

Foreword

HAROLD LUNTZ: DOYEN OF THE AUSTRALIAN LAW OF TORTS*

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[Professor Harold Luntz came to the Melbourne Law School from South Africa in 1965. His recent retirement affords the opportunity to survey the changes that have occurred during his service to the law of torts and to damages for personal injury. The author, by reference to Harold Luntz's writings, reviews the emergence of a distinctive Australian body of law, freed from the controls of English law. The outcome, however, is not always clear. For example, Australia has resisted Professor Luntz's call to embrace the New Zealand accident compensation system as a more just and cost-effective way to deliver compensation. In the context of current national and state moves to introduce special legislation with caps and limitations, the author suggests that a struggle is under way for the future of the law of torts. He proposes an annual or biennial symposium to continue the intellectual work on tort law carried on by Professor Luntz, the doyen of the Australian law of torts.]

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I BEGINNINGS

Putting it quite simply, Harold Luntz is one of the foremost scholars and teachers of the law in Australia. He is honoured internationally, as well as in Australia. He came to this country from far away to share his intellectual gifts with us — his colleagues and pupils.

Glancing through a recent volume of the *Torts Law Journal*, of which Harold Luntz is long-time editor, I came upon an opinion of Justice Heydon, then a judge in the New South Wales Court of Appeal, in *Union Shipping New Zealand Ltd v Morgan*.¹ Warming to the new role as critic general of the law, Justice Heydon, himself ‘a former academic and author of considerable distinction’,² took aim, this time at his erstwhile academic colleagues. He declared that ‘academic legal literature is, like Anglo-Saxon literature, largely a literature of

* This foreword is based on a speech given at a dinner at the University of Melbourne to mark the retirement of Professor Harold Luntz, George Paton Professor of Law on 19 November 2002.

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¹ (2002) 54 NSWLR 690 (*‘Morgan’*). It appears in an article by John Kernick, ‘Shipboard Torts in Territorial Waters: The Law of the Flag or the Law of the Land?’ (2002) 10 *Torts Law Journal* 223, 224.

² Kernick, above n 1, 223.

lamentation and complaint. The laments and complaints can be heard even when academic wishes are acceded to.³

Like much else said of late, such verbal flagellations must be taken with a pinch of salt. Most academic legal literature, like most judicial writing, is penned in a positive spirit. It is designed to help the law in its never ending quest for clear principles, accurate understandings and the advancement of human law and justice.⁴ In my opinion, there is currently no greater exemplar of these attributes in academic law in Australia than Harold Luntz. His energy is unbounded. His analysis is principled. His personal attitude is one of politeness mixed with firmness. To this splendid concoction he adds respect for his fellow human beings and optimism about the future of human society. These are virtues that other Australian lawyers should strive to emulate.

To find the sources of these qualities, it would be necessary to engage in a biological study of the rare genetic combination that came together in Harold Luntz, born in South Africa in 1937. To do him full justice, I would need to know much more of his ancestors, their struggle and what took them to South Africa instead of, say, Australia or some other part of the world then coloured with so much red. I would need to explore the influence of his teachers at the Athlone Boys' High School in Johannesburg, which he was attending at the time that King George VI visited with his family just before the dawn of the dark age of apartheid; those years were ushered in with the election of the National Party government that lasted until Nelson Mandela presided over the birth of the rainbow nation. I would have to explore the influence of his ethnicity and his cultural and religious upbringing to understand fully the response of an outsider to the stern society of laws set in place by the Afrikaner government. I would have to speak to his surviving teachers and fellow pupils in that most distinguished of South African universities, that of the Witwatersrand, where he took his primary degrees in arts and law with distinction.

I have done none of these things, for to have done so would have been to invade the private space of a man, always a little reserved, who upholds the rights of others because he insists on the same respect for himself. However, I will not leave South Africa, where Harold Luntz received his splendid preparation for a life of legal scholarship, without suggesting that his childhood and youth in that country had a profound effect upon his view of the world and of the law. South Africa was never a lawless state. That, indeed, was the central problem. It embalmed in law rules that anyone with sensitivity (and particularly anyone who was from a minority) could see were offensive to human equality, to personal autonomy and to the effective operation of law as an instrument of justice. I venture to suggest that those early years left a mark on Harold Luntz that has stayed with him ever since. They help to explain his sense of urgency,

³ *Morgan* (2002) 54 NSWLR 690, 728.

⁴ Justice Michael Kirby, 'Welcome to Law Reviews' (2002) 26 *Melbourne University Law Review* 1, 11. See also John Gava, 'Law Reviews: Good for Judges, Bad for Law Schools?' (2002) 26 *Melbourne University Law Review* 560; Frank Carrigan, 'A Blast from the Past: The Resurgence of Legal Formalism' (2003) 27 *Melbourne University Law Review* 163; John Gava, 'Another Blast from the Past or Why the Left Should Embrace Strict Legalism: A Reply to Frank Carrigan' (2003) 27 *Melbourne University Law Review* 186.

his great energy, his pursuit of justice through law and his search for a better home to give voice to these ideals.

