Australian Plaintiff Lawyers Association

Queensland Conference

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Key Note Address – Justice Peter Dutney

In the Courier Mail on 12 December last year I read an article concerning Queensland golfer, Peter McWhinney. McWhinney had been injured outside the Hilton hotel in Melbourne in February of that year.

The circumstances of the accident were briefly described in the article. McWhinney, a guest of the hotel, had been loading his golf clubs into the back of a courtesy car scheduled to take him to Huntingdale for the Australian Masters golf tournament. Another vehicle driven by a hotel employee struck him from behind crushing his calf between the two vehicles.

Because the accident involved a motor vehicle the provisions of Victoria's *Transport Accident Act* applied. In the result McWhinney who had averaged earnings of over $400,000 a year (or about $8,000 a week) during the previous ten years, received weekly compensation of $521.

McWhinney resumed his golfing career in the Australian Open in November and compensation ceased. As a result of the accident McWhinney was left with a disability which although small in percentage terms was, for a professional sportsman, probably the difference between winning and being an also ran. It seems unlikely he will ever return to the heights he achieved before the accident.

The point of the article was to draw attention to the fact that under the Victorian *Transport Accident Act*, McWhinney had no right of recourse against the driver who ruined his career or the Hilton hotel as the driver's employer.

As a barrister my practice was in the mainly a commercial one. Apart from the first few and the last few years I had little contact with real people as clients. Returning to personal injury cases after a gap of a dozen years or more I was astonished at the

extent to which the basic common law right of an individual to just compensation for personal injury had been eroded.

Despite the minefield that is the *Workcover Act* and the *Motor Accident Insurance Act* Queensland is far from the most regressive state in this respect. The *Transport Accident Act* 1986 (Vic) is a good illustration of the extent to which rights are being eroded. Under that act there is no common law right of action at all for disability less than 30%. Tasmania has recently or is about to adopt a similar restriction. Where a claim is allowed the component for pecuniary loss cannot include any loss for the first 18 months and cannot in any case exceed $686,840 (as at July last year) or any amount for voluntary services whether necessary or not. For non pecuniary loss damages cannot exceed $305,250 (as at July last year)). Future losses are all discounted at 6%.

This introduction has soought in a rather long winded way to approach the theme of this year's key note address which is the threat to the continued existence of a common law right to just compensation for persons who have suffered injury as a result of the negligent action of another.

The erosion of rights has variously been blamed on excessive generosity of judges and excessive greed of solicitors. The former is obviously wrong. As to solicitors, it seems most unlikely.

My view is that the erosion is attributable to three causes. One is envy at the apparently high quantum of awards of compensation by people who don't understand the nature of the calculation. A second is related to the general refusal of the community to accept responsibility for its own actions. The third is political expediency.

One of the notable changes in the practice of solicitors in the last dozen years or so has been the lifting of restrictions on advertising. Undoubtedly this is a minor thing when compared with the present government's proposed green paper reforms about which you will hear more tomorrow. Nonetheless the lifting of restrictions on advertising was, in my view, a welcome change. As a first year solicitor I worked for

a firm practising at Woodridge. A local solicitor who shall remain nameless (I don't know whether or not he is still in practice) had the endearing habit of visiting the office of each new solicitor in the district after hours with step ladder and tape and measuring the size of the printing on the firm's street front sign. I think from memory that in those days a sign visible from the street was not allowed to have lettering exceeding four inches and the word "solicitor" could not be in larger print than the name of the firm. If a transgression was found an instant report was made to the law society hopefully with the result that the sign would have to be removed and competition delayed by at least the time necessary to arrange the return of the sign writer. Thankfully we have moved on. Solicitor advertising is now commonplace everywhere. Outside Brisbane where television time is comparatively cheap it is the favoured medium and one is familiar with solemn faced solicitors advising the wisdom of rushing in to consult before time washes away the viewer's rights. If only we could have a little levity. The overriding theme of the advertising is the willingness of the solicitor to take matters on a speculative basis. The result of this has been a huge increase in the number of personal injury claims instituted as people become more aware of their rights.

