

Who are the Real 'Heroes' and 'Villains': The Print Media's Role in Constructing the 'Public Liability Crisis' as a 'Moral Panic Drama'

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Abstract

The recent process of tort reform in Australia has been undertaken in an atmosphere of *crisis* and has arguably thus far been reactive, ad hoc and ineffectual. In particular, there has been massive press attention directed towards public liability claims and their outcomes. The print media has discursively constructed the issue of public liability claims and their outcomes as a 'liability crisis', connecting the crisis to escalating and unsustainable insurance premiums that are having major effects on 'the Australian way of life'. This coverage implies that increasingly trivial matters are being litigated, and therefore signals self-interested lawyering and judicial remoteness from public opinion that must be corrected. Further, it is implied that there has been a wider shift away from balanced notions of personal responsibility in

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regard to risk-taking behaviours that must also be corrected; the 'public liability crisis' is constructed as a 'moral crisis'. Detailed examination of the discursive construction of the players in the so-called 'public liability crisis' reveals that litigants, lawyers and judges are constructed as a deviant population; references are made to 'lotto litigants', 'judges playing Santa Claus' and the 'greedy lawyers'. The heroes are the Federal and State governments, who are cracking down on this 'epidemic'. It is such storytelling or narratives within print media discourses about the 'public liability crisis' that are considered in this paper. Cohen's 'moral panic' criteria is applied in order to frame this analysis theoretically.

Introduction

The media appear in any or all of three roles in moral panic dramas: (i) *Setting the agenda* – selecting those deviant or socially problematic events deemed as newsworthy, then using finer filters to select which of these events are candidates for moral panic; (ii) *Transmitting the images* – transmitting the claims of claim-makers, by sharpening up or dumbing down the rhetoric of moral panics; or (iii) *Breaking the silence, making the claim*.¹

Cohen reveals the role of the media in the construction of moral panics. He argues that they appear in all three roles in moral panic dramas: setting the agenda; transmitting the claims of the claim-makers; and, breaking the silence.

In the following paper, I engage directly with Cohen's moral panic criteria, applying it to my analysis of examples of print media articles concerning the so-called 'public liability crisis'.² Therefore, I explore print media representations of

¹ Stanley Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (3rd ed, 2002) xxiii-xxiv.

² Cohen has demonstrated the media's ability to shape public knowledge is especially powerful: Cohen, above n 1.

public liability and its claims as the construction of a new social problem within the framework of Cohen's notion of 'moral panic',³ examining how the print media has portrayed the climate of public liability reform as one of responding to a 'crisis'. In doing so, I demonstrate that the print media constructs lawyers, judges and litigants as society's villains or deviants and the Federal and the New South Wales governments as the heroes of the 'public liability crisis'. Thus, tort law reform is constructed as a moral crusade. This construction of a 'moral crusade' is typically identified in the moral panic literature as a tactic to 'mask down-to-earth political interests'.⁴ Consequently, while the print media plays a significant role in the construction of the 'public liability crisis', I argue that it is essentially a politically produced moral panic. Primacy is given to particular political viewpoints, which fuel this debate.⁵ The Federal Government, for example, has framed its discourse about the supposed public liability crisis as a 'threat to Australian values'. Political discourse about reform, too, is aimed at curbing the emerging pre-disposition to 'litigious' behaviour. The media plays a pivotal role in the way that this politically motivated panic unfolds.⁶

Of course, the prominence of political discourses in print media representations of the so-called 'public liability crisis' is not a profound insight. It is well evidenced that journalists tend to approach particular spokespeople, such as government

³ Cohen, above n 1, xxii.

⁴ Nachman Ben-Yehuda, *The Politics and Morality of Deviance: Moral Panics, Drug Abuse, Deviant Science and Reversed Stigmatisation* (1990) 115.

⁵ In drawing on the work of Goode and Ben-Yehuda (see below n 22), Paterson and Stark differentiate between three models of moral panics: a grassroots model; a middle level model; and, an elite engineered model: B Paterson and C Stark, 'Social Policy and Mental Illness in England in the 1990s: Violence, Moral Panic and Critical Discourse' (2001) 8 *Journal of Psychiatric and Mental Health Nursing* 257.

