TORTS SPECIAL ISSUE

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TORTS AND DAMAGES: POLICY & FUTURE DIRECTIONS

Special Issue Honouring

HAROLD LUNTZ

Professor Harold Luntz has built a formidable reputation in the area of torts and damages law over the past thirty years. From his base at Melbourne Law School, he has taught a generation of law students, educated and informed lawyers, mentored and guided countless academics in their research, and influenced judges at the highest appellate levels around the common law world. Justice Dyson Heydon recently described Harold’s *Assessment of Damages for Personal Injury and Death* (4th ed, 2002), as ‘one of the most outstanding treatises ever written on Australian law’. ¹

Justice Michael Kirby writes that in early 1975, as Deputy President of the Australian Conciliation and Arbitration Commission, he visited Melbourne Law School to be introduced to Harold by Gareth Evans, who at that time was a lecturer. ‘This man reads everything’, Evans told him.²

Nothing much had changed by the early 1990s, when I arrived at Melbourne Law School as a thesis candidate. Harold’s e-mail missives — quietly shared with colleagues and deconstructing recent appellate decisions that few could honestly claim to have heard of, let alone read — were the stuff of legend. I was surprised to hear one quite senior academic tell me, with some satisfaction, how they had ‘managed to get their paper through Harold’. Another felt their paper was ready for submission because ‘Harold likes it and encouraged me to publish it’. Generous to colleagues, polite yet direct, never compromising on scholarly standards: these are Harold’s trademarks. I discovered this first hand when Harold, who became my PhD supervisor, dutifully read and returned my slabs of half-formed thesis, awash with red ink. It was a steep learning curve for me; it can’t have been much fun for him either!

In New South Wales and throughout Australia, common law claims have been subject to rapid legislative reform, and much debate and criticism (not all of it well informed). This thematic issue of the *Sydney Law Review* provides an opportunity for leading Australian and international scholars to explore current controversies raised by developments in case law and legislation, as well as future directions in tort and damages law. It also provides an opportunity to honour Harold’s scholarship.

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I am very grateful to Justice Michael McHugh for generously reading the papers in this issue and writing the introduction. Justice McHugh, who retires later this year from the High Court, has been one of Australia’s most influential judges in the development of tort law, both through his judgments, and a long record of scholarly writing in the field. I would also like to thank each of the reviewers for this issue.

Warm thanks also to Joanna Howse, for her tireless and ongoing role as Coordinator of the Sydney Law Review.

ROGER MAGNUSSON

July 2005
INTRODUCTION: SYDNEY LAW REVIEW
TORTS SPECIAL ISSUE

MICHAEL MCHUGH*

One of the purposes of the splendid collection of essays that appear in this special issue of the Sydney Law Review is to honour the outstanding and continuing contribution of Professor Harold Luntz to the law of torts. Indeed, Professor Luntz himself contributes a fascinating essay of his own — ‘Personal journey through the law of torts’, an essay that he describes as ‘intensely personal and very anecdotal.’ In various ways, the other essays in this collection respond to the enactment of the Civil Liability Act 2002 (NSW) and its counterparts in other States, all of which quickly followed the publication of the Ipp Report.¹

The themes of the essays are directed to the policy and future direction of tort law including the law of damages. The changes that the Civil Liability Acts make to substantive tortious doctrines, particularly the law of negligence, are wide-ranging. The essays note key areas of change and contribute to the lively debate as to whether the reforms unwisely trespass onto, or prudently provide necessary structural support for, the tortious doctrines that the common law has developed.

As Luntz points out in his essay, torts law has become essentially a system of accident compensation. With the exception of the law of defamation in New South Wales, negligence actions constitute all but a small percentage of the tort cases with which Australian lawyers deal. That is not to say that practitioners are never called on to advise concerning such torts as trespass to the person, trespass to land, malicious prosecution, false imprisonment, conspiracy to injure, intimidation and inducing breach of contract. But years may pass before a practitioner is called on to advise in respect of any of these ‘so called’ intentional torts. In contrast, seldom does a month pass without a solicitor in general practice being asked to advise in respect of a claim for damages for negligence.

* A Justice of the High Court of Australia.

After the enactment of the Civil Liability Act 2002 (NSW), the New South Wales Premier, Mr Bob Carr, remarked that the Act represents ‘the biggest body of tort law reform in 70 years’. Just over 70 years ago, Lord Atkin’s speech in Donoghue v Stevenson\(^3\) articulated the nature of the legal duty of care on which the common law negligence action has ever since been based. His conception of the duty of care was grounded in notions of corrective justice as between neighbours. The Civil Liability Acts of the State legislatures, on the other hand, aim to reallocate, as between members of society, the distribution of losses that flow from accidents. The recent passing of these Acts makes the present an appropriate time to consider how the common law of tort, which aims to correct the injustice that was done as between the parties, is shaped by the introduction of legislation whose purpose is to achieve distributive justice.

Many readers of these essays will conclude that, in one way or another, the Civil Liability Act 2002 (NSW) and its counterparts are defective. Given the unbelievably short period that elapsed between the publication of the Ipp Report and the enactment of the New South Wales Act — about three weeks — it is hardly surprising that that legislation in particular is open to the criticism contained in Professor Barbara McDonald’s essay. Insurance crisis or not, it is difficult to understand why such a major piece of ‘reform’ was rushed through the legislatures without the public consultation and debate that usually accompanies substantial pieces of law reform. Indeed, the Ipp Report itself contains some internal evidence that, because of the time constraints imposed on the Panel,\(^4\) the Report was hastily compiled. What other explanation, is there for, for example, the totally inaccurate account in the Final Report of the facts and issues\(^5\) in the important High Court decision of Sullivan v Moody?\(^6\)

The essays divide into two broad categories: those that are expressly or inferentially critical of the Civil Liability Acts and those that at least sympathise with its aims and methods. Luntz’s essay makes it plain that he sees legislation such as the Civil Liability Acts as a fundamentally flawed solution to a major social problem. He repeats the view that he has urged for many years: the torts system of compensation for accidents should be replaced by a national compensation scheme that does not depend on proof of negligence. Luntz advocates the enactment of no-fault accident compensation schemes, which are ‘much more efficient, non-discriminatory and less harmful accident scheme[s]’ than the common law system underwritten by private insurance. Indeed, he thinks

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\(^{2}\) New South Wales, Legislative Assembly, Parliamentary Debates (Hansard), 13 November 2003 at 4980. See also (Hansard), 2 November 2003 at 2947.

\(^{3}\) [1932] AC 562.

\(^{4}\) Above n1.

\(^{5}\) Id at 160 \[10.36\].

\(^{6}\) (2001) 207 CLR 562. Sullivan decided that doctors and social workers employed by the Department of Community Welfare and South Australia did not owe a duty of care to the father of a child being examined for evidence of sexual abuse. However, the Final Report states that Sullivan ‘held that imposing a common law duty on a school authority to take care in conducting a disciplinary investigation about the conduct of a head teacher would be incompatible with the authority’s statutory obligations in conducting the inquiry.’
that a no-fault scheme should not be confined to compensation for physical or mental injury but should include provisions dealing with compensation for sickness and disease.

The longest of the essays and the one most critical of the Civil Liability Act 2002 (NSW) (‘the Act’) is that of Associate Professor McDonald. She surveys and describes the provisions of the Act that attempt to regulate the common law tests for breach of duty of care, negligence liability for obvious risks and causation. Of concern to McDonald is the ‘rush to legislate’ that the insurance ‘crisis’ of 2002 precipitated. In New South Wales, this rush diminished the opportunities for consultation and reflection on the recommendations of the Ipp Report before the enactment of the Act. Of particular concern to her is the Act’s encroachment upon principles that are fundamental to negligence liability. As she points out, the Acts are not legislative Codes, and it is often not clear whether they intend to cover the field on particular issues or simply provide a framework in which common law principles continue to operate. It is, I think, fair to say that she disapproves of the Civil Liability Act 2002 and sees it as distorting the law of negligence and creating injustices. I suspect that she would say of that Act what a joint judgment of the High Court said of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW), viz, that ‘[i]t represents a piece of law reform which seems itself to call somewhat urgently for reform.’

The themes of other essays, however, support the objects and the approach of the Civil Liability Acts or, at all events, are sympathetic to their aims. Associate Professor Vines’ essay focuses on the Acts’ concern for the role that an apology plays in preventing litigation from proceeding to trial and those provisions of the Acts that make evidence of a defendant’s apology inadmissible as ‘evidence of the fault or liability’ of the defendant. While recognising the importance of tort law not discouraging wrongdoers from apologising, Vines queries whether the reforms are truly radical. She notes the High Court’s decision in Dovuro Pty Ltd v Wilkins, which applied a long-standing common law distinction between apologies, admissions of liability and admissions of fact. She thinks that the enactment of the provisions that prevent apologies being used as an admission of, or evidence of, liability are likely to succeed ‘in reducing litigation’. Accordingly, she thinks ‘[t]his legislation should be cautiously welcomed.’

If experience with the tender of apologies in defamation cases applies to other tort actions, however, Vines’ optimism concerning the reduction of litigation may be misplaced. At the Bar, I advised plaintiffs and defendants in scores of defamation cases where the defendant was willing to retract a defamatory imputation and make a public apology. Only in a small percentage of cases were plaintiffs willing to accept such offers as a complete answer to their claims even when the retraction and apology were accompanied, as they usually were, by an offer to pay the plaintiff’s costs. The very great majority of plaintiffs wanted

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7. Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government Transport (1955) 92 CLR 200 at 211.
money. And even in the cases where plaintiffs settled for an apology, the apology was seldom the factor that induced the settlement. More often, the inducement was the fear of an adverse costs order resulting from the weakness of the plaintiff’s case or the fear of the effect that damaging publicity might have on the plaintiff’s career or interests.

Professor Stephen Todd’s essay describes the ‘political reaction’ of State legislatures to the High Court’s decision in Cattanach v Melchior\(^9\) that resulted in the Civil Liability Acts precluding courts from awarding damages for economic loss in cases of failed sterilisation. He thinks that the Act strikes a much-needed balance between the competing concerns of corrective justice, as between doctor and parent or doctor and child, and distributive justice, as between all users of a national health service whose funds require allocation. This balance, he concludes, may be best struck by courts awarding damages to parents for loss of the autonomy that the birth and rearing of a child causes.

Professor Waddams surveys a number of difficult areas of law where in his view conventional awards should replace heads of damages that are assessed as ‘all or nothing’. He argues that the advantages of these damages awards are that they give ‘a real measure of compensation’ for the plaintiff’s loss, but also recognise ‘the high price to the public (especially, but not exclusively, where the defendant performs a public service) of excessive, unpredictable, and open-ended awards.’

Professor Sugarman’s essay is critical of the present position in many United States jurisdictions. He argues that the resultant ‘crazy quilt’ of available statutory compensation schemes in the United States need to be reconciled with each other and with any common law damages awards. He proposes a ‘collateral source rule’, whereby common law awards are reduced by the sum that the plaintiff may receive under statutory compensation schemes. In this way, common law awards may be ‘reserved’ to deal with compensation needs that are not already met by the society’s core social insurance arrangements.’ He thinks ‘that Australia in general, and News South Wales in particular, have already moved in the direction I suggest.’

The need to avoid the duplication of statutory and common law awards has long been recognised by Australian legislatures.\(^10\) But in Australia, statutory schemes of compensation are the complement to the common law awards of damages. The amount a plaintiff receives under statutory schemes is reduced by the amount that the plaintiff has received under a common law remedy. Moreover, Workers Compensation legislation and its equivalents have long contained provisions that require a worker who recovers common law damages to repay any payments made under the statutory scheme. These methods of calculation ensure that common law duties of care continue to be recognised even when statutory schemes of compensation are enacted and at the same time avoid double dipping.

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\(^10\) See, for example, Victims of Crime Assistance Act 1996 (Vic) s16. Compare Criminal Offence Victims Act 1995 (Qld) s22.
by injured persons. In general, statutory schemes of compensation in Australia do not represent an alternative to common law liability. In effect, they are a safety net, which ensure that in the areas where they apply an injured person will obtain compensation even if the defendant has acted in accord with the standards of care that the law of tort demands. The Australian schemes work differently from that which appears to be contemplated by Sugarman’s collateral source rule.

The overlap of statutory reforms embodied in the Civil Liability Acts with pre-existing common law principles raises, however, a more fundamental issue. An underlying question that some of the essays raise is whether these Acts change not only the substance of tortious causes of action and evidentiary procedures but also the common law techniques and principles by which judges have incrementally developed the law of tort. In particular, two questions resonate through this collection.

First, in practice, do the Civil Liability Acts effectively prescribe amendments to judicial processes of reasoning as well as principles of law? An example of a statutory provision that raises this issue is s5D of the *Civil Liability Act 2002* (NSW). That section follows recommendation 29 of the Ipp Report, which suggested that a statutory codification of the issue of causation entail two elements, namely ‘factual causation’ and ‘scope of liability’. The Ipp Report made this recommendation so that the statutory provision ‘will suggest to courts a suitable framework in which to resolve individual cases.’

A question that McDonald’s essay raises for consideration is whether ‘legislative guidance’ on issues like causation (s5D of the Act) and tests for the breach of a duty of care (s5B of the Act) may be of any use to a court. The reason is that the sections specify tests that are satisfied, not upon the happening of a specified event or the doing of a specified act, but upon the court being satisfied that the general and indeterminate tests of the section have been met. It therefore remains to be seen whether the established common law tests as to causation and breach of duties of care will be shaped by, or merely fitted into, the language of these provisions.

The second and more important question that the essays raise is: what relevance does the purpose of the Civil Liability Acts have for the ways that judges discern and prioritise the ‘contemporary values’ by which issues of duty of care and standard of care are inevitably resolved and damages awarded?

In *Dorset Yacht Co Ltd v Home Office*, Lord Diplock warned against the mechanical application of Lord Atkin’s ‘general conception of relations giving rise to a duty of care’. Lord Diplock said that, while it may be used by the common law judge ‘as a guide to characteristics which will be found to exist in conduct and relationships which give rise to a legal duty of care’, it is ‘misused as a universal’ proposition. In the absence of a universal and unifying proposition, from which all duties of care may be deduced, Australian courts have generally adopted a technique of incremental development, whereby courts reason by analogy from

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11 Ipp Report, above n1 at 117 [7.48].
established categories of duties of care and established legal principles.  

However, as Hayne J noted in *Brodie v Singleton Shire Council*, ‘[e]ven incremental steps require implicit reference to some general principles.’

When the well of established legal principles and rules in negligence runs dry, judges must reason from more basic and general principles. Lest the law's development be capricious, the judicial conscience must discern these principles, not from the judge’s own philosophy, but from the values that existing legal principles recognise as being espoused by the society.

As Todd’s essay highlights, this technique is clearly demonstrated in the area of medical negligence, where the application of established legal principles to actions involving life and death are likely to produce results that conflict with fundamental values recognised by other common law principles. In *Cattanach v Melchior*, the majority of the High Court held that the damages claimed for the costs of raising a child who was born as a result of a doctor's negligent sterilisation procedure were allowable under established principles of compensatory damage. In contrast, the minority held that the value that society places in the integrity of the family unit required the common law to deny that its negligence principles reached such cases. The minority Justices reasoned that, because the law recognises the family as the essential unit of society, at least so far as the rearing of children is concerned, tort rules should not be applied or modified so as to blur or obscure that recognition. Todd accepts that there ‘are good arguments on both sides’ of this debate. But he thinks that the minority’s arguments in *Cattanach* ‘ultimately are persuasive and should prevail.’ In his view, ‘the majority approach in *Cattanach* is not a policy-free application of ordinary legal principle’, as the majority judgments maintained.

As McDonald’s essay also illustrates, it is unclear whether, in conducting the type of analysis engaged in by the minority judgments in *Cattanach*, statutory articulations of fundamental values should be taken to override the values embedded in the common law generally and in negligence doctrine in particular. This issue has not arisen until recently because, as McDonald notes, ‘[l]egislative intervention in tort law has historically tended to be piecemeal and context-driven, through specific extensions or restrictions of liability rather than through broad-ranging reforms.’ However, Australian courts are now called upon to apply the broad-ranging provisions of the Civil Liability Acts to difficult negligence cases including those involving conception, birth and death and other important social issues. As a result, a live issue for the courts will be whether the ‘waves of legislative tort reform’ should be taken to ‘reflect significant changes in social policy or conditions or community values and sentiment’? Do they require the courts not only to give direct effect to the language of the Civil Liability Acts but to regard those Acts as signaling a fundamental change in the direction of tort law?

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13 *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 216 [93].
16 Id at 22 [35] (Gleeson CJ), at 133 [363] (Heydon J).
This issue is complicated by one of the stated purposes of the legislation, which is ‘to reduce insurance premiums by reducing liability’. In considering common law cases, to what degree, if at all, should a court give effect to the legislature’s purpose of according distributive justice? To what extent is a court required to take into account the interests of insurers and policy holders? The adversarial nature of the common law system has traditionally required its courts to do justice according to law having regard to the interests of the parties appearing before them and, in some cases, to the interests of those in like situations. Most judges spend most of their working lives applying established principles to factual issues joined between the parties. Appellate judges — particularly ultimate appellate judges — however spend considerably more of their time formulating and reformulating general principles of law. Even so, the role of the appellate judge is not that of the legislator. Appellate judges formulate and reformulate principles with the facts of the case before them and the facts of similar cases in mind. The strength of the common law system of justice has largely resulted from its capacity to adapt and apply its principles to ensure that justice is done in individual cases. Only in rare cases — usually those involving illegality — have the common law courts considered interests beyond those of the parties before it and those who are or will be in similar situations. Have the Civil Liability Acts inferentially changed this paradigm? Is a court now required to ask itself whether the order sought by a party has such consequences for insurers and policy holders that the court cannot do corrective, or, what Sugarman describes as ‘precise’, justice? Will it, for example, affect the evaluation of whether the defendant owed a duty of care or has acted reasonably or whether an award of a particular sum of damages is reasonable? The answer to these questions will depend on the extent to which, if at all, the Australian judiciary sees the Civil Liability Acts as bringing about fundamental change in the underlying philosophy and direction of Australian tort law. Many would say that recent decisions of appellate courts17 — including the High Court of Australia18 — signal that negligence doctrine has already shifted ground to bring it into line with the purposes and the underlying philosophy of the Civil Liability Acts.

These essays then are highly topical. They constitute an important contribution to a question of fundamental importance to the future application and development of the law of negligence. That question is whether, despite the Civil Liability Acts, the insurance ‘crises’ and beneficial changes to the welfare state, the values of neighbourhood and the structure of incremental reasoning articulated by Lord Atkin in *Donoghue v Stevenson* just over 70 years ago continue to set the framework for resolving negligence disputes?


A Personal Journey through the Law of Torts

HAROLD LUNTZ*

1. Introduction

In August 1965 I arrived in Melbourne by sea from South Africa to take up a position in the Law School of the University of Melbourne. Australia was still more under the influence of the UK than the USA and there were three terms a year, not semesters. As soon as the third term began, I started teaching the law of torts. I have taught it every year since, interrupted only by some sabbatical years, most of which I spent working on one aspect or another of torts. This essay will try to set out who and what influenced my thinking on the subject when I began to teach it, what brought about changes and what my current thoughts are. As will be seen, the changes in my thinking have been relatively few and I still strongly adhere to the philosophy I developed soon after starting out. The world may have changed and, though others have adapted their views to the different era, nothing that has happened has persuaded me of the need to change where I stand on most of the fundamental issues. The essay that follows will be intensely personal and very anecdotal.

2. Experience in South Africa

After completing a BA at the University of the Witwatersrand in Johannesburg, I studied for the LLB degree, which was a postgraduate degree in South Africa, at the same university. Like almost all the students in the class, I served articles of clerkship at the same time as undertaking the degree; both took three years. The firm that I was articled to had several insurance companies as clients and I obtained some knowledge of the actual treatment of claims for damages before I studied any of the theory, because delict — the equivalent of torts — was a final year subject. First, I learnt that nearly all cases are settled. Only one case with which I was involved went to trial in the Supreme Court. It involved a fire at a petrol station. The counsel whom we briefed was a young advocate (barrister) called Arthur Chaskalson, who later founded the Legal Resource Centre, which assisted many of those oppressed under the apartheid regime. He subsequently became the first President of the Constitutional Court and then Chief Justice of the ‘new’ South Africa. What I remember particularly from that case was an attempt to establish the position where the fire started in relation to the petrol pumps through an illiterate witness who could not understand the relationship between a drawing of the forecourt and actual reality. I had never previously realised that illiteracy, which was widespread in South Africa, does not extend only to an inability to read and write, but also to making sense of maps.

* Professorial Fellow, The University of Melbourne. Thanks to Roger Magnusson for initiating this thematic issue and carrying it through, for his comments on my paper and for the subsequent exchange of views. Thanks also to Ian Malkin and the anonymous referees for their suggestions for the improvement of the earlier drafts. Most of these suggestions have been incorporated.
Another case that I remember probably did end in settlement. One of our clients insured the Johannesburg General Hospital and I recall attending a conference at the hospital relating to a medical negligence claim. Lawyers, medical practitioners and insurers sat around a large table while an orthopaedic surgeon demonstrated how he had performed an operation. What struck me was that he used a great deal more force than I had thought was required for human surgery. In recent years I have taught postgraduate courses to classes consisting of a mix of health professionals and lawyers and the health professionals have had much to teach the lawyers.

The delict course that I studied in the final year of my LLB degree, like all South African law, was theoretically based on Roman-Dutch law. The law of delict drew its inspiration from two Roman actions, the *actio legis Aquiliae* and the *actio injuriarum*. There was some minor reference to so-called quasi-delicts, like the *actio de pauperie*. However, the text book we used was RG McKerron, *The Law of Delict: A Treatise on the Principles of Liability for Civil Wrongs in the Law of South Africa* (4th ed, 1952). I suspect that this had more affinity with English than Roman-Dutch law. We were taught by Paul Bobberg, who had taken over the course from Maurice Millner. Millner, whose colourfully written case notes on delict enlivened the *South African Law Journal* and who taught me the law of sale of goods in an equally entertaining fashion, showed how easy it was to convert from South African law to English law when, having emigrated to the United Kingdom, he published *Negligence in Modern Law* (1967) to general acclaim. In the delict course at Wits, I made my acquaintance with *Donoghue v Stevenson*,1 where Lord Atkin’s ‘neighbour principle’ was apparently the embodiment of the Aquilian action. The *actio injuriarum* had, according to the way I learnt it, been adapted by the courts so that it corresponded in great part with the English law of defamation. When I later learnt of the English *scienter* action, it did not seem at all strange after what I knew of the *actio de pauperie*.

All this, I later found out, was very different from what was being taught in the Afrikaans universities. On a recent visit to South Africa, I spent a couple of hours browsing through the delict text book now used at the University of the Witwatersrand, an edited translation of one in Afrikaans.2 This reflects very little of the ‘new’ South Africa. Presumably it is distilled from the approach developed in the period from 1960 to 1990, when Afrikaner nationalism dominated and the courts sought to extirpate the English influence. *Donoghue v Stevenson* is not cited anywhere in it. In my early years as an academic, when I myself was teaching at the University of the Witwatersrand, I wrote a section of the *Annual Survey of South African Law*, in which I was strongly critical of a decision of the Appellate Division of the Supreme Court of South Africa banishing the English law of nuisance from South Africa’s jurisprudence.3 I was writing from a position of familiarity with the one and ignorance of the alternative.

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1 [1932] AC 562.
By the time I came to study delict, I was already in my last year as an articled clerk and permitted to appear in the magistrates’ court. My first case was an ordinary ‘crash-and-bash’ motor accident, in which our client was exercising its right of subrogation to recover the costs it had laid out in having the insured’s car repaired. The advocate on the other side, no doubt aware that I was a neophyte, put it to the lay client in the witness box that he had suffered no loss because the insurance company had paid for the repairs. He then submitted to the magistrate that the action must fail. Fortunately, I knew that as a matter of law, insurance was not taken into account in such circumstances and was able to cite authority for this from an insurance text book that I had brought to court. The lay client was greatly impressed and no doubt pleased that on the real legal issue, the other driver was found to have been at fault. Practical insights like this made the course that I studied much more meaningful than it is to full-time students who do not have the opportunity to see the law in action in this way. Of course, at that time I was not able to stand back and ask, as I did as an academic many years afterwards, whether the law is wise to allow insurers rights of subrogation.4

Although this particular case was trivial, it taught me one thing that was reflected in many more important ones that I merely read; namely, that the outcome of litigation is often not dependent on the merits or the law, but on the forensic tactics adopted, which may in turn be dependent on the experience and skill of the legal representatives the parties are able to afford. Several other lessons that emerged from the tiny number of cases in which I appeared in the Johannesburg magistrates’ court, which no doubt apply in most jurisdictions, are: that even where the law is on one’s side, the judicial officer may refuse to apply it; that the result of a case often depends on the judicial officer who happens to preside, which may be a matter of luck; that an appeal against every ‘perverse’ decision is not practicable, usually being too costly; and that the evidence that comes out in the witness box is often significantly different from what one’s client has told one in the office.

3. **Oxford and Introduction to Fleming’s Ideas**

My first opportunity to stand back and reflect a little more on the law came when I obtained a scholarship to study for the BCL at the University of Oxford. At that time, only Oxford graduates were permitted to take the BCL in one year. The rest of us had to prove our competence in a preliminary year. We were divided into those from a common law background, who had to study Roman law, and those from a civil law background, who had to study the common law. My good fortune was to be classified as coming from a Roman-Dutch background and so to be placed in the common law stream. At the end of the first year, a single examination tested us on contract, tort and crime and another on jurisprudence. During the two years at Oxford, I attended lectures not only by the ‘great men’ — such as Herbert

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Hart, Rupert Cross, John Morris and Tony Honoré — but I also had the benefit of one-to-one tutorials from the then young Brian Simpson, Tony Guest and Lennie Hoffmann. These taught me to think critically and to sharpen my analysis. Others whose lectures on torts-related topics I attended included Guenter Treitel, Peter Carter, Donald Harris and Douglas Payne. The last named was one of the first people I saw after my arrival in Australia from South Africa. On the way to Melbourne, our ship called at Fremantle. My wife and I were met by one of my BCL classmates, David Malcolm (now Chief Justice of Western Australia). He took us to the University of Western Australia for lunch with Douglas Payne, who had moved from Oxford to WA. In Oxford his lectures had not been popular, but I thought that they gave me a valuable grounding in the common law.

While in Oxford I read the standard text books, including Sir John Salmond and Robert Heuston, *Salmond on the Law of Torts* (12th ed, 1957), which I did not find much different from McKerron. But I was also introduced to John Fleming, *The Law of Torts* (1957). In his first chapter I recognised the law that I had seen practised, as opposed to the law I had been taught. I shall return to that after referring to one other event during my time in Oxford.

In January 1961 the Privy Council decided *The Wagon Mound (No 1).* Arthur Goodhart, then Master of University College, for whom it was the successful culmination of a long campaign to establish foreseeability of harm as the criterion of liability for negligence, gave a lecture on the case, which I attended. As McHugh J was to say many years later, in relation to a passage in the judgment of the Privy Council, ‘not everyone has shared Lord Simonds’ view that it is not consonant with current ideas of justice and morality that a defendant should be liable for all the consequences of a trivial act of negligence so long as they are direct.’ Tony Honoré, for one, disagreed. I was in the Honoré camp, though I have since come to distinguish between property damage, as was at issue in that case, and personal injury because of the relative ease with which one can insure against property damage and because most such claims are really subrogation actions. One thing that must have influenced me was Fleming’s book.

Fleming was obviously in the course of producing his book when he delivered his inaugural lecture on 3 October 1956 at what was then Canberra University College (later the Australian National University). He called it *Accident Law and Social Insurance* and I recently came across it for the first time. Reading it now, almost 50 years after its delivery, I find little to disagree with. The great themes of the book are all there. The law of torts has become essentially a system of accident compensation. The intentional torts, though important from a civil liberties point of view, do not occupy much of the time of the courts. The action for negligence predominates. Accidents are inevitable in our society and though we may strive to

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5 *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound (No 1)) [1961] AC 388.*
6 Id at 422.
7 *Nader v Urban Transit Authority of New South Wales* (1985) 2 NSWLR 501 at 537.
diminish them, there are much better mechanisms for doing so than the supposed deterrent effect of the law of torts. The law of torts is there to allocate the losses that flow from the inevitable accidents. Insurance has transformed the way the losses are allocated.

Society has no interest in the mere shifting of loss between individuals for its own sake. The loss, by hypothesis, has already occurred, and whatever benefit might be derived from repairing the fortunes of one person is exactly offset by the harm caused through taking that amount away from another. The economic assets of the community are not increased, and expense is incurred, in the process of re-allocation.\(^{10}\)

During the 19th century, fault on the part of the defendant was seen as a good reason for shifting the loss. However, the growth of third party liability insurance and vicarious liability has largely removed the deterrent effect of an award of damages against the defendant, because the tortfeasor seldom pays the damages personally. These mechanisms also mean that in practice losses are being transferred to people who are themselves free of fault. While there may be other good reasons to shift losses from injured people to enterprises and their insurers, requiring that the shift depend on the fault of a wrongdoer makes little sense and incurs unnecessary costs. In order to allocate the losses fairly, the nature of ‘fault’ has changed and no longer carries a notion of moral blameworthiness. Fourteen years later, Patrick Atiyah spelt out these points with great clarity in his ‘indictment’ of the fault system on six counts, demonstrating conclusively that, from the plaintiff’s point of view, it was often not fair to require proof of fault as a necessary constituent of the remedy. At the same time, it was sometimes unfair to defendants that ‘fault’ should be a sufficient criterion of liability.\(^{11}\)

In that context, Fleming in his inaugural lecture posed the crucial question:

The progress of society is linked to the maintenance and continuance of industrial operations and fast methods of transport, and must therefore suffer the harms associated with them. The question is simply, who is to pay for their cost, the hapless victim who may be unable to pin conventional fault on any particular individual, or those who benefit from the accident-producing activity?\(^{12}\)

In particular, my practical experience would have endorsed the following:

[I]t must be remembered that a vast proportion of all claims, having a background of insurance, are settled out of court without resort to formal trial. Insurance companies prefer to settle for a reasonable sum rather than litigate, and it is only when claims are regarded as completely without foundation or wholly excessive that the matter is entrusted to court adjudication.\(^{13}\)


\(^{12}\) Fleming, above n10 at 7.

\(^{13}\) Id at 19.
I would also have concurred entirely with the penultimate sentence of the lecture:

If our future is to remain linked to a free enterprise economy, the advantage seems to lie in a continued growth of ’sponsor’ or ’enterprise’ liability, along the lines long charted by workmen’s compensation and the vicarious liability of employers.14

4. Workers’ Compensation

In the delict course that I studied, workers’ compensation was not mentioned. We were taught cases like Paris v Stepney Borough Council,15 in which workers sued their employers at common law, as though they applied in South Africa. In fact, South Africa had a scheme along the lines of those found in North America, which made workers’ compensation the exclusive remedy and prohibited action against the employer. In a society where most workers exposed to injury were black, who had no trade unions to look after them, there must have been little litigation in the area and the subject was not one noticed at the university. I discovered it during the period between completing my LLB and leaving to take up my scholarship at Oxford, a period when I continued to work as an attorney (solicitor). My father was employed to drive a van, delivering bread. He had a young black assistant who would take some of the loaves from the van on a bicycle to deliver to some of the customers. The young man fell off the bicycle one day and was injured. My father asked me to help him and the firm allowed me to take on the matter pro bono. I obtained some pittance for him, but his gratitude was enormous.

When I came to Melbourne, I was astonished at the plethora of case law on workers’ compensation. The Victorian Parliament was going through one of its regular bitterly fought changes to the scheme. Completely new to a political debate of this sort, I tried to make some sense of the subject and published my first article, ‘Workers’ Compensation and a Victorian Amendment of 1965’.16 In the concluding section, I drew attention to the haphazard way in which some people were able to reap the benefits of workers’ compensation, while others were excluded by virtue of some minor difference of circumstance. To illustrate this, I used a series of coupled letters of the alphabet in which one member of the couple recovered workers’ compensation and the other did not. The examples were mostly drawn from the case law. The cases turning on functionally insignificant differences continued to arise and I was soon able to extend my examples through the whole alphabet.17 In the latest edition of the case book I have shortened the list again, pointing out merely that it could be extended almost endlessly.18

14 Id at 22.  
16 (1966) 40 ALJ 179.  
18 Luntz & Hambly, above n9 at 64 and 65, 66.
I probably did not realise when I obtained the compensation for my father’s assistant that the money did not come directly from the employer, but from a statutory fund based on the Canadian model and later adopted, for instance, under the WorkCover schemes of Victoria and South Australia. Had I done so, I might have disagreed with the final sentence of Fleming’s lecture.

In this manner, instead of society as a whole making itself responsible for the cost of repairing the casualties of accidents through welfare grants, the burden can be allocated with greater discrimination to that segment of the public which reaps the benefits of the accident-producing activity and, by the same token, may fairly be expected to underwrite its losses.19

In 1987–1988 I conducted a review for the Commonwealth of the law of seafarers’ compensation, which had become very outdated. I was assisted by a former student of mine at Melbourne, Alan Clayton. We interviewed those on both sides with an interest in the outcome and produced a discussion paper and then a report.20 We strongly recommended the establishment of an industry fund for the payment of compensation, instead of the system of employer’s liability that had prevailed. Although the legislation that followed, the Seafarers Rehabilitation and Compensation Act 1992 (Cth) rejected this (and other) recommendations in our report, I was subsequently appointed Deputy Chair of the Seafarers Rehabilitation and Compensation Authority, which oversaw the operation of the scheme, and served as such for five years. A few years earlier, I had assisted the Victorian Government with the development of the Accident Compensation Act 1985 (Vic) and later for about two and a half years served as a part-time senior member of the Workcare Appeals Board, which gave me an insight into the sorts of claims made under such schemes. Very few disputes before the appeals board related to traumatic injury; nearly all concerned back, shoulder, knee and other joints, where the issue was mostly whether the continuing condition that rendered the worker unfit for the previous heavy labouring was due to the employment or natural degeneration. The method by which the Board went about its work has been described by its chairman.21

5. Academic Apprenticeship

I should now go back in time. After completing my BCL in Oxford, I returned to the University of the Witwatersrand for three years as a senior lecturer. Delict was one of the courses I taught. More significantly, I learnt to write for academic publications under the tutelage of Bobby Hahlo and Ellison Kahn. The very small faculty was responsible for the production of the South African Law Journal and the Annual Survey of South African Law. All members of staff were expected to

19 Fleming, above n10 at 22.
write case notes for each issue of the *SALJ* and one or more chapters of the *Annual Survey*. There are over a dozen case notes that I wrote for the *SALJ* during the period, nearly all on delict or damages. While Paul Boberg was on leave, I wrote the chapter on the Law of Delict for the 1962 *Annual Survey*. This stood me in good stead when I later wrote the chapter on the Law of Torts in the *Annual Survey of Australian Law* in almost every year from 1976 to 1994.

Ellison Kahn taught me the importance of ‘house style’ and perfect proofreading. As General Editor of the *Torts Law Journal* since its inception in 1993, I have tried to emulate his work, though I am unable to do as he did and check every reference in the library.

6. Teaching Torts in Melbourne

On the ship from South Africa to Australia, I prepared for the task of teaching torts by again reading Fleming’s book, this time the 3rd edition (1965). It had not initially been well received in Melbourne. The first edition had been reviewed so unfavourably in the *Melbourne University Law Review* by EG Coppel that the editors had thought it necessary to give Fleming a right of reply. Coppel was later to conduct a Royal Commission for the Victorian government inquiring into compulsory motor accident third party insurance, in which he expressed an inability to understand the concept of no-fault.

On arrival in Melbourne, I took over a class from a teacher who had left the Law School and who, I was told, had spent the first two terms discussing *Rylands v Fletcher*.

The centenary of Lord Blackburn’s formulation of the rule in the lower court was to take place the following year and, though it could be seen as an example of enterprise liability, it was not truly a case demonstrating how the law of torts applied in modern day practice. I plunged immediately into the law of negligence. The book we were using was the second edition (1962) of the first Australian case book, W L (Bill) Morison, *Cases on Torts* (1955), ‘[p]ublished at the request of the Australian Universities Law Schools Association’. In that edition Morison was joined by Norval Morris and Robin Sharwood. Morris having left the University of Melbourne for Chicago just before I arrived, my colleague Cliff Pannam replaced him as co-author of the third edition (1968). This book starts with the intentional torts and negligence plays a relatively minor role. It is very much a black letter book. As the years progressed, I felt increasingly dissatisfied with it. I would start teaching at the beginning of each year from towards the middle of the book and try to relate the law to the real world. Two models eventually presented themselves to me as much more in keeping with my own aims.

In 1970–1971 I took sabbatical leave in North America, the first semester at Queen’s University in Ontario and the second at the University of California at

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22 (1957) 1 MLR 272 and 274.
24 (1868) LR 3 HL 330.
25 *Fletcher v Rylands* (1866) LR 1 Ex 265.
Berkeley. With a young family, and even though the Australian dollar was much stronger than either the American or Canadian currency, I could not afford to live in America without supplementing my income. Accordingly, I took teaching positions at both institutions. The post at Berkeley was arranged for me by John Fleming, with whom I had corresponded and who was himself to spend the semester on sabbatical leave. Fortunately, he did not go to Europe for some weeks after my arrival and I was able to meet him in person. In view of the large influence he had on my thinking, I was particularly pleased, though greatly astonished, when in 2000 I was awarded the inaugural Professor John G Fleming Memorial Award for Torts Scholarship.

While I was overseas Patrick Atiyah published his *Accidents, Compensation and the Law* (1970), the first in Weidenfeld & Nicolson’s Law in Context series. Shortly after my return, I attended the annual conference of the Australasian Law Schools Association (as ALTA was then called) in Adelaide. At the conference, Atiyah put forward his model for teaching an accident compensation course instead of the traditional torts course. At first I was sceptical as to the feasibility of this, given the requirements for admission to the profession, but of its merits I had no doubt. It was one of the inspirations for the case book that I produced with David Hambly and Robert Hayes, *Torts: Cases and Commentary* (1980). The other model for the case book was the one produced by Bob Hepple and Martin Matthews, *Tort: Cases and Materials* (1974). Bob Hepple had taught me at Wits, though not torts. He had escaped to England, where he went on to an eminent career (he is now Sir Bob). There was no doubt that his approach to the law of torts accorded with my own. We did not abandon the traditional intentional torts completely, though I left the writing of those chapters largely to my co-authors. Negligence, however, was in the forefront and dominant throughout. I wrote a long introductory chapter, seeking to place the law of torts in its social context and emphasising its actual operation. It also drew attention to the alternatives to the law of torts for compensating victims of accidents.

7. **Becoming Convinced of the Alternative**

The period when I started teaching at Melbourne was a remarkable one in other jurisdictions. It saw the publication on three continents of three similar critiques of the common law tort system and recommendations for its replacement by a comprehensive system of compensation insurance. The critiques and proposals were contained in the *Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand* (Woodhouse Royal Commission, 1967); Terence Ison’s *The Forensic Lottery* (1968), published in England before Terry’s move to Canada; and, in the United States, an article by Marc A Franklin, ‘Replacing the Negligence Lottery: Compensation and Selective Reimbursement’. In North America (and South Africa) the common law had been replaced for work-related accidents by workers’ compensation, while in the United Kingdom (and Australia) workers’ compensation provided an alternative

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26 (1967) 53 *Va LR* 774.
remedy. The debate which led to the introduction of workers’ compensation had been fought in the nineteenth century and the early part of the twentieth. As already mentioned, I had developed an interest in the subject. In the period to which I am now referring there appeared a little book by David Hanes, *The First British Workmen’s Compensation Act, 1897* (1968), which reminded us of that debate in England.27 That debate had shown the inadequacy of the common law, particularly as a result of what Fleming called the ‘ unholy trinity’ of defences — contributory negligence, voluntary assumption of risk and common employment — to provide compensation to workers for their injuries. It also showed the need to make industry pay its way by including some part of the value of those injuries in the costs of production.

The movement to extend the principles of workers’ compensation to no-fault motor accident schemes went back at least to the 1930s.28 It emphasised the artificiality of deciding where fault lay in a collision between fast moving vehicles; that the decision often depended on reconstructing flawed memories; that the deterrence of careless driving was to be found in fear for one’s own safety and in the widespread enforcement of criminal penalties; and, as with workers’ compensation, that inevitable injuries should be seen as part of the cost of motoring. The arguments were revived by the publication of Robert E Keeton and Jeffrey O’Connell, *Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance* (1965). The province of Saskatchewan in Canada had enacted such a scheme a few years earlier. The Keeton-O’Connell plan gave birth to the first such scheme in the United States, in Massachusetts, just as I visited that country for the first time. But the three proposals in 1967–1968 went much further.

The Woodhouse Royal Commission had started its life as an inquiry into the workers’ compensation scheme in New Zealand, which had become somewhat antiquated. It recognised that the needs of workers are the same whether they are injured at work or at home or during recreation. It also recognised that workers were supported by those currently out of the workforce, who also needed compensation when injured. It drew attention to the many flaws of the tort system of compensation, including its long delays and high costs. The method of compensating at common law, by means of a lump sum that required impossible predictions and seldom proved sufficient, was also targeted. Boldly exceeding its terms of reference, the Commission recommended the replacement of the common law, workers’ compensation and other systems by a comprehensive accident compensation scheme based on five principles: community responsibility, comprehensive entitlement, complete rehabilitation, real compensation and

27 See also Peter Bartrip & Sandra Burman, *The Wounded Soldiers of Industry: Industrial Compensation Policy, 1833–1897* (1983). Two of my sabbatical leaves were spent at the Centre for Socio-legal Studies in Oxford, where I met the authors of this book. One of them, Peter Bartrip, was working on a further history, which I read in manuscript. It was published as Peter Bartrip, *Workmen’s Compensation in Twentieth Century Britain: Law, History and Social Policy* (1987).

administrative efficiency. I read the report while travelling by train between Melbourne and Perth to the AULSA conference in August 1968 and was completely convinced. The emphasis on community responsibility explains why I said above that I would now disagree with the final sentence of Fleming’s inaugural lecture.

I was particularly receptive to the criticism of the lump-sum method of awarding damages. In 1967, South Australia had enacted legislation allowing for interim awards and later final assessments and when the adoption of such a provision in Victoria was rejected by the Chief Justice’s Law Reform Committee, of which I had become honorary secretary, I filed a dissenting report. I did have some minor successes while secretary of the CJLRC. One was to persuade it to recommend legislation that became the first occupiers’ liability statute in Australia, just before the High Court inAustralian Safeway Stores Pty Ltd v Załużna rendered the statute unnecessary by itself sweeping away the old rigid distinctions between categories of entrants and absorbing this branch of the law into the general principles of negligence. Another was to reform the law of damages for wrongful death. The wrongful death damages package included providing for the non-survival to the estate of damages for future loss of earning capacity, broadening the range of persons who can claim under Lord Campbell’s Act to all ‘dependants’ (widely defined) and removing the attribution of contributory negligence of the deceased to the claimants. This last point, which was modelled on the position in New South Wales, has survived the recent spate of ‘tort law reform’ in Victoria, but not in its state of origin.

I read The Forensic Lottery (1967) when I was due to spend the first semester of my 1970–1971 sabbatical at Queen’s University, where author Terry Ison was then teaching. It seems that though he met and spoke to the members of the Royal Commission, he and they had arrived at their criticism of the common law and their solutions independently. I cannot remember when I read Franklin’s article and, as I have never met or corresponded with him, I do not know if he too reached similar conclusions independently. Stephen Sugarman, a successor of John Fleming in teaching torts at Boalt Hall, the Law School of the University of California at Berkeley, where I had spent the second semester of my 1970–1971 sabbatical, later wrote Doing Away with Personal Injury Law: New Compensation Mechanisms for Victims, Consumers, and Business (1989). I did not meet him until 1996.

When I mentioned to one of my colleagues at Melbourne (who is today the Honourable Mr Justice Maurice Cullity of the Ontario Superior Court of Justice) that I found the prospect of teaching at Berkeley daunting, he flippantly replied,
‘[a]s long as you can spell Calabresi, you’ll be all right.’ Guido Calabresi was already making his mark with his application of economic analysis of law to the fields of tort. Before I arrived in Berkeley, he published The Costs of Accidents; a Legal and Economic Analysis (1970) and I set it as a subject for a presentation by a student in my class. The second word of the title is often misprinted as ‘cost’, but it is important to note the plural, since the insight which the book provided was that there are primary, secondary and tertiary costs of accidents. The book taught that the elimination of all accidents is an impossible goal and that the aim should be to minimise the sum of the costs of accidents, their avoidance and the administration of meeting the other costs.

Later, economic analysis of law was to sweep the American academy, particularly after the publication of Richard Posner’s Economic Analysis of Law (1972). Unlike Calabresi’s work, the analysis emanating from the Chicago school and its disciples never impressed me. In my BA degree, I had completed two courses in economics and so was equipped with the rudiments to understand the theory. As I had done as an undergraduate, I questioned most of the assumptions on which the economic analysts of this school based their conclusions, finding many of them completely unrealistic. I found support for my view in the criticism of economic analysis by Patrick Atiyah in a chapter of Accidents, Compensation and the Law,37 which was reinforced when I sat in on Atiyah’s seminars on the topic in Oxford during a later sabbatical. In each edition of my case book I have retained a passage from a later article by Atiyah, in which he wrote:

> Once it had been thoroughly and convincingly demonstrated that the torts system was, by any comparable standard, highly inefficient in practice, new legal and economic theorists appeared on the scene to assure us that it was, nevertheless, extremely efficient in theory.38

Similarly, in later years I found myself unable to sympathise with the corrective justice theorists, such as Ernest Joseph Weinrib, The Idea of Private Law (1995). Again, it seemed to me that they showed little understanding of the way the torts system worked in the real world.

My own knowledge of the ‘real world’ was not confined to the small amount of practice in South Africa. My second sabbatical, in 1976–1977, was spent at the Centre for Socio-Legal Studies in Oxford. The head of the Centre was Don Harris, who as a young fellow of Balliol had lectured to me during my BCL course and sparked my interest in the theory of the law of damages, which later led me to writing my book Assessment of Damages for Personal Injury and Death, the first edition of which appeared in 1974. My purpose in visiting the Centre for a whole year was to learn more about the actual process of recovery of damages in relation to different types of accidents, as well as to start work on the case book, the first edition of which was published in 1980. The members of the Centre, from diverse

37 (1970) at 566–600
38 Patrick Atiyah, ‘No-Fault Compensation: A Question that will not Go Away’ (1980) 54 Tulane LR 271 at 279.
disciplines — such as sociology, economics, psychology and statistics, as well as law — were at that time working on a large empirical survey the results of which were analysed and published in Donald Harris et al, *Compensation and Support for Illness and Injury* (1984). I returned to the Centre for my next sabbatical, in 1984, the year of publication of the work, though it had to some extent been overtaken by the survey conducted for the Royal Commission on Civil Liability and Compensation for Personal Injury, *Report* (1978) (the Pearson Commission). Both these studies confirmed, and did not contradict, what I had learnt from reading between the lines of hundreds of cases on damages for personal injury.

I have also experienced through direct involvement certain aspects of class actions under the American tort system. In 1994 I served on the ‘Foreign Fracture Panel’ appointed by the Federal District Court for the Southern District of Ohio to devise formulae for compensation of foreign residents in the settlement of a class action. I have described this in ‘Heart Valves, Class Actions and Remedies: Lessons for Australia?’ Then, in 1999, having been engaged as an expert on the law in Australia, I sat through a week’s hearings of the bankruptcy application by Dow Corning in Midland, Michigan, in relation to the global settlement of claims arising out of breast implants.

From all this, it was clear that the Woodhouse Royal Commission in New Zealand in 1967 was right to castigate the common law system for providing compensation haphazardly to a lucky few after long delays and at great expense. Further, the common law did little for deterrence and often retarded rehabilitation. The only sensible solution was to sweep it all away and replace it with a comprehensive social insurance scheme that would not discriminate as to the causes of injury, that would meet people’s needs swiftly and adequately and would devote resources to prevention of accidents through other means and to social and vocational rehabilitation.

8. **Developments in Australia 1954–1986**

A. **No-fault Motor Accidents**

Meanwhile, the debate over no-fault motor accident compensation had spread to Australia. As early as 1954, Mr EG (Gough) Whitlam apparently raised the issue with the Australian Labor Party. In 1959 he brought the matter up in Parliament and was also reported as having said outside Parliament:

> The victims of road accidents might be more justly and promptly compensated during their incapacity or bereavement if the Commonwealth Department of

40 For a review of my evidence and that of the other experts on foreign law, see *In re Dow Corning Corp* 244 BR 634 at 659–62 (1999); on appeal, 255 BR 445 at 514–520 (D Mich, 2000) (affirming the decision in relation to the foreign claimants); on further appeal, 280 F3d 648 at 662 (CA, 6th Circ, 2002) (again affirming the decision in relation to the foreign claimants); cert denied: *Class Five Nevada Claimants v Dow Corning Corp* 537 US 816 (2002).
Social Services made periodical payments equivalent to their prior earnings, irrespective of negligence.42

Years later, I participated in the debate to a small degree, appearing at one forum along with Mr Ken Marks QC (later Marks J), the principal author of a booklet, No Fault Liability (1972), which put forward proposals by the Victorian Bar Council, the Law Institute of Victoria and the Victoria Law Foundation. Those proposals, which in my view did not go far enough and were designed to preserve the lucrative income of the legal profession from the existing system, resulted in the Victorian legislature enacting an ‘add-on’ scheme that provided limited compensation on a no-fault basis for all motor accident victims without impeding access to the common law for those who could prove fault.43 This scheme came into operation on 12 February 1974, some six weeks before the comprehensive scheme that was enacted in New Zealand after the Woodhouse Royal Commission and which commenced operation on 1 April 1974.44 Towards the end of the year a scheme similar to the Victorian one came into operation in Tasmania, after I had made at least one trip to the island to speak to law reformers there.45 Later, the Northern Territory enacted a scheme, which initially preserved the common law only for capped non-pecuniary loss and then abolished that too, so that no-fault compensation became the exclusive remedy for Territory residents.46 I was also twice invited to Queensland to debate against Mr Gerry Murphy the merits of no-fault, but had no success in persuading that State to move from its attachment to the common law.

One objection put to me during that debate was that legislative schemes were constantly subject to political interference, whereas the common law was in the hands of independent judges. Even at that time I was able to point to examples of legislative interference with the common law. For instance, when the High Court in Todorovic v Waller47 held that future losses should be discounted at 3 per cent, a compromise figure that at least three of the judges thought too high, legislatures increased it to 5 per cent, 6 per cent or even 7 per cent, thereby reducing the recovery of the most seriously injured. Anyone who has seen what legislatures have done to the common law since 2001 can no longer possibly think that the common law is any more protected from political interference than legislative compensation schemes.48

In 1970 Mr Whitlam had met Woodhouse J in New Zealand and been persuaded of the wisdom of a broader comprehensive compensation scheme.49 In a speech to the Labor Party in 1971 he referred to New Zealand being about to

42 (1959) 33 ALJ 124.
43 Motor Accidents Act 1973 (Vic).
44 Accident Compensation Act 1972 (NZ).
45 Motor Accidents (Liabilities and Compensation) Act 1973 (Tas).
46 Motor Accidents (Compensation) Act 1979 (NT).
‘enjoy’, as a result of the Woodhouse report, ‘comprehensive “no fault” protection against the consequences of accidents of every kind’.50 In other speeches he picked up my alphabetical examples of the arbitrary distinctions made by workers’ compensation legislation. His policy speech for the 1972 election promised that, on election, the ALP would establish a National Compensation scheme, which would ‘reduce hardships imposed by one of the great factors for inequality in society — inequality of luck’.51 One of his first acts on taking office in 1972 was to obtain the approval of the New Zealand Prime Minister to the release of Owen Woodhouse from his judicial duties so that he could head an inquiry into the implementation of such a scheme in Australia. I have written for a New Zealand audience a brief description of the course of that inquiry, the reaction to it and the aftermath.52 There is no need to repeat all of that here. Several themes from the Report53 will be taken up later in this paper. Suffice it to say here that a comprehensive accident compensation scheme has never been implemented in Australia.

The failure of the Woodhouse proposals in Australia did not still the no-fault debate in the motor accident field. Its emphasis on rehabilitation was taken up the next time the issue was looked at in Victoria.54 Some years after the failure of the Woodhouse scheme, a former colleague of mine at the University of Melbourne, Ronald Sackville (later Sackville J), became chair of the New South Wales Law Reform Commission. He obtained a reference on transport accident compensation, with which I assisted to a small degree. Another colleague from Melbourne, Marcia Neave, became director of research and she gathered an enthusiastic and highly competent team to prepare the Commission’s background papers and report.55 Once again, it demonstrated on the basis of empirical research the flaws in the common law system, both as to liability and as to the method of payment in a lump sum, clearly evaluated the alternatives and recommended a no-fault scheme as the exclusive remedy for transport accidents, with fine detail as to the benefits to be paid. No New South Wales government has ever had the courage to implement it in full. An attempt to introduce the scheme as Transcover,56 but retaining the fault element, was as doomed to failure as a production of Hamlet without the prince.

The Victorian government, however, was willing to accept most of its principles.57 Unfortunately, the government lacked a majority in the Legislative

Council and had to accept a compromise, which saw some of the long-term benefits reduced for the less seriously injured and the retention of the common law for those who could prove fault and could surmount a threshold.\(^{58}\) The establishment of the Transport Accident Commission to administer the scheme has led to Victorian motorists enjoying far more stable and almost always lower levies on private motor vehicles than the premiums paid by New South Wales motorists. This is clearly demonstrated by a chart produced by the Australian Competition and Consumer Commission,\(^{59}\) which was intended to show the effects of competition in the New South Wales motor insurance industry and merely used the Victorian TAC as a comparator without drawing the obvious inference to which the graph points. At the same time, everyone injured in a motor accident in Victoria has medical and rehabilitation expenses met for life, whereas in New South Wales many miss out. Thus in *Derrick v Cheung*\(^{60}\) the High Court, emphasising the need to prove fault, denied compensation to a young child who ran on to the road and was run down. This has been followed in subsequent cases\(^{61}\) and no doubt in the rejection of many claims.

Not only have motorists in Victoria paid less than motorists in New South Wales, but the Victorian government has reaped many dividends from the TAC. In addition, without the free rider problem that discourages competing insurers from addressing such issues, the TAC has spent large sums on road safety. It has led the world with its dramatic education programs and advertising; it has provided funds to the police for random breath-testing vehicles and speed cameras, and to road authorities for the elimination of ‘black spots’. Victoria has benefited so that at all relevant times the road fatality rate per 100 million kilometres driven has been lower in Victoria than in New South Wales\(^{62}\) and the rate per 10,000 population has also been almost always lower after being virtually identical in 1973.\(^{63}\) Similarly, the TAC and its predecessor, the Motor Accidents Board, established road trauma acute hospital facilities and rehabilitation units, which no private insurers had done in Victoria in the years before the first no-fault scheme came into operation.\(^{64}\)

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58 See *Transport Accident Act* 1986 (Vic).
60 (2001) 181 ALR 301.
63 Id at Table 17.
64 See generally, Board of Inquiry into Motor Vehicle Accident Compensation in Victoria, above n54. See also my paper Harold Luntz, ‘Some Aspects of the Relation between Insurance and Prevention in the Area of Transport’ in Tore Larsson & Alan Clayton (eds), *Insurance and Prevention* (1994) at 47.
B. The Woodhouse Report — Safety and Rehabilitation

The approach of the TAC accords with that recommended by the Woodhouse Committee of Inquiry into Compensation and Rehabilitation in Australia. It put safety (or prevention) in the forefront. It has been shown repeatedly that a systems approach is much more effective in reducing accidents than imposing liability on individuals, even if insurance did not blunt the deterrent effect. Aviation is often cited as an example. The airline industry, shielded from the full effects of the common law by the Warsaw Convention in 1929, though subject to some strict liability, went from being ‘extra hazardous’ to one of the safest. This was achieved through mechanisms such as ‘incident reporting’, research and technological change that limited the scope for human error, rather than attempting to influence human behaviour as a result of the imposition of damages awards dependent on proof of fault. The truth of this has recently been acknowledged in relation to medical adverse events. The establishment of bodies such as the National Occupational Health and Safety Commission, the Australian Transport Safety Bureau and the Australian Institute of Health and Welfare has improved the possibilities of research into the true causes of accidents, but had the Woodhouse Report been implemented, data would have been collected at a central source, which would have enabled appropriate measures to be taken to reduce the incidence of accidents of every type.

The Woodhouse Committee placed rehabilitation after safety, but still ahead of compensation. Meares J, the second member of the Committee, was particularly interested in this and was largely responsible for the second volume of the Report, which dealt with this topic. Many reports, before and after, drew attention to the woeful inadequacy of rehabilitation facilities in Australia. The next decade saw workers’ compensation and motor accident systems give much greater attention to these needs. A comprehensive system could have done even more.

