Recent Developments in Personal Injury Law

North Queensland Law Association Annual Conference – Mackay

The Honourable Justice Peter Dutney

5th October, 2003

An article by Jeffrey Toobin in the *New Yorker* of 21st and 28th April 2003 begins as follows:

Someone unfamiliar with the New York courts might conclude that Daryl Barnes had a pretty weak lawsuit.

You can guess what's coming. Plainly he was successful. Another undeserving plaintiff triumphs in the American courts. You might very well think that. I couldn't possibly comment. The more relevant issue is, "Would he succeed here and how would his case have been affected by recent law reforms.?"

I have chosen this case as a frame within which to look at recent changes in personal injury law – I hesitate to use the word "reforms". The Macquarie dictionary definition of "reform" as a noun is *"the improvement or amendment of what is wrong, corrupt"* and as a verb *"to put an end to abuses, disorders"* or at its most banal, *"to improve by alteration"*. Whether recent changes constitute improvements depends on the perspective of the person who is asked. Why an American case? Self preservation has something to do with it. When I was first appointed to the bench I was asked to deliver the key note address at the plaintiff lawyer's annual Queensland conference at Noosa. Having been given free reign as to what I wished to speak about I chose to talk about the need for discretion in pursuing only those cases with merit even though they may be difficult legally. I cautioned against the temptation to run anything, however silly, lest the plethora of unwise or unmeritorious actions might give rise to the very reaction we have experienced in Australia since the collapse of HIH sent insurance premiums skywards. After illustrating the point by reference to some bizarre cases in other jurisdictions, I boldly cited *Borland v Makauskas*[1] as an example of the case to avoid, describing it in these terms, "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." To be frank I

[1] [2000] QCA 521 (22 December 2000)

will concede that perhaps I stated the facts colourfully. I could have gone further. I could have mentioned the finding that as he dived he yelled "Yahoo". I thought the illustration was a good one and close to home. Having indicated what the case was about I went on, "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".

You can imagine my mortification when the next item on the programme, without even the decency of an adjournment, was the presentation of awards to those plaintiff lawyers who had done great things for the cause over and above the call of duty in the previous year. No prizes for guessing who the first award went to. It went to the plaintiff's lawyer in *Borland v Makauskas*. In case you are wondering, I haven't been asked back.

In any event, I have chosen this case from another and weirder jurisdiction than our own to see how our present jurisprudence on personal injury litigation stacks up.

The facts of the case went something like this.

In 1988, according to evidence presented at trial, [Barnes] *was a twenty-three year old member of a gang known as the Five Percenters, which espoused an ideological hatred of the police and urged its members to shoot and kill police officers rather than submit to arrest. On the night of August 22nd, Barnes was carrying an illegal Tec-9 submachine gun on a street not far from Yankee Stadium, in the Bronx. Franz Jerome, an off duty cop who had just left a ball game, saw Barnes' gun, identified himself as a police officer, and told the youg man to drop it. Barnes bolted, telling Officer Jerome, "Fuck you," and Jerome chased him to a gas station. There according to Jerome, Barnes wheeled, assumed the combat position, and fired his gun at Jerome. (In pleading guilty to attempted assault* (a somewhat Quixotic charge resulting from firing at someone with a sub machine gun)*, Barnes admitted that he possessed the gun and pointed it at the officer. Two Tec-9 shell casings were found*

on the sidewalk.) Jerome returned fire, shooting three times, hitting Barnes once and leaving him paralysed from the waist down. Barnes sued the city claiming that Jerome had used excessive force to subdue him. His case went well: in 1998, a jury awarded Barnes $76.4 million in damages.

You may all relax, at least in the short term. The Court of Appeal reversed the judgement in 2002 and ordered a retrial which was held in February this year.

It horrifies the public at large that persons engaged in blatant criminal activity are nevertheless able to sue for damages. There are several recent instances of such actions succeeding in this country although none involving a sub machine gun. The earliest of the relatively recent cases was *Hackshaw v Shaw*[2]. That was the case where for some time a thief had been taking petrol from a bowser on a farm. The farmer lay in wait one night with a rifle and a shotgun. The thief drove through the gate, having switched off the car lights, and while he was helping himself to petrol the farmer fired several shots at the car to immobilize it. One shot hit the passenger in the car. In the passenger's action against the farmer the jury found that when he fired the shot he did not know or believe that another person was in the car, but that he should have known someone might be. The jury also found that the farmer was negligent in firing the shot, and awarded damages reduced by 40% for the passenger's contributory negligence. *Hackshaw v Shaw* was the case chosen by the High Court as the vehicle to enlarge the law of negligence to subsume the special rules applicable to occupiers' liability. In so doing it upheld the jury's verdict notwithstanding that the plaintiff was probably guilty of the theft of the petrol under an equivalent to s 7 of our *Criminal Code*. Last year in the District Court in NSW Judge Maguire awarded a plaintiff almost $50,000 damages for injuries he suffered as a result of breaking into the upstairs flat of the Peakhurst Inn where the manager lived with his wife and two children. Joshua Fox had been refused entry to the hotel nightclub and decided to gain entry by breaking and entering the upstairs flat. The manager discovered Mr Fox and hit him, fracturing his forehead and injuring an eye. Fox was taken to hospital for surgery and had three months off work. The allegation against the manager, which the judge upheld, was that the manager, although protecting his residence, had

[2] (1984) 155 CLR 614

used excessive force. Mr Fox's mother also received $18,000 damages for the nervous shock of seeing her son in hospital. To add insult to injury Mr Fox tried to sell his story to the media and when asked whether he took any responsibility for the attack said "I don't take any responsibility."

