Tort Law Reform in Australia

This is the text of a lecture delivered 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

The District Court of New South Wales has jurisdiction to hear motor accident claims and work injury damages claims irrespective of the amount claimed and all other common law claims where the amount claimed does not exceed about £350,000. Its civil jurisdiction is, to a substantial degree, a personal injury jurisdiction. Filings in the District Court have fallen from about 20,000 in calendar year 2001, to 13,000 in 2002 and to 8,000 in 2003. The reduced rate of filings is continuing this year. It is reasonably clear that something dramatic has happened to civil litigation in New South Wales. Similar effects are seen in other states.

What these figures reveal is a dramatic change in the practical operation of the law of negligence in Australia over a few years. This is the result of two factors. First, there has been a substantial shift in judicial attitudes at an appellate level, led by the High Court of Australia. Secondly, there have been major changes to the law of negligence implemented by statute. My purpose this evening is to outline in general terms the nature of the changes to the law that have had such dramatic effects in so short a period of time. It is first, however, necessary to provide a broader context.

One lesson we must all learn from history is never to underestimate the ingenuity of the legal profession when faced with such dramatic changes to its customary practices. I am reminded of the attempt by the City of New York to control its burgeoning litigation bill by adopting a law to the effect that the City could not be sued for a defect in a road or sidewalk unless it had had fifteen days' notice of the specific defect. The plaintiff lawyers, or as, they call themselves, trial lawyers of New York City, established the BAPSPC, the Big Apple Pothole and Sidewalk Protection Committee. The function of this committee was to employ persons to continually tour the streets and footpaths of New York to note each and every blemish and, forthwith, to give the City of New York precise details of each defect. Regular reports cataloguing the notices which had been given to the City were available for sale to trial lawyers.

At any one time the total cost of curing the defects of which the city had been given notice was several billion dollars. Last year the Mayor of New York complained that in calendar year 2002 alone, the city received 5,200 maps from BAPSPC spotters

which identified some 700,000 blemishes. Needless to say the city has never successfully defended a case under the fifteen days' notice law. I am confident that Australian lawyers lose little by way of invidious comparison with their American cousins on the scale of creativity.

The Historical Background

For well over a century judges were universally regarded, in all common law jurisdictions, so far as I am aware, as mean, conservative and much too defendant-oriented. This led parliaments to extend liability, commencing with Lord Campbell's Act, then the abolition of the doctrine of common employment, the abolition of the immunity of the Crown, the creation of workers' compensation and compulsory third party motor vehicle schemes and provision for apportionment in the case of contributory negligence.

In Australia, about twenty to twenty-five years ago, the process of legislative intervention changed its character. It proceeded on the basis that the judiciary had become too plaintiff-oriented. A generational change in the judiciary coincided with a change in the opposite direction in the social philosophy of the broader polity, which came to re-emphasise persons taking personal responsibility for their actions. There may very well be an iron law which dooms judges to always be a decade or two behind the times.

Throughout Australia, in different ways and at different times, new regimes were put in place from about the early 1980s, particularly for the high volume areas of litigation involving motor vehicle and industrial accidents. In Australia's second largest state of Victoria, a no fault scheme for traffic accidents was established similar to the more wide-ranging New Zealand scheme. In the largest state of New South Wales such a scheme was actively considered but not, in the event, adopted. In all states what had come to be regarded as common law rights were significantly modified by legislative intervention. When I say, "come to be regarded", many of the causes of action were only available because of the previous century of legislative change, to which I have referred, which overrode the common law.

There was, as I have mentioned, a philosophical clash between the expansion of the tort of negligence and the change in political philosophy, associated in this country most closely with the name of Margaret Thatcher. An element of welfare state paternalism, or, depending on one's point of view, a sense of compassion, that in some quarters came to be regarded as old-fashioned, was not absent from day-to-day judicial decision-making about when a person ought to receive compensation,

even in a fault based system. It was recognition of this phenomenon that led me to describe the tort of negligence as *"the last outpost of the welfare State"*, although in truth a universal no fault scheme would be more accurately so described.

The undefined elements of the tort left much open. What damages are remote? What does "commonsense" suggest as the cause? When is a contribution to the creation of a risk "material"? Should a limitation period be extended? Should the plaintiff's evidence be accepted? How should one choose between two widely divergent experts' opinions, each of which is probably at, or beyond, the boundaries of the range of legitimate opinion? Should the plaintiff be believed about what effect a hypothetical warning would have had upon him or her? There is much flexibility in the outcome of negligence litigation.

