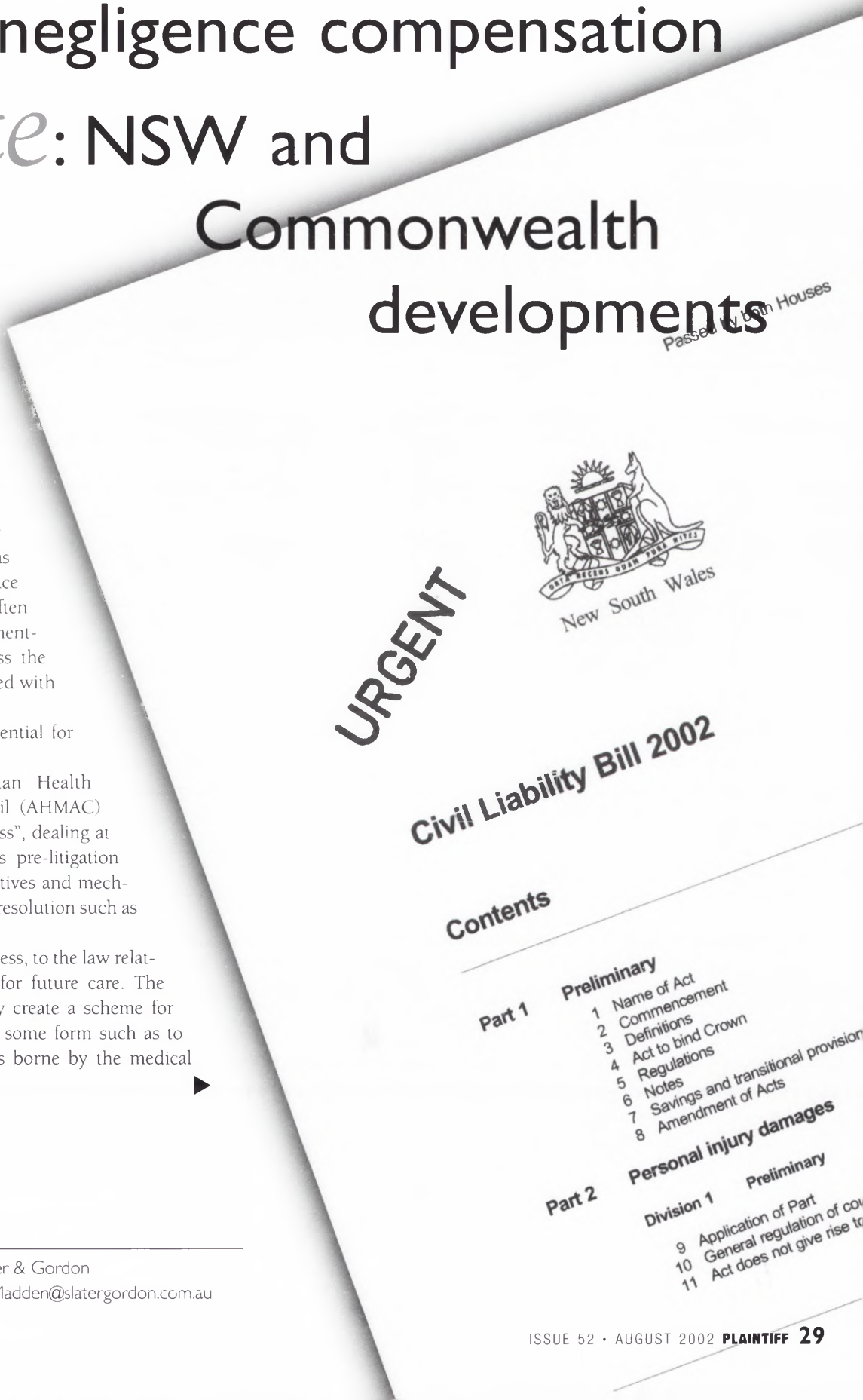
BILL MADDEN, NSW

Medical negligence compensation *update*: NSW and Commonwealth developments



Introduction

There have been a number of calls for reforms in the law as it applies to medical negligence and related areas. Such calls often suggest that changes be implemented in a uniform fashion across the country, yet that has not occurred with the damages reforms thus far.

