Submission No 44

INQUIRY INTO PERSONAL INJURY COMPENSATION LEGISLATION

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Subject:

Summary

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Mr Stephen Frappell
Principal Council Officer
General Purpose Standing Committee No 1
Parliament of NSW
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Mr Frappell,

Having today become aware of the Inquiry into personal injury compensation legislation which is being undertaken by the General Purpose Standing Committee No.1, I wish to make a submission to the Inquiry, noting however that the official closing date for submissions was indeed last Friday (11 March 2005).

I make this submission as a private individual, having had modest experience in considering matters of professional liability from my days as President of the New South Wales Council of Professions (in the early 1990s) and subsequently as Vice President of the Australian Council of Professions. My interests are known to a number of State and Federal politicians, senior members of the judiciary, senior members of New South Wales Bar and of course to colleagues in the Australian Medical Association. I have previously made submissions to an inquiry undertaken by Senator Helen Coonan and to the Committee of Inquiry which was chaired by Mr Justice Ipp.

I enclose copies of some of the articles which I have submitted to newspapers and medical journals over the last couple of years.

You will note that I have a simple thesis on tort law reform, particularly as it applies to professional liability for members of the medical profession. I am motivated by a search for justice rather than for economic remedies.

Having carefully read several NSW Supreme Court judgments and judgments of the High Court of Australia I have come to the conclusion that:

1. The effective remedies have to lie with parliaments and not with members of the judiciary.

2. The concept of justice in civil courts dealing with personal injury tort liability, at least in NSW, is one which receives rather erratic acknowledgment and consideration by judges and/or juries.

3. The only measure which would truly restore justice to the legal system as it applies in a civil courtroom would be a lifting of the level of proof required in (civil court) tort law cases.

4. The appropriate level to which proof should be lifted in such civil courts is that which applies in criminal jurisdictions, namely "beyond reasonable doubt".

If negligence has to be established by a plaintiff "beyond reasonable doubt" all other considerations tend to melt away when looking for just outcomes.

In the event that negligence can be established "beyond reasonable doubt", the damages awarded should indeed be those which are reasonable to fully compensate for the economic and non-economic hardship sustained. Any form of capping could most probably be phased out, whilst still enabling a very substantial lowering in insurance premiums for professional liability cover, particularly as such premiums apply to doctors and dentists.

I would be very happy to be interviewed by the Committee, should this be necessary.

I am happy for my submission to be publicly acknowledged in any report issued by the Committee.

I hope that the Committee can indeed consider this submission, even though the stated closing date for submissions was 11 March 2005.

Yours sincerely

DR JOHN R GRAHAM

Enclosures:

1. The Australian 6-5-2002.

2. The Canberra Times 16-5-2002.

3. Australian Financial Review 4-9-2003.

4. The Lancet 6-9-2003

5. Letter from the Hon Dr Brendan Nelson MP to the Prime Minister.

6. Royal Australasian College of Physicians (RACP News) October 2003.

7. Australian Financial Review 25-10-2004

campaign. But it remained broadly within the mainstream of political attack.

Latham's description of Staley as "deformed" falls outside that category. You could have thought of 10 other words that would have done as well. Latham's intent was clear; to suggest that Staley's physical disabilities reflected his personality. And it was an intention that was reinforced by the speech he gave the next day to the NSW Young Labor annual conference.

That was a very un-cute reference to the fact Abbott fathered an illegitimate child in his student days, putting that child up for adoption. It's a favourite topic of Latham's; he has referred to it previously in parliament, despite Abbott having volunteered the fact of his paternity several years ago, expressing, in the process, great sadness about his "mistake".

Latham rallied on to his Young Labor audi-

puzzling because Latham is one of Labor's new policy intellectuals — he is a party modernisers and one of the Opposition's great white hopes, even, possibly, a future leadership contender.

Except he also has this dark side; a "touch of the Doc Evatts", is the way one MP describes it. It was that touch that last year saw him break a cab driver's arm. His colleagues put it down to the fact Latham is desperate to emulate the unequivocally to Staley.

Howard prevailed on Heffernan to do as much. In both cases, it's not only been a case of bad personal behaviour, it's also been bad politics.

Glenn Milne is chief political correspondent for the Seven Network. His column appears in *The Australian* each Monday.

Labor must reclaim the revolution

IN a world of constant change, modernisation has become a necessity for political parties of the Centre-Left. In the long cycle of history, political movements come and go on a regular basis. Labor can move with the times or be swept away by them.

The ALP's greatest challenge is to craft a modern response to economic change. In recent decades the Australian economy has been through a revolution. Within the space of a generation, assumptions about ownership, skills and economic mobility have been transformed.

Assets are a regular part of our economic culture. People are no longer content to leave their savings in passive bank accounts. They want their money to work for them, turning over and trading upwards regularly.

Since the mid 1980s, we have witnessed a dramatic transformation of household wealth and asset trading in Australia. Consider the huge increase in public participation in the financial markets, especially through the growth of superannuation and equity investments. During the past decade, for instance, share ownership in Australia has increased from 10 per cent to 54 per cent of the population. Then there is the trend towards bigger and better home ownership, with record rates of double-storey construction and housing renovation.

In large part, the ownership revolution is Labor's revolution. It started with the Whitlam education reforms of the '70s that lifted working-class families within reach of tertiary qualifications. Then the Keating economic reforms of the '80s gave working people access to an open, dynamic and competitive economy — one in which they could convert their skills and enterprise into ownership.

In effect, Gough Whitlam and Paul Keating created a whirlwind of economic and social mobility. In less than a generation, families can go from owning nothing to owning everything. I see them in my electorate all the time. People I grew up with in Liverpool's public-housing estates are the contractors, small-business owners and information workers of the new economy, living in double-storey suburbs on Sydney's urban fringe.

