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3 November 2013

Access to Justice
Productivity Commission
GPO Box 1428
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Submission to an inquiry into
Australia's system of civil dispute resolution
Access to Justice Arrangements.

1 Introduction

Devised in 1977 as a research tool at UNSW into how patients interact with health services and to provide education/advocacy for those disadvantaged by service failure MCA transitioned after a few years into an independent community organisation. Unlike many health consumer groups, that seek more service coverage for specific medical conditions and so advocate for service suppliers, MCA seeks to remain independent of medical service suppliers and their bureaucracies in order to hope to be able to freely and objectively address service quality as the most effective driver for substantive system reform, rather than service shortage.

With the various forms of government supplied support set typically below poverty level the more serious cases of service failure involving medical negligence sees medical consumers feeling economically forced to at least consider civil legal action as a possible path to regaining some control over their lives following iatrogenic disablement with resultant major loss. This has caused MCA to become interested in the state of play within the civil and protective jurisdictions.

2 The underlying sociological problem

It became clear years ago that the legal services industry operates under conditions of market failure. Actions in legal negligence are so rare that when the on-line LawLink NSW site was searched no information was obtained. Medical negligence actions are rare. However in both areas complaints are massive in number.

The vast majority of medical consumers do not use such legal services at all. A very small number of always naive consumers need such services at an inopportune time under what are for them are conditions of force majeure.

They are totally unable to distinguish between the quality of professional service offered by different legal firms when seeking a plaintiff lawyer and initially find that the average reputable high street solicitor tells them by a free initial consultation that they do not have a case at law because of the extreme problems involved in such a legal action.

Some must just give up at this point but an unknown percentage feel they have no choice and proceed to seek more specialist legal advice in most cases they will get the same response but in some cases that MCA has had contact with those who did persist and manage to get legal service supply under conditions that were risky. A problem for them being certain no-win-no-fee offers. What this actually means is that a solicitor's time will not initially be charged but other costs will be. It is thus possible to start down the path to civil litigation and accumulate a bill of some thousands of dollars, for such things as medical

reports, photocopying, postage etc even when they in reality only have a small chance of ever getting the case to court. The danger is that a lock-in effect then starts to influence consumer behaviour, and so they can be influenced to then spend more rather like a gambler feeding a habit hoping to eventually get a return but remaining ignorant of both the probabilities of a win and the extent of the win possible. As far as MCA knows the statistics on winning are not reliably available, and indeed since legal rules and climate change over time statistics to date may not represent today's situation. Cases can last 10 years or more.

Additionally from anecdotal consumer histories it seems that legal professionals can have a very optimistic view of a case at the start and even up until the case is actually in court and then when a case is lost take a different view that the case was always rather uncertain as to outcome. (See also in section the use of a barristers opinion in section 4 below as an indicator that a case could be high risk for the consumer.) Another factor is that success in a negligence case means very different things to a solicitor and a medical consumer. When operating in an extended contingent fee mode the agreement for the legal firm carrying the risk of suffering a loss is that any eventual fee charged will be surcharged. In the USA a limit of 33% of the verdict award is the maximum that can be charged. However in Australia there is no limit so it is possible for a medical consumer to win his/her case and end up with just $10 say when the verdict award was $100,000 the rest being absorbed by legal fees. A reputable solicitor will keep a consumer well informed by accounts and costs disclosure statements. However this does not seem to be mandatory and consumer have related cases where this did not happen.

It can be even worse than this because in a civil action it is a judge who determines how the costs of the action are distributed. A classic case of this effect that spanned the period from 1980 to 2010 was the Hart civil and legal negligence cases. In this 1980 case the medical consumer plaintiff won on all heads claimed. But the judge made costs ruling that in effect reversed the jury award and left the medical consumer with a net loss from the action of just under $100,000 for wasting the court's time. This 1980 case was supported by legal aid. The plaintiff had been brain damaged by the negligence and depended fully on his barrister to run the case. The barrister was paid out in full by NSW Legal Aid for his work. The plaintiff ran an appeal and lost so getting deeper in debt and then run a legal negligence case in 2006 heard by a judge only and lost that as well. The final judgement in this extended action removed a right to appeal the legal negligence outcome in 2010 because the plaintiff was by then impecunious. Clearly court rules and way legal services are delivered must appear suspect to consumers in the light of such a legal saga.

On the other side of the adversarial court facing the consumer running a professional negligence case is a professional defendant who has indemnity insurance cover, which is today mandated in order to be allowed to practice. In theory this means that if a civil court awards a large sum in damages then it will actually get paid to the consumer plaintiff.

However some indemnity funds offer limited cover and are not simple insurance funds but rather mutual funds able to impose conditions on their members whereby under some conditions of negligence they will not have to payout. An overseas defence fund based in the UK actually withdrew from the NSW market because of such problems. So the payment of damages may depend on the wealth of the negligent doctor if the negligence is extreme and also he/she may well declare themselves bankrupt. A case in NSW connected with a surgeon from Bega removing a woman's genitals without consent seems to have gone down such a path going on newspaper coverage.

Also having an indemnity fund with many millions of dollars ready to use changes the dynamics massively. The fund may consider that the nature of a particular case requires that a lot of effort be spent because of possible flow-on effects should the consumer win , as the legal precedent established could open the door to many more similar cases and payouts for the fund . So it is quite possible that the defense fund may be willing to spend say 10 times what at first sight one would have estimated the cost

of defending the first such case to be.

In the case of a loss by the consumer all of these costs could well fall on the plaintiff consumer to pay. So it is possible for a consumer to lose their house over what at first sight appears a manageable risk.

MCA's advice about civil professional negligence cases is that as a consumer product they are just too dangerous to get involved with. The justice industry and its insurer Lawcover and the medical industry and its medical defence funds are able to focus vast amounts of money on defense of any cases brought against it and to vastly outspend the average consumer even if the consumer is seeking to defend their civil and human rights via a negligence action in the adversarial courtroom.

MCA does not have any statistics on how professional indemnity funds for the Law or Medicine spend their money. That is how much is spent on payouts to consumers and how much is spent on defence actions. It would seem that in the long run stopping any consumers winning could be a good strategy and such a view is supported by what the indemnity industry has publicly said in the past. In the 1990 book ***Who's to Blame and Who should Pay*** by Hilda Bastian of the Consumers Health Forum of Australia which is based in Canberra, the following is reported: "A spokesman for the Medical Defence Union in Australia said his organisation would fight claims even though this means that "many seriously injured patients get not a bean in compensation".

The judiciary does not seem to view its role as providing a simple service product to consumers of legal or medial services :

"There is a tendency today to treat the courts as some form of publicly funded dispute resolution service. Such an approach would deny the whole of the heritage we have gathered here to commemorate. This court does not provide a service to litigants as consumers. This court administers justice in accordance with law."

[The Hon. Justice Spigelman speaking at the 175th anniversary of the Supreme Court of NSW]

This goes long way to explaining why injured medical consumers can end up destitute when they seek redress via the civil court for damage done to them by professionals. If the criminal jurisdiction has already taken action things mat be different if the status of the professional has thus been damaged and a later civil case may well be more winnable. However in such cases the indemnity insurer may well not need contractually to pay out verdict money and once again the consumer victim may well get nothing.

When asked by medical consumers who have suffered loss due to medical negligence MCA has no choice but to warn them in no uncertain terms about the realities of an Australia which has no protective human rights laws. In today's NSW effective use of the civil court to obtain redress is reduced compared with the 1970s. Legal fees are much increased and have a 10% GST on them; and more protective jurisdiction bodies exist, such as the HCCC, which is what consumers are now supposed to use. What it does MCA does not know for sure because much of its operation attracts absolute privilege.

