The Young Report: an Australian perspective on the latest response to Britain's "Compensation Culture"

James Goudkamp

University of Wollongong, jamesg@uow.edu.au

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Abstract
This article addresses the Young Report, which is an important recent response to Britain's putative 'compensation culture'. This report is examined with reference to the far-reaching reforms of tort law that occurred in Australia at the start of the twenty-first century. The analysis reveals that while there are certain similarities in the way in which tort law has been reformed in Australia and Britain, the reform experience in these jurisdictions has been quite different. The main difference is that attention in Britain has centred on the system of procedure by which tort law is administered whereas in Australia the focus has been on the substantive law, including the law governing the assessment of damages. A possible reason for this divergence has to do with differences in political ideology.

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This article addresses the *Young Report*, which is an important recent response to Britain’s putative ‘compensation culture’. This *Report* is examined with reference to the far-reaching reforms of tort law that occurred in Australia at the start of the twenty-first century. The analysis reveals that while there are certain similarities in the way in which tort law has been reformed in Australia and Britain, the reforms have ultimately unfolded quite differently in these jurisdictions. The main difference is that attention in Britain has centred on the system of procedure by which tort law is administered whereas in Australia the focus has been on the substantive law, including the law governing the assessment of damages. A possible reason for this divergence has to do with differences in political ideology.
In Britain, as in several other countries, the law of torts is predominantly judge-made. For example, most of tort law’s central principles, such as those concerning the duty of care, the standard of the reasonable person, and the concepts of damage and remoteness, are found in the law reports rather than in the statute books. This sets tort law aside from many other fields. Of course, this is not to say that tort law has not been touched by legislation. In the ‘age of statutes’ in which we live, legislative alteration of tort law is ubiquitous. For instance, important statutory provisions apply in relation to occupiers’ liability, liability for animals, contributory negligence, and fatal accidents. Legislation has also made significant changes to the procedure by which tort law is administered. However, these statutory modifications do not, for the most part, relate to foundational doctrines of the law of torts. In other words, they have impacted upon hamlets and villages rather than metropolises or the polity as a whole.

In some other jurisdictions, the experience has been quite different, and legislation has affected a major shift away from basic common law principles. Such a shift occurred in Australia at the start of the twenty-first century. Between 2002 and 2004, the governments of all Australian States and Territories enacted statutes that radically altered the tort system.

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1 Stephen Sugarman writes that ‘tort remains, of all the law school courses we offer, the queen of the common law subjects’ (S Sugarman, ‘Assumption of Risk’ (1997) 31 Val UL Rev 833 at 833 n 1).
3 Occupiers Liability Act 1957 (UK); Occupiers Liability Act 1984 (UK).
4 Animals Act 1971 (UK).
5 Law Reform (Contributory Negligence) Act 1945 (UK).
7 In Australia, the States and Territories have primary responsibility in constitutional terms for the law of tort. The Federal Government can only legislate with respect to tort law in so far as doing so falls within a specific list of powers granted to it under the Australian Constitution.
8 The principal pieces of legislation are as follows: Civil Liability Act 2002 (NSW); Civil Liability Act 2003 (Qld); Personal Injuries Proceedings Act 2002 (Qld); Civil Liability Act 1936 (SA) (as amended by the Wrongs (Liability and Damages for Personal Injury) Amendment Act 2002 (SA) and the Law Reform (Ipp Recommendations) Act 2004 (SA)); Recreational Services (Limitation of Liability) Act 2002 (SA); Volunteers Protection Act 2001 (SA); Civil Liability Act 2002 (Tas); Wrongs Act 1958 (Vic) (as amended by the Wrongs and Other Acts (Public Liability Insurance Reform) Act 2002 (Vic), the Wrongs and Other Acts (Law of Negligence) Act 2003 (Vic) and the Wrongs and Limitation of Actions Acts (Insurance Reform) Act 2003 (Vic)); Civil Liability Act 2002 (WA); Volunteers and Food and Other Donors (Protection from
This flurry of legislative activity was motivated primarily by a desire to rein in insurance premiums, which had increased dramatically. As a result of these reforms, tort law is no longer primarily a creation of the common law. Its contours are now at least as much a product of statutory provisions as rules that have their origin in the common law.

When the Bill that became the Compensation Act 2006 (UK) was debated, it was tentatively suggested that provisions modelled on the Australian statutes should be introduced into it. However, this half-hearted proposal did not come to fruition. While the Compensation Act made certain adjustments to the law of torts, it did not go nearly as far as the Australian statutes. Pressure for further reform of tort law in Britain diminished following the enactment of the Compensation Act. There was a period of relative (or, merciful, some might say) quiet. However, this lull was short-lived. In 2009 the tort system caught the interest of the Conservatives, who were then in opposition. The Rt David Cameron MP asked his adviser on health and safety, the Rt Hon the Lord Young of Graffham PC, to report on the ‘compensation culture’, which the Conservatives thought had been inadequately addressed by the Compensation Act, and to suggest ways of remedying it. Lord Young published his report, which has become known as the ‘Young Report’, in October 2010. The Young Report is not exclusively concerned with the tort system. Much of it addresses occupational health and safety laws. Nevertheless, certain of its recommendations are of considerable interest to tort scholars.

Liability) Act 2002 (WA); Civil Law (Wrongs) Act 2002 (ACT); Personal Injuries (Liability and Damages) Act 2003 (NT); Personal Injuries (Civil Claims) Act 2003 (NT).

9 The word ‘reform’ sometimes implies a change for the better. I do not intend to convey this meaning when I use it in this article. By law ‘reform’, I mean any change in the law, positive or detrimental.


This article offers an analysis of those parts of the *Young Report* that relate to tort law, including the procedure by which tort law is administered (which tort lawyers cannot afford to ignore).\(^\text{13}\) It does so in the light of the Australian reforms that have been mentioned. Assessing the *Young Report* from this perspective is illuminating for at least two reasons. First, it was seemingly influenced by events in Australia\(^\text{14}\) (although this was not acknowledged in it). Secondly, it reveals that the reform experiences in Britain and Australia have been quite different. Whereas the focus of the Australian legislatures has been on the substantive law of torts, including the law governing the assessment of damages, in Britain the concern has been primarily with the procedural regime by which tort law is governed (a trend continued by the *Young Report*). The waters of the substantive law of torts in Britain, as has been noted, are relatively unpolluted by statutory intervention. This difference, which has so far been overlooked by theorists, is noteworthy considering the similarity of the British legal system to that of Australia. It is a difference that calls for explanation.

II TWENTY-FIRST CENTURY TORT REFORM IN AUSTRALIA: AN OUTLINE

(A) The 2001-2002 Insurance Crisis

One of the most important issues in domestic politics in Australia at the start of the twenty-first century was an ‘insurance crisis’. During 2001-2002, premiums for third-party insurance increased sharply, sometimes by several hundred per cent. These hikes, which were particularly pronounced in relation to medical indemnity and public liability insurance, had a profound impact on many facets of Australian society. Insurance became unaffordable for

\(^{13}\) It builds on a valuable analysis of the *Report* by Annette Morris, “‘Common Sense Common Safety’: the Compensation Culture Perspective” (2011) 27 PN 82.

\(^{14}\) That Lord Young was cognisant of the Australian reforms is evident from the language he used in his *Report*. Certain turns of phrase found in the Australian legislation appear in the *Young Report* with sufficient regularity to exclude the possibility that their presence is a coincidence.
many or unavailable. Businesses were wound up.\textsuperscript{15} Social clubs closed.\textsuperscript{16} Children’s playgrounds and sports fields were cordoned off.\textsuperscript{17} Stretches of road were shut. Charitable events were cancelled. Medical practitioners, especially those working in the ‘high risk’ fields of obstetrics and neurosurgery, retired prematurely or threatened to do so (which had severe consequences for parts of rural Australia, where medical services were, and still are, in short supply).\textsuperscript{18} Even ANZAC Day (a national day of remembrance) commemorations\textsuperscript{19} and Christmas carols\textsuperscript{20} were jeopardised. Politicians quickly realised that something significant had to be done (and be seen to be done) to address this situation.

