cover story

Whose liability is it anyway?

by Michael Grove and Bill Priestley

Very soon, the way practitioners consider, commence, run and settle personal injuries actions in both the Supreme and Local Courts of the Northern Territory, will change.

It used be a fault scheme, ie if X was negligent and Y suffered as a result, X would pay Y compensation. A simple and fair system was developed by the courts to determine the issue of fault and the compensation. It will still be a fault system, but now a person will be downright negligent themselves if they get injured – it will be their fault.

For a number of years, insurers and advisors have convinced governments throughout the country that it's fair to reduce constituents' rights and make it, in some cases, not worth their while to pursue legal claims in courts with the assistance of lawyers.

An example of the absurdity of all this change is to compare the recent public statement of Senator Helen Coonan, the Federal Assistant Treasurer, when she said premiums would be down in months, with that of Cridlands' partner David Farquhar (who has been advising the NT Government of the changes) that it would take years before premiums would come down. Businesses, running or nascent, ought to be calling their insurers and demanding premiums come down.

The truth is the changes have been introduced to improve the balance sheets of insurers, who have had poor premium collection (readers may have read a recent *AFR* column wherein an insurer representative body said businesses have had it too easy for too long!) and woeful investment returns during the last ten years.

Instead of doing the hard yards, which would be to introduce and monitor appropriate claims management procedures, the insurers are getting a leg-up from governments. This means the outrageous self-indulgence of HIH could happen again, but the ordinary punter, the one who does not want to be injured, may still get kicked when they're down.

Senator Helen Coonan's government and her state and territory counterparts will not put caps on professional liability, so those cynics among us could believe the changes are designed to kick the lawyers as well.

When you consider the Territory Government's approach has been informed by statistical information from NSW, you have just got to wonder.

A number of Bills have been introduced into the Territory Parliament in the November 2002 and February/March 2003 sittings to effect all this.

They include the *Personal Injuries (Liabilities and Damages) Act 2002* ("the Damages Act") and the *Consumer Affairs and Fair Trading Amendment Act (No 2) 2002*. The first Act is likely to commence operation sometime in April 2003.

In addition there is the *Personal Injuries (Civil Claims) Bill 2003* and the *Legal Practitioners Amendment (Costs & Advertising) Bill 2003* introduced at the February/March 2003 Sittings. These Bills are likely to be debated in the Alice Springs April sittings and are the subject of Ian Morris' article in this edition of *Balance* (p3).

Practitioners should get hold of the acts and bills on the government's website and become thoroughly conversant with their contents as they change the face of personal injuries litigation in the Territory.

The Damages Act will cover all but a specified number of claims for damages for personal injury. It will generally only apply to incidents which gave rise to those personal injuries that occur after the Damages Act commences operation.

Part 2 of the Damages Act excludes the right to sue volunteers and 'good Samaritans' (in emergency situations) for damages unless the act giving rise to the injury was reckless or done in bad faith.

The community organisation that engages the volunteer incurs the liability in the volunteer's place.

That Part also excludes civil liability of homeowners to unlawful entrants.

Part 3 of the Damages Act deals with changes to the law concerning contributory negligence.

Part 4 limits pecuniary loss to three times average weekly earnings. It also has some mumbo jumbo about future pecuniary loss. The discount rate for future pecuniary loss is five percent.

That Part also limits *Griffiths v Kerkemeyer* i.e. gratuitous service type damages.

Division 4 of that Part will bring the greatest change by abolishing common law for non-pecuniary loss and replacing it with an assessment of damages based on permanent impairment. It sets a cap on such claims to $350,000 and a sliding scale for injuries between five percent and 14 percent permanent impairment.

As anyone who has worked with the American Medical Association Guides (the prescribed guides), the manifest unfairness of this approach is worrying. A couple of actual examples further on should suffice to show this legislation will impact on those least able to protect their rights. The Law Society has provided these to government previously, clearly to no avail.

There are no exemplary or punitive damages for such injuries and no interest on damages awarded for non-pecuniary loss or gratuitous services.

A new section 68A will be introduced to the *Consumer and Fair Trading Act* so those who provide recreational services may in certain circumstances contract out of certain warranties and liabilities. This may not get off the ground if a similar Bill introduced into the Federal Government to effect changes to the *Trade Practices Act* does not pass the Senate.

