Australian Tort Reform: Are Defendant Insurers Getting Square with Plaintiffs?

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Introduction

1. Since 2002 each State and Territory has enacted legislation to compel the greatest change to public liability in decades (**the Reform Acts**)[1]. Whilst the Government has sought to make changes through the legislation, the ultimate arbiter and interpreter of the legislative changes are the judiciary.

2. Has the judiciary given effect to the legislation as intended by State Parliaments? For those of you who are unfamiliar with the operation of the Australian Judicial System, I have prepared an extract from some in Court footage[2] .

3. Whilst the footage is clearly fictitional and humorous, the old saying *"truth can be stranger than fiction"* is apt to describe some of our experiences with State based judiciary.

4. This paper looks at the Reform Acts in three areas:

   (a) Reasons why the Reform Acts were necessary and their effect;

   (b) current judicial opinion concerning the Reform Acts;

   (c) a selection of cases demonstrating how the judiciary has applied the Reform Acts.

[1] In New South Wales, *Civil Liability Act* 2002 (NSW), in Victoria the *Wrongs Act* 1958 (VIC), and in Queensland both the *Civil Liability Act* 2003 (QLD) and the *Personal Injuries Proceedings Act* 2002 (QLD).
[2] *"Getting' Square"* – 2003 Macquarie Nine Film and Television Investment Fund, Working Title Films Limited

Reasons for the Reform Acts

5. In 2002, there was a perceived "crisis" over the availability and affordability of liability insurance. Community Groups were experiencing an unaffordable rise in the cost of liability insurance for events such as local fairs, not-for-profit organisations such as surf life saving were experiencing a similar increase to the point they were threatening to withdraw their services and small businesses were also experiencing significant increases in their insurance premiums making their businesses uneconomic.

6. The crisis was also driven by the widespread belief in Australia and fanned by significant media exposure, that Australia was experiencing a litigation explosion, in particular New South Wales, akin to that in the US. The Judges were being compared to Santa Claus in their generosity.

7. It should also be remembered, as if anyone even remotely involved in insurance can forget, that HIH pre-tort form were actively undercutting rates in the market and were probably the largest public liability insurer in Australia driving down premiums. The result was their collapse in August 2001 which significantly reduced availability of insurance.

8. UMP, the largest medical indemnity organisation in Australia also went into provisional liquidation in 2001.

9. Following the demise of HIH, what had previously been a "soft" market rapidly "hardened" with an increase in premiums.

10. Other factors affecting the affordability of insurance was September 11 on the reinsurance market and falling stockmarkets.

11. The Commonwealth, State and Territory Governments reacted to the "crisis". A panel was appointed by the Commonwealth treasury to review the law of negligence chaired by Justice David Ipp, a Judge of

the NSW Court of Appeal. The panel made recommendations which led to the enactment of the Reform Acts.

12. The basis of the Ipp Review was that "*personal injury law has contributed to this state of affairs, and that reducing liability and damages would make a significant contribution to resolving the crisis".*[3]

13. The terms of reference made it clear that the panel had to devise ways of limiting liability and damages imposed by the law of negligence.

14. The Ipp Review proceeded on the premise was not that claim numbers were increasing but rather than personal injury claims were becoming increasingly successful and were resulting in increasingly larger awards. The perception was that it had become too easy for Plaintiffs to succeed in personal injury cases, and to obtain damages awards that were frequently too high.

15. It is not the intention of this paper to examine in detail each State's legislation. However, there are common threads running through each Act which mandated changes to the Court's approach to issues such as:

    (a) non-economic loss assessments; and

    (b) the obviousness of risks.

16. The legislation has placed greater emphasis on personal responsibility and taking care for one's own safety by attempting to define in legislation:

    (a) what constitutes an obvious risk;

    (b) dangerous recreational activities;

    (c) injuries sustained whilst intoxicated.

17. Briefly, the changes enacted in each state are as follows:

[3] Ipp Review, para 1.36

Commonwealth

18. Amendment of the Trade Practices Act to allow recreational service providers to contract out of the implied warranties s74. Liability for personal injury or deaths that might otherwise arise from a breach or an implied warranty that the recreational services would be provided with due skill and care can be excluded.

NSW

19. A Defendant does not owe a duty to warn a Plaintiff of an obvious risk (a risk that would have been obvious, to a reasonable person in the Plaintiff's position) unless:

- The warning was required to be given by law;
- The Plaintiff requested advice or information about the risks; or
- The risk is that of a personal injury or death arising from the provision of professional services by the Defendant;
- No person is liable to another for harm caused by an inherent risk materialising, which is a risk that cannot be avoided by exercising reasonable care.

20. A protection for recreational service providers:

- No liability in negligence arises from harm caused by the materialisation of an inherent risk of a dangerous recreational activity;
- No duty of care is owed to a participant in a recreational activity to take care of a risk of which the participant was warned as set out in the Act;
- If a person agrees to participate at his or her own risk, the provider has no liability in negligence for a breach of warranty that the recreation service will be rendered with reasonable care and skill.

21. Amendment of the Limitation Act 1969 to prevent claims for personal injury damages being commenced more than three years after the date on which the cause of action is discoverable by the Plaintiff.

Queensland

22. The Personal Injuries Proceedings Act 2002 proposed similar reforms in relation to the standard of care, causation, obvious and inherent risks as detailed in above in relation to New South Wales.

23. A sliding scale to damages for personal injury and an introduction of proportionate liability principles to claims for property damage and economic loss.

ACT

24. The ACT introduced the Civil Law Wrongs Act on 1 November 2002. The provisions of the Act are not as comprehensive as New South Wales or Queensland.

Victoria

25. Victoria enacted the State's Wrongs Act by legislation on 23 October 2002:

- Some caps for personal injury damages claims;

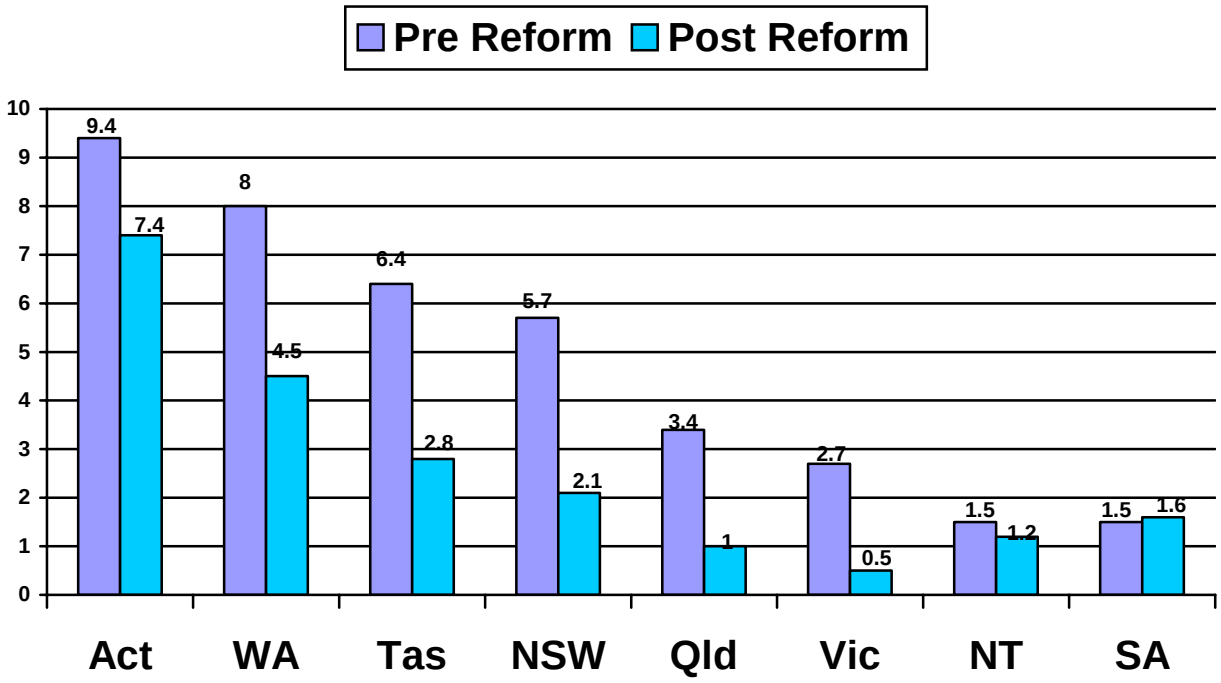
26. The third part of this paper will elaborate on the Court's interpretation of such provisions.

