

MEGA-HAZARDS: STORM CLOUDS GATHERING IN AUSTRALIA

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“MEGAHAZARDS” EMERGE IN AUSTRALIA

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1. “MEGAHAZARDS” EMERGE IN AUSTRALIA

Ulrich Beck suggests that human society has always been exposed to mega-hazards. We become de-sensitized to such events.¹

In the USA, we have seen major civil damages claims coming out of environmental accident/disasters...

The last 5 years in Australia has seen the emergence of big damages claims in environmental accident/pollution (“mega-hazard”) cases. For example:

- *Sydney Water Board contamination*
- *Esso-BHP Longford Gas Explosion*
- *Coode Island, Melbourne chemical explosion*

Legal commentators have noted developments in Australian courts.²

The analysis of damages by courts in environmental accident/pollution (mega-hazard) cases is complicated. In Australia, our damages rules would permit the assessment of damages to include non-pecuniary loss, and exemplary damages. We have little experience of such awards in such cases. We are, in fact, less likely to leave such assessments to juries. Yet we seem to be on the verge of this type of case.

For example, the Sydney Water Board contamination scare resulted in a class action which was commenced, and settled, without any reported instance of actual illness caused by the contamination. The medical evidence would have been fascinating: the unofficial engineering view seems to be to the effect that the levels of giardia have never changed; rather the advanced monitoring which was introduced with the recent BOOT projects, including the Prospect plant in question, simply detected the level of contamination which has always been present.

The Longford gas explosion, based on the report of the Royal Commission, seems to raise at least the spectre of exemplary damages, on the basis that Esso seemingly, in the minds of the Royal Commissioners, provided inadequate systems to avert the accident, despite earlier warnings.

2. NON-PECUNIARY LOSS: THE INSURANCE THEORY OF TORT COMPENSATION

Wetterstein³ has suggested that the analysis of damages by courts in environmental accident/pollution insurance cases is complicated by 3 factors:

1. technical, physiological and medical uncertainty⁴;

¹ The reference to “mega-hazards” is from a paper by Ulrich Beck, mentioned below, see: Beck U, “From Industrial Society to the Risk Society: Questions of Survival, Social Structure and Ecological Enlightenment”, (1992) 9 *Theory, Culture and Society* 97.

² See, for example, Derrington, *The Hon Mr Justice, “New Problems, New Solutions”*, (1990) 3 *Insurance Law Journal* 260.

³ Wetterstein P, Prof, “Damage from International Disasters in the Light of Tort and Insurance Law”, (1990) 3 *Insurance Law Journal* 172.

⁴ See, in this respect, the discussion below on the use of experts and the nature of expert evidence in mega-hazard cases.

2. uncertainty as to rules of liability and their applications;⁵
3. the time aspect, which makes assessment of technical risk and legal risk difficult.⁶

The USA has substantial experience in assessing damages in environmental accident/pollution insurance cases.⁷ Federal legislation has been introduced in the USA requiring compulsory insurance to cover potential clean-up costs of hazardous wastes in landfill, which has resulted in substantial litigation.⁸ Similarly, European countries have some experience in the litigation of such claims.⁹ The lack of an insurance market for environmental insurance in Australia (pollution damage, for example, in Australia, is usually covered, to the extent not expressly excluded, by a public liability policy, or potentially a transport/marine carrier policy¹⁰) suggests that international experience may be of some assistance.

The pecuniary damages potentially arising out of a mega-hazard claim might include any or all of the following:

- clean-up costs
- rectification of damage to property
- medical expenses
- economic loss
- pain and suffering

There is a debate as to the extent, if any, that *non-pecuniary* losses should form part of damages recoverable from a tortfeasor/insurer.

Pryor¹¹, for example, examines the *insurance theory of compensation* and expresses the view that it fails as a primary guide in determining the appropriate compensatory sums¹². She notes that the insurance theory of compensation places no value on the deterrence nature of payment for loss. Pryor notes that the theory arises from the “quite defensible observation”¹³

⁵ See, for example, the discussion below as to non-pecuniary damages, exemplary damages, and privilege in respect of certain inquiries.

⁶ See, for example, the discussion below as to when continuing pollution “occurs”, the effect where the pollution occurs over several policy periods, the varying decisions in US courts as to the “trigger” for claims under CERCLA, the varying analysis in US courts as to the joint and several liability for clean-up costs where several polluters may be liable over an extended period.

⁷ See, for example, litigation and articles arising out of environmental damage cases such as the *Love Canal*, *Exxon Valdez*, *Three Mile Island*, *Agent Orange*.

⁸ See, for example, the articles on recovery under CERCLA against polluters/insurers of polluters in Rahim D, “Controversial Clean up: Superfund and the Implementation of US Hazardous Waste Policy”, (1998) 26(4) *Political Studies Journal* 719; Hernandez M, “Resolving the Controversy Over CERCLA Claims Brought by Potentially Responsible Parties”, (1997) 21(1) *Harvard Environmental Law Review* 83; Hyson J, “In Government Cost Recovery Actions Under CERCLA”, (1997) 21(1) *Harvard Environmental Law Review* 137.

⁹ See, for example, the discussion of European experience, and legislative responses, in Wetterstein P, Prof, “Damage from International Disasters in the Light of Tort and Insurance Law”, (1990) 3 *Insurance Law Journal* 172.

¹⁰ As occurred, for example, in the recent oil spill on the Sydney Harbour.

¹¹ Pryor E, “The Tort Law Debate, Efficiency, and the Kingdom of the Ill: a Critique of the Insurance Theory of Compensation”, (1993) 79 *Virginia Law Review* 91.

¹² *ibid*, at p 94.

¹³ *ibid*, at p 99.

that most “societal compensation programs, including the tort system, currently function to a large extent as insurance programs”¹⁴. Pryor comments that tort law may be pictured as “a port of entry into an insurance program paid for and provided by members of the community for themselves”¹⁵.

Pryor notes that proponents of the insurance theory of compensation¹⁶ suggest that it makes sense to construct compensation guidelines that follow insurance principles¹⁷. She notes that insurance theorists posit that the optimal compensatory sum is the amount of insurance that individuals would have purchased in an “actuarially fair insurance market”. Pryor rejects this basis for measuring compensation, as it does not take into account non-monetary losses¹⁸. Non-monetary losses, in this context, include losses such as pain, anguish, physical impairment (inability to play sport), disfigurement, etc¹⁹.

Pryor refers to an example given by Professor Shavell²⁰ of the loss of an irreplaceable family portrait, which might result in a significant emotional loss, but not loss that affected the family members’ earning capacity. Professor Shavell suggests that the loss of this article would not affect the family members’ “need for money”, the loss would not increase the marginal utility of money, then the purchase of insurance coverage for that loss cannot increase expected utility, and is therefore inefficient.²¹

Pryor notes that some insurance theorists²² suggest that non-pecuniary losses might, in fact, reduce/increase the marginal utility of money. For example, an injured person, post-accident made poorer, may have decreased demand for goods and services. Such an individual might anticipate, post-accident, being less willing to spend in the post-loss state than before. If properly informed, that person might purchase less insurance, to keep more dollars for use in the pre-loss state. Alternatively, where, for example, an injured person was inclined to substitute travel, or symphonies, for pre-accident participation in sport, the marginal utility of money might be increased.²³ Pryor draws a series of conclusions about optimal insurance coverage depending on the non-pecuniary effects of an injury, and the marginal utility of money.²⁴

¹⁴ *ibid.*

¹⁵ This is a quote from an early study by the American Law Institute: *Reporters’ Study on Enterprise Responsibility for Personal Injury; Approaches to Legal and Institutional Change*, 2 American Law Inst., (1991).

¹⁶ For example, Danzon, “Tort reform and the role of government in private insurance markets”, 13 J Legal Stud 517 (1984).

¹⁷ Pryor, *ibid.*, at p 90.

¹⁸ *ibid.*, at p 101.

¹⁹ Pryor’s article is primarily directed at personal injury losses. She notes, however, see note 29 below, the example of the irreplaceable portrait. Conceivably, this line of argument would be equally applicable to a concern as to non-monetary aspects of environmental damage (concern for irreplaceable flora and fauna).

²⁰ Shavell S, *Economic Analysis of Accident Law*, 206-61 (1987). Pryor notes that Shavell, in his book, uses the insurance theory of compensation to critique the existing liability regime, and to propose an alternative approach; supplementing optimal compensatory awards with deterrence fines.

²¹ Pryor, *ibid.* at p 102.

²² For example, Schwartz A, “Proposals for products liability reform; a theoretical synthesis”, (1988) 97 Yale L J 353. Pryor notes that Professor Schwartz endorses use of a “consumer sovereignty” maxim in evaluating liability and damages rules for product-related injuries, arguing that such a maxim would support use of the insurance theorist’s approach to awarding damages.

²³ *ibid.* at p 102-3.

²⁴ *ibid.* at p 104. Pryor suggests (1) when an injury has only pecuniary impacts, full coverage is efficient; (2) when the injury has pecuniary effects that do not affect the marginal utility of money, the efficient choice is to purchase insurance fully covering the pecuniary effects, and completely excluding the non-pecuniary effects; (3) when the injury has non-pecuniary effects that lower the marginal utility of money, efficient insurance excludes non-pecuniary loss and covers less than full pecuniary loss; (4)

Pryor notes that though some commentators embrace the need to address deterrent concerns via some fine, surcharge, or modification of the compensatory-insurance measure, even those proposals would make use of the insurance theory to set the compensatory level of compensation.²⁵ She suggests that the two most important features of insurance theory are the question of marginal utility in relation to specific losses and the distinction between pecuniary and non-pecuniary losses.²⁶

Pryor concludes that the insurance theory, despite its failings, at least focuses attention on the compensatory role of payments for loss, and the extent to which monetary payments benefit a person who has experienced illness or injury.²⁷

Feldman²⁸, like Pryor, concludes that the insurance theory of tort compensation is inadequate. She notes that large numbers of USA States have introduced statutory limitations on certain damages in tort²⁹, noting further that “against this political backdrop”, certain legal economists have advanced the insurance theory of tort compensation to justify the elimination of tort damages for pain and suffering.³⁰ Feldman notes the central premise of the insurance theory: that accident victims should not recover damages for injuries in relation to which it would not have been economically rational to insure.³¹

Feldman comments that such results would seem to contradict two traditional goals of tort law: making tort victims whole, and discouraging excessively dangerous conduct or products by requiring injurers to internalise the full costs of the behaviour of goods.³²

Feldman notes that “insurance theorists” accept that eliminating damages for pain and suffering would compromise deterrence, but urge other measures³³ to restrain inefficient risk-taking.

