News & Views

THURSDAY, MAY 23, 1996
THE AUSTRALIAN FINANCIAL REVIEW

Risks in tighter cap on accident compensation

Your editorial, "Tighten cap on payouts" (*AFR*, May 13), displays a disturbing acceptance of the propaganda which the insurance industry has been peddling to the Australian public with increasing insistence over recent years.

You seem to suggest that there is something wrong with individuals obtaining compensation for injuries caused by someone else's fault, as assessed by an impartial court.

You denigrate consumer awareness and enforcement of legal rights. Your views are inconsistent with the expectations of the Australian community.

You suggest that there should be "sensible legislative limits" on compensation payouts in order to remedy what you see as "obvious drawbacks" in the increasing number of legal claims.

In fact, severe legislative restrictions have already been imposed on the right of victims of accidents to seek fair compensation for injuries in a number of States and in the Northern Territory.

In NSW for example, under recent amendments to the Motor Accidents Act, a person injured in a motor vehicle accident due to no fault of her own who sustains serious spinal injuries necessitating surgery is not entitled to any compensation for pain and suffering; in South Australia a young child rendered a quadriplegic in a motor vehicle accident due to somebody else's fault can expect to receive a maximum of $91,200 as compensation for a life time of pain and suffering.

New Zealand's "no fault" National Compensation Scheme has seen a progressive reduction of benefits payable to victims of accidents since its inception in 1974. The Chief Judge of the Employment Court of New Zealand, Judge Tom Goddard, has publicly lamented the erosion of benefits payable to victims of workplace accidents in the past two decades.

In contrast, the common law system of accident compensation which you and the insurance industry are so eager to limit has evolved over centuries and is based on judicial common sense and community notions of fairness.

Interfering with the common law rights of victims of medical negligence may bring about a small decrease in doctors' insurance premiums.

However, it also carries the risk of a sizable reduction in the quality of care and accountability Australians are entitled to expect of health-care professionals.

The further restrictions on compensation which you propose in your editorial are at once myopic and unfair.

Rather than taking away common law rights and slashing benefits to accident victims, insurers and governments should focus on constructive legislative measures to reduce the number of injuries due to negligence and hence the number of claims.

Lawyers (for both plaintiffs and defendants) will be just as busy if compensation payouts are further reduced. It will be Australian consumers and accident victims who will suffer.

Peter Semmler QC,
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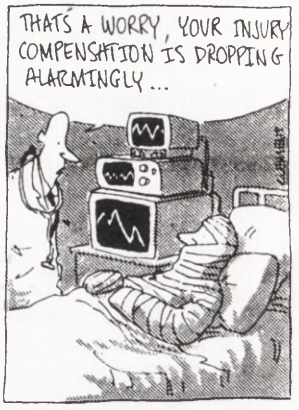

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This letter was in response to the editorial below (Australian Financial Review, May 13, 1996). Reproduced with the permission of the Australian Financial Review.

MONDAY, MAY, 1996
THE AUSTRALIAN FINANCIAL REVIEW

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Tighten cap on payouts

ONCE, minor accidents were regarded as unfortunate incidents of life. If someone fell off a horse, fell over in a public park, or tripped over a garden hose while delivering the milk, the resulting injuries were part of life's burden.

Now many Australians are deciding that if they are injured then someone else must be to blame. As a result there has been a general increase in consumer willingness to commence legal action in areas ranging from product liability through to compulsory third party, workers' compensation and medical negligence claims.

The trend certainly is not confined to Australia. There has been a world-wide increase in consumer awareness of legal rights while, in areas such as product liability, there has been an increasing trend to enact tough new laws, a development highlighted by today's report in the Opinion pages of *The Australian Financial Review*.

In Australia, some would argue the trend to more litigation may have been exacerbated by lawyers who, freed from age-old restrictions on advertising and competition, actively seek clients. Some have been advertising for clients with injury claims, who they promise to represent on a "no-win, no-pay" basis.

Lawyers are always an easy target for public abuse. If individuals are anxious to find someone to blame (and sue) for their injuries, then society collectively can also find someone to blame, and lawyers make an easy public scapegoat for the recent rise in injury claims.

It is not that simple. The professional restrictions on lawyers were dropped (amid cheering by *The Australian Financial Review*) for good reasons. The public has every right to know what legal services are available and to gain low-cost access to the legal system.

The rush to sue also has benefits. Local councils and companies offering services to the public are paying much closer attention to the quality of the services they offer. In Victoria, councils have become considerably more aware of the concept of "risk management".

There are obvious drawbacks, however, to the surge in legal claims, with one of the most notable being a substantial increase in insurance premiums.

By far the worst example of this is in professional indemnity insurance premiums for doctors. In just 12 years, insurance premiums charged by Australia's largest medical insurer, United Medical Defence, have jumped from a flat $450 for all doctors to between $1,700 for a non-surgeon and $25,000 a year for an obstetrician. Another example, and one that hits the average consumer, is the recent, sharp increases in compulsory third party (CTP) insurance premiums in NSW.

Consumers are even turning to Australian courts for compensation for damages caused by alleged failings in educational services – previously a peculiarly American phenomenon.

This new-found enthusiasm for claiming legal redress is, however, still well short of the legal mania long evident in American society, in part because the Australian legal system is quite different to that of America.

In Australia judges usually decide the facts in civil cases and calculate damages, rather than juries, as is the case in America. They also do not award punitive penalties such as the triple damages that can be awarded by Texan courts. In addition, local lawyers are not entitled to more than per-hour legal fees plus disbursements. In America lawyers regularly take one third of the damages judgement as their fee – a practice which makes for a particularly ferocious pursuit of unlikely civil claims.

The difference in legal systems, and the comparative ease with which the Federal and State governments can change legislation, means that American-style legal excesses can be prevented by legislative blocks to small claims and by capping damages awards.

This is happening to a certain extent in the already heavily regulated areas of CTP and workers' compensation. The Victorian Government has undertaken one legislative fix of the latter, and the NSW Government recently tried again to reform its CTP system.

As with many other matters of public policy, the State and Federal governments are faced with a balancing act. On the one hand they will want to ensure that deserving cases are properly compensated and that those who deal with the public take proper care. But on the other, they want to avoid the penalties of a system out of control, where doctors seek to protect themselves by ordering hundreds of unnecessary tests and councils bar the public from municipal parks.

The solution is not to re-regulate lawyers but to ensure that there are sensible legislative limits placed on compensation payouts.

Originally published in the AFR, May 13.