

Mr Allan Hunter

Overall impact

What I will tell you is that this law reform is working very well. We projected a 20 to 25 per cent reduction in the cost of claims. That has happened is evidenced by our recent announcement about premium reductions for next year. I could really now hand over to Bill Madden to tell you about the downsides.

Speaking at a Swiss Re conference on 14 September , Chief Justice Spigelman gave the following numbers in respect of District Court filings.

"Filings in the District Court have fallen from about 20,000 in calendar year 2001, to 13,000 in 2002 and 8,000 in 2003"

I mirrored the open claim numbers for civil unlitigated claims at United as at the end of those three years. They have a very similar ratio.

NSW is different

When I arrived at United, I had practised in a very different jurisdiction for a very long time. I had had the opportunity of auditing a number of MDOs during the course of the mid-nineties in terms of their case load for the Medical Protection Society. The thing that stood out about the New South Wales experience was the cost and the number of claims. There was no doubt that there was a far different attitude in New South Wales and the legal costs, I have to say, absolutely stunned me.

When United was being formed, we did these audits. Dr Megan Keaney went down to Adelaide for United to audit the books of the MDA of SA. She heard me whingeing about paying \$30,000 in early 1997 for the plaintiff's costs in a cerebral palsy case a claim settled for \$4.8 million. She was quite stunned by my desire to pay less.

One of the problems everywhere, but particularly in New South Wales, and this was raised by Chief Justice Spigelman, is that we have a lot of small claims and that the defence costs represent about 35 per cent. Then you have to add the plaintiff's costs. We are talking about complex matters which involve a lot of work. The plaintiff's costs would no doubt be similar to the defence costs, so that the transaction costs in small claims are simply too high. You can't cope with those sorts of costs.

Time-charging

Some of my legal friends won't like me for this, but I think that 'time-charging' is a problem. I think it breeds inefficiency. You need to be very good at your management and supervision to make it work well. To me, there has got to be a better way of costing. Time recording is a very different issue. I think that, generally speaking, lawyers who are working in groups have gone down the time charging route for too long. We need to look at other ways.

I suspect that there is too much travelling in packs because there is not enough management and delegation in a team when working on a matter.

The report of the MIIAA , (the Medical Indemnity Insurers Association of Australia), refers to the fact that one in 30 claims were for \$500,000 plus. Here you see the total claim costs and the \$2 million plus claims, so you can see where all the money goes. We have two groups of claims with very different problems.

Claim Value	Incidence of Claim	Total % Claim Costs
\$500,00 plus	1 in 30	49%
\$2million plus	1 in 200	23%

The key reforms

Most of you know the key reforms: the threshold and the cap for non-economic loss. The threshold, as you know, starts at 15 per cent and graduates up to 30 per cent and then we go back to, as it were, the norm.

The 5 per cent discount rate for future losses was clearly a very significant aspect in the large claims. The Civil Liability Act produced the peer acceptance test, the old Bolam test, and most importantly, I think, produced the cost restrictions, the amount that solicitors could recover on claims from the other side, that is, from the defendant.

The combination of the threshold and the cost restrictions has had a dramatic impact on small claims. I know that Bill Madden will also comment on this.

The cut-off date and the 'spike'

In 2001, United hit the jackpot in the sense that Bill and his colleagues were very busy, frantic in fact, processing claims before the cut-off date, 5th July 2001. We received 1,362 claims with 161 being worth more than \$300,000. I don't really think anyone understood the impact of that spike. I suspect, although I have never actually asked Bill this, that they actually turned away a lot of people because they made some quick assessments on whether or not there was any merit in the claims, and they were so busy that they probably concentrated on the ones they thought were really the good ones in terms of their prospects. The Treasury Managed Fund Visiting Medical Officers indemnity also reduces claims submitted to UNITED.

To give you an idea of what has happened since, we have so far received twenty claims over \$300,000 in 2003, approximately a sixth of the 2001 number, and only eight over \$500,000, also about a sixth.

Incidentally, only two claims over \$500,000 instituted post the reforms have been resolved by United. We had to try to make an assessment and to reduce the influence of this spike. We actually can't reduce the influence, because I'm sure it is still with us in terms of the mere fact that we are still processing those claims. As at 31 March 2001, 1,663 (20%) of these reported incidents had incurred costs. We brought forward a lot of claims to get the benefits of the old law, and I suspect that Bill and his colleagues are still working through those claims, and just managing or instituting proceedings and making claims where they need to in respect of new actions. The data are still influenced by that spike.

