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"Recent Developments in Australian Negligence Law: Implications for the Insurance Industry"

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Introduction

It is my distinct pleasure to address this year's State Conference of the Insurance Council. There are some important synergies between the legal profession and the insurance industry, and a forum such as this provides an excellent opportunity for cross-pollination of ideas.

Last year, the federal government commissioned a major review of the law of negligence, chaired by the Hon Justice David Ipp. The committee's report was released in October last year, and implementation of the recommendations is already well advanced in at least three states, including Queensland. Plainly, the implications of that report for the insurance industry are significant. Those contextual factors lend this forum a particular timeliness.

I plan to discuss the Ipp Report and its recommendations in some little detail shortly. However, in order to gain a full appreciation of the implications of the report, it is important to understand the factors underlying the federal government's review, including the way in which negligence law has developed in Australia, and the impact of the insurance crisis this country has faced in recent years.

Developments in negligence law

During the decade before the Ipp Report, the public perception was increasingly that the range of circumstances in which liability for negligence arose was too broad. While it is obviously impossible to undertake a comprehensive survey of court decisions founding that perception, it is worthwhile to canvass some of the more prominent examples of the trend.

Perhaps the most important case in this context was the High Court's decision in *Wyong Shire Council v Shirt*[1]. That concerned a Mr Shirt, who was water-skiing at Tuggerah Lakes in New South Wales, on a course managed by the Wyong Shire Council. He fell and struck his head on the bed of the lake, suffering quadriplegic paralysis. The bed of the lake was approximately four feet below the surface. A well-established principle of negligence law was that a person could not be liable in negligence if the injury caused was not foreseeable. However, according to Mason J, "when we speak of a risk of injury as being "foreseeable" we are not making any statement as to the probability or improbability of its occurrence, save that we are implicitly asserting that the risk is not one that is far-fetched or fanciful."[2]

Effectively, that principle implied that a person was required to take precautions to prevent injury from all risks that are not far-fetched or fanciful. The law of negligence was consequently opened to a very broad range of claims, and according to Ipp J himself, "a major reason for the relative ease with which plaintiffs have been able to succeed in claims for negligence is the *Wyong Shire Council v Shirt* "undemanding" standard of care."[3]

[1] (1980) 146 CLR 40.

[2] *idem* at 47.

[3] Ipp D, "Negligence – Where Lies the Future?" (2003) 23 *Australian Bar Review* 1 at 5.

Another very well-known High Court authority in this regard is *Nagle v Rottnest Island Authority*[4]. New South Wales Chief Justice Spigelman has described the case as "perhaps the high water mark of the High Court's expansion of the law of negligence."[5] Mr Nagle dived into a swimming area known as the Basin on Rottnest Island, hit a submerged rock and suffered injuries. The swimming area was managed by the Rottnest Island Authority. The court held that the authority had breached its duty of care to the public, in failing to erect a sign warning of the presence of submerged rocks. Given the obvious foolhardiness of diving into a pool of uncertain depth, the decision provoked considerable critical comment in the community.

There is some evidence that the trend continues today. For example, *Brodie v Singleton Shire Council*[6] concerned the collapse of a bridge maintained by the Singleton Shire Council. Mr Brodie was the driver of a truck which fell through the decking of the bridge onto a creek bank below. He, and the owner of the truck, claimed damages from the council for personal injuries and damage to the truck, respectively. The court found that the prevailing law, which provided an immunity for such authorities for non-feasance, no longer applied. In other words, an authority could no longer simply rely on its failure to perform an act; instead, it was subject to the usual laws of negligence. That decision, described in other proceedings by Kirby J as an "important reformulation … of the common law,"[7] opened the door for a significantly greater range of claims against local authorities.

[4] (1993) 177 CLR 423.

[5] Spigelman J, "Negligence: The Last Outpost of the Welfare State" (2002) 76 *ALJ* 432 at 443.

[6] (2002) 206 CLR 512.

[7] *Dow Jones & Company Ltd v Gutnick* [2002] HCA 56 at [77].