General Overview of Claim Numbers

27. So what has been the effect of the Reform Acts on claims?

28. Following the Reform Acts, the number of claims coming before the Courts continue to fall.

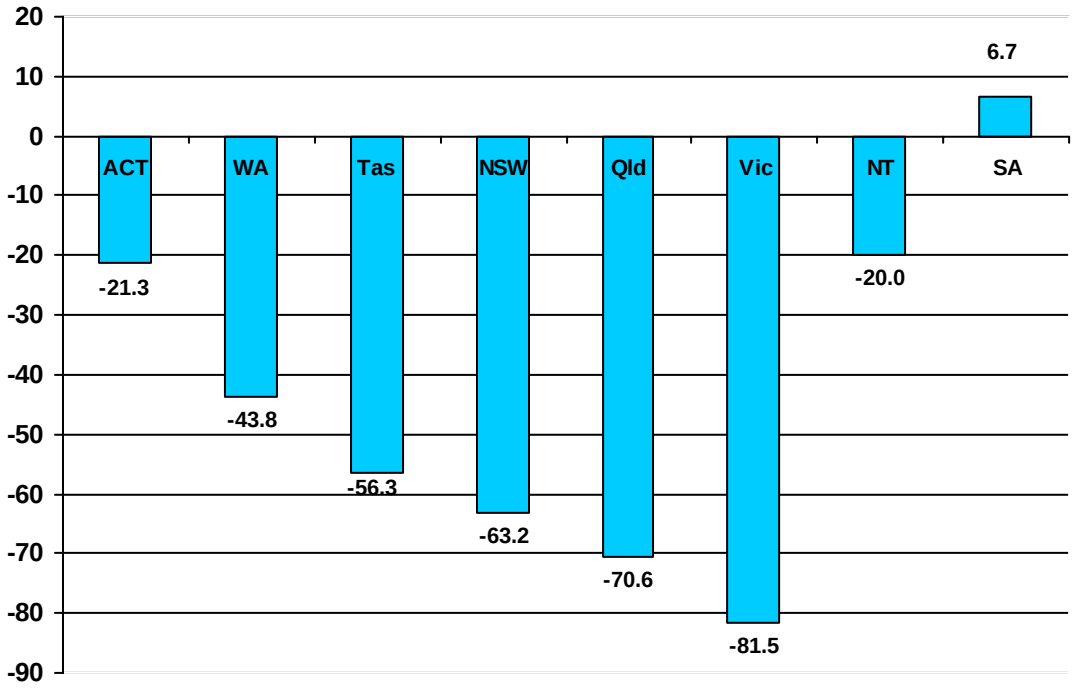
29. The national trend in claiming prior to the reform period was essentially stable, with fluctuations in year to year filings around an average rate of 4.5 claims per 10,000 population. There has been a decline of about 60% in the claiming rates in 2004 and 2005 following tort law reform. A summary picture of the national trends in personal injury litigation before and after tort law reform is contained in the below table.[4]



Average annual injury claims per 10,000 population before and after tort law reform, by jurisdiction

30. The change is more apparent, and relevant to underwriting and claims management, when the percentage changes in the average claiming rates before and after the reforms in each jurisdiction is considered.

[4] National Trends in Personal Injury Litigation: Before and After "Ipp", E W Wright, 26 May 2006



Percentage change in average claiming rates before and after tort law reform, by jurisdiction

New South Wales

31. In New South Wales the majority of professional indemnity and public liability cases are commenced in the District Court or the Supreme Court. In its civil jurisdiction the District Court deals with:

    a. all motor accident cases, irrespective of the amount claimed; and

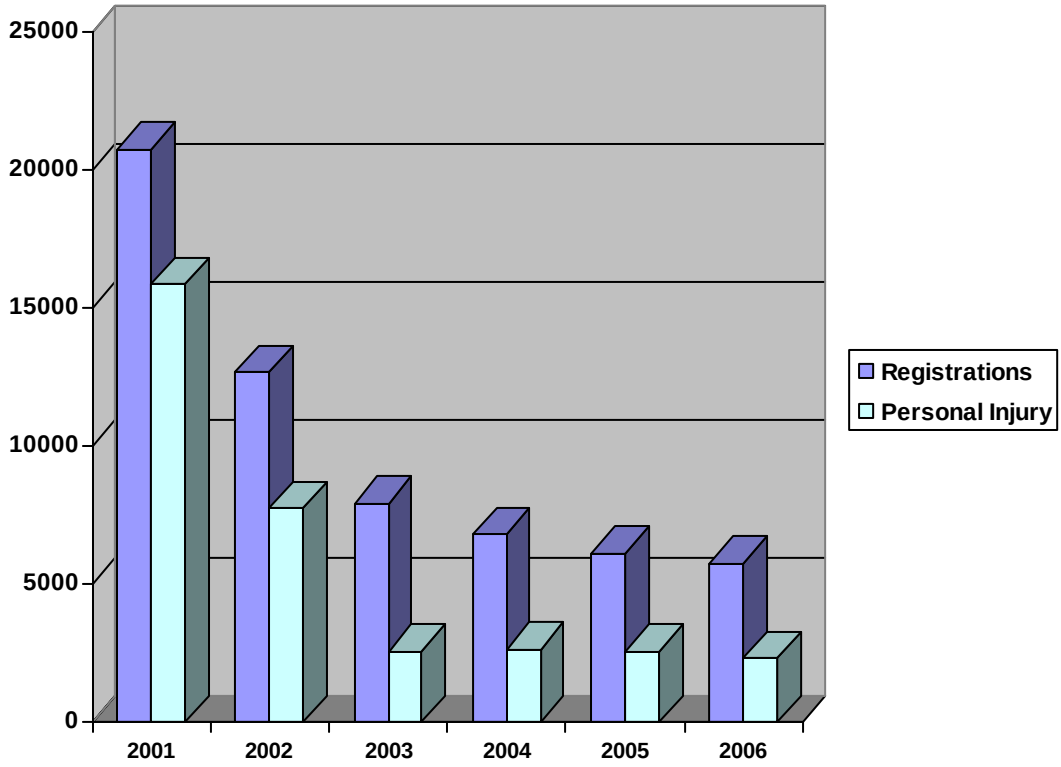
    b. other claims to a maximum amount of $750,000, although the District Court may now also deal with matters exceeding this amount if the parties consent, or alternatively if the defendant fails to object 3 months prior to the hearing.[5]

32. Whereas in 2001, new filings in the District Court were 20,784, and a quarter of them were for personal injury, in 2006 new filings were only

[5] *District Court Act* 1973 (NSW) s.51.

5,769, and around 40% of those were for personal injury. The cause of the decline in filings has been directly attributed to the *Civil Liability Act* 2002 (*CLA*) which both restricted the right to commence civil actions and also placed caps on legal fees.[6]

NSW District Court Civil Cases



33. What is somewhat worrying however is the slowdown in finalisations[7]. This suggests that despite the District Court's efforts in relation to case management, cases are still slow to finalise, which of course impacts on defence costs.

34. The same slowdown is apparent both in appeals to the Court of Appeal, and claims commenced in the Supreme Court of New South

[6] Forward to the Annual Review of the District Court of New South Wales 2005 by the Honourable Justice R O Blanch AM, Chief Judge.
[7] In part, the Honourable Justice R O Blanch AM, Chief Judge attributes the slow down to a decrease in the number of sitting Judges.

Wales (where the Court's jurisdiction is unlimited). At the end of 2005, the number of new cases going to the Court of Appeal (often on appeal from the District Court) decreased by approximately 9%. The Court expects that reduction to continue with a 22% reduction in holding appeals in 2005 compared to 2004.[8]

35. The Common Law Division of the Supreme Court deals with all serious personal injury and contractual actions. While its claim numbers continued to increase in each of 2004 and 2005 (the latter by 37%), the increase has been attributed to uncontested matters in the Possession List which have soared. While at first blush overall disposals substantially increased (by 21%), that is largely on account of the increased number of cases proceeding to default judgment.

