# Striking an insurer's raw nerve

John Voyage, Melbourne

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*Anyone who has seen a TAC advertisement will remember it. They are startlingly lifelike, invoking up-to-the-minute techniques to make realistic portrayals of motor vehicle accidents. They are universally considered to be distressing.*

### The Advertisements

The TAC says that the ads have played a significant role in reducing the road toll. This has been repeated so often that it is the understanding of the person in the street.

The assertion of the ads' efficacy is based on research from Monash University Accident Research Centre. MUARC receives sponsorship from the TAC. The TAC also has two representatives on the MUARC Board of Management.

Researchers from other institutions question where there is any causal connection between the decline in the Victorian road toll and the TAC ads. Victorian roads have a long history of being safer than those in other States, and improvement in road safety statistics in Victoria has been virtually identical to that of Australia over a long period. TAC does not make reference to that research when each new ad comes out in a blaze of TAC publicity.

Those researchers suggest there have been incremental advancements in road and vehicle engineering, compulsory seat belts, improved medical technology, societal changes resulting in decreased numbers of children walking to school, demographics (teenagers, the highest at-risk group, being a smaller number now than they were twenty years ago), increased perception of being caught speeding or drink driving, increased fines, etc.

### Corporate Image

The advertisements are fundamental to the corporate image of the Transport Accident Commission. The TAC is perceived by the public at large to be a benevolent organisation with the good of society at heart. This is a most desirable starting point for an insurer, especially one which is arguably being used by the Kennett Government as a surreptitious taxation, resulting in "dividends" of the order of $2 billion being paid to the State Government since 1993 whilst rights of accident victims have been decreased.

### The Incident

In 1986 Nicholas George, then aged four and a half years, was on the suburban street in front of the family home when he was struck by a car. He died shortly after.

In November 1995 the TAC, through its advertising agency, produced an advertisement called "Mum In A Hurry". It shows a woman driver hurrying through a suburban street. In a visually graphic way a young boy and his dog run out of a driveway and into the path of the car driven by the woman. The advertisement depicts the collision on the roadway and his consequent death in the presence of his mother and the driver. The climax of the advertisement includes scenes of the anguished face of the boy with his hands half raised appearing to strike the bonnet of the vehicle and of what appears to be the boy disappearing under the motor vehicle.

There were a number of striking similarities between the death of Nicholas George and the collision portrayed in the TAC advertisement. Common points included (i) a young boy (ii) running (iii) from the driveway of his house (iv) with a Border Collie dog (v) across the suburban side street (vi) into the path of a car (vii) driven by a woman. The circumstances were so strikingly similar that Ms. George considered the advertisement to be a reinactment of her son's death.

Carla George was understandably severely disturbed at this advertisement. It would pop up without warning during family television shows; a portrayal of the dying boy would appear the foot of the page containing footballers' names when she went to watch her team play football; and she suffered so severely that she required counselling. The advertisements had brought back strong memories and feelings regarding the death of her son.

The treating psychologist wrote to TAC advising that Ms. George suffered the symptoms of the delayed onset of post traumatic stress disorder as well as her accompanying depressed moods stemming from the accidental death of her son and further aggravated by the multi-media advertising by TAC. She asked TAC to pay for the counselling. TAC declined.

Due to the passing of time, the only option open to her for compensation under the *Transport Accident Act* related to the aggravation and not the original injury.

A claim form was delivered to the TAC asking them to pay the cost of medical treatment. The claim could only be made if she suffered personal injury directly caused by the driving of a motor vehicle. The TAC denied the claim. Ms. George made application to the Victorian Administrative Appeals Tribunal (now called Victorian Civil and Administrative Tribunal).

### The Appeal

The TAC was supposedly required to provide all documents relevant to its decision to deny the claim. It provided to the Tribunal almost no documents, asserting that none were in its possession. All the documents relating to the creation of the advertisement, including where and how they thought up the circumstances of the accident, were considered to be irrelevant. At a Directions Hearing, the TAC was represented by a prominent barrister of high standing. The Tribunal declined to require

TAC to provide the documents.

The case proceeded to judgement at the VCAT. The TAC asked for it to be heard by the President of the Tribunal. It was heard on 28th July 1998 by Justice Kellam. Noteworthy for a jurisdiction in which the lowest County Court cost scale generally applies, the Transport Accident Commission briefed a senior Queens Counsel and with him another member of the Bar. At the eleventh hour the TAC released a copy of a psychiatric assessment which it had arranged six months earlier, which confirmed that the TAC advertisements caused an aggravation of the post traumatic stress disorder.

The Tribunal found that the advertisements have caused psychiatric injury to Ms. George.