Other courts, including those in Queensland, offer no exception to the trend. For example, our Court of Appeal recently heard *Lisle v Brice*[8]. It concerned a Mr Lisle, who suffered relatively minor physical injuries after being involved in a car crash. The car crash was caused by Mr Brice, who admitted responsibility. However, Mr Lisle subsequently suffered severe depression and committed suicide. The Court held (admittedly with some reservations, especially by Thomas JA) that Mr Brice was liable in negligence not only for the accident, but indeed for Mr Lisle's death.

I recently addressed the Royal Australasian College of Surgeons on this issue, with a particular focus on medical negligence. That area provides some particularly striking examples of the perceived trend. Until a decade ago, medical practitioners were effectively exempt from liability provided their actions were consistent with those adopted by a respectable body of their colleagues.[9] That remained true even if "there [was] a body of opinion that would take a contrary view."[10] However, in 1992, following some earlier indications from lower courts,[11] the High Court in *Rogers v Whitaker*[12] rejected that authority.

Mrs Whitaker suffered from limited sight in her right eye, although she had full use of her left eye and led an active life. Dr Rogers was to perform an operation on her right eye in order to restore some sight. The operation was conducted by Dr Rogers with the required skill and care, but Mrs Whitaker contracted a rare condition referred to as sympathetic ophthalmia, which resulted in the loss of sight in her left eye. There was evidence that the

[8] [2001] QCA 271.

[9] *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 at 122.

[10] *ibid*.

[11] See for example *F v R* (1983) 33 SASR 189.

[12] (1992) 109 ALR 625.

condition only occurred in one of every 14,000 patients, and that Dr Rogers had not warned Mrs Whitaker of the possibility.

The High Court held that Dr Rogers had breached his duty of care. The reason why the court considered a warning should have been given was that Mrs Whitaker presented to Dr Rogers as keenly interested in the outcome, concerned about the risk of any accidental interference with her good left eye. She had incessantly questioned him.

There was, significantly, evidence that a respectable body of medical practitioners would have acted as Dr Rogers had in failing to warn Mrs Whitaker of the possibility of such a rare affliction. However, the court specifically found that the standard of care "is not determined solely or even primarily by reference to the practice followed or supported by a responsible body of opinion in the relevant profession or trade."[13] Instead, "while evidence of acceptable medical practice is a useful guide for the courts, it is for the courts to adjudicate on what is the appropriate standard of care."[14]

Those cases are, of course, merely examples of what is perceived to have been a broad trend in favour of plaintiffs. There are others to which I could refer. They adequately serve to illustrate the direction in which Australian negligence law was thought to be travelling prior to the Ipp Report.

The insurance crisis

The increasingly plaintiff-friendly state in which negligence law found itself prior to the Ipp Report had a number of consequences. Most importantly, insurance premiums rose sharply. According to the ACCC, for example, premiums for professional indemnity insurance rose by an average of 24

[13] *idem* at 631 per Mason CJ, Brennan, Dawson, Toohey and McHugh JJ.
[14] *ibid*.

percent in the 2001-2002 financial year, while premiums for public and product liability insurance rose by an average of 22 percent in the corresponding period.[15] Senator Coonan remarked that "the impact of the past year's dramatic increases in insurance premiums and the reduced availability of cover across a range of insurance classes has caused widespread concern for all areas of the Australian community."[16] The situation was commonly described as a "crisis".[17]

Of course, it is unreasonable to attribute the so-called crisis entirely to changes in the law of negligence. Plainly such a claim would be incorrect. It is generally accepted the rise in insurance premiums was at least partly attributable to extrinsic factors such as the World Trade Centre attacks on September 11 in the United States and the collapse of HIH in this country.

Ultimately, however, the increasing ease with which negligence actions could be made out has been a relevant factor contributing to the crisis, albeit one whose impact is difficult to measure. As New South Wales Attorney-General Bob Debus pointed out, "recent events [such as the September 11 attacks and the HIH collapse] cannot be seen as the primary justification for current reform initiatives. Rather, they [are] symptoms of more longstanding and fundamental problems concerning the scope of civil liability that provided a catalyst for government action."

