The Future of Common Law in Australia

An address to the National Conference of the Australian Plaintiff Lawyers' Association at Noosa Heads, Queensland on 18 October 1996 by Peter Semmler QC, APLA President.

All around Australia today governments are legislating to cap, curtail or eliminate entirely the entitlement of ordinary people to use the common law to recover damages for injuries.

Common law rights are being trampled in a manner which is the antithesis of the common law process itself. There is no thoughtful deliberation, no careful weighing of the merits and little consideration of conflicting views. Under pressure from big business, the insurance industry, professional associations and product manufacturers governments in this country are legislating to destroy rights which have evolved over centuries.

This late 20th century phenomenon is not peculiar to Australia. The tort reform legislation put forward by the Republican Party in the United States with which our sister organisation, the Association of Trial Lawyers of America has been grappling in recent times bears a striking similarity to legislation which has been enacted or is contemplated in this country. The lobbying power of self-interested commercial groups is not restricted by national boundaries.

In Australia the assault on common law rights has escalated to frightening levels recently. The campaign being mounted seeks to turn the public's sympathy away from the victims of wrongdoing. The public mind is being programmed with prejudice to think that the "compensation mentality" is costing Australian society a fortune. The propaganda being peddled to both politicians and the public at large portrays the wrongdoers, rather than the people whom they maim and kill, as the victims. The concept of responsibility has been turned upside down so that it is the victims who are castigated for not "taking responsibility" for their injuries.

Governments around the country are responding to such propaganda, and curtailing common law rights in many accident situations. A good example is the restriction on the right of workers to sue their employers at common law for accidents caused by the employer's negligence. In New South Wales the changes effected to the *Workers' Compensation Act* in the late 1980's have meant that in practice very few workers are able to utilise their common law rights against their employer. In South Australia the remaining rights of an employee to sue his employer at common law for damages as a result of a negligently caused work place accident were abolished in 1992. In Victoria, since the Kennett government came to power in September 1992, workers rights under the *Accident Compensation Act*, 1985 have been systematically dismantled.

Recent amendments in June of this year have punished workers' lawyers as well by the imposition of costs sanctions for the commencement of proceedings in the wrong jurisdiction. In Western Australia the *Workers' Compensation and Rehabilitation Act*, 1993 drastically curtailed the rights of workers to sue their employers for damages for negligence. The proposed changes to the common law were announced in the Western Australian parliament at 3.30 pm on 30 June 1993 to take effect at 4.00 pm the same day.

Here in Queensland the Kennedy Commission of Inquiry has recommended significant restrictions on the rights of workers to sue at common law. The Commission was bombarded by nearly 200 self-serving submissions by employers in a highly orchestrated campaign designed to convey the false impression that Queenslanders supported the erosion of fundamental rights. If the proposals become law, more than two thirds of common law claims by workers in Queensland will be eliminated.

The erosion of the common law rights of working people to which I have referred is but part of a trend which threatens to affect all accident victims in this country. Before long we can expect restrictions on the rights of citizens to sue for injuries sustained because of the fault of product manufacturers, occupiers of premises and medical practitioners, just as we have already seen widespread restrictions on the rights to sue of victims of motor vehicle and work accidents.

The common law system of determining compensation is unique in its capacity for fair and open dispute resolution. The tort remedy, it should be remembered, was one of the earliest protections available to the individual in society. Our tort law is derived from the English system, which existed before organised government. It antedates enforceable agreements. It antedates the criminal law.

Of course the common law system has its defects. But its greatest attributes are its capacity for change and its ability to evolve in accordance with the expectations of society. One of its hallmarks is that it determines disputes openly and accountably according to well established principles of fairness.

The self-interested pressure groups who seek to dismantle the common law ignore not only its antiquity but also its contemporary social significance. The primary purpose of the common law is of course to ensure that victims of careless

conduct receive proper compensation. However its secondary benefit is increasingly important. The threat of a civil law suit is an important moderator of irresponsible commercial and professional behaviour. Commercial power is not easily controlled. It owes no allegiance to moral principle, only to the bottom line. The rule of the common law maintains individual rights and curbs such amoral corporate behaviour.

The common law can achieve on a micro level what governments are unable or unwilling to accomplish on a macro level. Because of the common law, Australia is a safer and healthier place. We can thank the common law for liberating many public places from passive smoke. In the 1992 case of *Scholem v Department of Health*[1] an Australian jury decided, for the first time in the world, that an employer was negligent and would have to pay damages for exposing a plaintiff to the cigarette smoke of other people in her workplace. In the days following that decision all over Australia work and public places became smoke free, restaurants and government offices followed suite. Airport buildings throughout the country became cleaner over night. Even foreign airlines flying into Australia changed their practices, permanently and for the better. The decision of 4 jurors in a small 19th century courtroom in Sydney achieved what successive federal and state governments, under the spell of the powerful tobacco lobby, could never accomplish.