Professor Atiyah referred to a long-term historical trend of expanding the scope of the tort of negligence and the damages recoverable for the tort, as *"stretching the law"*, (Atiyah, *The Damages Lottery* (1997) Hart Publishing, Oxford, Chapters 2 and 3). There was, however, an equivalent, parallel trend, perhaps of even greater practical significance, of 'stretching the facts'.

Contemporary judges generally reached intellectual maturity at the time that the welfare state was a widely accepted conventional wisdom. The "progressive" project for the law of that era was to expand the circumstances in which persons had a right to sue. We are now more conscious of limits – social, economic, ecological and those of human nature. Hobbes has triumphed over Rousseau. For several decades now the economic limits on the scope of governmental intervention have received greater recognition. The law cannot remain isolated from such broader trends in social attitudes.

In particular there has been a significant change in expectations within Australian society, as elsewhere, about persons accepting responsibility for their own actions. The idea that any personal failing is not your fault, that everyone can be categorised as a victim, has receded. The task is to restore an appropriate balance between personal responsibility for one's own conduct and expectations of proper compensation and care.

This is, of course, an issue which resonates beyond the law. The change is noticeable over the decades. It is not likely that Donald Bradman would ever have taken a banned substance. If he had, however, it is quite inconceivable that he would have blamed his mother. There is a shift back to accepting responsibility, as Adam Gilchrist showed when he walked without the umpire having raised a finger.

The debate in Australia, leading to the statutory changes, focused on particular cases and a range of circumstances in which persons recovered damages, sometimes substantial damages, when there could be little doubt that they were the author of their own misfortune. One case referred to frequently involved a young man diving from a cliff ledge into a swimming pool without checking the depth of the water. The idea that the authority which owned the land should have put up a warning sign advising against diving is no longer, with the changing times, regarded as a reasonable basis for liability.

There seems no doubt that the past attitude of judges, when finding liability and awarding compensation, was 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 awarded to injured plaintiffs. 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 home.

The line between the kinds of mistakes or unfortunate results that are an inevitable concomitant of day-to-day human interaction, including professional practice, on the one hand, and the sorts of mistakes or results which should not occur at all, on the other hand, may have been drawn in a different way on many occasions in the absence of the ubiquity of insurance. The various choices that the fungibility of the concepts associated with the tort of negligence throws up may very well have been made differently.

Foreseeability

If one had to pick a single point of departure for the imperial march of the tort of negligence, the beginning of the process of what Atiyah calls "stretching the law", it was probably the judgment of Lord Reid for the Privy Council in *Wagon Mound (No 2)*, (*Caparo Industries v Dickman* [1990] 2 AC 605). The judgment of the Privy Council was delivered at a time when the practice of the Board was to deliver a single inscrutable judgment which acquires some of the power of a legislative enactment precisely because it is bereft of that divergence of reasoning amongst different judges in a final court of appeal that is more appropriate for the principled development of the law.

Lord Reid's judgment is quite simplistic. That is sometimes the product of the compromises that are required for a joint judgment.

The case was an appeal directly from a single judge of the Supreme Court of New South Wales, Mr Justice Walsh, later to serve on the High Court. Sir Cyril Walsh, placed particular weight on his assessment that the likelihood of an oil spillage catching fire was *"rare"* and *"very exceptional"*. The Privy Council rejected this as the appropriate test. It asked whether or not something was *"a real risk"* in the sense that it would not be brushed aside as *"far fetched"*. The subsequent application of this test by the High Court in Australia has led to the formulation that a risk of injury is foreseeable unless it can be described as *"far fetched or fanciful"*, (*Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47).

Lawyers, even after *Wagon Mound (No 2)*, continued to refer to the test for identifying a duty as one of "reasonable foreseeability". I cannot see that "reasonableness" has anything to do with a test that only excludes that which is "far fetched or fanciful". The test appears to be one of "conceivable foreseeability", rather than of "reasonable foreseeability".

As George Orwell said in his great 1946 essay *Politics in the English Language*:

> *"the English Language ... becomes ugly and inaccurate because our thoughts are foolish, but the slovenliness of our language makes it easier for us to have foolish thoughts."*

and

> *"... if thought corrupts language, language can also corrupt thought. A bad usage can spread by tradition and imitation even among people who should and do know better."*

So it appears to be with a continued use of the terminology of *"reasonable foreseeability"*.