The safest policy for the average Australian is to not get into civil negligence disputes with such professionals. You do not have any fund protecting you when you enter a court. Some years back MCA approached two large insurance companies asking if they could produce an insurance product for consumers similar to those available via defence funds for legal and medical professionals. There were no takers. MCA does not think that the risk of being made bankrupt by a civil court action will ever be insurable in the way that you can take out life cover to protect your family before you fly. The reason is very simple, flying is very low risk, whereas if you attempt to sue in medical negligence you probably have less than a 25% chance of winning. And as for legal negligence MCA could not find any local data.

3 What can be done

The reality is that the civil jurisdiction has never had much utility for medical consumers. Its utility dropped to near zero in the late 1990s when the Simpson case (a very high value medical case, the serious disablement of a newborn due to negligence) combined with a low interest rate environment then for the professional indemnity insurers which was leading to a cash flow crisis for these insurers who then radically changed the civil law landscape. This powerful industry imposed their will on the population via the NSW Parliament. New legislation would add thresholds and caps on damages obtainable by civil court action. The effect was to see entry to the NSW parliament blocked for some hours by a mass rally of members of several worker's Unions in their vain attempt to stop passage of the bill. This was followed by lights burning far into the night in the chambers of plaintiff law firms as work proceeded to file as many civil cases as possible before the new statute came into effect.

Is all but retiring the civil tort of negligence an overreaction by government in its surrender to the demands of indemnity insurers?

A comparison of historical data from the USA, Canada, and the UK is suggestive of less medical negligence taking place as higher levels of civil litigation are allowed. But a problem is of course the cost of such litigation and the resultant payouts inflicted on State budgets. Thus in Federated Australia the cost effects of medical error gets shifted over to the Federal budget and paid as disability pensions. The Federal PIR QAHCS study of the mid 1990s held that of the order of 30,000 patients ended up permanently injured due to medical error each year and 14,000 died from the same cause. The States offer a complaint conciliation ADR system , in NSW this is the HCCC and any payouts via this path are protected by absolute privilege and are thus unknown. This is another indicator that medical services are unlike others where competition has a clear role.

Being potentially put out of business by such policy plaintiff lawyers may be expected to express a view and indeed they have. For example: "Plaintiff verdicts in medical malpractice cases are the principal impetus to change and improvement in the medical care delivery system. Plaintiff verdicts have done more to improve medical care, to correct abuses in hospitals, and to stop adverse drug effects, than any other force in this country. Medical licensing boards, the U.S. Food and Drug Administration, State Health Departments, and all the forces of Health and Human Services are nothing compared to the impact of the plaintiff verdict. Where social pressures fail, money does not." [Schroder, Jack (1990) in the book Identifying Medical Malpractice]

3.1 A list of suggested changes

This section for convenience lists in one place but in no particular order of importance various ideas proposed over the years at MCA meetings and in MCA submissions. Data that gave rise to these suggestions is contained elsewhere. Note that some of these issues have now been addressed to varying extents by new legislation, regulations and court rules.

- Quality Assurance review with cost-benefit analysis to be carried out on all civil cases above a certain value to generate data on what was spent and what value was achieved and for who.
- Research on how to use computers to manage present and analyze evidence in discovery phase and in case hearings and so save a lot of court time and cost.
- Prejudgment on the evidence and case law applicable to a civil action to be produced by using an

evolving software system which is then reviewed by human advocates in court at the start of a civil action.

- Automate the legal research needed in civil cases.
- Add features to make self-representation much easier (and similar to an on-line taxation return)
- On-line systems and simulators to educate legal consumers on litigation process and courts.
- Make court process more transparent, including better signage at courts etc.
- New statutes limiting what can be spent in some civil actions by both sides to a dispute.
- Educate legal consumers, include overt warnings of the financial risks involved in civil actions.
- Establish a body to establish if any civil and human rights abuse of litigants is caused by civil actions and collect data on this.
- Judges to sign up to the Bangalore Code of Judicial Conduct.
- Judges to undergo more human rights education.
- Judges to lose the power to edit draft court transcripts (both paper and electronic ones)
- Transcripts to be a simple historical record, recorded and signed off by an independent body.
- No GST on legal services for private citizens seeking to defend their civil and human rights.
- Courts made liable if they defraud consumers by defaulting on service.
- Put an end to the various measures that actually make our courts 'secret courts'. (see later)
- Use open public pre-trial ADR attached to civil actions as used by some US States.
- Replace the Appeal Court system with a new QA phase that conforms to ISO Quality Standards.
- Dispense with most of the protective jurisdiction in its present form. It is only self-regulation.
- Separate education of barristers and judges as per the French system.
- Convert to the German system as per Marfording report findings (UNSW 2010 Paper 28)
- Force a real separation of powers, stop legal officers standing for parliament.
- University law degree only via post graduate study with science degree prerequisite.
- Progressive introduction of inquisitorial methodology and reduction of the adversarial.

3.2 A reading list

Some commentators have seen problems with the justice industry and are worth reading

The Cartel by Evan Whitton. ISBN 0 646 34887 6

The Evil Deeds of the Ratbag Profession by Brett Dawson. ISBN 0646361198

Trial by Voodoo by Evan Whitton, ISBN 0 09 182880 5

A State of Injustice by Robert N Moles. ISBN 0 7344 0597 9

Civil Litigation in New South Wales: Empirical and Analytical Comparisons with Germany by Annette Marfording and Ann Eyland. University of New South Wales Faculty of Law Research Series 2010 Year 2010 Paper 28 . This important paper was funded by The Law and Justice foundation and it is worth reproducing its conclusions here. These are as follows:

> Civil litigation in New South Wales is subject to significant delay and causes high and disproportionate litigation costs, in part as a result of the labour intensiveness of the civil litigation process. Long delays and high litigation costs in civil dispute resolution infringe values considered as fundamental to civil justice: efficiency and equal access to justice. The comparative analysis of civil litigation regulation and practice in Baden-Württemberg suggests ways in which these problems can be addressed without putting justice and fairness at risk. Implementing the recommendations for civil

justice reform in New South Wales to reduce delay, labour intensiveness and litigation costs may enhance the level of satisfaction of procedural actors in the civil litigation process and, perhaps more importantly, public confidence in the administration of justice.

3.3 Some background details

In 2009 MCA made a submission to the The National Human Rights Consultation on the protection and promotion of human rights. Our submission focused on access to justice and listed a number of recommendations, MCA's January-June 2009 newsletter to members summarised these and relevant pages are appended as part of this submission.

Any adversarial legal interaction between one consumer and an industry is going to be a very asymmetric contest. MCA did some work in the 1990s on structures that could re-balance both civil process and access to protective jurisdiction bodies and issued briefing notes. One these is also appended as part of this submission.

Addressing the underlying sociological problem is clearly a generational change enterprise that needs to attack the problem at source.

- Separate education of judges and advocates as per the French system is one path to substantive cultural change.

- Another powerful change driver would be ending the offering of a law degree as a first degree. In order to start university legal studies which would all be redefined as post graduate degrees an essential prerequisite would be the successful completion of a science based degree as a modernization measure.

4 A Quick Look at Costs

The justice industry is a cash hungry beast with an infinite ability to absorb resources. It makes sure it remains ignorant of the QA feedback loop and of any metrics allowing measurement of performance. Indeed quality assurance is not only missing but appears actively opposed using a mythology that maintains Australian justice is the best in the world because it is so expensive, and that any measure intended to reduce costs must thus have a negative effect on the quality of justice deliverable. Any oversight allowed is only self-regulation and these attitudes have had the effect of projecting the industry into a sort of parallel financial universe. Whereas in the universe of the scientist or production engineer a photo copy plus delivery can be achieved for 20 to 30 cents a page, in the legal universe the cost can be $5 per page at times.

In reality much of what is charged out at legal universe rates is actually only semi-skilled clerical work or is of such a routine nature that many legal consumers could do for themselves. And today some of it could even be fully automated and so the cost reduced to nearly zero.

