large and the doctors never seem to win, like obstetrics.

These problems have been building up over decades. However, 2002 was the year in which quite a number of chickens came home to roost.

In judicial decisions over the course of three or four decades, there had been a discernible process of what Professor Atiyah described as 'stretching the law'[7]. There was, on occasions, an equally significant process which can be described as 'stretching the facts', a process not confined to jury decision-making.

The approach of some members of that generation of judges which came to maturity during the years of triumph of the welfare state was influenced, notwithstanding protestations to the contrary, by the assumption, almost always correct, that a defendant was insured. Many judges may have proven much more reluctant to make findings of negligence if they knew that the consequence was likely to be to bankrupt the defendant and deprive him or her of the family home. The ubiquity of insurance was a factor that, step by step over the course of decades, led to a progressive increase of the burden on those who had to pay insurance premiums. The choice was often quite stark. In an obstetrics case, for example, litigation was always between an injured child and a bucket of money. It is no surprise to know that the bucket rarely won. Under its no-fault scheme, New Zealand has avoided the worst of this.

In Australia the reaction began about two decades ago. For over a century judges had been universally regarded as conservative and mean and too defendant-oriented. This lead parliaments to expand liability, for example Lord Campbells' Act, the abolition of the doctrine of common employment, the abolition of the immunity of the crown, the creation of workers' compensation and compulsory third party motor vehicle schemes, provision for apportionment in the case of contributory negligence.

As more fully set out in my paper last year, from about 1980 legislative intervention in Australia reversed its character and proceeded on the basis that the judiciary was too plaintiff oriented. A generational change in the judiciary coincided with a change in the opposite direction in the social philosophy of the broader polity, which came to re-emphasise persons taking personal responsibility for their actions. There may be an iron law which dooms judges to always be a decade or two behind the times.

In almost all states of Australia, in different ways and at different times, new regimes were put in place, particularly for the high volume areas of litigation involving motor vehicle and industrial accidents. By 2001, New South Wales had also developed a special regime for medical negligence cases. Notwithstanding the new restrictions imposed from time to time, including in 2001 with respect to workers' compensation, the perceived crisis of 2002 has now led to further legislative intervention affecting virtually every aspect of the law of negligence.

The Ipp Report

In collaboration the Commonwealth and the states appointed a group to review the law of negligence. The panel was chaired by the Honourable Justice David Ipp, formerly a judge of the Supreme Court of Western Australia and now a judge and judge of appeal of the Supreme Court of New South Wales. His Honour's panel proposed a range of changes in its two reports. Ministers of the Commonwealth and of the states agreed to implement the recommendations and the process of doing so is well advanced. There was an express commitment to proceeding on a nationally uniform, or at least nationally consistent, basis. At the time of this lecture, that is not yet apparent.

It was evident even before this process got underway that the attitude of the courts had changed. A series of cases in the High Court of Australia in which, if the prior tendency to 'stretch the law', to use Professor Atiyah's phrase, had continued in existence, the plaintiffs would have won, resulted in verdicts for the defendant.[8] The trend was clear. However, the parliaments of Australia have taken the view that this process of

change did not meet the exigencies of the crisis that had arisen or, at least, was perceived to exist. Altering decades of judicial attitude is akin to turning an oil tanker. The political exigencies did not permit a measured approach.

Most of the changes that have been implemented in Australia by legislation and by the drift of judicial decision-making are not of significance for a New Zealand audience. Indeed the principal thrust of the change is directed at the limitation of circumstances in which damages can be recovered for personal injury and the quantum of damages that can be so recovered. The kinds of changes that have been introduced in this regard include the following:

- establishment of thresholds of a percentage of permanent impairment before a person may sue at all;
- establishment of an indexed maximum for the recovery of economic loss;
- establishment of a threshold and maximum for recovery of non-economic loss;
- restrictions on the recovery of damages for gratuitous services;
- fixing and in all cases reducing the rate of interest that can be awarded; and
- fixing and increasing the discount rate established by the courts for the determination of the present value of future loss.

I cannot see that 'reasonableness' has anything to do with a test that only excludes that which is 'far-fetched or fanciful'. The test appears to be one of 'conceivable foreseeability' rather than 'reasonable foreseeability.'

Furthermore, the Ipp Panel recommended legislation to abolish liability for failure to warn of an obvious risk. It recommended that a provider of recreational services should not be liable for injuries suffered by a voluntary participant in a recreational activity as a result of the materialisation of an obvious risk. It also recommended that the law as to voluntary assumption of risk should be changed so as to make it easier for that defence to succeed. There were also recommendations for limiting the liability of volunteers, of a good Samaritan, for restricting liability of persons who act in self-defence to criminal conduct and provision that an apology cannot constitute any kind of admission.

These recommendations reflect the fact that the terms of reference of the Ipp Panel were directed to personal injury. Nevertheless, as will appear, many of its recommendations were taken up and applied more broadly.

In this address I propose to focus on some only of the changes made to the law and practice in Australia. I have selected those which appear to have some relevance to the New Zealand situation, bearing in mind your comprehensive regime for dealing with personal injury.

Reasonable foreseeability

The language of reasonable foreseeability remains at the heart of the law of negligence. It is applicable in New Zealand outside the field of personal injury. Over the decades it is cases of personal injury that have attracted the sympathy of judges in such a way as to distort this principle.

