Submission No 16

INQUIRY INTO PERSONAL INJURY COMPENSATION LEGISLATION

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Summary

THE PROTECTION OF MINORS
AND
TORT LAW REFORM

SUBMISSION TO THE INQUIRY INTO PERSONAL INJURY COMPENSATION LEGISLATION

General Purpose Standing Committee No. 1

Parliament of New South Wales
Legislative Council

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The author is an Articled Clerk with Clayton Utz, Solicitors. The views expressed in this submission are entirely his own.

‘Cherishing children is the mark of a civilised society.’
(Joan Ganz Cooney*)

‘Adults are obsolete children.’
(Dr Seuss)

* Creator of *Sesame Street*.

Contents

1. Executive Summary

This submission considers how the protection which tort and contract law offers to minors has been changed by recent tort reform measures, and recommends various changes which may assist to restore some protections and reduce the scope for exploitation of minors.

This submission shows that changes to the common law and to existing statutes have prejudiced the legal rights and interests of people under 18 years. It focuses principally on two areas:

(a) The limits on and uncertainty around the duty of care owed to minors; and

(b) Changes which impose upon the legal autonomy of children, such as by allowing parents to prejudice their rights to bring an action at common law.

This submission notes that the law has always sought to protect children from their own immaturity, and from exploitation by others. These protections have been weakened in New South Wales as part of the process of personal injury law reform. It makes several recommendations to protect minors, and to head off potential legal avenues to undermine these further.

Summary of Recommendations

1.1 Resist calls from the insurance lobby to allow minors to execute binding contractual waivers, or parents to do so on their behalf.

The law recognises that minors may unwisely bind themselves to contracts. It restricts their capacity to do so, and it recognises that it is unfair that anyone else, including a parent, should be able to do so on their behalf. Sections of the insurance industry have called for changes to this law. These calls should be resisted.

1.2 Prohibit a person from asking a minor or their parent to sign a contractual waiver, or representing that any such waiver is valid.

A minor or their parent may not be aware that a waiver which the minor has executed, or which their parent has signed on their behalf, is not valid. If the minor is injured, they may mistakenly believe they are not entitled to bring an action in negligence.

1.3 Provide that a risk warning under Section 5N of the *Civil Liability Act* is ineffective against anyone under 18.

A risk warning under Part 5N of the *Civil Liability Act* effectively operates as a contractual waiver. It can be effective if delivered to a parent of a minor, or if the minor (perhaps in the case of a teenager) is capable of understanding it. Minors may not be capable of making a properly considered decision to accept such a warning, and their parents should not be expected to do this on their behalf. The law prevents a formal contract from being effective in this way and the *Civil Liability Act* should be amended to have the same effect.

1.4 Set out clear minimum standards to ensure that risk warnings are brought directly to the attention of people whom they are to bind, and require that they are explicit and written in plain English.

If Parliament chooses not to exclude minors from Section 5N of the *Civil Liability Act* as recommended above, it should establish minimum standards to ensure that risk warnings are brought to a person's attention in a detailed and explicit manner. A risk warning a risk warning under s 5M should only be effective to the extent that a person had a subjective understanding of the contents of that warning.

1.5 Section 5L of the *Civil Liability Act* should not apply to anyone under 18 years.

Unlike the common law, section 5L of the *Civil Liability Act* does not require a subjective appreciation of risk in order to exclude liability. This is particularly unfair to minors who may not appreciate risks which are obvious to adults. Instead, this section should not apply to minors, and liability for negligence when providing dangerous recreational activities should be subject to the common law defences of contributory negligence and voluntary assumption of risk.

1.6 Abolish the 'custody of the parent rule' in New South Wales.

The *Limitation Act 1969* was amended to provide that 'time' will run against a minor if they are in the custody of their parents. It is unfair that parental inaction, (however well intended) will prejudice the rights of a child who is powerless to act on his or her own behalf. This section should be repealed.

