Mr Bill Madden

How we got where we are now

In a recent speech, Justice Spigelman pointed out these two quotes: "Patriotism is the last refuge of a scoundrel", said a couple of hundred years ago, and then, about 100 years ago, Senator Rochester said about that quote that the author was then unconscious of the undeveloped possibilities of the word 'reform'?. It is a word that I wish I would never again read in a newspaper.

Can I start back at the beginning, in terms of how we got to where we are now and just to remind you of the debate as it then occurred, a debate which. unfortunately, to my way of thinking, was not particularly well informed? There were a lot of newspaper headlines about greedy lawyers and Santa Claus judges, and the presentation of a series of anecdotes and case stories, some of which were not entirely accurate. Indeed Justice Ipp himself, one of the members of the Review Panel, in a recent speech at a Western Australian conference, referred to a series of cases he called the 'Stella' awards, named after the American plaintiff who sued McDonalds after spilling her coffee.

Unfortunately, the difficulty with those reports was either that they were fictitious cases or that they were misreported. It concerns me that someone as well-informed as Justice Ipp can be misled in that way or be misinformed about those sorts of cases. You can find a somewhat edited version of his speech, which doesn't refer to those cases, on the Supreme Court website.

Flaws in the argument for reform

Personal responsibility was part of the catch-cry of that reform process. Again, it was something referred to often in the newspapers. It seems to me that, in the medical negligence context, it was of lesser relevance, although there are some comments in the context of informed consent cases.

If I see a contributory negligence defence that says that somebody smoked too much, drank too much alcohol, was obese and did no exercise, like many of the people in this room, then perhaps in those circumstances we might see personal responsibility creep into the medical negligence debate, but it is not something, unlike public liability, which I thought was much of an issue.

Advertising

Advertising crept into the tort law reform debate, although it wasn't something which was so heavily promoted in the early stages. We now have a rather interesting situation in New South Wales, where there are very severe restrictions on advertising by lawyers, such as myself, who do injury work. It has reached the point where I have an accreditation in personal injury law from the Law Society, involving an exam etc. I cannot put that on my business card because someone who is not my client might see it and see that I do personal injury law. So now my business card says I am an accredited specialist. It doesn't say what I am an accredited specialist in!

The advertising restrictions extend not just to media advertisements, as you would expect, and to print, radio and television. They extend to websites and internet sources. This is an area I find difficult because it is not what I would call "push" advertising.

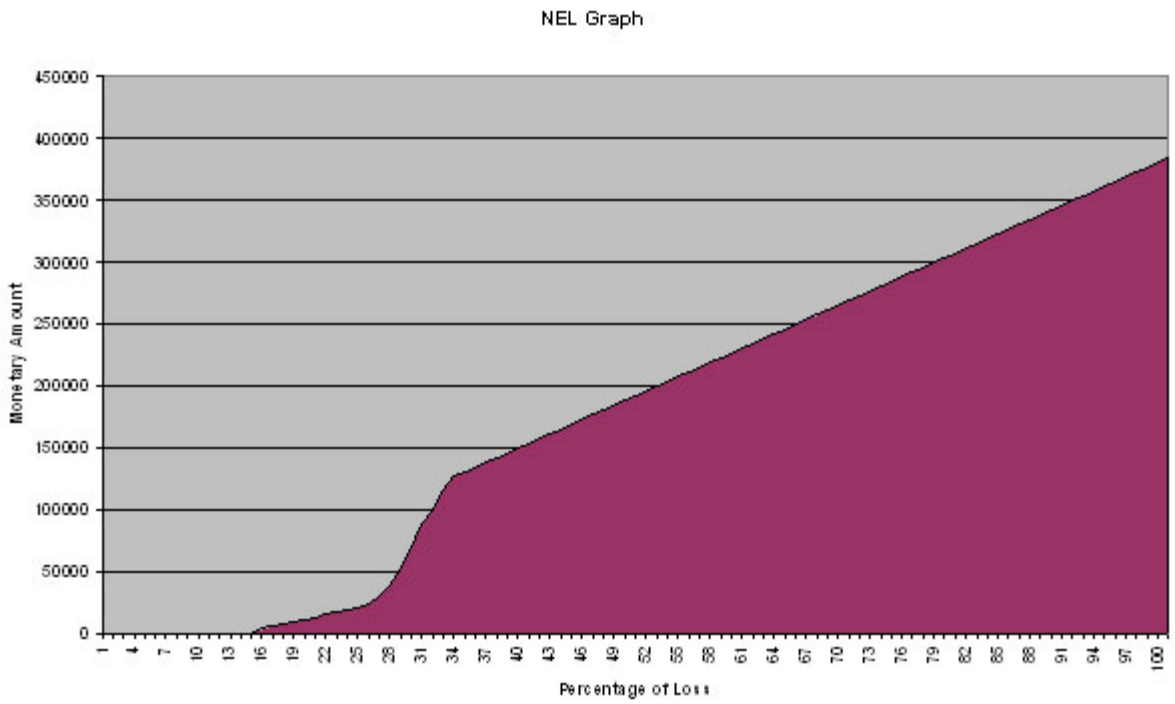
Someone could go to our firm's web site in order to obtain information and yet we are not permitted to put information on there, not just about medical negligence litigation, but about any sort of injury litigation at all.

Justice Kirby, in the recent High Court appeal that has been put on in relation to the advertising regulations, made this comment, that people go on to the web for information in this modern era and queries whether this really amounts to censorship.