In the paper I delivered last year I identified the commencement of the process of 'stretching the law' in this regard in the reasons of Lord Reid for the Privy Council in the *Wagon Mound [No 2]*.[9] The test of foreseeability there propounded has been applied in Australian law, both at the level of duty and of breach, in a formulation identified in the language of the High Court in *Wyong Shire Council v Shirt*[10] to the effect that a risk of injury is foreseeable, unless it can be described as 'far-fetched or fanciful'. I remain of the view I expressed last year that I cannot see that 'reasonableness' has anything to do with a test that only excludes that which is 'far-fetched or fanciful'. The test appears to be one of 'conceivable foreseeability' rather than 'reasonable foreseeability.'[11]

The application of this test had had the effect, accurately described by Justice Fitzgerald, when he was a judge of the New South Wales Court of Appeal, of: 'impermissibly expanding the content of the duty of care from a duty to take reasonable care to a duty to avoid any risk by all reasonably affordable means.'[12]

McHugh J expressed similar sentiments when he said late last year:

> Many of the problems that now beset negligence law and extend the liability of defendants to unreal levels stem from weakening the test of reasonable foreseeability. But courts have exacerbated the impact of this weakening of the foreseeability standard by treating foreseeability and preventability as independent elements. Courts tend to ask whether the risk of damage was reasonable foreseeable and, if so, whether it was reasonably preventable. Breaking breach of duty into elements that are independent of each other has expanded the reach of negligence law.[13]

His Honour went on to outline principles of negligence law which, if they had represented the majority of the High Court, may have averted the need for any legislative intervention at all. However, by the time this judgment was delivered, in September 2002, the process of legislative intervention was already well underway.

The Ipp Panel had an express term of reference to consider the issue of foreseeability of harm and the standard of care, albeit limited to cases of personal injury or death. The panel's report was critical of the 'far-fetched and fanciful' approach. My own preference had been to simply overrule the restriction inherent in the 'far-fetched and fanciful' test and allow the common law to reformulate the approach, perhaps by returning to the test of 'practical foreseeability' adumbrated by Walsh J in *Wagon Mound [No 2]* at first instance.[14] The Ipp Panel considered a number of options and eventually resolved to recommend that the far-fetched and fanciful test be replaced by statutory provision that a risk be 'not insignificant'.

The Ipp Panel also recommended that the legislation explicitly identify a number of factors, which were drawn from the case law, to be taken into account in determining breach: probability of harm arising, the seriousness of the harm, the burden of taking precautions and the social utility of the activity creating a risk. The report emphasised the need to avoid the bias of 20:20 hindsight, so that the burden of taking precautions should not only consider the particular causal mechanism of the case before the court, but also precautions that may be suggested by similar risks.

These changes have been adopted or are proposed in some

states[15] but not yet in others[16]. In the case of the latter a second stage of legislation appears likely.

I do not know whether the mischief of 'stretching the law', to which this particular statutory provision is directed, is present in the practical application of New Zealand tort law. Its principal source in Australia has been cases involving personal injury. The legislative change is not, however, restricted to that area.

Evidence by a patient that he or she would not have given permission for a particular medical procedure to be undertaken is almost impossible to cross-examine about or to verify. In the usual case it never rises above the level of self-serving assertion, with the full benefit of hindsight. Findings of fact in this regard are virtually unchallengeable on appeal.

Causation

Nothing is more calculated to excite a common lawyer, or exasperate the uninitiated, than a discussion on the subject of causation. Brushing aside the arcane speculations of philosophers, common lawyers have become accustomed to stating that the issue of causation is one of 'commonsense'[17]. Perhaps a more candid approach is to openly acknowledge that there is a normative element in deciding causation and what often occurs in practice is to ask whether, in all of the circumstances, the defendant should be made liable for the plaintiff's loss. Although this has been acknowledged in judgments,[18] in some Australian states this approach will now receive statutory approval in some cases.

The Ipp Panel acknowledged the 'commonsense' test applicable in Australian law but, nevertheless, founded its analysis of causation on the proposition that the basic principle was the 'but for' test, that is, 'the harm would not have occurred but for the conduct'.[19]

An issue to which the Ipp Panel directed particular attention was what has been identified as 'evidentiary gaps'.[20] This was a reference to the difficulties of determining causation where injury arises because of the cumulative operation of two or more factors, for example where a worker contracts mesothelioma as a result of successive periods of exposure while working for different employers, and where injury arises from the cumulative operation of two or more factors, for only one of which the defendant is responsible. Attempts to bridge such 'evidentiary gaps' have encompassed a test of whether particular conduct made a 'material contribution' to an injury[21] and if the conduct 'materially increased the risk'.[22]

The Ipp Panel described the issue in terms of when the 'but for' test should be relaxed. It said this raised a normative issue and required a value judgment about the allocation of the cost of injury. It recommended that, whilst the determination of such issues should be left to common law development, the normative character of the process should be made explicit in legislation. It recommended a provision that when deciding whether there was a material contribution or a material increase in risk, a court should consider whether responsibility for the harm should be imposed on the negligent party.[23]

The recommendation of the Ipp Panel in this respect has been adopted in some states.[24]

The legislation identifies two distinct elements in the determination of causation. The first, referred to as 'factual causation', is that 'the negligence was a necessary condition of the occurrence of the harm'. The second, referred to as 'scope of liability', involves a conclusion that it is 'appropriate for the scope of the negligent person's liability to extend to the harm so caused'. The legislation provides[25] that 'in an exceptional case' i.e. one in which there is an evidentiary gap and a factual 'necessary condition of the occurrence of harm' cannot be established, the court is obliged to consider 'whether or not and why responsibility for the harm should be imposed on the negligent party'.

One can anticipate a considerable body of litigation about the scope, meaning and application of this provision. These proposals arose from difficulties apparent from personal injury litigation. The provisions are not so limited. Their application to cases of property damage and pure economic loss may surprise us.

The panel noted that another means of resolving the problem of evidentiary gaps was the suggestion that the onus of proof on the issue of causation could shift from the plaintiff to the defendant, merely on proof of a duty to take reasonable care to avoid the risk and a failure to take the required care.[26] In order to overcome this suggestion, the Ipp Panel recommended an express new provision stating that the plaintiff always bears the onus of proving on the balance of probabilities *any* fact relevant to the issue of causation. This has been adopted in some states.[27]

Another matter that the Ipp Panel reviewed was the situation where an issue has arisen as to what a plaintiff would have done if a defendant had not been negligent. This is of considerable practical significance in view of the number of cases that turn on a failure to warn, notably affecting medical practitioners who have actually done nothing wrong as clinicians, but failed to warn their patient about certain remote risks.[28]

Evidence by a patient that he or she would not have given permission for a particular medical procedure to be undertaken is almost impossible to cross-examine about or to verify. In the usual case it never rises above the level of self-serving assertion, with the full benefit of hindsight. Findings of fact in this regard are virtually unchallengeable on appeal.

