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Secretary
Review of the Law of Negligence
C/- Department of the Treasury
Langton Crescent
PARKES ACT 2600

By E-mail: revofneg@treasury.gov.au

Dear Secretary,

RE: REVIEW OF THE LAW OF NEGLIGENCE

Unlike some of my colleagues, I am convinced that the law of negligence as it presently stands in Australia, is in need of reform. Despite the efforts of some senior judges (I mention Gleeson CJ and Spigelman CJ in particular), the law has failed to provide any uniform or predictable set of principles which can be clearly understood and applied by the community in their commercial and personal dealings. However, the fact that the system is in need of reform does not in my view justify a wholesale abandonment of principles and statements of rights and responsibilities which the common law has evolved over hundreds of years.

1. FUNDAMENTAL PRINCIPLES

1.1 Fundamental principles should be restated and if necessary be enshrined in legislation, anomalies and the lack of uniformity and predictability in the law should be removed, but that does not mean that the system as a whole needs to be abolished. What is needed is not a hastily cobbled together set of band-aid solutions to immediate problems, but a detailed review of the law in this area, with input from all interested parties in order that a workable and fair system can be devised for the benefit of all.

1.2. Members of the community who are seriously injured or damaged as a result of the negligence of another, should be entitled to be fairly compensated for their losses. But their benefits should not include the payment of expenses they have never incurred and their entitlements should be adjusted to reflect the community's judgment of the extent to which they were the authors of their own losses or injuries.

1.3. Providers of services and facilities who fail to take reasonable care for the safety and welfare of others within their area of responsibility should be called upon to pay for their negligent acts and omissions, but not by reference to some ad hoc and unpredictable standard which is incapable of being predicted or guarded against until an accident or loss actually occurs.

1.4. Some particular suggestions you may wish to consider are the following:

1:(Terms of Reference 1(a), (c) and (d))

1.5. Since the abandonment of the nebulous concept of proximity, the law has failed to identify any uniform set of principles which can be readily understood and applied by the community in regulation of their relationships and dealings. The search for such a principle was succinctly described by Gleeson CJ as searching for "the will-o-the-wisp".

1.6. As the law has stood since Shirt's[1] case in 1980, it is almost unheard of for any Plaintiff's case to fail on the basis that the injury or loss in question was not foreseeable. The fact that the injury or loss has actually occurred enables the court to readily conclude that the risk is something more than "far-fetched or fanciful" and therefore foreseeable. A test that requires proof by the Plaintiff that the loss as it eventuated was or should reasonably have been within the actual contemplation of the Defendant at the relevant time, would restore some common sense to the test of foreseeability.

1.7. In the vexed area of medical negligence the High Court abandoned established and predictable principles based upon standards which derived from the accepted practice of

[1] Wyong Shire Council v Shirt [1980] 146 CLR 40

professional peers, to substitute a subjective and unpredictable test, the application of which required no more than locating a witness whose views were critical of the practitioner in question. The "Bolam" test overruled by the High Court in Rogers v Whitaker[2], should be restored and should be made the appropriate standard for all professional negligence claims.

1:(Terms of Reference (b)) CAUSATION

1.8. Although recent decisions at an Appellate level have gone some way to redressing some of the earlier anomalies which arose under the law of causation, there remain two major areas of concern in this area of the law. Firstly, it is unfair to a Defendant and unduly generous to a Plaintiff for a Defendant to be liable for the whole of any loss to which the Defendant's negligence contributed, even if other causes (including the Plaintiff's own actions) have been responsible for causing an overwhelming percentage of the losses or injuries sustained. Surely the fairest approach is to limit the Defendant's liability to that proportion of the loss which the Plaintiff is able to establish was caused by the acts or omissions of the Defendant.

1.9. A good example of the unrealistic and unduly generous consequences of the law as it presently stands is provided by Medlin's[3] case. The High Court awarded the Plaintiff the whole of his economic loss flowing from his decision to retire prematurely from his position as a university lecturer, even though the university itself had no reservations about his ability to continue lecturing during the period of four years work he performed after his return from injury. As found by the trial judge the pre-eminent reason for his decision to retire was his wish to devote as much time as possible to research without the distraction of his university commitments- why therefore was the Defendant required to compensate him for the financial consequences of his own decision to retire early?

1.10. The second troubling aspect of causation is that in imposing a test that depends upon the application of "common sense and experience"[4] the operation of the law of causation becomes largely subjective and wholly unpredictable in its operation. It would be preferable

[2] Rogers v Whitaker [1992] 175 CLR 479.
[3] Medlin v State Government Insurance Commission [1995] 182 CLR 1.
[4] March v. Stramare Pty Ltd [1991] 171 CLR 506

in my view for the traditional "but for" test to be restored as the appropriate test on causation.

2. DAMAGES

2.1. Although there are a number of areas of the law of damages that are anomalous, the most costly impost frequently imposed upon defendants in personal injuries cases arises from the application of Griffiths v Kerkemeyer[5] principle allowing a Plaintiff to be paid the commercial cost of domestic assistance, even if no such assistance has been or is likely to in fact be provided. When the High Court most recently reviewed the law in this area, a majority of their Honours even extended the principle to allow a Plaintiff to be paid commercial rates of interest on the notional sum awarded.[6]

2.2. Although there is an element of unfairness in allowing a defendant's liability in damages to be reduced in circumstances where the Plaintiff's need for domestic assistance is met by a relative or partner voluntarily providing such services, the fairest way to strike a balance between the competing arguments is in my view to have damages limited to amounts actually expended or incurred and reserve the Plaintiff's right to apply for additional assistance if the need for commercial assistance arises in the future.

2.3. In the more serious cases, I am not convinced that the provision of luxuries such as heated swimming pools, new air-conditioned cars and houses and regular overseas holidays with an accompanying carer are reasonably justified in most cases. These are items which are not enjoyed by most members of the community and despite the sympathies we all feel for persons seriously injured, the community can no longer afford to have them included in damages awards in most cases.

2.4. It would be interesting to ascertain how many of the people who have been awarded damages including allowances for such items, have actually spent the money at the end of the day on the specific item that was the subject of the award.

[5] Griffiths v. Kirkemeyer [1977] 139 CLR 161.
[6] Grincelis v. House [2000] 201 CLR 321

3. LIMITATION PERIODS

3.1 I appreciate that this is a complex and difficult subject where competing interests and considerations are often delicately balanced, but there is one particular matter that has caused me considerable concern over the years. Defendants who are confronted with claims brought against them many years after the expiry of relevant limitation periods, often find themselves not only unable to effectively defend the proceedings because of the lapse of time, but are also substantially under-insured because responsible limits of insurance cover at the relevant time prove to be woefully inadequate to meet an award of damages in 2002 dollars.

3.2 It would be fairer in my view to limit the amount of damages recoverable in such circumstances to the amount of insurance cover available to the Defendant, unless the Plaintiff is able to demonstrate that the sum insured was inadequate judged according to the standards at the time the policy was entered into.

4. CONCLUSION

4.1 I regret that time constraints and the pressures of work, have prevented my dealing with the matters raised in any greater detail, and have precluded me from dealing with other topics however, I would be happy to expand on the issues outlined if it would be of any assistance.

Yours faithfully,

PETER J. DEAKIN QC