After the reforms

This is what has happened in those two groups of claims, the pre-reform and the post-reform groups. We have more than halved the number of litigated claims. The unlitigated claims have reduced by 21 per cent. 'Disciplinary matters' include Health Care Complaints Commission inquiries and Medical Tribunal matters. I have grouped in there inquests and those sorts of things where we have incurred costs in representing our members. These have increased very significantly. You will see I have given you the percentage change in the average costs of those claims. It is very significant.

Case Type	Claims Numbers			Change in Average Claims Cost
	Pre Reforms	Post Reforms	% Change	% Change
Litigated	932	404	-57%	-4%
Unlitigated	183	144	-21%	-21%
Disciplinary	188	270	44%	20%

This table refers to all the claims and involved an assessment based on our estimates of the open cases. Of course, they

are not mature. They will develop and some different data will come out of that. It won't look quite so good in a couple of years' time.

To give you an idea of how long it takes, the MDU(UK) left Australia as at 31 December 1998. We are still managing 51 active open claims which were open before the MDU left Australia. That's quite some time ago. Of course they are big ones and they are the ones that change the dollar numbers in all these claims.

The impact of the threshold

The claims that have been resolved, that have been closed, are small claims in the main, and principally very small. Only two of the unlitigated claims are over \$30,000, but there is a dramatic reduction in the number of claims that we have processed except in unlitigated claims. I actually think that this reflects the threshold. I think that, in all of these cases, they are small claims and I think the impact of the threshold is very significant. It is very significant because what you are finding is that there is a lot less to argue about. If the issue is how much, it is generally pretty easy to reach agreement in small claims. We are only talking about a few thousands dollars, so I think that, in the main, these cases can be resolved.

Case Type	Claims Numbers			Change in Average Claims Cost
	Pre Reforms	Post Reforms	% Change	% Change
Litigated	335	180	-46%	-44%
Unlitigated	59	51	-14%	-76%
Disciplinary	27	90	233%	55%

Of course the other effect of the threshold is that Bill and his colleagues are saying to their clients: 'Look, it's not worth your while. You are not going to get anything out of this, get on with your life. If you have got a problem, make a complaint.' Hence that dramatic increase in the number of disciplinary matters.

Unlitigated Claims

Pre-Reform

- Claims under \$30K - 43
- Average Cost - \$8,272

Post-Reform

- Claims under \$30K - 49
- Average Cost - \$5,494

These are just the figures on the unlitigated claims. You can see that for claims under \$30,000, there is, on average, a reduction in cost. As I said, there are only two over \$30,000. I would suggest these claims reflect the impact of the threshold.

The average cost of unlitigated claims under \$30,000 has dropped by 34%. There are similar figures for the litigated claims. Interestingly, the general damages, the non-economic loss component of these claims, is down on average 29 per cent and the economic loss not related to care is down 19 per cent. Care costs have increased by 137 per cent in the litigated claims group, and medical costs by 90 per cent.

Heads of Damage in Finalised Litigated Claims

Decrease

- Non economic - 29%.
- Economic loss (care excluded) - 19%.

Increase

- Care costs - 137%.
- Medical costs - 90%.

The increases might reflect the earlier resolution of more complex claims from lower amounts due to the threshold.

Differences before and after

My own view is that there is a group of claims which was significant and which would, perhaps, have been awarded \$30,000 or \$40,000 in the old law, but which are now being resolved for much smaller amounts. The care costs, the medical expenses, are proportionally higher because we are settling the claims lower, so I think that that's another impact of the threshold.

As I said, we don't have any real data on large claims at the moment. We predicted and projected 20 to 25 per cent reductions.

Case	Common Law	Post Reform	Difference	%
	\$1,236,537.14	\$784,221.26	\$452,315.88	36%
Case 3	\$1,019,936.05	\$808,136.95	\$211,799.10	20%
Case 4	\$10,998,692.00	\$8,372,485.00	\$2,626,207.00	23.8%

Case four is Diamond v Simpson as per the appeal verdict, but you can see that our assessment was within the ballpark. That's really the impact of the 5 per cent discount rate. I think that that's probably the crucial issue in terms of those claims for care. Interestingly, a case worth about \$170,000 under the old law, is now, under the new law, probably worth \$180,000 to \$190,000. Cases around \$200,000 haven't varied a great deal.

Will the changes last?

That's the big question. Does the community want them to last? That's for the politicians. What we know is that all these changes have what is known as a 'honeymoon' effect. Of course, the Health Care Liability Act spike gave us a real honeymoon effect.