Causation turns on what would have happened in the individual case and the Ipp Panel accepted that the appropriate test of causation is a subjective one. The panel rejected an objective test, *inter alia*, on the basis that such a test would answer the question 'what should have happened', not the causal question 'what would have happened'. It also rejected what it identified as a Canadian test which asks objectively what a reasonable person would have done, but stipulates that such a person must be placed in the plaintiff's position and with the plaintiff's beliefs and fears. As the panel noted: 'A problem with this approach is that it may require an answer to the nonsensical question of what a reasonable person with unreasonable views would have done.'[29]

The Ipp Panel recommended that in view of the difficulty of

counteracting hindsight bias and the virtually appeal proof nature of the finding, whilst the subjective test should remain the rule in Australia, a statement by a plaintiff as to what he or she would have done should be made inadmissible. That has been enacted in some states.[30]

As litigation of this character is often national in an integrated national economy, the differences amongst the recent state Acts may become an additional burden in the litigation process. The identification of precisely where a national corporation committed certain acts is not something that is worth the time and expense that may well be required.

Professional negligence

One matter of longstanding concern, particularly in cases involving medical negligence, has been the preparedness of some judges and juries to find negligence in defiance of the balance of professional opinion, by favouring minority opinions and even 'junk science'. The English *Bolam* test[31] which, in substance, meant that it was not open to a court to find a standard medical practice to be negligent, was applied in some Australian courts until the High Court determined in 1992 that it would not apply[32] New Zealand case law had developed in the same general direction so that evidence of professional practice was admissible and helpful to indicate whether there had been a breach of a duty of care but it was not decisive.[33] Eventually the House of Lords also accepted that the *Bolam* test was not conclusive on the issue of breach.[34] There appears to be a certain degree of convergence in the approach to this matter amongst common law countries, but the English have not moved as far from *Bolam* as Australia, or at least, not yet.

In 2001, when the New South Wales Parliament passed special legislation changing the principles and practices with respect to medical negligence, the introduction of a version of the *Bolam* test was considered but, in the event, not adopted.[35] By 2002 the sense of crisis, particularly with respect to the liability of medical practitioners, accentuated as it was by the near collapse of the major medical insurer, had changed the environment. The way that some of the parliaments have responded to this issue has, however, extended beyond the medical negligence field and, accordingly, applies to cases not involving personal injury. This was a response to the across the board explosion in premiums for professional liability policies and the exclusion of many risks from cover.

The Ipp Panel directed its attention to the position of medical negligence and posed the question in terms of whether, and if so when, the courts should defer to a substantial body of expert opinion. It noted instances in which a strongly held and reasonable, albeit minority, body of opinion had subsequently been shown to lead to unacceptable consequences[36]. The panel recommended a modified version of the *Bolam* test to the effect that the standard of care in medical negligence cases should be that treatment is not negligent if it was provided in accordance with an opinion widely held amongst a significant number of respected practitioners. This would be subject to an ultimate ability of the court to intervene if it believed that even such an opinion was 'irrational'. During the course of the debate the example most frequently referred to was the use of electro-convulsive therapy on a systematic basis in a Sydney psychiatric hospital which led to considerable controversy a decade plus ago.

The Ipp Panel considered the possibility of extending the new principle beyond medical practitioners to all professionals or even to all professions and trades. It accepted that this was a political decision and raised the possibility that legislation would apply only to medical practitioners, leaving it open to the courts to extend the approach to other professions.[37]

Some states have enacted, or proposed[38] the substance of the recommendations although in different terms. Other states have not, or have not yet, done so[39]. Although the differences amongst the enactments do not appear major, they may lead to different results. In each state, however, the new test extends to *all* professions, not just medical practitioners.

Notably, no Act defines a 'profession'. The quest for 'professional' status has been a matter of great concern for many occupations, not traditionally regarded as 'professions'. This will now become a matter which requires determination by the courts in the full range of cases in which 'professional' status has been asserted, such as chiropractors, psychologists, teachers, journalists. Perhaps just as likely is a challenge to whether the clergy, that has historically had professional status, can continue to make the claim to such status.

The New South Wales formulation is that a professional does not incur liability, if it is established that he or she acted in a manner that was widely accepted in Australia by peer professional opinion as competent professional practice[40]. However, such peer professional opinion cannot be relied upon if the court considers it to be irrational. Furthermore, this restriction does not apply to liability in connection with the giving, or failure to give a warning or advice in respect to the risk of death or injury to a person. This last provision has the consequence that the actual decision in the seminal High Court authority, *Rogers v Whitaker* – which involved the failure of medical practitioner to give advice to a person with one good eye of the most unlikely, but nevertheless extant, risk of an operation leading to the loss of sight in that eye – would still be decided in the same way[41].

This is likely to be an area that will require some period of litigation to determine the precise effect of the changes. Unlike the new system of proportionate liability, the operation of which has been suspended, these provisions will forthwith apply to cases of alleged negligence by lawyers, accountants and auditors. The possibility that the standards applicable in this respect will differ from those determined by the courts to apply under the Trade Practices Act and its state replicas, is a further layer of complexity that only a federal system like ours can enjoy. As litigation of this character is often national in an integrated national economy, the differences amongst the recent state Acts may become an additional burden in the litigation process. The identification of precisely where a national corporation committed certain acts is not something that is worth the time and expense that may well be required.

New South Wales and Western Australia have legislation which provide caps on liability with a quid pro quo of regulation of professional standards including a risk management regime. The caps are of limited effect because of the option to sue under the Trade Practices Act. A uniform national approach, with attendant complementary Commonwealth legislation, has recently been agreed but the details are not yet known. The scheme may be extended to medical practitioners for the first time.

Proportionate liability

A change that has been considered over a long period of time is whether or not the traditional common law position of solidary liability should be replaced by some form of proportionate liability. The rule is that a defendant is liable to compensate a plaintiff for the whole of the harm suffered and liability is not decreased by the fact that some other person's tortious conduct also contributed to that harm.

In my view it is by no means clear why one defendant, because it is wealthy or insured, should, in effect, become an insurer against the insolvency or impecuniosity of co-defendants, who have contributed substantially to the pecuniary loss in question.

