

Turning the tide of **PUBLIC OPINION**

for the **INJURED**

By John Flint

Sometimes I get
pretty steamed up about
lazy journalism.

Photo: Bill Madden

The other day I was watching a current affairs show on TV. It was all about frivolous lawsuits and the so-called 'public liability insurance crisis'. Towards the end of the story it was noted that public liability claims had fallen 11%, according to the Australian Competition and Consumer Commission (ACCC). Tort law

reforms around the nation had not translated into lower premiums. Yet the story rounded off, as it had started, with an attack on injured people who are part of the 'blame game' or 'compensation culture'. The compensation culture is a theme that the bulk of the media has swallowed hook, line and sinker.

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But it serves the ratings. Australians hate bludgers. So running surveillance footage of cheating compo claimants is good telly. And it's easy journalism when it's handed to you on a plate by an insurance industry that is keen to sell the compensation culture myth and divert attention from its own conduct.

Peeling back the layers of a complicated issue requires time that most journalists simply don't have. There are staff shortages in nearly all newsrooms and, of course, deadline pressures. On metro newspapers, journos are expected to churn out two to three stories a day, often more. Radio journos have greater deadline pressures and television news is image-driven, so unless there are good visuals to support the storyline, forget it.

Take the workers' compensation system. It's a turn-off for many, perceived as complex in terms of the legislation and its administration. It is also considered dull.

But there's an untold scandal here that challenged my perception of what doctors are about: that is, providing compassionate counsel and care and making sick people better. The Hippocratic Oath calls for, among other things, warmth, sympathy and understanding.

Much of what I have written to date has centred on a breed of doctor that appears to have abandoned its oath wholesale. As many personal injury lawyers know, a number of doctors no longer treat patients but work exclusively for insurance companies, undertaking medico-legal assessments.

Insurance companies have every right to thoroughly vet claims and guard against fraud.

But some of these practitioners, who pick up huge fees for their reports, appear to take glee in wiping out claims and being rude and obnoxious into the bargain. There are examples of bullying and using questionable techniques to heighten anxiety, misapplying well-known tests and twisting the words of those they examine.

The Australian Medical Association (WA) guidelines on medico-legal work were revised in 2002 to improve standards. They stress the need for impartiality, courtesy and sensitivity.

After writing about one doctor, my phone rang hot for days with horror stories from people who were badly treated. Many sent long, detailed letters and statutory declarations.

This doctor is not alone, although most of his colleagues on the insurance industry's payroll are more subtle in how they assassinate claims. It is commonly accepted that insurance doctors earn a lot more than doctors who write reports for plaintiffs.

For barrister Ian Freckelton, who is also a professor in law and medicine at LaTrobe and Monash universities, lawyers for insurance companies gravitate towards doctors with

known inclinations and orientations: likewise, lawyers for injured people.

AMA (WA) president, Paul Skerritt, agrees that these doctors are motivated by their views, not the size of their pay cheques. For injured people, the motivation is irrelevant because the end result is the same.

There is also a power/resource imbalance – the injured do not have the unlimited funds to purchase medico-legal opinions at the same cost and frequency as do insurers.

Perth psychiatrist, Ollie Kay, who is chairman of the forensic section of the Royal Australian and New Zealand College of Psychiatry, acknowledged: 'One worries when people express opinions entirely for one side.'

Mr Freckelton has recommended that all medicos should sign a declaration in order to 'forge a culture of primary obligation to the courts, rather than to the parties paying the fees'.

I got a phoned call a few months ago from the chief medical officer of a major insurer. He wanted to know when I would be concluding my

stories on the issue. Why? Because I'd apparently scared off a number of his regular doctors and he was having problems finding replacements.

After writing one particular article¹ I was besieged with 160 letters and phoned calls from people anxious to tell me about their experiences. Some of the accounts are truly astounding.

I have met some of these people face to face and I don't need a medical degree to see that they are not faking their disabilities. They are desperate to get their old lives back. Those with supportive partners and families cope better, but their changed financial circumstances put strain on even the strongest marriages.

Of course, the stigma of being labelled a malingerer, fraud or cheat rubs salt into the wounds of the genuinely injured. Many sustain attacks on their credibility and character over many years. For many proud men and women, this has pushed them over the edge into the abyss of suicide.

I wrote about Tony Ryan,² a boilermaker who suffered a back injury in 2000. He was made to work with damaged and inappropriate equipment in a confined space. His own treating doctors and other specialists verified his injury.

But a notorious psychiatrist/insurance doctor said he was faking it. Alarmingly – but not unusually – a medical assessment panel convened by WorkCover favoured this doctor's report over all the other opinions. Accordingly, Mr Ryan's weekly payments ceased immediately.

He had no problem convincing Centrelink's doctors that his disability was genuine. This attack on his character hurt him deeply. He sank into a deep depression and took his life one Saturday last September. The next day – Fathers Day –

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his beautiful twin daughters went to see him in the morgue, because they didn't believe their doting dad was dead.

