Restricting access to justice

Changes to personal injury laws: the NSW experience

In New South Wales during the 1980s and 1990s piecemeal changes dictated by political expediency were made to motor accidents and workplace compensation. In the result, the circumstances in which the injury occurred and the identity of the tortfeasor dictated the amount of compensation that could be recovered and the method of recovering it.

It is irrational, if not unjust, to compensate people with similar needs in different ways according to where they happened to be at the time of the injury or the category of tortfeasor.

The following is an edited version of a paper presented by Anna Katzmann SC at the Australian Bar Association Conference, Dublin, June 2005.

> *'We write letters to people. They send us money. It's called insurance.'* [1]

In 2001 a series of events (the collapse of the HIH insurance group, the terrorist attacks in the United States and poor returns on investments from a decline in the Australian stock market) caused premiums for all forms of public liability insurance to rise both rapidly and dramatically.

Pressure mounted in the community for changes to the law of negligence which, it was thought, would make insurance more affordable. Lawyers were blamed. We were an easy target. True it is that in the past courts had taken an expansive approach to the law. However, there was plenty of evidence to show that the trend was in reverse. Yet the political skills were with the insurance industry. The daily newspapers were demanding change.

What is 'access to justice'?

In this paper I use the phrase 'access to justice' in two senses: access to a judge and access to an equitable or fair and rational system of compensation. I also look at access to legal representation because that is a fundamental feature of our notion of access to justice.

I focus on the NSW changes but they are not atypical.

Restricting access to judges

Assessments by medical panels have been a feature of impairment assessment under the Workers Compensation Act for a long time. More recently the use of medical assessors in lieu of judges has expanded both in the area of workers compensation and into third party motor vehicle claims assessment.

Motor Accidents Compensation Act 1999

The Motor Accidents Compensation Act 1999 ('the MACA') was introduced with the stated aim of cutting premiums by $100. To achieve this, damages awarded for non-economic loss were to be reduced by $100 million a year and legal costs were to be halved. My premiums didn't fall.

The principal means of reducing damages for non-economic loss was by the introduction of a 10 per cent whole person impairment threshold (s131) and transferring from the judiciary to the bureaucracy the capacity to make important decisions.

It also provided for Regulations to be made fixing maximum costs for legal services. Regulations were passed, the effect of which was to transfer from the insurer to the injured person the burden of paying a substantial portion of the costs of prosecuting a claim.[2]

Before the passage of the MACA all questions in disputed cases remained to be determined in the courts. However MACA changed that. Medical disputes are referred to the Medical Assessment Service (MAS). Other disputes are referred to the Claims Assessment Resolution Service (CARS) unless deemed by a claims assessor to be unsuitable.[3]

An assessment by a claims assessor on liability is not binding on either party but an assessment on quantum is binding upon an insurer. The assessor alone may question the parties and the witnesses unless the assessor grants an application by the party's representative to question the witness and may dispense with an assessment conference altogether and deal with the case on the papers.

If significant evidence (as defined) is adduced in court that was not made available to the claims assessor the court is required to adjourn the proceedings until the party who called the evidence has referred the matter for further assessment and a claims assessor has issued a further certificate: s111.

The problems about being bound by a determination of a person beholden to the administration should be readily apparent.

A claimant is not allowed to commence court proceedings unless the principal claims assessor has issued a certificate exempting the case from assessment or a claims assessor has issued a certificate in respect of the claim on both liability (if disputed) and quantum[4] (s108).

The problems about being bound by a determination of a person beholden to the administration should be readily apparent. There has been an increasing number of complaints about the operation of the Medical Assessment Service. They include claims of bias against the injured, substantial delays in the finalisation of claims and complaints that the system is cumbersome and bureaucratic.[5] I give a graphic example in the written paper of bureaucratic meddling in the assessment process which happened to come to light through a subpoena.

Workers Compensation Act 2001

The WorkCover Authority, the statutory body charged with the administration of workers compensation in New South Wales, had for some time been in financial difficulty. As a result, in 2001 the Labor government of NSW proposed far-reaching changes to the workers compensation system and common law awards for damages for industrial injuries. The responsible minister assured injured workers that their benefits would actually increase. Yet, the proposals aroused the ire of the trade unions, who obviously didn't believe him. Talks between the Labour Council and the government culminated in some changes being made to the legislation and the sweeping reforms to the common law were put on ice. The government agreed to set up 'a judicial inquiry'. The only thing 'judicial' about the inquiry was that it was chaired by a judge.

The unions and the government were at cross purposes. The unions thought the inquiry would preserve the common law but make changes around the edges.[6] The government, on the other hand, was determined to kill it. It established the inquiry under the chairmanship of the Hon Justice Terry Sheahan, a former attorney general of its own, and gave it terms of reference which included identifying 'ways to reduce the incentive for pursuing common law claims'.

The inquiry came up with a scheme which certainly delivered on that term of reference.