My own view is that we are also seeing a more conservative judicial approach. One wonders whether that might not have happened anyway as a consequence of the insurance 'crisis', as they called it, and because of what happened to United. I suspect that we will see some growth, but I think that these changes will last longer than those we have seen before. I expect, because the combination of the threshold and the costs issue does make it harder, that they will last longer. Gradually, however, there will be an erosion.

Our difficulty, as an insurance company, in projecting premiums, is working out when that is all going to happen. We have a history of difficulty with that anyway and our actuaries still tell us that the IBNR is \$300 million. There is no question that the reform has had a greater impact than we expected, with a very significant impact on the smaller claims. We are seeing fewer civil claims because the threshold deters people from bringing claims. We don't know how many. I suspect it is more than we realise. Bill may be able to comment on that.

I think that our prediction in respect to the large claims is about right. As we all know, United has announced a premium reduction consequent upon these reforms. I am confident that that impact will be ongoing for the next few years. Beyond that, I don't know.

Acknowledgement

I am very privileged to work with an exceptionally special group of people at United. They give me all the ideas and I acknowledge the contribution they have made to my presentation.

APPENDIX A

Summary of NSW Law Reforms

[The Health Care Liability Act 2001](#) (HCLA) introduced in July 2001 applies specifically to medical indemnity claims. The reforms introduced included:

- Upper limit for non-economic loss of \$350,000 (indexed) (now \$400,000), amount that courts have been awarding for non-economic loss in recent times. This change taken in isolation will not have a significant impact upon awards.
- The application of a threshold of 15% impairment in respect of general damages, with a sliding scale above the threshold;
- Upper limit for loss of earnings of three times NSW's average weekly earnings;
- Restrictions and new calculations for the payments of interest on damages awards (10 years bond rate or as determined by regulation);
- The application of a prescribed discount rate of 5% for future economic loss;
- Provision for structured settlement;
- The abolition of punitive and exemplary damages.

[The Civil Liability Act 2002](#) (CLA) included:

- Limitation of plaintiff and defendant legal costs for smaller claims (damages less than \$100,000) to the greater of 20% of damages or \$10,000;
- Penalties for making unmeritorious claims;
- Clarification of awards for superannuation benefits;
- The awarding, on an indemnity basis, of costs of incurred after the failure to accept an offer of compromise.

The Civil Liability Amendment (Personal Responsibility) Act 2002 (CLAPRA) included:

- Peer acceptance defence for professionals;
- Limitations on findings of causation;
- Limitations on the concept of a foreseeable risk;
- Protection for apologies;
- Protection for volunteers and good Samaritans;
- Limitation is imposed on the amount, which can be recovered for loss of superannuation benefits;
- Claims for mental harm will only be allowed where harm consists of recognized psychiatric illness;
- Prohibition of damages recovery if injured person engaged in criminal activity;
- The limitation period three years from when the cause of action is 'discoverable' applies to children in the care of a capable parent or guardian.

APPENDIX B

Case 1

HEAD OF DAMAGE	ASSESSMENT UNDER COMMON LAW	ASSESSMENT UNDER CIVIL LIABILITY ACT	DIFFERENCE
General damages loss	\$100,000.00	\$88,435.00	\$11,565.00
Interest (calculated on 1/2 at 2%pa for 3 years)	\$3,000.00	\$0.00	\$3,000.00

Future economic loss (buffer)	\$30,000.00	\$30,000.00	\$0.00
Past out-of-pocket expenses	\$4,000.00	\$4,000.00	\$0.00
Future out-of-pocket expenses	40000	40000	\$0.00
Sub Total	\$177,000.00	\$162,435.00	\$14,565.00

Case 2

HEAD OF DAMAGE	ASSESSMENT UNDER COMMON LAW	ASSESSMENT UNDER CIVIL LIABILITY ACT	DIFFERENCE
General damages - 1st plaintiff	\$45,000.00	\$24,992.50	\$20,007.50
General damages - 2nd plaintiff	\$35,000.00	\$13,457.50	\$21,542.50
Interest	\$6,400.00		\$6,400.00
Past economic loss [combined]	\$0.00		
- 1st plaintiff		\$0.00	
- 2nd plaintiff		\$0.00	
			\$0.00
Future economic loss [combined]	\$40,000.00		
- 1st plaintiff		\$0.00	
- 2nd plaintiff		\$0.00	
			\$40,000.00
Past domestic and parental assistance	\$286,000.00	\$154,076.00	\$131,924.00
Interest	\$65,208.00	\$21,663.09	\$43,544.91
Future domestic and parental assistance	\$622,089.14	\$485,899.67	\$136,189.47
Past treatment expenses	\$30,000.00	\$30,000.00	\$0.00
Interest	\$6,840.00	\$4,132.50	\$2,707.50
Future treatment expenses	\$100,000.00	\$50,000.00	\$50,000.00
TOTAL	\$1,236,537.14	\$784,221.26	\$452,315.88