It was in fact this case which prompted the NSW Attorney General to promise to take legislative steps to prevent this type of action succeeding again. From a Queensland perspective, this response has found its way in to s 45 of the *Civil Liability Act* 2003.

The explanatory memorandum to the bill describes the effect of s 45 as follows:

> "Clause 45 excludes persons from claiming damages if the injury or loss was suffered while engaged in activity which, on the balance of probabilities, is an indictable offence. The court may still award damages in such cases if satisfied that in the circumstances the exclusion would be harsh or unjust. If the court decides to award damages, then a minimum reduction of 25% is to apply. The exclusion does not require the conduct of the person to have been considered by a criminal court or otherwise."

This summary only partly explains the effect of s 45 and hardly deals with its broader ramifications at all. The exclusion applies only if two conditions are satisfied. Firstly, the breach of duty which gives rise to the claim must occur while the claimant is engaged in conduct that is an indictable offence; and secondly the claimant's conduct must have contributed materially to the risk of harm.

The application of an exclusion to all conduct constituting an indictable offence makes it very broad. Indictable offences include dangerous driving, assault, drug offences and the like. Even the requirement that the offence contribute materially to the harm does not restrict the import of the section very much. For example, if having taken a schedule 1 drug proscribed by the *Drugs Misuse Act* 1986, a person is less steady on his feet than that person might otherwise be and falls and is injured; or handles a piece of defective machinery in such a way as to suffer injury, that person can only successfully sue if the Court can be persuaded that to deny them compensation would be harsh and unjust, and then only on pain of a 25% reduction in those damages. The standard of proof of the offence is only the civil standard.

Since the *Civil Liability Act* is a statute in the modern "plain English" idiom in which the tautologous use of words is scorned I can only assume that the legislature intended there to be some material difference between the two cumulative requirements of harshness and injustice but I have to confess it escapes me.

Section 45 of the *Civil Liability Act* is in Chapter 2 part 4 which, by sub-s 4(3) applies only to breaches of duty on or after 9th April 2003, being the date of assent of the Act.

So how would I have had to deal with Mr Barnes' case against the City of New York? Because the alleged excessive response to being shot at by a sub-machine gun was back in 1988, the provisions of s 45 of the *Civil Liability Act* would not apply and the action could proceed. Had the incident not occurred until after 9th April 2003 there are any number of indictable offences of which Mr Barnes might have been guilty (attempted murder comes readily to mind) and which would preclude his recovering damages unless I considered the operation of the provision to operate "harshly and unjustly". One criticism of the section is that there is no provision to deal with the issue of the harsh and unjust operation of the section in the particular case until the case has run its course. A plaintiff who has been injured while doing something that might constitute an indictable offence will have to run his whole action before knowing, firstly whether the section applies and secondly, if it does apply, whether the judge will excuse him on the harsh and unjust exception. I imagine that in the ordinary case it would be impossible to separate out the s 45 issues from the ordinary contributory negligence issues so as to enable a preliminary hearing to be conducted. The existence of s 45 is likely to test the nerve of plaintiff lawyers faced with the defence as to whether or not they are prepared to risk proceeding or will settle for an even bigger discount on the plaintiff's true measure of damage.

Perhaps the most significant area in which s 45 will be pleaded as a matter of course by defendants is in the driving case where there is some evidence of contributory negligence. In *R v Evans*[3] even momentary inattention was sufficient to constitute dangerous driving. Dangerous driving is, of course, an indictable offence. It is hard to imagine many cases in which driving of such a nature as to involve contributory

[3] [1963] 1 QB 412

negligence would not satisfy the test of requiring "*some serious breach of the proper conduct of vehicle upon the highway, so serious as to be in reality and not speculatively, potentially dangerous to others*".[4] Routinely, I would expect insurers in motor vehicle cases to rely on the defence in claims by one driver against another.

Of course, if Mr Barnes was intoxicated at the time of his antisocial behaviour s 47 of the Act would be relevant. Although once again it applies only to injuries suffered on or after 9th April 2003, it presumes an intoxicated plaintiff to have been guilty of contributory negligence unless he proves to the contrary. The contribution is required to be assessed at not less than 25%. Were Mr Barnes both drunk or stoned and engaged in criminal activity, his damages would automatically be reduced to a mere $37 million based on the award in the first trial. This is so even if he were able to show that cutting him out completely would be harsh and unjust.