Previously, a worker could recover damages for non-economic loss if she could show that her non-economic loss amounted to about 17 per cent or more of a most extreme case. To recover economic loss it was necessary to achieve a percentage of about 23 per cent. The original amending bill restricted the rights of injured workers to sue for damages by increasing the threshold. The government had proposed a 'serious injury' threshold of whole person impairment greater than 25 per cent and the determination was not to be made by a court but by a medical assessor appointed by the WorkCover Authority, who had no obligation to give reasons and whose decision was binding and conclusive. The proposals mirrored the motor accidents scheme. Organised labour rejected it and settled on the inquiry. Now, however, the legislation based on the recommendations of the Sheahan inquiry provides that no damages are payable for non-economic loss[7]. Neither are they payable for medical, hospital or related treatment or for care or services, including respite care, whether paid or unpaid, home modifications, travel assistance, fund management or anything else. The only damages payable are for economic loss and they are capped. Furthermore, in order to recover those damages it is necessary to show that the injury results in at least 15 per cent whole person impairment calculated in accordance with WorkCover Guidelines.[8] The assessment is made by a medical assessor appointed by WorkCover for the purpose and the certificate of the assessor setting out the assessment is 'conclusively presumed to be correct' if it relates to any one of a number of specified matters each of which affects the capacity of the plaintiff to recover damages.

There is a limited right of appeal against a decision of a medical assessor. The appeal is to an appeal panel consisting of two approved medical specialists and an arbitrator, chosen by the registrar of the Workers Compensation Commission. [9]

There are substantial restrictions on costs. Unlike the motor accidents regime there is no facility for contracting out.[10]

These changes do not apply to coal miners,[11] no doubt due to the superior lobbying efforts of the mining branch of the AMWU.

The legislation, in conformity with recommendations made by the Sheahan inquiry, did remove the obligation of workers to elect whether to recover compensation or damages, reinstating the pre-1987 scheme which simply precluded further payments after a damages award and required compensation already paid to be deducted from the damages and repaid to the person who paid it.[12] This means that a worker can recover non-economic loss in the form of a modest payment for permanent loss or impairment and, if eligible, also for pain and suffering and for care and services and treatment expenses and then sue for damages, provided time limits are met. The real vice, though, and the ultimate disincentive to sue, is that even though damages are not payable for any of those things, compensation for them has to be repaid out of the damages and, of course, none is recoverable for the future.

The legislative changes were not confined to tort law. Substantial changes were made to workers compensation laws, too. Some of these changes visit real injustice upon employers and insurers.

Limiting damages

Civil Liability Act 2002

In April 2002 Chief Justice James Spigelman AC delivered a speech to the Judicial Conference of Australia Colloquium in Launceston entitled 'Negligence: The last outpost of the welfare state'. He posted a copy of the speech and an executive summary on the Supreme Court's web site. It was dutifully picked up by the major Australian newspapers. It heralded a spate of legislative change throughout the country.

The chief justice's thesis was that the existence of different schemes for compensating injured people that depended on the circumstances in which an injury occurred, rather than the need for compensation, was underwriter driven and difficult to justify in principle. In the result, he claimed, it was likely to cause resentment in the community. He proposed 'an alternative model for legislative intervention', which he described as 'principle driven reform'. He suggested a number of changes designed to restrict damages in what he described as a principled way.[13] And he counselled that his model could provide the basis for substantial reform of the underwriter driven schemes.

The New South Wales Government responded swiftly to reduce damages in a range of areas but largely neglected to follow the chief justice's main message. The result is that in New South Wales we now have an even greater proliferation of underwriter driven schemes and the iniquities in the industrial accident and motor vehicle schemes remain in place.

In his second reading speech on the Civil Liability Act the premier of New South Wales, Mr Carr, claimed that 'actuarial advice shows that the threshold will lead to increased general damages for the more seriously injured people. These are the people who have suffered the most and they will get more because of the threshold.' However, as Associate Professor Barbara McDonald of the University of Sydney has pointed out:

> [While] it is true that the maximum amount for non-economic loss is to be indexed to keep up with CPI indexes, it could hardly be accurate to say that the seriously ill benefit because others do not meet the threshold. The true position is that damages for the seriously injured are considerably reduced by this legislation.[14]

The Civil Liability Act applies to all actions for damages in New South Wales for harm resulting from negligence, irrespective of whether the claim is brought in contract or tort or under statute. The only exceptions concern actions for dust related conditions,[15] smoking or tobacco related diseases, industrial injuries and diseases and certain statutory compensation schemes.[16]

Limits on damages for non-economic loss

The *Motor Accidents Act 1988*, the *Health Care Liability Act 2001* and the *Civil Liability Act 2002* all impose caps and thresholds for the recovery of damages for non-economic loss.

The caps and thresholds are adjusted each March and October for the CPI. Currently, the maximum sum payable under the MAA is $341,000 and under the CLA $400,000. No damages are payable under the CLA and the MAA where non-economic loss is lower than 15 per cent of a most extreme case (in the case of a motor accident occurring after midnight on 26 September 1995 but before 4 November 1999 when the MACA took effect).[17]

Between 15 and 33 per cent there is a sliding scale so that a person who is assessed at 20 per cent of a most extreme case of non-economic loss does not recover 20 per cent of the maximum but only $12,000 and at 25 per cent $22,000. Even at 30 per cent the figure is only $78,500. The thresholds significantly penalise the elderly because age affects the amount that may be recovered for non-economic loss: *Reece v Reece* (1994) 19 MVR 103.