If we had kept a firm hand on the idea of "reasonableness" as a limiting factor we would never have needed the flirtation with "proximity" nor the two stage *Anns* test, (see *Anns v Merton London Borough Council* (1978) AC 728). nor the three stage Caparo test, (*Caparo Industries v Dickman* [1990] 2 AC 605), nor the multifactorial analysis now applied by the High Court in Australia. The search for a unifying principle in the law of negligence has proven to be as futile as the search for a unifying principle in the laws of physics.

Over the course of a number of decades the effect of judicial decision-making was, in substance, to transform the tort of negligence from a duty to take reasonable care into a duty to avoid any risk by reasonably affordable means. That, in my opinion,

was the practical effect of a stream of judicial decision-making at appellate level, particularly for that vast body of decisions that never come before an appellate court and, indeed, the even larger proportion of claims that are settled out of court in the light of a practitioners' understanding of the likely outcome.

The Australian judiciary has now become more sensitive to the broader implications of individual decisions by reason of the cumulative effect of such decisions. The progressive paring back of the tort of negligence by statutory changes over the course of two plus decades has itself had an impact on judges. This legislative intervention has, as I will shortly show, accelerated and become much more dramatic over the last two years. Furthermore, evidence has accumulated about the unintended consequences of the tort system. The practice of defensive medicine is a good example. Both my brothers are doctors. Even in the late 1960s I recall the scorn that they expressed about their American colleagues who refused to stop at the scene of road accidents. Australian doctors have long since joined them.

I have expressed the view both in judgments and extra judicially, that the judiciary cannot be indifferent to the economic consequences of its decisions. Insurance premiums for liability policies can be regarded as, in substance, a form of taxation (sometimes compulsory but ubiquitous even when voluntary) imposed by the judiciary as an arm of the state. For many decades there was a seemingly inexorable increase in that form of taxation by judicial decision, (*see Kinzett v McCourt (1999) 46 NSWLR 32 at [97]; cf at 116]*), In Australia that increase has stopped as a result of a change in judicial attitudes and is likely, subject, of course, to the vagaries of the insurance market, to be reversed, as a result of legislative intervention throughout Australia.

At least indirectly in the case of judges, and overtly in the case of the parliaments, the shift in attitude has been driven by the escalation of insurance premiums and, in recent years, by the unavailability of insurance in important areas on any reasonable terms at all.

The year 2002, where insurance premiums escalated rapidly in numerous categories of insurance, was the year in which, for Australia, quite a number of chickens came home to roost. By that time, however, the change in judicial attitudes was well under way.

Although the *Wagon Mound (No 2)* continues to represent the law in Australia, there are distinct signs that the *"far fetched and fanciful"* test is likely to be reviewed by the High Court, (*see, for example, the observations of McHugh J in Tame v New*

South Wales (2002) 211 CLR 317 at [98]). There are a range of well-established categories of negligence in areas such as traffic and industrial accidents where the application of basic principles is well established. Change in such areas has occurred by legislative intervention. It is, however, at the boundaries of the tort, where new and different situations are under consideration, that the change in judicial attitude has become most apparent. However, that change must also have an affect on the outcome of cases even in the well-established categories. The various choices available to a judge in terms both of acceptance of evidence and the formulation of the judgments required to determine such cases will be affected by the kind of change of attitude to which I refer.

There have been a steady stream of cases in the appellate courts, particularly in the High Court, in which the outcomes would have been different if the process of stretching the law and of stretching the facts had not been arrested and reversed.

People who trip on footpaths no longer always successfully sue local councils. The owner of a shopping mall was not responsible for criminal conduct in the mall's car park. The authors of the rules for rugby were not liable to injured players. Nor was the person who conducted an indoor cricket arena. A cinema was not liable when a client tried to sit down in a darkened cinema but the seat was, as is common, retractable. A hotelier was not liable for injuries suffered after departure by an intoxicated patron. A club with gambling machines was not liable to refund the losses of a compulsive gambler whose cheques it had cashed. The driver of a vehicle was not liable when a child suddenly darted out into the road. A school authority was not liable for intentional criminal conduct, relevantly sexual abuse, of a teacher against a pupil. Governmental regulators were not liable for the health consequences of a failure to regulate self-interested commercial actors whose conduct caused injury. Governmental decision-makers whose intervention, for example, in family relationships, caused psychiatric injury on the basis of allegations that proved incorrect, were not liable for those injuries. Employers which conducted disciplinary or dismissal actions with adverse psychiatric consequences were also found not to be liable. A prison authority was found not liable for psychiatric injury caused to the victim of a crime by an escapee not for the defects of her prematurely born son – *Dorset Yacht* was doubted.

