Is there such a thing as access to justice?

By Richard Faulks

Recent Productivity Commission figures confirm an ongoing fall in civil claims filed in the District Court of New South Wales and the County Court of Victoria. This follows major falls in the previous year, particularly in personal injury claims.

In some jurisdictions, many personal injury claims are simply not viable because thresholds severely limit (or in some cases remove altogether) the right to compensation for pain and suffering. Coupled with limits on the legal costs recoverable from wrongdoers or their insurers, changes to tort law mean that most injured people simply cannot afford to run claims.

Government changes have hit the most vulnerable; namely, those who are welfare recipients and others without large economic loss claims. The legal cost burden has been well and truly shifted from the insurer to the innocent and injured victim. How can this situation be right? I suspect that many injured people have simply given up any hope of obtaining justice.

On top of that, the advertising restrictions in some jurisdictions are leading to many injured people not even knowing of their rights. As was conceded in the High Court (*APLA & Ors v NSW Legal Services Commissioner*), part of the rationale behind the banning of personal injury advertising was to prevent the injured finding out about their rights and therefore reducing claims against insurers. Surely this is the ultimate denial of access to justice?

As Simon Moran of the Public Interest Advocacy Centre said (*Law Society Journal*, November 2005):

> 'Obtaining information about legal rights is a key element of access to justice. Information about legal rights is the very foundation of our legal process … If members of the general public do not receive information about their legal rights, they will not be in a position to challenge unfair practices, detrimental treatment or abuse as they will simply not recognise that their rights have been breached.'

As usual, the most disadvantaged members of our community, such as those with poor language skills or the elderly, will suffer the most.

The latest assault on access to justice has come as insurers and corporations have sought to defeat large claims by challenging the litigation funding used by some claimants. Many firms take on claims at significant financial risk simply because their clients cannot afford to fund the litigation. Litigation funding may be the only way that disbursements in large cases can be managed. Though it does not affect all of us, large representative claims rely heavily upon the availability of litigation funding in some circumstances. In recent times, the federal court has rejected attempts to prevent claims where third parties have provided funding.

Defendants have raised the ancient laws of maintenance and champerty, but it seems the courts are rejecting such claims except where it is clear that the role of the funder has 'corrupted or is likely to corrupt the processes of the court' (*Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd*). The High Court is to consider this issue shortly.

Where legal aid is either not available or poorly funded by governments, it is essential that we take every opportunity to prevent the further erosion of access to justice for our clients and those who may become our clients. If we don't fight for it, no one will. ■

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