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TORT LAW REFORM HAS FURTHER TO GO

In a speech to the 14th Commonwealth Law Conference in London on September 14, the Chief Justice of the Supreme Court of NSW, Jim Spigelman, said, in regard to the recent tort law reforms in Australia, "a number of persons, including myself [Spigelman], have indicated that in various respects the statutory changes have gone too far".

Quite the opposite, they haven't gone far enough.

Spigelman indicated in his speech that "the past attitude of judges, when finding facts, determining liability and awarding compensation, was influenced to a substantial extent by the assumption, almost always correct, that a defendant was insured".

He went on to comment that "judges may have proved more reluctant to make findings of negligence if they knew that the consequence was likely to be to bankrupt the defendant and deprive him or her of the family home".

We can read into this that the prevailing judicial attitude, before parliaments stepped in during the last few years and reformed tort laws, was one of not letting the facts get in the way of a good, compassionate decision in favour of the plaintiff.

It's little wonder that the lay community has at times lost faith in our legal system. After all, shouldn't the prime aim of the courts be to show an unbiased integrity that promotes a striving for justice and the upholding of our laws (regardless of the insurance status of defendants or the profitability of insurance companies)?

For doctors in NSW, professional liability insurance is a compulsory prerequisite to registration. Most other professionals, and many other groups and individuals, also take out liability insurance policies to cover themselves in the event that they are sued for negligence.

And well they might, when the attitude of judges is spelled out.

Spigelman said "insurance premiums for liability policies can be regarded as, in substance, a form of taxation (sometimes compulsory but ubiquitous even when voluntary) imposed by the judiciary as an arm of the state".

Had the speech been given by a plaintiff lawyer, it would have hardly raised an eyebrow, but it was given by the Chief Justice of NSW.

It would appear that the NSW parliament has even more work to do.

We would all feel a little more confident if our judges were manacled to an obligation to seek justice, and nothing but justice, in a setting in which the inherent past bias against defendants is obliterated.

This will happen only when parliaments legislate that in civil tort law cases, the proof of negligence has to be "beyond reasonable doubt".

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