

TORT REFORM, INSURANCE AND RESPONSIBILITY

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I INTRODUCTION — AN INSURANCE CRISIS

The current Australian tort reform process is being driven by concerns about insurance. The collapse of the HIH Insurance group in 2001 (which had about 22 per cent of the public liability insurance market) and of United Medical Protection/AMIL (major medical insurers, particularly of New South Wales practitioners), the impact of the 11 September 2001 attacks on the global reinsurance market and apparent trends in litigation all contributed to this concern. The apparent seriousness of the problem led to the situation being dealt with on a federal basis. On 27 March 2002 a meeting of ministers put the process of dealing with the insurance crisis in the hands of the Heads of Treasuries. The Heads of Treasuries set up an Insurance Issues Working Party (which commissioned a report)¹ and the Panel of Eminent Persons ('Ipp Panel') to review the law of negligence with an implicit (if not explicit) brief to reduce damages and costs. At the same time there was an inquiry into medical insurance issues,² and reports by the Australian Competition and Consumer Commission³ and the Senate Economics Committee.⁴ The Prime Minister has announced packages of reform for medical indemnity insurance, while calling on State and Territory governments to continue tort law reforms.⁵

During 2002 all Australian jurisdictions passed legislation or developed Bills⁶ which were aimed at dealing with the insurance crisis on the assumptions that it

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1 Trowbridge Consulting, *Public Liability Insurance: Practical Proposals for Reform* (2002), Report to the Insurance Issues Working Group of Heads of Treasuries, 30 May 2002.

2 Australian Health Ministers Advisory Council Legal Process Reform Group, *Responding to the Medical Indemnity Crisis: An Integrated Reform Package* (2002), released on 18 September 2002.

3 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.

4 Senate Economics Committee, Parliament of Australia, *Report on the Impact of Public Liability and Professional Indemnity Insurance Cost Increases* (2002), released 22 October 2002.

5 John Howard, 'A New Medical Indemnity Insurance Framework' (Press Release, 23 October 2002), <http://www.pm.gov.au/news/media_releases/2002/media_release1937.htm> at 19 November 2002.

6 See, inter alia, Civil Law (Wrongs) Bill 2002 (ACT); *Civil Liability Act 2002* (NSW); Civil Liability (Personal Responsibility) Amendment Bill 2002 (NSW); Personal Injuries (Liability and Damages) Bill

was caused by an ever-increasing level of litigation, ever-increasing damages awards and an extremely litigious society composed of individuals who are not prepared to take responsibility for their own actions.

The present Australian tort reform process is based largely on a simple desire to cut costs and to ensure predictability for insurers. On its own this is not enough to create principled tort law or effective reform.

There is concern that the drive to reduce costs and the speed with which inquiries have been carried out may mean that the reforms produced do not meet the needs of Australian society — these include the needs of injured people to be able to continue with their lives, the need for people to feel that justice is done between wrongdoer and victim, and the need to deter wrongful behaviour in order to reduce the level of injury. All these things have connections to views of social and personal responsibility. Both tort law and insurance reflect ideas of the balance of responsibility between society and individual. To reform tort law effectively, we need to articulate what is wrong with the old views and consider what new views need to be put in their place.

II TORT LAW AND INVISIBLE INSURANCE

For many years tort law cases, and especially negligence cases, were decided while ignoring the existence of insurance. Very few cases have taken it into account in relation to liability. One of these is *Lynch v Lynch*,⁷ where the plaintiff sued her mother for negligently driving while the plaintiff was still *in utero*. Clarke JA held that, at least where there was compulsory third party personal injury insurance, a child born alive was able to sue her mother for injuries sustained while unborn. He thought this was a case where the existence of insurance should be taken into account.

However it has been far more common for courts until recently to deliberately ignore the existence of insurance in personal injury cases.⁸ In a case with facts very similar to those in *Lynch v Lynch*, the Supreme Court of Canada held that compulsory insurance was irrelevant.⁹ Evidence of insurance is not generally admissible in jury trials, although it has been argued by some that the fact of (or

2002 (NT); *Personal Injuries Proceedings Act 2002* (Qld); *Volunteers Protection Act 2001* (SA); Good Samaritans (Limitation of Liability) Bill 2001 (SA); Landowners (Recreational Use of Land) Bill 2002 (SA); Recreational Services (Limitation of Liability) Bill 2002 (SA); *Wrongs (Liability and Damages for Personal Injury Amendment) Act 2002* (SA); Statutes Amendment (Structured Settlements) Bill 2002 (SA); Volunteer Protection Bill 2002 (Vic); Wrongs and Other Acts (Public Liability Insurance Reform) Bill 2002 (Vic); Volunteer Protection Bill 2002 (WA); Civil Liability Bill 2002 (WA); Trade Practices (Liability for Recreational Services) Bill 2002 (Cth).