This matter was considered in 1992 by New Zealand's Law Commission, which recognised that there were arguments in favour of abolishing the rule. The commission was not convinced that it should be abolished, but it was influenced by the fact that others who had considered this change had also rejected it[42]. That was the case in Australia where consideration was given to the same issue at about the same time and no change eventuated[43]. Insofar as the commission was influenced by this parallel development in Australia, as appears to have been the case[44], that position has now changed.

At no stage during the course of the recent debate in Australia did anyone advocate the introduction of proportionate liability for personal injury. When I revived the matter in the context of the checklist of possible reforms I advanced in my paper last year, I limited the possible change to a situation of financial loss[45]. In my view it is by no means clear why one defendant, because it is wealthy or insured, should, in effect, become an insurer against the insolvency or impecuniosity of co-defendants, who have contributed substantially to the pecuniary loss in question.

My understanding of what had happened with respect to the proposals for change in Australia in the mid to late 90s was that they had foundered on opposition from the Commonwealth Treasury which had administrative responsibility for the consumer protection provisions of the *Trade Practices Act 1974* (Cth). There was, and is, no point in introducing proportionate liability for the tort of negligence when almost all such proceedings could result in parallel proceedings under the Trade Practices Act, and the application of that Act throughout the Commonwealth by the uniform fair trading Acts of the states.

The Ipp Panel considered the issue of proportionate liability in the context of its terms of reference, which were limited to personal injury. It recommended that in that context proportionate liability not be introduced[46]. No parliament has sought to do so.

Nevertheless, this issue has been taken up by the parliaments with respect to actions for economic loss and damage to property, whether in contract, tort or otherwise and, particularly, extending to contravention of the Fair Trading Act.

With respect to actions of this character, the Act or Bill in some states[47] provides that the liability of a concurrent wrongdoer is limited to an amount 'reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss'. There are a number of consequential and ancillary provisions to implement the scheme which at this stage differ from state to state[48].

There is one fundamental divergence amongst the schemes enacted or proposed. In Queensland, the Act excludes claims for damages of less than $500,000. That is to say in Queensland, unlike other states, solidary liability will remain the case for property damage or economic loss claims below the $500,000 threshold.

Neither Pt 4 of the *Civil Liability Act 2002* of New South Wales, nor Ch 2 Pt 2 of the Queensland Act have been proclaimed to come into effect. This is because the parallel Commonwealth scheme has not yet been announced. This delay is also affected by the desirability of efforts to achieve national uniformity. In both Western Australia and Victoria the proposals are still at Bill stage.

The Commonwealth and the states have set up a working party to create a more harmonious regime. There is no publicly agreed model at this stage. However, all will strive to reach a situation in which, at least, the fair trading Acts of the respective states remain identical with the Commonwealth Trade Practices Act and with each other. The political will for uniformity in all respects appears strong. There is scope yet for the emergence of the lowest common denominator phenomenon, so commonly triumphant in federal systems. It appears likely that there will be a common regime although specific variations could be accommodated such as the Queensland $500,000 threshold.

When Australia promulgates a coherent scheme in this regard, it will have a dramatic effect on certain kinds of litigation. The search for deep pockets, often in the form of a professional who is insured - a legal practitioner, accountant, auditor or valuer - will become much less of a determinant of litigation, particularly with respect to economic loss arising from corporate insolvency. A number of cottage industries – amongst liquidators, litigation financiers, expert witnesses - will be threatened by this change.

The courts will have to deal with a new kind of decision-making process similar to, but not the same as, an apportionment exercise between co-defendants. The determination of who is responsible, and in what proportions, for an ultimate loss in a case of insolvency between, for example, directors on the one hand and auditors or advising lawyers on the other hand, will give rise to some very difficult and complex factual issues. The issue will have to

be determined even if some of the persons whose conduct contributed to the loss are not parties to the proceedings.

Litigation of this character will be transformed. The risks to plaintiffs and, increasingly in Australia, to their independent financiers taking advantage of the abolition of the doctrines of maintenance and champerty, will be considerably increased. I anticipate that many such proceedings will no longer be pursued when, on an objective analysis, it appears that outsiders, whether accountants or lawyers, have little real responsibility for the demise of the corporation, in comparison with the responsibility of insiders. Nevertheless, for those proceedings that are worth pursuing even for a proportion of the ultimate loss, one can expect that the cases, historically lengthy, will be even longer than they have traditionally been because of the new issues that must be determined, that is, the identification of the appropriate proportion to be borne by the defendants who are able sued.

Mental trauma

It is difficult to justify at an intellectual level a different treatment for psychiatric injury from personal bodily injury.

Another area in which legislation has intervened is that of liability for mental trauma. As I understand the position in New Zealand under the *Accident Compensation Act 1982*, recovery was permitted for cases of mental injury unaccompanied by physical injury[49]. However, as compensation for pure mental harm had become a burden on the scheme, the reforms of 1998, continued in 2001, excluded mental injury not consequent upon physical injury or from a criminal offence of a sexual character.

Questions arise as to the identification of circumstances in which compensation under the Act is denied, because mental illness was not consequent upon the physical injury but the mental harm is still found to arise *indirectly* out of a personal injury and, therefore, is within the statutory bar now found in sec 317 of the Act[50]. However, a case of pure mental harm is not caught by the bar and, accordingly, the common law will apply[51]. It has been held that the bar does not apply if mental trauma is suffered by a person who observes or, presumably, subsequently hears of, personal injury to another[52].

There are, therefore, as I understand the position, circumstances in which damages for mental trauma can be pursued at common law. Accordingly, the Australian position in this regard is potentially relevant to New Zealand.

It is difficult to justify at an intellectual level a different treatment for psychiatric injury from personal bodily injury. However, as Fullagar J once warned us, we should resist 'the temptation, which is so apt to assail us, to import a meretricious symmetry into the law'[53].

