

APIL 'down under'

BY PAUL BALEN, NOTTINGHAM

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APIL president and secretary Ian Walker and Paul Balen attended the APLA conference at Sydney. Here is Paul's report.

by Paul Balen, solicitor, Freen Cartwright Hunt Dickins,
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There is no doubt that APIL has conquered the universe. Flying at 41,000 feet who should appear on a Malaysian airline TV screen but APIL member Andrew Dismore - not on this occasion making the headlines for APIL business but on the other hand demonstrating that you can't go anywhere without bumping into APIL.

After a few days' acclimatisation, cuddling the odd koala and feeding kangaroos, the conference itself was opened with a welcome from the president, Dr Peter Cashman, followed by an address by our own President taking up his pet subject of demolishing the concept of there being a compensation culture. General feedback suggested that this was a theme common to both countries. The conference itself followed broadly the style of APIL conferences: streams of further education lectures; plenary sessions and meetings of special interest groups, including the medical negligence special interest group (clinical negligence has not yet arrived!). Our own Arnold Simanowitz participated in a fascinating session on clinical governance where the key speaker was Dr Steve Bolsin now of Geelong Hospital, the anaesthetist who blew the whistle on the Bristol baby cases and as a result was effectively forced to emigrate. His presentation raised interesting questions which the current Kennedy inquiry will no doubt have to resolve. What actually was the problem going on at Bristol - was it medical, administrative, legal or political? Who actually was or should have

been responsible for what went on; what was the correct solution and could this happen again? Almost single-handedly Dr Bolsin has accelerated the introduction of the concept of clinical governance into the British Health Service dealing as it does with the audit, monitoring and risk management, evidence based medicine, the production of clinical guidance and the requirement for continuous training. Had this been in place could Bristol have happened?

My invitation was to present a paper at a session on class actions with two of the leading Australian class action practitioners, Peter Gordon and Peter Cashman and Justice Murray Wilcox of the Federal Court of Australia. Australian group actions are dealt with as a class action with a representative case leading the way. This is an opt out system so that the representative action will cover claimants similarly affected who have not yet come forward. After I revealed that we hoped that at long last a multi-party action rule would be introduced into British procedure, Justice Wilcox couldn't understand why we should accept such a compromise, insisting in his own words that we should go "the whole hog" and allow for representative actions in compensation claims. Significantly the chief problem with the Australian system appeared to be their current failure to provide a mechanism for controlling solicitors' costs! They expressed great interest in the assessment procedure for success fees in our system and in the proposed introduction of the losing defendant

paying the success fee and the insurance premium.

The medical negligence sessions were equally interesting, particularly when it became clear that Australian lawyers have great difficulty in finding Australian doctors to give evidence in medical negligence cases. Australians appear to be much in the position of English practitioners some fifteen or twenty years ago and so it was significant that Arnold Simanowitz was around, not only participating in the clinical governance session but also helping to launch the Australian version of AVMA - AVMAA. Working together with APLA, AVMAA should give a real leg up for Australian lawyers dealing with medical negligence cases.

The Chief Justice of New South Wales, Justice Jim Spigelman, gave the keynote speech which turned out to be a review of our Human Rights Act. His message was that the introduction of this Act was hugely important for Australia because unless Australia adopted a similar provision it will be isolated amongst common law countries. He claimed that the United Kingdom would have to start interpreting its common law in the context of the Human Rights Act and UK law and could therefore no longer be relied upon by the Australian courts in the interpretation of its own common law.

The highlight of the closing dinner was the presentation of the APLA justice awards, two of which went to plaintiffs in medical negligence actions, one in particular to Marie Whitaker, the

Whitaker in the famous case of *Rogers v Whitaker* which broke new ground on the issue of consent. She vividly described the trauma she went through when an elective eye operation on her blind eye led to her becoming blind in the other eye and to losing them both. I told her that all UK medical negligence specialists knew of her case and that I often lectured about it. She asked me to tell everyone she no longer had any eyes. She would not have had the operation if she had known there was a risk of becoming totally blind. She had specifically asked her doctor whether there was a risk but he did not mention it. Even though the risk was slight (1:15,000) it was important to her and the courts upheld her claim.

After the conference my wife and I took a short holiday before heading back to the English winter. Leaving Sydney preparing for the Olympic games we headed north. Not having been to Australia before I rather assumed that everyone would be having

a go at us poms but, although the republic vote was only a matter of days away, it was lawyer bashing that predominated. Deep in the rainforests of Queensland, the guide pointed out the way in which ferns grabbed hold of other plants in order to climb upwards towards the light and this is the lawyer cane because once you become entangled with one you can't get away from it! Even diving off the Great Barrier Reef we were not immune from the lawyer jokes. "Oh you are a lawyer are you? Have you heard about the lawyer and the Pope at the pearly gates..."

Finally, a useful tip. APIL after all is in the business of injury prevention! If you are attacked by a cassowary put your hands above your head and keep still. It will think that you are taller than it and run away. If you turn and run away, it will run faster than you and kick you to death with its feet. ■

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