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2011 Conference

The Pendulum Swings

The Civil Liability Act: Impact and Effect

Address by

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Introduction

It is a great pleasure to have been invited to address the 2011 national conference of the Australian Insurance Law Association. When I was a young practitioner, I quickly came to appreciate the profound effect which insurance, and the practices of insurers had upon the resolution of civil disputes. Insurers were a regular feature of many of the cases in which I was engaged as a practitioner, and of necessity I developed a strong interest in the impact which their role had upon the ultimate resolution of those cases. This interest was heightened when I saw insurance from quite a different perspective in my role as Counsel Assisting the Royal Commission into the collapse of HIH Insurance. In that capacity, I hope that I learned a lot about the economics of the insurance industry, particularly that part of the industry which provides indemnity against liability.

Before turning to the theme of my address, I would like to commence by acknowledging the traditional owners of the lands upon which we meet, the Wadjuk clan, who are the traditional inhabitants of the area which we know as the coastal plains surrounding the Swan River - known to the Wadjuk people as Derbarl Yerrigan, and to the greater group of the Nyungar people, of whom the Wadjuk people are a part. I acknowledge and pay my respects to the Elders, past and present, of those peoples.

The Theme

The organisers of this conference have chosen, as the theme of the conference "The Pendulum Swings". I take this to be a pithy reference to what many commentators have described as the contraction of the scope of liability in tort evident since around the turn of the millennium. The

organisers of this conference have used a pendulum as the metaphor, while others have referred to the ebb and flow of tides, and others to the wheel turning, but whatever metaphor is used, the concept is the same.

In this paper I will endeavour to assess the extent to which the swing of the pendulum, or the ebb of the tide of liability, if you will, can be attributed to the enactment of the various Civil Liability Acts in a number of Australian jurisdictions, or to developments in the common law of Australia, or to a combination of both.

The Ipp Report

In 2002, a meeting of Ministers from the governments of the Commonwealth, States and Territories agreed to appoint a panel of four eminent persons, chaired by Justice David Ipp of the Court of Appeal of New South Wales (and formerly of the Supreme Court of Western Australia) to review the law of negligence. As the Ipp Committee noted in its subsequent report, their appointment reflected a widely held view that there were problems with the law of negligence stemming from perceptions that:

- (a) the law of negligence as it is applied in the courts is unclear and unpredictable;
- (b) in recent times it has become too easy for plaintiffs in personal injury cases to establish liability for negligence on the part of defendants;
- (c) damages awards in personal injuries cases are frequently too high.

There is I think no doubt that these perceptions were widely held. Reasonable persons might differ as to whether these community

perceptions accurately reflected the general position, or were the product of media reporting of exceptional cases. I have commented elsewhere on the gap between perception and reality in the area of claims for medical negligence¹.

These community perceptions were exacerbated by significant increases in premiums for liability insurance. Insurers commonly justified those increases by reference to what they asserted was judicial expansion of the scope of liability, and the increase in the quantum of damages awarded by the courts. There was undoubtedly some basis for those assertions, but as I and other commentators have pointed out², there is also room for the view that the rapidity of the increase in premiums, particularly in areas like professional indemnity for medical practitioners, came about because of a realisation that insurers, including in some cases co-operatives who were outside the regulation of the Australian Prudential Regulation Authority, were making inadequate provision for future claims, with the result that they had been underpricing the risks they were taking. The underpricing of risk was a dominant factor in the collapse of HIH. That collapse was of itself a factor which contributed significantly to public concern with respect to the scope of tort liability and the cost of obtaining insurance against potential liability. In the market environment which followed the collapse of HIH, many community groups found it extremely difficult to obtain affordable insurance for sporting and recreational activities such as gymkhanas, or fetes which involved activities such as rides and slides. Local authorities expressed concern at

¹ Martin, W. S., "The Courts and Medical Practice: Teaching Granny to Suck Eggs?" (Address to the Royal Australasian College of Surgeons Scientific Congress, Perth, 6 May, 2010) available at http://www.supremecourt.wa.gov.au/publications/pdf/Royal_Australasian_College_of_Surgeons_06052010.pdf

² *Ibid*, pp 14-15

the rising burden of public liability insurance, which they reflected in increasing land rates.

These concerns were enunciated at a more cerebral level in a seminal paper by Spigelman CJ delivered in April 2002 in which he described negligence as the last outpost of the welfare state³.

The same lament was enunciated at the highest judicial level. In *Tame v State of New South Wales*⁴, McHugh J observed:

Many of the problems that now beset negligence law and extend the liability of defendants to unreal levels stem from weakening the test of reasonable foreseeability. But courts have exacerbated the impact of this weakening of the foreseeability standard by treating foreseeability and preventability as independent elements. Courts tend to ask whether the risk of damage was reasonably foreseeable and, if so, whether it was reasonably preventable. Breaking breach of duty into elements that are independent of each other has expanded the reach of negligence law.

