

TORT LAW: WHAT IS THE POINT?

AUSTRALIAN LAWYERS ALLIANCE

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*Justice Terry Connolly
Supreme Court of the Australian Capital Territory*

Justice Connolly was appointed a Judge in January 2003. He was Master of the Supreme Court of the Australian Capital Territory from 1996-2003, and had been a Member of the ACT Legislative Assembly from 1990-1996. He was Attorney-General from 1991-1995. He was educated at Adelaide University (BA, LLB (Hons) and the Australian National University (LLM). In 2001 he undertook mediation training at Harvard Law School.

The purpose of the law of torts, at least for those of us introduced to the subject via successive editions of *Fleming on Torts*, is to regulate “the allocation of losses incident to man’s activities in modern society”¹. Law students are introduced to the history of actions on the case and the old causes of action, and typically taken to a Scottish Ginger Beer bottle and a snail asserted, but never proven, to have been in the bottle, to the establishment of the modern law of negligence.

Tort law in this way can be seen as being all about corrective justice, and in many ways the recent debate on tort law reform, so called, proceeded on this basis. Australia faced a “liability crisis”, insurance was becoming unaffordable or unobtainable, courts were awarding extraordinary levels of damages. These were all unstated and untested assumptions that underlined that recent debate. The Review of the Law of Negligence (the Ipp Review) in its September 2002 Report asserted that:

*Another important consideration underlying our deliberations is that only a small proportion of the sick, injured and disabled recover compensation through the legal liability system, and only a very small proportion of deaths result in the payment of compensation. As a result, only a very small proportion of the total personal and social costs of personal injury and death are met by the imposition of legal liability to pay compensation. The vast majority of those who are injured or lose a breadwinner have to rely on their own resources and on other sources of assistance, notably social security*².

This assertion was, it seems to me, never questioned in the process of that review.

There is an assumption that tort law is only about allocating blame and requiring the wrong-doer to pay the victim, that is to say that it is an exercise solely in corrective justice. But as Professor Peter Cane points out, this is true only if we look at

¹ The Law of Torts, J Fleming, 8th ed 1992 Law Book Co at 3

² Ipp Review 1.29

individual cases and their individual outcomes by way of awards of damages.

Professor Cane says:

Once we take account of the fact that court decisions can create legal precedents which can be used to guide people's conduct and to decide disputes other than that before the court, we can see that the law of tort is also concerned with distributive justice³.

This can perhaps most clearly be seen in the context of industrial injury law, and the interaction between findings of employer liability and the emergence of greatly improved occupational health and safety over recent decades.

Tort law reform had not, until the collapse of HIH insurance and the ensuing “insurance crisis” been a subject of much political debate in Australia. True it is that the Whitlam Government commissioned a report that recommended a comprehensive no fault personal injury compensation scheme, an issue which never reached fruition in Australia, although it did across the Tasman Sea. In various jurisdictions over the past decade or so there have been various statutory schemes introduced to modify or replace common law liability in respect of transport accidents or industrial accidents. But we have not, until recently, seen tort law reform high on the public agenda, and certainly not dominating the front pages of *The Daily Telegraph* as we saw in late 2002. In this we contrast quite strongly with the United States where tort law reform has been a significant issue for the past 20 years⁴.

In the United States, tort law reform has become a highly partisan political topic, and an important driver of campaign fundraising efforts for candidates for public office, including, in some states, State Supreme Court Judges. Depending on your point of

³ The Anatomy of Tort Law, P Cane, Oxford 1997, p 18

⁴ P Bell and J O'Connell, Accidental Justice: The Dilemmas of Tort Law, Yale UP 1997

view - and this normally follows a Republican/Democrat partisan divide - you could expect to receive substantial financial support from either the insurance industry or plaintiff lawyer groups in a bid for public office, including judicial office. Whatever criticism might be made of the political debate over tort law reform in Australia in recent years, we have at least avoided an entrenched partisan debate. This at least may leave state governments more open to reconsider their position as material emerges that suggests that the dire assumptions of an unsustainable insurance industry that drove much of the debate in 2002 may prove to be mistaken⁵.

There was some variation in the extent to which State and Territory governments moved to implement recommendations of the Ipp Review, and this may prove to have been a good thing. In the Australian Capital Territory the Government and the Opposition both took a more cautious view, and we have avoided a regime of caps and thresholds in assessing damages in personal injury claims. Despite this, premiums remain competitive with New South Wales. Most of us have an interest as motorists in affordable third party insurance premiums. All of us have an interest as motorists, passengers, pedestrians or cyclists in a regime where we will have access to damages if we are injured on the road due to the negligence of another person. That a more traditional and pure form of common law tort liability and damages assessment continues to operate, with apparent economic efficiency, within the Australian Capital Territory, may encourage further reconsideration of the somewhat hastily implemented reforms of 2002 in other places.

