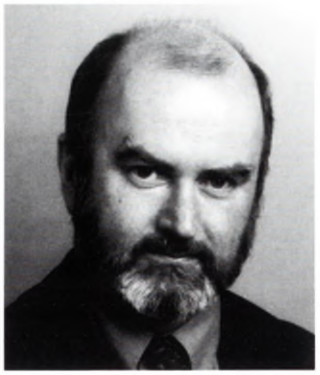
Boarding the bus to topsy turvy land

Peter Cashman, APLA National President



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A woman in the United States recently developed breast cancer. She was unaware of this until three years after she saw her doctor. She claimed that the doctor had failed to diagnose her problem and commenced legal proceedings for damages in Indiana. The doctor claimed, based on relatively recent changes to the law in that State, that her claim should be dismissed because it was not filed within the new time limit of two years after the alleged negligence had occurred.

According to the Indiana Supreme Court, to enforce such a law would have meant barring the woman from court because she had not sued within the period when she thought she was healthy. The court proceeded to find that the law which purported to require her to bring an action within two years was unconstitutional and therefore invalid. Any other decision, according to Justice Selby, "would be boarding the bus to topsy turvy land".

This is one of around 100 decisions by state appeal and trial courts in the United States declaring certain new liability laws (which severely restrict plaintiffs' rights or reduce damages) invalid because they violate certain "constitutional" rights (the *New York Times*, Friday July 16, 1999). Trial lawyers in the United States, assisted by public interest and consumer organisations, have now successfully challenged certain tort "reform" legislation throughout the United States "in one of the country's fiercest but least noticed legal wars" (*New York Times*).

Based on federal and state constitutions, drawing inspiration from the Magna Carta and, in part, based on arguments concerning the Separation of Powers, there have been successful challenges to laws which have purported to limit the amount of recovery of damages for pain and suffering, limited the time period for commencement of proceedings and sought to prevent consumers and plaintiffs from pursuing fundamental legal rights, including recovery of compensation in wrongful death actions.

In case after case throughout the United States, assisted by the American Trial Lawyers Association and its members, trial lawyers have resurrected long forgotten provisions of state constitutions which provide "the right to a remedy", many of which have no parallel in the federal United States Constitution. The constitutions of 38 states expressly guarantee every person a remedy for all tortious injuries - remedies that is for all injuries to "their persons, property and reputation" (Miltenberg: "The Revolutionary Right to a Remedy", *Trial* Magazine 48, March 1998). In part, such remedies are derived from the Magna Carta (1215).

In many respects, such legal challenges were in response to business-orchestrated changes to liability laws which were designed to protect the interests of corporations and their insurers at the expense of the rights of plaintiffs and consumers.

In the United States context at least, this quiet legal revolution has given rise to a tug of war between the courts and the legislatures over fundamental legal rights and has raised some interesting constitutional questions concerning the Separation of Powers.

The Illinois Supreme Court, in a recent decision, struck down a comprehensive and draconian law "reform" statute, noting the constitutional constraints on the legislatures right to alter the common law.

In Ohio, there has been a similar recent challenge to laws which went into effect on January 27, 1997. Such new laws made dramatic changes to: (a) civil procedure and evidence; (b) quantification and apportionment of damages; (c) joint and several liability; (d) the collateral source rule; (e) jurisdiction; (f) statutes of limitation and repose; (g) contributory negligence; (h) legal presumptions; (i) medical negligence; and (j) products liability.

The "reform" legislation was introduced after lobbying by powerful interest groups, including the three largest automobile manufacturers, along with the insurance industry (Merit Brief of Relators, Ohio Academy of Trial Lawyers et. al. "*Statement of Case and Facts*").

These legislative reforms were challenged, including on the ground that the legislature had improperly appropriated powers reserved for the judiciary. Seven other constitutional grounds were relied upon in the legal challenge in the Ohio Supreme Court. Those challenging the legislation also relied upon the argument that legal rights were a species of property which could not be adversely affected by legislative action without violating due process or constituting a taking without compensation, in violation of fundamental constitutional rights.