Feldman argues that first party preferences for insurance have no relevance to the tort damages that ought to be available. She suggests a “framework within which to think fruitfully about the relationship between pain and suffering awards and the goals of tort compensation”.³⁴ Feldman argues that we should resist statutory elimination or restriction of non-economic damages.

if the non-pecuniary effects of the injury increase the marginal utility of money, then efficient insurance arguably includes some non-pecuniary loss coverage.

²⁵ See the works referred to in note 43 to Pryor’s article, at p 104-105.

²⁶ *ibid*, at p 106.

²⁷ *ibid* at p 150.

²⁸ Feldman H, “Harm and Money: Against the Insurance Theory of Tort Compensation”, (1997) 75 (7) *Texas Law Review* 1567.

²⁹ Feldman cites 23 states placing limitations on tort damages for pain and suffering, 7 states capping damages in general tort cases, 16 states limiting awards solely in medical practice cases: see notes 1 and 2 in Feldman’s article. Feldman also notes that both chambers of Congress have passed bills limiting recovery for pain and suffering: see note 8 of the Feldman article.

³⁰ *ibid*, at p 1569.

³¹ *ibid*, at p 1569, and see the references in footnote 10 to works by Rubin, Calfee & Rubin, Cook and Graeme, Cooter, Freidman, Schwartz and Schavell.

³² *ibid*, at p 1570.

³³ Feldman refers in note 11, to Rubin (advocating the value of safety statutes as deterrence mechanisms), Shavell (identifying state-initiated approaches, including statutes, injunctions, taxes, fines and criminal sanctions), and Cooter (asserting that competitive pricing of unmatured tort claims will deter potential tortfeasors).

³⁴ *ibid*, at p 1571.

Feldman comments that the insurance theory argument against tort damages for pain and suffering depends on the claim that pain and suffering do not increase one's need for money.³⁵ Feldman also notes that the traditional tort system requires a tortfeasor to pay for damages for pain and suffering as well as for loss of wages and medical expenses. She notes the insurance theorists' argument that rational purchasers of first party insurance would not seek coverage for pain and suffering. This, according to the insurance theorists, means that the tort system *over-insures* victims, permitting them to recover for a type of loss against which it is irrational to insure.³⁶

Feldman comments that while the insurance theorists say it may be irrational to insure against this loss, it is not irrational to avoid. It is important, says Feldman (and possibly all commentators?) to inhibit people from imposing pain and suffering on others.³⁷ Feldman rejects the insurance theory of compensation that equates *wellbeing* with preference satisfaction, and contends that money cannot genuinely repair pain and suffering.³⁸

Feldman comments that the courts have traditionally stated the purpose of tort damages as being to *make the victim whole*.³⁹ She suggests that this aphorism is not to be understood through economic analysis. Feldman traces the development of damages theory through the courts noting that modern courts have "wholeheartedly adopted" the formulation of "making the victim whole". Feldman notes that this is a "metaphorical aspiration, not a literal one".⁴⁰ She observes that, in fact, the State does not require tort victims to use their damages to contract to regain their previous position.⁴¹

Feldman concludes that the insurance theory of compensation, based on the contractual view of first party preferences, is inappropriate in the assessment of damages in tort, which arises from a failure to observe a socially mandated level of care or safety, and redressing resultant injuries.⁴²

3. PUNITIVE DAMAGES: EXEMPLARY DAMAGES

Exxon Valdez and other Mega-Hazard Cases

On 24 March 1989, the Exxon Valdez grounded on Bligh Reef near the coastline of Alaska. It spilt 11 million gallons of oil into the sea. Five years later an action commenced in the USA Federal Court. For convenience, the trial judge divided the case into four phases:

1. At the conclusion of the first phase, in June 1994, the Federal Jury determined that Exxon and Mr (formerly Captain) Hazlewood had acted recklessly.
2. During the second phase, ending in August 1994, the jury decided that Exxon's contention that a drop in the herring and salmon numbers could not be entirely attributed to Exxon, and awarded approximately 10,000 fisherman the sum of \$286.8 million in compensatory damages (approximately a third of the amount sought).

³⁵ *ibid*, at p 1574.

³⁶ *ibid*, at p 1575.

³⁷ *ibid*.

³⁸ *ibid*.

³⁹ *ibid*, at 1577.

⁴⁰ *ibid*, at 1578.

⁴¹ Feldman gives the example that the State does not require the use of tort damages by a victim who loses an arm to spend that money to purchase artificial limbs.

⁴² *ibid*, at p 1596.

3. The third phase was to determine punitive damages for about 34,000 fishermen, 4,800 Alaskans and several thousand more Alaska residents and land owners and others who claimed that they had been harmed by the spill. On 16 September 1994 the Federal jury ordered that Exxon pay \$5 million in punitive damages. The jury also ordered that Captain Hazlewood to pay \$5,000 in punitive damages.
4. The fourth phase was to decide whether to award \$300 million in damages to crab fisherman and other specialised groups who are not included in the earlier trial.

On 16 September 1994 a Federal Court jury awarded \$287 million in compensatory damages, and \$5 billion in punitive damages against Exxon Corporation in respect of the spill. To date this amount has not been paid.

Many newspaper reports and comments have been written in respect of *Exxon Valdez* and the delay in dealing with the punitive damages award in the Federal Court⁴³. Prior to the award of the punitive damages, Exxon had already paid substantial damages. It had paid \$2.2 billion for the clean up, \$1 billion to settle state and federal civil charges⁴⁴, and \$300 million for lost wages to 11,000 fisherman and business operators. Exxon is presently contesting both the size of the punitive damages and the manner in which the \$287 million compensatory damage award was calculated.

The number of plaintiffs who would share the punitive damages award is still unclear.⁴⁵ At the time that Exxon was ordered to pay the \$5 million punitive damages, it had reported revenue of \$111.2 billion and net earnings of \$5.28 billion. In fact, the amount asked of the court had been \$20 million.⁴⁶ There were also related insurance claims.⁴⁷

There is an issue on appeal as to whether a group of Seattle seafood processors is entitled to a share of the \$5 million punitive damages award. Interestingly, the seafood processors had previously reached a \$70 million settlement with Exxon. Under that agreement, the processors' share of the \$700 million punitive damages, would be returned to Exxon. The plaintiffs presently contend that Exxon would hardly be punished if it could pay a share of those damages to itself.⁴⁸ The plaintiffs, in response had argued that while out of court settlements are favoured, they are not supposed to be secret and public policy did not favour double-crossing plaintiffs. They suggested that a "class could not include parties whose interests are contrary to the class".⁴⁹ Exxon failed in an argument that the agreement should be enforced saying that the processors should only get what they bargained for and that public policy favoured out of court settlements⁵⁰.

⁴³ See, for example, EUOS, "Litigation Abbreviated Timeline: Survivors of the Exxon Valdez Oil Spill", <http://www.exxonvaldez.org/articles/timeline.html>; AKPIRG, "Time For Exxon to Pay Up", <http://www.akpirg.org/Stateurgeexxon.html>.

⁴⁴ in respect of that billion dollars, there have been political arguments as to whether those monies have been properly spent. See, for example, 19.

⁴⁵ Exxon coined the phrase "spillionaires". At present there appear to be of the order of 40,000 fishermen, towns people, natives and businesses entitled to participate in the damages award.

⁴⁶ After the verdict was announced on 16 September 1994, Exxon stock rose \$1.50 on the New York Stock Exchange.

⁴⁷ In related proceedings, a Texas State Court Jury, on 10 June 1996, ordered a group of approximately 250 insurers lead by Lords of London to pay \$250 million to honour a policy that Exxon held with Lloyds at the time of the spill.

⁴⁸ Brandt A, "Court To Hear Exxon Valdez Appeal", <http://www.cadvision.com/cfns/valdez.htm>.

⁴⁹ Skeels T, "Exxon says, 'Lay Off!'", <http://www.eatthestate.org/03-33/ExxonSaysLay.htm>.

⁵⁰ The trial judge concluded that the agreement was "an astonishing ruse" and held it to be void on the ground of public policy.

In *Food Lion v ABC*⁵¹ the Court awarded punitive damages of \$5.5 million. In *Gore v BMW of North America*⁵² the US Supreme Court struck down a \$2 million punitive damages award (reduced from \$4 million by the appeal court). The US Supreme Court that the damages award was so grossly excessive as to violate the 14th amendment due process clause.

There have been several instances of similar pollution accident cases, which have not yet resulted in litigation.⁵³ In addition, natural environmental accidents⁵⁴ raise similar potential damages issues (in the absence of a polluter, the insurer may be available, as for example in the Newcastle earthquake). Potentially the cost to insurers of natural environmental disasters could be immense.⁵⁵ The Longford gas explosion was the subject of a recently released report by the Royal Commission comprising Sir Daryl Dawson and Mr John Brooke.⁵⁶ The accident was widely reported in the press.⁵⁷

Many groups have emerged in response to the present trends in punitive damages.⁵⁸ In recent years, in many US states, new procedures have been introduced and tort reforms enacted including limitations on joint liability, class actions, contingency fees, and punitive damages.⁵⁹

Corporate Purpose/Calculated Risk

The American experience suggests that there has been an evolving community view of *corporate purpose*: what was once considered normal commercial risk-taking may now be regarded as *evil motive*.

