Paradigm Shift in The Cost of Accidents: Review of the Law of Negligence

James Goudkamp*

1. Introduction

On 30 September 2002 the Panel of Eminent Persons, which was convened under the auspices of the Commonwealth Treasury, released its Final Report of the Review of the Law of Negligence (the 'Ipp Report'). The Ipp Report contained sixty-one recommendations as to how civil liability for personal injury and death may be limited. A significant number of these recommendations have now been implemented, in one form or another, in most jurisdictions.[1]

A number of factors provided the impetus for the review and the subsequent spate of legislative action. Most notably, the system of awarding damages for personal injury and death has been accused of being either wholly or partially responsible for the considerable rises in the cost of securing a contract for certain types of third party personal injury and death insurance in recent years.[2] Secondly, it has been asserted that contemporary Australian society is too litigious[3] and is embroiled in an unhealthy culture of blame.[4] Thirdly, there is a perception that the availability of compensation is ubiquitous, and that this has obviated the need for people to take personal responsibility for their own safety.[5] Finally, the belief has emerged that the system of awarding compensation is out of touch with prevailing community standards. Specifically, it has been declared that damages awards are overly generous,[6] that the standard of care is unrealistically high in many contexts,[7] and that tort litigation is effectively a lottery.[8]

---

* Law Student at the University of Wollongong.

1 *Civil Law Wrongs Act* 2002 (ACT); *Civil Liability Act* 2002 (NSW); *Civil Liability Act* 2003 (QLD); *Personal Injuries (Liabilities and Damages) Act* 2003 (NT); *Personal Injuries (Civil Claims) Act* 2003 (NT); *Recreational Services (Limitation of Liability) Act* 2002 (SA) and the *Wrongs Act* 1936 (SA), as amended by the *Wrongs (Liability and Damages for Personal Injury) Amendment Act* 2002 (SA); *Civil Liability Act* 2002 (Tas); *Wrongs Act* 1958 (Vic), as amended by the *Wrongs and Other Acts (Public Liability Insurance Reform) Act* 2002 (Vic); *Civil Liability Act* 2002 (WA).

2 Panel of Eminent Persons, (2002), *Final Report of the Review of the Law of Negligence*, p.ix; The Hon. Helen Coonan, (2002), 'Insurance Premiums and Law Reform – Affordable Cover and the Rule of Government', 8(2) *UNSWLJ – Forum* 7 at p.7; Spigelman, J.J., (2002), 'Negligence: The Last Outpost of the Welfare State', 76 *ALJ* 432 at pp.434-5.

3 *Lisle v Brice* [2002] 2 Qd R 168 at 174 per Thomas JA.

4 The Hon. Robert Carr, (2002), 'Strong Community Response to Public Liability Reforms', Media Release, 4 September 2002, p.1.

5 The Hon. Robert Carr, (2002), 'Statement by Premier Bob Carr', Media Release, 11 June 2002, pp.1-2.

6 Panel of Eminent Persons, (2002), above n2, p.25

7 Trindade, F., Cane, P., (1999), *The Law of Torts in Australia*, (3rd ed.), Oxford University Press, Melbourne, p.502.

Whilst the Ipp Report has been praised by some as "far-sighted",[9] a number of erudite commentators have questioned the veracity of the abovementioned premises for initiating the Review of the Law of Negligence,[10] and have trenchantly criticised both the Report's recommendations and the legislative action which followed.[11] Foremost among these critics is Professor Alan Fels, who has unreservedly denounced the legislative cuts.[12] Professor Fels' condemnation of these so-called 'reforms' proceeds on the assumption that the primary objective of the law is to advance public welfare.[13] From this viewpoint, he asserts that the legislative erosion of plaintiffs' rights undermines this objective because, by transferring the cost of accidents onto accident victims, it advances the interests of certain groups to the detriment of the wider community. This essay aims to assess the accuracy of this assertion.

2. Transferring the Cost of Accidents onto Accident Victims

At the outset, it is convenient to elaborate on some of the ways in which the legislative cuts have transferred the cost of accidents that would have previously been borne by defendants onto accident victims. There are essentially two ways in which this transfer has been brought about. Firstly, by the alteration of liability rules, so as to absolve defendants from liability which they would otherwise have incurred. Secondly, by subverting the principle that a successful plaintiff should be awarded the compensation necessary to restore him or her to the position which he or she would have been in but for the accident.[14]

---

8 Atiyah, P.S., (1997), *The Damages Lottery*, Hart Publishing, Oxford, pp.1-2.

9 The Hon. Helen Coonan, (2002), above n2, p.8. See also Mason, A., (2002), 'Reform of the Law of Negligence: Balancing Costs and Community Expectations', 8(2) *UNSWLJ – Forum* 15.

