Shoot the lawyers?

*By Dr Helen Pringle, UNSW **

It is often claimed that Australia is following the US down a path of litigation madness. Soaring insurance premiums follow frivolous lawsuits by money-crazed lawyers. And as premiums rise, firms become afraid to innovate, doctors afraid to practise, councils afraid to provide playgrounds, restaurants afraid to serve coffee. As Bob Carr noted on 9 July in a speech to the Sydney Institute, 'The growth of this culture of litigation has gone far enough…. We must act now or we will soon be living with an American-style culture of litigation where someone always has to pay.'

At a Canberra meeting to address the insurance crisis on 23 April 2002, John Howard had argued on similar lines: 'I said some years ago when we brought in national gun-control laws that I didn't want Australia to go down the American path on guns. I also don't want Australia to go down the American path on litigation…. You can't have it both ways – you can't expect to sue at the drop of a hat and complain about public liability premiums going up.' And Howard's ministers have echoed his concerns.

Such warnings draw on a standard picture advanced by proponents of tort reform in the US. When he was governor of Texas, for example, George W. Bush led the charge against the culture of litigation. Supported by public-spirited corporations like Enron and corporation-funded bodies like Texans for Lawsuit Reform, Bush zapped tort law reform through the Texas legislature by declaring a 'legislative emergency' in 1995.

'The most important thing you and I can do to improve our economy and create jobs in Texas is to reform our civil justice system,' Bush said at the time. His reform program capped awards for punitive damages, limited who could file suits and where, and increased the bonds to be posted by plaintiffs. Bush also gave some professionals blanket immunity to civil suits, and made it harder to recover damages where more than one defendant was involved.

Unfortunately, however, insurance premiums did not fall along with the number of suits not in Texas and not in any of the other reforming US states.

Like his father, Dubya railed against 'sharp lawyers' in 'tasselled loafers', who were alleged to be 'running wild' and terrorising everyone from doctors to boy scout leaders with malpractice and negligence suits. Bush set the pace that has since 1995 seen more than 30 US states passing tort reform schemes.

So what happened after? What can we learn from the American experience of trying to curb the culture of litigation and blame? In Texas, the number of civil suits certainly fell – although part of that fall probably had something to do with predictions of case outcomes in the light of the stacking of the (elected) Texas Supreme Court with Bush supporters. Unfortunately, however, insurance premiums did not fall along with the number of suits – not in Texas and not in any of the other reforming US states. In fact, as the Center for Justice and Democracy notes in its report *Premium Deceit*, 'States with little or no tort law restrictions have experienced approximately the same changes in insurance rates as those states that have enacted severe restrictions on victims' rights.'

In March 2002, the American Insurance Association (AIA), a major industry group, came out to say that contrary to many perceptions, 'the insurance industry never promised that tort reform would achieve specific premium savings'. The AIA position reiterates statements of the American Tort Reform Association that it too had never claimed that restrictions on litigation would bring insurance rates down.

The American experience seems to indicate that the standard picture of frivolous and outrageous litigation is not sustainable as the chief explanation for rising insurance premiums. In a *Wall Street Journal* report of 24 June 2002 on malpractice claims, Rachel Zimmerman and Christopher Oster noted that 'While malpractice litigation has a big effect on premiums, insurer's pricing and accounting practices have played an equally important role.' According to the *Journal* report, even the American College of Obstetricians and Gynecologists 'for the first time is conceding' that the business practices of insurance companies have contributed a great deal to the rising malpractice premiums of its members.

In other words, the US tells us a sobering story of corporate irresponsibility and lack of accountability, rather than a mad romance with litigation by citizens and their lawyers. In Ralph Nader's terms, 'tort reform' is more like 'tort deform'. In *No Contest: Corporate Lawyers and the Perversion of Justice in America* (1996), Nader and Wesley Smith write, 'The tort deform movement is a brazen effort by corporations and politicians beholden to corporate interests to pull off – under the guise of a 'common sense' reform – a nationwide perpetual bailout for polluters, swindlers, reckless health care providers, and makers of tobacco, defective vehicles, dangerous drugs, and many other hazardous consumer products.'

In both the US and Australia, there is certainly a rich folklore of horror stories featuring Robin Hood juries over-partial to plaintiffs who award outrageous payouts for minor injuries (like the McDonalds cup of coffee story, most recently mis-reported in the *Sydney Morning Herald* on 29 July 2002 by Caroline Overington). In an *Arizona Law Review* article in 1998, Wisconsin law professor Marc Galanter paints a lively picture of such 'legal legends'. Galanter argues that such legends portray the system as 'arbitrary, unpredictable, berserk, demented', one in which an explosion in litigation is 'unravelling the social fabric and undermining the economy'.

But there is scant hard evidence of any litigation 'explosion'. If anything, in cases of medical injury for example, there appears to be too little recourse to litigation in Australia. It seems more likely that Australia has taken off down the American direction of 'litigation beat-up' rather than that of 'litigation explosion'. Anecdote and legend do not however form a sound basis for public policy reform.

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