⁶ Ian Ward, *Politics of the Media* (1995) 261.

and key industry organisations and bodies, because of their 'official' and therefore 'credible' status, placing a 'premium on obtaining reliable and readily accessible information'.⁷ Ward notes:

To remove the uncertainty from, and to expedite news gathering, news organisations assign reporters to regular 'rounds' ... Journalists, that is, are given permanent assignments to routinely monitor particular organisations and agencies which are proven generators of news stories – such as court, government institutions and agencies ... The Press Gallery in Canberra and in the various state parliaments are the best known examples of rounds ...⁸

Ward, for example, explains how the flow of news is typically from the media relaying quotes from the political leaders, government and other officials.⁹ Thus, through an examination of media representations of the 'public liability crisis', I explore the role of the Federal and New South Wales governments in the production of this crisis and the media's contribution to the crisis–amplification. To do so, provides greater insight into the production of the 'public liability crisis' as a new moral panic. It is with this in mind that I now turn to an analysis of print media representations of the so-called 'public liability crisis', applying Cohen's 'moral panic' criteria in order to frame this analysis theoretically. But first, the methodology for this study will be discussed.

Methodology

The study investigated press reports relating to tort litigation in NSW, and how these have shaped reform discourse. The aim of the research was to counteract their disproportionate

⁷ Ibid 114–15.

⁸ Ibid 115.

⁹ Ibid 116.

influence, thereby improving the policy process and its outcomes. Qualitative documentary analysis of print media representations was applied to investigate practical and theoretical questions concerning tort law reform, and uncover key themes regarding representations of the relations between law, risk and personal responsibility.

Despite the apparent influence of the press coverage of tort litigation and the social significance of these issues for notions of citizen responsibility, these accounts have received no detailed analysis in Australia. The influence of the press has, arguably, been disproportionate, and, therefore, also warranted further investigation. The study involved a detailed content analysis of the selected newspapers published by Fairfax (the Australian Financial Review, the Sydney Morning Herald, the Herald Sun, the Illawarra Mercury and the Newcastle Herald) and News Limited (The Australian, the Daily Telegraph and the Sunday Telegraph) between 1998 and 2002.

Qualitative content analysis involves the development of inductive categories, rather than deductive categories, or the testing of hypotheses; one examines the content characteristics and the content elements, 'applying explicit rules for identifying and recording these characteristics'.¹⁰ The content of each article is analysed and categorised into content analytic units.¹¹ The content analytic units are, generally, thematic, conceptual or item groupings. Reliability and validity is achieved through detailing the data analysis process, so that the methods and findings can be replicated.

The initial analysis revealed ongoing media attention directed toward the issue of tort liability claims and their outcomes. A Factiva database keyword search for specific reference to 'tort law', within articles published by the selected

¹⁰ Bruce L Berg, 'Designing Qualitative Research' in *Qualitative Research Methods for the Social Sciences* (5th ed, 2004).

¹¹ Philipp Mayring, 'Qualitative Content Analysis' (2000) 2(1) *Forum: Qualitative Social Research*, available at <http://www.qualitative-research.net/fqs-texte/2-00/2-00mayring-e.pdf>.

newspapers, generated limited data. A subsequent keyword search of print media articles referencing 'public liability' and 'medical negligence' generated ample data for the purpose of the original study. Given the massive amount of data, it was decided that the study would focus on 'public liability' in the first instance.

The total number of articles that mentioned 'public liability', appearing in selected newspapers, was 2245 between January 1998 and December 2002 (see Figure 1).