10 See, for example, Graycar, R., (2002), 'Public Liability: A Plea for Facts', 54 *Plaintiff* 37 at p.38; Mullany, N., (2002), 'New Tort Reform Agenda – Same Old Myths', 40(6) *LSJ* 52 at pp.52-3; Luntz, H., (2002), 'Reform of the Law of Negligence: Wrong Questions – Wrong Answers', 8(2) *UNSWLJ – Forum* 18 at p.18; Davis, R., (2002), 'Tort Reform Crisis', 8(2) *UNSWLJ – Forum* 37 at p.37.

11 See, for example, Carter, J., Peden, E., (2002), 'A Contract Law Perspective of the *Civil Liability \ Amendment (Personal Responsibility) Bill* 2002 (NSW)', 54 *Plaintiff* 19.

12 See Australian Competition and Consumer Commission, (2002), 'Negligence Review Risks Creating Significant 'Losers': ACCC', Media Review, 22 August 2002; Australian Competition and Consumer Commission, (2002), 'Consumers to Lose from Negligence Review Proposals: ACCC', Media Release, 2 September 2002.

13 This objective is enshrined in section 2 of the *Trade Practices Act* 1979 (Cth).

14 *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39 per Lord Blackburn (HL).

There are numerous examples of modifications to liability rules. Consider, for instance, the changes effected on the advice of recommendation 11 of the Ipp Report.[15] The substance of this recommendation is that providers of recreational services should not incur liability as a result of damage which is caused by the materialization of an obvious risk involved in a recreational activity. The outcome of this change is that the cost of a recreational accident arising out of an obvious risk will now be borne by accident victims rather than negligent recreation service providers. Another example of a liability-orientated transfer is recommendation 19, which advocates for the abolition of the right to bring an action for damages for personal injury and death under Part V Division 1 of the *Trade Practices Act* 1974 (Cth). This recommendation, if implemented would have the result of reassigning the injurious consequences of, say, misleading or deceptive conduct by a corporation pursuant to section 52 of the *Trade Practices Act* from the guilty corporation to the aggrieved consumer.[16]

The curtailment of the compensation principle, which has occurred primarily by capping general damages,[17] damages for loss of earning capacity,[18] and *Griffiths v Kerkemeyer*[19] damages,[20] transfers the cost of accidents in a slightly more subtle way. Unlike liability-orientated transfers, damages-orientated transfers shift only some of the cost of an accident onto plaintiffs. The amount shifted is the difference between the loss which is compensated and the loss which is not.

---

15 *Civil Liability Act* 2002 (NSW) ss 5J – 5N; *Civil Liability Act* 2003 (QLD) ss 17 – 19; *Recreational Services (Limitation of Liability) Act* 2002 (SA); *Civil Liability Act* 2002 (Tas) ss 18 – 20 and s 39.

16 Other examples of liability-orientated transfers are found in recommendations 3 (reintroduction of the *Bolam* test for medical practitioners in respect of treatment), 28 (narrower test of reasonable foreseeability), and 42 (introduces a requirement that express words are needed before liability for a breach of statutory duty will arise).

17 See recommendation 48. *Civil Liability Act* 2002 (NSW) ss 16 – 17; *Civil Liability Act* 2003 ss 61 - 62 (QLD), *Personal Injuries (Liabilities and Damages) Act* 2003 (NT) ss 24 - 28 (NT), *Wrongs Act* 1936 (SA) s 24B; *Civil Liability Act* 2002 (Tas) s 27, *Wrongs Act* 1958 (Vic), s 24G and Pt 5BA; *Civil Liability Act* 2002 (WA) s 9,

18 See recommendation 49. *Civil Liability Act* 2002 (ACT) s 38; *Civil Liability Act* 2002 (NSW) ss 12 – 14 and s 15A; *Civil Liability Act* 2003 ss 54 – 57 (QLD), *Personal Injuries (Liabilities and Damages) Act* 2003 (NT) ss 20 – 22 (NT), *Wrongs Act* 1936 (SA) s 24D and s 24E; *Civil Liability Act* (Tas) ss 25 – 26, *Wrongs Act* 1958 (Vic) s 28F and s 28I, *Civil Liabiltiy Act* 2002 (WA) s 11.

19 (1977) 139 CLR 161.

20 See recommendation 51. *Civil Liability Act* 2002 (NSW) s 15; *Civil Liability Act* 2003 (QLD), s 57 and s 59; *Personal Injuries (Liabilities and Damages) Act* 2003 (NT) s 23 (NT), *Wrongs Act* (SA) s 24H, *Wrongs Act* 1958 (Vic) s 28IA and s 28IB, *Civil Liabiltiy Act* 2002 (WA) s 12.