⁵ see reports of 3 June 2005, *Australian Financial Review on Law Council Research on the profitability of the Australian insurance industry*).

There is no question that the last few decades have seen the tort of negligence march forward inevitably, seemingly ever expanding in its reach, and gradually replacing older, established categories of tort liability. The rules my generation learned at law school in relation to escape of dangerous goods⁶ and the various categories of duties owed to a person by a landowner depending on whether they were an invitee, licensee or trespasser, have now been replaced by the simple test of negligence⁷. Common law courts in Australia and England tended, in the view of one of the doyens of tort law academics, Professor Patrick Atiyah⁸ to stretch the law in respect of causation and the finding of blame⁹.

Chief Justice Spigelman, in his significant article in the Australian Law Journal, described negligence as the last outpost of the welfare state¹⁰ and noted that Professor Harold Luntz in the latest edition of his text on damages made the point that:

No welfare state would ever have created a system so irrational, expensive, wasteful, slow and discriminatory¹¹.

After noting Professor Atiyah's comments about the long-term trend of stretching the law his Honour said:

There seems little doubt that the attitude of judges has been determined to a very substantial extent by the assumption, almost always correct, that a defendant is insured. The result was that the broad community of relevant defendants bore the burden of damages and costs awarded to an injured plaintiff. Judges may have proven more reluctant to make findings of negligence, if they knew that the consequence was likely to be to bankrupt the defendant and deprive him or her of the family home¹².

⁶ *Rylands v Fletcher* (1866) LR 1 Ex 265

⁷ *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520; *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479

⁸ *Accidents Compensation and the Law*, various editions

⁹ P S Atiyah, *The Damages Lottery*, Hart, Oxford, 1997

¹⁰ JJ Spigelman, *Negligence, The Last Outpost of the Welfare State* (2002) 76 ALJ 432

¹¹ H Luntz, *Assessment of Damages for Personal Injury and Death*, 4th ed, Butterworths, 2002

¹² 76 ALJ 432 at 433

Transferring the economic burden of judgments from the individual tortfeasor to the broader community by way of insurance has spread the risk and the cost, but following the HIH collapse in 2002, the broader community has had the real cost of this brought home by way of dramatically increased insurance premiums. The causes of this are of course complex and controversial, and no doubt reflect the fact that one large insurer had in recent years been striking what emerged from the Royal Commission to have been economically unrealistic premiums¹³, as well as the dramatic impact the events of September 11, 2001 have had on the global reinsurance market which has a direct impact on the cost of insurance to the Australian consumer.

It is unfortunate that much of the debate has been conducted in the absence of verifiable data as to the factors that have driven up insurance costs. The Ipp Review noted that submissions to the Review:

Typically were not supported by reliable and convincing empirical evidence. The vast majority of the assertions were based merely on anecdotal evidence, the reliability of which has not been tested. A consequence of the dearth of hard evidence in the areas in which decisions are called for, is that the Panel's recommendations are based primarily on the collective sense of fairness of its members, informed by their knowledge and experience, by their own researches and those of the Panel's Secretariat, and by the advice and submissions of those who have appeared before the Panel and who have made written representations to it¹⁴.

With respect to the Panel, and being mindful that they had a very tight timeline of less than three months in which to conduct their review and present their report, it does seem to me to be a matter of real disquiet that Parliaments were being asked to take

¹³ M Westfield, *HIH: The inside story of Australia's biggest corporate collapse*, Wiley, Qld, 2003

¹⁴ *Review of the Law of Negligence*, Report, September 2002, p 32)

significant decisions to reform the law on the basis of what the Report has itself described as anecdotal evidence. The Report refers to evidence that:

throughout the country absence of insurance or the availability of insurance only at unaffordable rates has adversely affected many aspects of community life¹⁵.

But again, this is anecdotal evidence. The report does not provide any hard data on insurance costs, and how these have varied over time, or on the profitability and trading performance of the insurance industry. Again, this seems regrettable, if we are being asked as a community to make significant changes to the way we deal with members of the community who sustain personal injury. I note that this absence of good information as to the causes and consequences of the rise in premiums has been noted by Chief Minister Stanhope in the Legislative Assembly¹⁶.

