Medical negligence – on the horizon

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Introduction

It is difficult to think of an aspect of Australian medical negligence law which is not the subject of recent, or proposed, change. The area is high on the agenda of the medical profession, the Australian government and many of the states. Changes have already been made, and more may be on the horizon.

Developments in New South Wales

This year, New South Wales became the first Australian jurisdiction to modify the substantive law regarding medical negligence claims.

The *Health Care Liability Act* 2001 NSW came into effect on 5 July 2001. A detailed overview of the aspects of that legislation restricting the scope of damages which would otherwise have been available at common law appeared in the August issue of *Plaintiff*.

Briefly recapping, the Act seeks to deal with escalating medical indemnity premiums by reducing damages payable to injured patients. It creates a threshold below which general damages (non economic loss) must be reduced or not awarded at all.

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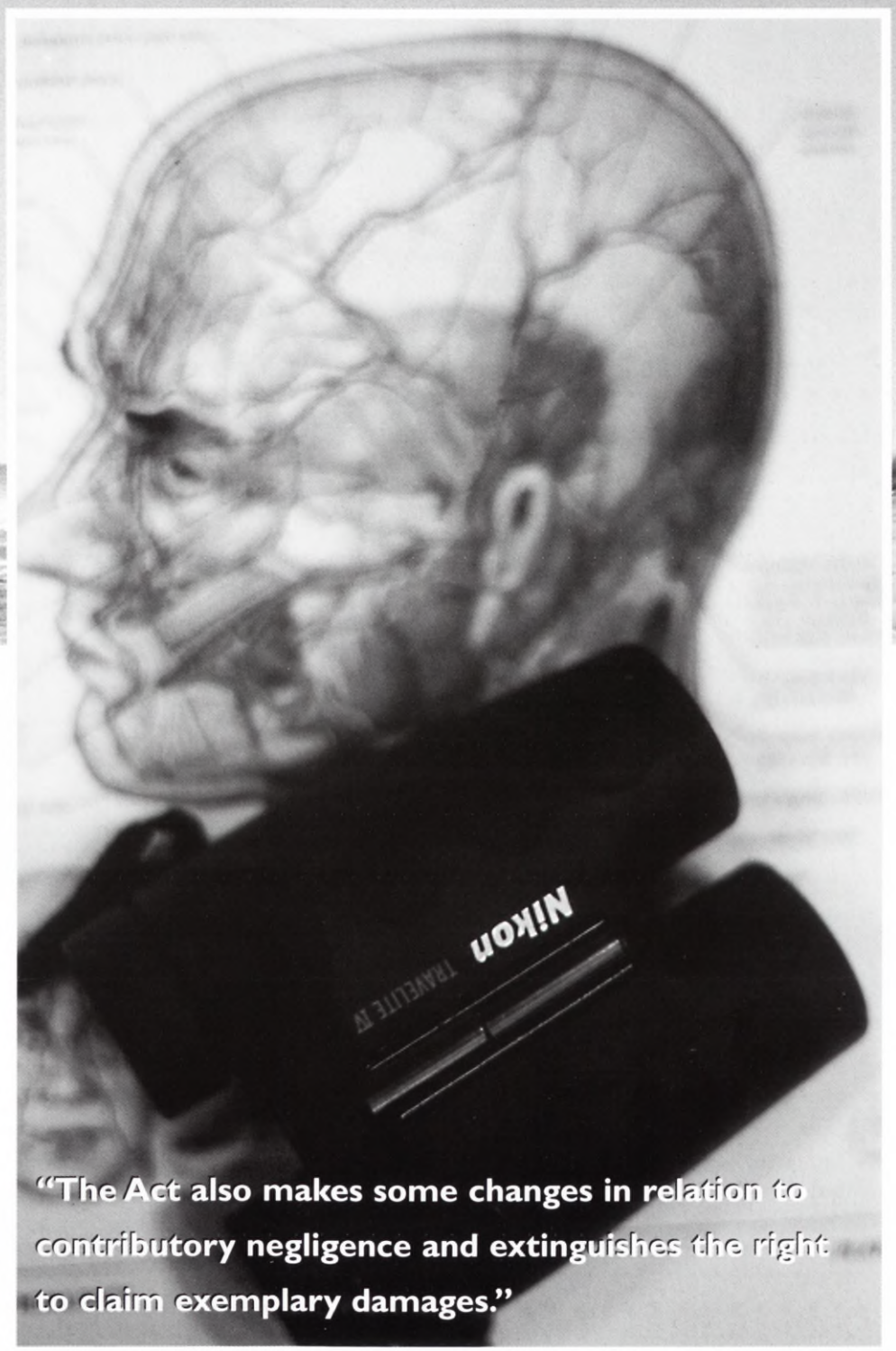