1.7 A person should be prohibited from asking a parent to execute a parental indemnity, and any such indemnity should be void.

There is nothing in the law currently to prevent a service provider asking a parent to indemnify the service provider against any action brought against the service provider in respect of damage suffered by the child. This means that a parent would be liable to reimburse the negligent service provider. While valid at law, this effectively destroys the child's cause of action and should be illegal.

2. Introduction

Society in general has a particular obligation to protect the young, and the common law has traditionally sought to protect children from themselves, and from exploitation by others. It does so by having a lower expectation of the care they will take for themselves, while not binding them to a contract unless it is beneficial and necessary.

In contrast to the common law's measured approach, the current process of tort law reform was commenced in an atmosphere bordering on hysteria which saw the concepts of negligence and assumption of risk dragged from the pages of the law reports and scholarly journals and onto the front page of tabloid newspapers.[1] Reforms adopted in New South Wales, particularly in the *Civil Liability Act 2002*, started from the premise, as expressed by the federal government, that

> the award of damages for personal injury has become unaffordable and unsustainable as the principle source of compensation for those injured through the fault of another...[2]

In making wide ranging changes to the allocation of civil liability for personal injury, the Parliament has both removed various safeguards to protect the legal rights of children, as well as exposed them to the risk that unscrupulous business operators may exploit particular legal loopholes.

This submission explores some of these changes and notes the manner in which they are especially detrimental to minors.

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[1] 'Break-In Teen Awarded $50,000' *The Daily Telegraph* (Sydney) 29 August 2002, 1.

[2] Senator Helen Coonan, *Minister Announces Review Panel* (Press Release, 2 July 2002).

3. Waivers, Risk Warnings and the Chilling Effect

An injured plaintiff will often have concurrent causes of action against a tortfeasor in tort and contract. The claim in contract may arise out of terms implied into the contract by the common law or by statute, such as the *Fair Trading Act 1987*. At common law, parties can execute a contract under which one promises not to sue the other in negligence (referred to here as a 'contractual waiver'). The *Fair Trading Act* implies a warranty that services would be provided with 'due care and skill' into most consumer contracts, and provides than any provision to the contrary is void. This renders contractual waivers ineffective in most consumer transactions. However, section 5N of the *Civil Liability Act* has removed these barriers in respect of negligence in providing a recreational service. This means that a waiver will now be binding on a person who has contractual capacity.[3] It is likely to result in an increase in the use of waivers by recreational service providers.

The law limits the contractual capacity of children in order to protect them from the consequences of their own inexperience and immaturity. A child is more likely than an adult to commit him or herself to a contract without giving it proper thought. The limited contractual capacity of children means that a contractual waiver will generally be ineffective. Nonetheless, the increased use of such waivers as a result of the *Civil Liability Act* may result in a "chilling effect." The result of this could be to discourage minors or their parents from bringing an action against a negligent service provider. Minors, or parents who purport to execute waivers on their behalf, may not be aware that the contractual waiver is unenforceable. Minors in particular are unlikely to appreciate the legal consequences of their actions or to seek legal advice.[4] Faced with what they believe is an insurmountable hurdle, they may not bring proceedings, and the waiver may achieve a result in fact which it could not in law. The Law Reform Commission of British Columbia recommended a prohibition against requiring a minor or parent to sign a waiver, suggesting that forcing minors or parents to sign unenforceable waivers could constitute misleading and deceptive conduct under the Province's fair trading legislation.[5] It is submitted that a similar prohibition should be incorporated into the Fair Trading Act or the *Civil Liability Act* as the only practical way of reducing the chilling effect.

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[3] In doing so, the legislation has the incredible effect of potentially allowing a recreational service provider to injure, perhaps fatally, a client through gross negligence without incurring civil liability, but unable to exclude liability for failing to exercise due care and skill to protect the deceased's car parked in its carpark. This is all the more startling, given that the car will probably be insured, while few people, particularly the young, hold private income, disability or life insurance. In contrast, s 21 of the *Unfair Contract Terms Act 1977* (UK) prohibits any contractual attempt to exclude liability for injury and death caused by negligence.

