Law Institute of Victoria "Medicine and Law" conference

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'Tort law reform – several years on'

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An established right

In 1932 the House of Lords established, for the common law world, what was in this country, for the next 70 years or more, regarded as a basic right. That was the right to be paid reasonable compensation for injury, by the person who, in breach of a duty of care, caused that injury. This is usually presented as the best illustration of so-called judge-made law. Over the following decades, the courts developed the right, proceeding incrementally, as it is put.

Now our parliaments, as our supreme law makers, may always intervene legislatively to vary judge-made law. In a rare show of unity, commencing in 2002, our Federal and State governments joined in legislation which impaired that basic right. Some would say the right to compensation was savaged. I will come to the depredations which were wrought. First, however, we should recall why those respective governments felt constrained to take such serious steps.

Legislative motivation for intrusion

Essentially, the governments were persuaded that the right of recovery had become too flaccid, and the damages awarded too bounteous, with insurance payouts at a level which was elevating premiums to unjustifiably high levels. The public's perception was undoubtedly swayed, also, by the emotive circumstance that important community based initiatives were being foregone because of unaffordable public risk insurance.

I said governments were persuaded of these things. The substantial agent of persuasion was the powerful and well-organized insurer lobby. The Insurance Council is no doubt very pleased with the reform it provoked. It keeps an eagle eye on any call that the

reforms be wound back. I know that from personal experience: whenever I renew that call publicly, I receive a letter telling me how comprehensively wrong I am.

The Federal Government was persuaded. Clear evidence of that may be garnered from the driving instructions given to Justice Ipp's review panel. That Committee was not asked to bring an open mind to the question whether the right of recovery of compensation had become too liberal. 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."

I will return shortly to whether the adoption of that position was justified.

It is helpful now to remind ourselves of the extent of government "impairment", as I termed it, of the negligently injured citizen's right to compensation.

Some reasonable changes

Some of the erosions were substantial and controversial, and they are my focus this morning. The governments also used the opportunity to work some concurrent streamlining of the landscape in respects to which no reasonable objection could be taken. For example, 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.

Further, in the context of *Wyong Shire Council v Shirt* (1980) 146 CLR 40, the Negligence Review Panel recommended, and the recommendation was adopted, that precaution should only be required at law if the risk of harm were "not insignificant". One could not fairly 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 now in a case such as *Nagle v Rottnest Island Authority* (1993) 177 CLR 423, where the plaintiff's foolhardiness was obviously a factor contributing to the injury. The report contained a variety of changes similar to those, each designed to restrict the circumstances in which liability could arise, and as I have suggested, none of those is exceptionable.

The imposition of monetary limits

What many see as the vice in this legislation rests in the imposition of monetary limits on recovery. If you work from the assumption that damages are awarded to compensate for injury and consequent disability, then inadequate compensation raises the question how the impaired victim is to cope.

In serious cases where a substantial reduction in earning capacity draws a disproportionally capped award of damages, do we contemplate increased reliance on publicly funded social security? In other cases of inadequate awards, should the community be expecting increased reliance on the publicly funded hospital system? Will gratuitously provided assistance, by family members and friends, for want of reasonable compensation, be less forthcoming, with consequent reliance on volunteer community organizations for example?

In short, the burden lifted from the insurance companies, which they suggested had become intolerable, must now be borne – to some extent and by some means or other – by the community. The parliaments must have contemplated and accepted the reasonableness of that result. That provides another illustration of the powerful influence which must have been brought to bear by the insurance lobby.

I will briefly mention the major limitations imposed by or through the reform legislation.

The questionable reforms

The most serious is the cap on the maximum damages recoverable for non-economic loss. The Ipp Committee recommended $250,000. Queensland adopted that recommendation. Perhaps curiously, other States set higher amounts: currently approximately $420,000 in New South Wales for example and approximately $370,000 in Victoria. Allowing for the national thrust which impelled this legislation, one may query the justification for such discrepancy. Significantly also, the Queensland amount has not been adjusted now for some years. Those aspects aside, many would say the real shortcoming of the cap is that it may leave catastrophically injured claimants grossly under compensated, unable to afford the treatment, support and other aids to rehabilitation a court would find reasonably necessary.