While on the topic, it is worth noting that if the plaintiff is himself sober but relies on the care and skill of someone who is not, a fact of which he is or ought to have been aware, he is also deemed guilty by s 48 of contributory negligence unless the plaintiff proves to the contrary. The minimum reduction in the award of damages is 25% unless the intoxicated person was the driver of a motor vehicle, when the minimum reduction is 50%.[5]

I love the *New Yorker*. It remains probably the best quality periodical regularly published anywhere in the world. It is a lonely survivor of a long time liberal literary tradition in the United States where almost everything else has trundled off in search of the loony right. The article to which I have been referring has a wonderful turn of phrase:

The conventional explanation for the growth in tort awards places most of the responsibility with plaintiffs' lawyers, who are believed to beguile juries with their eloquence and legislators with their campaign largesse. There is much truth in this, but plaintiffs' lawyers compose only one part of the tort ecosystem. The city finds itself in this situation for other reasons – among them greed, municipal ineptitude,

[4] *McBride v R* (1965-1966) 115 CLR 44 per Barwick CJ at 50.
[5] see s 49.

and the law of unintended consequences. Darryl Barnes' trial and retrial displayed this dysfunctional system in all its tattered glory.

As a player in the litigation ballpark I hesitate to accept that our system is dysfunctional, tattered or otherwise. The efforts to reform (there is that word again) the municipal legal system in New York includes representations by the Mayor to cap pain and suffering awards at $250,000.

Under s 62 of the *Civil Liability Act* awards for general damages – pain and suffering – in personal injury cases are capped at $250,000. It should be noted that this is Australian Dollars and not US dollars. At an exchange rate around 65 cents the cap sought by the New York Mayor and which already exists in relation to claims against New York State is the equivalent of more than $380,000.

Most of you will already be familiar with the structure of s 62. It requires an injury to be assessed on a scale of 0 to 100 with the award of general damages being a fixed amount depending on what the rating is.

The Act helpfully provides in s 61 that in assessing the scale value of an injury the Court must consider the range of injury scale values for similar injuries, prescribed under a regulation, of which, of course, there are none. There is of course the incomprehensible "Regulation" of which I am the proud possessor of version 7. The fact that it has already gone into so many versions without ever coming into force is compelling evidence of the quagmire into which we are descending. I have ignored it for this paper. Until it becomes law it will remain speculative as to what the end result will be. The Court must also consider scale values attributed to similar injuries in prior cases. In a legal system based on precedent and *stare decisis* that hardly seems to me to constitute a novel proposition although as you will see shortly it may be more of a change than we realise. The Act does not make it clear whether the reference to "personal injury" in s 62 is a reference to each injury, as is the case with assessing compensation under the *Criminal Offence Victims Act* 1995 where each discreet injury is given a percentage and the percentages added together to arrive at a total which cannot exceed the allowable maximum, or whether all the injuries are to be added together and a scale rating put on the total. The definition in s 51 does little

to help. In the former case the real cap could conceivably be much higher than $250,000 although the draft regulation prevents this.. It is the second interpretation which seems to me to be far and away the more sensible approach but it will be interesting to see how, if ever, the legislature attempts to fix a rating for multiple injuries in all their various combinations. The present draft regulation provides a formula for doing this. Insofar as the cap itself is concerned it seems reasonable at present.

I extracted some figures for a paper I gave on the *Civil Liablity Bill* 2002 at the Bundaberg District Law Association conference in February. Updating those figures gives the following. The 20 general damages assessments I have made in personal injury trials so far average $50,500. To my knowledge, the highest award for general damages to date was in a matter of *Mercantile Mutual v Winterton*[6] where the Court of Appeal reduced the trial judge's award of $200,000 to $150,000. The plaintiff was a young woman with a serious head injury, significant consequential physical and speech difficulties, insight but no capacity for living alone. She must have come close to the worst case scenario. I was told of another award around the $200,000 mark but the name of the case escapes me and I wasn't able to locate it when preparing this paper. $150,000 was also awarded for general damages in a brain injury case of *Green v FAI*[7]. That was not a particularly bad brain injury case. Botting DCJ was the Judge. As counsel in the case I would have rated the disability about 70% to 75% in combination with other injuries. Section 62 would have given the plaintiff $150,800 to $166,400. The $150,000 was said by the Court of Appeal to be very high but it was not disturbed.