3. Arguments Against Transferring the Cost of Accidents onto Accident Victims

Professor Fels' argument that it is undesirable for the cost of accidents to be transferred onto plaintiffs is defensible for at least three reasons.

3.1 Economic Analysis

In the context of personal injury and death, traditional economic analysis maintains that the legal system should provide a set of rules that achieves the optimum balance between the cost of preventing accidents and the astronomical cost[21] of accidents to society.[22] The guiding principle that has long been used to determine this balance is that the party who has the superior ability to avoid a particular accident should bear the cost of that accident.[23] In the overwhelming preponderance of cases, superior ability is consistent with both a greater capacity to control the circumstances out of which the accident arose and greater knowledge of the risks inherent in the activity in mention. For example, health care professionals invariably have a superior capacity to reduce risks inherent in the provision of health services than consumers of the service because they are more aware of the risks.[24]

Transferring the cost of accidents onto plaintiffs will, in theory, have a least three undesirable economic consequences.[25] Firstly, the removal of the economic incentive on defendants to take reasonable care to avoid foreseeable risks means that it is less likely that such care to avoid accidents will be taken. The inevitable result of this is that the number of accidents will increase, possibly above efficient levels.[26] Secondly, goods and services which carry a high risk of accidents will be overproduced, as the cost of purchasing these goods and services will not reflect the cost of the accidents which they cause. Thirdly, suppliers of goods and services who do not spend resources on avoiding accidents will be able to undercut suppliers that do take precautions.

---

21 For statistics in this connection see Luntz, H., Hambly, D., (2002), *Torts: Cases and Commentary*, (5th ed.), Butterworths, Sydney, pp.1–2.

22 Balkin, R.P., Davis, J.L.R., (1996), *Law of Torts*, (2nd ed.), Butterworths, Sydney, p.16; Ergas, H., (2002), 'An Economist's Perspective on Tort Reform', 54 *Plaintiff* 40 at p.41.

23 Calabresi, G., Hirshoff, J.T., (1972), 'Towards a Test for Strict Liability in Torts', 81(6) *Yale LJ* 1060 at pp.1070-1074.

24 Australian Competition and Consumer Commission, (2002), *Submission to the Principles Based Review of the Law of Negligence*, p.16.

25 See Cane, P, (1999), *Atiyah's Accidents, Compensation and the Law*, (6th ed.), Butterworths, London, pp.374-392.

26 Ergas, H., (2002), above n22, p.42.

3.2 Morality and Fairness

It is morally objectionable to transfer the burden of an accident from its guilty author onto its innocent victim. Indeed, general public sentiment demands that wrongdoers must pay for damage which they cause.[27] If the law fails to do justice between victims and wrongdoers then the rule of law, which is the linchpin of our society, will be directly threatened.[28] However, the recent legislative cuts ignore this moral imperative. The unfairness created in this connection may be demonstrated by some examples. Consider, for instance, the collapse of the Arthurs Seat Chairlift in Victoria on 3 January 2003 which resulted in the hospitalization of eighteen people.[29] Had the Ipp Report's recommendations concerning recreational activities been implemented in Victoria at this time, it is almost certain that the operators or builders of the chairlift would be absolved of any liability.[30] However, this would obviously be totally unfair. Patrons of the chairlift service doubtlessly expected, and were entitled to expect, that the chairlift would be safe. Accordingly, why should they bear the disastrous consequences of the failure of those responsible to take reasonable care?

The injustices created by the legislative cuts are also apparent upon the hypothetical application of the modified legal principles to the facts of decided cases. For example, consider the medical negligence case of *Rogers v Whittaker*.[31] In this decision, the defendant doctor was found to be liable for failing to warn of a one in fourteen thousand risk which occurred and caused the plaintiff to become blind. It was highly significant that the plaintiff specifically asked the doctor as to the existence of risks such as the risk which materialized. However, had the legislative alterations to the principle of reasonable foreseeability which have been made in several jurisdictions pursuant to recommendation 28 of the Ipp Report applied in this case,[32] the defendant would probably have escaped

---

27 *Donoghue v Stevenson* [1932] AC 562 at 580 per Lord Atkin; *Overseas Tankship (UK) Ltd v Mort's Dock and Engineering Co Ltd (The Wagon Mound (No 1)* [1961] AC 388 at 426 per Viscount Simonds; *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1976) 136 CLR 529 at 575 per Stephen J.

28 Heydon, D., (2003), 'Judicial Activism and the Death of the Rule of Law', 47(1) *Quadrant* 9 at p.10; Keeton, R.E., (1967), 'Is There A Place for Negligence in Modern Tort Law?', 53 *Virginia LR* 886 at p.888.

29 See Sydney Morning Herald, (2003), 'Chairlift Collapse: 18 Hurt', 4 January 2003.

30 See especially recommendation 11.

31 (1992) 175 CLR 479.