It is quite likely that many of these cases would have been decided differently only a few years ago. I do not wish to imply that the development has been all one way. There have been important cases in which liability has been established in

circumstances where the issue was debatable. Nevertheless, the drift of judicial decision-making is plain at a senior appellate level. It is unquestionably having an effect on trial judge decision-making of a substantial character.

The imperial march of negligence has also been restricted by a newly emerged emphasis on the importance of coherence in the law. The tort of negligence should not be permitted to cut across other areas of the law which have developed a distinctive approach to balancing conflicting interests. Negligent words causing mental harm may lead to incongruence between actions in defamation and negligence. Negligent conduct creating a nuisance should not create liability in negligence where an action in nuisance would be denied. Questions of coherence arise most frequently in cases which allege the negligent exercise of a statutory duty. In many quite disparate fields, the principle of coherence has restricted liability for negligent conduct in circumstances in which liability would probably have been found only a few years ago.

The most difficult area with which the law is still grappling in this regard is that of liability for psychiatric injury. Difficult issues of a philosophical and factual character remain to be resolved in this field. The application of legal tests, in a context where expert evidence has few, and often no, objectively verifiable elements, is particularly difficult. This is exacerbated by the fact that the relevant area of expertise is only, to a limited extent, based on scientific research and has a wide element of discretion. In this area, perhaps more than any other, the Whig approach to science – the assumption that improvement of knowledge occurs in some kind of straight line of progress, rather than being cyclical or, dare one say so, a creature of fashion – is not likely to be correct. It is particularly difficult to determine where to draw the line between refusing to give recovery for the normal stresses of life, including working life, and those extraordinary stresses that people should never have suffered.

In this area Australian law is now unlikely to develop in any principled way by reason of statutory intervention, to which I will presently refer.

The Sense of Crisis

Legislative change over the last year or two has been driven by a perceived crisis in the price and availability of insurance. In Australia this was focused in particular on public liability and medical negligence. However, similar pressures had been building up in all areas for a number of years, including the high volume areas of industrial accidents and traffic accidents.

Over 2002-2003 there were virtually daily reports about the social and economic effects of increased premiums: cancellation of charitable and social events such as dances, fêtes, surfing carnivals and Christmas carols; the closure of children's playgrounds; horse riding schools; adventure tourist sites and even hospitals; the early retirement of doctors and their refusal to perform certain services, notably obstetrics; local councils were shutting swimming pools and removing lethal instruments such as seesaws and roundabouts from children's playgrounds; our Sydney tabloid proclaimed "the death of fun"; many professionals could not obtain cover for categories of risks, leading to withdrawal of their services; for example, engineers advising on cooling tower maintenance could not get cover for legionnaires disease, building consultants could not get cover for asbestos removal, agricultural consultants could not get cover for advice on salinity; midwives were unable to get cover at any price; many professionals were reported to have disposed of assets so as to be able to operate without adequate cover or even any insurance.

The issue became highly charged politically. The talk was of "crisis". The concern of governments was reinforced by the liability of government directly as a major employer, property owner and provider of services, particularly in education, health and transport. This was, however, reinforced by the emergence, over recent years of a role for government as a backstop for private insurers, as the reinsurer of last resort. It took many years for the government role of "lender of last resort" to take the institutional form of the contemporary central bank. We are in the early stages of institutional development of the "reinsurer of last resort" function.

In Australia we have had a range of proposals in different areas for the government to underwrite existing insurers, e.g. for the risks associated with terrorism. Of particular significance is the acceptance that it was politically impossible for the government to stand by and let a major insurer default on its obligations. That is exactly what happened long ago in the case of banks. A national scheme was implemented to support the major medical insurer when it appeared to be insolvent. Governments at both levels of our federal system became involved in protecting policyholders when a major general insurer, HIH Limited, went into liquidation.

It is quite clear that governments have a very real financial interest in the operations of the tort system.

Whether by way of increases in insurance premiums or by way of a call on tax payers' funds it became widely accepted at all levels of Australian government and in the general community that the existing tort system had become economically unsustainable. The particular focus was the sudden escalation of premiums.