Stone⁶⁰, for example, develops the notion of corporate purpose and suggests that the tort suit is a primary vehicle in the United States for asserting a causal theory about harm and demanding a remedy. The *Agent Orange* cases, for example, in addition to being individual

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⁵² McNearly Insurance Consulting, Inc., "Punitive Damage Awards Pose Threat", <http://www.mcneary.com/punitive.html>.

⁵³ See, for example, the *Braer* case (oil spill near Shetland Isles in January 1993, considered "lucky" in that the damage turned out to be relatively harmless due to rough seas); the *KOMI* case (oil spill from pipeline due to collapse of dike near Usink, Russia, February 1994, reaching Kolva River, spill estimated to be eight times greater than *Exxon Valdez*); the *Sea Empress* case (tanker struck mid-channel rock in Milford Haven Harbour, Wales, February 1996, spilling 70,000 tons of oil into Irish Sea); discussed in "Exxon Valdez TED Case Study", <http://www.american.edu/projects/mandala/TED/EXXON.html>.

⁵⁴ For example, as occurred in the Newcastle earthquakes.

⁵⁵ See, for example, Tay S, "Southeast Asian Fires: The Challenge for International Environmental Law and Sustainable Development", (1999) 11 (2) Georgetown International Environmental Law Review 241.

⁵⁶ Dawson, The Hon D M, Brooks B J, *The Esso Longford Gas Plant Accident – Report of the Longford Royal Commission*, Government Printer for the State of Victoria, June 1999.

⁵⁷ See, for example 20, 21, 22, 23.

⁵⁸ See for example, "Exxon Corporation Viewpoint – Civil Justice Reform - Fighting Back The Case Against Lawsuit Abuse", http://www.exxon.com/exxoncorp/overview/viewpoint/civil_justice_reform/index.html.

⁵⁹ Such groups include, for example, Civil Justice Reform, American Tort Reform Association, Texans against Law Suite Abuse, Association for California Tort Reform, National Federation of Independent Business.

⁶⁰ Stone D, "Causal Stories and the Formation of Policy Agendas", (1989) 104 Political Science Quarterly 281. refers to *causal stories* to explain government action, politically driven, dealing with problems as they occur, leading historically to responses which might include prohibition of an activity, direct compensation of victims (through social insurance or special funds) and mandated compensation of victims (through litigation).

claims, are an organised protest by Vietnam Veterans against their treatment during and after the war.⁶¹

Stone theorizes that the concept of risk has become a “key strategic weapon” for pushing a problem out of the realm of accident into the realm of purpose (“evil motive” actions). She suggests that where harms associated with an action or policy are predictable, then business and regulatory decisions to pursue a course of action in the face of that knowledge appear or can be made to appear as a *calculated risk*.⁶² In short, says Stone, predictable stochastic outcomes have been transformed by reformers into conscious intent. “Courts are willing to hold companies liable for calculated risks.”⁶³ Stone refers to the *Ford Pinto* case⁶⁴ as an especially notable example where the court construed Ford’s business decision to trade off safety for costs as: “...conscious disregard of the probability that (its) conduct will result in injury to others...(and therefore as)...malicious intent...”⁶⁵ Stone observes that “calculated risk” was also the crux of the Plaintiff’s argument in the *asbestos* and the *Agent Orange* litigation.

Stone suggests that defendant corporations must now seek to establish inadvertence, rather than calculated risk: “carelessness and neglect do not look very good, but they are probably better defences than plan or designed failures.”⁶⁶ Stone suggests that the preferred defences to an (“evil motive”) action are, in order:

1. the defendant had no intent, the damage was caused by “nature” (for example, Union Carbide’s defence of a leak at its West Virginia Plant failed safety valves and a malfunctioning computer)
2. the problem was caused by someone else (Stone suggests that this is second best, because the “someone else” is likely to “fight back and resist the interpretation”)⁶⁷
3. the damage was caused through inadvertence.

Interestingly, suggests Stone, the ultimate future defence strategy may be that damage was the result of a *complex structural cause*, which can only be “solved” by larger institutions. For example, in the *Manville asbestos* litigation: “...By insisting that the federal government deal with compensating victims, Manville attempted to spread out the costs onto society at large...” Stone suggests that the widespread adoption of workers’ compensation in the early twentieth century was: “... a successful move by employers, who were increasingly losing liability suits, to define industrial accidents as the natural result of modern technology and to socialize the costs through insurance.”⁶⁸

Recent Australian mega-hazard examples⁶⁹ raise the spectre of evil intent/corporate purpose/corporate risk taking in a way which would seem to be relevant to an award of

⁶¹ *ibid*, at p 293.

⁶² *ibid*, at p 290.

⁶³ *ibid*, at p 291.

⁶⁴ *ibid*, at p 290-291, referring to *Grimshaw v Ford Motor Co* 119 Cal App 3d 757 (1981).

⁶⁵ *Grimshaw v Ford Motor Co* 119 Cal App 3d 757 (1981, citing language from *Dawes v Superior Court* 111 Cal App 3d 82 (1980).

⁶⁶ Stone, *ibid* at p 292.

⁶⁷ *ibid*, at p 291.

⁶⁸ *ibid*, at p 292-293.

⁶⁹ For example, the Longford gas explosion raised issues of the level of maintenance and training relative to the possible risks of personal injury, and property damage; claims for injury to health following the Sydney Water Board contamination from the Prospect Water Treatment Plant raised issues as to the level of monitoring which is appropriate relative to that potential health danger; the Ok

exemplary damages should this fall to be decided by an Australian court.

Punitive Damages: The USA Empirical Data

It may be fair to say that Australia has not, yet, experienced huge awards of exemplary damages in mega-hazard cases. In the USA, where huge damages awards have occurred, there is presently a continuing academic (and political) debate as to whether punitive damages are effective, should be abolished, and/or how they should be calculated.

There is a substantial degree of empirical data collected in the USA on punitive damages.⁷⁰ This data suggests that, in the USA, (contrary to popular opinion?):

- punitive damages are awarded in only a small percentage of personal injuries cases (in California, less than 2 % of personal injury trials);
- where punitive damages are awarded at trial, are often reduced or reversed on appeal, or are otherwise not paid;
- in certain categories of punitive damages, the median of awarded punitive damages is much lower than the mean (suggesting the odd extremely high, but rare example)
- despite the punitive and deterrent purposes of such damages, there exists a high correlation between punitive damages and economic loss⁷¹

The appropriateness of punitive damages has been examined in a number of USA reports⁷². An early American Bar Association committee has concluded⁷³ that punitive damages are appropriate subject to a number of recommendations for legislative reforms and trial court criteria. In contrast, the American Tort Reform Association argues that punitive damages should be reformed.⁷⁴ This debate has been around for some years.⁷⁵ The 1986 American Bar Association committee concluded that there was no punitive damages crisis, but did make a number of recommendations, including:

Tedi River claim by Papa New Guinea land owners raised issues relating to the requirement for a tailings dam relative to potential environmental damage.

⁷⁰ See, for example, Laurie J, Jennings W, Witt R, *Punitive Damages in Texas: An Economic Inquiry*, <http://www.aria.org/research/witt2.html>; Carroll S, *Punitive Damages in Financial Inquiry Jury Verdicts: Statement submitted to the Judiciary Committee of the United States Senate*, (1997), RAND Institute for Civil Justice, <http://www.rand.org/publication/CT/CT143/>; Moller E, et al, *Punitive Damages in Financial Injury Verdicts: An Executive Summary*, (1997), RAND Institute for Civil Justice, <http://www.rand.org/publications/MR/MR889/>; Hayward S, *The Role of Punitive Damages in Civil Litigation: New Evidence from Lawsuit Filings*, Pacific Research Institute, 1996, <http://www.pacificresearch.org/pressrel/gsheet/punitive2-i.html>; and in the UK, see United Kingdom Law Commission, *Aggravated, Exemplary and Restitutionary Damages*, Consultation Paper – No 247, Summary, December 1997, <http://www.open.gov.uk/lawcomm/library/ic247/summary.htm>.

⁷¹ “The History of Punitive Damages in U.S. Law”, <http://www.his.com/~pildb/punavex4.html>, at p 3.

⁷² See the reports referred to in note 87 above.

⁷³ See “Punitive damages; the debate continues”, <http://www.arlaw.com/pubarticles/ivaupn.htm>, (referring to a 1986 report of the American Bar Association).

⁷⁴ ATRA, “Statement on \$4.9 billion punitive damage verdict against General Motors”, <http://www.atra.org/pr.htm>

⁷⁵ See, for example, the comment in *Browning-Ferris v Kelco Disposal*, cited below, to the effect that as little as 10 years ago punitive damages were relatively moderate, and compare this to the comments of Prof J J Launie, in the Insurance Counsel Journal in January 1986, where Professor Launie refers to the consideration of the economic effects of punitive damages by numerous legal scholars, ultimately concluding that the adverse distribution effects resulting from the shifting of part of the punitive damage burden could be emulated by allocating the bulk of the punitive damages award to the state with a small amount, perhaps 5% allocated to the plaintiff.

1. a threshold requirement that the defendant exhibit a conscious disregard for its actions;
2. a standard for awarding punitive damages be clearly articulated for juries;
3. increased burden of proof on the plaintiff (“clear and convincing evidence” rather than “mere preponderance”).
4. more active role in pre-trial and post-trial motions by trial courts;
5. discretionary bifurcation of liability and punitive damages, where appropriate;
6. the size of the award for punitive damages be scrutinised by reference to factors such as degree of reprehensibility, risk undertaken, actual injury, reform by the defendant....⁷⁶

The US Supreme Court considered punitive damages in four cases between 1988 and 1993⁷⁷ considering constitutional issues of due process, excessive fines, double jeopardy and takings clauses.

