PUBLIC LIABILITY TRENDS IN AUSTRALIA

Has the Law Finally Coughed Up Mrs Donoghue's Snail?*

Abstract: *Donoghue v Stevenson was* the landmark decision where Lord Atkin espoused the "neighbour principle" which laid the way for the principles which gave rise to the modern tort of negligence. The tort emerged as a reflection of community expectations with respect to notions of harm and responsibility at that time. Trends in contemporary litigation, legislation and judgements in Australia show that lawyers, legislatures and courts have felt it necessary to review and refine the relevance of those principles to our time.

Introduction

The facts of *Donoghue v Stevenson* are well known to us all. Mrs May Donoghue was a Scottish store clerk in her early thirties. On Sunday evening in August 1928 Mrs May Donoghue and an unknown friend went to the Wellmeadow Café, an establishment that bore the sign "Real Italian Ice-cream". Of her friend we know only one thing – the trial Judge referred to the friend as "she".

This unidentified friend then placed an order, an ice-cream float – ginger beer and ice cream that would change the course of legal history around the world. Mrs Donoghue took a drink and when her glass was refilled with ginger beer, she saw what she thought was the decomposing remains of what she believed to be a snail. Mrs Donoghue said that what she thought was a snail made her ill and she was taken to the Glasgow Royal Infirmary.

Presumably, had it been the unidentified female friend who was served with and drank the snail laced ginger beer, we would probably have never heard of the event. If the friend were injured as Mrs Donoghue was, this friend would have sued the café owner presumably because of the oral contract of sale between the café owner and Mrs Donoghue's friend. The café owner would have been taken to and warranted, an implied term, that the ginger beer was fit to drink.

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Mrs Donoghue instead sued the manufacturer of the ginger beer bearing the name of "D. Stevenson".

Mrs Donoghue sued for £500 and costs.

Notwithstanding Mr Stevenson being known as a prosperous lemonade and ginger beer manufacturer, who was reported in the local press as running his establishment with "almost military thoroughness", it was found that the particular factory where the ginger beer was produced or at least bottles stored, was such that "snails had freedom of access" and snails and slimy trails of snails were frequently found.

Mrs Donoghue was ultimately successful and recovered damages in the order of £200.

The rest is well – history.

Background

In truth, *Donoghue v. Stevenson* was a case of which its factual base gives rise to a claim for product liability rather than public liability. Yet the principles it espoused laid way for modern tort or negligence.

In theory, the common law of tort adheres to a single standard of care and refuses to recognise different degrees of negligence. The controlling standard is that of the reasonable man adjusted to the individual circumstances of each case.[1]

Although tort law does not recognise different degrees of negligence the law does take into account different degrees of care.

A duty of care must arise out of some "relationship" or "proximity" between the parties of whom there is alleged to be a relationship, a duty of care owed, a breach of the duty of care owed and damage following as a consequence of that breach. It was in the decision of

[1] Fleming, J *The Law of Torts*, 13th Edition, The Law Book Company (1987) p. 112

Donoghue v. Stevenson[2] where the general formula for "duty" was outlined by Lord Atkin in what has since passed to be the "neighbour principal" where he pronounced:

> "There must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances … The rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyer's question, "who is my neighbour?" receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee will be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

Although this classic pronouncement is revered throughout the common law world it contains a noticeable ambiguity.[3] Is it merely a test of foresight or is there some allowance for other factors suggesting perhaps a contest between "principle" and "policy".

Wilberforce further developed and refined the content of the duty of care in *Anns v. Merton L.B.C.*[4]

> "The position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrong-doer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations, which ought to negative or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.

[2] [1932] AC 562 at 580
[3] Ibid p. 127
[4] [1978] AC 728 at 751-752

The concept of reasonable foreseeability identified by Lord Atkin in *Donoghue v Stevenson* is still the founding precept for a cause of action. In other words it must be reasonably foreseeable that the kind of negligence allegedly caused by the wrongdoer might result in the kind harm to the class of persons of which the Plaintiff is one.

Some legal commentators chronicling the historical application of the neighbour principle say that early on Courts have misunderstood the intention behind the edict as suggesting that liability should attach to all foreseeable harm.[5] Australia's High Court of Australia made it clear in *Sutherland Shire Council v. Heyman*[6] that the application of either Lord Atkin's principles or the Wilberforce approach should not be taken as a "mandate for judicial activism"[7]. In the United Kingdom the Privy Council and the House of Lords made similar pronouncements itself[8].

As Professor Fleming put it in his seminal text:

> "In truth, the decision whether to recognise a duty in a given situation, many factors enter play: the hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas as to where the loss should fall."[9]

The "Public Liability" Crisis

Over the last 2 years, all of the states in Australia have been embroiled in what has been dubbed the "insurance crisis".

It has been especially in the area of public liability, or those risks for which "public liability insurance" is generally available, and notably personal injury, that claims that have received so much attention by the media, politicians, the judiciary and more recently the legislature.

The general theme of much of the Australian media's presentation of the "crisis" was a contention that insurance was becoming "unaffordable". There was a perception that a feared

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[5] *Anns* (1978) to *McLaughlin v. O'Brian* [1983] 1 AC 410
[6] (1985) 157 CLR 424
[7] Fleming, J *The Law of Torts* at n. 1 at 128
[8] *Peebody Fund v. Parkinson* [1985] AC 210
[9] Ibid at p. 128

increase in premiums for, and the reduction in availability of insurance, particularly public liability insurance, for business and community activities in recent years, needed urgent and dramatic attention. There was a lot of publicity about particular events, sometimes one-off events being cancelled because of an alleged inability to obtain insurance cover.[10] In addition, the medical profession became particularly weighed in with complaints about what they perceived to be an increased burden of its own liability insurance.

In addition, there was a perception that a number of judicial decisions, which had also received a lot of media attention, did not accord with what some sectors of the community considered a fair result.

There was an overall concern that Australian judges were making awards of damages that were too high or otherwise compensating people for unworthy claims and/or finding people or entities liable for negligence when they were considered to be either blameless or the injured party perceived more blame worthy.

