Broader Issues – A Judge's view on the Effects of Tort reform

Friday 17 June 2005.
The Honourable Justice Peter Dutney

Reform! The Oxford English Dictionary – the big one – published in 1933 in 12 volumes, bound in full Moroccan leather with gold lettering and founded on the materials collected by the Philological Society, provides 10 meanings for the word "reform". Number 5 is this:

> *"To make a change for the better in (an arrangement, state of things, practice or proceeding, institution etc); to amend or improve by the removal of faults or abuses."*

Reform! How the politicians love that word. But, like Demtel, there's more!

Meaning 5 has a subplot; an alternative ironic meaning. It also means *"To alter to a worse state."*

Philology – which I assume is the core business of the philological Society – is the love of learning and literature. You would have to love learning and literature to track down the first recorded ironic use of the word "reform". In 1648 Clement Walker published the grandly titled, *"Relations and Observations Historicall and Politik, upon the Parliament begun in 1648"*. The book was in two volumes, part II of which was subtitled, *"The history of independency"*. This second volume was itself divided into three parts, the third of which, aptly for current company is entitled, "*The High Court of Justice, or Cromwell's New Slaughterhouse in England.*" But I digress.

At page 35 of the second volume of his book, Walker wrote, *"For in the interim, they garrisoned Black Fryars and St Pauls, reforming it from the church of God, to a den of thieves."*

Whether tort law reform has improved the common law by amending or improving faults or abuses or has converted it from system blessed in heaven to a base and impoverished system devoid of fairness and compassion depends on your point of view.

I have been asked to provide a judge's perspective on the effect of tort law reform. I can not speak for others on my Court or any other court. What follows is purely idiosyncratic.

The so-called "insurance crisis" in 2002 was the trigger for the most significant changes of the recent past. The collapse of HIH Insurance in March 2001 had a double effect on the general insurance industry. It removed a significant brake on the other insurance companies' ability to lift premiums and remain viable. HIH had a significant share of the Australian market for professional indemnity insurance and its subsidiary, FAI was a major motor vehicle insurer. Both companies had been maintaining or increasing market share by discounting premiums. The second impact was that the other companies used the collapse to focus attention on what they claimed was the parlous state of the indemnity insurance market, a condition they

claimed was due to a "culture of litigation." The insurers argument was bolstered by the roughly simultaneous collapse of UMP, the doctors indemnity insurer. This culture of litigation was said to have taken hold in Australia, sparked by high awards of compensation and low thresholds for liability. Premiums rose sharply, in some cases to multiples of pre 2001 levels. The community panicked. As a consequence, politicians panicked. The general hysteria surrounding personal injury actions climaxed with the document colloquially known as the "Ipp Report"[1] in September 2002. Justice Ipp's committee made a number of recommendations designed to limit the liability of defendants to pay compensation. The fact that these recommendations were made was hailed as an acknowledgement that the system, or more particularly, the Courts, had gone overboard in awarding compensation and had to be reined in by the legislature. Whether or not the Courts had gone overboard is a matter on which opinions might differ. The assertion that the affirmative view was justified by the Ipp report is, of course, nonsense.

The terms of reference addressed by the Ipp report began as follows:

> *"The award of damages for personal injury has become unaffordable and unsustainable as the principal source of compensation for those injured through the fault of another. It is desirable to examine a method for the reform of the common law with the objective of limiting liability and quantum of damages arising from personal injury and death."*
>
> *"Accordingly, the panel is requested to:*
> *1. Inquire into the application, effectiveness and operation of common law principals applied in negligence to limit liability arising from personal injury or death …*
> *2. Develop and evaluate options to limit liability and quantum of awards of damages"*[2]

Plainly the decision that awards were too generous and too easily obtained had already been made and Justice Ipp was precluded by the terms of reference from passing comment on that decision. As a wise and experienced judge he was cunning enough not to enter into that debate when it was not strictly necessary.

In fact, more recent research has come to an entirely different view from that which prefaced Justice Ipp's terms of reference. In October 2004, Jane Campbell, a lawyer and financial adviser prepared a report for international insurance broker, Benfield, in which the causes of the insurance crisis were attributed to the global capital shortage following the attacks in the US on 11 September, 2001, the cyclical nature of the insurance industry and the release from the problem of underpricing triggered by the HIH collapse. Ms Campbell's research did not support any conclusion that the crisis was caused by the law of negligence being unfairly slanted towards plaintiffs.