The highest award I have made is $110,000 to a man in late middle age with an horrific outcome from an unsuccessful laminectomy. Because of his age I would regard his injury at about 75% on the scale. He was impotent, incontinent, lacked bowel control and had continuous back pain. He had been a fit and active man still boxing and running into his fifties. At 75% he would get $166,400. My average assessment of $50,500 amounts to 32 – 33 on the scale. Under the draft regulation this is a high range serious cervical injury or an extreme lumbar or thoracic injury if

[6] [2000] QCA 249
[7] [1996] QCA 107

there is nothing else but coupled with the inevitable add ons comes lower down the scale $50,000 is about average at present for a bad back that significantly affects the ability to work. When considering my suggestion that the scales presently provide adequate levels of compensation you should bear in mind that in the last 12 months the Court of Appeal has only increased the damages awarded by a trial judge in personal injury cases twice. In both cases I was the judge. Having now frightened all plaintiff lawyers, I must add in my own defence that in one the original award was already in excess of the plaintiff's own offer. I think there has been a general softening of the of the attitude towards plaintiffs in the Court of Appeal. The wind of change in personal injury laws appears to have, for the moment at least, to have largely blown itself out. Evidence of this can be seen in the difficulty the doctors are presently having generating media interest in their current complaints about the indemnity levy they have recently received.

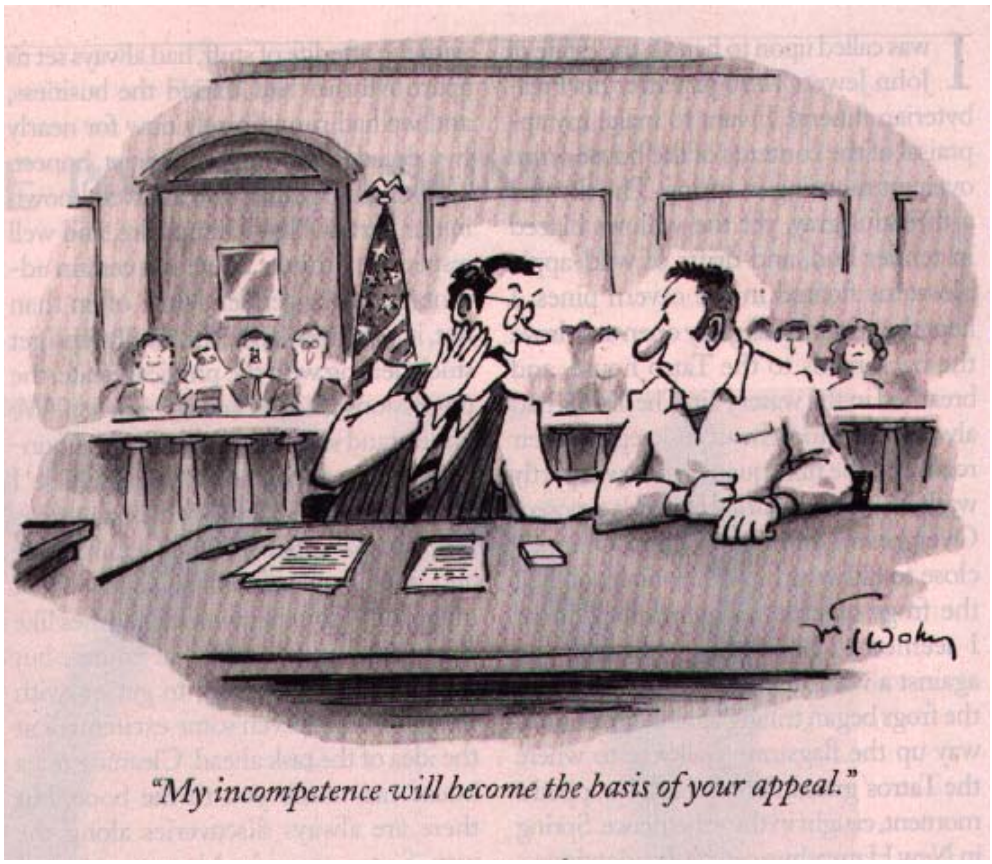
The problem with s 62 is that it does not provide a mechanism for automatic increase. Awards for general damages have been largely static in recent years. The principal reason for this seems to be the dearth of cases coming before the courts. One consequence of settling almost every case is that the Court awards against which the reasonableness of the offer has to be considered, are increasingly old. The real value of awards is not being maintained as a result.

The concept of a sliding scale in awards of general damages was said in the Ipp report at paragraph 13.23 to be a response to the High Court's decision in *Planet Fisheries v La Rosa*[8] where Barwick CJ, Kitto and Menzies JJ rejected the concept of awards of general damages having to conform to a norm. In other words they were not to be assessed by reference to awards in other cases but only by reference to the facts of the particular case. I must say that I was unaware of the decision in *Planet Fisheries* until I read the Ipp report. The decision dates from the time I was in first year of high school and more interested in girls and football than in what the High Court said. I am still more interested in football but I'm too old to be of much interest to the girls. In any event it has never been cited to me and I am sure most of you are equally unaware of it. At all events, it is systematically ignored. It was always accepted that

[8] (1968) 119 CLR 118 at 124

in jury cases, previous decisions were not to be cited to the jury, nor was a figure to be suggested. The jury was to determine the award in a vacuum. Counsel had to talk about moderate or generous awards without reference to any yardstick by which the meaning of such terms could be assessed. Again, the sense of not being able to suggest a range always eluded me. The absence of a mechanism to index the cap on general damages is likely to result in the long term erosion of the real value of such awards. It is difficult to see any incentive for the government to specifically legislate to raise the cap to compensate for the decline in its real value, particularly in view of the strength of the insurance lobby and the political fallout from increases in liability insurance.