Not everyone has welcomed the increase in the volume of claims. In particular the statutory insurers of workplaces and motor vehicles complained at the increase in payouts. Dire predictions of unfunded liabilities and impending financial collapse resulted in the changes to legislation throughout Australia aimed at limiting the right to pursue common law damages and the amount of compensation available. The argument which governments have found attractive throughout Australia is that payouts should be limited to avoid any increase in premiums for those insured. The erosion of common law rights to fair compensation for persons injured by the negligence of others has thus been reduced and in some cases abolished altogether. While this is within the power of governments to do it is, in my view, in large part an example of the rejection by society as a whole of responsibility for one's own actions.

Stripped of the interests of insurers the common law right to damages is merely a reflection of the notion that if my action causes injury to another I am responsible, so far as money can do so, to repair that injury. Insurance companies, for an appropriate premium, have always been prepared to provide indemnity against the risk that I

would carelessly injure another. In a responsible society I would accept that if my carelessness caused injury I would be liable for it to the extent of my assets. If I were sensible I would pay a premium and pass that risk on to an insurer.

There is a corollary in a common law society. If I am injured and that injury is genuinely an accident and not the fault of someone else I am not entitled to any compensation. I must wear the loss myself. In its most basic form this is the essence of the responsible society.

One of the functions of government is to provide for those who are unable to provide for themselves. To this end, workers compensation legislation has existed, in this state since at least 1905. This has nothing whatever to do with damages for the wrong of another. It is simply part of the basic safety net introduced to protect the income of workers who suffer injury irrespective of fault. It was historically no more than a statutory income protection policy with limited coverage. Where the problem arose is that coverage by workers compensation was made compulsory, charged to employers and cover provided by a monopolist government insurer. Premiums were fixed and became simply an on cost of business. Likewise in the case of motor vehicles coverage was compulsory and premiums determined by government. From a purely practical point of view the result of this has been that workers compensation premiums are regarded as just another government impost. Motor vehicle compulsory insurance premiums are simply a part of the cost of registration of the vehicle and likewise regarded as a government impost. From the government's point of view this has made any increase in premiums politically sensitive as in the case of the increase in any other impost. It follows that the pot from which claims can be paid is finite, much like the fidelity guarantee fund with which solicitors are familiar. As the number of claimant's increased with the greater awareness of the right to sue so the pot was quickly exhausted. From a political point of view, increasing the premiums in accordance with sound actuarial policy was dangerous because of business opposition in the case of workers compensation and motorist opposition in the case of motor vehicle insurance. The soft option is to reduce the amounts paid out.

Philosophically there can be no objection to the restriction in compensation payable from statutory schemes except in one respect. While it is open to any insurer to limit

the amount of liability to which it is prepared to expose itself the insurer has not itself caused any loss. The insurer has simply agreed to indemnify the wrongdoer to a particular amount commensurate with the premium paid. As an advocate of personal responsibility for one's actions I can see no legitimate justification for government legislation restricting the right of injured persons from being justly and fully compensated for their loss. Such a restriction is arbitrary and discriminatory. In the field of personal injury the restrictions are largely confined to workers and persons injured in accidents involving motor vehicles. They do not apply to persons injured in private residences, to guests at commercial establishments, to professional advisers and no doubt many others. One is left to wonder why some injured people are entitled to full compensation when injured by another and others are not. No similar restrictions apply to persons suffering damage for breach of contract (except, of course, breach of the contract of employment).

The effect of universal, but now limited, insurance for workplace and motor vehicle accidents is that unless the fault of the party causing the injury is so grievous as to justify criminal prosecution the wrong is of no consequence to the wrongdoer who does not carry the risk of even theoretical liability. The loss, if it exceeds the insurers liability is simply born by the victim. To my mind a fairer option than abolishing rights would be to cap the statutory insurers liability leaving employers and motorists liable for any excess but with the right to top up insurance.