It was not unnatural that Harold Luntz should choose Australia. In 1951 the High Court had struck down the *Communist Party Dissolution Act 1950* (Cth) as unconstitutional.⁵ That Act was modelled closely on the *Suppression of Communism Act 1950* of South Africa. The people of Australia, in their wisdom, had affirmed the decision of the High Court and rejected the government's attempt, by referendum, to alter the *Constitution*. Harold Luntz did not take long to seek out an academic appointment in Australia. He arrived to the post of Senior Lecturer in Law at the University of Melbourne in August 1965. His departure from his homeland must have seemed a great blow to his University where he had already progressed rapidly to the same rank in the Law Faculty, a development natural enough for the top student in the final year of the law course. He had taken his BCL at Oxford with first class honours in 1962. He was ready to conquer new academic worlds.

It was also natural that he should choose the Faculty of Law of the University of Melbourne. Sir Owen Dixon, a great alumnus, in a speech in 1935 commemorating the centenary of the State of Victoria, declared that virtually from the start, 'the true doctrine [of analytical jurisprudence was] more clearly grasped or better expounded ... at the University of Melbourne [than anywhere else]. Dr Hearn came to it', said Sir Owen, 'in 1855 as Professor of Modern History and Political Economy, a chair which he relinquished when he became Dean of the Faculty of Law in 1873'.⁶ Thus was established the oldest university law school in Australia.

A glance at the postgraduate handbook of the Faculty of Law of the University for 2003 demonstrates beyond question, as Professor Ian Ramsay asserts, that 'the Law School combines the traditions of excellence developed over nearly 150 years with ... innovative approaches to [the] challenges of legal education and research in the 21st century'.⁷ So it was probably inevitable that the gifted young academic from South Africa should choose to come to Melbourne. Fortunate was the University of Melbourne and Australia that he did so.

Recently, at a faculty meeting at which his retirement was marked, Harold Luntz reminded those present that he was a living link with the traditions and talents of the faculty he found on his arrival. Just to look at the contributors to the *Melbourne University Law Review* in 1965 confirms what he says. Zelman Cowen (not yet knighted),⁸ Sir John Barry (almost appointed to the High Court),⁹ Frank Maher¹⁰ and other authors demonstrated why the University of Melbourne Law School was such a dazzling place. The book review editor of that year was one K M Hayne. As you would expect, he chose the books and

⁵ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

⁶ Sir Owen Dixon, 'The Law and the *Constitution*' in Judge Woinarski (ed), *Jesting Pilate and Other Papers and Addresses* (2nd ed, 1997) 38, 41.

⁷ Ian Ramsay, 'The Melbourne Law School' in Faculty of Law, University of Melbourne, *Graduate 2003: Postgraduate Handbook* (2003) 3.

⁸ Zelman Cowen, 'Burns and the Law' (1965) 5 *Melbourne University Law Review* 17.

⁹ Sir John Barry, 'Suicide and the Law' (1965) 5 *Melbourne University Law Review* 1.

¹⁰ Frank Maher, 'The Kinds of Legal Rights' (1965) 5 *Melbourne University Law Review* 47.

reviewers prudently. Top of the list was Professor Paton's textbook of jurisprudence, edited by David Derham.¹¹ This, with a great book by Julius Stone,¹² was my text on jurisprudence at the Sydney Law School in the early 1960s. Harold Luntz was in due course to become the George Paton Professor of Law.

Professor Luntz took time off in 1970 to pursue his interests in comparative law as Visiting Associate Professor at Queen's University in Ontario, Canada. Later, in 1971, he was Visiting Professor at the University of California, Berkeley. But his commitment was to Melbourne and Australia. He returned as Reader in Law in July 1971. His professorial chair came in July 1976, and he served as Dean over three years from 1986–88. He was twice a Visiting Fellow at Wolfson College, Oxford, where he was attached on each occasion to the Centre for Socio-Legal Studies.

These are the bare bones of a distinguished academic career that is by no means over. The same catalogue of postgraduate courses offered at the Melbourne Law School this year includes a course which I should perhaps myself attend on 'current developments in negligence law'. It is being taught by Professor Luntz. The objectives of this course promise that it will explore the principles of negligence law and provide instruction on 'developments in relation to those principles in the High Court of Australia and in the highest courts of comparable common law countries'.¹³

In the past, I have endeavoured to shape negligence law in accordance with a clear principle, or at least a methodology that could command universal assent.¹⁴ Academic scholars (not, I should say, Professor Luntz) rallied to my cause,¹⁵ but not a single judicial colleague was persuaded and that was where support most mattered. I have now confessed defeat in my attempt.¹⁶ The three-stage test that I favoured, adapted from the House of Lords decision in *Caparo Industries plc v Dickman*,¹⁷ has clearly been rejected by the High Court of Australia.¹⁸ Unless reform and principle are introduced by legislation (a prospect that seems dubious, to say the least, contemporary legislative motivations being quite different), we are now committed to a search for 'salient factual features'¹⁹ or to

¹¹ David Derham (ed), *A Text-Book of Jurisprudence* (3rd ed, 1964), reviewed by E K Braybrooke in (1965) 5 *Melbourne University Law Review* 103.

¹² Julius Stone, *The Province and Function of Law — Law as Logic, Justice and Social Control: A Study in Jurisprudence* (1946).

¹³ Faculty of Law, University of Melbourne, *Graduate 2003: Postgraduate Handbook* (2003) 70.