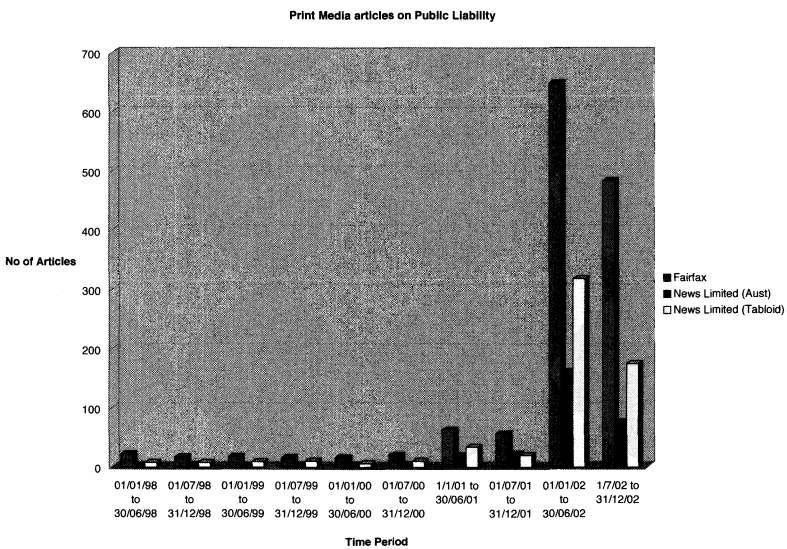


Figure 1. Graph indicating the total number of articles for each year between January 1998 and December 2002 referencing public liability

As evident in Figure 1, there was a high concentration of articles in the period 2001 to 2002; a total of 1852 articles appeared in this period. There was a marked increase in print media articles referring to public liability in 2001 following the HIH Insurance collapse early that year and after the September 11 terrorist attacks in the United States. A spike occurred in 2002 following the increase in public liability premiums, and the increased debate about tort liability reforms at the national and state level proceeded by the development of the New South Wales Civil Liability Bill 2002. The Chief Executive of

Insurance Australia Group was quoted as stating in an article in the *Sydney Morning Herald*: '[t]his is one of the most extraordinary years in the insurance industry that we will probably see in history.'¹²

The first stage in the data analysis process was to examine the 'public liability crisis'. The study turned its attention to the so-called 'crisis' period between January 2001 and December 2002. I set about establishing whether the so-called 'crisis' had changed in composition over time, and whether the articles provided useful information about the effects of the so-called 'crisis'. Themes, as opposed to conceptual clusters (concepts) were the unit of analysis. The text in each article during this period was analysed and coded into thematic groupings, which involved analysing the articles to identify consistent themes (commonly referred to as thematic coding in qualitative research). Coding demonstrated that the articles were not limited to simply portraying the 'crisis'.¹³ There were three consistent themes emerging in both the tabloid and broadsheet coverage of public liability claims and their outcomes (see Figure 2). The first concerned how rising insurance premiums were resulting in the closure of public events (such as local fundraisers) and public amenities (such as local swimming pools). The representation of anxieties was often embedded in a discourse of risk¹⁴ evident in the articles about public liability and the cancellation of events, closure of public amenities, and the effect of rising premiums. There are also quoted references to the public contempt expressed toward those that take risks and then injure themselves and

¹² Anthony Hughes, 'IAG ready to fire after \$25m loss', *Sydney Morning Herald* (Sydney), 21 August 2002, 19.

¹³ Peter Mares, *Reporting Australia's asylum seeker "crisis"* (2002) Australian Policy Online <<http://www.apo.org.au/webboard/items/00048.shtml>> at 22 January 2004.

¹⁴ See Roos Pijpers 'Help! The Poles Are Coming': Narrating a Contemporary Moral Panic' (2006) *Geografiska Annaler, Series B: Human Geography* 91, 92 for similar findings.

seek large amounts of monetary compensation (without taking personal responsibility). A number of sensational stories appear in the tabloid press about compensation cases wherein large monetary amounts were awarded. The second thematic grouping comprised of articles that focused on the debate about the cause of rising public liability premiums. Various reasons were given for the cause of rising public liability premiums, but, more often than not, reasons such as the HIH collapse were situated alongside arguments about a cultural shift toward a more litigious Australian society. The third category related to the justification of tort liability law reforms; these articles were often premised on arguments about the need to curb the growing culture of litigiousness. The latter two categories were often interrelated.