Despite this, by the time the Ipp report was released, the problem of excessive payouts

[1] Perhaps more properly called, "The final report of the Negligence Review Panel, in accordance with the terms of reference announced on 2 July 2002."
[2] Review of the Law of Negligence – Final Report of the Negligence review Panel, September 2002 at page ix.

was perceived wisdom. Other eminent jurists jumped aboard the reform bandwagon. In his speech on the occasion of the special sittings of the Supreme Court to mark his retirement Justice Thomas remarked:

> *"There is one concern that has troubled me greatly in recent years, and I want to share it with you. It is the popular lust for compensation in an over litigious society. This has been accelerating for the past 20 years. We are belatedly seeing its destructive side. Churches, schools, sporting clubs and all manner of voluntary organisations that help weave the fabric of our society are finding it too financially risky to perform traditional services. There has been a retreat on the part of professional people from some essential services. Suddenly an insurance crisis is upon us with unimaginable rises in insurance premiums. Theses are direct results of the explosion of litigation and our aggressive legal industry. We have allowed the tests for negligence to degenerate to such a trivial level that people can be successfully sued for ordinary human activity. We now have a compensation oriented society in which people know that a minor injury may be a means of getting more money than they could possibly save in a lifetime. The incentive to recover from injury disappears with such a system. Self reliance becomes a scarce commodity and society becomes divisive and weak."*[3]

Of course, the media loved it. Here was a senior and much respected judge acknowledging that we had got it horribly wrong. Not all judges were enthusiastic supporters of the new orthodoxy. The Chief Justice, opening the North Queensland Law Association Conference in Townsville on 4 October 2002, stoutly defended the status quo even if his remarks displayed a naïve confidence in the resolution of the legislature to hold the line. After noting that the legal profession was being blamed for the crisis the Chief Justice commented:

> *"A casual reading of the financial press would since have dissuaded most from the casuistry of that position, even allowing for the natural tendency to yield to the temptation of blaming foremost the lawyers."*

After criticising the recommendations of the Ipp report in relation to medical negligence the Chief Justice concluded:

> *"Fortunately the government of this State has not succumbed to the pressures borne, for example, in New South Wales, of particular local problems not replicated here. I hope that remains the position, but the pressure arising through the Standing Committee of Attorneys-General, will I expect be strong."*

The *Civil Liability Bill* was circulated by the end of 2002 and enacted in April 2003.

[3] The full text of the address delivered on 22 March, 2002 can be found on the Supreme Court web site at http://www.courts.qld.gov.au/publications/articles/speeches/Thomas/220302.pdf.

While the *Civil Liability Act* 2003 was the high water mark of tort reform, it was hardly the start. The reform process started in 1995 with what are referred to as the "Goss Amendments" to the *Workers Compensation Act* 1992. In the explanatory notes to the changes the purpose of the introduction of what, in retrospect, appears to be a rudimentary attempt to impose a restrictive regime of preliminary steps the reason for the amendments is explained as being to save the Workers' Compensation Scheme from a perceived financial diaster brought about by falling premium income and rising common law claim costs.[4] As you will recall this regime lasted a bare 12 months before being replaced by the far more extensive and comprehensive *WorkCover Queensland Act* 1996. These provisions commenced, to much consternation on the part of the profession, on I January 1997.

In 2002 the *Personal Injuries Proceedings Act* created its own stir.

As I have already said, the *Civil Liability Act* was the zenith of the process to date. Since late 2003, there have been increasing signs of a shifting mood in public sentiment. Statements that the reforms may have gone too far have actually been reported in the mainstream media.

Early toes to be dipped in the pro plaintiff side, not surprisingly, included Justice Kirby of the High Court. At a function at Allens Arthur Robinson in Sydney in February, Justice Kirby is reported to have said:

> *"We have to be very careful about pushing the notion of personal responsibility forward, in court decisions and legislation. We have to beware that we do not remove entirely the role of the common law as a standard-setter for carelessness and accident prevention in our society. Whilst in Australia we roll back the entitlements of those who suffer damage, in the name of 'personal responsibility', we have to be careful that we do not reject just claims and reduce unfairly the mutual sharing of risks in cases where things go seriously wrong."*[5]

Only three weeks earlier, Chief Justice Spigelman of New South Wales had raised concern about legitimate personal injury claims being excluded by the restrictive legislative changes. (Notice how I am subtly avoiding the use of the word "reforms"?)[6] The Chief Justice made his remarks in two contexts. The first was the figures from the Productivity Commission which showed that in the New South Wales District Court which dealt largely with personal injuries there had been a decline from 20,000 new claims filed in 2001 to 8,000 claims in 2003, a drop of 60%. Nationally over the same period the fall had been 31%. The second concern was that the entitlement to compensation in many cases depended on the relationship between the plaintiff and the defendant.