¹⁴ See, eg, *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 419–20; *Romeo v Conservation Commission of the Northern Territory* (1998) 192 CLR 431, 476; *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 275; *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1, 80–6; *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 604–5.

¹⁵ Norman Katter, *Duty of Care in Australia* (1999) 173; Christian Witting, 'The Three-Stage Test Abandoned in Australia — Or Not?' (2002) 118 *Law Quarterly Review* 214.

¹⁶ *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 194 ALR 337, 398–400. See also *Cat-tanach v Melchior* (2003) 199 ALR 131, 164.

¹⁷ [1990] 2 AC 605, 617–18 (Lord Bridge) ('*Caparo*'). See also *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 730–71 (Lord Browne-Wilkinson; Lord Jauncey, Lord Lane, Lord Ackner and Lord Nolan agreeing), esp 729 (Lord Jauncey), 739 (Lord Browne-Wilkinson).

¹⁸ *Sullivan v Moody* (2001) 207 CLR 562. Cf *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 253–4 (Gummow J).

¹⁹ The 'salient factors' referred to by the Court include 'vulnerability, power, control, generality or particularity of the class, the resources of, and demands upon the authority', the 'core or ... non-

a return to the womb of *Donoghue v Stevenson*²⁰ (although policy considerations continue to be important in these matters,²¹ albeit not as explicitly as would be the case under the *Caparo* test).²²

So I say to Professor Luntz that, when he gives his postgraduate instruction on developments in what he is pleased to call the ‘principles’ of negligence law, he should keep an eye out for an inconspicuous ageing gentleman sitting in the back row of his class, listening attentively and taking many notes. Indeed, there could be worse developments than to have seven ageing gentlemen (alas no lady) sitting in that back row. If anyone in Australia could throw light on a principled approach to negligence law, it would be Harold Luntz, for no-one knows more about it.

II WRITINGS

I remember very clearly the first occasion that I met Harold Luntz. In December 1974 I had been sworn into office as a Deputy President of the Australian Conciliation and Arbitration Commission. After forty days and forty nights, I was appointed — unexpectedly — to chair the newly inaugurated Australian Law Reform Commission. I there became reacquainted with Gareth Evans, then a lecturer at the Melbourne Law School, whom I had earlier known in the National Union of Australian University Students. He invited me to visit the Law School to discuss the future of the new Commission.

The first room to which Gareth Evans took me was that of Harold Luntz, upstairs in the old Law School. Before we entered, my host whispered, ‘this man reads *everything*’. Astonished that there was anyone who could read *everything* about the law, I was ushered into the presence of a young man then in his mid-30s. My attention was first caught by his sharp, searching eyes. Indeed, I thought of those eyes recently when reading a description of Béla Bartók in which the composer was described as having ‘exceptionally shrewd eyes, whose fire almost burns through his glasses.’²³

Harold Luntz was also somewhat unusual for a lawyer in that he listened before he spoke. Piled on his desk I saw what I assumed was his reading material for that afternoon — several metres of books, law reviews and a thousand loose parts of law reports. Over time I was to discover that Gareth Evans’s whispered confidence was correct. This was a scholar with a voracious appetite for information. All was written down, in those pre-computer days, on cards, searched by a Luntzian technique of using knitting needles that Gareth Evans attempted to

core’ functions, or relation to ‘a matter of policy of executive action’ and so on: *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 194 ALR 337, 428 (Callinan J).

²⁰ [1932] AC 562, 580 (Lord Atkin). Such a move has been suggested in *Avenhouse v Hornsby Shire Council* (1998) 44 NSWLR 1, 8 (Priestley JA), noted in *Perre v Apand Pty Ltd* (1999) 198 CLR 180, 253 (Gummow J). See also *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 194 ALR 337, 364 (McHugh J) (citations omitted), where it was said that ‘no duty of care can arise unless the relationship between the parties is one of neighbourhood in Lord Atkin’s sense as stated in *Donoghue v Stevenson*’.

²¹ *Cattanach v Melchior* (2003) 199 ALR 131, 167–8 (Kirby J).

²² *Ibid* 164 (Kirby J).

²³ Viktor Papp, *Arcképek a Zenevilágból* (1918) 54, cited in Malcolm Gillies, ‘Bartók and His Music in the 1990s’ in Malcolm Gillies (ed), *The Bartók Companion* (1993) 1, 7.

copy but abandoned in a fit of uncharacteristic temper and technological incompetence. Everything was fed into Harold Luntz's cards: sorted, analysed, sifted, organised — searched all the while with knitting needles for legal principles leading to justice.

Anyone who troubles to read of the long course of Harold Luntz's writing (and there must be few authors who have written so much over so long) will readily accept that he is an information processor with few peers. I was told of one celebrated occasion in the Melbourne Law School where a rudimentary system of artificial intelligence was displayed, programmed with case law and other writings on the law of torts. The Faculty showed great confidence in Harold Luntz, pitting him against the machine to give an accurate answer on the law of nervous shock. This was before the High Court's decisions in *Tame v New South Wales*²⁴ and *Gifford v Strang Patrick Stevedoring Pty Ltd*²⁵ cast what I hope was fresh light on that area of the law (muted though some of the dazzling beams may occasionally seem). Needless to say, Harold Luntz trounced the machine. In much quicker time, and with far greater accuracy, he produced the best analysis of the state of the law. Perhaps we should be grateful that we still live in an age where the human brain, with its rare capacities to conceptualise, select and analyse, can beat machines. So far no-one has been able to program a machine as good as the brain — and certainly not as good as Harold Luntz's brain. No-one has yet attempted to program a machine with a *will* to do justice.