By the decision in *Rogers v Whittaker*[2] the patrician notion that when it comes to providing information and warnings about medical treatment, "doctor knows best", was laid to rest in this country. In this case the common law championed the cause of the consumer and in so doing removed one of the last pockets of professional immunity from public scrutiny. An important aspect of health care in this country which legislation could never achieve, namely proper communication between doctor and patient, became a high priority for prudent medical professionals. We can thank the common law for that development. There can be no doubt that had this been the subject of legislative consideration, the medical profession would have lobbied with such force that no government would have had the courage to make such a change.

The beneficial changes I have mentioned have been brought about not by powerful lobby groups or influential individuals but by ordinary people. Without the civil lawsuit and the potential for unrestricted damages and their deterrent effect, asbestos, unsafe blood products and bad work practices would be killing and maiming untold numbers of Australians today.

The cost of common law compensation in this country is the subject of much disinformation. The insurance industry, greedy for even greater profits, blames the plaintiffs and their lawyers. They stress only the need to lower premiums without regard to the human consequences of inadequate compensation for injuries and lost earning capacity. Governments pander to insurance propaganda. They reduce benefits to keep premiums to what they describe as "politically acceptable" levels. Yet if the community realised what they were losing in benefits and fundamental rights, they would undoubtedly prefer to pay a reasonable premium. In the area of motor vehicle accident insurance for instance, many motorists pay significantly higher premiums to insure their vehicles against property damage than they are required to pay to protect themselves and their families under compulsory third party insurance schemes.

The cost of common law compensation in this country is not due to avaricious ambulance-chasing plaintiff lawyers. On the contrary the lawyers who act for accident victims are increasingly required to bear the costs of our civil justice system, at least until a verdict is achieved for a plaintiff. In the last Federal Budget funding for an already inadequate legal aid system was cut by a further $120 million over three years. In personal injuries cases legal aid effectively does not now exist. In difficult cases the only way in which deserving plaintiffs can achieve justice is through the preparedness of their lawyers to bear the financial risk.

The cost of common law compensation is caused first and foremost by negligent behaviour. For example the reason why there are so many medical negligence claims is because there is so much medical negligence. Another reason for the cost of the common law is the failure of governments, manufacturers, insurers and professional associations to take proper steps, to deter, prevent or penalise such negligence.

Moreover the carelessness which causes the blow-out in compensation costs is not only that of the tortfeasors. The inefficiency of the insurance industry which stands behind those tortfeasors is also a major contributor. Lack of accountability is endemic in the insurance industry. It extends from the boffins at the top who set premiums at unsustainable levels, and then grovel to governments to cap benefits, to the faceless claims-managers at the bottom who make repeated mistakes in settlement negotiations due to ignorance of the evidence.

The weakest intellectual link in the whole litigation chain is often the insurance claims manager who is entrusted with the decision to settle or not to

settle. Experience shows us that plaintiffs are often quite happy to compromise a claim for a lesser sum than they might ultimately achieve at an early stage of the hearing rather than go through the trauma and uncertainty of the court process. Yet all too often the clerk at the insurance company entrusted with the instructions to settle never even bothers to go to court to assess the evidence himself and make an informed decision as to the reasonableness of the plaintiff's order. He often keeps a judge, an associate, two barristers, two solicitors, countless witnesses and the plaintiff waiting while he comes back from a meeting or from lunch to convey instructions from his bureaucratic bunker. When he finally makes up his mind, all too often he lacks the courage or knowledge of the case necessary to accept a reasonable settlement offer by the plaintiff. Ultimately, his blunder, repeated daily in courts throughout the country, costs his company several times his annual salary. And when this happens, and premiums inevitably rise, is he ever held accountable? Certainly not by the lawyers he instructs. Far from being criticised he is wined and dined by them the day after his reckless decision has cost his employer heaps. In the course of that long, expensive meal the judge and the plaintiff's lawyers are blamed for the unhappy result and for the rises in premiums which flow from such outcomes.

Instead of punishing the victims, governments should be doing something about the inefficiencies and sheer greed of the insurance industry.

Instead of penalising some of the most disadvantaged people in society, its accident victims, governments should be concentrating on preventing accidents and punishing wrongdoers.

Instead of providing fast track facilities for criminals, commercial litigants and for politicians making unmeritorious defamation claims, governments should be concentrating on expediting and facilitating access to justice for the most frequent and most deserving users of their courts, the victims of accidents caused by the carelessness of others.

The critical question remains. How do we get governments to listen and act? How do we persuade people of the importance of common law remedies? How do we redress the imbalance between the resources available to the victim and those available to the tortfeasor? How do we ensure that there is a future for the common law in Australia?

