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My submission concerns four matters:

- 1. The notion of a person (not just a body) to underpin legislation.**
- 2. The importance of causation in law and medicine, and how this problem might be addressed.**
- 3. How a decision should be made about how the quantum of money allocated to this stream might be distributed between a stakeholder, lawyers and various kinds of claimants.**
- 4. Whether provision should be made for a person's retirement, and sometimes early retirement. That is under the present systems it is not uncommon for a recipient of compensation to have spent it all in a short time and to be no better off, and he has already been compensated and will need to be paid from the public purse again.**

1. The notion of a person (not just a body) to underpin legislation

Legislation in the twenty first century needs to be based on strict scientific causation before damages can be allocated. More and more is known every year about the causes of disease and illness many of which were a mystery when some laws still in use in Australia were promulgated.

Any new legislation should be predicated on the notion of a person, harm done to a person and not just a body. A person suffers losses according to the handicap that the injury causes. In order to assess a handicap and to understand suffering, the Law might need to acknowledge the importance of mind and its contents, intelligence, education, capabilities, beliefs and desires as it is by examining who that person is that his or her losses and needs and capability for rehabilitation can be identified. In such a model, an unskilled and uneducable labourer with an injured back might be compensated more quickly and in a more useful way than a professional person with the same injury. The NSW system compensates on impairment which is measurable in the body, and it is manifestly unfair. Compensation should be determined on handicap.

Laws which concern people and their illnesses need to be underpinned by what is now known about people and illnesses, by a concept of a patient as a person, and by the understanding that 50% of doctor patient contacts are without a biological basis. Illness, a human event is at least as common as disease, which is untoward changes in the body. This involves acknowledgment that psychosomatic syndromes are preventable and real, and should not be neglected, mocked or punished. These conditions which cover the greater portion of human misery have been defined out, as if they do not exist in NSW Work Cover and TransCover.

The inevitable result is that somatoform syndromes (which are the mimicking disorders) have been pushed into pseudo neurological, pseudo orthopaedic and pseudo any other specialty syndromes where sympathetic diagnosticians will misdiagnose them to give the sufferer some financial justice at the cost of misdiagnosis and bad treatment. Somatoform disorders need to be differentiated from malingering by experts and prognosticated upon by relevant experts.

Relevant expertise will not develop unless the law encourages it. Current laws discourage experts from giving information to courts unless it is information already familiar to judges. The evaluation of the evidence of experts requires training of experts, judges and lawyers as well. In the

United States these professions attend training courses in droves, more so since the introduction of a Daubert criterion, see below.

2. The importance of causation in law and medicine, and how this problem might be addressed. Why is causation important in the determination of negligence?

In brief: as it is unfair to punish a wrong doer who committed no wrong. It is unfair on the employer and it has consequences for the victim who is treated for a misdiagnosed condition.

Courtroom legitimating of false causes encourages poor science and poor expert evidence. This encourages malpractice, as doctors learn that courts will legitimate their mistaken beliefs about medical conditions because they have already done so. This increases until it become a legal, ethical and economic problem.

The problem has a long history, not yet tackled in Australian legislation.

Adamcik v the Government Transport Commissioner went to the High Court before Justice Windeyer in 1964. Briefly, Adamcik had tortuously sustained injuries in the course of his occupation and a few weeks after his discharge from hospital had developed leukaemia and died. His widow sued. The mainstream of medical evidence was that leukaemia was a disease of the white blood cells, in which they reproduced themselves to an abnormal degree, and its origin was in the chromosomes of the affected cells.

Nonetheless, a physician of some age and demeanour was found who was of the opinion that the physical injuries sustained together with the mental stress accompanying them, had caused the leukaemia. It was apparent that his opinion was not supported by scientific or statistical information. He was the only medical practitioner known to hold that opinion. The jury accepted his evidence and the widow won her right to lifelong compensation. The Government Transport Commissioner appealed to the High Court. The learned judge seemed to pass up an opportunity to define what constituted expert evidence, and to differentiate it legally from those offerings which were no more than the opinions of experts. Rather, he reaffirmed the right of the jury to choose the expert it preferred, and my legal colleagues informed me that this was correct and what juries and judges do.

It happened again in Abalos (and encouraged the RSI epidemic) and continues in many cases which are not even commented on.

More recently and publicly, a judge in NSW decided that a claimant's bowel cancer was caused by the stress of his occupation. This was not in accord with evidence of gastroenterologists familiar with the kind of painstaking and costly research that has gone into discovering elements in the environment that contribute to bowel and other cancers. Causation is an issue for epidemiologists and not for rogue experts or sympathetic tribunals which wish to be generous.