I would like to address each of these concerns separately. The decline in the number of cases proceeding in the courts is both dramatic and, at first blush, concerning. In my own small part of the world the callover list in the mid 1990's was around 90 cases awaiting the allocation of trial dates. Now a case is allocated a date when the

[4] *Queensland Acts 1995*, Explanatory Notes, p 740.
[5] Reported in *The Australian Financial Review*, 25 February, 2005.
[6] Report in *The Australian Financial Review*, 4 February, 2005.

request for trial dates is filed and that date is almost always in the next block of civil sittings. In Brisbane when I was at the bar, the period from entry on the call-over list to trial was of the order of 18 months. Now dates are available pretty well as and when required. The figures in the Supreme Court Annual reports show that at the end of the 1996/7 financial year, there were 258 civil cases awaiting trial dates in Brisbane. Following this the Goss amendments would have begun to have had an effect. At the end of the 2003/4 financial year there were 73 cases awaiting dates. In 2001/2 the figure had dropped as low as 28. The difference would be mainly reflected in the decline in personal injury cases. Interestingly, in 1996/7 only 67 cases were disposed of by the handing down of a judgment. In 2003/4 91 cases were similarly disposed of. In 2001/2 the figure was 113. In 1996/7 two thirds of cases seeking a trial date settled. In 2003/4 the figure was not much more than half.

Much of the fall in the number of cases has been because of the regimes of compulsory ADR imposed in virtually all personal injury matters as a prerequisite to the right to commence action. In the old days, despite the length of the call-over lists most matters settled, usually on the day of trial. A large proportion of those matters now settle at the pre-trial conference and never make it to the list.

The shift in settlements from the door of the court to the pre-action stage has resulted in the much faster resolution of the majority of claims. Cases settling at the settlement conference stage cost the litigants less than cases which settle at the door of the court. Less court time is wasted if cases that get trial dates are more likely to run. There is a downside, of course, as there always is. If a case gets to court, it is at a greater cost because of the duplication involved in preparing for both the settlement conference and the trial. The cases which now come before the courts are, in the main, much more finely balanced than in the past. There is usually an argument for both sides with the result that the defendant is now winning a much greater percentage of cases than was previously the case. In my view, this is purely a function of the more judicious selection by insurers of those cases which are worth fighting. Since last September, I have handed down six judgments in personal injuries cases. The defendant has been successful in two of those and one of the others is on appeal. I believe judgment may have been handed down this morning but I am unaware of the result. That represents a much higher success rate for insurers than has historically been the case but it represents, in my view, the change in the type of case coming before the court rather than any change in the approach taken by judges, me in particular, to the way in which a case is disposed of. This change in relation to the cases coming through the courts reflects one of the successes of the "reforms".

The inconsistency between regimes is of much greater concern. The examples are obvious. Where once master/servant actions were regarded by plaintiff lawyers as unfairly restrictive of a plaintiff's rights, excluding *Griffiths v Kerkemeyer* damages and such things as interest on unexpended money, they are now regarded as much more generous than other claims where damages for pain and suffering are capped under the *Civil Liability Act* 2003. It is difficult to see why an employee who is injured in the course of his employment by the negligence of his employer should be compensated differently from a person who is employed by a contractor on the same job and suffers the same injury as a result of the same negligence. The existence of such differences is unfair to litigants, lessens the prospect of consistency in awards and, so far as I can see, illogical. The pressure at present should be on a uniform

system irrespective of whether the injury is employment related, domestic or arises out of the use of a motor vehicle.

Perhaps the strongest indicator of a shift in the community's attitude to personal injury claims is an editorial on page 13 of the *Sydney Morning Herald* of 24 May 2005 headlined, *"Judges setting own damages barrier"*. The article commented that since Chief Justice Gleeson took over the helm in the High Court in 1998, plaintiffs have not won an appeal. Prior to 1998 the plaintiffs strike rate was three in four. The commentator remarks:

> *"... is the High Court following the lead of the legislatures by taking a firmer stand on issues of personal responsibility? Or was the common law trend already taking shape when lawmakers decided to tighten statute law and make it more difficult for the injured to sue for damages citing another's negligence? Answers to these questions are more than academic. They go to the issue of whether legislatures, blind to judges already turning back the damages flood, have gone too far with sledgehammer statutes, risking the appropriate balance between individual responsibility and broader duty of care."*

Later the editorial writer added:

> *"... a two pronged offensive by statute and common law risks making the burden of proof of negligence too onerous. The effect of court judgments is taking shape. Perhaps governments should focus now on the provision of care needed by the injured"*.

