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Legal Affairs

Contingency system has its advantages

Chris Merritt Analysis

The defeat last week of the US tobacco industry by five law firms has prompted renewed concern about Australia's restrictions on contingency fees.

The American lawyers who extracted a \$US15.3 billion (\$23 billion) settlement for the State of Texas were working on a contingency fee system that is illegal in Australia.

Their fees were pegged to a fixed percentage of the verdict. Unless they won, they would not be paid.

This capped the financial downside for Texas and ensured that in the event of a victory, the State would receive most of the winnings.

In Australia, some lawyers run cases on a no-win no-fee basis, but they are not permitted to peg their fees to a percentage of the winnings.

The most they can do, according to the Australian Plaintiff Lawyers' Association, is negotiate for an "uplift factor". This enables them to charge an extra percentage of their normal fee if they win.

While this can amount to an extra 25 per cent, APLA believes it is not enough to compensate for the enor-

mous financial risk involved in suing wealthy and determined defendants such as the tobacco industry on a no-win no-fee basis.

The Australian system also leaves open the possibility that legal fees can gobble up most of a plaintiff's winnings. But there is another problem.

APLA's national president, Mr Peter Semmler QC, believes that when the lack of incentive is coupled with what he said was the effective absence of legal aid for civil matters, it skewed the legal system in favour of wealthy defendants.

In large, complicated product liability cases like tobacco litigation, defendants "rely upon the fact that nobody has the financial resources to carry that kind of case to conclusion", Mr Semmler said.

Because of that, many plaintiffs were being denied their day in court, no matter how meritorious their cases may be, he said.

One of the traditional arguments against contingency fees is that they hand excessive gains to lawyers.

Yet one of Australia's most experienced plaintiff lawyers, Dr Peter Cashman, believes that argument can be applied to the current system.

Because damages awards in Aus-

tralia were generally lower than in the US, the current billing system was probably giving lawyers a greater proportion of the winnings than their American counterparts, he said.

He also dismissed the other main objection to contingency fees - the fear that they would encourage nuisance suits.

"No lawyer in their right mind would take a case [on contingency fees] that did not have merit. They would not be paid," he said.

One of the problems with the billable hours system was that it "rewards inefficiency by creating greater economic returns for a greater quantum of work, whether it is good, bad or indifferent".

Dr Cashman, who is principal of Sydney's Cashman & Partners, said contingency fees would permit greater flexibility in fee structures.

"But more importantly from the client's point of view, it would provide the desirable level of certainty in knowing that whatever the costs and delays and expense, the client rather than the lawyer would be the beneficiary of the litigation."

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APLA's 1998 Membership Directory

One of the important attributes of APLA is the unity and collective strength which it has brought to the lawyers who act for plaintiffs. An essential part of that unity and cohesion is a facility by which members may identify like-minded lawyers in other parts of the country and other parts of the world. Our Membership Directory is such a facility. By now all of you should have received your 1998 Membership Directory which lists the names, addresses, fields of practice and special expertise of APLA members.

Plaintiff welcomes new managing editor

For the first 24 editions of APLA's regular publication our national secretary, Roland Everingham, was the managing editor. The enormous time and effort which he devoted to that task was reflected in the progressively superior quality of the journal. For this and subsequent editions of *Plaintiff* our new managing editor is Bill Madden. Contact the Member Services Officer on phone 02 9415 4233 to discuss how you can contribute to *Plaintiff*.