APLA replies to Padraic McGuiness

The text of APLA's response to an article by P.P. McGuinness published by The Age and the Sydney Morning Herald, is reproduced.

Common law can serve the interests of common man

Precedents set through civil cases have made Australia a safer place, writes **Peter Semmler.**

THE right to use the common law to claim compensation for injuries is much maligned. Propaganda is repeatedly peddled to the public about the evils of personal injury litigation. Indeed, there is no shortage of provocative articles designed to infect the public mind with a view that the "compensation mentality" is costing Australia a fortune and that lawyers are responsible.

One such article appeared in this newspaper on 9 August written by P.P. McGuinness. Headed "Legal landslide about to engulf Thredbo', it displayed a disturbing ignorance of the laws which allow ordinary people to sue for damages for personal injuries. It also manifested an arrogant comtempt for the right of innocent victims of negligence to invoke such laws.

While denigrating the notion that people who have suffered psychiatric injury as a result of the Thredbo tragedy are entitled to compensation, Mr McGuinness says "The idea that nervous shock or distress can be worthy of compensation has quitte recently entered Australian law." This is incorrect. Australian courts have recognised the right to claim compensation for mental as well as physical injury for decades. In New South Wales that right was enshrined in a statute iin 1944.

Mr McGuinness also suggests that "apart from deliberate illlegality, there is no-one who should lbe blamed for Thredbo". Yet under Australian law as it has applied for decades, those who have not intentionally or deliiberately inflicted harm, but rather hiave negligently failed to take reasomable care are regarded by courts as beeing at fault and liable to pay compensattion for injuries caused by that conduct.

Mr McGuinness condemns personal injury litigation. Yet he ignores the reality that every day in this country innocent people are killed, maimed, and disabled by careless conduict on the part of product manufacturers, employers, governments, land owners and others.

In a civilised and carring society why shouldn't the victims be entitled to monetary compensatiom for the consequences of such carellessness, which often involves not only permanent disability but the loss of one's job, one's home, one's marriage and one's hope for the future?

As well as suggesting that the victims of negligence should be punished by removing their right to siue, Mr McGuinness also condemns the lawyers who act for such victims as being "vultures, scavengers and night walkers". He suggests that they have been "picking over the tragedy of the Thredbo landslide".

This statement is as untrue as it is unfair. There is simply no evidence to suggest that unwarranted action in relation to what occurred at Thredbo has been taken by any plaintiff lawyer. Rather than being condemned, lawyers who act for accident victims in difficult but meritorious cases should be applauded. In a climate where there is effectively no legal aid for civil cases in this country it is only through the preparedness of their lawyers to work for nothing unless a successful result can be achieved that the overwhelming majority of accident victims in this country have any access at all to justice.

A common theme of criticism of the legal system is that there is something wrong with the desire to seek compensation for injuries caused by the fault of someone else. In the ensuing indignation about such claims, the careless behavior which causes the injuries, and the need for compensation in the first place, is forgotten.

Mr McGuinness turns the concept of responsibility upside down. He castigates the victims for not "taking responsibility" for their injuries. He portrays the wrongdoers, rather than the people whom they injure and disable, as the victims.

"The story of the people who are seriously disabled because of dangerous products, unsafe workplaces or dangerous premises, and who have lost their health, their houses, their jobs and their marriages in consequence, is seldom told. This is not surprising since after they have been injured, these people mostly slide to the bottom of the socio-economic heap where they find themselves with no money, no power, no influence, and (without proper compensation) no hope of returning, depending on the extent of their injuries, to their former lives.

Individual legal claims can bring about beneficial changes which governments are unable or unwilling to contemplate. For instance, in the 1992 case of Scholem v NSW Department of Health an Australian jury decided, for the first time in the world, that an employer was negligent for exposing a plaintiff to the cigarette smoke of other people in her workplace.

After that, many work and public places became smoke-free across Australia. Airport buildings throughout the country became cleaner overnight. The decision of four jurors in a small courtroom achieved what successive federal and state governments, under the spell of the powerful tobacco lobby, could never accomplish.

A decision by the High Court earlier this month concerning a girl who was electrocuted because of a defect in rented premises will ensure that landlords take reasonable steps to prevent such injuries occurring in the future.

Because of the right to sue for injuries which Mr McGuinness condemns as a "disease", Australia is a safer and healthier place.

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