They represent a new class of aspirational voters. Anyone who denies the importance of this phenom-

Workers have had a taste of economic ownership and they want more

enon is denying reality. The workers have had a taste of economic ownership and, not surprisingly, they want more — not the cars and refrigerators that their parents aspired to but real economic assets: shares, investments, businesses and skills.

This is what makes the aspirational phenomenon so new and challenging. Mobility the like of which we have never seen before is fuelling further aspiration. Traditional Labor supporters want their fair share of the ownership revolution, and they expect an alert and modernised ALP to help them along the way.

Unhappily, some Labor activists, uncomfortable with the practice of economic mobility, have the hide to call these achievements greedy. At one level, this reflects a double standard. More often than not, the critics of aspirational politics own a significant portfolio of assets. This is the paradox of anti-materialism. Its proponents preach one set of values in public yet practice another in private. Do not think for a moment that they have impoverished themselves in the search for ideological purity.

As a movement, Labor needs to move past the politics of envy. We should be at ease with economic mobility. The ownership revolution is here to stay. Aspirational politics is a logical consequence of this reality. To win the next federal election, Labor needs to reclaim the revolution. We need to take back from John Howard the agenda that we started. Ownership and aspiration need to be at the heart of Labor's policy platform.

This is why the modernisation process is so important. It involves the application of traditional Labor values to new political tasks. Just as Whitlam and Keating started the ownership revolution, the ALP needs to reclaim this agenda with the next generation of asset-based policies. One hundred and ten years ago, our movement was created to meet the aspirations of working-class people for industrial protection. Today, we must meet the legitimate aspirations of working Australians for asset accumulation. It is possible to achieve ownership for all.

This is an edited extract from shadow assistant treasurer Mark Latham's paper on economic ownership, which Opposition Leader Simon Crean launches today in Western Sydney.

and whether members' equitable

Or perhaps it's simply a grab for cash, selling off another asset. But Medibank Private's assets, investments and reserves have been on its members' contributions at no cost to government. This Government may have made itself "the shareholder" by legislation when it separated Medibank Private from the HIC in 1998, but that only emphasises concerns about technical versus equitable interest. Should the Government, for budgetary or ideological reasons, be allowed to selloff Medibank Private members' equitable interests?

And what would be the likely effect of this and other not-for-profit healthfunds becoming for-profit businesses with dividends to pay to shareholders. There inevitably would be further upward pressure on members' premiums to cover that additional impost, when health funds are already struggling to meet the demands of high costs for private healthcare, with increasingly high technology and high expectations.

Recent extraordinarily high premium increases from Medibank Private and other health funds, after three years when health funds have never had it so good, indicate at best unsustainably poor performance, at worst systematic failure of the present private health-insurance arrangements.

Selling Medibank Private would be a direct attack on Medibank Private members' investment in their health fund by a government that has made no such investment but wants to put its hand in the till in any event. It would also invite for-profit interests to prosper at the taxpayers' expense from a generous government subsidy, which several for-profit health funds already enjoy. And it would do absolutely nothing to address the issue of a looming crisis of confidence in private health-insurance arrangements that are well past their use-by date.

John Evered is a former managing director of Medibank Private.

J.R. GRAHAM Enclosure #1

Hard luck – you'll need proof of negligence increased

Blame our litigious society — not doctors — for the medical indemnity crisis, says **John Graham**

LIKE castor oil given to a young child, the courts will take their dose of common sense only if it is forced down the throat. Now is the time to do just that.

As a practising physician and proceduralist, I am glad my professional indemnity insurer, United Medical Protection, was forced a few days ago to threaten going into liquidation. For the first time in living memory Australians have had a wake-up call. The crisis is theirs, not the doctors'.

Until now, any attempt by the medical profession to discuss publicly the burgeoning problems in medical litigation has been quickly viewed by the media as the tall poppies feathering their own nests. This has always been a misapprehension.

The crisis in medical insurance is the tip of the iceberg, for there should be no difference between the public liability concerns of doctors and those of anyone else in the community. Just ask the architects, or anyone running a small-town agricultural show, or the organisers of a fun run, to name but a few examples.

The right way to proceed from this point is to address the root cause of the medical indemnity insurance crisis, so that the problems for all aspects of public liability are addressed and fixed.

John Howard is right to be concerned about the increasing litigiousness of the Australian community. That problem has arisen only because the expectation of success in civil actions has become higher the longer we have allowed judges and juries in our civil courts to operate with the exceedingly low level of proof, namely: "on the balance of probabilities".

This level of proof sets such a low hurdle for the plaintiffs' lawyers to jump that the judge or jury only has to have a modest hunch that the plaintiff could be right to find that the defendant is at fault.

This low hurdle has been the reason for the blow-out in litigation generally, as it allows courts to virtually sidestep a search for truth, common sense and fair play to achieve outcomes that appear to be at least helping out a plaintiff who has had bad luck.

That's the nub of the medical liability issue and the public liability issue generally. Too many people are looking for someone to blame if they have simply had bad luck.

As a caring community, we need to ask governments to put in place adequate safety nets to look after people who have had serious bad luck, such as paraplegia or a bushfire with widespread property destruction.

As a moral and serious community, we need to allow genuine negligence to be

The law is sick at present. The remedy is at hand and can be swiftly administered

addressed in the usual way through our legal system, and there really should be no capping, as that is unfair to those who suffer as a result of such negligence.

But as an intelligent community, which has had enough of the increasing litigiousness attested to by the Prime Minister, we need our courts to honestly separate issues of true negligence from instances of bad luck. But luck is part of the human condition.

There is a simple solution. The courts need a new level of proof. The new level needs to be that which we all endorse when we are looking for the truth, namely the level that we apply in our criminal courts — beyond reasonable doubt. We look for the truth in criminal courts because we realise that it is unjust to send an innocent person to jail.

We should look with equal rigour for truth in our civil courts because it is equally unjust to send innocent doctors (or anyone else) to purgatory by claiming they are negligent when in fact the truth is often that plaintiffs have simply had bad luck or not taken sufficient personal care or responsibility for their own actions.

