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SYDNEY, WEDNESDAY 23 FEBRUARY 2005

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The Hon Justice Michael Kirby

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It is always a happy day for me when the High Court gets a case involving the law of insurance. This is because, from my earliest days as a lawyer, I was engaged with these problems. I feel comfortable with them - relaxed and comfortable, one might say. The same mood does not come over me when I have to tackle the income tax statute, even in its so-called "Plain English" version. Worst of all is a day spent lost in the wilderness of superannuation legislation. Some judges get lost there, never to emerge the same as they entered. Such a day, strange as it may seem, makes one long for the comparative simplicity of the *Insurance Contracts Act 1984* (Cth).

* Justice of the High Court of Australia.

I claim a little credit for that Act. I worked on it in the Australian Law Reform Commission with Professor David Kelly and Mr Michael Ball, now of Allens Arthur Robinson. They were the chief authors of the report that led to the Act. Getting there involved a huge enterprise of consulting the insurance industry, consumer groups and the public. What had formerly been hidden in centuries of judge-made law and differing State laws, we pulled together in a great national law. It is still in force.

When the Hawke Government replaced the Fraser Government in 1983, the new federal Attorney-General, Gareth Evans - formerly himself a Commissioner of the Australian Law Reform Commission - telephoned me to see if any statutes were drafted that could be considered for immediate introduction to Parliament. This was in the interval before the new Government's own legislation was ready. I pounced and suggested the *Insurance Contracts Act*, annexed to the ALRC report. It sailed through Parliament. The rest, as they say, is history.

I was glad to read in this 2004 *Annual Review of Insurance and Reinsurance Law* an excellent summary of the recommendations of the Treasury Review Committee on the operations of the 1984 Act. Unsurprisingly, the Committee concluded that the *Insurance Contracts Act* is generally "operating satisfactorily and to the benefit of both insurers and insureds". That would certainly be my observation from the viewpoint of the courts. The notion of ever

going back to the chaos and uncertainty of the previous law is unthinkable. Patching and updating are doubtless necessary, as the Committee has proposed. But one of the great virtues of having this single federal Act on insurance contract law is that it makes it easier to teach lawyers and claims managers the basic principles of insurance law. That is itself a contribution to fairness and balance. It is also a contribution to knowledge of rights and duties and to economic efficiency in the operation of a vital national industry.

The work of the ALRC on insurance contracts is one of the Commission's many achievements as it goes into its thirtieth year. It is interesting to me, as the first head of the ALRC between 1975-84, to witness, over the past three decades, the growing acceptance of the authority and usefulness of the Commission reports throughout the Australian legal profession. There are many cases now where the High Court, and other Australian courts, look to the Commission's reports as a useful and accurate statement of the law written by experts of high reputation, like David Kelly and Michael Ball.

It was a trifle unkind of the editors (but doubtless necessary to their duty) to list decisions of the High Court in the past year in which I had the misfortune to disagree with my colleagues. One of the cases, *Cole v South Tweed Heads Rugby League Club* concerned whether there was a legal duty in the Club to show care to a visitor for whom the day of her serious injury began with a free champagne

breakfast that lasted well beyond ordinary breakfast hours. Naturally, I was interested in the editors' opinion that, despite the majority's dismissal of that claim, this case offers little guidance on the extent (and satisfaction) of the duty of care owed by licensed premises to intoxicated patrons. I am not sure that the majority judges would agree with that assessment. But I certainly do.

Then there is the note on the decision in *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (p 107). That case concerned the liability of building engineering consultants to subsequent purchasers and owners of commercial premises for defects in the buildings they design. The majority of the High Court held, in that case, that there was no liability. But the defects laid down or approved by the engineers (who were paid a good fee for their expert advice) could not easily be seen, or discovered, by subsequent owners. In my reasons, I followed many overseas decisions that held that liability existed. In doing so, I made a point that courts, in such cases, have to keep their eye on regional and global developments in the law in such cases. The courts of Singapore and Malaysia have upheld liability in such cases. In Australia, we have to be careful that we are not needlessly out of step with the law in neighbouring countries. The global economy will exert pressure for greater knowledge about decisions beyond Australia's traditional sources in England and New Zealand. Nowhere is this more true than in the field of insurance. It is a global market as the foreword to this *Review* makes clear.

Australian lawyers must now keep pace with global trends and decisions. The internet comes to their aid in doing so. So does this *Review*.

In one case reported (p 35), *Insurance Commissioner of Western Australia v Container Handlers Pty Ltd*, the High Court was unanimous in the result. As the editors point out, the decision shows how compulsory insurance policies have to be construed in the light of the relevant legislation applying to them. The question was whether a stationary vehicle, with a defect that caused injury, fell within a policy limiting recovery to the consequences of driving the vehicle. The High Court held that the claim failed.