Pretending the routine and trivial is exotic and demands great skill and knowledge is perhaps a common scam practiced on the laity by all professions to some extent, but the consumer perception is that the justice industry is the leading and most successful exponent of this art form.

The McDonald's civil libel case in the UK is an indicator that the skill levels needed to carry out

competent advocacy in a courtroom may well be much lower than the justice monopolists propose.

A reality is that poverty normally causes medical consumers to be able to buy such a limited time to confer with their lawyers that they then find in the courtroom their advocates are not fully briefed on the facts and so are unable to provide accurate advocacy. The result seems to be that the more mistakes and misunderstandings that take place in court the longer the time used up and bigger the total legal fees that become chargeable for work. Everyone on the legal services supply side appears very pleased with this. But consumers, who have no key performance indicators to estimate if the legal work they are paying for is reasonably priced or is nothing more than advanced asset stripping, are not.

Statutory caps and thresholds on damages, introduced in the late 1990s, must have closed the path to the civil courtroom for many medical consumers as they made more cases unprofitable for legal professionals to even take on. Such suppression of legal rights by use of the power of the dollar is not seen as a solution by victims of professional negligence.

Similarly what was presented as process quality improvement introduced by the Carr government in NSW was intended to stop actions without merit getting to the overloaded NSW courtrooms but actually did nothing positive for consumers, only increased the cost of litigation for them.

The theory was that making a firm of solicitors liable for costs if a case without merit reached court would give rise to more rational forms of case preparation.

The theory failed because Australia is now the only common law jurisdiction to have retained substantial immunity from prosecution for barristers in their court linked activities. Thus the solution adopted by legal firms was to insist that the consumer pay for a legal opinion to be obtained from a suitably eminent barrister that their case did have merit. Then later in court any judge seeking to enforce the measure would have to publicly reflect adversely on the skills of a senior legal professional, which would be unlikely. The net effect for the consumer was just an extra up-front fee of a couple of thousand dollars for the opinion, with government also enriched by the 10% GST on the barrister's fee.

Such minor sums to legal professionals are massive problems for consumers of legal services. It is an era when legal aid for many civil disputes is an ancient memory and a disabled medical consumer seeking redress via the courts probably has a weekly income of under $500, whereas a barrister in court can cost a legal consumer many thousands of dollars a day. The current system is a total failure for working class consumers so it is worth now trying almost anything.

Some form of statutory financial constraint could still allow for at least some limited public airing of grievances from a growing underclass and assist with inculcating a justice industry culture in which cost-benefit thinking is allowed a space.

As an example one model of many possible uses some existing court rules over costs but adds statutory limits in order to starve the adversarial hungry beast at least a little bit.

All that civil actions can ever achieve directly is redress in the form of dollars. When filing a case the amount sought $X is a metric that has a reality for both parties. A statute that imposed an equal maximum recoverable cap on both sides to a dispute to cover case preparation plus in-court advocacy of say 10% of the redress sought would result in some more process equity in asymmetric contests and produce a risk minimisation equation for a legal services consumer as follows :

$$\text{Worst case consumer loss} = X*0.2 + Y$$

Where Y represents the court costs which could also be to a fixed scale set by the statute. Again let us

assume that Y is also fixed at ten percent of $X by the statute. Under such a system a consumer would thus know at the outset the financial risk of loss in running and losing the action would be 30% of his/her damages claim. When combined with measures to support self-representation (or lay-representation by a family member if the person suing is disabled and cannot self-represent) such more minimal cases could be a driver for wider cultural changes in the civil courts.

5 Actual examples of the Civil Jurisdiction's relevance for medical consumers

The operation of civil courts is still not that transparent. Certainly unreported cases have been replaced by a judgment published now on legal websites. The problem is this is a report written from the system viewpoint and may not reflect how the consumer saw the evidence in the case. The numerous TV programs on problems seen by consumers indicate that delivery of justice is far from perfect, as one would expect; but such public investigation is normally limited to high profile murder cases. Rarely a consumer asks MCA for general advice (MCA is not able to provide legal advice) and tells of what happened to them. In nearly all such cases MCA cannot comment to the consumer unless a pile of documents is also available to view to confirm what a consumer says. All such cases if then written up have to be fully de-identified and approved by the consumer in writing for transmission to any third parties. Thus such cases are rare.

The worse case interaction for MCA with a consumer is a phone call from a person very distressed and clearly in deep trouble claiming they have done nothing wrong and cannot get help and so distressed that they cannot explain how a doctor and sometimes also the legal system has impacted them – and then they ring off. Just how much unreported damage is done to consumers of medical and legal services remains a mystery.

The following cases have been researched and literally many kilograms of documents studied and the summary approved by the system victim and are presented as authentic ground-zero consumer voices.

Only the last case is not de-identified and is very well known (books have been written about it) and the summary following is based on published material and access to most of the documents before the courts plus MCA attendance at the court hearings

5.1 Legal logic on who to sue and the cost of ADR

ADR can be trap for the consumer. A worker suffered a back injury at work. Hospital treatment resulted in the negligent injection into the spine of the worker of a pharmaceutical not intended for such application and resulted in constant high level incurable pain and life long disability. A firm of solicitors was selected and the matter was then run fully by them. A civil action was mounted against the fast food chain as they were seen as a large corporate with lots of dollars whereas doctors are difficult targets. The worker needed to borrow around $90,000 from close relatives in order to run the case, which resulted in a minimal payout as the court found contributory negligence on the part of the worker. This left the worker with large debts to relatives plus around a $10,000 private hospital fee still to pay and no cash with which to pay anyone.

The hospital filed a civil action suing the consumer for the $10,000 still unpaid bill. The legal advice was to enter a process of voluntary ADR and so arrive at a settlement with the hospital prior to the date booked for the civil action. By this time, now some years on from the disablement, the doctor who had been responsible for the injection had been struck off the register for unrelated medical negligence and was seen by the legal advisers as being without funds and not a useful factor in the hospital fee dispute.

For some months the ADR process proceeded and then just days before the civil hearing date the hospital withdrew from the ADR and the consumer was presented with a bill for work on the ADR process of around $14,000 by the legal firm and very soon also now had to make an appearance in court in the civil case against them. MCA was able to suggest very privately to a solicitor involved that this was a very unreasonable outcome for the consumer and the law firm did the humane thing and did not press its claim for the cost of work done in the ADR process.

The only path open for this medical consumer was to self-represent and get to some free advice on how to do this from a chamber magistrate. An MCA member supported the consumer at this meeting. It turned out that the magistrate on duty that day had just returned from a period of extended sick leave due to a back injury and was very helpful indeed on how to conduct a defence in a civil court. On the day of the civil hearing the worker appeared, still in great pain, and with the expectation of having to confront a barrister advocating for the hospital. The clock ticked on in the courtroom no representative appeared for the hospital and the hospital's case was dismissed by the judge.

This case from the mid 1990s demonstrates what can go on outside the civil courtroom to the detriment of consumers and also how legal expertise can apply a client's money to a task without any regard to cost-benefit considerations. Hidden costs to consumers can be truly massive and responsibility for them is never sheeted home to the adversarial way the Civil Jurisdiction operates.

5.2 Human costs in a case that never made it to the steps of a civil court

Perhaps it was significant, in view of what was to happen, that Alex (not her actual name) had no private health insurance cover.

In June around 20 years ago Alex became very ill with massive head pains. As she drifted in and out of consciousness and vomited an ambulance rushed her to a hospital. A sole parent Alex wondered what would become of her 12 year old daughter as she signed a consent to surgery form. Next day a craniotomy was performed so a brain aneurism could be clipped.