Harold Luntz's magnum opus was his text on the law of damages,²⁶ now into its fourth edition.²⁷ It is, putting it plainly, a masterpiece. Fortunately, this was recognised by his own faculty (often in life, colleagues are reluctant to acknowledge the qualities of one in their midst). In 1983, the University of Melbourne awarded Harold Luntz the degree of Doctor of Laws for the second edition of this text. It is a book that is invariably used and cited in cases before the High Court dealing with damages.

The High Court's self-denying ordinance that forbids, in most matters, reference to comparable damages verdicts²⁸ (permitting only an occasional exception from this virginal purity)²⁹ naturally takes judges who have only occasional opportunities to consider damages questions to the book of the nation's acknowledged expert on the subject.³⁰ Most of the book is concerned with matters of principle. Given the somewhat chaotic way in which the principles of the

²⁴ (2002) 191 ALR 449.

²⁵ (2003) 198 ALR 100.

²⁶ Harold Luntz, *Assessment of Damages for Personal Injury and Death* (1st ed, 1974).

²⁷ Harold Luntz, *Assessment of Damages for Personal Injury and Death* (4th ed, 2002).

²⁸ *Planet Fisheries Pty Ltd v La Rosa* (1968) 119 CLR 118, 124 (Barwick CJ, Kitto and Menzies JJ). Cf *Moran v McMahon* (1985) 3 NSWLR 700, 709–11 (Kirby P).

²⁹ See, eg, *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44, 59 (Mason CJ, Deane, Dawson and Gaudron JJ), where the High Court held that a judge presiding in a defamation case could indicate to a jury, for comparative purposes, the 'ordinary level of the general damages component of personal injury awards' and that counsel could make similar references in their addresses. Cf Michael Tilbury and Harold Luntz, 'Punitive Damages in Australian Law' (1995) 17 *Loyola of Los Angeles International and Comparative Law Journal* 769, 789.

³⁰ See, eg, *Kars v Kars* (1996) 187 CLR 354, 376 (Toohey, McHugh, Gummow and Kirby JJ), where this book and other writings of Professor Luntz are referred to. See also *Catanach v Melchior* (2003) 199 ALR 131, 134 (Gleeson CJ), 232 (Heydon J).

common law are fashioned in individual cases, decided by judges in every jurisdiction of this and other countries, it is reassuring to see how Professor Luntz can hammer them into a framework of brilliant and seemingly consistent decision-making. I have sometimes suspected that it is his training in the logic of the Roman Dutch law of his original homeland that gave him this conviction that the chaos is actually tamed by logic and seamless order. Certainly, it is his analysis that has helped to reduce disparity and to enhance principle in the law of damages.

In addition to this central book, he has written many others worthy of praise. In 1980, with David Hambly and Robert Hayes, he launched the first edition of *Torts: Cases and Commentary*. That work is now in its fifth edition.³¹ The publisher's promotion, explaining why another edition was necessary after the fourth in 1995, states that 'numerous High Court decisions have impacted on tortious jurisprudence and this edition covers and considers these developments in detail'. It will be understood that I looked at each chapter to see the treatment by the learned authors of the cases in which I had been involved, many sadly in dissent. I read with much interest the authors' comment about ascertainment of the duty of care in Australian law: 'Once Deane J left the High Court in 1995 to become Governor-General, a reaction set in'.³²

Considering that it was I who had succeeded Deane J to the Court in 1996, for a tantalising moment I wondered whether Harold Luntz might have expressed that idea with greater clarity. Did he mean a 'reaction' in the sense of 'response'? Or did he mean a backward-looking attitude? Or did he mean both? Perhaps, as on so many things, if the different Justices of the High Court were to read the comment (and many more in the book) they would each see a different nuance. I will not even hint as to how I read what was written. I am perfectly happy to blame Professor Hambly for having authored such mischievous thoughts.

In addition to these major texts, and indeed woven through them, have been Professor Luntz's writings on the subject of 'compensation and rehabilitation'. He had first written a book by that name in 1975.³³ In that year (in which I helped inaugurate the Australian Law Reform Commission), hopes were high that a national compensation scheme would be introduced into Australia, similar to that ushered into life in New Zealand by Sir Owen Woodhouse. Harold Luntz has never lost his conviction that this is the way to proceed to a more rational and cost-effective system of compensation for personal injuries. As we know, a Bill to establish a national compensation scheme was in the federal Parliament on 11 November 1975.³⁴ It fell with the dismissal of the Whitlam government and the dissolution of the Parliament on that day. It has never been revived. One commentator, writing to me, remarked:

³¹ Harold Luntz and David Hambly, *Torts: Cases and Commentary* (5th ed, 2002).

³² *Ibid* 146.

³³ Harold Luntz, *Compensation and Rehabilitation: A Survey of the Report of the National Committee of Inquiry into Compensation and Rehabilitation in Australia and the National Compensation Bill 1974* (1975).