His Honour Appeal Justice Clark of the New South Wales Court of Appeal expressed concern in a diving case that the current law appeared to be placing a public authority or Council in the position of an insurer when he said:

> "The present situation which liability is imposed for negligence in circumstances which a lay person could be forgiven for thinking bore little relationship to the failings of the reasonable person. Indeed, although McHugh JA's statement in 1985… that the "standard of care has moved close to the border of strict liability" was criticised in the High Court… It seems to me accurately to reflect the modern law."

Queensland's Court of Appeal Justice James Thomas said on his farewell to the Queensland Court of Appeal on 22 March 2002:

> "In my view the rot started shortly before 1960 and has never been halted because we [Judges] have failed to see the bigger picture… The popular lust for compensation in an over litigious society… has been accelerating for the past 20 years. We are belated seeing its destructive side.

[10] Fun runs, fetes, sporting games, horse-riding etc.

> Churches, schools, sporting clubs and all manner of voluntary organisations that help weave the fabric of our society are finding it too financially risky to perform traditional services. There has been a retreat on the part of professional people from some essential services. Suddenly an insurance crisis is upon us with unimaginable rises in insurance premiums. These are direct results of the explosion of litigation and our aggressive legal industry. We have allowed the tests for negligence to degenerate to such a trivial level that people can be successfully sued for ordinary human activity."

His Honour Justice Fitzgerald, previously a Justice of the New South Wales Court of Appeal, made similar comments:

> "An infinite of variety of circumstances produce a foreseeable risk of injury which could often be eliminated or reduced. The current tendency to consider only individual circumstances which produce injury and the means by which those circumstances could have been changed and the injury avoided is redefining the foundation of the law of negligence of impermissibly expanding the content of the duty of care from a duty to take reasonable care to a duty to avoid any risk by all reasonably affordable means. Such an approach pays insufficient regard to the degree of the risk of injury from the particular circumstance which caused injury and to the time, effort and cost of avoiding the risk of injury from all circumstances which might have caused injury and the financial capacity of a Defendant to undertake such tasks. A situation amened from criticism by an imaginative forensic engineer cannot be achieved by the removal of isolated risks but necessitates the removal of all sources of risk… Ridiculous and exaggerated claims, sometimes followed by appeals when they are unsuccessful, are increasingly frequent. Employers, motorists, hospitals and schools, for example or rather their insurers, have become virtual insurers of those who are injured by their activities. There might be good policy reasons for this. However, unless its evolution is appropriately controlled by judicial common sense, fundamental concepts will be incrementally eroded and the law of negligence will eventually require every citizen to make life a risk free activity for everyone else."[11]

In March 2002 a national summit organised by the Commonwealth Government was told that an independent report commissioned by that government had blamed what was by then being described as a "public liability crisis" on increased claim costs and an insurance market

[11] *Rasic v Cruz* [2000] NSWCA 66.

dominated by defensive pricing and underwriting by insurers, and it was said that the situation would become worse without political intervention. Featuring high on the causes for the "crisis" was a perception that lawyers and the legal profession were drumming up claims by advertising the legal services and on most talk back radios Australia's injury litigation process was certain to be akin to North America with a whole host of ridiculous claims being cited to evidence the depth of the system's failings. Among the changes proposed at that meeting was legislation by the states to make people more responsible for their own risky behaviour, and protecting volunteers, community and sporting associations from legal action.

A particularly useful contribution to the debate was made by the Chief Justice of New South Wales in a speech to the Judicial Conference of Australia in Launceston in May 2002[12], when he suggested a number of steps which would reduce damages awards and restrict findings of liability in a way which might be perceived to be "less unfair". These included restricting the circumstances in which one person must guard against the failure of another to take care for their own safety, introducing proportionate liability for property damage or pure economic loss, limiting the amount recoverable for economic loss so that high earners were required to take out insurance for loss of income above this level, and increasing the discount rate used to determine the present value of future losses above the rate determined by the High Court in 1981. At a Ministerial Meeting on 30 May 2002 between various Australian State Governments' Treasury and Finance Ministers a "panel of imminent persons" was formed to be chaired by the Honourable Justice David Ipp of the New South Wales Court of Appeal (formerly of the Western Australian Supreme Court) to examine and review the law of negligence. The panel delivered its final report on 30 September 2002; it has since been generally referred to as the "IPP Report".

In November 2002 a meeting of Federal and State Treasurers agreed to legislate to implement most of the recommendations in the report.[13]

The Law in Action

In a study prepared by Professor Harold Luntz[14], he discovered that from the date from when Sir Anthony Mason took up his appointment as Chief Justice of the High Court on 6 January

[12] Spigelman, JJ. *Negligence: The Last Outpost of the Welfare State*, 76 ALJ 432
[13] *Review of the Law of Negligence* (September 2002) Australian Government Information Services, Canberra

1987 to the end of 1989, the High Court of Australia delivered some 96 judgements in cases falling under the law of torts as broadly defined. 63 (66%) of those were seen to result in decisions that could be described as pro-Plaintiff and 32 (33%) result in judgements that could be described as pro-Defendant.

There were forty cases dealing with liability or damages for personal injury. Of those, 32 (80%) were decided in favour of Plaintiffs, and 8 (20%) in favour of Defendants. In the year 2000 the High Court decided 9 tort appeals (all personal injury cases), 6 (67%) judgments where the decision could be described as pro-Defendant and 2 (22%) judgments where the decision could be described as pro-Plaintiff.

Professor Luntz observed that the trend appeared to be continuing into 2001. The first three personal injury tort cases that came before the High Court in 2001 were all decided in favour of Defendants.

But the Courts, especially the High Court, were reminding us of the scope of the duty of care owed much earlier.