Given the undemanding nature of the current foreseeability standard, an affirmative answer to the question whether damage was reasonably foreseeable is usually a near certainty. And a plaintiff usually has little trouble in showing that the risk was reasonably preventable and receiving an affirmative answer to the second question. This is especially so since Lord Reid said that a reasonable person would only neglect a very small risk of injury if there was "some valid reason" for disregarding it, a proposition that effectively puts the onus on the defendant to show why the risk could not have been avoided. Once these two questions are answered favourably to the plaintiff, there is a slide - virtually automatic - into a finding of negligence. Sometimes, courts do not even ask the decisive question in a negligence case: did the defendant's failure to eliminate this risk show a want of reasonable care for the safety of the plaintiff? They overlook that it does not follow that the failure to eliminate a risk that was reasonably foreseeable and preventable is not necessarily negligence.

...

I think that the time has come when this Court should retrace its steps so that the law of negligence accords with what people really do, or can be expected to do, in real life situations. Negligence law will fall - perhaps it already has fallen - into

³ Spigelman JJ, "*Negligence: The Last Outpost of the Welfare State*" (Address to the Judicial Conference of Australia Colloquium, Launceston, 27 April, 2002) (2002) 76 ALJ 432 and in *Speeches of A Chief Justice: James Spigelman 1998-2008*, T D Castles (ed) (Sydney: CS2N, 2008), pp 207 ff

⁴ [2002] HCA 35; 211 CLR 317 at 352-3, 354

public disrepute if it produces results that ordinary members of the public regard as unreasonable. Lord Reid himself once said "[t]he common law ought never to produce a wholly unreasonable result". And probably only some plaintiffs and their lawyers would now assert that the law of negligence in its present state does not produce unreasonable results.

Also in 2002, in *Graham Barclay Oysters Pty Ltd v Ryan*⁵, Kirby J put the position with his usual eloquence:

Once again this Court is required to consider whether, in the particular circumstances of the case, the law entitles a person who can prove damage to bring home the consequences not only to any private organisation that owed him a duty of care which it breached but also to public authorities whose breaches are said to lie in their failure to properly discharge their statutory powers.

One day this Court may express a universal principle to be applied in determining such cases. Even if a settled principle cannot be fashioned, it would certainly be desirable for the Court to identify a universal methodology or approach, to guide the countless judges, legal practitioners, litigants, insurance companies and ordinary citizens in resolving contested issues about the existence or absence of a duty of care, the breach of which will give rise to a cause of action enforceable under the common law tort of negligence. Courts such as this should recall the prayer of Ajax:

Ζεῦ πάτερ ἀλλά σύ ῥῦσαι ὑπ' ἠέρος νῆας Ἀχαιῶν,
ποιήσον δ' αἴθρην, δὸς δ' ὀφθαλμοῖσιν ιδέσθαι:
ἐν δὲ φάει καὶ ὄλεσσον, ἐπεὶ νύ τοι εὐάδεν οὕτως.

It is a supplication that must have occurred to many who have considered recent decisions on the subject of the duty of care: "[S]ave us from this fog and give us a clear sky, so that we can use our eyes"⁶.

In the influential paper to which I have referred, Spigelman CJ identified the decision of the High Court in *Nagle v Rottnest Island Authority*⁷ as the high water mark in the expansion of liability for negligence (no pun intended). In that case, a public authority was held liable to a diver by reasons of its failure to warn him of the presence of submerged rocks in a swimming area - the Basin at Rottnest. Residents of Perth who are

⁵ [2002] HCA 54; 211 CLR 540 at 616

⁶ Or, more literally, "O Father Zeus, yet draw from beneath the haze the sons of the Achaeans, make instead a clear sky, and grant to our eyes sight: and so in the light destroy (us) if this now pleases you" - in fact, read in context, the prayer by Ajax to Zeus was a prayer that he might lift the fog over the battle, so that Ajax and his comrades could meet an heroic death in clear light.

⁷ [1993] HCA 76; 177 CLR 423

familiar with that swimming area are well aware that the likelihood of submerged rocks is obvious to anyone who visits the area, but nevertheless the High Court found the authority liable for failing to erect a sign warning bathers of the dangers of diving from rock platforms into the water.

A few months earlier, in *Rogers v Whitaker*⁸, the High Court delivered a decision which was considered to significantly expand the scope of liability on the part of medical practitioners. In that decision, the High Court declared that the principle of English law enunciated in the decision in *Bolam v Friern Hospital Management Committee*⁹ to the effect that a medical practitioner was not negligent if his or her conduct was in accordance with a practice that was widely accepted by practitioners of good repute as competent medical practice, did not form part of the common law of Australia, at least in relation to the practitioner's duty to warn a patient of the risks that might be associated with any proposed course of treatment. In *Rogers*, the High Court held the relevant medical practitioner liable for failing to advise his patient (who was almost totally blind in one eye) that there was a risk (estimated at 1 in 14,000) that the treatment he was proposing to undertake on her other eye might result in a condition which led to loss of vision.