Insurance premiums are the result of a multiplicity of factors, however, the cost of claims sets the basic structural parameters within which other forces operate. Those costs have increased considerably over recent decades.

There is no doubt, in my mind, that the underlying cause of the "crisis" that was proclaimed to exist, was the practical application of the fault based tort system in the context of adversary litigation, even though the attitude of the judiciary was changing at the very time that this campaign in the media was occurring. The rate of change proved too slow for the political process. What brought the issue to a head were developments in the market for insurance.

By 2002 what had for many years been a buyer's market in insurance had become a seller's market. At an international level there had been a series of natural disasters, which had drawn down the capital of insurance companies, particularly that of reinsurers. The events of 11 September 2001 in New York exacerbated this process. This coincided with the end of the share market boom which further reduced the capital available to insurance companies. Quite quickly, demand came to exceed supply in the global reinsurance market.

In Australia this development was accentuated by problems of our own making. In particular, the collapse of HIH, which had been particularly active in the professional negligence and public liability market, transformed the pricing of insurance in the Australian market. It appears, with the benefit of hindsight, that one of the principal reasons for the collapse was that HIH had been aggressively underpricing in a number of areas of insurance in order to increase its market share. Indeed, one of our more successful insurance companies, QBE Limited, had found the Australian market so unattractive that only about fifteen percent of its capital was invested at home. In a sense, the increased insurance premiums, which should have emerged gradually over the course of a decade or so, came all at once, when this particular insurer was removed from the market. As a result of the changes to which I will refer, QBE has substantially expanded its exposure in the Australian market place.

Although the practical operation of the law of torts must determine to a substantial degree the level of premiums for liability insurance, the suddenness and size of the increases and the expansion of policy exclusions reflected such developments in the insurance market. The underlying cause of the problem must be distinguished from the immediate cause of the crisis.

Legislative Change

In New South Wales, the largest and most litigious state in Australia, legislative changes had commenced in a number of areas prior to the events of 2002-2003. Those events, however, led to a national response in which many of the New South Wales proposals were adopted more widely and legislation went even further than had been considered appropriate until that time.

The Commonwealth and the states appointed an inquiry to review the law of negligence. The Panel was chaired by the Honourable David Ipp, a judge of the New South Wales Court of Appeal. By and large, the recommendations of this panel have been implemented, with some variation, in all states and territories, with complementary national legislation almost complete. The principal thrust of the changes is the limitation of circumstances in which damages can be recovered for personal injury and the restriction of the heads and quantum of damage that can be so recovered. The changes are wide ranging and include the following:

- The not "far fetched or fanciful" test for foreseeability has been replaced by a test that a risk be "not insignificant" which, despite the double negative, is of a higher order of possibility.
- A requirement has been introduced identifying a range of factors which have to be taken into account when determining breach of duty – referred to as the "negligent calculus". These factors include probability of harm, seriousness of harm, the burden of taking precautions, the social utility of the activity and precautions that may be required by similar risks, not just the particular causal mechanism of the case before the court. This statutory requirement which in many respects reflects the common law will focus attention on matters which, following *Wagon Mound (No 2)*, may not have been given adequate weight, particularly in lower courts.
- An express acknowledgment of the normative element in determination of issues of causation is adopted by applying a test of whether responsibility for the harm *should* be imposed on the negligent party.
- An express provision emphasising that the plaintiff always bears the onus of proving any fact relevant to the issue of causation, thereby implicitly overturning judgments which suggested that in the case of evidentiary gaps – often medical causation issues – proof on the issue of causation could shift from the plaintiff to the defendant.