Another example I advance, as concerning, is the cap on damages for past and future economic loss. The Committee's recommendation was that the cap be set at twice the average full-time adult ordinary earnings. Victoria, New South Wales and Queensland set the cap at three times average weekly earnings. The computation of true compensation does not ignore the particular circumstances of the victim: otherwise, "amends" are not made – the victim is not restored, so far as money can achieve, to his or her own particular pre-injury situation. Is it clearly warranted that a defendant's insurer need no longer take the plaintiff as he or she is; that there should be an effectively discriminatory approach which ignores the enhanced capacity of some within the community to, say, maintain themselves and contribute to the maintenance of their families and often others in the community as well? The question arises of course why a defendant and thereby the defendant's insurer should escape the ordinary consequence of negligently destroying or diminishing an earning capacity which happens to be of substantially greater proportion than the average. Why as a matter of policy should that injured person lose out, with a windfall converse benefit flowing to the insurer?

Yet another concerning example is the limitation on the award of damages for gratuitous services, now dependant in the three major eastern seaboard jurisdictions on the provision of such services for at least six months and at least six hours per week. That is an arbitrary limitation. Its application means that an injured claimant who needs substantial

daily assistance from, say, a spouse, for only five months following the accident, loses out, albeit the spouse may have had to give up work to provide that necessary and beneficial care.

Another view of the reasons behind the reforms

I said I would return to the justification for the driving instructions given to the Panel chaired by Justice Ipp. Subsequent commentators have debunked the myth widely broadcast at the time, that Australians had become unsustainably litigious, that there was a "litigation explosion" in this country reminiscent of the excesses of the USA. The figures simply did not bear that out. Certainly filings have subsequently fallen dramatically. But that does not warrant the view that they were previously unreasonably high. It corroborates, rather, the effectiveness of the reform legislation in securing the goal which the governments and the insurers wanted. Another "myth" widely propagated at the time was that the courts had become irresponsibly generous in their awards. This was undoubtedly fed by some highly publicized jury awards. They were isolated and exceptional. The reality was that the courts proceeded case by case; where problems were perceived, appellate courts conducted appropriate reviews; some cases reached the High Court, and that court was signalling the need for a keener focus on personal responsibility. (The tripping cases tended to exemplify this, for example *Ghantous v Hawkesbury Shire Council* (2000) 206 CLR 512.)

The push for reform substantially grew out of the parlous financial condition and later collapse of Australia's second largest general insurer, HIH, and the collapse of this nation's then largest medical protection organization, UMP. 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. Yet that was the platform from which the reforms sprung.

I still find it astonishing that the financial state of those insurance companies plainly operated so substantially in bringing about a major legislative erosion of a basic common law right. I do not think it has seriously been suggested, let alone demonstrated, that the collapse of those companies was the result of the level of damages being awarded by the courts of law.

The end result is some reduction in insurance premiums, it may be acknowledged, but the counterpoise is massively profitably insurance operations. The loser is the injured citizen.

The significance of the exclusion of smaller claims

I mentioned earlier the major erosions of the right of recovery, with a focus on the more serious cases. But the erosion is more widely embracing. Particularly significant, I think, is the limitation in Queensland and New South Wales on the recovery of costs. The Committee's recommendation was that no costs should be recoverable where an award of damages was less than $30,000. That recommendation was adopted in Queensland, although the amount was set at $50,000. The result is that in practice many of those claims could not realistically be pursued.

Well settled members of the community should not discount in any blasé way the importance to a victim of relatively humble financial means of a payout of that order. It was said insurers tended to pay out those small claims to "clear their books", the suggestion being that some claims were not meritorious. Probably that was sometimes the case. But to structure a process where meritorious claims at the lower level become impracticable, for reasons of costs, plainly works injustice.

Revisiting the reforms

I think it important that we periodically revisit this matter. Some governments have indicated a willingness to reconsider the extent of the reforms, although none has yet

wound them back in any substantial way. I suggest it behoves the legal profession to keep the issue alive, in the hope the limitations may one day be the subject of active reconsideration and modification, so that the basic right to which I have referred is progressively restored. That must be the challenge for compassionate governments, to recognize that respect for these basic rights should stand above the interest of insurance companies in maximizing their profits.

Proportionate liability

At the outset, I said that the legislation enacted by the various jurisdictions reflected a rare show of parliamentary unity within the Federation. It was a unity of purpose, although the result was not in terms uniform. I wish to mention now a subsequent reform, effected in 2004 and 2005, where there are significant differences from jurisdiction to jurisdiction, and where the essential package is inherently problematic, raising many presently unanswered questions. I refer of course to the proportionate liability legislation.