[4] Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report no. 84 (1997), [4.16-4.19].

[5] Law Reform Commission of British Columbia, *Report on Recreational Injuries: Liability and Waivers in Commercial Leisure Activities*, Report no. 140 (1994), 31-32, 52.

4. Dangerous Recreational Activities and Obvious Risk

Section 5L of the *Civil Liability Act* states that a provider of a 'dangerous recreational activity', or one involving a significant risk of physical harm,[6] is not liable for injuries sustained from the materialisation of an 'obvious risk'. It applies whether or not a person was aware of the risk. This is an objective test. In the case of children, it would appear that the courts will examine what is obvious to a reasonable child of that age and experience. 'Obvious risks' include those with a low probability of occurring.[7]

This defence is disadvantageous to plaintiffs due to the difficulty of predicting what a court will consider 'obvious'. Many, albeit unlikely risks are obvious. Air travel is statistically almost risk free, however a passenger is 'obviously' at risk of injury through either mechanical failure or pilot error. Perhaps guidance may be taken from the various tests for foreseeability. Could it be, therefore, that a risk which is not 'far fetched or fanciful'[8] is obvious to an ordinary person? Must the precise mechanism of a risk materialising be obvious, or is that only required of the consequence? A rider, for example, faces an obvious risk of falling from a horse. This may arise through something mundane such as an improperly secured saddle, or something highly unexpected by the rider, such as a horse, known by the proprietor to suffer epilepsy, having a seizure. Both situations arise out of the proprietor's negligence, and have similar results. Does the obvious risk defence apply equally? It is possible that it is the result, rather than the precise manner of its occurrence, which must be obvious.[9] Furthermore, one would expect that the risk of an activity being conducted negligently is always obvious.[10]

It is not possible to predict how a court would answer the questions posed above. Potentially, the impact could be quite dramatic, effectively negating the existence of a duty of care on the part of providers of dangerous recreational activities. For example, the risk of a bungee cord breaking is obvious, even to a

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[6] *Civil Liability Act,* s 5K.

[7] *Civil Liability Act,* s 5F(1); s 5F(3).

[8] Being the standard set down in *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 48 (Mason J; Stephen and Aickin JJ agreeing); see also *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty* (*'The Wagon Mound' (No 2))* [1967] 1 AC 617, 643-644 (Lord Reid) (PC).

[9] See by way of analogy *Hughes v Lord Advocate* [1963] AC 837.

[10] The parliamentary position paper suggested that the Bill in its initial draft excluded straightforward negligence from 'obvious' risks, although it is unclear how it did so.: New South Wales, *Draft Civil Liability Amendment (Pesonal Responsibility) Bill 2002: Position Paper* (2002), 29-30. The author has been unable to obtain a copy of the draft. It was altered to achieve consistency with the recommendations of the Ipp Report: New South Wales, *Parliamentary Debates,* Legislative Assembly, 23.10.2002, 5764 (Bob Carr, Premier).

child. A service provider may not be liable for injuries suffered as a result, regardless of whether this occurs because an operator negligently fails to replace a worn cord, or due to an unforeseeable accident. Even if a risk is obvious to them, children are less likely than adults to consider the consequences of taking a risk. A child may not have sufficient prudence to make a balanced judgment as to whether to accept an obvious risk.

