This issue of *Bar News* goes to press at a time when public liability reform, or more generally tort reform, is a topic of considerable public attention. Henry Ergas, a well-known economist, brings us an economist's perspective on the question. The President, Bret Walker SC, in his message, provides a response.

Some of the other features of this issue include Gary Gregg's item on Grace Cossington-Smith, Justice Meagher and the Bar Association art collection. The cover of this issue contains a photo of her work, *from David Jones' window*, which came into the collection of the Bar Association due to the efforts of Meagher in 1974.

Reno Sofroniou brings us an interview with Justice Peter Young which should confirm that he is not as terrifying as he may appear to many.

Geoff Lindsay SC has recently produced, through considerable endeavour, the New South Wales Bar's centenary essays, which will be launched at the end of May. The collection will be well worth acquiring. We have in this issue an extract from Justice Heydon's piece on the history of the equity Bar in New South Wales.

It is with sadness we record the deaths of Penny Wines and Peter Comans. Their passing has greatly affected many members of the Bar.

This issue concludes with an extract from the *Common law phrasebook* written by Professor Wiesel Werds of Munchen Polytecnik. Professor Werds is a well-known commentator in the area of the common law and sometime visitor to Wentworth Chambers.

Justin Gleeson SC

Personal injuries:
Balancing individual & community obligations

By Bret Walker SC

What a mixture of motives, sources and solutions has been spread over the topic now called 'tort law reform'. Given that its most recent wave of public interest started in the silly season of summer, it is actually a good thing that the latest discussions, in autumn, are somewhat more serious. Recall, if you can bear it, the nonsense pushed by the ambiguously titled Minister for Small Business, the Hon Joe Hockey MHR, from which a deal of the least sensible press and broadcasting material has stemmed.

That litigation expert identified two aspects of what he encouraged people to regard as recent reform of the legal profession, as the twin authors of the threat to community activities by reason of steep increases in public liability insurance premiums. The first was advertising by litigators, and second was the so-called 'no-win-no-fee' retainer arrangements. And the Minister can claim a political victory of kinds in that the Government of New South Wales promptly altered the law governing advertising, effectively restricting public commercial messages by personal injury litigation solicitors to plain statements of their names, addresses and areas of practice.

The Bar could afford to stand aloof from that cameo controversy, because advertising of the kind which excited the opprobrious description 'ambulance chasing' is not done by barristers. For reasons which owe far more to the nature of the market for our services than hopeful conservatives concede, very few of us have perceived value in expenditure on messages about our availability, skills and prices directed to the public at large. Notwithstanding the irrelevance in practical terms of advertising regulation for the Bar, as President I protested to the Government on certain matters of principle.

They revolve around access to justice, if I may be forgiven for continuing to use that vague but honoured phrase about which others involved in the politics of the legal system now seem embarrassed. Big business, government, and the worldly middle-class generally have little difficulty in choosing from a range of appropriate lawyers to advise or represent them in the kind of transactions and circumstances which may end up in litigation. Not so for everyone else, whose numbers are vastly greater than the big end of town and the comfortably well-off. Contrary to myths earnestly believed in the last few decades about the reservation of litigation as an activity of the rich, the best of the few available empirical studies suggest that the demographic profile of litigants in our trial courts are a fair or near reflexion of society at large. If one removes avowedly commercial cases, the picture is even more one of ordinary people involved in ordinary cases.

An objection, of principle, to a ban on price information in advertising of any services is that it prevents the buyers' side of the market from obtaining the kind of information - of the most basic kind - that any buyer should have. Even doctors, by messages such as 'bulk billing', are permitted to signify their prices to people who may not yet have decided whether to obtain their professional services. Not so for personal injury litigation solicitors any more, who can no longer compete except to the point where a would-be client has actually come into his or her premises and is on the point of retaining the solicitor.

This distortion of ordinary commercial freedom of speech has been justified on a number of flimsy grounds, of which taste is merely the least relevant. Its detrimental effects are not merely those which are anti-competitive - although they are among the least rational. Given that there is simply no body of disciplinary case-law demonstrating common misleading or deceptive practices by the litigators who used to advertise their prices and other financial terms, one justification which should never have been advanced was that the dreaded ambulance chasers were conning their prospective clients.

That said, of course, the Bar also pointed out to the Government that the liberalisation in 1993 of advertising by lawyers was in terms which very carefully prohibited not only misleading and deceptive conduct but also advertising which might reasonably be regarded in that light. That legislation was supported by both sides of politics. Apparently, without telling anyone so, both have recanted.

To have achieved this, without ever providing even a scrap of statistical or empirical evidence to justify attributing a rising unmeritorious and expensive personal injury litigation to increased advertising by personal injury solicitors, was a real feat of advocacy by Mr Hockey.

Mr Hockey's second point had no merit at all. It was also grossly at odds with the history of

our profession. Spec briefs, being the Bar's version of no-win-no-fee arrangements, are scarcely a novelty of the late 1990s. Nor is the solicitors' allied practice. Nor are they local to New South Wales. When the High Court wrote 42 years ago of a practice which was 'consistent with the highest professional honour', they were speaking of solicitors taking the chance of ultimate payment, the only chance being payment out of the proceeds of judgment, after he or she had been honestly satisfied by careful enquiry that an honest case existed. Exactly the same principle applied then, as now, to barristers' spec briefs. The speculation must be confined to the chance of fees being paid - it does not involve actions which are merely speculative in the sense of lacking a substantiated foundation of fact and law. So much was clear in the same judgement, when the High Court insisted on the lawyer's belief that the client 'has a reasonable cause of action or defence as the case may be'.

