

PROBLEMS IN INSURANCE LAW

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Insurance companies have collapsed. Insurance premiums are on the rise. Litigation against professionals is proliferating. Allegations of blame by sectional interests on all sides have not unsurprisingly been amongst the key legal issues of 2002.

A multitude of reports, some even offering contradictory proposals for solving what has become known as the 'public liability insurance crisis', have been published in the last six months. In September 2002 there was the release of a report by the Australian Health Ministers' Advisory Council Legal Process Reform Group and the Australian Competition and Consumer Commission. October saw the release of a report from the Review of the Law of Negligence. The Victorian, the NSW ('NSW') and Northern Territory Parliaments all enacted legislation to cap or restrict damages in various ways. On 24 October, the Prime Minister announced a proposal by the government to assist the medical profession to obtain and secure a broad based indemnity.¹ Meanwhile, there have been calls from several former and current jurists for change: retired Chief Justice of Australia Sir Harry Gibbs,² Justice Thomas, recently retired from the Supreme Court of Queensland³ and NSW Chief Justice Spigelman⁴ in particular.

The question has been put, but not I think yet convincingly answered, whether the 'lawyers' are 'to blame' for the 'crisis'. What has gone wrong? What, since the House of Lords posed its famous question, 'who is my neighbour' in *Donoghue v Stevenson*⁵ has happened in the law of negligence to cause the current problems? A combination of factors may be identified. The weight to be attached to each remains more uncertain. Perhaps the lawyers have made a contribution. Whether they have, or the extent of it may depend upon who

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1 John Howard, 'A New Medical Indemnity Insurance Framework' (Press Release, 23 October 2002), <http://www.pm.gov.au/news/media_releases/2002/media_release1937.htm> at 19 November 2002.

2 See, eg, ABC Radio, 'Gibbs Calls for Law Reform', *The World Today*, 14 May 2002 <<http://www.abc.net.au/worldtoday/2002/05/14/20020514worldtoday02.asx>> at 19 November 2002.

3 See, eg, *Lisle v Brice* [2002] 2 Qd R 168, 174 (Thomas JA); Justice Thomas, 'Retirement Speech' (Speech delivered at the Banco Court, Supreme Court of Queensland, Brisbane, 22 March 2002) 7-8, <<http://www.courts.qld.gov.au/publications/articles/speeches/2002/Thomas220302.pdf>> at 19 November 2002.

4 Chief Justice Spigelman, 'Negligence: The Last Outpost of the Welfare State' (2002) 76 *Australian Law Journal* 432.

5 [1932] AC 562.

answers the question: an injured plaintiff, a plaintiffs' lawyers association, an insurance company or a professional, confronted with a sudden large increase in premium.

But I do think, and I can say with some confidence that those much maligned people, juries, in this country at least, are not culpable, if culpability there be. The jury system has been a focus of much, generally uninformed criticism. Reference is often made to the large 'payouts' awarded by juries in the United States in tobacco-related cases. Perhaps because of films and the media focus, even in Australia, upon huge awards by juries in the United States, many Australians believe that juries in this country are prone to excess.

It is surprising that the public should hold so many mistaken views about its own representatives: the jury is, after all, one of the oldest means for the public to participate in the legal system. It is, as I said in *Liftronic v Unver*, 'uniquely well qualified to decide, to use the language of Mason, Wilson and Dawson JJ in *Braistina* "[w]hat is considered to be reasonable in the circumstances of the case [according to] current community standards"'.⁶

The argument that juries are by their very nature inclined to excess also overlooks two features of American law which have no parallel in Australian law. The first is the United States constitutional guarantee of trial by jury.⁷ There is no analogue to this in Australian law. In this country the only constitutional assurance of trial by jury is to be found in s 80 of the *Australian Constitution* which provides:

The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

There are two other important distinctions between the two countries. First, compared with the practice in America, Australian juries are called on to give verdicts for damages in relatively few of the civil cases which come before our courts. The second difference between the two systems is that exemplary or punitive damages are available in almost all cases in the United States, whereas their availability is much more limited in Australia.⁸ Whether American juries are 'prone to excess' is not for me to say. Claims that the jury system is substantially culpable for any current problems in insurance law in this country are however misdirected.

Let me therefore return to Australia. The general perception remains that juries always find for plaintiffs and generally award far too much. Some journalists have adopted as a cliché, the description 'obscene awards'. The reality is somewhat different. A case came to the High Court recently in which a worker sued his employer in respect of a back injury that the worker said he

6 (2001) 75 ALJR 867, 877 (Gummow and Callinan JJ).

7 *United States Constitution* amend VII provides: 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.'

