Negligence and damages – personal injury, property damage and pure economic loss

Speech given by Tim Bugg, President-elect, Law Council of Australia

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I confess that I was somewhat aghast when I first learned of the speaking topic I had inherited. The law of negligence and related damages is a vast area of law. In the time permitted it is possible to do little more than give a general narrative of how it has developed in common law legal systems and to comment on some of the threshold issues now being encountered by lawyers, primarily from the Australian perspective.

I shall begin by setting the scene, discussing the history and growth of tort law and of the insurance industry. I shall then address three key justifications for the law of negligence and consider the extent to which they continue to have relevance in today’s society. Finally, I shall outline the Australian experience in recent years. It holds many lessons for jurisdictions considering embarking on legislative reform of the law of negligence.

Introduction – “setting the scene”

Under the common law the law of negligence, or “tort law”, has existed since early last century under the basic principle that those who suffer harm through the fault of another should be compensated for their losses. “Harm”, in this context, covers all forms of injury or loss, including:

- temporary or permanent physical impairment or restriction, which is commonly placed under the heading: “pain and suffering”;
- damage to personal property, and
- pure economic loss, encompassing past losses and predicted future loss of income and opportunity.

Modern notions of tort law

The modern doctrine of tort law was born out of the landmark House of Lords case, Donoghue v Stevenson, which, many of you will be aware, concerned a consumer’s right to claim damages from a manufacturer of bottled ginger beer for nervous shock induced by the discovery of a fermenting snail in the bottle, after its contents had been drunk. The significance of that case was not that a person could claim damages from a person or, in that case, a company. Rather, it was the extension of the concept of a “duty of care”. Prior to Donoghue v Stevenson it was considered that there had to be some relationship between the plaintiff and the defendant for a duty of care to exist. However, in Donoghue v Stevenson it was determined that a person has a duty of care to anyone who could be foreseeably harmed by their actions (or omissions).
Decades of debate, jurisprudence and statutory intervention have refined and molded the concepts underlying the law of negligence. However, the core principles have remained the same. In other words, a plaintiff is entitled to damages from a defendant if:

1. the defendant owed the plaintiff a duty of care;
2. the defendant breached that duty, and
3. the plaintiff has suffered loss or damage as a result.

Courts in various common law and civil law systems throughout the world have applied similar principles to the law of negligence. In recent times, this has given rise to debate about both the appropriate standards to be applied and who should bear the rising cost of compensating a person who has suffered loss as a result of the negligence of another. This has very much been the case in Australia during the last five years, with the so called tort law reform debate.

**The growth of the insurance industry**

The insurance industry has in many ways grown with the development of the law of negligence. Of course, insurance has existed and been available in a variety of forms for centuries. The earliest forms of insurance existed to give merchant traders surety against the losses they might incur through the sinking of a ship carrying merchandise. The Greeks and Romans were allegedly the first to develop health and life insurance through the establishment of “benevolent societies” that would care for the families and funeral expenses of families of a member upon their death. Housing insurance was conceived following the great fire of London in 1666, in which over 13,000 houses were destroyed.

The rapid development of insurance as a commercial industry ensured that, wherever a loss could be incurred, there would be someone to underwrite that loss. Accordingly, it is no surprise that when people began to sue each other for damages resulting from personal injury or property damage, insurance became available to protect people from the full consequences of their negligence or the negligence of another.

Today, in Western societies, insurance is a common feature of everyday life. It is often an essential requirement for business or any form of activity involving risk. Third party personal injury insurance is a compulsory feature of registration of motor vehicles in every Australian State and Territory, to ensure that as far as is reasonably possible the often catastrophic losses faced by people injured in motor vehicles are met. Professional indemnity insurance is compulsory for lawyers, accountants and other professionals in order to protect clients against economic and other losses resulting from their negligence. Public liability
insurance exists to protect those involved in many areas of endeavour and has become almost a requirement for any person or company involved in an organised activity or event. It is even a feature of domestic household insurance.

All of this has arisen from the notion that a duty of care extends to any activity in which there is a foreseeable risk of harm to others. Insurance means that major losses, which would ordinarily be impossible for an individual to meet, are spread across the community of insurance policy holders. In most cases, it is unlikely that individuals could meet the true cost of an injury or loss they have caused to another person. Insurance has provided a solution to that problem, allowing the broader “community” to meet the losses of an unfortunate “individual”.

The rationale for tort law

There is often a broader debate about the appropriateness of tort law for dealing with civil wrongs caused by negligent or thoughtless behaviour. Personal injury lawyers have often been accused of inciting a culture of blame and greed and increasing the costs involved in an already expensive scheme of compensation and restitution. The existence of insurance has provided a deep-pocketed defendant for plaintiffs to pursue for losses. Insurers argue that this has engendered a sympathetic attitude by the courts to plaintiffs, in the belief that insurers are better placed to bear the losses. The alternative postulated by opponents of the tort law system is no-fault compensation schemes.