The present position appears to be that the USA courts will continue to award, on occasion, substantial punitive damages awards.

The USA Academic Debate

There is a substantial academic debate (arguably funded to some extent by the commercial stakeholders) as to the appropriateness of punitive damages, and the legislative reforms introduced in some states to abolish punitive damages.

Viscusi⁷⁸, for example, suggests that punitive damages have come to symbolize the problems of (the USA) courts. He suggests that punitive damages are often substantial, and highly variable. He suggests that there is often no clear-cut basis to predict the likely size of the punitive damages award, even knowing the compensatory damages amount. He suggests that the high stakes and the high variability of punitive damage awards are of substantial concern to companies, to the point where punitive damages may pose a catastrophic threat to corporate solvency.⁷⁹ Viscusi quotes US Supreme Court Justice O’Connor, in her often-quoted dissent in *Pacific Mutual Life Insurance Co v Haslip* :

Punitive damages are a powerful weapon. Imposed wisely and with restraint, they have the potential to advance legitimate state interest. Imposed indiscriminately,

⁷⁶ See “Punitive damages; the debate continues”, <http://www.arlaw.com/pubarticles/ivaupn.htm>, (referring to a 1986 report of the American Bar Association).

⁷⁷ *Bankers Life and Casualty Company v Crenshaw*, May 1988 (bad faith refusal to pay a first party insurance claim for loss of a limb, jury awarded \$20,000 in actual damages and \$1.6m in punitive damages); *Browning-Ferris v Kelco Disposal*, June 1989 (interference with contractual relations, jury awarded \$51,000 in compensatory damages, and \$6m in punitive damages); *Pacific Mutual Life Insurance Company v Haslip*, March 1991, (jury awarded \$200,000 for compensatory damages and \$840,000 in punitive damages, in an action for fraud); *TXCO Production v Alliance Resources*, June 1993, (slander of title, jury awarded \$19,000 in actual damages and \$10m in punitive damages). A brief report of these cases is set out in “Punitive damages; the debate continues”, <http://www.arlaw.com/pubarticles/ivaupn.htm>.

⁷⁸ Viscusi W, “The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts”, (1998) 87 Georgetown Law Journal 285; Viscusi W, “Why There Is No Defence of Punitive Damages”, (1998) 87 Georgetown Law Journal 381.

⁷⁹ *ibid*, at p 285.

however, they have a devastating potential for harm. Regretfully, common law procedures for awarding punitive damages fall in the later category...⁸⁰

Viscusi proposes a societal benefit-cost approach: whether the adverse effects of punitive damages are so great that punitive damages do not pass a benefit-cost test. He concludes that punitive damages should be abolished.⁸¹ He argues that the kind of fine tuning to punitive damages awards, suggested by law and economic scholars, required to ensure a constructive role for punitive damages “does not account for how juries actually behave”.⁸² He notes that none of the state reforms of punitive damages have incorporated the suggested “subtle economic criteria for awarding and setting punitive damages”, but rather have focused on simple approaches such as damages caps.⁸³ Viscusi suggests that the assessment of desirability of punitive damages requires a thorough assessment of whether, in fact, they serve any constructive deterrent function. He concludes that there are no systemic differences in the safety and environment performance between states with punitive damages and states without them.⁸⁴

Viscusi points to certain damages awards in respect of toxic chemical accidents (selected, he says, for their localized character), toxic chemical release risks, in respect of facilities reporting reductions in toxic release inventory, forms reporting reductions in discharges, reduction in service water discharges, and reductions in total releases, and “accidental vitality rates”. In each of these areas, he argues that there is no statistical evidence (based on his comparisons between punitive damages states and non punitive damages states) suggesting a deterrent effect. Viscusi comments: “states with punitive damages are not safer”.⁸⁵

Viscusi looks at insurance premium differences, and notes that punitive damages are often uninsurable under standard insurance policies, and further, that 18 of the 46 states that allow punitive damages explicitly prohibit insurance of punitive damages assessed directly against an insured for its own actions.⁸⁶ He theorizes that if punitive damages deter from making risky decisions, then risk levels should decline, lowering the associated premium levels. He concludes, however, on his empirical data, that overall there is no net significant relationship borne out in the insurance premium levels, irrespective of the state punitive damages regime or the insurability of punitive damages. This suggests Viscusi, supports the anti-punitive damages argument, namely that random and unpredictable awards do not, in fact, have a deterrent effect.⁸⁷

Viscusi examines corporate risk decisions and argues that, though punitive damages can influence these risk decisions, by increasing the financial sanctions for adverse outcomes of risky decisions, if experience shows that punitive damages awards are unpredictable or unlikely, there will be less deterrence. He reviews the conceptual rationales for punitive damages that have been offered in the law and economics literature, and suggests that such conceptual rationales all deal with highly specialised circumstances, which often involve

⁸⁰ 499 US 1, at p 45-46 (1991) per O'Connor, J.

⁸¹ *ibid*, at p 286. Interestingly, he makes an analogy to the tort liability reforms enacted in response to the 1984-1986 liability insurance crisis and the American Law Institute Report *Enterprise Responsibility for Personal Injury; Reports Study* (1991), referred to by Pryor, see note 24 above.

⁸² *ibid*, at p 287.

⁸³ *ibid*, and see the discussion in note 4 of Viscusi article.

⁸⁴ This is a key issue in the evaluation of the Viscusi thesis. Luban and Eisenberg, see the discussion below, disagree with the Viscusi's conclusions on the basis of his submitted figures. They suggest, *inter alia*, that the figures are not truly local (they reflect corporations operating across state borders), and they question certain of Viscusi's assumptions. Viscusi, in reply, asserts that the areas studied were particularly selected for the local nature of the operations.

⁸⁵ *ibid*, at p 294-296, and see Tables 3 and 4 included in that article.

⁸⁶ *ibid*, at p 297.

⁸⁷ *ibid*, at p 299.

economic judgments likely to be beyond the jury's competence. Further, he suggests, market forces and regulatory incentives are more powerful and more appropriate means to provide the necessary deterrence incentives. Viscusi expresses the view that there are substantial concrete economic harms that occur when indiscriminate legal sanctions are levied without a sound economic basis.

Viscusi examines the principles for corporate risk decisions, concluding that there is, in fact, significant uncertainty in the assessment of such risks. He notes, for example, the *McDonalds Coffee Cup* case⁸⁸, in which a woman received \$160,000 awarded for compensatory damages after spilling hot coffee in her lap, and \$2.7 million in punitive damages.⁸⁹ Viscusi examines the sources of information regarding the risk available to McDonalds, including uncertain factors such as, for example, the extent of consumer carelessness. Viscusi similarly refers to the "low risk", in fact, from British beef due to mad cow disease, noting that fatalities estimates had ranged from 500 to 500,000 deaths in Britain⁹⁰. He further notes the uncertainty surrounding the catastrophe involving TWA flight 800, where after months of investigation it was still not clear whether the cause of the accident was a bomb, a missile or a mechanical failure.⁹¹ He points to risk decisions which affect peoples' lives daily.⁹²

Viscusi comments that economic resources are limited, to the point where it would not be economically feasible to cover all risks. He refers to the potential cost of reducing risks to a zero level, quoting Justice Breyer on the "90-10 principle", referring, in one Superfund claim, to the last piece of contamination clean-up, at a cost of \$9.3m, which purchased extra safety which had no discernible effect.⁹³ Viscusi suggests that, in fact, *market forces* promote safety, together with the *government regulation*. He notes that the existence of government regulations specifying standards of corporate behaviour can often serve as a reference point for efficient corporate actions.⁹⁴ He refers, however, to one company penalised \$210m for a chemical spill that was within EPA standards and took no land out of agricultural use.⁹⁵

Viscusi refers to the *Ford Pinto* case⁹⁶ and suggests that the courts create a "chilling atmosphere for analysis" and will therefore "suppress the type of systematic think about risk that, in the long run could enhance our safety much more than clandestine, qualitative decision making".⁹⁷ He argues that:

- punitive damages promote counter-productive spending and wasteful precautions (for example, expenditure of substantial sums on regulatory efforts to save lives might be used

⁸⁸ See, *Livick v McDonalds Restaurants*. No. CV-93-121419, (1995) WL 360309.

⁸⁹ The punitive damages award was reduced by the court from the initial jury award to \$480,000 (the case ultimately settled for an undisclosed amount).

⁹⁰ *ibid*, at p 303, and see the discussion in note 24.

⁹¹ *ibid*, at p 303, and see the discussion in or around note 25.

⁹² For example, he refers to everyone's one in one million risk such as drinking half a litre of wine, living two days in New York or Boston air pollution....

⁹³ Viscusi, *ibid* at p 307.

⁹⁴ *ibid*, at p 318.

⁹⁵ Viscusi gives the example of *Wilhit Rockwell International Corporation*, 1993 CI-00158 (Ky.Ct.June 24 1996).

⁹⁶ *Grimshaw v Ford Motor Co* 119 Cal App 3d 757 (1981). Ford calculated that moving the gas tank would prevent 180 burn deaths valid at \$200,000 per death, 180 serious burn injuries valid at \$67,000 per injury, and 2,100 burnt vehicles valued at \$700 per vehicles, concluding that the risk production benefits were only \$49.6m, far less than the \$137.5 m costs to recall the car. Interestingly, in discussing the *Ford Pinto* example, recording the liability/safety cost comparisons made by Ford preceding their decision not to recall the car, Viscusi says: "Ford clearly erred in such calculations by undervaluing safety. However, the company should be applauded for its efforts to at least systematically deal with the cost and safety implications of its actions. Indeed, in the wake of this experience we now know how Ford erred in the value of its safety benefits".