7 (1991) 25 NSWLR 411. More recent acknowledgments of the importance of insurance include *Morris v Ford Motor Co Ltd* [1973] QB 792 (Court of Appeal) (Lord Denning); *Smith v Eric S Bush* [1990] 1 AC 831, 858 (House of Lords) (Lord Griffiths) and many of Justice McHugh's judgments including those in *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords (Reg)* (1997) 188 CLR 241; *Perre v Apand Pty Ltd* (1999) 198 CLR 180; see also *Dimond v Lovell* [2000] 2 All ER 897, 907 (House of Lords) (Lord Hoffman).

8 *Davie v New Merton Board Mills Ltd* [1959] AC 604.

9 *Dobson v Dobson* [1999] 2 SCR 753.

the assumption of) the availability of insurance allows judges or juries to set damages at a very high level.

Where insurance is considered in cases about personal injury there are concerns that the evidence and understanding of its operation and consequences may be incomplete and that it may undermine some of the aims of tort law.¹⁰ There is a tendency for issues relating to insurance to be considered in a piecemeal way or for only limited evidence to be presented, while some matters are simply assumed. The adversarial process creates a significant risk that not all the information available will be considered.

III TENSIONS BETWEEN TORT LAW AND INSURANCE

Insurance is now a fundamental part of our society. It is clearly important to be able to factor it in and consider it comprehensively in the process of reform of the tort system, but it remains important also to factor in other principles underlying tort law.

As the tort reform process has progressed so far, battle lines appear to have been drawn between a group whose view is that tort law is too expensive and must be cut, and another group who argue that tort law has important aims that must not be sacrificed in the name of 'mere economy'. The synthesis that needs to arise from this apparent contradiction is a framework for tort law which factors in all these issues. However, it is not adequate to simply say that tort law must take into account insurance issues. There are some fundamental differences between the way insurance and tort law operate which make that an inappropriate way to proceed.

Insurance is based on groups and populations. It is based on assessing the probabilities of events coming to pass in relation to populations. Risks are assessed on a statistical basis and the individual insured is considered in terms of statistical data. By contrast, tort law focuses on the interaction between two individual parties, and in the common law systems it actually allows the two parties to control the process, with the judge acting more like 'referee' than investigator. This focus on the individual parties means that it is difficult for the law to deal with areas of law or fact which depend on the evaluation of evidence about populations — one example is epidemiological evidence in medicine;¹¹ another example is the ramifications of insurance.

It can be argued that there are direct conflicts between the aims of tort law and insurance. It is frequently argued that insurance prevents the deterrent function of tort law from operating by preventing the damages flowing from the wrongdoer. However, this ignores two things. One is that any deterrent effect may also flow from the fact of being blamed and bad publicity associated with

10 Jane Stapleton, 'Tort, Insurance and Ideology' (1995) 58 *Modern Law Review* 820.

11 For example, epidemiological evidence about causation of asbestosis or cancer: see Gary Edmond and David Mercer, 'Rebels without a Cause?: Judges, Medical and Scientific Evidence and the Uses of Causation' in Ian Freckelton and Danuta Mendelson (eds), *Causation in Law and Medicine* (2002) 83.

such blame; there is also the question of increased premiums which may operate as a more effective deterrent than a single damages verdict simply because they reappear every year to remind the insured of the desired behaviour. The second thing is that insurance may actually operate to remediate one of the troubling aspects of negligence law, which is that often a wrongful act seems relatively blameless and the reparation required disproportionate to the blameworthiness of the behaviour — a moment's inattention in a motor vehicle may lead to a catastrophic loss. Negligence is not about intentional harm; it is about accidental harm. In such a case insurance may operate to equalise the level of proportionality between the wrongful act and the harm done, at least where premiums are affected by assessment of risk and the track record of the insured, while the injured party still gets needed compensation. Thus there is no *necessary* conflict between tort law and insurance.

IV CONCEPTS OF PERSONAL RESPONSIBILITY IN TORT LAW

Tort law's traditional view of personal responsibility has been relatively focused on the individual. In negligence, which is the dominant tort in the public liability area, the individual is assessed by reference to the reasonable person who is an individual who cares for her or himself and who seeks to prevent harm to others but does not go so far as to rescue them from danger or to nurture others. However, the ideas of personal responsibility which underlie the law of negligence may swing from an emphasis on responsibility for the self to an emphasis on responsibility for others.