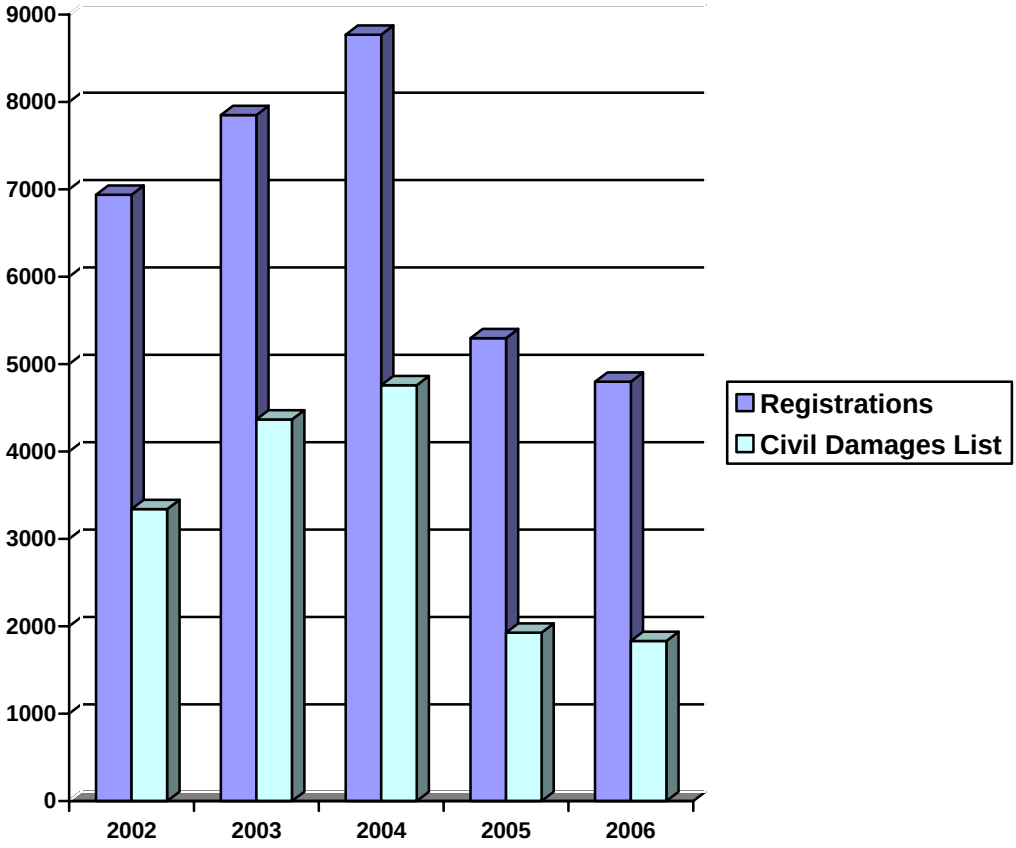
36. The Equity Division of the Supreme Court exercises the traditional Equity jurisdiction, and also hears most of the professional indemnity and commercial claims. The claims in the Equity Division have not experienced the same dramatic decrease, and fell by 6% in 2005.

Victoria

37. Claim numbers in Victoria have also dipped. In the County Court (which hears actions up to the jurisdictional limit of $200,000) claims have fallen from a high of 9,637 in 2001-2002 to around 4800 in 2005-2006.

38. Their statistics are summarised below:

[8] 2005 Annual Review of the Supreme Court of New South Wales, page 26.



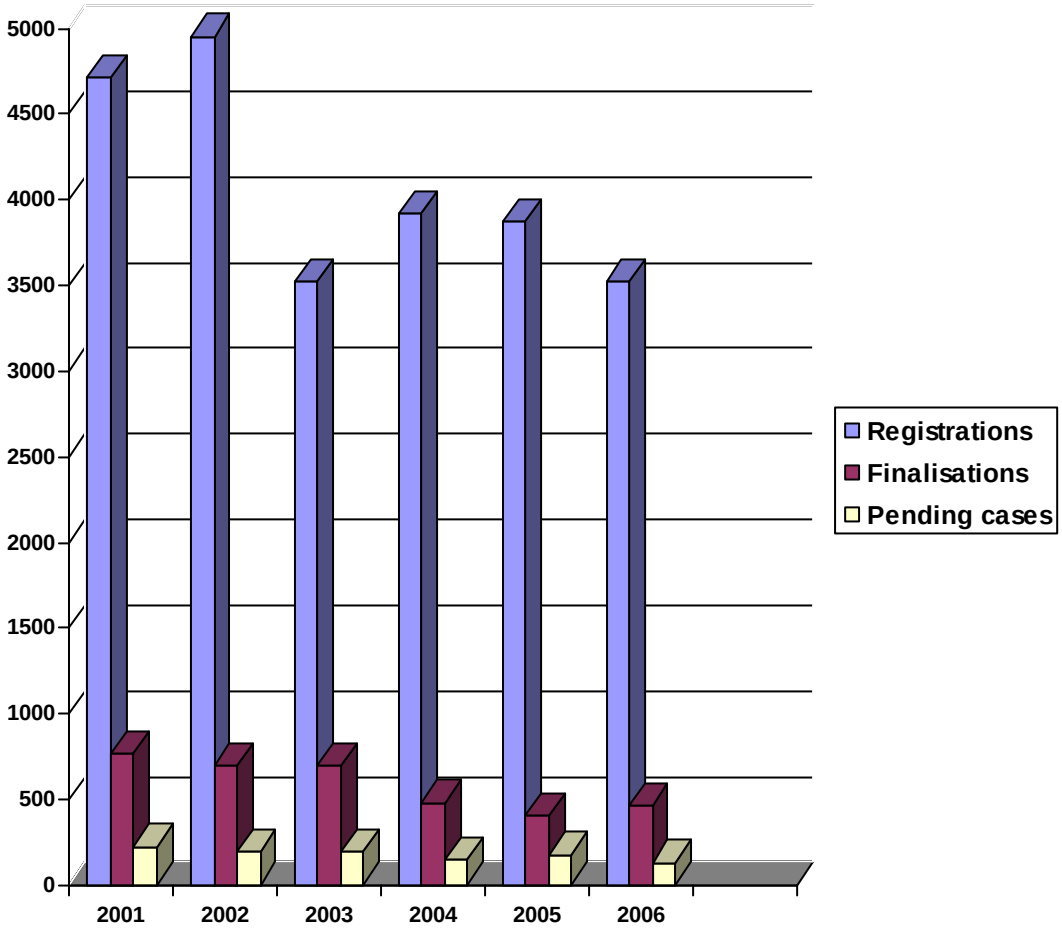
Queensland

39. Queensland appears to be bucking the national trend as claim numbers are no longer declining. In the District Court (where the jurisdictional limit is $250,000) claims have remained fairly stable over the past few years. They have actually grown in the Supreme Court:

    a. In 2000-2001 new filings in the District Court were 4,713. There was a dip in 2002-2003, where new filings dropped to 3,519, and they have levelled out at the 3500 to 4000 number[9].

    b. In the Supreme Court claims have increased from around 4300 in 2002-2003, to 5559 in 2005-2006[10].

[9] District Court of Queensland Annual Report 2005-2006, page 47.



Where to Now?

40. The above statistics demonstrate the significant decrease in Court filings post Reform Acts. One may query whether that situation will remain, in part having regard to:

    (a) the pressure to wind back the tort reforms;

    (b) the approach of the Courts to the Reform Acts; and

    (c) the increased mobilisation of litigation funders.

[10] Annual Report of the Supreme Court of Queensland 2005-2006, page 33.

41. The Tort reforms are not universally adored. Extra curial comments by senior members of the judiciary include criticisms of the extent of the Tort reform by both the Hon Justice D A Ipp AO who chaired the panel into the legislative reforms, and also by the Hon P de Jersey AC, Chief Justice of Queensland.

42. Justice Ipp recently stated:

> *Certain of the statutory barriers that plaintiffs now face are inordinately high. ... Small claims for personal injuries are a thing of the past. Establishing liability in connection with recreational activities has become difficult. Stringent caps on damages and costs penalties make most plaintiffs think twice before suing. Public authorities are given a host of novel and powerful defences that are in conflict with the notion that the Crown and government authorities should be treated before the law in the same way as an ordinary citizen. It is difficult to accept that public sentiment will allow all these changes to remain long-term features of the law.* [11]

43. Justice de Jersey's comments are even more pointed:

> *I have spoken previously about the two Queensland statutes of recent years which have significantly interfered with the awarding of compensation to those who have suffered injury because of the actionable fault of another. Now we would all accept that a person injured through the fault of another should be adequately compensated by that other. The issue is whether the legislative reforms went too far. Some change was justified, although legislation was not necessarily the only way of securing it. There had been a shift discernible from court decisions over recent years towards according more primacy to individual*

[11] *The Metamorphosis of Slip and Fall* The Hon Justice D A Ipp AO 30 March 2007 paper delivered on 30 March 2007 to the New South Wales State Conference of the Australian Lawyers Alliance

responsibility for those engaged in ordinary day-to-day activities. The tripping cases exemplify that.[12]