Restricting economic loss

Damages for past or future loss of earning capacity are capped.

No award may be made for future economic loss 'unless the claimant first satisfies the court that the assumptions about future earning capacity or other events on which the award is to be based accord with the claimant's *most likely* future circumstances but for the injury': s13.

If any award is to be made then the court is bound to reduce the amount by reference to the percentage possibility that the events might have occurred anyway.[18] It is axiomatic that this will particularly disadvantage younger plaintiffs, especially infants and young children.

Under both the Workers Compensation and Civil Liability Acts there are limits on the awards of economic loss which affect high income earners of any age. The theory is that they can afford to take out personal accident and illness cover and many do.

The other principal restriction comes in the form of the discount rate.

The discount rate

Discount rates are designed to reduce the amount of damages for future losses to take into account early receipt and the ability to invest the sum and earn interest. However, their effect is to reduce damages and under-compensate the injured. Obviously, the higher the discount rate the greater the level of under-compensation.

In the past courts were divided about what was a proper discount rate. In *Todorovic v Waller* (1981) 150 CLR 402 actuarial evidence was called that tended to suggest that the advantage of early receipt of a lump sum was more apparent than real. Views differed on the bench about what was the appropriate discount rate and the majority compromised on three per cent. Sir Ninian Stephen concluded that any 'discount for present payment denies to a plaintiff that measure of compensation for future economic loss to which the law entitles him' and that the range of discounts which the Australian courts were then imposing were unsupportable.[19] Murphy J agreed.

After *Todorovic v Waller* but before the introduction of the *Motor Accidents Act 1988* and the *Workers Compensation (Amendment) Act 1989*, all New South Wales actions were subjected to a three per cent discount rate for future losses. The assumption was that, by investing the sum wisely or conservatively, a plaintiff could earn a return of three per cent after tax and taking into account inflation.

In 1984, because motor vehicle insurance premiums for political reasons had been kept artificially low (with the result that there were inadequate funds set aside to meet the assumed long term liabilities of the scheme), the third party motor vehicle insurance scheme was in financial difficulty. The government responded to the problem, reducing the payouts to injured people by increasing the discount rate to five per cent. At the time inflation was up to about 12 per cent and interest rates exceeded 17 per cent. The minister undertook to review the matter when circumstances changed. Despite the

reduction in inflation and interest rates the rate was never reviewed. When the Motor Accidents Act was introduced in 1988, the five per cent rate was entrenched.

The HCLA and the CLA adopted the five per cent rate despite criticism and notwithstanding the pretence that the seriously injured were not going to be adversely affected.[20] Although a two per cent difference may appear modest, to the severely injured the effect may be devastating. In the written paper I give an example to illustrate this.

Other jurisdictions have also increased the discount rate in order to reduce damages. In Victoria, South Australia, Queensland and the Northern Territory it is five per cent. In Western Australia the figure is six per cent and it is seven per cent in Tasmania. Yet the Ipp Committee recommended the restoration of the three per cent rate.[21] In the UK the Lord Chancellor, Lord Irvine, reduced the rate from three per cent[22] to 2.5 per cent[23] and I understand that recently it has been reduced by a further 1/2 per cent.

Since the stated aim, at least, of the New South Wales Government in introducing its most recent reforms, was to protect the seriously injured, it is difficult to understand why the discount rate was raised.

Limiting damages for care and services

Damages for gratuitous attendant care services are limited in the same way as they were under the *HCLA* with the additional requirements (identical to those imposed by the *MAA*) that no damages are payable if the services are, or are to be provided, for less than six hours per week, and for less than six months, and the amount is fixed by reference to the ABS figures for average weekly total earnings of all NSW employees, not (as is the position at common law) by reference to commercial or market rates for such services. For no obvious reason, damages of the kind recognised by *Sullivan v Gordon* (1999) 47 NSWLR 319 are quarantined from the Act.[24]

Other statutory limits

There are additional limitations on damages in respect of injuries received while the plaintiff (or the deceased) was an offender in custody and the defendant is the Crown, a government department, a public health organisation or its staff, a public official or a private company or its staff managing a gaol. Ironically, the threshold is the same as that fixed under the Workers Compensation Act for workers injured through the fault of their employers implicitly acknowledging that those benefits are inferior to the assessment of non-economic loss under the CLA.[25] I list the restrictions in the paper.

Limiting recovery of damages

The Civil Liability (Personal Responsibility) Amendment Act

This legislation incorporated the second stage of the reform process the minister foreshadowed in March 2002.

The PRA effected substantial changes to the common law and to legislation affecting claims for damages for personal injury. The Bill was introduced into the Legislative Assembly on 23 October 2002, only three weeks after the publication of the panel's report, and the premier, himself, delivered the second reading speech, this fact in itself highlighting the political gains expected to be reaped from it.[26] Assent was given on 28 November 2002 and the Act commenced on 6 December 2002.

