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Tort Law Reform Business Session

"Recent Australian Tort Law Reform: was it necessary and did it go too far?"

The Hon P de Jersey AC,
Chief Justice

The pre-reform law

The legislative reforms introduced in all Australian jurisdictions, by way of implementation of the recommendations of the Negligence Review Panel which reported finally on 30 September 2002, bore upon a body of largely common law developed by courts substantially over the seven decades following *Donohue v Stevenson* (1932) AC 562. Unsurprisingly with the increasing sophistication of society, new avenues for relief were confirmed from time to time, and others broadened.

As to the former, the availability of damages for negligent misstatement established in 1963 by *Hedley Byrne and Co v Heller and Partners Ltd* (1964) AC 465, and for services rendered gratuitously in aid of injured plaintiffs confirmed by *Griffiths v Kerkemeyer* (1977) 139 CLR 161, are striking examples. As to the broadening of the avenue for recovery, one need not go beyond *Wyong Shire Council v Shirt* (1980) 146 CLR 40, defining a foreseeable risk as one neither far fetched nor fanciful. I should speak for a moment of that case.

Mr Shirt 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 is 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." (p 47) 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 broad

range of claims, and according to Justice Ipp who chaired the Negligence Review Panel, "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." ("Negligence – where lies the future?" (2003) 23 Australian Bar Review 1, 5).

I believe the system which had developed in that way was nevertheless generally perceived to operate fairly satisfactorily in the allocation of blame and the determination of appropriate compensation. The mechanism for appeal, importantly, provided the public with a reasonable safeguard against undue generosity, or, for that matter, undue parsimony.

Where legislatures had considered that the common law should be modified over the years, they intervened, and interestingly so, the object generally was to expand, not limit, rights of recovery. Good examples are the abolition of the common law rule that contributory negligence was a complete defence, and the abolition of the rule excluding recovery of damages for wrongful death.

The common law had developed, as it is put, incrementally, as described in the High Court in *Breen v Williams* (1996) 186 CLR 71, 115 per Gaudron and McHugh JJ as follows:

> "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."

Commentators not infrequently suggested courts did come to adopt an unduly generous approach to injured claimants. *Nagle v Rottnest Island Authority* (1993) 177 CLR 423 is often cited in that regard. 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.

It is significant to note that substantially prior to the recent legislative reforms, the courts had apparently been tightening somewhat their approach to negligence, expecting higher levels of personal responsibility in those suffering injury. For example, in *Ghantous v Hawkesbury Shire Council* (2000) 206 CLR 512, the High Court considered a typical "tripping" case. The plaintiff tripped on a 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." (581) 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". (639)

Other cases illustrate this trend, beginning with *Romeo v Conservation Commissioner of the Northern Territory* (1998) 192 CLR 431, where the majority applied *Nagle* but restrictively, so as to deny recovery; and followed by decisions excluding liability in sports administrators to voluntary participants (eg *Agar v Hyde* (2000) 201 CLR 552; *Woods v*

Multi-Sport Holdings Pty Ltd (2002) 208 CLR 460), and suggesting generally that more self-responsibility will be expected of those engaged in ordinary day to day activities (cf. *Graham Barclay Oysters Pty Ltd v Ryan* (2003) 211 CLR 540). Spigelman CJ in *Waverly Municipal Council v Swain* (2003) Australian Torts Reports 81-694 suggested that the recent cases show that "greater weight is being given to the proposition that people will take reasonable care for their own safety".

Notwithstanding what I have asserted to be the general stability of this body of principle, which had evolved over decades, and its apparent responsiveness to a concern that recovery be kept within reasonable bounds, the legislatures intervened with quite dramatically limiting reforms.

The catalysts for reform

The process of reform was remarkable for the speed with which it was effected, and the substantial uniformity of approach rather surprisingly generated among States and Territories generally noted for their strong independence.

Of course in terms of constitutional theory, it fell entirely within the prerogatives of the parliaments to act as they did. As put by Hayne J of the High Court in a paper delivered at the 13th Commonwealth Law Conference in Melbourne in 2003:

> "Subject to the 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."