(B) The Law of Torts Blamed

The law of torts was widely blamed as the (or the main) cause of the insurance crisis. It quickly became intensely politicised as a result. The media enthusiastically condemned the system by parodying it and the judges who administered it.\textsuperscript{21} The public was inundated with of ‘horror stories’ (which were sometimes not even from Australia) that supposedly proved the litigiousness of Australians, their reluctance to accept ‘personal responsibility’ for their...

\textsuperscript{21} Analyses of the warped picture that the Australian media painted of tort law are provided in K Burns, ‘Distorting the Law: Politics, Media and the Litigation Crisis: An Australian Perspective’ (2007) 15 TLJ 195 and D Howard-Wagner, ‘Who are the Real “Heroes” and “Villains”: The Print Media’s Role in Constructing the “Public Liability Crisis” as a “Moral Panic Drama”’ (2006) 10 Newcastle L Rev 69.
conduct, the insatiable greed of lawyers, and that the tort system generally was dysfunctional.22

Skirmishes between politicians, who widely believed the tort system to be responsible not only for the insurance crisis but for a litany of other problems in Australia, and claimant lawyers were regularly fought on television and radio shows, often at prime-time. Insurers, who organised themselves into a powerful lobby group, clamoured for change.23 Even judges weighed into the debate. For instance, at the height of the crisis the Chief Justice of New South Wales published a seminal article in which he argued that tort law was slanted too far in favour of claimants.24 His Honour called for ‘principles-based reform’ of tort law.

The legal profession vigorously disputed the suggestion that tort law had contributed materially to the insurance crisis.25 Associations representing the profession observed that there was no reliable evidence to warrant laying responsibility for the premium rises at tort law’s door.26 It was also pointed out that there had not been any recent developments in the law of torts that significantly increased insurers’ exposure. The ‘stretching’ of tort law in

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22 A case on which the media focused was Swain v Waverley Municipal Council. The claimant in this litigation had been catastrophically injured when he dived under a wave at a beach for which the defendant Council was responsible and struck his head on a sandbank. A jury (a rarity in civil actions in Australia) held the defendant liable in negligence. A majority of the New South Wales Court of Appeal set aside the jury’s verdict and entered judgment for the defendant: Waverley Municipal Council v Swain [2003] NSWCA 61; [2003] Aust Torts Rep 81-694. The claimant successfully appealed to the High Court of Australia: Swain v Waverley Municipal Council [2005] HCA 4; (2005) 220 CLR 517.

23 See, for example, the following short article written by a senior representative of the insurance industry: A Mason, ‘Reform of the Law of Negligence: Balancing Costs and Community Expectations’ (2002) 25 UNSW LJ 831.


25 The views of the profession were expressed primarily via an association then known as the Australian Plaintiff Lawyers Association (‘APLA’) (it is now known as the Australian Lawyers Alliance). APLA contended that the premium hikes were due to a multitude of factors that were unrelated to the tort system, including the collapse of two major insurers, HIH and United Medical Protection Ltd, instability in the global financial markets following the terrorist attacks against the United States on 11 September 2001, the rising cost of reinsurance, and the aggressive under-pricing of risks due to an overly competitive domestic insurance market.

Australia in favour of claimants, to use Professor Patrick Atiyah’s graphic phrase, had well and truly ceased by the start of the twenty-first century. Indeed, the High Court of Australia had been developing tort law in a decidedly pro-defendant fashion since approximately 1999. Claimants had lost in a string of cases in that Court in the period leading up to the insurance crisis. In short, the view of the legal profession generally was that reform of tort law was unnecessary.

(C) A Panel of Eminent Persons Convened

In a rare display of unity, the governments of Australia co-operated to address the insurance crisis. They commissioned a Panel (known as the ‘Panel of Eminent Persons’) to advise them how to reform the tort of negligence in the context of actions for damages for personal injury and death. The Panel’s terms of reference required it to assume that ‘[t]he award of damages for personal injury ha[d] become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another.’ The Panel was asked to proceed on the footing that it was ‘desirable to examine a method for the reform of the common law with the objective of limiting liability and [sic] quantum of damages arising from personal injury and death.’ Controversially, the Panel was not given a brief to consider whether tort law was causally related to the spike in insurance premiums.

The Panel was chaired by the Hon Justice David Ipp AO, who was then an Acting Justice of the Court of Appeal of the Supreme Court of New South Wales (an intermediate appellate

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28 APLA, above n 26 at 16-18.
29 This judicial reversal of the fortunes of claimants is described in H Luntz, ‘Torts Turnaround Downunder’ (2001) 1 OUCLJ 95.
31 Ibid.
court in Australia). Its other members were Professor Peter Cane, a medical practitioner, and the mayor of a local council. The Panel was answerable to the Federal Minister for Revenue and Assistant Treasurer (the Hon Senator Helen Coonan MP) and based in, and serviced by, the Federal Treasury Department. Both its institutional link with the Federal Government and its composition sent strong messages. The Panel’s close tie with the Federal Government suggested that its role was to advise the Federal Government how to implement its stated policy, which was clearly articulated in the terms of reference, rather than to recommend how the law might be changed for the better, all things considered. Furthermore, the fact that the Panel was responsible not to the Federal Attorney-General but to a Treasury minister underscored the political perception that priority should be given to economic considerations rather than to broader concerns of justice. The composition of the Panel also reflected the prevailing political climate. The appointment of lay persons to it indicated a belief on the part of the legislatures that the Panel’s report should be suffused with community views. The fact that the lay members were representatives of the medical profession and local authorities suggested that the interests of these stakeholders (both of which had been severely affected by the insurance premium increases) should be given particular weight. These features of the Panel rendered it quite a different entity from a law reform commission.

(D) The Ipp Report

Because of the calamitous consequences that the insurance crisis was having for Australian society, the Panel was forced to work under severe time restraints. Its terms of reference were

32 Peter Cane wrote an article about the Panel’s role in the reform process: P Cane, ‘Reforming Tort Law in Australia: A Personal Perspective’ (2003) 27 MULR 649.
issued on 2 July 2002. Following a consultation exercise, the Panel, as instructed, published its Interim Report on 30 August 2002 and its Final Report, which became known as the ‘Ipp Report’, on 30 September 2002. The Ipp Report is 255 pages in length and contains 61 recommendations. It is written in a scholarly style, although, understandably, it avoids getting drawn into theoretical debates. All in all, it was a remarkable achievement. This is especially so given the brief period within which the Panel had to report to their political masters and the fact that the workload must have fallen primarily on its two legally-trained members.

It is impractical and unnecessary to discuss the Panel’s recommendations in detail. However, it is convenient to briefly mention a selection of its proposals that are likely to be of particular interest to a British audience or which are essential to note in order to understand the Australian tort reform process. The Panel’s recommendations included the following:

- Legislation resulting from its recommendations should be uniform across Australia.
- Legislation should provide that, in determining whether the reasonable person in the defendant’s position would have taken precautions against a risk of harm, it is relevant to consider (among other things): (i) the probability that the harm would occur if care was not taken; (ii) the likely seriousness of the harm if it occurred; (iii) the burden of taking precautions to avoid or reduce the risk of harm; and (iv) the social utility of the risk-creating activity.

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34 Ibid.
38 Ipp Report, Recommendation 28(d). In making this recommendation, the Panel did not intend to change the common law. The four factors that it identified as being relevant to whether the defendant acted negligently are criteria that the common law regards as material: see Wyong Shire Council v Shirt [1980] HCA 12; (1980) 146 CLR 40. Rather the Panel’s hope was that, by reducing these factors to a statutory formula,
The Bolam test should be adopted in medical malpractice cases in which the allegation of negligence relates to treatment (as opposed to a failure to inform the claimant of risks of injury). (The Bolam test had been rejected by the High Court of Australia in Rogers v Whitaker. In that case, the High Court held that the ordinary rules concerning the standard of care applied in professional negligence cases.)

The immunity of highway authorities for non-feasance (which the High Court abolished in 2001, much to the dismay of politicians) should not be restored.

Providers of ‘recreational services’ should be given immunity in respect of liability resulting from the materialisation of an ‘obvious risk’ of injury in their services.