⁹⁷ *ibid*, at p 324.

more efficiently to pay for better food, better medical care, housing, etc., if the money was spent in this manner, more lives would be saved than from those regulatory efforts)⁹⁸

- punitive damages discourage innovation (he gives the example of the wave of litigation against vaccine producers, leading to a more than 50% reduction in the number of manufactured vaccines since 1968)⁹⁹
- statutory limitations on punitive damages do not solve the problems (where legal policy is fundamentally flawed, it should be eliminated rather than restricted)
- punishing malicious behaviour is more relevant to individual action, rather than to corporate risk decisions
- enforcement error is not a salient problem for corporate actions which are typically readily identifiable in the case of large-scale losses for which punitive damages might be awarded.

The academic arguments for retaining punitive damages are equally strong.

Luban¹⁰⁰, for example, suggests that punitive damages and the retributive aims of punishment are just as important as its deterrent aims. He says that Viscusi simply leaves out the retributive purpose of punishment, fails to identify all the potential benefits of punitive damages, fails to establish that punitive damages are an effective deterrence, and fails to acknowledge any significant social harms addressed by punitive damages.¹⁰¹

Luban suggests that, in fact, punitive damages are not out of control. He suggests that studies confirm that punitive damages are awarded in only a small proportion of accident cases (in the vicinity of 2-4% of plaintiffs' victories).¹⁰² Luban says, further, as to the size of punitive awards, means are much higher than medians, signifying a split-level structure with a handful of very large awards and a much larger number of modest awards. Luban argues that punitive awards are not especially unpredictable, referring to empirical studies by Eisenberg.¹⁰³ He suggests that in addition to jury self-restraint, an important constraint on punitive damages is the power of the judges, who, in fact, reduce punitive awards more than half the time.¹⁰⁴

Luban says that Viscusi's figures, which compare the 4 USA states without punitive damages with the remaining 46, are flawed in that most corporations operate across state borders. He suggests that, in fact, the 4 non-punitive states are riding on the back of the deterrence provided by punitive damages in the remaining 46 states.¹⁰⁵ He disputes Viscusi's assumption that chemical spills are essentially local in character. Luban does not suggest that punitive damages deter firms, but rather: "... absent hard data, I remain agnostic".¹⁰⁶ He argues that Viscusi's natural experiment, comparing the 4 non-punitive damages states, shows nothing

⁹⁸ *ibid*, at p 324-325.

⁹⁹ *ibid*, at p 326, see the reference to the AMA Board of Trustees Report; *Impact of Product Liability on the Development of New Medical Technology* in note 95 of the Viscusi article.

¹⁰⁰ Luban D, "A Flawed Case Against Punitive Damages", (1998) 87 *Georgetown Law Journal* 359.

¹⁰¹ *ibid*

¹⁰² *ibid*, and see the text in discussion in relation to note 87 above.

¹⁰³ Eisenberg et al, "The Predictability of Punitive Damages", 26 *J Legal Stud* 623; Eisenberg T and Wells M T, "Punitive Awards after *BMW*, a new Capping system and the reported Opinion Buyer", [1998] *Wis L Rev* 387; Luban also refers to Polinsky A, "Are Punitive Damages Really Insignificant, Practical and Rational? A comment on Eisenberg", 26 *J Legal Stud* 663 (1997), in support of the proposition that punitive damages are not, in fact, random and unpredictable.

¹⁰⁴ *ibid*, at p 362.

¹⁰⁵ *ibid*, at p 363.

¹⁰⁶ *ibid*, at p364.

about the effectiveness of punitive damages. Luban argues that there are other aims of punitive damages, including:

- punitive damages encourage settlement (where defendants and insurers wage a war of settlement negotiations, the plaintiffs have only one effective counter-weapon, to raise the stakes)¹⁰⁷
- the bounty hunter effect (the high cost of potential private litigation reduces the burden on bureaucratic enforcement)¹⁰⁸

Luban disputes Viscusi's proposition that random and unpredictable awards will not have a deterrent effect. He says that he largely agrees with Viscusi that zero risk is a financially impractical goal. He says, however, that this argument has nothing to do with punitive damages. Punitive damages are not awarded, Luban argues, because a firm has failed to reduce risks to zero.¹⁰⁹ Rather, he says, punitive damages are reserved for cases where the firm has been "really mean or really stupid".¹¹⁰ Luban suggests that Viscusi's argument (that corporate risk managers deliberately choose some level of risk, appropriately, but to jurists this looks really mean or really stupid) is plausible only if jurists truly are irrational in their punitive damages decision.

Luban refers to the eight cognitive biases noted by Viscusi, and comments that they have been confirmed by experimental psychologists in contexts far removed from punitive damages litigation. This support, says Luban, makes Viscusi's argument more plausible, but it is still not persuasive. He suggests that the Viscusi reasoning is flawed in that:

1. "is" becomes "might"
2. it ignores that jurors deliberate as a group (Luban refers to studies by Galanter,¹¹¹ and his conclusion that "serious students of the jury are virtually unanimous in their high regard for the jury as a decision-maker")
3. if juries are so biased against corporate defendants, why is the incidence of punitive damages only 3%?

Luban questions whether punitive damages in fact deter innovation. He notes that punitive damages are awarded rarely, and mostly at modest levels (figures seemingly, not disputed, by proponents of punitive damages)¹¹². He suggests that Viscusi ignores the *retributive* effect of punitive damages, sending a message by inflicting a public visible defeat on the wrongdoer.¹¹³

Eisenberg¹¹⁴, further, suggests that Viscusi makes "creative use of publicly available data sources" in support of his point.¹¹⁵ He rejects Viscusi's empirical assumptions about punitive damages, saying that they do not support the starting premises. He disputes that punitive

¹⁰⁷ *ibid*, at p 366, Luban suggests that he has no data only imperial information about the effect on settlement dynamics.

¹⁰⁸ *ibid*, at p 366.

¹⁰⁹ *ibid*, at p 368.

¹¹⁰ *ibid*. Luban explains: "... I do not mean that jurors invariably accept this doctrinal point... the low incidence of punitive damages suggests that juries are hardly the happy-go-lucky wealth redistributors depicted in modern tort reform mythology".

¹¹¹ Galanter, "Real World Torts; An Antidote to Anecdote", 55 *Md L Rev* 1093.

¹¹² These figures are, in fact, consistent with the reference set out in note 87 above.

¹¹³ *ibid*, at p 378.

¹¹⁴ Eisenberg T, "Measuring the Deterrent Effect of Punitive Damages", (1998) 87 *Georgetown Law Journal* 347.

¹¹⁵ *ibid*, at p 247.

damages have “come to symbolise the problems of our nation’s courts”.¹¹⁶ Eisenberg suggests a need for scholarly enquiry as to whether such claims are true: “...because these claims...to no small degree are attributable to massive advertising campaigns by business and insurance groups”.¹¹⁷ Eisenberg suggests that “all credible sources suggest that punitive damage awards are rare, and that they are especially rare in the visible areas of products liability and medical malpractice”.¹¹⁸

Eisenberg disputes the classification of Michigan, one of the 4 states relied on by Viscusi as a non-punitive damages state and, in Eisenberg’s view, a critical state for the purpose of Viscusi’s article, as a non-punitive damages state. He notes that Michigan allows “exemplary damages to compensate plaintiffs for their humiliation, outrage and indignity resulting from defendants’ wilful or malicious or wanton conduct. He suggests that in many states such exemplary damages might well be labelled punitive damages.¹¹⁹ Eisenberg notes, for example, that in one case¹²⁰ a jury awarded \$250,000 in actual damage and \$500,000 in exemplary damage in an action by an insured’s children from a previous marriage against the insured’s widow.

Eisenberg questions Viscusi’s statistical methods, suggesting that his statistics in fact lead to no conclusion, rather than a conclusion that punitive damages do not deter. He argues that the Viscusi material excludes the effect of damages caps by 14 states¹²¹, and suggests that one should look for the effects of punitive damages in the following areas:

- environmental law (Eisenberg notes the effect of Federal environmental law in the area of pollution and toxic wastes and the Superfund, he refers to work by Rogers¹²² in which he describes CERCLA imposing “a liability regime that is without parallel in US domestic law”)
- product liability and medical malpractice (studies in fact, according to Eisenberg have not shown that punitive damages play a major role in either area).

Eisenberg argues that Viscusi’s sample is too small to detect meaningful effects.

Grady¹²³, similarly, refers to inconsistencies in the economists’ view of punitive damages. For example, Grady comments, Polinski and Shavel¹²⁴ would conclude that mega-hazards, such as the oil spill in *Exxon Valdez*, do not warrant punitive damages because the spill would not escape protection, yet small spills which might otherwise escape protection should be subject to punitive damages. Grady notes that in some instances, where the negligence may be inadvertent, yet the probability of detection be low, punitive damages, on the basis of the economists’ theory would be awarded.

Grady suggests that there are two basic economic facts determining the structure of negligence law:

1. some negligence behaviour is efficient and other negligence behaviour is inefficient

¹¹⁶ See Viscusi, note 100 above, at p 285.

¹¹⁷ *ibid*, at p 348.

¹¹⁸ *ibid*, at p 348, and see the references in note 8 to the Eisenberg article.

¹¹⁹ *ibid*.

¹²⁰ *McPeak v McPeak* 577 N W 2d 670 (MICH.1998)

¹²¹ *ibid*, at p 353.

¹²² Rogers W H, *Environment Law* 58 (1994).

¹²³ Grady M, “Efficient Negligence”, (1998) 87 *Georgetown Law Journal* 397.

¹²⁴ *Punitive Damages; and Economic Analysis* 11 *Harv L Rev* 869 (1998).

2. it is extremely difficult for courts to define a strict boundary between the two¹²⁵

Grady defines “efficient negligence” as *failure to the standard acceptable*. Grady suggests that the major reason for the doctrine of assumption of risk comes from the possibility that negligent behaviour can be efficient.¹²⁶ Grady observes, for example, that, in a perfect world, a driver might look out substantially more for pedestrians in a school zone than on a dusty jeep track through a desert. He suggests, however, that it is impossible for real world actors to achieve the required standard of perfection during every waking moment. “... none of us can remember always to use precautions”. He defines inadvertent negligence as *efficient*.