I began to 'build a story', connecting the different categories. At this point in time, content analysis was coupled with discourse analysis to explore the discursive construction of reasons for rising public liability premiums in relation to the justification of tort liability reforms. In conducting this analysis it became evident that within this subset of articles about public liability reform and rising premiums there were three further interrelated themes (see Figure 2). First, the print media connected the 'public liability crisis' to escalating and unsustainable insurance premiums that were having major effects on 'the Australian way of life'. Secondly, this coverage implied that rising premiums were associated with increasingly trivial matters being litigated and, therefore, signalled self-interested lawyering and judicial remoteness from public opinion that must be corrected. Further, it was implied that there had been a wider shift away from balanced notions of personal responsibility in regard to risk-taking behaviour that must also be corrected. Federal and New South Wales governments were clearly contributing to the construction of the so-called 'crisis'. Discourse analysis revealed that the issue of public liability and its claims were being constructed as 'out of control' and, moreover, as a 'moral crisis'. In making connections between these categories and identifying subcategories, it became evident that there

were often disproportionate responses from government and industry representatives, which were depicted as the ‘moral entrepreneurs’. Politicians often referred to the threat to Australian values and the ‘folk devils’ (lotto litigants, greedy lawyers and judges playing Santa Claus) of the ‘public liability crisis’.

Essentially, through immersion in the data and repeated sorting, coding and comparison, it became evident that Stanley Cohen’s moral panic theory provided a meaningful way for describing the theoretical findings within the two interrelated sub-categories of data (see Figure 2). What proceeds is a discourse analysis of print media representation of the public liability crisis, applying moral panic theory.

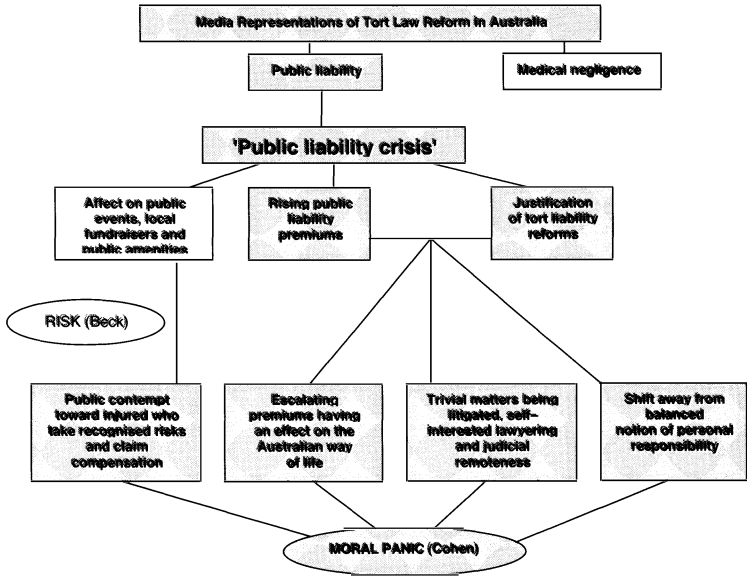


Figure 2. Hierarchical coding and theory development in relation to print media representations of public liability claims and their outcomes in Australia

The ‘Public Liability Crisis’ and Cohen’s Moral Panic Criteria

It was my particular interest in the print media’s exaggeration

of the public liability crisis, compared with and juxtaposed against September 11 and the collapse of HIH Insurance, that lead me first to consider Cohen's 'moral panic' criteria. In his third edition of the classic work *Folk Devils and Moral Panics*, Cohen argues that:

Calling something a 'moral panic' does not imply that this something does not exist or happened at all and that reaction is based on fantasy, hysteria, delusion and illusion or being duped by the powerful. Two related assumptions, though, require attention – that the attribution of the moral panic label means that the 'thing's' extent and significance has been exaggerated (a) in itself (compared with other more reliable, valid and objective sources) and/or (b) compared with other, more serious problems.¹⁵

As demonstrated below, the 'public liability crisis' is often exaggerated beyond escalating premiums. There is, generally, only anecdotal evidence to support the claims made.¹⁶ While evidence exists to support the claims about rising premiums, it is often also claimed that there had been a 'litigation explosion'. It will be concluded later that there is empirical evidence that contests this claim.

Moreover, Cohen's five moral panic criteria are met in relation to the print media's portrayal of the 'public liability crisis'. Cohen describes 'the criteria by which certain media driven narratives are easily recognised as moral panics' as the following:

drama, emergency and crisis; exaggeration; cherished values threatened; an object of concern, anxiety and hostility; evil forces or people to be identified and stopped; the eventual sense of the episodic and transitory, etc.¹⁷

¹⁵ Cohen, above n 1, viii.