The 'individual responsibility' end of the continuum is evidenced by language which emphasises individual autonomy and choice. It tends to see intoxication of the plaintiff as a defence because it is self-induced and contributory negligence gains a higher profile when this end of the continuum is in the ascendant. When the pendulum is at the other end of the continuum, cases are decided on the basis that the defendant ought to know that the plaintiff might make mistakes, contributory negligence is less prominent, even trespassers are protected by the law. The plaintiff's need for damages may be emphasised as well. There is a tendency to see the world less in terms of individual autonomy and to see choices as circumscribed or difficult to make.

In Australia in the 1980s and early 1990s negligence law went through a period when it seemed to emphasise collective responsibility more than it had done in the past. For example, in *Nagle v Rottnest Island Authority*¹² the majority of the High Court held that the Authority owed a duty of care to a man who dived into a swimming hole and became a quadriplegic. They held that a person who owes a duty to others must take account of the possibility that they may fail to take proper care of their own safety. But five years later in *Romeo v*

12 (1993) 177 CLR 423.

*Conservation Commission of the Northern Territory*¹³ when Ms Romeo was seriously injured when she fell, while drunk, from a cliff in a reserve the Court, by majority, held that the danger was obvious and that defendants should not have to warn against obvious dangers.¹⁴ That is, the plaintiff could have and should have protected herself.

Since then the High Court has continued to emphasise the importance of individual responsibility, autonomy and choice in a number of cases. This appears to be linked to a sharp increase in decisions favouring defendants over plaintiffs.¹⁵ Recent cases show this clearly.¹⁶ This trend is also evident in cases in the lower courts.¹⁷

A consideration of the language used in the judgments in the cases indicates the underlying ideas about moral responsibility to which the High Court is seeking to give effect. The individualised sense of fault which the later cases reflect is obvious. The individual's autonomy and voluntary human action is the key. The recognition of the interconnected nature of risk bearing in the community has receded.

V CONCEPTS OF PERSONAL RESPONSIBILITY IN INSURANCE

The principles of responsibility which underlie insurance may not be so obvious as they seem at first glance. Prima facie, insurance appears to be based on a view that an individual insurer is autonomous and has made a deliberate choice to be insured in order to avoid a loss which he or she might otherwise have to bear. Principles of the autonomy of the individual seem to underlie this view which are similar to the principles which underlie freedom of contract. This view of insurance does not examine where the risk is otherwise borne, but

13 (1998) 192 CLR 431.

14 *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431, 447.

15 See Harold Luntz, 'Torts Turnaround Downunder' (2001) 1 *Oxford University Commonwealth Law Journal* 95.

16 (2001) 205 CLR 166; *Agar v Hyde* (2000) 201 CLR 552; *Jones v Bartlett* (2001) 205 CLR 166; *Modbury Triangle v Anzil* (2001) 205 CLR 254; *Sullivan v Moody* (2001) 183 ALR 404; *Woods v Multi-Sport Holdings Pty Ltd* (2002) 186 ALR 145.

17 See, eg, *Warren v Revesby Heights Ex-Servicemen's Memorial Club Ltd* [2001] NSWCA 465 (Unreported, Mason P, Stein JA and Rolfe AJA, 11 December 2001); *Mortimer v Propix Pty Ltd* [2001] NSWCA 478 (Unreported, Meagher, Hodgson JJA and Grove J, 12 December 2001); *Waverley Council v Lodge* (2001) 117 LGERA 447; *Mawlodi v State Rail Authority* [2001] NSWCA 415 (Unreported, Meagher, Heydon JJA and Rolfe AJA, 12 November 2001); *Marrickville Municipal Council v Moustafa* [2001] NSWCA 372 (Unreported, Sheller JA, 12 March 2001); *Trustees of the Roman Catholic Church, Archdiocese of Sydney v Kondrajian* [2001] NSWCA 308 (Unreported, Mason P, Giles JA and Ipp AJA, 24 September 2001); *South Tweed Heads Rugby League Football Club v Cole* (2002) Aust Torts Reports ¶81-670; *New South Wales v Paige* [2002] NSWCA 235 (Unreported, Spigelman CJ, Mason P and Giles JA, 19 July 2002); *Buttita v Strathfield Municipal Council* [2001] NSWCA 365 (Unreported, Spigelman CJ, Giles JA and Fitzgerald AJA, 8 October 2001); *State Rail Authority v Schadel* [2001] NSWCA 394 (Unreported, Sheller, Beazley and Giles JJA, 9 November 2001); *Kozjak v Fairfax Community Newspapers Pty Ltd* [2001] NSWCA 37 (Unreported, Meagher, Beazley JJA and Windeyer J, 7 March 2001).

focuses on the individual. However, insurance may also be seen as a collectivisation technique which operates to spread risk across a population by the use of premiums. This view of insurance as a collective process is reinforced when one considers compulsory insurance such as the NSW third party personal injury insurance scheme for motor accidents, or workers compensation schemes.

