Queensland Law Society Personal Injuries Conference
Royal on the Park, Brisbane
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"Challenges and opportunities for personal injuries practitioners in Queensland"

The Hon P de Jersey AC,
Chief Justice

There are I believe two major challenges facing personal injuries practitioners in this State.

The first is not confined to Queensland. It is to continue to seek to foster reconsideration by executive government of the reforms legislatively set in place over recent years following publication of the report of the Negligence Review Panel chaired by Justice Ipp. Putting it that way, I betray a personal position, which I have previously declared publicly, and I accept that not all practitioners would necessarily share that view. But I suspect most would.

The second challenge is to comprehend and work competently within a difficult and complicated statutory regime. Sitting in the applications jurisdiction of the Supreme Court, one cannot help but be struck by the number of cases raising procedural issues under that legislation, issues sterile in character but often of critical significance to the pursuit of compensation. The question arises whether the regimes could not be simplified.

The terms of my topic refer to opportunity as well as challenge. The current legislation, and the ADR thrust which preceded it and no doubt encouraged those behind the legislation, have had a by-product I consider in one respect regrettable. There has been a marked shift away from court adjudication to consensual resolution. The regrettable aspect rests in reduced opportunity for the development of advocacy skills, and a shrinking range of court decisions available to inform that consensual process. The "opportunity" which I nevertheless identify is the opportunity to participate in that often less adversarial process.

May I say a little more now about each of those matters?

Tort law reform

I have spoken previously about the two Queensland statutes of recent years which have significantly interfered with the awarding of compensation to those who have suffered injury because of the actionable fault of another. Now we would all accept that a person injured through the fault of another should be adequately compensated by that other. The issue is whether the legislative reforms went too far. Some change was justified, although legislation was not necessarily the only way of securing it. There had been a shift discernible from court decisions over recent years towards according more primacy to individual responsibility for those engaged in ordinary day-to-day activities. The tripping cases exemplify that.

In some respects, the recent legislation has brought about marked erosion of that fundamental right to adequate compensation. I briefly mention some of those respects.

There is the cap on general damages, including the fact that the $250,000 Queensland maximum is substantially less than in some other jurisdictions. Why that discrepancy?

There is the cap on damages for past and future economic loss, no more than three times average weekly earnings per week. This involves discrimination which ignores the enhanced capacity of some within the community to, say, maintain themselves and contribute to the maintenance of their families and often others in the community as well.

Then there is the limitation on the award of damages for gratuitous services, now dependant on the provision of such services for at least six months and at least six hours per week: essentially an arbitrary limitation.

Limitations in relation to the costs of proceedings leading up to awards of up to $50,000 would mean in practice that many of those claims would not realistically be pursued. Structuring a process where meritorious claims at that lower level become impracticable, by reason of costs, plainly works injustice.

Then there is the grid by which damages fall to be calculated. The assessment of damages had traditionally proceeded as an evaluative process carried out by a court fully informed of the relevant facts, and appreciating the interrelationship of many of those factual considerations. The new legislative provisions introduce an inflexibility which is antithetical to that. The calculation of general damages under s 62 of the *Civil Liability Act* provides a good example of that.

The recently published report of Professor E W Wright, "National Trends in Personal Injury Litigation: Before and After 'Ipp'", for the Law Council of Australia, records an extraordinary fall in personal injury filings over the period of these reforms. They were introduced here in 2002 and 2003. As Professor Wright notes, claims lodged in the Supreme and District Courts in Queensland, in the year 2002/3, were down 75% on the previous year, and down by 68% from the average of the preceding seven years. In terms of raw numbers, there were 794 filings in the year 2000/2001, falling to 268 in the year 2004/5.

There is need for active reconsideration whether the so-called reforms have proved justified, or should in Queensland be wound back.

I have been concerned whether extraordinary jury awards in other jurisdictions may not have operated to skew the ultimate result adversely to claimants in this non-jury personal injury State. There is another local feature of arguable significance.

It is interesting to note the strong financial positions in this State of WorkCover and the compulsory third party scheme. The former is not affected by the *Civil Liability Act*, and any savings to the CTP scheme as a result of these reforms have yet to register. I understand WorkCover Queensland has the lowest employer premiums in Australia, a cost effective and efficient scheme which delivers what is accepted as reasonable

compensation to injured Queensland workers. The apparent strength of the financially secure CTP scheme in this State is not the result of these reforms.

Acknowledging the health of those systems, which account for the vast bulk of claims, one queries why – at least in this State – these new limitations were ever necessary for the residue of claims, and why they should have been engrafted onto an otherwise apparently healthily operating motor accident system.

I believe the time is ripe for the reconsideration of these legislative reforms.

I have covered this matter in abbreviated form today. Most of what I have said I expressed more extensively at a conference convened by the Australian Lawyers Alliance on 17 February 2006, and anyone interested may read what I then said on the courts' webpage.