Lawyers generally, and plaintiff litigation experts especially, are not likely to agree with these views. They are likely to fight tooth and nail before accepting this far more fair and honest level of proof in the civil courts. But that's why the medicine will have to be forced down the throat.

The law is sick at present. The illness has been diagnosed. The remedy is at hand and can be swiftly administered. The Prime Minister should show his leadership again and bring the nation to a happy and healthy outcome. As a by-product he will get his wish for a less litigious Australia.

John Graham, a former president of the NSW Council of Professions, is chairman of medicine at Sydney Hospital.

The Australian, Monday 6/5/2002 (Page 11 — OPINIONS)

be established west of the Jordan River", is a tactical move by Benyamin Netanyahu to wrest control of the party leadership in time for Israel's general elections scheduled for November 2003.

However, while outflanking Sharon from the right may make domestic political sense within right-wing political circles in Israel, it will disturb those inside and outside the region who know that a Middle East peace ultimately depends on a two-state solution. The implications of Likud's resolution deserve serious consideration, even if it has no binding force on party members or MPs.

First, it is worth noting the savage irony of the resolution. The that the PLO recognise Israel's "right to exist" as a pre-condition for the start of negotiations towards a peace settlement are now, in advance of such discussions, ruling out of bounds the very purpose of Palestinian participation in them. No-one seriously believes the Palestinians will settle for negotiations towards "self-rule".

Secondly, the closure of a diplomatic process will not only infuriate the Arab world generally which was beginning to gear up for a regional peace conference. More importantly, it will completely marginalise those moderate Palestinians who favour negotiations and oppose the suicide bombings. Despite the attention routinely given to Palestinian "terrorist Palestinian Authority who are realistic enough to know that a political settlement needs to be negotiated. *This resolution will leave the path* clear for hardliners to escalate their evil work without credible internal opposition.

The resolution forecasts an indefinite continuation of the brutal occupation of Arab lands in violation of international law, the Oslo Accords and the stated preference of Israel's North American patron. Its effect on young and old Palestinians alike, already desperate and hopeless after 35 years of humiliating military occupation, is not hard to surmise. Why any Likud member believes this can be the basis of a secure and peaceful Israel is much more diffi- Bush's vision of tw "side by side in pe ton's Middle East pc and contradictory er client whose own pe now effectively left

Likud's decision upset the powerful the United States w to cultivate befor elections, but it wi ings with the Arat ticular Egypt, Saud dan — much m Perhaps Arab stat rael's attitude to 1980s and refuse to summits until Li resolution from its

It's the legal system that's at fault, not the lawyers

The medical-indemnity insurance crisis offers us a unique opportunity, says **John Graham.**

EVERY dark cloud has a silver lining. If it were not for the occasional national disaster, crisis or threat, much overdue and beneficial law reform in Australia would never see the light of day.

The crisis now besetting United Medical Protection and all those patients who attend the tens of thousands of doctors who are insured with UMP is not dissimilar in severity to other national crises.

And so once again the opportunity presents itself to the Prime Minister, the premiers and the territory chief ministers, acting in a spirit of cooperation, to bring in law reform which is all but impossible when peace and harmony abound.

As an intelligent community, we have every right to expect that the court system will operate under the one set of rules; an optimum set of rules; a set of rules that consistently promotes every effort to get to the truth of issues, so that both process and outcome are imbued with common sense, fair play and justice.

This surely should be the essence of the first lecture to students on day one at a law school. Why is it then that we have two sets of rules?

In the first instance we have a level of proof for use in criminal courts which specifies that proof must be "beyond reasonable doubt", and history tells us that hard-working juries, exercising appropriate rigour, are more than capable of using this ground rule to achieve remarkable accuracy in reaching fair and honest verdicts. It is exceptional for an innocent person to be found guilty.

In the second instance, however, we have a level of proof in our civil courts which seems to have been set for no reason other than expediency.

In civil courts the level of proof is simply "on the balance of probabilities". This ground rule permits a less than rigorous approach to the quest for fairness of outcome.

Judges and/or juries in civil cases only have to reach a 51 per cent confidence, nothing more than a fair hunch, that a plaintiff might be right, to then find against a defendant.

This low hurdle makes it a farce for courts to reach valid decisions between bad luck and true negligence.

A distinction also often has to be drawn, especially in professional liability cases, between negligence and errors of judgment. Many judges, however, seem to be incapable of, or reticent in, doing this.

In cases involving alleged negligence, seemingly outrageous court decisions are an almost daily occurrence in Australia, especially in NSW.

The key to an increasing litigiousness in our society is an unfortunate concept in the minds of an increasing number of Australians that someone else should pay for any episode of bad luck. Fewer and fewer people are prepared to take responsibility for their own actions, especially when they end up with misfortune.

Having failed to insure themselves against such bad-luck outcomes, many Australians feel no qualms about suing someone else who has prudently — but at a cost — taken out insurance.

The low hurdle set by the civil proof standard gives potential plaintiffs well-founded, but improper, optimism about a successful outcome if they take their grudges to court.

We need a single level of proof for all legal actions requiring a decision.

As an intelligent and ethical community, we should not tolerate a faulty system that presages such inevitabilities.

The remedy is very simple.

We need a single level of proof for all legal actions that end up requiring the decision of one's peers in a courtroom.

That proof should quite obviously be "beyond reasonable doubt". This is especially important for all cases of alleged negligence.

Otherwise, how can any young school-leaver have the confidence to undertake a tertiary course leading to a professional or trade career as a provider of services, if that simply means that he or she will become a sitting duck for some plaintiff lawyer a few years later? Medical students and trainee builders would have particular concerns at present.

A reform of the level of proof will simultaneously improve justice, reduce court waiting lists and restore the financial viability of professional liability (and other) insurers.

In concert with this reform, the federal and state governments will need to extend and improve the ways in which all Australians, through their taxes, can provide the necessary financial and other forms of assistance to those fellow citizens who have sustained serious bad luck. This applies especially to calamitous personal injury.