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It also provides an upper end cap on general damages (indexed over time), however that is likely to be of little consequence in most cases and unlikely to give rise to any significant costs savings.

The other significant change is the increase in the discount rate for future economic loss claims from the common law 3% rate to a 5% rate, which is also used in Motor Accident and Workers Compensation statutory schemes. Although superficially minor, the 2% change will reduce lump sum awards significantly. For example, a 40-year projection would be reduced by 25%.

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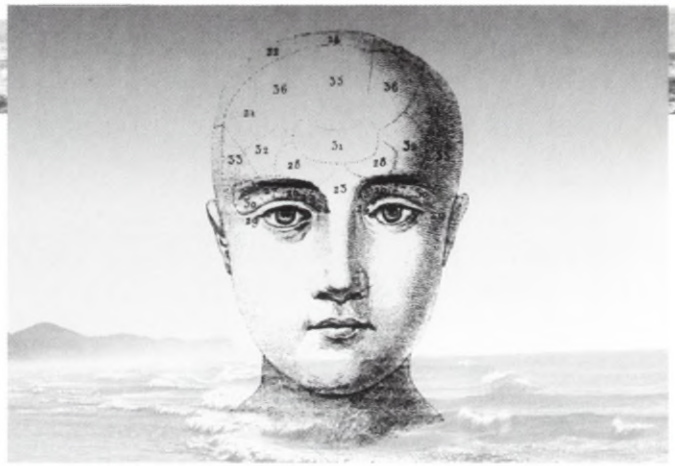
Importantly however, there are no significant changes to claims for future care provided either on a gratuitous or paid basis.

To date, focus has been upon the damages aspect of the *Health Care Liability Act*. However, Part 3 of the Act (which has yet to be proclaimed) may become important in the longer term. That Part addresses (primarily by way of regulation) issues such as compulsory professional indemnity insurance of an approved type, mandatory requirements relating to data collection reporting and risk management and other similar issues concerning the operation of medical defence organisations and insurers.

The NSW Health Department is currently drafting the regulations that will enable Part 3 of the Act to come into effect. ▶



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Australian Health Ministers' Advisory Council (AHMAC)

Elsewhere in this edition of *Plaintiff* you will see mention of the Medical Indemnity Jurisdictional Working Party and Consultative Forum, established by AHMAC.

That Forum was established following a meeting of AHMAC in February 2001. It has a wide-ranging brief dealing with four core areas as follows:

1. Sustainable solutions to long term care costs in health care litigation.
2. A national database on health care litigation.
3. National standards for the medical defence industry.
4. Reduction in legal and administrative costs associated with health care litigation.

The terms of reference of the AHMAC Forum have changed slightly since its inception and the forum may well become the focal point for consideration of all types of changes concerning medical negligence litigation.

For example, there have been recent media reports on the availability of insurance coverage for midwives. That led to an amendment of the terms of reference to include assessment of the need for a national regulatory regime for medical indemnity insurance.

Clearly there is some overlap between items 2 & 3 above and Part 3 of the New South Wales legislation. Of course, the AHMAC Forum is national in nature rather than state-based and can focus upon public sector data collection and standards, as well as those for the private sector.

The most advanced aspect of the Forum is in relation to standards for the medical defence industry, with a meeting on that topic having recently been held in Melbourne on 12 September 2001.

However, perhaps of greatest interest to lawyers representing injured persons is the reference regarding long-term care costs.

