

PUBLIC LIABILITY: A PLEA FOR FACTS

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Since the beginning of 2002, the Australian media have bombarded us with tales of a public liability 'crisis'. Early in September, the federal government released the first report of a Panel it established to review the law of negligence ('Ipp Report')¹ while on the following day the New South Wales ('NSW') government released a consultation draft of the Civil Liability Amendment (Personal Responsibility) Bill 2002 (NSW).² Broadly the recommendations contained in the Ipp Report and the provisions of the Civil Liability Amendment (Personal Responsibility) Bill 2002 (NSW) aim to limit the circumstances in which people who are injured through negligence can recover compensation. While the details of any actual legislative change are not final at the time of writing, my purpose in the context of this *Forum* is to discuss the framework within which debate around the so-called 'crisis' has been taking place. I will leave to other contributors the task of discussing the specific provisions of the various reports or the NSW Bill.

Ever since Joe Hockey, the federal Minister for Small Business and Tourism, first raised this issue early in 2002,³ what has struck me as singularly notable is the absence from the debate of *actual data* about the extent to which the tort system does (or does not) respond to people who experience accidents and injuries. The media and political commentary has focused on individual anecdotes and horror stories designed to demonstrate our supposed increasing litigiousness and avoidance of 'personal responsibility'. We hear much about

* Professor of Law, University of Sydney. I should like to thank Jane Wangmann for her assistance with preparing this presentation, and reworking it for publication, and Professor Harold Luntz for allowing me to rely so heavily on (and to reproduce) the data in his jointly authored text Harold Luntz and David Hambly, *Torts: Cases and Commentary* (5th ed, 2002). This paper was originally prepared for a discussion forum held at New South Wales Parliament House, Sydney, 23 September 2002.

1 Information about the Review of the Law of Negligence is available at *Review of the Law of Negligence* (2002) Department of the Treasury <<http://www.revofneg.treasury.gov.au/content/home.asp>> at 20 November 2002. The Second Ipp Report was released on 2 October 2002 and incorporates the first Ipp Report in full.

2 A consultation draft of the Bill was released in September 2002. This was revised and presented to Parliament in October 2002. The Civil Liability Amendment (Personal Responsibility) Bill 2002 (NSW) was passed by the Legislative Assembly on 30 October 2002 and by the Legislative Council on 19 November 2002. At the time of publication, it was awaiting assent.

3 See Jason Katsoukis, 'Crackdown on Injury Payouts', *Australian Financial Review* (Sydney), 21 January 2002, 1.

how we are becoming a 'blame' society, but rarely are we also told, at least by the media who have helped to fuel the 'crisis' environment, that as the law now stands, a person who has been injured has to find someone to blame before they can receive any compensation. The compensation system that forms part of NSW law involves, very simply, the person whose negligence caused an injury being required to compensate the accident victim, on a once and for all basis, for all past, present and future loss. Not surprisingly, only a tiny fraction of people injured in accidents are compensated. The rest are left to rely on the resources either of their families or of the social security system.⁴

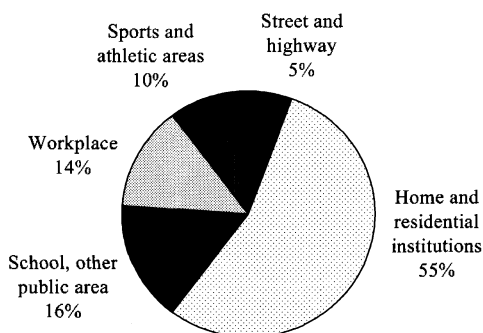
I WHO GETS INJURED AND WHO GETS COMPENSATION?

In the most recent edition of their comprehensive casebook,⁵ Harold Luntz and David Hambly begin their discussion of tort law by locating it within an empirical framework drawing upon a diverse range of sources to illustrate the landscape of injury, disease, incapacity and compensation in Australia.

A Where Do Injuries Occur?