Other decisions of the High Court had resulted in significantly increased awards of damages for personal injury. For example, in *Griffiths v Kerkemeyer*¹⁰, the High Court decided that a plaintiff who suffered personal injury could recover damages reflecting the value of services provided gratuitously by a family member. In another decision, the High Court declared that the immunity of public authorities responsible for the

⁸ [1992] HCA 58; 175 CLR 479

⁹ [1957] 1 WLR 582

¹⁰ [1977] HCA 45; 139 CLR 161

construction and maintenance of roads and footpaths for liability arising from a failure to act (as opposed to negligent actions) was not part of the common law of Australia¹¹. The combined effect of these decisions was to provide a justifiable basis for at least some concern at the increasing scope of liability for negligence.

The Pendulum Swings

I have already drawn attention to the express recognition of the undesirability of the expansion of liability for negligence at the highest judicial levels. That recognition has led to a discernible trend in which courts have restricted the scope of liability. Perhaps the first sign of the retreating tide (to switch metaphors) was the decision in *Romeo v Conservation Commission of the Northern Territory*¹². In that case, the High Court held that a public authority responsible for a reserve which included a cliff was not liable for failing to warn visitors to the site of the dangers associated with going to the edge of the cliff, or for failing to erect a barrier to prevent people from going to the edge of the cliff. The court was influenced at least in part by its perception of the magnitude of the burden that would be imposed upon public authorities responsible for undeveloped land. Further, in *Agar v Hyde*¹³, the High Court held that the controlling body of a sport (Rugby Union) owed no duty of care to participants in that sport in relation to the framing and promulgation of rules which might have reduced the risk of injury to those participants.

Moving away momentarily from the field of sport and recreation, in order to stay in approximate chronological sequence, in 2001, the High Court clarified precisely what had been decided in *Rogers v Whitaker*. In

¹¹ *Brodie v Singleton Shire Council; Ghantous v Hawkesbury City Council* [2001] HCA 29; 206 CLR 512

¹² [1998] HCA 192; CLR 412

¹³ [2000] HCA 41; 201 CLR 552

*Rosenberg v Percival*¹⁴, Gleeson CJ emphasised that the rejection of the Bolam principle did not produce the result that standards of medical practice were irrelevant - only that they were not the exclusive determinant of the scope of the duty to warn. The point made by the court in *Rogers v Whitaker* was that standards of practice are not conclusive, at least in cases involving alleged failure to warn of risks, although they remain relevant. In *Rosenberg's* case, the patient's claim was rejected on the basis of a finding by the trial judge that she would have undertaken the procedure in any event, even if warned.

In *Woods v Multi-Sport Holdings Pty Ltd*¹⁵, the High Court dismissed a claim for damages by a participant in the sport of indoor cricket who alleged that the owner of the venue in which the game was being played was negligent by failing to warn participants of the dangers of an injury to their eyes, and by failing to provide participants with eye protection or helmets while playing indoor cricket. Put very generally, the court observed that those who participate in sporting activities can be taken to be aware of the obvious risks associated with those activities. Similarly, in *Commissioner of Main Roads v Jones*¹⁶, the High Court held that drivers in remote parts of Western Australia, where roads are customarily unfenced, could be taken to be aware of the hazards posed by straying animals (given the prevalence of road kill beside the roads) with the result that the road authority was not liable for failing to erect signs to warn of that hazard.

¹⁴ [2001] HCA 18; 205 CLR 434

¹⁵ [2002] HCA 9; 208 CLR 460

¹⁶ [2005] HCA 27; 79 ALJR 1104

Hindsight Bias

Over this period, the court came to expressly acknowledge the dangers of hindsight bias. In *Rosenberg*, Gleeson CJ drew attention to the fact that it is inherent in the nature of litigation, that the conduct of the parties will be viewed through the prism of hindsight. Attention will be focused upon the particular risk which has eventuated and, in the light of what has happened, the foreseeability of the risk seems obvious. However, as the court has emphasised on a number of occasions now, it is essential for the court to resist that process of reasoning, and to endeavour to view the risks from the perspective of the participants prior to the occurrence of the risk which has eventuated¹⁷.

The dangers associated with the "retrospectoscope" were eloquently explained by Hayne J in *Vairy v Wyong Shire Council*¹⁸:

If, instead of looking forward, the so-called *Shirt* calculus is undertaken looking back on what is known to have happened, the tort of negligence becomes separated from standards of reasonableness. It becomes separated because, in every case where the cost of taking alleviating action at the particular place where the plaintiff was injured is markedly less than the consequences of a risk coming to pass, it is well nigh inevitable that the defendant would be found to have acted without reasonable care if alleviating action was not taken. And this would be so no matter how diffuse the risk was - diffuse in the sense that its occurrence was improbable or, as in *Romeo*, diffuse in the sense that the place or places where it may come to pass could not be confined within reasonable bounds.

