Twenty Years (or so) of Tort Law Reform in Australia (1990 to 2010)

Paper written by James Morse, Natasha Patney and Michael Gill

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By Michael Gill

Introduction

The law of negligence underpins community expectations of safety and responsibility and, as a result, attracts widespread interest. In Australia, it has been said that such interest has developed because the concept of negligence:

> 'is easy to comprehend … [*and*] … does not require an understanding of arcane rules to grasp the issues involved in a particular case. Lay persons [*therefore*] regard themselves as well-qualified to express opinions in the area, and many feel strongly about issues that are publicised. While reading a newspaper over the breakfast table, judgments can be made by ordinary citizens in the space of a few minutes. All negligence cases arise in the ordinary course of human endeavour and there is a general belief that the assessment of negligence is nothing more than common sense …'.

In other words, negligence is considered a common, garden-variety legal concept. However, because the law of negligence applies a community standard of reasonableness, it is especially prone to influence by moral, social, economic and political values. As the moral, social, economic and political landscape changes, so does the law of negligence. Coupled with this changing landscape is the ever increasing plethora of circumstances, activities and/ or situations that, as a result of technological advancement and societal development, create an infinite number of new and at times surprising ways that someone can be found negligent. It is no longer as simple as ensuring that you don't leave a snail in someone's drink.

But in the almost 80 years since Lord Atkin declared his (apparently) simple neighbour principle, the law of negligence has taken us on a journey of change, uncertainty and surprise. I say that the change has affected 'us' because the law of negligence and

insurance exist in symbiotic relationship: having inherent in them underlying ideas of personal responsibility that change over time but must remain consistent for each to maintain its legitimacy. As Professor John Flemming has explained, the particular symbiotic relationship arises because:

> '[n]either [*tort law or negligence*] could exist without the other; without exposure to liability, insurance would not be needed; without insurance, tort liability would be an empty gesture, reducing the tort system to a negligible role of accident compensation and depriving defendants of needed protection against financial catastrophe'.

In recent times however, insurance has been heralded as the fuel that propelled the negligence juggernaut to a state where it was out of control, costing more than the community could afford, crushing the innocent and losing public respect.

Australia sought to counteract these perceived issues by engaging in comprehensive legislative reform. The reforms were aimed at balancing the interests of victims of negligence with the interests of society (including the "wrongdoers" and the insurance industry).

Did it achieve that aim? This paper addresses the background and content of the Australian reforms and includes a critical analysis of their success - or otherwise. It then considers where the future may take us.

Australian Legal Structure

Central to a proper understanding of the Australian experience is an understanding of the Australian legal system.

The Commonwealth of Australia has a federal system of government that consists of the Commonwealth Government, six state governments and two territory governments. The Commonwealth of Australia came into being on 1 January 1901 after the *Australian Constitution* was passed as a British Act of Parliament. The *Constitution* outlines what

powers can be exercised by the federal, state and/or territory governments.

The *Constitution* defines exclusive powers; that is, those matters in respect of which the federal government has exclusive power to make laws, along with concurrent powers; that is, those matters where both 'levels' of government are able to make laws. The states and territories also have independent legislative power in all matters not specifically assigned to the federal government. Federal laws apply to the whole of Australia and, where there is any inconsistency between federal and state or territory laws, federal laws prevail to the extent of that inconsistency.

Australia has, in effect, nine legal systems - the eight state and territory systems and one federal system. Each of the federal and state systems incorporates three separate 'branches' of government - legislative, executive and judicial. The legislature makes the laws, the executive administers the laws and the judiciary interprets and applies the laws. Whilst a relatively young nation, the legal structure of Australia is not unlike Montesquieu’s tripartite system or that described by the Biblical prophets.

Relevantly, Australia’s insurance industry has been (and still is) subject to regulation by both federal and state/territory parliaments, depending upon the type of insurance business. The *Insurance Contracts Act 1984* (Cth) was introduced to reform and modernise, on a national basis, the law relating to contracts of insurance. However, it does not actually apply to all contracts of insurance in Australia. For example, contracts entered into for the purposes of a law that relates to workers' compensation or compensation for death of or injury to a person arising out of the use of a motor vehicle are specifically excluded from the operation of the *Insurance Contracts Act 1984* (Cth) and are governed by other legislative instruments.

As a result, each Australian state and territory jurisdiction has its own legislation relating to workers' compensation or compensation for death of or injury to a person arising out of the use of a motor vehicle. For ease of understanding and consistency, my remarks in this address will focus on the New South Wales experience where appropriate.

It was the best of times, it was the worst of times …

Depending on who your client was at any point in time, tort law litigation in Australia was either operating superbly, or in need of serious reform.

At the beginning of the 20th century, defendants were in favour. The Honourable James Spigelman AC, Chief Justice of New South Wales (until the end of this month), has remarked that judges in those Courts at that time were universally regarded as mean, conservative and much too defendant-oriented.

However, by the start of World War II, those (apparently) mean, conservative and defendant-oriented judges executed a shift in their own decision-making. In *Chester v Waverley Corporation*, Rich J observed that there were:

> 'tendencies plainly discernible in the development which the law of tort has undergone in its process towards its present amorphous condition. For the so-called development seems to consist in a departure from the settled standards for the purpose of giving to plaintiffs causes of action unbelievable to a previous generation of lawyers. Defendants appear to have fallen completely out of favour. In this respect perhaps judges are only following humbly in the footsteps of juries'.

It was a time when the law was being 'stretched', as negligence claims that would have failed in years gone by were being accepted by judges.

By the 1960s or 1970s, there was a growing community awareness of these legal ‘extensions’ or ‘developments’, and many were looking to take advantage of their newly 'recognised' rights. Litigation was increasing at a time when plaintiffs and their lawyers were enjoying relative ease in establishing liability for negligence on the part of defendants, and achieving awards of damages that were frequently high - even when there could be little

doubt that the plaintiff was the author of his or her own misfortune. And all this was happening when juries were being removed from much civil litigation and almost totally from personal injuries actions. Judicial generosity was a more than adequate replacement.

Public opinion raged so much so that mock presentations such as the Stella Awards began being issued for any unusually 'wild, outrageous, or ridiculous lawsuits'. The Stella Awards were named after Stella Liebeck who, in 1992, successfully sued McDonald's after spilling a cup of coffee onto her lap and burning herself.

The same Courts that were squarely in the defendant's camp at the start of the century had shifted firmly into the plaintiff's camp by the end of that century. The goal posts had moved. The pendulum had swung.

As a result, defendants (often insurers acting pursuant to a right of subrogation - a matter that, if not known by the specific judge hearing the case, was almost certainly assumed) and their lawyers were subjected to an unclear and uncertain application of legal principles. This meant that they were, at times, simply gambling on the outcome of particular litigation. Often, that gamble did not pay off. Eminent legal minds observed that the law of negligence in Australia had begun to exhibit incipient signs of gross instability reflective of erratic and unpredictable dementia.

These unstable or erratic uncertainties meant that insurers had significant difficulty in appropriately defending litigation, reserving or setting future premiums with confidence. There was a significant increase in the cost of claims: more than 10% per year on average during the two decades prior to the turn of the 20th century. There was also an increase in the size of claims. The average size of settled public liability claims in Australia increased 75% in total and about 13% annually between 1997 and 2002. In New South Wales, this increase was 133% in total and about 21% annually during the same period.

The legal uncertainties outlined above resulted in fewer insurers being in the market, especially in the hard hit medical and professional indemnity spaces where, historically, in the

name of competition, they had underpriced their risks and suffered large underwriting losses. Those that remained were very selective of their acceptance of risks (no doubt to appease their shareholders) but also of the price at which that risk was offered.

The unpredictability in the interpretation of the law of negligence was therefore driving up insurance premiums. Premiums in 2002 were expected to be, on average, 30% higher than they were in 2001, but increases of 500% to 1000% were expected to occur for some policy holders and others would be denied cover altogether. In reality, one Victorian indoor rock climbing gym reported a one-year premium increase of over 1,500% and one annual Tasmanian sporting event experienced an increase in public liability insurance premiums of 2,261%.

