

# PUBLIC LIABILITY

There has been a move to propose some sort of National Insurance scheme and that move has been acknowledged by our own Government, the Federal Government and various employer and insurer groups.

I would like to examine the reasons for the move as there is simply no real justification for why it should be that premiums should properly increase in the manner the insurance industry has shown they can.

I guess that you have all heard about the crippling increases in high risk areas, such as discos, marches, 'cultural events' and the like.

Think of the poor old Mudgee Parade in NSW and now there are fears in the business community about the future of the NT Expo.

In Sydney, the Mardi Gras won't be so gay. In addition, we have all seen some increase in the premiums we have to pay.

The stories of woe, as the renewal notices come in, are many and varied.

Public liability premiums have increased by as much as 1000 percent in some cases, business is hurting and the pollies have to be seen to be doing something to fix that.

Why have premiums increased, though? Joe Hockey, in what can only be described as an uninformed statement, has blamed it on the lawyers.

What a surprise!

It seems some of these lawyers have been offering to run people's claims on a "no win/no fee" basis and this has caused an increase in claims, which has resulted in an increase in payments, which has caused an increase in premiums.

Fancy lawyers being as misguided as helping people to achieve that which their rights provide them!

Let us just imagine that the allegation is true.

How many claims would have to be run to cause the increases in premiums that we have seen?

I do a bit of work in the insurance area, and I can't remember any really big public liability judgements recently.

The number of common law claims in general seem to be dropping, particularly in the Northern Territory.

That must be so because we have lost common law in MACA and in Work Health.

All that are left are non-resident claims in motor vehicle accidents, third party injury claims in work accidents and public liability in general.

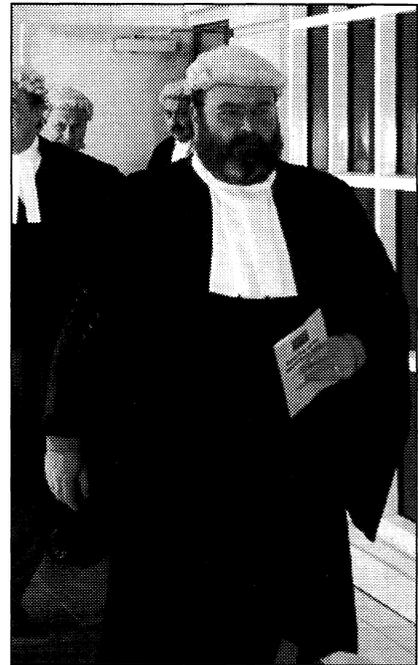
Not only that but, in fact, the attitude of the Courts has been hardening over the past couple of years in public liability claims and has tended to relieve the criticism of the "blame someone generation".

## newspaper headlines

For instance there have been verdicts for the defendants in two cases that grabbed news paper headlines: a surfer who sued a council in WA claiming the council was negligent for not warning him that surf can be rough: and a fellow in Queensland who dove into a canal and sued on the basis that also should have been warned.

In the High Court case of *Ghantos* the law of highway authorities was re-written to negligence, but the High Court quoted with approval the comments of Cumming-Bruce J in the English case of *Littler v Liverpool Corporation*:

*"Uneven surfaces and differences in level between flagstones of about an inch may cause a pedestrian to temporarily off balance to trip and stumble, but such characteristics have to be accepted. A highway is not to be criticised by the standards of a bowling green."*



Ian Morris, President

I read an article in *The Australian* when I was in Alice Springs for the opening of the Legal Year.

That article ran the theme that all this terrible increase in premiums was caused by the "no win/no fee" lawyers.

However it also said that the figures compiled by the Australian Prudential Regulation Association demonstrated that public liability claims had increased by 60 percent from 1998-2000, but payments had only gone up 10 percent in the same period and the average claim had dropped from \$19420 to \$13440.

What really confused me was that the article just dropped those statistics in and went on without trying to fit them into the story.

Of course, they did not fit in, but why ruin a good story with some inconvenient facts?