The courts have consciously adopted, from time to time, control devices to prevent the floodgates opening in this respect. One such device was the rule that recovery for pure mental trauma could only occur if a plaintiff had directly observed events which caused the trauma. So a parent who had only heard about an injury to a child could not recover. This led in England to the case law distinguishing between primary and secondary victims. Another control element that had been adopted was to confine recovery to situations that could be described as 'nervous shock', i.e. where there had been a sudden assault on the senses. Both these restrictions were swept aside by the High Court of Australia late last year in *Tame v New South Wales*[54]. However, the court affirmed one aspect of the prior position that recovery at common law was not available for any form of mental distress, but is restricted to a recognised psychiatric condition.

Another issue raised in the judgments in the High Court was the test of normal fortitude, that is, is recovery for this kind of injury limited to situations in which a person of a normal fortitude would be liable to suffer mental trauma? This matter was not so clearly determined.

The two factual situations before the High Court were as follows:

In one case, a woman suffered an acute mental disturbance upon realising that a traffic accident report had referred to her as the person who was under the influence of alcohol, rather than the other driver. In the other case a father had suffered a psychiatric disturbance after being informed by the defendant of his son's death, which had occurred in circumstances of a failure by the defendant employer to properly supervise the young man notwithstanding express prior assurances to his parents.

Of the two cases it was quite clear that the woman who had been wrongly identified as under the influence was not a person of normal fortitude (and she lost). However, the parent's reaction to hearing of the death of a son was the kind of reaction that one could expect from a person of normal fortitude (and the parent won).

The person of normal fortitude test was apparent in prior case law[55]. The English position was that normal fortitude was still required for what they had come to call 'secondary victims', but not for 'primary victims'.

In *Tame; Annetts* the High Court discussion of the person of normal fortitude test was expressed in different ways[56]. There was scope for further refinement at common law in these differences. That will continue to be the case in New Zealand.

The Ipp Panel concluded that the judgment in *Tame v New South Wales*:

> establishes … that a duty of care to avoid mental harm will be owed to the plaintiff only if it was foreseeable that a person of 'normal fortitude' might suffer mental harm in the circumstances of the case if care was not taken. This test does not require the plaintiff to be a person of normal fortitude in order to be owed a duty of care. It only requires it to be foreseeable that a person of normal fortitude in the plaintiff's position might suffer mental harm. In this sense, being a person of normal fortitude is not a precondition of being owed a duty of care.[57]

The Ipp Panel recommended that the majority opinion which it detected in the judgments should be enshrined in statute. In some states, but not elsewhere[58], this recommendation has been accepted. The possibility of further development at common law will now be set aside by the application of a statutory formula which categorically states that no duty is owed to a person, unless the defendant ought to have foreseen that a person of normal fortitude might suffer a

recognised psychiatric illness. This is to be determined in accordance with 'the circumstances of the case', which circumstances expressly include reference to sudden shock, direct perception of death or injury and the nature of the relationship between the plaintiff and any person killed or injured or between the plaintiff and the defendant.

In New South Wales and South Australia, the legislature has gone beyond the Ipp recommendations by restricting recovery for pure mental harm to persons who directly witnessed a person being killed or injured or put in peril or were a close family member of the victim[59].

Brodie v Singleton Shire Council identified an ability on the part of the highway authority to excuse its failure to remedy the defect on the basis of limitations of its resources and the identification of other priorities.
Photo: Peter Barnes / News Image Library

The Ipp Panel recommended that claims for consequential mental harm – harm associated with physical harm – should be subject to the same constraints as attach to claims for pure mental harm. There are many cases in which physical impairment is minor but has led to substantial continuing effects which are mental rather than physical. This has been enacted[60].

Liability of public authorities

In 2002, the Australian debate extended to the liability of public authorities. One of the terms of reference of the Ipp Panel was to 'address the principles applied in negligence to limit the liability of public authorities'. The panel identified two types of cases as having given rise to concern. The first is where an authority is alleged to have failed to take care of a place over which it has some level of control, such as highways and national parks. Concern about the frequency of litigation of this character has been particularly acute at the level of local government.

The issue came to a head in the decision of the High Court in *Brodie v Singleton Shire Council*[61] in which the court abolished the rule that a highway authority was not liable for non-feasance. The majority judgments in that case, however, identified an ability on the part of the highway authority to excuse its failure to remedy the defect on the basis of limitations of its resources and the identification of other priorities. This has given rise to a substantial amount of disputation about the resources and priority decision-making processes of particular local authorities[62]. Liability with respect to such matters is likely only to arise in the context of personal injury.

The second kind of case identified by the Ipp Panel is not so limited. It is directed to liability of public authorities in contexts in which the relevant decision-making process involves political, economic, social or environmental considerations. Australian case law has not always allowed such factors to justify a failure to remove a risk.

The Ipp Panel considered whether or not a 'policy defence' should be available to all public authorities[63]. It identified a category of cases in which the interests of individuals after materialisation of a risk had to be balanced against a wider public interest, including the taking into account of competing demands on resources of the public authority. These kinds of 'public functions', which the panel said should not be defined and, therefore, be allowed to develop at common law, should be excluded from liability. The panel's recommendation was that in a claim for damages arising from the negligent performance or non-performance of a public function, a finding of negligence cannot be supported where there was a 'policy decision' involved. This was identified as a 'decision based substantially on financial, economic, political, social factors or constraints'. In such a case liability should only arise if the decision was so unreasonable that no reasonable public decision-maker would have made it, that is, a *Wednesbury* unreasonableness test.

The Ipp Panel's recommendations were confined, in accordance with its terms of reference, to personal injury matters. The relevant legislative changes are not so confined. Some states have pursued the Ipp recommendation for a policy defence. There are, however, significant differences from the panel's recommendations[64]. In New South Wales the defence is stated in terms of principles for determining whether a duty exists or breach has occurred. These principles include the proposition that performance may be limited by financial and other resources that are reasonably available to the authority, that the general allocation of those resources by an authority is not open to challenge, and that the conduct of the authority is to be assessed by reference to the full range of its functions.

Furthermore, an authority may rely on evidence of compliance with its general procedures and applicable standards, as evidence of the proper exercise of its functions[65].