The pressure on insurance premiums was also made worse by other factors. At that time, our second largest insurer, HIH Insurance Limited, was a publicly listed company and held a market share of about 40% generally and about 22% of the public liability insurance market. On 15 March 2001, HIH and a number of its subsidiaries were placed into provisional liquidation and, on 27 August 2001, the companies that were in provisional liquidation were placed into liquidation. To add insult to injury, HIH was a major reinsurer of United Medical Protection, a collection of major medical insurers that also collapsed around that time. The collapse of HIH was primarily a result of ‘under-reserving’ and reduced a major competitive influence in the general liability insurance market at that time. In light of the collapse, the Australian Prudential Regulation Authority required insurers to reserve $1.09 for every $1.00 received in public liability premiums up from the previous 52 cents.

The tragic events of what is simply known as 'September 11' also had catastrophic effects on international primary insurance markets, as well as reinsurance markets. The associated financial uncertainty that followed also resulted in reduced returns on insurers' investments and increased costs that needed to be passed on to the consumer.

Many people seeking such insurance therefore could not find it at affordable prices (compared to prices during previous years) or could not find it at all. This caused a crisis in liability insurance.

In any event, unaffordable or unobtainable insurance cover meant that many commercial enterprises and community operations were shutting their doors, especially community shows, street parades, agricultural events, country fetes, pony rides, music concerts and Christmas Carols. Basically 'every manner of outdoor event' and ‘all manner of community gathering’. Small local authorities, that had been unable to obtain public liability insurance, closed roads for the maintenance of which they were responsible. Some rural hospitals closed down completely. Other hospitals, including city hospitals, experienced difficulties in providing important facilities. Members of the medical and other professions refused to practice in what were considered to be 'more risky' areas. The basic fabric of community life was being harmed and society at large suffered as a result. This was not something that could be ignored.

Reform was needed in the area of tort law: not just for the sake of insurers, but for the sake of the whole community.

What is tort?

Although no one has yet arrived at an adequate definition of the law of tort, it is generally accepted that tort law is concerned with the interests that a person has in bodily security or the protection of tangible property, financial resources or reputation which are protected by law and which are not exclusively within the fields of the law of contract, restitution or criminal law.

As outlined above, some 'tort' law in Australia (such as that relating to workers' compensation and compensation for the death of or injury to a person resulting from the use of a motor vehicle) is protected by specific state or territory legislation. Whilst this insurance is compulsory, the features of the schemes differ by jurisdiction given the different legislative provisions involved. This will be discussed in detail later.

However, there is debate concerning whether workers' compensation and/or motor accidents compensation is truly part of 'tort' law. In Australia, workers' compensation is a

statutory system of compensation for work-related injuries that does not depend on the existence of fault by the employer. Likewise, motor accidents compensation is also a statutory system of compensation for injuries sustained as a result of a motor vehicle accident; however, at least in New South Wales, it (generally) requires that the driver or the owner of a vehicle was partially or completely at fault. Being legislatively based, it is the government that specifies the compensation rules for these systems (even if judges determine the particular award) and, in some cases, this is an alternative to and/or replacement of common law damages for negligence or other 'torts'.

But the legislative influence on 'tort' law does not end there. Other legislation has been enacted in Australia that governs the relevant liability of certain wrongdoers for potentially tortious conduct. For example, in professional negligence claims in New South Wales, a person does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice. Similarly, in the case of proceedings against public or other authorities based on breach of statutory duty or an exercise of a special statutory power, an act or omission of the authority does not constitute a breach of statutory duty or power unless the act or omission was, in the circumstances, so unreasonable that no authority having such functions could properly consider the act or omission to be a reasonable exercise of its functions.

Specific Reforms - A journey from 1990 to 2000 (or thereabouts)

Although properly a topic in its own right, I will briefly explore the reforms undertaken in Australia just prior to the turn of the century in relation to workers' compensation and motor accidents compensation.

Workers' Compensation

Whilst workers' compensation originated in Germany in the 1870s and was developed in the United Kingdom in 1887, it was not legislated in New South Wales until the *Workmen's*

Compensation Act 1910 (NSW). This was followed shortly thereafter by the *Workers Compensation Act 1926* (NSW) which allowed insurers to underwrite the risk. During the early 1980s there were approximately forty insurers participating, but by 1986, only 14 insurers remained: most of those had indicated that they were considering leaving the scheme.

The *Workers Compensation Act 1987* (NSW) developed the current WorkCover Authority of New South Wales and allowed existing insurers to take up licences as 'fund managers' to assess and collect premiums and manage claims; however, as time progressed, both the New South Wales Government and WorkCover were criticised for increasing premiums and allowing a growing unfunded deficit to exist because claims costs far exceeded premiums earned.

On 15 September 1997, Richard Grellman published a report on WorkCover that outlined the financial progress of the WorkCover scheme and identified the weaknesses within the New South Wales system, including its severe financial instability (as at 30 June 1996, the deficit was $454 million and worsening). The Grellman Report also made several recommendations to address the scheme's weaknesses, including the introduction of private underwriting, improved return to work methods, the use of different methodologies when determining permanent impairment, a reduction in the availability of common law damages, an altered role of the (then) Compensation Court, a new conciliation process and the drafting of plain English legislation and regulations. However, many of those recommendations were not adopted and the weaknesses continued.

A report from a Committee of the New South Wales Government was damning on the methodology and practice of workers' compensation in New South Wales and made several important recommendations to improve the scheme. This was followed by a detailed consideration of the scheme by McKinsey & Company in 2002, which reviewed the operations of the scheme and made several recommendations for improving the scheme's stability, profitability and overall ability to meet the needs of employees, employers, insurers and society in general.

Whilst the WorkCover scheme in New South Wales has improved since that time (the scheme's deficit was eliminated in mid-2006), it still remains the subject of some criticism.

Motor Accidents

On 24 November 1988, the NSW Government tabled the Motor Accidents Bill 1988 (NSW) in State Parliament, the objective of which was to reintroduce third party common law rights for motor accident victims which had been removed from 1 July 1987 under the *Transport Accidents Compensation Act 1987* (NSW).

This legislation removed the government monopoly over this class of insurance, reintroduced common law rights and introduced a number of claim and compensation reforms.

Relevantly, at common law, there was a six year limitation period on the commencement of litigation with potential damages claims uncapped. However, this Bill required specific reporting protocols to be adhered to and required the injured person to commence legal proceedings within one year of a 'relevant date', or within three years of that 'relevant date' if there was a full and satisfactory explanation for the delay past one year. This Bill also introduced limitations upon awards of damages, both thresholds and caps.

The *Motor Accidents Compensation Act 1999* (NSW) was then introduced with the stated aim of cutting premiums by reducing awards of damages and costs. The primary ways in which it sought to achieve this aim were through the reduction of damages for non-economic loss by introducing a 10 per cent whole person impairment threshold, fixing thresholds and caps for damages along with maximum costs for legal services and transferring some decision making power from the judiciary to the executive (such as the Medical Assessment Service and the Claims Assessment Resolution Service).
As with workers' compensation, the motor accidents legislation still remains the subject of some criticism, especially given that it has transferred some decision making power from the judiciary to the executive (which, some people contend, blurs the line separating those government powers).

Overall

The reforms to workers' compensation and motor accident schemes were specific and limited. They did not apply generally to an award of damages for personal injury that occurred outside the course of a person's employment or not as a result of the use of a motor vehicle.

There was widespread discontent arising from the inconsistencies between different jurisdictions. As at 2002, some jurisdictions had legislated caps and thresholds on general damages for civil liability matters. Others had neither caps nor thresholds. This meant that, for example, a victim in New South Wales could receive significantly different compensation to a victim in Queensland, notwithstanding that each suffered the same injuries in the same manner. Alternatively, the same person could receive different compensation for the same injuries, suffered in the same way, depending upon where they were injured, or who it was that injured them.