Grady refers to two early decisions of Judge Cardozo to support his view of efficient/inefficient negligence. In *H R Moch Co v Rensselaer Water Co*¹²⁷, Cardozo J denied liability to owners of a warehouse that burnt down because the water company allowed the water pressure to sink. Given the difficulties the defendant would face as an insurer, Cardozo thought it better to hold the defendant totally immune.¹²⁸ Grady suggests this case was one in which problems of insurance/liability outweighed the deterrence benefits. In *Ultramares Corp v Touche*¹²⁹ an accountant was sued by a plaintiff who had relied on an accounting certification (the plaintiff was not his client), Cardozo J held that there was no duty of care. Cardozo J reasoned that liability would entail an unmanageable insurance obligation for accountants. Grady suggests that such considerations explain much of traditional products liability law.

Grady notes that the test for punitive damages is subjective, not objective. He notes that 14 states require *malice*, another 23 states require a *conscious indifference to risk* or similar mental state. He notes that 8 states appear to allow punitive damages for *gross negligence*, but most seem to require some further subjective element.¹³⁰ Grady suggests that: “... the fundamental distinction in punitive-damages law is the one between inadvertent negligence and wilful and wanton negligence”.¹³¹ He defines *wilful and wanton negligence* as a deliberate failure to use due care. He suggests that this type of negligence is *almost never efficient*.

Hylton¹³², further, considers the potential measures for amounts of punitive damages; should punitive damages aim to deter up to the appropriate level by internalising costs, or should they aim to eliminate the offenders’ expectation of gain?¹³³ Hylton refers to the internalisation approach adopted by Polinsky and Shavel¹³⁴. He disagrees with their model (that the court divide the victim’s loss by the probability of liability) and proposes:

¹²⁵ Grady, *ibid*, at p 399.

¹²⁶ Grady gives the example of sporting injuries. Not all injuries caused by negligent acts can be avoided, the participants would assume the risk of efficient negligent acts, but not inefficient negligent acts.

¹²⁷ 159 N E 896 (N.Y. 1928)

¹²⁸ The City would still be able to enforce the water company’s performance through a breach of contract action.

¹²⁹ 174 Fe. (M.Y. 1931)

¹³⁰ *ibid*, at p 418. Grady gives a number of instructive examples He notes, for example, occasions where there has been inadvertent negligence (defendant’s dog escapes against defendant’s will); deliberate or excusable negligence (defendant left his disabled vehicle in traffic, though the leaving of the truck was deliberate, because the defendant had no choice, his truck would not move). He suggests that in both cases, punitive damages not available, the defendants’ conduct was efficient.

¹³¹ *ibid*, at p 417.

¹³² Hylton K, “Punitive Damages and the Economic Theory of Penalties”, (1998) 87 Georgetown Law Journal 421.

¹³³ *ibid*, at p 422.

¹³⁴ Polinsky M and Shavel S, “Punitive damages: An Economic Analysis”, 111 Harv L Rev 869 (1998).

1. if the offender's gain is greater than the victim's loss, the punitive award should aim to internalise losses
2. if the offender's gain is less than the victim's loss, the punitive award should aim to eliminate the prospect of gain on the part of the defendant¹³⁵

Hylton suggests that the goal of punishment should be complete deterrence. In the *BMW case*¹³⁶, for example, BMW's refusal to disclose damage to the finishes of new cars resulted in the transfer of money from customers to BMW. According to Hylton, punitive damages in such cases should aim to eliminate the defendant's prospect of gain. Hylton reviews the model of what he describes as "classical deterrence" or the *Bentham-Beccaria* model of punishment.¹³⁷ Hylton draws from Beccaria: the penalty should be set at a level that eliminates the gain to the offender, but not much above that level because harsh penalties tend to encourage harsh behaviour in the long run. And from Bentham: the penalty should be set at a level than eliminates gain on the part of the offender, with the added enhancement that a very harsh penalty would not discourage the offender from committing a more harmful act carrying the same, or only slightly harsher punishment.¹³⁸

Hylton refers to an article by Becker¹³⁹, in which Becker suggests that punishment should aim to internalise the social costs of offences rather than eliminate the prospect of gain to offenders. Hylton gives the example of a potential offender causing a victim \$1,000 of harm with a probability of apprehension of 50%. To internalise all loss to the offender, the penalty should be set at \$2,000. If the offender must spend \$600 to avoid causing harm of \$1,000 to the victim the gain-elimination approach leads to a minimum penalty of \$1,200. (The difference in potential gain to the offender may depend on, for example, the value of the victims \$1,000 asset in the hands of the offender.)

Hylton concludes that it would be too complex for courts to attempt to incorporate the plaintiff's probability of victory in court into any effort to multiply the plaintiff's judgment by the reciprocal of the probability of liability. He suggests that the only factor that should be taken into account is the plaintiff's probability of filing suit. He suggests, ultimately, a strategy that shifts all legal costs (including attorneys fees to the losing defendant). This would minimise the failure of plaintiffs to file suits when they have legitimate claims.¹⁴⁰

Launie et al¹⁴¹, in a report prepared for the Texas Public Policy Foundation attempt to offer a more comprehensive assessment of the economic implications of punitive damages in Texas. They suggest that punitive damages could be considered conceptually as the economic equivalent of a random, private tax. They suggest that while one of the legal purposes of punitive damage award is to punish guilty individuals or business entities directly, the cost of punitive damages awards are ultimately shifted to workers, suppliers and others.

¹³⁵ *ibid*, at p 432-433.

¹³⁶ *BMW of North America, Inc v Gore*, 517 US 5.9 (1996)

¹³⁷ This originates from two classical works on punishment in society: Beccaria, *On Crimes and Punishments* 43 (1764), and Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* 166 (1781).

¹³⁸ For example, Hylton suggests, at p 426, imposing the death penalty for purse snatchers would provide little disincentives to the purse snatcher not to kill his victim.

¹³⁹ Becker G, "Crime and Punishment; An Economic Approach", 76 J Pol Econ 169 (1968).

¹⁴⁰ *ibid*, at p 464.

¹⁴¹ Laurie J, Jennings W, Witt R, *Punitive Damages in Texas: An Economic Inquiry*, <http://www.aria.org/research/witt2.html>; interestingly Prof Launie was writing on this topic as far back as 1986, see note 92 above.

Interestingly, Launie et al conclude that risk-diverse decision makers, including businesses, consider not only the expected amount of future punitive damages awards, but also the uncertainty associated with them.¹⁴²

Hernan¹⁴³ reviews the background to the *Love Canal* litigation over chemical pollution damage at a hazardous waste site created in the 1940's and 1950's, including the dumping of toxic chemicals. Hernan examines whether a state has a right to recover punitive damages in a public nuisance action. The *Love Canal* action was filed by the USA in 1979, and the State of New York and others joined the action subsequently. The defendants included a chemical corporation, together with the City of Niagara Falls, the local Board of Education, and the local health department. The State requested punitive damages of \$250m. The defendant argued, inter alia, that punitive damages in the environmental hazardous waste case were unnecessary to further the punishment and deterrence purposes served by punitive damages, since the area was already so heavily regulated. The court rejected that "policy" argument.

The court concluded that the analysis as to whether punitive damages are appropriate or legally supportable, does and should focus on the defendant's conduct, not on who the plaintiff is.¹⁴⁴

Australia: Exemplary Damages - Punitive Damages in Future Australian Mega-Hazard Cases?

So what then does this mean for the assessment of damages in mega-hazard cases in Australia?

The position in Australia is that exemplary damages are available to plaintiffs in civil actions. The leading authority in this respect is usually considered to be *Uren v John Fairfax & Sons Pty Ltd*¹⁴⁵ in which the High Court declined to follow the House of Lords¹⁴⁶ in restricting the instances where exemplary damages could be awarded. McTiernan J reasoned:

The law of exemplary damages as it was before it was altered by the decision of the House of Lords in *Rookes v. Barnard* (1964) AC 1129 is compendiously stated in *Mayne & McGregor on Damages*, 12th ed. (1961), p. 196: "Such damages are variously called punitive damages, vindictive damages, exemplary damages, and even retributory damages." They can apply only where the conduct of the defendant merits punishment, which is only considered to be so where his conduct is wanton, as where it discloses fraud, malice, violence, cruelty, insolence or the like, or, as it is sometimes put, where he acts in contumelious disregard of the plaintiff's rights. "Such damages" the learned authors said at p. 197 "are recognized to be recoverable in appropriate cases of defamation." (at p122).....I would adopt the statement quoted above from *Mayne & McGregor on Damages* as a summary of the decisions of this Court as to the circumstances giving rise to a claim for exemplary damages.¹⁴⁷

The traditional test appears from the judgment of Taylor J:

¹⁴² *ibid*, at p . This is consistent with the views expressed by Viscusi, and disputed by Luban, see the discussion above.

¹⁴³ Hernan R, "A State's Right to Recover Punitive Damages in a Public Nuisance Action: The Love Canal Case Study", <http://www.tourolaw.edu/Publications/EnvironmentalLJ/Vol1/PART3.html>

¹⁴⁴ *ibid*, at p 11.

¹⁴⁵ (1966) 117 CLR 118.

¹⁴⁶ *Rookes v. Barnard* (1964) AC 1129, per Lord Devlin.

¹⁴⁷ *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, per McTiernan J.

Prior to *Rookes v. Barnard* the law relating to exemplary damages both in England and in this country was that damages of that character might be awarded if it appeared that, in the commission of the wrong complained of, **the conduct of the defendant had been high-handed, insolent, vindictive or malicious or had in some other way exhibited a contumelious disregard of the plaintiff's rights**..... (emphasis added)

This broad view has been restated on several occasions by the High Court.¹⁴⁸

There seems no legal or historical reason why Australian courts will not be prepared to award exemplary damages where the Court believes it is appropriate, on traditional Australian tests.