The legal fraternity will of course have a hundred reasons why any law reform shouldn't or can't happen, but the citizens of Australia have 19 million reasons as justice-seeking individuals to say that reforming of the civil-court level of proof cannot be delayed any longer.

As a consequence of the current medical-indemnity insurance crisis, the deadline is June 30.

Dr Graham is currently chairman of Medicine at Sydney Hospital and is a former president of the NSW Council of Professions.

The Canberra Times, Thursday 16 May 2002

J.K. GRAHAM Enclosure #2

Civil justice serves plaintiff lawyers

It is the plaintiff lawyer firms of the world who are causing mayhem in the civil justice system, and in turn the insurance system, in every country that prides itself on having a system of justice that purports to protect the rights of the little guy.

How fascinating it is, then, for one such firm ("Insurers hide true profit breakdown", *AFR* Letters, September 3) to confess, in response to an expose by the Victorian Finance Minister, John Lenders, that the minister was "happy to sit back and allow allegedly hundreds of small businesses (particularly in the tourism industry) to go to the wall, despite the fact that most reported never being claimed against".

It is these very same plaintiff lawyers who are causing all these little guys to go to the wall, but it is the faulty civil court system of justice that allows them to achieve this.

We are about to see another big group of little guys walk away from their area of service to the community, and I am talking about the doctors. Just ask the Australian Medical Association if you want any confirmation of this. And where will our nation go for help then?

People are unlikely to get the right diagnosis or prescription by going to a plaintiff lawyer.

Soon you won't be able to hold a charity fete, coach an amateur sporting team, find a builder, or do anything where you might actually help your fellow man, such is the price of lawyer-led insurance hikes.

Until the level of proof in civil courts is raised to the only honest test height, namely "beyond reasonable doubt", we can only look forward to more and more little guys being forced out of business by the inevitable hikes in both public liability and professional liability premiums.

Where are the Prime Minister and the Premiers on this issue? Are there really too many former lawyers in our parliaments to expect any worthy tort law reform before the mayhem worsens? I hope not.

John R. Graham,
Former president of NSW Council of Professions,
Sydney, NSW.

One-time regulator caught short

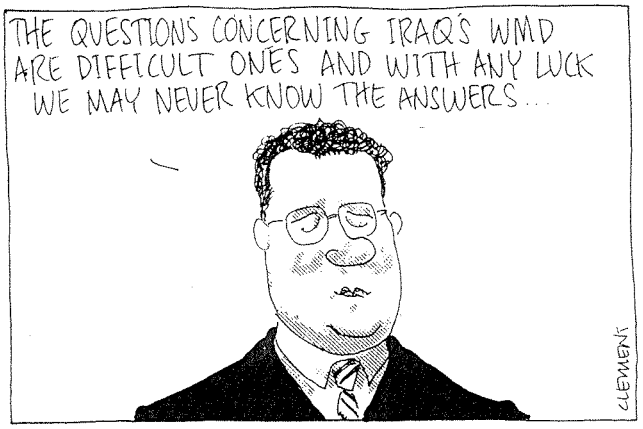
September 1 this year was a day of suspensions at the Australian Stock Exchange. Four companies had their shares halted for failure to lodge their half-yearly report and/or half-yearly accounts for the period ended June 30 within the required two-month time frame.

The ASX introduced new listing rules on January 1 and it looks as though some forgot the new time frame of two months – instead of 75 days – after the completion of the half year.

Several other companies were suspended due to a failure to pay their annual listing fees on time and no doubt will be on the Australian Securities and Investments Commission's target list.

The notable suspension included in the group for failure to lodge its half-year accounts on time was Chiquita Brands. Chiquita's chairman is none other than Tony Hartnell, the former chairman of the Australian Securities Commission (now the Australian Securities and Investments Commission). It could be said it was the day a former regulator knew what it was like to be supervised.

Rod Bennett,
Bilgola, NSW.



Government has not failed on truth of WMD

In arguing that the Prime Minister should appear before the Australian parliament's Joint Committee Inquiry into pre-war intelligence on Iraq, Geoffrey Barker charges the government with a strategy designed to prevent so-called attempts to "get to the bottom" of the Iraq WMD issue. Nothing could be further from the truth ("PM should face his peers", AFR Opinion, September 1).

Barker accuses John Howard of being "extraordinarily quick" to deny evidence given to the committee by Andrew Wilkie that the government had "skewed the truth" about the threat posed by Iraq's weapons of mass destruction.

But the fact that Wilkie failed to present even a shred of evidence in support of his claims meant there was very little for the Prime Minister to deny.

As Howard has made clear, if Wilkie has evidence that the government misrepresented intelligence he should submit it to the committee. It is open to him to do so without breaching his legal obligations not to reveal classified information obtained in the course of his previous employment.

Despite the government's own misgivings about the inquiry – primarily that it is premature – we have and will continue to co-operate with it fully.

The Prime Minister has not prevented the Office of National Assessments or the Defence Intelligence Organisation, the two key intelligence agencies involved in preparing assessment on Iraq's WMD programs, from appearing before the committee; this despite both agencies being outside the committee's mandate.

The fact that the committee is holding some of its sessions in camera is entirely appropriate given the sensitive nature of the intelligence being dealt with.

A similar inquiry by the UK Intelligence and Security Committee is also being held in camera.

This is distinct from the Hutton inquiry, at which British Prime Minister Tony Blair appeared recently. Its terms of reference are to look into the circumstances surrounding the death of the British scientist David Kelly.

Ultimately the extent of Iraq's WMD programs is going to emerge only through the work of the Iraq Survey Group.

Iraq's long history of concealing its WMD efforts means that this investigation will take time and require painstaking detective work.

But without the former regime there to actively obstruct inspections, as it did with the UN for over 12 years, we will finally be able to get a full picture of Iraq's WMD programs and capabilities.