Even before the so-called “insurance crisis”, however, the High Court and appellate courts in the various states have intervened to reverse the long-term trend in favour of an ever-widening scope of liability. This has been well expressed in the Torts Law Journal by Kylie Burns¹⁷. Ms Burns writes:

During the nineties, the High Court was criticised for taking a paternalistic approach to the determination of negligence cases and over-emphasising values of communal responsibility and loss distribution to the detriment of self responsibility, risk choice and autonomy. Nagle v Rottnest Island Authority ((1993) 177 CLR 423) was viewed as a paternalistic high point, extending a defendant’s duty to protect plaintiffs who failed to take care for their own safety when confronted with obvious risks ... However, at the turn of this century a clear trend emerged in the High Court away from paternalism, loss distribution and communal responsibility and towards the values of autonomy, risk choice and self responsibility. For example, while the plaintiff in Nagle, who failed to take care for his own safety by diving into obvious submerged rocks recovered for breach of duty in 1992, a careless female plaintiff who stepped off an obvious cliff face in the dark, failed to recover for breach of duty in Romeo in 1998.

¹⁵ Report, p 31

¹⁶ (for example, answer to question 27 August 2002, Hansard, at 2834)

¹⁷ *Its Just Not Cricket: The High Court, Sport and Legislative Facts* (2002) 10 Torts LJ 234

In *Romeo v Conservation Commission of the Northern Territory*, Kirby J said (at 478)

that:

*Where a risk is obvious to a person exercising reasonable care for his or her own safety, the notion that the occupier must warn the entrant about that risk is neither reasonable nor just*¹⁸.

The year 2001, that is the year before the so-called insurance crisis emerged, will probably be seen as the significant year for the change in attitude in the High Court.

In *Brodie v Singleton Shire Council; Ghantous v Hawkesbury City Council*¹⁹ the Court on the one hand extended the imperial march of negligence by abolishing the so-called highway rule, but more significantly, it seems to me, reminded us that:

*In dealing with questions of breach of duty, while there is to be taken into account as a “variable factor” the results of “inadvertence” or “thoughtlessness”, a proper starting point may be the proposition that persons using the road will themselves take ordinary care*²⁰.

In these cases Mrs Ghantous, who slipped and fell on an obvious and visible pavement irregularity, failed to recover, while Mr Brodie who was driving a truck over a bridge which collapsed due, the court found, to dry rot or white ant damage which was not apparent to an ordinary road user, recovered an award of damages. Mr Brodie could be said to have been exercising reasonable care for his own safety, but the Court held that Mrs Ghantous could not, and this, it seems to me, is the point of distinction between the two cases in the joint judgments.

This more rigid approach to requiring plaintiffs to exercise reasonable care for their own safety, and to be themselves responsible for avoiding obvious risks, was

¹⁸ (1998) 192 CLR 431

¹⁹ [2001] HCA 29; (2001) 206 CLR 512

²⁰ per Gaudron, McHugh and Gummow JJ at [63], 580

reinforced in the High Court in 2002, in *Woods v Multi-Sport Holdings Pty Ltd*²¹. Mr Woods was an experienced club cricketer who attended at the defendant's premises for his first game of indoor cricket. He sustained an eye injury when he deflected a ball from his bat - much in the style, it appears from the judgment, that we were accustomed to seeing from the visiting English cricket team in 2002. The trial judge rejected the claim that there was a duty of care to warn players that they faced injury.

In the High Court Gleeson CJ said at [43]:

French DCJ concluded that the risk of a player being struck in the face by a cricket ball was so obvious that reasonableness did not require the respondent to warn players about it.

The Chief Justice referred to Kirby J's statement in *Romeo* referred to above and said:

It is right to describe that observation as a comment. It is not a proposition of law. What reasonableness requires by way of warning from an occupier to an entrant is a question of fact, not law, and depends on all the circumstances, of which the obviousness of a risk may be only one. And, as a proposition of fact, it is not of universal validity. Furthermore, the description of risk as obvious may require closer analysis in a given case. Reasonableness would not ordinarily require the proprietor of an ice-skating rink to warn adults that there is a danger of falling: but there may be some skaters to whom such a warning ought to be given. Nevertheless, as a generalisation, what Kirby J said is, with respect, fair comment. That is how French DCJ and the Full Court understood it, and they did no more than indicate that they regarded it as apposite to the present case. There is no error in that.