The common law regarding the liability of not-for-profit organisations should not be changed. Nor should any adjustment be made to the law concerning Good Samaritans.

Legislation should authorise findings of 100 per cent contributory negligence. (The High Court of Australia had held that findings of contributory negligence were impermissible.)

Only those claimants who are ‘15 per cent of a most extreme case’ should be entitled to general damages.

judges would be more likely to pay closer attention to factors that militate against finding that the defendant acted unreasonably: Ipp Report at 106 [7.17].

Bolam v Friern Hospital Management Committee [1957] 1 WLR 582 (CA); [1957] 2 All ER 118.

Ipp Report, Recommendation 3.


Ipp Report at 152 [10.5].


Ipp Report, Recommendations 10 and 16.


Ipp Report, Recommendation 47.
- Damages for a loss of earnings per week should be capped at twice average full-time adult ordinary time weekly earnings in Australia\(^{49}\) (at the date the *Ipp Report* was published, this proposal would have resulted in a cap of AUD$1744.80\(^{50}\) (roughly £1130)).

- The discount rate applicable to damages for future economic loss should be three per cent.\(^{51}\) (This is the Australian common law rate.\(^{52}\) In most Australian jurisdictions, a higher rate, usually five per cent, had been set in many contexts.)

- Exemplary and aggravated damages should be abolished.\(^{53}\)

(E) The Legislative Reaction\(^{54}\)

It is a notorious fact that recommendations for the reform of the law frequently fall on deaf ears.\(^{55}\) This was not the case with respect to the proposals for change contained in the *Ipp Report*. In some jurisdictions, such as New South Wales and Queensland, many of its recommendations were swiftly enacted,\(^{56}\) essentially verbatim. The legislatures in other

\(^{49}\) *Ipp Report*, Recommendation 49.

\(^{50}\) Australian Bureau of Statistics, *Average Weekly Earnings Australia, Table 3: Average Weekly Earnings, Australian (Dollars) – Original* (Reference 6302.0).


\(^{52}\) *Todorovic v Waller* [1981] HCA 72; (1981) 150 CLR 402.

\(^{53}\) *Ipp Report*, Recommendation 60.


\(^{55}\) The *Law Commission Act 2009* (UK), which amends the *Law Commission Act 1965* (UK), attempts to rectify this situation. It requires the Lord Chancellor to report to Parliament annually on the extent to which the Law Commission’s proposals have been implemented: see *Law Commission Act 1965* (UK), s 3A. See also the Protocol between the Lord Chancellor and the Law Commission agreed pursuant to s 3B(1): Law Commission, *Protocol Between the Lord Chancellor (on Behalf of the Government) and the Law Commission*, Report 321 (London: The Stationery Office, 2010) at 6 [18]-[22]. This Protocol relevantly requires the government to correspond with the Commission following the publication of a report regarding its implementation.

\(^{56}\) Indeed, the governments in some jurisdictions did not wait for the *Ipp Report* to be published. Controversially, the New South Wales government began its reform process before the Ipp Panel had been
jurisdictions, such as the Territories, were more discriminating and only implemented a handful of the Ipp Report’s recommendations.

All of the legislatures enacted provisions to address issues that were not discussed in the Ipp Report. For example, in all States and Territories save for Victoria and Western Australia, potent illegality defences were enacted. These defences were created in response to a misguided belief that the common law routinely enables persons injured while committing a criminal offence to profit from their wrongdoing. The case for creating them was not considered in the Ipp Report. Likewise, in New South Wales, Queensland, Western Australia and the Northern Territory, provisions restricting or prohibiting lawyers from advertising personal injury services were introduced. Again, these controls were created without the benefit of advice from the Ipp Panel.

57 Civil Liability Act 2002 (NSW), ss 54-54A; Civil Liability Act 2003 (Qld), s 45; Civil Liability Act 1936 (SA), s 43; Civil Law (Wrongs) Act 2002 (ACT), s 94; Personal Injuries (Liabilities and Damages) Act 2003 (NT), s 10. No equivalent provision exists in Victoria or Western Australia. However, s 14G(2) of the Wrongs Act 1958 (Vic) provides: ‘In determining whether the plaintiff has established a breach of the duty of care owed by the defendant, the court must consider … whether the plaintiff was engaged in an illegal activity.’ This provision does not create a defence in the strict sense. Rather, the claimant’s illegal act is merely a consideration to be borne in mind for the purposes of the negligence ‘calculus’.

58 The political focus was on a decision of the District Court of New South Wales (Fox v Peakhurst Inn Pty Ltd (unreported, District Court of New South Wales, McGuire DCJ, 29 August 2002)) to award nearly AUD$50,000 (roughly £33,000) to an inebriated teenager who had been badly beaten by an occupier with a metal bar. This beating occurred when the teenager, having been denied entry into a night club because he was intoxicated and under-age, endeavoured to locate alternative access to the club via the occupier’s adjoining premises. The teenager’s mother recovered AUD$18,578 (approximately £12,000) in respect of a psychiatric injury that she suffered upon seeing her son in hospital. This decision was set aside by New South Wales Court of Appeal on procedural grounds: Fox v Peakhurst Inn Pty Ltd [2004] NSWCA 74. The defendant apparently lost on the retrial: V Goldner, ‘Drunk Youth gets Payout Back’, 18 December 2004, Daily Telegraph, 26. I provided a review of the statutory illegality defences in J Goudkamp, ‘A Revival of the Doctrine of Attainder? The Statutory Illegality Defences to Liability in Tort’ (2007) 29 Syd LR 445. See also J Goudkamp, ‘Self-Defence and Illegality Under the Civil Liability Act 2002 (NSW)’ (2010) 18 TLJ 61.

59 Legal Profession Act 2004 (NSW), s 85(1)(d); Legal Profession Regulations 2005 (NSW), Pt 5, Div 2.

60 Personal Injuries Proceedings Act 2002 (Qld), ss 64-66.


63 The constitutional validity of the New South Wales restrictions were tested in the High Court of Australia: APLA Ltd v Legal Services Commissioner [2005] HCA 44; (2005) 224 CLR 322. The main argument in support of the suggested invalidity of the restrictions was that they infringed the implied constitutional freedom to communicate on political and governmental matters (which had been recognised by the High Court in Nationwide News Pty Ltd v Wills [1992] HCA 46; (1992) 117 CLR 1; Australian Capital Television Pty Ltd v Commonwealth [1992] HCA 45; (1992) 117 CLR 106). A majority of the Court upheld the restrictions.
Not only did all State and Territory legislatures engage in legislative experimentation, but they positively disregarded certain of the Panel’s recommendations. Consider the following four examples. First, and most notably, they ignored the Panel’s eminently sensible recommendation that any legislation enacted to address the insurance crisis should be consistent across Australia. Unfortunately, there are significant variations in the legislation between jurisdictions.64 Secondly, contrary to the Panel’s advice, in all jurisdictions certain not-for-profit organisations (or ‘volunteers’) were provided ‘good faith’ defences65 and ‘Good Samaritans’ with immunity.66 Thirdly, in all jurisdictions except for the Northern Territory, the immunity of highway authorities was resurrected in modified form.67 The Panel expressly counselled against reviving the immunity.68 Finally, the advice in the Ipp Report with respect to the discount rate was ignored by all of the legislatures other than that of the Australian Capital Territory. A rate of five per cent was generally adopted.69 In the Australian Capital Territory, the common law rate of three per cent70 already applied. This was left undisturbed.