C. The Woodhouse Report — Compensation

Despite the priority given to safety and rehabilitation, the success of which in the long run would have diminished the need for compensation, the immediate task of the Woodhouse Committee was to devise a comprehensive compensation scheme for accidents to implement the Whitlam Government’s manifesto. Some representatives of the legal profession called for the retention of the common law alongside any comprehensive scheme, in much the same way as was adopted in the first no-fault motor schemes in Victoria and Tasmania. It was clear, however, that the flaws of the common law insurance schemes — their expense, delays,
concealment of the true causes and anti-rehabilitative effects — made this impossible. The Woodhouse Committee demonstrated that when properly measured over time, the periodical benefits proposed matched the lump sums that the common law awarded for only a small minority of accidental injuries. Occasionally today, it is proposed that as a solution to our recurring insurance ‘crises’, we should adopt a comprehensive scheme such as has now been operating for over 30 years in New Zealand. One then often encounters criticism on the basis of the alleged inadequacy of the benefits in that country. The comparison that is almost always made is between the benefits for non-pecuniary loss, entirely overlooking the continuing and certain benefits for loss of earning capacity. Over a lifetime, the earnings-related benefits paid in New Zealand are likely to be much, much higher than lump-sum damages for loss of earning capacity calculated with a discount rate of 5 per cent – 7 per cent per annum (depending on the jurisdiction) and reduced by 15 per cent for ‘contingencies’ (as in NSW). Even if one improperly confines one’s attention to non-pecuniary loss alone, the comparison between the New Zealand scheme and the common law is not unfavourable to New Zealand in the case of the most severe injuries when considered, as it should be, prior to any accident from behind a veil of ignorance. Non-pecuniary damages might at common law amount to $400,000 (and they are now lower in most Australian jurisdictions). However, there is at best a 25 per cent chance (probably even less) of recovering such a sum when one becomes a quadriplegic through, say, diving into the sea or a creek. In economic terms, this makes the lump sum worth only $100,000, which is the same amount (plus indexation) as is available in New Zealand for all who suffer catastrophic injuries. Further, the New Zealand lump sum cannot be reduced for contributory negligence as happens in many common law cases.68

I wrote a little book, Compensation and Rehabilitation (1975), reviewing the Report of the Committee. It was sympathetic to the aims of the Report and its recommendation for replacement of the common law, but was critical of some of the minor details. Perhaps I was over-influenced by the common law perspective in not criticising the Report’s acceptance of the need to replace a high percentage of lost earnings. My view on this changed as a result of contrary views from several sources. One was John Keeler’s review of the Report.69 Another was the submission of the Social Welfare Commission to the Senate Standing Committee on Constitutional and Legal Affairs after the Bill to give effect to the recommendations of the Report had passed the House of Representatives and been referred to that Committee by the Senate.70 A third was a lecture given by Richard Downing, then head of the Institute for Social and Economic Research at

70 Australia, Parliament, Senate, Standing Committee on Constitutional and Legal Affairs, Inquiry into the Clauses of the National Compensation Bill 1974 (Hansard), 28 February 1975, 397–415, esp at 399–403.
Melbourne University and also Chairman of the Australian Broadcasting Corporation. 71 I realised then that, in Geoffrey Palmer’s words, earnings-related compensation led to ‘redistribution in the wrong direction’, 72 was discriminatory against those not in the workforce or temporarily out of it — particularly women, children and the congenitally disabled — and was inconsistent with other social welfare benefits. I have since become a passionate advocate against earnings-related benefits at common law or under any substitute. 73 Essentially, I would compensate for needs, not losses. There is obviously room for disagreement on what amounts to needs and whether there is need for income support where there are alternative sources available, but I also believe that social insurance benefits should not be means tested. This is too large an issue to argue here.

This change of mind and consideration of the broader issues lay in the future. Having made a submission to the Senate Committee while it was considering the National Compensation Bill 1974 (Cth), I was invited by the Committee to assist it with the more technical elements. I spent some time in the Old Parliament House, Canberra, working on the submissions to the Committee and the wording of the Bill, with one ear to the intercom system, which was broadcasting the debates in the House on the ‘loans affair’ that was leading to the fall of the Whitlam Government. My work was ultimately published by the Committee as an Appendix to its own report. 74 That report recommended that the Bill be withdrawn and redrafted. The main reason for this brings us to another matter that has so far not been mentioned, the relationship of accident to sickness.

D. Incapacity from Sickness

In the foundation document of the welfare state in the United Kingdom, Sir William Beveridge wrote: ‘[a] complete solution is to be found only in a completely unified scheme for disability without demarcation by the cause of disability.’ 75 The Woodhouse Royal Commission in New Zealand was aware of this, but confined its recommendations to accidents, with a long-term goal of extending the scheme to sickness. Patrick Atiyah in *Accidents, Compensation and the Law* (1970) drew attention to the much larger numbers of people affected by illness and disease than by accidents and was then in favour of using the industrial injuries scheme that had replaced workers’ compensation in the United Kingdom.

72 Palmer, above n49 at 387. See also the paper by Stephen Sugarman in this thematic issue under the heading ‘III. Income Replacement: Progressive v Regressive’.
75 *Social Insurance and Allied Services* (Cmd 6404, 1942) at 38–39.
as a model for all disability. When the Whitlam Government instituted the Inquiry into Compensation and Rehabilitation in Australia, it announced its commitment to the introduction of a scheme for accidents. Once the inquiry was underway, it extended its terms of reference, directing it to inquire also into whether and how the scheme should cover the rehabilitation and compensation of every person who suffers physical or mental incapacity or deformity by reason of sickness or congenital defect. This was to include death resulting from such sickness or defect.76 The Committee did integrate incapacity from sickness and congenital conditions into its recommended scheme, though there were certain differences. For instance, there was to be a longer waiting period before payment of compensation commenced in the case of a person incapacitated by sickness (three weeks) than in the case of a person who suffered personal injury (one week).77 The Senate Committee had evidence that the accident part of the scheme could be implemented at no greater cost than the existing compensation schemes, but that the sickness part would require finding large additional funds.78 There were also constitutional concerns. It recommended that the accident scheme be implemented first and the sickness part be delayed for further consideration thereafter.79 The Bill was redrafted to take account of this and other recommendations of the Senate Committee and was ready for reintroduction into the House of Representatives on 11 November 1975, the day the Whitlam government was dismissed by the Governor-General.

Jane Stapleton chose to address the issue of compensation for disease for her DPhil thesis at Oxford University under the supervision of Patrick Atiyah.80 I had the good fortune to act as one of the examiners of the thesis during my visit to the Centre for Socio-Legal Studies and to meet Jane for the first time. It remains a challenge to all of us to find a way to deal with the much more significant problem of incapacity due to disease. While eventually incapacity due to sickness should undoubtedly be integrated with a comprehensive accident compensation scheme, I do not believe that we should postpone providing a remedy for the problems presented by the common law; we should immediately move to replace the common law insurance schemes with a much more efficient, non-discriminatory and less harmful accident scheme. Many diseases already come within the torts system, despite the difficulty of linking them to any particular ‘accident’.81 The growth in litigation in the medical field means that sickness and congenital

76 Report, above n53 at para 23.
77 Id at para 377.
79 Senate Committee on Constitutional and Legal Affairs, The Classes of the National Compensation Bill (1975) at para 1.23.
incapacity are often the subjects of tort awards of damages. The costs involved in such awards must now be included in the total expenditure by the community, reflected in the Commonwealth’s subsidy to the medical indemnity funds, which would allow further diversion to a more sensible replacement compensation scheme.

On the subject of disease, the torts system is sometimes given credit for having revealed problems such as those with asbestos and tobacco. In fact, the torts system has failed to cope with either of those problems and it is political pressure and changes in cultural attitudes that have brought compensation to non-employees and have limited the use of these products. Once again, a comprehensive compensation scheme is much more likely to bring to light future problems of this nature and to find methods of dealing with them, whether by legislation, regulation, criminal sanctions, increased levies, education of the public or other measures.

9. **Other Torts**

All that I have said does not mean that I see no role for the law of torts. The intentional torts such as false imprisonment can be valuable, even if far from perfect, in protecting civil liberties. They certainly do so much better than negligence. Some, like conspiracy, intimidation and interference with contract, can also be hindrances to freedom of association and the trade union movement. Defamation, while protective of reputation, can be a significant restraint on freedom of speech. Whether the common law has struck the right balance is debatable.

One issue on which I have changed my mind over the years is whether there is a place for exemplary damages. In the first edition of *Assessment of Damages for*...
I have said nothing in this paper about the law of negligence in relation to pure economic loss. The possibility of recovery for such loss effectively started with *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[^94] when I was already teaching delict. I have watched the subject develop ever since and do not claim to have any answers. The *Trade Practices Act* 1974 (Cth) s52 and its equivalents in the Fair Trading Acts of the States have supplanted much of the law of negligent misrepresentation. No national insurance scheme is required for other pure economic losses. All I can do is to remind the reader that Fleming’s view that the law of torts is concerned with the allocation of losses that inevitably occur in society must apply here too.

10. Conclusion

The insurance ‘crisis’ in 2001–03 demonstrated the prescience of the Senate Committee on Constitutional and Legal Affairs when it stated:

> The committee believes that unless significant changes are made to existing remedies for injury, most of which are financed by insurance, their cost will become too high to be financed by insurance premiums and governments will be required to provide supplementary financial assistance. It seems logical to the committee that, if governments are to be required to give financial assistance in this area, it is an appropriate time to consider new approaches to the provision of more equitable and comprehensive coverage at the lowest possible cost.^[95]

I have written elsewhere how the response to the inability of many community organisations to obtain insurance at all or at reasonable cost after the collapse of the HIH Insurance Group provoked ‘wrong questions’ and ‘wrong answers’.[^96] The

[^88]: (1974) at 43.
[^89]: (1962) at 34–36.
[^92]: *Donselaar v Donselaar* [1982] 1 NZLR 97 at 106–7 (Cooke P).
[^95]: Report, above n79 at para 1.22.
answer lies not in a ‘more principled’ approach to the law of negligence. 97 Decisions of the High Court in cases such as *Brodie v Singleton Shire Council*, 98 abolishing the immunity from liability for non-feasance by highway authorities, and *Tame v New South Wales; Annetts v Australian Stations Pty Ltd*, 99 abrogating the restrictive rules for recovery of damages for psychiatric injury, may be seen as adopting such a principled approach. These decisions have, however, exacerbated the problems of fact-finding in individual cases 100 and have provoked legislative backlashes. 101 Patrick Atiyah, who has become an even more forceful critic of developments in the common law, has lost faith in the welfare state and now wishes to eliminate common law liability without any proper replacement except for no-fault motor accident compensation. I have sought to respond to this view. 102 I adhere to the view I have expressed in article after article, urging the adoption of a national compensation scheme or, as I would prefer to call it, a social insurance scheme. 103 A key feature of such a scheme would be separation of safety (prevention or deterrence) and compensation, both of which the common law seeks to achieve at the same time, neither of them adequately. I have also published my views on the benefits that should be paid under a compensation scheme. 104 There is room for difference of opinion on the details of any scheme. On the principles, however, the two Woodhouse reports were right in putting safety first, emphasising secondly both vocational and social rehabilitation, and then basing compensation on community responsibility and comprehensive entitlement, to be provided with administrative efficiency.

101 See, for example, *Civil Liability Act* 2002 (NSW) ss30 and 45.
Of Law Reform Lions and the Limits of Tort Reform

DAVID PARTLETT*

1. Introduction

This essay tracks a tort law under siege for half a century. The challenge to tort has been provided by the likes of Harold Luntz in Australia, Steven Sugarman in the United States, Geoffrey Palmer and Justice Owen Woodhouse in New Zealand, and Patrick Atiyah in England. John Fleming bridges both Australia and the United States with his effective critical scholarship. All pointed to torts’ absurdities, and all argued that replacement by a state-run universal compensation system was logical and necessary. For all of the intellectual firepower of these giants, the gnarly body of tort law has survived. I want to take readers back to the 1970s when Luntz’s vision was close to reality. ¹ I will discuss the intersection between reform and politics and the strengths of tort law that have kept it alive against criticism. As I say at the end of the essay, citing the 9/11 compensation experience, compensation schemes are likely to be ad hoc in the future, tracing the elements of tort law compensation. The likelihood of the adoption of a universal compensation system is extremely low, although faith in tort law and its processes is failing. Like Luntz, I bemoan the present slew of tort reform in Australia and the United States, as thinly veneered wealth transfers from accident victims to industry and other potential tortfeasors and their insurers. Empirical evidence is sorely wanting in supporting these reforms. My suggestions for legal improvement are incremental. They are to do what we can in mature accident areas to compensate victims more effectively while maintaining the other desiderata of tort law. Tort law, as part of the civil justice system, ought to be maintained as a critical plank in an individual’s right in democratic governance. The attack on tort law has weakened faith in its integrity, but ironically a feeble tort law has not encouraged the reforms Luntz would press. The political economy of the times is alien to universal compensation schemes.

A. Harold Luntz and the Major Figures

Luntz speaks, in his sparkling paper, of the personalities in the law who influenced him in his distinguished career. He cites the likes of Fleming, Atiyah, and Tony Honoré. He mentions younger scholars like Jane Stapleton, who carried through

¹ Harold Luntz in a retrospective sees that even then, the chances were slim. See Harold Luntz, ‘Looking Back at Accident Compensation: An Australian Perspective’ (2003) 34 VUWLR 279.

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on the pathfinding work that he had done. He was, he says, heavily influenced by Justice Woodhouse (in this essay, I will refer to the Universal Compensation Scheme favored by Luntz and Woodhouse as the ‘Woodhouse-Luntz Scheme’). He registers his dismay with theoretical developments in law and economics and with corrective justice.

Many of the scholars first mentioned formed the ideas that I absorbed as a young torts professor. Luntz’s ideas and commitment to the law were, for me, deeply influential. His scholarship has always been passionate; one could not mistake his stance. At the same time, he is the most exacting of legal expositors. Read his now iconic book on damages and you will see a mastery of doctrine and a clear enunciation of legal pre-suppositions; you have in your hands a tool that is essential for courts and practitioners in Australia. Luntz, like Achilles, masters that which he, in the end, despises. Luntz has enlightened us about the substance of tort law, as Achilles won the bloody victories of war. The gods gave both talents that had them marvellously succeed in fields of human activity the results of which were deeply distasteful.

Luntz’s work in compensation for personal injuries ranks with that of Atiyah. Both were social rationalists who saw that tort law and negligence, in particular, was a woefully poor mechanism to deliver compensation to the victims of accidents. Indeed, the transaction costs of tort law were so high that if one could take those dollars and put them into a governmental no-fault scheme, one could begin to cover illness in addition to injury. If the victim’s need was the central rationale, no principled distinction could be drawn between injury and illness. Fleming had espoused the same philosophy but did not go as far as Luntz in crafting replacement schemes.

B. Disappointed Expectations

There were days in the 1970s when the National Compensation Scheme was an achievable goal. The Whitlam Labor Government was in power, whose platform called for a national compensation scheme. Justice Woodhouse had earlier propelled New Zealand, in a remarkable way, to a national compensation system. From an inquiry on workers’ compensation, he had successfully argued that the

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5 The Iliad of Homer, vol I (1900) (translation by Alexander Pope) at book X.
7 Peter Cane has, in the last three editions, added his intellectual power to the Atiyah core. See Peter Cane, Atiyah’s Accidents, Compensation and the Law (6th ed, 1999).
entire tort system ought to be abolished and replaced by a system of no-fault compensation. In replacement of tort law, a state-run compensation system could cover, on the aforesaid no-fault basis, some of the injury costs incident to accidents. Those injured slipping and falling in a bathtub were, under the scheme, compensated on the same basis as those injured in motor vehicle or industrial accidents. Social welfare was at the base of the scheme and the aim was to maximise that social welfare by government action. The bases of the scheme that Justice Woodhouse brought to Australian shores were community responsibility, comprehensive entitlement, complete rehabilitation, real compensation and administrative efficiency.

Following the election of the Whitlam Government in 1972, Justice Woodhouse led a commission to organise and propose a similar scheme for Australia. The initial version ambitiously planned to cover rehabilitation costs and provide compensation for losses arising from injury, sickness and congenital defects. Justice Woodhouse and his Committee completed their inquiry in June, 1974, however the Whitlam Government subsequently faced widespread opposition to their proposals. Government employees who already enjoyed

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8 Fleming, also an Achilles character with his withering critique of the law, set aside a superb legal exposition of the field of tort law. He was appointed to the Canberra University College (which amalgamated with the Australian National University of 1960) in 1949, as the first full-time faculty member. In 1955 he was appointed the first Robert Garran Chair of Law at Canberra University College and he published The Law of Torts in 1957. The story is told that Fleming wrote the book while at the Australian National University. After his notes had perished in a fire, rather than rewrite lecture notes, he simply wrote the book, now in its tenth edition (Carolyn Sappideen has taken over as the author of the last two editions): Carolyn Sappideen, Fleming: The Law of Torts (10th ed, 2002). See Peter Cane & Jane Stapleton (eds), The Law of Obligations: Essays in Celebration of John Fleming (1998). Fleming’s condemnation of tort law’s role in personal injury is summed up in his following words: ‘The overall accident compensation landscape in America is therefore highly fragmented and lacking any systematic plan. The benefits of tort liability are not husbanded for those who are un- or under-compensated from other sources but are distributed randomly without regard to the needs or deserts of victims. Its grossly inflated transaction costs add to the remarkable inefficiency of the tort system. Only the affluence of American society has deflected serious misgivings about this wasteful arrangement and about the need to develop a more purposeful compensation policy such as that which other countries, with more limited resources, have been driven to pursue.’ John Fleming, The American Tort Process (1998) at 30–31.

9 Peter McKenzie, ‘The Compensation Scheme No One Asked For: The Origins of ACC in New Zealand’ (2003) 34 VUWLR 193. Terence Ison stated: ‘Exactly why New Zealand was the first country to adopt a reform of this type is less clear. An imaginative attempt to find an explanation in the values implicit in New Zealand culture did not produce any easy or definite answers. It is clear, however, that New Zealand has a tradition of communal as well as individual responsibility in a systematic way. In particular, the country already had an organised system of public medical care. Thus, the Woodhouse Report was not embracing any alien view when it began its statement of objectives with a principle of community responsibility.’ Terence Ison, Accident Compensation: A Commentary on the New Zealand Scheme (1980) at 17.


11 See Luntz, above n1, providing an excellent discussion of the origins and fate of no-fault compensation in Australia.
compensation schemes offering more generous benefits than the proposed scheme rallied against it, as did the insurance industry, as well as organisations representing lawyers and doctors. Finally, resistance to the abolition of all common law rights manifested itself in the Senate of the Commonwealth and the legislation was shunted to the committee. This resulted in a recommendation that the proposed bill be redrafted. A less ambitious version of the original Woodhouse Report was formulated. However, the dismissal of the Whitlam Government, and the subsequent victory of the Liberal Coalition Party in 1975, eliminated any real hope of enacting a national compensation scheme similar to that in New Zealand.

I can vouch for those high expectations that Australia would adopt the Woodhouse Scheme. I joined the Australian Attorney–General’s Department in 1974. I was keen to engage in the work in bringing to Parliament the Racial Discrimination Act 1975 (Cth) and other human rights legislation at that time. Leslie Zines and David Hambly asked me to teach torts on an ‘adjunct’ basis at the Australian National University (ANU). To prepare classes on tort law was seen as rather a dead end – a fatuous exercise. Tort law was drawing its last breath in Australia, for soon liability for personal injuries would go the way of the Dodo.12 Who better to teach the course than an adjunct faculty member, reserving the energies of full-time faculty members for more vital areas – administrative, constitutional, criminal and contract law to name a few? My students were subjected to a class that, in the last term, mainly covered the compensation matters in the Woodhouse Report. Throughout the year I recall invoking Luntz, Atiyah and others in their critique of negligence.13

However, as in the case of Mark Twain, the report of death was premature. Tort law still lives thirty years after and I have taught this area of law in both Australia and the United States. For about a decade, I taught largely from Luntz’s and Hambly’s torts casebook14 at the Australian National University. I have continued to teach that law in the United States for the last twenty years, often referring my students and readers of the Prosser casebook, of which I am a co-author, to the vibrant tort law in Australia.15 I consider that American tort law should be better informed about tort developments in its related common law systems. It is encouraging that Stapleton has taken a leading part in the articulation of tort law in the Third Restatement of Torts now being debated before the American Law Institute.16 Stapleton is the first non-American scholar to be elected to the

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12 See ibid, arguing that the adoption of the reform was not so proximate.
13 I was to focus some of my earlier scholarship on economic loss recovery, an area in which the New Zealand courts, free of the personal injuries docket, had been pathfinding. Patrick Atiyah had held a chair at the ANU before returning to England, eventually to take up a chair at Oxford.
American Law Institute Council.\(^{17}\) Again, it is an irony that one of our most celebrated scholars internationally should be working in the area of torts once thought of as dead.

Two intriguing questions may be asked. One, what if Australia had adopted the Woodhouse-Luntz Scheme? What would the nature of our tort and related law have turned out to be? How would the Woodhouse-Luntz Scheme have fared? Two, should Australia now adopt the scheme? What salience does tort law have in a world of physical injuries as it has developed in the last thirty years? Do these insights about the role and function of tort law bear upon the appropriateness of a Woodhouse-Luntz Scheme in Australia or the United States? The remainder of this essay is divided between the two questions.

2. The Road Not Taken

If Australia had accepted the reforms for accidents causing physical injuries, one result would have been that the expository work of Luntz, Fleming, and, later, Stapleton, would have never surfaced, except in niche tort areas. Their energies would have gone elsewhere, perhaps in explicating administrative law and regulation as it would have developed. The welfare paradigm of government — community responsibility — would have been much advanced by powerful commentators. However, this would have taken place against a background where the role of government in the Western world had been increasingly viewed with suspicion. The Second World War had brought governmental coordination to the centre of the economy. The post-Second World War Welfare State was a product of the war mood that resided considerable faith in the redistributive function of government. The United Kingdom is the major exemplar of the Welfare State and it was the Beveridge Report on Social Insurance and Allied Services that infused the post-war period and inspired proposals for broad state-run compensation schemes. They were part and parcel of the Welfare State. It is not surprising that tort reform efforts – scholarship and governmental reforms – sprung up at that time, both in the United States and in the British Commonwealth. Throughout the 1960s, the ameliorative role of government was relatively unquestioned.\(^{18}\) Since the 1970s, however, the free market and ideas of individual liberty have dominated


\(^{18}\) It is noteworthy, although often forgotten, that the United States Congress came close to enacting the ‘National No-Fault Motor Vehicle Insurance Act’ in 1974. It passed the Senate in May, 1974. It did not pass the House of Representatives. President Nixon may well have signed the legislation. As a student at Duke University Law School, he had authored a piece analysing the no-fault auto legislation: Richard M Nixon, ‘Changing Rules of Liability in Automobile Accident Litigation’ (1936) Law & Contemp Probs 476. Other matters were occupying the President and the Congress at the time. For a description and exposition on the issue of federal legislation, see William Powers, Jr, ‘Some Pitfalls of Federal Tort Reform Legislation’ (1996) 38 Ariz L Rev 909, 958–959. The book that had a marked impact on the American public policy debate was Robert E Keeton & Jeffrey O’Connell, Basic Protection for the Traffic Victim: A Blueprint for reforming automobile insurance (1965).
discourse in political economy. The power of those ideas paralleled the decline in the reality of the socialist ideal.\(^{19}\)

In the immediate post-Second World War period in the United States, legal scholars like James regarded traditional tort law as being in need of radical surgery.\(^ {20}\) The dominance of legal realism encouraged a view of the law as a system of social engineering. In the realm of tort, the rules were increasingly viewed against a measure of loss distribution and enterprise liability. The public policy end of the law was to compensate the victims of accidents. Its substance ought to be consciously bent by courts to that end.\(^ {21}\) American reformers had to deal with a tradition of feckless state legislatures uninterested in changing the law to effect compensation. The best that could be done was for the courts to try to change, by the introduction of doctrines that widened liability. The most marked success was the introduction of strict liability for defective products.\(^ {22}\) Later, courts in large mass torts claims were innovative in devising what were, in effect, administrative compensation systems.\(^ {23}\)

\(^ {19}\) The foremost critic of dirigiste policies was FA Hayek. See FA Hayek, *The Road to Serfdom* (1944); FA Hayek, *Law, Legislation and Liberty* (1976).

\(^ {20}\) James’s influence is discussed by Priest, above n6 at 470–472.

\(^ {21}\) Leon Green, *The Litigation Process in Tort Law: No Place to Stop in the Development of Tort Law* (2nd ed, 1977). See Priest, above n6. The modern scope of tort law has inspired contemporary commentators to take a public approach to the function of tort law. David Rosenberg, ‘The Causal Connection in Mass Exposure Cases: A ‘Public Law’ Vision of the Tort System’ (1984) 97 *Harv L Rev* 851. The mood of the decades from the 1950s to the early 1970s was summed up as follows, by Eugene Kamenka & Alice Erh-Soon Tay in ‘Social Traditions, Legal Traditions’ in Eugene Kamenka and Alice Erh-Soon Tay (eds), *Ideas and Ideologies, Law and Social Control* (1980) 3 at 5: ‘The distinction between the private and the public is indeed breaking down as the central, organizing principle of legal and political theory, which rested so strongly on the paradigm of property as the expression of private power and private will, of an area of independence and inviolability. Contracts dictated from above, loss distribution and social insurance, ever-increasing state regulation and inhibition of unequal bargaining, the felt need for frank judicial policy to meet new circumstances and take account of new dangers – all are combining to undermine the traditional liberal conception of private law and its credibility in the legal system and centrality tradition.’ While true of the environment that spawned the Woodhouse-Luntz Scheme, the remainder of the century was to witness a revitalisation of the private sphere and the law that nurtured it. The division between public and private spheres has emerged most strongly in the late 20th century, but is still being articulated. See Martin Loughlin, *The Idea of Public Law* (2003), criticised by NW Barber, ‘Professor Loughlin’s *Idea of Public Law*’ (2005) 25 *Oxford Journal of Legal Studies* 157 at 166.

If Australia had adopted a national compensation scheme in the 1970s, it would have seemed like an appropriate next step, just as workers compensation schemes followed throughout the industrialised world after Bismark’s reforms in the late 19th century. In the common law world, more note would have been taken of Australia’s steps than New Zealand’s plunge into reform. Moreover, the South Seas would have been viewed – as they were in the 19th century – as a laboratory for reform that would have had more salience in the larger economies of the United Kingdom, Canada, and the United States. The New Zealand experiment for American reformers was difficult to translate to the enormous and diverse American economic and political system. New Zealand was, in size and complexity, like a medium sized city. Australia, a small economy, was, nevertheless, a more relevant model with its greater complexity, its federal structure, and its larger judicial and academic sector.

Liability for pure economic loss may have gained more judicial attention, while the economic torts may have been exploited and, therefore, become more developed and defined. Additionally, other dignitary interests, like privacy, may have received earlier attention. Certainly, administrative law fueled by compensation claims and regulatory enforcement would have consumed a greater proportion of the law reports.

The significant challenge would have been to adhere to the tenets of the Woodhouse-Luntz Scheme without succumbing to the shifts in the political climate and the consequent imperatives of reducing governmental spending throughout the remainder of the 20th Century. With faith flagging that government was either an efficient or desirable agent for protection of the citizen, how far would investments have been made in safety and general deterrence? The record in New Zealand is not encouraging. In addition, how far would real levels of


24 See Jürgen Tampke, ‘Bismark’s Social Legislation: A Genuine Breakthrough?’ in Wolfgang Mommsen (ed), The Emergence of the Welfare State in Britain and Germany 1850–1950 (1981) at 71, 81–82. Australia and New Zealand had adopted Workers Compensation early. Following Germany and Britain, Australia and New Zealand were among the first countries to adopt workers’ compensation plans. New Zealand adopted its first plan in 1900 and Australia followed with its first plan in 1902 in Western Australia. In 1910, New York was the first state in the U.S. to adopt workers’ compensation legislation.


compensation have been maintained? In a world of public choice, the pressures to reduce real compensation would have been significant. Compulsory third party or liability insurance for motor vehicle accidents, where insurance rates are tied to the registration of motor vehicles, provides one example. These costs have been the perennial target of politics in Australia, where they have been regarded as a tax impost. Responding to the cries of motorists, the government has entered the insurance markets. Little opposition is voiced since the injured continue to be a weak, diffuse political voice. Although all potential victims should, in a world of no information barriers, rationally factor in the costs of accidents, it is notorious that the risk of injury is grossly misjudged by individuals.

Not foreseeable in the early to mid–1970s was the explosion in health care costs that would occur over the remainder of the 20th century and continue apace in the 21st century. Recall that the original Woodhouse-Luntz Scheme called for coverage of illness in addition to accidental injuries. Illness was to be excised from coverage in the final versions of the Australian legislative proposals. Even if the limited coverage of accidental injuries had been adhered to, much of the burgeoning law of torts and its costs since the 1970s have related to diseases

27 Geoffrey Palmer an architect and active promoter of the Luntz-Woodhouse scheme gives short shrift to deterrence: ‘I have ended up as a skeptic as to whether any scheme capable of implementation will achieve much by the way of economic deterrence, at least so long as it is attached to a compensation scheme.’ Geoffrey Palmer, Compensation for Incapacity: A Study of Law and Social Change in New Zealand and Australia (1979) at 380. The absence of deterrence in most no-fault schemes partly explains their ‘low overhead costs,’ when compared with tort law. Patricia Danzon, ‘The Swedish Patient Compensation System: Myths and Realities’ (1994) 14 Int Rev of Law & Econ 453 at 463.


caused by toxic substances. The costs of a compensation scheme giving generous health care coverage would, by the same token, have risen steeply, putting financial pressure on the scheme. Two results are predictable. First, the medical coverage may have been truncated. Second, resources that should have been allocated to other ends of the scheme, accident prevention and rehabilitation, would likely have been curtailed. Certainly with escalating health care costs, any shift to include illness within the coverage of the Australian scheme, subsequent to its adoption, would have been resisted and the logical incoherence that Luntz and others have pointed to would have persisted. Take the first response of truncating health care coverage. The provision of medical services would be restricted either by utilisation review, by adding co-payments to be borne by claimants, or by forcing claimants to queue for medical services. If Australia had adopted a public national health system, the apparent cost of health care to the compensation system would have been restrained as the national health system could have absorbed the costs of the Woodhouse-Luntz Scheme. Although costs would have grown, they could have been hidden, as rationing would have taken place. This false refuge, however, would not have been available since the conservative governments had no sympathy for national health. Thus, with health care costs rising, action would have been taken to reduce actual benefits.

Although incentives for safety and investigation of the aetiology of disease would have been blunted under a Woodhouse-Luntz Scheme, some rescue lines would have been thrown by an unlikely hero. The strong remedial American torts system has produced considerable information about injuries and illnesses caused

32 Reformers had argued the need for bringing illness under the umbrella of compensation. Donald Harris, et al, Compensation and Support For Illness and Injury (1984); Jane Stapleton, Disease and the Compensation Debate (1986). Terence Ison stated: ‘It is difficult to see why, in the allocation of resources to compensation for human disablement, the victims of disease should be assigned a lower priority than the victims of injury. The needs of the disabled reflect the consequences of disablement, which depend on the nature, the extent, the duration, and the social and environmental significance of the disability. The needs of the disabled do not vary according to the cause of the disablement.’ Terence Ison, above n9 at 21.

33 For example, the accelerating costs of liability in the United States are attributable to a relatively small number of high-impact liability areas like asbestos, tobacco, medical devices, and motor vehicle design. Between 1974 and 1986, the estimated number of asbestos filings increased from 7 to 5632. See Terence Dungworth, Product Liability and the Business Sector: Litigation Trends in Federal Courts (1988) at 36. Also see Peter Schuck, The Limits of Law: Essays on Democratic Governance (2000) at 345-373 (pointing to the strains in the law as claims burgeoned).

34 In the United States, the cost of provision of medical services has precipitated a spate of regulatory, and market mechanisms designed to contain costs while maintaining a sufficient quality of service. The system still evolves. See Mark Hall, ‘The Death of Managed Care: A Regulatory Autopsy’ (2005) 30 J of Health Politics, Policy and Law 427.

35 See Woodhouse Report; Geoffrey Palmer, above n28 at 394–399 (describing the confusion and government in-fighting on rehabilitation services at the beginning.)

36 This was always viewed as a weakness in the tort law where victims were discouraged from rehabilitation prior to the determination of liability and/or compensation. Compare Ison, above n10 at 137–158 (pointing to weaknesses in the scheme but saying it is an improvement over the common law situation).
by toxic substances and defective products. Australians, the victims of these exposures, would have recovered under the scheme for such exposures. No doubt information also would have been brought to the commission administering the scheme, although the use to which the information would have been put would again have been limited by the availability of resources and other bureaucratic roadblocks.

Administrative bodies sometimes fail in properly pursuing their statutory mandates. They are subject to both administrative and judicial review in an attempt to force administrative action to conform with statutory mandates. The review, however, is frequently circumscribed. Much recent scholarship has elucidated this institutional failure and suggested means of reducing its incidence. This scholarship is directed to how the public ends of the agency can be best achieved in light of the failures of command and control of regulation. John Braithwaite, of the ANU has been deeply influential in analysing how regulations can be effective. Such has been the despondency with regulation throughout the Western world, that privatisation has been adopted as a way of overcoming the frustrations and costs of regulation. It is conceivable that under the compensation scheme, as it marched through the remaining decades of the century, private actors would have been substituted for public to make the regulation more responsive and the services to the public more effective. For example, private insurance companies may have bid to cover compensation costs and health care companies the coverage of rehabilitation.

Private law mechanisms could have also been utilised where it was observed that certain wrongdoers were, through their wrongdoing, placing undue burden on

37 Geoffrey Palmer concedes that knowledge about accident prevention is at a ‘primitive state’, but implies that a remedy is outside the bailiwick of a compensation scheme. Palmer, above n28 at 380.


the public fisc. The Woodhouse-Luntz Scheme called for specific deterrence of harm-producing activity through regulatory enforcement. If such enforcement were to fail short, private incentives to enforce breaches would have possibly found favour. In the United States, the antitrust laws are enforced both publicly and privately. Incentives are given to “private attorneys–general” to detect breaches and bring actions for treble damages. The same mechanism is used to attack criminal racketeering activities. In the absence of enabling legislation, the availability of exemplary and punitive damages serves similar purposes of overcoming pusillanimous public enforcement. Supercompensatory damages encourage attorneys, as bounty hunters, to root out harm-producing behavior, bringing malefactors to book.

Each of the institutional and legal changes would have detracted from the original conception of public responsibility through public governmental agency, each would have encouraged responsive regulation. It is noteworthy that Luntz has taken more seriously the role of punitive damages. As non-compensatory, these damages were found permissible within narrow confines in New Zealand outside the scope of the compensation scheme. The principle at play is that for deterrence or retributive reasons, the courts ought to be able to exact damages that go beyond a compensatory function. The formulation of the rule in all

42 In the compensation arena, a champion of such schemes, Jeffrey O’Connell, has shifted focus to private contracting as a substitute to state/government schemes. See Jeffrey O’Connell, ‘Elective No-Fault Liability by Contract—With or Without an Enabling Statute’ (1975) 1975 U Illinois L Forum 59.
43 See Ison, above n10 at 159–162.
44 The Sherman Act, 15 USCA § 1 prohibits ‘every contract combination … or conspiracy in restraint of trade,’ and s2 prohibits ‘monopolization, attempted monopolization, and conspiracies to monopolize.’ The Clayton Act prohibits mergers and acquisitions where the effect may be ‘substantially to lessen competition’ as ‘to tend to create monopoly’, 15 USCA § 18 (1994). The provisions may be enforced by individual aggrieved persons who may seek treble damages.
47 This supposes an identity of interest between attorney and client not always present. See Ellen Wright Clayton & David F. Partlett, ‘Lawyer-Client Relationships’ in Frank A Sloan et al, Suing For Medical Malpractice 72 at 77–78 (1993).
48 The courts have generally deferred to agency action respecting its capacity to assess risks more generally: Ramirez v Plough, Inc. (1993) 6 Cal. 4th 539, 863 P.2d 167.
Commonwealth jurisdictions is remarkably similar: punitive damages may be awarded for conduct that demonstrates an arrogant disregard for the plaintiff’s rights. The American courts and policy-makers have recently been concerned about the excessiveness of punitive damages, and the Supreme Court has attempted to apply brakes by way of relevant factors pursuant to the 14th Amendment due process clause.\textsuperscript{50} The Australian courts, absent the jury in most cases, have not been beset by a similar problem of excessive damages.\textsuperscript{51}

A real question would have arisen if the scheme were in place. Given that exemplary damages would have continued to be available, it is reasonable to assume that courts may have extended the criteria of their award if the real levels of compensation under the scheme had become inadequate. Pressure would then have mounted for legislative reform to cut back on the courts’ ‘erosion of’ the tenets of the scheme. One could have imagined the argument that the scheme, by a side wind of punitive damages, should not be undermined. The ideas of deterrence and retribution that are at the heart of punitive damages sit uncomfortably with community responsibility.

The Woodhouse Commission assumed that the level and nature of injuries would remain static. We are aware of, and see as inevitable, a level of injury in the workplace, on the road, and in the use of products. These, however, do not represent the entire set of injuries. For as society changes, as scientific knowledge is expanded, and as demands for protection are heightened, the field of injuries demanding compensation and optimal deterrence expands. Emotional distress has increasingly become an accepted type of damage supporting an independent cause of action.\textsuperscript{52} Informed consent in medical malpractice has pushed categories of harm thought worthy of compensation.\textsuperscript{53} The meaning of injury has altered, as we look at expectations in birth and conception.\textsuperscript{54} In a world where central policing authority cannot, and should not, be empowered to protect all citizens, certain

\textsuperscript{50} State Farm Mutual Automobile Ins Co v Campbell, 538 US 408 (2003).

\textsuperscript{51} Although it may be observed that the English courts were concerned about excessive damages in defamation cases in John v MGN Ltd [1997] QB 586 (Eng CA 1995), NSW law prohibits punitive damages in defamation cases. Defamation Act 1974 (NSW) s546(3)(a). See Gotanda, above n43 for comparative law and damages awards. In the Dow breast implant litigation, where an issue was the comparative quanta of damage awards in the jurisdictions of claimants, Luntz was an expert witness for the defendants, while I was an expert for the Australian claimants. Luntz’s evidence, among other relevant evidence, convinced the Bankruptcy Court that Australia experienced a lower level of claim frequency and severity, thus justifying the Australians as a class to receive less compensation. In re Dow Corning Corp 244 BR 634 (Bkrtcy ED Mich, 1999). We exchanged good natured letters after the event, Luntz having won the ‘battle of the experts’.


\textsuperscript{53} Scott v Bradford, 606 P 2d 554 (OK 1979); Canterbury v Spence, 464 F 2d 772 (DC Cir 1972); Moore v The Regents of the University of California, 51 Cal 3d 120, 793 P 2d 479 (1990); Hart v Chappel (1998) 195 CLR 232.
limited duties imposed on individuals may be more effective in protecting public safety.\textsuperscript{55}

The real politik would have been a toleration of reducing levels of compensation, and restriction to health care and rehabilitation services. The accident victims would have been, as they are now, weak voices in the political process.\textsuperscript{56} A scheme that in its inception contained generous benefits and robust enforcement would, over decades of political choices, have become a pale shadow of its first conception.

Even more radically, the scheme may have been fully repudiated by governments not subscribing to its social welfare roots. The rhetoric of community responsibility appears antique in an era where individual responsibility has taken the central intellectual ground.\textsuperscript{57} Conservative American commentators have complained about the cost of widening tort liability in America. They see it as an off-budget impost on the economy created by judicial fiat.\textsuperscript{58} In a political mood of privatization and the shedding of government responsibilities, it is predictable that to shift costs away from budget imposts, back to a weakened tort law, would have been attractive. The political advantage in repealing the scheme would have been considerable. Niggardly compensation and access to the courts, pressed by tort reform, would replace on-budget compensation payments.\textsuperscript{59} Government could avoid responsibility by permitting the private tort system to pick up the major role. No doubt established no-fault schemes, such as workers’ compensation and motor

\textsuperscript{54}See Todd’s article in this collection. In Australia the High Court addressed the issue in Cattanach v Melchior (2003) 215 CLR 1 (holding that where a plaintiff couple become parents of an unintended child due to the defendant’s negligence, they would recover the cost of raising and maintaining the child). The decision has been widely criticised and subjected to legislative overrule in Queensland, South Australia, and New South Wales. For a collection of the American law, see Schwartz, Kelly, & Partlett, above n16 at 476-479.

\textsuperscript{55}Although tort law has been reluctant to impose duties on citizens to rescue others, the courts have been willing to do so when those others are particularly vulnerable and the rescue may be exerted without endangerment or great expense. Jane Stapleton, ‘The Golden Thread at the Heart of Tort Law: Protection of the Vulnerable’ (2003) 24 Australian Bar Review 41 (reprinted in Peter Cane (ed) Centenary Essays for the High Court of Australia, (2004) at 242-255); Jane Stapleton, ‘Duty of Care Factors: A Selection from the Judicial Menus’ in Peter Cane and Jane Stapleton (eds), The Law of Obligations: Essays in Celebration of John Fleming (1998) at 59-95; Liam Murphy, Beneficence, Law, and Liberty: The Case of Required Rescue (2001) 89 Geo LJ 605. These cases are often at the boundaries of liability as, for example, the liability of servers of alcohol to those imbibing or to third parties: See the debate before the High Court in Cole v South Tweed Heads Rugby League Football Club Limited (2004) 78 ALJR 933. The leading American case is Kelly v Gwin nell 96 NJ 538, 476 A2d 1219 (1984); the liability of those who know that a child is being sexually molested: JS & MS v RTH (1998), 155 NJ 330, 714 A2d 924; the liability of psychotherapists for the violent injuries caused by patients to third parties: Tarasoff v Regents of University of California, (1976) 17 Cal3d 425, 551 P.2d 334. American Law Institute, Restatement of the Law Third, Torts: Liability for Physical Harm: Proposed Final Draft (2005) §§ 37–44 (setting forth circumstances in which a duty of care can be imposed to act to protect others).

\textsuperscript{56}Mancur Olson, The Logic of Collective Action: Public pdgods and Theory of Groups (1965) (the classic statement of the dilemma of collective action).
vehicle accident compensation, could still have been covered, although the levels of compensation would, again pressed by budgetary concerns, have been modest.

Thus, pressures would have been great to resile from Harold Luntz’s vision in the world as it emerged over the last thirty years. However, to be pessimistic on this front does not answer the question whether the time is ripe for a comprehensive compensation scheme to replace a tort law that is assailed on all fronts. The political forces that would have weakened a Woodhouse-Luntz Scheme may be on the wane. To be sure there is no dearth of creative suggestions for reform that would transform discrete branches of tort law.

3. Should the Woodhouse-Luntz Scheme be Adopted?

Debate on this matter has been marred by a “nirvana” fallacy. Often, the cumbersome tort system has been compared to the idealised compensation scheme. Contrariwise the compensation system is caricatured and compared with

57 At the same moment that the Beveridge Report set a course for the Welfare State, the tradition of individual rights under the US Constitution was revivified in Brown v Board of Education 349 US 294 (1955). The court, citing support of social data, decided that segregated education was inherently unequal and therefore violative of the 14th Amendment. This strong stance set a mood of judicial activism as the courts in many contexts found that the courts should provide remedies for constitutional wrongs, thus finding that a citizen could bring a cause of action for denial of constitutional rights by federal officials. Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics (1971) 403 US 388. It is clear that this stream of constitutional tradition is counter-majoriturious and difficult to reconcile with Dicey’s views of sovereignty of Parliament. For a discussion in the American context, see Barry Friedman, ‘The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy’ (1998) 73 New York L Rev 333, at 334. Australian courts, in contrast, had no such remedial revolution to draw on. The idea of human rights that may be judicially enforceable came late and by way of Parliamentary action, eg, The Racial Discrimination Act 1974 (Cth). See David Partlett, ‘The Racial Discrimination Act 1975 and the Anti-Discrimination Act 1977: Aspects and Proposals For Change’ (1977) 2 UNSW L J 152. Individuals and groups have, under emerging principles of administrative law, gained entitlements to health and welfare services, Ellie Palmer, Judicial Review, Socio-Economic Rights and the Human Rights Act (2005).

58 Note the governmental interest would be to put back in place a tame tort system with restrictive damages. Michael Horowitz, former General Counsel of the Office of Management and Budget, has said: ‘The crisis in tort liability is really the third wave of the politics of redistribution. In the 1960s, the political system reallocated resources through vast on-budget transfer payment programmes such as Medicaid, disability and food stamps. In the 1970s, the focus shifted to the regulatory agencies … which had the discretionary power to impose massive effective taxes on regulated parties, and regularly did so. In the Reagan era, however, those avenues have become political dead ends. Tort law, previously a backwater area of private law, has now become the principal means for reallocating resources away from active economic produces to passive — often culpable — “victims” of the economic system.’ Manhattan Institute, Manhattan Report, cited in ‘Notable & Quotable’, Wall Street Journal (17 September 1986).

59 The consistent attempts at law reform reducing claim frequency and claim severity testify to that governmental interest. For an analysis in the medical malpractice context, see Patricia Danzon, Medical Malpractice: Theory, Evidence, and Public Policy (1985). It is not plain that the courts would have accepted tort reform that derogated from certain ‘structural due process rights’ that have become imbedded in the law and in the United States have attained constitutional status. See John Goldberg’s article ‘The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs’ (2005) 115 Yale Law Journal forthcoming.
a tort system stripped of its vices. Both systems are human institutions and are subject to institutional failures. The extremely difficult job for commentators is to assess the likelihood of failure for both systems.

One must first expose the purpose of the tort and compensation scheme. The roots of the scheme focus on compensation. Although it is likely that the Woodhouse-Luntz Scheme would erode compensation over time, it has distinct advantages over tort. The transaction costs of the private law tort system have been shown in numerous studies to be onerous. Schemes delivering compensation on a no-fault basis do so comparatively more efficiently than the tort system. If the scheme is universal, as in the Woodhouse-Luntz model, the advantages are even greater as the issue of whether the cause of the injury falls within the definition of a compensable event is otiose. All incapacities stemming from accidents will be compensable. For limited no-fault schemes, such as workers compensation and motor traffic accidents, the oft-litigated issue is whether the injury fell within the terms of the scheme, that is, was it in the course of employment or a traffic accident?

Let us concede the point in terms of compensation. Take, however, a clear objective of the torts system and that of any accident scheme – deterrence. Deterrence is socially important. We would want to devise ways of inculcating incentives upon actors to take care to avoid harm-producing activity. We would want the rules of the society designed in a way to produce optimally safe products and encourage persons to take optimal care to avoid harming others in their activities. The deterrence may be specific, as in the criminal law, or it may be general, where harm-producing activities are priced in such a way as to disincetive persons from engaging in the activity in a careless way or by reducing the extent of harm-producing activities. It is general deterrence that Richard Posner first took up in his seminal article over thirty years ago. Liability rules in negligence, he proposed, work an efficient allocation of resources under which negligent behavior is optimally deterred.

Luntz and others have criticised the notion of tort providing optimal deterrence. No doubt they are correct that, in the real world, the signals are dulled to such an

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60 James Kakalik & Nicholas Pace, Costs and Compensation Paid in Tort Litigation (1986).
extent that optimal deterrence is illusory. The deterrence perspective, however, places a burden on the proponents of compensation schemes to show how deterrence can be effected within those schemes. Those proponents usually prefer criminal or regulatory sanctions. The real question is whether, on the deterrence vector, regulation is superior to tort law. The answer must be, ‘it depends’. Regulation may be prone to failure in some instances but in others, be advantageous. I am a sceptic on whether proponents on either side make out their cases convincingly.

A. Non-Economic Rationales

Both compensationists and deterrence theorists take a consequentialist view of tort law and thus view its substance as furthering the particular ends, either of compensation of persons or of deterring tortuous conduct. Other theorists view tort law as a system of rules that instantiates corrective justice. To view tort as servicing external ends is, in this view, mistaken. These theorists disagree with both the compensationists and the deterrence theorists, who hold that the validity of tort is judged externally by its instrumental efficacy in either its furthering of compensation or of optimal deterrence. For these latter theorists, ends may be externally imposed through legitimate public action, but those ends are not part of the structure of private law. Thus, Ernest Weinrib, the champion of corrective justice, is quite content to see torts replaced with a compensation scheme. If the political choice is that welfare is increased in this way, corrective justice, a private law notion, has nothing to say.

It follows that corrective justice theorists are not enemies of the Woodhouse-Luntz Scheme. All they would say is that one cannot draw on tort as a failed system upon which to build the palace of a compensation system.

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68 Danzon, above n60 (recognising the costs of liability but finding that on balance the cost may be worth it by inculcation of safety.)
70 The debate on law and economics is sometimes seen as whether the end is descriptive or normative. Richard Posner and Ronald Dworkin debated this issue. It involves the old philosophical saw that an ‘is’ does not imply an ‘ought’. See Jules Coleman, Markets, Morals and the Law (1988) at 112-132; Richard Posner, The Economics of Justice (2nd ed, 1983) at 60-115.
71 ‘Now an assertion of the integrity of private law supplies no gound for preferring private to public law: both modes of ordering can have their own integrity. Affirmation of the coherence of private law in terms of corrective justice is in no way inconsistent with the advocacy of the replacement of tort law by a comprehensive compensation scheme on the New Zealand model’: Ernest Weinrib, ‘The Insurance Justification and Private Law’ (1985) 14 J Leg Stud 681 at 687.
72 Ibid.
Reformers favoring compensation schemes have focused on the economic shortfalls of the tort system. The virtues of tort law as a means of empowering citizens through vindication of private rights are often ignored or dismissed. Torts’ moral dimensions are cast aside. Instead, the adversarial system that encourages an assertion of rights is seen as wasteful and to be avoided if possible. I have argued elsewhere that punitive or exemplary damages are justifiable as a reflection of republican government. Tort law empowers citizens to share responsibility in governing: a private suit accompanied by responsive sanctions allows citizens to assert rights against powerful corporations and government and to bring them to book by dint of financial sanctions (damages) and publicity impacting upon their reputation. Some writers refer to this as ‘tort law as ombudsman’. In the American context with the jury it is more effective, in that citizens may rely on the jury as a mediating institution that ameliorates the power of government and the corporations.

Tort law also has process benefits that are not easily balanced in an economic calculus. The Woodhouse-Luntz model bows to interests of speedy resolution and rehabilitation, but more in terms of arguing that the common law is woefully inadequate in these respects. This cannot be gainsaid. Victims of accidents demand, however, more than compensation from any system. Processes that provide a sense of vindication and an ability to probe for explanations for accidents are vital. Some years ago, co-researchers and I examined medical malpractice claims in Florida that stemmed from permanent injury or death suffered during birth or treatment at hospital emergency rooms. Florida law requires that information on all closed medical malpractice claims be reported to the State Department of Insurance and our research covered adults aged 25-54. In total, 187 interviews were completed, with 127 households experiencing a birth-related injury, and 60 households experiencing an injury in a hospital emergency room. Our research polled claimants to ascertain their satisfaction with the tort system. We found that the ability to bring even an unsuccessful claim generated claim...
satisfaction: to have a sense of accountability and vindication and an opportunity to discover information about the cause of the accident was of vital importance to these claimants. These are desiderata discarded under compensation schemes because they introduce elements of procedure, claims resolution, and fact-finding that are expensive. They tend to be seen as vestiges of the tort system that should be traded off of wider and bureaucratic claims determinations.

In the common law, moreover, tort law is the repository for vindication of changing interests in a changing society. The trespassory torts of battery, assault, conversion and false imprisonment were early and powerful expressions of the role of the courts in recognising and enforcing citizens’ rights. A changing society is constantly creating new interests that traditionally have been nested in tort law for the coordination of social interactions. As mentioned above, this dynamic may continue despite a Woodhouse-Luntz Scheme, but with violence to its economic efficiency. Recall that in the most seminal of cases, Donoghue v Stevenson, the dicta, later to become the mantra, was that the categories of negligence are never closed. If this were not the case, a vitally creative stream of the common law

80 Id at 72-91.
81 See Timothy Lytton, ‘Using Litigation to Make Public Policy: Theoretical and Empirical Challenges in Assessing Product Liability, Tobacco, and Gun Litigation’ (2004) 32 J of L Medicine & Ethics 556, discussing the use of tort litigation for public health policy ends. For example, public nuisance actions have been brought in respect of two blights in modern American urban life, urban street gangs and the proliferation of guns. In the former category the California Supreme Court, in People ex rel Gallo v Acuna, 929 P 2d 596 (1997), enjoined, at the suit of city of San Jose, a widely described number of street gang members from conducting their violent and intimidating gang-like activities in a San Jose neighborhood. The court found that citizens had suffered particular damage through the gang activities that constituted a public nuisance. In the latter category of gun liability suits, cities have brought public nuisance actions against the handgun industry seeking reimbursement for police, emergency and medical costs stemming from accidental shootings and homicides. Victims who suffered either physical trauma resulting from an assault with a gun or emotional distress upon experiencing and witnessing the events could bring a public nuisance claim against gun manufacturers for the manufacture, marketing and distribution of the firearms, Ileto v Glock, Inc 349 F 3d 1191 (9th Cir 2003), but compare, City of Philadelphia v Beretta USA Corp 277 F3d 415 (3d Cir 2002) holding that even though illegal use of firearms may constitute a public nuisance, defendant was not liable because the firearms were no longer under his control. For a critical appraisal of the litigation see Richard Ausness, ‘Public Tort Litigation: Public Benefit or Public Nuisance’ (2004) 77 Temple L Rev 825. Congress recently (July 2005) enacted the Protection of Lawful Commerce in Arms Act, prohibiting the filing of lawsuits against manufacturers and dealers of firearms or ammunition for damage caused by the criminal or unlawful misuse of the product. The President has indicated he will sign the legislation.
82 The cases on privileges as defenses to the torts are particularly effective tools in showing the elementary rights protected by the common law. Schwartz, Kelly & Partlett, above n161 at 91-130. They have been extended to reflect modern concerns such as protection from sexual harassment. Anita Bernstein, ‘Reciprocity, Utility, and the Law of Aggression’ (2001) 54 Vanderbilt L Rev 1, at 64 (tort allows for finding of wrongfulness).
84 [1932] AC 562.
would have been dammed. The political process is a poor mechanism to promote new interests of this kind; interests that are often sectional and individual, and would not attract majoritarian support through legislation. The common law process, with its decentralised law creation, has an inherent advantage of tracking social norms and, through a testing process, deciding if they should enter the legal canon. The very best legislative reforms permit the courts to test limits against the law’s traditions to develop mature legal norms.

It is an Herculean feat to codify areas of the law where the past is fully captured for the regulation of relationships in the future, but it is much more difficult to create a system from whole cloth. The frustration that Luntz has voiced about tort as a starting point is understandable because of his wider agenda that the very basis of the compensation scheme should be social welfare. Luntz recognised, as others did not, that one may criticise tort law but one should not take it as a failed compensation system to build a replica in the form of a government scheme. Community responsibility – social welfare – is a new foundation that is justified by its own lights. The relevance of tort law for personal injury is not its compensatory framework, or its claims for justice, but that with its demise social savings can be made. It is like scrap metal from which a new fleet of ships can be built. Without a tort anchor, however, the writ for government intrusion lacks a standard drawn from tradition. In an era disfavouring social engineering, it is a quixotic quest.

85 Id at 619.
89 Anita Bernstein, ‘Restatement (Third) of Torts: General Principles and the Prescription of Masculine Orders’ (2001) 54 Vanderbilt L Rev 1367 (describing the presumptions against codification in the common law tradition).
90 As I argue the full social costs of abolition are poorly recognised.
91 If the search is for revenues to support a new social welfare scheme, the source may be found in a myriad of places. It may be expensive to enforce certain contractual rights. Social costs generated may be allocated to a social welfare scheme. It is difficult to see why one should stop at the destruction of tort rights. If the rationale of tort and compensation is the same, the argument is open that policy makers could choose the more effective. But the aims are quite different for most supporters of compensation schemes, like Geoffrey Palmer, who see no real role for deterrence and certainly see process values as anathema to the efficiency of a state compensation scheme. Social reform is at its safest for individual liberty where it proceeds from traditions imbedded in the society. Michael Oakeshott, *Rationalism in Politics and Other Essays* (new and expanded ed Timothy Fuller) (1990) 61 at 66.
B. Reform As We Have It

Luntz may count me as a nay-saying conservative content with the status quo that is far from satisfactory. But, Luntz, let me counter: there is no denying the unsatisfactory state of the law. I certainly agree that it is the duty of the commentators and the courts to move the law to a more satisfactory level. Conservative forces have restrained effective regulation for safety where called for. Reforms of compensation schemes have been held captive to industry interests. Asbestos, a success of the tort system, where long-held secrets were uncovered by the probings of plaintiffs’ lawyers, has become a blight creating inequities and enriching plaintiffs’ lawyers to no social advantage.

Reform of the tort system in the United States has become a theatre of the absurd. What passes for reform is often a dressed-up version of industry subsidisation. For example, caps on damages are a brutal way to lessen the incidence of liability subsidising the production of dangerous products or of substandard medical care. Generally speaking, it is the most catastrophically injured victims who will suffer when they are the ones likely to have been under-compensated in a world of uncapped damages. Many of the reforms are based upon unsubstantiated claims about the dire impact of damage awards on doctors’ practice of medicine, of investment in products, of citizens’ willingness to engage in ordinary social activities, and other elements of a parade of horribles.