…

Last year I expressed serious reservation whether the so-called "insurance crisis" which led to the Ipp reforms was substantially caused by anything other than lack of prudent financial planning and forecasting by insurance companies, including premiums set uncommercially low for competitive reasons. The President of the Law Council of Australia, Mr John North, recently referred to current high levels of profitability in insurance companies. Many commentators have highlighted what has appeared to be minimal reduction in insurance premiums. Many remain to be convinced that the reduced financial burden on insurers, consequent upon these legislative changes, is benefiting anyone other than those insurers themselves.[13]

44. The judiciary and law councils are becoming increasingly vocal in their criticism on the extent of tort reform. The following headlines are examples of commentary in the media and legal publications:

- Compensations law are unbalanced and unfair, says Architect of Reforms

  "These harsh laws are out of line with community standards of fairness and decency. They benefit nobody except Governments and insurers, who are making of billions of dollars at the expense of injured people".[14]

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[12] *Challenges and opportunities for personal injuries practitioners in Queensland* address by the Honourable Paul de Jersey, Chief Justice of the Supreme Court of Queensland, to the Queensland Law Society Personal Injuries Conference 28 July 2006 and *Tort Law Reform in Queensland: was it necessary, is it fair and who has benefited from it?* address by the Honourable Paul de Jersey, Chief Justice of the Supreme Court of Queensland, to the Australian Lawyers Alliance, Queensland Conference.

[13] *Tort Law Reform in Queensland: was it necessary, is it fair and who has benefited from it?* address by the Honourable Paul de Jersey, Chief Justice of the Supreme Court of Queensland, to the Australian Lawyers Alliance, Queensland Conference.

[14] 21 May 2007 – Media Release, Law Council of Australia

- Supreme Court Justice Echos Law Council's Calls on Compensation

  "*Seriously injured people are suffering while insurance companies claim record profits. There is enough evidence now available to demonstrate this suffering need not continue.*"[15]

- Tort Law Reforms were Unnecessary According to Law Council Report

  "The Law Council has feared for some time, these reforms have simply diminished the rights of injured Australians to claim compensation, rather than help to reduce insurance premiums"[16]

- Spiegelman's London Call to Turn Back the Tide on Tort Reform

  "*The changes in New South Wales go well beyond anything that was ever recommended" and that "occurred" without a full appreciation of the extent to which judicial attitudes had already changed in relation to compensation in cases"*[17]

45. Despite comments such as these, there does not appear to be a serious move to wind back the reforms in any real respect.

46. It is not anticipated that the Acts will be abolished or wound back, but rather, what we do expect is some "fine tuning".

47. This position is given weight by the absence of any amendment to the New South Wales Act following the recent State elections. It was a New South Wales coalition policy at the election to refer the legislative Council report to the Law Reform Commission for assessment and

[15] 15th Annual Insurance Law Congress in Sydney – Justice Connolly
[16] Law Council of Australia – Media Release, - 31 May 2006
[17] Paper delivered by New South Wales Chief Justice Spiegelman to Lloyds of London – 14 September 2005.

report. This did not gain much publicity nor has it been acted upon by either party.

48. The main criticism of the legislation is now being championed by the very person responsible for the paper which gave rise to the changes, Justice Ipp. In a paper delivered to the Australian Lawyers Alliance[18] he raises concerns regarding the defences given to public authorities in the *Civil Liability Act 2002* and the anomalies that exist with different legislation providing different regimes, limitations and remedies:

> *"Under the Civil Liability Act, the threshold for damages for non-economic loss is 15% of the most extreme case. Under the Worker's Compensation Act, no damages may be awarded to an injured worker unless the injury results in permanent impairment of at least 15% and no regard is to be had to secondary psychological injuries. Under the Motor Accidents Compensation Act, no damages may be awarded for non-economic loss unless permanent impairment is greater than 10%."*

49. It is the disparity in these thresholds, which is rousing the most vocal of public backlash. It gives rise to a situation where persons suffering comparable injuries receive different levels of, or often no, compensation depending upon circumstances in which they were injured. For example, a worker who suffers a fall at work may not receive any compensation for non-economic loss, whereas a person who falls in their local shopping centre and sustains the same injury, will receive an entitlement to non-economic loss due to the differing threshold provisions of the legislation.

50. Justice Ipp notes that the most onerous thresholds for Plaintiff is imposed by the Workers Compensation Act, with the imposition being on the most productive group in the community, arguably the most in need of protection against the negligence of others.

[18] Friday, 17 February 2006

51. Justice Ipp comments:

> *"It is as well to remember that a major cause of the insurance crisis that led to the Civil Liability Act was inconsistency in judicial decision making. The differences in the legislation now give rise to new inconsistencies that are, potentially, as serious – if not more so"*.

The Court's Approach to the Reform Acts

52. Justice Ipp's comments are accurate. The Reform Acts have not brought the judicial certainty to judgments that was intended.

53. A review of decisions from the New South Wales Court of Appeal suggest that the Court does not approach the CLA with enormous warmth, and that approach appears to be shared by the District Court.

54. If the authorities over the last 12 months are an accurate barometer, the Court's approach is to:

    a. only rarely interfere with the discretion exercised by the Court below on damages for non-economic loss;

    b. to suggest that the *CLA* does not carry with it any change to the previous test of when reasonable precautions have been taken against a risk of injury;

    c. to indicate that "not insignificant" in the language of the *CLA*, is essentially the same as the previous test of a risk that is "not far fetched or fanciful"; and

    d. consider that where a risk is obvious that is not a factor that goes to whether or not a duty is owed.

55. On one view, the Court is interpreting the *CLA* in light of the previous common law, and reading some of the exclusionary provisions in the CLA, such as the dangerous risk provisions in a fairly narrow fashion.

56. The Court of Appeal's disenchantment with the CLA is demonstrated in the following table showing a summary of their attitude to non-economic loss. You will note that the early decisions in 2004 showed an eagerness by the Court of Appeal to embrace the legislative changes and reduce the District Court Judge's assessments of non-economic loss. However, more recent decisions show that the Court is once again reluctant to interfere with the discretion of the District Court Judges confirming their, increasingly generous, assessments of non-economic loss.

Case Name	Injury	NEL decision at first instance	NEL decision by the Court of Appeal
Martin v Trustees of the Roman Catholic Church [2006] NSW CA 132	Broken tibia and fibula involving insertion of nail and surgical scars	25% ($28,000)	Hodgson J noted in obiter, that but for scarring a substantially lower award would have been appropriate.
CG Maloney Pty Limited v Hutton-Potts [2006] NSW CA 136	Right knee required arthroscopy, fluid drained on a number of occasions, asymptomatic degenerative arthritic change, the need for a partial knee replacement and the likelihood of a total knee replacement in 10 years	40% ($171,000)	40% ($171,000)
Porter v Lachlan Shire Council [2006] NSW CA 126	Fractured ankle – 18 year old male	28% ($60,000)	In obiter – Hodgson JA & Giles JA indicated that 20% ($15,000) would be more appropriate.

Jopling V Isaac [2006] NSWCA 299	Plaintiff was a 26 year old male with comminuted fracture of the right patella	28% ($60,000)	28% ($60,000)
Fitness First Australia Pty Limited v Vittenberg [2005] NSW 376	Significant fracture of left leg, possibility of arthritic changes	35% ($149,500)	Confirmed on appeal
Doubleday & Anor v Kelly [2005] NSW CA 151	Loss of sensation in thumb and two fingers, numbness and weakness in right dominant hand. Plaintiff seven at time of accident	28% ($60,000)	20% ($15,000)
Penrith City Council v Parks [2004] NSW CA 201	Broken little finger, pain and discomfort in right hand, neck and back and a psychological reaction	28% ($60,000)	15% ($4,500)
Woolworths Limited & Anor v Lawlor [2004] NSW CA 209	56 year old female with aggravation of degenerate neck and back	30% ($98,000)	30% ($98,000)
Owners of Strata Plan 156 v Gray [2004] NSW CA 304	Sprained ankle, instability, pain and a possibility of operative treatment in the near future.	33% ($141,000)	20% ($15,000)
Coleman & Anor v Barrat [2004] NSW CA 27	Plaintiff 51 year old with close production of left arm fracture, pain in shoulder, elbow and arm	30% ($98,000)	22% ($19,000)

57. To quote, once again, from Justice Ipp:

> *"The pendulum of negligence is constantly in motion. Although there have been times when its movement has been excessively rapid, it has generally moved slowly. I suspect that it is moving towards the advantage of Plaintiffs again, albeit pretty slowly."*

58. Our case examples in this paper we consider confirm the views expressed by His Honour, that the pendulum is against swinging in the plaintiff's favour.