65 Civil Liability Act 2002 (NSW), s 61; Civil Liability Act 2003 (Qld), s 39; Volunteers Protection Act 2001 (SA), s 4; Civil Liability Act 2002 (Tas); s 47; Wrongs Act 1958 (Vic), s 37; Volunteers and Food and Other Donors (Protection from Liability) Act 2002 (WA), s 6; Civil Law (Wrongs) Act 2002 (ACT), s 8; Personal Injuries (Liability and Damages) Act 2003 (NT), s 7. See generally M McGregor-Lowndes and L Nguyen, ‘Volunteers and the New Tort Law Reform’ (2005) 13 TLJ 1.
66 Civil Liability Act 2002 (NSW), Pt 8; Civil Liability Act 2003 (Qld), ss 25-27; Civil Liability Act 2003 (SA), s 74; Civil Liability Act 2002 (Tas), ss 35A-35C; Wrongs Act 1958 (Vic), s 31A-31C; Civil Liability Act 2002 (WA), ss 5AB-5AE; Civil Law (Wrongs) Act 2002 (ACT), s 5; Personal Injuries (Liabilities and Damages) Act 2003 (NT), s 8.
67 Civil Liability Act 2002 (NSW), s 45; Civil Liability Act 2003 (Qld), s 37; Civil Liability Act 1936 (SA), s 42; Civil Liability Act 2002 (Tas), s 42; Road Management Act 2004 (Vic), s 102; Civil Liability Act 2002 (WA), s 5Z; Civil Law (Wrongs) Act 2002 (ACT), s 113.
68 See above the text accompanying n 43.
69 Civil Liability Act 2002 (NSW), s 14 (five per cent); Civil Liability Act 2003 (Qld), s 57 (five per cent); Civil Liability Act 1936 (SA), ss 3, 55 (five per cent); Civil Liability Act 2002 (Tas), s 28A (five per cent); Wrongs Act 1958 (Vic), s 281 (five per cent); Law Reform (Miscellaneous Provisions) Act 1941 (WA), s 5 (six per cent); Personal Injuries (Liabilities and Damages) Act 2003 (NT), s 22 (five per cent).
70 See above the text accompanying n 51.
The Resulting Statutory Chaos

As a result of the legislative reaction to the insurance crisis, Australia now has a spectacularly complicated tort system. Each jurisdiction has a unique set of rules (which is a nightmare for academics writing about the Australian law of torts, if such a thing still exists). And, within each jurisdiction, it is common to find a litany of schemes that establish different rules for different types of cases. For instance, in New South Wales the legislation enacted in the wake of the Ipp Report added to statutes governing compensation in the contexts of motor vehicle accidents and workers’ compensation. This ‘hodge-podge’ of statutes is pregnant with the potential to cause significant injustice. A claimant tortiously injured in, say, a motor vehicle accident, may receive treatment altogether different from a claimant who suffers identical loss due to the carelessness of a provider of a recreational service. Similarly, a person hurt as a result of the wrongdoing of another in one State may recover several hundred thousand dollars more or less than an identically injured person in another State. In short, tort law in Australia is now chaotically fragmented both inter-jurisdictionally and intra-jurisdictionally.

The Impact of the Statutory Changes

Reliable data regarding the effect of the tort reforms on third-party insurance premiums are not available (although anecdotal evidence suggests that premiums have returned approximately to levels seen before the 2001-2002 insurance crisis). However, the impact of

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71 Motor Accidents Compensation Act 1999 (NSW).
72 Workers Compensation Act 1987 (NSW).
73 The description is Ipp JA’s: Landon v Ferguson [2005] NSWCA 395; (2005) 64 NSWLR 131 at 135 [17].
74 Data regarding premiums were not systematically collected before the 2001-2002 insurance crisis. Since 2003, a national insurance database, the ‘National Claims and Policies Database’ has been maintained by the Australian Prudential Regulation Authority. It is accessible online: <http://www.ncpd.apra.gov.au/Home/Home.aspx>.
the changes made to the tort system in Australia in the wake of the *Ipp Report* is clearly visible in the number of personal injury claims filed.\(^75\) It is convenient to look at the data for the civil jurisdiction of the New South Wales District Court (New South Wales is the most populous state in Australia, and the civil jurisdiction of its District Court, which is roughly equivalent in institutional terms to the English County Court, deals almost exclusively with personal injury cases). In 2001, filings were 20,784.\(^76\) This figure fell to 12,686 in 2002 and then to 7,912 in 2003. In 2004, only 6,789 claims were filed.\(^77\) These are obviously very profound changes.\(^78\) There is no doubt that they were due to the legislation enacted following the *Ipp Report*.

(H) The Future

The statutory changes in Australia have, on the whole, been condemned by academics.\(^79\) Many judges have been critical of them too. One prominent judge, now the Governor of Tasmania, wrote that the reforms were ‘hasty and ill-considered reactions to the so-called insurance crisis’.

Justice Ipp complained that some of the statutory changes went too far and suggested that they will probably be wound back, quietly and gradually. His Honour wrote: ‘It is difficult to accept that public sentiment will allow all these changes to remain long-term.

\(^75\) A detailed survey of these statistics in all jurisdictions is provided in EW Wright, ‘National Trends in Personal Injury Litigation: Before and After “Ipp”’ (2006) 14 TLJ 233.

\(^76\) District Court of New South Wales, *Annual Review 2003* at Annexure A1.


\(^78\) The personal injury Bar in New South Wales was decimated as a result. Many sets of barristers’ chambers closed following the legislative reforms. The New South Wales government was even lobbied by the profession to create a ‘rescue package’ for unemployed lawyers. This was wishful thinking: see A Mitchell, ‘Get Over It, Carr Tells Jobless Lawyers’ 7 December 2003, *Sun Herald*, 21.


features of the law. Certain of the statutory barriers that plaintiffs now face are inordinately high.\textsuperscript{81}

It seems reasonably likely that at least some of the more severe provisions will slowly be softened or repealed as the insurance crisis fades from Australia’s political memory. One interesting recent development, which may be a reaction to the harshness of the post-\textit{Ipp} reforms, is that context-specific no-fault compensation schemes are on the rise. For instance, a no-fault system for persons catastrophically injured in motor vehicle accidents was quietly established in New South Wales in 2006.\textsuperscript{82} The Federal Government recently briefed the Australian Productivity Commission, an economic advisory body, to inquire into establishing a disability care and support scheme.\textsuperscript{83} The Commission recommended that a national comprehensive system be established to insulate persons from the financial consequences of significant disability.\textsuperscript{84}

(I) Summary

In contrast with the glacial pace at which law reform typically occurs, all Australian governments rapidly altered tort system at the start of the twenty-first century. These changes, which primarily concerned the substantive law of torts (including its remedial system) rather than the procedure by which it is administered, were severely restrictive of the ability of claimants to recover compensation. They were made with a view to reducing insurance premiums. Central to the reform process was a report, the \textit{Ipp Report}, commissioned by the

\textsuperscript{81} D Ipp, ‘The Metamorphosis of Slip and Fall’ (2007) 29 ABR 150 at 150.
\textsuperscript{82} \textit{Motor Accidents (Lifetime Care and Support) Act} 2006 (NSW). This scheme operates in tandem with a fault-based system: see \textit{Motor Accidents Compensation Act} 1999 (NSW).
governments of Australia. The reforms resulted in a dramatic reduction in the number of filings of actions for damages in respect of personal injury and death.

III  THE YOUNG REPORT

This part of this article examines the Young Report. Comparisons will be drawn with the Ipp Report and the tort reform process in Australia where appropriate.

(A)  The Political Context

In order to properly understand the Young Report, it is essential to appreciate the political environment in which it exists. The Conservatives commissioned the Young Report because they (like the other major parties) believed that Britain was in the grip of a ‘compensation culture’. Although a 2006 report by the House of Commons Constitutional Affairs Committee concluded that there was no ‘compensation culture’ in Britain, in his Foreword to the Young Report the Prime Minister claimed: ‘A damaging compensation culture has arisen, as if people can absolve themselves from any personal responsibility for their own actions, with the spectre of lawyers only too willing to pounce with a claim for damages on the slightest pretext.’ This ungrammatical piece of rhetoric, which was not supported by any empirical evidence to contradict the findings of the 2006 report, contains many phrases that are familiar to Australian lawyers: ‘compensation culture’, ‘personal responsibility’ and the spectre of ‘greedy lawyers’. These catch-cries were ubiquitous in the Australian media in the period preceding the publication of the Ipp Report.