The Ipp Report

[15] ACCC, *Second Insurance Industry Market Pricing Review*, ACCC Publishing Unit, Canberra, 2002 at 38.

[16] Coonan H, "Insurance Premiums and Law Reform – Affordable Cover and the Role of Government" (2002) 8(2) *UNSWLJ Forum* 7 at 7.

[17] See for example Graycar R, "Public Liability: A Plea for Facts" (2002) 8(2) *UNSWLJ Forum* 2 at 2.

It was in the context of this insurance crisis, and the preceding decade of perceived plaintiff-friendly judgments, that the Government announced its review of the law of negligence on 2 July 2002. The Hon Justice David Ipp, who chaired the review, has been an Acting Judge of Appeal in the Court of Appeal in New South Wales since 2001, and a Judge of the Supreme Court of Western Australia since 1989. The other committee members were Professor Peter Cane, a law professor from the ANU, Dr Don Sheldon, a medical practitioner, and Mr Ian Macintosh, the Mayor of the Bathurst City Council. After delivering an interim report on 2 September 2002, the committee released its final report on 2 October 2002.

Unsurprisingly, the committee's report strongly favoured a tightening of the law of negligence, in favour of defendants and away from plaintiffs. Such a conclusion was not unexpected, given the committee's establishment during a period of intense scrutiny of court decisions and rising insurance premiums. Indeed, the committee's terms of reference themselves included the following statement: "The award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another."[18]

The committee's proposals are wide-ranging and are relevant to a number of areas of negligence law. Broadly speaking, the two issues on which the report is likely to have the greatest impact are the delineation of the range of circumstances in which liability may arise, and the appropriate level of damages in the event that a negligence claim is made out.

In relation to the first of those issues, the Ipp Report proposed various restrictions limiting the circumstances in which liability for negligence could arise. To take but one example, I discussed earlier the relatively undemanding

[18] *Review of the Law of Negligence: Final Report*, Canprint Communications, Canberra, 2002 at 25.

standard of care imposed by the High Court in *Wyong Shire Council v Shirt*, which required persons to take precautions against injury provided the risk were not "far-fetched or fanciful." The Ipp committee proposed that instead, precautions should only be required at law if the risk of harm is "not insignificant."[19] Another example of the restrictive approach preferred by the committee was its suggestion that no liability should be incurred where an entity had failed to warn of an obvious risk, particularly in relation to dangerous recreational activities.[20] That change would probably lead to a different decision in a case such as *Nagle v Rottnest Island Authority*, where the plaintiff's foolhardiness was obviously a factor contributing to the injury. The report contains a variety of changes similar to these, each designed to restrict the circumstances in which liability can arise.

The Ipp Report also proposed several limitations on damages awards, each of which is meant to ensure that in the increasingly limited circumstances in which liability does arise, the extent of that liability remains at reasonable levels. For example, the report proposed a cap on general damages for non-economic loss such as pain and suffering of $250,000[21] or 15 percent of a most extreme case,[22] a cap on damages for loss of earning capacity to twice average full-time adult ordinary time earnings[23] and restrictions on recovery for gratuitous services (that is, *Griffiths v Kerkemeyer*[24] damages).[25] Each of these measures is subject to criticism on a micro level, but in a macro sense, the direction of reform is quite clear: a tightening of the liability regime to make it more difficult for plaintiffs to recover heavy damages.

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[19] *idem* at 106-107.

[20] *idem* at 130.

[21] *idem* at 195.

[22] *idem* at 193.

[23] *idem* at 198.

[24] (1977) 139 CLR 161.

[25] *Review of the Law of Negligence: Final Report*, *supra* note 18 at 205.

Those are only two of the arguably more significant broad changes suggested by the Ipp Report. There are important changes proposed in relation to other issues, such as professional negligence, the interaction of negligence law with trade practices law, limitation of actions and contributory negligence. Suffice to say, however, that the changes consistently pursue a framework within which a plaintiff's formerly strong claim might be somewhat weaker.