If you walk through the decisions in this *Review*, you can quickly see why insurance law is so inherently interesting. Often it involves the drawing of lines in the application of the ambiguous language of insurance policies. Was damage that was caused by a power surge, in turn triggered by a fire, "directly caused by fire"? Answer: No. Was the interruption in the glorious journeys of four ultra-luxury cruise ships following the events of 11 September 2001 within the language of a policy that excluded "acts of war" and "armed conflict"? Answer: The claim failed. Was jewellery "in transit" when it was left in a store by the salesman who had gone to the toilet when the policy required that, when in transit, it must be "carried by hand"? Answer: The claim failed. Was a "terminal

illness" to be judged with or without reference to the impact of any medical treatment? Answer: Without.

One interesting case that is noted in the *Review* concerned the meaning of the word "flood" (p 75). When I sat in the Court of Appeal, we had such a case. It related to the meaning of that word in an Australian policy. When we studied the English and the Australian dictionaries (the *Macquarie Dictionary* especially) we found that there was a different nuance of meaning for the word "flood" in Australian English. For us, in our continental country, a "flood" tends to mean something rather bigger than the puddles that pass for a "flood" in England. It is something to watch out for and a counterpoise to global interpretations.

Woven through many of the damages cases noted in the *Review* are instances of a distinct shift in mood of the courts of Australia which is noted by the editors. There seem to be endless cases about potholes and people falling over and suing the local authority following the change in the common law expressed by the High Court in *Brodie's* case. There appear now to be more losses in the courts than wins for plaintiffs in such cases. This trend seems to bear out Professor Harold Luntz's assessment that these are *not* good times for plaintiffs, and particularly in the High Court. I once, ever so tentatively, suggested this to one of my colleagues only to receive the snappy reply: "Well, plaintiffs had a dream run for a long

time". I wonder if the spirits of our predecessors considered themselves parties to the plaintiffs' "dreamtime".

It is very good of Allens Arthur Robinson to share the knowledge in this *Review* with an audience wider than its employees and clients. In the nature of these *Reviews*, they become snapped up like hen's teeth by competitors and other members of the legal profession and insurance industry. In the old days, when I was an articled clerk and young solicitor, working in insurance law, I had to rely on my own notes and painstaking reading of the cases reported, often months after delivery. Now it is virtually instantaneous. My notes were precious intellectual capital. There was no way I would have shared it with competitors and rivals. Now this book is shared, including on the Web. It is a badge of professional excellence. It is right up to date. It is beautifully presented. The statement of the case name, media-neutral citation, date of judgment and the key issues are accurate, clear and time-saving. The headings are often provocative. One of them "Potholes and Pot Luck" (p 138) may all too accurately sum up the chances of plaintiff recovery in tripping cases. But then again, such cases were always difficult for plaintiffs. They are specially so once the "dream years" finished.

We have to be very careful in pushing the notions of personal responsibility forward, in court decisions and legislation. We have to beware that we do not remove entirely the role of the common law as a standard setter for carefulness and accident prevention in our

society. For example, I have no doubt that the principle in *Rogers v Whitaker* (1992), laid down by the High Court, demanding full explanations of the risks of medical procedures, has been beneficial for patients throughout the nation. The days of "nanny knows best" are over in this country as in most others. The duty to inform and to warn patients, laid down by the courts has, I feel, improved the accountability of the medical profession and its interactive relationship to those in its care. The notion that such matters can be left entirely to the "club" of a profession, however brilliant and distinguished, is not one that is attractive to me. Nor is it the law in most countries.

Whilst in Australia we roll back the entitlements of those who suffer damage, in the name of "personal responsibility", we have to be careful that we do not reject just claims and reduce unfairly the mutual sharing of risks in cases where things go seriously wrong.

These are important questions for the insurance industry. It will not thrive if it becomes known, or suspected, that high premiums are paid when its liability is being significantly and constantly reduced. The sharing of risks is the essential brilliant idea of insurance. We must not kill the goose that laid the golden egg of insurance.

This *Review* demonstrates the many new, and old, problems that present for judicial resolution. It is an excellent, thorough and

accurate analysis. I congratulate Oscar Shub, the National Practice Leader of Allens in this field for this service. I am sad that I cannot announce the decision in *Silberman v CGU Insurance Limited* which the editor says is "eagerly awaited". In such matters readers must be patient and await next year's *Review*. In the High Court we only like to give so much excitement in any one year. I congratulate the Firm, the editor and contributors on an excellent production. I now declare the 2004 volume to be well and truly launched.