- The introduction of a modified version of the *Bollam* test, which was not the law in Australia, in all cases of professional negligence providing that treatment was not negligent if it occurred in accordance with an opinion widely held amongst respected practitioners, subject to the ability of the court to intervene if the opinion was "irrational". The *Bollam* test does not, however, apply to a duty to warn or inform. This has led to different approaches. In New South Wales there is no duty to warn of an obvious risk.
- The enactment of a "person of normal fortitude" test for purposes of foreseeability of mental harm, which the Ipp Panel identified as representing the majority view in the most recent High Court authority on the subject, although the judges who did in fact hold that view have since accepted that the majority regarded normal fortitude as merely a relevant consideration and not as an independent test.
- In a number of states, including New South Wales, the legislature has gone beyond the Ipp recommendations by restricting recovery for pure mental harm to persons who directly witnessed a person being killed or injured or put in peril or were a close family member of the victim.
- A number of states have adopted, in different terms, a policy defence available to all public authorities, requiring that the interests of individuals after materialisation of a risk have to be balanced against a wider public interest, including the taking into account of competing demands on the resources of a public authority. In New South Wales the defence is stated as principles for determining whether a duty exists or breach has occurred, expressly acknowledging that performance may be limited by financial and other resources available to the authority, that the general allocation of those resources by an authority is not open to challenge and that the conduct of the authority is to be assessed by reference to its full range of functions. Also, in New South Wales the legislation provides that a public authority is not liable for a failure to exercise a function to prohibit or regulate an activity if the authority could not have been required to exercise that function in mandamus proceedings instituted by the claimant. This provision may well come to test the limits of the availability of mandamus and principles of locus standi.
- The liability of a volunteer or a good samaritan is limited.
- Changes are made to the law about voluntary assumption of risk and contributory negligence. An intoxicated person is deemed to have contributed twenty-five percent to the injury.

- The liability of persons who act in self-defence to criminal conduct is restricted.
- An injured person is deemed to have been aware of any obvious risk, about which there is no duty to warn save in the case of a request or in the case of a professional service.
- Provision is made that an apology cannot constitute an admission, regarded as of particular significance in the field of medical negligence. Doctors can say sorry for a result, without fear of making an admission of liability.

There are also thresholds, caps and restrictions on recoverable damages, including:

- Establishment of an indexed maximum for the recovery of economic loss, generally three times average weekly earnings. Persons earning more than that have the ability to take out first person loss of earnings insurance.
- Establishment of a threshold of a percentage of permanent impairment before a person may recover general damages at all, generally a sliding scale of fifteen percent up to about thirty percent, after which full recovery is permitted.
- Establishment of an indexed maximum for recovery of general damages, at a little above £100,000.
- Restrictions have been imposed on the recovery of damages for provision of gratuitous services.
- The rate of interest that can be awarded on damages has been fixed and generally reduced.
- The discount rate established by the courts for the determination of the present value of future loss has been fixed and increased.
- Exemplary damages have been abolished in many jurisdictions and, to some degree, aggravated damages have also been abolished. Exemplary damages were rarely awarded and this would make little practical difference to insurance premiums. Aggravated damages represent actual loss. This change does, however, pander to the current imperative of political life in a media saturated age: to be seen to be doing something. In the heat of the debate it appeared that anything less was more. The reasons proffered for this change are singularly unconvincing.

This recitation of the major changes indicates how wide-ranging and fundamental the alterations of the law have been. Many of the changes were contained in a list of possible amendments to the law which I compiled in an address in 2002 – not

including caps and thresholds – and which became something of a template for the subsequent debate (*see Negligence: The Last Outpost of the Welfare State", 76 ACJ 432*). In that address I emphasised the importance of proceeding on the basis of a principled alteration, rather than an underwriter driven alteration of the law.

All the earlier changes to the law over the course of some two decades have resulted in significant differences amongst the respective schemes for transport accidents, industrial accidents and medical negligence. These arose because different insurers and administrators were involved in each area of liability. They had a great influence on what changes were required to bring down claims and, therefore, premiums, in a context where government had often announced an objective of reducing premiums in a particular area of insurance by a specific amount. These disparate processes created inexplicable and unjustified variations in the rules which applied. Quite different compensation was available depending on whether injury occurred in a car or in a car park or at work or on an operating table or in a public swimming pool or in a supermarket. The sense of fairness which is essential to the effective operation of the system had been attenuated.

The result of the new regime is to avoid the sense of inequality as a ground for unfairness. It has, however, replaced that ground with others and the debate is actively continuing. In particular, the introduction of caps on recovery and thresholds before recovery is feasible, has led to considerable controversy. The introduction of a requirement that a person be subject to fifteen percent of whole of body impairment – that percentage is lower in some states – before being able to recover general damages has been the subject of controversy. It does mean that some people who are quite seriously injured are not able to sue at all.

The evidence suggested that in smaller claims, say up to about £35,000, about half of total damages awarded were in the form of general damages. The threshold has made these claims virtually uneconomic from the point of view of the legal profession. Perhaps more than any other single change, it is the threshold for general damages that has led to the dramatic fall in filings in the District Court. This has been reinforced by the cap on lawyers' fees for cases below about £35,000 of the higher of £3,500 or twenty percent of the amount. This is a maximum fee in the absence of a cost agreement.