The potential impact of litigation funders

59. Whilst litigation funding for claims is not new in Australia, historically, the common law prohibited maintenance (supporting litigation, regardless of the reason) and champerty (supporting litigation in exchange for a share of the proceeds of that litigation), on the basis that they are contrary to public policy. Although recent court decisions have made it plain that litigation funding is now a reality in Australia, the decision in *Campbell's Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41 by the High Court of Australia, there was some uncertainty as to what elements of a litigation funding agreement might render it contrary to public policy and an abuse of process.

60. The underlying proceeding (a class action) by a number of tobacco retailers against licensed wholesalers for the recovery of state licence fees, was financed by a litigation funder, Firmstone, on the basis that it would take one-third of the proceeds if the case were successful.

61. The High Court held that where the crimes and torts of maintenance and champerty had been abolished by statute (each of New South Wales, Victoria, South Australia and the ACT), there was no foundation to conclude that the people seek to profit from assisting in litigation, and seeking out and encouraging litigation could only be maintaining an action could be contrary to public policy.

62. Moreover, fears concerning the adverse effects on the processes of litigation and the fairness of the agreement between the funder and the plaintiff are not sufficient to justify an 'overarching rule of public policy' that would prohibit funded actions or require funding agreements to meet particular standards concerning the funder's degree of control or reward. Such a rule 'would take too broad an axe to the problems that

may be seen to lie behind the fears'. Similarly, fears for the administration of justice (for example, that the funder might inflame the damages or suppress evidence) can be adequately met by existing doctrines of abuse of process, and fears that lawyers might find themselves in positions of conflict are also adequately addressed by the existing rules regulating their duties to the court and clients.

63. The High Court's decision is likely to encourage the number of litigation funders and funded cases, particularly for class actions which through economies of scale may be seen to offer the best chance of a large return for funders.

64. A good example is that attached to this paper, being a copy of the investment portfolio of one of Australia's largest litigation funders, IMF Limited. This investment portfolio, which is available on the internet and is announced quarterly to ASIC, lists each of IMF's funded matters and its potential return.

Significant Liability Decisions in the Last Twelve Months

65. In New South Wales, a reasonable number of claims which fall within the provisions of the *CLA* have now been considered by the New South Wales Court of Appeal. The focus here is on the past 12 months.

Duty of Care: failing to take precautions against a risk of harm

66. The Reform Acts have attempted to restrict the circumstances in which a person is negligent where they have failed to take precautions against a risk of harm. It is effectively a two stage process. First the risk must be foreseeable and not insignificant. Secondly, the claimant must establish that, in the circumstances, 'a reasonable person in the defendant's position would have taken those precautions' having regard to:

    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; and

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

67. What amounts to 'reasonable precautions against a risk of injury' was considered by the New South Wales Court of Appeal in *Martin v The Trustees of the Roman Catholic Church of the Archdiocese of Sydney* [2006] NSWCA 132.

68. The facts are that a schoolgirl on a school excursion slipped and fell from a 3.8 metre high ramp in an obstacle course and broke her leg. Although the ramp was slippery due to rain, it had an incident free history.

69. The Court held that notwithstanding the incident free history of the ramp, spotters had noted that other girls had already slipped (but not been injured). Accordingly, the climbing of the ramp in the rain was an increased risk which was both foreseeable and not insignificant, and could have been easily avoided by taking a different route. Accordingly, the school was negligent for failing to properly instruct and supervise the schoolgirls.

70. Accordingly, rarity of a particular kind of accident does not prevent it from being foreseeable. In *Sheridan & Anor v Borgmeyer* [2006] NSWCA 201, the claimant, a shearer was injured while shearing when he fell off the shearing board (which was a platform around 3 foot from the ground). The board did not have a guardrail because the defendant was concerned that the introduction of a guardrail would impede the work of the rouseabouts (although there was no evidence to that effect). While the risk of falling was somewhat obvious, and there had not previously been an incident, the Court held that the risk of a shearer being injured by falling off the board was foreseeable, and in the absence of evidence that it would impede the work of the rouseabouts the defendant owed the claimant a relevant duty.

71. In *Drinkwater & Ors v Howarth* [2006] NSWCA 222 the New South Wales Court of Appeal commented on a possible distinction between positive acts of negligence, and failing to take reasonable precautions against a risk of harm. The facts are that two friends were ejected from a hotel by a security guard who shoved one of them, who then struck the claimant causing injury. Whilst the Court technically did not have to determine the question in this case (as it had not been argued at trial) the Court suggested that the test of whether a risk is 'not insignificant' is only referrable to failing to take precautions against a risk of harm.

72. Furthermore, Basten JA commented that there may be little between the *CLA* test in s.5B, and the previous test in accordance with the *Wyong Shire Council v Shirt* calculus, stating:

> *"A risk which is much more than far-fetched or fanciful may not differ materially from a risk which is not insignificant." [16]*

Obviousness of Risk

73. One of the main planks of the Reform Acts was incorporating the concept of the obviousness of risk. That is "*a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person*"[19]

74. As the Court of Appeal recently stated:

> *A danger or risk may be relatively commonplace. But is it also an obvious risk? And what follows if it is, for the inadvertent plaintiff?*[20]

75. Over the past few years in cases including *Vairy v Wyong Shire Council* (2005) 80 ALJR 1, and *Mulligan v Coffs Harbour City Council* (2005) 80 ALJR 43 the Courts have confirmed that the expression

[19] s5F(1) *CLA*
[20] C G Maloney Pty Ltd v Hutton-Potts and Another [2006] NSWCA 136

"obviousness of risk" is merely a descriptive phrase that signifies the degree to which risk of harm may be apparent.

76. Judges, particularly at first instance, have previously erred in holding that in all circumstances where a risk was obvious, no duty of care was owed. The correct interpretation appears to be that the "obviousness of risk" is **one** factor that is relevant to whether there has been a breach of the duty of care, and the weight to be attached to the obviousness of the risk depends on the totality of all the circumstances. In some circumstances, it may be of such significance and importance so as to be effectively conclusive.

77. The test for whether a risk is obvious is objective, ie it is irrelevant whether the particular claimant actually observed the risk.

78. Importantly, an obvious risk does not necessarily exculpate a defendant. Where a woman fell and injured herself on spilt polish (that she did not notice) on a recently polished floor, the Court stated that an obvious risk does not necessarily exculpate a defendant, or there would be little room for the doctrine of contributory negligence: Therefore what would appear to constitute an obvious risk – may not be so obvious.

79. In *Randwick City Council v Muzic* [2006] NSWCA 66, a woman slipped on algae on her way into a sea bath and sued the Council for failing to remove it. The Court of Appeal held that, even though a risk may be obvious, this does not negate a defendant's duty to act reasonably in response to the risk of injury, hence the Council owed the claimant a duty of care.

80. However in *Falvo v Australian Oztag Sports Association & Anor* [2006] NSWCA 17 the Court of Appeal was somewhat firmer. The facts are that a player of Oztag tripped when playing on a standard Oztag oval. The Court of Appeal considered that the risk of slightly differing levels

and sandy patches on sports grounds are part of the practical reality of every day life and the state of the field was obvious to all players.

81. Finally in *Great Lakes Shire Council v Dederer & Anor; Roads & Traffic Authority of NSW v Dederer & Anor* [2006] NSWCA 101 a 14 year old boy dived off a bridge and was rendered a paraplegic. Both the Council and the RTA were aware of people jumping off the bridge and put pictograph signs at the approach to the bridge.

82. The Council (which was joined to the action late) successfully relied upon the obviousness of risk provisions in the *CLA*. Those provisions did not apply to the claim against the RTA as that action was brought before the *CLA* commenced.

83. Nevertheless, the Court held that:

a. the RTA exercised a significant degree of control over the bridge, and performed acts that tended to attract a duty of care to it;

b. the RTA knew or ought to have known that persons, including children, were jumping and diving from the bridge (which was about nine to ten metres above the surface of the water) into depths that varied but were not more than two to three meters;

c. the serious risk of devastating injury must have been obvious to the RTA;

d. the pictograph signs prohibiting diving (which were the only measure taken by the RTA) were not serving the purpose for which they had been erected as it was common knowledge that the practice of jumping and diving off the bridge was continuing unabated. In these circumstances, the RTA knew that the signs were ineffective; and

e. the obvious risks involved in jumping and diving off the bridge were not a deterrent, and as many of the visitors to the bridge

were children the RTA could not assume that they would take reasonable care for their own safety

84. Ultimately the Court held the claimant 50% responsible for his own injuries.

Dangerous Activities

85. Another of the reforms was to limit liability for harm suffered from the obvious risks of dangerous activities[21].

86. The Court of Appeal took a fairly restrictive approach to whether the injury occurred during the course of a dangerous activity in *Fallas v Mourlas* 65 NSWLR 418. The facts are that four men drove 300km from Sydney to Bathurst, had dinner and a couple of beers, and then went to 'spotlight kangaroos'. The claimant was holding a spotlight in the vehicle and the other 3 men were shooting at the kangaroos. When the defendant got back into the vehicle with his gun still loaded he and the claimant engaged in debate about whether the gun was loaded. The defendant tried to un-jam his gun, and it went off shooting the claimant in the leg.