Power aside, the question remains whether the reforms were necessary or appropriate, and that of course is the subject of this forum.

It was intriguing that the Negligence Review Panel was required to proceed on the assumption that there was a need for substantial reform. Its terms of reference commenced with this passage:

> "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. It is desirable to examine a method for the reform of the common law with the objective of limiting liability and quantum of damages arising from personal injury and death."

Why was the matter presented in that way?

The primary focus of those promoting change appeared to rest on the levels of insurance premiums, the unavailability of insurance cover in relation to important community endeavours, and anecdotal claims that medical practitioners practising in certain high risk areas had been forced to give up work. But it has never been demonstrated how reducing the recoverability of damages by persons injured through the wrongdoing of others would alleviate those problems.

The unfortunate reality is that the clamour for reform arose from a cauldron of international and national turmoil. The Negligence Review Panel was established in May 2002, only about seven months after the events of September 11, 2001, and about 14 months after the collapse of Australia's second-largest general insurer, HIH (covering about 200 subsidiaries including seven Australian insurers and re-insurers), and the imminent collapse of this nation's largest medical protection organization, UMP. Claims that recovery had become too easy were substantially just that – claims, unsupported by any comprehensive, compelling data from which that conclusion could sensibly be drawn. The insurance industry mounted a very strong campaign for change, supported by the medical profession which asserted that recovery in the area of medical negligence had likewise become too flaccid.

It is tempting to conclude that attention was unjustifiably diverted from the true reason for unduly high insurance premiums, with the courts the whipping boys, and wrongfully injured

claimants the ultimate victims. But should one reach that conclusion? Some arguable corroboration for that pessimistic view rests in the circumstance that although the reforms have been generally well received by those who promoted change, and although they have been operative now for an appreciable period, premiums have not, we are told, appreciably reduced. Has the only alleviating financial consequence been to reduce the financial exposure of insurance companies?

Much has been said and written about the cyclical nature of the insurance industry; about the artificially low levels of premiums generated prior to the collapse of HIH because of its habit of unrealistically undercutting competitors; about the escalation in premiums which occurred following the HIH collapse in early 2001; about increases in reinsurance costs following September 11, 2001; and about the failure of insurers to establish adequate prudential reserves. It is frankly hard to accept that notwithstanding those features, the indisputable key to desirable change rested in reforming recovery under tort law. (See, eg, Justice P Underwood: "Is Ms Donohue's snail in mortal peril?" (2004) 12 Torts Law Journal 1.) Yet that was the platform from which the reforms sprang.

Unfortunately some of those urging reform thrived on contention, rather than factual assertion. I have suggested – and it may be said by some, in a rather self-serving way – that there is no reasonable basis for trenchantly blaming courts and Judges for rendering insurance financially untenable because of the liberality of the awards made by courts. If this were not so, however, why was the insurance problem emergent or precipitate in character, and plainly brought on by the collapse of HIH following so closely upon September 11? Another catchcry was the anxiety often expressed that ours is an increasingly litigious society. Such analysis as has been done, including by the Productivity Commission, does not substantiate that claim, once one acknowledges, as one must, the growth of the Australian population over the years. Litigation has increased, over the last two decades for example, but it could hardly warrant the description "an explosion". In fact in very recent years, civil filings in the courts have generally reduced.

(See R Davis: "Exploring the Litigation Explosion Myth", APLA position paper, 8 January 2002; R Davis: "The Tort Reform Crisis", UNSWLJ Vol 25, no 3, 2003, p 865).

Those who would impugn our stable judicial system must resist the temptation of appealing to those influenced by MDA and Judge Judy.

The reforms

It is not my purpose to canvass comprehensively the reforms which were made. For my purpose, it suffices to identify those which substantially reduce avenues for recovery for those injured because of the wrongdoing of others. In fairness, I should however record my view on some of the substantial reforms which I consider unexceptionable.