There seems to be the potential for change at least as follows:

- As part of the Australian Health Ministers Advisory Council (AHMAC) process, to the "legal process", dealing at least with matters such as pre-litigation protocols, settlement incentives and mechanisms to facilitate dispute resolution such as mediation.
- As part of the AHMAC process, to the law relating to award of damages for future care. The concept here is to possibly create a scheme for provision of future care in some form such as to reduce future care costs as borne by the medical insurers. ▶

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- As part of the AHMAC process and Heads of Treasury discussions, reform to the Trade Practices Act so that it does not provide residual rights following any reforms at state level.
- Reform to the law of negligence, at state level and perhaps with a degree of replication across the various states.

In this article I will address:

- Statutory reforms to the law concerning medical negligence in NSW;
- The Open Disclosure Project; and
- Further reforms on the horizon, at Commonwealth and state levels.

NSW Changes: *Health Care Liability Act 2001* and *Civil Liability Act 2002*

New South Wales became the first Australian jurisdiction to modify the substantive law regarding medical negligence claims, upon commencement of the *Health Care Liability Act 2001*(HCLA). Further changes were made upon the recent commencement of the *Civil Liability Act 2002* (CLA). The CLA applies to a range of forms of negligence, not just medical negligence.

I will describe the HCLA in some detail, notwithstanding its replacement to some extent by the CLA, as most of the provisions are much the same. Further, the CLA is retrospective only to matters not issued by 20 March 2002, so the HCLA will still apply to a number of matters currently before the courts.

There is an exception for claims against the Crown, if such claims were notified before 20 March 2002 and are issued before 1 September 2002, except claims under HCLA.

The provisions of the HCLA limiting common law damages entitlements came into effect on 5 July 2001. Part 3 of the Act, which primarily deals with regulation of the medical insurance industry, was deferred until 1 January 2002.

The Act's objectives include "fair and sustainable compensation for persons who sustain severe injuries from the provision of health care" and "to keep the costs of medical indemnity premiums sustainable".

Commencement

Section 5 provided for the Act to have application to an award of damages that relates to an injury received, or to a death resulting from an injury received, whether before or after the date of commencement, unless proceedings have been commenced in a court before that date.

The Minister said this was "necessary if the reform package is to have an impact in the shorter term on the cost of indemnity cover." Most NSW practitioners were aware of this as a likely provision, so an unusually high number of claims were lodged at the court registries in the weeks leading up to passage of the Act.

Application

The Act does not apply to all areas that might generally be thought of as "medical negligence". However, the CLA will apply "across the board", except for intentional torts (somewhat narrowly defined) and cases involving sexual assault or other sexual misconduct.[1]

In the HCLA, regard must be had to the definition of a health care claim set out in Section 4, and in particular to the requirements that the health care provider be a medical practitioner, a public health organisation or the licensee of a licensed facility. A medical practitioner is one registered under the *Medical Practice Act 1992*.

The HCLA definition makes particular reference to the requirement of professional indemnity insurance, initially of any kind but later of an approved type. In this regard, the Act might be considered to be based on a similar philosophy to the Professional Standards Act.

The HCLA incorporated some aspects that might be seen as consumer trade-offs for damages restrictions – compulsory insurance, pre-litigation controls, data reporting and some premium price fixing.

Although the CLA was also introduced in the context of insurance premium increases, the Act was not limited to benefit only insured defendants, nor does it contain any other such consumer trade-offs.

Exclusions

Section 6 sets out a number of potential and existing exclusions from the HCLA legislation. In the discussions leading up to final drafting of the Act, reference was made to the possibility of excluding entrepreneurial medical practitioners such as cosmetic surgeons from the benefits provided by the legislation.

Section 6 HCLA specifically excludes awards of damages under the Fair Trading Act and claims arising on an "occupiers' liability" basis. Presumably, entitlements under the Trade Practices Act will not be affected.

Again, this becomes irrelevant under the CLA, at least in so far as the Fair Trading Act is concerned.[2] For the application of the Trade Practices Act to be excluded, Commonwealth legislation will be required.