The retreat from the high water mark of *Nagle* was evident in two decisions of the High Court in 2005¹⁹. In each case claims by young men for damages for personal injury suffered when they dived into water and struck their heads on the sand below were dismissed. In each case, the court paid attention to factors such as the obviousness of the risk, the

¹⁷ see, eg *Commissioner of Main Roads v Jones*

¹⁸ [2005] HCA 62; 223 CLR 422 at [128]

¹⁹ *Mulligan v Coffs Harbour City Council* [2005] HCA 63; 223 CLR 486; *Vairy v Wyong Shire Council*

intrinsically hazardous nature of the activity in which the plaintiff was engaged, and the magnitude of the burden which would be imposed upon the public authorities who were defendants in each case if they were found to have the duty to erect signs or barriers in order to reduce the likelihood of injuries of the kind that were suffered. Doubts were also expressed in relation to the causation issue which underpins claims based upon failure to erect signage, and in particular the proposition that the erection of signs is likely to discourage people who are intent upon participating in activities which are inherently dangerous. A similar approach was taken in a Western Australian case²⁰ in which the Court of Appeal dismissed a claim brought by a motorcyclist who had been riding fast through very large sand dunes near Lancelin, based upon an alleged failure by the local authority to adequately warn him of the risks associated with that activity.

More recently, in *New South Wales v Fahy*²¹, the High Court gave detailed consideration to the question of whether the principles which had been enunciated in *Wyong Shire Council v Shirt*²² should be overruled. A number of members of the court expressed the view that the principles enunciated in *Shirt* had given rise to problems in practice which justified its review and reconsideration. However, the view of the majority was that the case at hand was not an appropriate occasion upon which to reconsider and review those principles. Nevertheless, the outcome of the case was that the plaintiff failed to establish her claim to damages for nervous shock sustained by her in the course of her duties as a police officer.

²⁰ *Shire of Gingin v Coombe* [2009] WASCA 92; [2009] Aust Tort Reports 82-012

²¹ [2007] HCA 20; 232 CLR 486

²² [1980] HCA 12; 146 CLR 40

The retreat from *Nagle* was further reinforced by the decision of the High Court in *Roads and Traffic Authority of NSW v Dederer*²³, in which the High Court overturned decisions of the courts below awarding damages to a man who had jumped from a bridge into the water below, striking his head upon the bed of the estuary.

The doctrine of coherence

One of the ways in which the High Court has contained the previously expanding scope of liability for negligence is through the emerging doctrine of coherence. Over the last decade or so, the High Court has resolved a number of cases on the basis that holding the defendant liable in negligence would produce incoherence or inconsistency in the law as a whole by applying principles fashioned in the law of negligence into areas and activities primarily controlled by other principles of law.

Perhaps the first case in which this doctrine was expressly enunciated is the decision in *Sullivan v Moody*²⁴. In that case the High Court held that medical practitioners and other professionals working in clinics specialising in the diagnosis and treatment of victims of sexual abuse owed no duty of care to persons other than the patients they were treating, and in particular owed no duty to take care to protect persons who were suspected of being the perpetrators of sexual abuse. Amongst the reasons given for that conclusion was the observation that the damage suffered by each plaintiff was the consequence of defamatory statements made about them by the relevant practitioners. The court expressed the view that a conclusion that the practitioners owed a duty of care to suspected perpetrators would result in the law of negligence intruding into an area traditionally covered by the law of defamation, and would, effectively,

²³ [2007] HCA 42; 234 CLR 330

²⁴ [2001] HCA 59; (2001) 207 CLR 562

override aspects of that law, including the law relating to privilege which would protect the maker of the defamatory statement from liability in certain circumstances.

The doctrine of coherence is also evident in a series of cases in which the High Court has assessed the duties owed by suppliers of alcohol. In *Cole v South Tweed Heads Rugby League Football Club Ltd*²⁵, the court was divided on the question of whether a Rugby league club owed a duty of care to a patron to whom it had supplied alcohol. Two members of the court were of the view that the club owed such a duty; two members of the court were of the view that the club did not owe such a duty, and two members of the court found it unnecessary to decide the issue on the facts of the case before the court.

However, the issue came back before the court five years later in *Cal No 14 Pty Ltd v Motor Accidents Insurance Board*²⁶. In that case, a majority of the court held that in all but exceptional cases, the proprietor and licensee of licensed premises owed no general duty of care at common law to customers which required them to monitor and minimise the service of alcohol or to protect customers from the consequences of the alcohol which they chose to consume. Amongst the reasons relied upon by the majority was the observation that in all Australian jurisdictions, the particular duties imposed upon the licensees of licensed premises were statutory and specific, and the imposition of a general duty of care to customers would be likely to be inconsistent with those specific statutory duties.

²⁵ [2004] HCA 29; 217 CLR 469

²⁶ [2009] HCA 47; 239 CLR 390

In another case decided about the same time²⁷, the High Court held that proprietors of licensed premises owed a duty to take reasonable care to prevent injury to customers arising from the violent, quarrelsome or disorderly conduct of other customers. However, the claim of plaintiffs who suffered injury when they were shot by another customer after a fight broke out at a New Year's function failed because the court concluded that they had failed to establish that the performance of a duty to take reasonable care by, for example, the engagement of crowd controllers would not, on the balance of probabilities, have prevented the shootings (given that crowd controllers are not generally entitled to carry guns).