The CLA now restricts access to damages in several ways.

- The test of foreseeability has altered from neither far fetched nor fanciful to 'not insignificant'. That should produce a bit of litigation.
- Changes have been made to the law of causation.

A two stage test for causation has been enshrined in the Act. It requires that the courts consider both whether the injury was a necessary condition of the harm (the but for test, called 'factual causation') and the scope of liability, namely, whether it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (where the Ipp panel believed commonsense had its place). Although some (like Ipp J) have sought to suggest otherwise,[27] it seems that this is a change to the common law as explained by the majority in *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506 and a statutory enactment of the views of McHugh J in that case.[28]

Whereas once, in a failure to warn case, a plaintiff was obliged to give evidence that she would have heeded the warning for fear that a causal connection between the damage and the omission of the defendant could not otherwise be proved,[29] now such questions are inadmissible, unless contrary to interest: s5D(3). The apparent justification for this approach is the need to avoid what is commonly referred to as 'hindsight bias'. Recently, I was confronted with an argument in an appeal from such a case. The plaintiff didn't call evidence that he would have heeded the warning. Therefore, it was argued, he was bound to fail because otherwise he couldn't establish causation. The curious feature of the Act is that it provides that 'the matter is to be determined subjectively in the light of all the circumstances' but precludes a plaintiff calling evidence of what his or her subjective response would have been.

With certain exceptions[30] there is no duty to warn of an obvious risk: s5A. An obvious risk is defined as one that would have been obvious to 'a reasonable person in the position of [the plaintiff]'. The question of what is an obvious risk, however, is not easily determined under the Act for, according to s5F 'a risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable'.

Changes have been made to the standard of care professional people are expected to exercise. A modified version of the Bolam test[31] has been introduced.

With some exceptions[32] there is no duty of care owed to a person who engages in a recreational activity[33] to take care in respect of a risk where the defendant (or the occupier where the defendant is not the occupier) gives a warning, even if the injured person did not receive the warning or understood it and even if the injured person was incapable of receiving or understanding it: s5M. The risk need not be specific to the particular risk but can be in general terms wide enough to include the particular: s5M(5). The warning can consist of a sign in a language the plaintiff cannot understand or read. It does not matter if the plaintiff is blind or illiterate, a sign, the terms of which are never brought home to the plaintiff, will absolve a prospective defendant from liability for harm caused by his, her or its negligence. Yet, in the case of a young child or a person whose physical or mental disability means that he or she 'lacks the capacity to understand' the warning, the defendant can only rely on the risk warning if the plaintiff was under the control or accompanied by a capable person who was 'the subject of a risk warning' or the risk warning was given to the parent, irrespective of whether he or she accompanied or controlled the plaintiff. At least on one reading of this provision, the blind and the illiterate would still be caught.

Will poor playing surfaces become the norm? Can sporting organisations now get away with providing untrained administrators, referees and coaches? Does the law now permit the owner of a shopping mall to avoid liability merely by posting a general warning at the entrance to the mall so that recreational shoppers enter at their own risk?

'Recreational activity' is defined very broadly to include any sport, pursuit or activity engaged in for enjoyment, relaxation or leisure or any pursuit or activity engaged in at a place (such as a beach park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure (s5K).

The long term consequences of such a reform are not yet known. However, there are plenty of reasons to be concerned. Can the occupier of a place where the activity is being conducted avoid liability for harm caused through the use of the premises by issuing a warning on entry? Will poor playing surfaces become the norm? Can sporting organisations now get away with providing untrained administrators, referees and coaches? Does the law now permit the owner of a shopping mall to avoid liability merely by posting a general warning at the entrance to the mall so that recreational shoppers enter at their own risk? Will a warning on the back of a theatre or cinema ticket now absolve the occupier of the theatre from any liability for negligence? Is shopping for something you don't actually need a recreational activity? If I injured my foot on some defective stairs because I chose not to use the escalator in order to keep fit, could the building owner avoid responsibility by posting a warning on the door before I actually reached it?

Section 5N additionally permits a defendant to contract out of any liability for most harm[34] resulting from a breach of an express or implied warranty that recreational services will be rendered with reasonable care and skill and excludes the operation of any law that would otherwise render the provision void or unenforceable. Section 5(2) provides that no other NSW law should be used to render such a contractual term void or unenforceable. Thus, no recourse can be had to the ameliorating provisions of the *Contracts Review Act 1980* or to the *Fair Trading Act 1987*. In the result, a contractual waiver entered into by a child undertaking a recreational activity appears to be enforceable to exclude any liability. A contractual waiver executed by a parent will excuse the person at fault who causes harm to a child, no matter how gross the negligence.