To return to Mr Barnes, however, his award would remain uncapped because s 62 applies only to an injury arising after 1st December 2002.



The description of the retrial in the New Yorker's report is colourful. Here is an extract:

When the lawyers took their places for opening statements in the Barnes retrial, in February, it was easy to tell the favourite from the underdog.

As he rose before the jury, Robert Simels, who has represented Darryl Barnes for fifteen years, positively gleamed: he wore a gold tie and gold cufflinks, gold eyeglass frames, a gold bracelet, and a gold watch (More Trevor Morgan than Brian Harrison) *His pen was silver, and his hair was carefully and recently barbered. Gesturing around a room so cramped that the lawyers for the plaintiff and the defence shared the same, small table, Simels began, "The size of this courtroom is not going to be indicative of this case, because this is a big case". Simels asserted that "essentially there is one principal witness in this case … And that is the jacket and shirt of Darryl Barnes that he wore on August 22, 1988". The holes in the clothing showed "cylinder flash," which Simels said meant his client had been shot in the back at close range after he dropped his gun and surrendered.*

You might be puzzled at the thought that the principal witness in the case was a jacket. I suppose the plaintiff's lawyer had to say that. Neither the plaintiff nor the defendant gave evidence. But we'll come to that. The next remarks by the good Mr Simel might raise the odd eyebrow. The jury comprised 6 members and three alternates made up of 5 black women, 1 Hispanic man, 2 Hispanic women and 1 white woman. With such a mix Simels did the obvious and played the race card.

"They may suggest to you that Darryl was something other than an angel …but whether they say this because Darryl is a Muslim or they say this because Darryl is African-American, or whatever they may say"

It is just possible "they" may say Barnes was less than an angel because he was shooting at the defendant with a sub machine gun and had pleaded guilty to that. Nonetheless Mr Toobin's article continues:

Simels' racial pandering sent Patrick Mantione, the city's lawyer, vaulting out of his seat with an objection, which was sustained. With shaggy mane and frayed tie [You might unkindly think, "Baulch?"], *Mantione had the battered look of a veteran civil*

servant, but his combative, vigorous representation of the city was in marked contrast with the first time the case was tried. During summations in that trial, Simels so rattled the Corporation Council's attorney that she walked out of the courtroom in the middle of the proceedings.

Toobin commented that *in the abstract, cases like Barnes' – millions for a gun toting criminal? – look absurd. But as the retrial, before Judge Bertram Katz, unfolded, it didn't take long to see how the city could lose.* It was 15 years since the incident. The Tec-9 had been mistakenly destroyed along with the shell casings almost 10 years earlier. The police who attended the scene were white, one had almost no recollection of the event and one had misplaced his notebook. Officer Jerome's gun was also long gone.

Had the case been conducted against New York State rather than New York City there would have been no jury. Jury trials in personal injury claims against the State have been legislated away. The same result is achieved by s 73 of the *Civil Liability Act*. This applies to all claims whether arising before or after the commencement of the Act. It should be noted that almost all of the cases considered "silly" by the media including *Borland v Makauskas* and *Hackshaw v Shaw*, as well as such other treasures as the NSW man who received $2,000,000 for being caned at school were jury cases. *Borland* and the caning case were overturned on appeal. *Hackshaw* was also overturned by the Court of Appeal in Victoria but reinstated by the High Court. You can draw from that whatever conclusion you like.

I have already said that neither Barnes nor Jerome gave evidence. Earlier evidence given at other hearings and statements were tendered in lieu. I suppose in a sense it corresponded with the use of the quantum statement. Brisbane Judges still regard the use of a quantum statement as a rather quaint northern custom originally invented by Kneipp J. I must say that I regard them as extremely useful especially when I am not able to get to a judgement for a month or so and have largely forgotten the evidence. A well prepared quantum statement is always a better asset for the plaintiff than pages of semi-coherent quasi-English transcript. You might like to ask the Chief Justice while he's here why they have never "caught on" in the metropolis. At all events, any

statement signed by a party or otherwise attested to is admissible under s 42 of the *Evidence Act* 1974.

Why the plaintiff in Barnes' case would not make an appearance before the jury might be explained by the following evidence.