Alexander Downer,
Minister for Foreign Affairs,
Canberra, ACT.

A case of money to burn?

From back page

He has already made his move to settle the long-running John Marsden defamation action and just what happens with the Foxtel claim against McWilliam's former colleagues remains to be seen. McWilliam joined Seven from Gilbert & Tobin in July on request from David Leckie and brings to the job two decades of experience on the inside of the Packer and Murdoch empires.

He joined Malcolm Turnbull as in-house lawyer for Packer in 1983 before the two created their own CFO David Moffatt, Ziggy Switkowski decided to change all that and move Moffatt into a line management job.

The timing was lousy and smacks of some rapid rationalisation of events which for one reason or another were not foreseen before yesterday's announcements.

The moves have their own logic which makes the timing even more bizarre just a few days after the

"He's the right person for the job."

held for a matter of 10 months by Ted Pretty. Pretty's new role in charge of technology development and relationships effectively puts him back to where he started as the dotcom guru of the company when dotcom was in.

He just happens to be the right person for the job to talk up the growth projects Ziggy would love be able to speak about but the market isn't quite ready to believe.

Doug Campbell, who had technology under his wing, is more than fully occupied with Telstra Country Wide, the glamour division

JR GRAHAM Enclosure #3

What a CREEP, is it just 'get Abb

From back page

of reporters and television interviewers, who seemed convinced they were onto the biggest thing since Monica Lewinski took a liking to Romeo Y Julietas. The broadsheets hyperventilated; the ABC did its best impression of the ABC.

Abbott went on one of its public affairs shows. If you don't go on one of these things, you look as though you're trying to avoid facing the

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In tern democra and hell, – are pro

Inadequate justice when medical negligence is alleged

Sir—The English legal system came to Australia with the First Fleet in 1788, and with it the two distinctly different levels of proof that are used in the civil and criminal jurisdictions.

For two decades professional liability premiums for doctors have increased exponentially in Australia, and yet the standards of practice have, if anything, steadily improved. The average life expectancy has risen greatly, for the most part as a result of doctors doing a better rather than a worse job, using numerous technical advances in pharmacology and surgery.

One has to ask, why are the insurance premiums rising so fast when the insurance companies are not seemingly making vast profits?

Plaintiff lawyers are certainly vigorous in Australia, especially with the no-win-no-fee arrangements permitted by our laws. But plaintiff lawyers have to fight cases on behalf of their clients (our patients) within the legal system. So what is wrong with the tort law system?

There is an inherent defect, inherited from the British system, and it lies in the absurdly low level of proof to be hurdled by plaintiffs in civil courts, where negligence cases are fought.

In civil courts, the level of proof is "on the balance of probabilities". Such proof amounts to barely more than the toss of a coin. Judges and juries are constantly being confronted by plaintiffs who have had misfortunes, often serious misfortunes, with respect to medical outcomes. In a courtroom, it is well known that the defendant doctor will be insured (it is a legal prerequisite for medical registration in New South Wales), insurance companies have money to be disbursed, and the government is unlikely to help the plaintiff if the court does not.

That instances of bad luck and instances of errors of judgement made in good faith are both commonly found to be instances of negligence in our courts, when in fact neither amounts to negligence, is not therefore too surprising.

But, how unfair is this for the defendants? The loss of self-esteem, the loss of reputation, the waste of time in insurers' offices, in barristers' chambers, in courtrooms, the loss of earnings, the out of pocket legal expenses, etc, all add up to a more severe punishment than a common felon might face for robbing a bank. The common felon also gets more justice from our legal system, since in a criminal court, the level of proof is "beyond reasonable doubt".

There is only one answer to the rise in insurance premiums and that is to restore justice to the consideration of any allegations of negligence by replacing the civil court proof level with the criminal court proof level. Once done, not only will ridiculous claims fail when they get to court, but the much greater number of claims that are settled out of court for expedience and other reasons will also cease to benefit plaintiff lawyers and disgruntled plaintiffs who want financial recompense for bad luck.

In Australia there is a growing call for the more rigorous level of proof. Hopefully, this change will become a worldwide one, so that doctors can stop practising defensive medicine and get back to simply practising good medicine.

John R Graham

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Lord Carnarvon's death: the curse of aspergillosis?

Sir—In her Correspondence letter,[1] Ann Cox (June 7, p 1994) argues against the theory that Lord Carnarvon, the patron of Howard Carter, died of aspergillosis. That he became infected with the disease after inhaling spores of the fungus aspergillus in the tomb of Tutankhamen is a hypothesis put forward to challenge the previously held belief that pneumonia was the cause of his demise.[2] Cox dismisses any link between Carnarvon's ingress into the tomb and his untimely death, based on the long period of time between the two events.

However, spores of aspergillus can remain dormant in the lungs of infected individuals for extended periods before being activated, and it is conceivable that Lord Carnarvon was indeed symptom-free for the 5 months after his first ingress into the tomb in Novemver, 1922.

On March 17, 1923, *The Times*[3] of London reported that Lord Carnarvon suffered from "pain as the inflammation affected the nasal passages and eyes". This description is consistent with invasive aspergillus sinusitis with local extension to the orbit. Such sino-orbital infection is unlikely to complicate lobar pneumonia, which was the stated cause of death.

Potentially harmful fungi survive for extreme lengths of time in tombs, and results of research[4] indicate that such prolonged phases of dormancy can result in increased virulence. In 1970, the tomb of King Casimir IV was opened 600 years after the Polish king's death and, of the 12 scientists present, ten died within weeks. A variety of fungi was cultured from the tomb. Furthermore, the mummy of Ramses II was taken to Paris in 1976 and 89 different species of fungi were isolated from it, including aspergillus.