85 House of Commons Constitutional Affairs Committee, Compensation Culture: Third Report of Session 2005-2006, vol 1, HC 754-I (London: The Stationery Office, 2006) at 13 [31] (‘the evidence does not support the view that increased litigation has created a “compensation culture”’).
86 See above Part II(B).
Unfortunately, the difficulty that the Conservatives (and their Liberal Democrat partners) have with the supposed ‘compensation culture’ is not entirely clear.\(^{87}\) They do not, apparently, see it as objectionable on the ground that it places upwards pressure on insurance premiums. They could not take issue with the ‘compensation culture’ on this basis since there is not an insurance crisis in Britain.\(^{88}\) It is true that there has been some unease about recent premium spikes in specific contexts, such as in relation to motor vehicle insurance.\(^{89}\) But there is no doubt that the situation in Britain with respect to premiums is radically different from that which existed in Australia in the period preceding the publication of the \textit{Ipp Report}. Rather, it seems that the main objection to the ‘compensation culture’ is that it provokes excessive caution and encourages defensive practices.

(B) The Terms of Reference

Lord Young’s terms of reference relevantly stated:\(^{90}\) ‘To investigate and report back to the Prime Minister on the rise of the compensation culture over the last decade coupled with the current low standing that health and safety legislation now enjoys and to suggest solutions.’ Two points are worth noting in this regard. First, Lord Young was permitted to consider the entirety of the law of torts and, indeed, all other fields in so far as they relate to the ‘compensation culture’. His remit also allowed him to consider the causes of the

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\(^{87}\) Several reasons why politicians might find the ‘compensation culture’ to be problematic are canvassed in R Mullender, ‘Blame Culture and Political Debate: Finding our way Through the Fog’ (2011) 27 PN 64.


\(^{89}\) For example, between March 2010 and March 2011 premiums for young drivers were reported to have increased by up to 64 per cent. For other drivers, the cost of cover rose by up to 40 per cent. See D Prosser, ‘How Motor Insurers Drove Premiums to an All-Time High’, 9 September 2011, \textit{The Independent}, 33. See further House of Commons Transport Committee, \textit{The Cost of Motor Insurance: Fourth Report of Session 2010–2011}, vol I, HC 591 (London: The Stationery Office, 2011).

\(^{90}\) \textit{Young Report}, Annex A.
‘compensation culture’. The terms of reference issued to the Ipp Panel were quite different.\textsuperscript{91} The Ipp Panel, recall, was requested to consider only the action in negligence in so far as it applied to personal injury and death. It was also forced to accept that tort law was the root of the problem to be addressed. Secondly, the terms of reference required Lord Young to assume that a ‘compensation culture’ exists. He was not briefed with the task of determining whether there was in fact a ‘compensation culture’. Given the contentiousness of this issue, it is regrettable that the terms of reference did not permit Lord Young to investigate whether Britain in fact suffers from a ‘compensation culture’.

(C) Lord Young

It is useful to briefly reflect on the significance of the fact that Lord Young, a Tory peer, was assigned with responsibility for investigating the ‘compensation culture’ and identifying means of addressing it. Lord Young qualified as a lawyer and practised for a brief period early in his working life. He then left the law to pursue a career in business and then in politics. He was a cabinet minister in the Thatcher Government and subsequently served in an advisory capacity for the Conservatives. What, if anything, can be read into the fact that Lord Young was requested to advise the government how to tackle the ‘compensation culture’, rather than, say, the Law Commission? Arguably, it suggests the existence of a belief on the part of the Conservatives that ‘compensation culture’ should be addressed in a pragmatic way. The Prime Minister referred in his Foreword to the need for ‘common sense’ in the law. Economic factors, rather than wider considerations of justice, were also seen as particularly significant. Again, the Prime Minister claimed that the relevant law was bureaucratic and (in a mixed-metaphor) that businesses were being ‘drowned in red tape’.

\textsuperscript{91} See above Part II(B).
Finally, the fact that Lord Young was briefed as opposed to the Law Commission suggests that the Conservatives thought that the ‘compensation culture’ was a reasonably urgent problem. The Law Commission typically takes two or three years to publish a final report from the date that a project is referred to it. Presumably, the Conservatives were not prepared to wait this long. If the foregoing interpretation of the Conservatives’ motives for briefing Lord Young is correct, the Young Report shares a number of features in common with the Ipp Report.92

(D) The Nature of the Young Report

The fact that the author of the Young Report is a politician is immediately obvious upon even a cursory reading of it. It is replete with political slogans and written in emotive and often ungrammatical language. The Report’s recommendations are generally vague and it is difficult to determine precisely what changes are proposed. Indeed, it is at times unclear whether a change to the law is even being recommended. The Report is almost devoid of references to the case law or to legislation and it contains many tell-tale signs that its author had a relatively poor understanding of the tort system (several of which will be noted when the Report’s recommendations are discussed93). In these respects, the Young Report is decidedly amateurish compared with the Ipp Report. The fact that changes to important parts of tort law are being contemplated on the basis of the Young Report is, therefore, a cause for alarm. Proposals for reform that are made without the benefit of a proper understanding of the current state of the law run a significant risk of altering it for the worse.

92 See above Part II(C).
93 See below Part II(F).
The phrase ‘compensation culture’ is used in at least five ways in academic and lay writing about the law. First, it may indicate that too many lawsuits are being commenced. Secondly, a ‘compensation culture’ may refer to a society in which damages awards are frequently excessive relative to some benchmark, such as the gravity of the defendant’s wrongdoing or the severity of the claimant’s injuries. Thirdly, the words ‘compensation culture’ may mean that a substantial number of claims are fraudulent. Fourthly, a ‘compensation culture’ may refer to an undesirable readiness of sections of the public or the public generally to seek legal redress of their grievances. Fifthly, a ‘compensation culture’ may be a society in which legal redress for injuries is too readily available.

A serious defect in the Young Report is that it does not identify the sense in which it uses the term ‘compensation culture’. Consider the following passage in the Report.98

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95 Lord Phillips of Worth Matravers, then the Lord Chief Justice, understood the phrase ‘compensation culture’ to bear this meaning when he gave evidence to the Constitutional Affairs Committee in 2005. When asked whether a ‘compensation culture’ existed, Lord Phillips replied in the negative and referred to statistics indicating that the number of claims had fallen in recent years: House of Commons Constitutional Affairs Committee, Compensation Culture: Third Report of Session 2005-2006, vol 2, HC 754-II (London: The Stationery Office, 2006) at Ev 1.

96 See, e.g., Lewis, Morris and Oliphant, above n 94 at 175 (the phrase ‘compensation culture’ ‘insinuates that a significant proportion of claims are fraudulent, exaggerated or otherwise lacking in merit’).

97 See, eg., K Williams, above n 94 at 500 (‘The growth of a “compensation culture” implies an increased and unreasonable willingness to seek legal redress when things go wrong’ (footnote omitted)); J Lowe, J Broughton, B Gravelsons, C Hensman, J Rakow, M Malone, G Mitchell and S Shah, The Cost of Compensation Culture (London: Faculty and Institute of Actuaries, 2002) at Section 2.1 (a ‘compensation culture’ is a culture in which there is a ‘desire of individuals to sue somebody, having suffered as a result of something which could have been avoided if the sued body had done their job properly’); Hand, above n 94 at 575-576 (in a ‘compensation culture’ ‘people are more likely to “blame and claim” or “have a go” rather than display a reasonable level of stoicism’).

98 Young Report, Foreword by Lord Young.
I believe that a “compensation culture” driven by litigation is at the heart of the problems that so beset health and safety today. [In 2009] over 800,000 compensation claims were made in the UK while stories of individuals suing their employers for disproportionately large sums of money for personal injury claims, often for the most trivial of reasons, are a regular feature in our newspapers.’

In this extract, Lord Young conflates at least three of the five identified meanings of the phrase ‘compensation culture’. In referring to the number of lawsuits, he implies that there is a ‘compensation culture’ in the first sense. He then uses the term in the second sense by asserting that damages awards are disproportionate (he does not identify the criterion according to which proportionality is assessed). Finally, he suggests that many claims are frivolous and thereby alludes to the fourth (and perhaps also to the fifth) definition of a ‘compensation culture’. With respect, this situation is unsatisfactory. Before proposals for addressing a putative problem with the law are made, proponents for change should identify the suggested problem with reasonable precision. A failure to do so is prone to result in changes being made that fail to hit their target.