Despite their antipathy to concept of restricting common law rights, it would be foolish to think that judges will not apply the law as laid down by the parliament. Despite apparent attacks on the workcover legislation in cases such as *Tanks v Workcover Queensland* [2000] QSC 326; C*raig v BHP* (Dutney J – 19 October 2000); *Neuss v Roche Bros Pty Ltd* [2000] QCA 130 and *Scott v Workcover Queensland* [2000] QSC 414 the reality is that the court is doing no more than construing the legislation as it sees it and requiring that if rights are to be removed or restricted that be done plainly. If the trend is to be stopped or reversed that can only take place by effective lobbying of interested bodies such as the Australian Plaintiff Lawyers' Association.

My concern at the abrogation of responsibility for one's own action extends to injured persons accepting that oftentimes their injury is not the fault of anyone or anyone but themselves. In my view there is a responsibility on the part of lawyers acting for plaintiffs to exercise a degree of discretion in bringing cases. Some are plainly hopeless. Some hopeless cases even succeed at first instance. A good example is *Borland v Makauskas* [2000] qca 521. That was the notorious case of the horribly intoxicated young man who became tetraplegic as a result of diving off a back yard pool fence into the gold coast canal when the tide was out. One complaint made was that the owners of the property who were away and not even aware that the plaintiff was at the property failed to put up a sign warning people of the danger of diving head first from a great height onto a sandy beach. The jury found for the plaintiff and held him liable only to the extent of 25%. Not surprisingly, the Court of Appeal reversed the outcome and gave judgement against him.

The preservation of the right to common law damages is a precious one. Lawyers, in my view owe a duty to the community to lobby for its preservation. Such lobbying will be more effective if lawyers are not seen to be seeking to abuse the right by using it to foist obviously hopeless cases onto insurers in the hope of blackmailing them into paying something to avoid the cost of resisting even hopeless litigation.

One shouldn't confuse hopeless cases with difficult ones. A case may be difficult because of a paucity of evidence but the plaintiff deserving. Lawyers are to be commended for taking such cases on spec. Some cases, however, are so hopeless as to be amusing. The following were taken from the website of Duhaime and Company, an American law firm and except for one example from Israel just to show the Americans do not have a monopoly on such things are asserted to be genuine cases from the land of crazy lawsuits, the United States:

- A writer was sued for $60 million dollars after writing a book about a convicted Orange County serial killer. Although the inmate is on death row, he claimed that he was innocent in all 16 murders, so the characterisation of him as a serial killer was false, misleading and "defamed his good name". In addition, he claimed those falsehoods would cause him to be "shunned by society and unable to find decent employment" once he returned to private life. The case was thrown out in

a record 46 seconds, but only after $30,000 in legal fees were incurred by the writer's publisher.

- Southeastern Guide Dogs Inc., a 13-year old guide-dog school and the only one of its kind in the southeastern United States at the time, raises and trains seeing-eye dogs at no cost to the visually impaired. The lawsuit was brought by Carolyn Christian and her husband, the Rev. William Christian. Each sought $80,000. the couple commenced their action 13 months after Ms Christian's toe was stepped on and allegedly broken by a blind man who was learning to use his new guide dog, Freddy, under the supervision of an instructor. They were practicing at a shopping mall. According to witnesses, Ms Christian made no effort to get out of the blind man's way because she "wanted to see if the dog would walk around me". (source:*Houston Chronicle*, 27.10.95)

- A woman was treated by a psychiatrist from March to November 1986, became romantically involved with him, and subsequently married him in October of 1989. After more than five years of marriage they divorced in 1995, at which time the woman sued her ex-husband for psychiatric malpractice and negligence claiming that the romantic or sexual relationship between them started before the formal psychiatric treatment ended. She contended that her ex-husband had breached the standard of care as a psychiatrist by becoming romantically involved with her, and sought general, special and punitive damages.

- A woman in Israel is suing a TV station and its weatherman for $1,000 after he predicted a sunny day and it rained. The woman claims the forecast caused her to leave home lightly dressed. as a result, she caught the flu, missed 4 days of work, spent $38 on medication and suffered stress

- A college student in Idaho decided to "moon" someone from his 4th story dorm room window. He lost his balance, fell out of his window, and injured himself in the fall. Now the student expects the university to take the fall; he is suing them for "not warning him of the dangers of living on the 4th floor".