After the operation Alex experienced increasing problems with her sight and became totally blind in her right eye. After some tests she was told that without further surgery the condition would be permanent but that there was no guarantee of success. Alex did not take up the offer of eye surgery and since no public bed was available any longer was discharged with bandages around her head, a swollen face, and told to go home. She was given an eye patch to wear over the blind eye and advised to wear a helmet to protect her head as her skull now had a large hole in it from the operation.

Alex phoned the hospital each day as instructed to find out if a public bed was yet available for re-admission for a cranioplasty. Eventually she was re-admitted and a cranioplasty done in August. [Records show two registrars undertook the surgery; the expected supervising neurosurgeon was not present; the operating theatre had been booked for a period of 8 hours for the cranioplasty but the operation took only around an hour to complete.]

Alex explained to MCA what happened that August after the surgery when the bandages were removed:
" … I knew something was wrong. … the right side of my face was caved in at the area of my temporal muscle and there was a gaping hole in my skull with a very abrupt protruding edge over which the skin is stretched just above my eye, and it is still there today." … " I was not approached by any doctors after the operation, they did not come near me rather all I got was basically messages from nurses to ask my GP... "

Alex was discharged six days after the surgery. By early February the next year Alex had almost recovered clear vision in her right eye without any surgery but was subject to disabling pain, periodic vomiting and the head wound site was swollen and leaked blood and pus at times. Her GP offered pain control and referred Alex to several specialists to no effect. Over several years Alex suffered jaw problems as her skull distorted she lost teeth and needed dental work which was expensive. She suffered periods of sudden lapses into unconsciousness. A further neurosurgeon Alex had been referred to wrote in his report that Alex was suffering from "bi-polar personality disorder" while all but ignoring the physical symptoms Alex now suffered from.

A letter written in mid 1997 by the senior neurosurgeon who had carried out the craniotomy and who also seems to have had administrative carriage over the cranioplasty reads in part as follows
" ... an emergency craniotomy and clipping of aneurysm was effected. She made an excellent recovery and was discharged home. … The cranioplasty defect was repaired ... and she again made an uncomplicated recovery. … is not likely to require further surgical treatment. She has a scar on her head but which lies behind her hairline. … I don't believe this patient will have permanent impairment save for a minor degree of visual disturbance as a result of her haemorrhage. I don't believe that she is likely to require further treatment. I believe that she is fit to return to work in her usual capacity without limitation or restriction."

Actually quite unemployable a disability pension application was eventually successful. MCA has been told that the medical reason given was high blood pressure, which seems strange considering the nature of her disabilities.

In 1997 Alex used up the last of her spare cash on some private X-rays and medical opinion and a solicitor's letter to aid access to records. A member of the American Board of Neurology reported in part: "She was left with a bone defect over the right parietal region. Apparently there was an attempt at doing a cranioplasty, but she still has the right bone defect over the right frontal and parietal region. … I am not sure why she does not have replacement bone over the defect. I could not find in the notes from … Hospital as to what happened during the second operation."

Consequential damage was not restricted to Alex alone. With money problems because of the medical costs to her of the damage and without a father to assist and Alex becoming more disabled and less able to provide parental assistance during the most formative years of her daughter's life her daughter had got into bad company and due to a boyfriend involved with drugs became an addict and then got convicted and spent time in prison.

It was via a chiropractic centre that Alex managed to get a referral to a prominent neurosurgeon. His report observes the external realities of Alex's head. His report to Alex's GP talks of complications from cranial surgery and goes on to say: "…, she has overt evidence of chronic skull osteomyelitis with fistula formations. Inspection of her cranial defect shows that she has multiple fistula that appear to be excoriated with chronic discharge. She has thinning of the scalp and her defect is extremely caved in. This could certainly cause chronic illness, pain, vomiting, headache, and even neurological deficits by causing underlying dysfunction of the underlying brain. I have recommended surgery to treat the chronic osteomyelitis by resecting infected bone, cleaning out foreign material and removing any existing bone flap. I have given absolutely no guarantee or reassurance that her symptoms will improve with this procedure. Indeed, I have identified that she most likely has a chronic pain syndrome and there is a very good chance that her symptoms will not change with this surgery. Regardless, I believe it should be done if for no other reason except to improve her cosmetic effect and to improve her quality of life. She has a continuing discharge from her head … She understands that this whole process may take more than 12 months to clean up the infection and repair the obvious scalp and skull defects " Alex did not take up this offer that would have had private sector costs.

Some years back MCA prepared material on a CD about Alex's case and sent it to a number of NSW MP's to no effect. Indeed due to an accident of electoral location a reply from Alex's State MP was to tell her that he was sorry but unable to raise her plight in the Parliament because he was the Speaker of the House and thus did not have any opportunity to make a speech about her case. But he did put her in contact with the Health Care Complaints Commission who declined by letter to investigate as indeed is allowed by their governing legislation. Professional legal advice was that it would be impossible to run a civil case in medical negligence.

Alex related to MCA "My case proves just how little basic rights I have as an ordinary Australian, I understand that we in this nation have no basic human rights system that I can appeal to. So if you are down due to matters that are not your fault and over which you have no control, the system here (legal/government) then acts to 'kick you in the teeth' while you are on the ground. I feel I have been 'mugged' by the system. It is my belief that an important part of the way I have been treated by the medical system is that I did not have the money to 'go private' over medical care. I note another patient who suffered a somewhat similar medical emergency to me who I met in hospital did have private cover and she got her living bone flap put back in an operation within a very short time and now presumably does have a full skull and a normal life. When I ask for help I find I am an outcast and get called a mental case or after examining me the so called experts do not have the honesty to write down what they said or really found but only write reports that would not get them into trouble with other doctors. … I find NSW to be a most appalling place to be when you are an embarrassment to 'the system' because of what 'the system' has done to you."

MCA did write to the Director of the AHS where the operations had been carried out and this resulted in a review of the records of the case with the result that it confirmed the different medical history as per the letter of mid 1997 from the senior neurosurgeon and an offer that Alex could see the same patient's representative she had seen some long time before. Alex rejected this offer because she still did not consider that treatment for mental illness offered then was appropriate to her actual medical condition.

MCA in recent years wrote a letter to the then Federal Health Minister, providing details of the case and the problems encountered by the consumer expressing concern that Medicare services can be restricted because of the medico-legal status of a patient. Our letter asked if a way could be suggested by which access to Medicare services may be quickly obtained for Alex to produce an independent current audit of her medical condition that the AHS would respect, as she cannot afford private treatment. As is normal with such correspondence a bureaucrat always makes the reply on behalf of the Minister. In this case a reply came in around 7 weeks later from a Medicare eligibility bureaucrat and was in part as follows: (the letter has been de-identified)

… … Medicare, Australia's universal health care system, is intended to provide all eligible Australian residents with affordable, accessible and high-quality health care. This includes free public hospital care, and subsidised access to out-of-hospital services and pharmaceuticals. Your letter indicates that Ms A was able to access medical treatment under Medicare following her collapse from an aneurism. However, there is insufficient information in your letter in relation to Ms A's 'medico-legal status' for me to comment on the particular circumstances surrounding her current difficulties in accessing further treatment. I can only assume that the medical practitioners involved in her case have sound, medically responsible reasons for the decisions they have made.
While the Commonwealth Government, through this Department, is responsible for overall Medicare policy, the administration of public hospitals is a matter for the relevant state or territory government. With this in mind, and recognising the clinical judgement of the medical practitioners concerned, I am not in a position to offer any suggestions for ways in which Ms A might access the treatment she seeks.

Alex's plight is not exceptional but rather similar to other cases MCA has seen over the past 35 years and

broadly exhibits the six classic system responses.