Next observe that Lord Young fails to realise that, on some of these definitions, it is impossible to ascertain whether a ‘compensation culture’ exists. He refers to the fact that over 800,000 claims for compensation were made in 2009. He evidently thought that this proves that there are too many claims in Britain. What, however, is a non-excessive level of claiming? No sensible answer can be given to this question. Asserting that 800,000 claims is an excessive is neither more nor less defensible than asserting that 600,000 claims or a million claims is excessive.

The difficulties with the Young Report’s analysis of the ‘compensation culture’ do not end here. Incredibly, Lord Young vacillated on the issue of whether there is in fact a ‘compensation culture’. In the passage quoted above, Lord Young indicates that he believed
that a ‘compensation culture’ exists. However, later in his Report he wrote that ‘[t]he problem of the compensation culture prevalent in society today is ... one of perception rather than reality’. 99 It is also worth noting that the latter claim contradicts the terms of reference, which required Lord Young to assume that Britain is labouring under a ‘compensation culture’. 100

(F) The Recommendations for Reform

Preceding sections dealt with the background and context of the Young Report. Attention will now be turned to the recommendations that Lord Young made that are relevant to tort lawyers.

(i) Good Samaritans

According to Lord Young, the public believes that Good Samaritans are not infrequently held liable when their conduct causes injury. 101 To support this proposition, Lord Young referred to advice given on radio and television shows to homeowners during the 2009-2010 Winter that they should not clear snow in front of their homes as doing so might expose them to liability to passersby who slip and fall. Lord Young accepted that this public perception of the law is inaccurate. 102 As every lawyer knows, the law treats Good Samaritans sympathetically so as not to discourage altruism. The courts are reluctant to hold them liable in negligence. 103

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99 Young Report at 19.
100 See above Part III(B).
101 Young Report at 23.
102 Lord Young thought that the perception had arisen ‘largely because in the USA Good Samaritans are often liable’. In reaching this conclusion, Lord Young fell prey to a familiar myth about tort law in the United States. Good Samaritans generally enjoy greater protection from liability in the United States than they do in Britain. In many jurisdictions in the United States, Good Samaritans have been conferred with immunity. See DB Dobbs, The Law of Torts (St Paul MN: West Group, 2000) at 663-664. See also at 306-307, 339.
103 Authorities are collected in C Sappideen and P Vines (eds), Flemings the Law of Torts (Sydney: Law Book Co/Thomson Reuters, 10th edn, 2011) at 136.
(or find that they are guilty contributory negligence\textsuperscript{104} or that they assumed the risk of injury\textsuperscript{105}). However, Lord Young thought that it was important to give the public greater confidence on this score. Accordingly, he recommended that it be clarified that ‘people will not be held liable for any consequences due to well-intentioned voluntary acts on their part.’\textsuperscript{106}

Four points should be noted in this connection. First, the relevant law is already admirably clear. Enacting legislation in this connection entails the risk of making it less certain. Secondly, Lord Young thought that this recommendation, if implemented, would not change the law. On this point, he was badly mistaken. At present, Good Samaritans are obliged to take reasonable care for the safety of those to whom they owe a duty. Lord Young’s recommendation, if adopted, would confer Good Samaritans with immunity for acts performed in good faith, as has been done in many Australian jurisdictions.\textsuperscript{107} Thirdly, it is far from clear that Good Samaritans should be granted immunity. If Good Samaritans are bestowed with immunity, the only people who will be shielded from liability who are not already protected from it are Good Samaritans who act with reckless disregard for the welfare of others. It seems unlikely that that this is a sensible position for the law to adopt. Fourthly, Lord Young failed to realise that the public’s misperception of the law regarding Good Samaritans will not be corrected by reducing the law to statutory form. The fact of the matter is that legislation is not read by the general public. The problem needs to be addressed by targeting the cause of the public’s misperception, which is primarily misleading and irresponsible media reporting.

\textsuperscript{104} Baker \textit{v} TE Hopkins & Son \textit{Ltd} [1959] 1 WLR 966 (CA); [1959] 3 All ER 225.\
\textsuperscript{105} Haynes \textit{v} Harwood [1935] 1 KB 146 (CA); Baker \textit{v} TE Hopkins & Son \textit{Ltd} [1959] 1 WLR 966 (CA); [1959] 3 All ER 225. The interests of Good Samaritans are promoted in various other ways. For instance, in order to facilitate their compensation in the event that they are injured, their conduct is not usually treated as an intervening cause: for detailed discussion see Restatement (Third) of Torts: Liability for Physical and Emotional Harm at § 32.\
\textsuperscript{106} Young Report at 23.\
\textsuperscript{107} See above Part II(E).
Today, the advertisement of personal injury litigation services by both lawyers and claims management companies (‘CMCs’) is commonplace. In an attempt to curb the worst perceived excesses of such advertising, the Blair Government created a special regulatory regime for CMCs in Part 2 of the Compensation Act 2006 (UK).\footnote{Several Australian governments have also restricting the advertisement of personal injury litigation services: see above Part II(E).} In general terms,\footnote{What follows here is an abbreviated description of this complex regulatory system. A full understanding of this regime necessitates consideration not only of Pt 2 of the Compensation Act, but also of various regulations and statutory orders made pursuant to Pt 2, including The Compensation (Claims Management Services) Regulations 2006 (SI 2006/3322), The Compensation (Regulated Claims Management Services) Order 2006 (SI 2006/3319), and the Compensation (Exemptions) Order 2007 (SI 2007/209).} this regime requires CMCs to apply for authorisation before operating and to abide by a code of conduct.\footnote{Ministry of Justice, Conduct of Authorised Persons Rules 2007 (London: Ministry of Justice, 2007). The code is accessible online: <http://www.justice.gov.uk/downloads/guidance/inspection-monitoring/claims-management-regulation/conduct-of-authorised-persons-rules2007.pdf>.} This code states that their advertising must comply with general rules of advertising published by various regulators. Furthermore, CMCs are banned from engaging in ‘high pressure selling’, cold calling, advertising in medical or public buildings without the consent of the management of the facility or building, and offering immediate cash or similar benefits as an inducement for making a claim.

The Young Report proposes that the advertising of personal injury litigation services be further restricted (specifics regarding the appropriate additional restrictions were not given)\footnote{Young Report at 20-21.} on the ground that such advertising contributes to the ‘compensation culture’. The Young Report’s logic in this connection is not without difficulty. For one thing, it is unclear whether the advertising in question is behind the rise of the ‘compensation culture’.\footnote{An empirical study of the effect of legal services advertising on the ‘compensation culture’ was undertaken on behalf of the Government in 2006: Department for Constitutional Affairs, Effects of Advertising in Respect of Compensation Claims for Personal Injuries (London: Millward Brown, 2006). This report concluded that ‘no straightforward link has been identified’ between legal services advertising and the ‘compensation culture’ (at 3).} It has been...
permissible for lawyers to advertise their services since the mid 1980s. The ‘compensation culture’ is, apparently, a much more recent phenomenon.

The previous point aside, it is quite impossible for restricting or prohibiting legal services advertising to ameliorate the ‘compensation culture’ on some meanings of this concept. For example, it was noted above that a ‘compensation culture’ may mean, and Lord Young in his Report on occasion uses it to mean, a society in which that damages awards are frequently excessive relative to some standard. Limited or banning advertising would do nothing to reduce the quantum of awards. Advertising simply has no effect on the rules governing the assessment of damages.

A further difficulty with Lord Young’s analysis in this connection is that no weight is given to the disadvantages of restricting or prohibiting legal services advertising. There is insufficient space available to consider comprehensively these drawbacks in this article. In brief, however, restricting legal services advertising would arguably be undesirable for several reasons. It may reduce the speed with which facts in issue in litigation are investigated with adverse consequences for the accuracy of judicial determinations, limit consumer choice, raise the costs to consumers of finding a lawyer, and reduce public knowledge of the law. It is necessary for these and other considerations to be weighed before any action is taken to restrict legal services advertising. Even if such advertising has contributed to the ‘compensation culture’ or has other unwanted consequences, it does not follow that it should

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114 One commentator’s research reveals that the term ‘compensation culture’ did not feature in the British media until the mid 1990s: Hand above n 94 at 569.

