

# David v Goliath: The battle for the common good

Pat Worthy, Chair of the Public Liability Special Interest Group, joins regular *Activate* writer Eva Scheerlinck, for a report on APLA's momentous fight to retain common law rights in the area of public liability.

**A**PLA's Public Liability Special Interest Group (SIG) was revitalised about 12 months ago and not a day too soon. In light of all the recent developments in this area, the work that has been done by this group and countless other APLA members cannot be understated.

APLA became concerned about developments in the public liability area after the High Court decisions of *Ghantous v Hawkesbury City Council* and *Brodie & Anor v Singleton Shire Council*<sup>1</sup>. Councils around the country began to call for the reinstatement of the non-feasance immunity abolished by the High Court in these cases soon after the ruling was handed down.

In New South Wales the Public Bodies Review Committee was asked to investigate the likely impact of these two decisions. APLA made a written submission to the committee, and this can be viewed on our website. Our many thanks go to James and Tom Goudkamp for their hard work in putting the submission together. Oral submissions were made to the committee by Tom Goudkamp and Andrew Morrison RFD SC on 20 March 2002, and we continue to watch developments in relation to the liability of local government authorities around the country.

Media monitoring undertaken by APLA after the *Ghantous* and *Brodie* decisions were handed down foreshadowed the ballooning of the problem and the 'crisis' that was to follow.

The call signalling possible legislative intervention became clearer towards the end of 2001 as community events and activities were being cancelled due to unaffordable rises in public liability premiums. As the community began to feel the effects of increasing premiums, pressure mounted on governments around the country to address the problem.

In January 2002, the Federal Minister for Small Business, Joe Hockey, claimed the reasons small business and communities were feeling the pinch with public liability premiums lay with 'greedy lawyers' and the growing trend of individuals wanting to blame someone else for their misfortunes.

The focus of the public debate on public liability insurance premiums changed from that day forth, with APLA representing the leading voice in advocating the importance of the rights of the injured and the role of the legal profession. Public Liability SIG members actively monitored events in their state or territory, writing letters of response to the media and other groups when necessary.

Prior to Christmas last year our ►



**Eva Scheerlinck** is the APLA Public Affairs Manager **PHONE** 02 9698 1700  
**FAX** 02 9698 1744  
**EMAIL** [escheerlinck@apla.com.au](mailto:escheerlinck@apla.com.au)



**Pat Worthy** is the Chair of APLA's Public Liability SIG and a Partner at Snedden Hall & Gallop  
**PHONE** 02 6201 8986  
**EMAIL** [patw@sneddenhall.com.au](mailto:patw@sneddenhall.com.au)

National President, Rob Davis, undertook a lengthy, in-depth investigation into the real causes behind premium increases. As a result, two excellent public position papers were published (these can be found on our website). These position papers were instrumental in establishing APLA as an expert in the debate, and has led to countless inquiries from journalists, government ministers and lobby groups.

“It is one thing to fight a real enemy, another to fight a misconception.”

This crucial research also ensured that the assertions made by Joe Hockey and the insurance industry – that lawyers and litigation were to blame for the closure of businesses and the cancellation of events – were called into question.

Further to these initial two papers, Rob Davis also researched litigation rates and trends in the various Australian jurisdictions. This task was not an easy one as each court keeps different records, making it difficult to reconcile the data in any meaningful way. Rob persevered however and the evidence clearly demonstrates that litigation is not increasing in this country. All of the evidence is to the contrary.

This led us to the conclusion that if litigation is not increasing, yet premiums are still rising, then other factors must be at play.

APLA has discovered through this research that the reasons for spiralling premium costs are complex and varying. Some of the primary causes are:

- A significant decrease in competition within the insurance industry in Australia as a result of the collapse of HIH Insurance and mergers of the major players.
- Significantly less competition in the

insurance market means insurers are free to set premium prices as high as they deem necessary, and to be more selective in the risks they are willing to underwrite.

- A marked decrease in investment returns. The profitability of insurers relies heavily on the earnings they make from investing premium income. When the investment market took a dive, premium income became crucial.
  - During the 1990s HIH was an aggressive competitor for the premium dollar. They massively discounted premiums to secure a greater slice of the market. In turn, the other general insurers in the market did the same. Premiums were not reflective of the risks underwritten and now premium levels are again leveling out.
- The events of 11 September have resulted in an increase in reinsurance costs. This increased cost is passed on to policy holders. The tragic events of this day have also seen the industry reassess the risk environments in which they wish to be involved. This is a global phenomenon that is affecting insurance companies all around the world, not just in Australia.

Despite the reasons outlined above, governments insist on looking towards litigation and the entitlements of the injured in resolving the premium problem.

Some suggested solutions targeted at plaintiff practice have included:

- Capping personal injury damages
- The introduction of thresholds
- Curtailing advertising by personal injury lawyers, in particular those that advertise ‘no win, no fee’ arrangements<sup>2</sup>
- The introduction of a national ‘no-fault’ statutory scheme
- Reviewing court rules and pre-trial procedures
- Changing damages payouts from lump sums to annuities
- Reviewing legal costs in personal

injury claims

- Increasing the discount rate
- Alternative dispute resolution

While these issues are on government agendas, all of the evidence would indicate that if solutions restricting the rights of the injured to access fair compensation were implemented, they would have little, if any, impact on the cost of insurance premiums.

Public liability premiums are an issue that is being considered by every state and territory government in Australia, as well as the Federal Government.