Although not enunciated in precisely these terms, principles analogous to the doctrine of coherence appear to underpin the decision of the High Court in *Graham Barclay Oysters Pty Ltd v Ryan*. In that case, damages were claimed by a group of persons who contracted hepatitis A after eating oysters harvested from the waters of a lake which had been polluted by human faecal material. The High Court held that neither the State government, nor the local authority in which the oyster leases were situated owed a duty of care to consumers of the contaminated oysters. In arriving at that conclusion, a number of members of the court observed that the legal duties imposed upon governmental authorities responsible for regulating industries are generally covered by the law relating to judicial review of administrative action, rather than the law of negligence. Interestingly, the consumers' claim against the oyster farmers also failed, notwithstanding the undoubted existence of a duty of care, because the court concluded that the steps that would have to be taken to alleviate the risk to consumers were entirely disproportionate to the known risk. That

²⁷ *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; 239 CLR 420

conclusion appears to reflect a growing appreciation of the possible impact which the indiscriminate application of the principles enunciated in *Wyong v Shirt* has had upon the scope of liability in negligence.

From this review of the cases, the title chosen by the organisers of this conference becomes apparent. The trend of decision evident in cases decided over the last decade or so is firmly against expanding the scope of liability for negligence, and has served to constrain expansions in scope which took place during the latter part of the last millennium. Returning to my central theme, it is therefore clear that judicial development of the common law of Australia has significantly constrained the scope of liability for negligence. The question which I will now address is the impact which the Civil Liability Acts have had upon the same subject.

The Civil Liability Acts

Following the publication of the report of the Ipp Committee, all Australian States and Territories moved promptly to enact legislation based upon some of the recommendations contained in the report. In four States, the legislation took the form of Civil Liability Acts (New South Wales, Queensland, Tasmania and Western Australia), in South Australia the legislation took the form of an amendment to an existing Act of the same name²⁸, and in Victoria the legislation took the form of amendments to the Wrongs Act 1958 (Vic)). The Australian Capital Territory enacted the *Civil Law (Wrongs) Act 2002*, and in the Northern Territory the reforms were made in the *Personal Injuries (Liabilities and Damages) Act 2002*. However, unfortunately for those who have advocated the

²⁸ *Civil Liability Act 1936* (SA)

development of a unified Australian law of tort²⁹, the language of the various statutes is far from uniform³⁰. Not only is the legislation variously expressed, but its stated objects are variously expressed both in the statutes and in the secondary materials relating to the statutes, such as explanatory memoranda and Second Reading Speeches. The inevitable consequence is likely to be divergent interpretations in different jurisdictions³¹. As Pullin JA observed:

The passing of legislation with different provisions and different wording in similar provisions in jurisdictions around Australia has the potential to have an undesirable effect on what was a unified law of tort in Australia. Rather than creating fairness and predictability, the existence of different legislation around Australia might create a lack of predictability and increase the cost and availability of insurance³².

But for the jurisdictional variations in the legislation, the Ipp Report itself might have been taken to provide a reliable guide to its proper construction and interpretation. However, because it is clear that in most jurisdictions the recommendations of that report have not been embraced in their entirety, there are necessarily some limits upon the extent to which the Ipp Report can be relied upon as a reliable guide to interpretation.

Bryson JA made some disparaging remarks with respect to the New South Wales Civil Liability Acts:

There is no general statement of purposes or of objectives in either Act. Some of the provisions may have been intended to restate or declare parts of the law of negligence while others change parts of that law. I have not observed any overall purpose of scheme of the amendments which can be brought to bear on the construction of any particular provision. The application of each particular provision should be considered in its statutory context and in relation to the

²⁹ see, eg Trindade FA, *"Towards an Australian Law of Torts"* (1993) 223 UWALR 74

³⁰ Butler D, *"A Comparison of the Adoption of the Ipp Report Recommendations and Other Personal Injuries Liability Reforms"* (2005) 13 *Torts LJ* 201

³¹ McDonald B, *"The Impact of the Civil Liability Legislation on Fundamental Policies and Principles of the Law of Negligence"* (2006) 14 *Torts LJ* 268 at 269; *Grice v Qld* [2006] 1 Qd R 222

³² *Department of Housing and Works v Smith (No 2)* [2010] WASCA 25 [16]

facts of each particular case in which a litigant claims to rely on it. Broad views and insights based on them should be deferred until there has been a significant accumulation of judicial experience on the operation of these provisions³³.

As his Honour observed, the provisions of the Act are not a complete statement of the application of the law of negligence, and in many cases will deal with only part of the law applicable to the case. For example, although many of the Acts contain sections situated under a heading "Duty of Care", as the High Court observed in relation to the New South Wales Act, the heading is misleading, as the provisions of the Act grouped under that heading do not relate to the issue of the existence of a duty of care, but rather to issues concerned with breach of duty³⁴.

Because the legislation generally only applies to causes of action arising after its enactment, for the last eight years or so, Australian courts have been deciding cases in which only common law principles apply on one day, and then deciding cases to which the Civil Liability Act applies the next. This has led to confusion. There has also been contention as to the extent to which the principles embodied in the civil liability legislation displace common law principles³⁵. No doubt these contentions arise from the fact that the Civil Liability Acts do not purport to be a code of the law of negligence. However, it is in my view clear from the approach taken by the High Court in *Adeels Palace Pty Ltd*, that if a case falls within the legislation, the provisions of the Act displace the common law to the extent that those provisions apply to issues arising in the case.