After the shooting, he lived in a small apartment in the Bronx, but his behaviour became increasingly erratic. …[A community health worker] was called to Barnes' home forty to fifty times between 1991 and 1998. She would sometimes find him sitting on the couch wearing nothing but a T-shirt, and on other occasions he had smeared faeces on the wall. He often held onto his adult diapers, and the stench was awful. During this time [the health worker] had Barnes committed several times to mental hospitals. About two and a half years ago, Barnes moved to a rehabilitation nursing home in New Jersey, where he still lives. According to… a forensic psychiatrist who testified for the plaintiff, Barnes today is "inappropriately contentious," living in a state of perpetual rage at his paralysis. …[Barnes] had become a Muslim and adopted the name "x35y".

A substantial part of the retrial which went for five weeks was concerned with medical evidence about Barnes' mental state. Indeed, the only defence witness who appeared live and in person was a psychiatrist. Such debates may well become a thing of the past in Queensland. The most recent draft of the proposed expert evidence rules were published on the Court's web page on 4th August 2003. The draft rules permit experts to be appointed by agreement between the parties or on application to the Court. If appointed by agreement only one expert may give evidence on the issue for which that expert was appointed unless leave is obtained. Additional experts can be appointed if there is a divergence of opinion on a particular point and parties appear to me to be free to obtain independent reports, but may do so at their own expense unless they can persuade the Tribunal that the report has assisted the resolution of the dispute. Others may disagree on whether the power to independently obtain expert evidence is as broad as it appears to me, but that may be the subject of another paper when the rule is in final form.

In any event, in view of the evidence of the plaintiff's expert, it is no wonder Simels didn't want his client paraded before the jury. Especially when he could get out evidence like this.

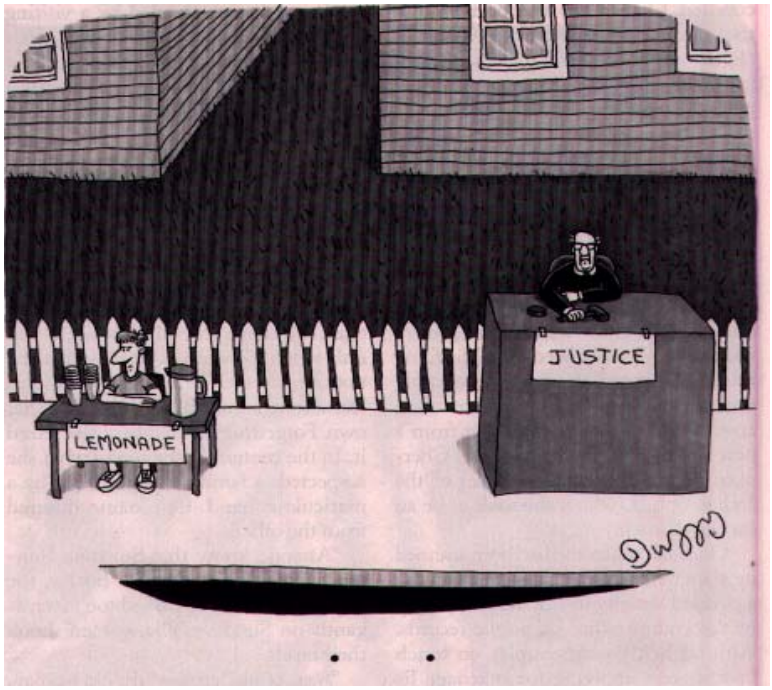
Dudley Barnes [the plaintiff's father] *trembled as he described his son's life since he was shot. Sometimes Darryl talked to his useless legs; sometimes he didn't talk at all. Dudley brought his son a television at the nursing home, but Darryl unplugged it, preferring to stare out the window. During weekly visits to the nursing home, Dudley used to bring ethnic foods from the city, but recently Darryl had refused to eat. His weight had fallen from 165 to 105 pounds. On the day he was shot, Darryl was wearing a family crucifix, which Dudley now wore. The crucifix was introduced into evidence, and, as it was passed from juror to juror, several had tears in their eyes.*

Even in America the crucifix was not strictly relevant to anything. It was great jury material however. Barnes' own version of the incident in which he was shot, given in a statement between 1989 and 1992 was that he was with a friend, Radley -last name unknown - when Radley got into fight with a stranger. The stranger reached for the Tec-9. Radley punched the stranger who dropped the gun which Barnes picked up. He then heard someone say "freeze" and he dropped the gun but was shot in the back at close range anyway. Whether this is entirely consistent with the guilty plea to the criminal charge might be a matter of some contention. When Simel's came to sum up he tested the patience of the presiding judge. In this respect I am entirely sympathetic with His Honour.

For Simels, like the opponents of tort reform generally, the case represented a form of political expression for the jurors. "We have to ask ourselves, 'Is it possible that a police officer could engage in excessive force in this city and the County of the Bronx?'" he asked the jurors. "the city would suggest to you that does not happen. But life tells us it's not so." To Simels , this was a case about policing the police. He turned to Jerome, who was sitting in the back of the courtroom, and asked rhetorically, "Could you tell us why you shot him in the back?" After a dramatic pause, the lawyer muttered, "I don't think so." Judge Katz was unimpressed. Ten times, he sustained Mantione's objections to Simels' remarks. "Don't mislead the jury!" the judge scolded. Then, when Simels referred to evidence that Katz had ruled

inadmissible, the judge erupted. He demanded that Simels stop talking and join him in his chambers. There Katz berated Simels so loudly that, back in the courtroom, the jurors shared embarrassed smiles. Plainly rattled, Simels raced through the rest of his remarks, and after precisely one hour, Judge Katz cut him off in mid sentence.