There were (and still are) further issues concerning perceived conflicts between legislation within the same jurisdiction. For example, in New South Wales, three separate compensation systems operate in the state, such that people suffering the same injury could be given different compensation payouts depending on whether they are covered by the *Civil Liability Act 2002* (NSW), the *Motor Accidents Compensation Act 1999* (NSW) or the *Workers Compensation Act 1987* (NSW). Some even consider that there is a fourth system operating in New South Wales - the common law which applies to intentional acts and/or assaults as they are specifically excluded from the operation of the *Civil Liability Act 2002* (NSW).

The result was and is that the circumstances in which the injury occurred and the identity of the wrongdoer dictated the amount of compensation that could be recovered and the method of recovering it. Some people said that it was irrational, if not unjust, to compensate people with similar needs in different ways according to where they happened to be at the time of the injury or the category of tortfeasor. Others said that it was underwriter driven, difficult to justify in principle and likely to cause resentment in the community.

Further Reforms - A journey from 2000 to 2010 (or thereabouts)

Whilst there was almost resounding agreement that something needed to be done to restore the balance between compensation to the injured and cost to premium payers, there was still an extensive debate over the very existence of an insurance crisis.

Those who could not get insurance or afford the price of what was available feared for the future of their businesses. Others commented that:

> 'the insurance industry has managed to convince politicians, journalists and the community that rising insurance premiums are a result of increasing litigation from personal injury victims and not the consequence of the sort of endemic inefficiencies and mismanagement exposed in daily revelations to the HIH Royal Commission'.

Some, who accepted that there was an insurance crisis, claimed that it was only a temporary result of regular economic cycles that, in due course, would be corrected by the market. Even in more recent years, the Law Society of New South Wales has said that:

> '[f]or all the inflamed rhetoric about an insurance 'crisis' and 'litigation explosion', it is now clear from the subsequent data that the perceived crisis in availability and price of insurance in the 1999-2002 period was largely due to cyclical factors affecting the insurance market exacerbated by one-off events, and not due to excessive litigation or compensation payouts'.

But despite the perceived insurance crisis, there were proponents who argued that there was not a 'litigation crisis' and, therefore, there was not a need for reform at any level. Others argued that any actual increase in litigation was only prompted by the proposed reforms themselves. Others rejected any notion that reform was needed given the apparent absence of actual empirical data about the extent to which the tort system did (or did not)

respond to people who experienced accidents and injuries.

Notwithstanding this criticism, the Australian Minister for Revenue and Assistant Treasurer declared that:

> '[t]he 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'.

This was the preface for the Terms of Reference issued to an expert panel of eminent persons, charged with the responsibility of examining the law of negligence, including its interactions with the *Trade Practices Act 1974* (Cth). The panel was chaired by the Honourable Justice David Andrew Ipp and included Professor Peter Cane, Dr Don Sheldon and Mr Ian Macintosh as its members.

The Panel sought to resolve the aforementioned 'insurance crisis' through a series of proposed reforms and recommendations - 61 to be exact - outlined in its report dated September 2002 but released on 2 October 2002. This has become known as the 'Ipp Report', which has been described as a springboard for tort law reform throughout Australia. The Ipp Report aimed to balance the interests and rights of victims of negligence and the interests and rights of wrongdoers, insurers and the community at large.

The Panel was also responsive to the criticism outlined above, highlighting that, irrespective of whether the perceptions of an 'insurance crisis' were in fact correct, they were serious matters because they could detract from the regard in which people hold the law, and, therefore, from the very rule of law itself. The Panel considered that its task was not to test the accuracy of these perceptions but to take as a starting point for conducting its inquiry the general belief in the Australian community that there was an urgent need to address these

problems. Clearly, the process of reform would not be halted.

Some herald the Ipp Report as the forming the basis for Australian reform on the law of negligence; however, at least for some jurisdictions, this is chronologically impossible. For example, by the time that appointment of the Panel was announced on 30 May 2002, the New South Wales and Queensland Governments had already announced their intention to legislate a number of significant tort law reforms and the Western Australian Government had announced its in principle support for a national approach to a range of similar measures. Insofar as New South Wales is concerned, the *Civil Liability Act 2002* (NSW) was assented to on 18 June 2002, some months before the Ipp Report was released.

Specific Issues for Reform

The Ipp Report identified various matters worthy and deserving of reform; however, for the sake of brevity, I will focus on only a few during my address today.

Nervous Shock / Mental Harm

The right to claim for 'nervous shock' or mental harm is not a new one. It has been available for over 125 years. Traditionally, the right to claim for mental harm has been more onerous to establish than the right to claim for physical injury. In 2002, the High Court of Australia made the following observation regarding the historical distinction between psychiatric and physical harm:

> 'authorities have isolated four principal reasons said to warrant different treatment of the two categories of case. These are (i) that psychiatric harm is less objectively observable than physical injury and is therefore more likely to be trivial or fabricated and is more captive to shifting medical theories and conflicting expert evidence, (ii) that litigation in respect of purely psychiatric harm is likely to operate as an unconscious disincentive for rehabilitation, (iii) that permitting full recovery for purely psychiatric harm risks indeterminate liability

> and greatly increases the class of person who may recover, and (iv) that liability for purely psychiatric harm may impose an unreasonable or disproportionate burden on defendants'.

However, in Part 9 of the Ipp Report, the Panel noted that the Australian law had reached the point where the basic principles governing liability for mental harm were essentially the same as those governing liability for physical harm. The common underlying principle was that what people can reasonably be expected to foresee, and the care that they can reasonably be expected to take, must be judged relative to the normally vulnerable plaintiff. The abnormally vulnerable are entitled only to the same care as the normally vulnerable unless the defendant knew (or ought to have known) that the plaintiff in particular was abnormally vulnerable.

However, the Panel recommended that there ought be no liability for pure mental harm unless the mental harm consisted of a recognised psychiatric illness. Further, a defendant ought not owe a plaintiff a duty to take care not to cause the plaintiff pure mental harm unless the defendant ought to have foreseen that a person of normal fortitude might, in the circumstances, suffer a recognised psychiatric illness if reasonable care was not taken.

In New South Wales, a restriction has since been placed on the right of individuals to claim for mental harm, requiring that the person have witnessed the victim being killed, injured or put in peril, or is a close member of the victim's family.

Take Care of Yourself

The Panel saw its task as being to recommend changes that imposed a reasonable burden of responsibility on individuals to take care of others and to take care of themselves, consistent with the assumption that the then state of the law imposed on people too great a burden to take care of others and not enough of a burden to take care of themselves.

This was particularly relevant in cases where the plaintiff’s ability to take care for his or her own safety, at the time of death or injury, was impaired as a result of being intoxicated; or where a person was injured or killed in a motor vehicle accident while not wearing a seatbelt.

These issues were largely addressed by the Panel through its recommendations concerning contributory negligence and proportionate liability. These will be discussed later.

In New South Wales, a defendant generally does not owe a duty of care to a plaintiff to warn of an obvious risk. Further, a defendant is not liable in negligence for harm suffered by another person as a result of the materialisation of an inherent risk or an obvious risk of a dangerous recreational activity engaged in by the plaintiff. This is broadly consistent with the recommendations made in the Ipp Report.

Lawyers Certificates / Advertising / Fees

In New South Wales, a legal practitioner must not provide legal services on a claim or a defence for damages (including personal injury litigation) unless they reasonably believe on the basis of provable facts and on the basis of a reasonable view of the law, the claim or defence has reasonable prospects of success. In the event that a Court finds that a legal practitioner acted without reasonable prospects of success it can order the legal practitioner be personally liable for costs incurred in the proceedings, both of the legal practitioner's client(s) as well as the opposing party (or parties). This is less stringent than the provisions of the consultative draft Civil Liability Bill 2002 (NSW), which proposed to require a solicitor or barrister who acted for a plaintiff to hold a 'reasonable belief that the claim was more likely than not to succeed'; however, it still aims to ensure that those proceedings which are doomed to fail will not use up scarce public resources.