The respondents to the action contended, inter alia, that the Ohio State legislature had carte blanche to modify or abrogate common law rights and remedies.

The issues are of interest outside of Ohio. The United States litigation as a whole is of relevance outside North America.

Recent developments in Australia suggest that we appear to be "boarding the bus to topsy turvy land". Interestingly, it is corporate defendants who are now seeking to mount constitutional challenges to the currently established legal rights of plaintiffs and consumers.

In the product liability class action presently pending in the Federal Court arising out of failed laparoscopic sterilisations allegedly caused by defective filshie clips and applicators, the respondents have intimated that the class action proceedings may be subject to attack on constitutional grounds. ▶

In the tobacco class action proceedings presently pending in the Federal Court before Justice Wilcox, the tobacco company respondents have sought to strike out the proceedings, including on the ground that the court is allegedly being asked to deal with one or more questions which are not within the judicial power of the Commonwealth as each question and its determination does not constitute a "matter" within the meaning of Sections 75 and 76 of the Constitution. Only jurisdiction in respect of a "matter" may be conferred upon a court constituted under Chapter III of the Constitution. The refusal of Justice Wilcox to strike out the proceedings is now the subject of an application for special leave to appeal to the Federal Court and is no doubt destined for the High Court.

In earlier Federal Court proceedings, the United States Tobacco Company mounted a constitutional challenge to provisions of the *Trade Practices Act* relied upon by the Minister for Consumer Affairs in banning the importation of chewing tobacco and other smokeless tobacco products. In proceedings instituted in the Federal Court, the United States Tobacco Company contended, inter alia, that to the extent that Division 1A of Part V of the *Trade Practices Act* purports to empower the Minister for Consumer Affairs to prohibit the supply of [harmful] goods, those provisions are beyond the power of the Commonwealth of Australia to legislate and, in particular, are beyond the legislative power granted by section 51(xx) of the Constitution. That case did not proceed to a final determination of the constitutional validity of the provisions of the *Trade Practices Act*.

Interestingly, in recent class action cases before the United States Supreme Court, questions have arisen as to the constitutionality of several class action settlements, including proposed settlements of mass asbestos claims.

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In the most recent decision, which was handed down on June 23, 1999 (*Ortiz v Fibreboard Corp*, 1999 WL 412604 US) the constitutional challenge to the settlement was based, in part, on the contention that the class claims were non justiciable under Article III of the United States Constitution. Like in the earlier decision of the Supreme Court in *Amchem Products Inc v Windsor* (521 US 591, S.Ct 2231,138 L. Ed. 689, 1997) the Supreme Court overturned the class action settlement on the basis of the failure to comply with the "logically antecedent" certification requirements of Rule 23 of the Federal rules of civil procedure and declined to rule on the constitutional issues.

In the United States context, the challenges to class action settlement were brought by lawyers representing asbestos victims. Fortunately, in their successful challenges it was not legally necessary to sustain the constitutional grounds of the attack.

Unlike in the United States, in Australia we have not (yet?) witnessed a proliferation of legal challenges to State laws which have abolished legal rights or capped damages (particularly in the areas of employment and motor vehicle accidents). By way of contrast, we appear to be witnessing constitutional challenges mounted on behalf of defendants seeking to invalidate or challenge laws and proceedings which seek to confer rights on injured persons and consumers. In this respect at least, we appear to be already "on the bus to topsy turvy land".

The challenge for plaintiffs lawyers is: to resist current challenges to class actions; to mount a counter attack on regressive legislative "reforms" and restrictive laws; and to find legislative alternatives and creative constitutional foundations for rights which have been eroded or which are under attack.

Recent developments in the United States have some important implications for APLA members in Australia. ■