

By Patrick Coetsee

In *Ashby v White*,¹ 300 years ago, Lord Chief Justice Holt remarked:

'If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.'

That statement is as true today as it was then. But remedies for rights are not always applied, a failing amply demonstrated by two recent events.

The first was when the propensity for a national Human Rights Act was banished to the backburner by the Commonwealth attorney-general, despite the overwhelmingly favourable response to the government's own public consultation. The aftershocks of this disheartening decision will be felt for years to come. Perhaps it will be left to the individual states and territories to lead the way, as the ACT and Victoria have done.

The second event was the High Court decision of *Tabet v Gett*.² In his article, 'Loss of chance in medical litigation', Bill Madden explains that the Court held that no damages are available for loss of a chance in Australia that is less than 50 per cent. We are left with the outcome that a 49 per cent chance of a better outcome will result in no damages, but a 51 per cent chance results in full damages.

While these decisions are undoubtedly significant, another issue on the horizon represents a greater threat. It is the National Disability Insurance Scheme, as proposed by senator Bill Shorten. Its pros and cons are succinctly outlined by Jnana Gumbert in her article 'The National Disability Insurance Scheme – what's it all about'. This proposal does have some meritorious goals, but it is also laced with poisonous barbs. Better and more compensation for disabled people is indeed a most commendable intention. But to remove this remedy for those over 65, and to remove the possibility for anyone to sue for damages for a disability (aka: a NZ no-fault scheme) would be disastrous for those affected.

We must face these future challenges with renewed vigour and determination in the battle to protect people's rights. This is no time to remain silent and idle. It is a time for action and agitation. Although difficult, the alternative of inaction will only lead to unwanted consequences. As Lord Chief Justice Holt said, 'it is a vain thing to imagine a right without a remedy'. ■

Notes: 1 (1703) 2 Ld Raym 938 at 953. 2 [2010] HCA 12.

Patrick Coetsee is the Alliance's Legal and Policy Officer.

PHONE (02) 9258 7700 **EMAIL** Patrick@lawyersalliance.com.au

NATIONAL COUNCIL **National President** Mark Blumer **President-Elect** Brian Hilliard
DIRECTORS **ACT** Andrew Freer **NSW** Anthony Scarcella **NT** Nicole Dunn **QLD** Laura Neil
SA Anthony Kerin **TAS** Greg Barns **VIC** Geraldine Collins **WA** Tom Percy QC

BRANCH PRESIDENTS **ACT** Amy Burr **NSW** Jnana Gumbert **NT** Nicole Dunn
QLD Justin Harper **SA** Anthony Kerin **TAS** John Green **VIC** Geraldine Collins **WA** Tom Percy QC

STAFF **General Manager** Michel Geurts michel@lawyersalliance.com.au

Conference Manager Maja Maunic maja@lawyersalliance.com.au

Public Affairs Manager Mandy Wyer mandy@lawyersalliance.com.au

Member Services Officer Nancy Hanna nancy@lawyersalliance.com.au

Publications Officer Renée Harris renee@lawyersalliance.com.au

Legal and Policy Officer Patrick Coetsee patrick@lawyersalliance.com.au

Event Co-ordinator Jessica Younan jessica@lawyersalliance.com.au

PRECEDENT Editorial Committee Toni Emanuele, Jnana Gumbert, Michal Horvath, Jennifer Newman, Morgan O'Brien-Powell, Paul Ohm, Richard Royle, Tim Tobin SC, Emma White, Ben Zipser

Editor and Production Manager Renée Harris renee@lawyersalliance.com.au Phone: (02) 9258 7721 **Assistant Editor** Jonathan Tyne

Design Tianli Zu tian@artstudiozz.com.au

This issue of Precedent is cited as (2010) 98 PRECEDENT. ISSN 1449-7719 © 2010 Australian Lawyers Alliance, ABN 96 086 880 499
Trading as the Australian Lawyers Alliance, GPO Box 7052, Sydney 2001, DX 10126, Sydney Stock Exchange Phone: (02) 9258 7700 Fax: (02) 9258 7777
Email: enquiries@lawyersalliance.com.au Website: http://www.lawyersalliance.com.au

PRECEDENT is published bi-monthly by the Australian Lawyers Alliance Ltd. Contributors and advertisers should submit their copy and/or artwork in electronic form by the agreed deadline.

Disclaimer: Views expressed by the contributors are not necessarily endorsed by the Australian Lawyers Alliance Ltd. No responsibility is accepted by the company, the editor or the contributors for the accuracy of the information contained in the text and advertisements. The Alliance does not necessarily endorse any of the products or services advertised. Copyright in this material is retained by the publisher, the Australian Lawyers Alliance Ltd. No part of this material may be reproduced or transmitted in any form or by any means, electronic or mechanical, without permission in writing from the publisher, the Australian Lawyers Alliance Ltd. Enquiries should be directed to enquiries@lawyersalliance.com.au.

Lawyers
for the People

