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Rob Davis

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# Queensland emphasises dispute resolution for personal injury claims to resolve premium 'crisis'

**Rob Davis**

General Editor

**Laurence Boulle**
*Professor of Law,*
*Bond University,*
*Queensland*

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A hardening insurance market, increased reinsurance costs, the events of 11 September 2001 and overly aggressive price competition by insurers throughout the 1990s have all combined to create a premium 'crisis' in the insurance industry.

A decline in competition since HIH/FAI departed from the general liability market provoked a massive rise in premiums by those remaining in the market. The likely departure of UMP from the medical indemnity market will evoke a similar crisis for medical indemnity insurance.

## State responses

The NSW Government recently announced proposals to severely curtail citizens' compensation entitlements in personal injury litigation in that State. Premier Bob Carr called on other States to adopt similar proposals in their response to the premium crisis.

So far the Carr proposals for 'tort reform' have found little support among the other States. For example, Queensland recently announced its own raft of reforms directed towards encouraging early negotiation and mediation of personal injury claims to reduce the need for parties to litigate. A summary of the Queensland and NSW proposals appears in Table 1 (see p 19).

Other States are yet to announce their responses, but most have already indicated scepticism of the view that law reform will have any impact on premiums. This scepticism is supported by extensive research from the US which indicates tort reform in that country over the last two decades has had no impact in reducing premiums.[1]

The Queensland proposals are still being negotiated with key legal and insurance stakeholders but are likely to be modelled on the existing *Motor Accidents Act 1988* (NSW). That Act requires a claimant to notify claims at an early time, provides for exchange of information and medical reports, requires defendants to either admit or deny liability at an early time, and provides for a compulsory conference before litigation can be commenced.

There is no formal requirement for the parties to confer with the assistance of a mediator, although in some cases this does occur already under the *Motor Accidents Act 1994* (Qld). It is likely, however, that conferences under the new legislation will produce more work for trained mediators in Queensland. This is particularly so as the new legislation will provide a framework for initiating and resolving more complex personal injury cases.

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Perhaps the most difficult of the cases to be dealt with under the new regime will be those involving claims of medical negligence. At present these cases are conducted in an environment of mistrust, stonewalling and combativeness. The new regime will encourage parties to attempt settlement as a precondition to accessing the courts. This will provide opportunities for practitioners skilled at principled negotiation and will give clients an opportunity to explore a mix of remedies in addition to pure financial compensation.

The reforms proposed by the Queensland and the NSW governments represent diametrically opposed responses to the premium crisis. The focus of the NSW legislation is to curtail citizens' compensation rights through caps, thresholds and other structural disincentives. This approach is designed to shift the financial costs of injury from defendants onto the injury victim and, indirectly, the taxpayer through increased reliance on medical and welfare services.

The Queensland approach does not seek to limit the rights of citizens. Instead, it attempts to encourage parties to resolve disputes in a way that benefits both the claimant and the defendant, by speeding the compensation process and reducing the costs they each pay out in legal and claims administration.

## Window dressing reforms

To a large degree these reforms are all window dressing. Put simply, they are not likely to provide solutions to the current premiums crisis. This is because, as all informed commentators agree, the current crisis has much more to do with the failure of the insurance market than an increase in litigation rates.

The insurance market periodically goes through cycles of low capacity/high premiums and high capacity/low premiums. High premiums are here to stay until the global economy provides the right environment for capital to flow back into the insurance market. That, in turn, will set off a new round of competition that will lower premiums again, for a while at least.

### Table 1: Comparison of NSW and QLD approaches to the public liability and medical indemnity issues

| No. | Proposed legislative change | NSW | QLD |
|---|---|---|---|
| 1 | Pre-action procedures to encourage early mediation and resolution of claims. | Nil. | Procedures are being discussed with stake-holders to make recovery action quicker and cheaper for the injury victim.[2] |
| 2 | Plaintiffs must make early notification of claims and defendants must admit or deny liability before action commences. | Nil. | Proposed as part of 1 above. |
| 3 | Minimum threshold for non-economic loss. | Nil damages below 15 per cent of worst case. | No thresholds. |
| 4 | Cap on maximum damages for non-economic loss recoverable. | Capped at $350,000. | No caps. |
| 5 | Cap on maximum loss of earning capacity recoverable. | Capped at $2712 per week. | Three times average weekly earnings.[3] |
| 6 | Discount rate for lump sum damages for future economic loss. | New rate will be 5 per cent. | Already 5 per cent in Qld. |
| 7 | Interest recoverable on past non-economic loss and damages for gratuitous attendant care. | Nil. | Usually 2 per cent.[4] |
| 8 | Contributory negligence in death claims. | Damages recoverable by dependants for negligently caused death may be reduced by contributory negligence of deceased. | Already the law in Queensland.[5] |
| 9 | Exemplary and punitive damages. | Will be abolished in all personal injury claims.[6] | Remain, but cannot be awarded against an insurer.[7] |
| 10 | Gratuitous attendant home care compensation. | Severely restricted. Nil damages recover-able for less than six hours care per week. Capped, if more than 40 hours care per week is required, at average weekly earnings. | No restrictions. |
| 11 | Jury trials. | Previously abolished. | Will be abolished. |
| 12 | Restrictions on legal costs recoverable against an unsuccessful defendant. | No restrictions. Usual loser pays rule continues to apply.[8] | Nil where damages are less than $30,000. Amount recoverable is limited where damages fall between $30,000 and $50,000. Over $50,000 the normal loser pays rule applies.[9] |
| 13 | Restrictions on legal costs that can be claimed against a client. | Limited to the greater of 15 per cent or $5000. | No restrictions apply. |
| 14 | Unmeritorious claims. | Lawyers commit 'professional miscon-duct' and may be ordered to pay the costs of an action if they commence action with 'no reasonable grounds for believing … that the claim is more likely than not to succeed'. | This is already regulated by the Court's inherent jurisdiction over lawyers as 'officers of the court'. |

Tort reform does not prevent periodic crises in the market place. The market does not care about legislative tinkering — it follows the more powerful laws of supply and demand. ●

*Rob Davis is National President of the Australian Plaintiff Lawyers Association, and can be contacted at rdavis@davislegal.com.au.*

## Endnotes

1. Hunter RJ and Doroshow J *The failure of 'tort reform' to cut insurance prices* Research Report published by CCAIR 1999.
2. Queensland already has pre-action procedures in place for motor accident and Workcover claims. The motor accident legislation is being used as a model for the new procedures, although some alterations will be necessary to take account of the greater complexity of some types of litigation.
3. This brings medical negligence and public liability into line with recovery limit already applicable under Motor Accident and Workcover Acts in Queensland.
4. Being the difference between the inflation rate and secure investment return rates.
5. Section 10(1) *Law Reform Act 1995* (Qld).
6. Creates the incongruous situation where exemplary damages can be awarded for hurt feelings in defamation cases but not for serious bodily injury.
7. Most insurers already exempt this type of liability anyway under their insurance policies.
8. The loser pays rule does not mean the unsuccessful party pays all the winner's costs and expenses. In every state the court scales limit the amount that is recoverable for these 'party/party' costs.
9. See above note 8.


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