There are three principal functions served by the law of negligence which can be considered as good justification for its existence:

1. to provide fair and just compensation for those who have suffered loss through no fault of their own;

2. to provide a deterrent against negligent or harmful conduct, and

3. to enable fair allocation of responsibility among wrongdoers.

It can be said that the law of negligence is integral to the healthy functioning of society.
Compensation

It seems only fair to most that those harmed by another's negligence should, as far as is reasonably possible, be restored to the position they were in prior to the injury or damage.

This tends to be an easier task in the case of pure economic loss and property damage, but tends to be more difficult in the case of non-economic loss. For example, how accurate can one be in quantifying the loss a person suffers through the loss of the capacity to walk, or see, or raise their arms, or move their fingers? Although courts have, with varying degrees of success, demonstrated a capacity to provide a reasonable assessment of damages to compensate a plaintiff for these types of personal loss, the disparity between awards of damages given in the various Australian jurisdictions underscores that it is no easy task.

The subjective nature of injury tends to limit the usefulness of referring to objective criteria in this analysis. For example, a builder or athlete who suffers a debilitating back injury in an accident is more likely to have quality of life substantially reduced by that injury than someone in a physically less active occupation. Similarly, a concert pianist who loses a finger will almost certainly be more dramatically affected than a butcher who suffers the same fate. There will also be other characteristics peculiar to physically injured plaintiffs that affect their level of impairment or the severity of their loss, such as age, infirmity, lifestyle (fit, active, family), reliance on others, etc.

It is a long standing principle of the law of negligence that people should be fairly compensated for all reasonably foreseeable losses arising from injury or damage caused by another person’s negligence. This is a principle that is derived from the public perception of what is fair and just. However, as I shall outline later, it is also true to say that the public view of what is fair and just can change according to the prevailing circumstances.

Deterrence

The principle of deterrence supports the proposition that negligence, like any behaviour resulting in harm to others, should be discouraged. The law of negligence provides this deterrent by requiring people to pay damages to those they harm. It is also argued that people will be less inclined to engage in dangerous or careless behaviour if they, rather than society at large, are required to bear the cost of that negligence.

No-fault schemes, which provide compensation to individuals who are injured, regardless of whether or not they are at fault, have been implemented by some governments as an alternative to fault based compensation. Such schemes can be
appealing to governments and policy makers as they are designed to provide care and rehabilitation for people, regardless of who is to blame. For example, such schemes operate with some success in certain Australian jurisdictions with respect to workers compensation. In New South Wales, the Government has, for some time, sought to introduce a scheme to fund the long term care of catastrophically injured people, regardless of who was at fault for the injury. A more expansive no-fault scheme has been on foot in New Zealand since 1992, though the reports on the success of that scheme have not been promising. A successful no-fault scheme for victims of motor vehicle accidents has operated in my home State of Tasmania since 1973.

Time militates against me detailing the virtues and limitations of no-fault schemes and I would simply suggest that, at a philosophical level, no-fault schemes tend to conflict with the fundamental aim of deterring wrongful conduct. It can be fairly said that if people are not met with the consequences of their negligence they will not feel compelled to take care to prevent injury to others.

**Responsibility**

The final principle on which the law of negligence is based is responsibility. This is intrinsically linked to both societal and individual concepts of fairness and justice. Individuals should be required to take responsibility for their actions, either by paying for the damage they cause or, more commonly, by obtaining appropriate insurance to meet those losses.

Social responsibility is often raised as a justification for no-fault schemes. That is, society, not the individual, should accept responsibility to ensure injured people are well looked after, regardless of who is at fault. A major defect in this argument is that the needs of injured people often cost far more than society is willing to pay.

For many years, courts in common law jurisdictions have, I would say successfully, assumed the role of attributing responsibility to those who have failed in their obligation to take reasonable care. Employers have been held responsible for failing to provide a reasonably safe work environment for their employees. Public and private entities have been held liable for failing to take proper responsibility for addressing such things as unsafe buildings and public spaces.

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3 Interestingly, this statement has been made repeatedly by the President of the Insurance Council of Australia in the context of decrying the unreasonable expectations of individuals, who expect others to meet the costs of all of their misfortunes.
In Australia, local government bodies have been held liable to pay significant sums to plaintiffs who have been injured when they were not properly warned of the dangers of what might be considered by some to be everyday activities, such as diving into a river or the sea from a jetty. If negligent, the relevant body has been made responsible for its negligence.

**Tort law reform in Australia**

The last five years or so have seen a period of dramatic change to the law of negligence in Australia. Statutory “reforms” in each State and Territory jurisdiction have shifted the balance of the law away from plaintiffs and towards defendants who are typically insurers or government authorities, making it more difficult for injured people to sue for damages.

Reforms have been introduced in response to claims by the insurance industry and certain sections of government that Australia had become a litigious society, a “culture of blame”, in which everyone was under the illusion that somebody else had to pay for their misfortunes.