87. The Court held that, although the claimant was engaged in a dangerous recreational activity with an obvious risk, it was not that risk that materialised. Rather the gross negligence of the defendant was so extreme, that it did not constitute an obvious harm.

88. Interestingly in *Falvo* (discussed above) the Court of Appeal commented that while amateur sports such as Oztag and touch rugby may not fall into the category of a dangerous activity with significant risk of physical harm, other sports such as football, cricket, hockey etc would fall within the definition.

[21] *CLA* s.5L

89. In *Lormine Pty Ltd & Anor v Xuereb* [2006] NSWCA 200 the claimant sustained injuries when a rogue wave swept her overboard whilst participating in a dolphin watching cruise. The Court of Appeal again took quite a restrictive approach to dangerous activities finding that the harm suffered by the claimant was not as a result of a materialisation of an obvious risk, but rather as a result of the ship captain's want of reasonable care and skill.

Road Authorities

90. Section 45(1) of the *CLA* provides a partial immunity for highway authorities mandating that a roads authority is not liable for harm arising from a failure to either carry out road work, or to consider carrying out road work, unless the authority has **actual** knowledge of the risk that materialises.

91. The relevant parts of s 45 of the Civil Liability Act state:

> "*45. Special Non-Feasance Protection for Road Authorities*
>
> *(1) A roads authority is not liable in proceedings for civil liability to which this Part applies for harm arising from a failure of the authority to carry out road work, or to consider carrying out road work, unless at the time of the alleged failure the authority had actual knowledge of the particular risk the materialisation of which resulted in the harm.*
>
> *(2) This section does not operate:*
>
> *(a) To create a duty of care in respect of a risk merely because a road authority has actual knowledge of the risk, or*

(b) To affect any standard of care that would otherwise be applicable in respect of a risk.

(3) *In this section "carry out road work" means carry out any activity in connection with the construction, erection, installation, maintenance, inspection, repair, removal or replacement of a roadwork within the meaning of the Roads Act 1993.*

Roads authority has the same meaning as in the Roads Act 1993."

92. The Courts have taken a restrictive approach finding that actual knowledge was not established by:

a. evidence that two Council employees walked past the area where the hole was: *Porter v Lachlan Shire Council* [2006] NSWCA 126; and

b. evidence that Council street sweepers had regularly swept gutters in the vicinity of a hole, in circumstances where the street sweepers themselves were not called, and the evidence of their supervisors was that they were not aware of the hole: *North Sydney Council v Roman* [2007] NSWCA 27.

93. In *North Sydney Council v Roman* decision the Court of Appeal considered whether or not a council could successfully rely on s 45 of the Civil Liability Act 2002 to defend a claim on the basis that it had no actual knowledge of the particular risk which in this case was an exposed hole.

94. The Council was successful in arguing that s 45 of the CLA was a complete defence to the action.

95. The plaintiff, Maria Roman, suffered a fractured ankle when she fell into a pothole half a metre wide and about four to five inches deep. She brought proceedings against North Sydney Council (the defendant) alleging that it had been negligent.

96. The evidence established that council street sweepers regularly swept the gutters in the vicinity of the hole. The street sweepers were instructed to identify hazards which needed attention and report them to their supervisor. The plaintiff argued that the street sweepers' actual knowledge of the pothole could be inferred from the regularity of those duties and that their knowledge was attributable to the defendant.

97. The defendant did not call the street sweepers but called evidence from their supervisors and people responsible for repairing the potholes. They all said that they had not known of the pothole. They said that if they had been aware they would have regarded it as a hazard.

98. The primary judge inferred the street sweepers had actual knowledge of the pothole and that, for the purposes of s 45, their knowledge could be attributed to the defendant. She also found the defendant had breached its duty of care by leaving the pothole in a place where a person getting into or out of a car might reasonably be expected to step. She awarded the plaintiff the sum of $475,485.

99. The primary judge held:

"*In having called no evidence from any sweeper who worked in that area nor from the person who was directly in charge of the street repair workers I can comfortably find that the council had knowledge of the hole from the time well before the plaintiff's fall and took no steps to rectify it.*"

100. On appeal, the defendant submitted that to find actual knowledge for the purposes of s 45 it was necessary that there be a connection between the person with actual knowledge of the particular risk and the

person able to, but who failed to, carry out the roadwork which would have avoided the harm which materialised. It argued that, even if it was assumed a street sweeper had actual knowledge of the pothole, such knowledge was not sufficient because street sweepers did not carry out repairs.

101. The appeal was allowed. Basten JA held as follows:

"*The section confers an immunity on a roads authority where harm arises 'from a failure of the authority to carry out road work'. The exception only arises where 'at the time of the alleged failure' the authority had actual knowledge of the particular risk. A purposive construction would require that the relevant knowledge exist in an officer responsible for exercising the power of the authority to mitigate the harm. The existence of the power is only coupled with a duty to act in circumstances where such knowledge exists. Accordingly, the knowledge must exist at or above the level of the officer responsible for undertaking necessary repairs. The knowledge of others without such responsibility will not, relevantly for the purposes of the provision, constitute 'actual knowledge' of the roads authority itself; at best it could give rise to 'constructive' or imputed knowledge…*"

102. There have now been four Court of Appeal decisions which considered the application of s 45 of the Civil Liability Act.

103. In *Leichhardt Council -v- Serratore* [2005] NSWCA 406, Giles JA concluded that for the purposes of s 45, actual knowledge could be inferred.

104. In the decision of *Porter -v- Lachlan Shire Council* [2006] NSWCA 126 the primary judge held the plaintiff could not prove actual knowledge for the purposes of s 45 by calling evidence "*that two council employees walked past the area and … there was a hole there*". The council employees had been present in the area to inspect the site where building works were to be carried out. Hodgson JA held that his

Honour was not in error in deciding the plaintiff had not proved the defendant had actual knowledge of the hole.

105. The third case in which s 45 was referred to is *Port Stephens Council-v-Theodorakis* [2006] NSWCA 70 which involved an unsuccessful application for leave to appeal from the decision in favour of a plaintiff who tripped and fell on a footpath. Bryson JA observed that s 45 posed "*no real difficulty*" to the appellant in circumstances where the council's records showed that as part of a systematic observation of the footpath in which a number of defects were recorded, officers observed the 20 mm lip on or shortly before 30 November 2000. Bryson JA said directly in relation to s 42 of the Civil Liability Act and implicitly in relation to s 45 that if those provisions were to be relied upon they should be pleaded, a duty which was discharged in the defence in the present case.

106. Apart from the decision of *Leichhart Council -v- Serratore*, the Court of Appeal has taken a restrictive interpretation to the section in relation to what constitutes actual knowledge.

107. The decision will be of assistance for road authorities in defending claims where it cannot be proven that a council officer at decision making level had actual knowledge of the particular risk.

Occupier's Liability

108. In *C G Maloney Pty Ltd v Hutton-Potts and Another* [2006] NSWCA 136, the Court of Appeal held that a hotel occupier and a cleaner were equally liable for a woman's injury when she slipped and fell on spilt floor polish. The Court considered that the hotel-occupier should have done more than place a warning sign that could easily be overlooked. Being in control of the premises, it should have roped off the area being cleaned or otherwise prevented access. That would not have involved great expense or inconvenience where there was an

appreciable risk of not trivial physical injury for hotel entrants. Similarly, the cleaner was careless in failing to remove the unbuffed polish [120]. The hotel occupier and cleaner were found to be equally liable.

109. In *Consolidated Broken Hill Ltd v Edwards* [2005] NSWCA 380 the Court of Appeal held that the standard of care which an occupier of private land owes to a claimant will generally be greater than that owed by a local authority which occupies large tracts of public land.

