In defence of economic interest and entrepreneurial plaintiff lawyers

This year marks the 25th anniversary of the establishment of the Australian Law Reform Commission. This was marked by a recent conference in Sydney at which distinguished speakers from throughout Australia and overseas reflected upon the law reform process and the civil justice system.

To date, approximately three quarters of the ALRC reports have been translated into legislative action. This is a considerable achievement given the relatively controversial nature of a number of the references and the changing federal political environment.

One of the major recommendations of the ALRC was in respect of class actions and this led to the introduction of part IVA of the *Federal Court Act*. Since coming into force on 5 March 1992, there have been about one hundred class actions commenced in the Federal Court of Australia.

In a paper delivered to the recent ALRC conference in Sydney, Dr. Deborah Hensler addressed a number of issues concerning mass tort and class action litigation in the United States, based in part on empirical research, conducted by the Institute for Civil Justice, and considerations of public policy.

The paper addressed a number of obvious benefits of class action litigation: access to justice and deterrence of various forms of injurious or harmful conduct. It also addressed a number of more problematic aspects of mass tort and class action litigation. She noted that individual rights were often sacrificed when settlements resulted in the formulaic allocation of damages. Non justiciable claims in respect of plaintiffs who have not as yet suffered injury are controversial when such claims are resolved in mass class action settlements which obtain judicial approval that purportedly prevents litigation of such claims.

Dr Hensler also observed that there have been a number of instances where corporations and some mass tort lawyers have become odd bed-fellows with alliances having been formed for the purpose of settling mass tort claims. Mass settlements often erode the value of settlements for those who are seriously injured at present, may provide inadequate funding for those injured in the future and also result in settlements where payments to foreign claimants are often reduced in order to provide more money for domestic United States claimants.

At the policy level, Dr Hensler also raised a number of interesting and somewhat controversial issues concerning the role of plaintiff lawyers and the value and impact of "social policy" litigation. She distinguished "social policy" litigation from both (a) mass tort litigation arising out of exposure to products or substances and (b) money damage class actions arising out of consumer transactions and violations of consumer protection and other laws. As she noted, social policy class action are cases brought by public officials and private lawyers who have come together to seek damages and changes in practice including in litigation against tobacco companies, gun manufacturers and, at least in the United States, health services financing organisations (HMOs). As she notes, such litigation has not only sought recovery of damages but also seeks to implement changes in product availability and business practices.

Dr. Hensler raised concern about private lawyers - driven by financial incentive - holding themselves out as representatives of a public that played no role in selecting them. In her view, this role "challenges our concept of governance in a democratic society..."

Her concerns raise some interesting policy issues, including what we mean by "a democratic society". 19th century notions on democracy need to be considered in the context of the reality of the 21st century where, at least in the view of some commentators, corporations exert an inordinate influence over so-called democratic processes. Direct and covert funding and influence on individual politicians and political parties is only one dimension of this complex problem. In the United States context, even the notion of democratically elected judges needs to be evaluated in the context of the empirical reality that interest groups finance candidates for judicial office.

The most recent study of funding of candidates for state judicial office in the United States shows that defence lawyers outspend trial lawyers (2 to 1) and funding came from firms representing businesses and doctors in litigation.

Whatever reservations there may be about private lawyers or "entrepreneurial" lawyers driven by financial incentives, in Australia this needs to be evaluated in the context of the following aspects of the civil justice system.

First, defence firms are driven by financial incentives and not infrequently are happy to derive substantial pecuniary gain in defending meritorious claims and seeking to prevent, delay or, as a last resort, reduce the level of payments to injured plaintiffs.

Second, legal aid or public funding is simply unavailable in Australia.

Third, notwithstanding the alleged lack of money to fund plaintiffs with meritorious claims, public subsidies are provided for defendants and insurers, with no limits on the tax deductibility of legal expenses incurred in the unmeritorious defence of claims and the pursuit of appeals which fail.

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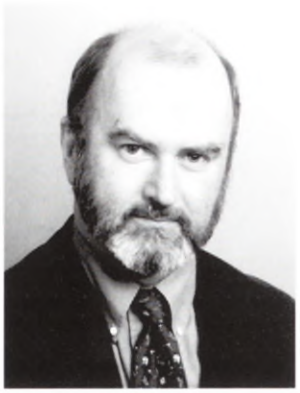

Fourth, regulatory authorities are subject to budgetary constraints and cutbacks in funding. Although government spending has remained a relatively constant proportion of GDP in recent years, regulatory bodies such as APRA and ASIC have had major funding cuts. In the case of APRA - a cut of 18% or $10.7million; in the case of ASIC a loss of 2% of its budget, despite an increase in staff.