8 See, eg, *Gray v Motor Accident Commission* (1998) 196 CLR 1.

suffered in lifting steel bars that he had to paint. The basis of his claim was unclear. He made no effort to ask anybody else to help him, and deliberately did what his employer told him not to do in lifting the bars. The employer had educated the worker in workplace safety and in ways to reduce the particular risk of injury. The jury held that he was 60 per cent responsible for his injuries and accordingly reduced his damages on that account. Despite this, and although the worker's actions amounted to 'an unauthorised departure from the system [that the employer] provided', a majority⁹ of the Court of Appeal of NSW held that:¹⁰

[the worker] change[d] the system so as to reduce the discomfort and inconvenience of working for hours ... in a crouched, kneeling or similar position. ... In [our] view this was something the [employer] ought to have foreseen and guarded against ...

The Court of Appeal accordingly rejected the jury's apportionment and decided that the plaintiff's damages should be reduced by only 20 per cent, that is, it held that his employer was 80 per cent to blame. The employer appealed to the High Court which, by a majority,¹¹ upheld the appeal and restored the jury's findings.¹²

To the best of my knowledge, the largest assessment of damages made in this country is far and away that of a judge sitting without a jury, in NSW, in *Blake v Norris*.¹³ There, the plaintiff was severely injured in an accident. He sued for damages. The defendant claimed that he was affected by fatigue and alcohol. The trial judge held that the plaintiff, an actor of considerable repute, 'ha[d] the potential to become a star male lead'. He added, '[i]n my judgment, he had the potential and the wherewithall to have a career like Mel Gibson's. It follows that the probabilities of his achieving the same degree of stardom as, eg, Nicole Kidman, were higher'.¹⁴ Hulme J then assessed damages at A\$44 329 664, to be reduced by 25 per cent for contributory negligence. The Court of Appeal of NSW reduced the assessment, by half, to A\$22 138 309, and subjected it to a further reduction of 35 per cent for contributory negligence.

In the United States there has been a trend, not generally discussed, by courts of appeal robustly to pare back excessive awards. People may think they know all the facts of the celebrated case of the spilt coffee at a McDonald's drive-in which caused third degree burns to an 80 year old customer who sued, and was awarded US\$200 000 compensatory damages plus US\$2.7 million punitive damages by a jury.¹⁵ Few know however of the reduced awards as a result of the successful appeal by McDonald's, of only US\$160 000 compensatory damages, and US\$480 000 punitive damages (the equivalent of two days of McDonald's

9 Mason P and Brownie AJA, Meagher JA dissenting.

10 *Unver v Liftronic Pty Ltd* [1999] NSWCA 275 (Unreported, Supreme Court of NSW, Court of Appeal, Mason P, Meagher JA and Brownie AJA, 29 July 1999) [14].

11 Gleeson CJ, McHugh, Gummow and Callinan JJ, Kirby J dissenting.

12 *Liftronic Pty Ltd v Unver* (2001) 75 ALJR 867.

13 (Unreported, Supreme Court of New South Wales, Hulme J, 5 December 1995).

14 *Ibid* 96.

15 *Liebeck v McDonald's Restaurants PTS Inc* (Unreported, No CV 93-02419, D NM, 18 August 1994). See Andrea Gerlin, 'A Matter of Degree: How a Jury Decided that a Coffee Spill is Worth \$2.9 Million', *Wall Street Journal* (New York), 1 September 1994, A1.

coffee sales),¹⁶ which, although still handsome, fell a long way short of the first instance jury award. Nor is it a matter of common knowledge that the customer only took action after McDonald's refused to reimburse her for medical expenses incurred during her stay in hospital of eight days for a skin grafting procedure. The fact that the customer had initially offered to settle her claim for US\$20 000, but that McDonald's rejected her offer also generally goes unnoticed.

The use of juries in negligence cases is embedded in a larger legal system that provides corrective mechanisms for wayward jury verdicts. In testimony about the case before the United States House Judiciary Committee in February 1995, consumer advocate Ralph Nader nonetheless, said, if not entirely convincingly:¹⁷

Notwithstanding the hysteria surrounding the McDonald's coffee case, the facts demonstrate that punitive damage awards are not awarded arbitrarily or without just cause, and that awards are subject to review and reduction by trial judges.

There have been several empirical studies in the United States comparing awards by juries with the final outcomes of the same trials, after all appeal avenues have been exhausted. For instance, a study by Ivy E Broder¹⁸ in 1986 compared 198 jury awards all of more than US\$1 million between 1984 and 1985 and concluded that on average, after all appeals had concluded, the final aggregate disbursements to plaintiffs was 57 per cent lower than the original verdict. Others have attempted similar surveys.¹⁹

Australian juries are not free to assess damages however they like. Assessments are made on the basis of the directions of the trial judge who is obliged to direct in accordance with principles stated by the High Court. Almost always in serious personal injuries cases the major component of the damages is not pain and suffering, or loss of earnings, but a sum for what is called 'gratuitous care', the history of which I traced in a recent dissenting judgement in *Grincelis v House*.²⁰ There I offered some criticism of what I thought to be a departure from *Blundell v Musgrave*,²¹ an earlier case in the High Court. I said:

Some relationships are more fragile and less enduring than others. Care provided gratuitously, for a time, may cease to be available or may simply cease because of fatigue or exhaustion. It may also be easy to make wrong assumptions in modern times about who, and in what circumstances, domestic services will ordinarily be provided, absent any disability. It has not always been easy to distinguish between care, and services provided out of natural love and affection, and the additional burden imposed by the fact of injury.²²

16 Evidence to the Committee on the Judiciary, United States House of Representatives, 12 February 1995 (Ralph Nader).

17 Ibid.

18 Ivy E Broder, 'Characteristics of Million Dollar Awards: Jury Verdicts and Final Disbursements' (1986) 11 *Justice System Journal* 349.

19 Neil Vidmar, 'The Performance of the American Civil Jury: An Empirical Perspective' (1998) 40 *Arizona Law Review* 849; Neil Vidmar, Felicia Gross and Mary Rose, 'Jury Awards for Medical Malpractice and Post Verdict Adjustments of Those Awards' (1998) 48 *De Paul Law Review* 265; Brian Ostrom et al, 'A Step Above Anecdote: A Profile of the Civil Jury in the 1990s' (1993) 79 *Judicature* 233.

20 (2000) 201 CLR 321, 341-2.

21 (1956) 96 CLR 73.

22 *Grincelis v House* (2000) 201 CLR 321, 343 [62].

Damages under this head are very much under the microscope in the current reviews to which I referred at the beginning of this article.²³

Another criticism of juries is that their presence prolongs and magnifies the cost of trials. That can happen. But there are countervailing factors. Trials conducted by judges can also be lengthy. Length may be just as much a consequence of volume and complexity as anything else. Earlier this year, the High Court heard an appeal in a native title claim, the trial of which before a Federal Court judge lasted 114 days and required 11 644 pages of transcript.²⁴

The generally satisfactory role of juries in the criminal legal system would suggest that their value generally is underrated and that their use in civil cases might well be enlarged. The criticism that the complexities, for example, in 'white collar crime' which may be compared with complex commercial matters which come before the civil courts, are beyond juries, is misplaced. In the first 'bottom of the harbour' taxation case, *Maher v The Queen*,²⁵ the tax evasions the subject of the charges were in respect of more than five hundred companies. There was a great deal of written material as well as oral before the jury. There were some twenty or so charges. The trial lasted more than five months. There were two defendants. The jury carefully assessed each of the charges. They were out for more than a week. Their verdicts, which were of guilt on the majority of the counts, were logically based and clear reasons were apparent from the jury's verdicts for the distinguishing of some of the charges, by acquitting on them.

A theme of this brief paper is that the jury system has been unfairly accused of being a, or a very substantial, cause of a current 'insurance crisis'. Our concerns over public liability and the broader implications of tort law are not a new phenomenon. When the law of negligence started to take its modern form in 1932, there was concern over the liability that manufacturers and others in the community might incur as a result of what they regarded to be no more than mischance. There was always going to be a need for some kind of balancing exercise to ensure that a true victim was properly compensated and that any burden which thus fell on the community to discharge liability, whether by increased insurance charges or higher prices for commodities and services, would be kept in check.²⁶ Care also needs to be taken in treating the legal profession as the main cause of current problems. The concept of insurance dates back thousands of years. Risk transference, which is a central feature of insurance, was a cornerstone of the commercial arrangements of the Babylonians, Phoenicians, Greeks and Romans. The modern contract of insurance had its origins in practices adopted by Italian merchants in the 14th century. Not all jury verdicts are in favour of plaintiffs. In a climate of rising insurance premiums, and intense media coverage of the insurance issue, we have become more conscious of our obligations to take reasonable care for others. If

23 See, eg, Panel of Eminent Persons, *Review of the Law of Negligence Final Report* (2002) 199 ff [13.77], [13.84].

24 *Western Australia v Ward* (2002) 191 ALR 1.

25 (1987) 163 CLR 221.

26 Justice Ian Callinan 'Legal Rules Governing the Requirement of Causation in Tort Law' in Ian Freckelton and Danuta Mendelson (eds), *Causation in Law and Medicine* (2002) 125, 131.

we do not take them we run the risk of liability and even higher insurance premiums. In consequence there is a beneficial, greater emphasis in the community upon measures to ensure safety. The effect of this emphasis is of universal benefit, to potential plaintiffs, defendants, insurers and consumers.

In the meantime arguments will no doubt continue as to, for example, the use within the medical insurance market of unregulated mutual discretionary funds and the possible failure for some years to set adequate reserves to meet claims, reinsurance costs from struggling overseas reinsurers, the reasons for the collapse of insurance companies, and of course the effect of the events of 11 September 2001. With respect to all of them, it will be important not to react by adopting short-term expedients, or other irresponsible measures. 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 is usually a time for patience and caution.