The Regrettable Way in Which ‘Personal Responsibility’ has been Employed as an Underlying Criterion to Determine Australian Negligence Law Claims

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This paper considers the ways in which the notion of personal responsibility has infiltrated the elements of the tort of negligence, most notably the duty to take care, as the ultimate basis on which many negligence cases have been decided. This trend is mirrored by a plethora of legislative changes which characterised the early 2000s. Legislatures acted upon their concern that far too many ‘underserving’ claimants were seeking recovery; far too many unmeritorious claims, where claimants were said to be the authors of their misfortune, had succeeded. Australian courts have likewise made significant decisions that are ultimately political in nature, based on individualistic beliefs about personal responsibility and deterrence. They have done so despite the fact that they say their decision-making in this area of law is meant to be value-neutral and unaffected by personal beliefs.

The paper questions whether it would be more appropriate to quarantine the use of the notion of personal responsibility within the well-recognised defence of contributory negligence, designed explicitly to account for the plaintiff’s responsibility. With this defence, where apportionment can sensibly and transparently operate, the claimant’s conduct is acknowledged; but, importantly, it does not wholly dismiss the defendant’s responsibility for the ultimate harm. In this way, a sense of community responsibility is maintained.