

MIIAA  
MEDICAL INDEMNITY FORUM  
TORT REFORM – 2007

**A DEFENDANT’S PERSPECTIVE**

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When the Honourable Justice Ipp was commissioned to inquire into the law of negligence it was with the expectation the panel would

*“...examine a method for the reform of the common law with the objective of **limiting** liability and **quantum** of damages arising from personal injury and death...”<sup>1</sup>*

The containment of insurance premiums was the end point of the review. This is a reminder that the suite of legislation we have been working with now for near on 5 years started out as a review of a profit and loss spread sheet. Many of the reforms are neither complicated nor difficult to apply. The transition from using a 5% as opposed to a 3% table, considering whether an injury is at least 15% of a worst case, determining the applicability of a contributory negligence set off, re-calibrating the plaintiffs costs recovery for a small claim or assessing the standard of care on the basis of a modified Bolam test or some other test has not been difficult to apply. These reforms have indeed had an impact. The end point has been achieved – claim numbers have been reduced. The profit and loss account is in the black. The NSW Supreme Court Professional negligence list filings<sup>2</sup> confirm the impact of the reforms.

	2001	2002	2003	2004	2005	2006	2007 ytd
<hr/> <b>COMMON LAW DIVISION – CIVIL</b> <hr/>							
<b>Professional Negligence List</b>							
Filings 2	259	111	101	117	114	142	67

Whilst the cap on damages and the reliance on a 5% discount table will have an effect on the value of a claim, once filed, of themselves each would not result in a claims reduction. Similarly the expansion of the reliance on the defence of assumption of risk, and contributory negligence, has also had an impact on the value of a small number of claims but has not to a significant extent resulted in a reduced number of claims. Moreover what the statistics do not show is whether the cost of each litigated claim has increased through more rigorous preparation – my sense is legal costs have increased.

The reduction in claim numbers has occurred as a result of the reforms directed at establishing a liability and in particular the standard of care. It is these reforms that challenge the very basis of a claim. Where a liability cannot be established or can

<sup>1</sup> Terms of Reference: Review of the Law of Negligence – August 2002, Report to the Commonwealth Government, Department of Treasury

<sup>2</sup> Supreme Court Annual Reviews

only be established on an arguable basis there would be a justifiable reticence to filing a claim.

It is palpably obvious the tide has turned and the blank scorecard has returned – or has it?

*“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”.*<sup>3</sup>

This was a comment made by the Honourable Justice Ipp in March of this year. The Chief Justice of New South Wales, James Spigelman, has said he considers that the 'statutory changes have gone too far' and were implemented 'without full appreciation of the extent to which judicial attitudes had already changed and were changing'<sup>4</sup>. The authors of each of these statements are judicial officers – in light of my comments below this is perhaps of more than just passing interest. Do these comments perhaps reflect a shift in attitude? Are they indicative of a groundswell of concern the reforms may have favoured the insurers at the expense of the plaintiff's. The Honourable Justice Ipp also said “...I approve of those reforms that the panel recommended. In many respects, the reforming legislation goes further, sometimes much further, than the recommendations...”<sup>5</sup>.

If these comments from Ipp and Spigelman are representative of a groundswell the legislature has indeed been resistant to change – I do not see nor has there been a legislative claw back. Given the level of debate, the reviews, reports and commentary since the reforms were introduced in 2002, the reforms must be here to stay.

However the plaintiffs' pleas for help have not gone unnoticed. Where the legislature has been resistant to change the judiciary has not. Whilst perhaps slow to comment we are now seeing judicial interpretation of some aspects of the legislative reform. This judicial interpretation has resulted in a dilution of some of the key elements of the reforms and has resulted in a greater accessibility. I anticipate an increase in claims volume.

Judicial hotbeds have arisen in relation to the definition and interpretation of the standard of care and the interpretation of the limitation periods. Finally, brief mention should be made of section 5D in our NSW legislation – a sleeping duck when it comes to factual causation/warnings but none the less ripe for some judicial dilution.

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<sup>3</sup> Honourable Justice Ipp Judge of Appeal, Court of Appeal, Supreme Court of New South Wales *The Metamorphosis of Slip and Fall*, Paper delivered on 30 March 2007 to the New South Wales State Conference of the Australian Lawyers Alliance

<sup>4</sup> *Negligence: Is Recovery For Personal Injury Too Generous?* Address By The Honourable J J Spigelman AC Chief Justice of New South Wales To The 14th Commonwealth Law Conference, London 14 September 2005

<sup>5</sup> see footnote 1 above

## Standard of Care for Professionals

*(1) A person practising a profession (a professional) does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice. (NSW s.50)*

The modified Bolam rule is a key aspect of the tort reform – amending legislation in each State included a version of this test. In practical terms the test established a peer assessment in relation to a professional's conduct. Unless the peer opinion was irrational the legislation obliged a court to accept the opinion. That there may be one or more differing opinions does not prevent any one or more (or all) of those opinions being relied upon.

In comparison the common law standard of care is that of the ordinary skilled person exercising and professing to have that special skill (as expressed in *Rogers v Whittaker* (1992) 175 CLR 47). Unlike the modified Bolam test the standard is not determined by a responsible body of opinion.

