

Medical Indemnity Forum

24th August



Tort Law Reform

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Until the ‘Medical Indemnity crisis’ civil liability was mostly common law

**Claims rapidly increased – in number, but
even more in value**

Indemnity providers collapsed: HIH, UMP

Drs started leaving practice

Government had to respond

Briefed Ipp Committee: CUT PREMIUMS!

Limit when claims can be made

Limit scope of liability

Limit amount of compensation

But don't change the whole system

(eg by recommending no-fault compensation)

Ipp Cttee (mostly) said: RE-STATE, NOT AMEND, common law

- Common law principles generally effective
- Problems due to judges' interpretation
- Some judges have imposed liability too readily
- Some changes needed to tort law – Civil Liability Acts

Procedural changes

- Thresholds
- Caps on certain heads of damages
- Limitation periods reduced
- Apologies encouraged
- More ADR
- Improved court procedures

Tort law reform

- Applies to actions alleging negligence –
‘failure to exercise reasonable care’ (s 43)
- Whether action in tort, contract, under statute
- But not trespass

1. Restricting circumstances where duty of care arises

- Good Samaritans
- ‘Nervous shock’

2. Standard of care: when is a risk foreseeable?

- Common law standard:
 - reasonable person's response to foreseeable risk
 - risk foreseeable if not 'far-fetched or fanciful': *Wyong Shire Council v Shirt*
- s48(1)(b): risk foreseeable if 'not insignificant'

3. ‘Calculus of negligence’: Would a reasonable person disregard the risk?

- Even if risk foreseeable, a reasonable person might disregard it: low probability; harm slight; cost/difficulty to avoid risk; social utility of conduct
- Ipp Cttee: some judges overlook this – find defendants liable merely b/c risk foreseeable
- s 48(1): A person is not negligent in failing to take precautions against a risk of harm unless a reasonable person would have taken those precautions

4. Relevance of common practice

- Common law: England, *Bolam* test – doctor is not negligent if conforming with ‘peer professional opinion’; Australia: *Bolam* rejected – peer opinion relevant, not decisive
- s 59(1): for treatment, but not warning/info – not negligent to act ‘in a manner...widely accepted in Australia by a significant number of respected practitioners’ - Peer opinion needn’t be universal; Court may disregard if ‘unreasonable’ – giving reasons

5. Role of judge and jury: law and fact

- No change
- Judge: is there evidence on which a reasonable jury could (not would) find breach, harm, causation?
- Jury: did the defendant in fact breach duty of care; did breach cause plaintiff's condition?
- Mere 'scintilla' of evidence no longer enough to require judge to leave case to jury

6. Causation

- Ipp Cttee: courts find causation too readily – should consider whether it is fair or ‘right’ that defendant should bear loss
- s 51: courts must consider
 - (1)(a) ‘*Factual causation*’: was negligence a necessary condition of occurrence of harm?
 - (1)(b) ‘*Scope of liability*’: is it appropriate for liability to extend to harm?
 - (2) ‘Whether or not & why responsibility for the harm should be imposed on negligent party’

Causation (cont)

- s 52: plaintiff bears burden of proving causation – balance of probabilities
- common law subjective test continues to apply - not codified
- Ipp Cttee recommended making inadmissible plaintiff's statement about s/he would have done - adopted in NSW, Qld, WA, Tas, not Vic. (does this matter, in view of HCA comments?)

7. Limits on duty to avoid causing psychiatric injury

- s 72(1): duty only if reasonably foreseeable that
 - person of normal fortitude
 - might suffer recognised psychiatric injury
- s 71(2) factors relevant to foreseeability (as in HCA (*Tame and Annetts*)): suddenness of shock, presence at scene, rel'ship b/w parties

8. Capping of damages

- Non-economic loss
 - Cap (Vic): \$371, 380 (indexed to CPI)
 - Court can refer to other cases
- Economic loss
 - Cap past/future earnings: three times average weekly earnings
 - Limits on gratuitous attendant care services; gratuitous services victim would have provided to others

9. Structured settlements

- Court may order structured settlement if parties agree
- All or part of damages paid by periodic payments funded by annuity or other agreed means

10. Apologies

- No admission of liability if:
 - Apology (‘expression of sorrow, regret, or sympathy’ – need not be ‘clear acknowledgement of fault’)
 - Fees reduced, waived

11. Limitation period

- 3 years from time injury discoverable
- 12 years from act or omission causing death, injury
- minors, mentally incapacitated: 6 years from when injury discoverable, or 12 years from event causing injury – suspended if no available parent, guardian
- pltff may apply for leave to issue out of time