- A man sued Anheuser-Busch for $10,000 for false advertising. He claimed that he suffered physical and mental injury and emotional distress from the implicit promises in the advertisements. When he drank the beverage, success with women did not come true for him plus, he got sick. The Michigan court of appeals affirmed a lower-court decision dismissing the case.

- A New York appeals court rejected a woman's lawsuit against the company that makes the device called "the clapper", which activates selected appliances on the sound of a clap. She claimed she hurt her hands because she had to clap too hard in order to turn her appliances on: "I couldn't peel potatoes (when my hands hurt). I never ate so many baked potatoes in my life. I was in pain." However, the judge said she had merely failed to adjust the sensitivity controls.

- John Carter, a New Jersey man sued McDonald's for injuries he sustained in an auto accident with one of their customers. He claimed that the customer who hit him did so after spilling the contents of his chocolate shake (which he purchased from McDonald's) onto his lap while reaching over for his fries. he alleged that McDonald's sold their customer food knowing he would consume it while driving and without announcing or affixing a warning to the effect "don't eat and drive." The court concluded that McDonald's had no duty to warn customers of obvious things which they should expect to know, but refused McDonald's request for costs stating that the plaintiff's attorney was "creative, imaginative and he shouldn't be penalised for that." This case was in the court system for three years, underwent appellate court review and cost McDonald's over $10,000.

Sadly, some of these cases have a somewhat familiar ring.

Even in Australia resistance is rising to attempts to push common law claims into increasingly tenuous areas. In A*gar v Hyde; Agar v Worsley* [2000] HCA 41; 74 ALJR 1219 the High Court rejected an attempt to hold the International Rugby Football board liable for injuries suffered by two rugby players on the basis that the board failed to alter the rules of the game to minimise risk to players. The court held

that to hold the board liable would diminish the autonomy of all who chose to voluntarily undertake that or any other inherently dangerous activity.

In *Scott v Davis* [2000] HCA 52 ; 74 ALJR 1410 the High Court refused to hold the owner of a private aeroplane liable for the negligence of a pilot over whom the owner could exercise no control.

The resistance to further attempts to push the boundaries of what conduct amounts to a compensable wrongdoing can be seen as far back as *Romeo v Conservation Commission of the Northern Territory* [1998] HCA 5; 192 CLR 431 where, perhaps surprisingly in view of the then recent decision in *Nagle v Rottnest Island Authority* (1993) 177 CLR 423 the High Court refused to hold the defendant liable for the injury to an intoxicated woman who climbed a low log fence 3m from a cliff at night, stumbled through an unfenced break in the vegetation and fell over the edge. Sometimes people have to accept responsibility for their own stupidity.

The cost of unmeritorious lawsuits is astonishing. One report in the United States concluded that "lawsuit abuse" had cost business and consumers as much as $152 billion businesses in 1994.

One of the challenges for plaintiff lawyers in the current decade is to preserve the right of injured parties to full and fair compensation where their injury is genuinely the result of wrongdoing by an outside party. To do so requires the courage to resist pressure to bring ever more creative but unmeritorious actions. Unless that is done I fear the pressure on governments to limit accident compensation will see the end of personal injury litigation.

The last case in which I appeared at the bar was a personal injury action involving a young woman who suffered severe brain injury in a car accident in Victoria. She lived in Queensland and sued here. She was entitled to sue in Queensland but required to apply the substantive law of Victoria to the damages. Had she been injured in Queensland I estimated her likely damages at something of the order of $4 million. Because some of the restrictions imposed by the *Transport Accident Act* 1986 (Vic) were then regarded as procedural she was entitled to recover and settled for something

of the order of $2.3 million. Had she sued in Victoria or not settled before the high court handed down its decision in *John Pfeiffer Pty Ltd v Rogerson* [2000] HCA 36; 74 ALJR 1109 she would have recovered substantially less. The challenge for the future is to ensue that access to the common law remains available and victims are not left to the uncertain and inadequate mercies of what is, in fact, an underfunded social security system dressed up as insurance.