In New South Wales, the *Legal Profession Act 1987* (NSW) regulates costs in claims of up to $100,000 for legal services provided by solicitors and barristers in personal injury claims under the *Civil Liability Act 2002* (NSW). For example, section 338 of the *Legal Profession Act 1987* (NSW) provides that, as a general rule, where the amount of personal injury damages awarded does not exceed $100,000, the limit that a legal practitioner can charge for legal services to a plaintiff is 20 per cent of the amount recovered or $10,000, whichever is the greater; and for legal services provided to the defendant, 20 per cent of the amount sought to be recovered or $10,000, whichever is the greater. This was an increase from the provisions contained in the consultative draft Civil Liability Bill 2002 (NSW) but still aims to

ensure proper proportionality between the amount claimed and the costs incurred in personal injury proceedings.

Similarly, in New South Wales, solicitors (or barristers) are generally free to advertise their legal services as they wish, subject to the *Legal Profession Regulation 2005* (NSW) and provided that the advertising is not of a kind that is or might reasonably be regarded as being false, misleading or deceptive, or in contravention of the *Trade Practices Act 1974* (Cth) or the *Fair Trading Act 1987* (NSW) or any similar legislation. There are also specific conditions upon which a solicitor (or barrister) may advertise or hold himself or herself out as being a specialist or offering specialist services. Interestingly and relevantly to today's address, the only regulations made so far relate to the advertising of personal and work injury based legal services. The *Legal Profession Regulation 2005* (NSW) 'restricts', but effectively prohibits, practitioners' advertising personal injury services. The *Workers Compensation Regulation 2003* (NSW) also contains similar provisions effectively prohibiting practitioners advertising workers' compensation services.

Timely Notices

The Ipp Report considered the so-called '90 day rule' that existed, at the time, in South Australia. It was suggested that this rule, which required a plaintiff to give the defendant at least 90 days notice of the proposed claim, was very successful, particularly in resolving matters of professional negligence. This was probably because such a notice was required to give sufficient detail of the claim and allow the defendant a reasonable opportunity to settle the claim before it was commenced. The Panel noted that similar 'early warning' procedures existed in virtually all motor accident and workers' compensation schemes in Australia, and had been beneficial for effective injury-management and early resolution of claims.

The Panel considered that this rule had considerable practical utility, and the Panel recommended that all jurisdictions give consideration to the introduction of a rule requiring

the giving of notice of claims before proceedings are commenced, especially in those jurisdictions where a significant number of professional negligence actions are brought. This recommendation was not however picked up in all jurisdictions in respect of general personal injury claims (such as in New South Wales).

Limitation Periods

Limitation periods aim to address concerns both for the defendant's interests in litigation and for the public interest. The Panel noted that they represent the legislature's judgement that the welfare of society is best served by causes of action being litigated within a limited time, notwithstanding that their enforcement may result in good causes of action being defeated.

The Panel recommended that the relevant limitation period be three years from the 'date of discoverability' (which, in the case of personal injury, was when the plaintiff knew or ought to have known that personal injury or death had occurred and was attributable to negligent conduct of the defendant and was sufficiently significant to warrant bringing proceedings) or 12 years after the events on which the claim is based. These recommendations were picked up in New South Wales.

The interpretation of the phrase 'date of discoverability' was recently considered by the New South Wales Court of Appeal in the case of *Baker-Morrison v State of New South Wales*. In that case, the plaintiff, a young child, was injured when her fingers were caught in automatic sliding doors at a police station. Shortly after the injury, the plaintiff underwent partial finger amputation and tendon reconstruction. The plaintiff's mother first consulted a solicitor within a week of the injury. However, the plaintiff commenced proceedings against the state of New South Wales three years and twenty-six days after the incident occurred. The defendant claimed that the proceedings were brought after three years from the 'date of discoverability'; however, for reasons outside the scope of this address, the Court disagreed but commented that:

> 'the overall effect of the new provisions with respect to personal injury actions may be described as restrictive of the interests of plaintiffs, because a court is not permitted to extend the relevant limitation period ... [*however*] ... the new provisions abandoned the rigidity of the commencement date for the relevant limitation period which used to run from “the date on which the cause of action first accrues” .... With respect to personal injury, that would commonly be the date on which the injury occurred. Under [*the new provisions*], the commencement of the period is defined by more flexible criteria, which may well not be satisfied until a significant period has elapsed'.

Changes to Court Processes and Procedures

Procedurally, personal injury proceedings are treated differently in New South Wales Courts than 'other' proceedings are. For example, on or as soon as practicable after serving a Statement of Claim, the plaintiff in personal injury proceedings must serve a statement of very specific particulars, accompanied by various documents, such as hospital and/or medical reports. Likewise, personal injury proceedings are exempted from the general requirement to verify pleadings in the Supreme Court and District Court. Discovery and interrogatories are also only permitted if the Court is satisfied that there are 'special reasons' to do so.

These rules are applied so as to give effect to the overriding purpose of the *Civil Procedure Act 2005* (NSW); namely, to facilitate the just, quick and cheap resolution of the real issues in the proceedings. In practice, the rules serve to ensure that personal injury proceedings are determined quicker, and with fewer interlocutory measures, than 'other' civil proceedings in New South Wales. This, in turn, results in reduced costs, which – it is suggested – translates into reduced underwriting and claims costs, as well as premiums.

Damages

Thresholds and Caps

In New South Wales, damages for economic loss are capped at three times the amount of average weekly earnings. There are also caps for gratuitous attendant care damages (which will be discussed below) and non-economic loss. In respect of non-economic loss, the relevant cap is $350,000 with a threshold that the plaintiff must have sustained injuries equivalent to 15% of the most extreme case.

Griffiths v Kerkemeyer / Sullivan v Gordon Damages

Gratuitous care emerged as a category of damages in Australian common law compensation as a result of the 1977 case of *Griffiths v Kerkemeyer*. In that case, the High Court of Australia held that compensation could be awarded in respect of a claimant's need for care and assistance, even if that need was met gratuitously by family or friends at no cost to the claimant. While gratuitous care claims are fewer in number than general damages claims, the damages for gratuitous care can be a significant amount in larger claims.

In New South Wales, a claimant can only be awarded damages for gratuitous care where they meet specific threshold requirements; namely, where services are needed (or will be needed) for at least six hours per week for six consecutive months. Recently, the New South Wales Court of Appeal held that, once this threshold had been met, a claimant was able to recover damages for gratuitous care provided for at least six hours per week during earlier broken periods of less than six consecutive months or subsequent care provided for lesser periods. The impact that this will have on future claims, and therefore on future claim costs, remains to be seen. Yet it is clear that, by not abolishing claims for gratuitous services (and thus prompting claimants to retain professional carers, thereby increasing total damages awards) the Ipp Panel was conscious of ensuring that total claims costs were reduced.

However, whilst *Griffiths v Kerkemeyer* damages compensate an injured claimant for the claimant's need for gratuitous services, damages that compensate the injured claimant in situations where the claimant can no longer provide gratuitous services to another person or

persons due to the claimant's incapacity arising from the injury are known as *Sullivan v Gordon* damages, after the 1999 decision of the New South Wales Court of Appeal.

Although the Ipp Panel recommended that this 'head' of damages be legislatively recognised, the High Court of Australia later considered that *Sullivan v Gordon* should be overruled. Nevertheless, the New South Wales Government has since partially reinstated *Sullivan v Gordon* damages by legislatively permitting the recovery of damages by a claimant for the claimant's loss of capacity to provide gratuitous domestic services to the claimant's dependants.

Interest

The Ipp Panel recommended that pre-judgment interest ought not be awarded on damages for non-economic loss, although many jurisdictions had already done so, at least in specific circumstances. This was because the award does not represent income forgone or expenses incurred and, therefore, there is no need to compensate the claimant for loss of use of the relevant funds.