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United States, it is a testament to the power of the sound bite and to interest group politics that reform proposals are supported and pressed despite contradictory empirical evidence. I do not want to enter into the lists of the recent Australian reforms, but I do note that the Ipp reforms in New South Wales are marked by a remarkable rush from idea to legislation. The reforms seem to respond to perceived abuses and liability burdens, however I do not see that careful empirical work that has laid a proper foundation for the changing of important legal rights. In this way, I am in accord with Luntz that modern tort reform lacks the coherence of his scheme. Luntz wanted, as did Justice Woodhouse, to promote social welfare. State and new federal reforms in the United States are motivated by the most base majoritarian interests to the detriment of the weakest members of our society, victims of accidents. It is noteworthy that not only tort law is under pressure. Workers compensation benefits have increased and thus steps are being taken to reduce payouts. For example, in 1993, California enacted legislation providing that no compensation shall be paid ‘for psychiatric injury if the injury was substantially caused by lawful, non-discriminatory, good faith personnel action’. Employees, in contrast, have complained about inadequacy of coverage limits on

96 J L R Davis, ‘Damages for Personal Injury and the Effect of Future Inflation’ (1982) 56 ALJ 168. The problem is a product of the common law damages remedy being awarded in a lump sum, once and for all. The catastrophically injured will incur uncertain costs into the future; the slightly injured will benefit from the interest of the insurance company in ridding from its portfolio of claims those that are low in value but are costly to process.

97 See also Thomas Eaton & Suzette Talarico, ‘A Profile of Tort Litigation in Georgia and Reflections on Tort Reform’ (1996) 30 Georgia L Rev 627, at 691–692 (calling for reliable data to inform policy making). Advocates of tort reform maintain that ‘[w]e have become a crazily litigious country’ in which plaintiff win rates and verdicts are ‘skysco[te][ing]’, ‘awards for punitive damages … [a]ve spiraled into the millions, not to mention billions of dollars,’ and the entire tort system is ‘out of balance, tilted to favor plaintiffs and reward their lawyers.’ Our data, together with the findings of every researcher who has systematically examined tort verdicts, solidly refute these claims. There are problems in the tort system, just as there are difficulties in every complex organisation, but the crisis described by most tort reformers does not exist. Deborah Jones Merritt & Kathryn Ann Barry, ‘Is the Tort System in Crisis? New Empirical Evidence’ (1999) 60 Ohio State LJ 315 at 396; Marc Galanter, ‘Real World Torts: An Antidote to Anecdote’ (1996) 55 Maryland L Rev 1093; Michael J Saks, ‘Malpractice Misconceptions and Other Lessons About the Litigation System’ (1993) 16 Just Sys J 7.

98 The authors of the Harvard Medical Practice Study concluded that ‘the problem is not a litigation surplus, but a litigation deficit. The gap between torts occurring in American hospitals and tort suits being filed in American courts is far greater than has ever been supposed.’ Paul Weiler, Howard Hiatt, Joseph Newhouse, William Johnson, Troyen Brennan & Lucian Leape, A Measure of Malpractice: Medical Injury, Malpractice Litigation, and Patient Compensation (1993) at 140–141. This assessment, based on careful statistical analysis, is in marked contrast to the philippic of critics like Peter Huber, Liability: The Legal Revolution and its Consequences (1990) and Walter Olson, The Liability Explosion: What Happened When American Unleashed the Lawsuit (1990). For an effective rejoinder to critics of punitive damages, see Daniels and Martin, Civil Juries and the Politics of Reform (1995).


claims and the eroding of benefits as levels of compensation are not adjusted for cost of living increases.101

It is necessary to be careful in translating American assumptions about power in the political process to Australia. The differences abound, particularly as political parties are a strong mediating force in the Australian context tending to mitigate the influence peddling common in the United States. However, the United States does have a more robust social research apparatus that, along with an influential legal academy and a vigorous press, forces a debate. The fact that, to date, a tort law has been quintessentially state law has helped reduce the incidence of special interest legislation in the United States.102 The problems of coordination of reform efforts and the vigorous debate has seemed absent in the rush to reform in Australia.

C. The Australian Perspective — The Role of Government

The barriers to reform through compensation schemes are less prominent in Australia than in the United States with its suspicion of government. The Australian political economy is much more under the sway of Benthamite notions than the United States with its republic political economy catalysed by the ideas of the American revolution.103 This can be salutary in harnessing tort law to effect social ends. Let me take two examples. In compensation for agent orange injuries in Vietnam, the American federal courts compensated the victims of agent orange by using a tort base and, in a procrustean way, cobbled together a compensation scheme.104 The lack of executive and legislative responsiveness dictated that the rights of the victims had to be vindicated by an inventive judicial compensation scheme.105 There followed later Congressional action.106 Australian victims had direct recourse to government that determined compensation through the executive. Both processes determined issues of causation. Arguably, the Australian process with a more responsive legislature was superior in drawing on wider resources outside the confines of judicial proceedings. If compensation was

101 Thomas Eaton, ‘The Bargain is no Longer Equal: State Legislative Efforts to Reduce Workers’ Compensation Costs Have Impermissibly Shifted the Balance of the Quid Pro Quo in Favor of Employers’ (2002) 37 Georgia L Rev 325 (arguing that destruction of the quid pro quo of the system makes necessary enhanced employers’ tort exposure).

102 Eaton & Talarico, above n87, at 629 (summarising state and federal initiatives). It is more costly and problematic for industry to push reform at the state level in the United States. Note that there is no federal common law of tort. The Bush administration has pushed for national legislation, 108th Congress, HR 4280, ‘Help Efficient, Accessible, Low-cost, Timely Healthcare (HEALTH) Act of 2004.’ Australian tort law is also state-based but in a context where the jurisdictions are few and the common law may be declared by the High Court of Australia. Compare Powers, above n19.


105 See Goldberg above note 24.
to be awarded, it did not entirely depend upon tort norms of causation, but could transparently be given on compassionate or general social policy or welfare grounds.

Other litigation, such as the Dalkon Shield claim, has forced the courts to create compensation structures and schemes to bring a measure of equal and fair compensation to victims. 107 With the appointment of Special Masters to handle the claims, the courts have become managers of claims and strayed far beyond the adjudicative tribunals of classic private law. 108 The fecklessness of the executive and legislative arms of government have arguably forced this role upon the American courts. The question must be whether the powerful remedial engine in the United States, despite its cumbersome process, has advantages in empowering the citizen. 109

D. The Persistence of Compensation

Since the 1970s government compensation schemes have lost their lustre. 110 In the midst of the recurring medical malpractice crises, the cry for a compensation scheme can be heard but no heed has been taken. The terrorist attack of September 11, 2001, was epoch-making in many ways. A side effect was to put the topic of compensation schemes on the plate of social policy again. The legislation was enacted in haste within 11 days of the attack. 111 Its goals were to provide compensation to families of those killed in the attacks and those who suffered physical injuries, as well as provide an alternative to civil litigation with the goal of avoiding lawsuits. Congress did not contemplate that tort law could play a constructive part. Its inefficient and costly ways were accepted. A compensation scheme was funded that would allow claims by victims (poorly defined) of the attack for the benefit of the victims and of the airline industry and all potential dependents. 112 As under court-inspired compensation schemes, Congress opted to appoint a Special Master to handle the claims and award compensation.

106 In 1984, the Veterans’ Dioxin and Radiation Exposure Compensation Standards Act (PL 98–542) was signed into law. It required the Veterans Administration to establish standards and criteria for resolving claims for benefits from death or disability as a result of exposure to Agent Orange and atomic radiation. Years later, the Agent Orange Act of 1991 (PL 102–4) called for a study on the effects of exposure to Agent Orange by the National Academy of Sciences. In 1996, the Agent Orange Benefits Act, which would have provided health care and compensation to children of Vietnam Veterans suffering from spina bifida was introduced, but never passed into law.


109 See Feldman, above n69.

110 Steven Sugarman, Doing Away with Personal Injury Law (1989) was a relatively lonely voice. Sugarman and John Fleming formed a Berkeley bulwark against the tenor of the times.

111 The Air Transportation Safety and System Stabilization Act (PL 107–42, HR 2926) was signed into law on 22 September 2001.
The levels of compensation traced those that could be expected in tort litigation. Compensation was designed to put victims back in the position they enjoyed prior to the injury or death of the relative. Collateral benefits were deducted from awards in a way less generous than the common law. The Special Master, Special Master Feinburg, has declared the compensation a great success. Most victims and their relatives seem to be satisfied.

However, it is clear that equality of treatment was sacrificed by Congress. One disaster was selected and victims and families were compensated while others, also the victims of terrorist attacks, were left in the cold. For example, the victims and families of the Oklahoma City bombing and those of other terrorist attacks, for example the USS Cole, received stingy compensation in comparison.

The inequality of treatment is explained by the 9/11 attack as an exceptional occurrence requiring, for political and practical reasons, an exceptionally generous response. Government had set no precedent while signalling compassion to an exercised populace. The claims of other victims had no particular political valiance in this context.

Special Master Feinburg’s claim of success is mainly based on the level of compensation he was able to accord to victims. Recognizing the importance of non-economic aspects of the tort system the Special Master invested heavily in time and effort to listen to the stories of claimants under the scheme. Victims and families were encouraged to tell of their loss and the personal tragedies that accompanied the loss of loved ones. This was partly dictated by a compensation scheme that demanded compensation according to lost earning capacity, but more it was a lending of an ear that seemed essential to a quietening and resolution of the agony of the deaths of so many. Not all agreed that a highly remunerated stockbroker should receive more than a fireman who acted heroically in the disaster, but the process of hearing the claim, Special Master Feinburg asserts, helped the claimants in coming to terms with their tragedies. He has also stated that the generous quantum of the compensation aided reconciliation.

Gillian Hadfield in a recent paper has questioned whether the hearings apprehended the common law desiderata in demanding open court explanations and answers from those who may have contributed to the deaths of the family members, and in drawing upon the subpoena power of the state to produce information about why people died and what steps were taken or not taken to help

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112 See Virgilio v Motorola Inc, 307 F Supp 2d 504 (2004), concluding that, under the Air Transportation Safety and System Stabilization Act, plaintiffs who had filed claims with the September 11 Victim’s Compensation Fund could not file a civil lawsuit against the manufacturer of radios used by fire fighters who were killed when the World Trade Center towers collapsed.


prevent those deaths.\textsuperscript{115} Hadfield strongly argues that the rule of law turns on our access to courts. She adds that psychological satisfaction is contingent on an explanation of the events through court process.\textsuperscript{116} She staunchly defends the democratic role of the courts, seeing this enfeeblement as a reason for erosion of civil liberties since 9/11. The fund was part of the belief that the civil liability system was inimical to the interest of the citizen, when it is quite the opposite. She states that any substitutes for ‘civil actions’ not only must give a reasonable substitution in money, but also the opportunity civil litigation gives ordinary citizens to participate in the institutions that give meaning to the rule of law.\textsuperscript{117}

An interesting question may be asked. Would Australia have given extraordinary compensation? Would that compensation have been given on the basis of putative tort recoveries, or if the Woodhouse-Luntz Scheme had been operative, would compensational levels thereunder have been sufficient? Would the processes under which compensation were viewed have obliged equal treatment to others? In a government structure more accommodating to public solutions, the response could have been more equal and less generous on a per victim basis. Would the claims process have been individualised to give explanations and to allow stories to be told? The reviviscence of torts concepts of compensation is remarkable and predictably would hold against claims of inequality.

4. **The Future**

It will be plain that, in contrast to many of my colleagues writing on this issue, I have more faith in the common law of tort. I see it as a dynamic set of rules that reflects society’s evolving norms. It is highly imperfect and our societies should, for reasons of utility and compassion, create compensation schemes in certain contexts, particularly where claims are mature and liability is well-rehearsed.\textsuperscript{118} Those schemes should deliver not only fair compensation but attend to non-economic imperatives of giving victims hearings and an opportunity for explanations.

Luntz will continue for a long time to cast a gimlet eye on present tort reform and will, at the same time, contribute to tort law, making it more responsive to the ends of justice. No one has fought the battle better than Luntz, but no one has been


\textsuperscript{116} Id at 16; Tom Tyler & Hulda Thorisdottir, ‘A Psychological Perspective on Compensation for Harm: Examining the September 11th Victim Compensation Fund’ (2003) 53 DePaul L Rev 355.

\textsuperscript{117} Hadfield, above n16 at 24.

\textsuperscript{118} Ironically, the demand in some mature areas for compensation systems is less urgent where the outlines of the common law are well settled as highway accidents. Liability claims are highly routinised, reducing transaction costs. Most of the demand comes in areas of perceived high claim frequency and severity, like medical malpractice, where the perceived social costs of tort liability are high.
more critical of the war in which he has been engaged. In the end, the world in this century is as flawed as that in Homer’s classical vision. Achilles is lauded for a fight in which he surpasses all others, and yet, his ambition for peace is beyond him because the gods do not make the world that way. The gods have not made the world in this part of the 21st century the way that would encourage a Woodhouse-Luntz Scheme. Gnarly tort law will continue to exist, not because it delivers compensation efficiently and not because it optimally deters, but because it is a system outside government bureaucracy that affords individuals an ability to bring claims that may demand an individual accountability and may produce information about the random occurrences in our society capable of devastating and dislocating harm. The best that we can hope for, in my view, is an engagement between those inspired by social welfare and those sceptical who would depend upon a decentralised system of claims adjudication. There is little to encourage supporters of the Woodhouse-Luntz Scheme, yet a dim light shines and hope springs in the destruction of the common law by the present spate of tort reform found in the United States and perhaps in Australia. Government action blindly and ill-advisedly taken may yet usher in, after public disillusionment, the good angels of a Woodhouse-Luntz Scheme.
Legislative Intervention in the Law of Negligence: The Common Law, Statutory Interpretation and Tort Reform in Australia

BARBARA MCDONALD*

1. Introduction

With the introduction of various civil liability legislation around the country (hereafter the Civil Liability Acts), tort law in Australia can no longer be regarded as largely a common law field. Tort law must now well and truly grapple with theoretical and practical issues of statutory scope and interpretation that have arisen in many other fields of law where there exists a broad body of legislation as well as fundamental and wide ranging common law principles.

As Professor Harold Luntz has warned, the legislative response to the so-called insurance ‘crisis’ in Australia in 2002 may well prove to have been misguided, ill-informed and ineffective: it merely tinkers with a system which has only a limited capacity to meet its own objectives or those attributed to it and which is clearly ineffective and arbitrary in meeting the broader needs of injured and disabled members of the community. The legislation may also prove to be harsh and unjust in its operation in some circumstances, although much will depend on the way in which it is construed by the courts and on whether they baulk at the idea that the legislature intended to achieve the stated purposes of the legislation — to reduce insurance premiums by reducing liability and to restore ‘personal responsibility’ — at all costs. This article will not comment on the justice or injustice of the provisions of the Civil Liability Acts nor on the persistent failure

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1 The term ‘Civil Liability Acts’ refers to the various pieces of state legislation introduced in 2002 and 2003 around the country under various names: Civil Liability Act 2002 (NSW) as amended by the Civil Liability (Personal Responsibility) Act 2002 (NSW); Civil Law (Wrongs) Act 2002 (ACT); Civil Liability Act 2002 (WA), Civil Liability Act 2002 (Tas), Civil Liability Act 2003 (Qld), Wrongs Act 1958 (Vic), Civil Liability Act 1936 (SA), Personal Injuries (Liabilities and Damages) Act 2003 (NT). All legislation enacted in 2002 and 2003 has been subject to frequent amendment since then.

2 For example corporations law, evidence law, the law of restraint of trade or unconscionable conduct or unfair contracts.


4 For instance, compensation for injury inflicted by others; corrective justice; deterrence or regulation; allocation of risk or loss based on economic efficiency or enterprise liability.
of government to undergo or resurrect a long overdue bolder and broader reappraisal of the existing compensation systems and of the alternative system in place in our close neighbour New Zealand. Rather, it will consider the place and role of statute law and particularly the Civil Liability Acts in the modern law of torts, against the background of the broad principles of statutory interpretation. It will take the Civil Liability Act (NSW) 2002 (as amended) (hereafter NSW CLA) as a model of the Australian reforms for the purposes of considering the coherence of the law and a range of pertinent questions:

i. Is the legislation a code or a supplement to the common law?

ii. Does the legislation ‘cover the field’ or only deal with some particular mischief, leaving the common law intact?

iii. What room is there for the common law to continue to apply or develop in the light of particular legislative provisions?6

iv. To what extent may the development of the common law be affected indirectly by some broader influence of these legislative enactments?

These are not entirely new questions for tort law, as shown by the historical review below, but what is new in Australia and unusual in the common law world is that statute law has encroached into issues at the very heart of the general principles of negligence: the negligence calculus and causation. The continuing relevance of the common law principles and cases in a number of areas is uncertain. In this new order, the courts will have to meet the challenge of restoring some coherence to the law of tort.7

No one would dispute the ideal that the law, whether embodied in statute or the common law, should be, if not readily comprehensible by all who have to live by it and apply it, then at least coherent. There is no doubt that the coherence of tort law has been ill-served by the rush to legislate in 2002 and that the legislatures did not use the advantage that legislatures usually have over courts in the process of law reform, that is, to legislate rather than adjudicate: to take the time necessary to give full consideration to the range of fact situations in which a statutory rule may operate and to make express provisions or exceptions for its operation across that range.8

Such a deliberate and careful process, although advised by the Chief Justice of New South Wales in his influential speech entitled ‘Negligence: The Last Outpost of the Welfare State’9 did not happen, with the period from the announcement of

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6 Note also that in Gifford v Strang Patrick Stevedoring Pty Ltd (2003) 214 CLR 269. McHugh J commented on the possibly increasing weakness of the presumption that a statute is not intended to alter or abolish common law rights unless it evinces a clear intention to do so, in view of the frequency of legislation doing so: at 284.

7 There are also challenges to the law of Contract because the statute also affects contractual liability. On coherence, see William Gummow, ‘The Common Law and Statute’ in Change and Continuity: Statute, Equity and Federalism (1999) at 26.


the project to passage of the final legislation taking a mere seven months. The first stage of the reforms introducing caps on damages (and costs) at least had precedent in schemes for motor accidents and medical liability claims. But the timetable and process for the second stage was more problematic. The Ipp Panel consulted a number of organisations and individuals and completed its task within the strict and short deadline given it, but after its Report was released on 2 October 2002, there was barely any time for or attempt at consultation on its recommendations. The second, much more substantial, stage of the Civil Liability reforms was enacted in Parliament barely three weeks later. It would seem that the criticism of legislation as ‘hastily and inconsiderately adopted’, referred to by Roscoe Pound in 1908 as one of many ways that judges, academics and lawyers try to diminish the validity of statute law, might be well deserved here. However ignoring statute law as apparently was done in the United States in the early 20th Century is not an option for courts and lawyers in the 21st Century.

Paradoxically, while the legislation in New South Wales was introduced in 2002 with the statement that it was the most important reform of the laws of negligence in 70 years (no doubt an allusion to Donoghue v Stevenson in 1932) the legislation does not attempt to change or formulate the general principles for determining the existence of a duty of care. They were the subject of that great case and have proved so difficult for courts to agree upon or define with precision. Arguably the duty of care is the most important factor in determining the scope of negligence liability.  

10 Motor Accidents Compensation Act 1999 (NSW); Health Care Liability Act 2001 (NSW).  
11 The panel appointed by a joint State, Federal and Territory ministerial meeting to examine and review the law of negligence.  
13 The Ipp Panel acknowledged that there was a dearth of hard or empirical evidence so the recommendations were ultimately based on the collective sense of fairness of the Panel 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 or who have made written representations to it: id at 1.39.  
15 For academics and students, any course which covered only the common law of torts, would give a very incomplete picture of the current law. I note, on the other hand, that, faced with 50 different states as well as a federal jurisdiction, the leading torts casebook in the United States by Victor Schwartz, Kathryn Kelly & David Partlett, Prosser, Wade and Schwartz’s Torts Cases and Materials on Torts (10th ed, 2000), analyses the common law but often attempts no more than an end note to a chapter warning that attorneys must carefully research state statutes. Perhaps that is a hangover of the judicial, professional and academic distaste for statute law identified by Roscoe Pound back in 1906 in the United States, (ibid), but it may just be a matter of pragmatism. Perhaps also it has come to this in Australia. Interestingly, it was only in the 7th edition of his treatise The Law of Torts in 1987, 30 years after its first edition that John Fleming included a table of statutes.  
16 Robert Carr, NSW, Legislative Assembly, Parliamentary Debates (Hansard), 23 October 2002 at 5764.  
17 [1932] AC 562.
This article will begin with an historical review of legislative intervention into tort law, followed by a brief survey of how the Australian courts’ interpretation of particular tort legislation reflects common questions of statutory interpretation and, perhaps more importantly, the limits of legislative impact and influence upon the common law. Turning then to the NSW CLA, it will proceed with an overview of the act followed by an analysis of the most problematic matters of interpretation. In this context, it will discuss those areas where the statute merely restates the common law and secondly those areas where the NSW CLA purports to regulate or change the common law principles dealing with three areas: the test for breach of duty in negligence, liability for obvious risks generally and in recreational activities; and the principles of causation. In this discussion, the questions set out above will be addressed as they arise, particularly the question as to the continuing relevance of the body of common law case law on a particular issue. The wording of the legislation raises many issues for interpretation by the courts. As the impact of this legislation will depend very much on the way in which ambiguities and uncertainties in its provisions are interpreted and as statutory interpretation now allows or even requires reference to the legislative history and extrinsic materials leading to an enactment, the article will conclude with an appraisal of the background sources relating to the NSW CLA as an aid to its interpretation and a brief general assessment of the continuing role of the common law of torts in this statutory age.

2. History of Legislative Intervention in Tort Law

While the fundamental principles of tort law are found in the common law, legislation has nevertheless played a significant role since the mid 19th Century. Legislative intervention in tort law has historically tended to be piecemeal and context-driven, through specific extensions or restrictions of liability rather than through broad-ranging reforms. Overall, and until recently, legislatures have been more concerned with supplementing or extending common law remedies than with restricting them.

In certain discrete contexts, legislatures have replaced or supplemented the common law of tort by schemes or codes. For example defamation law is codified in Queensland and Tasmania, and partly so in Western Australia, while in New South Wales, Victoria, South Australia and the two territories it is a ‘mosaic of common law overlaid by, far from uniform, legislation’. There are many state

18 The High Court of Australia had already exhibited a much more restrictive approach to duties of care in respect of physical injury than in previous decades, see Harold Luntz, ‘Torts Turn Around Down Under’ (2001) 1 Oxford Commonwealth Law Journal 95. Division 2 of Part 1A of the NSW CLA entitled ‘Duty of Care’ in fact deals with the principles relating to the test for negligence or breach of duty and the standard of care. The areas in which the statute restricts the duty of care are in relation to the duties to warn of obvious risks, except in some professional circumstances; duties in relation to the risks of recreational activities; duties of highway authorities; and duties to persons under the influence of alcohol or drugs. There are also immunities from liability for certain persons, for example, volunteers or ‘Good Samaritans’. See at pages see sections 4–5 below and see generally Joachim Dietrich, ‘Duty of Care Under the Civil Liability Acts’ (2005) 13 TLJ 17 for a discussion of the reforms on duty issues around the country.
and federal workers compensation schemes dating back to the 1920’s but radically restricted in the 1980s and 1990s.\textsuperscript{20} There are some limited schemes for sports injuries and for victims of crime.\textsuperscript{21} Some motor accident schemes modify the common law but retain the fault basis,\textsuperscript{22} while others such as in Victoria, Tasmania and the Northern Territory partly replace the common law with no-fault compensation.\textsuperscript{23} Many states have legislated in the area of occupiers’ liability: Victoria, Western Australia, and South Australia.\textsuperscript{24} There is specific legislation dealing with damage by animals, particularly damage by dogs.\textsuperscript{25} There is state and federal legislation dealing with damage by or on aircraft.\textsuperscript{26} There is strict liability for defective products under the \textit{Trade Practices Act} 1974 (Cth).\textsuperscript{27} There is strict statutory liability for loss caused by misleading and deceptive conduct outside as well as within a contractual setting, which applies to circumstances beyond the torts of deceit and negligence.\textsuperscript{28}

While most of this piecemeal reform occurred in the 20\textsuperscript{th} Century, one of the most significant pieces of reform to the general scope of tort liability occurred much earlier, in the midst of the railway\textsuperscript{29} and industrial revolutions and at the height of free enterprise, trade expansion and laissez faire politics. Known as \textit{Lord Campbell’s Act},\textsuperscript{30} the \textit{Fatal Accidents Act} (1846) was introduced in England in 1846 and followed immediately in New South Wales.\textsuperscript{31} Its descendant is the \textit{Compensation to Relatives Act} 1897 (NSW) and similar statutes throughout Australia. It provided a statutory exception to the common law rule that ‘in a civil court, the death of a human being could not be complained of as an injury’,\textsuperscript{32} by providing for a ‘wrongful death’ claim by dependants of the deceased victim.

Other significant legislative measures that extended general common law liability in tort were:

\begin{itemize}
\item John Fleming, \textit{The Law of Torts} (9\textsuperscript{th} ed, 1998) at 581. See also Sally Walker, \textit{Media Law: Commentary and Materials} (2000) at 3.5. At the time of writing there were well-developed proposals for uniform defamation laws throughout the Australian states and territories, which will legislate on some aspects of defamation law but leave other aspects to the common law.
\item Fleming notes that the original English \textit{Workers’ Compensation Act} (1897) was inspired by Bismarck’s historical measure of 1884, id at 575. Australian workers compensation statutes include the \textit{Workers Compensation Act} 1987 (NSW) as amended, and the \textit{Accident Compensation Act} 1985 (Vic).
\item For example \textit{Sporting Injuries Insurance Act} 1978 (NSW); \textit{Victims Support and Rehabilitation Act} 1996 (NSW). For further references see Rosalie Balkin & Jim Davis, \textit{The Law of Torts} (3\textsuperscript{rd} ed, 2004) at para 12.12.
\item \textit{Motor Accidents Compensation Act} 1999 (NSW).
\item For example \textit{Accident Compensation Act} 1985 (Vic) and see Balkin & Davis, above n21 at Chapter 12.
\item Peter Handford, ‘Occupiers Liability Reform in Western Australia and Elsewhere’ (1987) 17 \textit{UWALR} at 182 and see note 28 below.
\item For example, \textit{Compansion Animals Act} 1998 (NSW); \textit{Domestic (Feral and Nuisance) Animals Act} 1994 (Vic). For references to legislation in other states see Balkin & Davis, above n21 at para 15.19.
\item \textit{Damage by Aircraft Act} 1952 (NSW); \textit{Civil Aviation Act} 1998 (Cth) as amended; \textit{Civil Liability (Carriers’ Liability) Act} 1959 (Cth).
\item \textit{Trade Practices Act} 1974 (Cth), Part VA.
\item Id at s52.
\end{itemize}
i apportionment for contributory negligence where it was previously a defence;33
ii contribution provisions, giving plaintiffs greater flexibility with regard to joint tortfeasors and allowing wrongdoers to seek contribution from other wrongdoers liable for the same damage;34
iii legislation in New South Wales in 194435 and the two territories36 providing a remedy for nervous shock, to overcome the decisions of Bourhill v Young37 and Chester v Waverley Corporation,38 discussed in more detail below;
iv survival of actions legislation;39
v legislation to make the crown vicariously liable for breaches of statutory duties by officers of the crown and to make employers liable for breach of a statutory duty imposed directly on an employee.40

Legislation abolishing common law remedies without the provision of some alternative system or scheme of compensation (for example workers compensation schemes or motor accidents schemes such as in Victoria) has been rare and usually confined to anachronistic common law actions such as enticement of a wife or harbouring an errant wife, abolished by the Family Law Act 1975 (Cth)41. Different states have used different methods to redress the gender imbalance in regard to consortium actions: the action by a husband for loss of his injured wife’s consortium and servitium was abolished by statute in New South Wales, Western Australia, Tasmania, the Australian Capital Territory and Northern Territory,42 partly abolished in Victoria,43 but extended to give equal rights to a wife of an injured husband in Queensland and South Australia.44
3. A Brief Historical Survey of the Interplay of Statutes and Common Law in Tort

Referring to two ways that courts could ‘use’ statutes — directly by construction and indirectly by analogy — Professor Atiyah wrote:

Construction, as a matter of theory at least, requires the court to give effect to what it thinks the legislation actually enacts. Using statutes by way of analogy quite clearly involves using them to produce results which the legislation does not enact.\(^\text{45}\)

Roscoe Pound writing in 1908 subdivided these two uses further.\(^\text{46}\) Construction of a statute could be “liberal” — that is, an intent to cover the field could be readily inferred — or ‘strict and narrow’; use by analogy could treat a legislative policy as superior to those of the common law or merely as of equal weight with a common law rule. To that could be added a fifth category of case if not of ‘use’: where the courts refuse to draw an analogy from a body of statute law because they do not see it as reflecting a compelling legislative policy.\(^\text{47}\) Paul Finn has argued that all four of Pound’s categories have an appropriate place in our law and showed how different Australian cases across a range of areas have reflected each of these approaches at one time or another.\(^\text{48}\)

A. Construction of Statutes in Tort Law

Where legislation is unambiguous, a court generally has little choice or leeway in interpretation, no matter what judges, litigants, lawyers or academics would prefer. The court must give effect to the ordinary, plain or natural meaning of the statute, read in context and bearing in mind the legislative intent or purpose.\(^\text{49}\) This was so in the case of the \textit{Law Reform Miscellaneous Provisions Act} 1965 (NSW) which provided for apportionment for contributory fault but only, by reference to the

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\(^{46}\) Pound, above n14 at 385.

\(^{47}\) Pound refers to a decision of the United States Supreme Court in \textit{Chambers v Baltimore & Ohio RR} (1907) 207 US 142 at 149 refusing to see the ‘universal’ enactment of Lord Campbell’s Act as of equal weight with common law doctrines. Compare \textit{Morgan v States Marine Lines Inc} (1970) 398 US 375, cited in \textit{Esso}, above n45 at [26].

\(^{48}\) Paul Finn, ‘Statutes and the Common Law’ (1992) 22 UWALR 7 at 20.

\(^{49}\) The task of the court is to construe the legislation in its natural and ordinary meaning, having regard to the context and purpose of the enactment as informed by the history of the enactment and the state of the law when it was enacted: McHugh J in \textit{Gifford}, above n6 at 341; \textit{Pyneboard Pty Ltd v Trade Practices Commission} (1983) 152 CLR 328 at 341; \textit{Malika Holdings Pty Ltd v Stretton} (2001) 204 CLR 290 at 299. See generally Patrick Parkinson, ‘Interpreting Statutes’ \textit{Tradition and Change in Australian Law} (3rd ed, 2005) at 243 and cases cited therein; Dennis Pearce & Robert Geddes, \textit{Statutory Interpretation In Australia} (5th ed, 2001). Sometimes however the courts may construe one of a recognised category of statutes by ‘reference to general principles rather than by a textual analysis of individual enactments’: McHugh J in \textit{Webster v Lampard} (1993) 177 CLR 598 at 619, with respect to a statute giving protection from liability to a person carrying out a public duty.
definition of the defendant’s ‘fault’ in the Act, where it would have been a complete defence at common law. Contributory negligence at common law was a defence only to negligence in tort, not to intentional torts (and not to strict liability) and not to contractual claims based on breach of a contractual duty of care. There was a widely held view that where duty and liability in tort and contract was concurrent, a plaintiff should not be able to avoid the partial defence of contributory negligence by pleading the case in contract rather than tort. Unfortunately this view overlooked the wording of the statute. In Astley v Austrust\(^{50}\) the equivalent South Australian legislation was read literally by the High Court which held that the NSW CLA did not provide for apportionment for contributory negligence in contractual claims.\(^{51}\)

In a remarkably quick reaction, most probably after lobbying by the insurance industry and accountancy bodies, legislatures around the country legislated to make contributory negligence not only grounds for apportionment in tort claims where it would have been a complete defence at common law but also in contractual claims where the duty breached was concurrent and co-extensive with the duty in tort.\(^{52}\)

While state legislatures were quick to act after Astley, they have not always been so quick to react to judicial pleas for rectification of unclear or badly worded statutes. For example, the High Court has been called on several times to settle questions of interpretation of the Law Reform Miscellaneous Provisions Act 1946 (NSW) (and its equivalents in other states) dealing with rights of contribution between tortfeasors. In Bitumen and Oil Refineries (Australia) Ltd v Commissioner for Government Transport\(^{53}\) the High Court referred to a subsection of the equivalent English statute which the House of Lords had considered and remarked:

But as to the construction of the sub-section …their Lordships were unable to agree. It is small wonder, considering the economy of expression practised in the provision and the apparent failure to advert to any of the many practical problems involved in applying a general principle of contribution between persons liable jointly or severally for the same loss or damage.\(^{54}\)

That one subsection was the subject of three High Court appeals over a period of 43 years in addition to at least one House of Lords decision. Although Barwick CJ pointed out in Brambles Constructions Pty Limited v Helmers\(^{55}\) that the obscurity of the wording ‘cries out for some legislative intervention’ in order to clarify the section, that call has fallen on deaf ears. Let us hope the same fate does not await the uncertainties in some aspects of the new proportionate liability regimes.\(^{56}\)

\(^{50}\) (1999) 197 CLR 1 (hereafter Astley).
\(^{53}\) (1955) 92 CLR 200.
\(^{54}\) (1955) 92 CLR 200 at 207 (Dixon, McTiernan, Webb Fullager & Taylor JJ).
\(^{55}\) (1966) 114 CLR 213.
\(^{56}\) See below Section 4.
Where legislation is ambiguous or its meaning unclear, the courts immediately have more leeway in interpretation. The uncertainty may require the court to look carefully at the historical context of the legislation to determine what it was intended to achieve or what mischief it was intended to cure. Thus in Gifford v Strang Patrick Stevedoring Pty Ltd\(^5\) members of the High Court looked at and relied on the Hansard record to elicit the intention of Parliament in enacting a 1944 NSW Act dealing with liability for nervous shock.

A common issue of interpretation is whether certain legislation is intended to ‘cover the field’\(^5\) or merely to remedy a particular problem or fill a particular gap while allowing the common law to develop. Legislation is often silent as to its intentions in this regard. A prime example in tort law is in relation to recovery for nervous shock in New South Wales. After the stirring dissent of Evatt J in Chester v Waverley Corporation,\(^5\) the New South Wales Parliament became one of the few in the common law world to pass legislation providing for a statutory liability for nervous shock suffered by certain family members of the victim of a defendant’s wrong.\(^6\) This legislation was intended to overcome the restrictions of the common law, set out in Bourhill v Young\(^6\) that nervous shock is not generally compensable at common law and in Chester that a person could only recover for nervous shock suffered as a result of actually seeing or hearing the victim killed, injured or put in peril by the defendant. The legislation removed the need for the named plaintiffs to prove an independent duty of care to themselves and created a statutory liability to the parents or spouse\(^6\) even where they did not see or hear the event.\(^6\) But for other relatives, the statute required that they see or hear the event.

Other states did not enact legislation and it was in those states that the common law continued its development so that eventually in 1984, in Jaensch v Coffey\(^6\) on appeal to the High Court from South Australia, the common law abandoned its requirements of sight or hearing of the actual accident and, in line with the English case of McLoughlin v O’Brien,\(^6\) extended recovery to the wife of a victim who had attended the ‘aftermath’ of the accident. Once freed of proving presence at the scene, relatives in New South Wales, other than a parent or spouse, were then often better off suing at common law than under the statute, although they still had to prove a duty of care to themselves (which the statute made unnecessary where it applied). Non-relatives of the victim, for example rescuers, friends, passengers of vehicles, had to rely on the common law.

\(^5\) Gifford, above n6.

\(^5\) For example, see Gummow J in Collier Constructions Pty Ltd v Foskett Pty Ltd (1990) 19 IPR 44.

\(^5\) (1939) 62 CLR 1 (hereafter Chester).


\(^6\) [1943] AC 92 (hereafter Bourhill).

\(^6\) With extended meanings given to the words ‘parent’ or ‘spouse’ in the legislation.

\(^6\) Although without a definition of ‘nervous shock’ it was left to the common law to construe this phrase and it was considered that by retaining the word ‘shock’ parliament intended to refer only to illness caused by sudden events not long term problems: Chiaverini v Hockey (1992) ATR 81–223.


\(^6\) [1982] RTR 209.
For decades, the weight of authority was that the 1944 Act had not intended to cover the field but in Gifford v Strang Patrick Stevedoring Pty Ltd it was decided in the District Court of New South Wales that the children of a worker crushed to death on a building site could not recover for their nervous shock because they had not seen the accident as required by s4 (1)(b) of the 1944 Act and that that Act covered the field of nervous shock actions leaving no room for the common law in New South Wales. The Court of Appeal disagreed on that point but was constrained by the then prevailing common law requirement of attendance at the aftermath. Following the decision of the High Court in Tame v State of New South Wales; Annetts v Australian Stations Pty Ltd that direct perception of the accident or aftermath was not essential at common law, an appeal to the High Court by the children was successful. The High Court held, finally, that the 1944 Act was not intended to cover the field. Its wording was expansive or ‘extensive’ rather than definitive or restrictive. But by the time this issue was settled, it was no longer of long-term importance in negligence cases because of the 2002 reforms.

Apart from the statutory liability, the development of the common law for recovery of nervous shock was cautious and slow. Courts retained the nomenclature of nervous shock with its inherent notion of a sudden event. Often pronouncements and obiter dicta of the higher courts were treated almost as though they were statutory provisions. For example, the obiter dictum of Deane J in Jaensch v Coffey that ‘in the present state of the law [a] duty of care will not exist unless the reasonably foreseeable psychiatric injury was sustained as a result of the death, injury or peril of someone other than the [defendant]…’

In 2002 the High Court in Annetts liberated the law of nervous shock from what had come to be regarded as a fixed or quasi-statutory requirement of the common law — the requirement of perception of the scene or aftermath — and held that the ordinary principles of negligence applied to claims for nervous shock and that the relevant criteria for the existence of a duty were the same as in all negligence cases. Reasonable foreseeability of shock suffered by a person in the position of the plaintiff remained the cornerstone of liability and a number of other factors might also point to a duty of care, for example control by the defendant and the pre-

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67 (NSW District Court, Naughton DCJ, 24 August 1999).
69 Id at 332–334 (Gleeson CJ), 337–338 (McHugh J).
70 Schedule 3 of the Civil Liability (Personal Responsibility) Act 2002 (NSW) repealed Part 3 of the Law Reform (Miscellaneous Provisions) Act 1944 (NSW) which provided for a statutory action for nervous shock. Note however in respect of intentional injury Clause 11 of Schedule 1 of the Civil Liability Act 2002 as amended provides that Part 3 of the 1944 Act ‘continues to apply despite its repeal [sic]’ in relation to acts done with intent to cause injury or death etc as set out in ss3B(1)(a).
71 Jaensch, above n64 at 602. This view was rejected in FAI General Insurance, above n66 but was applied in Tasmania: Klug v Motor Accidents Insurance Board (1991) ATR 81–134. Note that in New South Wales this common law basis for recovery may continue to be important as the drafter of the NSW CLA Part 3 does not seem to have had this situation in mind but has not excluded it.
existing relationship between the parties. Sudden shock was not a necessary requirement of recovery. Actual perception of the accident or aftermath was not a fixed requirement. Rather there were a number of relevant factors or salient features which would be determinative of the existence of a duty of care, grounded on reasonable foreseeability of the plaintiff.

The last chapter in this saga so far is the NSW CLA. The ‘mental harm’ provisions of the NSW CLA, in Part 3, far from restricting the common law, in fact virtually mirror most of the common law developments particularly those set out in *Annetts*. However the legislation is more uneven in its treatment of witnesses to and rescuers in an accident: the former appear better off, the latter worse off. It also winds back the clock for parents and spouses of primary victims who previously had the benefit of the 1994 Act.72

**B. Analogy from Statutes in Tort Law**

More controversial than construction of statutes is the indirect effect of statutory developments on the common law.

It is generally accepted that the common law may evolve in the context of changing social conditions, although judges disagree as to whether it may explicitly or expressly react to change and as to whether obsolescence on its own is sufficient justification for a court to overturn a long settled principle. Justice Brennan has said:

> Within proper limits, judges seek to make the law an effective instrument of doing justice according to contemporary standards in contemporary conditions. And so the law is changed by judicial decision, especially by decision of the higher appellate courts.73

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72 ‘Mere bystanders’ or witnesses, whom the NSW CLA now recognises in s30 (2)(a), may thus be better off than at common law which has so far refused to recognise a duty *Bourhill*, above n61, *Alcock v Chief Constable of Yorkshire* [1992] 1 AC 390 at 403 and 416. On the other hand, parents and spouses of negligently killed or injured victims are now clearly worse off than under the 1944 Act which relieved them of the need to establish that the defendant owed them a separate duty of care in addition to a liability to the victim. They now, like everyone else, have to show that they were owed a duty of care. Perhaps this is fair given the increase in the range of nominate medical conditions recognised since that time and the difficulty of deciding if they amount to an ‘illness’, but in the absence of empirical data about the number and range of verdicts or settlements of nervous shock claims by parents or spouses, it is hard to see that we are better off making such claimants go through the legal hoops of establishing a duty of care if they are proved to have suffered a psychiatric illness following the negligently inflicted death of a child or spouse. A more appropriate enactment, which might head off nervous shock and resulting claims, would be a modest bereavement payment as in the United Kingdom, *Fatal Accidents Act* 1976 (UK) s1A. Other classes of persons now worse off than at common law are the rescuer or fellow employee (as to which see *Chadwick v British Transport Commission* [1967] 1 WLR 912 but compare *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455; and *Mt Isa Mines Ltd*, above n66 respectively) who is called to the scene of the accident after it occurs, and in the case of a rescuer is exposed to some danger. See Balkin & Davis, above n21 at 254–262 on the legislation and common law in all states.

Talking about the power of the judiciary relative to that of the legislature, Justice McHugh of the High Court recently stated:

Law making in private law cases raising social economic and sometimes political issues … has strengthened the position of the judiciary. Cases concerning such issues frequently enable the judiciary to change the direction of society.74

In doing so, how is a court to determine contemporary standards and conditions? That is a broader question than the context of this paper allows.75 The question in our context is: how and when is it legitimate for a court to take into account statutory developments when it is considering the common law, on the basis that they reflect significant changes in social policy or conditions or community values and sentiment?

In his Chorley Lecture in 1984, ‘Common Law and Statute’, Atiyah asked several questions:

Can the courts…use statutes as analogies for the purpose of developing the common law? Can they justify jettisoning obsolete cases, not because they have actually been reversed by some statutory provisions, but because a statute suggests that they are based on outdated values? Could the courts legitimately draw some general principle from a limited statutory provision, and apply that principle as a matter of common law?76

In Esso,77 the High Court was considering whether it should overturn its earlier decision in Grant v Downs78 which had established a ‘sole purpose’ test for legal professional privilege and adopt instead a ‘dominant purpose test.’ In the end it did so, by a majority, but not for one of the reasons advanced by the appellant, namely a so called ‘doctrine of analogy’ by which the Court should take into account and follow a trend of legislative enactment on the issue. In an earlier case, Adelaide Steamship Co Ltd v Spalvins,79 the Full Federal Court had concluded that the Evidence Act 1995 (Cth) had ‘created an entirely new setting to which the common law must now adapt itself.’80 But the members of the High Court in Esso pointed out that there was a fundamental difficulty with this line of reasoning in this context and that was that the legislation did not apply throughout Australia, but only at the time in federal courts, one state and one territory:

There is no consistent pattern of legislative policy to which the common law in Australian can adapt itself.81

76 Atiyah, above n45 at 6.
77 Esso, above n45.
78 (1976) 135 CLR 674 (hereafter Grant).
80 Ibid.
81 Esso, above n45 at 62.
Australian courts developing ‘but one common law’\(^{82}\) are in a more difficult position because of the federal system with its multiple states and split of federal and state powers. While in other cases, the High Court had taken into account a body of federal law\(^{83}\) or a uniform pattern of legislation in five states in criminal law statutes,\(^{84}\) this was not the case in respect of legal professional privilege, where only three state legislatures and the federal legislature had enacted the test but with varying application, and other state parliaments, although they had considered the issue, had not done so. Nevertheless, the fact that the common law under \textit{Grant v Downs} was out of step, not only with the common law position in Canada, England, Ireland and New Zealand, but also with the statutory provisions of the Commonwealth and New South Wales, encouraged the High Court to reconsider (and ultimately to overturn) its previous decision.

By contrast, four members of the majority of the High Court which recently upheld the common law immunity from negligence of advocates in \textit{D’Orta-Ekenaie v Victoria Legal Aid},\(^{85}\) against the trend in other countries, found support for their decision in the fact that the \textit{Victorian Legal Practice Act (1996)} expressly provided that it did not abrogate the common law immunity and that the legislature had deliberately not adopted the recommendation of the Law Reform Commission of Victoria that the immunity be removed by legislation. The sections of the NSW CLA imply that the immunity would be preserved.\(^{86}\)

Of course the failure of a legislature to adopt and enact a law reform proposal does not necessarily reflect a considered decision by the legislature not to do so. It might equally reflect a lack of interest in, or of research into, the issue, a practical inability, or a lack of political will. In some cases, courts have been prepared to take the step that the parliament in a particular jurisdiction had not taken, for example, to abolish the highway authorities’ immunity, in \textit{Brodie v Singleton Shire Council},\(^{87}\) and landlords’ immunity in \textit{Northern Sandblasting v Harris} and \textit{Jones v Bartlett},\(^{88}\) where such immunities were inconsistent with other developments in the law.

The question of whether courts should regard the NSW CLA as evincing some broad legislative policy of restricting liability for negligence, which should be applied to aspects of the common law not mentioned by the act, is an issue which has already surfaced and already provoked disagreement at appellate court level. In \textit{Harriton v Stephens; Waller v James}\(^{89}\) the New South Wales Court of Appeal recently considered whether the law should recognise a common law duty upon a doctor to avoid the so-called ‘wrongful life’ of the plaintiff.

\(^{82}\) \textit{Lange v Australian Broadcasting Corporation} (1997) 189 CLR 520 at 653.
\(^{84}\) \textit{R v L} (1991) 174 CLR 379.
\(^{85}\) (2005) 214 ALR 92 (hereafter \textit{D’Orta-Ekenaie}).
\(^{86}\) Id at [48]–[54] (Gleeson CJ, Gummow, Hayne & Heydon JJ).
\(^{87}\) (2001) 206 CLR 512.
\(^{88}\) (1997) 188 CLR 313 and (2000) 205 CLR 166 respectively.
\(^{89}\) [2004] NSWCA 93 (hereafter \textit{Harriton}). This case and the recent ‘wrongful birth’ cases are discussed by Stephen Todd in this volume.
Ipp JA supported his decision to reject the imposition of a duty on doctors, on doctrinal, philosophical and logical grounds, by the following ‘policy considerations’:90

Generally speaking, at the present time, when legislatures throughout the country have legislated or have foreshadowed legislation restricting liability for negligence… it would be quite wrong to expand, by judicial fiat, the law of negligence into new areas.

Mason P (who dissented from the majority decision denying the duty of care) disagreed in strong terms with this view:

I do not deny that legislation may exercise a gravitational pull upon the development of legal principle in particular fields (see generally Pilmer v Duke Group Ltd (In Liq) (2001) 207 CLR 165 at 230 [170]). But I know of no legal principle that directs the common law to pause or go into reverse simply because of an accumulation of miscellaneous statutory overrides. Parliament has frequently overridden or modified fundamental legal doctrines such as client legal privilege, self-incrimination privilege and natural justice. But the common law has stood resolute to its fundamental principles except when clearly expressed legislation indicates that they must be abandoned in particular contexts.91

In D’Orta-Ekenaike, members of the High Court majority refused to treat the recent wave of tort reform as indicative of any persuasive policy relevant to the issue of advocates’ immunity:

Some other legislative events must be noticed. Since 1999, State legislatures have given close attention to what has been called ‘tort law reform’. In particular, close attention has been paid to the law of negligence, and a number of statutes have been passed since 2000 which have dealt with that general subject. In none of that legislation has there been any reference to the immunities from suit of advocates, witnesses or judges.92

This approach implies that courts will be reluctant to give the civil liability acts any greater application or influence than the strict interpretation of their provisions requires.

Even more questionable than finding some indirect legislative influence from current statutes is the use of new legislative provisions as the basis for reformulating common law principles when a court is deciding a case which arose before the commencement of the legislation. It is arguable that this is what is happening in the New South Wales Court of Appeal in a series of cases93 where causation is an issue. Instead of applying the common law principles set out by the

90 Harriton, above n89 at [322], and [337].
91 Id at [164]. Mason P noted particularly that Parliament had ‘deliberately stepped back from the present issue’ when it legislated in respect of ‘wrongful birth’ claims and went on: ‘I see no pattern or guidance in the spate of statutory modifications operating in areas other than the one presented for determination in these appeals’.
92 D’Orta-Ekenaike, above n85 at [53] (Gleeson CJ, Gummow, Hayne & Heydon JJ).
High Court in *March v Stramere*\(^{94}\) and *Bennett v Minister of Community Welfare*\(^{95}\) the principles applied look remarkably like the new provisions of the NSW CLA based on the recommendations of the Ipp Report which in turn drew extensively on the work of Stapleton.\(^{96}\) For reasons I set out below I do not think that the principles set out in the act are the same as the common law principles laid down in *March*. In the meantime, special leave from these cases has been granted by the High Court which may or may not be asked to consider if it wants to reformulate the common law principles settled in *March* and *Bennett* to take into account legislative developments since those decisions. It seems unlikely that it would do so, as it would mean that a plaintiff would have his or her case decided by reference to legislative developments which occurred after the tort in question. While a change in the common law at the highest appellate level necessarily operates retrospectively with regard to the parties before the court (or as a result of some fiction\(^{97}\) of the declaratory theory of judicial law-making that the new common law rule was hidden, waiting for the court to find it), retrospective application of statutes by analogy would seem to be an unjustifiable expansion of legislative influence.\(^{98}\)

4. **The Substance and Interpretation of the Civil Liability Reforms**

Now turning to the 2002 reforms. It is as well to note at the outset that the NSW CLA is not only about tort law and not only about personal injury law. It also regulates liability for breach of contractual duties of reasonable care so that contract lawyers will also now have to grapple with how, for example, common law causation and remoteness principles in contract law are affected by the ‘causation’ principles set out in the Act. (Those statutory principles will not however affect the common law principles in relation to strict contractual warranties or duties). Furthermore, the act affects liability for any type of loss or damage resulting from negligence, based in ‘contract, tort, under statute or otherwise’,\(^{99}\) despite the fact that many of its provisions are based on the recommendations of the Ipp Report which dealt only with liability for personal injury and death. One of its most important reforms, the introduction of proportionate liability to replace joint and several liability for negligence, applies only in respect of property damage and purely economic loss.

The overall purpose and tenor of the NSW CLA will be an important factor in interpreting particular provisions. Thus, this part of the article will first give a brief overview of the NSW CLA before moving to an analysis of the most problematic matters of interpretation. Those include areas where the statute merely restates the common law and three significant areas where the NSW CLA purports to regulate

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\(^{94}\) (1991) 171 CLR 506 (hereafter *March*).

\(^{95}\) (1992) 176 CLR 408 (hereafter *Bennett*).


\(^{97}\) *D’Orta-Ekenaike*, above n85 at [358] (Callinan J).


\(^{99}\) CLA, s5A.
or change the common law principles: the test for breach of duty in negligence, liability for obvious risks generally and in recreational activities; and the principles of causation. A particular focus will be the question of the continuing relevance of the body of common law case law.

The NSW CLA makes a number of significant changes to the common law, all designed to reduce liability for negligence:

i Reduction of common law damages and recoverable costs. These reforms do not go as far as Sugarman suggests. They reduce liability and change the burden of liability for losses while still retaining liability for fault. They do introduce some disincentive against bringing claims, particularly small claims, rather than relying on other sources of financial assistance such as Medicare and private health insurance systems and government funded social services or disability pensions.

The legislation introduces caps on damages, both economic (for loss of past and future earning capacity) and non-economic; threshold amounts for damages for non-economic loss; a higher discount rate for calculating lump sums; limits on claims for gratuitous care; and substantial limits on the recoverable legal costs for smaller claims.

ii A ‘modified Bolam’ defence for professional negligence. That is, a professional will not now incur liability in negligence if it is established that the professional acted in a manner that, at the time, was widely accepted in Australia by peer professional opinion as competent professional practice.

iii Protection from liability for negligence for volunteers connected to defined community and voluntary organisations. Protection does not extend to voluntary or community organisations or entities for their own negligence (whether in breach of an ordinary or a non-delegable duty eg in a relationship analogous to that of a school) although the protection given to volunteers will reduce their burden of vicarious liability.

iv Proportionate liability for property damage and economic loss claims.
The legislation gives rise to a number of issues of interpretation and some practical issues about which it provides little if any guidance.109

v A provision that an apology (whether or not with an express or implied admission of fault) does not constitute an express or implied admission of fault and is not admissible as evidence of fault or liability.110 This provision and variants in other states are discussed by Vines’ article in this volume.111

vi A wide range of exclusions of liability for negligence where the person injured is ‘under the influence of’ any alcohol or drugs, including medicinal drugs.112

vii Exclusions of liability to those committing a ‘serious’ offence which contributed to the injury.113 The section does not operate where the defendant also committed an offence (section 54 (5)) so that the common law principles on the ‘defence’ of illegality in the case of joint illegal enterprises would continue to apply, effectively barring a claim where the plaintiff and defendant are engaged in seriously criminal, risky, anti-social behaviour.114

viii The Act not only legislates for protection in cases of negligent or intentional conduct causing injury or death in self-defence, defence of others or defence of property (unless death in fact ensues after intentional or reckless infliction), but limits damages even where the act in self defence etc is not a reasonable response, unless the court is satisfied that the circumstances are exceptional and the failure to award damages is harsh and unjust.115

There are a number of other reforms which are less significant because they are responding to matters which were not significant problems in the operation of the existing law. In these instances, the reforms have little purpose other than to assist the impression that the legislature is being busy and perhaps to head off extravagant claims in the future:


110 CLA, ss67–69. This provision is somewhat of a ‘sleeper’: we will not know what impact it will have until people and institutions begin to use or offer apologies, either from conscience or as a pragmatic strategy to mend fences and head off a desire to litigate, if they are confident both that the apology cannot be used against them in evidence or that it will not encourage blame.

111 Prue Vines, ‘Apologising to Avoid Liability: Cynical Civility or Practical Morality?’ in this volume.

112 CLA, Part 6. For a recent application see Russell v Edwards, (NSW District Court, Sidis J, 23 November 2003). I am indebted to Andrew Stone, for drawing my attention to this decision.

113 Let us hope that the young boy who considerably leant out of the tram window, in breach of a by-law, to be sick, fatally striking his head against a too-close steel standard, would be treated sympathetically if injured today Henwood v Municipal Tramways Trust (South Australia) (1938) 60 CLR 438.

114 Gala v Preston (1991) 172 CLR 243, compare Jackson v Harrison (1978) 138 CLR 438. Again I am indebted to Andrew Stone for pointing this out. Arguably this situation was not that which the provision was directed towards: rather it may have been directed towards a person using criminal force in excessive self-defence.

115 CLA, Part 7.
i. Exemplary or aggravated damages for personal injury caused by negligence are abolished.\textsuperscript{116}

ii. Good Samaritans are protected when acting voluntarily in an emergency.\textsuperscript{117}

iii. Contributory negligence may now defeat a claim for damages if the court thinks it just and equitable for it to do so.\textsuperscript{118} This provision seeks to overcome the decision of the High Court in \textit{Wynbergen v Hoyts Pty Ltd}\textsuperscript{119} that where a court has determined that the fault of both the plaintiff and the defendant caused the plaintiff’s loss, it cannot logically be ‘just and equitable’ under the apportionment legislation to hold the plaintiff entirely responsible. (If the defendant’s negligence was not causative of the loss in the first place, then there is no liability. If it was, some responsibility should generally ensue if other requirements for the action are met.) The circumstances in which a court would totally disregard a defendant’s causative negligence must be so rare that this section will probably have little effect. It may be that courts, even though armed with this power and even though apportionment is within the discretion of the judge, will continue to be persuaded by the logic and tenor of the High Court’s unanimous decision.

A. Provisions Which Restate the Common Law

In some provisions, the Civil Liability Act merely restates the common law or sets out a position that the common law had already reached. What Roscoe Pound described as ‘declaratory’ statutes are not unknown. But what is the point of such provisions, apart from allowing the legislature to look busy? One purpose may be to consolidate relevant legal principles which are otherwise scattered across fields of the law. Another may be to extend the operation of a legal principle to areas or facts outside those already the subject of the case law. Another may be to demonstrate legislative support for or give the legislature’s imprimatur to a particular principle, perhaps to dispel doubts about the principle’s validity. Another may be to ensure that the courts do not change or whittle away what the legislature sees as an important principle, in other words to freeze the development of the common law.

