



# Some enlightenment from Mr Justice Kirby concerning the **duty of care**

## A report on the National Council Meeting

**T**he ACT Branch of APLA hosted a dinner on 24 March, 2000 at the Hyatt Hotel in Canberra. The dinner was scheduled to coincide with the National Council meeting to be held at the Hyatt on 25 March.

Those attending the dinner, which included most National Councillors and many practitioners from the Canberra area, were privileged to hear Justice Michael Kirby addressing the interesting topic "The Duty of Care - Is it Light at the End of the Tunnel or a Train?" As might be expected, His Honour focused initially on the principles outlined by Lord Atkin in *Donoghue v Stevenson* and then continued to develop the concept of "neighbourhood" referred to by Lord Atkin in deciding who owes a duty of care. Justice Kirby in a lighthearted and entertaining fashion, highlighted the extensive discussions concerning the duty of care in the High Court in recent years referring to cases such as *Northern Sandblasting Pty Limited v Harris*. Those familiar with that case will know that it has been said by some commentators that it is almost impossible to work out what the ratio is and there was some concession of that by His Honour. Interestingly Justice Kirby suggested there were two further cases dealing with the nature of the duty owed by landlords which are likely to receive attention from the High Court in the near future.

Justice Kirby again highlighted that the approach that he preferred was that outlined by the House Of Lords in *Caparo Industries v Dickman* which suggested that in order to decide whether a legal duty of care exists it is necessary to ask three questions:

1. Was it reasonably foreseeable to the alleged wrong doer that particular conduct or an omission on its part would be likely to cause harm to the person who suffered damage or a person in the same position?
2. Does there exist between the alleged wrong doer and such person a relationship characterised by the law as one of "proximity" or "neighbourhood"?
3. If so, is it fair, just and reasonable that the law should impose a duty of a given scope upon the alleged wrong doer for the benefit of such person?

Justice Kirby favours the *Caparo* approach as it incorporates into the test the policy considerations as part of the third question. His Honour did highlight, however, that the said view is not necessarily favoured by other members of the High Court at the present time. One was left with the impression that the extent of the duty of care is far from settled and that there is still fertile ground for plaintiff lawyers to explore the limits of that duty. I think it is a fair summary that His Honour left open the question whether the duty of care was the light at the end of the tunnel, or in fact, a train. In doing so he presented an extremely entertaining and interesting analysis for those present at the dinner.

The dinner also provided an oppor-

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tunity for the National President, Peter Cashman to acknowledge the wonderful contribution made by Simon McGregor to APLA. He acknowledged the significant contribution made by Simon in developing the policy of APLA and in promoting its core values and aims. Simon's famous "hairdressing" exploits were also highlighted and, indeed, acknowledged by Mr Justice Kirby.

All in all, the ACT Branch was extremely happy with the support it received from the National Council and the ACT profession and hopes to hold a similar event in the future.

The following day represented a meeting of the National Council where strategic planning was the sole agenda item. The National Council spent some hours considering the strengths and weaknesses of APLA and identifying opportunities and threats to the organisation. A series of strategies were developed which no doubt will be reported to members in due course through the National Council. It was certainly my impression, however, that all present saw many opportunities for APLA to develop as the primary representative body for the protection of individual rights in Australia. **PL**

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