In the case of alleged breach of statutory duty, that is, not alleged negligence, some Acts provide that any act or omission of the authority does not constitute such a breach unless the act or omission was so unreasonable that no authority could properly have considered the act or omission to be a reasonable exercise of its function. This is the adoption of the *Wednesbury* unreasonableness test for breach of statutory duty[66].

The New South Wales Act alone provides that a public authority is not liable for a failure to exercise a function to prohibit or regulate an activity if the authority could not have been required to exercise that function in mandamus proceedings instituted by the claimant[67]. This may well come to test the limits of proceedings by way of mandamus.

The cumulative effect of these changes is likely to be substantial. This is a matter on which pleas for national uniformity are likely to appear less compelling.

Exemplary damages

Notwithstanding the restrictions on common law actions in New Zealand, proceedings for exemplary damages are permitted. The New Zealand jurisprudence on this subject has developed over a period, culminating in the decision of the Privy Council in *A v Bottrill*[68]. To some degree, one suspects, this case law may reflect an attempt to redress perceived inadequacies in the level of compensation provided under the statutory scheme.

By definition the award of exemplary damages serves social purposes other than compensation. Punishment for egregious conduct will serve as a deterrent and also as a vindication of a plaintiff's rights. By majority, the Privy Council overruled the Court of Appeal which had held that an award of exemplary damages should be limited to the case of intentional wrongdoing or conscious recklessness.

Recent Australian legislation has dealt jointly with exemplary damages and with aggravated damages, which are a form of compensatory damages relating, as they do, to the additional injury suffered by a plaintiff in the form of mental suffering due to the manner in which a defendant behaved. The award of exemplary damages in this context has generated different views over a long period of time[69].

In Australia at various times over the years, states abolished both aggravated and exemplary damages in their respective motor vehicle accident regimes. In mid 2002, prior to the Ipp Panel, Queensland abolished such damages in all cases of personal injury or death and New South Wales in such cases where caused by negligence. The Ipp Panel recommended that that occur elsewhere. Subsequently legislation to that effect has been passed in the Northern Territory[70].

I am unaware that there has been any empirical research with respect to this matter. The issue has been dealt with in a broad brush manner that any form of 'extra' damages was something that should be taken away, in the interests of reducing insurance premiums. Exemplary damages were rarely awarded. I doubt that their abolition has made any practical difference to insurance premiums. The speed with which the changes have been introduced and the focus on controlling premiums did not permit the consideration of the various social purposes, other than compensation, performed by the law of torts.

It may be that these new restrictions will lead to a revival in proceedings, at least in the alternative, for the intentional torts, which have been somewhat sidelined by the tort of negligence for the last half century or so[71].

Conclusion

The process of change in Australian tort law is not complete. In a number of crucial respects the overriding wish that there be national uniformity will require modification of some of the recently enacted provisions. I have concentrated on those changes which impinge to a significant degree on areas other than personal injury. It is by no means yet clear where, in many of these respects, Australian law will come to rest.

One thing is clear, by a combination of a major change in judicial attitudes, led by the High Court, and wide-ranging legislative change, the imperial march of the tort of negligence has been stopped and reversed. New categories of liability, which were a feature of recent decades are now less likely to emerge.

There is one occasion when a court refrained from extending liability in a novel case. This was a claim for damages by a landowner of the costs of protecting and reinvigorating a 'beautiful oak tree' into which an errant motorist had crashed his Chevrolet. This led the Michigan Court of Appeals to be moved to verse, in lament.

The court's judgment as reported was:

> We thought that we would never see
> A suit to compensate a tree.
> A suit whose claim in tort is prest
> Upon a mangled tree's behest;
> A tree whose battered trunk was prest
> Against a Chevy's crumpled crest;
> A tree that faces each new day
> With bark and limb in disarray;
> A tree that may forever bear
> A lasting need for tender care.
> Flora lovers though we three,
> We must uphold the court's decree.
> Affirmed.

This, I emphasise, is the *whole* judgment. The headnote was also in verse. For the doubters amongst you, the reported case reference is *Fisher v Lowe* (1983) 333 NW 2d 67. You may find some consolation in the fact that the reason the oak tree lost was because it was not covered by the Michigan system of no-fault liability.

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1 J J Spigelman, 'Negligence: The last outpost of the welfare state' (2002) 76 ALJ 432.

2 *The New Yorker*, April 21 and 28, 2003, at p101.

3 *Kinzett v McCourt* (1999) 46 NSWLR 32 at [97]; cf at [116].

4 Spigelman, above n 1, 434-435.

5 Spigelman, above at n1, at 440.

6 *Antico v Heath Fielding Australian Pty Ltd* (1997) 188 CLR 652; *FAI General Insurance Co Ltd v Australian Hospital Care Pty Ltd* (2001) 204 CLR 641; *East End Real Estate Pty Ltd v C E Heath Casualty & General Insurance Ltd* (1991) 25 NSWLR 400.

7 Atiyah, *The damages lottery*, Hart Publishing, Oxford, 1997, Chapters 2 and 3.

8 See *Agar v Hyde* (2000) 201 CLR 552; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254; *Rosenberg v Percival* (2001) 205 CLR 434; *Liftronic Pty Ltd v Unver* (2001) 75 ALJR 867; *Sullivan v Moody* (2001) 207 CLR 562; *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460; *Derrick v Cheung* (2001) 181 ALR 301; [2001] HCA 48; *Ghantous v Hawkesbury Shire Council* (2001) 206 CLR 512; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 77 ALJR 183; *New South Wales v Lepore* (2003) 77 ALJR 558.

9 *Overseas Tankship (UK) Limited v Miller Steamship Co Pty Ltd* [1967] 1 AC 617.

10 (1980) 146 CLR 40 at 47.

11 Spigelman, above n 1, at 441.

12 *Rasic v Cruz* [2000] NSWCA 66 at [43].

13 *Tame v New South Wales; Annetts v Australian Stations Pty Limited* (2002) 76 ALJR 1348 at [98].

14 See *Miller Steamship Co v Overseas Tankship (UK)* (1963) 63 SR(NSW) 948 at 958-959. See also Spigelman, above n 1, at 442.