To compare how these views vary over time, consider the situation in the 19th century when hardly anyone had insurance. By the late 20th century, we shift to a position where a large proportion of the population has insurance, where it is assumed that it is good practice for businesses to be insured and where indeed people are prohibited from practising in some industries and professions unless they are insured. The rise of social security in the 20th century is an extreme form of collectivisation of insurance, with premiums being paid in the form of taxation. Similarly, the New Zealand Accident Compensation Scheme is an extreme form of insurance collective.

VI CURRENT IDEAS ABOUT PERSONAL RESPONSIBILITY

Recently Chief Justice Spigelman¹⁸ disparagingly characterised the collectivist view of personal responsibility when he called negligence ‘the last outpost of the welfare state’, which ‘encouraged individuals to hold others responsible for looking after them and protecting them from the consequences of their own conduct’.

The speech appears to have resonated with a large number of people, even though it could be strongly argued that his call for a return to an emphasis on responsibility for oneself had already been answered by the High Court. However, it seems that this shift by the High Court has not been perceived by politicians, the insurance industry or the general public. The terms of reference of the Review of the Law of Negligence and the Second Reading Speeches of Bills introducing tort law reform all frequently refer to ‘self assumption of risk’,¹⁹ ‘personal responsibility’²⁰ and similar phrases. As the Ipp Panel noted in its Final Report there is an ‘assumption ... that the present state of the law imposes on people too great a burden to take care of others and not enough of a burden to take care of themselves’.²¹

18 Chief Justice Spigelman, ‘Negligence: The Last Outpost of the Welfare State’ (2002) 76 *Australian Law Journal* 432.

19 ‘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, ix–xii, 3(b).

20 See, eg, 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); South Australia, *Parliamentary Debates*, House of Assembly, 14 August 2002, 1033 (Kevin Foley, Deputy Premier): ‘The bill reflects the Government’s view that adult consumers of recreational activities should be able to take responsibility for their own safety in this way. In general, comment received on the Bill was supportive of this underlying concept’.

21 Panel of Eminent Persons, *Review of the Law of Negligence Final Report* (2002) 15.

The Ipp Panel did not examine the principles of personal responsibility relating to negligence any further. The Trowbridge Report²² did not examine the principles of personal responsibility relating to insurance at all. Thus the process of tort law reform in Australia has been predicated on an assumption that the ideas of personal responsibility underlying the tort of negligence are wrong, and that the costs of negligence law must be reduced, but there has been no examination of the validity of the assumptions about the law, and no examination of the ideas of personal responsibility underlying the insurance process.

VII AIMING FOR CONGRUENCE

In developing a system of tort law which will in the end operate in respect of individual parties, it is important to take account of contextual matters that parties would not bring into play. This paper argues that a particularly important part of this context is the area of personal responsibility. In this area the analysis of tort law and insurance may coincide and offer a site for compatible or congruent principles.

Both insurance and tort law have inherent in them underlying ideas of personal responsibility, which change over time. Part of the reason for this is that both exist within and are influenced by a society which shifts its ideas about responsibility over time. Where legal ideas about personal responsibility veer too far away from the community's ideas the law may lose legitimacy. There is implicit recognition that insurance and tort law need to be compatible in the calls for restraint in tort law; but so far we have seen almost no discussion of the underlying principles which should be in play in both areas.

It is common for people to argue that tort law needs to be congruent with ordinary social ideas about personal responsibility. The same applies to insurance; congruence between tort law and insurance can exist where both are applying highly individualistic models — for example, where tort law emphasises responsibility for the self and plays down responsibility for others, leaving the matter to an insurance system which is entirely voluntary. This appears to be the implicit model being sought by the current process. It emphasises individual choice as the basis for responsibility. Congruence can also be achieved by a model of tort law which emphasises care, concern and responsibility for others, along with compulsory insurance of some kind. At its most extreme and most congruent this would mean no fault tort law and society-wide compulsory insurance (that is, taxation). The current social climate suggests that this is anathema.

The current law reform process needs to articulate the ideas about personal responsibility which should underlie both negligence law and insurance and ensure that they are compatible; only then will it be possible to articulate tort law that will be effective in its context.

22 Trowbridge Consulting, above n 1.