I was gobsmacked. An editorial from the Sydney Morning Herald supporting judges over a populist legislature was like Alan Jones voting Labor - or worse – Andrew Bolt and Phillip Adams exchanging Christmas cards.

Perhaps the media have finally come to realise the real force in Justice Callinan's view[7]:

> *"Both the common law and insurance business and practice are the products of hundreds of years of evolutionary development. It seems rather unlikely that everything that has so evolved is wrong and should be discarded. When loud voices clamour for radical change it is usually time for patience and caution."*

The Law Council of Australia has been an effective lobbyist in moving the public sentiment. It was responsible for the publication in the past fortnight of profit figures showing the insurance companies making record profits. At last, the plaintiff lawyer lobby had a simple and popular foil to the spectre of failing community clubs and closing playgrounds which the insurers exploited so well only two or three years ago. After all, insurers are only a touch behind banks and plaintiff lawyers in public odium. *The Courier Mail* on 6 June had a headline on an article, albeit on page 8, *"Law Boss Seeks Public Liability Windback"*.

[7] (2002) 25 UNSWLJ 859, 864.

Our own Chief Justice, consistently with his position earlier in the reform debate and despite *Justinian's* assertions to the contrary, used the insurance companies' profit figures to suggest that, "*it may be time for the government with circumspection to look at the prospect of winding back the reforms."* Unlike the Chief Justice, however, I can see little prospect of the clock being turned back anytime soon.

"By God, for a minute there it suddenly all made sense!"

Not long after I was appointed to the bench I was asked to deliver the keynote address at the annual conference of the Plaintiff Lawyers. My theme on that occasion was that, in the emotive world of personal injuries, perception is everything. Nothing has changed in the 5 years since. The party perceived to be at fault changes periodically but real reform is difficult when much of the politics is media driven.

While the shift in public mood means that any further changes in the near future are, in my view, unlikely, there is an urgent need to do something about the confusion created by the multiple, complicated compensation systems. There is a need for the government to make a decision on which system it favours and impose it on all types of claims.

Even the government appears confused by what it has created. It seems to have become popular in *the Courier Mail* at least to make fun of the "Jim Hacker speak" to which the premier is alleged to be prone, as evidenced by the competition run in the Q-Confidential section of last Monday's paper. On Sunday I was listening to the premier commenting on the radio about the availability or otherwise of proper compensation for victims of the Bundaberg hospital fiasco. He asserted that under his government's "reforms", victims of apparently botched operations were still entitled to unlimited damages. He explained this by saying that even though general damages were capped at a maximum of $250,000, the victims were still entitled to unlimited additional damages for pain and suffering. Maybe it was a slip of the tongue but if not, what hope has a system got when the premier, himself a lawyer who did, at least for a short time in the 1980's, practice in personal injury law, knows that little about his own government's legislation.

One area which is of concern over the longer term is whether the value of awards for general damages will be maintained. There is no mechanism in the *Civil Liability Act* for automatic increases in the capped amounts. Capped awards for pain and suffering are new in Queensland and throughout Australia. The idea is hardly new, however. In 1975 awards for pain and suffering in California were capped at US$250,000. They have not increased since. By 2004 the real value of the cap had been reduced to US$71,000.

The top of the cap for the awards sounds attractive and is easily sold to a media which is, frankly, unsophisticated in legal matters. The truth is very different. The maximum payout is of course only available under the *Civil Liability Regulations*

2003 for quadriplegia and extreme brain injury. In the case of quadriplegia the schedule states that:

> *"An ISV at or near the top of the range will be appropriate only if the injured person has assisted ventilation, full insight, extreme physical limitation and gross impairment of ability to communicate."*

For brain injury it is just as bad. To get close to the full $250,000 the plaintiff needs to satisfy these requirements:

> *"An ISV at or near the top of the range will be appropriate only if the injured person needs full-time nursing care and has the following –*
> - *Substantial insight despite gross disturbance of brain function*
> - *Significant physical limitation and destruction of pre-existing lifestyle*
> - *Epileptic seizures*
> - *Double incontinence*
> - *Little or no language function*
> - *Little or no meaningful response to environment"*

Just to show that the draftsperson was not entirely determined that no-one should get the top award the schedule permits an award up to $250,00 even if the plaintiff has some ability to follow basic commands, can open his or her eyes, has some return of postural reflex movement and return to pre-existing sleep patterns.

For a mere amputee like the poor woman who has featured in the news reports in relation to the Bundaberg fiasco the maximum award would be 60% or $150,000. But, of course she was to have had the leg amputated anyway so all she suffered was pain and psychological trauma. Her solicitors estimate of a maximum of $71,000 is probably about right.

