

The road ahead

By Anthony Kerin



Over the Christmas break, I read a book called *The End of Lawyers* by Richard Susskind. His key point – that the provision of legal services is changing at a rate far greater than would have been envisaged even five years ago – would appear to be borne out by recent developments in personal injury law, including the NDIS and NIIS.

The motor vehicle, one of the greatest developments of western civilisation, has generated ever-evolving schemes designed to compensate those injured through its use, both negligent and otherwise. Numerous attempts, world-wide, have been made to devise satisfactory compensation schemes.

Ever since Mary Ward became the first recorded road traffic death, on 31 August 1869, the law has developed differently in different places, even within Australian jurisdictions. Both the NDIS and NIIS will bring about further changes to how the community proposes to support victims of road accidents.

As plaintiff lawyers, we are more attuned to the far more important factors of grief, pain, suffering and loss than are governments or insurers, who deal predominantly in dollars and cents. The common law has a deterrent effect and also offers a sense of justice to injured parties who are adequately compensated, a benefit upon which it is impossible to put a price.

The economics of the situation might change, but the fundamental principles – of deterrence, of providing justice, of compensating someone appropriately for their loss, and of making the world a safer place – have always been viewed in common law countries as a valuable aspect of the rule of law.

In South Australia right now, we are seeing an attempt to create an extra revenue stream at the expense of injured people.

Governments are mainly interested in revenue outcomes and typically fail to accord injury entitlements their proper importance. While I do not understand the economic pressures of running a state, I believe that these should not be allowed to undermine justice in a civilised society. Injuries devastate lives, and what a government might deem a 'minor injury' can be offensive to those so afflicted.

Of course, all compensation schemes have an economic imperative. For the injured, the prime objective must be to regain, as far as possible, their lives as they would have

been but for their accident. Sadly, we all know that that goal is quite often unattainable. The economic imperative for defendants and their insurers is to pay out the minimum and change the system if possible so as to pay even less, while protecting healthy profit margins.

At present, a number of different schemes operate throughout Australia. The ALA is not convinced that a federal NDIS or NIIS scheme will be as effective as individual schemes in creating compensation solutions for those injured in motor vehicle accidents. Differing demographics and other variable factors mean that standardisation is an inappropriate objective. And if someone is asked to forfeit a right, they should be guaranteed that what will replace it will be better.

The ALA wholeheartedly endorses an initiative designed to improve the care and services for the catastrophically injured, but not at the expense of current rights and entitlements.

Schemes must also be viable, but what is viable in one state may not be in another. While the concept of common systems is commendable, they must not only be financially viable but also fair.

Fairness is usually the factor that suffers most, in the form of artificial restrictions on heads of damages and the arbitrary presumptions that can attract deductions for contributory negligence, even if not causative of the accident. The ALA will continue to travel the road less travelled, critiquing the avalanche of change but working constructively with governments and other stakeholders on how best to look after the injured and disabled in our communities. We will continue to emphasise the benefits of the common law and contend that fairness is a critical factor. We speak for others and it is our obligation to speak up very loudly on this point. Our submission on the National Disability Insurance Bill is about to be delivered. I look forward to the robust debate that lies ahead. ■

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