

TORT LAW REFORM IN NEW SOUTH WALES: STATE AND FEDERAL INTERACTIONS

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In recent decades, the scope of liability in negligence has broadened to such an extent that it has fallen out of step with community expectations about the appropriate balance between protection of the injured and personal responsibility. The current insurance crisis, which has affected community groups, small business and professionals in all States and Territories, has been a catalyst for individual and cooperative reform initiatives designed to address longstanding concerns about the law of negligence. Following a brief discussion of the background to recent reforms, this article outlines some of the benefits of interaction between the States, Territories and the Commonwealth in developing reform proposals, and considers the implications of this interaction for tort law reform in New South Wales ('NSW').

I THE LIABILITY INSURANCE CRISIS AND THE UNDERLYING NEED FOR STATUTORY REFORM OF NEGLIGENCE

Community concern about the rising costs of litigation and liability insurance premiums escalated sharply throughout 2001, with the crisis reaching its peak in early 2002. To some extent the severity of the current crisis may be traced back to immediate causes such as the reduced availability of certain lines of insurance following the collapse of HIH in March 2001, and the flow-on effects of increased reinsurance costs in the wake of the United States terrorist attacks in September of the same year.¹ However, these recent events cannot be seen as the primary justification for current reform initiatives. Rather, they were symptoms of more longstanding and fundamental problems concerning the scope of civil liability that provided a catalyst for government action.

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1 See Senate Economics References Committee, Parliament of Australia, *A Review of Public Liability and Professional Indemnity Insurance* (2002) 29 ff.

The expanding scope of common law principles of negligence is a long-term trend that has been observable since the 1960s.² While judicial elaboration of the principles of liability has no doubt been motivated to a large extent by regard for the welfare of injured people, traditional constraints on the ability of courts to take into account policy matters have meant that the expansion of liability has not been adequately balanced by other considerations. In addition, the generally unacknowledged assumption that defendants will be insured has allowed courts to be consoled by the belief that the burden of compensating injured persons will be spread amongst a broader group than the individual wrongdoer.³ Independently of the impact of short-term disruptions in the insurance market, insurance has had a long-term influence on the development of the law of negligence, and any efforts at analysis and reform must recognise that interrelationship.⁴

In parallel with increasing community dissatisfaction with the law of negligence, there have been indications of growing concern among the judiciary that this area of the law has surpassed the bounds of fairness and common sense. The Chief Justice of New South Wales, J J Spigelman, recently delivered an incisive critique of the prevailing law of negligence, calling for 'principle driven reform' of the current system of compensation.⁵ Chief Justice Spigelman stated that the courts cannot be indifferent to the economic consequences of their decisions, and that pressure on premiums 'is a pertinent consideration for judges who are asked to extend the law in some manner or another'.⁶ Similarly, McHugh J of the High Court has questioned the validity of the assumption that defendants will be able to obtain insurance to protect against liability.⁷ Further, Thomas JA of the Queensland Court of Appeal has observed:

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.⁸

Despite some recent High Court decisions indicating a renewed effort to rein in some aspects of liability,⁹ other decisions have continued to broaden the scope of liability, particularly in relation to public authorities.¹⁰ As a result, it has become increasingly clear that thoroughgoing reform of the law of negligence requires principled statutory intervention.

2 See, eg, P S Atiyah, *The Damages Lottery* (1997) chh 2, 3.

3 See Michael Mills, 'Insurance and Professional Liability: The Trend of Uncertainty; Or: Negligence and the High Court: A Practitioner's Perspective' (2000) 12 *Insurance Law Journal* 25, 29.

4 Cf John G Fleming, *The American Tort Process* (1988) 21.

5 Chief Justice Spigelman, 'Negligence: The Last Outpost of the Welfare State' (2002) 76 *Australian Law Journal* 432, 440.

6 *Ibid* 435.

7 *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241, 282.

8 *Lisle v Brice* [2002] 2 Qd R 168, 174.

9 See, eg, *Agar v Hyde* (2000) 201 CLR 552; *Woods v Multi-Sport Holdings Pty Ltd* (2002) 186 ALR 145.

10 See, eg, *Brodie v Singleton Shire Council* (2002) 206 CLR 512; *Graham Barclay Oysters Pty Ltd v Ryan* (2000) 102 FCR 307.