Section 44 absolves a public authority from liability for a failure to exercise or consider exercising any function of the authority in all cases where the authority could not have required it to act. Public authorities are defined to include government departments such as the Department of Transport (hence responsibility for train crashes), Education (and hence to cover schools), public hospitals and local councils.[35] As if that didn't go far enough, s45 specifically exempts road authorities from liability for non-feasance 'unless at the time of the alleged failure the authority had actual knowledge of the particular risk the materialisation of which resulted in the harm'. However, it is difficult to see how, even in such a case, a plaintiff could succeed because of the operation of s44. In the case of statutory duties or 'special statutory powers' 'of a kind that persons generally are not authorised to exercise without specific statutory authority' there is no liability for a failure to act unless the act or omission was in the circumstances so unreasonable that no authority having the functions of the authority in question could properly consider' it reasonable. See ss43 and 43A. Again, the full implications of these provisions are unclear. However, they are troubling. Notwithstanding the abolition of the immunity in *Brodie v Singleton Shire Council* (2001) 206 CLR 512 road authorities are now immune from liability arising from a failure to carry out or to consider carrying out road work (widely defined) unless they had actual knowledge of the particular risk that materialised in the harm occasioned to the plaintiff, which may

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actually discourage road authorities from carrying out inspections for fear they might acquire knowledge of a risk they won't rectify.

A plaintiff is not entitled to recover damages for a psychiatric condition (called 'pure mental harm') unless she or he witnessed at the scene the victim being killed, injured or put in peril or is a close member of the family of the deceased: s30.

Parents and spouses of negligently killed or injured victims now have to show that the defendant owed them a duty of care, whereas under the *Law Reform (Miscellaneous Provisions) Act 1944* that was unnecessary.

In some respects if the plaintiff is affected by alcohol or drugs, including prescription medications, a defendant may be absolved altogether from liability and contributory negligence is presumed in cases where the harm would have occurred irrespective of the intoxication.

'Good Samaritans' are immune from suit: Part 8. So are volunteers who act in good faith while doing community work on behalf of an organised community group or as an official of one: Part 9. Yet, rescuers who suffer mental harm as a result of witnessing the plight of the injured, lose a proportion of the damages to which they would otherwise be entitled because of contributory negligence on the part of the injured: s30(3).

No damages are payable for the costs of raising a child or for lost earnings during that period in a wrongful birth case: Part 11.[36]

Except where the conduct of the defendant constitutes an offence, s54A precludes anyone who sustains injury, loss or damage from recovering any damages for non-economic loss or 'economic loss for loss of earnings' where the injury, loss or damage occurs at the time of or following conduct that would have constituted a serious criminal offence[37] but for the fact that the person was suffering from a mental illness at the time and the conduct contributed to materially to the death, injury or damage or the risk of it and irrespective of whether the person was in fact acquitted of the offence on the ground of mental illness. This provision, inserted by the *Civil Liability Amendment Act 2003*,[38] arguably represents a gross and unwarranted overreaction to an isolated and unusual case, which generated a furore in the media. See *Presland v Hunter Area Health Service* [2003] NSWSC 754. However, as it transpired, and unless the High Court is asked to decide otherwise, the legislation was unnecessary.[39]

Changes to consumer protection laws

The Fair Trading Act was amended to exclude actions for damages being brought under that Act in cases where the loss or damage was the death or personal injury of a person. That includes claims for misleading or deceptive conduct, unconscionable conduct and matters of that kind.

In March 2002 the NSW treasurer said that the New South Wales Government had obtained legal advice 'indicating that any change made by the states to tort law for personal injury cases would have only a limited effect unless the Commonwealth amends the Trade Practices Act'. He suggested that the warranty of due care and skill implied into consumer contracts with corporations by s74 of the TPA could allow plaintiff lawyers to frustrate state tort law reform by pursuing a personal injury damages claim under contract law rather than through an action in negligence.

The Australian Parliament answered the call. On 19 December 2002 the *Trade Practices Amendment (Liability for Recreational Services) Act 2002* came into operation. Section 68B now provides that a term in a contract for the supply of recreational services[40] is not void because the term excludes, restricts or modifies the application of the TPA or has the effect of so doing as long as the exclusion etc. is limited to liability for death or personal injury. When the amendments were announced the minister responsible for them told the Senate that 'businesses would have to have in place reasonable risk management plans in respect of any activity to which a waiver can apply'.[41] However, when the government introduced the *Trade Practices Amendment (Liability for Recreational Services) Bill 2002* on 27 June 2002, neither of these safeguards was included and none has subsequently been introduced.

What sort of message does this send out to the community? As Associate Professor McDonald remarked of the protection afforded recreational service providers under the provisions in the PR 'it seems odd and even offensive to the fundamental values of a modern civilised society to include this shedding of responsibility in a 'personal responsibility' program. It is hard to imagine that it will be good for tourism if we get known as a country where there is no responsibility for 'no care', where we add legal dangers to our many natural dangers'.[42]

Restricting access to legal representation

One way of restricting access to justice is to make it difficult to obtain legal representation. The New South Wales Government set out to achieve this in a number of different ways.

- First, it placed limits on the amount of costs recoverable in personal injury cases.
- Secondly, it introduced penalties for advertising.

Concurrently with the passage of the CLA, amendments were made to the *Legal Profession Act 1987* limiting the amount of costs that can be recovered in 'small' personal injury damages cases.

