Pendulums, outposts and the law of negligence

I have always had a very high regard for David Ipp, QC, J and JA. One cannot help but be impressed by his intellect, his ability to cut to the kernel of any legal problem confronting him, and by his work in South Africa prior to coming to Australia when, during the apartheid regime, he represented indigent black Africans charged with capital offences and others charged under the security legislation for defending human rights.

But it always puzzled me why a serving member of the judiciary would accept a commission from executive government to remove common law rights through foreshadowed statutory codification, if he was then to go back and adjudicate claims of people whose rights had been removed by the executive's acceptance of his recommendations. That, I assumed, was why such commissions (or committees) were usually presided over by retired judges. Those reasons have recently and dramatically become clearer.

There was an inkling at the time of Justice Ipp's appointment. The ABC's PM program reported on 3 July 2002 that Justice Ipp was 'comfortable with' his brief 'to look at ways of limiting liability by changing the common law, by making it harder to sue and by getting the public to take responsibility for their own risk'.

'I have sympathy for the view that individuals should bear responsibility for decisions they take themselves,' his Honour told the ABC.

And now the author of the Ipp report has gone into print to reflect on all that has occurred, with his article, 'Policy and the Swing of the Negligence Pendulum' in a recent issue of the *Australian Law Journal*.[1]

"Shifts in policy have caused judges to swing the negligence pendulum, gradually at first, then violently, then erratically."
Ipp J, p 749 *ALJ*

The gist of the piece (though I do not do full justice to the thesis in this precis) is that the law of negligence is often affected by policy considerations when judicial officers face new circumstances giving rise to negligence claims, and that the judiciary have failed to recognise or properly enunciate those policy considerations in their written judgments – 'policy factors have often

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not been acknowledged although they have been ever-present and significantly influential' he argues. As a consequence, those considerations are ignored in favour of the application of 'principles' derived from past cases, a process which is said, in fact, to be the application of new perceptions of policy, which in turn has led to the 'expansion' of the law of negligence to the benefit of plaintiffs in the 1980s and 1990s and ultimately to an 'erratic and unpredictable dementia that has required legislative repair'.

This thesis is an interesting one, and who could gainsay the argument that if judges are finding in favour of (or against) a party for particular reasons, they should state them. Moreover, such statement of reasoning by superior courts should compel and bind lower courts in the proper application of *stare decisis*. Such judicial honesty can only be applauded and supported.

In developing his thesis Justice Ipp makes a number of fascinating collateral excursions. Firstly, he engages in an extra-judicial defence of his own position in the case of *Annetts v Australian Stations*[2] when he was sitting as a member of the Western Australian Full Court. In that capacity he adjudged that the law relating to foreseeability of mental harm as a precondition to recovery was to be judged on the putative effect of the act or omission on persons of 'normal fortitude'. This part of the Full Court's ratio was clearly overturned by the majority of the High Court. Gummow and Kirby JJ,[3] Gleeson CJ[4] and Gaudron J[5] all rejected the 'normal fortitude' test as the sole criterion of, or necessary precondition for, liability.[6]

The real significance of Ipp J's denial that the majority rejected the normal fortitude test[7] is that the Ipp Committee made the same error in its report and asserted (after the majority of the High Court in *Annetts* had rejected it) that the existence of a duty was to be assessed on the basis of effect upon persons of normal fortitude[8]. Consequently, ignorant governments now codifying the law based on the Ipp recommendations are reasserting the 'normal fortitude' test as the law.

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> Ipp J, p 741 *ALJ*

Secondly, Justice Ipp's apparent defence of the executive government's very political direction to limit the time in which his committee was asked to report was that the 'government regarded the need for change as too urgent to undertake that process' - 'that process' being the involvement of all law reform commissions in the review.

Thirdly, he acknowledges that the balance in the courts (the negligence pendulum of the title) had swung towards defendants.

And fourthly, and most profoundly, this:

'Since Nagle, public sentiment has turned. Unbridled recognition of liability coupled with overly large damages awards brought about strong public resentment. Judicial generosity with insurers' money had foreseeable consequences. Premiums rose exponentially, insurance cover became difficult to obtain. The fabric of society was damaged. Education, healthcare, sporting events, professional practice, business enterprise, charitable institutions, rural get-togethers all suffered. No wonder the public objected. The community had been harmed by blinkered application of the full compensation theory.'[9]

What on earth can have possessed Justice Ipp to make this astonishing assertion in an otherwise academic exegesis?

Not even the Insurance Council of Australia, or any of its members, in their wildest pronouncements have made a claim like this. They, at least, acknowledge the significant influence, indeed the preponderance, of other market-based factors in attempting to defend the ramping up of public liability premiums in 2001 and 2002 and, indeed, today.

The reader will search Justice Ipp's paper in vain for a footnote, or any objective evidence supporting his allegation of a connection between the premium increases of 2001 and 2002 and earlier claims for damages.

And where (other than fatuous and ▶

refuted nonsense from the front page of the *Daily Telegraph*) is the evidence for the fanciful suggestions that 'overly large damages awards brought about strong public resentment' and that consequently 'the fabric of society had been damaged'?

Does Justice Ipp have some facility for gauging public sentiment and the effect of changes in the law of negligence upon it - a facility he readily denies in his article is available to his brothers and sisters on the bench?

This is stunning and provocative stuff in an article that purports to be, and in many respects is, an important contribution to the debate on the role of policy in negligence.

Last year, Justice Ipp rewrote the law of negligence. In his article, which contains the above social, economic and political conclusions, he says the following of judges who change the law:

'No right-thinking person would condone a system where the subjective intuitions, feelings and prejudices of judges are given free rein (even when couched in terms of objective community values)... This lies at the heart of the cautionary admonitions so often expressed against reasoning based on presumed moral, social, economic, or political values.'[10]

> "The community had been harmed by the blinkered application of the full compensation theory."
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And one more thing - how can any plaintiff (appellant or respondent) appear before Justice Ipp without wondering whether he regards their claim as one of those that is 'damag[ing] the fabric of society', an example of 'judicial generosity with insurers' money', or of the 'blinkered application of the full compensation theory'? PL

Endnotes: **1** (2003) 77 ALJ 732. **2** (2000) 23 WAR 25 at 52. **3** at 1382-83. **4** at 1353. **5** at 1359. **6** For a more complete examination of this point see Associate Professor Peter Handford, 'Psychiatric Injury: The New Era' (2003) 11 *Tort L. Rev.* **7** see (2003) ALJ 732 at 739. **8** Recommendation 34(b). **9** at 741. **10** at 747.