115 Meanings attributed to the phrase ‘compensation culture’ are enumerated above in Part III(E).

be banned or restricted. It may be that the adverse ramifications of legal services advertising are worth tolerating.

Finally, it should be noted that the ability of the government to restrict legal services advertising might be limited by Article 10 of the European Convention on Human Rights, which guarantees freedom of expression. The experience in the United States in this connection is significant. In that country, lawyer advertising is constitutionally protected as a form of ‘commercial speech’ under the First Amendment. Given the growing interest of British courts in First Amendment jurisprudence and their tendency to strengthen the protection given to freedom of expression, it is far from inconceivable that Article 10 would put a brake on attempts to further restrict legal services advertising in this jurisdiction. This possibility was not appreciated by Lord Young.

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117 Article 10(1) relevantly provides: ‘Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.’


119 First Amendment jurisprudence was until relatively recently essentially ignored by British courts. References are now made to it with some regularity: see, e.g., R (Animal Defenders International) v Secretary of State for Culture, Media and Sport [2008] UKHL 15; [2008] 1 AC 1312 at 1353 [47]; Douglas v Hello! Ltd (No 1) [2001] QB 967 (CA) at 1004 [135]; Brown v Stott [2003] 1 AC 681 (PC) at 708; Reynolds v Times Newspapers Ltd [2001] 2 AC 127 (HL) at 218.

120 Article 10(1) is qualified by art 10(2). This paragraph provides:

‘The exercise of [the freedoms guaranteed by art 10(1)], since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.’

It seems doubtful whether such restrictions on legal services advertising are ‘necessary in a democratic society’ (emphasis added). These words set the bar high. As Lord Bingham of Cornhill wrote in Regina (Animal Defenders International v Secretary of State for Culture, Media and Sport [2008] UKHL 15; [2008] 1 AC 1312 at 1345 [26]:

‘For a restriction to be necessary there must be a pressing social need for it, and it is for the member state which imposes the restriction to justify it. … [T]he importance of free expression is such that the standard of justification required of member states is high and their margin of appreciation correspondingly small…’.
(iii) Extension of the low-value road traffic claims procedure

The Civil Procedure Rules 1998 (UK) provide for a simplified claims procedure for low-value road accident personal injury claims. This procedure applies where the value of the claim is between £1,000 and £10,000 and at least £1,000 is sought in respect of pain and suffering. The streamlined procedure aims to expedite the processing of claims to which it applies (it applies to approximately 75 per cent of road accident personal injury claims). It also seeks, by way of a fixed costs regime, to keep costs in proportion to the value of the claim. Lord Young proposed increasing the upper limit of claims that are subject to this procedure to £25,000 and extending the procedure to medical negligence cases. This proposal might be sensible, although one wonders whether bringing some higher-value and therefore more complex claims within this streamlined system will result in injustice since higher-value claims tend call for more detailed investigations. This point aside, however, it is unclear whether this proposal will address the ‘compensation culture’. Indeed, if implemented, it may increase the number of claims brought, the opposite of what Lord Young hopes to achieve. This is because the faster claims are processed, the more attractive seeking legal redress will become. Some people who would have been discouraged from claiming by the time it would take for their claim to be processed will be more inclined to claim if they are confident of obtaining an award more quickly.

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121 SI 1998/3132.
123 Ministry of Justice, Solving Disputes in the County Courts: Creating a Simpler, Quicker and More Proportionate System, Consultation Paper 6 (2011) at 25-26 [76].
124 Young Report at 22-23.
(iv) Success fees and ATE premiums

In December 2009, Sir Rupert Jackson, a Lord Justice of Appeal, published his review of costs in civil litigation. Among the central recommendations that he made in his voluminous report are that success fees (the fee to which a lawyer who acts on a conditional fee agreement is entitled if the case is successful) and after-the-event (‘ATE’) insurance premiums (ATE insurance is insurance secured by the claimant when a claim is brought against the risk of having to bear the defendant’s costs) should cease to be recoverable as costs. Sir Rupert’s hope is that, by giving claimants a stake in the costs, it is more likely that costs will be more controlled than they are at present. In his Report, Lord Young urged the government to act on these recommendations. Presumably, he thought that their implementation might diminish the ‘compensation culture’. However, it is unclear whether success fees and ATE insurance premiums are causally related to the ‘compensation culture’.

Both the use of conditional fee agreements and the availability of ATE insurance became widespread in 2000. Yet the volume of claims remained essentially constant at this time. Accordingly, it is uncertain whether barring the recoverability of success fees or ATE insurance premiums as costs will do anything to resolve the ‘compensation culture’, at

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126 Young Report at 21-22.

127 Conditional fee agreements first appeared following the Conditional Fee Agreements Order 1995 (UK) (SI 1995/1674). They were used extensively as a result of the Conditional Fee Agreements Regulations 2000 (UK) (SI 2000/692). ATE insurance premiums became recoverable as costs following the enactment of the Administration of Justice Act 1999 (UK), s 29. Since this time, claimants have routinely bought such insurance.

128 Lewis, Morris and Oliphant, above n 94 at 171-172.
least in so far as the idea of a ‘compensation culture’ is taken to mean a society in which too many lawsuits are commenced.129

(v) Referral fees

Personal injury solicitors have many of their clients referred to them by CMCs and insurers. In return for referrals, solicitors pay a fee.130 The fee is roughly £800 per case referred.131 The Jackson Report recommends that the payment of referral fees be banned,132 primarily on the ground that cases are being referred to the solicitor who pays the highest fee rather than the solicitor who is able to provide the best service to the client. Lord Young supported this recommendation in his Report.133 He thought that implementing it would help to solve the ‘compensation culture’. This is not the place to comprehensively consider the merits of permitting the payment of referral fees. There is insufficient space in which to do so. However, it is worth noting that that the issue of referral fees draws in many of the considerations that are in play in relation to advertising by lawyers. Indeed, referral fees are essentially a fee paid by lawyers to have others advertise on their behalf. One of the strongest arguments against prohibiting legal advertising is that banning it would reduce information available to consumers about legal services and the law.134 The same argument militates against prohibiting referral fees. Coherence may demand, therefore, that the position taken in relation to advertising may affect what should be done in connection with referral fees and

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129 Various meanings attached to the phrase ‘compensation culture’ were discussed earlier: see above Part III(E).
130 Solicitors have been permitted to pay referral fees since an amendment to the Solicitors Conduct Rules in 2004. See D Greene, ‘The Referral Fee Conundrum’ (2010) 160 NLJ 419
133 Young Report at 20-21.
134 See above Part III(F)(ii).
vice versa. This does not seem to have been appreciated by the authors of either the *Jackson Report* or the *Young Report*.

(vi) Summary

In general, the recommendations made in the *Young Report* are all ill-considered. Some of them are based on a defective understanding about the current state of law, such as those concerning Good Samaritans. Others, like that regarding the extension of the simplified procedure for road traffic personal injury claims, might increase the volume of claims and therefore aggravate the ‘compensation culture’. Yet others are supported only by emotive slogans and clichés rather than reasoned analysis. The proposals regarding advertising, for instance, do not suggest that any thought has been given to the merits of permitting lawyers to advertise their services. They are essentially propped up only by sound bites. At the root of many of these shortcomings in the *Young Report* is the failure of its author to identify clearly what he means by ‘compensation culture’.

(G) Implementation of the *Young Report*\(^\text{135}\)

The stage is set for the implementation of the *Young Report*’s recommendations. Responsibility for putting them into effect has fallen to the Department for Work and Pensions\(^\text{136}\) and the Ministry of Justice.\(^\text{137}\) The *Legal Aid, Sentencing and Punishment of

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\(^{135}\) A timetable to the implementation of the proposals in the *Young Report* is provided in Annex M.