The future Australian mega-hazard cases are likely to involve:

- substantial monetary damage
- community disapproval, in particular public expressions of political and social attitudes to the accident/pollution and the circumstances leading to it
- regular examination of *corporate purpose* in the proceeding
- more efficient and available mechanisms (for example, class action mechanisms, better prepared plaintiff legal teams, no win – no pay payment terms for plaintiffs, case management advances....) which will encourage more plaintiffs to bring their claims

Perhaps the *Exxon Valdez* example is not so improbable in Australia ?

4. AUSTRALIAN PROCEDURAL DEVELOPMENTS

Legal Professional Privilege

The report of the Royal Commission into the Longford gas explosion¹⁴⁹ notes an issue raised by Esso as to the availability of legal professional privilege in respect of the proceedings before the royal commission. Section 19D¹⁵⁰ of the *Evidence Act 1958 (Vic)*, on its face, precludes a claim of legal professional privilege before a royal commission.¹⁵¹

¹⁴⁸ See, for example, *Ballina Shire Council v. Ringland* [1999] NSW SC 11; *Lamb v Cotogno* (1987) 164 CLR 1 S.C.; and see *Nixon v Philip Morris (Australia) Ltd* [1999] FCA 1107, handed down on 13 August 1999, in which Wilcox J, while finding that exemplary damages were not available in a section 52 *Trade Practices Act (Cth)* action, re-confirmed that they would available in a negligence action.

¹⁴⁹ Dawson, The Hon D M, Brooks B J, *The Esso Longford Gas Plant Accident – Report of the Longford Royal Commission.*, Government Printer for the State of Victoria, June 1999.

¹⁵⁰ Section 19D provides so far as it is relevant: “..if a person is required by.....legal professional privilege....”

¹⁵¹ This issue has been considered, in the context of disclosure on insurance proposal forms of persons named in royal commissions: see Newell R, “To Disclose or not to Disclose; The Duty of Utmost Good Faith and Royal Commission Findings”, (1990) 3 Insurance Law Journal 177. In that article, Newell notes that being named in a Royal Commission could conceivably be a matter which should be disclosed by a party to a contract of insurance, particularly marine insurance which is not subject to the reforms such as those found in the Insurance Contract Act ameliorating consequences to an insured of a material non-disclosure which is innocent.

A strong Federal Court reviewed the common law basis for the privilege and concluded that the legislation was valid, and that it did have the effect of precluding a claim of legal professional privilege.¹⁵²

The Full Federal Court noted that section 19D did not purport to abolish legal professional privilege, but rather confined the operation of the section to testimony and production of documents before the royal commission. The Court noted that the legislation would permit a royal commissioner to hear the evidence in closed hearings should the need arise. The Court reasoned that a commissioner “would usually exercise the discretion in order to prevent the public dissemination of privilege material”¹⁵³ and that “privileged material that comes into the possession of a Royal Commission will remain private for all time”.¹⁵⁴

The Full Court noted that the report of the Royal Commissioners, which might make reference to privilege material could, perhaps be tabled in Parliament. The Court noted, however, that it was the practice of the Executive not to make public any part of a report that might be prejudicial to pending or contemplated legal proceedings. There could be no such practice, however, in relation to litigation that is not foreseen.¹⁵⁵

The Full Federal Court noted that the position in the USA, where the removal of such privilege would be limited by constitutional guarantees¹⁵⁶. The Full Federal Court noted the USA decisions where courts had struck down legislation that had purported to abrogate the privilege.¹⁵⁷

The Full Federal Court noted, and rejected, the argument to the effect that the public would lose confidence in the Court system where the privilege was not maintained.¹⁵⁸ The Court reasoned that many informed members of the public would believe that the Commonwealth still placed too many restrictions on the ability of courts to exercise their constitutional function.¹⁵⁹

In *Westinghouse Electric Corp v Republic of the Philippines*¹⁶⁰, Westinghouse had provided certain information under an SEC voluntary disclosure program in relation to Philippines transactions. Hornstein¹⁶¹ reviews the emergence in the USA of the so-called *limited waiver* rule, to the effect that disclosure of information to an investigating government agency does not constitute a waiver of the attorney-client privilege.¹⁶² Hornstein noted that the limited

¹⁵² *ESSO Australia Resources Ltd v Sir Daryl Dawson* [1999] FCA 363. The question arose before the commission following a question asked by counsel assisting the commission of a witness who happened to be legal counsel employed by Esso. While the matter was proceeding before the Federal Court, the commission hearings were nearing completion and the question which had raised the privilege no longer required an answer for the commission to conclude its enquiry.

¹⁵³ *ESSO Australia Resources Ltd v Sir Daryl Dawson* [1999] FCA 363, at p 7 of the judgment.

¹⁵⁴ *ibid*

¹⁵⁵ *ibid*

¹⁵⁶ *ibid*, at p 9 of the judgment, and see the reference to *United States v Euge* (1980) 44 US 707, and *Hornstein, J A* “Paying the Traditional Price of Disclosure” (1993) 31 Washington University Law Courtly 467.

¹⁵⁷ The Court was there referring to *Times Publishing Company v Williams* (1969) 22 So 2d 470; *Dunn v Alabama State University Board of Trustees* (1993) 628 So 2d 519.

¹⁵⁸ That argument was based on *Kable v Director of Public Prosecutions NSW* (1996) 189 CLR 51 (the court, being a court exercising federal jurisdiction, being effectively reduced to a rubber stamp of the Executive, the legislation contravened the Constitutional separation of powers doctrine).

¹⁵⁹ *ESSO Australia Resources Ltd v Sir Daryl Dawson* [1999] FCA 363., at p 11-12 of the judgment.

¹⁶⁰ 951 S 2d 1414 (3 d Car. 1991).

¹⁶¹ Hornstein J A, “*Circuit Rejects Limited Waiver of the Attorney-Client Privilege*” 71 Washington University Law Course 466,

¹⁶² *ibid*, at p 474-475.

waiver rule had been rejected in some cases¹⁶³, but upheld in other cases¹⁶⁴ on the basis that the policy of upholding the effectiveness of the government's voluntary disclosure program outweighed the parties' interest in discovery. Hornstein suggests that in *Westinghouse* the court correctly rejected the limited waiver rule on the basis that the rationale underlying the limited waiver rule is wholly inconsistent with the policy underlying the attorney-client privilege. The widely recognised exceptions to the attorney privilege relate to obtaining informed legal advice; the limited waiver rule, on the other hand, served a different goal, namely encouraging corporate participation in voluntary investigations.

Expert Evidence¹⁶⁵

The common law rules are being progressively changed by legislation and the Rules of Court.

The litigation of claims arising out of mega-hazards raises the complex technical, physiological and medical uncertainty issues alluded to by Wetterstein.¹⁶⁶

The nature of expert evidence has addressed several times by the United States Supreme Court, for example in *Daubert v Merrell Dow Pharmaceuticals Inc.*¹⁶⁷ In Australia, the issues surrounding expert evidence have been examined by the Australian Law Reform Commission as part of a broader inquiry into the adversarial system.¹⁶⁸ In addition, legislative changes have been introduced in certain Australian jurisdictions to alter the common law rules of admissibility of expert evidence.¹⁶⁹

The Federal Court recently adopted a new Practice Direction in respect of expert witnesses¹⁷⁰, adopting the Woolf report recommendation that the expert's paramount duty be to the Court, and adopting virtually verbatim the duties and responsibilities as to the form of the expert's report as articulated in *The Ikarian Reefer*.¹⁷¹

The changes mooted in the Woolf report¹⁷² in relation to expert witnesses were, as Lord Woolf pointed out, substantially consistent with similar developments, albeit introduced into varying jurisdictions at varying times, to varying degrees, throughout the USA, Canada and Australia.¹⁷³

¹⁶³ See, for example, *Permian Corp v United States* 665 F 2d 1214 (D.C. Cir 1981)

¹⁶⁴ See, for example, *Diversified Industry v Meredith* 572 F 2d 596 (1997).

¹⁶⁵ Certain of the material included in this section was included in an earlier paper, previously submitted by me for credit in this course, entitled "Expert Witnesses: Who Plays the Saxophones".

¹⁶⁶ Wetterstein P, Prof, "Damage from International Disasters in the Light of Tort and Insurance Law", (1990) 3 Insurance Law Journal 172.

¹⁶⁷ 509 US 579 (1993). This is not the paper for a detailed discussion of *Daubert*. This topic was addressed in my earlier paper on expert evidence, see note 212 above.

¹⁶⁸ See Australian Law Reform Commission, *Issues Paper 20: Review of the adversarial system of litigation: rethinking the federal civil litigation system*, AGPS, Sydney, 1997.

¹⁶⁹ For example, section 80 of the *Evidence Act 1995 (Cth)* was amended to remove the inadmissibility of opinion evidence only because it is about the ultimate issue, or because it is a matter of common knowledge. This amendment followed a recommendation of the Australian Law Reform Commission. See Australian Law Reform Commission *Evidence*, Report No.38, AGPS, Canberra, 1987.

¹⁷⁰ Federal Court of Australia Practice Direction, *Guidelines for Expert Witnesses in proceedings in the Federal Court*, That Practice Direction is slightly unusual in that it sets out the theoretical bases for the directions, and provides the footnote references for those conclusions.

¹⁷¹ [1993] 20 FSR 563.

¹⁷² Lord Woolf, "Access to Justice": *Draft Civil Proceedings Rules*, July 1996.

¹⁷³ Lord Woolf, "Medics, Lawyers and the Courts", [1997] 16 CJQ 302, at 314.

Beck¹⁷⁴ refers to the emergence of (and acceptance of) *mega-hazards*.