The New South Wales Court of Appeal has recently delivered a trilogy of decisions in 2002 that reinforced this approach. The matters of *RTA v McGuinness*, [2002] NSWCA 210; *Burwood Council v Byrnes* [2002] NSWCA 343 and *Richmond Valley Council v Standing* [2002] NSWCA 359 emphasise, as it is stated in the headnote to *Burwood Council v Byrnes*, that:

A Council's duty to pedestrians is to take reasonable care to prevent or eliminate dangers to pedestrians taking reasonable care for their own safety.

²¹ (2002) 208 CLR 460

Handley JA in that case reviewed the decisions in *Ghantous*, and emphasised the comments of Gaudron, McHugh and Gummow JJ where they said at [163]:

The formulation of the duty of care in terms which require that a road be safe not in all circumstances but for users exercising reasonable care for their own safety is even more important where, as in Ghantous, the plaintiff was a pedestrian. In general, such persons are more able to see and avoid imperfections in a road surface. It is the nature of walking in the outdoors that the ground may not be as even, flat or smooth as other surfaces.

As Callinan J said at [355] in a passage endorsed by Hayne J at [339]:

The case of the applicant in negligence was that a differential in height between the concreted path of the footpath and the earthen part of it created a dangerous situation ... There was no concealment of the difference in height. It was plain to be seen. The world is not a level playing field. It is not unreasonable to expect that people will see in broad daylight what lies ahead of them in the ordinary course as they walk along. No special vigilance is required for this.

Handley JA then said at [33]:

A Council's duty to pedestrians is therefore to take reasonable care to prevent or eliminate the existence of dangers in the road or footpath. The duty is not to prevent or eliminate "obvious hazards" which "could possibly be an occasion of harm. The standard of care is that which is reasonably required to protect pedestrians who are taking reasonable care for their own safety. The care which pedestrians must themselves take enters into the definition of the duty and is not relevant only to contributory negligence.

The proposition that the formulation of the duty of care owed by a council to a pedestrian is a duty to a pedestrian who is taking reasonable care for their own safety is now endorsed by the High Court and the New South Wales Court of Appeal. Application for special leave was refused in *Burwood Council v Byrnes*²². But it seems to me that there is no reason why this should be limited only to highway cases.

²² High Court Bulletin, 9/03

Can it now be said that a defendant owes this duty generally - that is a duty to take care not to injure persons exercising reasonable care for their own safety?

The decision of the High Court in *Cole v South Tweed Heads Rugby League Football Club* [2004] HCA 29; (2004) 217 CLR 469, would be consistent with such an approach.

The emergence of the modern law of negligence is generally agreed to be based on the famous observation of Lord Atkin in *Donoghue v Stevenson* ([1932] AC 562 at 580 where his Honour said:

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

Is it now appropriate to amend this test to say that the neighbour to whom I owe a duty of care is the neighbour who is taking reasonable care for their own safety, and that a neighbour who ignores an obvious risk is a neighbour who is not taking reasonable care for their own safety. It seems to me that this proposition is clearly supportable from the authorities of *Woods v Multi-Sport Holdings* and *Brodie v Singleton Shire*.

I note that the Ipp Review recommended that legislation be enacted to strengthen the common law defence of voluntary assumption of risk to provide that a plaintiff is to be presumed to have been actually aware of an obvious risk. (Recommendation 32, Review of the Law of Negligence, p 130). I note that this matter has not been taken

up in the *Civil Law (Wrongs) Act 2002*. I wonder whether this in fact takes the law any further than the recent pronouncements of the High Court.

A more restrictive approach to tort liability will obviously have implications for the number of persons who can recover damages following personal injury. The more restrictive approach will be criticised as harsh, but of course it must be recalled that we live in a different world in 2005 than the world in which Lord Atkin developed his neighbour test. That was before universal schemes of social security and, despite the ongoing pressure, universal public health insurance.

A person in Mrs Donoghue's position in 1932 who sustained injuries that would prevent her from working would have had little to fall back on to avoid destitution, and would have had no way of meeting medical bills. Modern disability pensions, public hospital services and Medicare benefits (including the pharmaceutical benefits scheme and the safety net) and public housing schemes make modest provision for a person who sustains injuries which preclude them from working but cannot recover from a tortfeasor. And of course no-fault worker's compensation schemes provide more substantial benefits for those injured in workplace accidents. The burden of injury is thus spread over the entire community at a lower cost, and with more modest benefits for the injured, but the absence of a damages verdict does not leave the injured with no support but the poorhouse, which could have been the case in 1932.