Understandably there has also been contention on the extent to which the provisions of the legislation vary the principle of law formulated by the

³³ *CG Maloney Pty Ltd v Hutton-Potts* [2006] NSWCA 136 at [177]

³⁴ *Adeels Palace Pty Ltd v Moubarak*

³⁵ see, eg, *Department of Housing and Works v Smith (No 2)*.

High Court in *Wyong v Shirt*³⁶. However, at least in New South Wales it seems to be accepted that the legislation substantially restates the common law principles enunciated in *Shirt's* case³⁷. Many cases have been approached on the basis that there is no need to differentiate between common law principles and the statutory provisions, because the outcome of the case will be the same whichever approach is taken³⁸.

As it is beyond the scope of this paper to survey the particular differences between the legislation in the various States³⁹, for the purposes of my paper, it has been necessary to select one example of the legislation to develop my theme. At the risk of being accused of being parochial, I have chosen the Western Australian Act.

The Civil Liability Act 2002 (WA)

Another subject that is beyond the scope of this paper is a comprehensive analysis of the various provisions of the *Civil Liability Acts*, and their application. It is sufficient for present purposes to identify the general topics that are addressed in the particular Act that I have chosen. Those topics include:

- Breach of duty (as in New South Wales, misleadingly placed under the heading "Duty of Care")
- Causation
- Liability for injury suffered in the course of recreational activities
- Contributory negligence
- Obvious and inherent risks

³⁶ see McDonald, *op cit.* for an interesting discussion on this topic.

³⁷ see *Council of the City of Greater Taree v Wells* [2010] Aust Torts Reports 82-063 at [55]

³⁸ See, eg, *Department of Housing and Works v Smith (No 2)*

³⁹ For a comparison of the differences in different States and Territories see Butler, D, "A comparison of the Adoption of the Ipp Report Recommendations and other Personal Injuries Liability Reforms (2005) 13 Torts Law J 203"

- Liability of health professionals
- Liability for mental harm
- Liability relating to public functions
- Liability of road authorities
- Liability of good Samaritans
- Effect of apologies
- Proportionate liability
- The quantum of damages for personal injury
- Advertising legal services relating to personal injury and touting

Obviously there are some areas in which the legislation significantly amends the common law position in a way which could have a significant impact upon a particular case. For example, the provisions to the effect that the proffer of an apology is not to be taken as an admission of liability could have a significant impact in an individual case. However, in other areas covered by the Act it is more difficult to identify any significant impact arising from the legislation. Nor do the decided cases suggest that the legislation has yet had a profound impact upon outcomes. This may well be because the common law has in any event moved generally in the direction identified by the legislation, through the series of cases to which I have referred.

This point can be illustrated by some examples. As I have noted, at least in New South Wales it has been accepted that the statutory provisions relating to liability for breach of duty generally restate the principles enunciated by the High Court in *Wyong v Shirt*. However, even though the High Court has not expressly overturned those principles⁴⁰, the way in which those principles have been applied, taking into account the dangers

⁴⁰ in *NSW v Fahy*

of hindsight bias, and giving considerable weight to the burdens which might be imposed upon defendants if it is found that their duty requires them to take particular steps - such as the erection of signs or barriers, or would impose unreasonably high standards of maintenance of large public areas, has already achieved much of the objectives identified in the report of the Committee underpinning the statutory formulation of the principles relating to liability for breach.

To take another example, the legislation expressly provides that a defendant is not liable for harm suffered by a person engaged in a dangerous recreational activity if the harm is the result of the occurrence of an obvious risk. This provision appears to correspond very closely with the point at which the common law has arrived, evident in decisions such as *Woods v Multi-Sport* and *Shire of Gingin v Coombe*.

Liability of Health Professionals

Slightly more contentious is the question of the impact of the legislation upon the liability of health professionals. The Western Australian legislation expressly reinstates the *Bolam* principle in relation to acts or omissions by health professionals other than in respect of the warning of risks associated with treatment or a procedure conducted for the purpose of diagnosis. In my view, there is a respectable argument to the effect that, properly construed, *Rogers v Whitaker* only displaced the *Bolam* principle in relation to duty to warn cases in any event (although I acknowledge that this is not a view that is universally shared). However, at least since *Rosenberg v Percival*, it is clear that generally speaking, at least in the areas of treatment and diagnosis, actions by a medical practitioner that accord with generally accepted standards within the profession are unlikely to be found to be negligent.

The legislation also provides that a practice does not have to be universally accepted to determine the appropriate standard of care - it is sufficient if it is widely accepted. Another provision stipulates that if compliance with the generally accepted practice would be so unreasonable that no reasonable health professional in the practitioner's circumstances would have complied with the practice, the practitioner will be negligent. However, it seems to me to be extremely unlikely that any different view on either topic would be taken under general common law principles.