32 See *Civil Liability Act* 2002 (NSW) s 5B(1); *Civil Liability Act* 2003 (QLD) s 9(1); *Civil Liability Act* 2002 (Tas) s 11(1).

liability, as a one in fourteen thousand risk is, presumably, insignificant.[33] Clearly, however, this situation is unfair. Why should a doctor who fails to warn of a risk that he is specifically asked to address be excused of legal liability?

3.3 Loss Distribution

One highly desirable result of awarding compensation is that the pervasiveness of insurance ensures that accident losses are spread throughout the premium paying public.[34] This diffusion, which results in a large number of people sharing small amounts of all losses, spares individuals from having to bear the full brunt of a loss in isolation. Unfortunately, the legislation based on the Ipp Report reduces this diffusion, and imposes the burden of accident losses, which is often crushing, on individual victims. Of course, it is theoretically possible for would-be plaintiffs to secure first-party insurance against accident losses. However, there are numerous practical impediments to this occurring. Firstly, individuals are often not aware of the risks of particular activities and thus may not consider obtaining insurance. Nevertheless, even if they are alive to the relevant risks, the preponderance of individuals will decline to secure insurance because of the innate human tendency to underestimate the probability of risks materializing.[35] This is particularly so where the individual in mention is only occasionally exposed to a particular risk-bearing activity. Secondly, the knowledge that social security exists as a safety net militates against the likelihood of individuals purchasing first-party insurance.[36] Thirdly, because individuals typically engage in a wide range of risk-bearing activities on a daily basis, it is absurd to expect people to take out insurance against every material risk to which they are exposed.[37]

It is noted that some commentators argue that loss distribution is an insufficient rationale for the imposition of civil liability, as tort compensation is a less efficient method of distributing losses than social security, because the premium paying public is

---

33 Consider also *Chappel v Hart* (1998) 156 ALR 517.

34 Fleming, J.G., *The Law of Torts*, (9th ed.), LBC, Sydney, pp.11-12. See also *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 at 419 per Woodhouse J (CA). *Contra* Davie *v New Merton Board Mills Ltd* [1959] AC 604 at 626-7 per Viscount Simonds.

35 Calabresi, G., (1970), *The Cost of Accidents: A Legal and Economic Analysis*, Yale University Press, London, pp.56-7.

36 See further Australian Competition and Consumer Commission (2002), above n24, pp.18-9.

37 Ehrenzweig, A.A., (1966), 'Liability Without Fault', 54 *Calif LR* 1422 at p.1447.

smaller than the population which contributes to social security.[38] However, this argument overlooks the fact that there is an intrinsic fairness in spreading the cost of accidents among those who cause them and stand to gain from activities involving risks of injury rather than among contributors to the social security system.

4. Who do the Recent Legislative Developments Favour?

In light of the preceding discussion, it seems clear that the legislative intervention which followed the Ipp Report does not advance the interests of ordinary Australians. Rather, the changes have produced a system that is unfair, produces market distortions, and removes incentives to avoid accidents. Indeed, the only stakeholders who stand to benefit from the changes are insurance companies, as they have been presented with a legislative windfall which ensures a decline in the number and quantum of claims, but have not been placed under any corresponding obligation to pass on these savings.[39] This sad tale of crass self-interest represents a vindication of Marxist philosophy: the wealthy and politically powerful, with the assistance of the media (which has subjected the Australian public to anecdotal and misinformed information[40]), have prevailed over those who are, in comparison, politically powerless.

5. Conclusion

The legislative action which followed the Ipp Report has often been described as reforming the law of torts. However, the use of the term "reform" in this connection is a misnomer. "Reform" denotes some re-exposition of the law in order to advance the interests of society in some way.[41] Accordingly, it is apparent that the legislative developments in mention clearly do not warrant this epithet. Rather, terms such as "deforms",[42] "roll-backs",[43] "cuts"[44] or, as Professor Fels has put it, "regressive," are more fitting.

---

38 Cane, P., (1999), above n25, p.355.
39 See Davis, R., (2002), above n10, p.39.
40 Graycar, R., (2002), above n10, p.37; Mullany, N.J., (2002), 'Tort Reform and the Damages Dilemma', 8(2) *UNSWLJ – Forum* 44 at p.44.
41 See *Australian Law Reform Commission Act* 1996 (Cth) s 21(1)(a).
42 Cashman, P., (2002), 'Tort Reform and the Medical Indemnity Crisis', 8(2) *UNSWLJ – Forum* 51 at p.51.
43 Feldthusen, B., (2002), 'Posturing, Tinkering and Reforming the Law of Negligence – A Canadian Perspective?', 8(2), *UNSWLJ – Forum* 30 at 32.
44 Graycar, R., (2002), above n10, p.39.