General Damages (Non-Economic Loss)

Section 13 HCLA (and similarly section 16 CLA) establishes a regime similar to previous versions of the motor accidents legislation in New South Wales. A threshold is established at 15 per cent of a most extreme case, with a sliding scale of reduced damages extending from 15 to 32 per cent. No deduction is made for non-economic loss exceeding 33 per cent of a most extreme case. The percentages are determined by reference to an upper limit of $350,000 for a most extreme case.

NSW lawyers are familiar with the NSW "most extreme case" concept. It is a subjective assessment made by the court, not a variant of the AMA tables. Various types of injuries may meet the definition, as there is not one single "most extreme case". Case law examples exist for paraplegia[3] and brain damage[4].

The Court of Appeal[5] has made it clear that the trial judge cannot assess common law general damages first, then work back to the NEL percentage. And the NEL percentage assessment must be at date of trial, not some earlier date.

Table of NEL Amounts	
0 – 14%	Nil
15%	$3,500
16%	$5,250
17%	$7,000
18%	$8,750
19%	$10,500
20%	$12,250
21%	$14,000
22%	$15,750
23%	$17,500
24%	$19,250
25%	$22,750
26%	$28,000
27%	$35,000
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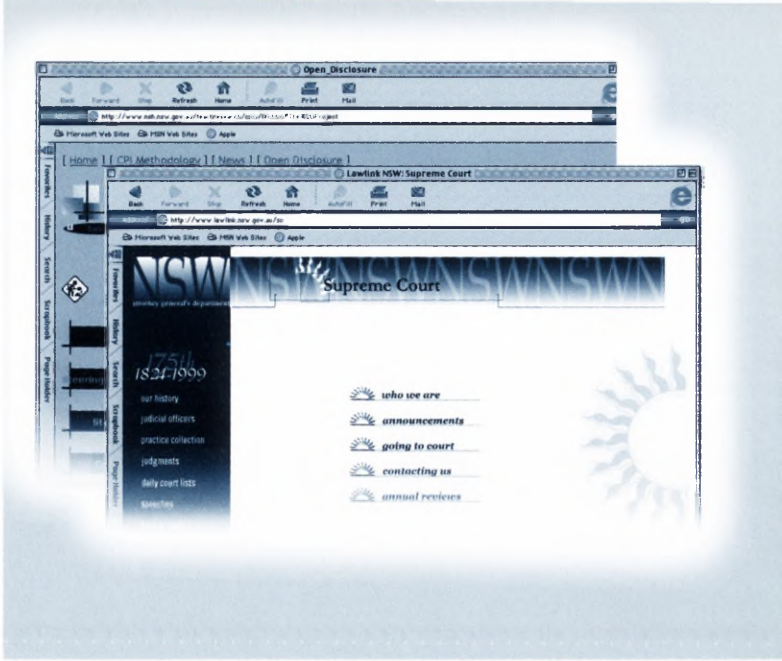
29%	$63,000
30%	$80,500
31%	$91,000
32%	$112,000
33%	$115,000



Economic Loss

An upper limit of $2603 net weekly earnings is established under Section 9 HCLA, to be adjusted in line with the *Motor Accidents Compensation Act 1999* (NSW). The CLA will take a slightly different approach, by providing a cap based on three times average weekly earnings.[6] Future economic loss predictions must be based on assumptions that accord with the claimant's most likely future circumstances but for the injury.

Discount Rate

Section 11 establishes a discount rate of five per cent, which contrasts with the pre-existing NSW common law three per cent rate. Provision is made for that rate to be changed from time to time by regulation. Although superficially minor, the two per cent change will reduce lump-sum awards for long-term claims significantly. For example, a 40-year future care lump sum will be reduced by 25 per cent.

Interest

Section 15(1) HCLA, and its equivalent in CLA, precludes an award of interest for non-economic loss. In relation to other past losses, interest is to be calculated by reference to the Commonwealth government 10-year benchmark bond rate or as may otherwise be specified by regulation. The benchmark bond rate is significantly less than the rates available under the Supreme Court Act. This Section does not affect post-judgement interest. Section 18(1) CLA also precludes an award for interest on past gratuitous attendant care services.