It is also possible that a risk which is not 'obvious' is also not foreseeable, and would not attract liability. Either way, the injured plaintiff may fail. This development is contrary to the common law, which accepts that children are liable to act with less than ideal consideration for their own safety.[11] It is bad policy to reduce the responsibility of all members of the community to help protect the young. Children are more likely to entrust their safety to others through innocence, enthusiasm or naiveté, and they should not be expected to undertake the same risk/benefit analysis expected of adults participating in dangerous recreational activities. In contrast to the arbitrary and potentially broad standard of obviousness under the *Civil Liability Act*, the common law defences of contributory negligence and voluntary assumption of risk (*volenti*) concentrate on examination of a plaintiff's conduct and subjective appreciation of risk. They provide a more appropriate and subjective mechanism for considering the effect of the risks undertaken by children.

5. Risk Warnings

Section 5L of the *Civil Liability Act* is limited to 'dangerous recreational activities'. A wider reaching provision, s 5M, provides that a recreational service provider does not owe a duty of care to a customer in relation to a particular risk if a 'risk warning' is delivered.[12] The warning may be expressed in general terms; it may be oral, written, or in the form of a sign,[13] but is not effective if there has been a breach of regulatory safety standards. It need not be specific to the particular risk. A warning of risks of the general nature is sufficient,[14] and 'the defendant is not required to establish that the person received or understood the warning or was capable of receiving or understanding the warning.'[15]

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[11] Eg *Beasley v Marshall* (1977) SASR 456, 458-9; *Joseph v Swallow & Ariell Pty Ltd* (1933) 49 CLR 578; *Bullock v Miller* (1987) 5 MVR 55, 59 (Tas SC).

[12] Sub-section 5M(3) of the *Civil Liability Act* provides that the warning be 'given in a manner that is reasonably likely to result in people being warned of the risk before engaging in the recreational activity. The defendant is not required to establish that the person received or understood the warning or was capable of receiving or understanding the warning.'

[13] *Civil Liability Act*, s 5M(3)-(4).

[14] *Civil Liability Act,* s 5M(5).

[15] *Civil Liability Act*, s 5M(3).

Crucially, while a risk warning delivered to a minor will not be effective, one given to a parent will be effective against a minor, regardless of whether the minor was with the parent at the time.[16] This would include a situation in which a child is not with his or her parent when the warning is delivered, or the parent is unable to prevent him or her from undertaking the activity. The provision also assumes that all children or parents are capable of understanding the warning, including those, for example, who cannot read English.[17] It seems incredible that a child's claim may fail because of an incomprehensible warning, or one given to a parent in the child's absence. No provision of any law operates against adults in a similar way, and it is submitted that the *Civil Liability Act* fails to ensure the protection of children's rights in a uniquely unfair manner.

The policy underlying the scheme of risk warnings, which in many respects operate as simplified contractual waivers, is superficially attractive in certain contexts. As courts in the United States have held,

> [t]he public as a whole receives the benefit of such waivers so that groups such as Boy and Girl Scouts, Little League, and parent-teacher associations are able to continue without the risks and sometimes overwhelming costs of litigation. Thousands of children benefit from the availability of recreational and sports activities.[18]

Nonetheless, the flaws in the scheme established by the *Civil Liability Act* are such that they overwhelm the policy benefits, at least in the context of children. The policy arguments are also less persuasive when applied to commercial service providers rather than the community service organisations discussed above. Furthermore, the *Civil Liability Act* does not restrict the defence established by risk warnings by reference to the defendant's conduct. There is no exclusion, for example, for gross negligence,[19] nor any stipulation that an alternative mechanism for compensation (such as first party insurance) should be available.

Section 5M is a worrying innovation for several reasons. Firstly, no other provision in law allows a party unilaterally to bind a third, to his or her detriment. Secondly, it operates completely differently to the common law defence of *volenti*, which requires subjective understanding of the nature of the risk. These provisions are particularly detrimental to minors, and represent a departure from the law's traditionally

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[16] *Civil Liability Act*, s 5M(2). A warning may also be delivered to any capable adult accompanying and in control of the child: s 5M(2)(a).

[17] *Civil Liability Act*, s 5M(3).

[18] *Hohe v San Diego Unified School District* (1990) 274 Cal.Rptr. 647, 649 (California Court of Appeal).