Again, I do not wish to comment on whether the amounts at present are fair. Awards in Queensland for pain and suffering have never been particularly high. It is, however, quite misleading to talk in terms of the maximum to which virtually nobody will ever be entitled.

One consolation in all this is that we are not alone. President Bush in the United States has nominated tort reform as one of the key focuses of his second term. In January this year, President Bush highlighted the need for *"'common sense medical liability reform' to protect patients, to stop the sky-rocketing costs associated with frivolous lawsuits, to make health care more affordable and accessible for all Americans and to keep necessary services in communities that need them most."*[8] Does any of this sound familiar? If not, try this. *"The rule of joint and several liability is neither fair, nor rational, because it fails to equitably distribute liability. The rule allows a defendant only minimally liable for a given harm to be forced to pay the entire judgment, where the co-defendants are unable to pay their share."*[9] The

[8] The White House, *Legal Reform: The High Costs of Lawsuit Abuse* (2005) <http://www.whitehouse.gov/infocus/medicalliability> at 10 June 2005.
[9] American Tort Reform Association, *Tort Reform Record* (2004) <http:// www.atra.org/files.cgi/7668_Record12-03.pdf> at 12 June 2005.

media releases make it clear that the President intends this to apply to personal injuries litigation.

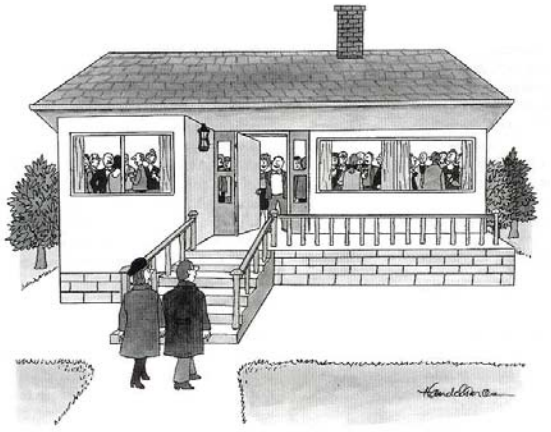
Where at the height of the hysteria surrounding rising insurance premiums, even the ultimate populist, Bob Carr of New South Wales finally was not prepared to tread, President Bush is planning to go stumbling in. Is it any wonder the New Yorker is currently publishing cartoons like this?

"Do you have any picture books that could help a child understand tort reform?"

Well, what has been the effect of the roller coaster we have been on over the last three years. Anecdotal evidence suggests that many small claims that once might have progressed to the settlement conference stage are not now being taken on by personal injury firms. There was some downsizing of specialist personal injury firms. There has been a marked increase in the attention being given to estate matters generally including TFM's. Because of the long lead times that now exist before actions are commenced the effects of the *Civil Liability Act* changes have not yet been felt. The first cases are just starting to come through. The limit below which actions may be commenced in the District Court and the fact that awards for non-economic loss, in the past, rarely exceed $200,000 even in the worst imaginable cases, means that litigants in the Supreme Court are still principally fighting over economic loss. Even the limit of 3 times average weekly earnings means that the loss of incomes of up to $2,700 gross per week can still be fully compensated. Such a loss over 10 years with 5% discount comes to well over $600,000.

What has become increasingly common over recent years have been the interlocutory fights concerning the operation of the various pieces of legislation. Where legislation generates as many genuine disputes concerning its meaning and application as the WorkCover legislation, *PIPA* and *The Civil Liability* Act there is a significant problem and a significant cost both to litigants and the community.

I am not pessimistic, however, regarding the future of personal injuries law. Insurance companies are no different to any other public company. Maintenance of share price depends, not on making profits, but on increasing profits. In 2002, a significant brake was taken off the insurers' ability to increase profit by charging higher premiums. I suspect that competition, being what it is, some other player will attempt to buy market share by discounting premiums and the crisis for the consumer will pass. I also suspect that it is not beyond the wit of lawyers to come up with new and lucrative areas of claim



"I think I'm having pre-traumatic stress disorder."

At the end of the day, reform is in the eye of the beholder. The last three years have shown us two things. First, what goes around comes around and second, reforms made in haste in response to hysterical pressure and made in a piecemeal way are not always the reforms which best serve the community interest.

As a judge it would be nice if the focus was turned away from the legal profession for a while. In view of the inquiry presently underway doctors would likewise prefer that the spotlight was directed elsewhere. Perhaps this might be an alternative. [10]

"We've been taking a little harder look at journalists lately."

[10] All illustrations in this paper are taken from the pages of the *New Yorker.*