

REFORM OF THE LAW OF NEGLIGENCE: WRONG QUESTIONS — WRONG ANSWERS

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I INTRODUCTION

The current debate on an alleged public liability and medical indemnity crisis has been marked by confusion of separate issues. One issue is why insurance premiums have risen considerably in the past year or so. The other is whether the law of negligence has become ‘unprincipled’. Judges and politicians have claimed that the latter is true and have attributed the rise in premiums to this cause. They have also claimed that the rise in premiums is ‘unaffordable’. In the preamble to the terms of reference of the Panel of Eminent Persons, chaired by Justice Ipp, *Review of the Law of Negligence Report*,¹ (‘Ipp Panel’) it is stated: ‘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’. The terms of reference themselves ‘accordingly’ call for inquiry into the principles of the common law of negligence and for the development of principled options in relation to a range of matters. Without even waiting for the Ipp Panel’s report, some governments have recommended or implemented changes that will supposedly make the law of negligence more ‘principled’. With a sweeping non sequitur, they have asserted that this will make our system of compensation more affordable.

In this paper, I contend that the rise in premiums is due to complex factors, not all of which are yet fully known, but that lack of principle plays only a minor role among them; that the changes advocated by politicians are making the law less, not more, principled; and that these changes will do little to reduce the costs of the system of compensation. I assert that the problem with the present system of compensation is its slow, cumbersome, expensive and discriminatory operation; that many of the costs of injury are inevitable and will be incurred anyway; that the real issue is how the unavoidable costs should be allocated; and that to make the system more affordable requires the elimination of the wasteful costs of investigation into fault.

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1 ‘Terms of Reference: Principles-Based Review of the Law of Negligence’ in Panel of Eminent Persons, *Review of the Law of Negligence Final Report* (2002) ix.

II CAUSES OF THE RISE IN PREMIUMS

In the Australian context, the principal cause of the rise in public liability premiums appears to have been the collapse of the HIH group of companies. The full picture will perhaps not be known until the Royal Commission into that collapse reports. However, it seems that this insurer aggressively sought an increased market share and fixed its premiums at unsustainable levels. Other insurers, to retain their competitiveness and their clients' other more lucrative areas of insurance, matched HIH's quotations. Once HIH was removed from the market, insurance levels rose to more normal levels, or possibly to higher levels to make up for the past losses. In any event, the nature of the insurance market is traditionally cyclical. It has been affected since the events of 11 September 2001 by huge increases in reinsurance costs.

Whether there has actually been an increase in litigation is difficult to know, mainly because insurers have been reluctant to reveal their claims experiences. If there has been, it may be due to removal of restrictions on lawyers' advertising, changes in professional regulation that now allow for no-win no-fee agreements, better education and a greater recognition by the public of their 'rights'. In relation to actions against medical practitioners, any increase in litigation may be due in addition to the difference in the modern relationship between doctor and patient. No longer are most people treated by respected family practitioners, nor are they visited in their homes as they once were. The social status and education of the patient (now often called a 'client') are no longer inferior to the doctor's; and the latter's fallibility is more easily recognised, possibly as a result of consulting the Internet. Already in 1995 the Review of Professional Indemnity Arrangements for Health Care Professionals, chaired by Fiona Tito, *Final Report: Compensation and Professional Indemnity in Health Care*,² pointed to problems for the medical defence organisations in relation to claims incurred but not reported and inadequate reserves, though it was unable to establish any substantial increase in litigation. Recommendations in this report for better data gathering have been ignored: see the report of the Australian Health Ministers Advisory Council Legal Process Reform Group, chaired by Marcia Neave, *Responding to the Medical Indemnity Crisis: An Integrated Reform Package*.³

Similar blow-outs in damages costs have beset the National Health Service in the United Kingdom. England has never abandoned the *Bolam v Friern Barnett Hospital Management Committee*⁴ ('*Bolam*') principle, under which no medical practitioner can be held to have been negligent for following a practice that is approved by a responsible body of opinion within the profession, though there has been some reinterpretation of it. It is most unlikely that the medical indemnity crisis in Australia is due to the rejection of the *Bolam* principle by the

2 Review of Professional Indemnity Arrangements for Health Care Professionals, *Final Report: Compensation and Professional Indemnity in Health Care* (1995).

3 Australian Health Ministers Advisory Council Legal Process Reform Group, *Responding to the Medical Indemnity Crisis: An Integrated Reform Package* (2002).

4 [1957] 1 WLR 582.

