any other legitimate item?

Private lawyers have already repatriated DSS benefits of more than $230 million in just three years. This does not include the figures for 97-98. The value of benefits withheld during subsequent preclusion periods is estimated to be at least a further $200 million for the same three years. All this has been done at no cost to government.

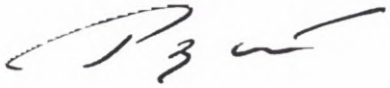
No wonder they think beneficiary recipients are an easy target and that no matter how hard they squeeze, no one will shout.

Regrettably this is a case of legislation by stealth. Where government hopes that those affected most - the weak, the elderly and the disabled will not have a loud enough voice to have their cries heard and not be sufficiently astute to expose the distortion.

APLA, with its allies, hopes to make a difference in these campaigns. Members will be called upon to assist in various capacities.

For the workplace produce liability campaign, the aim is the repeal of section 75AI.

For the social security issue it is hoped to achieve a reversal of the policy so that non-economic loss payments will not be regarded as "income". An argument will also be advanced to seek to have government share Plaintiffs' legal costs proportionally to the extent of the overall recovery, where any repatriation of funds is achieved.



Plaintiffs' solicitors' costs in CTP claims

Tom Goudkamp, Sydney

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The NSW State Government has attempted to peg plaintiffs' solicitors' costs in MAA cases on the pretext that costs have escalated to a point where they are adversely affecting the viability of the Motor Accidents Scheme.

The Government, without warning, introduced the Legal Profession Amendment (Costs Assessment) Bill 1998, seeking to give itself the power to regulate to fix "fair and reasonable costs for legal services in any motor vehicle accident matter".

The Bill sought to abolish solicitor/client costs by providing that:

"A barrister or solicitor is not entitled to be paid or recover for a legal service an amount that exceeds the fair and reasonable costs fixed for the service by the Regulations under this Section."

The Bill was introduced before the imminent release of a report by the Justice Research Centre which has carried out a detailed survey of plaintiffs' solicitors' fees and before the results of an enquiry on costs in MAA cases by the Law & Justice Committee of the Legislative Council have been published.

Much to the chagrin of the Premier the Bill was amended on the 29th June 1998 by the Legislative Council to the effect that the above provision "... does not apply in respect of any costs payable to a barrister or solicitor under a Costs Agreement with a client that relates to legal services provided in a motor vehicle accident matter if:

(a) before entering into the Costs Agreement, the barrister or solicitor made the disclosure required to be made under Section 175A, and
(b) the Costs Agreement complies with Division 3."

The Bill was further amended to provide that before a Regulation is made the Attorney General is required to ensure that:

(a) a copy of the proposed Regulation is forwarded to the Law & Justice Standing Committee of the Legislative Council, and
(b) the Committee is given a reasonable opportunity to review the proposed Regulation."

As most solicitors enter into conditional Costs Agreements in any event it is unlikely that any Regulations will be made. It remains to be seen however whether the Government will accept the amendments or will try again.

Earlier this year the Motor Accident Insurers Standing Committee (MAISC) engaged actuaries to prepare a detailed report into plaintiffs' legal costs in MAA cases. The actuaries reported that the problem in relation to costs lies "very much in the area of claims for minor injuries".

Had the Bill become law it is likely that the Government would have received recommendations by MAISC to set Regulations to impose a cap on plaintiffs' legal costs by setting maximum fees according to a percentage of the result, whether by settlement or verdict. The fixed costs would include Counsel's fees . Costs recoverable for medical and other expert evidence would be significantly restricted. The fixing of costs would not be restricted to minor claims.

The fixing of costs as a percentage of the result would have dire results for plaintiffs and their lawyers, including Counsel. The ability to properly prepare and present plaintiffs' claims would be severely inhibited and would be unfair because:

(i) The restrictions would apply to plaintiffs' costs only, thus resulting in an unlevel playing field.
(ii) Plaintiffs have no real control over the length and complexity of hearings. It would be uneconomical for many cases to proceed to a hearing.
(iii) A plaintiff would suffer unfair costs penalties if the result of a Court hear- ▶

ing was less than expected, thus reducing the costs recovered.