If the provisions of an Act do not state the whole of the common law relevant to a particular issue, judicial development of those ancillary issues will continue in

\textsuperscript{116} CLM, s21. But such damages were rarely awarded in negligence actions involving merely negligent conduct. Compare \textit{Gray v Motor Accident Commission} (1998) 196 CLR 1, a running down case where the conduct was intentional and the injury direct but the plaintiff nevertheless sued in negligence and exemplary damages awarded. For statutory provisions in motor and industrial accident claims see Luntz & Hambly, above n29 at 8.1.10.

\textsuperscript{117} CLA, Part 8. I know of no case in Australia where a Good Samaritan has been held liable in negligence for personal injury, but see Luntz & Hambly, above n29 at 7.7.11 in respect of two cases concerning property damage where a duty of care was not denied and of other statutory protection, particularly for emergency services.

\textsuperscript{118} CLM, s5S. See also sC5T in relation to contributory negligence in \textit{Compensation to Relatives Act} 1897 (NSW) claims.

\textsuperscript{119} (1997) 149 ALR 25.
a way that can expand, limit or change the scope of the rule, as happens in New South Wales in defamation law where the current statute, the *Defamation Act* 1974 (NSW), leaves to the common law the definition of what is ‘defamatory’. Continuing interpretation of this element of the cause of action in defamation has a significant impact on the scope of defamation law. Similarly, the task of a court in determining when and where a defamatory slur is ‘published’ depends on the common law principles, as statutes rarely define what is meant by the requirement of ‘publication’. Thus the law of defamation must accommodate dramatic changes in methods of communication,\(^{120}\) much as the law of copyright needs to.

In contrast, where legislation sets out the whole common law rule it may crystallise or freeze the development of the common law principles, preventing the courts from changing or moulding the principles in any way other than by changing their interpretative method. For example, legislation may give the provisions a narrow and literal, rather than a wide, interpretation, possibly because the previous interpretation of the provision was out of step with changes in legislative policies or other developments in the law.

(i) **Inherent Risks**

One example where the Civil Liability Act does no more than reflect the common law is the section dealing with inherent risks which provides that there is no liability in negligence for harm suffered by another person as a result of the materialisation of an inherent risk.\(^{121}\)

**Section 51 No Liability for Materialisation of Inherent Risk**

(1) A person is not liable in negligence for harm suffered by another person as a result of the materialisation of an inherent risk.

(2) An *inherent risk* is a risk of something occurring that cannot be avoided by the exercise of reasonable care and skill

(3) This section does not operate to exclude liability in connection with a duty to warn of a risk.

‘Inherent risk’ is defined as ‘a risk of something occurring that cannot be avoided by the exercise of reasonable care and skill’.\(^{122}\) Logically of course, if a risk cannot be avoided by reasonable care, there could be no negligence arising from its materialisation. This was pointed out by Kitto J in *Rootes v Shelton*, a case involving water skiing.\(^{123}\) Many activities involve inherent risks. If on the other hand the risk could have been avoided by reasonable care, then there may well be negligence on the part of the defendant and the risk of such negligence is neither inherent nor likely to have been readily assumed (such as to give rise to the common law defence of voluntary assumption of risk) by a participant in an activity.

\(^{120}\) *Dow Jones v Gutnick* (2002) 210 CLR 575.

\(^{121}\) CLA, s51.

\(^{122}\) CLA, s5(2).

\(^{123}\) (1967) 116 CLR 383 (hereafter *Rootes*).
It seems that it will continue to be helpful for reference to be made to cases such as *Rootes v Shelton* which explain how the argument of lack of negligence in relation to ‘inherent risks’ co-exists or is to be compared with the defence of *volenti non fit injuria* or voluntary assumption of risk.

Nevertheless it is interesting to note that the section of the NSW CLA dealing with inherent risks falls under the heading ‘Voluntary Assumption of Risk’. This is misleading. At common law, this phrase describes a complete defence, the onus of proof of which is on the defendant. But the statement of ‘no liability’ for inherent risks set out in section 51 is not expressed as a defence, nor does it involve the same concept as the common law defence. The common law defence is that the plaintiff voluntarily assumed the *particular* risk, which may or may not have been inherent and may or may not have been obvious, which caused the damage or loss. Because it is so difficult to prove, the defence is rarely used and defendants now tend to rely on the partial defence of contributory negligence. Many cases have dealt with what is involved in the term ‘voluntary’, for example actual knowledge and appreciation of the particular risk and practical freedom to choose whether to take that risk. The Ipp Panel declined to recommend a provision relating to voluntariness as this is an ‘evaluative question’ about which it would be difficult to make a general provision.

It appears that the common law defence of voluntary assumption of risk is unchanged in relation to all non-obvious risks. The reforms dealing with obvious risks will be dealt with below.

**B. Standard of Care in Contributory Negligence**

Another example of NSW CLA reflecting the common law is the provision that the principles in relation to determining contributory negligence are the same as those for determining negligence.124

This provision was apparently intended by the Ipp Panel to mean that the new provision125 which sets out a test for negligence or breach of duty (discussed below),126 also applies to contributory negligence. Again, the section reflects the current common law position, although without explicit reference to the necessary qualifications recognised at common law,127 which arguably must now be read into the provision. First, that a plaintiff’s contributory negligence consists merely of failing to take reasonable care for his or her own safety rather than failing to take care for other people’s safety, and second, that it may often include failing to protect himself or herself against the consequences of other people’s negligence. It is the first qualification which accurately explains why courts generally treat a plaintiff’s negligence as less culpable than a defendant’s, not the existence of some lower standard of care.128

124 CLA, s5R.
125 CLA, s5B.
126 See under Heading 5.A. below.
127 Fleming, above n19 at 302.
128 See also above under Heading 4.B.
C. Liability of Public Authorities

In relation to the liability of public authorities, again some of the statutory provisions reflect the current approach of the common law, for example the inability of the court to adjudicate upon the authority’s allocation of resources,\(^\text{129}\) or the principle that the court, when assessing the existence of a duty of care or whether a duty was breached, will take into account the burden of taking precautions across the whole range of the defendant’s responsibilities.\(^\text{130}\) Contrary to widespread rumour, the provisions only partially reinstate the immunity of highway authorities, abrogated by the High Court in *Brodie v Singleton Shire Council*,\(^\text{131}\) making the immunity depend on a lack of actual knowledge of the particular risk.\(^\text{132}\) Other provisions on the liability of public authorities go beyond the existing common law and appear to attempt to build some connection with public law remedies.\(^\text{133}\) The intersection of the common law principles and the new statutory provisions in this most difficult and complex area of the law is worthy of detailed treatment on its own.\(^\text{134}\) Nevertheless, it can at least be said that it is hard to imagine a court making sense of these provisions without the aid of the judicial discourse in the body of case law about the fundamental legal and governmental issues and tensions inherent in this area of negligence law.

5. Provisions Which Appear to Regulate or Change the Common Law Principles

A. The Test for Breach of Duty in Negligence

The provision on the test for negligence\(^\text{135}\) tinkers with the two-staged test set out by Mason J in *The Council of the Shire of Wyong v Shirt*,\(^\text{136}\) in an apparent attempt to rein in the alleged tendency of judges only to apply the first of the two stages.

The well-known test set out by Mason J in *Wyong v Shirt* is as follows:

1. Whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff? If the answer be affirmative, it is then for the tribunal of fact to determine:

2. What a reasonable man would do by way of response to the risk? The perception of the reasonable man’s response calls for a consideration of the

   (a) magnitude of, and the degree of the risk,

   (b) the probability of its occurrence, along with

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129 CLA, s42(b). See *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 469 (Mason J).
131 *Brodie*, above n87.
132 CLA, s45.
133 For example, s44 which makes liability for failure to perform a regulatory function depend on whether the plaintiff had standing to compel performance of the regulatory function.
134 See below n210 on the indications of legislative intent as to these provisions.
135 CLA, s5B which confusingly is to be found under the heading of ‘Duty of Care’.
(c) the expense, difficulty and inconvenience of taking alleviating action and
(d) any other conflicting responsibilities which the defendant may have.

This test was of course not new then. It had its origins in the well known dictum of *Blyth v Birmingham Waterworks Co*\(^\text{137}\) that:

Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

In the United States the test became known as the negligence calculus after the dictum of Judge Learned Hand in *United States v Carroll Towing Co*\(^\text{138}\) describing the notion in algebraic terms:

\[ \text{... if the probability be called } P; \text{ the injury } L; \text{ and the burden } B; \text{ liability depends upon whether } B \text{ is less than } L \times P; \text{ ie whether } B \text{ is less than } PL. \]

The Ipp Panel reported that ‘lower courts’ seemed to be in danger of ignoring the process of balancing the four elements of the negligence calculus identified in *Wyong v Shirt* case. They tended to treat a decision that a risk was foreseeable and not far fetched as conclusive that the defendant was negligent if he or she failed to take steps to avoid it, rather than going through the balancing process set out in the second stage.

Much of the difficulty with applying this test has arisen because dicta of Lord Reid in (*Wagon Mound (No 2)*)\(^\text{139}\) have been cut up and quoted in isolated extracts taken out of context which have then been applied as if they were some statutory definition of negligence.

In the context of a fire or a risk of fire it was arguably perfectly appropriate for a court to conclude that a reasonable person would not neglect a small (in the sense of low probability) risk of fire if it presented no difficulty, no expense and no disadvantage. A fire can start from a spark and cause an uncontrollable conflagration wreaking damage to life and property across a wide area. In that context it may be perfectly reasonable to decide that the gravity of the risk, in the sense of the seriousness of the possible or likely damage, outweighs the other balancing factors and comes down against the defendant. But that is not to say that it will always be the case that the balance will come out against the defendant in other cases involving foreseeable but low probability risks. That is a matter of fact, of weight and of balance of many factors.

It was never the law that a defendant was automatically negligent for failing to guard against foreseeable risks. Foreseeability of risk was only ever half the question in regard to breach of duty. Just because some judges have misapplied the test and not engaged in a proper balancing act is no reason to throw out the test.

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137 (1856) 11 Exch 781.
138 (1947) 159 F 2d 169.
139 *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd* [1967] 1 AC 617.
In *Swain v Waverley Municipal Council*, McHugh J recently called for the common law to set its face against the pernicious principles expounded in the *Wagon Mound (No 2)* which have done ‘such damage to the utility of the common law doctrine of negligence that it is now on the verge of legislative extinction in many jurisdictions’ and to adopt the approach Fleming set out in the first edition of his book in 1957, that a risk must be unreasonable in the sense of involving a sufficiently significant risk of injury before any issue of reasonable practicality of response arises.

**Section 5B General Principles**

(1) A person is not negligent in failing to take precautions against a risk of harm unless:

(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and

(b) the risk was not insignificant, and

(c) in the circumstances, a reasonable person in the person’s position would have taken those precautions.

(2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):

(a) the probability that the harm would occur if care were not taken

(b) the likely seriousness of the harm,

(c) the burden of taking precautions to avoid the risk of harm

(d) the social utility of the activity that creates the risk of harm.

What the legislation does, following the Ipp Panel’s recommendation, is tinker with the common law test. Instead of the words ‘not far fetched’, the legislation substitutes ‘not insignificant’. Instead of ‘the cost’ of taking precautions, there is substituted ‘the burden’. Instead of ‘any other countervailing responsibilities the defendant may have’ the test requires the court to balance ‘the social utility of the activity that creates the risk of harm’.

The Ipp Panel preferred the words ‘not insignificant’ to indicate a risk that is of a higher probability than is indicated by the phrase ‘not far fetched or fanciful’ but not as high as indicated by the words ‘significant’ or ‘substantial’.

This is a matter of very, very fine distinctions, which would challenge many philosophers, let alone the ordinary person or lawyer trying to apply the NSW CLA. I suppose that a foreseeable risk can be insignificant even though it is not far fetched. But, as Mason J pointed out the probability of the risk is to be considered at the second stage of the question not the first and this sequence is retained in the legislation. The Ipp Panel intend it to be ‘a precondition of the application of the negligence calculus’. Yet I think most people would find it hard to decide whether a risk was significant or insignificant or ‘not insignificant’ until they had

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141 Fleming, above n19.
142 Ipp Report, above n12 at para 7.15.
143 Id at 105.
thought about, at least, the probability of its occurring and the likely seriousness if it did.

The Victorian reforms attempt to provide some further guidance as to the meaning of ‘not insignificant’. Section 48(3) of the Wrongs Act 1958 (Vic) as amended now provides, after the same provisions as s5B of the NSW CLA:

(3) For the purposes of subsection (1) (b) —

(a) insignificant risks include, but are not limited to, risks that are far fetched or fanciful; and

(b) risks that are not insignificant are all risks other than insignificant risks and include, but are not limited to, significant risks.

This is really no more than an attempt to codify logic or common sense reasoning and may not provide any assistance to the tribunal of fact charged with evaluating whether a defendant’s conduct was reasonable or not.

The substitution of ‘the social utility of the activity that creates the risk of harm’ for ‘any other countervailing responsibilities of the defendant’ raises a different issue. While the common law wording allowed the court to make a comparative assessment of utility, benefits, obligations and necessity involved in the defendant’s activities or position, the words seem to direct the tribunal to look at the activity in isolation, unless the word ‘social’ encourages the court to look at the activity in a broader spectrum. While juries are theoretically better suited to the task, it is interesting to speculate how a court comprising a single judge is to go about evaluating the social utility of a defendant’s activities.

Each of the common law balancing considerations in the negligence calculus is the subject of a body of case law. The authors of Balkin and Davis’ Law of Torts state ‘it is assumed that, when interpreting this legislation, the courts will be guided by the principles already developed by the common law over the previous century or more.’

In conclusion, it is hard to see how this section will make the task of judges and juries much easier or that it will necessarily reduce the number of findings of negligence. It seems that the main point of embodying the negligence calculus in legislation was to ensure that lawyers and judges keep reading to the second stage of the test. As Premier Carr said in his Second Reading speech on 23 October 2002:

Although people might argue that these considerations are already the law, putting them in this bill will help curtail the willingness of some courts to find a creative way around them.

At least the legislation on this point is relatively uniform across jurisdictions so that some consensus may develop on interpretation of the provision.

144 Daborn v Bath Tramways Motor Co Ltd [1946] 2 All ER 333.
145 See also Burns, above n75 at 215.
146 Balkin & Davis, above n21 at 274.
147 Carr, above n16.
B. Inherent and Obvious Risks Generally; Recreational and Dangerous Recreational Activities.

What might be described as the cornerstone of the civil liability reforms is, in the NSW CLA, Divisions 4 and 5, headed respectively ‘Assumption of Risk’ and ‘Recreational Activities’. While the restrictions and caps on damages and costs go a long way to reducing all payouts, this is the part that responds to the rhetoric about ‘personal responsibility’, the idea that a person should take responsibility for his or her own actions without blaming someone else (no matter, it is implied, whether or not that other person was at fault). Yet this is probably the most complex part of the statute for the educated reader, let alone for the uneducated one. Why that should be so might be that legislators cannot usually bring themselves to (or cannot admit that this is what they are doing) explicitly legislate that one person must bear the burden of another’s negligence, when all the usual criteria for responsibility are present. So instead they go as far as they dare, attribute greater effects to their attempts than actually follow, and hope that the limits they can or appear to impose provide sufficient discouragement of worthy claims to achieve their aims.

The exception to this legislative reticence is the provision148 by virtue of which a term of a contract for the supply of recreation services may exclude, restrict or modify any liability that results from breach of an express or implied warranty that the services will be rendered with reasonable care and skill. Where a person enters a contract with a clause limiting or excluding liability for death or personal injury caused by negligence, the clause is now given statutory force by this provision and also by the new parallel provisions of the Trade Practices Act 1974 (Cth) in relation to recreational activities.149 I said that I was not going to comment on the injustice of these reforms but I am going to make an exception for this extraordinary measure. Why governments would wish to allow commercial recreational providers to exclude liability for negligence, including even the grossest failure to take care, and shift the costs of their negligence onto the public purse rather than bear them or pass them on to all those who partake in or benefit from the activity is, at best, puzzling. How quickly the public and government have forgotten the occasion in July 1999 when many young Australians, on one of those rites of passage known as a ‘Contiki’ tour of Europe, tragically lost their lives in the Swiss canyoning disaster, which could have been prevented so easily. Or the divers left behind near the Barrier Reef and never found after a diving trip? In other cases, those who suffer from negligence could include the most vulnerable in our society: our children.150 It seems offensive to the fundamental values of a modern civilised society to include this shedding of responsibility in a ‘personal responsibility’ program.

148 CLA, s5N.
149 CLA, s68B, inserted by the Trade Practices Amendment (Liability for Recreational Services) Act 2002 (Cth). (Query whether s5 N imports or overrides the common law requirements that the terms must be brought to the attention of the contracting party before entering the contract.) See Elisabeth Peden & John Carter ‘Consumers Beware; the Loss of Contractual Protection for Recreational Risks (2004) 1 Australian Civil Liability 33.
150 Note that liability for injury to a child would usually be provided for in a contract with the child’s parents, often requiring parents to indemnify the provider against a claim by the child.
But leaving aside contractual exclusions, the critical question is just what exactly do Divisions 4 and 5 of the NSW CLA do? Do they place ‘personal responsibility’ onto participants of activities and if so, personal responsibility for what? How do the provisions differ in their application to a recreational and a non-recreational activity? Do they provide the level of protection for operators and providers of services that insurers said they required in order to offer affordable premiums or insurance cover at all? And what level of protection is that? Protection from liability for risks that are reasonably preventable, or only from those that are not reasonably preventable? Freedom from liability only when participants fail to take basic safety precautions or freedom for providers not to take basic safety precautions?

(i) Inherent and Obvious Risks Generally

Division 4 entitled ‘Assumption of Risk’ applies to all claims of negligence: whether liability is in tort, contract, under statute or otherwise, including recreational activities, and not just in personal injury claims. It may, for example, apply to limit liability for failure to warn in any professional advice case, unless the plaintiff has requested advice from the defendant on ‘the risk’— presumably meaning the particular risk that occurs— and except where the risk is one of death or personal injury. In summary, the Division limits liability by making the defence of voluntary assumption of risk easier to rely on and by excluding a duty to warn of obvious risks, except in specified circumstances.

The section on ‘inherent risks’, which merely restates the common law on circumstances which do not entail negligence, discussed above, is relevant background here. More significant are the sections on ‘obvious risk’ dealing with a presumption of awareness and duties to warn.

The definition of ‘obvious risk’ for the NSW CLA is wide — a risk that would have been obvious to a reasonable person in the position of the defendant — and includes risks that are of low probability and risks, which are not physically observable.

At common law, and subject of course to satisfaction of the negligence calculus, a person may be liable both or either for failing to prevent the occurrence or materialisation of a foreseeable risk and/or for failing to warn of a foreseeable risk, unless the plaintiff had voluntarily assumed that risk.

Section 5G Injured Persons Presumed to be Aware of Obvious Risks

(1) In determining liability for negligence, a person who suffers harm is presumed to have been aware of the risk of harm if it was an obvious risk, unless the person proves on the balance of probabilities that he or she was not aware of the risk.

(2) For the purposes of this section, a person is aware of a risk if the person is aware of the type or kind of risk, even if the person is not aware of the precise nature, extent of manner of occurrence of the risk.

CLA, s5F.
Section 5H No Proactive Duty to Warn of Obvious Risk

(1) A person ‘the defendant’ does not owe a duty of care to another person ‘the plaintiff’ to warn of an obvious risk to the plaintiff.

(2) This section does not apply if:
   (a) The plaintiff has requested advice or information about the risk from the defendant, or
   (b) The defendant is required by a written law to warn the plaintiff of the risk, or
   (c) The defendant is professional and the risk is a risk of the death or of personal injury to the plaintiff from the provision of a professional service by the defendant.

(3) Subsection (2) does not give rise to a presumption of duty to warn of a risk in the circumstances referred to in that subsection.

Clearly the presumption of awareness of obvious risks now makes the defence of voluntary assumption of risk easier for defendants to prove in cases of obvious risks: a person is presumed to have been aware of an obvious risk, unless he or she proves that he or she was not, whereas the common law placed the onus of proof on the defendant to prove the plaintiff’s awareness and assumption of risk. However, the NSW CLA makes no further provision to render the plaintiff’s awareness of a risk a defence to a claim so that this provision does not replace the common law defence. Nor, as mentioned above, does it make any provision about the need for proof that the risk was voluntarily assumed, which is one of the other key elements of the common law defence.

But as well as being clearly relevant to the defence, the obviousness of a risk is also one of the factors (and it might be a factor of great weight) which are relevant to the existence of or ‘scope’\(^{152}\) of a duty of care and to the issue of breach of duty (because obviousness may affect the probability of the risk occurring and the need to warn of it or the precautions needed to prevent it).\(^{153}\) Any duty to warn is specifically attenuated by s5H: it provides that there is no duty to warn of an obvious risk to the plaintiff, except where the plaintiff has requested advice on the particular risk, the defendant is required by law to warn, or the defendant is a professional person and the risk is of personal injury or death.\(^{154}\)

But what of the duty to prevent the occurrence or materialisation of a risk, obvious or not? Because s5G comes within a Division entitled ‘Assumption of Risk’, it is arguable that the presumption of awareness was intended to apply only in relation to the defence of voluntary assumption of risk and not to the issue of

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152 Romeo, above n132. There is some legitimate debate as to whether the ‘scope’ of a duty should be considered by the court as a duty issue or as an issue more relevant to deciding whether there has been a breach of duty, ie what reasonable care in the circumstances required of a defendant.

153 The High Court has reserved judgment in two cases which will deal with the relevance of the obviousness of a risk to the duty of care and breach of duty questions: Vairy v Wyong Shire Council and Mulligan v Coffs Harbour City Council and Ors, heard on 7 and 8 April 2005. [2005] HCA Trans 195, [2005] HCA Trans 196.

154 For example, the Rogers v Whitaker circumstances, above n104.
any duty to prevent the occurrence of a risk or breach of that duty, which will
continue to be determined by the common law principles currently under some
development. 155 This interpretation is strengthened by the contrast with the more
restrictive provisions of the NSW CLA dealing with dangerous recreational
activities, discussed below. 156

Although most cases dealing with obvious risks are personal injury cases, it is
well to emphasise that this provision has a wider operation. It might apply to limit
liability in negligence in a range of situations: for example, pure economic loss
cases; a banker providing general advice to a customer on foreign exchange loans;
a stockbroker advising a client; a builder or architect advising a client. Duties to
warn will vary now according to a number of factors, such as whether a risk was
the subject of a specific request and whether it could be classed as obvious.

(ii) Recreational and Dangerous Recreational Activities

As noted above, the law relating to such activities attracted widespread community
comment because organisers of both not-for-profit and commercial recreational
activities suddenly found themselves without affordable insurance cover.
Members of Parliament spoke in emotive and patriotic terms about the importance
of preserving ‘the Australian way of life’, as though sporting, leisurely and
adventurous activities are unknown elsewhere in the world. No doubt in response
to these concerns, and despite the lack of hard evidence or even consensus that the
true cause of the problem was the state of the common law, 157 the NSW CLA’s
provisions take an even stricter approach than that recommended by the Ipp Panel.
According to the Attorney General of New South Wales this was to give ‘greater
assurance for recreational service providers’. 158

Division 5, dealing with recreational activities 159 provides that a person is not
liable in negligence as a result of the materialisation of an obvious risk of a
dangerous recreational activity (this applies regardless of whether a warning was
or was not given and regardless of whether the defendant was in a vastly superior
position to the plaintiff to guard against the risk). It also provides that a person does
not owe a duty to a participant of any recreational activity in respect of any risk,
obvious or not 160 provided they have been given a risk warning, as defined very
widely by the NSW CLA. 161

In practice, much will turn upon whether the actual risk warning given by the
defendant was adequate in the terms of the statutory requirements 162 and,

155 See above n155.
156 Particularly CLA, s5L.
157 Ipp Report, above n12.
25 UNSWJ 825 at 829.
159 Widely defined in s5K to include any activity engaged in at a place where people ordinarily
engage in a recreational activity.
160 Debus, above n158.
161 Note that a defendant is not entitled to rely on a risk warning if the harm resulted from the
contravention of a written law, s5M (7). But note also that there is no such qualification to s5L
relating to dangerous recreational activities.
secondly, on whether the activity involved comes within the definition of a ‘dangerous recreational activity’, that is, whether it involves a significant risk of physical harm.\textsuperscript{163}

The fundamental questions of interpretation involved in Division 5 are more difficult to resolve:

i Can a risk of negligence by a defendant in relation to a dangerous activity ever be classed as an ‘obvious risk of the activity’? Surely, it is the opposite: the reasonable expectation of any participant is that the provider will take \textit{at least} reasonable care? But expectations aside, it seems that the unspecified negligence of another person is not a risk arising out of the activity itself.\textsuperscript{164}

ii For the purposes of s5M, is the risk of negligence by a defendant a risk that may be the subject of a risk warning? Again, it is hard to imagine a situation where, outside contract, parties would be able to rely on a general, unspecific, warning that the defendant might not take proper care or has no liability for negligence or that the plaintiff enters or participates ‘at their own risk’. Such a warning is not a warning of the ‘general nature of the particular risk’.\textsuperscript{165}

To conclude, although there has been much fanfare of the high degree of protection given to recreational providers by the legislation, it is strongly arguable that it will be difficult to rely on these provisions to excuse negligence in organising or carrying out an activity, particularly a dangerous one.\textsuperscript{166}

\textsuperscript{162} The operation of this section in relation to children and non-English speakers is especially harsh. The provision that a warning to the parent will be effective against the child was justified by Premier Carr and others as being that the government did not see why recreational providers should have to take better care of the child than the child’s parents would take: NSW Legislative Assembly (\textit{Hansard}) 23 October 2002. This seems odd given the greater expertise and experience that one would reasonably expect the provider to have over that of many parents. And in a country where there is a large migrant population with varying English skills and a large tourist industry intent on capturing tourists from non-English speaking neighbours the failure to advert to the needs of foreseeable groups in the community, such as blind people or non-English speakers, as the common law has done at least since \textit{Glasgow Corp v Taylor} [1922] 1 AC 44 at 67 (Sumner LJ), applied in \textit{Haley v London Electricity Board} [1965] AC 778, is regrettable.

\textsuperscript{163} CLA, s5K.

\textsuperscript{164} If the negligence is identifiable in advance For example, a failure to check or maintain equipment or to check weather reports then possibly the situation may be different as the dangerous activity may be classified as ‘canyoning with unchecked equipment’ instead of just ‘canyoning’. It is hard to imagine a court giving the NSW CLA this operation, particularly as it leaves the defence of voluntary assumption of risk to cover situations where the plaintiff is aware of particular risks.

\textsuperscript{165} CLM, s5M(5).

\textsuperscript{166} An interesting question is whether \textit{Swain}, above n140 would necessarily have a different outcome if governed by the Civil Liability Act \textit{but with the same evidence adduced}. For the reasons I have given my tentative answer is that it would not. In that case the plaintiff seemed to base his case on the alleged representation made by the placing of the flags on the beach that the area was safe to swim and to dive in. It was the placing of the flags that was alleged to be negligent, not a failure to warn or a failure to prevent an obvious risk.
The continuing role of the common law principles of causation and remoteness of damage in negligence cases is particularly uncertain in view of the legislative provisions. The Ipp Panel did not recommend a particular formulation of the provisions but only of the principles they should embody. The provisions are much briefer.

**Division 3 Causation**

**5D General Principles**

1. A determination that negligence caused particular harm comprises the following elements:
   - that the negligence was a necessary condition of the occurrence of the harm (factual causation), and
   - that it is appropriate for the scope of the negligent person’s liability to extend to the harm so caused (scope of liability).

2. In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

**Section 5E Onus of Proof**

In determining liability for negligence, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.

The legislative provisions raise several questions:

i. In what respects do the principles set out in the statute differ from the common law principles of causation?

ii. Do the common law principles of causation continue to have any relevance?

iii. Does the provision deal only with causation principles and not with what Anglo-Australian law calls ‘remoteness of damage’?

iv. If so, how do the common law principles of remoteness of damage interplay with the new causation principles?

v. If the provision does encompass or integrate remoteness principles, do the common law principles of remoteness continue to have any relevance?

vi. What is the intent and effect of the provision concerning the onus of proof?

Causation is a notoriously difficult question for lawyers, philosophers and scientists alike. Debate about causation goes back 2000 years. In law, academic and judicial views go around and around with no-one ever entirely satisfied that he and she has got it exactly right or has solved all issues of logic, legality and morality. The current common law approach to causation for legal purposes in
Australia — the common sense test — was set out by a majority of the High Court in *March.*

The common law tradition is that what was a cause of a particular occurrence is a question of fact which ‘must be determined by applying common sense to the facts of each particular case’.  

It was recognised that the notion of common sense incorporates value judgements. Although rejecting it as a complete test of causation, Mason CJ and others in the majority nevertheless accepted that the ‘but for’ test, applied as a negative criterion of causation, has an important role to play as a threshold test in the resolution of the causation question, subject to certain qualifications when it would give a result contrary to common sense, for example, where there are two or more sufficient causes, or in some cases involving successive events.

In contrast, McHugh J in *March* was of the view that the ‘but for’ test should be the exclusive test of causation, except in the case of simultaneous sufficient causes, (although he does suggest that it be applied in a practical common sense way which enables a tribunal of fact, consciously or unconsciously, to give effect to value judgements concerning responsibility, such as ignoring mere preconditions) and that:

> Any other rule limiting responsibility for damage caused by a wrongful act or omission should be recognised as a policy-based rule concerned with remoteness of damage, not causation.

Earlier he had said:

> Whatever label is given to such a rule — “common sense principles”, “foreseeability”, “novus actus interveniens”, “effective cause”, “real and efficient cause”, “direct cause”, “proximate cause” and so on — the reality is that such a limiting rule is the product of a policy choice that legal liability is not to attach to an act or omission which is outside the scope of that rule even though the act or omission was a necessary precondition of the occurrence of damage to the plaintiff. That is to say, such a rule is only concerned with the question whether a person should be held responsible for an act or omission which *ex hypothesi* was necessarily one of the sum of conditions …which produced the damage.

The majority approach was affirmed in a series of cases following *March* and has not been overturned by the High Court since, even though the Court has had ample opportunity to do so in any of the many difficult cases, which it has considered.

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167 *March*, above n94.
168 *March*, above n94 at 515 (Mason CJ), quoting Reid LJ in *Stapley v Gypsum Mines Ltd* [1953] AC 663, at 681, and 523 (Deane J).
169 *March*, above n94 at 523 (Deane J).
170 *March*, above n94 at 516 (Mason CJ).
171 Like having a head as a precondition to being decapitated! See *March*, above n95 at 523 (Deane J).
172 *March*, above n94 at 534.
173 *March*, above n94 at 530–531.
As noted above, the legislative provisions are based on the recommendations of the Ipp Panel. The Ipp Panel stated that it made no recommendation to overturn the ‘but for’ test and noted that the law has devised satisfactory and fair rules for resolving the exceptional cases referred to above. It equated the ‘but for’ test with the ‘necessary condition’ formulation, now seen in the enacted provision.175

After considering alternative tests in ‘evidentiary gap cases’, the onus of proof of causation in those cases and generally, discussed below, and subjective causation cases176, the Ipp Panel then considers the ‘second normative question of causation’ and recommends that the legislative statement has two elements — ‘factual causation and scope of liability’.177

Within ‘scope of liability’ the Panel notes common law terms and criteria such as ‘real cause’, ‘effective cause’, ‘new acts intervening’, ‘remoteness of damage’ and ‘foreseeability’.178 These last terms are included despite it being said by the High Court in Chapman v Hearse179 that ‘reasonable foreseeability’ is a test of the limits of liability not of causation.180 Further, the Report does not once refer in this discussion to the Wagon Mound No 1,181 where reasonable foreseeability was laid down for the common law world as a test of remoteness of damage.

Having defined what they see as included in the scope of liability question, the Panel states that:

It is in the context of the second element — namely scope of liability for consequences — that the statement that causation is a matter of commonsense is most often made.182

Although it is obvious from a reading of March that the common sense test was seen by the majority of the High Court, unlike McHugh J, as a test of factual causation only, leaving issues of remoteness or ‘scope’ to be determined separately.

Where does this confusion leave us in interpreting the statutory provisions? It follows from what is said above that the provisions are intended, despite the misconstruction quoted in the last paragraph, to change the actual current approach as set out in March and to move ‘common sense’ considerations into a broader ‘scope of liability’ question which will, arguably, leave no room or need for a

176 In respect of which the NSW CLA makes an important provision s5D(3).
177 Ipp Report, above n12 at 7.42.
178 Note also Recommendation 29 (b) (ii), which includes ‘remoteness of damage’ in its description of ‘scope of liability’.
179 (1961) 106 CLR 112 at 121.
180 Although it is hard to ignore the role of foreseeability when determining liability for the intervening conduct of third parties where liability may depend on whether it is the very kind of thing likely to happen. See March, above n94 at 518 (Mason CJ).
182 Ipp Report, above n12 at 7.43.
separate and discrete question of whether or not the damage was too remote because that question and the tests used to answer it are only one of many ways of resolving the scope of liability. This appears to be a statutory enactment of the views of McHugh J in March.

Where does this leave the remoteness principles laid down in the Wagon Mound No 1? It seems strange that an enactment dealing with and headed ‘Causation’ would sweep away a common law principle, in place for 40 years, without expressly saying so and without the preparatory material mentioning this effect. But a statute may impliedly overturn a common law principle and courts are used to determining whether this is the effect of a statute.

The way out of this dilemma may be for the courts to take up the suggestion of the Ipp Report that the provisions should be regarded as only providing a framework in which to resolve cases and that the provisions should be regarded as ‘legislative guidance’ only, which may or may not prove to be helpful. Premier Carr also stated: ‘Its intention is to guide the courts as they apply a common sense approach.’ such a purpose may allow the courts, and indeed make it necessary for them, to continue to refer to the principles set out in previous cases, under several rubrics, as they determine acceptable criteria, not listed in the enactment, for deciding upon the ‘scope of liability’ in a range of circumstances.

It must also be remembered that this provision on causation applies equally to contractual claims for breach of a contractual duty of reasonable care. The same questions of interpretation will arise in respect of the common law principles of causation and remoteness in such claims.

(i) Onus of Proof of Causation

Section 5E provides that in determining liability for negligence, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation. This again simply restates the common law, which is that the plaintiff bears the onus of proving, on the balance of probabilities, all the elements of his or her action in negligence.

‘Onus’ in legal terminology generally refers to what is known as the ‘legal’ onus of proof. However, common law cases on a number of factual issues in negligence also show that despite the ‘legal’ onus remaining on the plaintiff throughout a negligence case, a so-called ‘evidentiary’ onus may pass to the defendant, in the sense that if he or she does not answer or disprove an allegation of fact made by the plaintiff, he or she runs the risk that the court may accept the plaintiff’s version of events and infer negligence.

Does s5E prevent a plaintiff from arguing that an ‘evidentiary onus’ has passed to the defendant?

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183 Carr, above n16.
184 But listed in Recommendation 29 (ii) (b) of the Ipp Report on which the enactment was based.
185 NSW CLA, s5A.
The Ipp Panel recommended this provision to counter the suggestion that the legal onus of proof should shift to a defendant once the plaintiff has established that the defendant was under a duty to take reasonable care to avoid the risk in question and failed to take the required care. This approach has been suggested in cases where several manufacturers or employers exposed the plaintiff to a risk of disease or injury or materially increased the risk. It was an approach espoused by Lord Wilberforce in *McGhee v National Coal Board*, but quickly denounced by the House of Lords in *Wilsher v Essex Area Health Authority*. Although this view had some support in Australia, particularly by Gaudron J in *Bennett*, generally her view is construed and read down as involving only a shift of an evidentiary onus.

The Ipp Panel states that the principle has been ‘referred to with approval by various courts in recent cases’ and that it represents a fundamental change in the traditional law with the potential to expand liability for negligence. This would be correct if Gaudron J and those that followed her had been talking about the legal onus but not the case if they had been referring to the evidentiary onus. There is a significant difference: the passing of an evidentiary onus merely allows a court to infer a conclusion of fact, it does not require it to do so in the absence of further evidence.

It is unfortunate that the Ipp Panel neither drew any explicit distinctions between the legal onus and the evidentiary onus nor gave the names of any of the ‘recent cases’ on which its discussion was based. In the absence of this clarification, it seems that the section should be construed as using the word ‘onus’ in the usual and strict ‘legal’ sense.

More difficult is to work out whether the new provisions, read together, prevent an Australian court from following the case of *Fairchild v Glenhaven Funeral Services Ltd* in which the House of Lords relaxed the usual requirements of proof of causation in exceptional cases where there is an ‘evidentiary gap’ as to whether the defendant’s negligence caused a material increase in the risk of harm (and in the

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186 For example, in cases where the plaintiff relies on the maxim *res ipsa loquitur*; see Schellenberg *v Tunnel Holdings Pty Ltd* (2000) 200 CLR 121 at 132 [22]. This also seemed to occur recently in *Swain*, above n140 where although the plaintiff did not provide evidence of what precautions the defendant could or should have taken to avoid the risk of injury to the plaintiff, on the question of whether he had a legal onus of proof, a majority of the High Court (Gleeson CJ, Gummow and Kirby JJ) did not upset the jury’s finding of negligence. Compare the judgments of McHugh and Heydon JJ.

187 [1972] 3 All ER 1008 at 1012.


189 *Bennett*, above n65 at 420–1. The Ipp Panel noted that the principle set out by Gaudron J has also been cited with approval by Gummow J and Kirby J in *Rosenberg*, above n174 at 461 and in the problematic case of *Chappel*, above n174 at 257 and 273, but arguably it was *obiter dicta* in both those cases, or was merely part of the common sense reinforcement of the ‘but for’ test. See also now *Chester v Afshar* in [2005] 1 AC 134.

190 See Luntz & Hambly, above n29 at 4.1.14 and the authorities discussed in 4.1.11.

191 Ipp Panel, above n12 at 7.36.

192 This certainly seems to be the sense of id 7.36.

193 [2002] 3 WLR 89.
absence of evidence that it materially contributed to the harm itself). As the Ipp Panel noted, the High Court has not considered such an ‘evidentiary gap’ case.

The Ipp Panel recommended that ‘the detailed criteria for determining the issue [of evidentiary gaps] should be left for common law development’ 194 but recommended a series of principles (set out in Recommendation 29). The statutory provisions on causation do not follow the recommendations word for word and are much briefer. If the courts do consider whether facts that do not satisfy the ‘but for’ test should nevertheless be accepted as establishing factual causation in an exceptional case, s5D(2) now requires the court to consider, ‘amongst other relevant things’, which are not listed or suggested, ‘whether or not and why responsibility for the harm should be imposed on the negligent party.’ This may simply be a direction to the court to give reasons for its decision, and it is inconceivable that a court would not do so anyway. But importantly it is left to the common law to develop or continue to develop how it deals with situations where the ‘but for’ test does not provide a satisfactory way of dealing with such situations.

What is unclear is how this provision, s5D(2), sits with s5E on the onus of proof of causation. Section 5E is absolute in its terms that the onus remains on the plaintiff. Section 5D(2), particularly in view of the statement quoted above from 7.33, would seem to qualify this in exceptional cases. In his Second Reading speech on 23 October 2002, Premier Carr stated:

…The very limited exception to the ‘but for’ test …was developed by the court for those rare cases, often in the dust diseases context, where there are particular evidentiary gaps. By including this exception in the bill it is not intended that the bill extend the common law in any way. Rather, it is to focus the courts on the fact that they should tread very carefully when considering a departure from the but for test. 195

One reading of this statement and of the Ipp Report 196 is that in exceptional cases involving an evidentiary gap the court may relax the causation requirements including the onus of proof. This too will be a matter of interpretation for the courts. It is ironic however that while the ‘evidentiary gap’ principles have developed and been critical in the dust diseases cases, as Premier Carr recognises, the civil liability reforms in most jurisdictions do not apply to actions for damages for dust diseases. 197

6. How Useful Will Recourse be to the Political History, the ‘Travaux Preparatoire’ and Other Extrinsic Materials?

In CIC Insurance Ltd v Bankstown Football Club Ltd, 198 the joint judgment of Brennan CJ, Dawson, Toohey and Gummow JJ affirmed a view that places the identification of the context of legislation as a necessary tool of statutory

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194 Ipp Report, above n12 at 7.33.
195 Carr, above n16.
196 Id at 7.36 and 733.
197 CLA, s3B(1)(b).
interpretation in all cases, not just in cases requiring resolution of some statutory ambiguity. Furthermore, this view recognises that the context of a statute encompasses both the existing law and the mischief to be remedied, as discerned from the range of extrinsic materials that relate to the statute.

…the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses ‘context’ in its widest sense to include such things as the existing state of the law and the mischief which by legitimate means such as [reference to reports of law reform bodies], one may discern the statute was intended to remedy: Attorney General v Prince Ernest Augustus of Hanover [1957] AC 436 at 461, cited in K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd (1985) 157 CLR 309 at 312, 315.199

Co-existing with the common law principles is s15AB of the Acts Interpretation Act 1901 (Cth), inserted in 1984, which is mirrored in state legislation200. Both provide for consideration of a range of extrinsic materials in the task of statutory interpretation.201

As a matter of common sense, the usefulness of extrinsic materials often depends on the fullness, accuracy and clarity of their statements and explanations. Whether or not they are reliable as a source of legislative intention also depends on their authorship or provenance. A controversial question in this area is whether the concept of ‘legislative intention’ refers to the subjective intent of the legislators, so that the relevant intention can be gleaned from the statements and debates of individual parliamentarians or government ministers, or rather to some more objective construct of legislative intent.202

There are a number of background sources relating to the NSW CLA, which served as a model for legislative changes around the country, although the final legislation in the various states often differs:

i The Ipp Review of the Law of Negligence Report.203 No state enacts the recommendations of the Ipp Panel in their entirety. Various states change some of the recommended provisions, adopt others word for word and do not adopt others at all.204 Nevertheless the Ipp Report may provide a useful explanation of what was perceived as the mischief of the law and what the legislative drafters must be taken to have intended. However, a significant

199 Ibid.
202 Johan Steyn, ibid.
203 Ipp Report, above n12.
defect of the Ipp Report as a source of information on the existing state of
the law or on the mischief to be remedied by the statute is the lack of
evidence, authority or sources to support many of its assertions about the
practice, content and alleged problems of the current common law.205 No
doubt this was due to the extraordinarily tight time frame imposed on the
Ipp Panel and its stated desire not to let the opportunity for legislation to be
passed throughout the country to be lost by delay in meeting the
schedule,206 but it does mean that readers will often have to do their own
research into the existing state of the law that the recommendations of that
the Panel were intended to overcome.

A second problem is the assumptions on which the Ipp Panel was instructed
to proceed and the task it was set, that is, to recommend changes to limit
liability and the quantum of damages. To a considerable extent this might
be seen to foreclose any debate as to the purpose of any recommendation.
However, given that in some situations the Panel expressly declines to
make a recommendation, for example, to exempt ‘not for profit’
organisations from liability or to introduce proportionate liability for
personal injury cases, and in other cases merely and deliberately
recommends a re-statement of the common law, it will be necessary to
investigate whether any particular recommendation has a purpose of
restricting the common law or retaining the status quo. The former cannot
necessarily be presumed from the overall purpose of the statute. The second
purpose is consistent with giving the legislature the appearance of being
busy.

The Report is also, of course, of more use where the state or federal
parliament concerned followed the Panel’s recommendation than where it
did not. In the latter circumstance, the court will have to rely on other
materials. The Second Reading Speech of Premier Carr on 23 October 2002
refers to those instances where the Civil Liability (Personal Responsibility)
Bill 2002 follows the Ipp Panel’s recommendation but not to those where it
does not. Attorney-General Robert Debus explains in an article in a
university law journal that, in one instance, the government made the
legislation more restrictive than the Ipp Panel recommended ‘to promote
greater certainty or a fairer balance of responsibility’.207

ii The Second Reading speech of 23 October 2002 sets out some specific,
some broad, some emotive, purposes for the Act: to assist in the reduction
of insurance premiums; to wind back the culture of blame; to prevent the
Americanisation of our society; to preserve the Australian way of life; to
restore personal responsibility.

204 See useful summary by Prue Vines, ‘Faith, Hope and Personal Injury: The Ipp Report and the
at 1.
205 See for example paras 10.3–10.8; or para 11.12: ‘courts often seem to think…’
206 Ipp Report, above n12 at para 1.36.
207 Robert Debus, above n158 at 13.
It also makes some other specific comments which will be useful in relation to particular sections, for example, ‘The bill modifies particular aspects of the common law. It does not establish a complete code’; ‘…it is not intended to extend the common law in any way’ (in relation to dealing with evidentiary gaps in causation cases); ‘…it is to focus the court’s attention that they should tread very carefully when considering a departure from the ‘but for’ test’; ‘…The bill will codify the current law’ relating to inherent risks.

iii Parliamentary debates reported in Hansard. Others have warned of the unwisdom of relying on parliamentary debates as a source of parliamentary intention. Problems include the preference a particular Member of Parliament or a Minister may give to certain interests for a range of political reasons, the views of others that such persons may select to promote, and the special responsibilities that Ministers may have.

iv The Position Paper of the Attorney–General’s Department of New South Wales. This was issued before the final version of the Ipp Report was released on 2 October 2002 and used for the first draft of the second stage Civil Liability (Personal Responsibility) Amendment Bill 2002 which was later changed in many respects as a result of the Ipp Panel’s recommendations. The paper is not as accurate a statement of the existing law or of ‘the mischief’ to be remedied as one would usually find in a carefully researched and carefully drafted report of a law reform commission. It nevertheless provides some insight into what the framers had in mind in relation to some of the provisions, particularly those which do not follow the Ipp Panel’s recommendations. It is particularly relevant for example to the provisions on the liability of public authorities, where its statement as to the limits of the difficult and complex provisions will be illuminative:

These provisions do not affect the ordinary duty of care that authorities owe to members of the public in carrying out their activities. Actions in negligence (as affected by this Bill) will still be possible when authorities cause damage as the result of their activities.

v Explanatory memoranda: unfortunately it seems to be the practice for such memoranda to paraphrase the provisions of a bill but not to explain them. They are often not helpful in determining meaning.

vi In relation to the proportionate liability sections of the Civil Liability Acts around the country, there is much value in looking at the Draft Model Provisions to Implement the Recommendations of the Inquiry into the Law

208 Steyn, above n201.
210 For example, see the ‘Explanatory Memoranda Relating to the Corporate Law Economic Reform Program’, Chapter 3 issued by Treasury on reforms introducing proportionate liability into federal statutes.
of Joint and Several Liability released by the Treasury and the New South Wales Attorney General’s Department in July 1996, as well as the two reports of the Committee of Inquiry headed by Davis. However, none of the statutes enacting proportionate liability at state or federal level follow those model provisions exactly and some changes are difficult to interpret.

7. Conclusion

The immediate impact of the NSW CLA has been to require the courts to resolve a number of issues as to the meaning and intent of the various statutory provisions. The NSW CLA is so wide ranging and the relationship between the provisions and the common law so complex that it will be some time before a consensus settles on these issues.

An obvious long term effect of the lack of uniformity in the legislative provisions enacted by state legislatures around the country will be the reduction in the extent to which the principles of law and the court decisions of one state will inform the principles and decisions of another state. In addition, the common law of Australia is reduced in content and application. The advantages we have so far enjoyed of having the High Court as a final court of appeal for a ‘common law of Australia’ will be reduced.

Many critical issues and questions in negligence and tort law remain wholly or partly untouched by this legislation and require further development and elucidation by the courts, including:

i. The test for the existence of a duty of care in many areas, particularly for purely economic loss;
ii. The duty to control or protect a person from the torts of third parties;
iii. The rationale and incidence of vicarious liability, especially for intentional torts of an employee or agent;
iv. Causation in ‘evidentiary gap’ cases and loss of chance cases;
v. The potential for a new tort of invasion of privacy;
vi. The intentional torts and the meaning of ‘intent’;

In addition there are several important categories of cases which are expressly excluded from the operation of some or all of the provisions of the NSW CLA, for example, dust diseases cases and smoking or tobacco cases.

212 For example, the addition of the words ‘or jointly’ to the definition of ‘concurrent wrongdoers’ in CLA s34(2) makes application to cases of joint liability under contract problematic.
213 See for example the recent case of McCracken v Melbourne Storm Rugby League Football Club and Ors (2005) NSWSC 107, which dealt with the meaning of s3B(1)(a) of the CLA.
214 Even where sections of one state act mirror a section in another state act, each will have to be interpreted in the context of the whole statute for that state.
215 CLA, s3B(1)(a).
Whether or not the statutory enactments on general principles such as causation will have an indirect influence on the development of the common law in those areas which fall outside the direct application of the legislation remains to be seen. Arguably, the express exclusion by the legislature of these categories should be regarded as conclusive that they were not to be affected, yet sometimes this seems paradoxical and against the understanding of members of the legislature. On the broader influence of any legislative policy to be discerned from the Civil Liability Acts, there could be at least two approaches the courts could take: discern some broad legislative policy and community standard that liability in tort should be restricted rather than extended, or, alternatively, take the view that the legislatures had a clear opportunity to restrict tort liability and that the enactments must be read as reflecting precisely how far they wished to go and no further. In any event, the courts would do well to exercise caution in trying to discern any consistent community, legislative or governmental attitudes or policies towards tort reform over a period of time. In 2002 there were strident calls from the insurance industry, professional groups and government to restrict tort liability, while in 2005 there have been equally strong calls, in the context of asbestos claims, to secure and extend the tort liability of corporate defendants.

Even where the Civil Liability Act ‘reforms’ apply, it is difficult to imagine that reference will not be needed to the common law cases which expound, explain and illustrate the principles of law which form the basis of or provide the context for so many of the statutory provisions. The Acts are not codes. It is not always clear whether they intend to ‘cover the field’ on a particular issue or merely provide a framework within which the common law principles continue to operate. In some areas they restate the common law: in those areas the future development of common law principles will be limited, although interpretation of statutory wording may change over the years. In others, the Civil Liability Acts make changes to the common law or build upon a body of law which is not suddenly irrelevant, but which will, however quickly, become obsolete if it is not used. It will be important for advocates and judges to look past the statutory wording to the common law context within which the enactments operate and to promote and restore coherence to the law of negligence.

As for the apparent aim of ‘restoring personal responsibility’ and the other purposes of the legislation, it is to be hoped that the courts do not infer an intention to pursue these purposes at all costs, and certainly not at the cost of promoting a humane and responsible regard for others, and a fair — or as fair as possible under the tort system — approach to compensation for unreasonable infliction of injury.

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216 For example, see CLA, s3B(1).
217 See the contrasting views expressed in the New South Wales Court of Appeal in Harriton, above n89.
Apologising to Avoid Liability: Cynical Civility or Practical Morality?

PRUE VINES*

1. Introduction

In Australia’s recent whirlwind of tort reform, one reform which was not mentioned in the Ipp Report,¹ has been taken up by every jurisdiction except for the Commonwealth. This is the special mention of apology or expression of regret accompanied either by a legislative disclaimer of liability arising out of the apology and/or a provision about the admissibility of the apology into evidence. This provision is based on the view, firmly supported anecdotally if not empirically,² that people often sue wrongdoers because they are so enraged by the lack of an apology that a wrong which they would otherwise suffer without recourse to law becomes intolerable and litigation follows. At the very least this demonstrates that something about the process of apologising is important to people.

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2 Very few empirical studies have been carried out which really investigate this question. See for example Jennifer Rebennolt, ‘Apologies and Legal Settlement: an Empirical Examination’ (2003) 102 Mich LR 460 and Russell Korobkin & Chris Guthrie, ‘Psychological Barriers to Litigation Settlement: An Experimental Approach’ (1994) 93 Mich LR 107. These experimental studies have yet to be matched by empirical research using actual cases. A few studies of propensity to sue are discussed below in the section entitled ‘Empirical Data about Apologies and Propensity to Sue’. Many of the Second Reading speeches for the various civil liability acts refer to anecdotal evidence, as do many of the articles arguing that apologies will reduce the desire of plaintiffs to sue: Steven Keeva, ‘Does Law Mean Never Having to Say You’re Sorry?’ (1999) ABAJ 64 (suggests 30 per cent of medical malpractice cases could be resolved with an apology); Peter Rehm & Denise Beatty, ‘The Legal Consequences of Apologising, (1996) J Disp Resol 115; Hiroshi Wagatsuma & Arthur Rosett, ‘The Implications of Apology: Law and Culture in Japan and the United States' (1986) 20 L Soc R 461.
Is this sudden emphasis on apologies merely a fashion? Some people have suggested that this is the ‘age of apology’. Calls for apologies for the treatment of Indigenous people in Australia and elsewhere, for wartime acts by Japan, Germany, Russia and others, as part of the process of truth and reconciliation in South Africa and Chile, have all been made and in many cases those apologies have been made. American scholars have drawn on the importance of the apology in Japan as one model. American Presidents have apologised to their people. Indeed the apology of Richard Nixon is a well-known ‘failed’ apology, in that he failed to acknowledge his fault and even tried to assert that it was for the greater good. The Blair Government’s apology for the treatment of the Birmingham Four and the Guildford Six has just been reported. In Australia, the refusal of John Howard to apologise to Aboriginal people for the injustices of the past, and to Cornelia Rau, who was mistakenly locked up in Baxter immigration detention centre, has been extremely controversial.

In the area of interpersonal disputes, apologies are central to mediation and alternative dispute resolution, and in criminal law apologies are a significant part of reintegrative shaming. In these situations apologies are seen as essential to healing and rebuilding relationships and communities. The law of defamation, of course, has always paid attention to apologies. All these things suggest that there is something very significant about apologies in very many societies. That is, that apologies are meaningful to people in some way and have a significant function.

The significance and meaning of apology in the context of civil liability is an interesting aspect of the argument about the aims of tort law which has been such a feature of Professor Luntz’s work. If tort law is all about compensation (and I do not think it is), does this mean that an apology can be regarded in some way as compensatory? Is this treatment of apology an implicit recognition that the aim of

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5 Note especially, Wagatsuma & Rosett, above n2.
7 Reported on ABC Radio National, 10 Feb 2005.
11 Luntz’s work on the aims of torts as compensation has led to his well-known support for no-fault compensation schemes. Luntz’s work has always been informed, not only by meticulous legal analysis, but by attention to the effectiveness of the legal framework in achieving its aims. See Chapter One of Harold Luntz & David Hambly, Torts, Cases and Commentary (5th ed, 2002) (which has 128 pages) for a demonstration. See also, inter alia, Harold Luntz Compensation and Rehabilitation (1975); Harold Luntz ‘Looking Back at Accident Compensation: an Australian perspective’ (2003) 34 Vict U Well LR 279.
tort law is corrective justice? What kind of apology would meet this aim? Prima facie, apologies do not seem to have a connection to deterrence, although in the medical context of open disclosure an argument has been put that open disclosure can reduce medical accidents.

In this paper I argue that the best way to think about apology in the civil liability arena is as a form of corrective justice. The legislative treatment of apology in the civil context arises out of recognition of the significance of apologies in our society, but most of the legislatures which have attempted to deal with apologies have failed to deal coherently with the real nature of an effective apology in the context of personal injury litigation and are therefore unlikely to achieve the desired result.

2. Apologies in the Medical Context

One of the driving forces of the tort reform process was a crisis in medical insurance, so it is appropriate to consider the medical context specifically. The Ipp Panel, which was asked by the Commonwealth Government to report on the reforms to the law of negligence in 2002, was asked to report specifically on medical negligence. The area of medical negligence has become of major concern to doctors. Despite the fact that there is still no consistent evidence that litigation is increasing on a per capita basis, and recognition that there may even be a decrease per medical service in the litigation rate, the view that an increasingly blaming society is massively increasing its litigation rate remains prevalent and this causes doctors to be extremely fearful of litigation.

Possibly because of this fear, it is in the medical context that the apology has been most discussed. There is some evidence from the United States of advantages to defendants in open disclosure and apology. A great deal of the literature on apology has also been developed in relation to medical negligence. Most of what little empirical evidence there is about reduced litigation in response to apologies and/or open disclosure has arisen in the medical context. For example, the AHHMAC Report refers to the practice adopted at the Lexington Veteran Affairs Medical Centre in the USA they lost two major medical malpractice cases in 1987. The Lexington Centre, in a practice that appeared to be totally counter to legal

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12 Ipp Report, above n1. See the terms of reference.
13 ‘It seems likely that there has been an increase in claims numbers over the past 10-15 years – possibly doubling over that period in some jurisdictions. However, this is not simply explained by a theory of more litigious patients. Over that same period the number of Medicare services provided has increased by 66 per cent and the number of hospital admissions has increased by 76 per cent so a significant proportion of that increase will have arisen from greater exposure to risk’: Australian Health Ministers Advisory Council Legal Process Reform Group, Responding to the Medical Indemnity Crisis: an Integrated Reform Package (hereafter AHHMAC Report) at [3.25]: <http://health.act.gov.au/c/health?a=sendfile&ft=p&fid=1054039512&sid> (3 January 2005).
advice, began to notify patients of adverse events even when patients were not aware of them. They also admitted fault verbally (and in writing if the patient so desired). This was done partly to ensure that there was evidence of a process of dealing with adverse events in case of future litigation, but it also had ‘unanticipated financial benefits’, in that many more settlements were made and the hospital’s costs for malpractice claims dropped markedly. The AHMAC Legal Process Reform Group recommended that legislation provide that an apology made as part of an open disclosure process be inadmissible in an action for medical negligence, referring to the development of the Open Disclosure Project and the National Open Disclosure Standard for Public and Private Hospitals developed by the Australian Council for Safety and Quality in Health Care. They said:

The elements which might be included in an effective initial disclosure of an adverse event to a patient (or where relevant and appropriate, their family) include:

- Factual information about what happened;
- Factual information about the immediate effect on the patient;
- An apology or expression of regret to the patient;
- Discussion of the possible consequences for the patient;
- Factual information about options to ameliorate harm done to the patient;
- A brief outline of what will be done to ensure that lessons are learned from the adverse event to prevent recurrence; and
- The identification of someone who will be able to answer any questions which the patient or family may have once they have had some time to think about it.