Aspergillus spores grow especially well on grain, the supply of which was abundant in Tutankhamen's tomb, with offerings of bread and raw grains stored in numerous baskets. Lord Carnarvon could readily have inhaled contaminated grain dust as the sealed tomb was broken into. Since his car accident in 1901, he had had numerous chest infections and would have been especially susceptible to the toxic mould. Indeed, this increased susceptibility could explain why so many others did not succumb to the same infection upon entry. It is noteworthy that the American railroad tycoon Jay Gould also died soon after visiting the tomb from what was also described as pneumonia.[5]

Lord Carnarvon's private doctor, Dr Johnson, could easily have mistaken lobar pneumonia for pulmonary aspergillosis, since the symptoms are similar—eg, cough, fever, chest pain, haemoptysis, and dyspnoea. The chest radiographs would also have looked similar with signs of consolidation. The laboratory techniques necessary for the diagnosis of aspergillosis were available but, with a low index of suspicion, Dr Johnson is unlikely to have analysed his patient's sputum for aspergillus.

That Lord Carnarvon died of invasive aspergillosis therefore remains a possibility.

**Sherif El-Tawil, Tariq El-Tawil*

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3 Anon. Lord Carnarvon's death. *Times*, April 6, 1923; 11–12.
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DEPARTMENT OF ERROR

Armstrong PW. Two hard lessons. Lancet *2003:* ***361:*** *1417*—In this Uses of error (April 26), the 5th sentence in the first paragraph should be: "As this was before furosemide was widely available, I called for nasal oxygen, 2 mL of subcutaneous thiomerin, and a quarter of a grain of morphine".

JR GRAHAM
Enclosure #4

Bradfield
Put your heart in it!

Dr Brendan Nelson MP
Federal Member for Bradfield

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19 September 2003

The Hon John Howard MP
Prime Minister
Parliament House
CANBERRA ACT 2600

Dear Prime Minister,

I writing to you, I wish to bring to your attention the concerns of my constituent, Dr John Graham. Dr Graham has asked that consideration be given to the introduction of a higher proof requirement in civil courts dealing with cases of alleged negligence.

Dr Graham has forwarded a copy of an article from a recent edition of the Lancet, entitled 'Inadequate justice when medical negligence is alleged' which outlines the reasons for this request. I have included copies of both Dr Graham's letter and the article for your information.

I thank you for your consideration of this important matter.

Yours sincerely,

DR BRENDAN NELSON MP
Federal Member for Bradfield

Encl.

Cc: Dr John R Graham, 195 Macquarie St, Sydney NSW 2000

MC

J.R. GRAHAM
Enclosure #5

Letters to the Editor

We encourage Letters to the Editor of 300 words or less. Because of space limitations we reserve the right to shorten long letters. Letters will be subject to minimal editing procedures. When sending correspondence, please mark clearly that it is for publication. Email submissions are preferred. Ed.

General medicine and communication training needed

I agree heartily with Dr Batey's views (*RACP News*, August 2003) about the lack of exposure to "general medicine" by registrars undertaking specialist training. The elimination of general medical units has been a great disservice to patients and doctors alike. In fact I suspect (but have only anecdotal evidence to prove it) that the fragmentation of medicine into more and more narrow sub-specialties has contributed to the blowout in the health budget.

It may be too late to reverse this trend in the teaching hospitals but the College should make every effort to ensure that the physicians who are "let loose on the public" have a degree of competence in "medicine", not just in their sub-specialty.

Finally, I am concerned that some of our younger colleagues do not appreciate the importance of communication with the referring doctor. Communication becomes increasingly important as patients are looked after by a number of specialists rather than one GP and one general physician.

Perhaps these concerns could be addressed when revising the requirements for advanced training.

Susan Lawrence FRACP

The tort in the Australian legal system

A tort is a breach of duty leading to liability for damages.

The English legal system came to Australia with the First Fleet in 1788 and with it the two distinctly different levels of proof that are used in the civil and criminal jurisdictions respectively.

For at least two decades professional liability insurance premiums for doctors have increased exponentially in Australia and yet the standards of practice have, if anything, steadily improved with ever brighter young Australians entering the profession. The average life expectancy has dramatically risen and this in large part is the result of physicians and surgeons doing a better (not worse) job, using numerous advances in diagnostic technology, pharmacology and surgery.

One has to ask then "why are the insurance premiums sky-rocketing?" when the insurance companies are not seemingly making vast profits.

Plaintiff lawyers are certainly vigorous in Australia, especially with "no win, no fee" arrangements being permitted by our laws. But plaintiff lawyers have to fight cases on behalf of their clients (our patients) within the existing legal system and so we cannot necessarily just blame the lawyers. The real villain is the tort law system itself.

So what is wrong with the tort law system?

There is an inherent defect, inherited from the British system, and it lies in the absurdly low level of proof to be hurdled by plaintiffs in civil courts where negligence cases are fought out.

In civil courts the level of proof is **on the balance of probabilities**. Such a level is barely more than the toss of a coin. Judges and members of juries are constantly being confronted by plaintiffs who have had misfortunes, often serious misfortunes, in regard to medical outcomes. In a courtroom it is well known that the defendant doctor will be insured (it is a legal pre-requisite for medical registration in New South Wales). It is also known that insurance companies have money to be disbursed. It is also known that government, State or Federal, is currently unlikely to help the plaintiff if the court doesn't.

So it doesn't come as any surprise that instances of bad luck and instances of errors of judgement made in good faith are both commonly found to be instances of negligence in our courts, when in fact neither amounts to negligence.

But how unfair is this for the poor stream of medical defendants (with Fellows of our College being far from immune to any allegation)? The loss of self-esteem, the loss of hard-won reputation, the waste of time in insurers' offices, in barristers' chambers, in courtrooms, the loss of earnings, the out-of-pocket legal expenses et cetera, et cetera, all add up to a more severe punishment for a doctor (who may well be totally innocent) than a common felon might face for robbing a bank. In some instances the mere allegation of negligence can even lead to marital breakdown in a medical family. How unfair is that?

