

INQUIRY INTO PERSONAL INJURY COMPENSATION LEGISLATION

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Subject:

Summary



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10 March, 2005

The Director,
General Purpose Standing Committee No 1
Legislative Council
Parliament House
Macquarie Street
Sydney NSW 2000

Dear Sir,

**RE: Inquiry into Personal Injury Compensation Legislation
Submission with Respect to the Civil Liability Act 2002 and the Civil
Liability Amendment (Personal Responsibility) Act 2002**

I am pleased that the Inquiry has been launched and I am grateful for the opportunity to make a submission to the Committee. The purpose of my submission is to alert the Committee to a major flaw in the Civil Liability legislation that has become apparent to me through bitter personal experience.

The major flaw is the capping of legal costs at the greater of twenty percent (20%) or ten thousand dollars (\$10,000) for damages under one hundred thousand dollars (\$100,000). Whilst on its face this seems a reasonable deterrent to litigate small claims it has in practice turned sound and predictable law (upon which Solicitors rely to guide their clients) into a game of chance or lottery with dire financial consequences for an injured Plaintiff. The capping only applies to the costs the Defendant pays to a Plaintiff if the award of damages is less than one hundred thousand dollars (\$100,000). The capping of legal costs must be legislated to apply to costs as between the Plaintiff and the Plaintiff's Solicitor and as between the Defendant and the Plaintiff where in circumstances such as mine the Court of Appeal overturns the decision of the Court below, reduces damages below one hundred thousand dollars (\$100,000) and awards costs of the Appeal to the successful Appellant/Defendant on an uncapped basis.

The injustice in my matter is strikingly evident from the chronology detailed hereunder and supported by documents annexed hereto. The only potential relief for a Plaintiff in my position is a claim is the Suitors' Fund. I draw your attention to the letter dated 24 December, 2004 from my Solicitors Heazelwoods, identifying the inadequacy of the Suitors' Fund and the advice to abandon any claim against the fund granted to me by the Court of Appeal.

Chronology

1. Date of Injury – 3 June, 1999
2. Proceedings commenced in the District Court on 6 May, 2002 (Hunt & Hunt are instructed by the Defendant. Messrs Heazelwoods are instructed by me as Plaintiff)
3. Arbitration before District Court Arbitrator Ian Bryden
4. Arbitrators award in my favour for \$224,843.00 plus cost handed down 16 June, 2003.
5. Re-hearing applied for by Hunt & Hunt
6. Hearing before His Honour Acting Judge Andrew of the District Court
7. Judgement of His Honour Acting Judge Andrew in favour of me as Plaintiff in the amount of \$238,541.23 plus costs handed down on 17 November, 2003.
7. Hunt & Hunt apply for a stay of Judgement on 23 December, 2003 whereupon His Honour Acting Judge Andrew grants a stay and orders the release of \$100,000 to me as Plaintiff
8. Hunt & Hunt file a Notice of Appeal in the Court of Appeal on 15 March, 2004.
9. Court of Appeal delivers a Judgement overturning the decision of the Court below and enters Judgement for \$95,478.73 in favour of me as Plaintiff. The Court of Appeal orders me as Plaintiff/Respondent to pay the Appellant/Defendant's costs of the Appeal and grants me as Plaintiff/Respondent leave to make an Application to the Court of Appeal with respect to costs. My application in relation to costs is rejected by the Court of Appeal on 11 November, 2004

Documents in Support of Submission.

1. Award of Arbitrator Ian Bryden annexed and marked "A"
2. Judgement of His Honour Acting Judge Andrew annexed and marked "B"
3. Judgement of the Court Appeal with respect to the substantive matter annexed and marked "C"
4. Judgement of the Court Appeal with respect to costs annexed and marked "D".

I also enclose the following correspondence for the purpose of disclosing the unjust operation of the Act with the respect to the issue of costs.

1. Memorandum of Costs and Disbursements rendered by my Solicitors Messrs Heazelwoods for work done up to and including 17 November, 2003 annexed and marked "E".
2. Letter from Heazelwoods to me enclosing the Memorandum of Professional Costs of Hunt and Hunt for the Defendant dated 25 November, 2004 annexed and marked "F"

3. Letter from Messrs Heazelwoods to me dated 25 August, 2004 detailing their further costs and a settlement strategy with respect to costs annexed and marked "G".
4. Letter from Heazelwoods to me dated 24 December, 2004 annexed and marked "H"

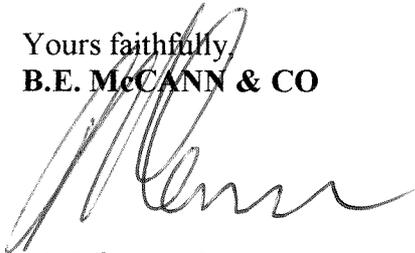
The end result in circumstances where I was injured when a 25 kilogram box fell on me through the admitted negligence of the Defendant is financial hardship arising out of the operation of the Civil Liability Act and its interpretation and application by the Court of Appeal as constituted in my matter. In essence my award of damages by the Court of Appeal will be consumed by legal costs if Scenario 1 in Heazelwood's letter of 24 December, 2004 unfolds. In frank terms this means that I am in a negative financial position as a result of the decision of the Court of Appeal and the operation of the Act. Of particular concern is the fact that I will not receive the benefit of damages awarded for future medical expenses in the amount of \$20,000 by the Court of Appeal. You will be aware that I cannot utilize Medicare for ongoing treatment when a Judgement makes provision for that future treatment.

This has happened to a Legal Practitioner. What chance does a lay person have?

I am writing in similar terms to the Premier and the Attorney General in the desperate hope that an ex gratia payment might be made by the Government for costs to ensure that I least break even; the entire award of damages having been consumed. Whilst I appreciate the making of an ex gratia payment is outside the Inquiry's terms of reference my family and I would certainly appreciate a favourable recommendation.

I look forward to your reply and to reading the Committee's findings and recommendations in due course.

Yours faithfully,
B.E. McCANN & CO



BRUCE McCANN
SOLICITOR