Thus, apologies in the medical context have come to be seen as part of a process which includes better healing for patients, better learning for medical practitioners and hopefully reduced litigation as a result. Note that they refer to an ‘apology or expression of regret.’ This is because of concern that an apology might amount to an admission of liability in itself, which has been seen as a stumbling block to the resolution of personal injury litigation, whether or not an insurance contract is involved.

15 AHMAC Report, above n13 at 49; the Lexington Centre’s experience is also discussed in Steve Kraman and Ginny Hamm, ‘Risk Management: Extreme Honesty May be the Best Policy’ (1999) 131 Annals of Internal Medicine 963–967 and in Cohen, above n14.

16 AHMAC Report, above n13 at 2.

17 The Open Disclosure Project was carried out at the request of the Australian Council for Safety and Quality in Health Care by the National Open Disclosure Consortium in 2001 and 2002. The aim was to develop national standards, education and support for open disclosure of adverse events to patients. ‘Adverse event’ is defined as ‘An incident in which harm resulted to a person receiving health care’ by Merrilyn Walton in Open Disclosure to Patients or Families After an Adverse Event: A Literature Review at 53. The project website is at <http://www.nsh.nsw.gov.au>.

18 AHMAC Report, above n13 at 48.
However, as the Legal Review for the Open Disclosure Project notes, the Lexington experience does not prove that litigation rates would drop in Australia if a similar scheme was introduced — but there is certainly no evidence that the rate would increase.19

3. Apologies and Insurance

An important stumbling block to the practice of apology has been the interpretation of the frequent clause in insurance contracts, which voids the contract if any admission of liability is made. These clauses are known as admissions and compromise clauses. It is common for organisations to advise clients not to apologise because that might be taken as an admission of liability. For example, in 2003 United Medical Protection’s Australasian Medical Insurance Limited policy stated:

4.1 You must not make any admission, offer or promise in relation to any claim covered by this policy without our prior written consent.20

Although apology is not mentioned in this clause, nor is it usually mentioned in such clauses, there is often concern that an apology will be construed as an admission of liability which would avoid such a contract. Admissions and compromise clauses are common in insurance contracts. Such clauses normally say that if a person makes an admission or a compromise on a claim, the insurance contract will be terminated and the insured may be left unprotected,21 but if the liability would have existed regardless of the admission or compromise the exclusion does not apply.22 The Commonwealth Insurance Contracts Act 1984 (Cth) prevents the termination of the contract, instead allowing the insurer to reduce the claim by the amount the insurer has been affected by the admission or compromise. Of course, this could be the whole sum in some circumstances.

The existence of these clauses and the advice which has arisen out of the fear that an apology will activate the clause has had a significant chilling effect on the willingness of defendants to apologise to people they have injured. This is ironic considering that there is little legal evidence that an apology will be regarded as an admission which will create liability. This is discussed below.

4. The New Civil Liability Legislation

As with many of the Australian tort reforms, the legislation provided across the jurisdictions in respect of apologies does not form a single pattern. Four models exist and in this paper I set out why different models have been chosen and the likely effect of the different models.

20 Id at 30.
The New South Wales provision is in Part 10 of the Civil Liability Act 2002 (NSW), ss67–69:

67 Application of Part

(1) This Part applies to civil liability of any kind
(2) This part does not apply to civil liability that is excluded from the operation of this Part by Section 3B.23

68 Definition
In this Part:
apology means an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter whether or not the apology admits or implies an admission of fault in connection with the matter.

69 Effect of apology on liability
(1) An apology made by or on behalf of a person in connection with any matter alleged to have been caused by the fault of the person:
(a) does not constitute an express or implied admission of fault or liability by the person in connection with that matter, and
(b) is not relevant to the determination of fault or liability in connection with that matter.
(2) Evidence of an apology made by or on behalf of a person in connection with any matter alleged to have been caused by the fault of the person is not admissible in any civil proceedings as evidence of the fault or liability of the person in connection with that matter.

The significant elements in this legislation include:
A: the fact that apology is defined to include an admission of fault, rather than merely as an expression of regret;
B: the apology does not constitute a legal admission of fault or liability;
C: the apology is not relevant to the determination of fault or liability; and
D: the apology is not admissible in civil proceedings as evidence of fault or liability.

Element A is significant because the apology is defined as more than a mere expression of regret. It is not just ‘I am sorry this happened to you’, but ‘I am sorry for doing this thing which has harmed you. I was at fault’. Element B states that the apology does not constitute a legal admission of liability — that is, the fact that I have acknowledged that I was at fault is not the same as me being legally liable. Thus, legal liability remains to be proved in another way. Element C emphasises

23 Section 3B provides that the Act does not apply to intentional torts, sexual assault or any civil matter involving intention to cause injury or death, nor to dust diseases, or injury or death resulting from tobacco products nor matters under the following legislation: Motor Accidents Act 1988 (NSW); Motor Accidents Compensation Act 1999 (NSW) or Transport Administration Act 1988 (NSW); Workers Compensation Act 1987 (NSW); Workers Compensation (Bushfire, Emergency and Rescue Services) Act 1987; Victims Support and Reconciliation Act 1996. Not all jurisdictions have so restricted the provision.
this by saying that the apology is not even relevant to the determination of legal liability. Thus, it will not be relevant for the purposes of determining admissibility of evidence by relevance and it cannot be used to go towards the determination of liability. Element D prevents the apology from being admitted in civil proceedings as evidence of liability, but it does not prevent the apology from being admitted for other purposes. For example, in mitigation of damages in defamation; or possibly, in jurisdictions which allow exemplary or punitive damages, it might be admissible as evidence of contrition so that such damages might not be awarded.

The ACT legislation\(^\text{24}\) is in essentially the same terms as the New South Wales legislation, having all four of the above elements.

The Western Australian legislation\(^\text{25}\) and the Tasmanian provisions\(^\text{26}\) differ from those of New South Wales and the Australian Capital Territory. First, they define ‘apology’ as ‘an expression of sorrow, regret or sympathy by a person that does not contain an acknowledgment of fault by that person’\(^\text{27}\). They also apply to civil liability of any kind. Section 5 AH of the Western Australian provision and ss7(1) and 7(2) of the Tasmanian provision are in the same terms as New South Wales’ ss69. Thus the Western Australian and Tasmanian legislation have elements B, C and D but not element A.

The Northern Territory Personal Injuries (Liabilities and Damages) Act 2003 (NT) ss12–13 and Queensland Civil Liability Act 2003 (Qld) ss68–72 have only element D of the elements outlined above. That is, they refer only to admissibility of an apology defined purely to evidence in civil proceedings so that the only exclusion from evidence is a mere expression of regret.

The Victorian provisions are different again. The Wrongs Act 1958 (Vic) s14I defines ‘apology’ as ‘an expression of sorrow, regret or sympathy but does not include a clear acknowledgment of fault’. Section 14J provides:

1. In a civil proceeding where the death or injury of a person is in issue or is relevant to an issue of fact or law, an apology does not constitute-
   a. an admission of liability for the death or injury; or
   b. an admission of unprofessional conduct, carelessness, incompetence, or unsatisfactory professional performance, however expressed, for the purposes of any Act regulating the practice or conduct of a profession or occupation.

2. Sub-section (1) applies whether the apology –
   a. is made orally or in writing; or
   b. is made before or after the civil proceeding was in contemplation or commenced.

3. Nothing in this section affects the admissibility of a statement with respect to a fact in issue or tending to establish a fact in issue.

\(^{24}\) Civil Law (Wrongs) Act 2002 (ACT) ss12–14.
\(^{25}\) Civil Liability Act 2002 (WA) ss5AF–5AH.
\(^{26}\) Civil Liability Act 2002 (Tas) s7.
\(^{27}\) WA s5AF; Tas s7(3).
The South Australian provisions are similar in effect: Civil Liability Act 1936 (SA) s75:

In proceedings in which damages are claimed for a tort, no admission of liability or fault is to be inferred from the fact that the defendant or a person for whose tort the defendant is liable expressed regret for the incident out of which the cause of action arose.

Thus the South Australian and Victorian provisions have only element B.

Similar legislation has been passed recently in the United States in California\(^2\) and Texas\(^3\) and has existed in Massachusetts since 1986.\(^4\) The Californian Evidence Code provides:

S 1160 The portion of statements, writings or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering, or death of a person involved in an accident and made to that person or to the family of that person shall be inadmissible as evidence of an admission of liability in a civil action. A statement of fault, however, which is part of, or in addition to, any of the above shall not be inadmissible pursuant to this section.

Thus, these jurisdictions have only element D.

The differences across the jurisdictions can be put in the form of the following table:

**Table 1: Apology Elements by Jurisdiction**

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\(^2\) California Evidence Code, s1160.

\(^3\) Texas Civil Code, s18.061 (introduced in 1999).

\(^4\) Mass Gen Laws Chapter 233, s23D.
The most striking thing about this table is the extent to which the jurisdictions have chosen to protect only the ‘safe’ or ‘partial’ apology, the expression of regret. Such an expression of regret in the majority of jurisdictions is not an admission of liability nor is it admissible as evidence of liability.

5. **What is the Legislation Trying to Achieve?**

The speeches in the Australian Parliaments demonstrate that the main aim of this legislation is the reduction of litigation. In introducing the changes into parliament, the Premier of New South Wales, Mr Carr said: \(^{31}\)

An apology by or on behalf of the defendant will also not constitute an admission of liability and will not be relevant to the determination of fault or liability in connection with civil liability. Injured people often simply want an explanation and an apology for what happened to them. If these are not available, a conflict can ensue. This is, therefore, an important change that is likely to see far fewer cases ending up in court.

In the same session, Mr Brown said:

When I was getting my driver's licence I was told that, if I ever had an accident and it was my fault, I should never apologise as it could be taken to be an admission of guilt and I could be sued. Australians are happy to apologise if they are at fault. They try to work things out. It is totally un-Australian not to apologise if one thinks that one has done something wrong. The Carr Labor Government has included provisions in this bill that will ensure that any apology made by or on behalf of a defendant will not constitute an admission of liability and it will not be relevant to the determination of fault or liability in connection with civil liability. The Government, through this bill, is restricting the rights of individuals that have developed through common law in protection of the community. That is what the community expects the Government to do. That is what the Carr Labor Government is doing. It is doing everything it can to change the law of tort in New South Wales. I encourage other States to change the law of tort. \(^{32}\)

In the Northern Territory, it was observed by Mr Kiely:

This legislation, which a community could be rightly happy with, is a means by which individuals are empowered to make expressions of regret without that statement being used at a later date as an acknowledgement of fault. Thanks to this legislation, a person may make an oral or written statement expressing regret for an incident that is alleged to have caused the personal injury. Such a statement does not contain an acknowledgement of fault by that person, and is not admissible in future proceedings. I do not know how many times each of us here have heard stories where people wanted to say sorry but were constrained by fear that saying sorry might mean some liability. The same goes for all the times

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\(^{32}\) Mathew Brown, Legislative Assembly, *Parliamentary Debates (Hansard)*, 30 October 2002 at 6244.
people have stated all they wanted to hear was the person who caused the accident to say sorry so that closure could be effected. I believe this clause alone will have a significant effect on the frequency of claims.33

Dr Toyne:

It is simply to promote that pre-court process by providing an extra formal provision within the act. Given that it is practice for doctors to be instructed not to apologise, this provides some scope for them to enter the negotiation on a different basis.34

The various speeches suggest that the main aim of the legislation is to stop litigation because most people will be satisfied with an apology and an explanation. The first such legislation, that of Massachusetts, was apparently passed at the instigation of a senator whose daughter had been killed on the road while riding a bicycle. He apparently thought that expressions of regret and sympathy alone could reduce people’s desire to sue.35 However, it is arguable that the choice of expression of regret rather than an apology acknowledging fault by the majority of jurisdictions is less likely to be successful in reducing litigation than parliamentarians hope.

This raises the issue of whether a true apology involves an admission of fault, and how effective a mere expression of regret or partial apology can be in reducing litigation.

6. What is an Apology?

The legislation in both Australia and the United States defines apology as an expression of regret either with or without an admission of fault. Most jurisdictions define the protected apology as no more than an expression of regret. Most of the legislation is based on the distinction between apology and expression of regret — the expression of regret being regarded as a ‘safe’ apology. Thus, element A is missing from them.

However, in the moral domain an apology is more than a mere expression of regret. Saying ‘I am sorry for your loss’ is an expression of regret, but in the moral domain that is not a real apology. Saying ‘I am sorry that I hurt you’ is a real apology because it acknowledges responsibility. Paul Davis36 gives an example of the difference:

I – a white man – might have some blacks among my friends. That might offend some who think whites should not befriend blacks. If so, I would regret that offence, ie I would wish it that those who are offended were not so. However, I would be quite disinclined to apologise. This is because I would not feel that I am doing anything wrong if the behaviour in fact causes offence to some. I would feel

33 Leonard Kiely, Legislative Assembly, Parliamentary Debates (Hansard) 27 February 2003.
34 Dr Peter Toyne, Legislative Assembly, Parliamentary Debates (Hansard) 27 February 2003.
35 Taft, above n6 at 1151.
that the offence results from, not a culpability of mine, but a deficiency in the outlook of those who are offended.

There is an extensive literature which shows that many people do not regard an apology as real unless it includes an admission of wrong.37 This was also noted in the Victorian debate on the provisions:38

The next matter to which I refer is a set of provisions …[which] state that apologies or reductions or waivers of fees on their own do not constitute admissions of liability. The intention of this is clear: that the government wants to not have people clam up and feel they cannot express a normal human emotion of sympathy or condolence in the event of an accident for fear that whatever they say might be taken down or memorised and subsequently used against them in court proceedings.

As I said, the intention is clear. The problem with these provisions is that they do not seem to achieve that intention, because while they provide that an expression of sorrow, regret or sympathy falls within the definition of an apology, they go on to qualify that by stating that it does not include a clear acknowledgment of fault.

Further on in the legislation it says in several places that nothing in the relevant section affects the admissibility of a statement with respect to a fact in issue or tending to establish a fact in issue.

To summarise, if you say to someone 'I am sorry', that is not a clear acknowledgment of fault, but if you say to someone 'I am sorry. It is all my fault', then the apology provision is rendered inoperative. The Australian Medical Association (AMA), amongst others, has expressed the view that this sort of highly qualified, highly restrictive drafting is not calculated to encourage the outcome the government seeks to achieve. The AMA believes doctors, amongst others, are going to be very cautious in trying to take advantage of these provisions because of their limited nature.

Lee Taft argues that, ‘[f]or an apology to be authentic, it must meet essential criteria: there must be an unequivocal expression of sorrow and an admission of wrongdoing. Without a meaningful and unequivocal expression of wrongdoing, apology cannot be an authentic moral act’.39 Cohen suggests that an apology has three elements — admitting fault, expressing regret for the action and expressing sympathy.40 He also emphasises the importance of sincerity and voluntariness.

An effective apology, according to Brown, requires an affirmative purpose, must be the legitimate result of ‘analysis and introspection on the part of the offender’, and timely — a delayed apology may make the offence or harm seem greater.41 One question is the extent to which an apology should also contain a

38 Robert Clark, Legislative Assembly, Parliamentary Debates (Hansard), 8 October 2002 at 285.
promise to change something in the future. In the psychological domain, an apology is ‘remedial work’ itself. Goffman describes an apology as an exchange ‘which [splits] the self into a blameworthy part and a part that stands back and sympathises with the blame giving, and, by implication, is worthy of being brought back into the fold.’

The construction of apologies as admissions of liability comes out of the moral domain where an apology consists of an admission + expression of regret and may include asking for forgiveness. We need to pay attention to the moral domain because that is the domain in which plaintiffs and defendants live and make their decisions. Because it is so well-recognised that apologies in the moral and ordinary social domain acknowledge fault, it has often been assumed that that is the same as a legal admission of liability. That is not necessarily so at common law.

7. **Does the Legislation Make a Difference?**

A. **Apologies vs Admission of Liability**

The common law is able to distinguish between apologies, admissions of liability and admissions of fact. There are two contexts in which the question of whether an apology amounts to an admission of guilt is important. The first question is whether a party to an accident who says ‘I’m sorry, that was my fault’ has breached his or her contract of insurance.

As noted above, admissions and compromise clauses are common in insurance contracts. A medical example was given above. Such clauses normally say that if a person makes an admission or a compromise on a claim the insurance contract will be terminated and the insured may be left unprotected. However, if the apology does not amount to an admission of liability then an apology would not breach an admission or compromise clause.

The second question, therefore, is whether the apology amounts to an admission of liability which will count against the defendant in court. The High Court of Australia addressed this question in 2003 in *Dovuro Pty Ltd v Wilkins*. In that case, contaminated canola seed had been released to growers and caused them pure economic loss. The Dovuro Company, which had released the seed to the growers, made written statements and apologies. The first was a media release which said:

> We apologise to canola growers and industry personnel. This situation should not have occurred but due to strong interest in Karoo the unusual step was made of undertaking contract seed production in New Zealand to assist rapid multiplication; whilst the urgency to process and distribute the seed of Karoo in time for planting caused additional time pressures.

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41 Brown, above n9 at 668 ff.
43 Goffman, id at 113.
44 *Terry v Trafalgar Insurance*, above n21.
The second statement was in a letter:

I’d like to stress at this stage that this does not excuse Dovuro in failing in its duty of care to inform growers as to the presence of these weed seeds. We got it wrong in this case, and new varieties will not be brought on the market again in this manner. Dovuro will not be producing seed in New Zealand again. The company will continue in bulking up its varieties (as it does every year) in Western Australia.

Both these statements are what the literature calls ‘full’ apologies. That is, they not only express regret but admit fault and even go so far as to say what will be done to remedy the situation in future. They would not be protected under the legislation in any jurisdiction except that of New South Wales and the Australian Capital Territory.

However, in the High Court Gleeson CJ, McHugh, Hayne, Callinan and Heydon JJ generally agreed with the proposition that where such admissions include a matter which is a conclusion about the legal standard required, the admissions could have no effect and could not amount to a basis for a finding of negligence. Only Kirby J appeared to think they could have some significance and he did not directly discuss it. The importance here is, as Gleeson CJ said,\(^ {46}\) the

…[c]are that needs to be taken in identifying the precise significance of admissions, especially when made by someone who has a private or commercial reason to seek to retain the goodwill of the person or persons to whom the admissions are made…The statement that the appellant “failed in its duty of care” cannot be an admission of law, and it is not useful as an admission of failure to comply with a legal standard of conduct.

Thus, an apology could not amount to an admission of liability because it is for the court to determine that. This is consistent with a line of previous cases which have held that a statement as to a legal conclusion by a party cannot be relied on to establish that conclusion, because that is the role of the court.\(^ {47}\) In the same way that in the criminal law the fact that someone confesses voluntarily does not necessarily mean they are guilty, in the civil domain an apology is not necessarily to be construed as an admission of liability. This applies even to an apology which admits some sort of fault. As is now well recognised, false confessions occur voluntarily as well as as a product of coercion. In the same way, an apology which is made voluntarily may or may not be evidence of legal liability or guilt. It may be made by a person who feels morally guilty; or just by a person who wishes the accident hadn’t happened and is inclined to feel responsible in general: it is extremely common, for example, for a parent to feel that the death or injury of a child is their fault (‘If only I had not let him go to that party’) when there is no question of fault at all. This is what the courts recognise. Fault remains to be

\(^{46}\) Id at [25].

proved and that determination is for the court, not for the parties, to make. Thus it can be argued that in relation to apologies the common law is simply reinforced by the new legislative provisions in the six jurisdictions which provide that an apology does not constitute a legal admission of fault or liability. The advantage of having the provision in legislative form is largely in ease of recognition to the legal and insurance community.

B. Admitting Apologies into Evidence

Even if they are not admissions of liability, the problem with apologies is that their prejudicial effect may outweigh their probative value. It is said of confessions, ‘A confession relieves doubts in the minds of judges and jurors more than any other evidence’; but this relief is misplaced because people may feel in the wrong when they are not legally at fault. Therefore, preventing the admissibility of evidence of an apology may be very important for a defendant.

The issue of whether an apology will be admitted in evidence is the core area of the legislation in most jurisdictions where they have been legislatively considered. The general rule is that evidence which is relevant is admissible unless there is a reason to exclude it. One of those exclusions is hearsay evidence. One exception to the law preventing the admission of hearsay evidence is statements which go against the interests of the person. An admission of fault falls squarely into this category. However, as noted above, a statement as to a legal conclusion by a party cannot be relied on to establish that conclusion, because that is the role of the court. When a party makes an informal admission of facts by words or conduct, that admission may be admitted in evidence against that party as evidence of the truth of its contents. The apology evidence would normally be evidence which is admitted as an exception to the hearsay rule, but keeping it out of the court is particularly important in areas where juries remain fairly common, for example in medical negligence cases.

In Dovuro’s case, the court held that, although the apology did not mean that the company was liable, the facts admitted in the apology could be used to go towards a determination of liability. New South Wales, the Australian Capital Territory, Tasmania and Western Australia have provided that an apology ‘is not relevant to the determination of fault or liability in connection with that matter’. Does that mean that an apology cannot be admitted for the purpose of establishing the facts contained in the apology if some other basis for relevance can be found? Where a person has apologised, saying after a car accident, ‘I’m sorry I hit you, I was looking at my mobile phone,’ is the statement ‘I was looking at my mobile phone’ protected by these relevance provisions? Looking at one’s mobile phone

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48 ACT s14(1)(a); NSW s69(1)(a); SA s75; Tas s7(1); Vic s14J (1); WA s5AH(1)(a).
50 Rhone-Poulenc, above n47 (in the context of s52 Trade Practices Act (Cth)); Eastern Express, above n46.
51 Civil Liability Act 2002 (NSW) s68(1)(b); ACT ss12–14; SA s75; Tas s7; Vic s14J (1); WA s5 AH.
while driving would normally be evidence going to liability. So far no cases have considered these provisions, and one commentator has suggested that such a statement would not be admissible on that basis.\(^\text{52}\) However, if a statement could be regarded as relevant on some other basis it seems likely that it would be admissible. For example, if the defendant said ‘I’m sorry I did this; my role as an importer was occupying my mind,’ then the apology might be admissible for the purpose of identifying the defendant. However, the two clauses of the above sentence might be severed so that only the words about ‘my role as importer’ were admissible in evidence. The words ‘I’m sorry I did this’ would not be relevant for the purpose of establishing the facts, but that does not necessarily mean that they would not be admitted into evidence, depending on the view the court took of severance. By contrast, the Victorian provision specifically states that nothing in the section affects the admissibility of a statement with respect to a fact in issue or tending to establish a fact in issue.\(^\text{53}\) It is not clear from any of the legislation that all aspects of an apology would be protected from admission in all cases.

Preventing the apology from being admitted aims to prevent a jury drawing a wrong conclusion about liability from the fact that an apology has been uttered, and this may be more effective than a judicial direction that an apology does not amount to an admission of liability. This is important given the extent to which judges and juries are thought to be swayed by the existence of an apology or a confession. However, this is not to say that after this sort of protective legislation has been introduced, judges in particular may be less likely to be affected by the existence of an apology.

8. Empirical Data about Apologies and Propensity to Sue

Unfortunately there are very few studies which consider the propensity to sue of potential litigants\(^\text{54}\) and even fewer which consider the impact of apology on the desire of people to sue following personal injury. In 1991, Herbert Kritzer published an account of different propensity to sue in the United States, England, Australia and Canada. He drew on previous studies to find that the United States and Australia showed similar propensity to sue, with Canada and England being

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53 Vic s14J(3).
lower. The data he used from Australia and the United States was from 1983. Kritzer argued that the factors which contributed to higher propensity to sue included more favourable treatment of plaintiffs by cost rules, the existence of jury trials (the Australian data was from Victoria which had and continues to have more jury trials than other Australian jurisdictions) but that these were not so significant as ‘more general views of the role of adversity and misfortune’ which he attributed to culture. He did not discuss the role of apology at all. Studies which consider apologies continue to be rare. However, the Lexington Centre experience, the Open Disclosure project and the studies that do consider apology all suggest that the acknowledgement of fault is important for its effect on the desire to sue and willingness to settle, as well as increasing the ability of medical practitioners to learn from mistakes.

One set of experimental studies based on simulated accidents between a bicycle and pedestrian was carried out by JK Rebbennolt. Participants in the study reviewed the scenario and then, standing in the shoes of the injured party, evaluated a settlement offer. In one study the only variable which changed was the nature of the apology offered (partial apology (expression of regret), no apology or full apology (acknowledging fault)). Another study examined how respondents reacted to an apology in light of their knowledge of the evidentiary rules which admitted or did not admit the apology, and did or did not protect it. The results of the studies suggested that respondents were far more inclined to accept a settlement offer where a full apology was offered, less so for partial apologies and much less inclined where no apology was offered. The study also noted that respondents saw the offender as more moral, more forgivable and more likely to be careful in the future if they offered a full rather than a partial or no apology. The partial apology appeared to create uncertainty in participants as to whether to accept the offer. One study also suggested that where an injury was severe, a partial apology might actually be detrimental (this effect was not seen where injury was slight).

Some other studies in the medical context tend to support these conclusions. A German study of handling of errors found that while severity of injury was the major factor affecting patients’ choice of action to be taken, where there was a severe injury,

Most patients accept that errors are not entirely preventable, but they expect accountability and clear words. These clear words should include the acknowledgment that something wrong has happened, that measures will be taken to prevent future events…and an expression of sincere regret.

An Australian study of medical complaints showed that where 97 per cent of complaints had resulted in an explanation and/or apology, none had proceeded to litigation. However, another Australian study showed that only 16 per cent of

56 Rebbennolt, above n2.
57 Schwappach & Koeck, above n14.
complainants to the New South Wales Health Care Complaints Commission said they would have been satisfied by an apology.\textsuperscript{59} It should be noted that only 6.4 per cent of the complaints considered in this study were about clinical care (as opposed to issues such as morally wrong personal behaviour) so it is difficult to evaluate the force of this study with respect to apologies and propensity to sue.

However, the literature shows clearly that many people do not regard an apology as real unless it includes an admission of wrong. The definition of apology is a real strength in the New South Wales and Australian Capital Territory legislation compared with all the other provisions, because it allows a person to not only express regret but also to admit wrongful behaviour without that automatically creating an admission of legal liability.

9. **Why Apologise for Negligence?**

The first and major aim of the legislation in all the jurisdictions mentioned has been to reduce litigation rates by allowing apologies to be unimpeded. If apologising does reduce litigation rates or the desire to litigate, it suggests that there is some connection between apologising and the central aims or roles of the law of negligence. People sue for many reasons. They may need compensation, they may wish to deter wrongful behaviour, or they may need to blame someone or force the recognition of responsibility.\textsuperscript{60} This corresponds to the three major aims or functions of the law of negligence commonly recognised — compensation of victims for harm, deterrence of wrongful behaviour and what is now known as ‘corrective justice’. I turn to consider whether an apology may contribute in some way to each of these functions.

A. **Apologies and Compensation**

Compensation is clearly one of the aims of tort law, although there is major evidence that it is a poorly achieved aim.\textsuperscript{61} However, that is not the present issue. It is arguable that there is a compensatory aspect to apologising which is one of the reasons the apology seems so attractive to legislators. What is compensation? The usual answer of the law of damages in tort is that the aim of compensatory damages is to put the plaintiff back in the position they would have been in had the accident not happened.\textsuperscript{62} Viewed in this light and with our customary emphasis on monetary compensation, an apology does not look as if it could meet any compensatory function. However, viewing the victim in terms of the damage to

\begin{itemize}
  \item This has been the rationale behind some of the stolen generation litigation. See for example, Australia National Sorry Day Committee web site: <http://www.austlii.edu.au/au/special/rsjproject/sorry> (12 August 2005).
  \item Livingstone v Raywards Coal Co (1880) 5 App Cas 25; Skelton v Collins (1966) 115 CLR 94.
\end{itemize}
their human dignity might make a difference to this. It might be argued that in
some ways apologies work to remediate the sense of dignity of the plaintiff:
psychologists certainly see apologies as ‘remedial work.’63 However, considering
apologies as a form of compensation is an inadequate characterisation of a process
which really turns on the acknowledgement of a wrong and it is therefore
preferable to consider apologies in the context of corrective justice.64

One of the major problems with the tort system, discussed by Professor Luntz
and others,65 is the tension between the competing roles of compensating injury
and attributing fault. This is a particular problem in negligence because often there
is such a level of disproportion between the level of fault and the compensation
required to be paid by the wrongdoer.66 This is more of a problem in negligence
than it is in, for example, criminal law, because negligence does not necessarily
involve deliberate harm. Negligence may be just a moment’s inattention. Many
corrective justice proponents reject the idea of no-fault schemes on the basis that
they neglect the necessary moral recognition of responsibility. It may be worth
considering whether no-fault compensation schemes which incorporated the
possibility of formal apologies (voluntary or coerced) might meet some of the
objections of corrective justice theorists. Similarly, an apology might be a
mechanism which reinforces the ‘very strong positive reasons for not awarding
damages that go beyond compensation of actual loss’ which Stephen Waddams
discusses in his paper.67

B. Apologies and Deterrence

Prima facie, it seems unlikely that apologies could operate as a deterrent. Certainly
it seems extremely unlikely that, for example, a driver would drive carefully
because otherwise he or she might have to apologise. However, deterrence as the
aim of tort law is often used as shorthand for the aim of reducing the number of
accidents. In this case, the Open Disclosure experience seems to offer a way in
which apologies which include the proper acknowledgement of fault might help to
reduce accidents. The argument is that when apologising rests on
acknowledgement of responsibility then it is also likely to lead to (a) finding a way
to prevent the accident occurring again and (b) making public (or at least to the
victim) that the accident can be avoided. An example was given of this occurring
in the Open Disclosure process by the Chief Executive Officer of the NSW
Clinical Excellence Commission, who noted that this had led to the:

discovery of an instrument used to retract abdominal tissue during surgery that
was left inside two patients … NSW Health put out an alert to all hospitals

63 Goffman, above n42; Tavuchis, above n42.
64 This is argued by Sandra Marshall, ‘Noncompensatable Wrongs, or Having to Say You’re
65 For example, inter alia, Luntz, ‘Looking Back at Accident Compensation: an Australian
Perspective’, above n10, Luntz & Hambly, Torts, Cases and Commentary, above n11.
66 See for example Jeremy Waldron, ‘Moments of Carelessness and Massive Loss’ in David
67 Stephen Waddams article, ‘The Price of Excessive Damage Awards’ in this volume.
regarding the instrument, to inform staff of the incidents and to remind them to ensure it was counted … so we don’t have to learn from our own mistakes, we can learn from the mistakes of others.68

Of course, this can only happen if the apology process includes recognition of mistakes, not just expressions of regret. This appears to be the lesson from the Lexington Hospital experience.69 It is for this reason that ‘apology should be rooted in responsibility and remorse rather than in economics and strategy.’ Such real apologies are most likely to be effective in all the ways sought. However, it could be argued that the deterrent effect arose really from management’s ability to recognise and deal with mistakes and that apology is simply incidental to it. Thus, deterrence is also not a sufficient explanation for why apologies are important.

C. Apologies and Corrective Justice

A better way of considering the importance of apologising lies in considering the apology in the context of corrective justice theory. Negligence law is based on the attribution of fault and the catch-cry in recent years, in both the drive for reform and in the attitude of the appellate courts in Australia, has been the term ‘personal responsibility’.70 This version of personal responsibility has been focused on the plaintiff. However, the apology must come from a defendant. If a defendant gives a partial apology they have not acknowledged their responsibility for the harm; however, if the defendant gives a full apology they have acknowledged their responsibility for the harm. If making the defendant acknowledge this responsibility is the plaintiff’s aim, then an apology means that goal is achieved and there may be no necessity to go to court in order to force that recognition. Where there has been negligence or something has gone wrong, the victim may be concerned that the tortfeasor does not realise or fails to acknowledge that they have done wrong. An apology will meet that need, but where such an apology acknowledging fault does not arise, the victim may feel that they must sue to force the issue. Such an analysis takes corrective justice to be one of the central aims of tort law.

Corrective justice theory raises the question of the relationship between moral fault and legal liability. Although legal fault or responsibility is not to be equated with moral fault71 it is clearly important for the legitimacy of decisions made in negligence that there be some relationship between our social and moral sense of responsibility and the decisions made at law. This is one reason why such a vast literature exists in tort theory about the meaning of fault and responsibility.72 As

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69 Cohen, above n14 at 1459.
70 This term is used in the Ipp Panel, above n1. The views of personal responsibility inherent in various negligence judgments and changes to those views are discussed in Prue Vines ‘Fault, responsibility and negligence in the High Court of Australia’ (2000) 8 Tort law Review 130.
71 Vaughan v Menlove (1837) 3 Bing NC 468.
72 See, for example, the articles in footnote 74 below and Tony Honore, Responsibility and Fault (1999); Peter Cane, Responsibility in Law and Morality (2002).
Leon Green said, ‘[there is a] deep sense of common law morality that one who hurts another should compensate him’. Fault is central to negligence law because of its connection to moral responsibility, and in particular, to personal responsibility.

Corrective justice theory focuses strongly on the connection between law and morality by arguing that there is a specific obligation against the individual who causes harm to correct that harm in some way. Ernest Weinrib has been a leading proponent of corrective justice theory in tort law. He draws on Aristotle’s account of corrective justice, emphasising the transactional nature of the relationship between victim and wrongdoer. After wrongdoing alters the equilibrium between the party, the relationship between victim and wrongdoer should be restored to equality. Weinrib strongly contrasts corrective justice, which is about the dyadic relationship between the parties, with distributive justice, which is concerned more with distribution of good/risk etc in a relationship and across society.

In Stephen Perry’s account of corrective justice, he argues for a principle of reparation which is fault based. In his view, we should put together the

localised distributive argument for fault and the agency-oriented understanding of outcome responsibility...Outcome-responsibility [ the view that the wrongdoer must be responsible for the outcome of his or her actions rather than just the actions themselves, often regardless of fault] ensures that the distributive argument for fault can be non-arbitrarily limited to victims and wrongdoers. Fault is the further consideration that supplements outcome-responsibility so as to produce a general obligation to compensate.

On this view, the establishing of fault or responsibility is important because it recognises that any harm or loss caused is real and that it has had an effect on one party because of the actions of the other. Perry’s emphasis on ‘degradation of some aspect of human well-being’ is illuminating because it can allow us to consider that the balance of the relationship between the two parties is disturbed not just in terms of money or injury, but also in terms of human dignity.

75 See Perry, ibid and Ernest Weinrib, ‘The Special Morality of Tort Law’ (1989) 34 McG LJ 403 for accounts of corrective justice theory.
76 Perry, above n74.
77 Perry above n74 at 497.
This is where apology comes in. In corrective justice terms, an adequate apology may be seen as an equaliser of the relationship. In terms of general social culture this is important for creating the ability of the two parties to continue on in their social roles. This applies both to the person who accidentally trips up another person walking past, and to the person who accidentally takes off the wrong toe of a patient. In terms of human dignity, if person X falls over person Y’s foot they may feel humiliated. If person Y apologises for having their foot in a silly place and for having caused the fall, then person Y has taken themselves down from a superior level and equalised the relationship between the two parties. This is a trivial example but it illustrates the ‘corrective’ nature of the process quite well. This explains why an apology might be effective in reducing the desire of a person to sue. It also might explain one of the issues that arose from the empirical data which suggested that a full apology was likely to lead to a person agreeing to settle whether an injury was severe or not; but a partial apology was likely to lead either to uncertainty with mild injury or, in the case of a severe injury, to the injured party becoming even more determined to proceed.

The use of apology in the criminal context underscores this approach to civil justice. It would be unthinkable in the criminal context for apology not to include recognition of wrongdoing. The literature on the use of apology in the criminal justice system and the little sociological literature on apology emphasise that apologies acknowledging fault are:

- secular remedial rituals. They both teach and reconcile by reaffirming societal norms and vindicating victims. As such, they are concerned not just with individual dispositions but also with membership in a particular moral community.79

The leading sociological/psychological treatments of apology are those of Nicholas Tavuchis80 and Erving Goffman.81 They both emphasise the social role of apologies. Similarly, from a legal perspective, Peter Cane argues that tort law may have a role in both supplementing moral principles and ‘mediating between divergent moral views’.82 Cane sees tort law as ‘a set of rules and principles of personal responsibility’83 which operates to set down acceptable behaviours — such as making up for wrongs or, perhaps, apologising. Sincerity is critical. As a bicycle manufacturer observed to me in relation to his practice of dealing with product liability claims,

    In this situation sincere compassion makes all the difference. To the relatives of the injured this seems only natural. To be not sharing in the sorrow is unnatural and heartless. It is also quite inappropriate from a party that has made a profit from the product sale and service provision.

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79 Bibas & Bierschbach, above n10 at 109.
80 Tavuchis, above n42.
81 Goffman, above n42.
82 Cane, above n72 at 26.
83 Cane, above n72 at 15.
The reference to the profit levels of the manufacturer is also an example of how the apology process may operate to correct the balance between the parties. This is consistent with the literature on apologising, which emphasises its dyadic, remedial and corrective nature and shows that apologies are best thought of as part of the corrective justice aspect of tort law.

10. Cynical Civility or Practical Morality?

The value of the legislation into which the Australian jurisdictions have entered will lie in the extent to which they do not chill or fracture the normal response to apologise. The evidence suggests that even the partial apology or expression of regret will be useful in reducing the desire to litigate, particularly where injury is not severe, but the moral literature and empirical evidence suggests that the failure to incorporate acknowledgement of fault is likely to significantly reduce the chance of this.

The problem of the partial apology is that it requires such precise wording in order for the statement to be protected. If a doctor goes beyond saying ‘I’m sorry your vocal cords no longer work’ to ‘I’m sorry I hurt you’, it seems that the protection will be lost in those jurisdictions which confine protection to the mere expression of regret. The greater danger is that people will remain afraid to apologise for fear of litigation, when it seems that at common law even the full apology did not amount to an admission of legal liability. What the evidence suggests is that the critical difference in provisions is not whether the apology is admissible or not, but the characterisation of the apology, because it is the character of the apology which is most likely to effect behavioural change. That is, it appears to be significant whether an apology incorporates taking responsibility for wrongdoing and, to a lesser extent, whether the apology is shielded from litigation risk by litigation and rules of evidence.

Because the jurisdictions vary so much, the opportunity will arise for us to evaluate the approach taken by the different jurisdictions, in particular, to compare the New South Wales and Australian Capital Territory provisions with those of the rest of the country.

Some people have been concerned that legislating for safe apologies may create a situation where apologies are cynically and insincerely made. Certainly it seems possible that lawyers might begin to advise their clients to apologise as a strategy. There are a number of answers to this. The first is that insincere apologies are unlikely to be effective and they are unlikely to reduce the propensity of a plaintiff to sue. Secondly it can be argued that even where an apology is insincere it may be part of a process of normalisation of the situation which may have some impact on both parties. It is thus likely to amount to a partial rather than a full apology even where the wrongdoer has appeared to accept responsibility, as in the New South Wales and Australian Capital Territory definitions of apology. In my view, the empirical evidence and the arguments from moral philosophy, sociology and psychology all suggest that the protection of the mere expression of regret is most likely to lead to a situation where insincere and ineffective apologies are
made. (It may well be that, paradoxically, the apology which is most likely to be
effective is the riskiest apology. That is, the apology which admits fault and where
the person being apologised to knows that the apology is not protected by
legislation).

The path that New South Wales and the Australian Capital Territory have
taken, on the evidence, seems to be the most likely path to succeed in reducing
litigation.

This legislation should be cautiously welcomed. In this paper I have tried to
show that if this legislation is effective it will be largely because it has reduced the
chilling effect of the fear of apologies and because apologies themselves can play
a role in the central aim of tort law which I see as corrective justice. The fact that
apologies can also be seen as contributing in some ways to both the compensation
goal (although a weak argument) and the deterrence function of tort law simply
emphasises the point that apologies are a significant part of the social functioning
of human beings and should be allowed to carry out their functions. The answer to
the question in the title is therefore that it depends on the apology. Where apologies
are real and sincerely meant, they may operate as practical morality and meet some
of the goals of corrective justice. This will not mean that all victims who are
apologised to will decide not to sue the wrongdoer. Clearly, the need for
compensation where the injury is severe will impact on that in the absence of real
no-fault compensation schemes. At the same time, the impact of an apology on the
person depends greatly on their psychological makeup and their perception of the
wrong done to them, but it seems that for legislation to aim to prevent the chilling
effect of people being advised not to apologise is entirely appropriate in the civil
domain.
Substantive tort liability depends on whether the defendant breached a duty of care and thereby caused an injury that is fairly part of the risk the defendant took. Yet, whether the defendant is liable or not is only part of the story. The way we determine the amount of money awarded to successful plaintiffs also critically impacts upon tort law’s social function. Indeed, sweeping changes in the law of damages can dramatically transform tort law.1 Perhaps this explains why Professor Harold Luntz has made damages a central focus of his scholarship.2

At common law, tort damages were meant to provide complete compensation for the tort victim’s loss. When a wrongdoer caused harm, the goal of tort damages was to force the defendant to pay for everything necessary to make the specific plaintiff whole. Awards were meant to be highly individualised as to their amount, so as to reflect the unique circumstances of every individual case. Precise justice was understood to be as important in the award of monetary recovery as it was in the determination of liability itself.

Many people continue to embrace this view, and it clearly reflects the perspective of many judges and legislators in a large number of United States jurisdictions. American tort lawyers who represent plaintiffs in court typically make their reputations by convincing juries that an enormous sum is required to put a particular victim equivalently back in the position he or she would have been in but for the tortious conduct of the defendant.

Yet, in some American states, and in other nations around the world, different values have been brought to bear on the law of tort damages. These other perspectives can be importantly traced to experience in the design and implementation of social insurance schemes that compensate people suffering from disabilities (such as industrial injury compensation plans). Those social insurance schemes generally rest on the notion that it suffices to provide victims with rough justice when attempts at achieving precise justice cost too much. Costs here include both the financial costs of more individualised administration and the moral cost of inconsistent treatment of equals. Furthermore, whereas tort law conventionally has been understood to be exclusively about corrective justice,
social insurance schemes almost always contain a distributional justice perspective. Put simply, those plans worry more about the actual monetary needs of ordinary people than the needs of those who are financially well off or otherwise well provided for.

Once it is appreciated that some or all of the typical features of social insurance schemes might be substituted for common law principles, the possibilities of large-scale changes in the tort damages law become evident.

In this essay, I explore several core issues with respect to tort damages in personal injury cases. In the process I propose ways in which the common law and traditional US rules might be changed so as to make recovery in tort considerably more like recovery under social insurance schemes. Along the way, I point out that Australia in general, and New South Wales in particular, have already moved in the direction I suggest. Although a few American states have also begun a similar shift, the process is slower, in part because the underlying politics has been so easily characterised as no more than ‘taking away victims’ rights.’

My proposals are not meant merely as a package of pro-defendant changes, even if, on balance, they would considerably reduce the cost of tort liability. My central motivation is not simply to enable enterprises and individuals to purchase cheaper tort liability insurance, even if this consequence should also yield general social benefits in the form of lower priced goods and services. Rather, my goal is a reformed law of tort damages in personal injury cases that better meets what I see as genuine victim need.

1. **Primary v Secondary**

Conceptually, the most crucial initial issue that must be resolved in constructing the law of damages for personal injury is whether tort should be the primary or a secondary source of compensation for victims with valid tort claims. Put differently, should victims turn to tort initially, or only as a matter of last resort to fill in where compensation is otherwise not available?

More than a century ago, the answer to this question mattered little, because then most accident victims had no other source of compensation. But today that is all changed. Every developed nation has some institutional structure in place, altogether apart from tort law, to deal with its citizens’ medical and related expenses and their loss of income.

In many countries, all residents have access to free or low cost health care, and the social insurance scheme replaces a considerable share of lost earnings arising from disability, retirement, unemployment and death. In robust systems, disability benefits attend to both short and long term needs, as well as to both partial and total disabilities.

Despite its wealth, the United States has a less comprehensive scheme, and we rely on both private insurance and the labour market to a far greater extent than countries with a broader political consensus on the social welfare role of the state.3

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For example, although most of our elderly and many of our poor have government-funded free or low cost health care, most Americans access health care through private health insurance provided in connection with the employment of one or more household members. As a consequence, perhaps 15 to 20 per cent of Americans are without health insurance. They must go without health care, pay out-of-pocket for care, or else seek care as charity patients. So, too, the US lags behind most wealthy nations with respect to income protection. Our national Social Security scheme provides moderate wage replacement benefits to survivors of deceased former workers and to workers and their families if the worker is totally and permanently disabled. Beyond that, those injured on the job have some wage replacement protection through workers’ compensation schemes; those schemes are mandated by the fifty individual states, not the national government, and a substantial majority of employees are protected through insurance their employers purchase from private carriers. To provide income replacement in case of total disability beyond that made available through social insurance, many workers are provided, or permitted to purchase, group-based private disability insurance through their employment, and there is an individual market in long-term disability insurance policies that caters especially to high earners. Only a handful of states mandate income replacement for non-occupational short-term disabilities, and sick leave benefits are nowhere required by law. On the other hand, larger employers commonly provide such benefits to their regular employees.

Notwithstanding this ‘crazy quilt,’ even in the US, there is a good chance that anyone who happens to be an accident victim with a valid tort claim will today have at least some substantial alternative source of compensation.

Historically in the US, and at common law generally, these so-called ‘collateral sources’ have been formally ignored in tort litigation. Defendants are not permitted to lower the amount of damages they owe merely because advance provision has otherwise been made for victim need. Nor, traditionally, are American juries meant to learn about such other sources of compensation any particular victim might have had. This approach has been variously justified: the wrongdoer should not get off easy; safety incentives would be undermined; proper social cost accounting would be disrupted; victims and/or society pay for the collateral sources and that advance planning was not done to benefit wrongdoers.

Nonetheless, the rule has been much criticised, even by those who concede that ‘precise justice’ might be better served, for example, by a careless driver’s auto insurer paying full tort damages to the victim, and that victim, in turn, reimbursing his own health and disability insurers. The central objection to this arrangement is practical, not theoretical. Put simply, the transaction costs of shifting losses from one insurer to another are so large that, it is claimed, society as a whole would be

4 See at <http://www.census.gov/hhes/www/hlthins/hlthin03.html>.
better off forgoing the luxury of whatever exquisite justice is achieved by the common law solution. Moreover, if there is no reimbursement by the victim of the collateral sources, then, critics believe the victim winds up with a socially undesirable windfall of double recovery. Furthermore, in America, because legal fees are paid by victims and are generally calculated as a proportion of gross tort recovery, the common law rule is also seen by American critics as unjustly benefiting plaintiffs’ lawyers at the expense of their clients. Finally, many American opponents of the common law collateral sources rule argue that by driving up the cost of tort liability it makes goods and services more expensive and for some crucial matters, like health care services, this can have the result of denying some members of the public adequate access to such things.

In response to these arguments, several American states have recently taken steps to overturn the conventional rule. Some simply reverse the rule for specified sources. Others, somewhat opaquely, provide that juries may be told about certain collateral sources, presumably with the implied understanding that juries will appropriately reduce awards accordingly, but without specific instruction to that effect.

Although plaintiffs’ lawyers and many consumer groups in the US view these reforms as part of a broader effort to ‘take away victims’ rights’, I nonetheless conclude that a substantial reversal of the collateral source rule should be the centerpiece of what I envision (and will more fully describe later in this essay) as a balanced reform of the law of damages that would dramatically alter tort law’s social role. As the first piece of the overall package, this reform would reserve tort for when it is most needed, that is, to deal with compensation needs that are not already met by the society’s core social insurance arrangements. Put differently, if society is already assuring some income support and health care for all accident victims, then ‘making them whole’ does not require duplication (and complex follow on arrangements) through tort law itself.

Political leaders in many countries appear to have resisted this change on the ground that the reversal of the collateral source rule shifts costs away from liability insurance (and the causes of accidents) and onto social insurance schemes whose funding is especially politically sensitive. But since it should be clear to even those with modest sophistication that citizens generally pay for both social insurance and liability insurance (the latter via the costs of goods and services), it seems to me to be politically irresponsible to waste money in transaction costs merely on the basis of the public’s misperceptions as to how costs are borne (ie, allowing the public somehow to imagine that when the payment of tort claims comes from private insurance companies, then these costs really are not being borne by consumers).

Those especially concerned about social cost accounting (and the impact the assignment of accident costs may have on the level at which accident-causing activities are engaged in) might be placated if a reversal of the collateral source rule were joined with a tax (or some suitable substitute) on activities whose costs would otherwise be shifted onto basic safety net benefit schemes. As to auto

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injuries, for example, along with reversing the collateral source rule, petrol taxes could be increased and/or auto registration fees could be increased. While outside of tort law, the Quebec auto no-fault scheme has, in effect, adopted this approach.7 So far, however, US states that have somewhat reversed the collateral source rule have not taken this extra step of imposing new fees on activities that are relieved of costs because of the modification of damages law.8

Assuming there were to be a substantial reversal of the collateral source rule, this does not mean that it would be appropriate to reverse the rule for all collateral sources, however. Privately purchased life insurance is a good example. Indeed, American jurisdictions that have already altered the collateral source rule have made this distinction. They have not reversed the rule for private life insurance, but they have for US Social Security benefits, even though an important type of those benefits is the payment of pensions to deceased workers’ survivors — in short, a life insurance policy whose benefits are paid out over time.

I agree with this distinction because the cultural understanding of these two collateral sources is very different. Private life insurance is viewed as providing a voluntarily-arranged supplemental source of income, aimed at improving the material well being of policy beneficiaries on top of whatever else they might receive at the time of the insured’s death — including stocks, bonds, real estate, personal property, and tort claims that might come to the survivors. Consistent with this perspective, it is unheard of for the standard life insurance policy to insist upon reimbursement if the policy beneficiary is successful in a wrongful death action in tort. By contrast, basic Social Security income replacement benefits and basic health insurance (as well as workers’ compensation insurance) are widely understood as core safety net protections and not supplements.

The wisdom of continuing to ignore private life insurance when other benefits are being calculated is, in my view, re-enforced by our experience with the way life insurance was treated in the US by the compensation scheme set up in response to the aeroplane hijack terrorism events of September 11, 2001.9 Contrary to past practice, in this case Congress provided that benefits payable to survivors of those killed on 9/11 would be reduced by life insurance payments obtained by those survivors. This was seemingly justified on the simple basis that, when survivors had life insurance proceeds, their need was correspondingly less. Moreover, the plan’s

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7 Auto accident victims do not directly receive compensation from the Quebec auto no-fault plan for their motoring-related health care, since that is already provided by the Canadian national health scheme. But, each year, the auto scheme pays a lump sum to the health scheme, reflecting the approximate cost of health care provided to all auto accident victims. This cost, in turn, is passed on to Quebec motorists in the fees they pay into the auto plan. See generally Stephen Sugarman, ‘Quebec’s Comprehensive Auto No-Fault Scheme and the Failure of Any of the United States to Follow’ (1998) *Les Cahiers de Droit Numéro Spécial* 109.

8 In countries like Australia, the pressures for and against the reversal of the collateral source rule appear to have resulted in an inconsistent resolution of the issue, both over time and as to different types of accidents. For the very complicated state of Australian law on this issue, see Luntz, above n2 at 423–478. See generally, Luntz above n5.

designers probably thought this solution would be politically attractive with the public since its effect would be to lower what otherwise could be enormous payments to families of high earners killed in the terrorist attacks (since the 9/11 plan benefits were generally designed to reflect the lost earnings of those who died).

But in fact, as surely could have been anticipated, life insurance protection varied enormously among the victims. Hence, the 9/11 plan wound up ‘valuing the life’ of victims very differently — and most objectionably, devaluing the advance planning and thrift of the victim. As a result, it was commonly and powerfully argued that the family of a person who had paid US$12,000 a year for life insurance would get far less from the 9/11 plan than the family whose now-deceased breadwinner instead had more frivolously spent the same money to lease an expensive sports car.

Assume, then, that tort damages law is altered so that recoveries in personal injury and death cases are reduced from what they would otherwise be by subtracting benefits provided by basic social safety net schemes, but not subtracting private life insurance proceeds or other sources that are culturally understood to belong to the recipient beyond any tort recovery that is awarded. (As for how tort law should deal with private disability insurance that provides income replacement to high earners, see section 3 below.) Even reversing the collateral source rule to this limited extent would reduce sharply the role tort law in the US and in many other nations now plays in accident compensation. In addition, it would provide a mechanism for further diminishing the role for tort, were the basic social safety net to expand (as well as the mechanism for a renewed larger role for tort if a changing political climate or a decreased public fiscal capacity results in a reduced basic social safety net).

2. Compensation for Non-Economic Loss

The second most important issue in the law of damages for personal injury is its role in the compensation for what we in the US call pain and suffering, or general damages, or non-economic loss. However labelled, this refers to losses based neither on lost income nor on out-of-pocket financial payments made (or owed) by victims. Rather, this is money to compensate for the physical pain and suffering that goes along with a physical trauma, the emotional harm that can come from an injury to one’s self or a loved one, the disappointment or embarrassment coming from one’s changed appearance or altered abilities to engage in pleasurable activities and favourite pastimes as a result of an injury, the harm to one’s dignity from being wrongly injured by another, and so on.

US tort law compensates these losses quite generously. The formal US rule is that the jury determines an appropriate pain and suffering award in the specific case. Hence, in principle, one’s recovery is supposed to turn on a highly individualised appraisal of the victim’s precise harm. In practice, the amount is

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10 See Luntz, above n2 at 211–246, for the Australian position.
11 This is altogether apart from either medical care that might be sought to deal with those sorts of losses, or lost income that might result from these losses.
also understood to turn on the talent of the victim’s lawyer, the appeal of the victim to the jury, jury composition, the nature of the defendant’s faulty conduct, and more. In reality, of course, the overwhelming share of tort claims is settled without a trial. In principle, settlement occurs in the shadow of a likely jury verdict in the individual case. In practice, lawyers for victims and lawyers and insurance adjustors for defendants negotiate in more rough and ready ways.

It is not true, as sometimes rumoured, that in the US pain and suffering awards (general damages) are simply figured as three times the special (or hard, or economic) damages. Nonetheless, participants in the process report that there is more than a kernel of truth to the idea that the parties start their negotiations with that multiple well in mind, adjusting their demands and offers based upon all sorts of particulars in the case.

In any event, other things being equal, one ordinarily can anticipate a larger pain and suffering settlement if one has larger medical bills (or more lost income). While there is undeniably some common sense appeal to the idea that the greater your medical needs, the larger your pain and suffering, in the US this sort of thinking can all too often have the undesirable effect of victims running up larger health care costs in order to have a multiplier effect on their tort awards for pain and suffering. This is especially objectionable when victims are encouraged by their own lawyers to obtain what amount to fraudulent health care services. Some unscrupulous lawyers have a special arrangement with, say, a physical therapist, chiropractor, or other health care provider, who is happy to earn the extra income for services which may well not be needed (and in extreme cases are not actually provided, even though paper records are created). Under the US percentage-of-recovery-based system for the payment of victim legal fees, this inflation of health care costs not only means more money for the client and the friendly health care provider, but also more money for the lawyer. To be sure, defence interests know about these shenanigans and have good reason to make efforts to uncover them and expose the participants to punishment, which for the unethical lawyers involved could mean disbarment from future practice. Nonetheless, it is widely believed that undetected fraud of this sort is substantial.

In contrast to tort law, pain and suffering type harms are largely ignored in the US by a wide range of other compensation mechanisms. For example, basic social insurance plans and typical private disability insurance policies do not compensate for pain and suffering.

To be sure, there is a small private market in the US for so-called ‘accident insurance’. These policies provide a specified (and usually relatively small) payment for the loss of an eye or an arm or a leg (but they typically do not cover many other common and painful injuries caused by accidents, like an injured back or neck, or nerve pain down the leg). It is also true that American workers’ compensation plans typically provide modest payments for certain serious harms like major disfigurations or dismemberments.

Moreover, it is noteworthy that in the US at least two important non-tort national victim compensation schemes have provided for non-economic loss. The Childhood Vaccine Injury program awards up to US$250,000 for non-economic loss to seriously disabled young children who are accepted under the terms of the
plan as having suffered their harm as a side-effect of a childhood vaccine. So too, the 9/11 compensation plan provided lump sum benefits to survivors of those killed as a consequence of the terrorist acts that were completely unrelated to any income or other out-of-pocket loss of the survivors. The amount set by the special master who managed the 9/11 plan was also US$250,000 per decedent, plus an additional US$100,000 for each surviving spouse and child. But while these may seem like large sums when compared with other nations’ tort awards for non-economic loss, in the US ‘deep pocket’ careless defendants may well find themselves owing more than a million dollars (and occasionally more than ten million dollars) for pain and suffering to victims they have gravely disabled.

