

INQUIRY INTO PERSONAL INJURY COMPENSATION LEGISLATION

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Date Received: 07/03/2005

Subject: Submission to Personal injury compensation legislation lodged by
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Summary

I am 43, a sole practitioner in personal injury in Albury and I am finding it harder to picture a future where litigation services are available to country people and marginalised groups. Although public interest groups and legal aid do a great job they are not available to country people and even the wealthy in the country will soon find it hard to find any litigator outside of the capitals.

It is impossible for these services to exist where there no regular income. The personal injury law and its profitability underpin all other work for litigators and advocates. Once conveyancing was a pillar for making legal services more available but that was taken away too.

Why is it important that litigators are available to country and legal folk? It is impossible to accept legal aid rates to appear for a child at the Children's Court or in a care application or to appear at a bail hearing if the litigator is not able to make money from the civil circuits coming through town about 2 or 3 times per year.

The following are examples of the important work we do all cases will be hard fought and require an experienced practitioner:

- The farmer who has his crops destroyed by a careless water authority,
- a landowner who seeks fair compensation for resumption of her land
- or the meat industry leader whose product is contaminated by dangerous use of pesticides,
- the small business owner who is charged with a breach of the OH & S laws
- or the individual seeking restraint on unsustainable development
- the person assaulted by Police
- the person suffering sexual abuse who can only name their attackers years after for fear of retribution (I recently successfully ran a claim for a lady who had been assaulted repeatedly over 20 years from 1961 by her sister's husband. Our total fees for this difficult claim made in the Victims Comp Tribunal \$1650 incl GST)

These are all people who would use the services of their local litigator. They could not or should not have to go to the capitals to obtain these services. The fabled pro bono legal services cannot exist if there is no profitable work. At the moment by doing legal aid other lawyers and me are paying \$30 to \$40 per hour for the privilege.

The average age of the profession in country towns is growing ever older too. A young person is attracted to the law to litigate and if that work is not available then how do you provide profitable and interesting work? There is also a brain drain when a home loving bright local kid who might not want to be a surgeon or even want to go to uni, cannot get a decent job as a paralegal or articled clerk that is stimulating and interesting. Law unlike medicine can be learned at nightschool and this is a big advantage as it offers choices particularly for those for whom university is a financial impossibility or they simply like it where they

are.

The hooaha about advertising and no win no fee is so misleading. The NSW government has come up with a response that is as iniquitous and blockheaded as the pass and racial mixing laws in the pre apartheid South Africa. Like those laws the government has spun unfounded and untrue justification for these laws. Like those laws they deserve peaceful civil disobedience, which is what I practice as often as I can.

The people seeing these ads are not greedy litigants but mostly the victims or their traumatised and worried parents or relatives not opportunists.

The so-called greedy litigants are often flat on their backs. Even those going in for a few days or to casualty with a fairly simple fracture know that in front of them is a period of rehab when they will not have any money to deal with ongoing expenses or access to advice until they feel well enough to go down town. Some politicians want no win no fee banned. I suppose they would have the victims of negligence have \$500 to have a conference with a solicitor and check liability when they feel well enough.

Just as they are entitled to the counsel of a priest, the tea lady or an icecream from the shop why can they not have legal advice. If it reassures them it is a positive good?

Doctors could offer no fee no win. You don't pay unless you feel better! Or maybe it could be used to encourage better car maintenance. You don't pay unless your car uses 15% less petrol. We are the only group that offers that and it was enshrined by legislation. Now it is to be taken away because it makes justice available to ordinary people.

I have yet to hear of a Packer or Alan Jones worrying about if they can afford a lawyer.

The greatest protection against both rampant personal injury litigation and a blase laissez faire approach to public safety is the specialist lawyer who is prepared to look at a matter on its merits and decide if it is worth running or not without requiring a payment up front. I only had to lose one case to concentrate my mind wonderfully on the consequences of not scrutinising each matter with an endoscope before proceeding. Losing \$45,000 worth of time and disbursements in one hit will knock any firm let alone a solo with 5 young kids. The more firms run as a business the less likely a matter will be taken on if it looks dodgy.

Meanwhile a moneyed developer with the most rancid and nebulous defamation case can shut down debate about the merits of a project or a debtor prevent the resolution of a lawful claim by a creditor by simply

paying solicitors and counsel to draw and file a sham defo writ or meritless cross claim and run endless interlocutories. The PM picked such a counsel for the High Court.

There is a real push in the general public at the moment wants to lump all the not quite right (NQR) characters into this generalised crapulent thought pattern. They think that all reffos are potential terrorists or at least willing to put the lives of children at risk. All prisoners in jail or people accused of crime are obviously guilty or why would the police charge them and all injured people are bludgers/frauds and have a get rich mentality. How smug people have become.

Further we are seeing a general attack on the integrity of the law as exemplified by the attack on Justice Kirby. The public don't need information about his private life like that because it was information they could not manage or separate from his conduct of the office, which is of the highest integrity.

However if the public see the judges that sit on cases as being suspect and the lawyers in front of them all running suspect cases then it is going to follow that the public will lose trust in the rule of law. Is this what politicians want? A bummed out bench, a burnt out bar and insolvent solicitors will be a lot more susceptible to manipulation than a body that enjoys high esteem from the public.