Fifth, governments themselves cannot always be relied upon to take necessary action or to even facilitate action by others.

One may ask rhetorically whether we can rely on governments to protect the public from the evils of tobacco when public revenue is increasingly dependant on income from the sale of tobacco products. Can we assume that the government will take steps to prevent the adverse effects of gambling when revenue consideration often drive regulatory policy?

Economic (self) interest - said to be an undesirable motivating influence on private lawyers - may be said to have an adverse effect in many areas of governmental responsibility and policy and has served (a) to corrode commitment to genuine public interest protection; (b) to diminish expenditure on regulatory enforcement; and (c) to undermine legislative initiatives.

All too often, genuine public interest is subservient to narrowly conceived economic rationalism in which interest is the operative word but pecuniary is regarded as synonymous with public.

Regrettable though it may be, the courts are all too often the last bastion for protecting consumers and other individuals whose financial and personal livelihoods are destroyed by defective products, dangerous work practices, toxic chemicals and so on.

These products and practices may only be in the market or work place because of a failure of governments and regulatory authorities to prevent this in the first place.

The genesis of such harm may all too often be found in economic self interest, and not infrequently some corporations have put corporate profit ahead of the health and welfare of consumers, customers and employees.

Rather than being subject to criticism on the grounds of economic self interest, plaintiff lawyers should receive commendation as they are often the last remaining foot soldiers, in the last line of defence, seeking to redress the abuses of both corporate and governmental power.

In considering what Dr Hensler has referred to as the "concept of governance in a democratic society", we need to reflect upon the role of the courts and plaintiff lawyers in connection with the award of damages for injured individuals in a system of justice whereby governments, certain professions and other self interested sectors of society are seeking to place caps on damages to injured individuals.

In this area there have been some interesting developments in the United States. In numerous jurisdictions, legislators - at the behest of big business, insurers and other lobby groups - have legislated to cap or eliminate damages and to require legal proceedings to be commenced within short time frames (often expiring before the injured person is aware of either the injury or the cause of action). In various state courts throughout the United States, in reliance on state constitutional provisions, courts have declared such so-called tort reform (or "tort deform") measures to be unconstitutional (for example Oregon, Indiana, Illinois and Ohio). In response, following lobbying by those with a vested pecuniary interest, legislators have proposed further legislative "reform". For example, in Oregon, there is proposed legislation in response to a ruling by the Oregon Supreme Court that the State's twelve year-old cap of $500,000 for non economic damages was unconstitutional.

There are many who would no doubt seek to defend the right of the legislature to cap damages in the manner proposed. No doubt this could be said to be, to use Dr Hensler's words, implementation of proper governance in a democratic society. However, a recent poll in Oregon revealed that 75% of the public who voted (with a 47% response rate) rejected the proposition that would have allowed legislators to place caps or limits on how much people should receive in personal injury litigation. Interestingly, the campaign against such legislation was conducted by an organisation calling itself the "Trust Juries not Politicians Coalition".

Whatever ones views about the role of "entrepreneurial" plaintiffs lawyers, it is difficult to disagree with Dr Hensler's conclusion that private litigation may be the means of achieving important goals, not just in terms of compensation, but in deterring practices that may harm society.

Economic self interest may be regarded by some as a dubious rationale for the motivation of plaintiff lawyers, whether in the class action context or elsewhere. However, it is such lawyers who have been primarily responsible for notable recent successes, including against the tobacco industry in the United States, facilitating settlements whereby US tobacco companies will pay over US $250 billion in damages to pay for the costs borne by the public purse in treating people with tobacco induced diseases. Moreover, most plaintiff lawyers and class action lawyers are motivated by a genuine desire to redress injustice and serve the interests of their clients, who would normally be turned away from the doors of most other law firms, and from the doors of almost all corporate and defence firms, as they are unable to afford the monthly billing and are incapable for paying for the transaction costs without a favourable outcome.

Without representation by plaintiff lawyers, who are prepared to put their money where their mouth is, many injured plaintiffs would be denied representation because of what could be described as the economic self-interest of other sectors of the private legal profession and the dubious economic rationalism of governments who deny legal aid to plaintiffs because of alleged lack of funds. Yet at the same time they forego substantial revenue by allowing tax deductibility of legal expenses by defendant corporations and insurers, without regard to the merits of the defence of claims. PL