Drawing on hospital admissions information, Luntz and Hambly show that by far the largest proportion of injuries happen in the home, where there is rarely anyone that can be sued. Figure 1 below indicates that only a small proportion of injuries occur on the roads, but these accidents have the most severe consequences for the person injured.⁶

FIGURE 1



4 The social security system has also increasingly been amended to avoid any possibility of 'double dipping': see *Social Security Act 1991* (Cth), pt 3.14 'Compensation recovery'.

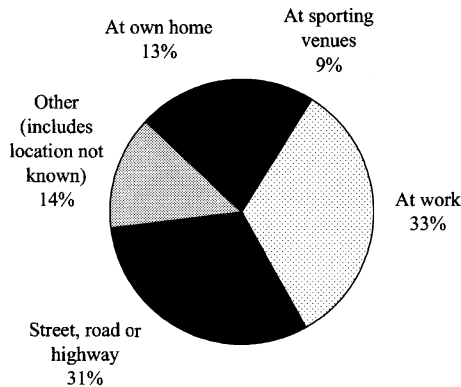
5 Luntz and Hambly, above n *, 2002.

6 Ibid 4. Figure 1 derived from Australian Institute of Health and Welfare, *Australian Hospital Statistics* (2000) table 9.6, 'Separations by External Cause in ICD-10-AM Groupings and Place of Occurrence, All Hospitals, Australia, 1999-2000'.

B What are the Causes of Long-Term Disability in Australia?

Data from the Australian Bureau of Statistics survey of disability reproduced in Luntz and Hambly, reveals that over 30 per cent of accidents causing disability lasting six months or more were caused by road accidents. By contrast, only 13 per cent of accidents causing long-term disability resulted from injuries that took place at home.⁷

FIGURE 2



C Who Makes Claims?

Road accident victims are far more likely to make claims and receive compensation than any other group.⁸ Seventy five per cent of claims finalised in the NSW District Court over a survey period in 1994 were associated with motor vehicle accidents ('MVAs'). Yet, only about 54 per cent of people injured in MVAs receive any compensation.⁹ Few common law claims are made for workplace injuries, compared to under the statutory workers compensation scheme. In addition, accidents and injuries other than those at work or on the roads comprise only a very small proportion of tort claims in any year.

7 Ibid 6. Figure 2 derived from Australian Bureau of Statistics, *Disability, Ageing and Carers: Accidents and Injuries – Common Causes of Disability* (1999) table 'People Aged 18 and Over With a Disability [whose main condition was caused by an accident or injury] ... by Where Accident or Injury Occurred'.

8 Luntz and Hambly, above n *, [1.1.9] citing Marie Delaney, 'Some Characteristics of Personal Injury Claims in the New South Wales District Court' (1995) 8 *Civil Issues* 1 (Bulletin of the Civil Justice Research Centre). See also Donald Harris et al, *Compensation and Support for Illness and Injury* (1984) 50–1 and see more generally 45, ch 2, 'Who Claims Compensation: Factors Associated with Claiming and Obtaining Damages'.

9 Luntz and Hambly, above n *, 8 (fn 23) citing Delaney, above n 8.

D Are Damages Awards 'Too High'?

According to the first Ipp Report, there is a widely held view in the Australian community that '[d]amages awards in personal injuries cases are frequently too high'.¹⁰ Significantly, the Panel said it was not their job to test the accuracy of these perceptions, but rather to take them as a starting point.¹¹ In NSW, large claims leading to awards or settlements of over A\$500 000 under the third party motor vehicle insurance system averaged 115 per year between 1989–96.¹² For 1997, of all claims (by type of insurance), 128 were for over one million dollars of which the vast majority (89) were MVAs.¹³

TABLE 1

Type of insurance	Size of lump sum			Total number	Total amount \$million
	\$1 million	\$500 000– \$1 million	\$100 000– \$500 000		
Motor accident	89	164	2455	2706	800
Workers compensation	12	79	2128	2219	506
Public liability	18	33	501	552	163
Medical indemnity	9	13	158	180	60
Total	128	289	5242	5659	1529

E How Many Australians with Disability Caused by Accident or Injury Have Access to the Tort System?

There are about 3.6 million people in Australia with some form of disability, however only 590 000 (16 per cent) attribute their condition to some form of accident or injury.¹⁴ Only 65 400 recovered damages and of those only 5660 received more than A\$100 000.¹⁵

10 Panel of Eminent Persons, *Review of the Law of Negligence Final Report* (2002) [1.4].

11 *Ibid* [1.6].