[19] Although the risk warning is ineffective if the service provider has breached safety regulations: *Civil Liability Act*, s 5M(7).

protective approach. Finally, the policy rationale given above should not be used to justify blanket waivers in the absence of a legislative framework which incorporates stronger consumer protection provisions, and avoids the unfair effect on children.

6. Parental Conduct: Consent and Limitations

At common law, there is little scope for a minor to waive his or her rights to damages by way of contract. This chapter considers the ways in which a parent or guardian is able to consent to risk or execute a binding contract on behalf of a minor. It illustrates the sharp contrast between the common law and the operation of risk warnings under the *Civil Liability Act* by showing that, whereas that Act allows a parent to accept risk, even in the absence of a child, the common law allows a parent no such power.

6.1 Parental Consent Generally

The *paterfamilias* of ancient Rome wielded absolute power over his children. As his personal property, those who met with his displeasure could be disowned, sold into slavery, or even killed.[20] Fortunately, the common law adopts a more enlightened approach. The ways in which parents may affect the legal rights of their children are circumscribed. Their power to consent to or withhold medical treatment is limited,[21] and courts will intervene to protect a child even when parents act in good faith, if their actions are not in the best interest of the child.[22] The common law does not even recognise a parent's power to administer the property of a child.[23] Further, the law of contract does not allow a contract between two individuals to burden a third in any circumstance. It would be a major departure from these established principles to allow a parent to execute a binding waiver on behalf of a parent.

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[20] Public Broadcasting Service, *The Roman Empire in the First Century: Marriage and Family Life*, http://www.pbs.org/empires/romans/life/, at 10 June 2003.

[21] A minor may consent to treatment when he or she 'achieves a sufficient understanding or intelligence to enable him or her to understand fully what is proposed.': *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, 183-4, or is '*Gillick* competent'. Prior to this, only the consent of the parents is effective. The High Court approved this test in *Secretary, Department of Health and Community Services v J.W.B. and S.M.B. (Marion's Case)* (1992) 175 CLR 218, 237.

[22] *Re Jane* (1989) FLC 92-007, 77-257-8, approved by the High Court in *Marion's Case* (1992) 175 CLR 218, 250. See also cases involving parents' refusal to consent to blood transfusions on religious grounds, such as *Re O. (A Minor) (Medical Treatment)* [1993] 2 FLR 149.

[23] H K Bevan *Child Law* (1989), 34; *M'Reight v M'Reight* (1849) 13 I Eq R 314; Michael Waterworth, 'Minor Solutions: Receipt Clauses under the Children Act 1989 Regime', (1997) 1 *Private Client Business* 37; H K Bevan Child Law (London, 1989) 34

6.2 Limitation of actions

Amendments to s 50F(2)(a) of the *Limitation Act 1969* have introduced the 'custody of the parent rule' in New South Wales. Whereas once, 'time' did not run against a minor until they were capable of managing their own legal affairs, the limitation period will now run if a child is in the custody of his or her parent. Supporters of the rule argue that the law should recognise that 'in most cases a minor has some adult who can be expected to look after his interests…',[24] and it should provide relief to defendants otherwise faced with long limitation periods for claims by children.

Several law reform commissions have recommended against adopting the 'custody of the parent' rule,[25] while others have recommended its abolition.[26] Well-intended parents may fail, through inadvertence or otherwise, to pursue their child's rights. Caution has been expressed against visiting 'the sins of the fathers upon the children',[27] while the New Zealand Law Commission argued that

> [i]t is not possible to generalise about the reasonableness or responsibility of parents' or guardians' actions to protect the interests of children and young persons (or to distinguish easily and effectively between those that may have been reasonable and those that may not).[28]

Similar arguments apply against allowing children to be bound by a parent's decision to allow them to waive their right to sue in negligence. While parents usually act in good faith, they may not always act with good judgment. Nor is it reasonable to require risk averse parents to commence litigation on a child's behalf, when they will be liable for any costs order as the litigation guardian. Finally, it is an unreasonable imposition on the autonomy of a child to allow his or her legal position to be adversely altered by a third party, however closely related or well intentioned. It should be repealed in New South Wales.

