

Could the tide be turning?

By Tom Goudkamp

As I write my last President's Page, I find myself asking, could the tide be turning against tort law reform? Certainly more and more people are voicing concern that the restrictions on damages and erosion of the law of negligence have gone too far.

At the recent LAWASIA Down Under conference, Chief Justice de Jersey pointed out that before the recent legislative reforms the courts had already been tightening their approach to negligence, expecting higher levels of personal responsibility in those suffering injury. The clamour for reform had arisen from a 'cauldron of international and national turmoil' – the events of 11 September 2001, the collapse of Australia's second largest insurer, HIH, and the imminent collapse of Australia's largest medical protection organisation, UMP. He expressed particular concern about the limitations on awards of damages, which effectively mean that injured claimants subsidise the costs of cutting insurance premiums while those who act negligently escape the consequences of their wrongdoing, as do their insurers, to the detriment of victims and the wider community.

Chief Justice de Jersey also pointed out that the stated objective of tort law reform – reduced insurance premiums – has failed to eventuate.

Similarly, Senator Aden Ridgeway, in his speech to Federal Parliament on 10 February 2005, stated:

"If you look at the operation of the tort law reform over the past few years, the reforms have not had the intended effect ... What is worse is that this massive decline in civil cases has not led to a decline in insurance premiums, as we were all told it would. That was the great promise; it has now become the great myth.

In fact, premiums continue to rise." Mr Justice Kirby of the High Court has



publicly warned of the dangers of reducing entitlements of injured persons in order to help the insurance industry:

"While in Australia we roll back the entitlements of those who suffer damage, in the name of 'personal responsibility', we have to be careful that we do not reject just claims and reduce unfairly the mutual sharing of risks in cases where things go seriously wrong."

He also warned that this practice would, in the long term, have repercussions for the insurance industry:

"The insurance industry will not thrive if it becomes known, or suspected, that high premiums were paid when its liability is being significantly and constantly reduced."

The Chief Justice of the Supreme Court of NSW, the Hon JJ Spigelman, has expressed similar concerns, as have an increasing number of media commentators.

In 2002, the proponents of tort law reform, which included large sections of corporate Australia, mounted a united and unrelenting assault on the tort system, convincing the Australian public that personal injury damages awards had become unaffordable and

unsustainable. The tort system was successfully portrayed as a Pandora's Box, and was held responsible for an array of evils, including spiralling insurance costs, an increasing litigiousness in Australia, the forced closure of businesses, winding up of community organisations, withdrawal of doctors from certain areas of practice, an unhealthy culture of blame and a reluctance on the part of individuals to take responsibility for their own actions.

Sensationalised media coverage paraded – as the norm – exceptional cases in which 'morally undeserving' plaintiffs recovered damages, or where massive damages were awarded. By comparison, the reversal of many such decisions on appeal received scant coverage.

Politicians seemed happy to swallow the line that changing the laws of negligence and damages would ensure lower insurance premiums. But while insurance premiums have not reduced, the reforms have caused great hardship to accident victims and their families. Any incentives for corporations to avoid harming others have also been significantly eroded.

Ultimately, the only way to safeguard against such wholesale removal of people's rights and civil liberties in the future is for Australia to have a bill of rights – a subject canvassed by several leading authors in this edition. ■

Note: 1 The Honourable Justice Michael Kirby, at the launch of the Annual Review of Insurance and Reinsurance Law, Sydney, February 2005, p10.

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