Individualised justice – has its time passed?

By Anthony Kerin

Recently, at two separate gatherings, senior legal personnel remarked that the time for 'individualised justice', in the area of personal injuries in particular, has passed. I was taken aback, given that these practitioners had previously been ardent advocates for that very ideal. If you wanted to summarise our organisation's objectives in a phrase, that would be it. By protecting individuals' rights in our daily work, we protect the rights for all. The most commonly touted alternative to individualised justice is a commonality of approach that leaves the injureds' thirst for accountability unquenched.

For example, the New Zealand no-fault compensation scheme is lamentable. Running at $10 billion by way of unfunded liability in a country of four million people, it makes Australia's most poorly performing no-fault scheme, SA's Workcover, look positively healthy by comparison. In recent years, the Accident Compensation Scheme [ACC (NZ)] has savaged benefits and services, including medical expenses and treatment. What is the point of having a compensation scheme that does not deliver to the bulk of the community?

The ALA wholeheartedly endorses the concept of a national disability insurance scheme (NDIS). Currently, we are being asked to consider a NDIS that we are told will benefit all (or rather all who are eligible). Our major concerns about the NDIS are having independent rights of review on all decisions including eligibility, not wasting countless millions on a bureaucracy to run it (of the first $1 billion allocated to the NDIS, $650 million has been earmarked for set-up costs and $350 million for the pilot program services), and the right to have an advocate. Little detail has yet been released on the actual ongoing costs. Indications to date are that the pool of those who will benefit will be significantly smaller than those who need it. The disability sector says that 1.7 million Australians need services and assistance. The Productivity Commission itself concluded that approximately 400,000 people would be eligible. Clearly not everyone is going to be able to get on the Ark. Some are going to be left floundering in the mire of state disability schemes that currently exist, or will they? What will be the alternative for those who do not make it? Where will they look for support?

Then there is the National Injury Insurance Scheme (NIIS). The Productivity Commission made a number of generalised statements about the common law which, when examined, are unsustainable. Its claim that no-fault schemes are better models to provide compensation cannot be made out. The common law offers a number of benefits, such as closure and choice, which no-fault schemes cannot deliver.

Moreover, the NIIS is unnecessary. The current compensation schemes, apart from a couple of no-fault workers' compensation schemes, work reasonably well. Those in Victoria and NSW have experienced an emasculation of rights over the years, principally through the use of whole person impairment ratings and the *AMA Guides*, both inappropriate for measuring losses and damages for injured claimants. They have not led to any consistency other than that of denying claims, and they are complex to follow. We are being asked to consider forfeiting important rights in favour of a scheme with many unknowns.

A well-functioning lifetime care and support scheme is a wonderful concept, which the ALA supports, but not at the cost of the right to individualised justice, the right to govern your own life and retain your independence and choice. These aspects matter most to those with disabilities.

The NDIS is intended to deliver choice for some; how many remains to be seen. As a concept, it is commendable. The NIIS is going to remove rights, which can be justified only if the alternative is better. Individualised justice, even with the recent 'dumbing down' of rights and benefits, both by reducing damages and applying increasingly restrictive eligibility criteria, is nonetheless better than a system that promises to deliver much to a few and little to many.

Interestingly, medical negligence claims, in terms of the catastrophically injured, have recently been termed 'medical misadventure'. Call it what you like, but those injured through negligence should not lose the right to hold accountable those responsible for their loss. A fundamental flaw of any no-fault scheme is the loss of accountability. Doing our best to ensure the protection of individualised justice, and the accountability that goes with it, is at the heart of the ALA's mission. ■

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