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[24] Law Reform Commission of Western Australia, *Report on Limitation and Notice of Actions*, Project no. 36, Part II (1997), 399. The Commission recommended adoption of a modified form of the rule. The government rejected this: Western Australia, *Limitations Law Reform* (discussion paper prepared by the Attorney General, Jim McGinty, 17 May 2002), 4.

[25] New Zealand Law Commission, *Limitation Defences in Civil Proceedings*, Report no. 6 (1988), 85-86; Queensland Law Reform Commission, *Review of the Limitation of Actions Act 1974 (Qld)*, Report no. 53, (1998).

[26] Law Reform Commissioner of Tasmania, *Limitation of Actions for Latent Personal Injuries*, Report no. 69 (1992), 42; United Kingdom Law Reform Committee (the Orr Committee), *Interim Report,* Report No. 20, Cmnd 5630 (1974), [104]-[110]. The rule has now been repealed in the United Kingdom, New Zealand, Victoria and Ireland.

[27] Law Reform Commissioner of Tasmania, above, n 26, 42.

[28] New Zealand Law Commission, above n 25, 85-86.

6.3 Indemnities: a Worrying Exception

The above demonstrates both that minors cannot execute valid contractual waivers, nor can parents do so on their behalf. The potential for parental indemnities, however, calls for urgent action. There is no legal reason why a recreational service provider (or any other party) cannot enforce a properly drafted agreement by a parent to indemnify it against a child's action in negligence. Household or public liability policies generally exclude claims by family members,[29] and parents are highly unlikely to institute proceedings on a child's behalf when they will be called upon to satisfy judgment. Proceedings instituted by a third party on behalf of the child have the potential to cause grave damage to family relations, or to be used as a weapon in the case of family breakdown; they may only benefit a child when the parents' liability under the indemnity exceeds their capacity to pay, and they are able to seek discharge through bankruptcy. This too is a dramatic and potentially damaging step for a family.

No Australian cases address this issue directly. The Ontario High Court refused to enforce an indemnity executed by parents on the grounds that it

> … could be argued that an infant's potential cause of action has effectively been destroyed. In most cases the parent is the next friend. There is always the possibility that facing the prospect of indemnification the parent will not initiate the action, thereby precluding the infant from securing recovery for his injuries. [Such indemnities] are … so contrary to the procedures set up in our Courts for the protection of infants that the documents should be held to be unenforceable.[30]

Similar policy arguments have been accepted in Australian cases which have considered parental liability in the context of contributions claimed by negligent tortfeasors, who have alleged that inadequate supervision contributed to injuries caused to a minor.[31] An example is the South Australian case of *Robertson v Swincer*.[32] In this case, a negligent driver sought contribution from a parent who had allowed a young child to wander unsupervised onto a road. The courts in this and several similar cases limited parental liability to negligent acts, rather than omissions of supervision.[33] In addition to concerns regarding the intrusion of legal duties into family relationships and parental judgment,[34] the threat of legal

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[29] *Robertson v Swincer* (1989) 52 SASR 356, 361 (King CJ).

[30] *Stevens et al. v Howitt* [1969] 4 DLR (3d) 50, 52 (Hartt J).

[31] See generally the discussion in Stanley Yeo, 'Am I my Child's Keeper? Parental Liability in Negligence' (1998) 12 *Australian Journal of Family Law* 150.

[32] (1989) 52 SASR 356.

[33] *Hahn v Conley* (1971) 126 CLR 276; *Posthuma v Campbell* (1984) 37 SASR 321, 330; *Towart v Adler* (1989) 52 SASR 373; *Robertson v Swincer* (1989) 52 SASR 356.