¹⁶ Angela Melville and Deirdre Howard, 'Manufacturing the News' (Paper presented at the 21st Annual Australasian Law and Society Conference, 2003).

¹⁷ Cohen, above n 1, xxvii.

Drama, emergency and crisis are consistently part of the print media's portrayal of issues relating to public liability claims and their outcomes (see Figure 3).

Figure 3. Extract from Jacquie Hayes, 'Get ready for the big cover up', *The Australian* (Sydney), 26 January 2002, 55

Last year, rationalisation within the insurance industry, greater frequency and size of claims and our increasing willingness to sue one another were compounded by the terrorist attacks in the US in September.

The collapse of HIH Insurance, once the lead writer of liability business, is said to be largely responsible for pushing up some commercial insurance premiums by as much as 1000 per cent.

Here the author links the issue of changes in the nature of tort liability claims and their outcomes to the September 11 terrorist attacks in the United States and the collapse of HIH Insurance, as well as Australian society's *increasing willingness* to seek compensation. The author not only constructs the drama by making a connection between these significant events and rising insurance premiums, but also constructing a crisis by reference to the rise in 'commercial insurance premiums by as much as 1000 per cent'. The media attention to the 'public liability crisis' continuously surpasses the objective reality of the threat posed to society.¹⁸

It is evidenced throughout this paper that discourses about the 'public liability crisis' centre around a narrative

¹⁸ Pijpers, above n 14, 92.

of who or what is to blame for the crisis, such as 'greedy lawyers', 'judges playing Santa Claus', 'lotto litigants', 'a US-style litigation culture', 'the under-pricing of public liability premiums', 'insurers' poor management', and 'terrorist attacks' (see examples given below). Cohen points out that: '[t]his allocation of blame is intrinsic to moral panics'.¹⁹

The 'public liability crisis' also concerns the threat to society's social and moral order;²⁰ often asserted by politicians who perceive the social and moral order to be endangered. For example, the threat to Australian values is a consistent theme in print media representations of the 'public liability crisis' (see Figure 4).

Figure 4. Extract from 'Culture of blame behind the risk crisis', *The Australian* (Sydney), 4 February 2002, 12

IT'S been a year of turmoil in our insurance markets. The HIH collapse left thousands of Australians with question marks over whether their policies still covered them for the many risks of daily life and business. The terrorist strikes of September 11 made it clear that we all lived in a more dangerous world, producing an immediate crisis in aviation insurance. And amid these two shocks, a more insidious trend – a sharp rise in public liability claims – threatens the Australian way of life. That's the warning from Assistant Treasurer Helen Coonan and there's enough anecdotal evidence to take it seriously ...

A priority for Senator Coonan's proposed forum should be exploring ways of tackling the explosion

¹⁹ Cohen, above n 1, xxvi.

²⁰ Pijpers, above n 14, 92.

of small liability while protecting the right to fair compensation for genuine and serious cases. Yet whatever the impact of the HIH collapse and September 11, the public liability crisis appears to reflect a fundamental change in social attitudes. Just as many Australians are more prepared to get out of their financial problems by declaring themselves bankrupt, so more people are eager to seek financial redress against others for their misfortunes. And the legal profession and their courts seem more than willing to do business with those wanting to put the blame on to others.

Again, the extent and significance of the 'public liability crisis' is exaggerated within the context of September 11 and the collapse of HIH Insurance. Moreover, the author takes this a step further with the headline 'Culture of blame behind the risk crisis'. Here the 'sharp rise in public liability claims – threatens the Australian way of life'. The author quotes the viewpoints of Federal Liberal Senator Helen Coonan to support these claims. In these quotes, Coonan is asserting that the increasingly litigious nature of public liability poses a 'threat to the Australian way of life' and that there has been a fundamental change in social attitudes.

Continuous reference is made to political claims of an emerging 'litigation culture' or 'culture of blame' in Australian society contributing to the 'long-tail' nature of the negligence litigation business.²¹ For example, in an article published in *The Australian* on 29 May 2002, the Prime Minister is quoted

²¹ See *Report of Commonwealth, State and Territory Ministers attending a Ministerial Meeting on Public Liability March 2002*; *Report of the ICA Public Liability Submission to Ministerial Forum in March 2002*; Justice David Ipp, *Review of the Law of Negligence* (2002) 25.

as stating that:

the nation must stop the spread of the 'US-style litigation culture. 'It's not just a question of the Government changing a few laws and life going on as it has before,' ...