The common felon also gets more justice from our legal system than does the doctor facing an allegation of negligence. When the felon is before the judge or jury in a criminal court, the level of proof is **beyond reasonable doubt**.

There is only one morally sound answer to the blow-out in insurance premiums and that is to restore justice to the consideration of any allegations of negligence by replacing the civil court proof level with the criminal court proof level.

Once this happens, not only will ridiculous claims fail when they get to court, but the much greater number of ridiculous claims that are settled out of court for expedience and other reasons will also cease to benefit plaintiff lawyers and disgruntled plaintiffs who want financial recompense for bad luck.

As a separate issue, all 19 million Australians should take financial responsibility, through taxes, to look after their fellow citizens who have sustained serious bad luck of the kind that produces paraplegia, blindness, amputations and the like.

Physicians are very privileged in many ways, not the least occurring through the vast number of contacts we have with a very broad cross-section of members of the Australian community. We should make use of all our contacts with lawyers, judges, politicians and media personalities to push for fair play in the tort law system.

Until we change the "rules of the game", with an upgraded level of proof in civil litigation, the real tort will continue to be the legal system itself. The legal system has breached its duty to doctors and all other service providers. The system itself must accept liability for all the damage. Skyrocketing insurance premiums are just the tip of the iceberg.

John R Graham FRACP

J.R. GRAHAM
Enclosure #6

Plans to simplify tax legislation

In regard to Fiona Buffini's article "Tax board's move applauded" (October 21) everyone complains about the complexity of tax legislation but I have never seen any evidence of a coherent analytical structure for defining and tackling it.

The simple reason for this is that there is none.

Even very simple rules can give rise to incredible complexity – anyone who has looked at pictures of the Mandelbrot set, which is generated by one very simple equation would appreciate the point.

Conversely, sheer "volume" does not always equal complexity. A string of a billion 0s is in no sense "complex". Those who understand the theory of computability and complexity have a much better chance of developing strategies to deal with complexity than lawyers and accountants who actually have very little training in understanding complex structures. I would be fascinated to know what the Board of Taxation's definition of "complexity" is and how it will consistently deal with it.

In the absence of a coherent theoretical basis for understanding complexity it seems difficult to make any real headway, and that is before you even begin to deal with the political dimensions that fundamentally colour all tax legislation.

"Given that one English appeal court once described the distinction between capital and income as being essentially determined by the toss of a coin, I wish the board luck.

Peter Haggstrom,
Bondi Beach, NSW.

Hardie's morals

Attempts by James Hardie chairwoman Meredith Hellicar to justify the obscene payout to disgraced chief executive Peter Macdonald is breathtaking, no pun intended.

According to Hellicar, the board was bound both legally and morally to make the payout of almost $9 million while at the same time paying compensation to those suffering asbestos related diseases an average of $250,000 a claim.

It is to be hoped that the board's new found morality will be extended to those claimants yet to receive fair and just recompense.

Ian De Landelles,
Hawker, ACT.

State abuse of monopoly power in water

As an economist and a lawyer, I am professionally appalled at the utter nonsense being peddled as conventional wisdom on water pricing. John Maynard Keynes was wont to observe vulgar opinion is often wrong. So it is with those who say Australian businesses and families must pay more for water.

The truth is that Australia's potential water supplies per capita are higher than for many countries.

What is really happening is that state/territory governments are turning water into a taxing mechanism. They are stripping exorbitant dividends out of government-owned monopolies while refusing to invest in additional infrastructure. Academic Bob Walker observed years ago that the Industry Commission was quite wrong in thinking water authorities were not fully recovering costs.

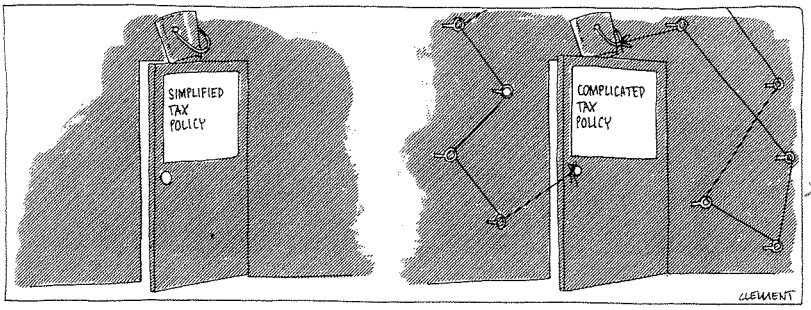
If none of the excess profits being gouged from water users are ever ploughed back into additional infrastructure, of course water prices must rise towards infinity. But this is the result of state government policy. It should not be blamed on a niggardly creator.

In a free market, when prices rise they do more than merely ration existing supply – they call forth new supplies. What we are witnessing with water is a gross abuse of monopoly power – state governments are blocking new water supplies as thoroughly as a medieval warlord might cut off a besieged town's water. States are really levying disguised excise taxes and calling them water "prices". Inevitably, declining water supply security and rising water costs will drive industry and jobs offshore.

If business groups, trade unions and the federal Treasury are content to see living and business costs rise, with jobs and tax bases going offshore, while the states evade both the constitution and the GST inter-governmental agreement, so be it.

But, please, do not let anyone be heard to say that this has anything to do with proper economic thought or logic.

Terence Dwyer,
Visiting fellow, Asia Pacific School of Economics and Government, Australian National University, Canberra, ACT.



SUBMITTING LETTERS

- Please email or fax your letter with your full address and day and night telephone numbers for verification.
- Letters: Faxes: (02) 9282-3137; email: edletters@afr.com.au (file attachments are not accepted). Or on our website AFR.com/letters

Emergency services for private hospitals

In his commentary, "Health is a federal affair" (October 13), Alan Mitchell observed that there is spare capacity in the private hospital sector. Could the private health sector do more to merit the subsidy given to it in the form of the private health insurance rebate?