So if claims aren't driving up the premiums, what is?

I have read a study compiled in the USA that has addressed this problem, and it indicates that the reason is that the insurance industry tends to go through a cyclic pattern: when interest rates are high, and the economy is buoyant, everything is alright and premiums are moderate and insurers feel confident of

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undercutting each other to get market share to get the premium income to invest at the high interest rate.

It is then that premiums are low.

But when the pattern swings around, interest rates drop and the economy slows, and that is what is happening now, then premiums increase dramatically.

The industry then has to have a reason why that should be so. It can't say that premiums are going up because they are not making enough money, or that premiums are going up because they lay off the higher risks to re-insurers and they, in turn, have charged the local insurers more this time around and they are passing the rise directly on to us, the poor consumers.

The industry cannot say recent events have also knocked them around and that means that premiums will have to go up, and neither have they said that on this occasion.

None of those excuses will exculpate the industry.

After all, they are the people who are meant to be able to predict all this stuff, to ensure they have sufficient reserves to meet catastrophes; they sell themselves as being able to meet the future.

They are saying to us "put your future in us, we'll look after you", so they cannot admit they failed in their own specialty.

What they do is to say that the problem is that the high cost of claims caused by wrongful claimants and the lawyers that support them.

When that happens, the industry says the diminution of common law rights is the only way to save the situation.

The suggestion is never going to provide any short term relief to those seeking to insure their community events now. Legislation will take at least 12 months or more to come into operation.

I guess politicians find solace in spouting a seemingly quick fix solution. It just won't work.

Look at the *Motor Accident Compensation Act* in the Northern Territory.

If closing the door on common law rights is the panacea, why do we pay so much in registration? Why aren't we paying a fraction of the premiums of the common law states like SA rather than more?

The truth is that the direct relationship between claims and premiums is tenuous at best, and fanciful at worst.

The truth is that premiums have got everything to do with how easily insurers can convert their premium income to large profits on the money market and how low they are prepared to drop the cost of insurance to get the premiums in the first place.

And the sad truth is that there is no short-term cure to the current problem being suggested by the insurers.

What will happen, though, is that if there is any cap placed on common law public liability, and insurers do not reduce premiums, then the insurers will be like pigs in mud, charging the same premium for a lower risk.

I have thought about whether there is a solution to the current premium hike.

The only solution I can come up with is to introduce a system of exemptions from public liability for certain events or risks.

But any scheme like this would have to perform the somewhat ignored effect of common law, and that is to encourage potential tortfeasors to take necessary steps to make their enterprise as safe as possible.

This could take a number of forms.

One example, that would immediately effect premiums, would be for legislation to allow an activity, event or risk to be exempted from liability at common law.

Then there could be a lesser version where the exemption would relate only to gross negligence or criminal negligence.

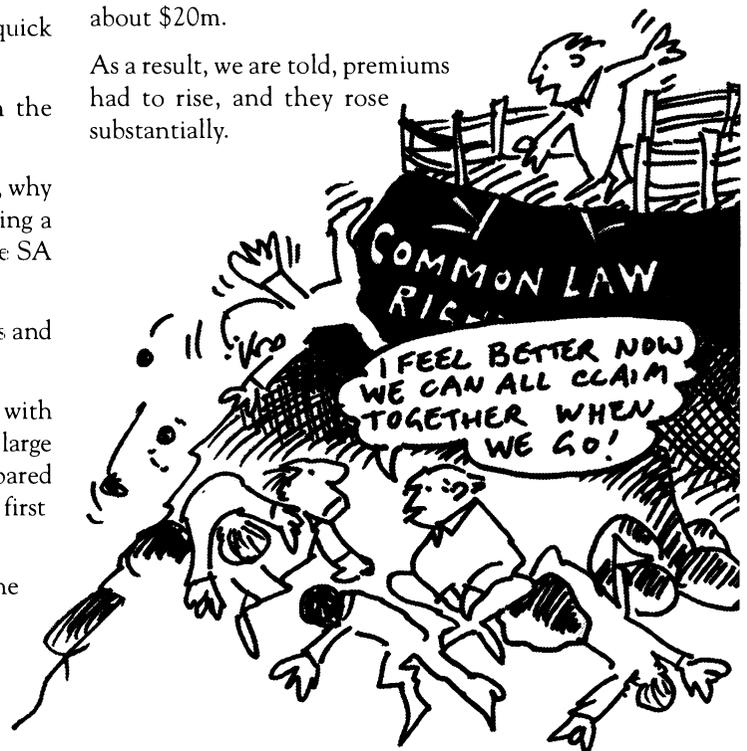
These solutions would involve an assessment of whether there should be an exemption, and that will mean someone will have to be charged with the duty of making the assessment.