In New South Wales, a Court cannot order the payment of interest on damages awarded for non-economic loss, gratuitous attendant care services or loss of a claimant's capacity to provide gratuitous domestic services to the claimant's dependants. However, where a Court is satisfied that interest is payable on damages, the amount of interest is calculated for the period from when the loss to which the damages relate was first incurred until the date on which the Court determines the damages. The rate of interest used is such interest rate as may be determined by regulation or, if no such rate is determined by regulation, then the relevant interest rate (as published by the Reserve Bank of Australia) as at the date of determination of the damages.

Exemplary/Punitive and/or Aggravated Damages

Exemplary (or punitive) damages, along with aggravated damages, have been abolished in many Australian jurisdictions, at least in respect of personal injury proceedings. For example, in New South Wales the right to claim exemplary, punitive or aggravated damages in personal injury proceedings was abolished when the *Civil Liability Act 2002* (NSW) was enacted in 2002.

Before 2002, exemplary damages were rarely awarded and made little practical difference to insurance premiums. The Ipp Panel considered that this was reflective of a community view that the remedy of exemplary damages was neither necessary nor desirable and, in that light, the Panel recommended a general provision abolishing exemplary damages in relation to claims for negligently caused personal injury or death. The Panel also recommended that aggravated damages be abolished because they would be redundant as compensation for mental distress could be given under other heads, yet there was a danger that, if they were retained while exemplary damages were abolished, they could be used for punitive purposes.

Defences

Resourcing Constraints and Policy Decisions

As outlined above, in the case of proceedings against public or other authorities based on breach of statutory duty or an exercise of a special statutory power in New South Wales, *an act or omission* of the authority does not constitute a breach of statutory duty or power unless the act or omission was, in the circumstances, so unreasonable that no authority having the functions of the authority in question could properly consider the act or omission to be a reasonable exercise of its functions. This provides protection to a public authority that is far beyond that recommended by the Panel, which had recommended that a policy *decision* (that is, a decision based substantially on financial, economic, political or social factors or constraints) ought not be used to support a finding that the authority was negligent unless it was so unreasonable that no reasonable public functionary in the defendant's position would have made it.

David Ipp has been critical of the New South Wales legislation because it provides that *any* act or omission of a public authority, of whatever kind, does not constitute a breach of statutory duty unless the act or omission was so unreasonable that it could not be regarded as a reasonable exercise of the functions of the authority. This, he submits, is substantially inconsistent with the notion that the Crown and government authorities should be treated before the law in the same way as an ordinary citizen.

Good Faith

In New South Wales, specific individuals and entities now receive the protection of a defence of 'good faith' where, at common law, they did not. This includes public officials, food donors and volunteers, as well as various public or other authorities. Whilst the defence of 'good faith' was addressed in the Ipp Report, the Panel focused on protecting those public and other authorities through the use of those policy consideration and recourse constraint defences outlined above. This was probably because the defence of 'good faith' for public and other authorities had already been enacted in various pieces of legislation by that time.

Proportionate Liability

Paragraph 3(e) of the Terms of Reference required the Ipp Panel to develop proposals to replace joint and several liability with proportionate liability in relation to personal injury and death, so that if a defendant was only partially responsible for damage, they would not have to bear the whole loss.

The Panel therefore gave 'careful consideration' to this issue and, whilst it noted that this Term 'could be interpreted as requiring the Panel to make recommendations for the replacement of 'joint and several' liability for negligently-caused personal injury and death with a system of proportionate liability', the Panel did not consider itself to be constrained in this way.

The Panel came to the 'firm view' that personal injury law should not be reformed by the introduction of a system of proportionate liability. The Panel found that, although no significant practical problems would arise as a result of the introduction of such a system, there was a major problem of principle against it.

This problem of principle was that the claimant bore the risk that one of a number of wrongdoers would be impecunious or unavailable to be sued. Should that occur, a person who was harmed by two people might be worse off than a person who was harmed by one. Conversely, a person who negligently caused harm to another could be better off merely because someone else also caused the person harm.

This was – and is – difficult to justify. Proportionate liability for personal injury is therefore not available in New South Wales.

Contributory Negligence

The Ipp Report recommended that the standard of care for contributory negligence should be the same as that for negligence against a defendant; judicial discretion to apportion damages for contributory negligence should remain unfettered; and a Court ought be entitled to reduce a plaintiff’s damages by 100 per cent (even though this is impossible at common law) where the Court considers that it is just and equitable to do so. These proposals have been picked up in New South Wales.

The basic principle underlying the defence of contributory negligence is that people should take reasonable care for their own safety as well as others. Whilst contributory negligence is an objective concept, and thus the standard of care applied is that of a reasonable person in the plaintiff's position, subjective factors need to be considered when determining what steps a reasonable person in the plaintiff's position would have taken. These factors include the plaintiff's relative knowledge, age, experience and risk taken by participating in the relevant

activities. This has lead to different apportionments against plaintiffs based upon the specific facts and circumstances of the case.

For example, in *Yip v Zreika* a cyclist rode a bicycle without brakes down a sloping driveway, across a level footpath and out onto a street where the cyclist was hit by a car. The Court held that whilst there was negligence by the car driver, the proper apportionment for contributory negligence was 50%. Further, in *Taheer v Australian Associated Motor Insurers Ltd*, the New South Wales Court of Appeal upheld the finding of 30% contributory negligence against a pedestrian who failed to keep a proper lookout before crossing a road and being hit by a car. Importantly, the pedestrian was wearing dark non-contrasting clothing (including a hijab) and was walking after sunset. Likewise, in *Swain v Waverley Municipal Council*, the infamous case where the High Court of Australia reinstated a multi-million dollar negligence payout to a claimant who dove headfirst into a sandbar at Bondi Beach (albeit based upon the law prior to the Ipp-styled reforms), the claimant's contributory negligence was assessed 25%.

What of the future?

The reforms brought about (allegedly) by the Ipp Report reveal the political, economic and social influence of the law of negligence. As outlined in The Law of Torts in Australia:

> '[p]ersonal injuries law is unlikely to be a subject of constant political and social debate; but events of recent years suggest that from time to time, tort law will emerge, from the shadowy world of courts and the offices of insurance companies and lawyers, into the bright light of the political and legislative process. In Australia at least, there has been a significant politicisation of personal injuries law, ushering in a new era, which is likely to continue for the foreseeable future, in which tort law is the cause of occasional but vigorous political debate and contestation'.

Some of that debate concerns whether, as a result of the recent reforms, some people with

serious injuries receive little, if any, compensation, forcing them to rely on family, friends and social security. This has led some people to protest the use of the word 'reform', when a more apt word might be 'cuts'. The Chief Justice of New South Wales has admitted that the reforms mean that some people who are quite seriously injured are not able to sue at all. David Ipp himself has said that one of the main purposes of the caps and thresholds contained in the reforms was to weed out and discourage small claims in line with the view that it was (and is) more important to provide compensation for those who are more seriously injured and to keep premiums at a reasonable level.

The reforms ultimately enacted have been referred to as 'patchy', 'hasty and ill-considered reactions to the so-called insurance crisis'. The Law Society of New South Wales has claimed that:

> '[i]t is clear that the changes to personal injury law have gone too far, that the pendulum has swung too far in favour of defendants. The community has suffered in three ways. Individuals have lost rights to fair compensation when they are injured as a result of the carelessness of another person; they are not receiving the significant reductions in premiums that were promised; and community organisations continue to report problems with the availability of insurance'.

Some claim that legislative conflict remains and, in respect of the New South Wales experience, the *Workers Compensation Act 1987* (NSW), the *Motor Accidents Compensation Act 1999* (NSW), and the *Civil Liability Act 2002* (NSW) should, as far as possible, be unified in the interests of fairness and clarity. However, this would only impact upon the perceived issues within the New South Wales jurisdiction. It would have little, if any, impact on the same or similar issues in other jurisdictions.

Still others remark that the only 'winners' from the reforms are insurance companies, as underwriting and claim costs have reduced while premiums have not. Whilst it is difficult to

obtain reliable empirical data on this issue, it would appear that, if this was the case, almost everyone with a superannuation fund could be considered a 'winner' as well given that increased profitability would result in increased dividends and stock prices. But I digress.