The Ipp Report was greeted with cautious approval by the community. Senator Coonan, the Minister responsible for administering the review, argued "the Review of the Law of Negligence provides a range of significant proposals and outlines a principled approach to reforming tort law which impose a reasonable burden of responsibility on individuals to take care of others and to take care of themselves,"[26] and to a large extent there seemed to be support for that attitude. For example, the Executive Director of this body, Mr Alan Mason said that the Report's recommendations "appear to provide a good balance between the rights of injured people and the community's ability to afford insurance premiums. I believe that the community thinks after some recent damages awards that the balance has gone too far in favour of the individual. We need to bring the balance back in favour of the whole community."[27]

Implementation of the Ipp Report

Implementation of the Ipp report proposals is currently underway in a number of states. The State furthest advanced is New South Wales. There, the *Civil*

[26] Coonan H, "Minister Welcomes Final Negligence Review Report" 2 October 2002, available at http://assistant.treasurer.gov.au/atr/content/pressreleases/2002/106.asp.

[27] Mason A, "ICA Welcomes Governments' Commitment to Consistent Approach to Public Liability" 2 October 2002, available at http://www.ica.com.au/.

Liability Act 2002 (NSW) (as amended by the *Civil Liability Amendment (Personal Responsibility) Act* 2002 (NSW)) is already in force. Similarly, in Queensland, the *Civil Liability Act* 2003 (Qld) was passed by parliament last month. A Western Australian equivalent is also in the pipeline. In each case, many of the changes proposed by the Ipp Report are included.

Other Initiatives

The Ipp Report clearly represents the focus of negligence law reform in this country. Interestingly, however, the past year or two appear to have witnessed an independent trend back towards a tighter negligence regime.

While the legislation implementing the Ipp Report proposals represents the first comprehensive attempt at law reform, a number of earlier legislative initiatives were intended to restrict the application of specific aspects of negligence law. For example, the *Trade Practices Amendment (Liability for Recreational Services) Bill* 2002 (Cth) now limits the liability of recreational service providers under s 68 *Trade Practices Act* 1974 (Cth). Similar reform initiatives are underway in the Northern Territory.[28]

In South Australia, changes designed to limit the liability of volunteers who offer assistance to persons in distress have already taken effect,[29] and will soon do so in the Northern Territory as well.[30] Those changes combat the principles espoused by the New South Wales Court of Appeal in *Lowns v Woods*[31]. And perhaps most importantly of all, restrictions on damages and costs are in effect in New South Wales[32] and Queensland,[33] and will soon

[28] *Consumer Affairs and Fair Trading Amendment Bill (No 2)* 2002 (NT).

[29] *Volunteers Protection Act* 2001 (SA).

[30] *Volunteers Protection Bill* 2002 (NT).

[31] [1996] ATR 81-376.

[32] *Civil Liability Act* 2002 (NSW).

come into effect in the Australian Capital Territory,[34] Victoria[35] and Western Australia.[36]

This legislative attitude in favour of tightened negligence laws appears to some extent to have been echoed by the courts. A trend away from plaintiff-friendly findings has been evident in recent decisions of the higher courts in Australia.

For example, in *Ghantous v Hawkesbury Shire Council*[37], the High Court recently considered a typical "tripping" case. The plaintiff tripped on footpath that protruded 50mm above the surrounding ground. The High Court's statements of principle reflect an unwillingness to favour plaintiffs unduly. According to Gaudron, McHugh and Gummow JJ, "persons ordinarily will be expected to exercise sufficient care by looking where they are going and perceiving and avoiding obvious hazards, such as uneven paving stones, tree roots or holes."[38] Similarly, according to Callinan J, "it is not unreasonable to expect that people will see in broad daylight what lies ahead of them in the ordinary course as they walk along."[39]

Similar sentiments have been evident in recent Queensland decisions. In *Spencer v Council of the City of Maryborough*[40], a Council was sued for failing to repair a 10mm gap between two concrete slabs of pavement. Holmes J (with whom McMurdo P agreed) held that "to say that the Council should have

[33] *Personal Injuries Proceedings Act* 2002 (Qld).

[34] *Civil Law (Wrongs) Bill* 2002 (ACT).

[35] *Wrongs and Other Acts (Public Liability Insurance Reform) Bill* 2002 (Vic).