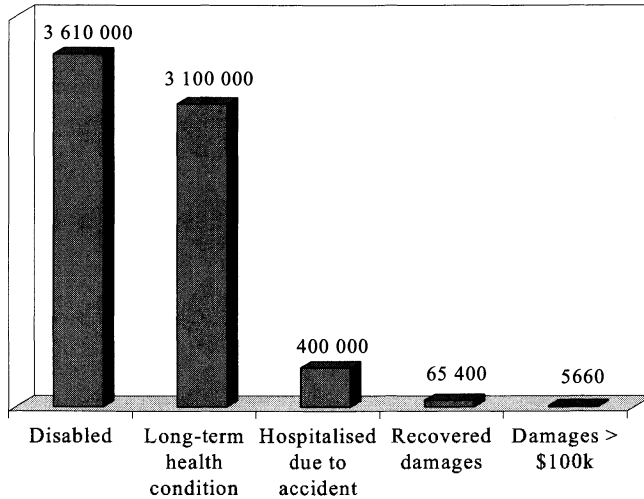
12 Luntz and Hambly, above n *, [1.1.10], citing the Motor Accidents Authority of NSW, *NSW Motor Accidents Scheme Large Claims* (1997).

13 *Ibid* 10; J R Cumpston, *Report to the Structured Settlement Group* (2000), citing Coopers & Lybrand, *Structured Settlements — Legislative Project* (1997).

14 Luntz and Hambly, above n *, [1.1.11] extracting Australian Bureau of Statistics, *Disability, Ageing and Carers 1998: Summary of Findings* (1999) 7, table 11 (Cat No 4430.0).

15 *Ibid*. See figure 3. See also P S Atiyah, *The Damages Lottery* (1997).

FIGURE 3



II SO WHY THE SUDDEN NEED TO CHANGE THE LAW?

It does seem clear that there is an insurance crisis of some kind that appears to have followed on from the events of 11 September 2001, and the collapse of Australian insurance giant HIH.¹⁶ Despite these recent critical events, there is an assumption in the public discussion, in aspects of the NSW proposals, and in the Ipp Report, that the premium increases are causally related to a flood of claims and increasingly large damages awards.

In the past year, premiums for small community and voluntary organisations, local councils and small businesses have risen exponentially and in some cases insurance has been difficult (or impossible) to obtain. Yet a survey of 700 community organisations undertaken in March 2002 by a national umbrella group, Ourcommunity.com.au, found that 96 per cent had not had a claim on their public liability insurance in the past five years. Of those groups who did have a claim, the total money paid out by insurers represented just 3.5 per cent of

16 Some papers and reports and submissions to the Ipp Panel have canvassed these factors and others: eg Australian Competition and Consumer Commission, *Second Insurance Industry Market Pricing Review* (2002), <http://www.accc.gov.au/pubs/publications/industry/Insurance%20report_Sept2002.pdf> at 17 November 2002; David Kehl, *Liability Insurance Premium Increases: Causes and Possible Government Responses*, Current Issues Brief No 10 2001–02, Department of the Parliamentary Library, Information and Research Services (2002), <<http://www.aph.gov.au/library/pubs/CIB/2001-02/02cib10.pdf>> at 21 November 2002; Rosa Lozusic, *Public Liability*, Briefing Paper No 7/2002, NSW Parliamentary Library Research Publications (2002) <<http://www.parliament.nsw.gov.au/prod/web/phweb.nsf/frames/parliamentaryservices>> at 25 November 2002.

the total premiums paid over one year. The average claim was A\$8875 with only two groups reporting that they had claims of over A\$50 000.¹⁷

In its September 2002 report, the Australian Health Ministers Advisory Council Legal Process Reform Group ('Neave Committee') on medical indemnity issues¹⁸ was careful to acknowledge that there really is insufficient data to blame litigation for the insurance crisis. The Neave Committee noted that the lack of hard data was 'a substantial barrier to national policy making'¹⁹ and had led to 'some simplistic conclusions about the connection between premium rises and rises in claims frequency ... not necessarily strongly supported by the existing evidence'.²⁰

Two key conclusions can be drawn:

- the vast majority of people who experience injury or disability are unable to recover compensation from anyone/anywhere; and
- insurance premiums have indeed risen substantially, but there is no actual evidence that this is linked to tort claims or to our becoming an increasingly litigious or 'blame' society.