110. In *Shellharbour City Council v Rhiannon Rigby & Anor* [2006] NSWCA 308 the Court of Appeal considered a claim for damages following a 13 year old's accident on a local BMX bike track. The Court accepted that both the local Council and the Club that set up the bike track exercised a degree of control over the track and in particular over a starting ramp which enabled users of the track to gain considerable momentum and caused the majority of the injuries. It is likely that the age of the potential entrants (in part) motivated the Court's finding that a higher standard of care was owed because the children would be less cognisant of risks.

111. In *Skulander v Willoughby City Council* [2007] NSWCA 116 the fact that an accident would not have occurred but for a plaintiff's inattention, while relevant to breach of duty, generally will not of itself negative a duty of care. This is particularly so when a plaintiff's inattention is foreseeable by the surrounding circumstances.

112. The defendant installed carbon monoxide detectors on pillars at a bus interchange, which were at about head height. Due to vandalism of these detectors, the defendant had built yellow steel cages around the detectors.

113. The plaintiff walked along a footpath close to a wall, at the end of which was a pillar fitted with a carbon monoxide detector. As she walked, she dialled her mobile telephone. While she was distracted, she

walked past a caged detector, striking her head and causing a hyperextension injury to the neck.

114. While the defendant did not concede breach of duty of care, the plaintiff conceded that, due to her inattention, a finding of contributory negligence was appropriate. The trial judge found that the defendant did not owe the plaintiff a duty of care in the circumstances and entered a verdict for the defendant.

115. On Appeal, all three judges found, contrary to the trial judge, that the defendant owed the plaintiff a duty of care. They differed as to whether this duty had been breached.

116. Basten JA acknowledged that the metal cage posed a hazard principally to pedestrians failing to keep a proper lookout. A standard of care, however, must take into account the possibility that plaintiffs will be inadvertent, since the prospect of a pedestrian striking her head gave rise to the risk of significant injury, it was not a risk that a reasonable person could reasonably disregard. The response to the risk was, in his view, straightforward. He found the plaintiff to have been 50% contributorally negligent in the causation of the accident, based on her failure to keep a proper lookout while she used her mobile telephone.

117. The Court of Appeal has reiterated that, even if an accident would not occur unless a plaintiff was not taking proper care for her own safety, this does not necessarily negative the existence of a duty of care. This is particularly so in circumstances where plaintiffs can be expected to have other calls on their attention.

118. In the matter of *Blackwood & Son Steel & Metals Pty Limited v Nicholas* [2007] NSCA 157, The Court of Appeal held that the duty of care owed by an occupier to an experienced independent contractor does not require the occupier to provide the contractor with a safe system of work once the activity has been organised and its operation

is in the hands of the independent contractor. The Court of Appeal also held that the duty to provide safe access to a place of work under the Occupational Health & Safety Regulation 2001 was confined to the provision and maintenance of safe access to a worker's place of work – ie the regulation is not directed to circumstances where a worker is already at his or her place of work.

119. The plaintiff was an experienced driver of prime movers and trailers and had been employed in that capacity for some six years. The plaintiff was injured at the premises of the defendant when he fell off the back of his trailer whilst trying to tie down a load of steel which had just been loaded onto his truck. The load moved under his feet, he lost his balance and fell, sustaining serious injuries. .

120. There was evidence that neither a representative of the defendant nor the employer had ever informed the plaintiff that it was unsafe to place his dogs on the chains whilst standing on top of his load. There was also evidence from the defendant that there was a stepladder and an access platform on site which would have been available to the plaintiff if required. The plaintiff was unaware of the availability of these items.

121. There was evidence that on many occasions representatives of the defendant had been present when the plaintiff was tying down his load and had never said anything to him about the safety or otherwise of the plaintiff standing on top of his load and tightening the chains. There was also evidence as to instructions given by the defendant to its own employees who worked as truck drivers in relation to safe loading methods. Those instructions were not however extended to independent contractors such as the plaintiff.

122. The Trial Judge took the view that the function exercised by the plaintiff in securing his load was no different from that of an employee of the defendant. His Honour considered that, had the defendant had in place a system whereby all drivers, including contractors such as the plaintiff, were given adequate instruction and provided with a means to

secure loads without standing on them, the accident could have been avoided. His Honour considered that as the risk of injury to the plaintiff was "readily identifiable" and had also been observed by the defendant on a daily basis, the defendant was in a position to control the loading procedures on its premises even where contractors were involved.

123. Although the plaintiff had considerable experience in securing loads on trucks, his Honour considered he had been given little choice about how to do so and had never been given proper instructions. Accordingly, his Honour concluded that the defendant owed the plaintiff a duty of care which it had breached.

124. The Court of Appeal unanimously upheld the defendant's appeal. The plaintiff sought to argue that the defendant had numerous indicia of controls in relation to the loading of the plaintiff's truck and the procedures which were to be employed in this. The defendant submitted that its only direct control was in the placing of the steel products upon the trailer of the plaintiff's truck. Thereafter the securing of the load was left to the plaintiff. The defendant argued the circumstances of this case were very different to those in *Christie*[22] which was a case where the defendant had supplied the plaintiff with faulty equipment and had therefore actively provided a system of work which was unsafe and which the plaintiff was directed to follow. Unlike Christie, the defendant had not exercised daily control over the relevant work activities of the plaintiff, namely the securing of his load.

125. The Court of Appeal held the defendant did not owe any duty of care to the plaintiff with respect to the manner in which he secured his load.

126. An occupier does not owe a duty of care to an independent contractor to provide him or her with a safe system of work when the occupier has no control over the manner in which the contractor carries out a task which he or she is experienced in performing.

[22] TNT Australia Pty Ltd v Christie [2003] NSWCA 47

127. The decision affirms the authorities that a defendant's ability to control the manner in which a plaintiff goes about a task on the defendant's premises remains a crucial factor in determining whether there is a breach of duty in circumstances of injury to an experienced independent contractor.

Landlord's Liability

128. The New South Wales Court of Appeal has recently restated that a landlord's duty is to take reasonable care to avoid foreseeable risk of injury. Importantly, the Court has confirmed that the landlord does not have to make the premises as safe as reasonable care could make them. Therefore in *New South Wales Department of Housing v Hume & Anor* [2007] NSWCA 69 at [87] where steps had been used for many years, and could have been made safer, it did not mean that they were dangerous or defective.

Vicarious Liability

129. When the Civil Liability Act was introduced in New South Wales, Section 3B provided amongst other things that the provisions of the Act did not apply to or in respect of civil liability and awards of damages in those proceedings where the injury had been the result of an intentional act that was done with intent to cause injury or death or that was a sexual assault or other sexual misconduct except and in the case of claims for damages by criminals or where self defence was involved.

130. The Crimes and Courts Legislation Amendment Act 2006 introduced in November 2006 amended Section 3B of the Act so that whereas previously the relevant section of the Act read as follows:

> *"Civil liability in respect of an intentional act that is done within intent to cause injury or death or that is sexual assault or sexual misconduct"*

It now reads as follows:

> *"Civil liability of a person in respect of an intentional act that is done by the person with the intent to cause injury or death or that is sexual assault or other sexual misconduct committed by the person"*

131. You would be excused for thinking that basically what the amendment was trying to do was exclude the provisions of the Civil Liability Act only in relation to the actual individual who committed the intentional act. If that was the intention of the legislation then logically it would mean that somebody such as an employer who was only vicariously liable for the acts of their employees would nevertheless still have the benefit of the civil liability provisions.

132. That is certainly the way the legislation reads.

133. The Court of Appeal, however, has now considered the matter twice, the most recent being in a case in which Curwoods represented the defendant insurer *Zorom Enterprises Pty Ltd v Zabow & Ors* [2007] NSWCA 106. That case involved an assault by a security guard outside the premises of a Hotel in circumstances where it was argued that the nature of the assault was such that the guard was acting outside the scope of his employment.

134. As an alternative it was argued that even if the guard was acting within the scope of his employment and hence was found liable to the plaintiff for the assault that nevertheless his employer would still have the benefit of the Civil Liability Act and hence have the benefit of the caps on damages and in particular the prohibition by the Act that exemplary and aggravated damages are not to be awarded.

135. After finding that the guard was acting in the course of his employment albeit performing an authorised act in an unauthorised manner, the Court of Appeal and more specifically His Honour Mr Justice Basten said that an interpretation of the amendment to the effect that the only person who was not protected by the Civil Liability Act was the individual who committed the intentional act "*seeks to stretch the language, albeit in the opposite direction, so as to give the narrowest possible exclusionary effect to the provision*".

136. The Court said that doing this required that the civil liability of the employer involved some different form of liability from that of the employee which in the Court of Appeal's opinion it did not.