Many American scholars and business leaders have called for reform in the way that tort law deals with pain and suffering awards\(^\text{12}\) — although earlier calls simply to eliminate this category of tort damages are not common today. Rather, the typical effort by defence-minded reformers in recent times has been to impose a ceiling (or cap) on the amount of such awards.\(^\text{13}\) In California more than thirty years ago, for example, a cap of US$250,000 (that same amount again) was imposed on pain and suffering recovery in medical malpractice cases. Later, other states adopted ceilings that were often applicable to pain and suffering awards in all personal injury cases. These caps tended to range rather widely from, say, US$300,000 to US$850,000. But the major direct effect of any cap is the same. It is to cut back on what the most seriously injured victims can be awarded.

In the US a monetary cap also tends, in its effect, to harm the young more than the old, other things being equal. That is, under the American system, permanent pain and suffering is conventionally determined by taking into account the future life expectancy of the victim — i.e., the number of years of suffering that lie ahead. So, other things being equal, a 25 year old would be expected to obtain more money for the same huge injury than a 55 year old would. For this reason, some have envisioned that caps could be set in terms of annual limits (or, what is much the same, individuals would face shrinking caps the older they are). The legislature in the state of Washington tried a more flexible cap of this sort, taking victim age into account. However, the Washington Supreme Court found the law unconstitutional on other grounds and so the opportunity to assess the suitability of this age-related approach was lost.\(^\text{14}\)

Indirectly, caps could also have an important additional effect. If the ceiling is understood to reflect what the legislature has determined should be paid to the most seriously harmed victim, then one might feel it appropriate to reconsider what are the proper sums payable to those who, prior to the cap, would have received an amount, say, nearly equal to the cap, but for a far less serious harm than one can suffer and yet now be restricted by the cap. Were that to occur, a cap could, in the end, have the effect of forcing a downward adjustment of pain and suffering awards not only on those above the cap, but also throughout the full range of harms.

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\(^{12}\) For a classic article, see Louis Jaffe, ‘Damages for Personal Injury: The Impact of Insurance’ (1953) 18 Law & Contemporary Problems 219.

\(^{13}\) See generally Sugarman, above n6.

\(^{14}\) Sofie v Fibreboard Corp 771 P2d 711 (1989).
Yet, it does not appear that caps in the US are intended to or importantly have such effects. Juries, for example, are generally not told about caps; rather, they are instructed to award damages as always, with the judge then later simply knocking off anything that turns out to be above the cap.

But, one could surely imagine a regime in which a cap amount was set to reflect what is thought appropriate for the most severe injury, with instructions to those managing the system to adjust accordingly. Indeed, perhaps the easiest way to envision such a scheme is to think about adopting a schedule that lists a wide range of harms, with presumptive benchmark sums for pain and suffering set from zero up to the highest figure, depending on the nature of the injury (with the largest amount becoming the cap). This approach appears to have taken hold somewhat informally in Great Britain.15

In Australia, a restrictive statutory approach to non-economic loss has been enacted in several jurisdictions.16 Caps have been placed on recovery for general damages (typically ranging AUS$250,000-$350,000).17 Losses are then scheduled up to the cap, so that only the gravest injuries yield the maximum recovery. The New South Wales law provides that the severity of the loss in the individual case is to be compared with the most extreme case, and appropriate awards as a percentage of the maximum are set out by statute. For example, a non-economic loss which is 20 per cent of the most extreme case is to receive but 3.5 per cent of the maximum award; a non-economic loss which is 30 per cent of the most extreme case is to receive 23 per cent of the maximum award; and a non-economic loss which is 60 per cent of the most extreme case is to receive a full 60 per cent of the maximum award.18 As for what per cent of severity is to be attached to specific sorts of injuries, courts are supposed to pay attention to what percentages have been assigned by other courts in similar cases.19

In my view, the most essential policy choice with respect to pain and suffering awards has not even yet been mentioned. It is deciding whether some harms should attract zero recovery. Put differently, the issue is whether there should be a threshold (or floor) on recovery for pain and suffering.

I favour that solution for a variety of reasons. First, these awards are today often paid out for small pains and emotional upsets that are long gone before the money is received. That is, there is no ongoing pain and suffering, and indeed that which the victim felt might well have been very temporary. Second, because of the

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17 See for example, Civil Liability Act 2002 (NSW) s16 ($350,000 to be indexed over time as per s17).

18 Civil Liability Act 2002 (NSW) s16.

19 Civil Liability Act 2002 (NSW) s17A.
nuisance value of these cases, victims are often able to exploit defendants’ needs to get the claims off their books. Worse, because less is at stake, these are also cases in which devious victims are readily able to get away with running up unneeded care costs, to manufacture ailments, and the like.

Third, and this is perhaps most important, if combined with the reversal of the collateral source rule proposed above, a threshold on pain and suffering recovery provides the potential for simply eliminating entirely from the tort system an enormous share of current claims. After all, if you have your medical bills and lost income reasonably well replaced already, and if you are not injured enough to meet the threshold for recovering for pain and suffering, what is there to sue for? Indeed, as a practical matter, you might well be willing even to absorb modest shortfalls in recovery of economic losses if that is all you could recover in tort in any event. And while the latter means a modest burden for victims, the potential social gains of ridding the system of a giant share of current claims are very large. Obviously, there is the prospect of large savings in legal costs and payouts, as well as the reduced burden on the administration of the judicial system. Less evident, but perhaps equally important, there is the prospect of overturning the widespread American social norm that suing somebody else when you are hurt in an accident is what everyone does and what you are culturally expected to do.

Finally, combining a threshold on pain and suffering awards with a reversal of the collateral source rule means that the tort system would shift its focus towards the more seriously injured.

Based upon experience with auto no-fault plans in the US and Canada, there is good reason to believe that the imposition of a fairly high verbally phrased floor on recovery for pain and suffering for example, requiring serious disfigurement or dismemberment or at least three months of full disability — could achieve a very significant reduction in personal injury claims.

Such a threshold could be combined with a presumptive schedule of recovery for a range of increasingly serious injuries. With both a schedule and a threshold, presumably even those at the bottom of the schedule would be entitled to not insignificant sums. For example, under this approach, which I favour, pain and suffering awards might range from US$15,000–25,000 at the base to perhaps US$500,000 at the top. A US$500,000 maximum in the US would still target American awards considerably beyond those of other nations, but it would more like putting the US schedule at the edge of the chart instead of way off the chart.

Australia is again out in front in moving in this direction, as a few jurisdictions have already enacted thresholds on the recovery for pain and suffering. In New South Wales, for example, a non-economic loss which is less than 15 per cent as severe as the most extreme case does not entitle the victim to recover any damages for pain and suffering.20

20 Civil Liability Act 2002 (NSW) s16.
3. Income Replacement: Progressive v Regressive

As already noted, tort law is conventionally understood to be a system in the service of corrective justice, not distributive justice. Put differently, the traditional role of damages law is to restore the victim to the position he would have been in absent the tort — at least to the extent that money can achieve that. To be sure, the fact that you get money rather than having your body instantly repaired and restored casts some doubt on how seriously tort law can pretend to achieve corrective justice after all.

Nonetheless, when it comes to replacing lost income, the long-standing commitment of tort law is to replace all lost income. This means that higher earners will receive more from the system than will low earners, other things being equal. Of course, other things are not equal, and it is complicated to determine, for example, the relative likelihood of high and low earners becoming tort victims and whether the same sort of physical injury is likely to have a larger (or smaller) impact on the future earning potential of one, who, before the accident, was a higher (or lower) earner. But what is clear is that if two people of the same age are disabled for a month, or for five years, the amount to which they are entitled in tort will be greater for the one who was earning more at the time of the accident.

The upshot is that tort law in action is understandably viewed as regressive — and especially when its funding arrangements are taken into account. After all, motorists, generally speaking, do not pay different sums for liability insurance simply because they earn different salaries. So, too, enterprise defendants do not pass the cost of tort liability on to consumers on the basis of consumer income levels. In short, for the same injury, higher earner victims as a class draw more from the tort system than do lower earner victims, but without paying more into it.

This need not be the law of damages. Indeed, social insurance schemes — even if wage-related — tend to resolve this issue very differently. In the US, benefits are wage-related in both our national Social Security scheme and our state workers’ compensation plans. But these plans impose a limit on the level of wages that are replaced (and Social Security also replaces a smaller share of income the higher the income of the claimant). The basic social understanding of these plans, as already noted, is that they are aimed at core household needs. And as a corollary, these plans assume that those with much higher earning can choose, and except for deliberately high risk takers, will responsibly choose to purchase what they conclude is an appropriate level of supplemental protection (or will take jobs with employers who provide supplemental income protection as part of the employment package).

Given that social understanding, tort damages law could also adopt such an attitude, and I favour that sort of reform. Indeed, the case for this approach grows stronger in my view once it has been decided to reverse the collateral source rule with respect to basic social safety net benefits.

21 For the Australian situation generally, see Luntz, above n2 at 301–354.
22 As with pain and suffering, completely destroying the future income potential of a younger person, other things being equal, yields a larger award than would be made to one near the end of his career.
As just noted, high earners are the very ones best positioned to obtain extra insurance to protect wages that are not covered by social insurance. For those who buy this extra disability insurance, to then provide tort recovery as well would amount to unneeded double recovery in my view. To be sure, reversing the collateral source rule might suffice to deal with this problem if the reversal were applied, not merely to basic income replacement plans (as proposed above), but also to this sort of additional income protection as well. Yet, that would be an incomplete solution, in my opinion, when we next consider the victim who has not obtained supplemental income protection. Simply reversing the collateral source rule in an even more expansive way will have no effect on that high earning plaintiff, who would still draw generously from tort, thereby rewarding what strikes me as cavalier risk taking. Put differently, the point here is not that private disability insurance and private life insurance should be treated differently for purposes of the collateral source rule. It is rather that, from the perspective of distributive justice, tort law itself should be understood to compensate only for moderate levels of income loss to the extent that they are not already replaced by basic social insurance schemes. The result of this way of thinking would be to have tort law deny everyone recovery for the loss of high levels of income, once more bringing tort damages law closer to the policies governing social insurance.

If this policy were pursued, a difficult issue is just where the cut-off line should be. Again, experience in the US with the 9/11 compensation plan may offer some preliminary guidance. There, the plan administrator provided tables showing what benefits would be paid to survivors of those who had earned up to US$231,000 a year, which was said to be the cut off for approximately 98 per cent of American earners. Of course, the 9/11 plan was not understood to involve wrongdoers paying their tort victims. Moreover, there were complaints by families of high earners, especially when this seeming restriction on income replacement was combined with the set off of life insurance proceeds discussed earlier. Yet, overall, there seemed little public opposition to a cap on benefits at the ninety-eighth percentile in income. But this may well be inappropriately generous. Indeed, it seems to me that it might be quite sufficient for tort law to limit income replacement to, say, the seventy-fifth percentile, or perhaps at two or three times the average weekly wage. The latter in the US today would put the cap, not at US$231,000, but perhaps somewhere in the US$70,000–$100,000 range.

While some might favour completely eliminating the role of tort in replacing lost income, the modest level of income replacement provided by most US social insurance schemes would make this abrupt change in the US too harsh in my view.

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23 Indeed, some have speculated that of the perhaps eighty or so claimants whose family members died in the 9/11 attacks and who have sued in tort, rather than accept the 9/11 plan benefits, a large share is comprised of those whose decedents were high earners with large life insurance policies.

24 The plan administrator denied that there was a hard cap on income replacement at the 98 per cent level, and information is not yet forthcoming about precisely how survivors of those in the top two per cent of earners were actually treated with respect lost income beyond the tables. But it is generally understood that, even if families of higher earners might have received something more, the principle of full income replacement was not applied to such stratospheric earning levels.
Put differently, the goal here is to exclude the really high earners from having all of their income replaced by tort law, and not to exclude the middle class from full wage replacement.

Once more, Australia has taken the lead on this issue, as several jurisdictions have restricted recovery for income loss to a multiple of the average annual earnings of full time adult workers — typically three times that amount, as in New South Wales.25

4. Sharing

The common law rule was that an at-fault victim, whose negligence contributed to his own injury in a causally relevant manner, could recover nothing from someone whose fault was also a cause of the injury. The law, in effect, conveyed the message that we do not open our courts to wrongdoers, especially those who could have avoided harm had they only been careful.

Nowadays all this has changed, and nearly everywhere a regime of comparative fault has taken over.26 In what we in the US call the ‘pure’ form, even a victim who is 75 per cent at fault will recover 25 per cent of his loss from a defendant who is 25 per cent at fault. A majority of US states, however, have adopted the so-called ‘modified’ form, in which victims whose fault is greater than (or in some cases equal to) that of the injurer remain fully barred from recovering. These harsher rules continue to let off some wrongdoing defendants.

I propose a much more dramatic change in the effect of victim fault on damages recovery. In its strongest form, victim fault would be ignored, regardless of what share of the fault is attributable to the victim. An example of a more moderate reform would provide that, if the victim is no more at fault than the injurer, then the victim’s fault would be ignored, but when the victim’s fault is more than the defendant’s, the defendant would be liable for damages equal to his share of the fault. Notice that, as compared to the ‘pure form’ of comparative negligence, this moderate reform provides greater compensation to victims who are less than half at fault. Regardless of the precise rule adopted, the sentiment behind reform of this sort rests on several considerations.

First, victims are the ones who suffer the physical harm. Hence, they already incur a substantial negative consequence of their fault. Second, from the viewpoint of punishing injurers, horizontal equity among injurers counsels against reducing a defendant’s liability simply because that defendant’s victim coincidentally also was to blame for the accident. Think of two drivers who carelessly speed through an intersection. One hits an innocent pedestrian and the other hits a carelessly inattentive second motorist. Both speeding drivers are equally at fault, but


26 For the Australian situation, see Luntz, above n2 at 133–148. See generally American Law Institute, Restatement of Torts (Third): Apportionment of Liability (2000).
reducing the damages paid by the second (as comparative fault now does), imposes a lesser penalty on the second driver, who was no less careless than the first. Third, counterpart solutions in compensation plan alternatives to tort point in the same direction. In US workers’ compensation schemes, for example, ordinary fault by victims is ignored. That the employer is ‘strictly liable’ in workers’ compensation is not itself the reason why employee fault is generally ignored. After all, defective product makers in the US are also strictly liable in tort. But the latter currently have available to them the partial defence of comparative fault (say, against a careless user of the product), when the employer does not. The reason that the employer does not go to a wider understanding about the social need to provide medical care and income replacement to industrial accident victims whether or not they were injured through their own carelessness. My proposal for tort damages reform would ordinarily take away this defence from the defective product seller too, and hence, as with reform in the law covering income replacement discussed above, this reform would also bring tort damages law more in line with social insurance generally.

A different matter is the sharing of losses among defendants. Assume that the fault of more than one defendant was a cause of the victim’s harm, and that the award is initially apportioned among them on the basis of defendant fault. The practical issue, then, is who should bear the risk that one or more of those who carelessly caused the victim’s loss is either unable to be brought before the court (the absence problem) or financially unable to pay for his share of the damage award (the insolvency problem). The solution that best reflects a desire to use tort damages in order to provide backup compensation to tort victims is one that thrusts the risks of insolvency and absence on defendants. In the context of the other provisions here proposed, this is the solution I generally favour. In the US we call this a rule of joint and several liability.

The rule at the opposite extreme adopts the principle of what we call several liability. There, a defendant is liable for damages only up to its share of the fault (unless otherwise independently liable for the fault of another defendant, say, in co-conspirator cases). Hence under this rule, the risks of insolvency and absence are borne by victims.

In-between rules are also possible. In California today, for example, defendants bear those risks as to economic losses, but victims bear them as to non-economic losses. Or, under the rule proposed by the Uniform Comparative Fault Act (1979), those risks are shared by both defendants and plaintiffs. Hence, if the victim is not at all at fault, insolvency and absence are problems for the deep pocket defendant before the court. But if the plaintiff is also at fault, then he shares those risks with the available defendant(s) — based on the relative fault of both plaintiff

27 To be sure, certain especially blameworthy worker misconduct can preclude any recovery from workers’ compensation, and so too, extreme wrongdoing by victims might also appropriately serve as a continued bar under the general rule proposed here. Indeed, in comparative fault jurisdictions today, in instances of especially wrongful behavior, victims may be fully denied tort recovery just as they were under the common law rule.

and defendant(s). While this latter solution has considerable appeal in the current US state of the law, it seems to me to be out of place if the proposal described earlier is embraced — that victim fault generally is to be ignored.

All things considered, then, a sensible victim-oriented compromise solution on the question of sharing might resemble something like this. Ordinarily, victim fault is ignored. If, however, the victim’s fault is more than that of a single defendant, then, as between them, the victim bears his share of the available pain and suffering award based on his relative fault (but the defendant still bears all of the economic loss). In the same vein, if there are multiple defendants and one or more is absent and/or insolvent, then, only if the plaintiff is more at fault than the defendants as a group, would he bear any of those risks, and the risk would be restricted to pain and suffering damages, which the more at fault plaintiff would bear in proportion to his fault.29

5. Legal Fees

The typical rule outside the US is that the loser pays the winner’s legal fees. In the US, however, the formal rule is that each side pays its own fees. But in practice, the American rule functions rather differently. On the defence side, although defendants officially have responsibility for their own fees, win or lose, those fees are almost always paid for by liability insurance (assuming defendants carry that insurance). Indeed, liability insurers not only pay for the legal defence, they normally control the defence (including selecting the lawyer and determining whether to settle, and if so for how much). After all, it is their money that is at risk. On the victim side, plaintiffs too have a kind of insurance. Even though claimants formally bear their own fees, win or lose, the contingent fee system that applies in virtually all personal injury cases means that there is no fee if there is no recovery. The plaintiff’s lawyer, by taking on the case, in effect, provides the insurance that covers the fee (ie, not charging) if the case is lost.

The major shortcoming of the American system is that when victims win, they have to pay their own legal fees out of their awards, and typically those fees now range between 20 and 50 per cent of the recovery depending on the nature of the case, who the victim is (eg, minors are often charged less because courts may not approve higher fees in such cases) and at what stage of the litigation the case ends (eg, after an early offer of settlement versus after a protracted appeal of a trial court verdict). In a world of high pain and suffering awards and where the collateral source rule remains, victims may well be able to pay for their legal fees out of what

29 In the Restatement of Torts (Third): Apportionment of Liability, ss28–31, the American Law Institute has recognised a large number of alternative solutions to this issue, but not the one I propose here. A related issue is what to do with the risk of under-settlement. Suppose the plaintiff has reached an agreement with one defendant, but that turns out to be for less money than what the judge or jury later determines to be that defendant’s fair share of the liability. In such a setting, where the settlement was truly based on an estimate of the defendant’s liability, and not, for example, on what was in fact the defendant’s limited solvency, I would not oppose leaving the risk of under-settlement with the plaintiff, as the Uniform Comparative Fault Act (1979) generally recommends.
is understood as an extra bundle of recovery. Yet, this outcome happens idiosyncratically, depending on differences among cases that have little to do with the fairness of leaving the victim under-compensated as to real economic losses.

Hence, along with a partial repeal the collateral source rule and a restriction on the right of recovery for pain and suffering, I favour changing the law of damages in the US in a way that (unlike most other nations) continues to impose defence side legal costs on defendants win or lose, but (like most other nations) requires defendants to pay victim legal costs if the victim wins (and presumably settlements would be made that provide for coverage of the victim’s legal fees). Put differently, under my proposal legal fees would be treated like other recoverable expenses that are incurred as a result of the accident.

Under such an approach one must decide what constitute reasonable fees. Although they might be set as a percentage of the recovery, which is how victim lawyers in the US now typically charge, there are many other options. Some say that, while it is true that tort recovery usually increases when the victim is harmed more, the plaintiff lawyer typically does not do proportionately more work to obtain such a recovery. On that view, the rule might be that, as recovery goes up, the fee owed by the defendant to the claimant’s lawyer would decline as a proportion of damages won. For example, the fee might be 50 per cent of the first US$50,000 recovered, 25 per cent of the next US$100,000 and 10 to 15 per cent of the rest. Alternatively, some argue that the fee proportion should be higher (i.e., rather than lower) the more the victim wins. The theory here is that higher awards reflect greater effort or talent shown by the victim’s lawyer.

There are other options as well. For example, victim legal fees could be based on an hourly rate tied to how much time the plaintiff’s lawyer put into the case (which is how defence lawyers charge) or they could be set as a lump sum tied to the nature of the case (e.g., so much for an auto crash, so much for a slip and fall injury and so on).

A quite different solution would be to base the fee that the defence owes the victim’s lawyer on a comparison of the amount of any early offer of settlement by the defence to the amount ultimately won at trial or achieved in settlement. For example, the plaintiff’s lawyer might be awarded a fee equal to, say, ten per cent of whatever the defendant offers within, say, 90 days of the harm. But to the extent that the ultimate payout is more than the initial offer, the defence would owe the plaintiff’s lawyer an amount equal to, say, 40 or 50 per cent of the difference. Moreover, if the final payout was less than the early offer, this might result in a reduced, or even zero, legal fee. This sort of formula arguably not only nicely approximates the value added to the case by the lawyer, but also provides strong incentives for the defence to make reasonable early offers and for victim lawyers to recommend to their clients to take such offers, if made. This would be an attractive way to establish claimant legal fees in my view.30

30 In Australia today, somewhat analogous rules now govern the award of legal fees to successful plaintiffs.
6. Punitive Damages

In US tort cases in most states, juries may award punitive damages for truly outrageous conduct. Defence interests in the US have been bitterly complaining about the award of punitive damages for several years, and they have been heard.

Even though such damages are actually awarded infrequently, and their amounts have long been reduced by trial judges, by appellate judges, and in post-verdict settlement agreements, the rare enormous award is terrifying to many company executives. Moreover, these executives and their lawyers complain that even a small risk of a potentially huge punitive award forces them to offer unduly generous settlements. Further, some argue that many punitive damages awards have been imposed for conduct that falls far short of the level of misconduct formally required by the law.

As a result of these complaints, some American states have responded by eliminating this sort of recovery altogether, leaving extra punishment to the criminal and administrative law systems. Other US states have limited recovery in a variety of ways, such as trying to assure that punitive damages are not awarded merely for negligence. This approach has also been taken by some Australian jurisdictions. In some American states, punitive awards (or a portion of them) go, not to the victim, but to the state treasury, or some special fund set up by the state for this purpose. Furthermore, the US Supreme Court has recently weighed in, holding that certain punitive damages awards violate the US Constitution. The upshot is that those with substantial compensatory awards are now not normally supposed to receive punitive damages that are larger in amount than their compensatory awards, rarely more than four times the amount of their compensatory damages, and almost never more than 10 times as much. However, if the defendant fault is huge and the individual victim’s harm rather minor, then higher multiples might be appropriate after all.

At an earlier time I recommended for the US that the determination of whether punitive damages should be awarded and, if so, the amount should be made by judges not juries. Although I still favour that solution, at this point in America perhaps it would be wisest to wait some years to see how the various recent reforms turn out in practice before making further changes. I mention punitive damages here primarily to acknowledge that their availability for victims of the worst sort of wrongdoing is not inconsistent with otherwise moving the law of tort damages towards the social insurance model. This is, after all, the solution reached in New Zealand, which has largely abolished tort law for accidental personal injuries and yet has maintained the right to sue for exemplary damages in egregious cases.

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31 For example, Civil Liability Act 2002 (NSW) s21. For the Australian situation generally, see Luntz, above n2 at 71–90.
33 For further support of this position, see generally, Harold Luntz, ‘A Personal Journey Through the Law of Torts’ (this issue) at notes 95–100.
7. Conclusion

To review, suppose tort damages in personal injury cases cover:

- otherwise un-reimbursed medical and related expenses caused by the tort;
- lost income up to no more than, say, three times the state average wage, to the extent that income is not otherwise replaced by core social insurance plans;
- pain and suffering, with amounts payable tied to a schedule that requires well more than a minor injury before any award is allowed and that tops out at, say, US$500 000 (or its cultural equivalent in other nations);
- victim losses, in most cases, regardless of whether the victim too was at fault;
- victim legal fees, based importantly upon how much recovery the plaintiff’s lawyer obtains beyond what is promptly offered by the defendant; and
- punitive damages, for now, to the extent currently permitted.

As a result of these changes, damages law for personal injury in tort would much more reflect the values underlying the payment of benefits by non-tort compensation plans. A much greater share of the damages awarded in tort would go to fill genuine need, and more of the total payout would go to the more seriously injured. Were these changes put in place in the US, tort law for personal injuries would play a very different social role from the one it plays today. Put more informally, damages law in San Francisco would move somewhat closer to damages law in Sydney.34

Finally, I should emphasise that, along with Harold Luntz, I continue to believe that it would be even more desirable if both of our countries would emulate the law in Auckland.35 Yet, I recognise that in today’s political and economic climate in both the US and Australia, the prospects of adopting a New Zealand-style accident compensation scheme seem even further away than they were 20 years ago. Nevertheless, political currents, like ocean waves, come and go, and it seems to me that a country would be much better positioned to shift to a sweeping no-fault approach to accident compensation if its basic tort damages law were broadly in tune with social insurance thinking generally. Hence, the reforms recommended here, in my view, are desirable, not only in their own right as applied to our existing, largely fault-based tort law, but also as a future stepping stone to something even better.

34 To comply with these criteria, the law in New South Wales would also have to be somewhat altered. Although tort damages law in Sydney already contains several of the elements I favour, it would especially need revising as to both the collateral source rule and the consequences of victim fault. Indeed, as for the latter, unlike many other areas of tort damages reform discussed here, New South Wales currently seems to be moving in the opposite direction by becoming harsher to at-fault victims. See for example, Civil Liability Act 2002 (NSW) s55.

Wrongful Conception, Wrongful Birth and Wrongful Life

STEPHEN TODD*

Professor Harold Luntz is one of Australia’s leading torts lawyers. Australian academics, practitioners and judges turn frequently to his writings when they want to know about the state of the law and when seeking insights about where it is, or ought to be, going. They know that they are relying on an impeccable source carrying a clear stamp of authority. So I am delighted and honoured to contribute to this collection of essays, and in this way to mark Harold’s many and wide-ranging contributions to the understanding and development of this absorbing area of law.

1. Introduction

The question whether a doctor is under a legal duty to take care when treating a patient does not normally raise serious difficulties of principle. Certainly there are virtually unlimited opportunities for contentious disputes about a doctor’s civil liability, but these are not usually about the existence or the scope of the duty which the doctor owes to the patient or about the kind of damage in respect of which he or she may be held liable. Rather, the argument in medical cases is likely to be about whether there has been a breach of the doctor’s duty, or whether any breach was a cause of the harm of which the plaintiff complains. Exceptionally, however, a question about the very nature of a doctor’s obligation or duty, or its extent, needs to be resolved. Recent decisions concerning claims for damages for (so-called) wrongful conception, wrongful birth and wrongful life 1 provide us with some controversial examples. In very general terms, the cases all involve allegations that negligence by a doctor or other health professional in relation either to a patient or to the patient’s partner has caused a child to come into existence, that had proper care been taken the child would not have been born, and that by reason of the birth either the parents or the child have suffered loss or damage. The cases are bound to be controversial because, at their core, they raise the question of whether, or to

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1 These descriptions are convenient, but they have been criticised as emotive and as implicitly denigrating life: Harvey Teff, ‘The Action for “Wrongful Life” in England and the United States’ (1985) 34 ICLQ 423 at 427–428. Their use in this article is not intended to carry any moral judgment or to point towards any particular conclusion.
what extent, the expense associated with the unplanned or unwanted existence of a human being ought to be recognised in law as amounting to damage of a kind which can found an action in tort for negligence.²

Let us consider some different ways in which this question can arise. A person wishing to avoid having a child may undergo a sterilisation operation which turns out to be unsuccessful, with the result that the patient (if female) or the patient’s partner (if the patient is male) unexpectedly conceives, and an unplanned child subsequently is born. So also a parent may allege that his or her doctor gave wrong advice about the efficacy of a sterilisation operation, or, perhaps, about the parent’s ability to conceive a child, with the consequence that other contraceptive measures were not taken and, once again, an unplanned child is born.³ The patient and/or his or her partner may then bring an action alleging that the doctor or surgeon was negligent in performing the operation or giving the advice, and may seek to recover the costs of bringing up the child. We can call this an action for wrongful conception, because the central allegation is that the defendant ought to be held responsible for not preventing the child from being conceived.⁴

Another kind of case is where a woman is wrongly informed that she is not pregnant, and by the time she finds out the truth it is too late for her to have an abortion. Again, a pregnant woman who undergoes an ultrasound scan may be misinformed that her unborn child is healthy, and accordingly, she loses the opportunity to have an abortion and later gives birth to a disabled child. In either case the mother may allege that negligence by her doctor or radiologist has caused her to continue with a pregnancy that is not wanted or is no longer wanted, and to suffer the expenses of raising the child. These, then, are actions for wrongful birth, as the plaintiff complains about the wrongful continuation of an existing unwanted pregnancy or of an initially wanted pregnancy that the mother would have wished to terminate. In common with wrongful conception cases they raise policy issues about the ‘loss’ involved in the birth of a child, but also can raise different concerns about the nature of the defendant’s duty, the cause of any loss and the impact of the law concerning abortion.

Actions for wrongful conception or wrongful birth are both actions which may be brought by one or both of the parents of an unplanned child. An action brought by the child himself or herself, in circumstances where he or she suffers from a disability or disadvantage, may be termed an action for wrongful life. It raises different issues of policy and, as we shall see, acute difficulties of principle.

² The cases nearly all involve negligent doctors who undoubtedly owe a duty of care in treating their patients, leading to a debate as to whether the question is about the scope of the defendant’s duty of care or the recoverability of a particular head of damage. The latter seems the better view, but the question need not be resolved. In Rees v Darlington Memorial NHS Hospital Trust [2004] 1 AC 309 (hereafter Rees) 322–323 (Lord Steyn), 328–329 (Lord Hope), 338 (Lord Hutton) and 344–345 (Lord Millett), four members of the House of Lords maintained that the question at heart is one of policy, and that provided this is understood, the different methods of analysis should yield the same result.

³ Similar questions can arise in relation to an allegedly negligent manufacturer of a contraceptive, as to which see Richardson v LRC Products Ltd [2000] PIQR 164.

⁴ There may be differences between the position of the mother and the father, but these will not be explored here.
We will consider first the parents’ claim. In the case of the action for wrongful conception, the House of Lords on the one hand, and the High Court of Australia on the other, have taken very different approaches and have come to divergent conclusions. Secondly, we will examine the claim by a child who seeks compensation for being born in a disabled state or condition in the light of different opinions recently expressed in a leading decision of the New South Wales Court of Appeal.

2. The Parents’ Claim

A claim for wrongful conception involves sharply competing questions of policy and principle. If we focus immediately on the heart of the dispute, we must ask whether it is appropriate or possible to put an economic value on the life of a child – whether, as it is sometimes put, the parents’ claim ‘commodifies’ the child – or whether the claim can be seen as a straightforward application of ordinary principle, under which a victim of negligent conduct can recover damages representing his or her consequential financial loss. The decisions are founded ultimately on the choice which is made between these two views. The choice also can be expressed as that between applying concepts of distributive and corrective justice, but the same underlying policy concerns are involved.

A. McFarlane v Tayside Health Board

Most wrongful conception decisions in the United Kingdom initially were in favour of allowing the parents to recover full damages. However, in McFarlane v Tayside Health Board, the House of Lords held that a mother could claim general damages for the pain, suffering and inconvenience of pregnancy and childbirth, and for associated expenses, but that the parents could not recover the costs of bringing up their child. All of their Lordships rejected any suggestion that failure by a pregnant woman to undergo an abortion or arrange an adoption on discovering that she was pregnant could be a new act, which broke the chain of causation between the negligence and the birth. But the parents’ claim still should fail. Lord Slynn declined to set off the intangible, non-economic benefits of parenthood against the economic costs of caring for the child, regarding this as well-nigh


6 McFarlane v Tayside Health Board [2000] 2 AC 59 (hereafter McFarlane) at 82–83 (Lord Steyn).


impossible. The choice was between awarding all costs or excluding those for child rearing. He favoured the latter approach, on the grounds that it was not fair and reasonable to impose liability, and that the doctor should not assume responsibility for these costs. Lord Steyn’s solution focused on the idea of distributive justice. Ordinary citizens would consider that there should be a just distribution of burdens and losses in society and that the law of tort has no business to provide legal remedies consequent upon the birth of a healthy child. This would be founded upon an inarticulate premise as to what was morally acceptable. Lord Hope said that it would not be fair and reasonable to leave the benefits of parenting out of account, yet their value was incalculable. Accordingly, the costs could not not be recovered, because it could not be shown that overall they would exceed the benefits. Lord Clyde thought that relieving the parents of their financial obligations went beyond reasonable restitution for the wrong. He would allow the mother’s claim for solatium, but no other costs. Lastly, Lord Millett accepted the main argument that the birth of a child is a blessing. He said in truth it is a mixed blessing, but society must regard the balance as beneficial. The advantages and disadvantages of parenthood are inextricably bound together, and it would be subversive of the mores of society for parents to enjoy the advantages but transfer the responsibilities to others. His Lordship considered that this reasoning also led to the rejection of the mother’s claim for the loss associated with her pregnancy. However, he would allow a conventional sum representing the parents’ loss of their personal autonomy and their freedom to limit the size of their family.

McFarlane did not decide whether a claim might lie where the unplanned child suffers from a disability. This question was considered in Parkinson v St James and Seacroft University Hospital NHS Trust.\(^9\) The claimant, a mother of four children living with her husband, underwent a negligently performed sterilisation operation. She later conceived her fifth child, the marriage then broke down, and three months later she gave birth to the child, who suffered from severe disabilities. It was held that the claimant was entitled to recover damages in respect of the costs of providing for her child’s special needs and care relating to his disability, but not for the basic costs of his maintenance. In deciding this the court needed to give guidance as to what constituted a ‘significant disability’ giving rise to a right to compensation. Brooke LJ said that this would have to be decided on a case by case basis, that the expression would include disabilities of the mind and that it would not include minor defects or inconveniences. Hale LJ referred to the statutory definitions in welfare legislation identifying those whose special needs required special services, and saw no difficulty in using the same definition in the present context. The extra expenses attributable to a child’s disability were seen as falling outside the ordinary and inextricable calculus of benefits and burdens associated with the birth of a child. As Hale LJ observed, this analysis treats a disabled child as having exactly the same worth as a non-disabled child. It affords the child the same dignity and status. It simply acknowledges that the child costs more.

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B. *Rees v Darlington Memorial Hospital NHS Trust*

In *Rees v Darlington Memorial Hospital NHS Trust*, in another variation on *McFarlane*, the mother suffered from a disability. She had undergone a sterilisation operation because she suffered from a severe visual handicap which she feared would prevent her from properly looking after a child. Having later conceived and given birth to a healthy child, she sought damages to recover the costs of providing for the child. While ordinary costs were precluded, the question was whether the mother’s special difficulties could be taken into account. The Court of Appeal, in a majority decision, held that just as the parent of a child with significant disability was entitled to compensation for providing for the child’s special needs associated with his or her disability, so too was a disabled parent entitled to the extra costs in discharging his or her responsibility towards a healthy child. However the House of Lords, in a 4 to 3 decision, allowed the appeal and also introduced a significant ‘gloss’ on the holding in *McFarlane*. Lord Bingham of Cornhill accepted and supported a rule of legal policy which precluded recovery of the full cost of bringing up an unplanned child, yet questioned the fairness of a rule which denied the victim of a legal wrong any recompense at all beyond the immediate expenses of pregnancy and birth. The real loss was that the parent, particularly the mother, had been denied by negligence the opportunity to live his or her life in the way that he or she wished and planned. Lord Bingham accordingly supported the suggestion favoured by Lord Millett in *McFarlane* that there should be a conventional award to mark the plaintiff’s injury and lost autonomy. This sum, fixed at £15 000, would not be the product of calculation but would be some measure of recognition for the wrong done. It would be in addition to any award for pregnancy and birth and would be applied without differentiation to all cases, including those in which either the child or the parent was disabled. Lord Nicholls, Lord Millett and Lord Scott agreed that there should be an award of this sum, but Lord Millett did not decide whether the extra costs where the child is disabled might also be recoverable and Lord Scott said that he might allow them if the purpose of the sterilisation was to avoid conception of a disabled child.

Lord Steyn, giving a minority view, thought that *McFarlane* was critically dependent on the birth of a healthy and normal child and that *Parkinson* was rightly decided, but recognised that there were cogent objections to the disabled plaintiff’s claim. The benefits of having a healthy child being incalculable, the court should not give damages because it should not go into a calculation which involved weighing up possible family circumstances of different mothers. However his Lordship was persuaded that the injustice of denying a limited remedy to a seriously disabled mother outweighed these considerations and, accordingly, would have dismissed the appeal. He regarded the idea of a conventional award in the instant case as contrary to principle and as a backdoor evasion of the legal policy enunciated in *McFarlane*. There were limits to

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11 *Rees v Darlington Memorial Hospital NHS Trust* [2002] 2 WLR 1483.
permissible creativity for judges and in his view the majority had strayed into forbidden territory. Lord Hope and Lord Hutton similarly favoured allowing damages where either the mother or the child was disabled and rejected a conventional award.

C. Cattanach v Melchior

Contemporary developments in Australia contrast markedly with those in the United Kingdom. In Cattanach v Melchior, another failed sterilisation case, the High Court of Australia in a 4 to 3 decision was not persuaded by the policy considerations against recovery, and upheld a trial judge’s decision to award damages against a negligent obstetrician for the cost of raising an unplanned child. The majority view was that the defendant could be held liable on the application of ordinary principles of negligence. McHugh and Gummow JJ thought that the expression ‘wrongful birth’ was misleading, because what was wrongful was not the birth but the negligence of the doctor. The defendant sought merely the proscription of a particular head of recovery of damages. But no novel head of damages was involved. The plaintiffs’ loss was not the coming into existence of the parent-child relationship but simply the expenditure that the plaintiffs had incurred or would incur in the future. If this was causally connected to the negligence and reasonably foreseeable then it ought to be recoverable. Kirby J maintained that in the real world, cases of this kind were about money, not love or the preservation of the family unit. The notion that in every case the birth of a child was a ‘blessing’ represented a fiction that the law should not accept in the absence of objective evidence bearing it out. In any event the parents’ claim was simply for economic loss consequential upon physical injury to the mother. To deny such recovery was to provide a zone of legal immunity to medical practitioners engaged in sterilisation procedures that was unprincipled and inconsistent with established legal doctrine. Furthermore, the emotional benefits of parenthood were different in quality from the costs incurred in child-raising and should be ignored in calculating the recoverable damages.

Gleeson CJ, in dissent, saw the coming into existence of the parent-child relationship as an integral aspect of the damage of which the plaintiffs complained. That relationship had multiple aspects and consequences, some economic and some non-economic, some beneficial to the parents and some detrimental. The claim here was for a new head of liability for pure economic loss arising out of the relationship, yet it displayed all the features that had contributed to the law’s reluctance to impose a duty of care to avoid causing economic loss. First, the liability sought to be imposed was indeterminate. Even if limited to adverse financial consequences to the parents, as opposed to siblings and others, there was


13 Cattanach, above n12 at 32 (McHugh & Gummow JJ). Their Honours were using the expression ‘wrongful birth’ here as including wrongful conception.
no reason to restrict the claim to costs until the child reached any particular age or to any particular form of discretionary expenditure. Secondly, there was a problem of legal coherence. The law imposed many obligations on parents in support and protection of a child which were difficult to reconcile with the idea that creating the parent-child relationship could be actionable damage. A child was not a commodity that could be disposed of in order to avoid hardship to a parent. Thirdly, the proposed liability was based upon a concept of financial harm that was imprecise and selective. When the parents had spent the money itemised in their claim, they would have an adult son. His Honour disputed that some of the detrimental financial consequences of the relationship could be selected and all others, financial and non-financial, ignored. Finally, the claim was incapable of rational or fair assessment. It involved treating, as actionable damage, and as a matter to be regarded in exclusively financial terms, the creation of a human relationship that was socially fundamental.

Political reaction to Cattanach was negative. In Queensland, where the case originated, legislation was quickly introduced to reverse it. Section 49A of the Civil Liability Act 2003 (Qld) provides that in the case of failed sterilisation procedures a court cannot award damages for economic loss arising out of the costs ordinarily associated with rearing or maintaining a child. Section 49B provides similarly in the case of failed contraceptive procedures or advice. These provisions do not appear to cover a claim for wrongful birth where the plaintiff has lost the opportunity of terminating her pregnancy. Legislation in New South Wales and South Australia is more widely drawn to cover these and other cases where damages are sought for the costs of raising a child, but with specific exceptions in respect of the extra costs associated with the upbringing of a disabled child. Elsewhere, of course, Cattanach applies.

The effect of these provisions is to bring the law in the states concerned broadly in line with that in the United Kingdom. However, a significant imponderable is that the provisions say nothing about the notion of the parents’ loss of autonomy, to which matter we will return. But first we need to evaluate the contrasting decisions in McFarlane and Cattanach. Accordingly we must look more closely at the merits of the arguments underlying claims for the costs of bringing up a child.

D. Nature of the Damage

Let us consider the nature of the damage of which the parents complain. This is important, because the majority in Cattanach took the view that the parents’ claim was maintainable simply on the application of ordinary principles of negligence. In particular, Kirby J considered that the loss was consequential upon physical injury to the mother by reason of pregnancy and childbirth. If this is right it is possible to see the claim as no different in principle from any other claim for physical injury and consequential economic loss. But the better view is that the
loss is purely financial, and this certainly was accepted by the House of Lords in McFarlane\textsuperscript{18} and by Gleeson CJ in Cattanach.\textsuperscript{19} The complaint is not about the consequences to the mother of the physical aspects of birth and of any injury and pain that she herself has suffered, but is about the consequences to the parents of the existence of a child and the creation of a relationship pursuant to which there are legal and moral obligations to expend money on, and provide support for, the child. Indeed, in Cattanach the father was also a plaintiff and he certainly suffered no physical consequences. Kirby J dismissed the father’s position, contending that his claim was ‘made concrete’ by the physical injury suffered by the mother and that it would be artificial to sever it from that of the mother. Yet even if we accept that the claims should be seen as made in common, which is doubtful as the father’s arguably can stand alone, the mother’s claim involves the unique physiological event of pregnancy and childbirth and can be seen as quite different in nature from an ordinary claim involving physical injury and consequential economic loss. Indeed, if the mother is treated as suffering physical injury we might be driven to accept that an action for consequential expenses based on Donoghue v Stevenson\textsuperscript{20} could lie against the negligent manufacturer of a contraceptive. However, it is not very easy to distinguish upbringing expenses from other expenses associated with the birth, which the majority of their Lordships in McFarlane were prepared to allow. Seemingly they should stand or fall together. Lord Millett in dissent took this view and, accordingly, thought that the other expenses ought to be rejected as well.

This is not an arid argument about labels. Rather, the very special nature of the damage which is alleged to be actionable — financial loss by way of expenditure on the child — suggests that the majority approach in Cattanach is not a policy-free application of ordinary principle. The view that ‘legal principle’ can tell us whether Dr Cattanach should have been held responsible for the cost of rearing the unplanned child might be called a fairy tale.\textsuperscript{21} Even if the loss is characterised as consequential upon physical damage to the mother, the claim nonetheless has unique features and requires a decision in a novel area of law. The courts must make judgments on matters involving controversial questions of moral and philosophical principle, and to these we will now turn.

E. Appraisal

There are good arguments on both sides. But those that deny the parents’ claim ultimately are persuasive and should prevail. They are in essence that financial loss is not recoverable without special justification; that the existence of a child cannot be treated as legally recognisable loss or damage or that it is impossible to measure any damage; that treating the existence of a child as a loss to the parents is inconsistent with many other rules affecting the parent-child relationship; that the determination of which expenses are and which are not to be the subject of an

\textsuperscript{18} McFarlane, above n6 at 79 (Lord Steyn), 89 (Lord Hope), 99–100 (Lord Clyde) and 109 (Lord Millett).

\textsuperscript{19} Cattanach, above n12 at 14 (Gleeson CJ).

\textsuperscript{20} [1932] AC 562.

\textsuperscript{21} Cane, above n12 at 26.
award of damages must necessarily be selective and unprincipled; and that the damages are potentially indeterminate both as to their nature and their amount. Let us consider some aspects of these reasons in a little more detail.

The core contention is that the birth of a healthy child should not in law be treated as ‘harm’ or a ‘loss’. Lord Millett made the point very clearly in McFarlane. His Lordship said that parents may choose to regard the birth of a healthy and normal baby as harm, but that ‘plaintiffs are not normally allowed, by a process of subjective devaluation, to make a detriment out of a benefit’, and that ‘it is morally offensive to regard a normal healthy baby as more trouble than it is worth’. This leads us to consider whether we ought to characterise all money expended on a child as a ‘loss’. Why separate the expense incurred by the parents in providing for their child from the emotional benefit to the parents in providing for his or her happiness, self-esteem and security and in showing that he or she is a loved and wanted member of the family? Certainly we should at least recognise that the answer involves judgment and the making of a choice. It is not a matter merely of quantifying a loss.

If, contrary to this view, we accept that parents have suffered a loss in paying for a child’s upbringing, we must decide how it ought to be quantified. In particular, we need to determine which expenses ought to be included and which excluded, and whether there should be an offsetting of any prospective financial benefits. In his judgment in Cattanach, Gleeson CJ asked some pertinent questions. Why not include wedding expenses, or costs of tertiary education? Why distinguish between child-rearing costs and the adverse effects on the career prospects of the parents? Why exclude the natural and moral obligations owed by children to parents and the financial consequences in later years that may entail? Commentators who support the majority view in Cattanach usually accept that there must be some limit on what can and cannot be claimed. So a partial answer to his Honour’s questions might be to limit the damages to, say, the upbringing expenses that are reasonably ascertainable and objectively necessary. But solutions of this kind do not deal with the possible financial advantages to the parents and why these must be ignored. As for the disadvantages, many of the expenses involved in bringing up a child – like private school fees, presents and holidays – are perfectly reasonable but not ‘necessary’. A court seeking to compensate only for strictly necessary expenses is not quantifying a loss but is choosing to award a lesser sum precisely because the award of a proper compensatory sum is unpalatable or even offensive. Furthermore, once a court compensates not for the reasonable expenses of this parent but the necessary expenses of any parent, the amount of the award will tend towards a uniform sum in every case. Perhaps, then, we should start thinking about whether a conventional award of general damages representing the parents’ loss of autonomy, as in Rees, provides a better solution.

Before doing so we should seek to resolve any uncertainties about when the McFarlane rule ought to apply. One question is whether there should be different treatment for an action in contract in the case of private medical treatment.22

22 In McFarlane, above n6 at 99, Lord Clyde recognised that actions in contract may give rise to different issues than those in tort.
Seemingly, upbringing costs would be a natural and ordinary consequence in the case of a breach of a promise guaranteeing the efficacy of a sterilisation and also, perhaps, in the case of a negligent breach of contract without any guarantee. But there can be policy controls on recovery in contract as well as in tort. An example is the continuing debate, going back to Addis v Gramophone Co Ltd, about limits upon damages in contract for upset and distress. Furthermore, there may be concurrent liability, subject to any limits or exclusions in the contract, where the cause of action is for negligence, and the ambit of the two causes of action usually will be coextensive. Accordingly, it is both arguable and, it is suggested, appropriate that the policy denying upbringing costs should apply at least to an action for negligent breach of contract. Indeed, the same policy clearly ought to apply in the case of an action against the retailer of a contraceptive for breach of an implied warranty of quality. Recovery in the case of an express guarantee could depend on the terms of the contract and whether a specified or ascertainable sum is agreed as payable on failure of the guarantee.

The next question is whether a mother’s or a child’s disability ought to be taken into account as giving rise to a right to damages. The reasoning of Lord Millett in Rees is helpful. His Lordship observed that the costs of bringing up a healthy child are infinitely variable, not only according to the needs of the child but according to the circumstances of the parents and other members of the family. To the extent that a mother’s disability has any effect it simply increases the amount of the costs which she reasonably incurs, costs which were held by McFarlane to be irrecoverable. Furthermore, the costs will gradually disappear as the child grows up, to be overtaken by advantages. And costs due to the birth and due to the disability cannot be disentangled: they are a single cost with composite causes. But where it is the child who is disabled the costs are attributable either to the birth of the child or the fact the child is disabled and they do not diminish but are present throughout. So Lord Millett thought that a line should be drawn between costs referable to the characteristics of the parent and those referable to the characteristics of the child. In the latter case he preferred to leave the question open, but would not find it morally offensive to reflect the difference between a healthy and a disabled child in an award of damages.

Introducing a special rule if the mother (or father?) is disabled thus would be inappropriate and unworkable. The position is different where the child is disabled. One solution, which has support in Rees from Lord Scott, is to allow damages representing the extra disability costs at least in wrongful birth as opposed to wrongful conception cases. In the latter the mother did not wish to become pregnant or to give birth at all. But in wrongful birth cases the mother did wish to become pregnant, but due to the defendant’s failure to diagnose or to advise that

23 See Thake v Maurice, above n7 (a pre-McFarlane decision).
the foetus was suffering from an abnormality, she lost the opportunity to terminate the pregnancy. Here the child was desired, so the parents would have incurred upbringing costs had they terminated the pregnancy and conceived another child, and the risk of the mother giving birth to a disabled child was specifically the reason for undergoing the diagnostic test. The defendant’s responsibility relates to the disability rather than the birth, and damages for the disability expenses alone can be seen as well justified. But we can go further, for disability expenses can be seen as justifiable in wrongful conception cases as well. Sometimes the very reason for a person to seek sterilisation is the risk of conceiving a disabled child, which consequence again should be within the defendant’s contemplation. More broadly, even where there is no special risk but a disabled child is born, the disability expenses can be seen as falling outside the ordinary and inextricable calculus of benefits and burdens associated with the birth of a child and, accordingly, as falling outside the core principle in McFarlane. So the principle recognised in Parkinson ought to apply. If necessary we should grasp the nettle and recognise that to the extent that a child is disabled the birth does involve a loss to the parents. In the words of one commentator, the birth of a handicapped child is surely a matter for condolence, whereas that of a healthy child is (despite the expense) a reason for congratulation.

F. Loss of Autonomy

We should turn now to consider the award of a conventional sum to compensate for the mother’s or the parents’ loss of autonomy in controlling the size of her or their family, without proof of financial loss. The minority in Rees rejected this solution, partly because it was put forward only at a late stage of the proceedings and, so it was said, had not been fully argued through. But convincing justifications can be advanced in its support. A claim for loss of autonomy is conceptually quite different from a claim for the costs of bringing up a child. The same objections of principle do not apply, and the focus is on the impact of the child on the lives of the parents rather than on the unwanted costs of, or expenditure on, the child. A conventional award also avoids a key vice of the wrongful conception action, that it can compensate for major discretionary expenditure of well-to-do parents. In Rees, Lord Bingham recognised that underpinning the decision in McFarlane was a sense that to award potentially very large sums to parents of normal and healthy children against a National Health Service always in need of funds to meet pressing demands would rightly offend the community’s sense of how public

28 On this view it may sometimes be necessary to bring into account the law governing abortion. If at the time of the alleged negligence an abortion would have been illegal the plaintiff’s claim must fail, as the lost opportunity could only have been turned to value by a breach of the law: Rance v Mid-Downs Health Authority [1991] 2 WLR 159; CES v Superclinics (Australia) Pty Ltd (1995) 38 NSWLR 47.
29 Weir, above n8 at 241.
30 A comparable innovation perhaps was the award to an estate of a conventional sum for loss of expectation of life: see Benham v Gambling [1941] AC 157.
resources should be allocated. By contrast, the award of a conventional sum recognises that the parents have suffered a real loss, but evaluates the loss at the same level for all. It introduces a desirable element of certainty and predictability into the quantum of damages.

There is an unavoidable element of arbitrariness in setting the appropriate sum. In Rees, no explanation is given for fixing it at £15,000. Of course, the loss is necessarily uncertain in financial terms and there can be no ‘correct’ figure. But should courts outside the United Kingdom accept this solution, the quantification of the claim could be further explored. There are various ways of looking at this question. One approach might be to focus on necessary expenses in coping with restrictions on autonomy in a deserving case. This might include, say, expenses of childcare until the child reaches school age in order to allow a single parent to remain in employment. Or perhaps the quantum should be such as to give the parents a period of time to re-order their lives and adjust to their new circumstances. Ultimately the court must search for a sum that can be widely recognised as reasonably fair, taking into account the loss of choice about lifestyle, the allocation of resources and the like. Fixing general damages in this way must be impressionistic rather than calculated.

In Australia the legislative reversals of Cattanach do not deal with a possible claim for loss of autonomy, no doubt because the relevant state legislatures would not have had it in mind. But there are no formal bars, and a claim of this kind remains to be explored.

A conventional sum should not be awarded in wrongful birth cases where the child is disabled. Here the initial pregnancy was not unwanted, and in these circumstances the defendant might be seen as responsible for the disability costs but not for any loss of autonomy. The parents decided for themselves to exercise their autonomy, and had the mother terminated the pregnancy on receiving proper advice, she would have had the opportunity of conceiving another child. In these circumstances the defendant could not reasonably be expected to anticipate that his or her negligence would cause the loss. More doubtful is the case of an unplanned pregnancy where the child is not disabled but the mother is wrongly advised that she is not pregnant. Here, one or other parent simply failed to take steps to prevent the pregnancy. The pregnancy is unwanted and perhaps, as in sterilisation cases, the parents ought to be able to sue.

Finally, brief speculation about future developments is due. Judicial recognition of the notion of a loss of autonomy suffered by parents of unplanned children may be one harbinger of a newly developing field of tortious liability. Perhaps a similar notion is involved in another recent decision of the House of Lords, in Chester v Afshar. Here, a doctor was held liable for failing to warn a patient of a small but unavoidable risk of surgery, this notwithstanding that the patient could not show that, had she been warned, she would not have undergone surgery at some time in the future when the risk would have been precisely the

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same. A majority of their Lordships took the view that the duty owed by the defendant was intended not only to help minimise the risk to the patient, but also to vindicate her right of autonomy and to enable her to make an informed choice about when, where and in what circumstances to undergo the treatment. Again, protection from interference with personal autonomy and dignity underlies recently accorded recognition of a remedy for the misuse of private information, in New Zealand as a new tort of invasion of privacy, and in England as a development of the action for breach of confidence. These various developments perhaps can be recognised as responses of the common law to an emerging human rights-based jurisprudence in European and national laws. They may mark the beginnings of an attempt to determine what the notion of autonomy might cover and to develop an integrated theme of decision-making in this field.

3. The Child’s Claim

A. Harriton v Stephens, Waller v James and Waller v Hoolahan

Thus far we have considered the claims of the parents arising out of loss or damage to them caused by an unplanned conception or birth. We should now turn to consider a claim by the child himself or herself. This kind of claim usually is described as a claim in respect of ‘wrongful life’ and poses problems which are truly unique. These are explored in three consolidated appeals of the New South Wales Court of Appeal in Harriton v Stephens, Waller v James and Waller v Hoolahan.

In Harriton v Stephens the appellant’s mother had a fever and a rash and also thought that she might be pregnant. She had a blood test, after which her doctor, the respondent, gave her a misleading assurance that her illness was not rubella. However, a prudent general practitioner would have arranged for an IgM blood test, which would have been positive for rubella antibodies. Had the rubella been diagnosed, Mrs Harriton would have exercised her lawful right to terminate her pregnancy. As a consequence of the rubella infection the appellant (Alexia) was born suffering from severe congenital disabilities.

In Waller v James and Waller v Hoolahan the appellant’s father had a genetic

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32 Hosking v Runting [2005] 1 NZLR 1; Rosemary Tobin, ‘Yes, Virginia, there is a Santa Claus: The Tort of Invasion of Privacy in New Zealand’ (2004) 12 TLJ 95. In ABC v Lenah Game Meats Ltd (2001) 208 CLR 199, the question of whether a tort of invasion of privacy should be recognised in Australia was left open by the High Court of Australia. See Megan Richardson, ‘Whither Breach of Confidence: A Right of Privacy for Australia?’ (2002) 26 MULR 381.

33 Campbell v MGN Ltd [2004] 2 WLR 1232.


deficiency known as anti-thrombin 3 deficiency (AT3 deficiency) which was genetically transmittable and could give rise to cerebral thrombosis in his children. He and his wife sought advice from the respondents concerning in vitro fertilisation, but the respondents did not investigate Mr Waller’s AT3 deficiency and did not advise Mr and Mrs Waller about its potential consequences. Mrs Waller became pregnant and gave birth to a son (Keeden) with a genetic AT3 deficiency and cerebral thrombosis. Had Mr and Mrs Waller been advised about Mr Waller’s AT3 deficiency, they would have ensured that an embryo without the AT3 deficiency was implanted in Mrs Waller, or used donor sperm, or obtained a lawful termination of Mrs Waller’s pregnancy. And had another embryo been used, Mrs Waller might have given birth to another child, but that child would not have been the appellant.

