# Mr Geoffrey Watson

**Why "The Damages Lottery"?**

The name of tonight's talk was changed, at my urging, to incorporate the title "The Damages Lottery". That, as some of you will know, is the name of a book by the late Professor Patrick Atiyah. Professor Atiyah was a famous writer and academic in the field of contract law, the sale of goods and the like, but he had an abiding interest in the failure of tort law to present an appropriate means of compensation to injured people. "The Damages Lottery" is short; it is readily available. I would commend it to anybody interested in this field.

The reason why I thought the idea of "The Damages Lottery" was appropriate for tonight was because it seemed as though the subject was encouraging a discussion about (do I dare speak its name?) reform, and the potential for reform especially as it might be reflected in a no-fault scheme. Lawyers do not like that, because there is an impression that a no-fault scheme may cost us jobs and fees, but nevertheless that is the subject of tonight's discussion. I do not think this looks like a radical body of people here tonight, yet I would hope that you would at least come to agree that the failings so plainly evident in the current scheme must sound at least in need of a government inquiry, at some level, as to how people are today compensated in tort.

**Why the present system doesn't work**

When James Sheller gave you some examples, he told you, perhaps unconsciously, why the current system does not work. It is because the decisions made are all emotionally charged. As soon as a decision has to be made in an emotionally charged environment, bad decisions are made. For example, all of us sat here and swooned with sympathy about the story of Rosie Cheung, who will get nothing?nothing except for a costs order against her parents. On the other hand we all bristled at the Swain case and wondered why a drunken man who had been smoking marijuana should get a penny.

Just imagine these are the circumstances (I am not suggesting that they are, but just imagine with me for a moment)? that Rosie Cheung was the daughter of multi-millionaires who had millions of dollars which they could use on her care. Imagine Mr Swain was the son of poor parents and the injuries were such that his mother and father had to give up their hobbies and jobs and had to get up every night, and could not get a decent night's sleep and it was driving them crazy. Those factors are never taken into account, even in catastrophic cases. One only hears of the emotion engendered from the position of the plaintiff, not from the families. I suggest that as soon as you consider the issue of the emotional impact more broadly than by the injured person, your reaction may change altogether.

I had a gnawing feeling during that era that we now call "the public liability crisis" that the reason why the courts had got it so wrong was because the judges themselves did not think the system was working and the judges themselves could not understand why one case, close to the line, would be handsomely compensated and another case, close to the line but on the other side of the line, would result in a verdict for the defendant. It was a naturally corrupting atmosphere for the application of principle. A lot of this stems, in my view, because we do not really know how the system works. At a fundamental level, I do not know anybody who can tell me how much the system costs. True, there are micro studies available which, in specific litigation, can produce results, but across the board in terms of tort law, nobody can say how much the system costs. There will be a lot of people who are here tonight who have experienced this.

**The astronomical costs of the system**

It must, on any view, be a great deal of money. At one stage during the height of the rush of claims, there were up to 40 District Court arbitrations being heard and determined each day. Many of those cases were small, but some were a bit bigger, and all of them involved two sets of lawyers, and some of them more than two sets of lawyers. I would hazard a guess and say that those cases, including the legal costs, were costing in the order of $100,000 a piece. That, at 40 per day, is $4 million per day and $20 million per week. If there were 10 cases being decided each day by the judges as well, and they would be slightly larger but let us still treat it at the $100,000 estimate. That takes it up to $5 million a day, and $25 million a week running through the one building, the John Maddison Tower. Why, when so much money

is involved, would it not be worthwhile for people to ask questions about whether or not the system under which the damages were being awarded was working?

I know we are directing our thoughts tonight at catastrophic injuries, but for the moment, I hope without trivialising it, I will give you a simple example which applies in catastrophic cases, as well as in the most minor case. Does anybody know whether the awards of damages made to plaintiffs in respect of medical expenses which will be expended into the future are, in fact, utilised? Nobody knows the answer to that question. Nobody even knows the answer to the question whether plaintiffs then go on to claim their notional expenses again through private medical insurance, or through Medicare. We do not know the answer to that question. I think we should.

**Some remarkable cases**

Does anybody know why, and I will return to catastrophic injuries in this case, certain cases can attract such incredibly large sums in compensation when the fact of the matter is that the recipient often lies in precarious health and can die prematurely? The case which James Sheller mentioned of Palmer led to an award of $16 million. The vast majority of that related to care which would be provided either by Mrs Palmer's family or externally at cost. Mrs Palmer died not long after receiving that sum. The rest of the money presumably went to her estate; to be distributed to the people who had not suffered the injury; who had not provided the care; who actually had no real entitlement to it. To cite that example only demonstrates that in those sorts of cases there is a huge potential for an injustice to be inflicted on the system by the system.