Beck suggests that risks have always been part of human life, dating back as old as the human race itself. He suggests that the “calculus of risks” has had the effect of depersonalising those risks (it relates such risks more to a systematic need for political regulation).¹⁷⁵ He suggests that insurance payments are agreed and guaranteed on a no-fault basis (setting aside extreme cases of gross negligence, or intentional damage), thereby making legal battles over causation unnecessary and removing “moral outrage”.¹⁷⁶ Beck describes the manner in which the industrial system has been made incapable of dealing with its own unforeseeable future.

Beck refers to flecks of lead and arsenic, the size of a penny, falling on the community of Altensadt in 1985. After 10 days of trial, the deciding judge offered to drop the charges in return for a fine, a result “typical of environmental crimes in the Federal republic”.¹⁷⁷ Beck suggests that the more liberally the acceptable levels are set, the greater the number of smoke stacks, the lower the “residual probability” that a culprit can be made responsible.¹⁷⁸ He suggests that when the social pillars of calculus of risk fail; “security degenerates into mere technical safety”. He suggests that we have now the contradiction between highly developed safety bureaucracies, and on the one hand, and the open legislation of previously unseen, gigantic threats on the other, without any possibility of after-care.¹⁷⁹

Beck suggests that the institutions of developed industrial society, politics, law, engineering science, industrial concerns, command a broad arsenal for “normalising” non-calculable hazards. He suggests that they can be “under-estimated, compared out of existence, or made enormous causally and legally”¹⁸⁰.

Beck suggests that “hard sciences” are granted the binding authority to decide on the basis of their own standards: what the “state of technology” demands. He suggests that the “legal standard for safety” is decided by private organisations and committees (for instance, the society of German engineers, the Institute for standards). Those private bodies, says Beck, “decide the amount of hazards to which everyone can be subjected”.¹⁸¹ Beck notes the “monopoly of scientists and engineers in the diagnosis of hazards”.¹⁸² He notes that there is a distinction between safety and probable safety. For example, even if there are only 2 or 3 nuclear reactors which would blow up, though few overall, still disastrous, yet “the statements of the engineers would remain true”.¹⁸³ Beck comments that sociologists cannot force society into a test tube; engineers cannot let reactors blow up all around them in order to test their safety.¹⁸⁴

Weiner¹⁸⁵ notes the dichotomy between the perception of risk by experts and the public.¹⁸⁶ Margolis¹⁸⁷ traces the factors which encourage the “public” more or less to the view that the expert view is not to be accepted.

¹⁷⁴ Beck U, “From Industrial Society to the Risk Society: Questions of Survival, Social Structure and Ecological Enlightenment”, (1992) 9 Theory, Culture and Society 97.

¹⁷⁵ *ibid*, at p 99-100.

¹⁷⁶ *ibid*, at p 100.

¹⁷⁷ *ibid*, at p 102.

¹⁷⁸ *ibid*, at p 103.

¹⁷⁹ *ibid*, at p 103-104.

¹⁸⁰ *ibid*, at p 105.

¹⁸¹ *ibid*, at p 107.

¹⁸² *ibid*

¹⁸³ *ibid*, at p 108.

¹⁸⁴ *ibid*

¹⁸⁵ Wiener J, “Risk in the Republic”, <http://www.law.luke.edu/journals/delpf/articles/DELPF8P1.HTM>

¹⁸⁶ *ibid*, at p 4.

Governo et al¹⁸⁸ note the medical and scientific issues which arise in lead poisoning litigation. They refer to a study of the effects of lead poisoning on 300 first grade public school students: symptoms included anti-social behaviour, reading disabilities and decreased hand eye co-ordination. The symptoms only appear over time, and even then may be difficult to discern. Governo comments that the complexity of the expert scientific medical evidence necessary in child health cases make it critical that the scientific expert testimony be properly based.

Class Actions

The development of class action mechanisms seems to have been a result of tort reform, to ease the court disposition of actions with multiple plaintiffs, where those plaintiffs have a commonality in certain respects. This is particularly true in mega hazard litigation. In *Exxon Valdez* for example, there were eventually approximately 40,000 plaintiffs.¹⁸⁹

In Australia, there has been a rush to commence class actions in a number of recent mega hazard cases.¹⁹⁰

Morabito¹⁹¹ examines the opt out procedure contained in the provisions of the recently enacted Part IV of the *Federal Court of Australia Act 1976 (Cth)*. He notes the Australian Law Reform Commission definition of a class action as a “procedure whereby the claims of many individuals against the same defendant can be brought or conducted by a single representative”.¹⁹² The Federal Court Act procedure follows South Australia, Ok Tedi, Quebec, and the United States, in choosing an opt out scheme.¹⁹³

Morabito notes the policy goal of class actions in relation to non-viable claims, individually non-recoverable claims, and individually recoverable claims.¹⁹⁴ Morabito suggests that three major benefits expected to flow from the implementation of class actions are:

1. reduced costs, increased efficiency and defendants’ avoidance of conflicting judgments, by enabling a single determination of issues common to members of a group (the “judicial economy” goal);
2. opening the doors of courts to individuals with individually non-recoverable claims, or whose claims would not have lead to individual proceedings because of social or

¹⁸⁷ Margolis H, “A New Account of Expert/Lay Conflicts of Risk Intuition”,

<http://www.law.duke.edu/journals/delpf/articles/DELPF8P115.HTM>

¹⁸⁸ Governo D M, and Shemmel L W, “Lead Poisoning Litigation”, <http://www.cvcac.com/lead.htm>

¹⁸⁹ EUOS, “Litigation Abbreviated Timeline: Survivors of the Exxon Valdez Oil Spill”,

<http://www.exxonvaldez.org/articles/timeline.html>

¹⁹⁰ See, for example, the claims for loss of gas supply following the Longford gas explosion; claims for injury to health following the Sydney Water Board contamination from the Prospect Water Treatment Plant; the claim by land owners near the Ok Tedi River in Papua New Guinea relating to damages from a BHP owned palling dam.

¹⁹¹ Morabito V, “Class Actions: The Right to Opt Out Under Part IVA of the *Federal Court of Australia Act 1976 (Cth)*”, (1994) 19 Melbourne University Law Review 615.

¹⁹² Australian Law Reform Commission, Report No. 46, *Group Proceedings in the Federal Court* (1988).

¹⁹³ Morabito quotes, in a footnote, US Judge Frankel, who describes the opt out system as being “patterned after the highly successful procedures of the Book of the Month Club”. Frankel J, some primarily observations concerning civil rule 23 (1967) 43 Federal Rules Decision 39 44. Morabito goes on to note that the book of the month club analogy has been used elsewhere, by the Hon Kevin Andrews MP, and by Kennedy J, “Class actions in the ” (1983) 25 Arizona Law of Use 3.

¹⁹⁴ Morabito, *ibid*, at p 627.

physiological barriers (access to justice goal)¹⁹⁵

3. knowledge by potential defendants that numerous persons can, through the device of class actions, pursue legal remedies which would not otherwise be available to them, which should provide potential defendants greater incentive not to break the law (the “behaviour modification” goal)

There seems, perhaps, a hint of political reform in the introduction in recent years of the class action mechanism, beyond mere convenience and case management principles.

Felstiner et al¹⁹⁶ refer to *naming, blaming, and claiming* to characterise where disputes come from and how they proceed. They trace how disputes are *transformed* through the naming, blaming and claiming process. They suggest that courts may transform disputes by individualising remedies, for example, by collecting individual disputes and providing a class action mechanism for reasons of convenience and efficiency, rather than a form of collective action aimed at achieving a group objective.¹⁹⁷

Clauson¹⁹⁸ examines the 1987 Federal legislation which, inter alia, precludes citizen actions under the USA *Clean Water Act*. Clauson notes the background to the 1987 amendments. The amendments introduced the power of civil administrators to assess civil penalties thereby needing to preclude citizens suits so that violators would not be subject to dual enforcement action or penalties for the same violation.¹⁹⁹

CONCLUSIONS

The analysis of damages by courts in environmental accident/pollution (mega-hazard) cases is complicated.

Wetterstein’s observations seem, with respect, perceptive. In Australia, our damages rules would permit the assessment of damages to include non-pecuniary loss, and exemplary damages. We have little experience of such awards in such cases. We are, in fact, less likely to leave such assessments to juries.

Yet we seem to be on the verge of this type of case.

For example, the Sydney Water Board contamination scare resulted in a class action which was commenced, and settled, without any reported instance of actual illness caused by the contamination. The medical evidence would have been fascinating: the unofficial engineering view seems to be to the effect that the levels of giardia have never changed; rather the advanced monitoring which was introduced with the recent BOOT projects, including the Prospect plant in question, simply detected the level of contamination which has always been present.

¹⁹⁵ *ibid*, at p 628, and see Gleeson C J, “Access to Justice” (1992) 66 Australian Law Journal 270.

¹⁹⁶ Felstiner W et al, “The Emergence and Transformation of Disputes: Naming, Blaming, Claiming (1980-81) 15 Law and Society Review 631.

¹⁹⁷ *ibid*, at p 648 and see discussion in note 13.

¹⁹⁸ Clauson H, How Far Should the Bar on Citizen Suits Extend Under S 309 of the Clean Water Act?”, Fall (1997) Environmental Law; and see also Flora C, “An Inapt Fiction: The Use of the Ex Parte Young Doctrine for Environmental Citizen Suits Against States After Seminole Tribe”, Fall (1997) Environmental Law.

¹⁹⁹ Clauson, *ibid*, at p 969.

The Longford gas explosion, based on the report of the Royal Commission, seems to raise at least the spectre of exemplary damages, on the basis that Esso seemingly, in the minds of the Royal Commissioners, provided inadequate systems to avert the accident, despite earlier warnings.

Our small insurance market suggests that the early insurance cases are likely to involve exclusion clauses rather than the division of responsibility for pollution clean up over multiple polluters and multiple insurance periods.

It will be interesting to follow the extent to which we follow the USA experience.

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