Both appellants claimed damages from the respondents, alleging that they were liable for causing the appellants to suffer harm or loss in living their profoundly disabled lives. A core difficulty facing the appellants was proving actionable damage, for had the respondents not been negligent they would not be living at all. On the majority view this was the decisive objection. Spigelman CJ and Ipp JA both held that the claims should fail, because neither appellant could establish that non-existence would be preferable to life with disabilities or could demonstrate the monetary value of non-existence. By contrast, Mason P considered that it was legitimate to approach the problem by making a comparison between the appellants’ condition affected and unaffected by the impact of the respondents’ conduct, and that on this basis the claims ought to be allowed to proceed.

B. Appraisal

The reasoning in Harriton reflects the debate in many decisions overseas, particularly those in the United States. The two most common reasons why wrongful life claims have failed are because courts have held that life itself cannot be a legal injury, and because courts are unable or unwilling to measure compensation that involves comparing the harm of living with that of never having lived at all.37 The minority of cases that allow such claims are based on the defendant’s responsibility for having created an impaired life. They are premised, not on the concept that non existence is preferable to an impaired life, but on the policy that law should respond to the call of the living for help in bearing the burden of their affliction.38 So we need to weigh up the competing arguments.

Let us attempt to focus on what can be accepted and what can be seen as the key points of controversy. First, we can agree with Mason P in Harriton that there is no separate issue of causation. A medical adviser’s negligence in failing to warn the parents that a foetus is or might be disabled is at least a cause in fact of the

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38 See, for example, Procanik v Cillo 478 A 2d 755 (1984). In Israel see Zeitzoff v Katz [1986] 40(2) PD 85.
child’s loss. While the doctor does not cause the existence of the disabilities, he or she does cause the child to be born in a disabled condition, by depriving the parents of the opportunity of preventing the birth. In that sense the negligence is a cause, and we can move on to the question whether the doctor ought to be held liable for causing a loss of that kind.

Secondly, it is clear that if wrongful life claims are to be allowed, they must be based on a special rule of liability. We can agree again with Mason P that the compensatory principle is a means of assessment and is not a means of identifying ‘damage’ where that is the gist of the cause of action. Measuring loss in assessing damages is different from determining liability. But normally a defendant can only be liable in respect of a loss that is at least measurable on a comparative basis, as both Spigelman CJ and Ipp JA emphasise. In a personal injury claim, the particular plaintiff’s pre-existing state, not a notional ‘average’ person, is the comparator. In determining whether damage has been inflicted the court takes the position of the plaintiff before and after the negligence. But in wrongful life cases there is no measurable loss if ordinary principle is to be applied. It cannot be said that a child with disabilities is worse off than if he or she had never been born at all. So the child’s claim has to be put on a basis different from other claims.

Ipp JA helpfully explains how the child’s interest in the mother having an opportunity of preventing his or her conception or birth is distinguishable from other, arguably similar, interests. In particular, a claim on behalf of a foetus injured in the womb does not involve the proposition that the foetus should have been terminated and is based on the established compensatory principle; a mother can seek the lawful termination of a pregnancy, but the foetus has no rights in this respect; the interest of a disabled person on a life support system is in whether his or her life should be preserved, by balancing his or her existing quality of life against death should treatment be withdrawn, whereas the disabled child’s interest is in not being conceived or born; and the parents of a disabled child have a financial interest in recovering the expenses of bringing up the child, which does not raise the same difficulties (and to which we shall return). Ipp JA also points out that the question in issue does not involve offsetting the value of non-existence, nor does it put an evidential onus on the defendant. The child’s damages are not ‘reduced’ by identifying his or her pre-accident condition. The problem is one of determination of the damages alleged to be sustained, not one involving the amount by which otherwise determined damages are to be reduced.

Accordingly, we should turn now to the question whether a special rule for wrongful life claims ought to be recognised. In attempting to formulate a rule it would be possible to hive off what would otherwise be some particularly controversial applications. So the type of claim described by Mason P as involving a ‘dissatisfied life’ could be excluded. Any rule could be confined to loss attributable to physical disabilities or characteristics, as opposed to social or financial disadvantages. For example, we need not be driven to accept claims by

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39 Compare McKay v Essex Area Health Authority [1982] QB 1166 at 1181 (Stephenson LJ) and 1188 (Ackner LJ).
children complaining about the disadvantages and stigma of illegitimacy. Such claims invariably have been rejected overseas.40 Again, there are special policy implications involved in claims by disabled children against their parents for conceiving them or allowing them to be born. These also could be excepted from any general rule, in the same way that claims by a child against its mother for negligence during pregnancy causing injury to the foetus can be treated as falling into a special category of their own.41

The rule might, therefore, be that a person who negligently gives advice or administers treatment to a prospective parent which deprives the parent of the opportunity of terminating a pregnancy or avoiding a conception by reason of undesired physical disabilities or characteristics of the child owes a duty of care to the child. A practical advantage of a rule of this kind is that damages are retained under the control of the court and are not at risk of dissipation by the parents.42 But it is strongly arguable that the policy of the law should not support such a rule, for the following reasons.

First, in deciding whether to recognise a rule of liability the courts should seek to promote underlying coherence in the law. At the most general level, it is not desirable to admit claims that cannot be justified by the application of well accepted principle. If this factor stood on its own then it would not necessarily be given substantial weight. But it does not stand alone and should play a part in the balancing exercise.

Secondly, we must identify the disabilities or characteristics which would allow the rule to be invoked. Mason P said that it trivialised the particular claims to suggest that there would be a cause of action available to children born with minor disabilities. But the problem cannot be summarily dismissed in this way. Do we really want courts deciding whether a disability is sufficiently serious to justify a mother making a decision to terminate a pregnancy? Where exactly might the line be drawn? And why? If the court does not make the decision then it must depend solely on that of the mother or father or both. Many parents, if given the choice, would decide to terminate pregnancies where the disabilities fall far short of those suffered by Alexia Harriton and Keeden Waller. Indeed, supposedly minor or cosmetic disabilities can have a very serious impact, both socially and financially, on the kind of life that the child in question might expect to live. Again, advances in techniques of genetic modification referred to by Ipp JA are likely to raise problems that are truly intractable. How might a court deal with a genetic

40 See, for example, Zepeda v Zepeda 190 NE 2d 849 (1963).
41 In Dobson v Dobson [1999] 2 SCR 753, a majority of the Supreme Court of Canada thought that recognising a duty owed by the driver of a car to her unborn child would result in extensive and unacceptable intrusions into the bodily integrity, privacy and autonomy rights of women, and could render the most mundane decision taken in the course of their daily lives subject to judicial scrutiny. By contrast, in Lynch v Lynch (1991) 25 NSWLR 411 and Bowditch v McEwan (2003) 2 Qd R 615, it was held that claims of this kind could be maintained. The mother’s freedom of action in respect of her driving was already restricted by her duty of care to users of the highway. She would not have to take any further precautions to avoid liability to her born-alive child.
deficiency which shortens a child’s anticipated life or the effects of which might emerge in later years? How might a failure in advice about or testing of genes affecting mental health or behaviour be treated? The problem is one of principle, not of measuring a loss. No principled line could be drawn in determining what is and is not actionable. The whole spectrum of claims would have to be admitted as potentially actionable. We can reasonably question whether it would be desirable for the courts to make decisions about the ‘loss’ suffered by plaintiffs in living their lives with their particular and unique genetic profile.

This brings us to the third reason for declining to admit these claims. In Harriton it was common ground that any action by the child was mediated through negligent advice or treatment given to the mother or father. So the parents themselves have an action for the loss they have suffered by reason of the birth. We have seen already that claims for wrongful birth do not pose the same difficulties in concept or policy as claims for wrongful conception, for the parents’ complaint is in respect of the financial loss caused by the birth of a child with disabilities, rather than by an unwanted birth per se. In this case, we can compare the parents’ position caused by the negligence with what it would have been without the negligence. They have a child with disabilities, and but for the negligence they would either have had a child without the disabilities or would have had no child at all. In either case, an award of damages representing the costs attributable to the disabilities should be recoverable. The objections to the wrongful conception action concerning the calculation of the damages do not arise. The parents can recover reasonable expenses attributable to the disability without any formal limit as to the child’s age or in time. Again, the parents’ action can more easily cope with possible complaints about negligent treatment or advice in the field of genetics. If, say, due to a medical adviser’s negligence a child lacked a desired genetic attribute, the parents would have an action if they could establish that its absence had caused them to suffer financial loss in bringing up the child. But, absent a contract to achieve a particular result, there would otherwise be no damage to support their claim.

Finally, we can come back to the core objection. Sadly, the plaintiff in a wrongful life action could not have had a different and better life. The courts cannot give compensation for being in this world with whatever disadvantages that may entail. They can compensate parents for the expenses involved in coping with their child’s disabilities. These are justifiable, ascertainable and calculable. Sometimes the parents may not be able to sue because, for example, the claim is statute-barred. This very difficulty faced the parents in the Harriton case. But the courts cannot for this reason create a new cause of action which is not otherwise supportable on a weighing of relevant considerations of policy and principle.

4. Conclusion

The recent upsurge in decisions concerning damages for unplanned children may not have ended. Various uncertainties remain in the different jurisdictions. In England the position of the parents of disabled children remains to be determined. In Australia, in states where Cattanach applies, some difficult questions about the
extent of the parents’ recoverable damages can be anticipated. In states where legislative controls have been introduced, there remains scope for actions for disability expenses and, possibly, for interference with parental autonomy. And the action for wrongful life is due to be argued before the High Court of Australia in appeals in Harriton and both Waller cases,\(^4\) and has yet to be considered by the House of Lords.

The merits of these various claims have been the subject of extended debate. In Cattanach in particular the differing opinions are advanced with very considerable power and conviction. My view, in essence, is that claims for wrongful conception or birth raise special concerns of policy and morality and that they therefore require special treatment. In this fundamental respect they are no different from the unceasing stream of decisions limiting or negating liability for negligence where the claim is on the boundary of existing principle or, indeed, is entirely novel. The courts are constantly drawing lines, here and elsewhere. In the instant case the approach taken by the House of Lords achieves a better balance in resolving the concerns raised by the cases than that of the majority in the High Court of Australia, at least on the assumption that disability expenses remain recoverable. On either view, there is no warrant for the courts to uphold a wrongful life claim by a disabled child, which must confront serious objections of principle. These are avoided by a parent’s claim for wrongful birth. The problem of overlapping claims also disappears.

\(^4\) On 29 April 2005 the High Court granted leave to appeal in all three cases.
The Price of Excessive Damage Awards

STEPHEN WADAMS

Moral indignation is not a factor that is to be used to inflate the calculation of a compensatory award.¹

There has been a tendency during the past 30 years, in many common law jurisdictions, towards an increase in amounts of damages, both in contract and tort. Arguments for increasing awards have, for a variety of reasons, been vigorously and effectively promoted, whereas the counter-arguments have appeared weak and diffuse. The counter-arguments, therefore, deserve attention. ‘The more the better’ cannot be a principle of justice, rationality or of sound policy.

The expansion of damage awards has been assisted by the ideas that the defendant is a wrongdoer deserving of little sympathy; that wrongs should all ideally be deterred and so it is acceptable — desirable even — that damage awards should err on the side of excess; and that damages will in any event be paid by an anonymous insurance fund and impose a real burden on no one. The third idea is inconsistent with the others, and each of the three rests on erroneous assumptions. In many cases — probably in most cases — those liable to pay damages are not personally guilty of blameworthy conduct; it is not true that all conduct giving rise to what the law calls a wrong should ideally be deterred; and all awards, even if funded by insurance, have to be paid for. These points will be illustrated by considering several kinds of legal wrongs and several different kinds of loss.

1. Breach of Contract

It may seem an attractive simplification to establish a single category of legal wrongs, but there is danger in attempting to force all legal wrongs into a single category. Although breach of contract has been classified, for purposes of assessment of damages, as a legal wrong, it is not true that every breach of contract is, for all purposes, equivalent to a tort. In our search for a simple scheme of classification, we are in danger of losing sight of a dimension of contractual obligation that used to be considered elementary, namely, promise or agreement. Contracts often (it is not necessary for present purposes to say always) involve self-imposed and self-defined obligations. This is not an irrelevant or accidental feature of contractual obligation and it has important implications for the appropriate remedy. In contrast to most torts, there is often nothing inherently objectionable or anti-social in the conduct that constitutes breach of contract. Often (again it is not necessary to say always), the promisee’s interest is primarily in the economic value of performance. Further, it is in the interest of both contracting parties to predict and to limit the probable costs of breach because this

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¹ Cadbury Schweppes Inc v FBI Foods Ltd [1999] 1 SCR 142 [64] (Binnie J).
affects the agreed price. Together, these considerations present strong reasons for restricting damages for breach of contract to reasonable compensation of the promisee’s expectation.

Since breach of contract has usually been classified, for purposes of damage assessment, as a legal wrong, it follows that the just measure of compensation for a particular wrong that constitutes a breach of contract must generally be, viewed strictly as a matter of compensation, the same as the just measure where the wrong constitutes a tort or an equitable wrong. In some cases of torts or equitable wrongs, there may be persuasive reasons for awarding damages that exceed compensation, but if such reasons are operative, they ought, for the sake of clarity of thought, to be separately identified and distinguished from the assessment of compensation.

Liability for breach of contract is not dependent on proof of fault, either at the stage of contract formation, or at the stage of non-performance. The effect of a binding contract is that the promisor gives a guarantee of performance, and liability generally follows on simple proof of non-performance. Sometimes, indeed, breach of contract is inevitable, for example, where a person is bound by two incompatible contractual obligations, a circumstance that may arise without fault. In such a case an early announcement of inability to perform, though amounting to a legal wrong that exposes the defendant to liability, is not only permissible but, where coupled with an expression of regret and an offer to pay due compensation, praiseworthy.

Even where performance is possible, breach of contract is not always deterred by the law and deterrence is not always desirable. Thus, specific enforcement or enforcement by injunction is not usually available; self-help is not usually permissible to force unwanted performance on another party; a threat to break a contract is not always treated as wrongful; inducing another to break a contract is not always wrongful; punitive damages are, in most jurisdictions, usually not available; and a contract-breaker is usually not required to account for profits derived from breach.

Sometimes arguments have been adduced in favour of a general right to specific performance of contracts, but no such right has developed in Anglo-American law. The principal cases where specific performance has been refused are contracts for personal services, non-payment of debts and long-term contracts where orders of specific performance might have unexpected and oppressive

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2 For example, contracts to sell the same property to two purchasers might be made by an agent, acting within ostensible authority. The principal, though without fault, would be contractually liable to both purchasers. See Hilton v Barker Booth & Eastwood [2005] 1 WLR 567 at para 35.

3 Canada is an apparent exception, but the scope of the exception remains to be determined: Whiten v Pilot Insurance Co [2002] 1 SCR 595.

4 Attorney General v Blake [2001] 1 AC 268 did require an account of profits, but the court emphasised the exceptional nature of the case.

5 Frederick Lawson, Remedies of English Law (2nd ed, 1980) at 211; Alan Schwartz, ‘The Case for Specific Performance’ (1979) 89 Yale LJ 271.

consequences. Other considerations have been that the rules governing mitigation would be undercut by a general right to specific performance; that a decree of specific performance would often have the effect of prolonging a dispute and creating new occasions for conflict between hostile parties; that where the cost of performance greatly exceeds the economic benefit of the performance, a decree of specific performance would be oppressive to the defendant and would give undue bargaining power to the plaintiff; and that rights of third parties would sometimes be affected.

These various rules, taken together, justify the proposition that breach of contract has not been treated by the law as conduct that ought always, or at all costs, to be deterred. Holmes went so far as to say that there was never a legal duty to perform a contract, but only to perform or to pay damages at the promisor’s option, and his published correspondence with Pollock shows that he adhered to this opinion throughout his life despite cogent arguments to the contrary adduced by Pollock. A modern version of Holmes’ view has appeared in the economic doctrine of ‘efficient breach’, to the effect that breach of contract may be economically efficient, since the contract-breaker is made better off by it and the other party no worse off on receipt of full compensation. Some supporters of these theories have tended to overstate their case, but nevertheless the ideas underlying them have, as a matter of legal history, played a significant role.

Putting it at its lowest, it is a justifiable observation that there are some circumstances in which breach of contract has been treated as legitimate. A simple example would be of a student who agrees to paint the outside of a house, but, in breach of contract, determines to attend law school instead. In such a case, if the owner of the house can obtain the services of a competent professional painter for the contract price or less, no substantial damages would be awarded. Nor would a court order specific performance, issue an injunction to forbid attendance at law school, order an accounting of profits derived from a legal education or require payment of punitive damages. These rules are interrelated, and tend to support each other. They may be summarised by saying that the house owner has no proprietary interest in the student’s services. Though to some extent circular, the reasoning is not empty of content. Few would say that the student commits any moral wrong in breaking the contract, at least if the breach is coupled with an offer to pay compensation for any higher price the owner might have to pay to engage a

8 These were that Holmes’ view was incompatible with the historical origins of assumpsit, with the availability of specific performance, with the tort of inducing breach of contract, with the doctrine of frustration and with the ordinary expectations of contracting parties, Mark Howe (ed), Pollock-Holmes Letters: Correspondence of Sir Frederick Pollock and Mr Justice Holmes 1874–1932 (2 vols, 1942) vol I at 79–80 [1894], vol II at 201–2 [1927].
professional painter. The power to break the contract in these circumstances is part of the student’s legitimate freedom of action and it would be an undue restraint on that freedom to compel performance.

These considerations affect the amount of monetary damages. The contract-breaker is bound, normally, to pay the full loss caused by the breach, including the loss of the value of the bargain if the owner has made a good bargain, but there is a positive and very powerful reason for not allowing the owner to recover any greater sum: it would place an unjustifiable restraint on freedom of action. From an economic point of view, it may be said that it would often deter an efficient breach.

Anticipated awards of damages affect not only the freedom to break a contract, but the terms on which the contract is made in the first place. Where the promisor acts in the course of a business, the anticipated cost of liability will be reflected in the contract price. If the law changes so that the damages likely to be paid upon breach of contract rise, the price charged to customers will, if the defendant is to remain in business, also rise. Before 1972, it was confidently asserted that damages for mental distress were not available for breach of contract, but in that year a decision of the English Court of Appeal awarded damages for mental distress and for loss of anticipated enjoyment to a disappointed holiday-maker against a holiday tour supplier.11 As Professor Samuel Rea pointed out the effect of such a decision, though beneficial, of course, to the individual plaintiff, was probably not beneficial to holiday-makers as a class, because the effect was to compel all of them to purchase insurance against a risk that they would almost certainly have preferred not to insure against if given the choice of saving the implicit premium.12 Damages for mental distress and for disappointed expectation of enjoyment are notoriously difficult to quantify. Insurance against such losses, without monetary limit, with the amount payable to be established, in case of dispute, by self-serving evidence in the course of costly litigation, implies a high premium.

Some cases have attempted to confine awards of damages for mental distress to contracts for ‘peace of mind’.13 This category is difficult to define and there is no obvious reason why compensatory damages should be so restricted.14 But the concern of courts in several jurisdictions to limit this head of damages manifests a perception that introducing an open-ended and expanding head of damages into ordinary commercial contracts has heavy costs. In a recent Ontario case, for example, involving breach of a contract by a small building contractor to renovate a domestic heating system the trial judge awarded extensive damages, including $35 000 general damages to the homeowner, who suffered from bipolar disorder. On appeal, this part of the award was set aside. The contract price was only $11 000 and the Court of Appeal was evidently concerned both at the disproportion between the price and the damages, and at the prospect of introducing open-ended

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damage awards into every commercial and consumer contract. The court said that 'generally before damages for mental distress can be awarded for breach of contract, the contract must be one where peace of mind is what is being contracted for, such as a contract for a holiday … or for insurance’, adding that:

[t]here are persuasive reasons to confine within narrow limits the circumstances when damages will be awarded for the exacerbation of mental illness for breach of a consumer contract… An extension of the circumstances when such damages are awarded could cause businesspeople to be wary of dealing with persons with mental disabilities for fear of exposure to claims for damages much higher than the value of the contract.15

A comparison with the amount of damages awarded for non-pecuniary loss in personal injury cases is, it may be suggested, appropriate in this context. Mental distress may itself be classified as a personal injury. If $300000 (the approximate current upper limit in Canada) is the appropriate award for non-pecuniary loss in the case of the gravest physical injuries, a proportionately smaller sum must be appropriate for mental distress caused by breach of contract. It is difficult to accept that the distress suffered by a disappointed holiday-maker usually warrants a larger award than the pain, suffering, and distress caused by a broken limb.

2. **Strict Liability in Tort**

There are many instances of tort liability where the defendant is not at fault and where it is not in the public interest to force the defendant to cease altogether from the risk-creating activity. It is sufficient to mention, as instances in many (but not all) common law jurisdictions, vicarious liability, products liability, nuisance, dangerous and unusual use of land, liability for animals, defamation and cases where there is a defence of necessity. In these cases the defendant is required to compensate the plaintiff for loss caused by the defendant’s enterprise. The merits of strict liability are debatable, but they will not be debated here. It will be assumed, for present purposes, that strict liability in the classes of case mentioned can be justified in so far as it relates to compensation for loss. The point made here is that there are very strong positive reasons for not awarding damages that go beyond fair compensation of loss. The reasons may be summarised as freedom of action on the part of the defendant and a positive public interest in permitting the defendant’s enterprise to operate, provided that it pays its way by compensating those to whom it causes loss.

The principal argument for strict liability is not (as is sometimes suggested) that the defendant is liable because he or she is or could be insured against liability, but that the defendant is liable because it is just to treat the defendant as an insurer. Pollock treated the instances of strict liability as ‘duties of insuring safety’.16 Whether or not the defendant purchases liability insurance is irrelevant to the

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15 Turczinski v Dupont Heating & Air Conditioning Ltd (2004) 246 DLR (4th) 95 at [27], [38].
reasons for imposition of liability: it is the defendant who is the insurer. The just limit of an insurer’s liability is the amount of the indemnity and the extent of the indemnity in these cases is compensation for harm. A similar argument is applicable to many cases usually classified as negligence. A learner driver doing his or her incompetent best, or a driver who suffers an occasional lapse of concentration or judgment — that is to say, every driver — is not excused from liability if an accident occurs in consequence of the incompetence or the lapse. Liability is based in such cases not so much on personal blameworthiness, as on the idea that the driver gives a guarantee to other road-users of a certain minimum standard of conduct. The just limit of liability supported on this basis is compensation for harm.

In *Bazley v Curry*, the Supreme Court of Canada addressed important questions of vicarious liability and charitable immunity. The corporate defendant, The Children’s Foundation, was a non-profit organisation that ran a residential home for emotionally troubled children. The plaintiff, a child resident in the home, had been sexually abused by an employee of the defendant. The question was whether the Foundation, assuming that it had not been negligent, was liable to the plaintiff. The court held that liability was appropriate. The reasoning involved considerations of enterprise liability, loss spreading, and internalisation of costs – arguments often used in other jurisdictions in the context of strict liability for defective products:

The employer puts in the community an enterprise which carries with it certain risks. When those risks materialize and cause injury to a member of the public despite the employer’s reasonable efforts, it is fair that the person or organization that creates the enterprise and hence the risk should bear the loss. This accords with the notion that it is right and just that the person who creates a risk bear the loss when the risk ripens into harm. While the fairness of this proposition is capable of standing alone, it is buttressed by the fact that the employer is often in the best position to spread the losses through mechanisms like insurance and higher prices, thus minimizing the dislocative effect of the tort within society.... The second major policy consideration underlying vicarious liability is deterrence of future harm. Fixing the employer with responsibility for the employee’s wrongful act, even where the employer is not negligent, may have a deterrent effect. Employers are often in a position to reduce accidents and intentional wrongs by efficient organisation and supervision.

The court then went on to consider whether there should be any immunity for charitable, or non-profit, organisations. In this context the court accepted that the Foundation, like other charitable organisations, was engaged in excellent work that was extremely beneficial to the community:

They do work few others would, and they do it in a selfless, generous manner. In the case at bar, the Children’s Foundation took in the respondent when no one else seemed ready or able to do so and undertook the difficult task of providing him with the love and guidance that other children receive from their parents. That

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17 [1999] 2 SCR 534 (hereafter *Bazley v Curry*).
18 Id at [31], [32].
non-profit organizations do important work is beyond question. They are funded
by the government and by donations from the public.19

Nevertheless, the admirable nature of the Foundation’s work was insufficient
reason to excuse it from paying damages:

It is difficult to conclude that the fact that the appellant does good work in the
community without expectation of profit makes it unjust that it should be held
vicariously responsible for the abuse of the respondent.20

The reason was that to accept an immunity would cast the loss entirely on the
shoulders of the injured plaintiff:

The suggestion that the victim must remain remedyless for the greater good
smacks of crass and unsubstantiated utilitarianism…. If, in the final analysis, the
choice is between which of two faultless parties should bear the loss — the party
that created the risk that materialized in the wrongdoing or the victim of the
wrongdoing — I do not hesitate in my answer. Neither alternative is attractive.
But given that a choice must be made, it is fairer to place the loss on the party that
introduced the risk and had the better opportunity to control it.21

Both questions that the court addressed, liability for intentional wrongdoing of an
employee, and charitable immunity, are debatable and have been decided
differently in other common law jurisdictions.22 The purpose of the present paper
is not to debate these questions. Let us assume that they were rightly decided, and
that The Children’s Foundation was rightly required to pay compensation to the
plaintiff. The point that I wish to make is that implicit in the reasons is a very strong
case for not requiring the Foundation to pay more than fair compensation. The
Foundation is an excellent institution doing admirable work. It has done nothing
wrong. It is decidedly not in the public interest that it should cease, or restrict, its
operations, for if it did so, other children might be exposed to more and even
greater risks of harm that those that materialised in this case. The diversion to the
plaintiff of any of the Foundation’s money beyond the strict requirements of
compensation is not only unjust to the Foundation, but also (in the particular
circumstances) decidedly against the public interest because it will withdraw funds
from a vital public purpose and from the assistance of other needy children. Thus
the Foundation is rightly required (let us assume) to make fair compensation to the
plaintiff, but there is a very strong positive case for not requiring it to pay any
more. Punitive damages against the Foundation, of course, would be completely
inappropriate and so too would any measure of damages that stretched the
principles of compensation or that mixed punitive with compensatory
considerations for the purpose of enhancing the award. There is a case for fair
compensation and there is an equally strong case for not going beyond fair
compensation.

19 Id at [49].
20 Id at [51].
21 Id at [54].
The argument here is not that the defendant’s interest should prevail because it is a public interest, but that the defendant’s interest should prevail after the plaintiff is compensated because compensation is all that is due to the plaintiff. The public nature of the activities merely supplies a vivid illustration of the point.23

As this case shows, Anglo-American tort law has had more than one dimension. Wrongdoing is one, but allocation of risk is another. Where a question arises of whether or not the imposition of liability is appropriate, it inhibits the court’s choice if the question is presented in all-or-nothing terms, as though the court, if it gives compensation, must also impliedly declare that the defendant’s activity is itself wrongful and should ideally be suppressed. There are many instances where the appropriate solution, as in Bazley v Curry, is to permit — indeed, to encourage — the defendant’s activity to continue, but to require compensation to be made to those injured in the process. The point was made in the context of products liability by a civilian lawyer:

The Roman praetor allowed the farmer to use his horse to carry fruit and vegetables at the Forum Romanum. This method of transport increased the range of goods on offer to society and, for the farmer, increased the possibility for personal profit, but nevertheless created the risk of damage whenever the horse followed its unpredictable nature. The praetor did not, however, accept the farmer's excuse that as the horse had never before gone out of control, the damage caused was unforeseeable. To allow the activity, but to allocate the risk, this 'yes, but...' approach is socially the best solution....24

Failure to recognise this intermediate possibility forces an all-or-nothing choice that may inhibit development of the law to the detriment both of injured persons and of the public interest. To argue against potential liability for injury caused by rocks falling on a highway, for example, on the ground that 'if the court imposed liability the government would have to close the highway' might possibly be good rhetoric in some contexts, but overlooks the intermediate possibility of awarding compensation for injuries without implying that the activity of operating the highway is in any way objectionable. The argument is that fair compensation may be due to the injured plaintiff, but the corollary is that only fair compensation is due.

Many other examples might be adduced of instances where the apparent necessity of all-or-nothing choice has inhibited the development of the law. In a number of cases, the question has arisen of an employer’s liability for distress suffered by an employee dismissed in an unreasonably harsh manner. In Wallace v United Grain Growers Ltd,25 the majority of the Supreme Court of Canada held that employers were bound by obligations of good faith and fair dealing, but that breach of these obligations was to be reflected in a lengthened period of notice

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23 Hence, reference to ‘distributive justice’ appears to introduce more difficulties than it resolves. See McFarlane v Tayside Health Board [2000] 2 AC 59 at 82, 83 (Lord Steyn); see Rees v Darlington Memorial Hospital NHS Trust [2004] 1 AC 309 at [105] (Lord Millet).
rather than as a separate head of damages. The dissenting judges would have based liability on an implied obligation in the employment contract. The approach of the minority is in many ways simpler, more logical and more convenient in practice, but the majority evidently feared that it would open the door to unlimited awards of damages in routine cases of wrongful dismissal. The solution, beneficial both to employers and employees, and to the rational development of the law, lies, it is suggested, in adopting the minority approach, but with damages strictly limited to fair compensation.

3. Non-pecuniary Loss

To speak of ‘fair’ compensation is not to resolve the question of how this is to be measured in respect of non-pecuniary losses. In 1979, the Supreme Court of Canada established a conventional figure of $100,000 (later held to be adjustable for inflation, and now, therefore, about $300,000) as a ‘rough upper limit’ for non-pecuniary loss in personal injury cases. Dickson J was plainly anxious to find a justification for moderation in the amount of awards:

The sheer fact is that there is no objective yardstick for translating non-pecuniary losses, such as pain and suffering and loss of amenities, into monetary terms. This area is open to widely extravagant claims. It is in this area that awards in the United States have soared to dramatically high levels in recent years.26

The court did not use the word ‘cap’, and that word is misleading because it implies an artificial limit on some otherwise appropriate higher figure to which the plaintiff has a natural entitlement. The whole tenor and gist of the 1979 decision was that there was no such appropriate higher figure. The court was not confiscating something to which the plaintiff was naturally entitled; it was establishing a fair figure for the compensation of the most seriously injured. If the amount is not to be zero, and is not to be infinite, and if like cases are to be decided alike, some sort of conventional limit for the most serious cases is inevitable. In establishing a figure, the court did not depart from its proper judicial role, as some critics have implied. It performed a function very proper to a court of last resort in setting a figure that would be fair and just both to plaintiffs and defendants, and in the public interest. If this conclusion is correct, it cannot be right to subvert it by the creation of new open-ended heads of damages that blur the distinction between pecuniary and non-pecuniary loss, or by allowing (ostensibly as economic loss) large items of notional expenditure which it is known have not, or probably will not, actually be incurred.

There has been some disagreement in Canadian cases on whether the limit for the most serious injuries (now, as mentioned, about $300,000) implies a corresponding proportional limit for less serious cases. In Boyd v Harris a jury awarded $225,000 in respect of injuries that, while serious, were by no means comparable with the most severe imaginable. The British Columbia Court of Appeal dismissed the defendant’s appeal.27 Smith JA said that the damages should

be assessed without any implicit comparison with the upper limit ‘a trier of fact, be it judge or jury, must assess non-pecuniary damages appropriate to the circumstances of the particular plaintiff, uninfluenced by the legal limit’. On the other hand, the same judge a few months later reduced a jury award of $197 000 after considering comparable cases. He commented that ‘the injuries in this case cannot by any stretch of the imagination be characterised as “catastrophic or near catastrophic,”’ and described the award as ‘a manifestly unreasonable verdict’, substituting an award of $115 000. Many other judges have also recognised an implicit scale for less serious injuries and this is, in my view, a necessary aspect of achieving consistency and just results as between plaintiff and plaintiff, as well as between plaintiff and defendant. The rejection of a scale for injuries less serious than the most severe springs from the implicit view, mentioned above, that the ‘rough upper limit’ established in the 1979 cases is a kind of artificial rule (or ‘cap’), that reduces high awards for some extraneous purpose without independent rational or principled justification and is therefore unrelated to any principles of justice applicable to lesser injuries.

4. Wrongful Death

In case of wrongful death, the question arises of compensation of survivors for non-pecuniary losses. The original Fatal Accidents Act was construed to exclude any compensation for grief, but by legislation in several Canadian provinces the court must now compensate certain relatives for loss of ‘guidance, care and companionship’. Judicial interpretation of this provision has varied markedly. One judge said that the provision:

cries out for the exercise of judicial restraint in the general interest of the public in the assessment of damages…. I say this because uncontrolled by such restraint the ceiling under the heading of loss of guidance, care and companionship for an award could be unlimited.

Some courts have held that a ‘modest’ sum is appropriate and others have stressed the need for ‘objectivity, predictability, and certainty’. On the other hand, several courts have said that there is no conventional limit and that the amount of the award will depend on the evidence in each particular case. This approach leads to enquiries into the emotional relationship between the deceased and the survivors, is likely to encourage self-serving evidence, to complicate

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28 Id at [32].
30 For example, Hodgson v Walsh (1999) 121 OAC 255 (Unreported, Morden, Laskin & Rosenberg JJA, 2 June 1999).
31 9 & 10 Vic c93 (Lord Campbell’s Act).
32 Zik v High (1981) 35 OR (2d) 226 (Holland J).
33 Lawrence v Good (1985) 18 DLR (4th) 734 at 741.
34 Nightingale v Mazerall (1991) 87 DLR (4th) 158 at 162, 163.
settlement negotiations and to lead to disparities in awards in apparently similar cases. Adapting Professor Rea’s comment quoted earlier, this is likely to be a costly form of life insurance. It is true that no amount of money can compensate for the loss of a life, but it does not follow that the appropriate award is either zero, or an infinitely large amount. The solution lies, it is suggested, in a conventional limit, and in one that bears a reasonable relationship to the $300,000 maximum for non-pecuniary loss in personal injury cases. In some jurisdictions a fixed sum is set by legislation, but where the legislature has left the amount open, the implication is that the award should be in an amount that is fair to both parties and it must be within the proper power of the court, as in the case of non-pecuniary loss in personal injury cases, to establish an upper limit. Another possibility, mentioned below, would be to go a step further and for the courts to establish a fixed invariable sum.

5. Defamation

A different area of tort law where large awards of damages have, in some jurisdictions, been common is defamation. Liability for defamation is strict and this rule can be defended on the ground that even a morally innocent defendant should compensate an injured person for loss. But, as with the personal injury cases discussed earlier, the corollary is that compensation is the limit of the defendant’s liability, because there are strong interests in freedom of action on the part of the defendant — in the case of defamation the interest is in freedom of speech. Something of this principle may be discerned in the traditional rule that in cases of slander the plaintiff, with certain important exceptions, can only recover special damages.

It is not the prospect of paying moderate compensatory damages that creates ‘libel chill’ but the prospect of large and unpredictable awards by emotionally inspired juries. The law of defamation is habitually criticised on quite inconsistent grounds. A critic may denounce libel chill and yet the same critic, or like-minded critics, may be heard to say that the prospect of large jury awards has a salutary deterrent effect. Clarity of thought demands the separation of compensatory from other kinds of damages. Damages for defamation have often gone far beyond compensation of actual proven loss and have tended to mix punitive and deterrent with compensatory considerations. The traditional rules of defamation, including strict liability and the defendant’s burden of proving justification, may be supported, but then compensatory damages should, it is suggested, be restricted to loss, established, as in other cases, on the balance of probabilities. If punitive damages are to be awarded at all they should be separately identified and supported by persuasive independent justification.

Compensatory damages for defamation may include an award for mental distress, but it is inherent in what has been said earlier that this element of the

36 Above n12.
award should be moderate and that it should bear some reasonable relation to damages for non-pecuniary loss in personal injury cases, a proposition accepted in some common law jurisdictions, but rejected in others. The making of a substantial (compensatory) award may itself go a long way towards vindicating the plaintiff’s reputation — in fact, it ought always to vindicate it in the minds of right-thinking persons. Of course not all persons are right-thinking, and compensation is due to a plaintiff for the distress of knowing that some of the mud has stuck. But this element of the award should bear a reasonable relation to other awards for mental distress and should strictly exclude elements of punishment and deterrence. Such a separation of heads of damages would go far to remove libel chill, because the defendant would know that large awards would not be made except on proof of conduct deserving of punishment. Compensatory awards (of moderate size, as suggested) might well be regarded by large media enterprises merely as a cost of doing business, but there is nothing necessarily objectionable in that, assuming, again, that the defendant’s conduct is not shown to be worthy of punishment. Indeed this approach offers benefits to both parties and to the public, analogous to other instances of strict liability. The innocent plaintiff is compensated (adequately but moderately) without the need to prove fault; his or her reputation is vindicated (by the very fact of the award or settlement), again without the need to prove fault; and the defendant is not deterred from publishing news and comment (unless, indeed, punishable misconduct is established).

6. Punitive Considerations

Strong arguments may be adduced against the award of punitive damages in any circumstances. I do not wish to rehearse those arguments here, but I do wish to object, both in the context of defamation and in other contexts, to the introduction of punitive and deterrent considerations into the assessment of compensatory damages. This leads inevitably to confusion of thought: it undercuts rational principles of compensation, and, as shown in the examples discussed in this paper, it tends towards a constant increase in the amount of awards for which explicit justification is never demanded or required. If punitive damages are to be retained, there is everything to be said for separating them clearly from compensation, because the arguments that support compensation are quite different from those that support punishment. It has often been said by appellate courts that punitive damages are exceptional and that they are only to be awarded if compensatory damages fail to exercise a sufficient deterrent and punitive function. This approach requires an assessment of compensatory damages, entirely free of punitive considerations and then an enquiry into whether and to what extent additional punishment may be required. This process is impossible if punitive and compensatory considerations are intermixed.

39 Hill v Church of Scientology of Toronto [1995] 2 SCR 1130.
7. Legislation

A practical consideration that weighs in favour of restraint in damage awards is the danger of creating what is, or what is perceived to be, a ‘liability crisis’, or an ‘insurance crisis’, which may in turn evoke legislative responses that distort the law and inflict injustice on potential plaintiffs by arbitrary exclusions of liability, or arbitrary and unjust limits on compensation for actual loss. Instances, in various common law jurisdictions, have been numerous and varied. They include the restriction of liability of occupiers of land to trespassers, restrictions on liability for recreational activities, special tests for medical negligence, the exclusion of liability of rescuers, the departure from the principle of joint and several liability, unreasonably short limitation periods and limits on various heads of compensatory damages. Excessive damage awards have not been the only cause of such legislation, but they have played an important part. If compensatory damages are maintained at a level that can be demonstrated to be no higher than what is reasonable, ill-considered and potentially unjust political interventions are — to put the point at its lowest — less likely to occur.

8. Loss of Autonomy

Reference has been made, at several points, to conventional limits on the amount of awards. Somewhat different is the idea of a fixed conventional sum that is not a maximum, but an invariable amount. Such conventional awards have sometimes been provided by statute, as in the case, in some jurisdictions, of non-pecuniary loss caused by wrongful death. Judicially established conventional awards have been uncommon, but not unknown. Nominal damages may be one example and there have been some instances of awards of substantial sums described by courts as ‘nominal damages’, but which appear to be designed to compensate the plaintiff for a loss that is real, but difficult to calculate.

There is a case to be made in favour of conventional awards in the medical field, where a patient’s autonomy is wrongfully interfered with, but no economic loss is suffered that the law will recognise, as where a surgeon fails to give the patient complete information, but does not increase the risk of harm, or where a physician’s negligence results in the birth of a healthy but unwanted child. These cases have led to different results in different jurisdictions. The present purpose is not to debate the merits of these results, but to suggest that, if substantial compensation is denied (because of principles of causation, or public policy) there is a case for an award to compensate the plaintiff for loss of autonomy. Of course,

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42 Statutory provisions in force in New South Wales are discussed by Barbara McDonald, ‘Legislative Intervention in the Law of Negligence: the Common Law in a Sea of Statutes,’ in this issue.


46 The same view is taken by Todd, ibid.
assessment of such an award is inherently difficult, but it does not follow that it
should be either zero or infinity. The majority of the House of Lords in Rees v
Darlington Memorial Hospital NHS Trust,47 while refusing damages to a mother
for the cost of bringing up an unwanted child, supported an award of £15,000. The
basis for the award was somewhat unclear, as pointed out rather forcefully by the
dissenting lords, Lord Steyn calling it ‘heterodox’, ‘contrary to principle’, and ‘a
novel procedure’.48 But Lord Millett (one of the majority) put the award on the
basis of compensation for ‘injury to the parents’ autonomy.’49 Departing to this
extent from a view he had expressed three years earlier,50 he said that the figure
should not be simply a maximum, but should ‘be a purely conventional one which
should not be susceptible of increase or decrease by reference to the circumstances
of the particular case’.51 A conventional award, though certainly unusual in the
past practice of the courts, has several merits: it recognises a real loss, and
simultaneously gives a real measure of compensation for it, while also recognising
the injustice to the defendant and the high price to the public (especially, but not
exclusively, where the defendant performs a public service) of excessive,
unpredictable and open-ended awards.

47 Above n44.
48 Id at [45], [46].
49 Rees, above n44 at [125].
50 McFarlane, above n44.
51 Rees, above n44 [125].
Case Notes

Psychiatric Injury in the Workplace: The Implications of Koehler v Cerebos

RIMA HOR*

1. Introduction

In Koehler v Cerebos (Australia) Ltd,¹ the High Court confirmed that an employer will not be held liable for psychiatric injury sustained by an employee in the workplace unless such injury is reasonably foreseeable. Specifically, and more contentiously, the High Court asserted that an employee who has contractually agreed to undertake onerous duties cannot subsequently rely on the fact that they lodged persistent complaints about an excessive workload or an inability to cope for their claim for psychiatric injury sustained in the workplace to be successful. Instead, there must be some evidence of psychiatric injury observable by, or known to, the employer such as the employee’s external distress or prolonged absences from work. By requiring that complaints be couched in the language of psychiatric injury, the High Court seems to adopt a more conservative approach than their English counterparts in the House of Lords² and Court of Appeal.³ By focusing on the employee’s contractual agreement, the High Court also appears to favour an approach that reverts back to a form of voluntary assumption of risk, a defence sparingly applied as between employer and employee. Accordingly, in Australia, while not entirely excluded, the possibility of an employer being held liable for psychiatric injury resulting from an employee’s stress in the workplace has been significantly curtailed.⁴

This paper will explore how insistence on early warning signs or clearly manifest symptoms sits uncomfortably with the nature of psychiatric injury, which is typically more complex to detect. To demand such requirements from employees, who may themselves be unaware of the onset of psychiatric injury, intimates that courts are still hesitant in their treatment and understanding of psychiatric illness. Further, the court’s legalistic approach is of some concern. At a time when stress in the workplace is a significant industrial relations and societal problem, it is somewhat unfortunate that the High Court should demonstrate reluctance to recognise that employers should assume some responsibility in managing the stress of their employees, particularly when it has clearly been brought to the attention of management.

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2 Barber v Somerset County Council [2004] 2 All ER 385.
3 Hatton v Sutherland [2002] 2 All ER 1 (hereafter Hatton v Sutherland).
4 For liability of employer to family members of the employee, see generally Gifford v Strang Patrick Stevedoring Pty Ltd (2003) 214 CLR 269.
2. Background to the High Court Decision

A. Material Facts

The appellant in this case, Ms Koehler, was employed as a sales representative. After her full time position was made redundant, she was re-engaged in April 1996 as a part-time merchandising representative. The letter of engagement re-employing her outlined, inter alia, her hours of work, starting date and car allowance, but made no reference to the duties she was expected to perform. It was correctly assumed that her duties were to be the same as before namely: negotiating sales to independent supermarkets; visiting supermarkets; moving and lifting boxes and setting up the display of goods.

On the first day of her new job, Ms Koehler was given a ‘territory listing’ specifying the areas and shops she was expected to cover. Upon seeing this, the appellant immediately informed her supervisors that she had serious concerns about being able to perform her duties. More specifically, she said that there was ‘no way’ she could reach all the stores outlined in the ‘territory listing’ within 24 hours.

Over the next few months, Ms Koehler continued to inform management that her workload was too intense. She made several complaints in both oral and written form outlining to management that she was working more than eight hours a day and that her area was too large. Evidence at trial indicated that Ms Koehler was performing the same duties she used to perform in five days over three.\(^5\) The appellant indicated that her difficulties could be alleviated by either reducing the number of stores she had to visit or by having her work a fourth day. She even identified the shops that ought to be removed. Despite the relentless nature of the appellant’s complaints, the employer failed to instigate any change to the ‘territory listing’ or modify the appellant’s workload. The employer did not investigate the nature of the complaints any further and did not offer any other assistance. Despite assurances on her first day of work that her workload could be re-evaluated in a month’s time, Ms Koehler continued to perform the same duties for several more months. Significantly, Ms Koehler’s complaints were all related to her capacity to perform the work within the time-frame. It will be critical in the judgments of the Full Court of the Supreme Court of Western Australia and the High Court, that her complaints never indicated that her workload may be directly affecting her health.\(^6\)

Ms Koehler’s difficulties at work culminated in October 1996 when she found that she was unable to lift cartons and felt unwell. She consulted her doctor in regards to a variety of physical symptoms including tiredness, aches and pains and insomnia. Although her complaints were initially physical, her medical practitioner diagnosed that she was in fact suffering from a psycho-physical disorder that also causes anxiety and depression (fibromyalgia syndrome). The appellant was referred to a psychiatrist who diagnosed that she was suffering a depressive illness of a moderately severe nature.

\(^5\) Koehler v Cerebos, above n1 at 357 (McHugh, Gummow, Hayne & Heydon JJ).
\(^6\) Id at 363.
B. Nature of the Claim

The appellant’s claim was grounded in negligence. She argued that the employer had breached a common law duty to provide a safe system of work. At first instance, the appellant also sued for breach of statutory duty derived from s19(1) of the Occupational Safety and Health Act 1984 (WA) requiring employers to provide a safe system of work. By the time the case reached the High Court, the appeal was only concerned with the claim for negligence.

C. Procedural History

In the District Court of Western Australia, Commissioner Greaves found that the appellant’s workload was indeed excessive and that the employer did not need any special skills or qualifications to foresee that this workload could expose the appellant to a risk of psychiatric injury. By refusing to offer the appellant any assistance or change her hours of work, the employer failed in a duty to ensure that all reasonable steps were taken to provide the appellant with a safe system of work particularly as the options open to the employer to rectify the situation were not deemed to be particularly expensive or inconvenient. As the employer was found to be liable in negligence, there was no need for Commissioner Greaves to also consider the claim for breach of statutory duty. The appellant was awarded damages in the sum of $856742.81.

The employer appealed to the Full Court of the Supreme Court of Western Australia (Malcolm CJ, McKechnie and Hasluck JJ). Here, by contrast, it was held that the employer could not reasonably have foreseen that the appellant’s duties of work could have led to a risk of psychiatric injury. Whereas Commissioner Greaves appeared persuaded by evidence of the strenuous workload, the Full Court — consistent with their role at an appellate level — focused on the more technical aspects of the case, and in particular the requirement for ‘reasonable foreseeability’. In the absence of any ‘external signs of distress or potential [psychiatric] injury’, an employer could not be expected to realise their employee was exposed to a risk of psychiatric injury. Ms Koehler appealed to the High Court.

3. High Court Decision

The main judgment in the High Court was delivered by Justices McHugh, Gummow, Hayne and Heydon with a separate but supporting judgment from Justice Callinan. For the purposes of the High Court decision, it was no longer contentious that the appellant ‘sustained and suffered from a recognised psychiatric illness’. It was also conclusively established that the appellant’s work

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7 Cerebos (Australia) Ltd v Koehler [2003] WASCA 322 at 32–43 (hereafter Full Court decision) (Hasluck J).
8 Koehler v Cerebos, above n1 at 358.
9 Full Court decision, above n7 at 71.
10 Role of an appellate court is discussed at 62–68, Full Court decision (Hasluck J).
11 Id at 75.
was the cause of the subsequent injury. Accordingly, the High Court had to consider the ‘determinative issue’ of reasonably foreseeable. In assessing whether psychiatric injury was reasonably foreseeable, the High Court outlined the basic principles governing the law of negligently inflicted psychiatric injury in the workplace. The risk of injury must not be far-fetched or fanciful. The duty of care is owed to the particular employee with knowledge of their workload which is why it is significant to consider the nature and extent of work being done and any signs of the risk of psychiatric injury. The principle in Tame v NSW of ‘normal fortitude’ was confirmed as not applicable when assessing the liability of employers. In addition, the duty of care is determined at the time the contract was entered into. The employer cannot be bound by information he or she later acquires about the vulnerability of a particular employee.

Ultimately, the High Court found that there were two factors indicating that the injury was not reasonably foreseeable. Firstly, it was critical that the employee had agreed to undertake the work. This was seen as indication of the employee’s ‘willingness to try’ and her agreement apparently meant she could not have feared for her health. The fact that the parties had made a contract that required a standard of work higher than industry standards was acceptable because the parties freely entered into the contract.

Secondly, the High Court held that there was no reason for the employer to suspect a risk of psychiatric injury. Here, it was held that the signs emanating from Ms Koehler indicated an industrial relations problem not a medical grievance. There were no prolonged absences from work. There were no complaints about the appellant’s health let alone psychiatric injury. The court also emphasised the difference between psychiatric injury and stress. While recognising that some psychiatric illnesses may be caused by stress, the High Court demonstrated considerable reluctance to recognise that all employees are at risk from psychiatric injury because they suffer stress at work.

Although the High Court reached the same conclusion as the Full Court, there was a notable difference in their approach. In particular, the High Court emphasised that viewing the case solely through the lens of reasonable foreseeability may be limiting because it overlooks fundamental aspects of the employment relationship.

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12 Koehler v Cerebos, above n1 at 357 (McHugh, Gummow, Hayne & Heydon JJ).
13 Ibid.
14 Id at 360.
15 Id at 362; and 367 (Callinan J); Wyong Shire Council v Shirt (1980) 146 CLR 40.
16 Koehler v Cerebos, above n1 at 362.
18 Koehler v Cerebos, above n1 at 361.
19 Ibid.
20 Ibid.
21 Ibid.
22 Id at 362.
23 Ibid.
analysed in conjunction with other obligations that may exist between parties such as their contractual agreement and other statutory responsibilities.

The validity of these arguments and the Court’s overall approach will be considered below.

4. **Analysis**

**A. Reasonable Foreseeability and Psychiatric Injury: Attempting to see what Cannot be Seen**

Although described as the ‘next growth area’\(^{25}\) of claims, the area of psychiatric injury in the workplace remains in its embryonic stages. The first case that was successfully upheld was the relatively recent decision of *Walker v Northumberland County Council* in 1997.\(^{26}\) In Australia, it has been estimated that claims for psychological injury could rise by 38 per cent this financial year.\(^{27}\) Despite this, psychological injury remains an uncertain facet of negligence claims perhaps because psychiatric injury is notoriously more difficult to detect than physical injury.\(^{28}\) Accordingly, establishing an appropriate test of reasonable foreseeability tends to be shrouded in controversy. Critics note that psychiatric symptoms are easier to fake and even claim that workers should be able to deal with stress.\(^{29}\) While some of these concerns are valid, most appear antiquated when considering medical research which has long recognised the gravity and legitimacy of psychiatric injury. As Des Butler persuasively argues, there is a need for courts to be consistent with medical trends.\(^{30}\)

Further, fears about opening up floodgates appear to be unfounded when the English approach has hardly exposed employers to excessive litigation.\(^{31}\) Yet, it is precisely this fear of an inundation of claims that appears to be underlying Callinan J’s decision. As His Honour notes with some scepticism, the test for reasonable foreseeability is often so broad that ‘With enough imagination and pessimism it is possible to foresee that practically any misadventure, from mishap to catastrophe is just around the corner.’\(^{32}\) Accordingly, the High Court appears to have limited the scope for which claims for psychiatric injury may arise. While some caution is indeed advisable, the High Court’s requirement for external signs of distress or

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\(^{24}\) *Koehler v Cerebos*, above n1 at 358.


\(^{26}\) [1995] 1 All ER 737.


\(^{28}\) *Hatton v Sutherland*, above n3 at 4 (Hale LJ).


\(^{32}\) *Koehler v Cerebos*, above n1 at 367 (Callinan J).
injury represents a more stringent approach than was discussed in the leading English authority on psychiatric injury in the workplace, *Hatton v Sutherland*.\(^{33}\) In this decision, the English Court of Appeal and in particular, the leading judgment of Hale LJ (as she was then) considered four cases relating to psychiatric injury arising from the workplace. The four cases canvassed a range of factual situations. In two of the situations, employees did not inform their supervisors of their stress. In another situation, Mr Barber successfully appealed the decision of the Court of Appeal in *Barber v Somerset County Council* and this will be discussed further below.\(^{34}\) Therefore, the only case where the Court of Appeal found an employer to be liable, albeit ‘not without some hesitation’, was where the employee, Mrs Jones, had complained about her workload.\(^{35}\)

Mrs Jones was an administrative assistant who had to work ‘excessive hours’\(^{36}\) in order to discharge her duties. Like Ms Koehler, Mrs Jones made her complaints obvious to management including a five-page document outlining her grievances in relation to being overworked. There are some pertinent differences between Mrs Jones’ situation when compared to that of Ms Koehler. For example, and the High Court would find this significant, the hours Mrs Jones was working extended beyond those required in her contract of employment whereas Ms Koehler contractually agreed to undertake her workload. The significance of contractual agreement will be questioned in part (b) below. At this stage, it is sufficient to note that this was not a particularly pivotal factor for the English Court of Appeal. Instead, her Lordship noted that it was critical that Mrs Jones’ employers knew that excessive demands were being placed on her and that despite complaints being made, no assistance was ever provided.\(^{37}\) Accordingly, the English Court of Appeal stated that:

> The question, therefore, is not whether [the problems at work] had in fact caused harm to her health…but whether it was sufficiently foreseeable that they would do so for it to be a breach of duty for the employers to carry on placing unreasonable demands upon her.\(^ {38}\)

Hale LJ identified a number of factors for the court to consider when determining reasonable foreseeability including express warnings or implicit warnings that may come from frequent or uncharacteristically long absences from work.\(^ {39}\) The High Court, by contrast, affirmed that such indicia may be helpful but emphasised that it is not a ‘comprehensive statement of relevant and applicable considerations’\(^ {40}\) preferring to give equal weight to the contractual obligations that may exist between the parties.

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33 *Hatton v Sutherland*, above n3.  
34 *Barber v Somerset County Council*, above n2.  
35 Id at 406 (Lord Rodger).  
36 Id at 404 (Lord Rodger).  
37 Id at 406.  
38 Ibid.  
39 Id at 399 (Lord Rodger).  
40 *Koehler v Cerebos*, above n1 at 360.
Admittedly, Mrs Jones had also made two written complaints claiming that the problems at work were causing harm to her health but she did not identify this harm to be psychiatric injury. Moreover, nowhere in the judgment of Hale LJ did she indicate that the complaints be linked to external signs of distress. The decision in *Hatton v Sutherland* now needs to be read in conjunction with *Barber v Somerset County Council*. In this case, the employer ignored Mr Barber’s complaints about stress at work. The House of Lords held that his employer failed to provide a safe system of work. The two decisions indicate that, under English law, an employer may be held liable for psychiatric injury if an employee has clearly indicated problems with their workload and the employer fails to take appropriate steps in response. The onus is placed on the employee to alert the employer of the employee’s inability to cope, not to demonstrate symptoms of psychiatric injury.

The ability of an employee in the circumstances of Ms Koehler to persistently lodge complaints should not be overestimated. Many workers may feel inhibited because of the pressure to portray that they are a competent worker and certainly one who is not suffering a psychiatric illness. For Australian courts to further insist that complaints be couched in the language of psychiatric injury appears unnecessarily harsh. As case law in this area reveals, often the nature of psychiatric injury is such that the employee may not even be aware of the symptoms. Here, both Ms Koehler and her doctor were initially under the impression that she was suffering a physical problem. By the time a definite link between psychiatric injury and workplace conditions can be complained of, the damage may already have been done.

The High Court emphasised that stress and psychiatric injury are distinct conditions. While this is a valid distinction to make, they themselves recognised established medical evidence indicating that stress is one of the most important causes of psychiatric injury arising from the workplace. This link has also been confirmed by research in this area. Despite purporting to search for vital signs, the High Court then appears to overlook the most obvious sign of all — complaints of stress suffered at work.

Therefore, the interpretation of what signs are needed to hold an employer liable represents a subtle point of divergence between Australian and English law. As Peter Handford remarks, imposing more precise preconditions into the realm of the employers’ general duty ‘threatens to derail an important body of case law carefully built up for the protection of employees.’

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42 Above, n2.
43 *Koehler v Cerebos*, above n1 at 362.
44 Ibid.
46 Handford, above n42 at 128. Although Handford’s comments were directed towards the Full Court decision, they are equally applicable to the decision of the High Court.
B. Assessing the Willingness of the Employee

In determining reasonable foreseeability, the High Court placed some emphasis on the fact that Ms Koehler willingly agreed to undertake the duties she had to perform. By this, the High Court acknowledged the fact that Ms Koehler signed the contract. The agreement, according to the High Court, signified that the employer could not have appreciated that there was any risk of psychiatric injury. This line of reasoning that focuses on contractual agreement is of some concern not least because the contract in this case outlined only the ‘bare bones’ of the employment relationship and the subsequent agreement was by the Court’s own admission ‘hesitant’ in nature.

