president's column

Mandatory blues

I have to admit I am penning this article by the shore of Lake Mulwala, at the twin border town of Yarrawonga/Mulwala. It's sort of like the catfish returning home, and a feeling of relief from the rigours of practice and the law washes over me in muddy waves. Well, it did until I had to do this article or suffer the barbed and life threatening comments of the editor.

One of the much repeated comments after the repeal of mandatory sentencing was the general feeling of relief that there was not another article about it in *Balance*. To those who spoke to me about this, please accept my apologies in advance.

My mind has been mulling (no pun intended) about the recent introduction of the *Civil Liability Act* and the two ancillary Bills which will accompany it in April. In the past we had to deal with mandatory sentencing in the criminal jurisdiction, and now we have to deal with it again, this time in the civil jurisdiction.

They and similar Bills were the subject of some discussion at the Hunt & Hunt National Conference that has allowed me to continue this ~~junket,~~ err, research trip.

The abiding feeling of the insurance lawyers section of the conference was that the real reason there has been a slow down in public liability claims, and especially the "slip and trip" variety, was because of the decision of the High Court last year in *Ghantos*, rather than any of the introduced legislation. Stories of disaster (at least from the claimant's point of view) of claims discontinued on the "no order as to costs" basis were told because of the adoption of the principles stated in that case.

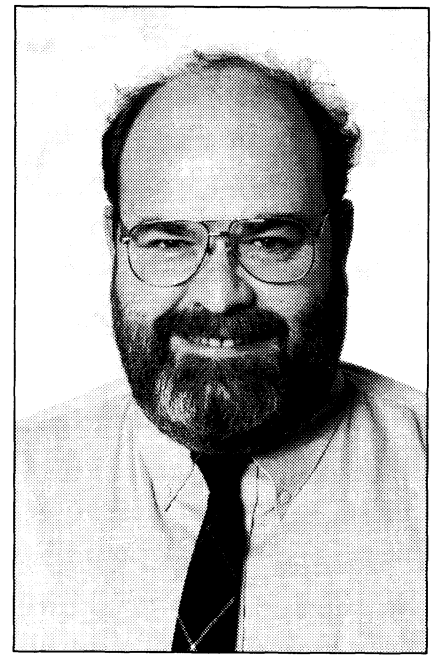
Looked at from a distance, there could not be a clearer example of the continued survival of a living breathing, but constantly changing, system of common law.

It is sad that those currently at the helm of the administration of law across Australia are so attracted by the saccharine of so-called 'immediate results', that they cannot see this demonstration of the robust good health of the common law system – one that will not suffer the constant political tweaking of populist reaction.

What will happen next week when there may exist adverse reaction to this legislation? Will the legislation change with each popularity poll? I guess it is like an inexperienced sailor (I can speak authoritatively about that) trying to steer a boat at low speed. Overcorrection causes the boat to wallow and pitch from direction to direction, seemingly getting no closer to the goal, whereas attention to a longer view will allow a slightly meandering journey achieve the shortest more direct journey.

However, the civil liability legislation that has been introduced has produced apocryphal stories from plaintiff practitioners, and firms generally, having to make hard decisions as to their future as plaintiff lawyers. Some were said to have decided to stop practicing in the area, and others have decided to hang in there for the time being, relying on the anticipated departure of the other firms to increase the number of higher damages claims for them to run and thus allow them to continue to practice in the area. Others acting for insurers spoke of being as busy as they could be, with claims being accelerated by the 'front end loading' sections of the new Acts. Anecdotally those from Queensland spoke of numerous applications to the court to extend the various time limits imposed by their Act (the one we are supposed to follow). All were of the view that the changes were an ill wind, and not an improvement on the previous common law system.

We are shortly to suffer the impost of those 'improvements'. In this *Balance* there is an article from Michael Grove and Bill Priestley, which deals with that which has been already imposed and the unfair results which will follow. In concert with the Act which has already been passed are two other Bills that deal with costs and advertising.



Ian Morris, president

The LEGAL PRACTITIONERS AMENDMENT (COSTS AND ADVERTISING) BILL 2003 is designed to impose a new costs regime, including disclosure of costs estimates (make sure you have a piece of string in your interview room) and new rules as to conditional costs agreements.