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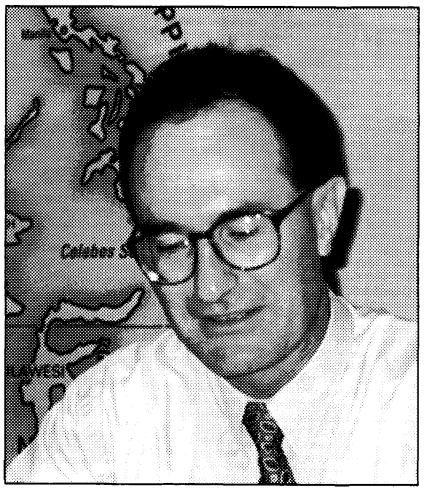
case notes with mark hunter

TIO v Kouimanis Enterprises Pty Ltd & Anor
Supreme Court No. 68 of 2002
Judgment of Martin CJ delivered 20 December 2002



Mark Hunter

CIVIL PROCEDURE - SUBPOENAS - ORDER 42

On appeal from the Master of the Supreme Court of the Northern Territory.

The respondent claimed damages for breach of contract. Pleadings had closed, discovery had been completed, and the matter was ready to be set down for trial. Four subpoenas were, at the request of the appellant, issued by the Registrar to non-parties pursuant to 0.42 of the Supreme Court Rules. Documents were lodged by these persons with the Court prior to the date when the subpoenas were returnable before the Master.

On 29 August 2002 the Master set aside the subpoenas. He ruled that the appellant was attempting to use the subpoena process to effect non-party discovery. The Master determined that "at this stage of the proceeding" the appropriate procedure available to the appellant was to seek discovery from a non-party pursuant to 0.32.

HELD

1. The issue of the subpoenas was appropriate.
2. The decision from the Master is set aside / leave to inspect documents granted.
3. Notwithstanding the terms of Rule 77.05, the right of appeal from an interlocutory judgment or order by the Master or a Registrar is not dependent upon leave being granted by a judge.
4. Costs be costs in the cause.

Martin CJ observed that the unlimited right of appeal given by s 31 of the *Supreme Court Act* is a substantive right which may not be limited by an inconsistent rule of court.

The Chief Justice further observed that the terms of the subpoenas made clear that the appellant was aware of the nature and type of documents which were sought and which were apparently relevant to issues between the parties; this was not a "fishing expedition" by the appellant.

APPEARANCES

Appellant - Reeves QC / Ward Keller.

Respondent - Tomlinson / De Silva Hebron.

COMMENTARY

A very similar appeal from an interlocutory decision of the Master was also allowed in *Giblin v Beach* (2001) NTSC 67 - Case Notes (*Balance* ed.10/2001). See also McConnel, D. *Early Return of Subpoenas to Produce Documents* (*Balance* ed. 11/2001).

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Balance will have more on *Personal Injuries (Civil Claims) Bill 2003* and the *Legal Practitioners Amendment (Costs & Advertising) Bill 2003* which impact on how matters are handled for those you would have thought deserve the especial protection of government - the young, the elderly, the infirm and the disabled.

CASE 1

Three-year-old patient with facial haemangioma on upper lip. Prior to removal of the haemangioma, hospital decided to reduce blood flow to the lesion by an injection of ethanol. First (and last) time technique used at this hospital.

The ethanol extravasates from the lesion throughout the facial tissue causing severe necrosis of the skin over cheeks, lips and chin. Upper lip drops off. Multiple skin grafts required.

Left with extremely severe facial scarring over 60 percent of the face. Will require future surgery as a teenager but otherwise requires no day-to-day care.

Scarring has created a grossly disfigured mouth but other than an inability to lick ice-cream, the patient (who is now eight) has no functional impairment. As the injury requires no day-to-day care and does not impinge on function to any great degree would probably have a 0 percent impairment under the AMA Guides.

CASE 2

Patient attends for cervical spinal discetomy at C4/5 level. In error C5/6 is removed. Patient continues in severe pain. Further investigations performed and error discovered after eight months of ongoing pain. Patient unable to work in job as mechanic in this time.

Patient undergoes further surgery for removal of correct level. During second operation, infection is introduced into the wound. Infection persists for more than six months causing extreme pain and requiring constant packing and dressing. Patient then able to return to work. No permanent impairment. No entitlement to compensation under AMA Guides. ①