The effective abolition of what insurance companies regard as small claims, albeit the matters are not small from the perspective of the injured person, is expected to have a considerable impact on premiums. The insurers convinced the governments that this was an important aspect of the changes required. My own suspicion is that

they simply find it easier to compute the effect of such a change than of changes in applicable legal principle. Underwriters do not believe that they are capable of predicting changes in judicial behaviour and who can blame them.

Small claims raise very real issues about transaction costs. Nevertheless, there is likely to be a growing body of persons who have suffered injury which they believe to be significant and who resent their inability to receive compensation.

Proportionality

One aspect of the legislative change that is not yet in force, but will be in the near future, I am sure, is the adoption of a system of proportionate liability with respect to economic loss. Relevant legislation has been passed in a majority of states but its proclamation is delayed pending the passage by the Commonwealth Parliament of complementary legislation, which has been introduced.

The traditional approach of awarding damages in tort, or for breach of a contractual term of skill and diligence, has been one of what has been called solidary liability, where the liability is joint and several in situations where the same damage is caused by negligence on the part of more than one person. A proposal to introduce a system of proportionality was considered in Australia about a decade ago and rejected. The climate established by the recent debate on tort law reform has been such that the system of proportionate liability has been adopted and is on the verge of being introduced.

A defendant who is only ten percent responsible for the injury would only bear ten percent of the damages. The system will not apply to claims for personal injury but is limited to claims for damages with respect to economic loss or damage to property. Joint and several liability is preserved in the case of a defendant who intended to cause or who fraudulently caused economic loss or damage to property. Vicarious liability and the several liability of partners is also preserved.

This system creates the possibility that a person who has suffered injury will be unable to fully recover. However, it is by no means clear why one defendant, because it is wealthy or insured, should, in effect, become an insurer in favour of plaintiffs against the insolvency or impecuniosity of co-defendants who have contributed more substantially to the economic loss suffered by the plaintiff. The traditional attitude of the law, which favours personal injury plaintiffs, puts them in a different category from those who suffer economic loss.

This is a matter likely to be of particular significance in the area of professional liability for auditors and lawyers who are frequently joined in commercial

proceedings simply on the basis of the depth of their pockets or rather of that of their insurers. In many such cases the directors of a particular company, who are primarily liable for the events leading to economic loss, are not sued at all.

It is quite likely that the new system will change the dynamics of a considerable body of commercial litigation. How that will actually impinge on large cases involving auditor's negligence and the like has yet to be seen. However, the courts will have to determine a new set of principles for allocating responsibility to different actors whose cumulative conduct leads to a single loss.

The mechanism for making claims between concurrent wrong-doers will be abolished. However, a plaintiff may claim against concurrent wrong-doers in subsequent actions and the court may join concurrent wrong-doers in proceedings. A defendant is under an obligation to notify a plaintiff of concurrent wrong-doers of whom the defendant is aware so that the claim, of what might be called "diminished economic responsibility", does not ambush a plaintiff.

There are important considerations of principle underlying the choice that has now been made. That is most clearly reflected in the decision to limit the proportionate liability system to claims for economic loss and property damage and the retentions of the old rules for intentional or fraudulent causation of economic loss. The principal impact of the new regime is likely to be in the sphere of professional indemnity insurance.

Professional Indemnity Insurance

Another proposal is of particular significance for professional indemnity insurance. The High Court has adopted a literalist interpretation of s54 of the *Insurance Contracts Act* which permits a court to excuse late notification of claims and of circumstances. This has rendered the restrictions inherent in a claims made or claims made and notified policy virtually irrelevant (*see Antico v Heath Fielding Australia Pty Ltd (1997) 188 CLR 652; FAI General Insurance Co Limited v Australia Hospital Care Pty Ltd (2001) 204 CLR 641; Eastend Real Estate Pty Ltd v C E Heat Casualty & General Insurance Limited (1991) 25 NSWLR 400*).

Such policies are common form in the case of professional indemnity. Insurance companies found it difficult to price professional indemnity cover or to quantify provisions for such claims. An inquiry has reported on how this provision should be changed, with respect to claims made, but not occurrence based, policies, (*see Alan Cameron and Nancy Milne, Review of the Insurance Contracts Act 1984 (Cth) Report into the Operation of s54, Commonwealth of Australia, October 2003*). An early draft

of the provision attracted criticism, but that is well on the way to being resolved. I have no doubt that this will be implemented.