15 *Civil Liability Act 2002* (NSW), Pt 1A Div 2; *Civil Liability Act 2003* (Qld), Ch 2 Pt 1 Div 1; *Law Reform (Ipp Recommendations) Bill* (SA) (introduced 2 April 2003), cll 31, 32; *Civil Liability Amendment Bill* (WA) (introduced 20 March 2003), cl 8 (s 5B).

16 The Australian Capital Territory, Tasmanian and Victorian legislatures have not sought to enact the panel's formulation.

17 See *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506.

18 See, eg, *Barnes v Hay* (1988) 12 NSWLR 337 at 339F-G and 353E-F.

19 Commonwealth of Australia, *Review of the law of negligence: Final report* (September 2002) at [7.26].

20 See, eg, Jane Stapleton, 'Lords a'leaping evidentiary gaps' (2002) 10 TLJ 276.

21 See *Bonnington Castings Ltd v Wardlaw* [1956] AC 613.

22 See *Fairchild v Glenhaven Funeral Services Limited* [2003] 1 AC 32. See also *Bendix Mintex Pty Ltd v Barnes* (1997) 42 NSWLR 307 and Jane Stapleton, above n 20.

23 *Review*, above n 19, at [7.33].

24 *Civil Liability Act 2002* (NSW), Pt 1A, Div 3; *Civil Liability Act 2003* (Qld), Ch 2 Pt 1 Div 2; *Law Reform (Ipp Recommendations) Bill* (SA) (introduced 2 April 2003), cl 34; *Civil Liability Amendment Bill* (WA) (introduced 20 March 2003), cl 8 (Pt 1A Div 3).

25 *Civil Liability Act 2002* (NSW), sec 5D(2); *Civil Liability Act 2003* (Qld), s 11(2); *Law Reform (Ipp Recommendations) Bill* (SA) (introduced 2 April 2003), cl 34(2); *Civil Liability Amendment Bill* (WA) (introduced 20 March 2003), cl 8 (s 5C(2))

26 *Review*, above n 19, at [7.34]. The matter arose from observations in *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at 420-421; *Chappel v Hart* (1998) 195 CLR 232 at [27]; *Naxakis v Western General Hospital* (1999) 197 CLR 269 at [31] and [127]. See also *Bendix Mintex*, above n 22, at 315-316 and *Seltsam Pty Ltd v McGuiness* (2000) 49 NSWLR 262 at 278-280.

27 *Civil Liability Act 2002* (NSW), sec 5E; *Civil Liability Act 2003* (Qld), sec 12; *Law Reform (Ipp Recommendations) Bill* (SA) (introduced 2 April 2003), cl 35; *Civil Liability Amendment Bill* (WA) (introduced 20 March 2003), cl 8 (sec 5D).

28 See, eg, *Chappel v Hart*, above n 26 and *Rogers v Whitaker* (1992) 175 CLR 479.

29 *Review*, above n 19, at [7.39].

30 *Civil Liability Act 2002* (NSW), sec 5D(3); *Civil Liability Act 2003* (Qld), sec 11(3). These provisions add to the recommendation of the Ipp Panel an exception for statements of the plaintiff against his or her own interests.

31 *Bolam v Friern Barnet Hospital Management Committee* [1957] 1 WLR 582.

32 *Rogers v Whitaker*, above n 28.

33 See Todd, *The law of torts in New Zealand* (3rd ed), Brookers, Wellington, 2001 esp at 402-403.

34 *Bolitho v City and Hackney Health Authority* [1998] AC 232.

35 See *Health Care Liability Act 2001* (NSW).

36 *Review*, above n 19, at [3.9]-[3.11].

37 *Review*, above n 19, at [3.30].

38 *Civil Liability Act 2002* (NSW), Pt 1A Div 6; *Civil Liability Act 2003* (Qld), Ch 2 Pt 1 Div 5; *Law Reform (Ipp Recommendations) Bill* (SA) (introduced 2 April 2003), cl 41.

39 The Australian Capital Territory, Victorian, Western Australian and Tasmanian legislatures have not taken steps to implement this aspect of the Ipp Review.

40 *Civil Liability Act 2002* (NSW), sec 5O. In South Australia, the protection from liability extends to professionals who act 'in a manner that…was widely accepted in Australia by members of the same profession as competent professional practice' and in Queensland 'in a way that…was widely accepted by peer professional opinion by a significant number of respected practitioners in the field as competent professional practice.'

41 All three jurisdictions exclude from the application of the 'accepted professional opinion' test, liability claimed in respect of the giving of, or failure to give, a warning, advice or other information as part of a professional service in respect of a risk of personal injury or death. In South Australia, the exclusion is limited to cases involving the provision of a health care service. In Queensland, the recommendations of the Ipp Panel regarding a doctor's duty to warn have been enacted (*Civil Liability Act 2003* (Qld), s 21; see *Review*, above n 19, at [3.35]-[3.70]).

42 See Law Commission of New Zealand, *Apportionment of civil liability*, Preliminary paper No 19, Wellington (1992) and Law Commission of New Zealand *Apportionment of civil liability* Report No 47, Wellington (1998).

43 See Davis, Commonwealth of Australia, *Inquiry into the law of joint and several liability*, Report of stage 2 (1995); NSW Law Reform Commission, *Contribution between persons liable for the same damage*, Discussion paper No 38 (1997); NSW Law Reform Commission, Contribution between persons liable for the same damage, Report No 89 (1999), esp Ch 2. See also Swanton & MacDonald 'Reform to the law of joint and several liability – Introduction of proportionate liability' (1997) 5 TLJ 109.

44 See Todd, *The law of torts in New Zealand* (3rd ed), above n 33, at 1157-1158.

45 Spigelman, above n 1, at 446-447.

46 *Review*, above n 19, Ch 12.

47 *Civil Liability Act 2002* (NSW), Pt 4; *Civil Liability Act 2003* (Qld), Ch 2 Pt 2; *Wrongs and Limitation of Actions Acts (Insurance Reform) Bill* (Vic) (introduced 20 May 2003), cl 3; *Civil Liability Amendment Bill* (WA) (introduced 20 March 2003), cl 9.