The New South Wales legislation did not attempt to address long term care costs because of the overlap with the Health Insurance Commission Medicare scheme and Commonwealth funding issues.

However, it is no doubt an area where considerable pressure for change can be expected, as future care costs make up a considerable proportion of the large claims, which in turn make up a considerable proportion of the medical defence organisations' annual damages expenditure.

Precisely what might be suggested in this area remains to be seen, but it seems reasonable to assume that the recommendations may well be of application not only to medical claims, but to all injury claims.

Expert Evidence

There has been ongoing attention to the procedural aspects of health care litigation including specialised court lists, mediation, and the mechanisms by which expert evidence is obtained. There have been significant advances in this area, particularly in the New South Wales Supreme Court and the Victorian County Court.

In the expert evidence area, the New South Wales Supreme Court has built upon the Federal Court's work and now has a series of rules addressing experts' reports and, more recently, a practice note designed to facilitate the conferences between experts often ordered in advance of a hearing.

The aims of such rules are succinctly expressed in the opening paragraphs of the practice note:

(a) The just, quick and cost effective disposal of the proceedings.

(b) The identification and narrowing of issues in the

proceedings during preparation for such a conference and by discussion between the experts at the conference. The joint report may be tendered by consent as evidence of matters agreed and/or to identify and limit the issues on which contested expert evidence will be called.

(c) The consequential shortening of the trial and enhanced prospects of settlement.

(d) Apprising the Court of the issues for determination.

(e) Binding experts to their position on issues, thereby enhancing certainty as to how the expert evidence will come out at the trial. (The joint report may, if necessary, be used in cross-examination of a participating expert called at the trial who seeks to depart from what was agreed.)

(f) Avoiding or reducing the need for experts to attend court to give evidence.

The full text of that practice note number 121 can be found on the NSW Supreme Court website http://www.lawlink.nsw.gov.au/practice_notes/nswsc_pc.nsf/Web+Version+Notes

Access to Records

The *Privacy Amendment (Private Sector) Act* 2000 is planned to come into effect in December 2001, and should improve upon the current rather disjointed situation regarding access to medical treatment records.

More information can be found on the website http://www.privacy.gov.au/private/index.html

Australian Council for Safety and Quality in Health Care

This Council, under the chairmanship of Professor Bruce Barraclough has obtained much media attention for its work researching the issues surrounding adverse events in the health system.

The intention clearly is that the Council might make recommendations such that systemic causes for adverse events can be identified and adjusted, so as to reduce the incidence of adverse events.

The Council issued its First National Report on Patient Safety in August 2001.

ACSQHC is to establish an advisory group to address the issue of open disclosure of adverse events, which will of course be of some interest to lawyers representing injured persons.

More information can be found on the website http://www.safetyandquality.org/home.htm

The Political Environment

In the lead up to the anticipated Federal Election later this year, the Australian health system has been the subject of much attention and of course health care litigation has been raised as part of that.

Obviously the current Australian government is considering whether changes are warranted, and I have referred above to the AHMAC Forum.

Consideration of such changes can be expected regardless of the outcome of the election, as there seems to be a degree of policy consensus between the two main political parties.

In New South Wales for example, the *Health Care Liability Bill* put forward by the Labor government was not opposed by the Liberal opposition. The Upper House only sought to amend the Bill by reducing the period before which a review would be undertaken.

Subsequently, at the Federal level, the Labor Party has launched its Medical Indemnity Reform Package which could encompass further activity along the lines of the New South Wales legislation. Media conference transcript available at http://www.alp.org.au/media/0701/kbjmmcact310701.html

Conclusion

Clearly there has been considerable recent focus upon the area of health care litigation; I have no doubt that focus will continue into the future.

Of course, we are not alone in grappling with problems in this area. The recent procedural reforms to the clinical negligence systems in England have recently been followed by a statement in July 2001 foreshadowing "the biggest overhaul that the system of NHS clinical negligence compensation has ever seen".

Changes designed to improve health care litigation can only be welcomed. However where much of the focus seems to be on reduction of insurance premium costs, great care is needed to ensure that those who are injured as a result of medical negligence retain their right to seek fair compensation. PL

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