[36] *Civil Liability Bill* 2002 (WA).

[37] [2001] HCA 29.

[38] *idem* at [163].

[39] *idem* at [355].

[40] [2002] QCA 250.

committed itself to such close and constant inspection of its footpaths to ensure any defect was eradicated before reaching dimensions of 9mm to 10mm, dictates, in my view, a use of resources which is not rational to the risk posed."[41] There are a number of similar decisions in Queensland,[42] and in New South Wales[43] and Western Australia.[44]

Lending further support to this trend is *Enright v Coolum Resort Pty Ltd & Ors*[45], which involved a claim for over $100 million by the widow of an executive of Pepsi Corporation, Mr Enright. In 1993, he was in Queensland attending a conference at Coolum, and visited a beach at Yaroomba. Despite a warning from a local that the beach was dangerous, he entered the surf without locating the lifeguard area. He was caught in a rip and drowned. Moynihan SJA found in favour of the resort, holding that responsibility for the events lay with the deceased alone.

Indeed, for many years, some judges have expressed their unhappiness with the development of negligence law in this country. In 1985, as a member of the New South Wales Court of Appeal, current High Court Justice McHugh wrote that:

> "I think that it is impossible to read recent decisions of the High Court of Australia without realising that employers are now required to comply with safety standards which, only 20 years

[41] *idem* at [36].

[42] *Percy v Noosa Shire Council* [2002] QCA 245.

[43] *Burwood Council v Byrnes* [2002] NSWCA 343; *Lombardi v Holyrod City Council & Anor* [2002] NSWCA 252; *Richmond Valley Council v Standing* [2002] NSWCA 359; *Roads & Traffic Authority of NSW v McGuiness* [2002] NSWCA 210.

[44] *Gondoline Pty Ltd v Hansford* [2002] WASCA 214.

[45] [2002] QCA 394.

> ago, would have been seen as imposing an onerous, even an absurd burden on employers."[46]

According to Thomas JA, formerly of the Queensland Court of Appeal:

> "Today it is commonplace that claimants with relatively minor disabilities are awarded lump sums greater than the claimant (or defendant) could save in a lifetime. The generous application of these rules is producing a litigious society and has already spawned an aggressive legal industry. I am concerned that the common law is being developed to a stage that already inflicts too great a cost upon the community, both economic and social."[47]

These statements suggest that while judges are bound to apply the doctrine of precedent, they are certainly attuned to community expectations and sentiment.

The role of the judiciary

The process of law reform I have described is one of gradual court-initiated change, followed by a legislative response echoed by the courts. That process is itself jurisprudentially interesting and worthy of consideration. Judges are sometimes criticized for assuming a legislative role. That may happen in relation to developments in the common or judge-made law. An example is the criticism endured by the High Court of Australian in relation to the *Mabo* case. But intermediate courts of appeal, which are more often than not final because of the requirement for special leave to proceed in the High Court, also sometimes develop the common law, by giving decisions in

[46] *Bankstown Foundry Pty Ltd v Braistina* [1985] ATR 80-713 at 69,127.

[47] *Lisle v Brice* [2002] 2 Qd R 168 at 174.

circumstances which may be described as unique and to which existing precedent does not readily apply. The law of negligence provides a good example. Judges do their conscientious best to regulate the common law by adherence to the doctrine of precedent, that is, following the parameters to be drawn from cases already decided in similar situations in higher courts, so that the law in endowed with the requisite certainty; and where higher courts develop the law to meet changing social circumstances, they tend to do so incrementally, that is, by small steps.

That process was interestingly described in the High Court in *Breen v Williams* (1996) 186 CLR 71, 115 per Gaudron and McHugh JJ:

> "Advances in the common law must begin from a baseline of accepted principle and proceed by conventional methods of legal reasoning. Judges have no authority to invent legal doctrine that distorts or does not extend or modify accepted legal rules and principles. Any changes in legal doctrine, brought about by judicial creativity, must "fit" within the body of accepted rules and principles. The judges of Australia cannot, so to speak, "make it up" as they go along. It is a serious constitutional mistake to think that the common law courts have authority "to provide a solvent" for every social, political or economic problem. The role of the common law courts is a far more modest one.
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> In a democratic society, changes in the law that cannot logically or analogically be related to existing common rules and principles are the province of the legislature. From time to time it is necessary for the common law courts to re-formulate existing legal rules and principles to take account of changing social conditions. Less frequently, the courts may even reject the continuing operation of an established rule or principle. But such steps can be taken only when it can be seen that the "new" rule or principle that has been created has been derived logically or analogically from other legal principles, rules and institutions."

