The APLA Update

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Medical Negligence

APLA Meets with Fiona Tito, Author of the *Review of Professional Indemnity Arrangements for Health Care Professionals*

The United States journal, Public Citizen, said in November 1993:

> "Most attempts to address the problem of medical malpractice have been embodied in attacks on victims and their right to recover damages from negligent providers, not on solving the problem at the source, ensuring quality care and eliminating medical negligence".

APLA viewed with the gravest of concern, the contents of the Interim report of the Review of Professional Indemnity Arrangements for Health Care Professionals. In APLA's view the Interim report had an implicit, although mutely stated, agenda that favoured the adoption of no fault compensation to replace our present tort based system of compensation for medical negligence claims. Alternatively, if no fault compensation was not acceptable, the Interim report appeared to promote limits, caps and thresholds to the rights of injured plaintiffs to recover compensation.

APLA was anxious to ensure that submissions were made on behalf of plaintiffs who would otherwise have had no input to the inquiry to counter the avalanche of material from the defendants' interests.

Despite the serious challenges to our tort system and the rights of injured plaintiffs, the Interim report did contain some ancillary recommendations which APLA supported. These recommendations included the enactment of legislative provisions

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to guarantee patient access to medical records from health care providers and institutions. The Interim report also promoted the collection of information and development of data bases concerning adverse patient outcomes. Similarly the Interim report promoted delay reduction programs in all jurisdictions.

Following the publication of the Interim report APLA prepared a detailed submission.

Subsequently, on 21 December, 1994 the author of the report, Fiona Tito, met with a group of APLA members, including the President Peter Semler QC, the National Secretary Roland Everingham, Committee Member Rob Davis and Barrister Len Levy.

The discussions with Ms Tito were invaluable. It became apparent that, following consultation and in the light of submissions received, it is most unlikely that a no fault compensation scheme will be introduced. Nor is it likely that there will be any limits or thresholds on the damages payable in medical negligence cases.

Ms Tito agreed that the tort system provided significant benefits in its operation. In addition to compensating injured plaintiffs, it sets standards of professional conduct and behaviour which become the benchmark for acceptable medical treatment in our community. It is noteworthy that significant changes in medical practice have taken place since the O'Shea case concerning failure to diagnose cervical cancer. Similarly, psychiatric care and treatment have improved as a result of the Chelmsford litigation and Royal Commission. Rogers v. Whittaker has set the benchmark in standards of information to be provided to patients. These benefits were positively acknowledged and adopted by Ms Tito in discussions.

Ms Tito also confirmed that no caps would be introduced on damages in medical negligence cases. As was pointed out, a cap only serves to disadvantage the seriously injured.

The APLA members agreed with Ms Tito that obtaining independent and impartial medico-legal assessments in medical negligence cases was an ongoing problem. Ms Tito is exploring a range of solutions. Possible solutions which were suggested by APLA include reversing the onus of proof, introducing a modified legislative form of res ipsa loquitur and possible codifying of National Health and Medical Research Council guidelines and other appropriate standards. The solution to this problem is vexed. Any APLA members with suggestions on how access to medical expertise can be improved in medical negligence claims are urged to submit them to the editor of the APLA UPDATE.

Another issue was whether plaintiffs should be encouraged to accept structured settlements. Research had suggested that, at the time of settlement or verdict, plaintiffs clearly preferred a lump sum amount. However at a later point, and with the benefit of hindsight, research indicated that a structured settlement would have been preferred. It is likely that Ms Tito will make final recommendations which would encourage plaintiffs to at least consider structured settlement.

Ms Tito's research has shown that there are many myths surrounding medical negligence. Firstly, her evidence suggested that recent increases in insurance premiums for doctors was not the result of a sudden significant growth in claims. Rather it reflected that premiums were generally not increased between 1975 and 1988.

Further, Ms Tito's research shows that it is fallacious to suggest that obstetricians and gynaecologists are fleeing their speciality because of fear of litigation. On the contrary the numbers of professionals practising in these areas is remarkably stable.

The discussions between APLA and Ms Tito were most enlightening and certainly those in attendance were reassured that the challenges thrown out in the Interim report to the tort based system of compensation are most unlikely to be implemented in the foreseeable future.