President's column

Michael Slattery QC

In the last two years Ian Harrison SC has served in the office of President of the New South Wales Bar with great distinction. Ian has given constant assurance to members of his personal concern for their welfare and best interests. He has done so much to strengthen the Bar during this period. The Bar's present stability is very much a product of his commitment.

Ian undertook a very high administrative load as president, including an exceptional number of official and private speaking engagements. In all of these he has been an inspiring and positive public face of the Bar. I am grateful to have the continuing advantage of his experience and judgment to guide me and I am honoured to be elected as Ian's successor.

This first message from the president raises for reflection one public policy question and two Bar issues.

The Civil Liability and Worker's Compensation Acts

The Civil Liability and the Workers Compensation Acts are now excluding many genuine and serious claims for personal injury from civil redress at common law.

Over the last three years the Honourable J J Spigelman AC, Chief Justice of New South Wales, has given several speeches about this legislation. At least three main themes emerge from those speeches and they are an important guide to the Bar as it formulates reasonable proposals for change.

First the reform of actions for personal injury must be approached in a principled and consistent way rather than by the creation of underwriter driven special liability schemes. The Civil Liability Act is only one of such schemes. The Workers Compensation and Motor Accidents legislation are two of the others. The chief justice warned in 2002:

> An approach that restricts liability and damages in a principled manner is capable of resulting in the same degree of control of insurance premiums as that achieved by the special schemes. Such an approach would, in my opinion, achieve that result in a manner more likely to be regarded in the long term as fair and, therefore, to receive broad community acceptance. [1]

Under the guidance of its presidents at the time, Ruth McColl SC and Bret Walker SC, the New South Wales Bar Association maintained during the debate in relation to the workers' compensation changes of 2001 and the Civil Liability Act in 2002 that only principled reforms should be undertaken. The community's sense of the coherence of the law is diminished by inconsistency between underwriter-driven liability schemes. A key objective in future law reform should be the restoration of consistency across all types of awards of compensation for personal injuries.

Second, legislated thresholds and other restrictions on the award of damages which operate to exclude claims for serious injury are apt to lead to growing community resentment. Two years after these Acts came into operation, the chief justice made the following judgment about their effects:

> In particular, the introduction of caps on recovery and thresholds before recovery – an underwriter driven, not principled change – has led to considerable controversy The introduction of the requirement that a person be subject to 15 per cent of whole or body impairment – that percentage is lower in some states – before being able to recover general damages has been the subject of controversy. It does mean that some people who are quite seriously injured are not able to sue at all. More than any other factor I envisage this restriction will be seen as much too restrictive.
>
> …
>
> Small claims raise very real issues about transaction costs. Nevertheless, there is likely to be a growing body of persons who have suffered injury which they believe to be significant and who resent their inability to receive compensation. [2]

The present operation of those thresholds and restrictions should now be carefully scrutinised with a view to their improvement. Recent outcomes suggest that adjustment is needed to restore fairness to compensation for personal injury in this state. The enactments of which the chief justice is speaking have in fact operated like a legislative baseball bat. The filings of the District Court of New South Wales have fallen from over 19,000 in 2001/2002 to 5,500 in 2004/2005. Unless one makes the improbable assumption that the difference between these two figures is entirely made up of unmeritorious claims, the excluded claims represent a considerable and growing body of justifiable community resentment.

The third of the chief justice's themes is that legislative changes in New South Wales have given government bodies in this state an almost unique set of immunities from civil liability. In September this year Chief Justice Spigelman said:

> The changes in New South Wales went well beyond what has occurred in other states. That included significant changes that have no implication for insurance premiums paid by individual organisations or companies. The changes in New South Wales have fundamentally altered the ability of citizens to sue the government and its instrumentalities. These changes go well beyond anything that was recommended by the Ipp report. New South Wales is virtually the only state to have gone so far in restricting the liability of government.[3]

It should be a serious question for public debate in New South Wales why only the citizens of this state are now unable to take necessary and meritorious civil action against government bodies.

