

Compensation: Care and justice

By Barbara McDonald

This important edition of *Precedent* is timely, coinciding with two major, national developments putting compensation firmly in the spotlight: the introduction of a National Disability Insurance Scheme (NDIS), and the establishment of a Royal Commission into systemic sexual abuse of children and young adults in institutions.

The long-term success of the NDIS will lie in the practical detail rather than the concept: will there be a real increase in the essential services and support for disabled people, and what will be involved in navigating their way through the bureaucratic hurdles of the scheme? Nicholas Mann and Emily Mitchell show that, for disabled people with access to other forms of compensation for injuries inflicted, the interaction of the NDIS with those other schemes will be complex. The availability of expert financial advice on the implications of the NDIS for future care costs will be critical, as will skilled advocacy to deal with reviews of administrative decisions. Importantly, various common law and statutory avenues for legal redress will apparently still be available for victims of another's fault.

Andrew Morrison discusses the unique protection from suits for abuse that the Australian Roman Catholic Church has been able to structure for itself by the legal separation of its operational and teaching arms from its valuable property portfolio, comparing the cases brought in Australia with those brought elsewhere. Claims for compensation in various other contexts are the subject of many articles in this edition. Money cannot change the course of history, nor find a cure where none is yet known to science, nor put everything right. But it can go a long way to relieve the suffering of the disabled, the ill or the injured, and provide support for carers stretched past the limits of human and financial resources. As Harry Hobbs argues, in his comparison of human rights instruments in Australia, Canada and NZ, money can also serve as a symbol of justice for wrongs and vindication of rights.

Dr Gaze argues that low damages awards in successful anti-discrimination cases are disproportionate to the personal stress and financial risks involved in litigating a claim, and are insufficient to act as a deterrent to systemic problems in large organisations.

Frances Simmons examines the lack of compensation schemes for victims of federal crimes such as human



trafficking, the difficulties victims face under state schemes and the dearth of reparation orders against the offenders themselves. Claire O'Connor examines the claims of immigration detainees for physical and psychiatric injury suffered during detention. Maithri Panagoda clearly summarises the key issues in claims by members of the Stolen Generations, drawing on a number of leading cases.

Christine Forster turns to family violence and the particular problems of finding an ideal model for compensation. Civil actions make little difference to family resources, while there are a number of common barriers facing family members when

seeking compensation under state schemes for victims' compensation.

Moving away from monetary compensation, Nigel Stobbs examines other successful methods for achieving restorative justice, in particular by mediated dialogue and negotiation between offenders and their victims. He argues that disillusion with incarceration as a long-term solution to recidivism justifies efforts to find a more effective means to restore the offender's self-worth and the victim's sense of resilience.

Medical misadventure and negligence cases raise very different issues, which Rick Iedema and Donella Piper examine. How best to compensate victims of medical negligence and yet still provide deterrence against sub-standard care and avoid the costs blow-out and consequent decrease in benefits to the seriously disabled that a no-fault system would arguable bring?

Natalie Spearing and Luke Connelly tackle the enduring hypothesis that compensation claims retard recovery and encourage malingering. A powerful argument supporting the common law 'once and for all' approach to damages has always been that it allows the plaintiff to move on with his or her life, forget the trauma and anger of the wrong done, and forge independence. Is there a moral hazard in providing compensation avenues? The authors conclude that there is a dearth of evidence to support this theory.

There is much to read in this volume for anyone interested in legal avenues for supporting society's most vulnerable members. ■

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