Gratuitous Care

Damages for gratuitous attendant care services are not greatly affected by the HCLA. The Act provides that such damages cannot be awarded unless the court is satisfied that there was a reasonable need for the services, which has arisen solely because of the injury; and that the services would not otherwise have been provided to the claimant but for the injury. ▶

But the CLA provides that gratuitous care damages cannot be awarded unless the services are provided for more than six hours per week for six months. Valuation of gratuitous care is to be made by reference to average weekly earnings, pro rata if less than 40 hours per week, and with an effective maximum recovery of 40 hours per week.[7]

Exemplary Damages

A claimant's right to exemplary or punitive damages is extinguished by Section 17 HCLA. The CLA section 21 goes one step further by removing any right to aggravated damages.

Contributory Negligence

Section 16 introduces reductions for the contributory negligence of the deceased person into claims under the Compensation To Relatives Act. Similar provision appears in the CLA section 20.

Good Samaritan Protection

Immunity from negligence compensation claims is established for a medical practitioner or nurse providing care in circumstances of an emergency at or near the scene of an accident, in good faith and on a voluntary basis.[8]

Structured Settlements

Section 18 HCLA establishes a regime enabling payment of damages other than in the form of a lump sum, however it only applies *where the parties agree* to settle the claim by making a structured settlement and apply to the court for such an order. This section anticipated some change to the taxation law by the Australian government, making annuity payments more attractive. Such changes were foreshadowed prior to the recent Federal Election, and a Bill was recently brought forward by the Commonwealth. Similar provision appears in the CLA section 22.

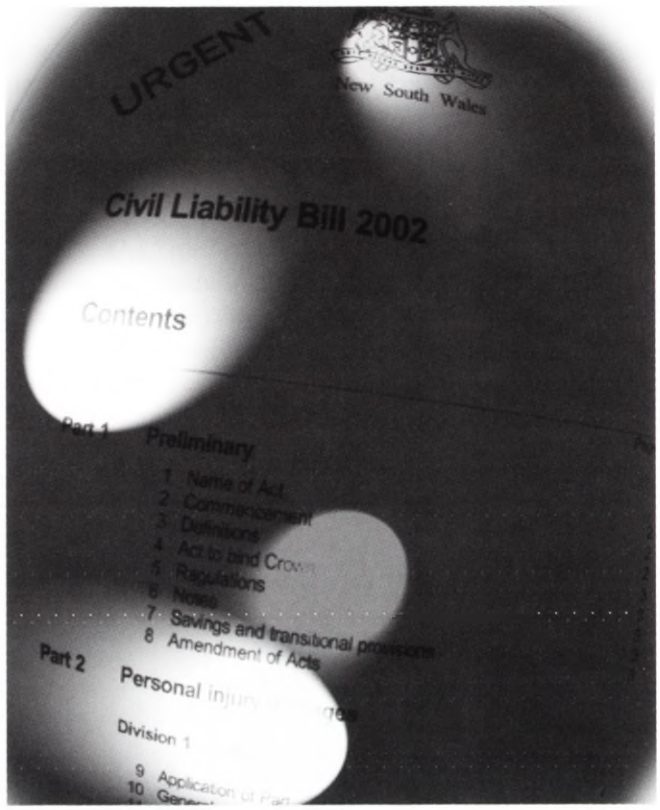
Review

Section 36 HCLA originally provided that the Minister was to review this Act as soon as possible after the period of five years from the date of commencement, to determine whether the policy objectives of the Act remain valid, and whether the terms of the Act remain appropriate for securing those objectives. The Legislative Council amendment had the effect of reducing the review period to one year. There is no similar review clause in the CLA.

Costs and Certification

The CLA goes on to amend the Legal Profession Act (LPA) in certain ways. Firstly, there is established a regime for maximum costs in certain personal injury damages matters if the amount recovered does not exceed $100,000. Costs of a plaintiff are fixed at 20 per cent of the amount recovered, or $10,000, whichever is the greater.

Costs in that context include solicitors', barristers' and agents' fees, but not disbursements. There is a contracting out



provision, if a costs agreement complying with Division 3 of the LPA exists.

The CLA goes on to deal with various exceptions to the above, which I will not describe in detail. The exceptions relate to offers of compromise and certain work brought about by another party taking an action not reasonably necessary for the advancement of the parties' case.