As an example of why litigation needs to be available to people; a couple of years ago in Albury 2 cases ran against the Police for assault. The first case looked as if it was going to run for a fortnight and the plaintiff would lose. He was a 75 year old Alzheimers sufferer who claimed that he had been given a hiding in the booking area and cells. He was a classic who in his evidence in chief and in cross-examination looked like he did not know what day of the week it was. Fortunately his experienced lawyer had carefully investigated the tapes shown of the booking area. He found hey were tampered with to delete the most damaging parts. On this being revealed the State's defence counsel sought instructions to settle and the conduct of the Police has been referred to the Police Integrity Commission. It also led to the next assault by Police being settled. These sorts of cases could not be run in a society where the lawyers have no experience of litigation. The examples given of some of the US awards of damages would stagger me too if those people turned up looking for assistance. But we cannot even check if these are true or whether a court of appeal ever reduced the award because it is presented as uncontested fact.

To deny the general public a protective umbrella of assistance that guarantees accountability is dangerous to the public. It funds a system that is there for people who could not pay for legal advice generally themselves. In acting for injured workers and others victims generally, I have been able to assist in mediating the inevitable family rifts and dealing with creditors that follow an injury and this has been included in

the final fee, so people end up with a complete service all funded by their claim.

I reckon the thing that bugs me is that anyone in the public or media who is critical of what we do would hate to think they could not get decent representation if they were in trouble themselves.

And they all want the best, either a Clarence Darrow or a Gerard Brennan or at least Atticus Finch or Rumpole. Sadly they picture that character sitting in suspended animation waiting for them to give instructions for their case which will be so worthy. They would never recognise that in order to run their big matter that most counsel and solicitors need to do hundreds of boring crash and bash, slip and fall and misdemeanours before that lawyer is ready to take on the case that will change society for the better. But nor would they like to admit that the lawyers acting for the NQR are humans with families and businesses that have to be nourished.

It is just the same with surgeons and journalists but who wants to legislate to ban ingrown toe nail removals or covering the local flower show as it might lead to unmeritous work being done.

The QC played by Charles Tingwell in the movie *The Castle* could never have existed but for a vigorous and flourishing common law system of compensation for injury.

Personally I suspect that the politicians are all too aware of the potential for individuals to make a difference so they are doing their best to starve the grass roots litigators of work so that governments will not be confronted by fit and experienced litigators willing to take on matters on principle and spec.

Basic marketing tells us that it is much cheaper and easier to persuade current client/customers to spend more than to obtain new clients. The market base of regular business travellers must be considered as more important to consolidate than marketing to the capricious and uncertain discretionary tourist milieu. Of these business travellers the most lucrative, underrated and misunderstood is the litigation lawyer.

Politicians and insurance companies have made a great deal out of blaming personal injury lawyers for the woes of the tourist industry re insurance premiums. What has been left out is that the 1992 privatisation of the NSW GIO left the state without a body dedicated to providing affordable insurance and a counter to the private insurers. This started the sell off craze amongst all the states and we now have no bodies that fulfil this role.

In 1992 we had affordable insurance, decent compensation

for the injured and no outcry about litigation madness. In those days I was employed at the GIO and there were sittings of the courts that went on for weeks in country towns all over NSW that consisted only of personal injury claims. Apart from buying or selling a home or divorcing this would be the only exposure a law-abiding countryman or woman would have to legal services.

It was also a fact that various size country towns had regular sittings of the Compensation, District and Supreme Court that have been rationalised out of existence. Casino, Gunnedah, Young, Cowra, Cootamundra, Hay, Cooma, Tumut and Gundagai are examples of towns, which no longer have sittings.

One of the other ironies is that the subsequent "deforms" to the injureds' rights is that it will end what is left of what was almost conscripted tourism to country and regional towns by the lawyers and court staff attending court for the sittings. For one strong example ask any restaurant owner in Mudgee, Albury or Wagga who buys a meal and the best wines and spirits night after night, for several weeks, several times a year when the best that can be hoped from the locals or other travellers is that they will come in one night only for an anniversary or birthday dinner or a local business will celebrate Christmas there.

Ask at motels like the Poet's Rest at Gundagai, the Wagga Pavilion or the Albury Country Comfort how many vacant rooms they have had during a sitting.

Not only would the city lawyers come for the sittings, there were also pre trial conferences with country clients. Often the families of the city lawyers get to know the areas well too because Dad or Mum takes them for holidays that can be tax effective. Not a few visits to Ballina, Falls Creek, Broken Hill races or the Western Plains Zoo at Dubbo have occurred because of this.

The benefits of these sittings reverberate for months post sittings. The car dealers, white good retailers, real estate agents and travel agents benefit directly from the money that comes in for the litigants. Indirectly these towns can have viable services for legal aid for the indigent, interesting local employment as legal staff for its young, intellectual capital and range of other benefits. It works far better than TV campaigns or booths at tourism forums.

Personally this firm would have contributed over a million dollars annually to the local economy of Albury and surrounds for the last three years. It has done so with a staff consisting of one assistant and myself. If that is multiplied by the number of litigation firms in rural NSW and countrywide then the withdrawal of litigation services in the country is a catastrophic loss.

These benefits have been considered expendable for the shortsighted, feel good, lawyer bashing (though ultimately fruitless) appeasement of insurers. There have been no guarantees that any of these 'deforms" will make any difference to premiums, while it is guaranteed that it will reduce or eliminate the direct and indirect benefits of personal rights to just compensation remaining as a viable aspect of the legal industry.

In respect of the medical profession asserting that the threat of litigation is the only matter affecting their continuation in rural areas, the truth is that it is a much lesser aspect than the withdrawal of services and brains generally. These make rural and regional cities much less attractive to educated, worldly and moneyed professionals as long terms bases to make money and raise children than the infrequent chance of being named in a suit.

So while the governments knot brows about how to make tourism alive again, they should be pilloried for arguing for and implementing steps that have helped dig the hole that insurance and tourism is in.

With Compliments

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