A 'no fault' system of personal injury compensation has previously received significant attention in Australia and has been the subject of the Woodhouse Report, the National Compensation Bill 1974 (Cth) and New South Wales Law Reform Commission Report 43. Each of these three publications were supportive of a no fault scheme, at least to a limited extent, primarily because the scheme was said to better compensate numerous people, reduce expense and delay associated with compensation, and encourage rehabilitation. However, the only no fault compensation schemes that currently operate in Australia are in relation to workers' compensation, or in relation to motor accidents compensation in Victoria, Tasmania and the Northern Territory.

A modified no fault scheme exists in New South Wales, in the form of the Lifetime Care and Support Scheme. This scheme commenced on 1 October 2006, for children under the age of 16 years injured in motor accidents. By 1 October 2007, the scheme was in operation for all people injured in motor accidents, regardless of age. The scheme provides treatment, rehabilitation and attendant care services for people severely injured in motor accidents in New South Wales, regardless of who was at fault in the accident. Such services include assistance with personal care such as feeding, drinking and personal hygiene; domestic services like cooking, cleaning, shopping and home maintenance; home and transport modifications; child care services; nursing care and respite care for the injured person or their family. Those people eligible for the scheme include those who have suffered spinal cord injury; moderate to severe brain injury; multiple amputations; severe burns or are blind as a result of a motor vehicle accident. The scheme is funded by green slip (that is, compulsory third party insurance) premiums.

As at June 2010, there were 344 adult and 46 child participants in the scheme. Males made up the vast majority of the scheme’s participants: accounting for nearly 70% of adults and over 65% of children. At that time, almost 20% of all participants in the scheme were aged between 16 and 20 years, while over 12% were aged between 21 and 25 years. Whilst it is still early days, the scheme has been described as affordable and prudently managed.

Although it had an income deficit of a little over $65 million for the financial year ending 30 June 2010, it also had net assets of over $90 million at that time.

Since the inception of the scheme, the New South Wales Parliament’s Standing Committee on Law and Justice has conducted three reviews of it. Those reports have been consistently favourable of the scheme. In its first report, the Committee welcomed the 'thoughtfully designed' scheme which set 'a new benchmark in care and support for adults and children who are catastrophically injured in motor vehicle accidents, not only in New South Wales, but also in other jurisdictions, both nationally and internationally'. The Committee also noted that the scheme was 'underpinned by human rights principles and a sophisticated and equitable funding arrangement'. In its second report, the Committee said that it was 'a profoundly enlightening experience' to hear from participants and their family carers, who gave 'heartening views' on the benefits of the very existence of the scheme. In the most recent (third) report, the Committee noted that there was 'a great deal of praise' for the scheme and the ongoing improvements that had been made since the scheme was introduced.

There is also current support for a national no fault scheme in Australia. On 17 February 2010, the then Assistant Treasurer of the Commonwealth, Nick Sherry, referred a national disability long-term care and support scheme in Australia to the Productivity Commission for inquiry and report by 31 July 2011. Although the Commission was still receiving written submissions from interested persons during the course of last week (at last count 654 submissions had been received), there is already a clear indication that the Commission will propose a national no fault compensation scheme covering all catastrophic injuries which, by its current 'ballpark estimate', will have a net annual cost of around $30 per Australian. Although I have not reviewed all of the submissions received by the Commission, the selection that I have reviewed has been generally positive of the proposed scheme.

The Commission has been derisive of the differences across and conflicts between the various state and territory schemes, and has declared that no fault systems are likely to produce generally superior outcomes compared with fault-based systems. It has also stated that:

> '[o]nly no-fault accident schemes meet people's lifetime care and support costs efficiently. The major flaw in the remaining fault-based arrangements is that people who cannot identify an at-fault party in a catastrophic accident get inadequate supports. Even when an at-fault party can be identified, the processes for securing compensation for support through litigation are drawn out and costly in fault-based regimes. (It can sometimes take more than 20 years.) Nor is there evidence that the common law right to sue for compensation for care costs increases incentives for prudent behaviour by drivers, doctors and other parties'.

The Commission has indicated, by way of draft recommendations, that it proposes to suggest that state and territory governments establish the National Injury Insurance Scheme (**NIIS**), which would provide fully-funded care and support for all catastrophic injuries on a no fault basis. The NIIS would be structured as a federation of separate, state-based injury insurance schemes, to ensure consistency in assessments and to provide certainty around a benchmark minimum standard of care. The NIIS would cover catastrophic injuries from motor vehicle, medical, criminal and general accidents, with common law rights to sue for long-term care and support being removed. However, the NIIS would not cover accidental injury where the only care needed could be provided by the health sector.

The Commission is likely to propose that the Australian state and territory governments set up no fault catastrophic injury schemes for motor vehicle and medical injuries by the end of 2013. The NIIS could then cover all sources of catastrophic injury by 2015, prior to a review in 2020, at which time the Australian Government could examine whether the NIIS could be extended to provide no fault cover for economic loss and general damages or whether it could extend to significant - but not catastrophic - injuries. However, that would clearly be a radical shift and its practicability would need to be carefully tested.

No fault schemes can be, and have been, successful. A number of no fault schemes currently exist throughout the world, including in the United States of America, Canada, Sweden, Denmark, Norway, Finland, France and New Zealand (where it has operated for

almost 40 years and was introduced on the back of a separate report provided by Owen Woodhouse, who was also the Chairman responsible for the Australian Woodhouse Report referred to above). There has recently been commentary to the effect that New Zealand's move to a comprehensive no fault scheme was demonstrably wise given the chaotic, inconsistent, limited and expensive mishmash of measures for dealing with personal injury in Australia.

Whilst there are arguments for and against the no fault scheme, it is clear that such a scheme can flourish in appropriate jurisdictions and that there is support in Australia for such a scheme.

But there is no certainty as to the direction, form and/or manner that further tort reform in Australia will take.

The legislature and the judiciary must continue to attempt to strike that fair balance between the interests of victims of negligence and interests of the wrongdoers who have caused the harm, as well as the interests of society at large. Whether that balance can ever be achieved, is uncertain. However, one thing that is certain is that, should that balance ever be struck, the success will only be momentary as the influence of moral, social, economic and political values, along with the effects of technological advancement and societal development, cause the pendulum of tort law to swing again.

I therefore urge everyone in this room to actively participate in a healthy, proactive discussion concerning tort law reform on a national and, perhaps, international level. After all, as Lord Denning said nearly 60 years ago:

> '[i]f we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on; and that will be bad for both'.

May we never see the day when the law stands still.

Thank you.

**** Remain on stage for rapturous standing ovation ****

Consultant, DLA Piper Australia (formerly DLA Phillips Fox); Former President of the Law Society of New South Wales and the Law Council of Australia; Inaugural Chairman of the New South Wales Motor Accidents Authority; Chairman of the Insurance Industry Code Compliance Committee; President of the International Insurance Law Association; Foundation President of the Australian Insurance Law Association

Policy and the Swing of the Negligence Pendulum, Edited version of a paper delivered by David Ipp, Judge of Appeal, Court of Appeal, Supreme Court of New South Wales at the Government Risk Management Conference, Perth on 15 September 2003. Retrieved from HYPERLINK "http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_ipp_150903" http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_ipp_150903

Ibid

Donoghue v Stevenson [1932] AC 562

Ibid at 580

See, for example, Vines, 'Tort reform, insurance and responsibility' (2002) 25(3) *University of New South Wales Law Journal* 842

Fleming, *The American Tort Process*, Clarendon Oxford Press, Oxford, 1988 at 21

See, for example, Tapsell, 'Turning the Negligence Juggernaut' (2002) 76 *Australian Law Journal* 581