The notion of 'legitimate claims', the 'growing trend towards litigation', and the 'culture of blame' become consistent themes in the statements of the Federal Government, New South Wales Government and insurance industry representatives (see also below).

Government discourses construct normative contours and moral boundaries around the issue of public liability claims, arguing litigation is somehow inconsistent with the values of Australian society (see Figure 5).²²

Figure 5. Extract from Morgan Mellish and Mark Skulley, 'Solidarity – But Cap Doesn't Fit', *Australian Financial Review (CITY)*, 31 May 2002, 27

Canberra has pledged to co-operate, with Prime Minister John Howard blaming increasing litigation.

...

"This is an issue which is in part a product of the litigation disease which is rampant in the Australian community," Mr Howard said.

"Just as public liability insurance is in great difficulty because of the litigation diseases, the same applies to medical indemnity."

²² Erich Goode and Nachman Ben-Yehuda, 'Moral Panics: Culture, Politics, and Social Construction' (1994) 20 *Annual Review of Sociology* 149.

Here, as elsewhere, the moral panic 'focuses on the issue of morality and value systems'.²³ As evident in Figure 6, and in the above extracts, the Prime Minister is quoted as stating that a 'litigation disease' is 'rampant in the Australian community', which threatens to disrupt a particular social and moral order. What happens in these stories is that the 'culture of blame' is constructed as threatening established norms, values, and traditional relationships.

The media references ministerial reviews, policy documents and statements that direct the blame for the so-called 'crisis' at the ad hoc application of the law of negligence in the courts, the ease at which personal injury plaintiffs can establish negligence, and the frequently high damages awarded in personal injury claims. For example, the author in the extract in Figure 4 above portrays the so-called 'public liability crisis' as representative of 'a fundamental change in social attitudes'. This is defined as 'more people [being] eager to seek financial redress against others for their misfortunes' and 'the legal profession and their courts [seeming to be] more willing to do business with those wanting to put the blame onto others'. Here we have the creation of folk devils; 'the visible reminders of what we should not be'.²⁴ The 'public liability crisis' is attributed to the moral failure of judges, lawyers and public liability litigants.

Industry and government discourses construct judges, lawyers and claimants, in particular, as the villains of the 'public liability crisis' (see Figures 6, 7, 8 and 9).

²³ Ben-Yehuda, above n 4, 14.

²⁴ Pijpers, above n 14, 92.

Figure 6. Extract from Robert Guy, 'Chief Aims To Insure IAG's Future', *Australian Financial Review* (CITY), 24 June 2002, 47

A lack of willingness to assume responsibility for personal risk is adding extra pressure to the insurance industry, Insurance Australia Group chief executive Michael Hawker has warned.

The head of Australia's largest general insurer said the growing trend towards litigation had undermined the fairness of the system and could lead to legislative solutions which might detract from people's common law rights.

Mr Hawker believed less personal assumption of risk and the need to attribute blame was producing behaviour that was pushing claims costs up. This in turn pushed premiums up, which consequently meant people might not be able to afford insurance.

"A lot of what is happening in public liability today, in my view, is that you have a number of people who are trying to be paid more money than the community is willing to pay," Mr Hawker told the *Australian Financial Review*.

"It is taking away from legitimate claims where people absolutely should be paid."

"The unfortunate thing is that there seems to be a social trend; where 20 years ago, if you walked down the street and you fell over and broke your leg, you would say "I need to go get my leg fixed".

"Today, you say, 'Who am I going to sue to pay for it?'"

Here the Chief Executive of Insurance Australia Group warns that the growing propensity of Australians not to take responsibility for personal risk is putting pressure on the insurance industry, which is putting claim costs up and in turn is pushing premiums up.

Figure 7. Extract from 'Insurers point finger at courts for premium rises', *The Australian* (Sydney), 3 August 2001, 25

Massive payouts by the courts to insurance claimants could be to blame for sharp rises in some premiums rather than the HIH Insurance collapse, the industry's peak body claimed yesterday.