As well as placing restrictions on the extent of presently recognised tortious duties, there has been a noticeable reluctance in the appellate courts to extend a new duty of care. In two recent decisions of the New South Wales Court of Appeal it has been

held that a person who drinks to the point where they take actions that are clearly dangerous cannot recover in an action against the person who sold them the liquor (*Desmond v Cullen* [2001] NSWCA 238, *South Tweed Heads Rugby League Football Club v Cole*). In rejecting the proposed extension of the Australian common law to follow developments in Canadian jurisprudence, the courts, it seems to me, are again emphasising personal autonomy. The same conclusion was reached by the English Court of Appeal in *Barrett v Ministry of Defence* [1995] 3 All E.R. 87 where Beldham LJ said at 95:

I can see no reason why it should not be fair, just and reasonable for the law to leave a responsible adult to assume responsibility for his own actions in consuming alcoholic drink. No one is better placed to judge the amount that he can safely consume or to exercise control in his own interest as well as in the interest of others. To dilute self responsibility and to blame one adult for another's lack of self control is neither just nor reasonable and in the development of the law of negligence one increment too far.

The importance of personal autonomy was expressly referred to by the New South Wales Court of Appeal in *Reynolds v Katoomba RSL* [2001] NSWCA 234, (2002) 189 ALR 510. This again was an attempt to establish a novel duty of care - the duty of care on a gaming establishment to not allow a patron to gamble beyond their means. In his decision Spigelman CJ referred to McHugh J's remarks in *Perre v Apand* (1999) 198 CLR 180 at 223 where his Honour said:

One of the central tenets of the common law is that a person is legally responsible for his or her choices. It is a corollary of that responsibility that a person is entitled to make those choices for him or her self without unjustifiable interference from others.

This position was reinforced in the joint judgment of Gaudron, McHugh, Gummow and Hayne JJ in *Agar v Hyde* (2000) 201 CLR 552, a case where a young man who sustained injuries playing rugby union sought to bring a claim against the codes' governing body. Their Honours said:

The decision to participate is made freely. That freedom, or autonomy, is not to be diminished. But with autonomy comes responsibility. To hold that the (governing body) owed a duty of care to (the injured player) would diminish the autonomy of all who choose, for whatever reason, to engage voluntarily in this, or any other, physically dangerous pastime.

The NSW Chief Justice concluded, in a passage that previewed his 2002 article referred to above (at 514):

*In many respects the tort of negligence is the last outpost of the welfare state. There have been changes over recent decades in the expectations within Australian society about persons accepting responsibility for their own actions. Such changes in social attitudes must be reflected in the identification of duty of care for purposes of the law of negligence. The recent authoritative statements in *Perre v Apand* and *Agar v Hyde* give greater emphasis in the development of the law of negligence to the acceptance by individuals of a personal responsibility for their own conduct, than may have been given in the past.*

These comments, it must be recalled, took place in September 2001, well before the emergence of the insurance crisis. While legislatures, including our own, have understandably reacted to public concern about rising insurance costs, it should be recalled that the courts have, well before the public hue and cry, been engaged over recent years in a substantial reform of the common law of negligence. This process, as the NSW Chief Justice observed, has reflected changes within society more generally. This is of course a most appropriate role for common law courts, and hardly a new development.

Writing in 1905 Dicey acknowledged that:

The courts or the judges, when acting as legislators, are of course influenced by the beliefs and feelings of their time, and are guided to a considerable extent by the dominant current of public opinion²³.

Or, as Oliver Wendell Holmes put it some 20 years earlier:

²³ A.V. Dicey, *Law and Opinion in England*, MacMillan, London 1905 p 361

*Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy*²⁴.

As Chief Justice Gleeson said recently in *Tame v New South Wales* [2002] HCA 35, (2002) 76 ALJR 1348, the law of negligence is based on the concept of reasonableness, and (at [14]):

Reasonableness is judged in the light of current community standards. As Lord Macmillan said in Donoghue v Stevenson “conception[s] of legal responsibility ... adap[t] to ... social conditions and standards”.

The change of public policy now being reflected in legislatures around the country, and reflected in the recommendations of the Ipp Review, to the extent that they embody a move from the paternalism of the past to a greater emphasis on autonomy and self responsibility have, it seems to me, already been reflected in the approach of the High Court and the New South Wales Court of Appeal in recent years. The common law, as ever, adapts to its times.

²⁴ O.W. Holmes, *The Common Law*, Little Brown, Boston, 1881, p 32