In December 2006 McClellan J, NSW Supreme Court Chief Judge at Common Law, delivered Judgement in *Halvorson v Dobler*<sup>6</sup> a claim brought by a young man and his family against a rural General Practitioner. Whilst His Honour's findings on liability are important, this case in my view is significant for His Honour's review of section 50 Civil Liability Act 2002 (NSW), the NSW version of the modified Bolam test.

On 11 February 2001, at the age of 19, the plaintiff suffered a cardiac arrest causing hypoxic brain damage and catastrophic injuries. It was found the plaintiff's medical history was indicative of an undiagnosed cardiac condition, although the subject of much debate in the evidence. His Honour found that the defendant had breached his duty of care by failing to perform an ECG any time from 4 February 2001 onwards. Had the ECG been performed the plaintiff would have had a 65% or greater chance his long QTS would have been diagnosed, resulting in an appropriate treatment being instituted and the cardiac arrest would have been avoided. The injured plaintiff was awarded \$8,086,000.

Five general practitioners, four cardiologists and one emergency medicine practitioner gave evidence. The evidence on breach of duty was neither unanimous nor conclusive. The defendant's treatment was supported by three of the GP experts. Were the 50 standard of care to be applied it would have been difficult to reject the supportive evidence of three peer practitioners. His Honour found that the common law standard, as expressed in *Rogers v Whittaker* was not displaced by section 50 – this operating only as a defence. The reversal of the onus of proving that the modified Bolam test applies in my view dilutes the operation and applicability of the section. In practical terms it is now for the defendant to plead the test as a defence to a claim and indeed to call evidence in support – it is in the courts discretion to reject this evidence.

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<sup>6</sup> [2006] NSWSC 1307

## Limitation Period for Personal Injury Actions

A key feature of the reforms as to procedure was the review the laws on limitation periods. The chief reforms set the limitation period as three years from the “date of discoverability” and inserted a 12 year long stop period. It was felt these reforms provided better certainty and containment of the long tail claims.

The phrase “date of discoverability” is a somewhat unusual and has taken on some unusual characteristics. When is a cause of action discoverable? The NSW definition says a cause of action is discoverable on the first date a person knows each of

- a) *the fact that the injury or death concerned has occurred,*
- b) *the fact that the injury or death was caused by the **fault** of the defendant,”*
- c) *in the case of injury, the fact that the injury was sufficiently serious to justify the bringing of an action on the cause of action.*

Similar provisions exist in many of the jurisdictions including Victoria<sup>7</sup>. In *Dark v Country Fire Authority* (unreported) and *Ilardi v Forster*<sup>8</sup>, considered the meaning of “*fault*”. In those cases Judge Stott construed the word “*fault*” to mean “*act or omission*”. Thus the discoverability referred to in s 27F(1)(b) of the Victorian statute was held by Stott J to relate “*to the time at which the plaintiff knew that there was a causative link between the defendant’s conduct and the injury he suffered*”. This reasoning was approved by Kaye J in *Caven v Women’s and Children’s Health* [2007] VSC 7.

In a recent unreported decision of the NSW District Court<sup>9</sup> the interpretation of the section was elevated to yet another level. It was found the section required:

- 1) *knowledge of the causal nexus between the injury/death and the defendant’s conduct; **and***
- 2) *knowledge by the plaintiff of the culpability of the defendant’s conduct for the injury/death.*

It is not sufficient for a plaintiff to believe she/he is not at fault and the defendant is at fault. The question is when the Plaintiff knew of the legal culpability of the Defendant. Knowledge of legal culpability arises when the plaintiff has been advised, by someone with expertise or training, that a legal liability exists.

This threshold is indeed high. A plaintiff will be entitled to an extension of time at any point before obtaining expert opinion as to culpability. So for example a plaintiff could have knowledge of the fact of the injury, the date of the injury, the type and nature of injury suffered, the identity of the defendant, the cause of the injury, and who is at fault (in a colloquial sense). However until there is available evidence that the party at fault has a legal liability/culpability the plaintiff is not equipped with all relevant information upon which to file proceedings. Such an interpretation of the section makes it difficult to oppose any extension of time application. That there is a

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<sup>7</sup> s27F(1)(b) *Limitation of Actions Act 1958 (Vic)*

<sup>8</sup> [2006] VCC 793

<sup>9</sup> *Lauren Wright v Country Waste Systems*, Neilsen DCJ unreported 23 July 2007

statutory three year time limit exists in theory only. Any careful, competent lawyer could well prepare an extension application bound to succeed.

Managing a claims portfolio with an uncertain, flexible, limitation period is now an uncomfortable reality. What was thought to be a strategy to manage the long tail claims has been eroded

### **Causation and Warnings**

*If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:*

*Any statement made by the person after suffering the harm about what he...would have done is inadmissible except to the extent that the statement is against his...interest<sup>10</sup>*

This in my view is a sleeping duck. It remains an effective weapon in the defence of a case on inadequate warning. It is difficult for a plaintiff to plead, “Had I been appropriately warned I would not have had the surgery” – to do so offends the reform. In the absence of the plaintiffs’ statement as to warnings, the defence ought to succeed - unless circumstantial evidence can assist the plaintiff to prove the case. Creative judicial interpretation may well see the erosion of this useful defence to a warnings case – however for the moment it still appears as a pleaded defence to many of the claims in which I am instructed.

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<sup>10</sup> *Civil Liability Act 2002 NSW, S.5D(3)(b)*