Insurance Council of Australia executive director Alan Mason said the biggest impact on public liability and professional indemnity rates in recent years had been a surge in the cost of claims to insurers. Professional indemnity premiums climbed 18 per cent between 1998 and 2000 while the overall costs of claims increased 82 per cent, according to data from the Australian Prudential Regulation Authority.

In the above article it is suggested that the 'massive payouts' awarded by judges to insurance claimants are to blame for the 'sharp rise' in public liability premiums. The assertion is made by the Insurance Council of Australia, and is backed up by figures from the Australian Prudential Regulation Authority.

Figure 8. Extract from Andrew White, Alison Crossweller and Belinda Hickman, 'Forum to confront crisis in insurance', *The Australian* (Sydney), 31 January 2002, 3

A NATIONAL forum to deal with spiralling public liability insurance premiums and claims will be announced today by federal Assistant Treasurer Helen Coonan.

The forum is expected to gather data on the premium increases that are threatening small business, community clubs and tourism operators. It will come up with proposals to be put to a meeting of federal and state ministers in March. ...

Senator Coonan's proposal follows calls last week from her predecessor Joe Hockey, now the federal Small Business and Tourism Minister, for a national scheme to address the growing problem in public liability premiums and claims.

Mr Hockey blamed greedy "no-win, no-fee" lawyers for the 60 per cent jump in public liability claims from 55,000 in 1998 to 88,000 in 2000.

Here the former Federal Assistant Treasurer Joe Hockey blames 'greedy "no-win, no-fee" lawyers for the 60 per cent jump in public liability claims from 55,000 in 1998 to 88,000 in 2000'.

Figure 9. Extract from 'Draft liability laws open for comment', *Illawarra Mercury* (Wollongong), 8 May 2002, 9

Mr Carr said the legislation was backdated to March 20 and would set limits on general damages as well as setting maximum damages for loss of earnings and earning capacity.

"I warned the ambulance-chasing lawyers not to go around bustling about getting people secure in some imagined window of opportunity between the announcement and the enactment of the legislation," he told Parliament. ...

The Bill limits the costs recoverable by a lawyer in claims involving less than \$100,000 to 15 per cent of the amount recovered or \$5,000, whichever is greater.

Lawyers will also be liable to pay defendants' costs where no reasonable grounds exist for believing a claim would succeed – and acting under such circumstances would also be considered professional misconduct ...

Here Carr directs some of the blame for the public liability crisis at lawyers. Moreover, Carr argues that the draft New South Wales Civil Liability Bill 2002 will resolve such behaviour because it includes clauses that will curb ambulance-chasing, greedy, lawyers. Such stories contain powerful elements of argumentation and convey a negative image of lawyers as the public liability villains.²⁵ Here the response is law reform to contain and manage lawyers. The Government becomes the public liability hero.

²⁵ Tuen van Dijk, *Elite Discourse and Racism* (1993) 155.

Thus, what I have attempted to do is engage with the storytelling or narratives within print media articles about the so-called ‘public liability crisis’ as a form of ‘moral panic’.²⁶ In doing so, I have demonstrated that discourse plays a significant role in the transmission of objectives. Discourses operate as intellectual technologies and constitute the objects of politics rendering ‘aspects of existence amenable to inscription and calculation’.²⁷ Government and industry discourses construct the judiciary as plaintiff-oriented, suggesting that the judiciary is awarding massive payouts in public liability matters because it serves certain ends; that is, it justifies a particular model of law reform.²⁸

Conclusion

It has been argued elsewhere in the moral panic literature that the generation of public concern serves the purpose of justifying policies presented as necessary to rectify the ‘crisis’.²⁹ Thus, the creation of a moral panic serves certain political ends. Accordingly, the study of moral panics has turned also to a study of the political and economic interests of those involved in the construction of the moral panic to establish the underlying motivation for its creation.³⁰

²⁶ Angela McRobbie and Sarah L Thornton, ‘Rethinking “Moral Panic” from Multi-mediated Social Worlds’ (1995) 46 *British Journal of Sociology* 559.

²⁷ Peter Miller and Nikolas Rose, ‘Governing Economic Life’ in Mike Gane and Terry Johnson (eds), *Foucault’s New Domains* (1993) 75.