Accordingly, it seems to me to be cogently arguable that despite the fanfare which has attended the enactment of the legislation, in many areas its impact is difficult to detect. My admittedly *ad hoc* review of the cases in the area of medical negligence has not identified any case in which it is clear that the legislation has produced a different outcome to that which would have applied at common law. Of course, this may be because in cases where it is clear that the legislation would provide a different outcome, they have not been brought to court. It is a significant limitation upon the views which I express in this paper, that the data set upon which I rely is exclusively that of cases which have come to court. For this reason, I readily acknowledge that many legal practitioners and insurance underwriters will be better placed than I to assess the impact which the civil liability legislation has had upon cases in which claims are advanced, given that my review is restricted to cases that have gone to court.

This is, of course, not to say that there have not been cases in which the legislation has been relied upon as providing a defence to a medical

practitioner⁴¹, and although those cases are replete with reference to the so-called reinstatement of the *Bolam* principle, when regard is had to the facts of those cases, and the expert evidence which was led to sustain the reasonableness of the conduct of the medical practitioner, it seems to me that the result would be unlikely to have been any different, with or without the Civil Liability Act provisions.

Liability arising from the performance of public functions

There is, however, one area of the legislation which is capable of having a significant impact upon the outcome of cases. Those are the provisions of the Act which relate to liability arising from the performance of public functions. The WA Act expresses the principles applicable to such claims in the following terms:

5W. Principles concerning resources, responsibilities etc. of public body or officer

The following principles apply in determining whether a public body or officer has a duty of care or has breached a duty of care in proceedings in relation to a claim to which this Part applies —

- (a) the functions required to be exercised by the public body or officer are limited by the financial and other resources that are reasonably available to the public body or officer for the purpose of exercising those functions;
- (b) the general allocation of those resources by the public body or officer is not open to challenge;
- (c) the functions required to be exercised by the public body or officer are to be determined by reference to the broad range of its activities (and not merely by reference to the matter to which the proceedings relate);
- (d) the public body or officer may rely on evidence of its compliance with the general procedures and applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceedings relate.

⁴¹ *Melchior v Sydney Adventist Hospital Ltd* [2008] NSWSC 1282; *Dobler v Halverson* [2007] NSWCA 335; 70 NSWLR 151

5X. Policy defence

In a claim for damages for harm caused by the fault of a public body or officer arising out of fault in the performance or non-performance of a public function, a policy decision cannot be used to support a finding that the defendant was at fault unless the decision was so unreasonable that no reasonable public body or officer in the defendant's position could have made it.

The portions of the Ipp Report dealing with these provisions mainly focus upon the policy defence provided in s 5X. On the subject of the allocation of resources, it seems that the recommendation was based upon concern expressed by local authorities and other public authorities responsible for the management of land to the effect that they were concerned at being held liable for failure to provide the resources necessary to discharge their duty of care, in circumstances in which they have made decisions, in good faith, about the allocation of limited resources between competing public activities.

The provisions, of course, extend to all public bodies and authorities, not just the local authorities or land managing authorities referred to in the report of the Ipp Committee. Accordingly, a public hospital which decides that it lacks the resources to provide round the clock specialist obstetric care would be in a position to rely upon s 5W in a case in which it is asserted that the failure to provide that care, or the delay in providing a Caesarian section, caused or contributed to injury at the time of birth.

Perhaps surprisingly, I have been unable to identify a large number of cases in which these sections have been applied. One such case involved a claim by a number of vigneron in the south-west of Western Australia, who suffered smoke damage to their grape vines as a result of burning off carried out in the area of their vineyards by the Department of Conservation and Land Management. The vigneron asserted that the

department should have delayed the burning off until after their grapes had been harvested. The trial judge held that the burning off had been carried out in compliance with the general procedures and applicable standards for the exercise of its functions, within the meaning of s 5W(d) of the Act, and further, that the decision to burn was a policy decision within the meaning of s 5X of the Act. As he also held that the decision to burn was not so unreasonable that no reasonable person could have made the decision, the defences provided by the Act applied⁴².

In another case, it was held that a local authority could not rely upon the defence because its action in approving an external stairway for use as a fire escape in the event of a fire was so unreasonable that no reasonable council could have authorised it⁴³. However, this decision has been criticised on the basis that the judge did not apply the conventional test of unreasonableness developed in the context of administrative law⁴⁴ and which should be taken to have been incorporated into the policy defence (given the terms of the report of the Ipp Committee). However, in a later case the New South Wales Court of Appeal held that the "*Wednesbury*" principles of unreasonableness are incorporated by the statutory provision and import a high threshold before unreasonableness will be found⁴⁵. In that case, the Court of Appeal set aside the decision of the trial judge who concluded that placement of a sign warning road users of water on the road 924 metres away from the water was so unreasonable that no reasonable road authority could have decided to place the sign in that position. The court considered that the high hurdle of *Wednesbury* unreasonableness had not been made out, and the claim was dismissed.