Subject to certain exceptions, s198D of the Legal Profession Act limits lawyers acting for plaintiffs in personal injury suits to 20 per cent of the amount recovered or $10,000, whichever is greater, in all cases where the amount recovered does not exceed $100,000.[43] The provision is inequitable. It imposes no comparable limit on defendants.

In effect, this means that any action for damages that are unlikely to exceed $100,000 and which is statute barred (and therefore requires an application to be made for an extension of time) could never be brought unless the plaintiff is independently wealthy or the legal practitioner is prepared to do the work for no reward.

An indirect but likely result of these changes is that most, if not all, old age pensioners are unlikely to be able to sue for damages for personal injuries. The threshold and the deductible sums for non-economic loss and the limits on damages for gratuitous care mean that few would recover damages that exceed $100,000.

Yet, the premier, in his second reading speech, said that 'no-one wants to deprive the genuinely deserving of compensation'.[44]

And what about the right to know? One other obvious way of restricting access to justice is to restrict access to legal advice.

In 2001 the government introduced the Workers Compensation (General) Amendment (Advertising) Regulation.

The Regulation made it an offence with a maximum fine of $20,000 for a lawyer or agent to advertise workers compensation services other than by stating name and contact details and area of speciality in certain publications. In other words, the regulation made it an offence for a lawyer or agent to make any statement in writing or electronically which might have the effect of encouraging or inducing a person to exercise his or her legal rights with respect to workplace injuries.

The only apparent mischief to which the Regulation was directed was that advertising encourages people to bring claims and it is expensive to pay claims.

An indirect but likely result of these changes is that most, if not all, old age pensioners are unlikely to be able to sue for damages for personal injuries.

In 2003 the parliament went further. It passed the *Legal Profession Legislation Amendment (Advertising) Act 2003* which included a regulation making power to prohibit conduct relating to the marketing of legal services, punishable by a fine of 200 penalty units (or $20,000) and potentially amounting to professional misconduct. In introducing the legislation to the lower house the attorney general asserted that 'the manner in which lawyers' services are advertised and marketed can have a detrimental effect on both the court system and on the availability of affordable insurance'.[45]

Although the Act was expressed very generally, the Regulation that was made related exclusively to advertising 'personal injury legal services'.[46] Clause 139 of what became the *Legal Profession Regulation 2002* prohibits any barrister or solicitor from publishing, causing or permitting to be published any advertisement that includes any reference to or depiction of personal injury or 'any circumstance in which personal injury might occur or any activity, event or circumstance that suggests or could suggest the possibility of personal injury, or any connection to or association with personal injury or a cause of personal injury or any legal service that relates to recovery of money or any entitlement to recover money in respect of personal injury'. An advertisement is defined broadly as 'any communication of information (whether by means of writing, or any still or moving visual image or message or audible message, or any combination of them) that advertises or otherwise promotes the availability or use of a barrister or solicitor to provide legal services, whether or not that is its purpose or only purpose and whether or not that is its only effect'.[47] 'Publish' is defined equally broadly.

Any contravention is declared to be professional misconduct.[48]

There are limited exceptions that permit entries in a practice directory, on an internet website operated by the legal practitioner or a sign displayed at the practitioner's place of business stating no more than the name and contact details and area of practice or specialty. However, the mention of fees would violate the provision.

Legal practitioners who practice in other areas have the right to market themselves but those who have or had the temerity to practise personal injuries litigation will be criminals if they do! If I advertise my services for people with grievances affecting their property or their purse or their reputation I am free to do as I please (subject to the constraints of the Fair Trading Act). Why isn't the person who injures herself or the person responsible for it entitled to have as much information as accessible to her or him as the company or person who is aggrieved in a commercial transaction gone wrong? The 2002 amendments to the Legal Profession Act prohibit a legal practitioner from providing legal services in any claim for damages unless there are reasonable prospects of success.[49] So this ban was designed to thwart access to lawyers by injured people whose claims have reasonable prospects of success. Why was it necessary anyway? After all, the sweeping changes to the law with respect to personal injuries compensation to which I have referred above, dramatically reduced both the potential for and the number of claims in any event. However, it was apparently not enough to reduce rights and to restrict access to the courts. It was also apparently necessary to prevent people from learning about what remained of their rights or how to enforce them. It is a curious and troubling course for a democratic regime in a free market economy.

The irony, of course, is that the Bar, at least, never sought the right to advertise. We were told in 1987 that we were out of step with society because we banned it. We were told that advertising encouraged competition and that competition was to be fostered above all else. Since when is informing citizens about their legal rights so repugnant that it should become an offence?

The Australian Plaintiff Lawyers Association (now the Australian Lawyers Alliance) instituted a challenge in the High Court to these regulations.[50] The case has now been reported.[51] For my own part, whatever view might be taken of the merits of the constitutional challenge, it is difficult to see why, if advertising by lawyers is permissible, and if free speech is to have any meaning, it should be unethical, let alone criminal, to tell someone what you do for a living or what his or her legal rights might be. I have no desire to place an advertisement in the ordinary sense in any publication. I have an old fashioned distaste for it. However, I cannot accept that anyone else who chooses to promote herself in that way should be punished for it as long as she does not make any false or misleading statement and I have a preference for advertisement that do not breach the bounds of good taste.