³⁴ National Compensation Bill 1974 (Cth).

In relation to childe [H]arolde, get hold of the first edition of Luntz, Hambly and Hayes on Torts and see how prescient he was on the forensic lottery, and the costs of not adopting a measured timely federal solution. Of course it was all left too late. Look at the shambles that's unfolding!

Aside from these major texts, there has been a tremendous flow of timely articles, incisive case notes, engaging book reviews, comments on the direction of the law and other publications.

Already in 1963, before he first came to Australia, Harold Luntz was staking his claim as a major scholar in the *Annual Survey of South African Law* issued by his old faculty at the University of the Witwatersrand. Not content with writing the chapter on the law of property (covering no fewer than 35 closely printed pages of great detail),³⁵ the young academic also wrote the chapter on the law of negotiable instruments (10 pages)³⁶ and the law of evidence (33 pages).³⁷ It was a tour de force, in quite diverse areas of the law, showing just how broad were his interests and how perceptive his insights. They demonstrate how he could have chosen any area of legal scholarship to make his own. We were fortunate that he sharpened his mind by concentrating, essentially, upon two: torts and damages, and negotiable instruments (a special form of property).

In 1964, in the *South African Law Journal*, Harold Luntz was writing on a subject to which he frequently returned, namely liability in negligence in relation to the person specially susceptible to injury and damage.³⁸ The analysis is replete with references to Gaius' and Justinian's *Institutes* and analogies from the times of Justinian considering damage to sick slaves — a question probably not entirely alien to the South Africa of those days. Soon after he arrived in Australia, Harold Luntz was writing to the *Australian Law Journal* on 'duties to extraordinary people'.³⁹ He also continued to write on the law of cheques, one of his essays on that topic being an early contribution to the *Melbourne University Law Review*.⁴⁰ Yet for the most part, his core writings have addressed a problem that has gnawed away at his brain for more than 30 years: how to combine rationality with fairness in the field of compensation for personal injuries?

Even after it seemed clear that the national accident compensation scheme had been abandoned, Harold Luntz concluded a 1980 analysis of liability for sporting injuries with a reminder that this was but a species of a wider genus. He said:

the whole field is bedevilled with technicalities and distinctions not related in any way to the needs or deserts of the victims. Many injured persons would have no remedy at all in tort and few would be covered under the alternative compensation systems. In New Zealand, on the other hand, since 1st April, 1974, every member of the community, whether injured as a result of a sporting

³⁵ Harold Luntz, 'Law of Property (Including Mortgage and Pledge)' [1963] *Annual Survey of South African Law* 277.

³⁶ Harold Luntz, 'Law of Negotiable Instruments' [1963] *Annual Survey of South African Law* 395.

³⁷ Harold Luntz, 'Law of Evidence' [1963] *Annual Survey of South African Law* 493.

³⁸ Harold Luntz, 'The Man with the Thin Skull' (1964) 81 *South African Law Journal* 18.

³⁹ Letter from Harold Luntz to the Editor, 30 September 1968 in (1968) 42 *Australian Law Journal* 194.

⁴⁰ Harold Luntz, 'The Bank's Right to Recover on Cheques Paid by Mistake' (1968) 6 *Melbourne University Law Review* 308.

activity or any other type of accident, would be entitled to the benefits payable under the *Accident Compensation Act 1972* (NZ). The proposals for a comprehensive national compensation scheme put forward in 1974 by the National Committee of Inquiry into Compensation and Rehabilitation in Australia (the Woodhouse Committee) have been pigeon-holed too long; it is time they were taken out, dusted off and put into operation in this country.⁴¹

This theme is woven through many of Harold Luntz's later contributions to the law. The capacity of the *Trade Practices Act 1974* (Cth) to deliver efficient justice was analysed by him and doubted.⁴² The experiments overseas with particular categories of strict liability were examined and found wanting.⁴³ The ventures with such categories in Australia and the suggested organisation of multiple claims in class actions were analysed as temporary remedies on the path to a solution that was universal and more comprehensive.⁴⁴ Harold Luntz continued to hanker for an answer at once larger and bolder, more efficient and just.

It is important to make the point that Professor Luntz was never devoted to major tort reform in order to assure lawyers, generations of whom he had taught, an easy living in personal injuries cases. On the contrary, one of his major criticisms of tort law as practised in Australia was that it was simply too expensive in the delivery of justice to the individual. It was not cost-effective. For example, he pointed to the fact that the successful plaintiff in *Rogers v Whitaker*⁴⁵ had to invest, and risk, legal costs of A\$350 000 to recover damages of A\$743 050 plus interest.⁴⁶ To Professor Luntz, that highly cost-intensive, professional and expensive way of delivering the compensation dollar was simply not rational.

So, unlike some others, Harold Luntz's objective has never been to shore up the ways of the past simply because they are the way things have always been. Rather, he has been a proponent of truly radical change in the law of torts. Not for him the shreds and patches, the bandaids and the piecemeal reforms. In a sense, he foresaw the inefficiencies and inequalities of the current measures and proposals for reform of the law of torts in Australia. It was his insight that led him to embrace the comprehensive reform adopted in New Zealand. And if some critics of the New Zealand scheme pointed to the fact that the amounts payable under the *Accident Compensation Act 1972* (NZ) have fallen away in real terms, at least they appear to have ensured a greater rationality in the treatment of accident compensation than the particular schemes of caps and limitations and

⁴¹ Harold Luntz, 'Compensation for Injuries Due to Sport' (1980) 54 *Australian Law Journal* 588, 601 (citations omitted).