The Blake case was more extraordinary, involving a very gifted young Australian actor, predicted by many to be the next Mel Gibson. I am not sure how much Mr Blake ended up with, but I do know that on the first calculation he was awarded $33 million in damages. That was reduced by the Court of Appeal, but the trial amount will do for present purposes. Most of that, unusually for a catastrophically injury case, related to the income which he may have generated on the chance that he might have become the next Mel Gibson. An award of damages of $33 million converts the recipient into an economic force. It cannot be right that that sort of amount of money should be awarded in an individual case.

I have given you only examples about the injustice which can be inflicted if the recipient died early. What about if the injured person survives?

I went to school with a fellow who got married very soon after he left school. He would have only been 20 or 21. On his honeymoon he was driving and he caused a terrible accident and his wife became a paraplegic. She sued him and fault was easily established. She recovered an absolutely extraordinarily large sum of money for the day. It was $400,000 odd. I wonder how they are doing now.

**Governments' reluctance to enquire**

Yet strangely our government will not appoint an inquiry to find out what is happening in these cases, or what can be done to improve the system. I know that because I wrote to the government. I encouraged them to commence an inquiry. I got a letter back from Mr Debus saying that they were not inclined to do so yet.

When I had a look at some of the reasons why the current system is in place you can understand why lawyers might be reviled by the rest of the community. The idea that damages are awarded "once and for all" is one which all lawyers treat as sacred. It is interesting to note that it derives from a judgment from England which was handed down close to 1770. That was just at the time that Captain Cook was arriving here. We are still applying that rule, without adaptation, to current circumstances. It is about time we rethought it. It is certainly about time we rethought it in catastrophic injury cases.

Should the reform go so far as to be one which is no-fault? It is interesting to reflect that is now 30 years since the Whitlam Government commissioned Professor Woodhouse to conduct such an inquiry, but it went nowhere. In a federation like ours, how was it ever likely that all of the states would agree on such a matter to introduce a federal based no-fault scheme? The scheme proposed by Professor Woodhouse was imported across the Tasman, where it has remained in place and is still working 30 years later. It is about time we looked at this issue again. Maybe it would not

recommend a no-fault system for all cases. Maybe it would not recommend a no-fault system for all tort law liability.

**Could we do better?**

Could I suggest this example to you: from around about 1913, and more comprehensively since 1926, we recognised that there were a class of people who were entitled to be compensated on a no-fault basis, workers. So we introduced the workers' compensation scheme. Why? Because they were vulnerable and they were, as it were, an identifiable group. They were a readily definable class, but they are all doing something that we have to do, they were all working. So we understood we could put in place a scheme for people like that. Could I ask you to reflect for a moment: why would not that thinking apply with similar force to motor car accidents? Why could we not introduce a no-fault scheme there as well? I have often wondered, when I have been arguing some of these cases, just how unfair the current system is. I picture myself in a car where there is some dispute between the passenger and the driver as to whether or not we want to keep Alan Jones on the radio. The driver reaches forward to turn it off, crashes into a telegraph pole, the passenger recovers $8 million and the driver recovers nothing?but to the external observer the positions of fault between them were indistinguishable.

Is it not about time that we thought that we could do better in that area? Even if it means (as James Sheller pointed out occurs in New Zealand) that all injured people get some percentage of their lost wages? rather than some who fall on one side get the lot and some who fall just on the other side of the line get nil. But, at the very least, is it not time that we inquire into it?

The law reform which was introduced as the Civil Liability Act just scratches the surface. It does some things and it may not even do those well, but was it not at that time that considerations like this should have been taken on board to see whether or not the reforms could have been more far reaching? Even in the Civil Liability Act, regarded by many tort lawyers as a Draconian scheme, people are still entitled to recover lump sums reflecting, as I have mentioned before, medical expenses to be incurred in the future. Yet we are doing that in a system where nobody can tell us the outcome as to whether those moneys are actually spent for the reason for which they are awarded.

I have not offered you any solution. I have not offered you any reason as to why we should move one way or the other. All I am offering for your consideration tonight is this thought: Why would not our government look at inquiring into these issues?

## About Mr Geoffrey Watson

Mr Geoffrey Watson is a barrister who was appointed Senior Counsel in 2002. He has appeared in many large common law trials and has a special interest in catastrophic injuries. He lectures and speaks regularly on matters related to the common law.