Although traditionally the law of negligence has been predominantly the province of the common law, statutory intervention in this area is by no means a new phenomenon. Parliamentary reform of negligence dates back at least as far back as the 19th century.¹¹ The 20th century has of course seen major interventions in areas now dominated by compulsory insurance schemes, such as workers compensation and motor accidents, and also in areas such as compensation to relatives and psychiatric injury.

II BENEFITS OF A NATIONWIDE RESPONSE

Of all States, NSW has been the most seriously affected by the expanding scope of negligence. NSW is now widely recognised as the most litigious State in Australia, and consequently other jurisdictions have acknowledged the need for it to initiate reforms without delay.¹² While the NSW Government has responded quickly and decisively to the liability insurance crisis, it has also actively supported nationwide cooperation on the issue of negligence reform.

As a result of the federal division of powers under the *Australian Constitution*, the Commonwealth has no power to legislate specifically in an area such as negligence. Statutory reform of negligence must generally be enacted by individual States. However, a number of factors point to the desirability of a nationwide response, involving the Commonwealth, the States and the Territories.

The first factor flows from the implications of Australia's unified common law,¹³ namely that the High Court's statements of the principles of negligence apply to all Australian jurisdictions. As a result, perceived defects in the common law (insofar as they have not already been remedied by State and Territory legislatures) are a shared concern of all States and Territories.

A second factor stems from the interaction between liability and insurance. The insurance industry is a nationwide industry, and premiums are generally calculated on the basis of national pools of policyholders. Not only does this account for the nationwide impact of the insurance crisis, but it also suggests that measures to reform the law of negligence will only have a significant impact on premiums if enacted in all States and Territories. The Commonwealth has the constitutional power to regulate insurance other than State insurance,¹⁴ and has assumed primary responsibility for doing so on a national basis. Since governments have recognised that negligence reform should be complemented by measures to promote the effective functioning of the insurance industry, Commonwealth participation in developing proposals and enacting reforms is essential.

11 Spigelman, above n 5, 437.

12 See New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5764 (Robert Carr, Premier, Minister for the Arts and Minister for Citizenship) (Second Reading Speech for the Civil Liability Amendment (Personal Responsibility) Bill 2002 (NSW)).

13 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563.

14 *Australian Constitution* s 51(xiv).

A third reason is that some areas that have an impact on the law of negligence overlap with other Commonwealth heads of power, such as the taxation and corporations powers. For example, until recently structured settlements have been under-utilised as a result of taxation disincentives. Likewise, negligence cases arising out of contractual situations — such as the liability of companies providing services for risky recreational activities — frequently raise questions of interaction with the *Trade Practices Act 1974* (Cth). Both issues have been the subject of recent Commonwealth reform Bills.¹⁵

A final justification for a nationwide response is the incidental benefits of national consistency. Recent common law developments regarding choice of law have reduced some of the incentives for ‘forum shopping’ in tort cases,¹⁶ but concerns nevertheless remain. Further, the benefits of a national approach in promoting predictability — particularly for organisations and professions operating in several States — and community acceptability continue to apply.

III THE ROLE OF THE NEW SOUTH WALES GOVERNMENT IN ADVANCING NEGLIGENCE REFORM

Recognising the importance of taking a nationwide approach, the NSW Government has consistently urged the Commonwealth to demonstrate leadership on the issue of tort law reform. After initially stating that tort law reform was essentially an issue for the States and Territories to deal with themselves, the Commonwealth agreed to facilitate intergovernmental discussions on reform proposals, resulting in a series of ministerial meetings on public liability, convened by the Commonwealth Assistant Treasurer.

The NSW Government has played a groundbreaking role in this intergovernmental initiative, beginning with the solid set of proposals it brought to the first ministerial meeting. These proposals, focusing primarily on keeping the measure of personal injury damages within reasonable limits, offered the basis for the ‘stage one’ reforms incorporated in the *Civil Liability Act 2002* (NSW), and have provided a model for legislative reform in a number of other States.