In *Romeo v. Conservation Commission of the Northern Territory*[15] the High Court unanimously dismissed an appeal by a Plaintiff who had fallen 6.5 metres from the top of a cliff onto a beach in a nature reserve managed by the Defendant and suffered serious injuries. The fall occurred at night and whilst she was intoxicated. There was a carpark surrounded by a low log fence about three metres from the edge of the cliff. Between the carpark and the cliff edge was open space covered with low vegetation. The woman fell at a point where there was a gap in the vegetation. There was no fence or other barrier at the edge of the cliff. The presence of the cliff was obvious. The area was one of natural beauty. The cliff was about two kilometres long. His Honour Chief Justice Brennan held:

> "To those who exercise reasonable care for their own safety, the cliff and its dangers were obvious. The Commission was under no duty to fence, light, erect warnings or take any other steps to protect the public from those obvious dangers."[16]

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[14] Luntz. H, Courts Turnaround Downunder, *Oxford University Commonwealth Law Journal* June 2001 95
[15] (1998) 192 CLR 431
[16] Ibid at 447

The scope and content of the duty of care is plainly an important matter in determining difficult issues that arise in determining whether or not there has been a breach of duty. In *Romeo*[17] his Honour Justice Hayne emphasised the importance of the enquiry in these terms:

> "The real subject for debate was what that duty required of it for it is only when the content or scope of the duty is identified that questions of breach and causation of damage can be considered. So, too, in *Nagel* the central question was not whether the Board owed any duty of care to those visitors lawfully visiting the island, it was what the duty of care required it to do."

Later at 488, His Honour added:

> "In this case the Commission owed visitors who lawfully entered land which it managed a duty to take reasonable care to avoid foreseeable risks of injury to them. But the bare fact that the risk of the injury which in fact occurred was reasonably foreseeable (in the sense of not far-fetched or fanciful) does not conclude the inquiry about the scope of the Commission's duty. The duty is a duty to take reasonable care, not a duty to prevent any and all reasonably foreseeable injuries."[18]

As to what is reasonable must be judged in the light of all the circumstances. His Honour went on:

> "Usually the gravity of the injury that might be sustained, the likelihood of such an injury occurring and the difficulty and cost averting the danger will loom large in that consideration. But it is not only those factors that may bear upon the questions. In a case of a public authority which manages public lands it may or may not be able to control entry on the land in the same way that a private owner may; it may have responsibility for an area of wilderness far removed from the nearest town or village or an area of carefully manicured park in the middle of a capital city; it may positively encourage, or at least know of, use of the land only by the fit and adventurous or by those by all ages and conditions. All of these matters may bare upon what the reasonable response of the authority may be to the fact that injury is reasonably foreseeable. Similarly it might be necessary, in a particular case, to consider whether the danger was hidden or obvious, or to consider whether it could be avoided by the exercise of the degree of care ordinarily

[17] (1998) 192 CLR 431
[18] Ibid at 488

> exercised by a member of the public, or to consider whether the danger is one created by the action of the authority or is naturally occurring. But all of these matters (and I am not to be taken as giving some exhaustive list) are no more than particular factors which may go towards judging what reasonable care on the part of a particular Defendant required. In the end, that question, what is reasonable, is a question of fact to be judged in all the circumstances of the case."

A number of the matters referred by His Honour relate to both the factual evaluation of the reasonable response on the part of a particular Defendant and to the issue of any breach of duty. Further, a number of those matters, as His Honour pointed out, are also relevant to an examination of the scope or content of the duty prior to a consideration of the factual question as to whether it has been breached or not.

His Honour Justice Kirby also pointed out in *Romeo* that the failure to distinguish between the existence of a duty of care and its measure or scope can lead to confusion.[19]

His Honour thought that the question of scope of duty should be ascertained before considering whether a breach of that duty had occurred. He said:

> "The ordinary formulation of the common law is that a body such as the Commission must take reasonable care to avoid foreseeable risks of injury to persons entering an area such as the reserve, including the cliffs as a common right. However, that expression of the duty must be elaborated if it is to be of any practical guidance. The entrant is only entitled to expect the measure of care appropriate to the nature of the land or premises entered and to the relationship, which exists between the entrant and the occupier. The measure of the care required will take into account the different ages, capacities, sobriety and advertence of the entrants. While account must be taken of the possibility of inadvertence or negligent conduct on the part of entrants, the occupier is generally entitled to assume that most entrants will take reasonable care for their own safety … but where, as here the statutory duties are stated in general and permissive terms, the scope of the duty of care imposed by the common law will be know more than that of reasonable care. Where a risk is obvious to a person exercising reasonable care for his or her own safety, the notion that the occupier must warn the entrants about that risk is neither reasonable nor just."

[19] Ibid at 478

Chief Justice Gleeson in Woods v. Multisport Holdings Pty Ltd endorsed these comments[20] where he commented:

> "It is right to describe that observation as a comment. It is not a proposition of law. What reasonableness requires by way of warning from an occupier to an entrant is a question of fact, not law, and depends on all the circumstances, of which the obviousness of a risk may be only one. And as a proposition of fact, it is not of universal validity. Furthermore, the description of a risk as obvious might require closer analysis in a given case … nevertheless, as a generalisation, what Kirby J said is, with respect, fair comment".

Slips, Trips and Falls

In *Ghantous v. Hawkesbury City Council*[21] where a majority of the High Court articulated the duty of a local authority to pedestrians walking on a footpath or a road as follows:

> "The formulation of the duty in terms require that a road be safe not in all circumstances but for users exercising reasonable care for their own safety[22] is even more important, as in Ghantous, the Plaintiff was a pedestrian. In general such persons are more able to see and avoid imperfections in a road surface. It is in the nature of walking in the outdoors that the ground may not be as even, flat or smooth as other surfaces. As Callinan, J points out in his reasons in Ghantous, persons ordinarily would be expected to exercise sufficient care by looking where they are going and perceiving and avoiding obvious hazards such as uneven paving stones, tree roots or holes. Of course, some allowance must be made for inadvertence…"

The High Court refused an appeal by a pedestrian who tripped and fell while walking along a concrete footpath. She had stepped partly onto the grass verge in order to allow other pedestrians to pass and in doing so placed her foot partly on the concrete and partly on the verge, which was 50mm lower than the concrete. The footpath was not constructed in that way, but rather some of the ground had subsided beside the concrete path.