\(^{137}\) Proposals to implement certain of the *Young Report*’s recommendations are detailed in Ministry of Justice, above n 123.
Offenders Bill,\textsuperscript{138} which was introduced by the government on 21 June 2011, contains provisions that prohibit the recovery of success fees and ATE insurance premiums as costs in most situations.\textsuperscript{139} On 9 September 2011, the Justice Minister announced plans to prohibit referral fees.\textsuperscript{140}

In March 2011, the Ministry of Justice published a consultation paper in which it indicated the government’s support for Lord Young’s recommendation that the ceiling of the simplified procedure applicable to road accident personal injury claims be raised from £10,000 to £25,000 (this change would bring approximately 90 per cent of road accident claims within this streamlined procedure).\textsuperscript{141} It also expressed the government’s agreement with Lord Young’s proposal to extend the simplified procedure to medical negligence claims, beginning with claims against the National Health Service.\textsuperscript{142} Indeed, the Ministry revealed that the government is contemplating going further than Lord Young in this connection in two respects. First, it seems that the government is interested in bringing public liability and employer’s liability claims within the simplified procedure’s net too.\textsuperscript{143} Secondly, the government is contemplating a claims ceiling of £50,000 in all four contexts (in relation to road accident claims, the government estimated that such an increase would result in approximately 95 per cent of claims being processed pursuant to the streaming procedure.)\textsuperscript{144}

Happily, it seems unlikely that Lord Young’s confused proposal concerning Good Samaritans will not be put into effect. Shortly after the Young Report was published, the

\textsuperscript{138} HC Bill 205 (2011).
\textsuperscript{139} See Pt 2 of the Bill.
\textsuperscript{141} Ministry of Justice, above n 123, 23 [66]-[69].
\textsuperscript{142} Ibid, 25 [74]-[76].
\textsuperscript{143} Ibid, 25-26 [77]-[82].
\textsuperscript{144} Ibid, 23-26 [66]-[82].
Department of Transport published a ‘Snow Code’\textsuperscript{145} advising occupiers that they were very unlikely to incur liability to pedestrians who slip and fall if they clear snow in front of their house. It seems that the government regards this as sufficient to address the public’s misconceptions regarding the responsibility in tort law of Good Samaritans.\textsuperscript{146}

It remains to be seen whether Lord Young’s proposal concerning advertising by lawyers will be implemented. The government seems to be less than enthusiastic about this recommendation. Of course, even if the government regards the volume and type of advertising as objectionable, it may feel that it is unnecessary to restrict or outlaw legal services advertising on account of the ‘compensation culture’ if referral fees are banned. This is because prohibiting referral fees would result in the disappearance of the CMC industry and the extensive advertising in which that industry engages.

IV THE AUSTRALIAN AND BRITISH REFORM EXPERIENCES COMPARED

It is useful to reflect on some similarities and differences in the tort reform process in Australia and Britain. There are several parallels between the processes that are worth noting. First, in both jurisdictions, the reform process has been largely driven by stakeholders. Governments, for the most part, merely reacted to lobbying. They did not act on their own initiative. The major stakeholders are insurers and organisations representing claimant lawyers. The positions taken by these stakeholders have been firmly entrenched. Neither has been willing to give ground to the other. Secondly, governments in both Australia and Britain have focused on economics and efficiency rather than on broader considerations of justice. The politicians’ concentration on economics meant that their main concern has been with cutting the cost of the tort system to society. The interest in achieving inter-personal justice

\textsuperscript{145} The code is available on the Department’s website: <http://www.direct.gov.uk/en/N11/Newsroom/DG_191868>.

\textsuperscript{146} Department of Work and Pensions, above n 136, at 11.
between tortfeasors and victims has occupied little, if any, space in the minds of politicians. Thirdly, in both Australia and Britain, the media played an influential role in the reform process. It thrust the tort system into the public’s eye. By and large, it has been highly critical of lawyers, the judiciary, and claimants. Reports of the tort system have generally been grossly distorted. The manner in which it has been portrayed generally bears little resemblance to reality. One of the most regrettable features of the reporting is that the difference between a claim being brought and a claim succeeding has often been suppressed. Accordingly, the impression has been created that claims that had little chance of succeeding led to an award of damages.

Although the tort reform processes in Australian and Britain have much in common, there are some significant differences between the Australian and British experiences in this regard. Perhaps the most noteworthy difference concerns the location where insurers and lawyers have clashed. In Australia, the war between these stakeholders took place in the law governing liability and the assessment of damages. Unsurprisingly, therefore, this is where the governments of Australia focused their attention. As described earlier,\(^\text{147}\) the reforms enacted in the wake of the *Ipp Report* made establishing liability significantly harder in many cases and severely restricted the damages to which successful claimants are entitled. Little thought was given to the procedure by which tort law was administered. For example, barely an eyebrow was raised about the fact that claimant personal injury lawyers in Australia, like their counterparts in Britain, invariably work pursuant to conditional fee agreements. The experience in Britain could hardly have been more different. The battle between insurers and lawyers in Britain has been waged not over the law of liability or that concerning the assessment of damages. Rather, the major campaigns have been fought in the realm of

\(^{147}\) See above Part II(E).
procedure. In particular, brutal battles have taken place in relation to costs.\textsuperscript{148} Because attention in Britain has been focused nearly exclusively on the procedural system, the substantive law of torts, including the law governing the assessment of damages, has largely escaped legislative alteration (for the moment).

It is not easy to explain this profound difference in the tort reform process in Australian and Britain (which so far seems to have gone unnoticed). Why have things unfolded so differently in two countries the legal systems of which have so much in common? It is conceivable that it is merely a historical accident.\textsuperscript{149} However, a more plausible explanation has to do with differences in political ideology. Arguably, the idea of the Welfare State has more attraction in Britain than in Australia. Consider, for example, the fact that the National Health Service, the jewel in the crown of the British Welfare State, is regarded as sacrosanct in England. In Australia, no such reverence is given to state-funded medical arrangements. Indeed, in Australia, significant efforts have been made, primarily through a generous premium rebate scheme,\textsuperscript{150} to encourage citizens to purchase private health insurance. The latest statistics reveal that approximately 45 per cent of Australians have such insurance.\textsuperscript{151}

Conversely, only around 6 per cent of adults Britain and Scotland have private health insurance.\textsuperscript{152} This example gives some insight in the wildly different attitudes held in Australia and Britain regarding state-run welfare arrangements, of which tort law is an

\textsuperscript{148}Brooke LJ in \textit{Hollins v Russell} [2003] EWCA Civ 718 [2003] 1 WLR 2487 at 2506 [42]; [2003] 4 All ER 590 at 605 likened the conflict between insurers and claimant lawyers to ‘trench warfare’.

\textsuperscript{149}It is true that there is a long history of legislative intervention in Australia (especially in New South Wales) in the law on liability and remedies in the tort context (see, for instance, the radical changes made to motor vehicle accident compensation in New South Wales by the \textit{Transport Accidents Compensation Act 1987} (NSW) (since repealed). It may have been natural, therefore, for Australian legislatures to continue to concentrate their attention on these areas than on issues in procedure. However, this does not explain why the Australian legislatures focussed their attention in this way to begin with.

\textsuperscript{150}\textit{Private Health Insurance Incentives Act 1998} (Cth). This Act was repealed by the \textit{Private Health Insurance (Transitional Provisions and Consequential Amendments) Act 2007} (Cth). The rebate scheme is now provided for by the \textit{Private Health Insurance Act 2007} (Cth).

\textsuperscript{151}The private health insurance industry in Australia is regulated by the Private Health Insurance Administration Council. Extensive statistical information is provided on its website: <http://www.phiac.gov.au/>.

example. This difference in views may go some way towards explaining why profound reductions in the availability of tort compensation have been politically palatable in Australia but have not even been seriously considered in Britain. British insurers are well aware that there is less political resistance to modifying the procedure by which tort law is administered in their favour. It is here, therefore, that they have sought to tilt the law in their favour.

V CONCLUSION

Tort reform swept across Australia following the 2001-2002 insurance crisis that occurred in that country. These reforms severely curtailed the circumstances in which liability in tort arises and the quantum of damages recoverable. In Britain, less extensive but nevertheless important reforms are in the works. Change, it seems, is coming to Britain too. This article has described the Australian reforms and those contemplated in Britain. The reform process in both countries has been quite similar in certain respects. However, a major difference between them is that the Australian reforms primarily concerned the law on liability and damages whereas the changes presently being mooted in Britain are directed mainly at the procedural regime by which tort law is administered. This difference may be attributable to Welfare State ideology enjoying greater vitality in Britain than in Australia.