It was also apparently necessary to prevent people from learning about what remained of their rights or how to enforce them.

Have we gone too far? Who benefits from the changes?

I urge the powers that be to consider a number of questions. What is the overall impact of all these changes on the wider community? Why should recognition of personal responsibility to avoid harm give rise to an abrogation of corporate responsibility? What ever happened to government responsibility? Why should the injured shoulder more of the burden of accidents particularly when they are injured through no fault of their own?

While the full force of the most recent changes is yet to be felt, an increasing sense of disquiet is emerging.

In a recent speech the Hon Justice Michael Kirby AC said:

> Whilst in Australia we roll back the entitlements of those who suffer damage, in the name of 'personal responsibility', we have to be careful that we do not reject just claims and reduce unfairly the mutual sharing of risks in cases where things go seriously wrong.
>
> These are important questions for the insurance industry. It will not thrive if it becomes known, or suspected, that high premiums are paid when its liability is being significantly and constantly reduced. The sharing of risks is the essential brilliant idea of insurance. We must not kill the goose that laid the golden egg.[52]

It is most unlikely that the convergence of factors that arose in 2001-2 will ever again occur at the same time. And times have changed. The Australian insurance market has stabilised post HIH. So, too have international reinsurance markets with many policies now carrying terrorism exclusion clauses. Boom times on the stock markets have again seen insurers making significant profits from their investment divisions.

The *KPMG General Insurance Industry Survey 2004* revealed that the insurance companies surveyed had increased their gross premium income by 12 per cent to $23.58 billion. Underwriting profit before tax increased by a staggering 428 per cent to $1.551 billion. Investment returns added a 73 per cent improvement contributing just over $2 billion.[53] Yet, despite the gift from government and the promises to the contrary there has been no appreciable decline in insurance premiums.

Whilst the profits of the insurance companies have risen beyond expectations, seriously injured people are missing out on compensation.

Is it not time to review the changes and restore some fairness to the process? There is little reason for optimism that, without legislative intervention, insurers will return to any significant extent the benefits they gained from the new laws.

One might be forgiven for thinking that a legacy of the changes to the law relating to the recovery of damages for personal injuries is that insurance companies have been given a legislative licence to print money. What a glorious state of affairs when you can write insurance and rarely have to pay out on a policy. How close are we now in the area of personal injuries to what must surely be the insurer's ideal world - where insurance is compulsory but payment of claims is forbidden? Remember those words attributed to Rodney Adler.

1 An observation allegedly made by a former leading Sydney identity in the insurance industry, currently serving a gaol term for offences of dishonesty arising out of his conduct as a director of the HIH insurance group, in answer to a question about what he did for a living.

2 See the *Motor Accidents Compensation Regulation (No 2) 1999* and Schedule 1 for the costs themselves.

3 An assessor is required to have regard to certain factors in determining whether the matter is suitable for assessment, such as where the matter involves complex questions of fact or law or involves issues of indemnity or insurance or whether other non CTP parties are involved.

4 See s94.

5 Information supplied to the Australian Lawyers Alliance from members.

6 See e.g., *Workers Online Issue No* 97 25 May 2001 http://workers.labor.net.au/97/b_tradeunion_compo.html

7 Except where at least 10 per cent permanent impairment can be established and then only a modest sum.

8 See *Workers Compensation Act 1987* Part 5. Actually the Sheahan inquiry recommended 20 per cent.

9 See WIM Act s327.

10 Section 348 of the Workplace Injury and Workers Compensation Act provides that, to the extent that regulations make provision for the costs payable to a legal practitioner, those regulations displace the provisions of the Legal Profession Act.

11 See Workers Compensation Act Schedule 6 Part 18 clause 3.

12 See Workers Compensation Act s151A (as in force for claims commenced from 27 November 2001).

13 See http://www.lawlink.nsw.gov.au/sc per cent5Csc.nsf/pages/spigelman_270402

14 B McDonald, 'Legislative intervention in the law of negligence: The *Civil Liability Act 2002*: the common law in a sea of statutes', March 2005.

15 As defined in the *Dust Diseases Tribunal Act 1989*. They include any disease of the lungs, pleura or peritoneum that is attributable to dust.

16 See Civil Liability Act s3B.

17 It is nine per cent for earlier injuries subject to the Act.

18 Section 13.

19 (1981) 150 CLR at 438.

20 The CLA provides that a prescribed discount rate is to apply to future economic loss claims and, in default of any such rate being prescribed, a five per cent discount rate applies: s13(3). To date none has been prescribed.

21 *Review of the Law of Negligence Final Report*, Canberra, September 2002 Recommendation 53, p.211.