⁴² Harold Luntz, 'Section 73 of the *Trade Practices Act* and the Liability of Financiers for Defects in Goods' (1975) 3 *Australian Business Law Review* 90.

⁴³ Elizabeth Brophy and Harold Luntz, 'Statutory Standards as Indicators of the Standard of Care in Negligence: The Nursing Home Context' (1999) 7 *Torts Law Journal* 263, 267.

⁴⁴ Harold Luntz, 'Heart Valves, Class Actions and Remedies: Lessons for Australia?' in Nicholas Mullany (ed), *Torts in the Nineties* (1997) 72, 73.

⁴⁵ (1992) 175 CLR 479.

⁴⁶ Harold Luntz, 'Mrs Whitaker's Gothic Cathedral' (1996) 4 *Torts Law Journal* 195, 196-7.

multiple changes to legal principles that are now in place, or on the table, in Australia.⁴⁷

It does seem unfortunate that Professor Luntz's call for a return to conceptual thinking about a broader approach to accident compensation has not even been considered in the current debates. The perceived urgency has been to respond to the problems of insurance availability and cost. The terms of reference of the Ipp Committee, established to review the law of negligence, were not interpreted to permit consideration of root and branch reform. The Committee cannot really be blamed for this. The thrust of proposed changes was in a different direction. Instead, it seems, we are on the brink of more piecemeal reforms with federal, state and territory legislation that will almost certainly invite, and not rebuff, litigation and administrative costs simply because of the complexity of the itemised reforms suggested by the Committee.⁴⁸

In essence, Professor Luntz urged an approach to personal injury compensation that was more closely influenced by economic analysis. I do not refer to the economic analysis that will save the viability of a few insurers and make risks more palatable to those who, like the writers of Anglo-Saxon literature, are forever lamenting and complaining. I refer instead to the need to examine foreseeable economic consequences further down the track. For instance, in the context of commercial sport, what are the true costs of failing to insist that individual defendants are rendered liable for omitting to take reasonable care to prevent injuries, when such an insistence might result in other potential defendants taking proper precautions to avoid such injuries? What are the true costs to the community of football players with broken spines, beyond the individual plaintiffs who sue?⁴⁹ What are the true costs to the community of individual participants in indoor cricket who lose the sight of their eyes because the peculiar malleability of the indoor cricket ball causes such damage when it makes contact with the eye socket?⁵⁰ What are the true costs of the sports whose codes concentrate on the colour of the players' dress⁵¹ rather than on the need for protective gear that is taken for granted in North America and might be introduced here if a few sporting enterprises were rendered liable in damages? In *Woods v Multi-Sport Holdings Pty Ltd*, I put it this way:

The law, and specifically the law of negligence, promotes a greater consciousness of the need for safety, accident prevention and the avoidance of needless

⁴⁷ Panel of Eminent Persons ('Ipp Committee'), *Review of the Law of Negligence: Final Report* (2002) ('*Ipp Report*').

⁴⁸ The *Ipp Report* makes several recommendations that would reverse or modify decisions of the High Court: see, eg, Recommendation 3, 'Treatment by a Medical Practitioner — Standard of Care' (*Rogers v Whitaker* (1992) 175 CLR 479); Recommendation 28, 'Standard of Care' (*Council of the Shire of Wyong v Shirt* (1980) 146 CLR 40); Recommendation 29, 'Causation' (*Chappel v Hart* (1998) 195 CLR 232); Recommendation 43, 'Non-Delegable Duties and Vicarious Liability' (*Commonwealth v Introvigne* (1982) 150 CLR 258; *New South Wales v Lepore* (2003) 195 ALR 412); Recommendation 46, 'Tariffs for General Damages' (*Planet Fisheries Pty Ltd v La Rosa* (1968) 119 CLR 118); Recommendation 51, 'Gratuitous Services' (*Griffiths v Kerkemeyer* (1977) 139 CLR 161; *Kars v Kars* (1996) 187 CLR 354).

⁴⁹ *Agar v Hyde* (2000) 201 CLR 552. Cf Hayden Opie, 'The Sport Administrator's Charter: *Agar v Hyde*' (2001) 9 *Torts Law Journal* 131.

⁵⁰ *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460, 466, 486–8.

⁵¹ *Ibid* 487–8.

or excessive injury in sport. In doing so, it promotes the true values of sport rather than the brutal and excessive features that debase sport, leaving victims and their families to pick up the pieces over many years, long after the watching crowd's cheering has subsided.⁵²

Economic analysis is needed in tort reform. But it must be long-term economics, not short-term tinkering, complicated and cost-intensive.