"most people - it will come as a terrible surprise to people in this room - never think about the law, they do now know

about the law, they do not know about the Courts and they do not care, but when they get into a corner and they have a problem and have been damaged, it becomes of some importance to them and their families. Now we have the web, all sorts of people will go in and try to find out what their rights are. That is part of a free society?"

Don Munro and John Pavlakis are here tonight. I had a look at their Tress Cox and Maddox and Blake Dawson Waldron websites and the advertising regulations and it seems to me that they presently breach the regulations. Perhaps Don and John can tell me how it is that that isn't the case, or how I have misunderstood their websites.



General damages

Obviously there has been some discussion about this already. The bit that worries me, when I wear my plaintiff lawyer's hat, is the steepness of that curve. At 25 per cent the compensation amount is $20,000, while at 30 per cent it is $75,000. That 5 per cent, as much as I would like to pretend otherwise, makes it very difficult for me to advise a client at the beginning of a matter, whether they will be 25 or 30 per cent of a most extreme case by the time the matter comes to court.

That gives rise, as Allan has pointed out, to a question of economics in pursuing litigation in those contexts. It has a particular impact for children, for the elderly, and for the unemployed or people who stay at home and look after children, because they may not have a claim for economic loss. They may not have any significant medical expenses, especially if they have gone through the public system. Those people can, in effect, be left with a meritorious claim, clear enough negligence, but no economically viable piece of litigation. It is compounded, again as Allan has pointed out, by the costs recovery provisions. It is the combination of those two factors that makes life very difficult.

Costs

I have tried to give an example of a case cost. Despite Allan's enthusiasm for the cerebral palsy claim of $30,000 for costs, most reasonably straightforward relatively moderate medical negligence litigation will, in my view, cost about $60,000by the time it runs for a couple of days in court. It may resolve earlier for less, but let's assume we end up in court because we are having a brawl about something.

If we are recovering $20,000 of that amount there is a shortfall of $40,000. Costs won't be recovered by a successful claimant with a meritorious claim, no matter how lucky they are, leaving aside some arguments about indemnity costs. So you will appreciate, if we go back and look at that graph, that in order to swallow up not only a reasonable award for

non-economic loss and the costs, we need to get up to about 28 per cent of a most extreme case before the claimant reaches a break-even position. Although, superficially, we have a 15 per cent threshold, the reality in commercial terms is somewhat different.

Is it fair?

Whether or not that's a problem depends upon how the thresholds operate and whether or not you think it fair that people below a particular level don't obtain compensation for their general damages, pain, suffering, and emotional distress. It seems to me that there are a number of cases where there would be a significant impact from the non-economic loss threshold. Cosmetic surgery cases, where there is scarring, are a classic example. Whether or not anyone would get above 15-25 per cent is problematic.

We ran a case recently in relation to loss of fertility. A woman who had had a post-partum haemorrhage, followed by a D&C, ended up with Asherman's Syndrome and was then effectively infertile. The general damages award to her was about $80,000 which isn't too bad, but that was under the old scale. $80,000 is around the 30 per cent mark. If you take the cost recovery into account, it suddenly doesn't look too flash as a piece of commercially viable litigation.

Entrepreneurial medicine

In relation to entrepreneurial medicine, in my Sunday newspapers, yours may be different, one finds advertisements for cosmetic surgery, laser eye surgery, impotence treatments and a number of other areas I would tend to describe as entrepreneurial medicine. Some of those advertisements seem rather optimistic. Some of the names of the clinics are extremely optimistic. I must admit that I struggle with a situation where at least that particular segment of medicine, which is really an entrepreneurial activity, should obtain the benefit of these sorts of restrictions on damages awards if they entice someone in the door and then provide a service to a standard which can be described as less than negligent.

What becomes of the uncompensated victim? Allan has already touched on this issue in terms of the rise in the number of disciplinary issues. I can assure you that it is not very pleasant having a conversation with someone and saying. 'Yes, you have a meritorious claim but it is not worth pursuing'.

Alternatives to civil litigation

I have a nice supply of booklets from the Health Care Complaints Commission. I have the web site for the Medical Board. I have phone numbers for local members and phone numbers for some members of the media. People do not like being told to go home and forget it about. They are not inclined to forgive and forget by the time they have come to see me.

Disciplinary activity therefore is, to my way of thinking, likely to rise. The Health Care Complaints Commission has been a bit coy about its numbers. As you will appreciate, in January, February, March of this year, as a consequence of the Campbelltown and Camden publicity, the numbers went up. I saw some of the published numbers. They suggested a three- or four-fold increase over that period. I don't think it was just the inquiry. I think that what Allan says is right: there will be an increasing number of complaints as people, in the absence of financial compensation pursue that line of redress.

Individual professional accountability and systemic problems

I just want to touch on one quote by Brett Walker in one of his interim reports considering whether these problems are really systemic problems or individual problems. He suggests that the two concepts aren't necessarily inconsistent.

"this inquiry to date discredits the notion that individual accountability through professional discipline is inconsistent with systemic improvement of clinical care and institutional administration."

Achieving a balance

Ultimately I simply want to say, and I am again quoting from Justice Ipp, in the speech where he referred to the Stella

case, that what we should be trying to achieve is some balance between the rights of people who have been injured, the social benefit as a whole, and the rights of medical practitioners. It seems to me, at the moment, that that is not something we have achieved and that it is something that will require a bit more refining.

About Mr Bill Madden

Bill Madden is a partner of Slater & Gordon. He practises in professional negligence and is currently Chair of the Australian Plaintiff Lawyers Association's Professional Negligence Special Interest Group. He is a member of the New South Wales Law Society Medico-Legal Liaison Committee and an Editorial Board Member for the Health Law Bulletin and the Civil Liability Bulletin.