- Problems arise but no one will explain at the time.
- Later inquiry is frustrated due to missing records.
- If a patient persists in seeking answers the system applies a mental illness label.
- Treatment, except pain killers and/or drugs for mental illness, is not on offer.
- Civil action is too expensive to consider and the protective jurisdiction either just declines to investigate or fails to confirm the facts of the case as claimed by the consumer complainant. Their assessment/investigation probably consists only of a letter to a doctor whose reply is assumed to be both complete and accurate. The HCCC does not have to explain to the complainant on what it bases its outcome of an investigation/assessment or release names etc. [MCA was a founder member of the consumer advisory committee to the former Health Department Complaints Unit and was still on this committee when the Unit was converted into the HCCC but then did not get invited back onto the new Consumer Committee to the Commission because we suspect we were unable to give a clear undertaking that we would be able keep any material before the new committee secret from our membership.]
- Once a solicitor is used the industry closes ranks and may generate disinformation and even produce a new and different medical history that is suitable for use in a civil action defence.

For a medical consumer to take on a civil action needs very deep pockets. Also in practice because of the typically very long time between the medical event and the consumer reaching a point of being able to start a civil action a lack of proximity makes it impossible anyway.

5.3 Hart v NSW Inc., the definitive medico-legal case study

At the time of the first hearing in March 1980 Hart v Herron became the longest ever civil action in the NSW Supreme Court. Due to a series of very unlikely events even back then, and all but impossible today, Hart got what probably no other consumer with a complaint about medical negligence will ever get again, a $15,000,000 royal commission into his case and the others who had been similarly mutilated by the Chelmsford doctors. The findings of this royal commission fully validated Mr Hart's claims and also established 24 patients died in this private hospital from the Deep Sleep Therapy that brain injured Mr Hart. In 1986 judgment from Street CJ, Priestley JA, and McHugh JA stopped all complaints to the NSW Medical Board from the relatives of the dead and also from survivors like Mr Hart. It was Priestley JA who was to be the leading judge in Mr Hart's 1995 appeal from the 1980 case.

So much has been written by MCA and others that it seems futile to repeat the process here and so Mr Hart's history is just brought up to date in this submission with a case summary..

One small event that is worth covering in the context of this inquiry is an incident at the 1995 appeal hearing. A number of MCA members were in the public gallery of the court and during a break came in contact with a young woman who was also observing the appeal it turned out for a university assignment connected with a law degree at Sydney University. MCA provided her with material about the history of Hart v Herron. A few weeks later MCA received a letter of thanks from her together with the report she had submitted as part of her coursework. Her report appeared to us as well written comprehensive and clearly in accordance with the facts in the case as we knew them to be. What was a surprise shortly later was a further contact in which MCA found out that she only got a low mark from the university lecturer who had written on her assignment report when marking it that what she had reported could not have happened as she described. This indicates to MCA the extent to which even academic legal professionals are in denial about how the civil courts actually operate. As MCA has found in other contexts there is a culture of legal superiority that seems to allow for a summary dismissal of consumer claims without any attempt or need to check. The concept of Legal Standing is seen by MCA as a very serious barrier to the lay consumer seeking redress in a civil court.

6 List of included material

Barry Hart civil cases 1972-2010 a Summary Chronology

Part of MCA newsletter for January June 2009 about MCA submission to the National Human Rights Consultation

MCA Briefing Note BN/9-94/PIRb A Complaints System for Medical Consumers
(some is converted to text only as some diagrams could not be converted)

Summary of the legal actions Hart v Herron and Hart v Cashman

1972 Barry Hart, successful businessman and actor, complains about failed plastic surgery to a psychiatrist who happens to be one of the notorious Chelmsford doctors. To 'persuade' him the surgery had not failed Hart is drugged against his will, kept like this for 10 days in the Chelmsford Private Hospital, subjected to six sessions of electroconvulsive therapy while deteriorating with anoxia, bilateral pneumonia, and pulmonary embolus. Near to death, he is moved by ambulance to a public hospital where he partly recovers but emerges brain damaged, unemployable and unable to run his business.

1975 November 11 Page One , **Sydney Morning Herald.** " *Shock treatment protest. Given against will says actor. ... Mr. Hart claims that he did not give permission for shock treatment …*"

1976 September. After seeing six solicitors and spending over $6,000 a Legal Aid certificate is obtained.

1980 March 3 Hart v Herron NSW Supreme Court. Hart maintains he was tortured. Defence claim Hart's symptoms are pre-existing, that the plastic surgery result was good and that a paranoid personality disorder made him delusional over the surgery results. Fisher J. rules as prejudicial, and thus inadmissible, medical reports that held the plastic surgery was negligent and had failed and also stops Hart's expert witnesses referring to these reports. [Years later in 1988 an impecunious Mr Hart would sue the 1972 plastic surgeon using these same medical reports and this medical negligence action settled out of court, providing Hart with some money to press his appeal by 1992.] Some of Hart's symptoms fit with anoxic brain damage due to what had been done to him in the private hospital. Other symptoms cannot be ascribed to any then known medical condition and are ruled out of scope for damages. [Later these symptoms are shown to be those of PTSD] Fisher J. sums up solidly against Hart, saying he is a fit man, who had suffered an inconvenience of a few weeks in hospital, could always get a job as a labourer, and any damages could only be minimal. The jury finds for Hart awarding $6,000 for false imprisonment, $18,000 for assault and battery, and $36,000 in general compensatory damages, plus interest. Fisher J. makes a cost order of $169,205.74c against Hart so he will 'feel the sting' for 'wasting his court's time' on a case of 'little importance'. This leaves Hart deep in debt for winning the case.

1980 September. Hart continues to maintain he was tortured. Channel 9 TV program ***60 Minutes*** covers the case. Dr Herron's lawyers seek an injunction wanting further coverage suppressed.

1982 Hart has financial problems in getting his appeal to court. NSW Legal Aid will no longer assist; they are still chasing Hart for the balance of the 1980 cost order fine awaiting payment of a balance of $151,205.74c. [An unemployable Mr Hart will be found to qualify for a disability pension.]

1983 May 19 A letter to Mr Hart from then Chairman of the Law Reform Commission, Justice Michael Kirby, reads in part: "The story you tell though not entirely atypical brings no great credit on the legal profession of this country." He suggested Hart get an inquiry into his case.

1984 Sept 19 Hart appears on Channel 9 TV and is made first defendant in a defamation action lodged by Dr Herron against Hart and Channel 9.

1986 The Chelmsford doctors appeal in 1986 claiming abuse of process due to delay. Ward J finds that no blame attaches to Hart for any delay, quoting the continuing appeal actions and defamation action. The doctors appeal Justice Ward's determination back to the Court of Appeal. It upholds the doctor's appeal. The judgment (12th Sept. 1986 Street CJ, Priestley JA, McHugh JA) reports in part : *" ... the circumstances of this case make the delay in bringing proceedings so oppressive as to amount to an abuse of process. Civil proceedings for damages against Dr Herron over the subject matter of the complaint took four years to come to trial. The hearing of the action took 64 days. It resulted in a large verdict for Mr Hart. ... It must have been a cruel blow to Dr Herron to receive a complaint by Miss Eastgate concerning Mr Hart in April 1982 on top of the Coroner's finding on 4 March 1982 that there was a prima facie case of manslaughter against him in the Podio matter "* So the court dismisses all complaints in the protective jurisdiction blocking further complaints actions by relatives over the 24

Chelmsford deaths and many injuries.

1990 The Royal Commission into Deep Sleep Therapy found (Report Vol 6 "The cover-up" Chapter 5 p167-185) that a conspiracy, by Drs Herron and Gill, and the receptionist, to pervert the course of justice existed in Hart v. Herron. An unsigned consent form had been altered and forged to hide from Hart's solicitor, the court, and GIO the insurer, that Hart had never signed a consent form. The Royal Commission also found that Dr Herron told lies under oath and had deliberately lied in Hart v. Herron 1980. Evidence from nurses exposed how Dr Herron had threatened a nurse to ensure her silence. The Royal Commission recommended the NSW Director of Public Prosecution (DPP) consider criminal charges. One doctor, Dr Bailey, committed suicide when charged, no other prosecutions took place.