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[20] (2002) 76 ALJR 483 at 489
[21] (2001) 206 CLR 512
[22] Ibid per Gaudron, McHugh & Gummow JJ

The Court held that to some extent, pedestrians have to take responsibility for observing where they are walking. Gleeson, CJ, referred to a decision in England (where the non-feasance rule had been abolished by statute) in *Littler –v- Liverpool Corp*[23] to the effect that:

> "Uneven surfaces and differences in levels between flagstones of about an inch may cause a pedestrian temporarily off balance to trip and stumble, but such characteristics have to be accepted. A highway is not to be criticised by the standards of a bowling green".

Their Honours, Justices Gaudron, McHugh and Gummow, stated that "In general, such persons are more able to see and avoid imperfections in a road surface. It is the nature of walking in the outdoors that the ground may not be as even, flat or smooth as other surfaces, as Callinan J, points out in his reasons in *Ghantous* persons ordinarily would be expected to exercise sufficient care by looking where they are going and perceiving and avoiding obvious hazards, such as uneven paving stones, tree roots or holes. Of course, some allowance must be made for inadvertence."

Justices Gaudron, McHugh and Gummow in a joint judgement agreed with the decision of His Honour Justice Callinan to the effect that there was no breach of duty to Mrs Ghantous as did His Honour Justice Hayne. Justice Callinan, who also rejected the appeal on the basis of the non-feasance rule, dismissed the Plaintiff's appeal on the basis that there was no negligence either in the construction of the footpath or in not keeping the concrete strip and verges level. He stated that there was no concealment of the difference in height, which was plain to see. He held:

> "It is not unreasonable to expect that people will see in broad daylight what lies ahead of them in the ordinary course as they walk along. No special vigilance is required for this. The applicant herself, in cross-examination, admitted that she knew before the day of the accident that the earthen surface was lower than the concrete surface. The photographs tendered at the trial clearly show that there was a discernible difference between the kerb and the earthen verges".

[23] [1968] 2 All ER 343

His Honour, Justice Kirby, stated

> "Something more than the fact that she fell would be necessary to convert the powers which the respondent Council enjoyed into a duty to safeguard a pedestrian such as Mr Ghantous, rendering the Council liable to her because she momentarily took a false step. That "something" might be evidence of poor original design, a history of previous accidents or complaints, or deterioration that was judged manifestly dangerous".

In *Garvan v. ACT*[24] a Plaintiff tripped on a small piece of concrete, which protruded 20mm above the surrounding paving. There had been no prior complaints of this defect reported to the relevant public authority. Master Connelly held that the ACT was not liable, finding:

> "The proposition that the Territory must constantly monitor all paved areas for irregularities is inconsistent with the decision in … *Ghantous*."[25]

In *Spencer –v- Council of the City of Maryborough*[26] the Plaintiff Respondent was walking along one of the main streets of Maryborough. She was wearing reasonable flat heeled shoes, had not been in a hurry, and claimed that she was watching where she was going. She was familiar with the street and had previously noticed unevenness in the cement pavement. On this particular occasion, however, she tripped over a "lip" between two adjacent concrete slabs where one was higher than the other by approximately one centimetre. After the accident, the Council used a machine to "shave" the raised section away and therefore smooth the path.

The trial Judge had particular regard to the risk of serious consequences for the elderly in a fall and concluded that the Council's to identify and remedy the problem prior to the accident, demonstrated negligence on the Council's part. The trial Judge found there was no change in colour or density of adjoining slabs or anything else which might warn a pedestrian of the one centimetre difference in height.

The Council had previously performed inspections of the footpath in 1996 and 1997 (in excess of two and three years prior to the accident). There is no indication that the particular

[24] [2002] ACT SC 70
[25] Ibid at 6
[26] [2002] QCA 250

problem existed at those times. For approximately six months prior to the accident, the Council had a computerised maintenance request system in place, recording requests for maintenance of footpaths, which requests were primarily by way of complaints from the public. There was no complaint recorded for the spot where the accident occurred.

Expert evidence led on behalf of the Plaintiff indicated that the average minimum clearance of a person's foot when it is being swung forward during walking is 14mm and the lowest minimum for the general population would be 10mm. An ordinary healthy adult would not be at risk of tripping over the "lip" even if it were not readily visible. However, those unsteady on their feet through age or disability might be at risk. The Plaintiff was 73 years old.

The Court of Appeal held that while the rectification of the "lip" once identified was not difficult, the task of conducting such a close inspection of all footpaths under the Council's control in order to eradicate 10mm height differentials was such a large task (there were some 26 kilometres of paved footpaths under the Council's control), it would have been a very large task and, in the view of Her Honour Justice Holmes, with whom Her Honour the President of the Court agreed, would have been an irrational use of resources given the small risk posed by such irregularities in the footpaths. The Council was entitled to assume in considering any risk that pedestrians using its footpaths would themselves take ordinary care. The risk was not one of grave or numerically significant proportion.

Her Honour Justice Holmes with whom Her Honour President McMurdo agreed found as follows:

> "To say that the council should have committed itself to such close and constant inspection of its footpaths to ensure that any defect was eradicated before reaching dimensions of 9 – 10 mm dictates, in my view, a use of resources which is not rational in relation to the risk posed."

In *Percy –v- Noosa Shire Council*[27] the Plaintiff was jogging along a footpath near the Noosa National Park. The street in question had an asphalt footpath, which was separated from the roadway by a low log fence. Between that low log fence and the actual roadway there was another strip of ground, which was largely stony and bare of grass. The Plaintiff, having

[27] [2002] QCA 245

jogged along the asphalt pathway, went through a gap in the log fence, which was associated with a pedestrian crossing. However, instead of crossing the road, the Plaintiff then jogged not on the asphalt footpaths, but on the stony ground between the fence and the roadway. He put his foot on what he thought was a tuft of grass. A tree root was concealed within the grass; the Plaintiff twisted his ankle sustaining an ankle and leg injury.