The assessing body would have to be protected from negligence; otherwise the whole system would just transfer the risk to the assessing body. Such legislation would have to have to provide for extensive warnings to be given of the exempted state.

The assessing body would fulfil the role of encouraging safety, the Mudgee Parade would be saved! It remains to be seen whether the public would be unaffected by a scheme like this.

Let us have a look at a recent knee jerk and examine the effect of the *Health Care Liability Act 2001* in NSW. There was one very big judgement against a doctor in NSW, about \$20m.

As a result, we are told, premiums had to rise, and they rose substantially.



The claim involved a difficulty in a birth that left the victim brain damaged. Liability was admitted.

The reason for the high amount of the judgement was the amount of medical and like care that she needed.

This was the stethoscope that broke the doctors' back. Their fund had already experienced a few body blow judgments, and premiums rose dramatically.

There were reports of some doctors in obstetrics having to pay six figure sums, there were dire predications to the effect that doctors could not afford to practice.

The ironic thing though was that the medical profession was complaining about the high costs of their own services causing judgements against them for their own mistakes to cost them too much money.

So the new Act came in. It did several things.

The first was to limit awards for "non-economic loss".

(As an aside, isn't it pitiful when suffering and pain is disguised in legislation as being non-money?).

The system introduced was that, in order to obtain an award for non-economic loss, the award that would have been made had to equal 15 percent of the maximum.

The maximum is now \$350,000.00.

It seems that the Court, when hearing the matter, decides whether the injuries complained of by the plaintiff are such as to rate higher than 15 percent of the worst injury that the Courts, in general, have had to consider.

If the pain and suffering does reach 15 percent, the relieved claimant does not get 15 percent.

There is a sliding scale that equates 15 percent with 1 percent, 16 percent with 1.5 percent and so on, until at 33 percent the scale expires and the claimant recovers the actual amount of pain and suffering up to the limit of \$350,000.00.

In monetary terms the claimant whose injuries are rated at 15 percent will not recover the full non-economic loss that those injuries represent, but starts at \$3,500.00

It would not stop there, as the claimant

would also face limits on his economic loss at about \$2600 a week.

Not only that, but the claimant couldn't claim interest on any pre trial amount of damages and the legislation imposes higher than normal qualifications to the receipt of the very types of medical attention that caused the problem in the first place.

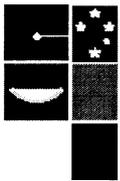
### *lesser injuries*

And that means there are a host of lesser injuries, especially those that are not permanent, where there would be no pain and suffering payment or indeed any payment at all, in NSW.

There is a moral in that story about quick political fixes.

So we have our work cut out for us to ensure that our Government is not led into error by the current crisis.

We will have to try to assist in the examination of the proposals made by the business community and the insurers and help the Government to realise that there is more than one way to skin a catfish, and legislating against common law rights is not one of them.



## *An invitation for expressions of interest in the 13th Commonwealth Law Conference Melbourne, Sunday 13 - Thursday 17 April 2003*

The triennial conference of the CLA is to be conducted for the first time for many years in Australia in conjunction with the LCA's Australian Legal Convention.

Are you interested in attending? Or would you like to present a paper?

### **TOPICS INCLUDE:**

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