Four years ago a handful of personal injury lawyers from various states met to address these issues. They formed an association. Originally known as the Association of Personal Injury Lawyers of Australia, the group changed its name to the Australian Plaintiff Lawyers Association, better to reflect its commitment

Peter Semmler QC delivers the President's Address to the 1996 APLA National Conference.

to the cause of consumers and accident victims. At its launch in Sydney this group was fortunate to have as its guest speaker Roxanne Barton-Conlin, the then president of an organisation which inspired the formation of APLA, the Association of Trial Lawyers of America. Four years further on, here at our inaugural national conference we are fortunate to have with us the current President of the Association of Trial Lawyers of America, Howard Twiggs. From 6 members in 1992 we have grown to more than 540 members at the present time. Our numbers are rapidly rising. We now have branches in every state and territory except Tasmania.

As APLA grows, so the prognosis for the common law in this country improves.

In its short life, APLA has had significant success in individual states and federally in helping to retain people's common law rights and the processes of the common law. For instance, by lobbying the independents in the New South Wales Upper House in 1993 we prevented the passage of legislation which would have eliminated the right to jury trial in personal injuries cases. Our submissions to the

Tito Inquiry into health care were an important factor in the preservation of the medical negligence action. In this state APLA has played an important part in recent months in preventing the passage of changes recommended by the Kennedy

Commission of Inquiry.

The disadvantage suffered by individual lawyers acting for plaintiffs compared to their better financed counterparts acting for insurers and medical defence unions is being addressed by APLA.

Four years ago, in medical negligence cases for example, the absence of an effective network amongst plaintiffs and the inability to identify and access an expert prepared to assist prevented many otherwise meritorious cases from succeeding in court. Our expert database now contains over 300 experts all of whom have been recommended by APLA members who are prepared to provide opinions for plaintiffs.

Our regular publication, the APLA Update, contains up to the minute information concerning developments in, and attempts to dismantle, the common law in this country.Our special interest litigation groups provide opportunities for networking and the sharing of specialist information about particular classes of case. I believe that all of us will benefit from the outstanding papers which are to be presented over the next three days.

Despite our success to date there is no room for complacency. Plaintiff lawyers are the keepers of the common law. We cannot rely upon law societies and bar associations to protect the interests of plaintiffs and their lawyers.

Unless lawyers who understand, take a stand, one day the nation's courts and common law processes could become the exclusive preserve of defamation litigants, corporations and criminals. The people who deserve most to have access to our courts, the victims of accidents caused by the carelessness of others, will be shut out.

If organisations such as APLA do not take the lead the common law rights which have served people so well for so long will disappear, completely and forever. Rather than stability and savings the result will be an increase in harmful conduct and cost. Rather than progress the outcome will be a return to a less fair and less responsible society.

References:

1. Decision of New South Wales District Court jury given on 27 May 1992.
2. (1992) 175 CLR 479

Medical Negligence Special Interest Group

Catherine Henry, MacMahon Drake Balding, Sydney, Convenor, Medical Negligence Group

It was encouraging to have a full room of people at the first meeting of this Special Interest Group at the Noosa Conference in October. The group resolved to have meetings in each state (ideally to feature a guest speaker) throughout the year with the following state convenors responsible for branch activities:

NSW: David Hirsch, Cashman & Partners, Sydney

VIC: Andrea Wallace, Holding Redlich, Melbourne

SA: Jessica Hope, Xenophou & Co, Adelaide

NT: John Neill, Ward Keller, Darwin

QLD: Gemma McGrath, Cartner Capner, Brisbane

WA: Nick Mullany, Barrister, Perth

Minutes of the Noosa meeting have been sent to those who attended the first meeting.

It was also resolved that some form of transcription of the proceedings of future meetings in the various states should be maintained for the membership of the SIG as a whole. The mode of recording will obviously be dictated by cost considerations and this will have to be monitored over time. There will be one face to face meeting each year at the National Conference. Of course, interstate members should feel encouraged to attend meetings in other states throughout the year if individual practices (and finances!) permit.

Fiona Campbell of Vizzone Ruggero, Solicitors in Sydney has kindly agreed to act as Secretary of the Group. Any correspondence which is to be circulated to members of SIG concerning state meetings or any other matter of interest should be sent to Fiona for distribution at the following address:

Fiona Campbell, Vizzone Ruggero, DX 242 Sydney or 1129 Botany Road, Mascot, NSW 2020 Fax: (02) 9317 5715

The general aims of the SIG are agreed to be as follows:

- To keep members apprised of recent developments and cases settled, determined by the Courts and "in the pipeline" by means of exchange between members;
- To facilitate exchange of pleadings in medical negligence matters between members;