The surrounding area had been mowed eight days previously. The tuft of grass surrounding the tree root was apparently left because it was difficult to mow because of the tree root. A contractor had mowed the area. The quality of the contractor's work was checked intermittently by a Council employee. The asphalt walkway was mechanically swept from time to time. The Council had a risk assessment scheme such that if a potential hazard was noticed by an employee or reported by a member of the public, the risk was examined and a decision made about how to deal with it and how urgently.

The Plaintiff lost at trial and on appeal. It was commented that the cost of removing all tree roots in the Shire which were above ground level and adjacent to footpaths would be "astronomical". The system which the Council had in place for inspection and for the recording of complaints from the public was appropriate.

His Honour Mr Justice Williams found that:

> "The Respondent Local Authority provided a well kept asphalt walkway for those persons who were not prepared to take the ordinary risk associated with walking on natural ground. The Appellant freely elected to leave that walkway and traverse the natural ground between it and the roadway. In so doing he accepted the ordinary risks which a person in every day life takes when traversing natural ground. Unfortunately, nature does not provide totally risk free surfaces on which a person may walk. Natural ground is notoriously uneven and frequently a person traversing it will come across clumps of grass or other vegetation, or roots of trees or other vegetation, which prevent a minor obstacle. Because of that a reasonable person crossing such country would keep an eye open for such potential obstacles".

He stated that the view of the Council was to minimise unusual dangers of which it was aware, either by removing the dangers or warning of them. The tree root was not an unusual danger.

In *Gondoline Pty Ltd –v- Hansford*[28] the Plaintiff had tripped at a rural farm, which appears to have been something of a tourist resort with approximately 30,000 to 35,000, visitors per year. She claimed to have tripped on a paved footpath asserting that there was a protruding lip of one of the pavers, with either that paver being pushed up, or the preceding paver having sunk into the ground.

The Plaintiff succeeded at first instance, but lost on appeal. The Full Court of the Supreme Court of Western Australia held that the Plaintiff was required to appreciate that a pathway at the property could not be expected to be "of the standards of a bowling green". Rather it was to be expected that there might well be a half-inch variation in the height of occasional paving stones. One of the members of the Court held that:

> "If there was a relatively insignificant difference in the level of a particular paver in the path from those surrounding it, it was of a kind which was visible and which the ordinary user of the path, obliged to anticipate that there might be such an imperfection in it, would reasonably be expected to cope with. The failure to inspect with such thoroughness as to detect and rectify this imperfection did not … constitute a breach of the appellant's duty of care".

In *Roads and Traffic Authority of New South Wales –v- McGuinness*[29] the Plaintiff tripped over the left-hand corner of a manhole cover on an urban footpath, near a hotel. The corner of the manhole cover was about half an inch above the surrounding pavement and the other corners of the cover were flush with the pavement. The Plaintiff suffered from multiple sclerosis and had lost some control over her right foot.

The manhole cover had become unnecessary some years earlier when new equipment had been installed. The Defendant's employees had been at the relevant corner on numerous occasions since the problem presumably developing performing work on the traffic lights. The manhole cover and associated pit had become redundant in 1965. The accident occurred in 1990. The Authority removed the cover and restored the pavement in 1995.

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[28] [2002] WASCA 214
[29] [2002] NSWCA 210

The Court of Appeal did not accept that an inference could be drawn that employees working on the nearby traffic lights should have noticed the problem with the manhole cover.

The Court of Appeal held that the Defendant was not liable as the manhole cover corner was obvious and was not in the nature of a trap. The modest difference in height did not make the footpath unsafe for a person taking ordinary care. There was no evidence that the authority knew or ought to have known of the defect. The Court held that even if the Authority had become aware of the difference in height, it would not have been obliged to take any action. It referred to the fact that notice could be taken of the fact that there were a large number of "defects" of such height in footpaths in built up areas.

In *Parramatta City Council –v- Watkins*[30] the Plaintiff parked by the side of a road. She then walked around the front of the car towards the footpath, but then stumbled on putting her foot on a manhole cover that was below the level of the roadway. She fell and sustained injury. It was not known who had installed the manhole or its cover. The manhole cover was roughly level with the bitumen at the kerb side but was two inches below the bitumen at the edge furthest from the kerb. The problem was not obvious to the Plaintiff as she approached as the car partly covered the manhole.

The Council had resurfaced the road in the early 1990's. The accident occurred in March 1996. The evidence was to the effect that the manhole cover had not subsided since that repaving. The ridge between the higher bitumen and the lower manhole cover was steep.

The Court of Appeal upheld the Trial Judge's decision saying that Council, when resurfacing the road, should have provided for a more gradual transition between the general level of the bitumen and the level of the manhole cover, that is the steep edge should have been avoided. The Plaintiff was successful.

In *Hawkesbury City Council –v- Ryan*[31] the Plaintiff's family had parked their vehicle by the side of the road in order to do some shopping. On their return the Plaintiff was endeavouring to access the front passenger door.

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[30] [2001] NSWCA 364
[31] [2001] NSWCA 212

The footpath consisted of a paved brick surface abutting a sandstone kerb. On the top of the kerb was a layer of asphalt. The top of the asphalt was 22mm higher than the brick paving. Most of that 22mm consisted of the asphalt layer, though a small part consisted of the sandstone kerb. The gutter on the other side of the kerbstone was deep.

The Plaintiff was paying attention to where she was placing her feet. However, she was focused on the deep gutter rather than on the kerbstone. She accordingly tripped. The Plaintiff succeeded on liability both at trial and on appeal. The Court did not accept evidence suggesting a possibility that the pavers had been originally placed flush with the top of the asphalt but had subsided. The Court of Appeal in distinguishing the decision in *Ghantous* referred to the following factors:

1. In this case there was evidence the actual footpath was constructed improperly;

2. In this case there was some concealment of the difference in height (the nature of that concealment in this case is not clear);

3. The problem of the lip was compounded by the deep gutter adjacent to the lip (the depth of the gutter does not appear to be stated).