1993 December 16 NSW Appeal Court puts Hart to an election concerning Royal Commission evidence. Hart can have a new trial on grounds of fraud; but must first pay back all of the 1980 damages award plus interest, or use the new evidence to add more weight to his existing appeal as to why there should be a new trial. An impecunious Hart can only choose the second offer.

1995 Hart had by then paid Cashman's Solicitors $35,000 to run his appeal. Hart's 1980 barristers withdraw as the Doctor's defence is that Hart's lawyers had failed to exercise due diligence in 1980 and thus failed to discover what the 1988-90 Royal Commission had found out. Only days before the hearing Hart found a QC willing to act on a fully contingent basis.

August 21 1995 Hart v Herron on Appeal (Priestley JA Clarke JA Sheller JA) The appeal was a mess. On the first day Hart discovered new PTSD evidence he had requested in writing months before be put into evidence had not been.

1996 June 6 The judgment finds that the Royal Commission's findings, about the actions of the defendant doctor in the 1980 court case, was the doctor 'acting badly'. It dismisses Hart's appeal with costs. Hart faces ruin with probably several hundreds of thousands of dollars of additional debt.

1997 April 10 Special Leave application in the High Court. Branson QC acting for Hart goes to confusion totally failing to raise any of the issues (PTSD, human rights etc) Hart had instructed him to. The High Court then responded Hart's MP about what happened by sending an edited transcript and tape concealing what happened in the courtroom. Hart's MP gets 12 statutory declarations from witnesses present in the High Court at the time in order to expose the truth. Hansard 14 October 1997 P.P.727/732, a speech by Pat Rogan, MP for East Hills in NSW State Parliament. "I now accuse the judiciary and the legal profession of this State of corrupting due process, of incompetence, bias and a conspiracy to deny Barry Hart natural justice. … This is an absolutely serious matter when the High Court of this land has lied to a Member of Parliament taking up a matter on behalf a constituent." Media present in the press gallery totally fail to report this speech.

2004 Hart inherits some money and started an action in legal negligence against Cashman's Solicitors. He spends of the order of at least $70,000 on case preparation and medical reports.

2006 March-April Hart v Cashman. Hall J. (who had cross-examined Hart in the 1988-90 Royal Commission) sits alone to hear this case in legal negligence. An affidavit of 25/8/95 is produced in which the defendant solicitor swore he had no knowledge of the relevance of the PTSD evidence until the 17 August 1995. (He had actually served the PTSD reports on the defence solicitor in 1993 and received Hart's stream of letters asking it be put into evidence.) Mr Arden SC acting for Hart fails to establish much at all because Justice Hall ends the matter using words to the effect: 'Mr Arden, you heard what he said, it was a mistake!' A strange matter is the defence tendering to the court a photocopy of a handwritten note that gives Cashman's power to run the appeal as they see fit. The photocopy could be a composite as the signature is Hart's but is quite separate from the text which is in a different hand. Hart says under oath in court that he has never seen it before and that the body of the note is not in his handwriting. When pressed the defence fails produce the original of this note.

2007 March 27 Judgment by Hall J. Hart loses with costs by a judgment that in the opinion of MCA appears inexplicable in that it that it seems to convert a case brought in legal negligence into an appeal in medical negligence? Nowhere in the judgment is any material about what may constitute legal negligence. It is littered with simple errors of fact. It finds Hart did not have PTSD until 1993, and infers that Hart is an unreliable witness and that thus all Hart's medical expert's evidence is tainted. Hart's solicitors start the appeal process but then withdraw. Hart locates a low cost firm (The People's Solicitors) for his appeal. However a series of paperwork errors are made and Hart's right of appeal is lost. An application for an extension of time for an appeal as of right is refused by Registrar Schell who takes a year to deliver this refusal judgment.

2009 September 7 A short hearing before Handley AJA to recover a right to appeal.

2010 February 9 Handley AJA in judgment refuses an appeal with all costs against Hart. This judgment in the opinion of MCA appears to have the effect of extending errors of fact present in the 2007 judgment.

Extracted text of pages 1 to 4 of MCA newsletter of January-June 2009 :

Some things a new Federal Human Rights law should trigger

1. A dollar value for each human life should appear clearly on the medical services industry charts of accounts. This will act to force realistic quality assurance programs to be set up and so save thousands of medical consumer lives each year by massively reducing today's concealed cost shifting to welfare payouts and disability pensions. In addition this reality check should help to stop cost cutting hospital management pushing clinicians beyond realistic limits so 'blooding' them with a 'negligent' patient death that then works to produce the deadly culture of "There but for the grace of God go I - so I had better shut up about what I see going on".

2. "Australian legal process is a disgrace and a barrier to the observance of human rights." (a quote from the book Trial by Voodoo)
Until the system can be cleaned up the following warning notice must be put above the door of every courtroom: **Warning, You Are Now Entering An Unscientific Commonsense-Free Zone** The reality is: The adversarial civil court room is a theatre of war and the first casualty is the truth. Do not naively think that you will be allowed to get all the facts of your case into evidence. Facts are secondary in the Australian courtroom, but the dollars you have with which to hire a more expert legal team than your opponent are important. Lawyers are trained to find ambiguity so expect to find an open and shut case converted into a labyrinth of complexities that costs you years and hundreds of thousands of dollars to progress. Lawyers charge you by the hour not by the results they achieve. The powerful professional indemnity insurance funds have potentially millions of dollars to throw into a war of attrition. No rules exist on how much of your verdict monies can be absorbed by legal costs. Even if you win your case you may be plunged into debt via costs orders. The 'street smart' name for the Court of Appeal is 'The Judges' Protection Society', it is interested in points of law not logic or natural justice The protective jurisdiction is protective of the professional who is your opponent.

3. Machinery should be put in place to retrospectively and publicly expose cases where courts have abused the human rights of individuals. (Note that currently under the Australian Constitution no effective right is provided to a fair trial or access to due process.)

4. Australian judges must embrace the Bangalore Code of Judicial Conduct (5) and also must have a duty to make judgements that are logical. They must receive human rights education allowing them to understand what the lay community understands by fairness, natural justice, and a respect for human rights. Some EU nations provide a judge with a different education to that of the advocate. Each have distinct roles and career paths. But in Australia judges get the same legal education as barristers and solicitors and so come to their exalted role from years of experience in becoming experts in disguising some of the facts in a case so they can weave fantastical stories around a subset of the actual evidence in order to support whichever side to a dispute happens to be paying them at the time. Weaving fantastical stories is not a skill that should be exercised in judgement, but unfortunately is.
Unfortunately current legal process here "is an affront to reality"[Chapter 2 Origins of the voodoo, in the book 'Trial by Voodoo'] and there is nothing in Australian legal culture to stop judgements being illogical.
A way to ensure judgements are sounder would be to force use of a quantitative methodology in their construction. A rationally and objectively constructed judgment would be capable of being

tested by anyone later on, rather in a parallel way to that of a mathematical proof. A judgement would be seen to 'add up' by whoever cared to do 'the calculations' in accordance with the agreed set of scientific rules. Use of structured multiple utility theory could well be one such technique. If such a measured quantitative approach were to be mandated the number of shares judge may hold in a company or the judge's political beliefs would not be capable of infecting a judgment. In a codified legal system a basis may indeed be seen to exist for the application and development of such methodology, but in the irrational shifting sands of the English Common Law the prospects seem poorer. However if only some of the processes used in the common law courts could be tamed by the addition of some quantitative logic perhaps at least the wilder flights of judicial fancy would stand out from the rational material and be easier to both detect and question.

5. A judge should have no power to edit a court transcript. Court transcripts are currently best viewed by the public as political documents not as history. Court transcripts should be signed off as complete and correct by an independent recording authority.