The NSW Government also welcomed the formation of a Panel of Eminent Persons (‘Panel’) to conduct a principles-based Review of the Law of Negligence chaired by Justice David Ipp, and took an active part in contributing to its deliberations. The formation of the Panel was followed by the release of a discussion draft of the Civil Liability Amendment (Personal Responsibility) Bill 2002 (NSW) (‘CLA(PR) Bill’). This Bill incorporated a range of proposals designed to remodel the substantive law of negligence (the ‘stage two’ reforms). The Panel considered and based some of the recommendations in its report on a

15 See Taxation Laws Amendment (Structured Settlements) Bill 2002 (Cth); Trade Practices Amendment (Liability for Recreational Services) Bill 2002 (Cth).

16 See, eg, *John Pfeiffer Pty Limited v Rogerson* (2000) 203 CLR 503.

number of the NSW proposals.¹⁷ Similarly, after a period of public consultation, a revised version of the CLA(PR) Bill was tabled in the NSW Legislative Assembly, incorporating a number of the Panel's proposals.

The CLA(PR) Bill follows the *Review of the Law of Negligence Final Report* ('Ipp Report') in areas where the need for nationwide consistency is most apparent, such as basic principles of negligence and limitation periods. For example, the CLA(PR) Bill provides statutory reformulations of the duty and standard of care in Part 1A, Divisions 2 and 3 which are modelled on Recommendations 28 and 29 of the Ipp Report. Similarly, the CLA(PR) Bill proposes amendments to the *Limitation Act 1969* (NSW) which closely follow Recommendations 24 to 27 (sch 4). These provisions, along with further clauses relating to contributory negligence, mental harm and comparability of general damages, have been drafted as 'model' provisions that may be used by other jurisdictions in order to facilitate a nationally consistent approach.

Other provisions of the CLA(PR) Bill, while not drafted specifically as model provisions, have been adapted in order to ensure consistency with the recommendations of the Ipp Report. Thus the CLA(PR) Bill now provides that a professional cannot rely on compliance with peer professional opinion to avoid liability if the court considers that opinion to be 'irrational'.¹⁸

In some instances, the NSW Government has found it preferable to depart from or extend some of the Ipp proposals in areas where an alternative approach is likely to promote greater certainty or a fairer balance of responsibility.

In the area of recreational activities, for example, both the Ipp Report and the CLA(PR) Bill propose to exempt defendants from liability in relation to obvious risks of dangerous recreational activities. However, the CLA(PR) Bill seeks to provide greater assurance for recreational service providers by protecting defendants from liability in relation to risks — whether obvious or not — of all recreational activities, provided that they have given an adequate risk warning.¹⁹

The CLA(PR) Bill also takes a somewhat different approach to proportionate liability. The Ipp Report's consideration of the issue was constrained by its terms of reference, which required it to consider proportionate liability only in the context of actions for personal injury or death. Given the risk of prejudice to seriously disabled plaintiffs that may result by introducing proportionate liability in this context, the Panel convincingly supported the retention of the existing system of solidary liability for personal injures, whereby if there are multiple tortfeasors any one defendant may be liable to compensate the plaintiff fully for their injuries. However, in cases of negligence not involving personal injury, considerations of prejudice to plaintiffs weigh less strongly than the value of limiting the liability of defendants according to their share of responsibility, and as a consequence the CLA(PR) Bill proposes in Part 4 the introduction of proportionate liability in the context of economic loss and property damage. The

17 Panel of Eminent Persons, *Review of the Law of Negligence Final Report* (2002) [9.32]. See, eg, Recommendation 36, modelled on cl 69(3) of the discussion draft.

18 Civil Liability Amendment (Personal Responsibility) Bill 2002 (NSW) pt 1A, div 6. Cf *ibid*, Recommendation 3.

19 Civil Liability Amendment (Personal Responsibility) Bill 2002 (NSW) cl 5A.

proposals in the CLA(PR) Bill are based to a significant degree on an extensive inquiry jointly undertaken by NSW and the Commonwealth during the 1990s.²⁰

The principle-driven reform of the law of negligence presently underway is clearly a long-term process requiring the engagement of all levels of government. The NSW Government has taken a constructive approach to federal–State interaction on the issue, both through advancing concrete proposals for reform and supporting the Ipp Report’s recommendations in the interests of national consistency. The Government is strongly committed to developing and implementing a system of compensation for negligence that accords with the basic community values of fairness, personal responsibility and common sense.

20 J L R Davis, *Inquiry into the Law of Joint and Several Liability: Report of Stage 2* (1995).