²⁸ The Chief Justice of New South Wales refutes the claim. Spigelman CJ also asserts that, while there has been a significant change in the last twenty years in expectations in Australian society in relation to fault and the categorisation of oneself as victim, it has been a move toward persons accepting responsibility for their own actions: see below n 36.

²⁹ Ben-Yehuda, above n 4; Goode and Ben-Yehuda, above n 22, 29.

³⁰ Ben-Yehuda, above n 4, 115.

In this instance, governments' market reforms in terms of a 'litigation explosion' because, to do so supports a particular model of law reform. In New South Wales compensation was capped, new thresholds before recovery were introduced, and solicitor's fees have been regulated to discourage solicitors from taking on smaller claims and the 'no-win no-fee' approach, which were said to be responsible for the 'litigation explosion', and, therefore, the rise in premiums. For example, on 21 March 2002, the Australian Financial Review quotes Carr (the former Premier) as announcing that he would, amongst other measures, be putting in place measures to cap general damages at \$350 000; 'cap damages for loss of earning'; and 'make lawyers liable for defendant's costs in cases of speculative unmeritorious claims'.³¹ Effectively, government reforms have limited the compensatory function of negligence law.

Through the media, government and industry representatives have suggested that a 'litigation explosion' has occurred, which also implies that Australians are becoming more litigious. While there is considerable evidence of the significant increase in premiums, empirical work does not support claims of an increasingly litigious society.³² For example, Wright found that there is no empirical evidence to support claims of a 'litigation explosion', and, therefore, asserts that there was 'no empirical foundation for premises underlying tort law reform as a strategy for addressing the insurance crisis in 2002'.³³ Wright conducted a study on trends in personal injury litigation based on court registry data gathered (excluding workplace and road accidents) prior to the Ipp Report conducted in 2002,³⁴ which resulted

³¹ John Breusch and Lisa Allen, 'States Study Plan to Cap Public Liability Payouts', *Australian Financial Review*, 21 March 2002, 43.

³² Professor E W Wright, *National Trends in Personal Injury Litigation: Before and after "Ipp"*, Report Commissioned by the Law Council of Australia, 26 May 2006.

³³ *Ibid* 3.

³⁴ Justice David Ipp, *Review of the Law of Negligence* (2002).

in considerable law reform. The findings are reinforced elsewhere.³⁵ The judiciary too has countered assertions about it being too plaintiff-oriented.³⁶

Briefly, if we consider the law of negligence prior to reforms as 'the last outpost of the welfare state', then the political impetus for reform is evident.³⁷ Negligence law that recognised a level of distributive responsibility and 'rights' and that served a compensatory function was a creature of the 1980s and 1990s. One of the main aims of the reforms is to manage community expectations about personal responsibility and assumption of risk along a particular model, and to wind back the compensatory function of negligence law.³⁸ Today, the prudent individual is required to 'take responsibility for their own actions' based on a 'self-assumption of risk';³⁹ the negligence of others and compensation for such negligence is negated through risk management strategies.⁴⁰ On the basis of evidence to the contrary, it is obvious that further theoretical and empirical research needs to be conducted investigating the motivations for law reform, specifically in relation to risk management and neo-liberal governance. An in-depth empirical analysis of the legislation, parliamentary speeches, and policy documents is required to explore this relationship.

³⁵ See Rob Davis, 'Exploring the Litigation Explosion Myth' (2002) 49 *Plaintiff 4*; Trowbridge Consulting, *Public Liability Insurance: Analysis for Meeting of Ministers*, 27 March 2002.

³⁶ Chief Justice James Spigelman, 'The New Liability Structure in Australia' (Speech delivered at the Swiss Re Liability Conference, Sydney, 14 September 2004).

³⁷ Chief Justice James Spigelman, 'Negligence: The Last Outpost of the Welfare State' (2002) 76 *Australian Law Journal* 432, 432.

³⁸ Senator the Hon Helen Coonan, *Joint Communiqué: Ministerial Meeting on Public Liability*, Melbourne, 30 May 2002.

³⁹ *Ibid.*

⁴⁰ See Ulrich Beck, *Risk Society: Towards a New Modernity* (1992).