⁴² *Southern Properties (WA) Pty Ltd v Executive Director of the Department of Conservation and Land Management [No 2]* [2010] WASC 45

⁴³ *T & H Fatouros Pty Ltd v Randwick City Council* (2006) NSWSC 483; 147 LGERA 319

⁴⁴ see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223

⁴⁵ *Allianz Australia Insurance Ltd v Roads and Traffic Authority NSW* (2010) NSWCA 328

The legislative provisions relating to the allocation of limited public resources were considered in the New South Wales Court of Appeal in *Roads and Traffic Authority (NSW) v Refrigerated Roadways Pty Ltd*⁴⁶. However, before considering those provisions, the court applied what it took to be common law principles to the effect that in determining whether a statutory authority had breached a duty of care, evidence of funding constraints and competing priorities of the authority should be taken into account in order to determine what a reasonable authority, with its powers and resources would have done in the circumstances of the case. It will immediately be seen that this expression of common law principle bears a strong resemblance to the defence enunciated in the Act. Indeed, for that reason, the Court of Appeal did not consider it necessary to determine whether the relevant section of the Act provided a defence because it concluded that the plaintiff had failed to make out a breach of duty of care at common law - in that case by failing to show that the risk of objects falling from bridges over roadways was so great that the roads authority was negligent in not allocating more of its resources to providing fences and barriers to restrain objects falling from all the bridges over all the roadways in New South Wales.

However, the legislative provisions were considered by Campbell JA who observed that whether or not the defence provided by the Act would apply may depend critically upon the precise way in which the breach of duty was formulated by the plaintiff. That was because the formulation of the breach of duty would critically affect the question of whether or not the relevant acts or omissions of the public authority could be said to

⁴⁶ [2009] NSWCA 263; 77 NSWLR 360

be the consequence of the general allocation of the public authority's limited resources.

There is, however, one significant distinction between the common law principle upon which the court relied, and the statutory defence. Under the common law principle, it is possible for the court to review decisions made by public authorities with respect to the allocation of their resources and conclude that the authority was negligent in failing to allocate sufficient resources to fulfil its duty of care. However, under the statutory defence, decisions by the authority with respect to the general allocation of its resources are "not open to challenge"⁴⁷. Consistently with the observations of Campbell JA, it follows that persons advancing claims against public authorities should take care when formulating the precise acts or omissions which are said to constitute the breach of duty, with a view to the scope of the statutory defence provided in relation to the allocation of limited public resources.

Summary

The civil liability legislation enacted following the report of the Ipp Committee responded to widespread public concern arising from the expanding scope and increasing burden of liability for negligence. However, the legislation was enacted at or about the time at which the courts themselves recognised the adverse consequences of earlier decisions which had given rise to these concerns. Although there are some cases in which the legislation may have a significant impact, in many areas, the application of the legislation has had little or no impact upon outcomes. That may well be because the courts themselves have

⁴⁷ *Ibid* at 402

developed common law principles to implement the objectives of constraint which appear to underpin the legislation.

A study commissioned by the Law Council of Australia in an attempt to identify the effect which the enactment of the Civil Liability Acts and their equivalents under other names had upon the level of claims for damages for personal injury concluded that in all Australian jurisdictions there had been a dramatic decrease in personal injury cases brought before the courts following the enactment of the legislation⁴⁸.

However, I would respectfully suggest a number of notes of caution before arriving at the conclusion that the civil liability legislation has been the direct cause of an enduring reduction in negligence claims.

First, the study suffers the same disadvantage which I suffer in that it was entirely dependent upon data relating to claims brought to court, which one would expect to be only a portion of claims advanced and resolved.

Second, the report was published in 2006, and therefore included only data up to, and including, 2005. There is I think a reasonable hypothesis that in the period preceding the enactment of the Civil Liability Acts, many lawyers encouraged prospective claimants to launch their claims before the legislation was enacted, in order to avoid the possible effect of the legislation. Put more colloquially, claims that were in the pipeline were accelerated and brought to court before the legislation was enacted, against the contingency that the legislation might apply to events which occurred before its enactment, but in respect of which proceedings had

⁴⁸ Wright EW, *National Trends in Personal Injury Litigation: Before and After "Ipp"* - Law Council of Australia

not by then been commenced. That practice, if it did occur, would undoubtedly have had the effect of reducing the number of claims brought in the years immediately following the enactment of the Acts. At all events, the issue of whether the marked reduction in personal injury claims following the passage of the legislation has had an enduring effect in reducing those claims would have to be assessed with another follow up study.

Third, the study was limited to claim for damages for personal injury, and did not extend to negligence claims generally.

Fourth, and perhaps most significantly of all, the burden of this paper has been the advancement of the proposition that developments in the common law which have occurred over much the same time period as the impact of the civil liability legislation has been felt have had much the same effect as the legislation. It is I think very difficult to distinguish, at an empirical level, from the impact which the legislation has had upon the bringing of claims from the impact which the "swinging of the common law pendulum" has had.

Nevertheless, the size of the reduction in the number of claims for personal injury brought following the enactment of the legislation was significant. In that context, it would I think be naïve and unrealistic to suggest that the legislation had no or negligible impact on the volume of claims brought. I do, however, suggest that developments in the common law have significantly reduced the impact which the legislation has had upon the legal principles applicable to the resolution of claims in negligence.