As Harold Luntz has often pointed out, the object of all decisions in the law of torts is not only to provide for just loss distribution between the parties. It is also to influence the conduct of others. There can be little doubt that the replacement of the English test as set out in *Bolam v Friern Hospital Management Committee*⁵³ with that expressed by the High Court in *Rogers v Whitaker*⁵⁴ made healthcare workers in Australia more forthcoming in explaining risks and options to their patients. Depending upon one's point of view about individual autonomy and human dignity, that outcome may not be such a bad one.⁵⁵ To reverse or qualify it, as the Ipp Committee has proposed,⁵⁶ may amount to a return to the philosophy of 'nanny knows best' inherited from England. For my own part, I would always be doubtful of any law that committed exclusively to any profession the final judgment on what reasonable care requires. This is just another illustration of the dangers of approaching tort reform in bits and pieces.

III SCHOLAR AND TEACHER

During his life in Australia, Harold Luntz has witnessed enormous changes in the law and its institutions. He has described some of these in reflective essays that are well worthy of attention.⁵⁷ In one, vividly titled 'Throwing Off the Chains',⁵⁸ he contrasts the attitude maintained by Australian courts towards English precedent at the time he arrived here with the confident, independent approach of today's courts. He cited Deane J's remarks in *Hackshaw v Shaw*⁵⁹ explaining why the English categories of liability for particular occupiers of land were bound up with the social structure of England and landholdings that could be traced back to feudal times. Professor Luntz went on:

Factors such as these make it inevitable that the common law of Australia, as developed and adapted by Australian courts, will draw increasingly away from

⁵² Ibid 492. See also Kylie Burns, 'It's Just Not Cricket: The High Court, Sport and Legislative Facts' (2002) 10 *Torts Law Journal* 234.

⁵³ [1957] 2 All ER 118, 122 (McNair J).

⁵⁴ (1992) 175 CLR 479, 488–90 (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ). See also *Rosenberg v Percival* (2001) 205 CLR 434.

⁵⁵ Brophy and Luntz, above n 43, 267; Luntz, 'Mrs Whitaker's Gothic Cathedral', above n 46, 197.

⁵⁶ *Ipp Report*, above n 47, Recommendation 3, 'Treatment by a Medical Practitioner — Standard of Care'.

⁵⁷ Harold Luntz, 'Torts Turnaround Downunder' (2001) 1 *Oxford University Commonwealth Law Journal* 95; Harold Luntz, 'Damages' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 188, referring to *Moran v McMahon* (1985) 3 NSWLR 700, 709 (Kirby P).

⁵⁸ Harold Luntz, 'Throwing Off the Chains — English Precedent and the Law of Torts in Australia' in M P Ellinghaus, A J Bradbrook and A J Duggan (eds), *The Emergence of Australian Law* (1989) 70.

⁵⁹ (1984) 155 CLR 614, 659.

the common law of England in which its roots were located. Statutory amendments of the law will accelerate the trend. At one stage in Australia's history such amendments were frequently based slavishly on English legislation. No longer is this so.⁶⁰

In a more recent article, he has commented on the 'ups and downs' of attitudes that have underpinned the law of torts, observing:

Whatever the speculation as to its cause, in 2000 a remarkable turnaround occurred in the outcome of torts appeals in the High Court of Australia. From the date when Sir Anthony Mason took up his appointment as Chief Justice ... to the end of 1999, the High Court ... delivered some 96 judgments in cases falling under the law of torts ... 63 (66 per cent) of those may be seen as pro-plaintiff and 32 (33 per cent) as pro-defendant ... In 2000 plaintiffs appealed in three cases concerning liability for personal injuries. All of these appeals were dismissed. ... Defendants, on the other hand, were successful in all three of their appeals on issues of liability or damages for personal injury. ... Undoubtedly, the judges had what Julius Stone called 'leeways of choice' in all of them. They chose to go in the direction that favoured defendants.⁶¹

Such swings tend to occur in courts over time. Professor Luntz suggests that they may be associated with the cycles of judicial appointments, reflecting, in turn, the cycles of differing governments.⁶² If that is so, it is simply an incident of our constitutional system of elected government. Academic writing must not complain about such fluctuations lest it attract Justice Heydon's castigation.

Now locked in mortal combat are a number of great forces that are struggling for the soul of the law of torts. On the one side are those who, responding to pressures from particular professional and commercial groups, seek to cut back what they see as the inefficiencies of the forensic lottery and to do so by a patchwork of legislative caps and special substantive reforms. On the other side are those who demand that tort law today be seen in the context of the developing law of human rights.⁶³ Unlike the United Kingdom and most other common law countries, Australia has neither a general statute of human rights, nor a constitutional charter of rights, nor access to a regional court of human rights to uphold the principles of liability that conform to general rules protective of human rights.⁶⁴ Undisciplined by such larger principles, we stumble along on an uncertain road to an unclear destination.⁶⁵ Crying in the wilderness, like a

⁶⁰ Luntz, 'Throwing Off the Chains', above n 58, 88 (citations omitted).

⁶¹ Luntz, 'Torts Turnaround Downunder', above n 57, 96–8 (citations omitted).

⁶² Ibid 106.

⁶³ See generally Jane Wright, *Tort Law and Human Rights* (2001), reviewed by Ian Malkin in (2002) 10 *Torts Law Journal* 306.

