

SENIOR LEGAL STUDIES AND DISCOVERING DEMOCRACY MATERIALS

CASE STUDY: DEMOCRACY AT WORK

1. Rationale

The aim of this unit is to relate the Discovering Democracy materials to a topical legal and social issue.

The reason for focussing on a current issue is that students may be expected to have some background information on the topic, either through the media or from personal experience, they will be able to relate this unit to. They should immediately see the relevance of the topic to a major social issue confronting Australia today.

Through this process, it is expected that students will appreciate the complexity of decision making in a democracy.

2. Overview

An important legal and social issue confronting society today is whether our society can afford our legal system, and particularly our system of public liability. Public liability involves one person suing another person or organisation for damages for personal injury. The person suing will be seeking compensation, on the basis that their loss was the fault of the person or organisation being sued. The rate of court action resulting from personal injury is increasing in Australia. Many fear that Australia is moving down the American path of extreme litigation.

There are many different views and stakeholders on this issue. It is a very complex issue, and we can only present an introduction to the topic in this module.

3. Background

Most organisations and businesses, and in many cases, have public liability insurance. This is insurance against the risk that they will be sued by another person who has suffered personal injury. The person suing might try to blame the organisation for personal injury they have suffered. Obviously, those wanting insurance must pay a fee to insurance companies for the insurance cover. This is known as an insurance premium.

In recent years, the premiums that organisations and individuals have had to pay for insurance against the risk of being sued in negligence have risen sharply. There are many possible reasons for this, as we will see shortly. The increase in premiums means it is more expensive to run businesses or community events. Some community events are now being cancelled or reviewed due to the increases. Sometimes, the costs are passed on to all of us as consumers of goods or services, and in our own insurance policies (ie for our houses or cars). The Federal Government has now appreciated the extent of the problem and called a summit in March 2002 to consider some solutions.

Case Studies

Some examples of actual cases will show how the courts have developed principles of negligence liability in recent years.

Beck v New South Wales (2001)

A pre-service teacher accompanied primary school students to a ski trip to the Snowy Mountains. The ski resort had signs up warning guests not to toboggan down the nearby slopes, as they were steep and dangerous. The teacher took his students out onto the slopes, apparently not having seen the warning signs. He commenced tobogganing down one of the slopes on a flat piece of cardboard (a real estate agent's "For Sale" sign). He became a quadriplegic after he crashed along the way down the slope. He sued his employer the State Government for placing him in a dangerous work environment, and the ski resort for not providing sufficient warning of the danger. The court awarded him around \$7 million in damages.

Johns v Cosgrove (1997)

A regular at a hotel drank there for several hours on the day in question, to the extent he was intoxicated. He left the hotel late that night, and commenced walking home along a busy road. Due to the effects of alcohol, he became feeling faint, and rested against a lamp post at the side of the roadway. Then he stumbled onto the roadway, and into the path of a vehicle driven by the second defendant. He sustained serious injuries. He sued the hotel who served him the drinks, arguing it was their fault for serving him too many drinks. He sued the second defendant, arguing she should have slowed down on the off-chance he may have stumbled onto the road. He was successful against both defendants, and won more than \$300 000 in compensation. (The case was later appealed on other grounds, but the finding of negligence has not been overturned.)

Lisle v Brice (2001)

A man sustained minor whiplash injuries in a serious motor vehicle accident on the Sunshine Coast. As a result of the physical injuries, he developed psychological problems. Medical evidence was that he was pre-disposed to some mental illness. He became frustrated because his injuries prevented him from working in his newly-established business. He was depressed and committed suicide. His widow was able to claim compensation for her husband's death from the insurance company of the driver at fault in the accident.

Let's consider the views of some stakeholders on this issue. Should the Government step in to limit the ability of a person to claim compensation, bearing in mind the problem of increasing premiums for insurance against these claims?

Lawyers

Generally, lawyers will reject any move that would reduce the right of an Australian to seek compensation. This is viewed as a fundamental human right. Lawyer representatives have claimed the increase in insurance premiums has been caused by various factors, including the failure of Australia's second largest insurance company, HIH, which reduced competition in that market. The Sept 11, 2001 terrorist attacks have also been blamed, as has a media focus on some claims.

Lawyer representatives will point to evidence showing a small increase in the number of claims made in proportion to insurance policies in the last five years in Australia.

Lawyers would be against capping liability in such cases, and against a government-administered no-fault compensation scheme to assist injured people (as operates in New Zealand). This New Zealand fund has a high level of unfunded liabilities at present. Many lawyers favour a review of the aggressive “no-win, no-fee” advertising of some personal injury lawyers. However, they tend to deny any link between lawyer advertising, and increased claims. They state that 70-80% of people approaching lawyers to run a no-win, no-fee case are turned away by lawyers.

One suggestion from lawyer lobby groups is pooled insurance arrangements, particularly for non-profit organisations. This may help to reduce their insurance premiums.