There is little advantage in now wrestling with the rights and wrongs of the passage of the Workers Compensation and Civil Liability Act changes of 2001 and 2002. Next year, using the chief justice's three themes as a guide, the Bar will put

submissions to the legislature for principled and responsible changes to these and other pieces of scheme legislation.

Advocacy at the Bar

One of the Bar's principal claims to provide a specialised service to its clients is through the quality of its persuasive advocacy. This specialty comes in various forms, appellate advocacy, the preparation of written submissions and the art of cross-examination. Over many years our Bar's CPD programs have included presentations on these aspects of court craft. Next year I will ask for a special emphasis on the practical development these skills.

This emphasis could perhaps include a few useful guides derived from classical times that underlie the art of forensic persuasion. Aristotle's *Art of Rhetoric* says that rhetoric may be defined as 'the faculty of discerning the possible means of persuasion in each particular case'. This definition remains a beacon of hope to the advocate who has not yet found a winning argument. There is always a means of persuasion. The skill of the advocate is to keep looking for it and then to find and use it.

Women at the Bar

One of our common objectives is the pursuit of excellence as advocates serving the administration of justice. Promoting the finest legal intellects into careers in advocacy is consistent with this objective.

Over the past 15 years women have comprised more than half the graduates and even higher proportions of the honours graduates from most New South Wales Law Schools. These impressive levels of women's achievement at graduation have not been well matched by progress in professional advocacy careers. Over the same period, the total number of women at the Bar has moved from approximately 10 per cent to just over 14 per cent of all barristers in practice. To varying degrees the pattern demonstrated in these figures is replicated in other Australian states.

The independent Bar is an essential community service. It is better able to serve the community if the best and brightest law graduates choose to practise as advocates. The Bar is disabled from doing this if many of our law schools finest graduates are not choosing to come to the Bar and embark on a career in advocacy.

This logic suggests that this issue is not to be viewed narrowly or to be solved in the interests of only part of the Bar. Rather it is an issue for the whole Bar. Unless the Bar attracts and retains significant numbers of women law graduates we will not have the best possible Bar.

The Bar now has an opportunity to enrich our courts with some of the excellent female and male legal intellects graduating from our law schools and commencing practice. I hope to assist the Bar to grasp that opportunity.

1 'Negligence: The last outpost to the welfare state', Judicial Conference of Australia, Launceston, 27 April 2002

2 'The new liability structure in Australia', Address to the Swiss Re Liability Conference, Sydney, 14 September 2004.

3 'Negligence: Is recovery for personal injury too generous', Address to the 14th Commonwealth law Conference, London, 14 September 2005

Letter to the editor

Dear Sir,

In the winter 2005 edition of *Bar News*, Dina Yehia asserts that I demonstrated a misconception about the evidentiary value of DNA evidence when I delivered the Sir Ninian Stephens Lecture for 2005.

The fallibility of DNA evidence, Ms Yehia posited, was demonstrated in *JR v Bropho* [2004] WADC 182 in which the defence called evidence that the calculation of statistics could produce misleading evidence in cases involving Aboriginal people. She notes that:

> the objection to the DNA evidence was successful…And to think that without the challenge to the DNA evidence by some 'tricky' defence lawyer...we may have continued to rely on statistical interpretation of DNA evidence which is not necessarily reliable…

The case was the trial of a person for sexual assaults upon a 13-14 year old girl resulting in the birth of a child, with the child's paternity at issue.

The postscript to that case is that the National Institute of Forensic Science Standing Committee on Sub-Population Data, convened (as it indicates in the foreword to its report) as a direct result of the *Bropho* ruling, delivered its findings on 7 December 2004. The committee was constituted by three scientists including R John Mitchell, whose evidence that the prosecution DNA evidence may not be reliable was accepted by the trial judge, who then acquitted Bropho.

The report has been independently reviewed and statistically validated outside Australia. Its findings were that the statistical factor used in the *Bropho* calculations is a sufficiently conservative figure to be applied even in relation to Aboriginal sub-populations. The prosecution evidence on DNA in *Bropho* was therefore proved to be correct.

It should now be clear to your readers where the 'fallacy' lies.

Margaret Cunneen