The desirability of uniformity

There are differences from jurisdiction to jurisdiction on a number of issues: whether parties may contract out of the legislation (yes: NSW, WA, TAS; no: QLD; unstated: VIC, SA, CTH); whether the court may apportion loss to a wrongdoer absent from the proceeding (yes: NSW, QLD, WA, SA TAS; no (with qualification): VIC) ; and whether the legislation applies to an action brought by a consumer (yes: CTH, NSW, VIC, WA, SA, TAS; no: QLD).

Fortunately there is relative uniformity on the basic questions whether the legislation excludes personal injury claims (it does); excluding the benefit of apportionment for intentional or fraudulent acts (excluded); excluding rights of contribution against concurrent wrongdoers (excluded); and providing for contribution for a party not included in an original proceeding (available).

The Standing Committee of Attorneys-General is reportedly interested in securing greater national uniformity in respect of this regime. That is to be encouraged. SCAG has shown

a commendable drive to remove jurisdictional discrepancies where national uniformity is plainly desirable. It is hard, for example, to justify continuing differences from jurisdiction to jurisdiction in the laws of evidence and procedure, especially now we are moving to a national legal profession.

I recently encountered an odd discrepancy in the criminal arena. Queensland and the Commonwealth have parallel laws forbidding use of the internet to procure a child under 16 years of age to engage in a sexual act, s 218A(1)(o) of the Queensland Criminal Code and s 474.26(1) of the Commonwealth Criminal Code. Yet while the maximum Queensland penalty is five years imprisonment, it is 15 years under the Commonwealth provision. I was confronted with an indictment including an offence under each provision: very similar criminal offending, yet substantially disparate penalties. That is the sort of discomforting discord which a cooperative effort might address. In similar vein, it seems hard rationally to justify differences from jurisdiction to jurisdiction in the proportionate liability regime.

Notwithstanding the adoption by the legislatures of the Review Panel's recommendation that this regime not apply to personal injuries and death claims, the replacement of joint and several liability with proportionate liability, in relation to economic loss and property damage claims, involves a substantial legislative revision of the common law. In brief, claimants in those situations have lost the assurance that they would be able to recover all their compensation from a solvent defendant, with that defendant being left to pursue any right of contribution against a concurrent wrongdoer. The risk of non-recovery has consequently been accentuated. The legislation was patently driven by a wish to serve the interests of defendants' insurers.

Let me return finally to some presently unanswered questions thrown up by this novel regime.

Difficult unanswered questions

A fundamental query is whether a defendant may raise an allegation that another person, not a party to the proceeding, was a "concurrent wrongdoer", so as to invoke an apportionment of the plaintiff's damages, in circumstances where the plaintiff has made no claim against that other alleged wrongdoer. A natural reading of the legislation would, to my mind, seem to permit a defendant to take that course, although the contrary view has been expressed (D Byrne J, "Proportionate liability: some creaking in the superstructure" 19 May 2006, para 20(4)).

Another is whether a putative "concurrent wrongdoer" must be a person against whom the plaintiff has an enforceable cause of action, and not just a person who has innocently, as it were, contributed to the plaintiff's loss. The case seems compelling for the conclusion that all concurrent wrongdoers must be persons or parties liable at the suit of the plaintiff. Support for that view may be drawn from *Chandra v Perpetual Trustees Victoria Ltd* (2007) NSWSC 694 and *Shrimp v Landmark Operations Ltd* (2007) FCA 1468.

Also, how will courts approach the determination of "just and equitable" responses to the failure of a claimant, or a concurrent wrongdoer, to identify all relevant parties? This is certainly uncharted territory.

And what of separate subsequent proceedings, where a court has already made a determination of the apportionment attributable to the earlier joined wrongdoer: to what extent may the subsequent court depart from the apportionment earlier decreed?

These and other issues are usefully discussed in the recently published second edition of Douglas, Mullins and Grant: The Annotated Civil Liability Act 2003 (Qld) (LexisNexis Butterworths).

Conclusion

This legislative regime denotes an obviously important change, in transferring from defendant to plaintiff the risk of non-recovery from insolvent or elusive wrongdoers. It is unfortunate both that the regime was not established uniformly throughout the Federation,

and that its differences will undoubtedly lead to uncertainties necessitating appellate determination.

It is reassuring, as to the former matter, that SCAG is showing some determination at least to explore the possibility of greater national uniformity in this important area.

As to the latter, the unfortunate reality is that court proceedings are by nature expensive, and appellate proceedings add an additional layer of cost: insurers are much better resourced to bear that burden than almost every natural person litigant.

And so again we see a governmental determination to assist insurers at the expense of ordinary citizens’ rights, even through the novel re-crafting of already well-established doctrine.