### A Transport Accident?

The hurdle for Ms. George, however, was to establish that her injuries were directly caused by the driving of a motor vehicle. The TV advertisement portrayed driving, but was that enough to fall within the Transport Accident Act? The Tribunal found that it was not, and that there had to be an incident separate to the driving. There was no transport accident, so the TAC was not obliged to pay "no-fault" compensation.

The case received interest from the press and was reported in each of the daily newspapers. Neither the name of Carla's solicitor, nor his firm, were identified in those articles.

Things became personal. At about 5:30 p.m. on Friday 7th August, prior to judgement, the TAC delivered two large folders of documents. They gave notice that they intended to pursue the applicant's solicitors for costs asserting that the application had been pursued solely for an ulterior purpose and not to represent the applicant's interests. In support of this application they asserted that the requests for further documentation during the running of the case was evidence that the material was sought for ulterior motives. Furthermore they provided a selective dossier of articles, television interviews, letters to the editor, and other documents relating to any issue whatever of commentary by the instructing solicitor about TAC.

Furthermore the TAC briefed a senior Queens Counsel and another barrister to argue that costs ought to be ordered against the applicant's solicitor personally.

The Tribunal rejected TAC's request. Justice Kellam said that whilst the Applicant's case was not without difficulties, it had been considered appropriate by TAC for the matter to be heard "by a judicial member of VCAT and furthermore for the retention of very senior Queens Counsel". The Tribunal found that the case, although a difficult case from the viewpoint of prospects of success, was a case defining the outer boundaries of the words "directly caused by" appearing in Section 3(1) of the *Transport Accident Act*.

### Conclusion

The case was always going to be a difficult one; however, it highlights the importance of corporate image to insurers. In this particular case the TAC took what it perceived to be an attack on its corporate image, in circumstances where a woman suffered injury from viewing depictions of her son's death in TAC advertisements, and it defended the case with a personal attack not seen before in this jurisdiction.

In a sense, the soft underbelly of the TAC has been revealed.

A different method of compensation is now being sought for Ms. George, and hopefully a successful outcome will be reported in a future edition of *Plaintiff*. ■

*For the Applicant: Mr D.C.Pulling, instructed by Maurice Blackburn & Co.*

*For the Respondent: Mr R.K.L.Meldrum Q.C. and Mr P.Solomon, instructed by TACLaw Pty Ltd*

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# Sport rule makers liable as crippled players win case

**By AMANDA PHELAN**

**Sports administrators can be sued for making rules that cause injury to players under a landmark decision by the NSW Court of Appeal yesterday.**

**Two rugby union hookers, who became quadriplegics after being mowed down in scrums in separate games, won the right to sue 16 officials from around the world who drew up new rules for the game in 1986 and 1987.**

**Mr Luke Hyde, a Sydney man injured in 1986, and Mr Peter Worsley from Wagga Wagga, who was crippled the next year, maintain these administrators from the International Rugby Board are negligent.**

**Justices Spigelman, Mason and Stein dismissed arguments by lawyers for the officials that sport could be "crushed by legal claims by athletes" against administrators who are part-time amateurs.**

**"Sports administration in the modern era bears many of the trappings of big business," the court ruled. This included corporate controlling bodies, paid full-time executives and staff, and insurance, marketing and sponsorship deals designed to attract viewers, rather than merely enable the game to be played for pleasure.**

**The Australian Rugby Football Union Ltd and officials from other rugby sporting groups are listed as the defendants in the case. The 16 officials – from Australia, New Zealand, Ireland, Britain, France and South Africa – will be forced to defend themselves in court in NSW and may be held responsible for a "duty of care" to players.**

**Lawyers for the sporting bodies warned the decision had "dangerous potential".**

**"The court has broken new ground today," said Mr Brendan Swift, representing the 16 officials, and the New Zealand Rugby Football Union.**

**"This finding has widespread implications for other sports, particularly those with a high incidence of injury."**

**Mr Swift stressed the issue of negligence is still to be put to the test before a trial judge.**

**The court said the sports administrators, or defendants, "are sued for negligence in the conduct of the particular football match or their responsibility for rules under which it was played, including responsibility for failure to enforce the rules or to have them modified locally, so as to require scrummaging to take place safely".**

**Mr Hyde, a first grade Colts player for the Warringah Rugby Club, was injured in a scrum against Gordon. Mr Worsley, who played for Wagga Agricultural Rugby Football Union, was crippled in a scrum against Rivcoll.**

**A lawyer for the two injured players, Mr Michael Ryan, said: "We are looking forward to finally getting on with our case. We have had to fight 30 interlocutory proceedings just to get this far."**

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