Following the very public collapse in 2001 of HIH Insurance, Australia’s then largest commercial insurer, a number of insurers dramatically increased their insurance premiums, particularly for public liability and professional indemnity cover. It was claimed that increased claims and legal costs and an increasing number of large compensation awards handed down by the courts had contributed to a situation where public liability insurance was virtually unaffordable. The empirical basis for these claims was not made public, but was concealed behind a veil of commercial sensitivity.

Of course, there were factors affecting the insurance industry at the time, such as the September 11 terrorist attacks in New York; aggressive and irresponsible premium pricing lead by HIH Insurance, which culminated in its collapse; a higher than usual number of natural disasters over the period; and an oppressive taxation regime for insurers in Australia. These significant factors were virtually ignored in favour of the more popular theory that the legal system was to blame.

Politically, the insurance crisis was a great challenge for Australia’s Federal, State and Territory Governments. Journalists and other commentators named the crisis “The Death of Fun”, as the affordability of insurance for public events had effectively caused the cancellation or closure of a number of public facilities and events. Some predicted the closure of public parks and beaches and the cancellation of concerts and festivals due to the prohibitive cost of public liability insurance.
The Federal Government responded by commissioning a Review of the Law of Negligence, which was intended to provide a principled basis for reform of personal injury laws.

Unfortunately, what has resulted is a mezzanine of different legislative schemes in each jurisdiction, riddled with inconsistencies at every level. For example, in NSW, Queensland and Victoria, physical impairment thresholds to be crossed before an injured person can recover damages were introduced. These require examining physicians to arrive at a numerical determination of the level of impairment suffered by an injured person in an accident, based on standard tables set out in the American Medical Association Whole-Person Impairment Guidelines.

The thresholds set by each jurisdiction vary considerably and, in some cases, vary within the same jurisdiction! In NSW a different threshold will apply depending on whether an injury occurs when you are driving a car, walking through a shopping mall or carrying out manual labour at work. The situation is only slightly better in Queensland and Victoria and in all three States the procedural impediments to bringing a common law claim add significantly to the thresholds already in place.

The most significant aspect of what has occurred in Australia is a shift in the ideology underlying the compensation needs of the injured. Previously, fair and adequate compensation was viewed as a fundamental common law right, a right of restitution, which allowed faultless injured people a sense that justice had been done. Now it appears compensation is viewed as a discretionary financial interest, one which must compete with insurance premiums and other political concerns.

Three years after some of the most significant reforms were introduced there is a growing number of calls for some of the tort law changes to be rolled back. Increasing numbers of injured people are receiving either no compensation or grossly inadequate compensation and there are reports of the high profits of the Australian insurance industry which last year claimed a record profit of $3.252 billion. Chief Justice Spigelman of the NSW Supreme Court, when speaking last year at the Commonwealth Law Congress in London stated that tort law reform had gone too far. Judges in other States have raised similar concerns. Many commentators now agree that there is significant injustice being done to those injured through the negligence of others. Even insurers privately acknowledge that tort law reforms may have gone too far. Many critics of the reforms agree that there is a clear lack of any principled basis upon which the reforms have proceeded.

4 Law Society of NSW, 2005, Submission to the NSW Upper House General Standing Committee No.1
An excellent demonstration of this lack of principled reform is found in Tasmania. In 2001 the Tasmanian Government introduced sweeping changes to that State’s workers compensation system in response to rising insurance premiums. A 30% whole of person impairment threshold was introduced, restricting access to common law damages only to those who can establish they have suffered injury resulting in impairment to that extent.

Whilst 30% may not sound like a high threshold, under a “whole body” impairment scale, many severe, debilitating injuries will fall short of the threshold. It excludes, for example, most back and neck injuries. It also excludes loss of fingers, most injuries to shoulders, elbows, wrists, knees and ankles, even when they have required significant medical intervention, and limit the injured person’s ability to work and undertake normal daily activities. Similarly, psychological injury and skin conditions, including severe burns and scarring to the face or body, are excluded.

An unjust result of the workers compensation laws in Tasmania is that a worker’s right to claim damages, despite the presence of negligence, can be different from that of another person injured in the same circumstances. For example, a person hit by a falling brick while walking past a building site may be entitled to claim damages from those responsible for the building site whereas a worker on that building site injured in the same way may not be because of that worker’s level of resulting impairment.

Another unfortunate effect of impairment thresholds is the inability when assessing impairment to take any account of the subjective impact of an injury on a person’s way of life. A butcher who loses a finger may well return to work on the day after the injury, while a concert pianist afflicted with the same injury will never perform again.

In Tasmania and a number of other Australian jurisdictions, the ‘pendulum’ of tort law reform has swung too far and some correction is necessary.

**Conclusion**

The Australian experience holds many lessons for countries considering statutory reform of tort law. Good reason for the reform of tort law to the extent seen in Australia must be clearly shown. The reforms which have occurred have robbed many seriously injured people of the right to seek fair compensation from the wrongdoer. In the meantime, perhaps the most vocal proponent of legislated tort law reform, the insurance industry, has experienced considerable financial gain.
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