137. His Honour Mr Justice Basten relevantly said as follows:

> *"Rather, it is sufficient to identify the liability of the employer as derivative from, but not in substance different from that of the employee. There is no purpose or policy underlying the Civil Liability Act which would suggest that a different approach should be taken to the civil liability of the employee as compared with that of the employer when each is in respect of an intentional tort. The employee does not escape liability, under the general law, by demonstrating that it did not have the intentions of its employee. So, for the purposes of Section 3B(1)(a) of the Civil Liability Act, the act is that of the employer as is the intention."*

138. The general law has of course been amended by the Civil Liability Act.

139. His Honour's interpretation begs the rhetorical question:

> *"If the provisions of the Act in the amended form are no different to the provisions of the Act in their unamended form so that anyone who has vicarious liability for an intentional act is still precluded from relying on the Civil Liability Act, what was the purpose of the amendment in the first place?"*

140. An application for Special Leave to the High Court has been lodged by the underwriters.

Self Defence

141. There are a number of provisions of the Act[23] which deal with injuries which are occasioned as a result of a Defendant acting in self defence. Specifically Sections 52 and 53.

142. Without delving into these sections in detail briefly they provide that a person being a defendant does not occur at a liability arising from any conduct of the person carried out in self defence and Section 52 then goes on to set out the circumstances in which self defence would apply. Section 53 provides that if a person was acting in self defence but used unreasonable force then there are still limitations which are applicable to the recovery of damages accepting in certain circumstances.

143. The District Court of NSW demonstrates an inconsistent approach to those provision. One District Court Judge determine that a security guard who was attempting to evict some people involved in a brawl from a hotel was acting within the scope of his employment but insofar as the plaintiff was concerned, not acting in self defence when he allegedly injured the plaintiff.

144. The Court determined that the injuries to the plaintiff occurred when the guard used unnecessary and unreasonable force to evict the plaintiff from the hotel in the circumstances where the Court did not believe that the plaintiff was actually one of the individuals involved in the brawl notwithstanding that the guard's sworn evidence was to the effect that the only people who he touched were those who were assaulting a barman and who he was trying to drag off the barman. This is an example where a District Court Judge engineered a situation for the

[23] NSW Civil Liability Act 2002

plaintiff to succeed by limiting the provisions of the Act by making specific factual findings which on the evidence were not supported.

145. That matter is also the subject of consideration for an appeal.

Significant Quantum Issues: Public Liability

146. The Reform Acts limit the determination of damages for non-economic loss in two ways:

a. First in order to be able to seek damages, the non-economic loss component must be at least 15% of the "most extreme case". The maximum for the recovery of non-economic loss is indexed annually as at 1 October and it is currently $427,000.

b. Second, gratuitous services is limited, unless the claimant can establish a need for a minimum of 6 hours per week for 6 months.

147. In the last 12 months we have seen:

a. A marked reluctance by the New South Wales Court of Appeal to alter the award for non-economic loss ordered by the trial judge so long as it is not outside of range of sound discretionary judgment. The Court has indicated that it will only disturb findings below where it is "wholly erroneous" and "so unreasonable and plainly unjust that error in the exercise of the discretion must be inferred" : *C G Maloney Pty Ltd v Hutton-Potts and Another* [2006] NSWCA 136; *Fitness First Australia Pty Ltd v Vittenberg* [2005] NSWCA 376; *Jopling v Isaac* [2006] NSWCA 299.

b. A finding that 25% ($28,000) of a most extreme case was reasonable for a broken leg and some scarring for a 14 year old

girl: *Martin v. The Trustees of the Roman Catholic Church of the Archdiocese of Sydney* [2006] NSWCA 132.

c. A finding in the District Court of 28% ($60,000) of a most extreme case for an 18 year old's fractured ankle. Whilst the Court of Appeal indicated that it would not have considered that it exceeded 20% ($15,000), as the respondent had conceded that 23-25% ($21,500 - $28,000) was reasonable, 28% was not outside the range of what was reasonable: *Porter v. Lachlan Shire Council* [2006] NSWCA 126.

d. A finding of 35% ($149,500) of a most extreme case for a fracture of the left leg with a greater likelihood of arthritis in the left knee in the future: *Fitness First Australia Pty Ltd v Vittenberg* [2005] NSWCA 376.

e. A finding that 28% ($60,000) of a most extreme case was not outside the range of what was reasonable for a fractured patella with restrictions in squatting, kneeling, walking, running and with scarring and muscle wasting: *Jopling v Isaac* [2006] NSWCA 299

148. Putting non-economic loss to one side, the New South Wales Court of Appeal has also made findings relating to other aspects of damages for personal injuries. For example, the Court of Appeal has determined that claimants will not automatically be awarded a buffer for future economic loss because they may suffer some disadvantage by reason of an injury caused by the defendant. Rather there must be an "unquestionable reduction in earning capacity before a claimant is entitled to a buffer: *Sophie Fegan by her tutor Inga Rozenauers v Lane Cove House Pty Limited* [2007] NSWCA 88.

149. In Queensland the Reform Acts also significantly reduced claimants' entitlements for damages, however the courts appear to have taken a favourable attitude towards claimants in awarding damages for past

and future economic loss often despite evidence of a poor past work history or issues of credit.

a. In *McMillan v Kissick & Anor* [2006] QSC 202 a 25 year old plaintiff suffered whiplash in a motor vehicle accident which lead to a chronic pain disorder and a narcotic dependency. Whilst he had worked consistently as a labourer, he had not held any one job for any length of time. He had a poor social history having served a three month jail sentence at the age of 17 years for the manslaughter of his then girlfriend's three month old child, domestic violence orders, drug use, binge drinking, psychological problems including depression and suicidal feelings and a criminal history in South Australia. Douglas J awarded the plaintiff a total of $620,560.07, including $111,843 for past economic loss and $317,995.20 for future economic loss, which took into account employment until 65, but discounted by 40% taking into account his future prospects of employment.

b. In *Wells v Abbotsleigh Citrus* [2006] QSC 355, the claimant injured her back whilst working, cleaning a post harvest machine. The claimant had no particular job skills, a poor work history prior to the accident, had not worked since the accident, and was receiving a disability pension. There was also evidence of mental health issues, and drug and alcohol abuse. Dutney J assessed the claimant's claim for future loss of income at two thirds of her capacity at the time she was injured, awarding the claimant $392,350.98 which included $77,400 for past economic loss and $205,800 for future economic loss.

c. The Court of Appeal in *Moore v Kelly & Anor* [2006] QCA 380 awarded a 57 year old former plumber $85,000 for past and future economic loss. The claimant's plumbing business went into liquidation in the early 1990s and he had not worked since that time until his injury. The trial judge assessed that the

claimant had a 20% chance of working until retirement at an age of between 60 to 65 years. The Court of Appeal upheld the trial judge's assessment.

Conclusions

150. The Reform Acts in each State and Territory have had an impact on the volume of predominantly personal injury litigation in each jurisdiction. However, it can be said that defendant insurers are square with plaintiffs?

151. The statistics show that the Reform Acts have had the effect of reducing the volume of claims in each jurisdiction, perhaps with the exception of Queensland. This was only to be expected whilst both the legal profession and judiciary, came to terms with the Reform Acts and their interpretation.

152. As can be seen from the contents of this paper, both the plaintiffs' lawyers and judiciary have come to terms with the operation and effect of the Reform Acts. In coming to terms with the Reform Acts, the judiciary is moving away from their initial black letter law interpretation of the Acts and exercising greater discretion in interpreting the restrictive provisions of the Reform Acts to give judgments favourable and more generous to plaintiffs. The exception appears to be in relation to public authorities such as Councils.

153. The quantum of damages being awarded is still less than pre-Reform Acts, however as demonstrated in this paper, the quantum of awards is slowly creeping upwards and the duration of cases lengthening.

154. What the Reform Acts have achieved, is a reduction in the small, volume, claims such as slip and falls in shopping centres. However, if the pendulum is in the plaintiff's favour as suggested by Justice Ipp, it

may only be a matter of time before plaintiff solicitors regain their confidence to pursue claims of lesser value.

155. Whilst the situation has not, and is unlikely to return to the volume of litigation or generosity of awards pre Reform Acts, the Reform Acts have not provided the desired certainty to awards with the exercise of judicial discretion in the interpretation of the Reform Acts as can be seen from the foregoing case examples.

156. Notwithstanding the continued swing of the pendulum, it must be said that the insurance crisis has been resolved and that the Ipp Review and resulting Reform Acts have been successful in reducing both the number of claims and size of awards.