We often read of American jury awards where there is an enormous component for aggravated or exemplary damages. These have always been rare in Queensland



except in defamation cases and in such matters as malicious prosecution. Section 52 of the *Civil Liability Act* now abolishes them in personal injury cases except in two circumstances. One is obvious given society's abiding obsession with sex and particularly other people's engagement in it. Exemplary, punitive or aggravated damages are available if the act that caused the personal injury was "*an unlawful act done with intent to cause personal injury"* or "*an unlawful sexual assault or other unlawful sexual misconduct."*

There is a lot more that could be said about the *Civil Liability Act* than has been touched on in this paper. I should say some things in passing. Proportionate

liability[9], if it is ever proclaimed, does not apply to personal injury claims. A plaintiff can and will still be able to recover all his or her damages from any one of a number of tortfeasers. In the New Yorker article reference is made to New York city's annual bill of $77 million for sidewalk slip and fall cases. This is notwithstanding a municipal law giving abutting landowners property in the footpath and making them liable for footpath maintenance. Few cases are, however, brought against the landowners. The council is the litigant of choice. In Australia, of course, until *Brodie v Singleton Shire Council*[10] a council was not liable for failing to maintain. There was the old distinction between misfeasance and nonfeasance. Councils are now liable under the general law of negligence for dangers of which they are or ought to be aware. The *Civil Liability Act* seeks to address this in s 37 by restoring the law to its pre *Brodie* position except where the authority had actual knowledge of the particular risk which resulted in the harm. New York tried to solve the problem of burgeoning footpath accident claims by passing a law that the city could be sued only if it had 15 day's notice of the specific defect. This places it very close to where the law in Queensland stands as a result of the *Civil Liability Act*. Plaintiff lawyers are, however, ingenious people. The author of the New Yorker article explains it.

Plaintiffs' lawyers responded by creating a bizarre non profit entity called the Big Apple Pothole and Sidewalk Protection Committee …[T]he trial lawyers hired a company to map every defect on every sidewalk, crosswalk and curb in the city. Surveyors walk the streets and record such defects as cracked sidewalks, broken curbs, and potholes…

By the city's estimate, Big Apple has identified abut 700,000 defects, which would cost $2.7 billion to repair. Eight or ten times a year, a Big Apple clerk takes the new maps over to the city's Department of Transportation, thus giving the city "notice" of the defects. Members of the trial lawyers' association who want to use the maps can buy them from Big Apple for $375.00 each. "The whole point of what we're doing is trying to help the city fix the potholes," [the president of Big Apple said]. Not surprisingly Mayor Koch is less than impressed. He is quoted as saying, "*Lawyers, being very smart, decided that the way they could subvert this law was to turn in these*

[9] *Civil Liability Act* 2003 Chapter 2 Part 2, ss 28 to 33
[10] (2001) 206 CLR 512

maps. But the maps are useless to the city – because there are probably millions of defects, unless you have a real description there is no way to know which ones to deal with first." In other words the "notice" provided by the Big Apple maps is little more than a legal fiction, designed to perpetuate the lawsuits against the city.

Be aware that "Breach of Duty" and "Causation", the two elements of negligence, are now defined concepts.[11] This represents a bold step. The recommendation to make the attempt came from that notorious wag, Justice Ipp in Chapter 7 of his panel's report although the current legislation does not follow his suggested draft. His rationale, as explained in the report was that the misinterpretation of *Wyong Shire Council v Shirt,*[12] as identified by McHugh J in *Tame v New South Wales,*[13] is largely responsible for the disrepute into which injury compensation law fell. The misinterpretation was this. There was a tendency once it was established that a risk was not far fetched or fanciful to find that it was negligent not to take steps to alleviate the risk thus ignoring the proposition that there are risks of such low probability that a reasonable person would ignore them. There was thereafter a cost/ risk analysis to see if the level of risk justified the effort at alleviation. The definitions try to address this issue. Curiously these definitions apply only to injuries suffered after 2nd December 2002 but in any event it is probably no longer appropriate to rely on *Shirt* even for earlier injuries in view of the comments of McHugh J in *Tame.*

Be aware of provisions excluding damages for the manifestation of an "obvious risk",[14] and for dangerous recreational activities.[15] The standard of care owed by professionals is now defined.[16] Volunteers are given a measure of protection.[17]

There is in the end a point to all this. The problems with personal injuries claims in Queensland are neither new nor unique. Different jurisdictions have tried different methods of confronting them with differing degrees of success. Lawyers need to be aware of the restrictions and the exceptions. A little ingenuity in personal injury

[11] *Civil Liability Act* 2003, sections 9 and 11.
[12] (1980) 146 CLR 40
[13] [2002] HCA 35 [96] – [108]
[14] Sections 13 to 16
[15] Sections 17 to 19
[16] Sections 20 to 22
[17] Sections 38 to 44

claims goes a long way. Years ago damages were calculated on a global basis encompassing all heads. The break up into specific heads capable of separate calculation is a relatively new phenomena. It developed as a result of skilful lawyers departing from conventional practice and persuading judges to take a more analytical approach. The result was substantially enhanced awards to plaintiffs. The scope for further development is not necessarily limited.