22 Fixed by the House of Lords in *Wells v Wells* [1999] 1 AC 345.

23 Fixed on 27 June 2001 in the *Damages (Personal Injury) Order 2001* made pursuant to the *Damages Act 1996*, based on what he believed to be the accurate figure for the average gross redemption yield on Index-Linked Government Stock for the three years leading up to 8 June 2001. See http://www.dca.gov.uk/civil/discount.htm

24 See s 15(6). However, they may not survive a High Court challenge in *CSR Limited v Thompson* in which the Court of Appeal declined leave to reargue *Sullivan v Gordon* at (2003) 50 NSWLR 77 but which concerned damages for the care of a spouse whereas *Sullivan v Gordon* concerned the care of children (special leave granted 10 December 2004).

25 It does not however apply if death ensues and the claim is brought under the *Compensation to Relatives Act 1897* or to an award of damages for mental harm to a person who was not an offender in custody at the time of the incident resulting in the harm. See s26B.

26 Indeed, in his speech at the ALP campaign launch for the 2003 state elections the premier declared: 'We are prepared to fight - and fight hard - for the biggest reform to tort law in 70 years: putting commonsense and personal responsibility back into our legal system. These views were reached by talking to the experts. But, above all, by listening to people.'

27 See, e.g. *Harvey & Ors v PD* [(2004) 59 NSWLR 639. Spigelman CJ was a little more guarded about the issue in that case.

28 See McDonald op. cit. at p 30.

29 See, e.g. *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553 and *Towns v Cross* [2001] NSWCA 129.

30 They are:

(a) where the plaintiff has asked for information or advice about the risk;

(b) where the defendant is required 'by written law' to warn the plaintiff of the risk; and

(c) where the defendant is a professional and the risk is one of death or personal injury.

31 *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 which decided that a doctor is not negligent if he or she acts in accordance with a practice accepted at the time as proper by a responsible body of medical opinion even though other doctors adopt a different practice.

32 See s5M (6)-(9).

33 One commentator has argued that the definition is so wide that it covers almost all aspects of daily living with the exception of work and sleep. See T Goudkamp, 'Has tort law reform gone too far? a paper delivered a the LawAsia Conference in Queensland, 23 March 2005, p.8.

34 There is an exception for cases where the harm resulted from a contravention of a provision of 'a written law' that established specific practices or procedures for the protection of personal safety. That may include a breach of an Australian Standard incorporated into a regulation.

35 Civil Liability Act s41.

36 Following the outcry in the media after the High Court decision in *Cattanach v Melchior* (2003) 214 CLR 1.

37 Defined as an offence punishable by imprisonment for six months or more.

38 commenced 19 December 2003 and applies to cases whether the cause of action arose before or after the date it was introduced into the parliament (13 November 2003) and whether or not proceedings were already on foot at the time: CLA Schedule 1 cl 15.

39 The Court of Appeal (by a majority, Spigelman CJ dissenting) allowed the appeal and set aside the judgment in favour of the plaintiff: *Hunter Area Health Service & Anor v Presland* [2005] NSWCA 33.

40 Defined to mean 'services that consist of participation in:

(a) a sporting activity or a similar leisure-time pursuit; or

(b) any other activity that:

(i) involves a significant degree of physical exertion or physical risk; and

(ii) is undertaken for the purposes of recreation, enjoyment or leisure.'

41 Senator Hon Helen Coonan, Question without notice: Insurance, Senate, Hansard, 27 June 2002, p.2557.

42 Barbara McDonald, 'Legislative intervention in the law of negligence: *The Civil Liability Act 2002*: the common law in a sea of statutes', a paper delivered to the joint conference of the NSW Bar and the ABA entitled 'Working with statutes', Sydney, 18-19 March 2005, pp.24-5. In its submission to the Ipp inquiry the ACCC voiced its concern that such proposals would result in the risks of recreational and other activities being inappropriately allocated to consumers.

43 Changes to those figures can be made by regulation: s198D(2). The provision does not apply to costs as between the lawyer and her client in cases where a costs agreement has been entered into: s198E or for costs incurred after an offer of compromise has been filed where damages exceed the amount of the offer: s198F. Section 198G also permits a court hearing a claim for personal injury damages to exclude legal services provided to a party to the claim if the legal services were provided 'in response to any action by or on behalf of the other party to the claim that in the circumstances was not reasonably necessary for the advancement of that party's case or was intended or reasonably likely to unnecessarily delay or complicate determination of the claim'.

44 http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LA20020528026

45 http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LA200312030

46 Defined as any legal service that relates to recovery of money, or any entitlement to recover money, in respect of personal injury. See *Legal Profession Regulation 2002* clause 139(1)(c). Gazetted 9 May 2003.

47 *Legal Profession Regulation 2002* clause 38.

48 Clause 139(2).

49 See now *Legal Profession Act 2004* (NSW) s345

50 *APLA Ltd & Ors v Legal Services Commissioner of New South Wales & Anor* (S202/2004).

51 *APLA Ltd v Legal Services Commissioner* (NSW) (2005) 219 ALR 403; (2005) 79 ALJR 1620.

52 http://www.highcourt.gov.au/speeches/kirbyj/kirbyj_23feb05.html

53 See the full report and the executive summary at http://www.kpmg.co.nz