For example, I think it was reasonably acceptable to modify the liability of a medical practitioner by effectively restoring the test in *Bolam* (1957) 2 All ER 118, subject to the reservation that the professionally held view not be "irrational". The medical profession in this country was, rightly or wrongly, confounded by *Rogers v Whitaker* (1992) 175 CLR 479, and in the interests of greater certainty, a substantial reversion to the *Bolam* test was justifiable (though in my respectful view the approach of the High Court in *Rogers v Whitaker* was likewise justifiable).

Further, in the context of *Wyong Shire Council v Shirt*, the Negligence Review Panel recommended, and the recommendation was adopted, that precautions should only be required at law if the risk of harm is "not insignificant". One could not reasonably cavil with that. Another example of the restrictive approach preferred by the committee, and adopted by the legislatures, 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. That change would probably lead to a different decision in a case such as *Nagle*, where the plaintiff's foolhardiness was obviously a factor contributing to the injury. The report contained a variety of changes similar to those, which were adopted,

each designed to restrict the circumstances in which liability could arise, and as I have suggested, none of those is exceptionable.

Of arguable concern, however, are the recommendations, implemented by the legislatures, imposing limitations on damages awards, meant to ensure that in the increasingly limited circumstances in which liability does arise, the extent of that liability remains at what may be perceived to be a reasonable level. For example, the report proposed a cap on general damages for non-economic loss such as pain and suffering of $250,000 or 15% of our most extreme case, a cap on damages for loss of earning capacity at twice average full-time adult ordinary time earnings, and restrictions on recovery for gratuitous services previously covered by *Griffiths v Kerkemeyer*. There are also provisions establishing a threshold of loss below which compensation is not recoverable.

The effect of these provisions is that an injured claimant subsidises the costs of cutting insurance premiums. Those who act negligently are partially relieved of the consequences of their default, as is their insurer, to the detriment of the victim of their negligence, and possibly the broader community. As to the latter aspect, those injured but inadequately compensated may well have greater resort to the public health systems, so that taxpayers generally would be called in aid of the supposedly beleaguered insurer.

In the course of the debate, much was said about reasserting a need for people to accept responsibility for their own actions. That must however work both ways. A difficulty about these provisions, arguably, is that they suggest the wrongdoer is to a degree being protected.

Conclusion

When these reforms were very fresh, I suggested on another occasion that they were 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". I said that in the context of observations about the process, reproduced earlier in this paper, from Justices of the High Court.

Time having progressed, we are now in a better position to assess the social justification for what has occurred. The theory, that insurance premiums would reduce, has apparently not been borne out. What, then, has been the beneficial consequence of this initiative which almost erupted from the cauldron of September 11 and the collapse of HIH, stirred by insurers beset by inadequate financial forecasting and a medical profession generally in turmoil over the imminent collapse of UMP? Ultimately, there seems to have been no substantial benefit, rather prejudice, to those to whom the courts had given reasonable accommodation by the application of the independent judicial wisdom borne of decades.

I conclude with the observations of two Justices of the High Court. In an article published in (2002) 25 UNSWLJ 859, 864 Callinan J said this:

> "Both the common law and insurance business and practice are the products of hundreds of years of evolutionary development. It seems rather unlikely that everything that has so evolved is wrong and should be discarded. When loud voices clamour for radical change is usually time for patience and caution."

Finally, in *Cattanach v Melchior* (2003) 215 CLR 1, 53 Kirby J said:

> "Subject to any constitutional restrictions, Parliaments motivated by political considerations and sometimes responding to the 'echo-chamber inhabited by journalists and public moralists', may impose exclusions, abolish common law rules, adopt 'caps' on recovery and otherwise act in a decisive and semi-arbitrary way…Judges, on the other hand, have the responsibility of expressing, refining and applying the common law in new circumstances in ways that are logically reasoned and shown to be a consistent development of past decisional law. Of course, in a general way, judges should take the economic outcomes of their decisions into account. But they have no authority to adopt arbitrary departures from basic doctrine."