Another matter of considerable significance for professional indemnity is the model established a decade ago in New South Wales, soon to be nationwide, of Professional Standards legislation. In essence, this is a trade off between the adoption of regulated risk management procedures by a profession in exchange for a statutory cap on liability. Not everyone who could do so has taken advantage of the scheme, not least because clients have resisted the idea of a cap, even though the statutory caps are higher than almost all historical claims.

The system works on the basis of a representative association of a professional group submitting a scheme for approval by the regulator. The scheme must include a range of obligations, particularly for risk management, in exchange for a cap.

The professional standards regime has received the unanimous policy support of all governments. The caps will vary from one scheme to another e.g. a cap of $1 million for a sole practitioner per claim is proposed by the scheme of the New South Wales Bar Association compared with various limits in the case of solicitors with a level of $1.5 million. These limits will generally exclude only larger commercial claims. The objective is to temper the considerable escalation of premiums and the expansion of policy exclusions, of recent years.

The ten year old New South Wales Act had only limited impact. The cap did not apply to statutory causes of action under Commonwealth legislation. It will now. A nationally consistent scheme appears to be imminent.

Conclusion

As can be seen, the change in the law of negligence in Australia has been quite dramatic. The working out of the new statutory regime has commenced and will take some time. There remains a significant debate as to whether or not the reforms have gone too far. Australian lawyers are focussing attention on the considerable increase that has been reported in insurance company profits. Political pressure on premiums is increasing but, in the long term, the level of premiums will be determined by the renewed ability of Australia to attract insurance company capital, particularly, the capital of reinsurers and by a turn in the insurance market cycle which, sooner or later, is inevitable.

I am conscious that I have used the word "reform", a word that has long since acquired a positive connotation of 'improvement', which puts anyone opposed to

the relevant change on the defensive. Not all the changes I have identified would be accepted by Australian lawyers as "reforms" in that sense.

I am reminded of the blistering attack on reformers by Senator Roscoe Conkling, a Republican machine party boss in New York City who said in 1880:

> *"Some of these worthies masquerade as reformers. Their vocation and ministry is to lament the sins of other people. Their stock in trade is rancid, canting, self-righteousness. ... Their real object is office and plunder. When Dr Johnson defined patriotism as the last refuge of a scoundrel, he was unconscious of the then undeveloped possibilities of the word 'reform'."*

May I say in conclusion that there has been no serious discussion in Australia of us adopting on a universal basis the no fault type insurance scheme that exists in New Zealand. It does, as I have said, exist for motor vehicle accidents in Victoria and has been advocated more widely. Nevertheless, if the changes both in judicial attitudes and the legislative regime now in place do not result in a system of compensation for accidents which is widely accepted to be economically sustainable, a no fault scheme may appear to be the only alternative.

May I leave you with a judgment from a United States Court in Michigan, where damage to a tree was found not to be covered by the Michigan system of no fault liability. The claim was for damages for the cost of protecting and reinvigorating what the owner described as a "beautiful oak tree", into which an errant motorist had crashed his Chevrolet. This led the Michigan Court of Appeals to be moved to verse. The Court's judgment as reported is as follows:

"We thought that we would never see
A suit to compensate a tree.
A suit whose claim in tort is pressed
Upon a mangled tree's behest.
A tree whose battered trunk was pressed
Against a Chevy's crumpled crest;
A tree that faces each new day
With bark and limb in disarray;
A tree that may forever bear
A lasting need for tender care;
Flora lovers though we three,
We must uphold the Court's decree
Affirmed."

This I emphasise is the whole judgment. The headnote I should add was also in verse. For the doubters amongst you, the reported case reference is *Fisher v Lowe* ([1983] 333 NW 2nd 67).

I conclude with a note of apprehension, even defeatism, reminiscent of the fate of the New York City 15 days notice regulation. Earlier this year the Commonwealth Government produced a booklet proclaiming the triumph of the tort law reform legislative package throughout Australia. The publication set out in detail the major changes to the law which I have outlined this evening. The introductory chapter of this official publication concluded with a paragraph which struck a discordant note with the self-congratulatory tone of the booklet. It said, under the heading "DISCLAIMER":

> *"Information contained in this report should not be relied upon without reference to Australian legislation in force from time to time and appropriate legal advice."*
>
> (*Reform of Liability Insurance Law in Australia*, Commonwealth of Australia, February 20-04, p12).

Perhaps the authors were just teasing.