48 Those provisions include, in all states adopting proportionate liability, the abolition of claims for contribution between concurrent wrongdoers, the capacity for the plaintiff to claim against concurrent wrongdoers in subsequent actions provided the total recovered does not exceed the actual loss suffered by the plaintiff, provisions for the joinder by the court of concurrent wrongdoers not having been the subject of a previous judgment and the preservation of the operation of vicarious liability and the several liability of partners. In addition, in the Queensland Act, joint and several liability is preserved against a defendant who committed an intentional tort pursuant to a common intention, was the principal of a liable agent, was engaged to provide professional advice which failed to prevent a loss caused by another, committed fraud or engaged in misleading or deceptive conduct in trade or commerce. Of the additional categories in the Queensland Act, Victoria has proposed to include only fraud and principals of agents. Victoria has also expressly preserved the court's power to award exemplary or punitive damages against a defendant in an apportionable proceeding.

49 Todd, *The law of torts in New Zealand* (3rd ed), above n 33, at p73 esp fn 35.

50 See, under the previous scheme, *Brownlie v Good Health Wanganui Ltd* (unreported, NZCA, 10 December 1998).

51 *Queenstown Lakes District Council v Palmer* [1999] 1 NZLR 549; see G McLay 'Nervous shock, tort and accident compensation: tort regained?' (1999) 30 VUWLR 197.

52 Mullany 'Accidents and actions for damage to the mind – Kiwi style' (1999) 115 LQR 596 esp at 597.

53 *Attorney General (NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237 at 285.

54 *Tame v New South Wales; Annetts v Australian Stations Pty Limited*, above n 13.

55 See my consideration of the cases in the court below, *Morgan v Tame* (2000) 49 NSWLR 21 at [14]-[20].

56 Cf Gleeson CJ at [16], Gaudron J at [61], McHugh J at [109] et sec, Gummow & Kirby JJ at [196] et sec, Hayne J at [273] and Callinan J at [366].

57 *Review*, above n 19, at [9.13].

58 *Civil Liability Act 2002* (NSW), sec 32; *Civil Liability Amendment Bill* (WA) (introduced 20 March 2003), cl 8 (sec 5P); *Law Reform (Ipp Recommendations) Bill* (SA) (introduced 2 April 2003), cl 33. Tasmania, Victoria, Queensland and Western Australia have not enacted the recommendations of the panel in this regard.

59 *Civil Liability Act 2002* (NSW), sec 30; *Law Report (Ipp Recommendations) Bill* (SA) (introduced 2 April 2003), cl 54. The South Australian provisions possibly cover a person present at the scene of the accident when it occurred but not actually witnessing the occurrence.

60 *Civil Liability Act 2002* (NSW), secs 32(1), (3) and 33; *Civil Liability Amendment Bill* (WA) (introduced 20 March 2003), cl 8 (secs 5P(1), (3) and 5Q); *Law Reform (Ipp Recommendations) Bill* (SA) (introduced 2 April 2003), cll 33(1), (2)(b) and 54(3)).

61 (2001) 206 CLR 512.

62 This may be attenuated to some degree by a recent decision of the Court of Appeal of New South Wales in which attention was directed to the obligations under the *Local Government Act* upon all councils to incorporate in their Annual Report an outline of the public works required to bring public facilities up to a satisfactory standard and an estimate of the cost of doing so. As all councils in New South Wales have to produce such a report on an annual basis it appears likely that councils will be readily able to establish the defence envisaged by the majority judgment in *Brodie*. See *Roads & Traffic Authority of New South Wales & Ors v Palmer* [2003] NSWCA 58, esp at [159]-[173]. Contrary to the recommendations of the Ipp Panel, three states have reintroduced the non-feasance immunity rule for highway authorities: *Civil Liability Act 2002* (NSW), sec 45; *Civil Liability Act 2003* (Qld), sec 37; *Law Reform (Ipp Recommendations) Bill* (SA) (introduced 2 April 2003), cl 42. In South Australia the immunity will apply only in negligence actions. In New South Wales and Queensland, the immunity does not operate where an authority had actual knowledge of the relevant risk.

63 *Review*, above n 19, at [10.20]-[10.29].

64 *Civil Liability Act 2002* (NSW), secs 41, 42; *Civil Liability Act 2003* (Qld), secs 34, 35; *Civil Liability Amendment Bill* (WA) (introduced 20 March 2003), cl 8 (secs 5R, 5T, 5U). The contents of the Annual Report referred to in note 62 above will be relevant to the new policy defence.

65 The New South Wales, Queensland and Western Australian provisions are closely similar in this regard. All three states have applied the 'principles' to bodies specified in the Act, constituted under other Acts, or identified (in respect of all or specified functions) by regulation. The Western Australian Bill in addition proposes the policy defence with respect to 'public functions' as recommended by the Ipp Panel.

66 *Civil Liability Act 2002* (NSW), sec 43; *Civil Liability Act 2003* (Qld), sec 36. In contrast, the Western Australian Bill adopts the 'compatibility' test recommended by the Ipp Panel, *Wednesbury* unreasonableness being a defence to all claims for damages against a public body or officer: *Civil Liability Amendment Bill* (WA) (introduced 20 March 2003), cl 8 (sec 5V). See Review, above n 19, at [10.34]-[10.45].

67 *Civil Liability Act 2002* (NSW), sec 44.

68 See *A v Bottrill* [2003] 1 AC 449, on appeal from *Bottrill v A* [2001] 3 NZLR 622.

69 See, for example, H Luntz, *Assessment of damages for personal injury and death* (4th ed), Butterworths, Australia, 2002, at [1.7.9]. See also *Review*, above n 19, at [13.163], [13.164].

70 *Review*, above n 19, [13.159]-[13.167]; *Civil Liability Act 2002* (NSW), sec 21; *Personal Injuries Proceedings Act 2002* (Qld), sec 50 (the provision is now at *Civil Liability Act 2003* (Qld), sec 52); *Personal Injuries (Liabilities and Damages) Act 2003* (NT), sec 19. The Queensland provision excepts cases of unlawful conduct with the intention of causing personal injury and cases of unlawful sexual assault or misconduct.

71 See *TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333 at [152]-[169