Mr Hockey's reading in the area had either omitted one of the leading cases taught to all new practitioners as part of their ethics inculcation, or else the Minister had forgotten them. I am referring, of course, to *Clyne v New South Wales Bar Association* (1960) 104 CLR 186 esp at 203 - 205.

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The Bench in question scarcely consisted of bomb-throwers, or rabid economic rationalists. Nor could they seriously be suspected of decadent American tendencies. It comprised Dixon CJ and McTiernan, Fullagar, Menzies and Windeyer JJ. The expressions I have quoted above were cited by their Honours from English and New Zealand authorities from the early years of last century. There is no reason to believe that in 1900 Lord Russell LCJ was blessing a very recent development in legal ethics: rather, his Lordship was undoubtedly praising what he regarded as a well established tradition.

Long may it continue. I think that the New South Wales Bar will always practise it, and defend it. Given the state of legal aid, how could we do otherwise, in the public interest, and the interests of the administration of impartial justice?

But this short-lived effusion of fallacy from a junior federal minister lacks importance, relative to more recent developments. What the citizens of New South Wales, and the Bar as an institution, should be grappling with are the complexities of a common law of tort (particularly negligence) based on individualist ideology, and micro-economic realities (including governmental intervention in the form of compulsory insurance for professionals) which present in the nasty form of huge increases in annual insurance premiums.

At an earlier stage in this part-heard debate, it might have been tempting to suggest a bromide for those excited in a tabloid way about the death of local community fairs and other innocent ways of breaking children's necks. After all, we have got over the loss of bull-baiting as part of our culture's fabric, without denouncing its historical opponents as vandals intent on destroying important social values. And, seriously, there have been no doubt some local fêtes where some version of the coconut-shy or the mud-jump truly should not have been allowed, and should not be lamented if an insurer's risk-management policies discourage it.

The real political issue is far more profound. I believe we should resist the temptation to see the present stage of the insurance industry cycle, the collapse of HIH, (as I write) the mooted collapse of UMP, and the winter round of premium hikes, as short-term phenomena which we can survive by ignoring. In other realms of social conflict, we expect Government to respond in quick measure to problems with such obvious human and financial implications as these recent events manifestly carry. So the Bar should not feel put upon when the pressure of public debate focusses on the activity of litigation which is the peak experience in the social dealings giving rise to the insurance problem in the first place.

Probably most of us at the Bar grimace somewhat at what we might term the lay press and broadcasting reports of supposed horror stories involving lunatic verdicts. But maybe our grimaces have discrete motives: on the one hand, much of the reporting is exaggerated, incomplete, or plain wrong; on the other hand, some of the accurately reported court results involve findings of negligence which at least raise a decent query whether hindsight has not taken the counsel of perfection.

It is a long time since the term 'common law' was a decently precise label for the cause of action in negligence or breach of statutory duty involved in most personal injuries litigation. The abolition by statute of contributory negligence as a complete defence, the statutory availability of contribution between tortfeasors and the liability of the Crown in tort are vitally important illustrations. So, too, is the entirely statutory no-fault workers' compensation field. It is therefore appropriate always to consider the possibility of further legislative adjustment, by way of trade-offs in the usual way of good government, in the field of rights to claim damages for bodily injury caused by other people's carelessness.

For present purposes in relation to the Bar and the Bar's interests (and duties), this is particularly so in relation to the compulsory insurance we must buy every year against our potential liability to compensate clients who may suffer loss by our own negligence. In my opinion, there can be no argument in principle against a trade-off being granted: barristers must buy insurance, thereby removing (almost, but not quite) the risk of a defendant's insolvency from client-plaintiffs; in return, members of the public benefitting from that protection could suffer eg a statutory limitation of a barrister's liability, say, to a sum equivalent to proceeds of the compulsory insurance policy (assuming it were to answer to the claim) and the fees charged together with interest. This may be a pipe-dream, but it is the kind of politics the Bar should be ready to practise.

Paramount above all these considerations, which vary from *buffo* to grave, is the overarching principle for which the Bar should remain a champion. A decent society does endorse standards of conduct between people in their relations with others. When the relations are not pre-agreed, are involuntary or are not governed by a contract, those standards should require reasonable care by some in relation to others. Within the ambit of that duty, negligence should therefore always be a social wrong - unless the relationship (such as parent and child, or judge and litigant) is such as to defy any virtue in making shortcomings actionable. Generally, otherwise, the social wrong of negligence should be recognised and sanctioned - by the familiar device of shifting its cost from the victim to the wrongdoer.

Unfortunately, the words 'fault liability' are uttered by pundits today as if they were nothing more than the artificial construct of venal forensic gladiators. In truth, they describe a civilised norm which balances individual and community responsibilities - rights and obligations. I hope the New South Wales Bar will never be embarrassed to defend its role in civil government, viz the administration of justice, in connexion with these fundamental values. Even, dare I say it, given that it is how we earn our living.