Commonwealth of Australia Constitution Act

Section 52 of the *Commonwealth of Australia Constitution Act*

Section 51 of the *Commonwealth of Australia Constitution Act*

Section 107 of the *Commonwealth of Australia Constitution Act*

Section 109 of the *Commonwealth of Australia Constitution Act*

See, for example, Baron de Montesquieu, *L'Esprit des Lois [The Spirit of the Laws]*, Translated by Thomas Nugent, Hafner Press, New York, 1748

Isaiah 33:22: “For the LORD is our judge, the LORD is our lawgiver, the LORD is our King; …” (New International Version)

Lionel Bowen, Minister for Trade and Member for Kingsford-Smith, Australian Federal Parliament, *Hansard*, 29 May 1984

Section 9(1)(e) of the *Insurance Contracts Act 1984* (Cth)

See, for example, *Workers Compensation Act 1987* (NSW), *Workers' Compensation and Rehabilitation Act 2003* (Qld), *Workers Compensation Act 1958* (Vic), *Workers Rehabilitation and Compensation Act 1988* (Tas), *Workers Rehabilitation and Compensation Act* (NT), *Workers Compensation Act 1951* (ACT), *Workers Rehabilitation and Compensation Act 1986* (SA) and *Workers' Compensation and Injury Management Act 1981* (WA)

See, for example, *Motor Accidents Compensation Act 1999* (NSW), *Motor Accident Insurance Act 1994* (Qld), *Transport Accident Act 1986* (Vic), *Motor Accidents (Liabilities and Compensation) Act 1973* (Tas), *Motor Accident (Compensation) Act 1979* (NT), *Road Transport (General) Act 1999* (ACT), *Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002* (SA) and *Motor Vehicle (Third Party Insurance) Act 1943* (WA)

Justice Spigelman has recently announced that he will resign as the Chief Justice of New South Wales on 31 May 2011. He was appointed to that role in 1998

Tort Law Reform in Australia, Address by the Honourable J J Spigelman AC, Chief Justice Of New South Wales, to the Anglo-Australian Lawyers Society & The British Insurance Law Association at Lincoln's Inn, London on 16 June 2004 and his Presentation to the London Market at Lloyd's on 6 July 2004. Retrieved from HYPERLINK "http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_160704" http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_160704

(1939) 62 CLR 1

Ibid at 11

Atiyah, *The Damages Lottery*, Hart Publishing, Oxford, 1997, Chapters 2 and 3

However, there is a question as to the extent to which the pro-plaintiff mentality of the judiciary was a cause of the differing volume and changed patterns of claims. See, for example, Cane, *Atiyah's Accidents, Compensation and the* Law, 7th edition, Cambridge University Press, 2006 at 193

Tort Law Reform in Australia, Address by the Honourable J J Spigelman AC, Chief Justice Of New South Wales, to the Anglo-Australian Lawyers Society & The British Insurance Law Association at Lincoln's Inn, London on 16 June 2004 and his Presentation to the London Market at Lloyd's on 6 July 2004. Retrieved from HYPERLINK "http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_160704" http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_160704

See HYPERLINK "http://www.stellaawards.com/" http://www.stellaawards.com/

However, this is not to say that Stella Liebeck's case fell into that category. See, further, Haltrom and McCann, *Distorting the Law: Politics, Media and the Litigation Crisis*, University of Chicago Press, Chicago, 2004 and Burns, 'Distorting the law: Politics, media and the litigation crisis: An Australian perspective' (2007) 15 *Torts Law Journal* 195

Negligence: The Last Outpost Of The Welfare State, an address by the Honourable J J Spigelman AC, Chief Justice Of New South Wales, to the Judicial Conference Of Australia: Colloquium 2002 at

Launceston on 27 April 2002. Retrieved from HYPERLINK "http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_270402" http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_270402

See, further, *Policy and the Swing of the Negligence Pendulum*, Edited version of a paper delivered by David Ipp, Judge of Appeal, Court of Appeal, Supreme Court of New South Wales at the Government Risk Management Conference, Perth on 15 September 2003. Retrieved from HYPERLINK "http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_ipp_150903" http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_ipp_150903

Pearson and Atkins, *Public Liability Insurance: Analysis for Meeting of Ministers 27 March 2002*, Towbridge Consulting, 26 March 2002

Australian Competition and Consumer Commission, *Public liability and professional indemnity insurance - monitoring report*, July 2003, at 112. Retrieved from HYPERLINK "http://www.accc.gov.au/content/item.phtml?itemId=346591&nodeId=e1d76ba7b6308dd7c6b56deb7f083efd&fn=Insurance%20monitoring%20report_July%202003.pdf" http://www.accc.gov.au/content/item.phtml?itemId=346591&nodeId=e1d76ba7b6308dd7c6b56deb7f083efd&fn=Insurance%20monitoring%20report_July%202003.pdf

Ibid

See the reference to the Ministerial Communiqué that followed the Second Ministerial Meeting held to discuss public concerns about the cost and availability of public liability insurance: referred to at [1.2] of the Ipp Report

Pearson and Atkins, *Public Liability Insurance: Analysis for Meeting of Ministers 27 March 2002*, Towbridge Consulting, 26 March 2002

Australian Government, The Treasury, *Available and affordable - Improvements in liability insurance following tort law reform in Australia: Background to the tort law reforms*. Retrieved from HYPERLINK "http://www.treasury.gov.au/documents/1200/html/docshell.asp?URL=Part_3_Background.asp" http://www.treasury.gov.au/documents/1200/html/docshell.asp?URL=Part_3_Background.asp

See Vines, 'Tort reform, insurance and responsibility' (2002) 25(3) *University of New South Wales Law Journal* 842

The HIH Royal Commission, *The Failure of HIH Insurance Volume I: A corporate collapse and its lessons*, 2003 at xvii

Griggs, *Consumers and the Ipp Report into negligence reform*, (2002) 10 Competition & Consumer Law Journal 208

It must be noted that there is considerable debate as to whether an ‘insurance crisis’ actually occurred, and if so, what its causes were. It is outside the scope of this address to weigh the competing arguments; however, given my presence in the industry at the time, I unapologetically proceed in the knowledge that the ‘crisis’ did occur

Griggs, *Consumers and the Ipp Report into negligence reform*, (2002) 10 Competition & Consumer Law

Journal 208. See also the Ipp Report at [1.34]

Negligence - Where Lies the Future?, a paper presented by David Ipp, Judge of Appeal, Court of Appeal, Supreme Court of New South Wales at the Supreme Court & Federal Court Judges' Conference in January 2003. Retrieved from HYPERLINK "http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_ipp_010102" http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_ipp_010102

Ibid

Balkin and Davis, *The Law of Torts*, 2nd edition, Butterworths, 2001, at 3

In relation to workers' compensation, see, for example, *Mynott & Orrs v Barnard* (1939) 62 CLR 68 at 91 per Dixon J

Section 5O of the *Civil Liability Act 2002* (NSW)

Sections 43 and 43A of the *Civil Liability Act 2002* (NSW)

Burton, *Workers' Compensation in Australia – with Specific Focus on NSW*, Australian and New Zealand Institute of Insurance and Finance Journal, Volume 28 Number 5, October/November 2005 at 14 to 16. Retrieved from HYPERLINK "http://www.theinstitute.com.au/journals/Vol%2028%20No.%205%20-%20October%20November%202005%20(Workers%20Compensation%20in%20Australia.pdf" http://www.theinstitute.com.au/journals/Vol%2028%20No.%205%20-%20October%20November%202005%20(Workers%20Compensation%20in%20Australia.pdf

Ibid

Ibid

Grellman, *Inquiry into Workers' Compensation System in NSW, Final Report*, September 1997

Ibid at 15

Burton, *Workers' Compensation in Australia – with Specific Focus on NSW*, Australian and New Zealand Institute of Insurance and Finance Journal, Volume 28 Number 5, October/November 2005 at 16. Retrieved from HYPERLINK "http://www.theinstitute.com.au/journals/Vol%2028%20No.%205%20-%20October%20November%202005%20(Workers%20Compensation%20in%20Australia.pdf" http://www.theinstitute.com.au/journals/Vol%2028%20No.%205%20-%20October%20November%202005%20(Workers%20Compensation%20in%20Australia.pdf