Case 3

HEAD OF DAMAGE	ASSESSMENT UNDER COMMON LAW	ASSESSMENT UNDER CIVIL LIABILITY ACT	DIFFERENCE
General damages loss	\$70,000.00	\$24,992.50	\$45,007.50
Interest on general damages	\$2,562.00	\$0.00	\$2,562.00
Past out-of-pocket expenses	\$2,800.00	\$2,800.00	\$0.00
Int on past OPs (CL: allow on \$1K high range only) (CLA: allow on \$1K high range only at 2.96% (balance is HIC charge)	\$0.00	\$0.00	\$0.00
Funeral expenses	\$12,800.00	\$12,800.00	\$0.00
Interest on funeral expenses (CLA: allow 2.96% for 3.66 years)	\$2,342.40	\$2,773.40	-\$431.00

Future out-of-pocket expenses	\$0.00	\$0.00	\$0.00
Past economic loss (CL: allow 1yr low+3yrs high) (CLA: allow 1yr low+3.66yrs high)	\$18,304.00	\$18,304.00	\$0.00
Interest on past economic loss (CLA: at 2.96%)	\$3,349.63	\$1,982.98	\$1,366.65
Loss of financial support (past & future incl int)	\$240,957.77		
Past loss of financial support		\$42,680.72	
Interest		\$4,623.86	
Future loss of financial support (incl super)		\$190,466.48	\$3,186.71
Past loss of domestic support	\$162,296.00	\$149,848.24	\$12,447.76
Interest on past domestic support	\$29,700.17	\$17,582.50	\$12,117.67
Future loss of domestic support	\$459,824.08	\$324,282.27	\$135,541.81
Future economic loss	\$0.00	\$0.00	\$0.00
Management fees	\$15,000.00	\$15,000.00	\$0.00
TOTAL	\$1,019,936.05	\$808,136.95	\$211,799.10

Case 4

Diamond v Simpson			
HEAD OF DAMAGE	Court of Appeal Award	Notional Civil Liability Act	DIFFERENCE
GD's	\$390,000	\$350,000	\$40,000
Interest on GD's	\$87,087	\$0	\$0
Past Loss of Earnings	50,880	\$50,880	\$0
Interest on Post Loss of Earnings	\$15,860	\$6,000	\$9860
Future Loss of Earning Capacity	\$720,169	\$531,976	\$188,193
Past Loss of Superannuation	\$2,100	\$2,100	\$0
Future Loss of Superannuation	\$84,700	\$62,600	\$22,100
Long Service Leave	\$5,000	\$2,400	\$2,600
Past Gratuitous Services	\$119,730	\$119,730	\$0
Interest on Past Gratuitous Services	\$310,880	\$140,489	\$170,391
Future Gratuitous Services	\$10,000	\$10,000	\$0
Future Attendant Care	\$4,933,800	\$3,520,800	\$1,413,000
Home Building and Architecture	\$300,000	\$300,000	\$0
Pool	\$95,467	\$95,467	\$0
Home Maintenance	\$390,606	\$278,739	\$111,867
Aids and Appliances	\$427,980	\$305,410	\$122,570
Maintenance on Aids and Appliances	\$25,916	\$18,494	\$7,422
Computer	\$292,679	\$213,311	\$79,368
Educational Tutoring	\$158,628	\$163,775	-\$5,147
Car	\$161,623	\$115,336	\$46,287

Future Medical	\$125,564	\$98,567	\$26,997
Future Paramedical	\$476,625	\$343,619	\$133,006
Future Pharmaceutical	\$16,569	\$11,804	\$4,765
Additional Vacation Costs	\$200,000	\$200,000	\$0
Case Manager	\$542,718	\$387,288	\$155,430
OP's	\$488,700	\$488,700	\$0
Interest on OP's	\$510,411	\$500,000	\$10,411
Funds Management	\$55,000	\$55,000	\$0
TOTAL	\$10,998,692	\$8,372,485	\$2,626,207

About Mr Allan Hunter

Allan Hunter is the General Manager of the Professional Services Division of United Medical Protection. He was admitted as a solicitor in South Australia in 1971. In the 1980s, he specialised in health law-related areas and acted for the Medical Defence Association of South Australia, the Medical Protection Society of the UK, the Dental Protection Society of the UK, the South Australian Branch of the AMA and the Pharmacy Board of South Australia. Having joined United as the senior adviser to the CEO, he is currently responsible for the management of claims and professional development in risk management.