[34] *Posthuma v Campbell* (1984) 37 SASR 321, 329; *Robertson v Swincer* (1989) 52 SASR 356, 361.

liability was described as a 'sword of Damocles', ready to descend on the parental head.[35] Likewise, the threat of financial ruin 'in consequence of a momentary failure of supervision … has alarming personal implications for parents and disturbing implications for society generally.'[36]

The decisions discussed above illustrate a reluctance to impose legal duties into the parent-child relationship. Similar arguments apply in relation to parental indemnities. A parent signing a consent form and indemnity for a child to participate in a recreational activity is unlikely to appreciate that she is assuming the financial risk of the child being injured by a negligent defendant. Parental indemnities act in a similar fashion to a waiver, and have the practical effect of imposing upon a child's legal autonomy. Rather than courts simply refusing to enforce them on policy grounds, they should be prohibited by legislation. This would avoid the 'chilling effect' discussed above, and provide certainty for defendants by establishing conclusively that an apparently enforceable contract was void.

7. Conclusion

Tort law reform might once have implied an expansion of the injury compensation regime into brave new worlds such as the New Zealand no fault scheme.[37] It now suggests further restrictions on a system which already allows only a very small proportion of injured people to obtain relief. Of these, children are least likely of all to be able to fall back on savings or private insurance in case of injury.

There is, to some extent, a conflict between protecting the legal autonomy of a child from injury through parental conduct, and asserting that the law should restrict his or her legal autonomy to prevent a voluntary waiver of the right to seek compensation. However, this is one area in which policy should impose upon strict legal or philosophical reasoning. It has done so for hundreds of years, to the extent that a defendant is obliged to take precautions in anticipation of children's 'ingenuity in finding unexpected ways of doing mischief to themselves and others…'[38] Children cannot always be under the supervision of their parents, nor can it be expected that parents, even with the best intentions, will act in the best interest of their children at all times. The common law recognises this and imposes a higher duty on the wider community to safeguard the interests of children.

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[35] *Robertson v Swincer* (1989) 52 SASR 356, 369 (Legoe J).

[36] *Robertson v Swincer* (1989) 52 SASR 356, 361 (King CJ).

[37] Ibid, 396.

[38] *Jolley v Sutton London Borough Council* [2000] 1 WLR 1082, 1093 (Lord Hoffman).

The failure of the *Civil Liability Act* to deal adequately with minors is regrettable, and will have serious consequences. Primarily, even unenforceable waivers may deter parents of children with otherwise meritorious claims from pursuing their legal rights. Litigation centred on the enforceability of a waiver will expose children and their litigation guardians to the burdens and complexities of the court process. By confronting children and parents with the uncertainties of litigation, waivers may in fact achieve in many cases what they cannot do in law. Parliament did not obviously intend to provide for this outcome, and it should now legislate to avoid imposing this burden on injured children. We must also guard against the risk that the legislature explicitly allows minors to execute binding waivers.

The measures contained in the *Civil Liability Act* represent an equally serious affront to the protection of children. The scope of the 'obvious risk' defence is uncertain, while it is both an innovation and an infringement of a child's legal autonomy to allow parents to assume risk on his or her behalf.

While the common law recognises situations in which children may assume risk, it is reluctant to do so. It imposes strict subjective requirements which focus on ensuring that a person fully comprehends any risk assumed. This is preferable to the approach adopted by the *Civil Liability Act*, which allows risk to be assumed in an often arbitrary and objective fashion. The common law also, and for good reason, refuses to allow children's legal rights to be compromised by their well intentioned, but perhaps ill-advised parents. Unfortunately, the current political climate is heavily biased towards the interests of insurance companies. The most one might hope for is a halt to the further erosion of children's protections. I appreciate that there appears little prospect of reversing the most odious changes enacted as part of the process of tort reform.