III DOES THAT MEAN THERE'S NO PROBLEM?

Rather than the notion that we are increasingly becoming a 'blame' society, one of the biggest problems facing our community is that we link blame to compensation, rather than accept collective responsibility for those who, because of injury or illness or disability, are unable to care for themselves.²¹

In the early 1980s, the NSW Law Reform Commission undertook a comprehensive inquiry into accident compensation (though it was subsequently limited to transport accidents). The Commission's identification of some of the key problems with the system is as relevant today as it was 20 years ago.²² Perhaps the least rational thing of all is courts making assessments on a once and for all basis of all past, present and future loss. As one judge so aptly described the phenomenon (in a case involving a young child):

17 Ourcommunity.com.au, 'Are Community Groups Getting Ripped Off on Public Liability Insurance?' (Press Release, 25 March 2002), <http://www.ourcommunity.com.au/article/view_media_list.do> at 5 November 2002.

18 Australian Health Ministers Advisory Council Legal Process Reform Group, *Responding to the Medical Indemnity Crisis: An Integrated Reform Package* (2002) (chaired by Professor Marcia Neave AO).

19 *Ibid* [3.1].

20 *Ibid* [3.5].

21 For a review of the debate about the efficacy of a tort-based system, versus a no fault system see Luntz and Hambly, above n *, [1.3.25]–[1.3.27].

22 New South Wales Law Reform Commission, *Report on a Transport Accident Scheme for New South Wales*, Report No 41 (1984) ch 3; New South Wales Law Reform Commission, *Accident Compensation: Issues Paper*, Issues Paper No 2 (1982), especially [3.14]–[3.26].

These disputes must of course be determined on a once and for all basis. Looking to the past is one thing; this causes no great difficulties. Looking to the future is an entirely different proposition. ... [T]he Court must proceed on the judicial fiction that it is capable of assessing a loss of earning capacity ... for this young boy. This is a task that no man or woman on this planet could wisely discharge.

Each of these exercises — the determination of the loss of earning capacity and awarding a money sum to look after his future care — requires the Court to assess the unassessable, to pronounce on the unpronounceable, to judge the unjudgeable. But that is what I am required by law to do, and what, to the best of my abilities, I will do.²³

Other participants in this *Forum* will be addressing the issue of structured settlements so I will not discuss this issue any further.

IV PROCEED WITH CAUTION

I want to conclude with a plea that we slow down and give this issue some careful thought. We could start by refraining from the use of the word 'reform' when what we actually mean is 'cuts'. Each of the statutory changes to tort law over the past 20 years or so has really been about reducing the amount of damages possible in one category or other. As the Neave Committee's report on medical indemnity points out:

Many changes which are suggested as so-called tort reforms are simply benefit reductions, which if not well-considered will have the effect of increasing the harm and disadvantage suffered by those people who are most in need of assistance. Cost containment is an appropriate aim for reform. However the ... basis for changes [*must be*] justified by the evidence.²⁴

A real and effective reform exercise would start by gathering empirical data that supports the existence of a problem that needs 'reform'. If, as the Neave Committee and the Australian Competition and Consumer Commission suggest, there is no clearly established causal link between the insurance pricing crisis and an increase in claims (or their magnitude), reducing the damages available to the small proportion who have someone to sue will not resolve the premium crisis. Instead it will simply exacerbate the difficulties experienced by those who have suffered an injury (and those who care for them) while putting on hold, or sending off to the too hard basket, the pricing issues.