6. End the GST tax for plaintiffs in professional negligence cases. Consumers find it abhorrent that government imposes a 10% tax impost on defending their human and economic rights when seeking to remove themselves from reliance on a taxpayer funded disability pension.

7. Courts should be made liable if they defraud by defaulting on service
For example: Court timetables are a joke. A medical consumer can be defrauded of thousands of dollars by arriving at a court at the appointed hearing time, while paying many hundreds of dollars per hour for the presence of his(her) barrister and solicitor, have to wait a long time as another case drags on, and then be told his/her case will be heard another day.

8. Put an end to 'secret courts', make them open and honest.
In rare cases public outrage forces intervention by a parliament in the face of a stubbornly silent judiciary whose silence exposes the basic truth that no effective quality assurance system exists in the operation of the Australian courts. Powers that stop reporting that a court action has even taken place must be removed. Equal expenditure rules for both contestants to a dispute would seem to be essential if the civil adversarial system cannot simply be abolished and replaced by a search for the truth. Honest courtroom process should have the effect of rendering the relative skills of the combative counsels irrelevant, and allow rapid logical analysis leading to a judgment based solidly on the evidence, or a 'Not Proven' verdict if this is the only possible honest result on available evidence. Court audio systems frequently seem to be adjusted so that it is impossible to hear from the public gallery what is said by protagonists.
When combined with the inaccessibility of written material submitted to the court, judicial editing of transcripts, judicial discretion applied in judgement so only a selected portion of evidence that supports the judge's opinion appears in the official record, and action is taken against journalists, in practical terms Australian courts are secret courts.

9. Allow use of ADR as an integral part of civil process
A revised complaints/litigation process that included ADR was suggested by MCA in 1994 in a submission to the Federal Government's Professional Indemnity Review. [BN/9-94/PIRb. MCA Briefing Note: "A Complaints System for Medical Consumers".]
Experience with open public ADR attached to a civil action in at least one US jurisdiction has

proved a means of getting to settlement at low cost. In a dispute where one party has massive financial resources while the other has very little ADR may work to introduce some balance back into adversarial process.

10. Replace the Appeal Court system with a new QA phase that conforms to Australian and ISO Standards.

The Appeal Court system is a relic of a past era. It fails to meet today's standards of quality assurance. For consumers concern about points of law that are the focus of Appeal Court process are often as relevant as efforts to determine the number of angels that can dance on the head of a pin. In the 21st Century Australians should expect to have consumer products rationally certified as having quality to known objective standards. Australian courts should be subjected to the same rational processes and a set of objective standards.

11. Dispense with most of the protective jurisdiction in its present form.

The major effect of this jurisdiction appears to be to place selected legal and medical professionals outside the scope of both civil and criminal law. It is certainly used to deceive the general public into thinking that they have a useful alternative to running a case at common law.

In revised form it could have a useful role as a means of collecting and indexing consumer experiences. If data is not edited to conform to establishment requirements, but rather published 'in the raw' it could feed an Internet database of consumer problems.

For this to work material supplied would have to be made fully exempt from defamation law, but not attract absolute privilege in relation to civil negligence actions. The same Internet application would provide an unrestricted right of reply to contested material. (For example if consumers hold stupid views they deserve to be publicly exposed as stupid people.) The aim should be to facilitate a very open debate useful for education, research and as a trigger for law reform. The data collection/presentation processes could be substantially automated and operate at much lower cost than existing protective jurisdiction systems that only produce limited data, heavily edited and sanitised, normally only via annual reports.

The practice of parliamentary committees, charged with oversight of protective jurisdiction commissions, being unable to descend, due to their terms of reference, to the individual case level must end. The stratospheric reporting to MPs by top bureaucrats of how a commission is operating reveals all but nothing. Rather MPs should conduct reviews from the bottom up because the truth is to be found at the individual case 'ground zero level' where the human rights of consumers are actually being trampled on.

Public comment about the NSW LSC is consistently negative. (2) Its performance must be investigated. A question that the public needs an answer to is: Has the NSW LSC any proof that it has achieved anything at all in a cost effective way to improve the quality of legal services in NSW? If it cannot do this then it should be abolished.

For government the protective jurisdiction may well serve a number of functions that are not all useful ones from the consumer viewpoint:

- Its elements are used to end the concept of Westminster style ministerial accountability by offering up the head of a Commissioner as a proxy for that of the Minister. This has happened in NSW in the case of the HCCC.
- To the uninformed its elements act as a series of 'fig leaves' covering up the extent of human rights abuse that a government imposes by neglect or commission via government services. At least this is how the vast majority of the lay community, who have not needed to use the services offered and are thus ignorant of the truth, are naively fooled.
- Viewed as a series of sheltered workshops perhaps it saves from the unemployment queue, or psychiatric ward (3), legal professionals who find they have too much of a social conscience get aboard the gravy train of mainstream legal work.

Footnotes in the Original

1"Plaintiff verdicts in medical malpractice cases are the principal impetus to change and improvement in the medical care delivery system. Plaintiff verdicts have done more to improve medical care, to correct abuses in hospitals, and to stop adverse drug effects, than any other force in this country. Medical licensing boards, the U.S. Food and Drug Administration, State Health Departments, and all the forces of Health and Human Services are nothing compared to the impact of the plaintiff verdict. Where social pressures fail, money does not." Schroder, Jack (1990), Identifying Medical Malpractice, The Michie Company, Charlottesville, Virginia

2 A recent example. ***SMH*** Letters Friday 17 April 2009 Time for action on lawyers' excessive fees is overdue. “If the standing committee of attorneys-general presses on with legislation to curb fee gouging by lawyers, it will be much to the credit of the Herald ("Lawyers to face scrutiny on fees", April 16). But it may not be enough. According to your report, the Legal Services Commissioner, Steve Mark, apparently believes that getting a client to sign a document with blank spaces, clients not receiving a bill, or being informed of a final settlement of $300,000 of which $250,000 is extracted as fees and expenses, is acceptable legal behaviour.” Geoff Mullen, McMahons Point

3 Having contact with the law and courts seems to produce a lot of mental illness. One case related to MCA by a consumer who had been driven over the edge by the system was from a chance encounter in a psychiatric clinic. Having just graduated in Law she left the ivory towers of University expecting to help the community by her practice of law to find the reality of legal life, at a city firm, was all about finding creative ways to charge clients by each and every 15 minute quantum of time as dictated by a software application irrespective of what was achieved. Her delusions smashed she was now to be found in a psychiatric clinic situated beyond the other side of the harbour bridge.

4 A case reported by Richard Ackland from in the ***SMH*** Opinions page Friday 31 July 2009 ‘Locked-up and angry: the lot of a foreign student’ shows that even a very capable legal PhD holder can be destroyed by the lunacy of the Australian legal system.

5 A speech by Michael Kirby entitled ‘Tackling Judicial Corruption – Globally’ given at The St James Ethics Centre, gave details of a draft form of the Bangalore Code which in part sets out conditions whereby a judge shall disqualify (him)herself from proceedings. An extract reads as follows :
4.5 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which a reasonable, fair-minded and informed person might believe that the judge is unable to decide the matter impartially.
4.6 A judge shall disqualify himself or herself in any proceedings in which there might be a reasonable perception of a lack of impartiality of the judge including, but not limited to, instances where:
4.6.1 The judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;
4.6.2 The judge previously served as a lawyer or was a material witness in the matter in controversy;

BN/9-94/PIRb..

Medical Consumers Association of NSW Sept. 1994 (updated Nov. 1995)

Briefing Note: A Complaints System for Medical Consumers

Purpose of this Note: To inform members of a proposal put forward by MCA to the federal Professional Indemnity Review (PIR) in response to their interim report.