There are a number of other authorities in various contexts of the need for pedestrians to take account of hazards as they are walking.

In *Lanyon –v- Noosa District Junior Rugby League Football Club Inc & Others*[32] the Plaintiff was a volunteer football coach. He was injured during a training session when, while running, he put his left foot into a depression on a training ground. The depression was approximately 2 to 3 inches deep and approximately one foot in diameter. There had been an exposition called "Farming for the Future" which had been held on the ground at the weekend. The Plaintiff was injured at training on Tuesday night. The representative of one of the Defendants had conducted an inspection after the exposition to see if it was in fit state for training on the following Tuesday night. He indicated that they had had a good look and "walked around and around". They did not find the depression. No one else observed the

[32] [2002] QCA 163

depression prior to the accident nor had it caused any other accidents prior to the Plaintiff's accident. Evidence was heard that the Plaintiff was an accredited A-Level coach and that part of the training of coaches involved training of the need to inspect grounds to ensure they were suitable.

As part of its decision the Court of Appeal, dismissing the Plaintiff's appeal, stated that:

> "It would be quite unreasonable to expect the respondent, which was a volunteer organisation, to have the football ground free at all times of all unevenness, and so require it to produce a surface of the kind suitable for lawn bowls or croquet. It is a matter of common experience that a football ground from time to time has rough patches on its surface. The respondent was not required to achieve a perfect surface any more than the Defendant municipal council that provided the ground for the playing of soccer in *Bartels –v- Bankstown City Council* … The depression that caused the Appellant's mishap was nothing more than might ordinarily be expected at times on a football ground of the kind occupied by the respondent."

Similar reasoning was applied by the New South Wales Court of Appeal in *Lombardi v. Holroyd City Council* where His Honour Appeal Justice Hodgson said:

> "I do not accept that a plain and visible step of 25mm in a footpath is correctly regarded as a high risk or an unacceptable risk. It is desirable that even obvious steps of 25mm in footpaths be avoided and eliminated if possible; but that is not to say that a failure of a council to detect and eliminate all such risks is negligent. As a general rule, in my opinion, it is not."[33]

However, in *Sutherland Shire Council v. Pallister*[34] in circumstances where the Defendant council had been notified of a defect some six months prior to the accident which was the subject of the claim, but the council had failed to repair it, the Defendant council was held to be liable.

[33] [2002] NSWCA 252 at paragraph 32
[34] [2002] NSWCA 66

Similarly in *ACT v. Badcock*[35] the ACT had received complaints about pavers raised by tree roots but had taken no steps to alleviate the problem. In the circumstances where a Plaintiff sustained injuries after tripping upon the raised pavers because of the tree root problem – the New South Wales Court of Appeal found the Defendant liable.

There are therefore a number of decisions at appellate level indicating that where the difference in height or other defect was obvious, and the difference in height was of the order of perhaps one inch, and there had been no previous accidents or complaints, the company or authority responsible for the footpath or other surface could not be held liable for failing to detect and "remedy" the problem. However, where the risk would not be obvious as a person approached the defect or where the defect arose from negligent design or construction, liability may be established.

Accordingly, to enhance prospects of success in these types of claims it will be an important feature of the Plaintiff's case if complaints about the defect which is the cause of the Plaintiff's injury (raised pavers etc) has been made to the Defendant authority and factual aspects associated with the period of time that they had such knowledge, and their action or inaction in response to the complaint, will be critical in determining whether or not a Plaintiff has reasonable prospects in recovering an award in the circumstances.

Stairways

Another area where claims have frequently been brought against various organisations and entities in this area of public liability law arises from people negotiating stairways or staircases. In *Wilkinson v. Law Courts Limited*[36] the Plaintiff failed in circumstances where he was unable to demonstrate that the cause of the accident was anything other than a mistake that he made in the way that he placed his feet has he descended the stairs[37]. His Honour Appeal Justice Heydon pointed out that stairs where inherently, and obviously dangerous, and that persons using steps may misjudge their footing and slip or trip but this was an every day risk which members of the public could avoid by taking care for their own safety.

[35] (200) 169 ALR 585
[36] [2001] NSWCA 196
[37] Ibid at paragraph 10

Occupiers

In most cases of physical injury over the past several decades, the existence of a duty has been almost a certainty:

> "With very few exceptions, a person is guilty of the tort of negligence and therefore liable to pay compensation for physical damage to the person or property of another caused by affirmative negligent conduct on his part."[38]

Liability under the old "occupier's rules" depended not upon ownership but upon the degree of control, exercised over the premises.[39] In the absence of some limited exceptions, a landlord or occupier did not owe a duty of care in tort even if in breach of a contractual duty to repair.[40]

However, the courts and the legislatures have subsequently abolished a landlord's immunity. The High Court declined to follow *Cavalier –v- Pope* in *Northern Sandblasting Pty Ltd –v- Harris*.[41]

In *Australian Safeways Stores –v- Zaluzna* [42] the majority of the High Court took the final step in holding that there was no longer any justification for the previous recognition of special duties that landlords or occupiers owed to different classes of entrants.