The same Bill makes it illegal for practitioners to actually encourage people to take action by 'publishing' a recommendation that could fairly be said to recommend the institution of legal proceedings. The latter is so broad that it actually fails, by a bare whisker, to make it an offence to advise a client to bring proceedings for damages for personal injury.

On the brighter side the Bill does empower the Law Society to make rules as to advertising, and also to deal with disputes concerning conditional costs agreements. Presently, the Law Society does not have power to interfere with costs arrangements or disputes in respect of those arrangements unless the conduct complained of amounts to misconduct.

Many disputes between solicitor and client relate to costs, and I would hope that intercession by the Law Society may bring these to a satisfactory conclusion. One step forward to balance the many steps back.

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The PERSONAL INJURIES (CIVIL CLAIMS) BILL 2003 deals with the new improved procedure. It is still, as is the LPB (C&A) referred to above, capable of change and is to be introduced to parliamen in its final form in April. This Bill follows that same tack as the LPB (C&A). This time the PIB (CC) effectively makes it almost economically impossible for those who have claims in the lower range of damages to seek legal advice because they will not be able to claim costs against the defendant even if they are successful. By lower ranges my best guess is less than $30,000. There are three levels of costs: below the defendant's final offer, above the claimant's final offer and in between. Only if the claimant is more successful than they offered will they be able to collect the bounty of 25 percent of their legal fees. On my calculation that means that at best the claimant would be able to recover costs at 20 percent of the Supreme Court Scale, or $36 per hour. You can't get a labourer for that amount!

Above that limit and the successful claimant can get back 25 percent of their legal fees if they get more than the defendant's final offer, or 50 percent if above the claimant's final offer. I reckon that level will go up to $100,000, so the maximum the claimant can get is $72 per hour. Over that limit the 25 percent range changes to 50 percent and the 50 percent to 100 percent. Easy isn't it? It still means that even in the Supreme Court a successful claimant may only recover $90 an hour, the current clerk's rate. Some sort of similar provisions exist for claims settled before action, but we don't know what that is as it will be all explained in Regulations that haven't yet been drafted.

The other major step is to require a claimant to give notice of a claim within 12 months of the event giving rise to a claim. This has been brought in for the medical profession mainly, as they get grumpy when claimants sue them many years after a negligent act by the medical practitioner. It seems doctors don't even know when they screw up so they have to be protected, poor things.

Well, all the stuff I have referred to above is a bit turgid. The 'why' is a bit more interesting. This is all coming about because of the agreement by our Government, made at high "National Government" levels, to impose similar national steps. By 'national' read NSW! Many of the proposals are only relevant to the NSW situation, but our pollies have put them in just to...well I am not sure why. I would expect the Sydney Harbour Bill to be introduced by our Government soon, or perhaps the NT could be come a signatory to the Murray River agreement? It would make as much sense.

I suppose it all comes back to why politicians do basically unfair and stupid things. They do it, I think, because someone who is pushing them to do something is more an immediate pressure than the people they will effect by those steps. Mandatory sentencing was a good example of this.

The funny thing is the current government has not learnt from the previous one, and cannot realise this push in respect of civil law is an election ploy of the NSW Government (just as mandatory sentencing was an election ploy of the previous NT Government) and their current 'borrowed' policies will create a large segment of disaffected people who will eventually, after some years, if the current Government lasts that long, even up the scales where it counts the most.

Imagine the following potential interview with an unnamed Minister:

LSNT Hello Minister! Thank you for the chance to speak with you...

Minister Hello yourself Law Society!

LSNT ...I want to speak to you about civil law.

Minister Civil law? I've never heard of it!

LSNT Civil law, you know, sort of like criminal law, but about damages, not jail?

Minister Criminal law! I know about that! I want you to know this party stands for the proper administration of justice...

LSNT But Minister....

Minister Don't interrupt, I am making a very important statement ....yes criminal law, you know, every person has a right to fair trial, to the application of...

LSNT Minister!

Minister I know, I know, the right to a fair trial is very important, so is the right to have legal counsel and no one is who is charged should be treated as a job lot!

LSNT Minister!

