Letters to the editor

Changes to expert witnesses will be harmful to plaintiffs

Dear Sir,

The chief justice, in 2002, delivered an impassioned defence of the capacity of the common law to develop as circumstances change: 'Negligence: The last outpost of the welfare state', (2002) 76 ALJ 432 at 445. According to the daily press he has recently questioned the fairness of the interference with the common law wrought by recent statutory limitations on the award of general damages for personal injuries.

There appears to be some inconsistency between the latter view and his suggestion, which also received publicity in the daily press, that steps need to be taken to rein in expert witnesses.

The problems posed by hired gun expert witnesses are not new. In *Hocking v Bell* (1947) 75 CLR 125 the verdict of a jury which had accepted the evidence of an underqualified expert in preference to that of several highly qualified surgeons was allowed by the Privy Council to stand. But that was a jury trial. Jury trials of civil actions are now an endangered species. Surely judges have the capacity to choose between conflicting experts. *In Makita (Aust) Pty Ltd v Sprowles* (2001) 52 NSWLR 701 the Court of Appeal has redefined the approach to expert evidence in non-jury trials.

The chief justice's suggestions have the potential to do great harm to all plaintiffs, not just those with small claims and to tilt the playing field in the defendants favour. They are two: prohibit experts from acting for contingency fees and having only court-appointed experts.

Many plaintiffs who have been injured are without the means to finance an action. The contingent fee system allows legal practitioners to represent them. What justification is there to apply a different rule to witnesses? To ban experts from entering into contingent fee arrangements will effectively disenfranchise many plaintiffs. Since 2002 legal practitioners cannot even commence an action for damages unless they are prepared to put their professional standing on the line by certifying that, on the available evidence, there are reasonable prospects of success. How can they do that in a case which depends upon expert evidence, such as a medical negligence action, if no expert is allowed to report.

Of course we all know that there were two reasons why governments reversed a centuries old prohibition on contingency fees for lawyers. First, it was not working. And second, and more important, it was to shift the burden of legal aid in civil matters to the legal profession.

The chief justice's next suggestion is that the courts should rely solely on court appointed experts. The parties should agree on an expert, or if they can not, the court will appoint one for them. There are two problems about this suggestion. First, the court could not appoint an expert until proceedings have commenced and proceedings cannot be commenced until the plaintiff's lawyers have an admissible report from an expert upon which to certify there are reasonable prospects of success. Second, who is pray the expert in the first instance if the plaintiff has no money. You can bet that the government will not fund the courts to do so. And natural justice would require that the defendant, or its insurer, be heard before it could be ordered to do so.

D I Cassidy QC

Silks v Juniors cricket match

Dear Sir,

I refer to an article published by you and written by the Hon Justice Richard White SC (sic).

It is apparent that his Honour, who is now an equity judge, has always practised in that field because of his uncertain handling of matters of fact.

I was described as bowling with 'plenty of flight' and was coupled with Morrison SC as a target for the innuendo that Moorhouse and Stowe were in 'two minds as to whether to hit the ball conservatively for six over the ropes, or with more flamboyance, onto New South Head Road'. The imputation was that we were complete duffers.

My recollection was otherwise. I therefore consulted the scorer's records and to my horror found that not only was his Honour inaccurate, but that the scorer was also.

At least the scorer attributed one wicket to me: 'P Moorhouse, stumped Ireland bowled Poulos'.

My recollection was that I had done better than this; accordingly I contacted our captain, Hastings QC. He remembered my performance well (as it was a clear proof of his captaincy skills). He confirmed that I had taken the wicket of a second batsman (Stone) and that, accordingly, my figures should have read: '3 overs bowled, 2 for 24'.

I telephoned Andrew Stone who confirmed that he had been trying to block out the memory of being bowled middle stump by a ball, bowled by myself, which had deceived him by its complete absence of pace.

To my chagrin, this second wicket had been incorrectly attributed to Douglas QC -need I say more?

In closing, I note that his Honour was replaced behind the stumps by Ireland QC who went on to take three catches, and that, with the bat, his Honour managed to amass four runs

J Poulos QC