Zaluzna effectively endorsed the comments of His Honour Justice Deane in *Shaw –v- Hackshaw*[43] where it was held:

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[38] Atiyah P *Accidents, Compensation and the Law*, Second Edition, Weidenfield & Nicolson, London 1975 at page 69
[39] *Wheat –v- Lacon* [1966] AC 552
[40] *Cavalier –v- Pope* [1996] AC 428
[41] (1997) 71 ALJR 428; 146 ALR 572
[42] (1997) 162 CLR 479; 69 ALR 615
[43] [1983] 2 VR 65

> "It is not necessary, in an action in negligence against an occupier, to go through the procedure of considering whether either one or other or both have a special duty *qua occupier* and an ordinary duty of care was owed. All that is necessary is to determine whether, in all relevant circumstances, including the fact of the Defendant's occupation of premises and the manner of the Plaintiff's entry upon them, the Defendant owed a duty of care under the ordinary principals of negligence to the Plaintiff. A pre-requisite of any such duty is that there be the necessary degree of proximity of relationship. The touchstone of its existence is that there be reasonable foreseeability of a real risk of injury to the visitor or to the class of person of which the visitor is a member. The measure of the discharge of the duty is what a reasonable man would, in the circumstances, do by way of a response to the foreseeable risk."[44]

In *Jaenke –v- Hinton*[45] a milkman delivering milk at night tripped over a hose lying on the lawn and suffered injury. The Plaintiff succeeded at first instance in suing the householders, but lost on appeal.

The Queensland Court of Appeal held that "reasonable householders in the position of the Appellants would not and should not be expected to foresee that their conduct in leaving a domestic hose lying on the lawn overnight involved a risk of injury to a milk delivery person, or indeed to anyone.

Obvious Risks

In *Gandoline Pty Ltd v. Hansford*[46], the Western Australia's Court of Appeal dismissed a Plaintiff's claim in circumstances where a Plaintiff tripped over a paver which was 12.5mm to 25mm above the surrounding path. The Court accepted evidence that the Defendant tourist attraction operator had a system of inspecting pathways for rubbish and grass growing on it and found that notwithstanding this system failing to detect the defect and to rectify the imperfection on this occasion did not constitute a breach of duty, the Plaintiff was obliged to anticipate imperfections, the defect was visible to the ordinary user and that there was a relevantly insignificant difference in paver levels all coming together to result in the Court dismissing the Plaintiff's claim. His Honour Justice Miller held:

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[44] (1997) 69 ALR 615 at 662 and 663
[45] [1995] QCA 484

> "In my view there was no basis upon which the learned trial judge could, in this case, have concluded that the pathway on which the respondent fell was unsafe. The protruding paver was but an ordinary and everyday risk that a pedestrian on a pathway ought to have envisaged. It was not a hazard, but an everyday risk in relation to which care for her own safety was required."[47]

In *Sullivan v Moody*[48] the High Court had this to say about the obvious risks associated with diving in unfamiliar pools or waterways:

> "The fact that [a diving injury in the shallow area of a pool] is foreseeable, in the sense of being a real and not far fetched possibility, [or] that a careless act or omission on the part of one person may cause harm to another does not mean that the first person is subject to a legal liability to compensate the second by way of damages for negligence if there is such carelessness, and harm results."

Reliance can also be placed on what Justice McHugh said in his judgment in *Tame v New South Wales*[49] about the undemanding nature of the current foreseeability standard and the lack of difficulty in a Plaintiff showing that the risk of injury or damage was reasonably preventable in so far as the most important question is: has the Defendant's failure to eliminate the risk shown a want of reasonable care for the safety of the Plaintiff. His Honour Justice Hayne in *Tame* referred to what he had said in *Moody*:

> "As five members of the Court have recently held, foresight of harm does not suffice to establish of existence of a duty of care. Or, to put the same proposition another way, the common law does not provide a remedy for all who suffer negligently inflicted harm, even if the actor could reasonably foresee that carelessness may cause harm of a kind which in fact is suffered. The common law confines recovery to those to whom a duty of care is owed."

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[46] [2002] WA SCA 214
[47] Ibid at paragraph 65
[48] (2001) 207 CLR 562-576.
[49] (2002) 76 ALJR 1348

In *Hornberg v Horrobin*[50], Queensland's Supreme Court's Justice Ambrose considered the Plaintiff's claim for damages for injuries when as a 17 year old she was playing in a game diving across the corners of a pool. The occupier had warned the Plaintiff not to participate in the game but the Plaintiff alleged that a failure to erect signs prohibiting the playing of the game negligently caused the injury. The Court found that the failure of the Defendant's to erect signs prohibiting the playing of the game "cut the corner" did not cause the Plaintiff's injury. The Court found that even if such a sign had of been erected, then it would probably have been ignored by the Plaintiff.

Similarly, in *Scarf v Queensland*[51], again in Queensland's Supreme Court, Her Honour Justice White considered a claim for personal injuries after a Plaintiff had dived into water. On this occasion the Plaintiff dived from a bridge into water below. Her Honour rejected the Plaintiff's arguments that the Defendant should have put warning signs across the bridge so as to deter the Plaintiff from diving. The Court found that whilst a higher guardrail on the bridge may have deterred the Plaintiff from diving from it, the erection of a higher railing was not reasonably required because of the cost, infrequency of similar accidents, obviousness of the risk to potential divers and the interference with the visual amenity of the structure itself.

There are some risks which people like a person must accept responsibility for. Although there are some circumstances where a special warning may be called for, negligence at common law is still a fault based system.

There is a point at which those who are prepared to take the risk of pleasurable but sometime dangerous activities must take personal responsibility for what they do. That point is reached when the risks are so well known and obvious that it can reasonably be assumed that the individuals concerned will take reasonable care for their own safety.

[50] Unreported – Supreme Court of Queensland – 24 October 1997.
[51] Unreported – Supreme Court of Queensland – 30 October 1998.

Landlords

In *Jones v. Bartlett*[52] the High Court in considering a landlord's duty to a tenant determined that a landlord was not negligent in circumstances where the tenant's son was injured when he put his knee through an internal glass door of a property which did not comply with the Building Standards and Regulations applicable at the time of the injury. The glass in the door however complied with building standards and regulations at the time the house was constructed. The High Court held that the duty of care did not extend to require landlords to replace items, which were undamaged and were in good working order. All that was required was that they act reasonably.

The reasoning of the High Court in *Jones* was applied in Queensland's Court of Appeal by Her Honour Justice Wilson in *Fine v. Geier*[53]. The Plaintiff, a tenant in a unit owned by the Defendant was injured when escaping through the main bedroom window during a fire in the unit. Her Honour, in dismissing the claim, held that the landlord was not in breach of the tenancy agreement by not having smoke detectors or fire-fighting equipment at where there were bars over the window preventing escape. Her Honour applied the principle in *Jones* strictly and therefore dismissed the Plaintiff's claim.