Ibid at 14 to 16

McKinsey & Company, *Partnerships for Recovery: Caring for Injured Workers and Restoring the Financial Stability to Workers' Compensation in NSW*, released September 2003

Safe Work Australia, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand*, March 2011 at 10. Retrieved from HYPERLINK "http://www.safeworkaustralia.gov.au/AboutSafeWorkAustralia/WhatWeDo/Publications/Documents/575/ComparisonWorkersCompensationArrangementsAusNZ2011.pdf" http://www.safeworkaustralia.gov.au/AboutSafeWorkAustralia/WhatWeDo/Publications/Documents/575/ComparisonWorkersCompensationArrangementsAusNZ2011.pdf

For more information, see Peach, *Common Law Damages for Motor Accident Victims - Motor Accidents Bill 1988 (NSW)* (1989) 4 ILB 33

Being the latest of the date of the accident, or the date where symptoms caused by the accident were observed by a medical practitioner within three years of the accident, or the date of death, or the date of the injured person reaching 18 years old

See, for example, sections 16(1) and (2) of the *Civil Liability Act 2002* (NSW)

See, for example, the *Personal Injuries Proceedings Act 2002* (Qld)

For a further examination of this issue, see Chris Merritt's article, *Liability of flawed law reform*, published in The Australian on 14 April 2007

See, for example, the *Australian Lawyers Alliance Submissions for Tort Law Reform in NSW*. Retrieved from HYPERLINK "http://www.lawyersalliance.com.au/documents/public_affairs/ala_tort_reform_submissions_nsw.doc" http://www.lawyersalliance.com.au/documents/public_affairs/ala_tort_reform_submissions_nsw.doc

Section 3B of the *Civil Liability Act 2002* (NSW)

Katzmann, *Restricting access to justice - Changes to personal injury laws: the NSW experience*, Bar News, Summer 2005/2006 at 5. Retrieved from HYPERLINK "http://www.nswbar.asn.au/docs/resources/publications/bn/bn_summer0506.pdf" http://www.nswbar.asn.au/docs/resources/publications/bn/bn_summer0506.pdf

Ibid

Negligence: The Last Outpost Of The Welfare State, an address by the Honourable J J Spigelman AC, Chief Justice Of New South Wales, to the Judicial Conference Of Australia: Colloquium 2002 at Launceston on 27 April 2002. Retrieved from HYPERLINK "http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_270402" http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_270402

Wolthuizen, 'Insuring there's a crisis', (2002) 92 *Consuming Interest* 6

See, for example, Davis, 'The tort reform crisis' (2002) 25(3) *University of New South Wales Law Journal* 865

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See, for example, Wright, *National Trends in Personal Injury Litigation: Before and After "Ipp"*, 26 May 2006. Retrieved from HYPERLINK "http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=7B802D34-1E4F-17FA-D264-BA4B10731A20&siteName=lca" http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=7B802D34-1E4F-17FA-D264-BA4B10731A20&siteName=lca

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See, for example, Graycar, 'Public liability: a plea for facts' (2002) 25(3) *University of New South Wales Law Journal* 810

Terms of Reference: Principles based Review of the Law of Negligence

This Act has since been repealed; however, its provisions have been largely incorporated into the *Competition and Consumer Act 2010* (Cth)

This report also included those matters outlined in a previous report issued by the Panel on 2 September 2002

Carter Newell Lawyers, *Australian Civil Liability Guide*, 7th edition at 1

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Ipp Report at [1.5]

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However, some of the recommendations outlined in the Ipp Report were enacted in the *Civil Liability Act 2002* (NSW) by virtue of the *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW)

Tame v New South Wales; Annetts v Australian Stations Pty Ltd (2002) 211 CLR 317 at [192] per Gummow and Kirby JJ

Ipp Report at [9.19]

Ibid

Ibid

That is, mental harm that is not a consequence of physical harm suffered by the mentally-harmed person

Ipp Report, Recommendation 34

Ibid

See, further, sections 27 to 33 of the *Civil Liability Act 2002* (NSW)

Ipp Report at [1.29]

Ipp Report at [8.15]

See sections 5F to 5H of the *Civil Liability Act 2002* (NSW)

See section 5I of the *Civil Liability Act 2002* (NSW)

See section 5L of the *Civil Liability Act 2002* (NSW)

Ipp Report Recommendations 11, 14 and 32

Section 345 of the *Legal Profession Act 1987* (NSW)

Section 348 of the *Legal Profession Act 1987* (NSW)

There are some exceptions, see section 337 to 343 of the *Legal Profession Act 1987* (NSW)

Section 84 of the *Legal Profession Act 2004* (NSW)

Arguably, such as the recent *Competition and Consumer Act 2010* (Cth)

Section 85 of the *Legal Profession Act 2004* (NSW)

See the Law Society of New South Wales' publication on Advertising Legal Services. Retrieved from HYPERLINK "http://www.lawsociety.com.au/ForSolictors/professionalstandards/Advertisinglegalservices/index.htm" http://www.lawsociety.com.au/ForSolictors/professionalstandards/Advertisinglegalservices/index.htm

See Clauses 23 to 31 of the *Legal Profession Regulation 2005* (NSW)

See Clauses 74 to 80 of the *Workers Compensation Regulation 2003* (NSW)

Ipp Report at [3.83]

See, generally, rule 6A of the *Supreme Court Rules 1987* (SA)

Ipp Report at [6.57]

Ipp Report at [3.84] and Recommendation 9

Ipp Report at [6.1]. See also *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 553 per McHugh J

Ipp Report, Recommendation 24

See sections 18A, 19 and 50C of the *Limitation Act 1969* (NSW) and the *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW)

[2009] NSWCA 35

Ibid at [9]

Rule 15.12 of the *Uniform Civil Procedure Rules 2005* (NSW)

Rules 14.22 and 14.23 of the *Uniform Civil Procedure Rules 2005* (NSW)

Rules 21.8 and 22.1(3) of the *Uniform Civil Procedure Rules 2005* (NSW)

Section 56 of the *Civil Procedure Act 2005* (NSW)

Section 12 of the *Civil Liability Act 2002* (NSW)

Section 15 of the *Civil Liability Act 2002* (NSW)

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See section 15(3) of the *Civil Liability Act 2002* (NSW)

Hill v Forrester [2010] NSWCA 170

Ipp Report at [13.77]

(1999) 47 NSWLR 319

Ipp Report at [13.88] to [13.91] and Recommendation 52

CSR Limited v Eddy (2005) 226 CLR 1

Section 15B of the *Civil Liability Act 2002* (NSW)

Ipp Report at [13.110] to [13.114] and Recommendation 54

Section 18(1) of the *Civil Liability Act 2002* (NSW)

Section 18(2) of the *Civil Liability Act 2002* (NSW)

Section 18(3) of the *Civil Liability Act 2002* (NSW)

Section 21 of the *Civil Liability Act 2002* (NSW)

See, for example, *Tort Law Reform in Australia*, Address by the Honourable J J Spigelman AC, Chief Justice Of New South Wales, to the Anglo-Australian Lawyers Society & The British Insurance Law Association at Lincoln's Inn, London on 16 June 2004 and his Presentation to the London Market at Lloyd's on 6 July 2004. Retrieved from HYPERLINK "http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_160704" http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_160704. This issue is also covered in various other speeches and addresses from Justice Spigelman. These can be retrieved from: HYPERLINK "http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman140904" http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman140904, HYPERLINK "http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_270503" http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speech_spigelman_270503, and HYPERLINK "http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwPrint1/SCO_spigelman140905" http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwPrint1/SCO_spigelman140905

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See, for example, sections 731 and 733 of the *Local Government Act 1993* (NSW), sections 145B and 158 of the *Environmental Planning and Assessment Act 1979* (NSW) and section 128 of the *Rural Fires Act 1997* (NSW)

See, generally, Part 10 of the Ipp Report

Ipp Report at [12.1] to [12.2]

Ipp Report, Part 12

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