Other legal professional bodies have also taken an interest in this issue. APLA has been working closely with the Law Council of Australia and various law societies and bar associations around the country. The enormity of the possible impact that legislative intervention could have on the rights of negligently injured individuals has been recognised by the legal profession in an unprecedented way.

On 27 March 2002 a national meeting of all state and territory government ministers with the responsibility for insurance met under the co-ordination of Federal Minister for Revenue and Assistant Treasurer, Senator Helen Coonan. Submissions were made to the forum in writing prior to the meeting. APLA’s submission can be read on our website.

Lobbying has been undertaken in every state and territory on this issue. All Attorneys General were briefed on APLA’s position prior to the meeting of the Standing Committee of Attorneys General in early March 2002.

All state and territory ministers with the responsibility for insurance in their jurisdiction were briefed by APLA prior to the national forum hosted by Helen Coonan.

All state and territory government sports ministers have also been briefed by APLA on the issue.

At a state level, members of APLA’s various branch committees have undertaken lobbying of government ministers and shadow ministers in their state or

territory with an interest in the premiums problem. Wherever possible, Rob Davis has attended those meetings.

APLA continues to contribute to the debate in the media wherever possible. Opinion pieces have been featured in the *Australian Financial Review*, the *Newcastle Herald* and on ABC Radio's *Perspective* program.

Television interviews of Rob Davis, Steve Roche (Queensland President), Peter Burt (Victorian President) and Tom Goudkamp (NSW spokesperson on the issue) have also contributed to the message in the media.

APLA has also contributed to various community forums, including forums organised by the Chambers of Commerce and Industry, the National Party and Volunteering WA. APLA has been proud to be involved in these public forums and is grateful for the opportunity to explore these issues with individuals and businesses in our community.

APLA has endeavoured to keep its members informed of the public liability campaign through its email list servers for the Public Liability SIG and the weekly APLA News email bulletin. Reports have also been made by APLA's Public Affairs Manager at seminars organised for members and also at APLA state conferences. The website is regularly updated with media releases and quotes from the press relating to the campaign.

We are hoping to continue to contribute to the debate and assist governments and communities around the country in addressing the problems raised by increasing premiums for the community, not-for-profit and adventure tourism operators in particular.

Some programs initiated by the community themselves have proved successful in addressing the problem of affordable insurance cover. Meals on Wheels NSW is to be congratulated on its achievement in securing affordable insurance cover for small community organisations under the MOW umbrella. 500 community organisations have now taken advantage of the insurance

brokerage service they have been able to provide.

Similarly, Agfest in Tasmania was able to use the bargaining power of other agricultural shows to secure its insurance policy for this year's festival at an affordable premium.

Other bodies have looked overseas to find suitable cover and have had some success in pursuing this option.

Similarly, some initiative is forthcoming from an insurance company specialising in the provision of insurance cover for the adventure tourism industry. Triton insurance has developed a risk management tool to complement the insurance cover it provides to policy holders. Their risk management approach in Family Day Care has seen a demonstrable improvement with a marked reduction in the number of claims and injuries suffered.

Risk management in this area will continue to be of paramount concern to APLA. Injury prevention lowers the risk for liability under an insurance policy. It follows that if the risk is reduced, premiums should decrease accordingly.

Meanwhile, another hurdle we face in this campaign is the misinformation and misconceptions that abound in relation to the work of plaintiff lawyers. It is clear that there is little or no understanding of what constitutes negligence, why compensation is awarded, how damages are calculated, and how 'no-win, no-fee' arrangements operate.

It is one thing to fight a real enemy, another to fight a misconception.

The lack of understanding of what

plaintiff lawyers do and the real hardship faced in our communities when local events are cancelled due to unaffordable insurance premiums, has led APLA to develop a speakers kit for use by members. We encourage all members who are able to address their local Lions or Rotary Club to use our speakers kit to explode some of the myths surrounding this issue. Please contact our office if you think you might be able to assist APLA in this way.

The fight to maintain full common law rights for the negligently injured throughout Australia continues. You are perhaps all aware of the fundraising efforts APLA has made to support this campaign. For those of you who have contributed, we thank you for your much needed assistance. As a result, APLA has been able to recruit two researchers to support the work in this campaign.

So where to from here? We are remaining vigilant and taking seriously all proposals raised in the debate to resolve the premiums problem. We will continue to communicate our message and influence the debate.

We thank you for your continued support. ☐

#### Footnotes:

- <sup>1</sup> (2001) 75 ALJR 992 (HCA).
- <sup>2</sup> The New South Wales Government has placed restrictions on the advertising of personal injury law services with the Legal Profession Amendment (Advertising) Regulation 2002 which took effect on 1 April, 2002.

## JOIN APLA'S PUBLIC LIABILITY SIG

If you work in the area of public liability, or would like to be kept informed of APLA's campaign progress in the area, join the Public Liability SIG. It is free for members to join and is a great forum for keeping up to date on all the important issues in the area.

To join send an email to [aplalists@apla.com.au](mailto:aplalists@apla.com.au) and type **Your Name** and **Public Liability** in the body of your message. We will then add you to the list.

Once you have joined, you will receive messages from the group to your email address automatically. And all you have to do to post your own message to the group is email your message to: [aplapublicliability@lyris.depoconnect.com](mailto:aplapublicliability@lyris.depoconnect.com)

**For more information contact Felicity Crombach, Membership Officer on 02 9698 1700**