The Legislative Response – The *Civil Liability Act 2003*

The *Civil Liability Act* 2003 ("CLA") was passed by the Queensland Government on 3 April 2003.

Most Australian states have passed similar legislation.[54] All states acknowledge that this species of legislation is in direct response to the IPP Report and its recommendations.

The CLA does not contain an object clause, but the purpose of the Act was set out in the Explanatory Note to *the Civil Liability Bill*:

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[52] [2000] 205 CLR 166
[53] [2003] QSC 191
[54] For example the following States have so far enacted legislation to similar effect: *Civil Liability Act* 2003 (Tasmania); *Civil Liability Act* 2002 (Western Australia); *Civil Liability Act* 2002 (New South Wales); *Civil Liability Amendment (Personal Responsibility) Act* 2002 (New South Wales).

> "The main purpose of the Act is to facilitate the ongoing affordability of insurance through clarification of some basic principles within the substantive law and sustainable awards of damages for personal injury. The Act contains fundamental changes to the law of negligence."

The Act applies to "any civil claim for damages for harm".[55]

"Harm" includes claims for personal injury, economic loss and damage to property.[56]

"Claim" means a claim for damages for personal injury, damage to property or economic loss, whether a liability based in tort or contract or in or on another form of action, including breach of statutory duty and for a fatal injury – damages for loss of dependency.

The majority of provisions will apply to injuries or incidents after 2 December 2002.

The CLA does not relate to work related injuries if the injury meets the definition of an "injury" pursuant to the *WorkCover Queensland Act* 1996 nor does it relate to any injury arising from an industrial related injury or injury resulting from smoking or use of tobacco products or exposure to tobacco smoke.[57]

As outlined above, the CLA is in response to the IPP Report. Similar legislation has been enacted in most states throughout Australia. Some of the more significant consequences of the CLA include:

1. The standard of care for professionals has been altered.[58]

2. A professional does not breach a duty arising from the provision of a professional service if it is established that the professional acted in a way that (at the time the service was provided) was widely accepted by peer professional opinion by a significant number of respected practitioners in the field as competent professional practice.[59]

[55] Section 4 of the *Civil Liability Act* ("CLA").
[56] Schedule 2 of CLA – "Dictionary".
[57] Section 5 of CLA.
[58] Section 21 and 22 of CLA.
[59] Section 22(1) of CLA.

3. (a) A Court can reject peer professional opinion only when the Court considers that the opinion is "irrational" contrary to a written law. The fact that there are differing peer professional opinions widely accepted by a significant number of respected practitioners in the field does not prevent any one or more of the opinions being relied on for the purposes of the section.

(b) These propositions are clearly designed to take the test for professional negligence away from the test as it emerges in *Rogers v Whittaker*[60] and closer to the test in *Bolan v Friern Hospital Authority* or perhaps more accurately *Bolitho v City and Hackney Health Authority*[61].

4. The CLA introduces a number of provisions relating to proportionate liability. These provisions will not apply to personal injury claims. There is a threshold of $500,000.00 in the Queensland legislation with respect to when these provisions will apply. The basic proposition is to abolish joint and several liability and replace it with a concept where the liability of the Defendant who was a concurrent wrongdoer is limited to the amount reflecting the proportion of the damage the Court considers just having regard to the Defendant's responsibility. It applies where the concurrent wrongdoers are parties to the action or otherwise. Contributory negligence is to be excluded in any calculation.

5. The liability of public authorities has been altered by chapter 2, part 3 of the CLA. A public authority is not liable for repair a road, keep a road in repair or inspect a road for repair. The functions and financial resources of a public authority are to be taken into account in assessing duty or breach and allocation thereof is not open to challenge. For the authority to be found liable, its conduct in this sense must be "so unreasonable that no public or other authority could properly consider an act or omission to be reasonable".

6. The CLA introduces liability exclusions based on particular behaviour. Liability is excluded if the Court is satisfied, on the balance of probabilities, that the incident occurred when the Plaintiff was engaged in a "indictable offence".

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[60] [1992] 175 CLR 479
[61] [1998] AC 332

7. The CLA alters liability where there is an element of intoxication. It is no longer relevant to consider, in the assessment of the standard of care, that persons may be exposed to increased risk because of intoxication.[62]

8. The CLA regulates or attempts to define what is called "obvious risk". The concept seems to be that an obvious risk is a "risk that, in the circumstances, would have been obvious to a reasonable person".[63]

9. There is some enlivening of the defence of voluntary assumption of risk; the Plaintiff is presumed to be aware of an obvious risk unless the Plaintiff proves that he/she is unaware of the risk.

10. There is no duty to warn of obvious risks and no liability for personal injury suffered from an obvious risk rely where the activity is a "dangerous recreational activity".[64]

Conclusions

A snail is:

> "A slow moving mollusc with spiral shell."[65]

Just as the slow moving snail found its way into Mrs Donoghue's ginger beer bottle, so too the law in Australia has slowly moved to a point where, considered by some to be a slow moving creature itself, the Courts and legislature have responded to a perception, real or otherwise, that the neighbour principle, needed modern refinement to maintain a valid role in our law of torts. Lord Atkins' famous test as enunciated in his judgment in *Donoghue v Stevenson* was intended and understood to respond to a more general and expansive approach to the duty of care a manufacturer owed to the ultimate consumer in response to what was then considered to be a more demanding social responsibility of that time.

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[62] Part 4 Division 2 of CLA.
.[63] Section 13 of CLA.
[64] Section 17 to 19 of CLA.

In a similar way, it is submitted recent case law and legislation dealing with the tort of negligence, in the context of public liability claims, is attempting to respond to the social responsibilities of our time.

[65] The Australian Oxford Mini-Dictionary – Second Edition, Oxford University Press 1998 at p500.