To conclude the story of Darryl Barnes. Jeffrey A Lichtman, Pesident of the New York State Trial Lawyers Association responded to Toobin's article in a letter to the editor published in the *New Yorker* of 26th May 2003:

Toobin's account of Mayor Bloomberg's plan to limit the right to a civil jury trial was disappointing. New tort claims against the city are not skyrocketing; if costs have increased, it is, in large part, because the city is finally paying off the backlog of claims that past mayors have allowed to pile up. Bloomberg may have curbed that habit, but his answer is to make victims pay. And torts are about victims: babies brain-damaged at city hospitals, children poisoned by lead paint in city housing, and others hurt by city negligence. Toobin notes that the city only recently created a unit to study how it can learn from accidents and prevent injuries. The city should figure out what it is doing wrong – and try to fix it – before it restricts the ability of victims to obtain justice. The rights of vulnerable citizens should not be sacrificed to pay for the city's mistakes and wrongdoing.

The tone of this response echoes the quote from Mr Lichtman in the Toobin article:

Juries would no longer decide cases of police brutality, negligent city doctors, or unsafe schools … Whom would you want to decide whether your injury is frivolous or who is responsible for your child's birth defect – a politically appointed judge or a jury of your peers.

I suppose I should be offended that leaving the decision in a case to me, or at least one of my distant judicial cousins in New York is regarded as depriving the litigants of justice. But that aside the sentiments are very familiar to all of us who have experienced the hysteria, on both sides of the debate, over the last 18 months or so.

Thankfully the worst seems over although we now have to come to terms with the *Workers Compensation and Rehabiltation Act* 2003. While the general import of the sections seems the same I have just got used to the numbering of the *WorkCover Queensland Act* 1996 and I will still not know what the barristers are talking about when they talk about a s 275 notice or seek leave to institute proceedings under s 298 but that is another story.

Oh, and by the way, in the end the jury gave Barnes on the retrial $1.135 million in medical expenses, $15 million past pain and suffering and $35 million future pain and suffering, making a total of $51.135 million in damages. The city is appealing.

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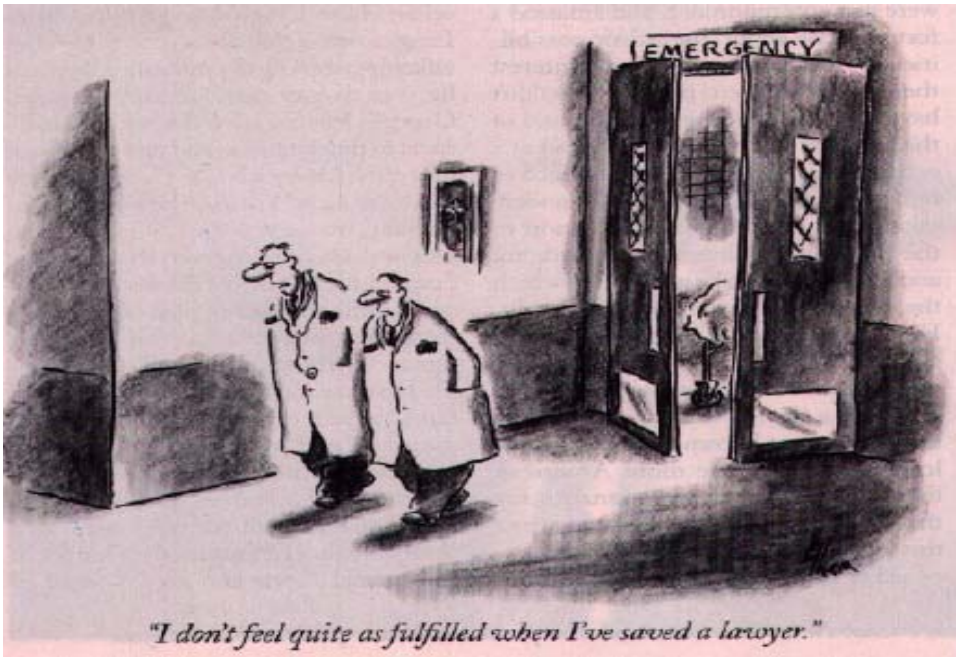

All cartoons and illustrations used in this paper are from the pages of the *New Yorker.*