I would like to see more private hospital emergency services. This year my family has had two trips to one of the few private emergency departments in Sydney. On both occasions a GP had advised the patient to attend hospital urgently, and both visits resulted in admission. We chose to drive an hour from home due to adverse experiences at our local public hospital.

I was happy to pay the emergency department's facility fee because both patients were seen promptly by experienced doctors. By providing emergency facilities the private sector would add value to insurance, reducing the pressure on public hospitals.

Andrea Kunz,
Mosman, NSW.

AIRC partly to blame for jobless

Larissa Andelman suggests (Letters, October 18) that industrial relations reform will "hit the lowest paid, who are predominantly women and young people" and she complains about the wage of $27,000 being paid to call-centre workers.

However, such a wage would doubtless be welcome for the many unable to obtain a job and who make do with much lower social security, including unemployment, benefits.

The existence of more than 1 million jobless couples reflects the problem.

She should recognise that existing industrial relations regulations and their interpretation by the Australian Industrial Relations Commission are a major reason why many such people are out of a job.

Reform would do much to help them obtain work.

Finally, while most of the lowest paid are women and young people, the majority of them live in households with incomes at the upper end of the scale.

Des Moore,
Director, Institute for Private Enterprise, South Yarra, Vic.

Big guns levelled at Australian PBS

Interesting but not surprising to see America's "Big Pharma" muscling up to try to roll the defences for our pharmaceutical benefits scheme (PBS) system, which had been invoked by the coalition and ALP before the federal election.

I mean, not only has the Geneva-based International Federation of Pharmaceutical Manufacturers weighed in against the Australian people, but even our great friends like congresspersons Jennifer Dunn and Cal Dooley. And what right do we have to challenge?

G. Bolton,
Nowra, NSW.

Justice in reform

Why is it that all the talk about tort law reform focuses on money . . . money . . . and more money?

Chris Merritt ("Lawyers push for bigger injury payouts, October 22) highlights that plaintiffs, lawyers and even some judges all think that tort law reform in NSW has gone too far and that it is now too difficult to compensate citizens (with money) when they have had bad luck, or to compensate lawyers (with money) when their potential work is drying up.

When oh, when will the key players start to talk about justice in tort law reform?

It should not be forgotten that there is always a defendant in every alleged negligence claim. Does anyone care anymore about the rights of defendants?

Surely governments, lawyers and plaintiffs should stop talking about reforms of the money aspects and start talking about reforms of the justice in the tort law system.

Until the level of proof in civil tort law cases is upgraded to require any negligence to be proven "beyond reasonable doubt" there is no platform on which to look for any justice in protecting innocent defendants or compensating (yes . . . with money) those plaintiffs who have truly been hurt by genuine negligence.

John R. Graham,
Sydney, NSW.

These big insurance profits won't last forever

If one needs an explanation for why personal injury insurance premiums have not fallen dramatically under the latest round of tort reforms, one need look no further than your front page ("Lawyers push for bigger injury payouts", October 22).

Insurers with any sense of history are extremely sceptical about the ability, even the will, of governments to hold back the tide of ever-increasing damages payouts.

From about 1940 to 1980, damages costs increased at an average rate of about 10 per cent a year faster than inflation. Since then the rate of superimposed inflation has, as it has always done, fluctuated dramatically. At times it has been low, usually in response to the panic reaction to high premiums. At one stage, in the mid 1990s, there was a period when NSW compulsory third-party awards appeared to rise by more than 30 per cent a year faster than inflation.

Such sharp rises are often associated with the complacency induced when a small number of ill-advised insurers take an overly optimistic view and, through their own underpricing, force the rest of the insurance industry to charge less than sustainable premiums.

Personal injury claims take a long time to settle, particularly in cases of serious injury. Depending on the scheme under consideration, the cost-weighted average delay may be between three and six years. Cases settled through the courts take substantially longer than this. The most serious cases, which are also the most costly, tend to take longest, particularly children. While cases are settled on the basis of statute law at the time of the injury, they are also settled on the basis of standards at the time of settlement, including new case law interpretations of what the law was at the time of injury. It is these changing standards that are the source of superimposed inflation. Because of these delays, an insurer cannot know the cost of what it is selling until many years later.

In setting premium rates, its actuary has to assess the likely rate of superimposed inflation over perhaps the next 20 years. The period, from perhaps two to eight years out, when the bulk of the cost is settled, is the most important, and is far enough out that any concern about restraining costs will have been forgotten. What matters is how things are seen at the time.

Another important aspect of superimposed inflation has been the damages awarded for lesser injuries. In contrast to more serious injuries, where the bulk of the damages paid relate to actual losses, such as treatment or loss of income, the bulk of the damages for lesser injuries is paid out as general damages, basically as compensation for pain and suffering.

As an actuary who has had to make such assessments in the past, I would look at the sustained campaign by the plaintiff lawyer lobby, and conclude that any relief from superimposed inflation is likely to be short-lived and that there is little prospect of large profits emerging from premium rates. The profits now being reported relate mostly to past premiums and, in some cases, are a partial clawback of losses previously recorded on business written at inadequate rates in the past.

If pricing actuaries are to recommend substantially lower premiums, they need to be convinced that there has been a sea change in the public perception of personal injury insurance. While the public, encouraged by plaintiff lawyers, persists in failing to connect injury awards to insurance premiums, this is unlikely.

It should be remembered that insurers rely on stable averages and that, in the long term, because the barriers to entry are fairly low, competition will ensure that they do not make excessive profits.

What they have trouble with is unpredictable trends. And this is just what they face in personal injury insurance. If there is one certainty in that business, it is that plaintiff lawyers are very inventive and skilled at expanding the boundaries of the law of tort. Even this would be good for insurers, if the rate of increase were predictable. Unfortunately it is not, and the industry is left in the difficult position of having to charge more than its customers are comfortable with, but less than enough, when you allow for the cost of failed insurers, such as HIH, to pay for the uncertainty that they face.

Bob Buchanan,
Goulburn, NSW.

J.R. GRAHAM Enclosure #7