Insurance Council of Australia

The Insurance Council blames judges for the steep damages payouts awarded to claimants. It also claims consumers have a blame mentality, rather than accepting their circumstances.

It has sought an end to damages for pain and suffering of victims, wants to discourage claims for minor injuries, and favours a ban on lawyer advertising. The Council wants governments to prohibit any claim for compensation for negligence against volunteers and volunteer bodies. It wants to totally bar claims against adventure tourism operators. (At the moment, s68 of the *Trade Practices Act 1974* (Cth) says that a person who undertakes adventure tourism cannot legally assume the risks of the event, meaning that if an accident occurs, the organiser is likely to suffer the blame.)

The Council concedes the lawyers’ point that there may not have been a large increase in court claims, but says many of the cases are settled prior to reaching court. This masks the real increase in claims in recent years.

Recently Retired Qld Court of Appeal Justice Thomas

Justice Thomas, after a long and distinguished career as a Queensland judge, believes the judiciary has a lot to answer for. As he put it in his retirement speech:

“Some (judges) have enjoyed playing Santa Claus, forgetting that someone has to pay for our generosity. We have allowed the tests for negligence to degenerate to such a trivial level that people can be successfully sued for ordinary human activity. When I say “we”, I mean all levels of adjudication, right up to the High Court... We now have a compensation-oriented society in which people know that a minor injury is a means of getting more money than they could possibly save in a lifetime... It is no use blaming plaintiffs’ lawyers. We (the judges) are the ones who have laid down the ground rules and given the judgments. The buck stops with us, not them. We are the ones who have let the quantum of damages get out of hand, and who have lowered the barriers of negligence and causation”.

New South Wales Government

This State Government is proposing changes to its laws, criticising the decision in Beck in particular as having gone too far. It is suggesting a cap on court payouts, limiting an individual’s right to sue in minor cases, and in cases where a person’s drunkenness contributed to their injuries in some way.

United Medical Protection

UMP is the main insurance company for Australia’s doctors. There has been a real growth in negligence claims against doctors in recent years, with insurance premiums for doctors

skyrocketing, leading to a withdrawal of services in some areas. UMP warned in March 2002 it could collapse without immediate Government financial assistance. It asked the Commonwealth Treasury for \$100 million assistance to allow it to meet its financial obligations.

Businesses and Community Groups

These groups are complaining about increased premiums, threatening the viability of their business or community event.

Some examples

- ✓ Bridgeclimb, which organises tours of the Sydney Harbour Bridge, has seen its insurance premiums increase 50% in one year, from \$40 000 to \$60 000, although they have never made a claim;
- ✓ A typical AFL club pays \$150 000 pa in premiums, compared with \$51 000 in 1998-99;
- ✓ The Tully River whitewater rafting company has seen its premiums jump from \$25 000 to \$100 000 in one year

Some sporting or community clubs have closed, and many events have been cancelled, because insurance is either not available, or the cost is too great.

Prime Minister

Prime Minister Howard, a solicitor, has claimed it was a “disastrous mistake” to allow lawyers to advertise their services. He also called on State Governments to introduce restrictions on court payouts.

ACTIVITIES

Activity 1 Opinion Poll

(Discovering Democracy Secondary Units p11-13)

Gauge public opinion on the above issues, particularly whether litigation is out of control, why it is out of control, and what can be done. Read the opinion poll contained on p12 of the DD Secondary Units. Frame an appropriate questionnaire for this poll, and make sure you ask a cross-section of the community about the issue. Record your methodology in doing this.

Activity 2 Youth Party

(Discovering Democracy Secondary Units pp39-41)

Imagine that you are member of the Youth Party. Your task is to prepare your party’s policy on the above issue. The policy must consider all of the issues raised above. You may need to conduct further research on some of the issues mentioned. Your policy should suggest some solutions to the crisis, with justification for your solutions, and other ideas you considered but did not include.

Possible Sources: Australian, Courier-Mail, Sydney Morning Herald, The Age Newspaper March 15-28, 2002, websites of Law Societies in Australia, Insurance Council of Australia, Australian Medical Association

Activity 3 Summit
(Discovering Democracy Secondary Units p55-57)

You are to hold a summit to discuss the issues with key stakeholders. Appoint a group in the class to act as spokesperson for each of the groups mentioned above. Adopt your designated role. You are to consider some possible solutions to the crisis.

One aspect to consider is the Universal Declaration of Human Rights. Article 8 states that if rights under the law are violated, you have the right to see justice done. Article 10 states that courts must be independent of the Government, and free to make their own decisions. Are these Articles relevant to the discussion?

Links to Senior Courses

This subject matter of negligence law is the primary focus of the Civil Law Unit, a compulsory term unit in the senior subject Legal Studies in Year 11. The material could also be used in Unit 10 of the Legal Studies Syllabus (2001), namely Overview of the Legal System, the last unit Year 12 students complete. It could also be the focus of a student's research assignment in Unit 9.

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