High Court in *Rogers v Whitaker*⁵ and *Naxakis v Western General Hospital*.⁶ The former approved a movement away from *Bolam* that had already occurred in Australia. It will, in any event, often not lead to outcomes unfavourable to practitioners: compare *Rosenberg v Percival*.⁷

III A HYPOTHETICAL CASE

Take a case where a child falls off a horse at a gymkhana and suffers serious brain damage. It is likely that an ambulance would be called and the child taken to hospital, where treatment would be administered. Subsequently the child might be cared for by parents at home or be admitted to an institution. The ambulance, hospital and institutional costs are necessarily and inevitably sustained. The question is who is to bear them: the child, its parents, the State taxpayers who support the ambulance service and the hospital, federal taxpayers through Medicare, the organisers of the gymkhana or others. The same applies, though perhaps less obviously so, in relation to the care provided at home by the child's parents. The cost of additional care provided at home in consequence of the accident, even if it is not monetary, is initially sustained by those who provide the care. The same questions of how that cost is to be distributed arise, though there is possibly a more acute question here of how it is to be valued. But it cannot be denied that some cost has been 'sustained' somewhere and cannot be said to be 'unaffordable and unsustainable'. If left to lie on the shoulders of those who have initially sustained the cost, the burden may indeed be painful and unaffordable by them. But the sort of society in which most Australians prefer to live has long made the judgment that it will at least relieve those who initially bear such losses of the costs of medical and hospital treatment and will provide a minimum level of support for those unable to work and to support themselves.

Under the present system of tort law backed up by insurance, how the costs referred to in the previous paragraph are to be distributed depends on a detailed investigation of whether the organisers of the gymkhana were at fault. Such investigation imposes additional costs on the community and it may well be that these are what have become 'unaffordable and unsustainable'. The question is whether any worthwhile benefit flows from these additional costs. One benefit might possibly be that investigations of this sort will induce the organisers and others like them to be more careful and so reduce the likelihood of similar accidents in the future. Fewer accidents are more 'affordable and sustainable' than more accidents, as long as the costs of preventing the additional accidents do not exceed the costs saved.

It is, at best, speculative that the investigation of fault on an occasion such as the gymkhana will induce more care on other occasions. There are already many other inducements to the taking of care. In order to prevent the severe

5 (1992) 175 CLR 479.

6 (1999) 197 CLR 269.

7 (2001) 205 CLR 434.

consequences of brain injury to children on horseback, education encouraging the wearing of safety helmets when riding a horse would be much more effective than making the organisers of the gymkhana liable and possibly reducing the child's damages for contributory negligence. Since 1970, in relation to the wearing of seatbelts, it has been shown that, if necessary, backing up such education with minor criminal penalties can reduce the toll of injury considerably. The campaign slogan 'if you drink and drive you are a bloody idiot', together with random breath-testing, has been far more significant than the common law of negligence in reducing motor vehicle accidents.

Further, it may be said fairly confidently that if the organisers of the gymkhana were uninsured, litigation would not result and the investigation would not occur. Where the organisers are insured, the deterrent effect of the law of negligence is largely blunted and the purpose of the inquiry into fault reverts to the issue of who is to bear the inevitable primary costs. Insurers seldom adjust premiums in accordance with risk; in the case of small bodies like the organisers of gymkhanas it is in fact impossible to do so, or the necessary investigations are too expensive to undertake. Since the mechanism of insurance simply shifts the costs to a body of persons largely coincident with taxpayers generally, it is exceedingly difficult to see what benefit flows from incurring the additional costs of investigation. Some would say that 'corrective justice' makes it worthwhile. However, it is hard to see why this should have a role to play against insured defendants, but seldom in actual practice against uninsured defendants. In any event, it may be that it is the costs of effecting 'corrective justice' that have become unaffordable and unsustainable.

IV A REAL CASE

In *Derrick v Cheung*,⁸ a 21 month old child darted out into the road and was run down by a car travelling at moderate speed. A majority of the New South Wales ('NSW') Court of Appeal upheld a finding by the trial judge that the motorist was negligent.⁹ In the same volume of the *Motor Vehicle Reports*, one finds several similar cases, in some of which the plaintiff succeeded¹⁰ and in some of which the plaintiff failed.¹¹ This caused the editor of the series of reports to say that determining fault in cases like *Derrick v Cheung* is extraordinarily difficult and shows that proponents of no-fault liability have a case.¹² The High Court reversed the concurrent findings of fact of the trial judge and the majority of the NSW Court of Appeal. It reasserted the need to prove

8 (2001) 181 ALR 301.

9 *Derrick v Cheung* (1999) 29 MVR 351 (NSW Court of Appeal).

10 *Clarke v Freund* (1999) 29 MVR 361 (NSW Court of Appeal); *Managrave v Vrazalica* (1999) 29 MVR 419 (NSW Court of Appeal).

11 *Stojanoska v Fairfax* (1999) 29 MVR 387 (NSW Court of Appeal); *Harper v Blake* (1999) 29 MVR 389 (NSW Court of Appeal); *O'Brien v N M Rothschild Aust Ltd* (1999) 29 MVR 406 (NSW Court of Appeal).