The non-elected judiciary is independent of the other arms of government. The judiciary determines upon such developments in the law without direction from parliament. To the extent that Judges “make” law, some people find it difficult to accept the legitimacy of their doing so, because of a view that the

"law" should only be made by the people's elected representatives in parliament: if the people are dissatisfied with the laws so made they may register their disapproval at the ballot box. But practically speaking, it is not possible to legislate to cover every exigency of the human condition, and Judges are therefore left with the discretion to proceed as they do. The people do, however, have an ultimate safeguard should the unelected judiciary, the third arm of government, be perceived to have got it wrong, and that is through parliamentary intervention.

As put recently Hayne J of the High Court ("Restricting Litigiousness", a paper delivered at the 13th Commonwealth Law Conference):

> "Subject to applicable constitutional restraints, it will be the legislatures of Australia which ultimately determine the course that is to be taken in restricting litigiousness. It will be for the parliaments to say what kinds of litigation are to be restricted and how that restriction is to be effected. That is not to deny the importance of the roles of the courts in promoting efficient and predictable disposition of litigation. But if those legislatures choose to modify, or even abolish, legal rights of a kind which those legislatures consider give rise to too much litigation or litigation which is costing too much, that, subject to applicable constitutional restraints, will be a matter for them."

As I have indicated, prior to the Ipp Report, the view was expressed that the courts had developed the law of negligence to the point where recovery had become too easy, and the relevance of common sense unduly downplayed. Some were surprised at the verve with which this message was effectively spread by insurance companies said, by some, simply not to have engaged in prudent, forward financial planning. In short, those at the vanguard of the promotion of the view that parliament should intervene did appear to have a major self-interest in the outcome. But the message nevertheless caught on, and legislatures are intervening by modifying rights of recovery for damages for negligence, both in the field of medical negligence and negligence more broadly. While one may regret the prospect that persons injured through no

fault of their own, but the fault of another, should be denied reasonable compensation, what has occurred, is occurring is actually nevertheless an example of the governmental system working well, with the parliament intervening to meet perceived public concern as to the level of recovery which to that point had been ordained by the courts.

That is, ultimately an example of the operation of what we call the rule of law: the courts acting independently, subject nevertheless to the public safeguard ultimately of parliamentary intervention to support the perceived public interest.

Conclusion

May I refer in conclusion to something said by Justice Callinan of the High Court:

> "Insurance companies have collapsed. Insurance premiums are on the rise. Litigation against professionals is proliferating. Allegations of blame by sectional interests on all sides have not unsurprisingly been amongst the key legal issues of 2002."[48]

His Honour's remarks are indicative of the importance of the issues facing the insurance industry today. These are fast-moving times in the field of negligence law, and hopefully, fast-moving in the right direction. Certainly, the reforms proposed by the Ipp Report, and subsequently implemented in some States, favour the defendant over the plaintiff, which will provide some comfort for insurers, though the real issue is whether the reforms advance the public interest.

[48] Callinan I, "Problems in Insurance Law" (2002) 8(2) *UNSWLJ Forum* 33 at 33.

The reform process should not be entirely about winning and losing; vested interests are relevant, but ultimately, a reform package that favours one group more heavily than another does not benefit the community as a whole. The government's efforts to reform the law should be applauded, not because they support any particular industry, but instead because they appear to represent a reasonable solution to an otherwise intractable problem. The ultimate issue is what is reasonable compensation for those injured through the fault of others: and as to that, how many angels may stand on the head of a pin? But what is being crafted does seem alright, bearing in mind first, those who suffer and then, though in my view secondarily, those who should pay.