To give just one illustration of this type of statutory 'reform': in cases involving serious injury, one of the two 'big ticket items' is damages for the costs of care.²⁵ In 1977, the High Court acknowledged that the work of caring for accident victims is often left to family members, and as Sir Ninian Stephen pointed out, this care is almost invariably provided by women.²⁶ In *Griffiths v Kerkemeyer*,²⁷ the Court held that the costs of that care were recoverable by the

23 *Mundy by his Tutor Mundy v Government Insurance Office of New South Wales* (1995) (Unreported, Supreme Court of NSW, Spender AJ, 5 June 1995).

24 Australian Health Ministers Advisory Council Legal Process Reform Group, above n 18, [2.9].

25 The other is of course loss of earning capacity.

26 *Griffiths v Kerkemeyer* (1977) 139 CLR 161, 170–1.

27 *Ibid.*

accident victim, even where the care was being provided at no actual financial cost to the plaintiff. Yet almost immediately following that decision, courts and legislatures started making cuts to those kinds of damages, working on the theory that the families would have no choice but to pick up that care themselves.²⁸

As for statutory caps being placed on non-pecuniary loss, this is more a rhetorical gesture than a real cut when the cap is set as an amount of A\$350 000 (and indexed)²⁹ since awards would rarely if ever reach that size. Perhaps of more interest is the fact that while damages for non-economic losses for personal injury have been capped, there is currently no statutory cap on the amount that can be awarded for such losses in defamation law.

We need to find a way to stop the media depicting tort actions as some kind of lottery in which anyone can receive a large payout and where egregious tales of plaintiff excess and rapacious lawyer greed always make a good prime time story (though of course when the appeal happens, it's nowhere near as interesting and therefore may not get any air time).

In closing, I would like to draw an analogy from an area that I spent a fair proportion of the past five years involved in — family law reform debates — because I think there are some common themes. One of the key aims of the *Family Law Reform Act 1995* (Cth) was to reduce the incidence of litigation, just as the government claims will be achieved by the NSW civil liability amendments. Yet one of the outcomes of its introduction was a significant *increase* in the number of applications made to the Family Court.³⁰ A similar increase is being predicted to flow from the Civil Liability Amendment (Personal Responsibility) Bill 2002 (NSW), which will increase uncertainty and likely lead to more disputed cases.

Perhaps I can best illustrate the analogy by referring to the titles of two of the papers I have written in the past few years. The first, which speaks for itself, was called, rather unoriginally, 'if it ain't broke don't fix it'³¹ and was a call for those arguing the case for reform of matrimonial property laws to produce some evidence of what the mischief was that the reform proposals were apparently designed to address. The second was called 'law reform by frozen chook'.³² It referred to the trend to respond, sometimes by broad ranging legislative change, to anecdote and horror story, rather than to evidence-based data. Why did I call it that? One of the key lobbyists in the area, someone whose views are taken seriously by at least some governments, was quoted a couple of years ago in a

28 For a critical discussion see Reg Graycar, 'Women's Work: Who Cares?' (1992) 14 *Sydney Law Review* 86; Reg Graycar 'Love's Labour's Cost: The High Court's Decision in *Van Gervan v Fenton*' (1993) 1 *Torts Law Journal* 122.

29 *Civil Liability Act 2001* (NSW) s 16(2).

30 See data cited in Helen Rhoades, Reg Graycar and Margaret Harrison, *The Family Law Reform Act: The First Three Years* (2000) ch 6, <http://www.law.usyd.edu.au/teaching/2001/famlawref95_report> at 21 November 2002.

31 Reg Graycar, 'If it Ain't Broke Don't Fix It: Matrimonial Property Law Reform and the Forgotten Majority' (Speech delivered at the NSW Bar Association Public Forum, Sydney, 20 May 1999), <<http://www.familycourt.gov.au/papers/html/graycar.html>> at 25 November 2002.

32 Reg Graycar, 'Law Reform by Frozen Chook: Family Law Reform for the New Millennium?' (2000) 24 *Melbourne University Law Review* 737.

national newspaper as saying that all the official statistics on family violence used by the Family Court, academia, law societies and other professional groups are wrong in saying men are more violent than women. He maintains that women and men are equally violent. And his evidence for this: 'My ex wife, for example, once chucked a frozen chook at me'.³³

33 Miriam Cosic, 'Uncivil War', *The Australian Magazine* (Sydney), 21–2 August 1999, 15, 20.