The Cost of No Justice

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One of the most frequent arguments raised against the Common Law system is that we simply can not afford the cost.

Inability to bear its ongoing price has been the justification for the introduction of statutory schemes in many states for motor vehicle and workplace injuries. The reasoning goes that an administrative scheme without the overheads of judicial determination leads to major savings on the cost of insurance and preserves the compensation fund.

This contention acknowledges that there will be casualties of the arbitrary determination by such a scheme but says that this is a worthwhile cost for the major benefits that can be achieved by eliminating the overheads of the subjective approach which occurs in judicial determination.

Business is ranked ahead of the individual under this thinking as it is the lower insurance cost that is invariably credited as the most tangible benefit of such arrangements.

We are repeatedly confronted with these arguments notwithstanding the many examples demonstrating that no fault and other administrative schemes are neither cheaper nor more efficient than the common law. In workplace injury compensation for example, the state with the highest average employer premiums, South Australia, has no common law access. New Zealand, which has had a national accident compensation scheme and no common law access for injury for nearly 30 years, is seeing a system degraded by higher premiums and lower benefits in an effort to finance the long tail in payouts.

Another of the theses against common law culpability is that it wrongly subrogates the notion of personal responsibility to a culture of seeking blame in others. Put another way, this theory contends that one should accept life's trials and tribulations and that the attribution of liability is morally inappropriate both for the victim and the community.

That injury victims should turn the other cheek to reckless wrongdoers is an argument as conceited and arrogant as those who propose it. It has no support among the injured. Despite the susceptibility of the public to the manipulation by vested interests, damages recipients are strong opponents to the abolition of court awarded damages.

Similarly these proponents deliberately obscure the discriminating nature of the common law and its concepts of causation, forseeability and apportionment. Rather than a blunt instrument for attributing guilt manipulated by lawyers as it is portrayed, our civil justice system is in fact a delicate and refined tool for fairly distributing responsibility among all.

That the community is harmed by blame falling where it fairly should denies the consequences of subsidising injurious practices. Fairness and economics demand that the cost of injury be borne by the responsible party. Anything less is a market distortion, protectionism that perpetuates the unsafe conduct and proliferates the resulting injuries.

With the cost of workplace and transport injuries alone to the Australian economy exceeding $50 billion annually, one would have thought that a system that discourages injury, accounts accurately for its cost and fairly compensates the victim was highly desirable.

The third popular justification for the removal of common law determination of wrongs is to reduce the role of lawyers.

Lawyers are a dispensable item in an administrative compensation model, it is said. Such argument proceeds not in reason, for lawyers are very much needed to protect against the excesses of bureaucracy, but in emotion.

The history of the practice of the law is as ancient as the history of human dispute. So it seems is the criticism of lawyers. Shakespeare and Voltaire both decried them.

But the defence of a villain, the suit of a pauper, or the impugning of a king were causes as unpopular then as they are now. And for those whose role it is to seek the truth in those causes we can expect the same reaction as belongs to that truth we expose. When human nature ordains such truths loathsome, so too by human nature are we loathed.

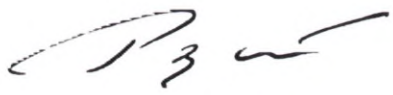
This feature of behaviour is one often exploited by those who stand to benefit from the degradation of the justice system.

As I have observed before in these pages, the powerful, including business and government, resent the empowerment of the ordinary citizen through the courts. That lawyers bear the brunt of the attack raged against it is well known to members.

But these assaults on lawyers are a disguise for the attack the system itself. With the attention of lawyers and the public diverted to issues such as lawyers' fees, it has been never been easier to achieve their conquests.

While not popular heroes like minstrels and athletes, lawyers will continue to be at the forefront of truly popular causes. Both at the level of government and at that of the individual, lawyers safeguarding of the law and the protection of rights ensures that they will remain in the last line of defence of the public.

So the question really is not whether we can continue to afford to retain our civil justice system but whether we can afford the cost of not having it. ■



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