(iv) In many cases plaintiffs could not afford to have Counsel. There would simply be insufficient fees to go around.

(v) It would be uneconomical for leading expert witnesses to be engaged on behalf of plaintiffs.

(vi) The fixed costs would apply regardless of the complexity or length of the trial, or the behaviour of the defendant.

A scheme whereby costs are fixed to a result rather than to the amount of time and effort involved in preparing and presenting a case could also be open to abuse by plaintiffs' solicitors. Some could be tempted to settle cases with minimal preparation and investigation, to the detriment of their clients, so as to recover "reasonable" fees. A significant increase in professional negligence cases could ensue.

It is not entirely clear why plaintiffs' solicitors' fees are being targeted as the cause of any problem which may exist in relation to legal costs. The surveys undertaken thus far have lumped plaintiffs' solicitors' fees with defendants' investigation and surveillance costs, defendants' disbursements, including Counsels' fees and fees for medical and non-medical experts. No information is currently available to provide a breakdown of the costs.

If plaintiffs' solicitors' fees have in fact increased under the Motor Accidents Scheme a reasonable explanation would be the increased work expected of solicitors in the area. Plaintiffs' solicitors are required to provide multiple further and better particulars to insurers and their lawyers. Further, the various obligations imposed on plaintiffs and their solicitors have undoubtedly increased the frequency of Notices of Motion being filed by defendants. Attendance at the District Court Motions List can be extremely time consuming.

The behaviour of insurers should also be considered. Some insurers tend to be obstructive and unco-operative, particularly when it comes to admitting liability and/or attempting to settle claims. This inevitably results in higher costs being awarded to the successful plaintiff.

Finally, it is often overlooked that most plaintiffs' solicitors in MAA cases carry significant disbursements due to the inability of their clients to pay. It is not uncommon, particularly in catastrophic injury cases, for plaintiffs' solicitors to carry disbursements in excess of $20,000. Further, most plaintiffs' solicitors accept instructions on the basis that no fees will be payable unless the claim is successful. ■

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Mt Druitt High School "Class Action"

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On 7 January 1998 the Daily Telegraph Mirror ran a front-page headline 'Class Action'. The following story reported the excellent result that had been achieved by the Year 12 students in the Class of 1997 at Mt Druitt High School.

The headline *'Class Action'* is also a convenient summary of the proceedings which had by then been filed, following the publication the previous year by the Daily Telegraph on its front page of the story about Mt Druitt's Year 12 Class of 1996 headed *'The Class We Failed'*. The class that the Daily Telegraph said had failed had different ideas. They engaged The National Children's and Youth Law Centre and Gilbert and Tobin Lawyers to represent them in this matter. In December of 1997 nineteen of them filed proceedings against Nationwide News, the publisher of the Daily Telegraph, seeking damages for injury to their reputation and credit. They also seek aggravated damages for the prominence and sensational treatment given to the original article as well as the reckless indifference of the newspaper in failing to check the basic facts with the plaintiffs.

The students' pleading alleges that the Telegraph's story about the performance of the Year 12 students in the 1996 class at Mt Druitt High School was defamatory of them because it identified each of them in an accompanying front-page photograph of the class and also by reference to the class. They say that the article suggested :

- that they were so stupid and lazy that they failed the Higher School Certificate;
- that they were pitiable failures unfit for any useful occupation; and
- their performances in the HSC were so bad as to make them objects of scorn, ridicule and pity.

The case was before the Court on 11 June 1998 for an application by the Defendant to strike out several aspects of the Statement of Claim. Such applications are usual in defamation proceedings. His Honour, Justice Levine, in his Judgment dated 10 July 1998 ordered that the article *"Class We Failed"* and the editorial were capable of conveying the imputation that the students "were so stupid that they failed the higher school certificate." His Honour further ordered that the editoral was capable of conveying the additional imputation that the students were "abject, overwhelming failures in that they were incapable of successfully completing their HSC."

The matter is likely to take at least two years to finally reach trial. ■

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