The authority for such a presumption is nevertheless consistent with a number of authorities including discussions in Hatton v Sutherland. The principle basically affirms that in the absence of other evident signs warning of the possibility of psychiatric injury, an employer is entitled to assume that the employee is capable of performance if the employee has contractually agreed to undertake the duties. Arguably, the principle is designed to operate in situations when the employee gives the impression that they are managing their workload and insists on continuing their work. As Lord Rodger of Earlsferry discusses in Barber v Somerset County Council, in such instances, an employer can do no more than warn of the dangers — they cannot forcibly prevent the employee from working extra hours if the employee so desires. In Hatton v Sutherland, two of the cases involved employees who decided to keep their concerns and problems to themselves. For example, Mrs Hatton was even seeing a stress councillor but decided not to inform her employer of this.

It appears unpersuasive that the principle should also prevail when the employee has clearly indicated that they are incapable of coping. After all, employers’ duties may need to be read in light of the surrounding context. While it is true that Ms Koehler signed the contract, it is also crucial that from the very first time she saw her ‘territory listing’, she strongly objected to the amount of work she had to perform. Her agreement may be more accurately summarised as ‘reluctant’ rather than ‘willing.’ Nevertheless, the High Court appears disposed to prioritise the formality of the contractual arrangement whilst allowing employers to close their eyes to an employee’s immediate and persistent complaints about the level of the workload. The implication of such an approach is that an employee is expected promptly to refuse to sign a contract if they fear they will not be able to perform. Clearly such an expectation overlooks the reality that many employees may not have the luxury of refusing the opportunity of work.

The High Court’s approach is, once again, unlike the decision taken by the majority of the House of Lords in Barber v Somerset County Council. In that case, even though the contract made reference to employees being required to ‘work

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47 Koehler v Cerebos, above n1 at 356.
48 Id at 363.
49 Hatton v Sutherland, above n3 at 36.
50 Ibid.
such additional hours as may be needed’, it was still found that the employer had breached their duty when the employee complained of the stress of working excessive hours.

The High Court also insisted that reasonable foreseeability must be assessed at the time the contract was entered into as the ‘obligations of the parties are fixed at the time of the contract until and unless they are varied.’\textsuperscript{51} As such, an employee is effectively locked into the amount of hours they initially agree to do even if it later emerges that they may have overestimated their abilities and are unable to cope. If a zealous employee ambitiously agrees to take on an intense workload, it would appear that the employer is effectively exonerated from any further requirements to alleviate stress that may subsequently develop once the employee realises and complains of the intensity of their workload.

Although not specifically articulated as such, the analysis of the High Court in regards to Ms Koehler’s contractual agreement bears the hallmarks of a defence of voluntary assumption of risk. In essence, the High Court implicitly argued that as the employee consented to and continued with her strenuous workload, she voluntarily assumed a risk of injury and forfeited her rights to compensation. However, in recent times, the defence of voluntary assumption of risk has been applied strictly and cautiously in the context of employment relationships.\textsuperscript{52} It is in very rare circumstances that an argument of voluntary assumption of risk will defeat a claim initiated by an employee against an employer.\textsuperscript{53} The House of Lords has also established that an employee’s knowledge of the risk is not, in and of itself, sufficient to exonerate the defendant from any responsibility.\textsuperscript{54} The employee must assume not merely the risk of injury but the legal risk consequent upon that injury.\textsuperscript{55} Here, the repeated protests of Ms Koehler strongly suggest that she was not willing to bear the legal risk of her injury. Consequently, the judgment of the High Court through its subtle homage to the defence of voluntary assumption of risk appears to take a retrograde step in a field of case law which, in recognition of social and economic changes, has resisted efforts to bind an employee merely by virtue of their contractual agreement to risks that may arise from the employee’s work. The High Court’s approach to this issue reveals a preference for a technical, legalistic approach to resolving such disputes that is inconsistent with the realities of workplace relations and the interactions between employer and employee.

\textbf{C. Interpretation of a ‘Safe System of Work’}

Traditionally, the duty to provide a ‘safe system of work’ has been upheld in a physical sense where the actions (or more commonly, the inactions) of the employer threaten the physical wellbeing of an employee.\textsuperscript{56} The judgment in \textit{Koehler v Cerebos} implies that the High Court is reluctant to extend the concept

\begin{itemize}
  \item [51] Koehler v Cerebos, above n1 at 362.
  \item [52] Rosalie Balkin & Jim Davis, \textit{Law of Torts} (3\textsuperscript{rd} ed, 2004) at 376.
  \item [53] \textit{Imperial Chemical Industries Ltd v Shatwell} [1965] AC 656.
  \item [54] Smith v Charles Baker & Sons [1891] AC 325 at 355 (Lord Watson).
  \item [55] Balkin & Davis, above n53 at 376.
  \item [56] William Creighton & Andrew Stewart, \textit{Labour Law} (4\textsuperscript{th} ed, 2005) at 602.
\end{itemize}
of a ‘safe system of work’ to encompass an environment that is free from stress. In this regard, it is interesting to compare the judgment of the High Court in *Czatyurko v Edith Cowan University* handed down contemporaneously.\(^{57}\) In this case, the High Court once again considered the same piece of Western Australian Occupational Safety and Health legislation\(^ {58}\) and found that the university had breached their duty to provide a safe system of work by failing to implement relatively inexpensive safety mechanisms. The appellant suffered considerable physical injuries. Although this reduces comparison of the cases to a somewhat superficial level, it nonetheless appears that the High Court is more willing to offer protection where the injury was physical rather than psychological. Accordingly, it echoes arguments discussed above that psychiatric injury still struggles to gain the recognition and protection of other forms of injury.

5. Conclusion

The decision in *Koehler v Cerebos* clarifies a contentious area of the law in terms of when psychiatric injury will be held to be reasonably foreseeable in the workplace. It imposes a stricter requirement for employees who wish to succeed in a claim by insisting their complaints of stress be linked to some external signs of psychiatric injury. The judgment may be interpreted as a cautious decision and the court appears to demand criteria that may not accommodate the true nature of psychiatric injury. Rather than confront the role of stress in the workplace, the decision appears to indicate that stress is an inescapable component of modern workplaces for which the employer will not ordinarily be held liable.

\(^{57}\) (2005) 214 ALR 349.

\(^{58}\) *Occupational Safety and Health Act 1984* (WA) s19(1).
Griffith University v Tang: Review of University Decisions Made ‘Under an Enactment’

MELISSA GANGEMI*

1. Introduction

In Griffith University v Tang,1 the court was presented with the quandary of determining the correct construction of the phrase ‘under an enactment’. A long history of litigation over the interpretation of the phrase has been played out in the Federal Court since the introduction of the Administrative Decisions (Judicial Review) Act 1977 (Cth) (ADJR Act). However, before this case, the phrase had only once been considered by the High Court, a decade and a half earlier in Australian Broadcasting Tribunal v Bond.2 While the application brought by Ms Tang was made under the Judicial Review Act 1991 (Qld) (Review Act), the linkage between s4 of that Act and s5 of the ADJR Act placed this case in a position to decide the previous Federal Court battles once and for all.

Vivian Tang was a PhD student at Griffith University (the University) in 2002. Following accusations of academic misconduct being investigated by the University’s Research and Postgraduate Committee, Ms Tang was excluded from her PhD candidature. An appeal by Ms Tang was dismissed. Ms Tang commenced proceedings for statutory review of the decision made by the University in the Supreme Court of Queensland. At all three levels, the University claimed that the decision to exclude Ms Tang was not amenable to review as the decision had been made under policy and not ‘under an enactment’. Before both the primary judge and the Queensland Court of Appeal, it was found that the decision to exclude Ms Tang was made ‘under an enactment’, namely the formative Act of the University, the Griffith University Act 1998 (Qld) (GU Act).

A majority of the High Court upheld the appeal of the University, disagreeing with the findings of the Court of Appeal on two grounds. Firstly, the majority held that the decision to exclude Ms Tang was properly characterised as a termination of a voluntary agreement between the two parties and not as an exercise of power under the GU Act.3 Secondly, the judges delivering the majority judgment

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3 The tests used in the lower courts to find that the decision was made under the GU Act were rejected in the High Court. The ‘what anyone in the community could do’ test endorsed by Dutney J was rejected by the majority judgment: Griffith, above n1 at 741 (Gummow, Callinan & Heydon JJ). The core functions test approved at first instance and by Jerrard JA received no support from any of the judgments.
(Gummow, Callinan and Heydon JJ), added an additional requirement to the test described by Lehane J in *Australian National University v Lewins*, requiring that a decision made ‘under an enactment’ affect legal rights or obligations by virtue of the enactment. While the Court of Appeal and Kirby J agreed with the statement in *Lewins*, both rejected this test on the grounds that it was incompatible with the requirements of a ‘decision to which this act applies’ under s4 of the *Review Act*.

In the aftermath of this decision, we are left to wonder what avenues of review, judicial or otherwise, are available to people such as Ms Tang who are subject to university decisions made ‘under an enactment’. While statutory review as framed by Ms Tang may no longer be an option, this case note will discuss alternative options for review of university decisions made ‘under an enactment’.

2. **Background to the High Court Decision**

A. **Material Facts**

(i) **The Applicant**

Griffith University is a statutory body formed under the *GU Act*. The functions of the University, listed in s5, include:

- (a) to provide education at university standard;
- (b) to encourage study and research;
- (c) to provide courses of study or instruction…;
- (e) to confer higher education awards;
- (f) to disseminate knowledge and provide scholarship.

The University has all of the powers of an individual and is governed by a council that has broad powers to manage the University’s affairs. Under s61, the University’s council can make statutes concerning matters listed in subsection 2, including (a) admission and enrolment, (b) the entitlement to degrees and other awards, and (c) the disciplining of students and other persons undertaking courses at the University. The Council can delegate its powers to committees and sub-committees, but not its ability to make statutes and rules for the University. Two such committees created by the Council are the Academic Board and the Research and Postgraduate Studies Committee. A constitution approved by the Council sets out the functions of the Academic Committee, namely to report to the Council assuring the quality of academic activities across the University. In 2001, the Academic Committee approved two revised policies: a Policy on Academic

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4 (1996) 68 FCR 87 at 101 citing *CEA Technologies Pty Ltd v Civil Aviation Authority* (1994) 51 FCR 329 at 333 (Neaves J): A decision meets the test ‘only if it is one for the making of which the relevant statute either expressly or impliedly provides and one to which the statute gives legal force or effect’.

5 Gleeson CJ approved a similar test: *Griffith*, above n1 at 729.

6 *GU Act* ss7, 8 and 9.

7 Id at s11.

8 *Griffith*, above n1 at 726.
Misconduct and a Policy on Student Grievances and Appeals. There was no suggestion during the appeal that the Council did not have the power to revise these policies.9

(ii) The Respondent

Vivian Tang was a PhD candidate in biology at the University. On 12 March 2002, a meeting of the Research and Postgraduate Studies Committee considered documents alleging that Ms Tang had engaged in academic misconduct. On 19 July 2002, a letter was written to Ms Tang by the Assessment Board, a sub-committee of the Research and Postgraduate Studies Committee. This letter advised Ms Tang of the Board’s findings at their meeting of 10 July 2002, specifically, that she had presented falsified or improperly obtained data as if it were the result of university work10 and that such presentation was academic misconduct as described in clause 1.1 of the Policy on Academic Misconduct.11 Ms Tang was invited by the Board to make further submissions on the issue.

A further letter dated 9 August 2002 was sent to Ms Tang by the Assessment Board, indicating that they had received her submissions and that the Assessment Board had resolved to exclude Ms Tang from her candidature on the basis that she had conducted research without regard to ethical and scientific standards.12 In accordance with the Policy on Student Grievances and Appeals, Ms Tang appealed the decision on procedural grounds to the Appeals Committee. In a letter dated 21 October 2002, the Chair of that committee advised Ms Tang that her appeal had been dismissed.

B. The Claim

On 16 December 2002, Ms Tang lodged an application for statutory review with the Queensland Supreme Court under s20(1) of the Review Act which states:

[a] person who is aggrieved by a decision to which this Act applies may apply to the court for a statutory order of review in relation to the decision.

Ms Tang alleged that the University, in making their decisions notified on 19 July 2002 and 21 October 2002, had breached the rules of natural justice, failed to observe the procedure set out in the clauses of the Academic Policy, made errors of law, made a decision in the absence of evidence and that the decisions were an ‘improper exercise of the power conferred by the enactment’.13

C. History of Litigation

At first instance and on appeal, it was held that the decision to exclude Ms Tang from her PhD candidature on the basis of academic misconduct was a decision made under an enactment, namely the GU Act. In response to Ms Tang’s application, the University applied for an order under s48(1) of the Review Act to

9 Ibid.
10 Id at 733.
11 Id at 726.
12 Id at 733.
13 Id at 737.
dismiss or stay Ms Tang’s application on the grounds that the decision was neither of an administrative character, nor made under an enactment.

In rejecting the University’s application, the trial judge found that the structure of the GU Act enabled the University to delegate responsibility for core functions to committees. Mackenzie J believed that the core function enumerated at s5(f) of the GU Act was most relevant, ‘… since it is an incident of the University’s function of conferring higher educational awards to decide whether Ms Tang had displayed conduct disentitling her to work towards obtaining such an award’.14 Accordingly:

The tightly structured nature of the devolution of authority by delegation in relation to the maintenance of proper standards of scholarship and, consequently, the intrinsic worth of research higher degrees leads to the conclusion that, even though the Council’s powers are expressed in a general (but plenary) way, the decision to exclude [the respondent] from the PhD program is an administrative decision made under an enactment for the purpose of the [Review Act].15

The University appealed this decision on the sole ground that the decision was not made ‘under an enactment’. Before the Court of Appeal, Jerrard JA considered that in the absence of any relevant statute enacted by the University, a court has to determine whether a decision:

… made in the exercise of the widely and generally expressed powers granted by s 6 of the Griffith University Act for doing what is necessary in respect of the functions granted by s 5, answers the oft-cited descriptions given by Mason CJ in Australian Broadcasting Tribunal v Bond, (of a substantive decision having the character of finality which the statute requires or authorises, or for which it makes provision) and the further helpful decision given by Thomas J in Blizzard v O’Sullivan, namely of a unilateral exercise of power deriving from a statutory source and which does affect the applicant.16

Dutney J asserted that for a decision to be made ‘under an enactment’, it must firstly be authorised or permitted by the statute; and secondly, derive its legal efficacy from the statute.17 In order to determine the second limb, Dutney J endorsed the question posed by counsel for Ms Tang, namely whether the decision is:

… something that anyone in the community could do, which is simply facilitated by the statute, or is it something which a person can only do with specific statutory authority?18

Philippides J agreed with the reasoning of the other two justices of the Court of Appeal.

14 Tang v Griffith University [2003] QSC 22 at [20].
15 Id at [25].
17 Id at [43].
18 Id at [35].
3. **Griffith University v Tang before the High Court**

Special Leave was granted to the University to appeal the decision of the Queensland Court of Appeal on one ground — ‘whether the decision to exclude the respondent from her enrolment was a decision to which the Review Act applied’. The *Review Act* applies to ‘a decision of an administrative character made … under an enactment’ as described in s4(a). The majority did not consider the implications of s4(b) as it was not at issue. In line with s16(1) of the *Review Act*, the provisions of s4 were given the same meaning as s5 of the *ADJR Act* such that considerations bearing on the latter were taken to also bear on the former.

In bringing an application under Part 3 of the *Review Act*, the respondent sought a statutory order for review. Accordingly, the court only addressed this application, giving no consideration to the respondent’s possible entitlement to a remedy under the common law jurisdiction of the Supreme Court of Queensland (see Part 5 of the *Review Act*).

The majority of the court granted the appeal. The leading majority judgment was given by Gummow, Callinan and Heydon JJ, with Gleeson CJ also giving a judgment agreeing that the appeal should be upheld. Kirby J delivered the sole dissenting judgment dismissing the appeal.

**A. ‘Under an Enactment’**

(i) **The Majority Judgment – Gummow, Callinan and Heydon JJ**

Gummow, Callinan and Heydon JJ believe that there are three distinct elements involved in construing s20(1) of the *Review Act* (and therefore also s5(1) of the *ADJR Act*):

1. a decision to which the *Review Act* applies because the decision was made ‘under an enactment’;
2. an applicant who is ‘aggrieved’ by that decision;
3. reliance upon one or more of the listed grounds for review.21

For the majority, the first element is the ‘linchpin’ which governs the *ADJR Act* at all stages.22 Unless this first element is proved, the second element cannot be considered. If the *Review Act* does not apply to a decision, the Act provides no relief for an applicant who claims to have been aggrieved by that decision.23

The majority explained that the historical focus on the phrase ‘a decision of an administrative character made …. under an enactment’ had been mainly on three different elements of the expression:

i. ‘a decision’
ii. ‘of an administrative character’
iii. ‘made … under an enactment’24
The majority noted that the trend in cases in the Federal Court had been to look at the elements separately, but that there were dangers in looking at the expression other than as a whole.25

The majority judgment constructed a test involving two criteria. Under the first criterion: '[a] decision under an enactment is one required by, or authorised by an enactment. The decision may be expressly or impliedly required or authorised'.26 Additionally, the decision must generally be final or operative and determinative.27 However, a decision being required or authorised by an enactment is not sufficient by itself.28 The decision must be of an ‘administrative’ character in the sense that it is neither ‘legislative’ nor ‘judicial’ in character.29 From this, the majority judgment went on to consider what it sees as the key question in this case: ‘What is it, in the course of administration, that flows from or arises out of the (administrative) decision so as to give significance which has merited the legislative conferral of a right of judicial review upon the aggrieved’?30

The answer to this question is the second criterion of the majority judgment test, that ‘the decision must itself confer, alter or otherwise affect legal rights or obligations and in this sense the decision must derive from the enactment’.31 Therefore, where the recipient of a statutory grant of power to make contracts enters into an agreement, the power to affect another party’s rights and obligations through contract ‘… will be derived not from the enactment but from the agreement as has been made between the parties’.32

In the case of the respondent, the majority judgment found that there were no legal rights or obligations under private law that had been affected by the decision in question. At best, a consensual relationship had been brought to an end.33 While the decisions in question were authorised, but not required, by the GU Act, ‘[t]he decision did not affect legal rights and obligations’ and had ‘… no impact upon matters to which the University Act gave legal force and effect’.34

(ii) Gleeson CJ

Gleeson CJ preferred the test as stated by Davies AJA in Scharer v State of New South Wales:

the crux of the issue is whether the enactment has played a relevant part in affecting or effecting rights or obligations. A grant of authority to do that which under the general law a person has authority to do is not regarded as sufficient.35

25 Id at 738.
26 Bond, above n2 at 377.
27 Griffith, above n1 at 61; id at 32 (Mason CJ; Brennan & Deane JJ agreeing).
28 Griffith, above n1 at 743.
29 Id at 739.
30 Id at 743.
31 Id at 745.
32 Id at 744.
33 Id at 746.
34 Id at 747.
Gleeson CJ noted that the source of the University’s power to confer higher education awards as derived from the *GU Act* is important in construing the respondent’s status as an aggrieved person under the *Review Act*. However, Gleeson CJ asserted that this is not a consideration when determining if a decision had been made ‘under an enactment’.

What is at issue for Gleeson CJ is whether the *GU Act* had any legal force or effect on the legal rights or obligations of Ms Tang or the University. For Gleeson CJ, the decision made by the University to withdraw the provision of university standard education had the same legal effect as a decision to terminate either a contractual or voluntary arrangement. While the power to formulate the terms and conditions of the arrangement with Ms Tang, to enter that relationship and to later end it were conferred on the University in general terms by the *GU Act*, the ‘… decision to end the relationship was not given legal force or effect by that act’.

(iii) *Kirby J*

Kirby J gave the sole dissenting judgment. In his opening paragraphs, Kirby J is highly critical of the judgments handed down by his colleagues, asserting that their judgments, like those of the majority in *NEAT Domestic Trading Pty Ltd v AWB Ltd*, should be described as a ‘wrong turn’ in the law. Kirby J argues that instead of correcting the errors in *NEAT*, the position of the court in *Griffith University v Tang* extends those errors further, eroding important reforms made by the *ADJR Act*.

The question at issue for Kirby J in this case was ‘… whether the “decisions” affecting the “interests” of the respondent were, or were not, “made … under an enactment”’. As the University had conceded on appeal that the decisions were of an administrative character, Kirby J focused his discussion on the construction of the latter two terms.

In analysing the arguments of the majority judgment and Gleeson CJ, Kirby J deemed the limitation of decisions made under an enactment to those where ‘legal rights and obligations’ had been affected as unwarranted gloss. As Kirby J pointed out, this gloss is incompatible with the notion of an aggrieved person as defined in s7(1) of the *Review Act*. Under s7(1), an aggrieved person includes someone whose ‘interests’ have been adversely affected, a far broader construction of the term. Kirby J argued that artificial restrictions should not be read into a

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36 *Griffith*, above n1 at 729.
37 Ibid.
38 Id at 730.
39 *NEAT*, above n2.
40 *Griffith*, above n1 at 747–748.
41 Ibid.
42 Id at 757.
43 Id at 748–749.
44 This was the position taken by Jerrard JA in the Court of Appeal: *Tang*, above n16 at [37].
45 Ibid and also at [155].
statutory phrase inconsistent with express provisions of the Act, especially where
the legislative intent behind reforms to legislation such as the ADJR Act was to
enlarge, and not restrict, judicial remedies.46

In considering the proper construction of ‘under an enactment’, Kirby J applied
the legal source test approved by the court in NEAT. Kirby J argued that there were
only two possible sources for the ‘decision’ made by the University in respect of
Ms Tang: (1) the GU Act; or (2) legal powers that the University had derived from
outside the GU Act.47

As a corporate body with ‘all the powers of an individual’,48 the University had
the capacity to contract. However, as both sides repudiated the existence of a
contract, an additional source outside of the Act was required for the decision to
be excluded from judicial review. While both the majority judgment and Gleeson
CJ argued that the decision was the termination of a relationship at general law
between two parties, Kirby J argued:

… that in the absence of contract in this case the only possible source of power
for the decision to exclude the respondent from the programme was the
University Act. No competing statutory or other source of a relevant power
existed.49

The University was empowered under the GU Act to ‘provide education at
university standard’ and ‘confer higher education awards’ to Ms Tang and others,
something which ss6 and 7 of the Higher Education (General Provisions) Act 1993
(Qld) prohibited unrecognised university providers from doing. As the GU Act was
the only source empowering the University to provide university standard
education and confer university awards, Kirby J held that all decisions the
University made dealing with these powers were made under the GU Act. Necessarily,
a decision to cease providing university standard education or not to
confer a higher education award would also have been made under the GU Act.
Kirby J asserted that despite attempts by the majority at abstraction, the basic
characteristics of the University’s actions cannot be altered. “[T]he termination
was, and remains, indistinguishable from the University’s refusal to exercise the
relevant statutory powers.”50 As Kirby J points out, by creating policy and
committees to deal with these issues, the University itself recognised that these
actions were within power, the power conferred by the GU Act.51 On this basis,
Kirby J dismissed the appeal brought by the University.

4. Implications of the Decision and Other Avenues of Review

As Kirby J recognised in his decision, the judgment of the court has further eroded
the reforms of the ADJR Act, diminishing access to statutory forms of judicial
review. Future applicants for judicial review will need more than a decision

46 Id at [154].
47 Id at [156].
48 GU Act s6(1).
49 Griffith, above n1 at 766.
50 Ibid.
51 Id at 765.
adversely affecting their ‘interests’ for review to be granted. Applicants will need to prove that the decision itself affected legal rights and obligations and that this decision was derived from the enactment.

While decisions made within a contract are not made under an enactment, it is of interest to discuss whether Ms Tang would have had more success arguing the existence of a contract in this matter. As neither party claimed the existence of a contract, the issue was only briefly discussed in each of the judgments. In coming to their decision, the majority judgment stated that no relationship could be construed between the parties based on the manner in which the respondent framed her application. Even if Ms Tang could prove that her relationship with the University was based in either an implied or express contract, it is doubtful that this would be of assistance. As Gleeson CJ argued, the exclusion of Ms Tang was in accordance with the terms and conditions that the relationship between the parties was governed by. Even if there had been a contract, her exclusion would have been in accordance with the purported terms.52

Given that the respondent was unable to obtain review of the decision excluding her from the University, the decision leaves us pondering what avenues of review, if any, remain open to Ms Tang or other students seeking to challenge their exclusion from coursework. The good news is that other avenues of review with a lesser threshold exist for reviewing the decisions of universities. The bad news is that these avenues do not present the same remedies, if an application is successful, as statutory review.

A. Other provisions of the Review Act
Two avenues for review remain open to Ms Tang under the Review Act. As this case did not decide if the exclusion of Ms Tang was a decision under s4(b) to which the Review Act applied, a further application for review remains open under this section. However, the judgment of Gleeson CJ tends to indicate that this application would be equally unsuccessful.53 As a second option, Ms Tang might seek to bring an application under the original jurisdiction of the Supreme Court of Queensland. Under Part 5 of the Review Act, the lesser threshold of ‘interests’ applies such that ‘[a] person is entitled to make an application for review if the person’s interests are, or would be, adversely affected in or by the matter to which the application relates’. However, unlike statutory review, where the court may quash or overturn the original decision, the Supreme Court is limited in the remedies they can award under Part 5 to orders of declaration and injunction.

B. Ombudsman
Under Queensland legislation as in other states, decisions of universities may be reviewed by the state Ombudsman. The Ombudsman is empowered to review ‘administrative actions’ of an agency54 including decisions and failures to make

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52 Id at [729].
53 Id at [730].
54 Ombudsman Act 2001 (Qld) s14.
decisions.\textsuperscript{55} If, after investigating the complaint, the Ombudsman is satisfied that appropriate action can be, and should be, taken to rectify, mitigate, or alter the effects of the administrative action; the Ombudsman may give to the principal officer of the agency a report stating the action that the Ombudsman considers should be taken.\textsuperscript{56} However, if the agency fails to act upon these recommendations, the Ombudsman’s actions are limited to providing a copy of its report to the Premier and the Speaker of the House.\textsuperscript{57} The Ombudsman is not empowered to award the remedies obtainable by judicial review.

\textbf{C. By-laws and University Statutes}

Under s61 of the \textit{GU Act}, the University Council was empowered to make statute in the areas mentioned above. While other universities have made by-laws addressing student discipline, the Griffith University Council has not proceeded down this path.\textsuperscript{58} There has been some debate that a failure to enact by-laws where a university has a capacity to do so should be seen as a strong statutory intention for the lesser rules not to be binding. This issue was not discussed in this case, but at any rate, the majority decisions tend to indicate some support for this view. A question that this debate leaves unanswered, is if Ms Tang had been a student at a university where by-laws had been enacted, would the outcome of her appeal have been different?

Unfortunately for Ms Tang, the answer to this question is yes. As Gleeson CJ explained, the university policy on academic misconduct and the procedure for exclusion based on that conduct were known to Ms Tang and formed part of the terms and conditions of her relationship with the University. The nature of this relationship as a consensual agreement was such that when the University decided to end the relationship, the majority decision found that Ms Tang had no legal rights or obligations that could be affected in private law. However, at universities where the procedures for student discipline are codified in statute, the relationship between student and university does have some basis in law. Where the correct procedures for student discipline are not complied with, legal rights and obligations prescribed in the by-law can be pointed to and derivation from an enactment established. Accordingly, the decision in this case provides no incentive for universities and other organisations to enact by-laws and other delegated legislation where broad powers already permit a full range of functions to be carried out.

\textbf{D. Higher Education Support Act 2003 (Cth)}

The \textit{Higher Education Support Act 2003 (Cth)} (\textit{HESA}), was enacted after the Commonwealth Government conducted a review of Australia’s higher education system.\textsuperscript{59} The Act increased regulation of Higher Education Providers (HEPs),

\textsuperscript{55} \textit{Id} at ss7(a),(b).
\textsuperscript{56} \textit{Id} at s50(1)(b).
\textsuperscript{57} \textit{Id} at ss51(3),(4).
\textsuperscript{58} \textit{Tang}, above n16 at [40].
with additional requirements set out in Chapter 2 for a university to be accorded HEP status and thus be eligible for higher education assistance grants. While this legislation was enacted after the exclusion of Ms Tang, current students may be able to utilise the Act to make applications for judicial review.

Section 16.25 of the Act lists the requirements that must be met by a university before it will be granted HEP status. Section 16.25(1)(f) requires that ‘the Minister is satisfied that the body is willing and able to meet the quality and accountability requirements’ before HEP status is accorded. These quality and accountability requirements include a fairness requirement developed in Division 19D of the Act.

The extent to which the fairness requirement extends to all university decisions is not made clear by HESA. According to s19.30, a HEP must treat fairly all of their students and all persons seeking to enrol with the provider. While s19.30 could be construed as a ground for review, it must be noted that within the Higher Education Provider Guidelines, a HEP must inform a student of their right to apply to the Administrative Appeals Tribunal for a review of their decision only where the decision concerns financial assistance. It is unclear whether the guidelines, written before this case, considered that judicial review was already available to students with grievances about academic and non-academic matters, or wished to limit judicial review to decisions concerning financial assistance. At present, it would seem that only where the procedure for review of academic or non-academic grievances has been codified within a university’s by-laws, will a student succeed in bringing an application for judicial review.

5. Conclusion

If Griffith University v Tang was the opportunity to settle all previous battles over the interpretation of the phrase ‘under an enactment’, the case did not provide a very satisfactory result. While the statutory intent and purpose of the ADJR Act aimed to increase accountability and access to review, the decision in this case does the opposite. The criteria test favoured by the majority increases the threshold applicants must satisfy before accessing statutory review. Students such as Ms Tang, looking to challenge university decisions made ‘under an enactment’, must now turn to other avenues of review. Yet, unless a university has enacted grievance procedures into their statutes or by-laws, the opportunities for review and remedies available are hardly encouraging.

Notwithstanding the current situation, there is some cause to hope. As the final section of this case note explained, HESA may prove a source of power, albeit after some minor amendments. It is hoped that the Federal Government, in their push for accountability from student organisations, will seek to make universities more accountable for their decisions as well. If not, universities will be encouraged to enter ‘voluntary’ relationships and create swathes of policy, safe in the knowledge that the rules of procedural fairness and accountability do not apply.

The two books under review in this piece, Michael Ratner and Ellen Ray’s *Guantánamo: What the World Should Know*, and David Rose’s *Guantánamo: America’s War on Human Rights*, are part of an emergent literature on one specific (albeit increasingly synecdochic) aspect of the United States-led ‘War on Terror’ — the indefinite detention of ‘unlawful combatants’ at Guantánamo Bay Naval Station, in Cuba. Like much of the broader post-11 September 2001 literature on counter-terrorism and human rights, these books represent an attempt to publicize exactly what the US is doing in that part of the world. As such, they are both impressive examples of investigative journalism and courageous acts of resistance in their own right. However, both books suffer from important flaws in how they read Guantánamo as a legal and political artifact — flaws which seriously affect our ability to comprehend the practices of the US military and, more importantly, to resist them. Before turning to address what I perceive to be the analytical failures of both books, I want first to introduce them and to comment on their (quite significant) achievements in documenting the US’s detention and interrogation practices in Guantánamo.

Both books are written for a general readership in an accessible and highly engaging style. Ratner and Ray’s book is, in fact, constructed largely in the form of an interview — the interviewer, Ray, is president of the Institute for Media Analysis (New York) and is an investigative journalist of some considerable experience, whilst the interviewee, Ratner, is (among other things) president of the Center for Constitutional Rights (‘CCR’), an organization which has litigated many of the human rights violations of the US government both before and after 11 September 2001. Importantly, Ratner was co-counsel in the historic US Supreme Court case of *Rasul v Bush* 124 S Ct 2686 (2004). Their book consists of four short chapters, structured in a typical ‘question and answer’ interview format, followed by an ‘Afterword’ (written by Ratner on the effect of the Supreme Court’s decision in *Rasul v Bush*) and some useful appendices containing legal and governmental documents referred to in the body of the text.

The interview begins in chapter 1 with some interesting remarks on the legal and political history of Guantánamo Bay Naval Station and how the US came to acquire the territory from Cuba in 1903 on a perpetual lease (pp1–4). It then moves to some legal details and case history of the *Rasul v Bush* litigation (pp7–15),
followed by a discussion of both the US administration’s non-application of the
Geneva Convention to alleged al Qaeda members and their summary detention of
non-citizens under Presidential mandate in the ‘War on Terror’ (pp15–29). Chapter
2 deals with allegations of torture both from within Guantánamo itself as well as
in Afghanistan and Iraq, whilst chapter 3 relates the stories of various CCR clients
currently detained in Guantánamo. The concluding chapter is probably the least
interesting to the general reader interested in what is currently happening in
Guantánamo (and, conversely, perhaps the most interesting to lawyers), as it is
largely concerned with the legality of the US administration’s proposed Military
Commissions and with Ratner’s attempts to predict the outcome of Rasul v Bush.
However, as with the preceding discussion, this more legalistic material is
rendered in clear, intelligible, and sometimes even conversational, prose. Given
the book’s aims and general orientation, I consider this to be one of its strengths.
At times, however, the interview format loses in critical rigour what it gains in
explanatory force. ‘Is that right, and is that fair?’ Ray ‘questions’ Ratner at one
stage (p73). Indeed, this is quite characteristic of their conversations throughout
the book. Readers seeking either a probing discussion of Ratner and CCR’s stance
and/or a nuanced engagement with the politico-legal arguments of the US
administration and its apologists (such as they are) will be disappointed in Ratner
and Ray’s book. Yet, to be fair, Guantánamo: What the World Should Know never
pretends to that depth of analysis, and on balance the book is an incredibly valuable
catalogue of some of the human rights abuses perpetrated by the US military in
Guantánamo in the specious name of ‘freedom’. The book not only documents
these abuses but, more importantly, gives a voice to the detainees themselves —
either through relating their particular stories (as in chapter 3) or through letting
them speak for themselves (as with the open letter from British detainees Shafiq
Rasul and Asif Iqbal, extracted in the appendices at pp154–158).

Like Ratner and Ray’s book, Rose’s Guantánamo: America’s War on Human
Rights, is written more in the genre of polemic than academic analysis, and, as with
the previous book, the sacrifice of nuance to moral and rhetorical force involved
in telling the story of Guantánamo does produce a powerful indictment of the US’s
detention and interrogation practices. Rose is an investigative journalist who has
written extensively about the failings of the British criminal justice system, and he
brings this experience to bear on Guantánamo in the form of a personal narrative
of discovery. In Guantánamo: America’s War on Human Rights, Rose follows the
stories of the British detainees released from Guantánamo early in 2004. His
investigations lead him to the Pentagon and to Guantánamo itself, where, through
journalistic observation and interviews with some surprisingly candid
administration officials, he attempts to understand what gave rise to, and what
sustains, Guantánamo’s system of indefinite detention. In doing so, he encounters
some disturbing individuals (among them, Major-General Geoffrey D. Miller, one
of the architects of Guantánamo’s brutality seconded to Abu Ghraib with infamous
effect) and he uncovers some similarly disturbing facts. However, it is probably the
relation of the detainees’ individual stories that is Rose’s most powerful tool. The
story that Asif Iqbal tells of his transportation in a container out of Afghanistan by
the US-backed Northern Alliance troops, in which he almost suffocated to death and survived only because ‘someone made holes [in the container] with a machine gun’ (p13) is among the most harrowing.

Rose has collected many other important details on the everyday internment and interrogation of detainees at Guantánamo, and is on this score more effective than Ratner and Ray at placing the reader within the camps and bringing to life the routine discipline and violent abuse which is the detainees’ daily lot. In addition, Rose creates a vivid picture of the life which the military guards lead at Guantánamo. From the giant plasma screens which broadcast Donald Rumsfeld’s press briefings into the mess hall (pp56–57) to the saturation of ‘9/11’ iconography throughout the camp (p58), and finally to the (obligatory) souvenir shop which sells Guantánamo merchandise emblazoned with the picture of a savage dog clenching the ankle of a detainee (p87), it is hardly surprising that the atmosphere in which the detention and interrogation of prisoners takes place constructs, in the euphemistic words of a Professor of Forensic Psychiatry whom Rose interviewed, almost insuperable ‘barriers to intimacy’ (p65). Rose’s account of what is happening in Guantánamo is thorough, timely and incredibly important — he details some shocking practices of the US military and for this reason alone his book is of great value. However, it is in its final chapter, entitled ‘The Meanings of Guantánamo Bay’ (pp129–158), in which Rose proffers several readings of the legal and political situation in the camps, that his book loses much of the critical edge it has accrued in the preceding pages. Because Rose’s book happens to share its main analytical failings with Ratner and Ray’s book, I conclude now with a general discussion of two of the most important of these theoretical shortcomings as represented in both books under review.

The first of these failings is how both books conceive of the relationship between Guantánamo Bay and the rule of law. For all their critical energy and moral passion, both books rehearse the now familiar and self-satisfyingly legalistic position that Guantánamo is a ‘legal black hole’ (to borrow the language of the English Court of Appeal in R (on the application of Abbasi et al) v Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA Civ 1598 at [32]). Whatever the spatial metaphor used to describe Guantánamo’s putative lawlessness — whether it be depicted as a ‘law-free zone’ (Ratner and Ray, ppxxi, 81), as a ‘black hole’ as per the English Court of Appeal (Ratner and Ray, p23; Rose, pp10, 32, 137), or simply as a place ‘outside’ (Rose, p11) or ‘beyond the law’ (Rose, p31) — the assumption of all three authors is that there is a fundamental absence of law at Guantánamo. The corollary to this assumption is that the reassertion of the rule of law will solve the problem of Guantánamo, and indeed this assumption is implicit throughout, and made more explicit towards the end of, both works. Ratner concludes his and Ray’s text with an upbeat ‘Afterword’ which asserts that ‘[t]here is still a lot of work to do; restoring the rule of law will be a hard but worthwhile struggle’ (p97), while Rose goes further in his paean to the rule of law, dedicating most of his final chapter to a strident critique of how the Bush administration is assaulting the progressive values of Enlightenment rationality, constitutionalism and the separation of powers. He
writes: ‘If the United States and its constitution stand for anything, it is the ambition expressed by the Enlightenment: the replacement of absolute monarchy with codified, rational, legally-answerable government’ (p137). This review is not the place to advance a full argument on how the concepts of rationality and the rule of law have historically (and indeed in the present) been mobilized both to produce and to conceal oppression of the poor, women, ethnic minorities, gays and lesbians, and other socially marginalized groups. Suffice it to say, however, that Ratner, Ray and Rose’s liberal legalist assumption that the rule of law is the antidote to violence and suffering, instead of frequently its cause, precludes a more progressive critique on their part (and ours, as accepting readers) of the many different ways in which codified, rational legality can perpetrate the most hideous social injustices. Indeed, my point is that Guantánamo itself is just one such example: far from being a non-legal space, it is arguable that Guantánamo is perhaps the legal space par excellence. Lawyers have chosen the precise location of the camp (with concrete jurisdictional aims in mind); lawyers have argued at length over the precise legal justification for Guantánamo and the precise legal status of its detainees (to which Ratner and Ray’s extensive appendices attest); and, lawyers (to our eternal professional discredit) have drafted precise instructions on how to deal with the detainees pursuant to these legal classifications. Far from being a lawless island of violence, where anything goes, Guantánamo in fact emerges from these accounts as a legally determined, hyper-regulated space (there is no shortage of rules and regulations in Guantánamo — see Rose, pp69–70) in which the detainees are legally classified and subjected to a finely calibrated legal violence. Whether one agrees that Guantánamo is in fact a function of modern law, rather than a symptom of its dangerous absence, the repetition of the now almost mantric slogan that Guantánamo is a ‘legal black hole’ prevents us from seeing the many ways in which the treatment of detainees at Guantánamo is in fact entirely consistent with modern law’s (often violent) techniques of classification, exclusion and discrimination.

My second major criticism of both books is that they do not address one of Guantánamo’s most important functions — namely, as political symbol. Both books focus on the practicalities of Guantánamo’s role in the ‘War on Terror’. Ratner argues that it is counter-productive in that it fosters enmity in Arab and Muslim communities and sets a dangerous precedent for the treatment of prisoners (pp5–6), whilst Rose goes further in saying that the most important criticism to be made of Guantánamo is neither legal nor moral, but that as a means of gathering intelligence it is singularly ineffective (p11). I can appreciate the strategy of raising these instrumentalist arguments, but it is remarkable that in two books otherwise quite alive to the importance of representation (Ratner likens Guantánamo to the ‘Château d’If from the Count of Monte Christo’ (p6) and ‘Dante’s ninth circle of hell’ (p39), while Rose devotes a full chapter to elucidating the meanings of Guantánamo), neither book really addresses the symbolic work that Guantánamo performs. Paying attention to the symbolism of Guantánamo prompts us to read it not as something the US is necessarily trying to wholly cover up, but rather as something it is trying to broadcast to the world, as a calculated move in a wider
and more complex system of representation which serves to (racially) discipline Arab and Muslim communities. Rose himself hints that this meaning (or function) of Guantánamo is intended to transcend the camp’s spatial location, when he relates the story of how when the British detainees returned to their home town of Tipton, they were greeted with effigies of men in orange jumpsuits hung from the lampposts (p130). Reading Guantánamo as symbol means that we forsake the attempt to uncover the ‘secret, truer reason’ of the camp’s purpose (Rose, pp136–137) and read instead the messages produced on the surface. Perhaps the expressed intention of intelligence-gathering is subordinate to, or works in tandem with, this symbolic function. Regardless, my general criticism here (and above, with respect to the relationship between Guantánamo and the rule of law) is that whilst both books are passionately opposed to what is going on in the camps, and do provide much information for activists, scholars and the general public to absorb, they are nevertheless ultimately limited by their theoretical positions in what they can say and do about Guantánamo.

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The spectacular, perverse story of the United States torturing its prisoners in Iraq and Afghanistan was exposed by a fateful conjunction of incriminating photographs and official documents, first reported in the US media or posted online. The Torture Papers fleshes out those media fragments by publishing the original texts of a flurry of internal US government documents. In doing so, this massive edited collection delivers to public scrutiny the normally secret legal and moral reasoning of key voices in the US administration in its response to ‘terrorism’.

The focus of the collection is the so-called ‘torture memos’ (pp144–382), a series of internal documents drafted by senior lawyers in the US Departments of Justice, Defence, and State, and by Counsel to the US President (Alberto Gonzales, now Attorney–General) and the Secretary of Defense (Donald Rumsfeld). The central thrust of these opinions is an attempt to evade the international prohibition on torture by various strategies of contrived, disingenuous or incorrect legal reasoning. Thus distinctions are drawn between torture and mere ‘coercive interrogation’, based on a finely-honed sliding scale of pain; the law of criminal defences is invoked to justify or excuse torture in the event that it is found to have occurred; and the applicability of legal prohibitions on torture is denied altogether outside US territory.

The cumulative effect of these documents is to give the impression that mistreatment of detainees in Iraq and Afghanistan was not merely the result of isolated acts of renegade or ill-disciplined individuals, but the product of a systematic policy that was deliberately constructed, ordered and implemented by a chain of responsible government and military officials. Although authorisation for the most aggressive interrogation techniques has since been formally and publicly rescinded by the US, there remains a lingering sense that the US still believes that the exceptional threat of terrorism justifies pushing legal boundaries — especially international ones. Allied to this is an underlying theme of American exceptionalism, based on the subjective belief that the protection of American lives is a higher value than any other — even if the measures adopted are radically disproportionate or excessive.

Despite its focus on the ‘torture papers’, the collection also publishes a series of distinct but related US documents denying the applicability and protections of humanitarian law to Taliban and Al-Qaeda detainees in Afghanistan (pp3–143). In particular, prisoner of war status (POW) is denied to fighters captured in Afghanistan on the basis that they are non-State actors and thus ‘unlawful combatants’. A further strategy revealed is the attempt to preclude judicial supervision of the classification and treatment of detainees, on the basis that constitutional protections do not apply to non-citizens outside US territory (at
Guantanamo Bay). While some of these fighters (especially Al-Qaeda) may well not have satisfied the criteria of combatancy under the Geneva Conventions, blanket denial of POW status to whole groups, without individualised determinations or an opportunity to seek review of status by a competent tribunal, is fundamentally at odds with humanitarian law. Moreover, as de facto State agents, much of the Taliban’s forces fell squarely within the conditions of combatancy and were therefore entitled to POW status.

A fascinating dynamic revealed by this collection is the extraordinary tug-of-war for power and influence between the different branches of government in the US (executive, judicial, and congressional) and — even more pronounced — between different agencies within the executive branch itself. In particular, some of the documents reveal a startling and uninhibited tendency to tilt, redistribute and centralise power in the US President in a time of emergency, at the expense of both Congress and the courts. Thus constitutional arguments are made for the US President being able to suspend both the Geneva Conventions and the Torture Convention. Conversely, some of the documents reveal courageous attempts by the State Department (including Secretary of State Colin Powell, and Legal Adviser William H Taft IV), and professional military lawyers such as Judge Advocate Diane Beamer to stem the tide of creative but invidious lawyering by others. Their opinions try to draw attention to the negative consequences of denying humanitarian law and the prohibition on torture — not least the threat of the reciprocal treatment of captured US soldiers.

This raises underlying considerations of the professional responsibilities of government lawyers (an issue which moved centre stage in the UK and Australia in the 2003 debate about the legality of invading Iraq). While legal advisers must serve the interests of their government clients, this duty is tempered by the overriding obligation of fidelity both to the law and to the broader public interest — both of which may conflict with the interests of the government. Many of the legal opinions in The Torture Papers reflect overly technical and highly strained approaches to legal interpretation, disregarding the object and purpose of humanitarian or human rights treaties (and their domestic enactments), which are protective and should thus be interpreted beneficially rather than restrictively. The editors write that US government lawyering reflects:

a wholly result-oriented system in which policy makers start with an objective and work backward, in the process enlisting the aid of intelligent and well-credited lawyers who, for whatever reason — the attractions of power, careerism, ideology, or just plain bad judgment all too willingly failed to act as a constitutional or moral compass that could brake their client’s descent into unconscionable behaviour… (pxxii).

It is fitting, then, that the remaining sections of The Torture Papers are given over to the reports of those who do provide a vision of moral and legal restraint (pp383–1165), such as principled and professional US military investigators, and non-government organisations such as the International Committee of the Red Cross and the American Bar Association. These reports provide counterweights to, and correctives of, many of the earlier, outlandish legal claims by government
lawyers, and detail with great specificity some of the concrete practices of torture by the US.

A review of an edited collection of primary documents must necessarily focus on the documents themselves, particularly in a collection such as this where there is relatively little editorial intervention. While something might be said about the editors’ selection of documents, in this case the range of documents available for selection is largely driven by factors outside editorial control — in particular, whether an official document has become publicly available through declassification, unauthorised leakage (often to the media), court processes or freedom of information requests. The fact that so many of these US documents found their way into the public domain is itself extraordinary, particularly when contrasted with the much tighter grip on the secrecy of government information in the UK and Australia.

The editors note that the story told by the documents presented is necessarily incomplete: ‘there remains the possibility that there is advice coming from numerous quarters that is not documented here. The confluence of prior associations, overlapping affiliations and other connections among the drafters of the torture memos remains for historians and journalists to discover over time’. Indeed the editors list ‘missing’ documents that they were unable to obtain (pxxiv), and some of the documents have been disfigured by the censor’s pen. In addition, the last 70 odd pages of the book, following the Afterword (p1165), illustrate the great fluidity and currency of this saga, by hurriedly reproducing documents which became available just as the book went to press. These include an affidavit filed in the US District Court by David Hicks, an Australian detained at Guantanamo Bay, detailing his alleged mistreatment in US custody (p1234).

The relative lack of editorial commentary refreshingly allows the documents to speak for themselves, and encourages readers to draw their own conclusions. On the other hand, the sheer volume and density of the documents sometimes make it difficult for all but the most dedicated reader to make sense of what is going on. In particular, it is often hard to discern the legal effects (if any) of particular documents (especially for readers unfamiliar with the hierarchies of authority within the US government and administration); how documents from different sources relate to others; and whether or not certain documents have been rescinded.

These problems are clarified to some extent by three short but helpful introductory pieces by Anthony Lewis (pxiii) and the editors Karen Greenberg (pxvii) and Joshua Dratel (pxxi), and also by a chronology highlighting the key documents and developments (pxxv). Nonetheless, the collection would be strengthened by including a more engaging analysis and intensive interpretation of the documents, notwithstanding the understandable pressure to publish the documents in as timely a manner as possible. Largely beyond the scope of the collection, however, is detailed consideration of the actual practice of torture or ill-treatment by US officials; the sufficiency of disciplinary measures taken; and whether different or secret rules govern exceptional organisations such as the Central Intelligence Agency.
In addition to exposing the internal legal reasoning of US government officials on the meaning of torture and the applicability of humanitarian law, the editors hope that publishing these documents will ‘enable open-minded reflection and self-correction even in times such as these’ (pxx). Such optimism is not unfounded, as earlier public exposure of the ‘torture memos’ provoked public censure that forced the US to retract its more extreme legal positions and to reaffirm the prohibition on torture. This book ultimately embodies powerful normative ideals about the importance of exposing internal administrative processes to public scrutiny and democratic accountability — even when those processes are dealing with highly sensitive matters of security; and even when the great hegemonic power of the US Presidency is arrayed against them.

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Ratna Kapur’s *Erotic Justice* is yet another recent addition to the vast and heterogeneous field of postcolonial discourse. Firmly placing her theoretical trajectories within postcolonial legal feminism, Professor Kapur examines the theme of the subaltern subject. Although her text focuses primarily on the issue of women, she also considers other subjects at the margins of traditional legal discourse, such as transnational migrants, sexual minorities, and Muslims. In her work, she reconceptualises law as a system of domination and resistance, where the role and place of the world’s peripheral subjects and cultural Others have been (and continue to be) constructed (and reconstructed). Kapur uses her sexual subaltern subject to trace the hegemonic operations of the law, where the Other is culturally configured (continually) in hierarchical structures of difference. In this text, she explores how the law has been implicated in recent debates on sexuality, culture, and subalternity, and significantly, how it is ‘used not only as a site of empowerment, but also as a device for excluding the world’s Others, or including them on terms that are quite problematic, both historically as well as in the contemporary context’ (p2).

The language used in *Erotic Justice*, and its theoretical and thematic base, will not be unfamiliar to those who are already converts to (or, at least, sympathisers of) postcolonial and postmodernist discourse. While Kapur situates her postcolonial feminist legal position from the location of the Indian subcontinent, her aim is to speak to a broader global audience. Indeed, the controversies in her text mimic the larger debates in academic discourse: hegemony and subalternity, cultural homogenisation versus cultural heterogeneity, and the public arena and the private domain, among other common themes. At its core, Professor Kapur’s work is concerned with fundamental questions relating to epistemology and ontology, and is essentially a study of the contiguous relationship between knowledge systems and categories of power.

Like other critical legal scholars, Kapur rejects the view of law proffered by the liberal positivist tradition, and challenges its claims to universality, neutrality and objectivity. Her writing is unashamedly critical in her rejection of liberal legalism, and the base from which its presumptions and ‘truths’ unquestioningly operate. Indeed, Kapur belongs to those contingent of scholars who believe that the Western legal project, framed in its liberal positivist tradition, operates hegemonically, and excludes alternative categories of recognition and meaning.

As a postcolonial legal scholar, Ratna Kapur is acutely aware of how the colonial past continues to instruct the postcolonial present. For example, she examines how contemporary Indian cultural values are ‘protected’ by obscenity laws, which have their origins in Victorian England. One of her major arguments is that the law operates hegemonically, and has been (and continues to be) used as an instrument of control by the imperial classes. For this reason, the reterritorialisation of the non-Western world features as a key theme in her work.
Kapur champions the critical tools offered by postcolonial feminism—primarily, the ability ‘to understand the world’s “Others”, and diverse locations from which they can speak’ (p6). She also suggests that postcolonial feminism offers legal discourse some essential guides about method—particularly a wariness towards generalisations which transcend the boundaries of culture and region. The intersection of law and postcolonial feminism is used by Kapur to challenge the Eurocentric assumptions (and constructions) which relate to identity, representation and difference. Significantly, she exploits her theoretical framework to demonstrate the way in which a centre–periphery relationship still clearly exists in this postcolonial world.

If not explicitly, her text implicitly adopts the postmodernist view of the need to recognise multiplicity, cultural hybridity, difference, heterogeneity, and open–closed systems and structures of belief. Moreover, Kapur is of the view (consistent with a postmodernist postcolonial approach) that universal accounts of society, culture, tradition and values are exclusionary, and are only achieved through the suppression of alternative realities. Like all postcolonial scholars, she is wary of ‘authentic’ positions, binary thought processes and grand theorising. Kapur is also greatly concerned about the pitfalls of essentialism, and the dangers inherent in constructing another monolithic category—ie ‘the subaltern voice’.

Erotic Justice is comprised of five self-contained chapters, which ‘are linked by a postcolonial feminist legal analysis’ (p7). In Chapter 1, she introduces her broad theoretical and thematic base, and outlines the way in which her sexual subaltern subject will be used to trace the hegemonic operations of the law.

In Chapter 2, ‘New Cosmologies: Mapping the Postcolonial Feminist Legal Project’, she challenges the universal feminist position assumed by liberal internationalism, and rejects the uniform remedies offered by scholars such as Martha Nussbaum. Kapur’s critique of liberalism focuses on its essentialism, and its incapacity to fully appreciate the complex postcolonial ‘layered’ subject. She also explores how the public/ private divide in India, which was partly constituted by colonial legal regimes, continues to inform contemporary debates on sexuality and the identity of the nation state. She uses her postcolonial feminist lens to explore the issue of sexual harassment and its contradictory results for the sexual subaltern subject. Kapur also analyses how the politics of the religious right in India (primarily through the Bharatiya Janata Party), have exploited notions of cultural authenticity to pursue their agenda on sexuality, nationhood and the role of women in state and culture.

In Chapter 3, ‘Erotic Disruptions: Legal Narratives of Culture, Sex and Nation in India’, Kapur examines the role of law in the formulation and reformulation of sexuality and culture. She is interested in showing how cultural essentialism has been used by hegemonic actors to reaffirm dominant sexual ideologies in postcolonial India. In this chapter, Kapur explores some of the contemporary controversies on the Indian scene, such as satellite broadcasting and adult television, Kama Sutra condom advertisements, and movies like The Bandit Queen and Fire, which all pose as ‘erotic disruptions’ to the hegemonic Indian narrative. She also traces the threat presented by sexual subalterns, such as
homosexuals and sex-workers, whose ‘increasing visibility’ threaten ‘to destroy
the fantasy of the joint Indian family and the ancient cultural values and traditions
that have cemented it together’ (p58).

In Chapter 4, ‘The Tragedy of Victimisation Rhetoric: Resurrecting the
“Native” Subject in International/ Postcolonial Feminist Legal Politics’, Kapur
shifts her focus to the international arena, and suggests that the global feminist
movement, particularly through its focus on violence against women (VAW), has
reinforced the image of women as victims. Kapur argues that the victim subject
used by VAW campaigns continue to sustain gender and culture essentialism.
These monolithic categories are then used to reinforce the first world/third world
divide, where the victim ‘native subject’ is used (yet again) to justify imperialistic
intrusions. Like Gayatri Spivak, Chandra Mohanty and other postcolonial
feminists, Kapur uses her theoretical trajectory to expose the essentialism inherent
in the global women’s rights movement. She is critical of the centre–periphery
cultural model which has come to characterise global feminism, and which
continues to stereotype the third world subject as ‘abject’. Moreover, according to
Kapur, the focus on the victim subject by legal scholarship fails to exploit the
emancipatory potential of feminist insights.

In the final chapter, ‘The Other Side of Universality: Cross-Border Movements
and the Transnational Migrant Subject’, Kapur explores how yet another
subaltern—the ‘transnational migrant subject’—is regulated by the law. In this
chapter, Kapur traces the shifting contours of legitimacy (and illegitimacy) which
follow the transnational migrant subject, and demonstrates how notions of
nationhood are reinforced by the law through its construction of this subaltern as
Other. She suggests that when the law does intrude into the rights of the
transnational migrant, the interventions are often based on imperialistic
assumptions about the Other. Kapur explores the plight of the transnational
migrant subject largely through three separate areas of legal regulation: anti-
trafficking legislation (in countries such as the US), where she particularly focuses
on the impact of anti-trafficking laws on women who migrate for work (including
sex-work); the eligibility and citizenship criteria for immigration to countries such
as the UK; and the recent Australian legal response to terrorism and asylum-
seekers.

Ultimately, Kapur’s critique of the liberal project is not intended to result in
‘hopelessness’ (p10). Rather, its aims are transformative: ‘to articulate a different
cosmology within which to understand the relationship between postcolonial
subjects, law, culture and sexuality, that does not reproduce universalising agendas
or fall into a cultural relativist trap’ (p10). Kapur’s transformative goals in Erotic
Justice are fully realised, as the text not only presents another challenge to liberal
legalism’s imperialism, but it is also a clear demonstration of the disruptive and
theoretical possibilities the subaltern subject can bring to law.

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