12 Editorial note, 29 MVR 354.

that the defendant was at fault. It is true that the majority of the NSW Court of Appeal had commented that the standards laid down in such cases often do not coincide with the habits of Sydney drivers and that the defendant certainly did not bear any moral, as opposed to legal, responsibility. But this is hardly a departure from principle, since it has long been acknowledged that the standard of care of the reasonable person is an ethical one — what the reasonable person *should* do — rather than the actual behaviour of real people. Indeed, if the law of torts is to play any deterrent role so as to prevent accidents, it must constantly raise standards above those commonly adopted: compare *Bankstown Foundry Pty Ltd v Braistina*.¹³

The real point, however, is that mothers are not in consequence of the decision of the High Court going to take any greater care to see that their children do not run into the road. Any 21 month old is likely to be a handful for parents, who will not be motivated by the prospect of recovering compensation into giving children more or less rein. Nor would the decision provide a licence to drivers to drive less carefully, any more than the decision of the trial judge and the intermediate appellate court would realistically have led to Sydney motorists driving more carefully because their compulsory third-party insurers would have been liable to pay damages.

All this was made abundantly clear in the context of motor accidents by the New South Wales Law Reform Commission in 1984, in its *Report on a Transport Accidents Scheme for New South Wales*.¹⁴ Successive NSW governments failed to adopt that report's recommendations for a complete no-fault scheme. The Cain Government in Victoria, on the other hand, did try to implement it. Owing to the absence of a majority in the Legislative Council, it had to make some compromises in the *Transport Accident Act 1986* (Vic). But essentially, Victoria has operated a no-fault motor accident scheme since 1 January 1987, whereas NSW has retained a fault scheme. In consequence, Sydney motorists have persistently paid higher premiums than the levies exacted from Melbourne ones: see the very informative graph of the respective rates in the *Second Insurance Industry Market Pricing Review*.¹⁵ The Victorian levies have been sufficient to assure every person injured in a motor accident in Victoria (and some outside) of some compensation and to pay hefty dividends on occasion to the Government. The NSW premiums pay only about 50 per cent of injured victims some compensation and large parts of the fund are squandered on the costs of determining who they are to be.

A further point is that Victorian victims of motor accidents receive their compensation swiftly, whereas a study in NSW revealed that 'victims wait a

13 (1986) 160 CLR 301.

14 New South Wales Law Reform Commission, *Report on a Transport Accidents Scheme for New South Wales*, Report No 43 (1984).

15 Australian Competition and Consumer Commission, *Second Insurance Industry Market Pricing Review* (2002) 87 (figure 3.10), <http://www.accc.gov.au/pubs/publications/industry/Insurance%20report_Sep2002.pdf> at 17 November 2002.

median of 47 months to obtain damages following a motor vehicle accident, 38 months from the commencement of the proceedings, until settlement'.¹⁶

V OTHER ACCIDENTS

*Brodie v Singleton Shire Council*¹⁷ may be seen as a case that restored the general principles of the law of negligence to an area of law that had been governed by a special rule, affording immunity to a highway authority for mere non-feasance. As I write this, the NSW Court of Appeal has handed down on one day three cases involving pedestrians who fell as a result of imperfect surfaces under the control of such authorities.¹⁸ In each, the Court reversed a finding of negligence by the trial judge. Each required a detailed investigation of the facts. These cases followed several earlier ones. The time elapsed since the original falls was considerable, as must have been the costs. Reversion to principle has not made the solution to the problem of tripping injuries any easier.

Legislation introduced while the Ipp inquiry was under way and since it reported does not in fact revert to principle. It introduces special rules for persons who were intoxicated or committing offences or trespassing at the time of their injury. These are clearly a response to public outcries at some well-publicised cases. The legislation also introduces new immunities, for Good Samaritans and others. In the general scheme of things, the cases covered by the new legislation are few. They absorb only a small proportion of the community's premiums. Interpreting the legislation is going to put more of that money into lawyers' pockets.

The real solution is to abandon the fault system for compensating personal injuries, as recommended by the *National Committee of Inquiry into Compensation and Rehabilitation in Australia*, 1974 (the Woodhouse Committee). Such a system has been operating successfully, and sustainably, in New Zealand for over 28 years. Scare tactics put out by some representatives of lawyers in Australia, claiming that the New Zealand scheme has huge 'unfunded liabilities', are mostly false. It remains much less costly than the incomplete, partial compensation schemes functioning in Australia, and it represents the embodiment of community responsibility for the inevitable accidents of modern society.

16 Deborah Worthington, *The Pace of Litigation in New South Wales* (1991) 7.

17 (2001) 206 CLR 512.

18 *Richmond Valley Council v Standing* [2002] NSWCA 359 (Unreported, Handley, Sheller and Heydon JJA, 4 November 2002); *Roads and Traffic Authority v McGuinness* [2002] NSWCA 210 (Unreported, Mason P, Handley JA and Foster AJA, 4 November 2002); *Burwood Council v Byrnes* [2002] NSWCA 343 (Unreported, Handley, Beazley and Hodgson JJA, 4 November 2002).