Background Notes:

In a 79 page report MCA outlined a system that would introduce a 'level playing field' in disputes over substandard medical care. The way that doctors insure themselves turns out to largely determine the way that complaints end up being managed. In this note defects in the present system are listed and the new system proposed by MCA outlined.

The Present System of 'Health Care':

A global medical industry today is more and more about making money for a few. This drives today's so called 'health care' industry in the following directions; keep the consumer ignorant of the risks and choices; work to maintain the economic value of a patient's life as close to zero as possible; discourage complaints and administratively absorb as many complaints as possible; prevent if possible (or at least limit) injured patients access to the common law; work to limit de-registration of medical professionals.

Even the judicial system often fails to bring charges against medical providers seeing prosecution not in the public interest in the most outrageous cases. (For example in the case of the Chelmsford narcosis doctors even after a Royal Commission exposed criminality, perjury, 24 deaths and 18 falsified death certificates no doctor was ever prosecuted or struck off. The book *Remission Impossible* (Ron Williams, 1992, Jacaranda Press) explains how big business is defining the path the industry is now taking). Both medical industry and government view complaints as causing added expense, respectively cutting into profits or causing a need to raise extra taxation.

These two forces are thus found to be in effective coalition in opposing measures that would favour compensation for a medical consumer who has been negligently injured. Informed review of the NSW Statute Book shows that the legal industry has adapted to this environment and have self optimised so as to allow such consumers to spend their last cent on legal services often to no net effect. Thus unlike the US situation where legal fees applicable to running a case on a contingent fee basis are limited to 33% here legal costs can financially wipe out a consumer who wins a medical negligence case .

Today's government sanctioned regulation is only industry self regulation behind the closed doors of exemption from FOI (Freedom of Information) and absolute privilege. Action is focused on what are said to be systemic improvements over decades not on rapid response to individual problems of iatrogenic death and injury. Systemic reform causes many reports to be written but actual prosecution of individuals is defined as being counter productive. The medical industry is thus able to use a sham type of quality control that breaks the proven quality assurance rules used in other industries, and thus fails to stop the death and injury rates.

The New HCC Act in NSW fits neatly into this system and actually may extend the problems faced for injured consumers by acting as a mere camouflage measure, tricking the public into thinking that something substantive has been done to address malpractice. The effect is to conceal the true cost of medical services by cost shifting. Victims of medical negligence end up on minimal social security pensions paid for by the tax payer. This is seen by State governments as the cheapest way of managing medical services. (Of course those running the system understand these risks produced and so avoid the average standard of care the system produces.)

If you have reason to complain … what is currently on offer:

Context: 36% chance of iatrogenic injury, and 12% chance of being injured due to negligence, Rosenthal 1988, 1995 QAHS study 18,000 Australians killed and 50,000 injured each year by adverse events i.e. four times the risk of the US health care system . Note that most outcomes below marked * are secret or do not get recorded. The MDO's end up knowing much more than the HCCC is likely to ever know and the HCCC statistics are useless as they cover only a few percent of the total possible consumer complaints.

EVENT THAT TO THE CONSUMER APPEARS NEGLIGENT

- Complaint not made (perhaps over 90% of cases)*
- See provider and then give up (Provider lets MDO know of risk so MDO's know a lot more about what is going on than government or its HCCC does.)*
- Resolve with provider *

USE THE HCCC

- Screened out (say 80%)*
- Offer of Conciliation (say 5%)
- HCCC investigation with no action recommended
- HCCC investigation finds possible misconduct or gross negligence case sent to professional Boards.
- then if you wish to get any compensation you must …start a civil action)

USE THE COURTS

- But this is too costly to continue
- About 95% settle out of court*

IN COURT

- 75% of patients lose in court and end up deep in debt - having to pay the defence costs as well *
- Win and perhaps end up with more in compensation than in legal costs due to judge's cost orders.

MCA's Reformed System

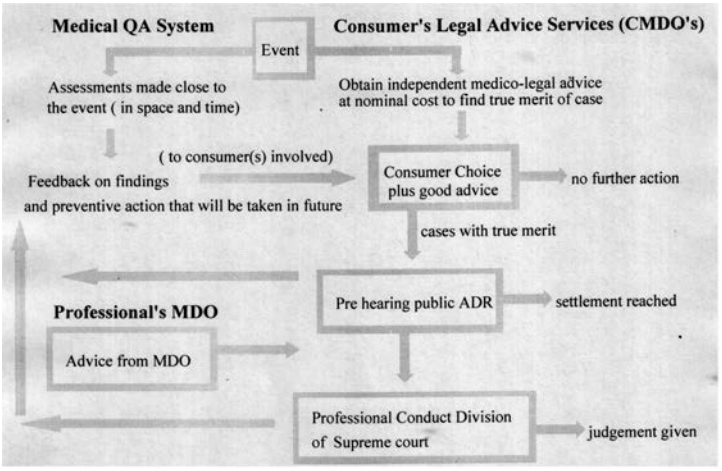
Based on meaningful, accessible QA, plus all providers and consumers have meaningful indemnity insurance to make the tort system work by:

• Following the recommendations of the Royal Commission into Deep Sleep Therapy by the introduction of a professional conduct division of the Supreme Court. (Evidence standards for use in court are assisted by establishing a medical evidence institute along the lines of the German model. 'The German Institute for Expert Examination of Doctors Errors')

• Adding ADR mediation allowing public settlement of many (probably 95% or more) of cases to settle prior to full court action.

• Levelling the playing field financially by setting up a Patient's Justice Organisation to balance MDO defence fund dollars.

• Levelling the playing field by organising legal resources for patients so expertise for plaintiffs will exist for the first time.



For the first time consumers have directly available expert legal and medical advice available via a private system similar to the doctor's MDOs. Access is funded partly via medicare levy and partly from professional indemnity cover fees. All MDOs are required to account separately their defence fund and their compensation fund. A balance is achieved. It is 'medicine in the sunshine' as much data is now in the public domain and the hidden costs of today's secret medicine are exposed for the first time. The system operates much faster, often in months not years. The critical QA corrective feedback loop operates in well under a year. Consumers do not need to go 'cap in hand' to

official bureaucracies such as registration boards, and government bodies such as the HCCC and HCR. Instances of use of the full legal path actually reduce in number as good advice and reason replaces today's fear driven situation.

Bibliography and notes

Slattery. J.P., (1990) The Report of the Royal Commission into Deep Sleep Therapy, Sydney. (This is the $15,000,000 investigation into the Chelmsford deaths. It proposed a professional conduct division of the supreme court be set up. It has since been ignored by government and the Health Care Commission Act just ignores its recommendations !)

Dugdale, Tony (1989) "Restructuring legal and health services: the challenge to the professions", Professional Negligence, May/June 1989. (p97-*102 'However, another approach to professionalism is to see professional status as resting not on market control but on quality control. This functionalist approach sees professions as receiving their status, privileges and autonomy from society in return for using their expertise in society's interests, promoting high ethical standards and ensuring quality of service with rigorous disciplinary procedures .... On this approach the reform proposals ... call on the professions to deliver their side of the bargain by taking quality seriously. ... operate audits, codes of conduct and effective complaints procedures* ... (in the context of the UK situation and the government's White Paper 'Working for Patients'.)

Schroder, Jack (1990) Identifying Medical Malpractice, The Michie Company, Charlottesville, Virginia. (Jack Schroder writes: *"Plaintiff verdicts in medical malpractice cases are the principal impetus to change and improvement in the medical care delivery system. Plaintiff verdicts have done more to improve medical care, to correct abuses in hospitals, and to stop adverse drug effects, than any other force in this country. Medical licensing boards, the U.S. Food and Drug Administration, State Health Departments, and all the forces of Health and Human Services are nothing compared to the impact of the plaintiff verdict. Where social pressures fail, money does not."* (MCA notes that NSW government policy is quite the opposite.)