Under the new section 198J LPA, a solicitor or barrister must not provide legal services on a claim (or defence) if they reasonably believe on the basis of provable facts and a reasonably arguable view of the law that the claim (or defence) has reasonable prospects of success. A fact is provable only on the basis of the material then available. Success is defined by reference to damages being recovered.

A form of certification to accompany originating process is envisaged by section 198L(3) LPA. Preliminary legal work is not covered.[9]

Provision of legal services in breach of section 198J is capable of being professional misconduct or unsatisfactory professional conduct, and personal costs orders can be made under section 198M.

Section 198N places the onus upon the lawyer to show that the then known facts provided for reasonable prospects of success, by creating a rebuttable presumption following certain findings by a court.

Open Disclosure

The Open Disclosure Project is perhaps of a different nature than the reforms referred to above, but nevertheless is related and often referred to in the broader discussions.

My task in providing information regarding the Open Disclosure Project is made immeasurably easier by the fact that the project maintains a comprehensive website at *http://www.nsh.nsw.gov.au/teachresearch/cpiu/OD.htm#The%20Project* from which much useful material can be obtained.

The information sheet "Clinical Risk Management and Defensive Medicine" by Professor Bruce Barraclough suggests that by re-designing unsafe care systems, there is the possibility of a reduction of four per cent of Australia's total health expenditure which presently, with 210 million Medicare items and 5.7 million hospital admissions per annum, consumes 8.5 per cent of Australia's GDP.

Overseas studies suggest that 10 per cent of people using hospital care will have an adverse event, of which two per cent will be severe. Half of adverse events are preventable, but of course not all adverse events are what the legal system would interpret as negligent.

The Harvard medical practice study suggested that one quarter of adverse events involved negligence, and of that quarter only one in eight filed a claim. Half of them (that is, one in sixteen) received any compensation.

A small number of claims account for most of the costs, obviously those with catastrophic consequences. United Medical Protection's data suggests that two per cent of claims by number account for 45 per cent of their total payments.

The interface between the project and medical negligence litigation, as I understand it, arises in that honest disclosure may itself lead to less, not more, litigation. And of course, the systems improvement aspect should lead to reduced error in the longer term. But for lawyers in private practice, the project's relevance is perhaps limited to proposed protection for apologies being used as an admission of liability ("benevolent gesture legislation") and privilege protections for investigation of errors as part of the quality improvement process.

Further Reform on the Horizon

In NSW, Premier Bob Carr has already foreshadowed legislation further modifying the tort law system, which relevantly to the medical profession will include "establishing a realistic duty of care".

There is little detail to this plan as yet. In Parliament, on 29 May 2002, Mr Carr said:

"In stage two we will be doing something that no government anywhere in Australia, or at an earlier time in this State, has done. We will be comprehensively reforming the law on negligence, but it requires painstaking work."

The Premier Mr Carr made mention of a speech by the NSW Supreme Court Chief Justice Mr Spigelman on 27 April 2002. Perhaps his comments give us further insight into what the government may be contemplating. The full text of the address is available on the NSW Supreme Court website *http://www.lawlink.nsw.gov.au/sc*.

On 30 May 2002, there was a further public liability summit meeting, the changes from which may well impact on medical litigation. The Commonwealth, States and Territories agreed to jointly appoint an expert panel of three eminent persons to examine the law of negligence, including its interactions with the *Trade Practices Act 1974*. The review will also consider the liability of public authorities and joint and several liability.

The panel, chaired by Justice Ipp and including Professor Can from the Law Faculty of the ANU, a medical practitioner, and a local government representative, will report by August 2002 after consultation with the Standing Committee of Attorneys-General. Terms of Reference for the Review have been announced and are available in the Research Resources/Public Liability section of the APLA website. PL

Footnotes:

1 Section 9(2)(a).

2 Section 9(3).

3 *Dell v Dalton* [1991] 23 NSWCR 528.

4 *Marsland v Andjelic* (No.1) [1993] 1 NSWCR 162.

5 *Kurrie v Azourie* NSWCA (7 Dec 1998).

6 Section 12(2).

7 Section 15(3)&(4).

8 Section 27 HCLA.

9 Section 198K LPA.