There have been other Tony Ryans and there will continue to be tragic cases. The adversarial system we have will never be perfect.

But in WA it's odd that WorkCover officials attach weight to the reports of doctors whose lack of impartiality is commonly known. One review officer considered that an injured person had obstructed his examination by taking notes – his lawful right. His payments were stopped but, fortunately, this decision was overturned by the Full Court.

And why have the medical assessment panels in WA been over-represented by doctors who derive large incomes from insurers?

This is borne out in the names and data released by WorkCover following FOI applications.³ It's no surprise that the panels' determinations were remarkably consistent with insurers' views.

These controversial medical panels will no longer be able to determine access to common law. But they will retain a role in the statutory scheme. I will be keeping an eye on them and WorkCover, which has enjoyed an all-too-cosy relationship with insurers.

This point was acknowledged by its now-chairman, Tony Cooke.

In a confidential report to Cabinet in 2002, Mr Cooke called for WorkCover to be re-constituted as a statutory authority with a more independent board, noting the 'broadly held belief that the current structure provides excessive representation of the insurance industry'. He added: 'It is difficult for a body charged with the independent resolution of disputes to contend with criticism that it is paid for by insurers.'

Vic Evans of RiskCover WA went further, calling for private insurers to be banished from the workers' compensation system. He believes the state should run it on a not-for-profit basis, like it does third-party motor vehicle accident cover. He called it 'social insurance'.

In my articles, I have also addressed the use of surveillance agents and exposed some of the dirty tricks of their trade.

This industry is rife with cowboys, whose main bread and butter is insurance work. A large number of private investigators have been sacked from the police for dishonest conduct. There are examples of selective editing of video evidence to make subjects appear guilty of fraud. I am left asking: Who is perpetrating the fraud?

Treating doctors complain that knowledge of potential surveillance deters patients from undertaking activities that will aid their return to normal life. Surveillance is legalised stalking, according to Dr Skerritt, and it has provoked paranoid psychosis in those it has targeted.

If surveillance harassment wasn't bad enough, who remembers the 'Help Get the Bludgers Off Our Backs' campaign in 1998, which encouraged people to do in their neighbours?

A Commonwealth inquiry in 2003 noted a general perception that injured workers were automatically suspected of fraud. It concluded that employee fraud was minimal. Moreover, it highlighted concern that Centrelink

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and Medicare are subsidising the insurance industry – a problem known as 'cost-shifting'.

HomesWest is the last resort for homeless families on the post-injury scrapheap and our social security system has become a defacto workers' compensation system.

Bear in mind that 50% of people who suffer workplace injuries do not lodge a claim for workers' compensation.

Some treating doctors and indeed the Employment Protection Minister, John Kobelke, have complained to me about plaintiff lawyers who do a disservice to their profession and their clients by leading them up the path of litigation on the promise of a pot of gold that rarely materialises, leaving them with little more than loose change after they have deducted their fees.

I am not critical only of the insurers. It's not a black and white issue. But the debate over the past 12 months has

been conducted against a backdrop of private insurers enjoying record profits, and there is little doubt, given the figures produced by WorkCover, that the WA workers' compensation system is a big cash cow for insurers.

Surpluses skyrocketed following legislative changes at the end of the 90s. The surpluses have been close to \$300 million a year, not taking into

consideration insurer overheads or the proceeds of their considerable investments and bank interest.

Last year I was chasing hard the most recent figures for 2003/4. WorkCover said they were with Mr Kobelke, and only he could divulge them. The Minister said they would have to be tabled in parliament first. They were tabled half an hour after the passage of the government's Workers' Compensation Reform Bill.

But what about the genuinely injured person who is not only denied compensation, but has their character assassinated? For what? For profit.

Car accident victims and war veterans deemed totally and permanently impaired are also subjected to similar treatment by insurance doctors and surveillance agents.

The experience of becoming involved with the WA's workers' compensation system is for some like entering the gates of hell.

The loss of self-esteem, stress, and the onset of depression are compounded by perceived injustices. Whole families suffer. Marriages fracture and once happy human beings choose occasionally to end their lives.

The greatest indictment of the system is that too many people go into it seeking rehabilitation and security only to emerge years later feeling more injured and destitute.

As one of the victims, Barry Vaughan, said:⁴

'It took the combined efforts of a whole raft of professional people representing three different industries to obliterate my life goals and dreams. They represented the insurance, legal and medical industries. In some cases it took their very best efforts; in other cases it took their worst efforts.

'I have no objection to being judged fairly but until my dying day I'll have an objection to being fitted up.' ■

Notes: 1 *The Sunday Times*, 19 September 2004. 2 *The Sunday Times*, 26 September 2004. 3 *The Sunday Times*, 21 December 2003. 4 *The Sunday Times*, 19 September 2004.

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