As practitioners we are bound to uphold the law, but that of course does not exclude our articulating a push for reconsideration of legislation when appropriate, which in this case I encourage concerned practitioners to do – certainly in support of the Queensland Law Society which has been taking active steps in that regard. I turn now to the second challenge I identify.

The complexity of personal injuries legislation

In this State we now have three pieces of legislation which regulate claims for damages for personal injuries: the *Motor Accident Insurance Act* 1994, the *Workers Compensation and Rehabilitation Act* 2003 and the *Personal Injuries Proceedings Act* 2002. Broadly speaking, the last applies to injuries not covered by the others.

The legislation is dauntingly comprehensive. I illustrate with these statistics. While the *Personal Injuries Proceedings Act* covers 77 sections in a pamphlet copy 67 pages long, the other Acts are of even more substantial proportion: taking the cake is the *Workers Compensation and Rehabilitation Act*, the successor to the *WorkCover Queensland Act*

1996: it contains as many as 637 sections together with six schedules, and the pamphlet copy consumes a massive 427 pages, which leaves the *Motor Accident Insurance Act* comparatively spare: 111 sections over 123 pages.

Of course establishing comprehensive WorkCover and CTP schemes necessitates substantial provision. But much of that legislation is devoted to regulating the claims which may be litigated.

There is plainly worthwhile focus on matters like rehabilitation, and the compromise of claims short of court. But my overall concern is the complexity of the schemes which have been established, and that there are substantial differences between the regimes. Again I accept that the schemes cannot, for various reasons, be uniform, but I am not persuaded the current extent of difference could not be moderated. I am not suggesting this legislation emulates or even approaches the Byzantine complexity of the *Income Tax Act*, but there is I believe room for simplification of what are complicated legislative landscapes, and for greater coordination among the three of them.

That present complication increases the prospect of error on the part of practitioners, and that is not in the interest either of the litigant, the practitioner or the public. I imagine it has necessitated the production of flowcharts and the like applicable to the respective regimes, and the devising of comprehensive bring up systems.

The Queensland Law Society informs me that over the last five years, the number of solicitors' claims on the professional indemnity scheme relating to personal injury matters has increased. As a percentage of total claims, in respect of all areas of law, personal injuries based claims have in fact decreased, but that is considered a result of the circumstance that claims arising from other areas are increasing. Focusing on a ten year period, the numbers of claims from the personal injuries realm in 1997/8 and 1998/9 were similar to those now arising. The number of personal injuries insurance claims decreased from 1998 to 2001, but has increased again to earlier levels. While it is difficult to be

confident about the reason, it is apparently clear there are now more claims because practitioners fall foul of the pre-litigation processes built into these pieces of legislation. Gone are the days when the almost exclusive basis for a successful claim in this area was failure to commence the proceeding before the expiration of the limitation period.

Hence the second challenge identified, that the practitioner comprehend and work competently within these complicated legislative frameworks, while, again, promoting a view favouring simplification and coordination. I know that the Law Society is itself engaged in that initiative as well, which I obviously support.

I appreciate that yet further modification of these statutory schemes would necessitate yet further education – in-house and collectively – within the profession. Tedious though that prospect may be, I believe there would nevertheless be great utility in the course I am urging.

I turn from those challenges to the matter of opportunity.

The opportunity of consensual resolution

I say at once that I am a proponent of ADR, because of the fulfilment of its principal goals – consensual resolutions involving less acrimony, perhaps continuing relationships, and importantly, less expense and more expedition, subject always to the stipulation that the result be well-informed and in broad terms just. But regrettably, there is a downside to the conspicuous success of ADR: as I said at the outset, there is no longer the substantial raft of court decisions available to inform the settlement process, and practitioners do not enjoy as much opportunity to develop their advocacy skills. The fall-off in trial work is a world-wide phenomenon. I read recently of the results of some research in the USA, where the American Bar Association established that the percentage of federal civil cases going to trial dropped from 11.8% in 1962 to 1.8% in 2002, a trend also appearing in the State courts. This is I believe largely attributed to a renewed focus on settlement, fostered by the early proponents of ADR. One consequence is the tapestry of court judgments is

not as plush, and court trial work for many practitioners has become something of a luxury. But there is the converse opportunity.

When the courts embraced ADR 25 years ago, the profession – after some early forgivable resistance – soon came on board and developed new skills, with mediation, for example, taking a place alongside adjudication. Each branch of the profession now boasts substantial numbers of practitioners who display particular talent in that art.

In the area of personal injuries work, there is under these regimes large scope for the deployment of those talents. Practitioners are encouraged actively to develop them, because they are not necessarily congenital. The universities run worthwhile courses, and completion of such a course if generally required for accreditation by the Supreme Court.

Conclusion

Over recent decades, practice in this important, though once comparatively simple area of the law has become particularly demanding. The legislation is a minefield of potential pitfalls. Recent reforms are increasingly being identified as of dubious justification. In the result, this landscape poses real challenges to the conscientious practitioner, not only to understand and keep abreast in a difficult area, but also to do something to promote a more equitable approach to the awarding of compensation in particular.