⁶⁴ Chief Justice J J Spigelman, 'Access to Justice and Human Rights Treaties' (2000) 22 *Sydney Law Review* 141. Cf *Osman v United Kingdom* (1998) 8 Eur Court HR 3124; *Human Rights Act 1998* (UK) c 42.

⁶⁵ See, eg, *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 248–58 (Gummow and Hayne JJ), 277–9 (Kirby J), 320–9 (Callinan J); David Lindsay, 'Playing Possum? Privacy, Freedom of Speech and the Media following *ABC v Lenah Game Meats Pty Ltd* — Part II: The Future of Australian Privacy and Free Speech Law, and Implications for the Media' (2002) 7 *Media & Arts Law Review* 161, 193–4; Steven White and Graeme Orr, 'Precarious Liability: The High Court in *Lepore, Samin and Rich* on School Responsibility for Assaults by Teachers' (2003) 11 *Torts Law Journal* 101, 112–13; Prue Vines, 'New South

prophet of old, is Harold Luntz, appealing for a more fundamental, national, universal and even-handed approach.

I asked one member of the Melbourne Law Faculty why Professor Luntz had not served longer as Dean. He was very successful, I was told. He was Dean at the moment when free university education was abandoned and replaced by HECS; he was efficient in difficult times. But this was not what he wanted to do. His life's wish was to be a writer and a teacher. In both of them he excelled.

I asked another what was his special genius as a teacher. 'Clarity' was the reply. He *did* read everything and he knew so much. Yet he had a capacity to cut it back to the very essence and to convey that essence without 'over-teaching'. He accepted large teaching burdens in 'Torts and the Process of Law', a first year subject. Why did the students like him, I questioned. The answer came back: 'Because he is a good storyteller'. Torts is about human stories. For Harold Luntz, it is about stories concerning the search for just solutions to particular problems.

One could understand if, surveying his life's work in the field of tort law, and looking at the horizon at this moment, he felt discouraged. Reform he always wanted. But the reforms he can now see being proposed run the risk of compounding the forensic lottery that he has always strongly opposed. They risk entrenching its inequalities.

So this brings me back to ask what has made Harold Luntz tick. Why this tremendous energy? Why *does* he read everything?

Last year, Harold Luntz took his seat on the Equal Opportunity Committee of the Melbourne Law School. He is deeply committed to the defence of cultural diversity and to upholding respect for the many different groups that now make up a modern Australian law school. Here, I feel we see his response to the scar of his childhood that led him to leave his homeland of birth and make his life amongst us. Had he stayed in South Africa, he would undoubtedly, like Chief Justice Arthur Chaskalson, Justice Edwin Cameron and other alumni of the Witwatersrand, have become a leader in the struggle for the new South Africa. His motivating force is ultimately a belief that law is an instrument of justice, not just a set of rules. He looks through the words and the formulas to the purpose of it all. He has been an anchor for the intellectual strength and stability not only of the Melbourne Law School but also of Australian scholarship in the field of torts. This is no time for him to retire. He must continue to wield his pen, his words and his influence — speaking and writing of principle, looking at us with those sharp, searching eyes.⁶⁶

The need for Harold Luntz in the law of torts in Australia is greater now than ever before. So as we celebrate his achievements, we are so bold as to demand more from him. His contribution should not dissipate in a miasma of celebration. At this watershed in the law of torts in Australia, we need an annual or biennial

Wales v Lepore; Samin v Queensland; Rich v Queensland: Schools' Responsibility for Teachers' Sexual Assault: Non-Delegable Duty and Vicarious Liability (2003) 27 *Melbourne University Law Review* 612, 626.

⁶⁶ Professor Luntz continues to offer insights into some of the most difficult problems of tort law. See, eg, Harold Luntz, 'Loss of Chance' in Ian Freckelton and Danuta Mendelson (eds), *Causation in Law and Medicine* (2002) 152.

conference to review where we have come from, where we are and where we are going. Each year it is my privilege to attend, at Yale Law School, a conference on constitutionalism conducted by the Law Faculty and judges from final appellate courts drawn from all parts of the world. It is a great learning experience, and not only for the Faculty. Emboldened by the Melbourne Law Faculty's postgraduate handbook, and by the creative moves that have been made in recent years by the Melbourne Law School, I make a suggestion. There should be a Luntz annual or biennial conference on directions in the law of torts. To it should be invited distinguished judges from overseas and a sprinkling of our own judges. Locked away for a weekend or more with the Law Faculty of the University of Melbourne and other scholars and practitioners from here and abroad, such an encounter could inject the best of thinking into the principled application and development of the law of torts. Professor Luntz should, of course, be lifetime rapporteur. The papers should be published, some of them in this *Review*. The visitors should speak to the law students. The dialogue of the judiciary and the academic world should be enhanced and deepened, as it is increasingly the case in Europe and North America.

If such symposia happened more often, there might be less need for ad hoc statutes and hasty repairs performed on the run. Perhaps there would also be less need, and less justification, for academic legal literature to offer lamentation and complaint, as Justice Heydon said that it does.⁶⁷ Like the Anglo-Saxons after the Conquest, academics might be embraced by the citadels of the law that they now justly criticise: influencing their values and affecting their directions with commonsense, practical wisdom and plain speaking — three great strengths of Harold Luntz throughout his long, illustrious career.

⁶⁷ See above n 3 and accompanying text.