Minister Yes, I know, you people had a real say in that and we respect you for it! But for you, the real issues of personal freedom and the right to justice and the rule of law would never have been raised to the heights it was! You said all those things and we believed it, especially when it became such a nice election issue!

LSNT But Minister, I want to talk to you about civil law!

Minister Oh, all right. I know my stuff about criminal law, though, don't I? Once learned, never forgotten, that's what I say!

LSNT Yes Minister, you sure do know you political stuff about criminal law, but shouldn't the same thing apply to civil law?

Minister Should it? That's interesting. Do you think it could be an election issue? Remind me, what is civil law again?

LSNT You know, when people fall over in supermarkets and pavements and get paid damages for their injuries.

Minister Outrageous! They get paid! I can't believe it, I'll put a stop to that immediately!

LSNT But Minister, that has been the case for more than a hundred years!

Minister Not in my life time! Anyway, I've been told by Sir Robert Askin that all these people are frauds!

LSNT Sir Robert Askin retired from politics 30 years ago...

Minister All right! Technical error! It wasn't him, it was the bloke who has been in NSW for a while.....ummmm

LSNT Carr?

Minister Carr? No I don't have a car, well not personally, anyway, and the one I have I always use for government business. I have never lent it to a friend, particularly the friend of a friend who might.....

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Advocacy, from page 11

It is the sign of a well constructed written submission that the advocate sees it reflected in the judgment ultimately delivered.

In preparing the document it will be necessary to consider the audience to whom it is addressed.

If the matter is before a superior court it is unlikely to be necessary to remind the members of the court of basic principles of statutory interpretation or sentencing or whatever the topic being addressed may be. Insofar as it is possible the document should be attractively packaged.

In longer documents the use of headings to identify what is being addressed at a particular location is of great assistance. The use of a clear font and print of reasonable size is obviously desirable.

In preparing written submissions it is necessary to bear in mind that your subsequent oral submissions should match those earlier lodged in writing.

In recent times the Court of Appeal in New South Wales has delivered warnings in this regard.

It has reminded practitioners that the court may order that costs thrown away by an adjournment be paid by the legal practitioner where the oral submissions failed to match those lodged in writing and that, in an extreme case, the court may decline to hear oral argument outside the parameters of the written argument unless there has been some good explanation for the disparity: *Lake Macquarie City Council v McKellar* (2002) NSWCA 90.

An interesting article dealing with written submissions in appellate matters is to be found at (2002) 22 Australian Bar Review 149.

The importance of written submissions to the effective presentation of a case should not be underrated by the advocate.

1 (1984) 58 ALJ 537 at 541

mandatory blues, from page four

LSNT Bob Carr? The Premier of NSW?

Minister Ah yes. NSW, yes, yes, I remember them. They contributed to our election strategy.

LSNT Well, what did he say?

Minister Say? He said all these people were frauds! And they shouldn't be paid damages coz it hurts the insurance companies. And I believe him, after all, I have never fallen down and hurt myself, and neither has anyone I know.

LSNT But Minister, don't these people deserve a fair trial?

Minister No, No and No. Fair trials are for those people who have been charged with criminal offences!

LSNT But these people have done no wrong....

Minister Done no wrong! Spare me! I went to Sydney on a fact finding tour and I was shown the very pavement they all fall over! All they do, all of them, is to fall over this pavement and claim money from insurance companies! No wrong...I can't believe you said that!

LSNT Well, they don't all fall over the same piece of pavement...

Minister Yes they do, Sir Robert showed it to me!

LSNT But Sir Robert...

Minister Yes I know, you say he isn't there any more! Another technical point for you! But I know it is true.

LSNT Even if they did, wouldn't they deserve not to be treated as a job lot? I mean, if a lot of them got hurt and it wasn't their fault, and they got angry because they didn't get damages, wouldn't they vote against you?

Minister You mean this could be an election issue?

LSNT Well, it could be...

Minster Civil law?

LSNT Yes, you know, the rights of the injured.

Minister And you fellows would come out in favour of them?

LSNT Well I guess so...

Minister I see. I have found that the rights of the person to be paramount, and all who are hurt by others deserve a fair trial and shouldn't be treated like a job lot! Ummm How does that sound? Is that the right sort of pitch?

LSNT Yes Minister. ①