Cases where causation has been decided on the basis of judicial 'common sense' abound. However scientific knowledge has increased to the extent and no one can claim any longer that the 'judicial common sense' is needed to replace gaps in medical or scientific knowledge. Judges will resist this threat to their power.

Causation in functional (i.e. somatoform) illnesses is important, and it becomes a serious economic issue in epidemics of somatoform disorders such as was experienced a decade ago in Australia, repetitive strain injury. Mental and emotional disorders can only have causes that are events in the mind.

Why is causation important?

When courts encourage the medical profession to legitimate false causes, doctors will continue to do so, and to underpin their 'remedies' with false beliefs. In some cases, these beliefs cause the very problem they are trying to correct by informing a patient, mistakenly, that he has an injury.

Treating conditions on the basis that they are stress-caused when they are not (such as bowel cancer) is a large and lucrative industry. However it is not as large or lucrative an industry as the physical treatment of the functional somatic syndromes and of symptoms without a biological base. RSI is only one example of socially and legally legitimated epidemics of clinical and social iatrogenesis, of huge sums of money expended on the physical remediation of false causes which have been legitimated by court decisions and misdiagnosed injuries.

Experts tailor their opinions to be in tune with court decisions, and they generate costs for treatment of misdiagnosed conditions. they are misdiagnosed as their causes are not correctly known. Judges routinely defy scientists and rely on their own common sense.

There is a solution that Australia needs to adopt, sooner rather than later. It is resisted by a conservative judiciary some of whom are reluctant to cede any power to expert views. This has been resolved in the USA. The 1993 United States Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals* changed the criteria by which the views of experts are to be admitted as scientific testimony in court.

Daubert was one of a thousand actions, on behalf of infants with abnormalities, against the manufacturer of Bendectin, known in Australia as Debendox, a common morning sickness remedy. The judges allowed evidence from epidemiologists who had found no excess of foetal abnormalities among the progeny of users of the drug. The judges barred from giving evidence to a jury those experts who only pointed out that it was impossible to prove that no causal relationship existed when Bendectin use and foetal abnormality coincided.

The unanimous ruling states that the criterion of the scientific status of a proposition is that it can be tested, particularly by way of a logical process called 'falsification'. That is, it must be possible to specify a set of circumstances, the occurrence of which, would demonstrate that the proposition is false.

In effect, *Daubert* replaces the *Frye* and *Bolam* tests of 'expert opinion', being that which is 'generally accepted' by a significant number of authorities in the field, with Karl Popper's notion of science as 'knowledge' which has withstood rigorous testing. This sometimes entails a preliminary assessment, a *Daubert* Hearing, to decide if the reasoning or methodology underlying the testimony is scientifically valid.

Daubert has not been adopted in Australia where simple plausibility of expertise has held sway, with *Adamcik* and *Abalos* setting the standard. In each case, the High Court lost an opportunity to comment on the difference between expert evidence within the relevant body of scientific knowledge, and the unsupported opinions of persons who held the status of being, professionally trained, hence experts. The High Court, on each occasion, confirmed that the judge or jury could choose whichever opinion they preferred.

Scientific method includes putting up a proposition couched in the negative, a null hypothesis, and testing it to see if it can be knocked down. Examples of the null hypothesis are that the prisoner is not guilty and that the a positive assertion, one which cannot be proved to be untrue even if it is untrue. One can never prove that a unicorn does not exist, as it might always be just out of sight, so a proposition asserting that a unicorn exists is not a suitable one for a scientific investigation. The presumption of innocence is a null hypothesis, a hallmark of good law as well as good science.

3. How should money available be distributed between stakeholders?:. How a decision should be made about how the quantum of money allocated to this stream might be distributed between stakeholders: lawyers. Treating doctors, experts and claimants

My third suggestion is that the a quantum due to disabled persons is a political decision and how it might be distributed as a matter and it could be determined by the stakeholders in a conference or summit loosely based on the work of the American Philosopher John Rawls. I would be interested in talking further about such a notion and d setting up such a meeting.

- 4. Whether provision should be made for a person's retirement, and sometimes early retirement. That is under the present systems it is not uncommon for a recipient of compensation to have spent it all in a short time and to be no better off, and he has already been compensated and will need to be compensated from the public purse again.**

I do not know but this should be considered by the inquiry.

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