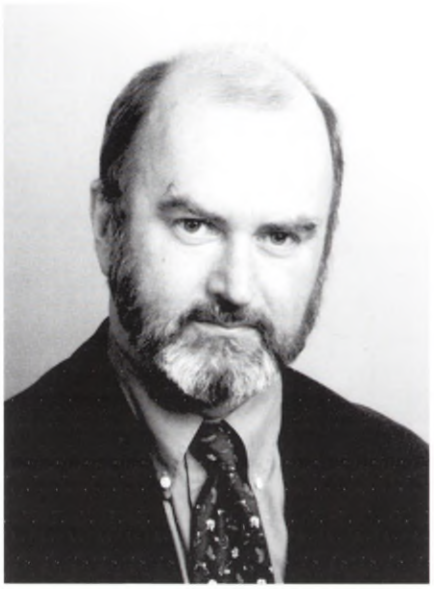
On the need *for*

BY PETER CASHMAN



We have come some distance from the days when the right to damages died with the Plaintiff. However, legislative reforms in both the U.K. and Australia do not go as far as those in the United States where the right to general damages and punitive damages is not extinguished when the victim dies...

Peter Cashman is the National President of APLA and a partner at Maurice Blackburn Cashman. PO Box A266 Sydney South NSW 1235 **PHONE** (02) 9261 1488 **FAX** (02) 9261 3318 **EMAIL** pcashman@cashmans.com.au

Whilst writing this page in London, the local newspapers provide a daily reminder of the dismal state of the law on damages in Anglo-Australian jurisdictions. True it is that we have come some distance from the days when the right to damages died with the Plaintiff. However, legislative reforms in both the U.K. and Australia do not go as far as those in the United States where the right to general damages and punitive damages is not extinguished when the victim dies as a result of the acts of the tortfeasor. Whilst legislative reforms in both the UK and Australia have allowed survivors to recover economic loss to the extent of their financial dependency on the deceased, the manifest injustice of limiting damages in this manner cries out for legislative reform.

The law recognises intangible injury to feelings and reputation in many other areas and substantial damages are often awarded for what many would consider to be relatively inconsequential injury, particularly to reputation.

Recently, relatively substantial damages were awarded, in the sum of $300,000 against a prominent plaintiff law firm which had adapted a photograph of two doctors in an operating theatre on the cover of a brochure confirming the firm's policies and guidelines in conducting medical negligence cases. The doctors were depicted wearing surgical masks and efforts were apparently made to modify the original photograph in order to ensure that the medical practitioners were not identifiable. No doubt few professionals would want their integrity questioned. However, the size of the damages awarded to the Doctors in this case stands in marked contrast to the minimal levels of general damages awarded to seriously injured tort victims and to the pathetically inadequate compensation principles applicable in the case of wrongful death.

A recent English case reported in *The Times* (June 27, 2000) provides a good example of the effects of limitations on damages in cases of death. The case arose out of the death of Mrs Pollis at the age of 60. On September 29, 1995 she slipped and fell in the defendant's "Quick Save" store, breaking her femur. After undergoing surgery she was discharged from hospital. She subsequently collapsed and died from a pulmonary embolism. Prior to the accident she had not been in good health, and was suffering from osteo-arthritis, osteoporosis, diabetes and high blood pressure. She was in receipt of a disability living allowance, including a mobility component at the higher rate.

Prior to her death she lived with her husband. She did the cooking, general cleaning and helped in the garden. The future progress of her pre-accident disabilities were found to be entirely unpredictable. Whether she would have continued to provide assistance in the house, or become a "burden" on the claimant was a matter for speculation.

How is the law to determine an appropriate level of compensation for the surviving husband? First, as the Court of Appeal noted, questions of

Damages Reform

APLA National President

emotional injury or the extent of emotional dependency of the plaintiff on the deceased are legally irrelevant. The court was required to determine the nature and extent of financial loss under English (and similarly under Australian) law and the loss of services which could be valued in monetary terms, even if not in fact replaced by an outside agency. In this British case, the trial judge awarded an amount of 50,000 pounds. According to the Court of Appeal, this figure was far too high. The trial judge had been in error by allowing himself to be affected by the fact that the plaintiff had lost a close and loving companion. According to the Court of Appeal, the loss, in monetary terms, was not worth more than 20,000 pounds. According to the Court of Appeal, the trial judge had also seriously overvalued the award for pain and suffering. The pain and suffering was allowable for the period of three weeks between when the deceased fell and broke her femur on 29 September 1995 and when she died on 21 October 1995. According to the Court of Appeal, the sum of 2,500 pounds was appropriate under that head of damage.

By way of comparison, British newspapers have reported this week that partners at many of the leading commercial law firms in London are earning in excess of 1 million pounds per annum. Using this benchmark, the three weeks of pain and suffering between injury and death was considered by the Court of Appeal to be equivalent to the amount earned by a partner in a leading commercial law firm in London in just over half a day.

Returning to the Australian example of the damages awarded to the doctors for the unauthorised use of a photo, the amount of damages awarded is close to the upper limit of general damages available for pain and suffering in the most serious personal injury case.

In the medical negligence context, although Tom Lipovac received a record award of damages, he was only awarded $300,000 for general damages for pain and suffering. His pain and suffering is a lifetime of extreme physical and psychological disability. He requires 24-hour-a-day care, seven days a week for the rest of his life. He sustained his injury at age 14 months.

Whilst it is conceded that human tragedy and suffering are not readily translated into dollars and cents, the current upper "limit" on general damages in Australia is far too low and the restrictions on damages in the cases of wrongful death are indefensible. In the case of general damages for pain and suffering, the historically inadequate conventional upper limits have been further eroded by inflation. Property prices, insurance premiums and the price of goods and services have continued to escalate in recent years but the value of general damages awards appears to have remained relatively static and in some instances has been reduced by legislative "reform".

Damages awards and settlements have been further eroded in recent years as a result of various legislative schemes which require payback of health care and social security benefits. The policy justifications for such schemes are obvious. However, the transaction costs of quantifying and recouping such benefits are often carried by the plaintiff. This is usually borne out of other amounts awarded for damages given that the legal costs of conducting litigation are not usually recovered in full from the defendant. In some Australian jurisdictions, there appears to be a growing disparity between party-party and solicitor-client costs. This is exacerbated in the case of premiums which are recoverable as compensation for the risk of conducting cases on a no-win-no-pay contingency basis. Even where indemnity costs are awarded, courts usually do not allow recovery of the full amount of the fees borne by the successful plaintiff.

Injured plaintiffs, particularly those suffering catastrophic injuries, and the surviving relatives of those who lose their lives as a consequence of the wrongful conduct of others, are entitled to greater levels of compensation. APLA will continue to fight efforts to further erode compensation entitlements but all APLA members are encouraged to seek reform of damages entitlements with a view to ensuring more adequate compensation for those seriously injured and for the surviving dependants of those who died. Legislative reform and creative test case strategies help redress the increasing imbalance in the scales of justice. PL