

Limitation of Professional Liability

A View from Australia

Oscar Shub

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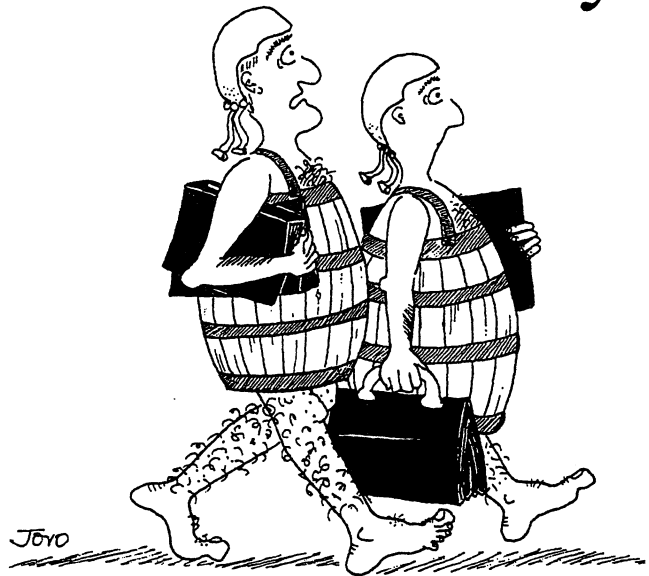
The New South Wales (NSW) Professional Standards Act, proclaimed in May last year, goes only part of the way to ensuring consumers are properly protected against professional negligence. The law aims to limit the civil liability of the professional. It also promotes the availability of reasonable compensation for consumers, affordable professional indemnity insurance, greater certainty on the limitation of actions and effective risk management.

While well meaning, the NSW legislation is hamstrung since NSW is the only State to have passed the law. National legislation is needed if the full benefits of this type of law are to be realised.

The NSW law aims at making sure that parties who suffer loss because of professional negligence get reasonably compensated. The Act links the limitation of liability with the level of insurance or the ability to pay of the wrongdoer. **Why should there be an Act which compensates to a reasonable level and not the full extent the damages flowing from the professional act?** *The answer: consumers are ultimately worse off.*

Professional liability litigation has risen over the last three years both in the number of claims and size of claims. This is due to developments in the law of negligence and greater awareness by consumers of their rights.

Litigation is also on the rise because of professional indemnity insurance. There is a greater community expectation that professionals should not make mistakes. This is particularly relevant to the medical profession where, for example, there has been a growing belief that mothers would have perfect children or operations be 100% effective. Many people do not see payment of their liability claim when something does go wrong as a cost borne by the community. Rather the view is insurance companies have bottomless pockets.



"If we go any bare, we'll be in Court for an entirely different matter..."

These developments have led to five problems.

- First, the growing difficulty of obtaining affordable professional indemnity insurance.
- Second, a trend by some professionals to practice defensive professionalism. This leads to added cost of the professional service through excessive testing and referrals.
- Third, the trend for professionals to leave or avoid those fields of practice which are high-risk, high-cost and low-profit areas, for example, auditing and obstetrics. In this case, consumers are the ultimate losers.
- Fourth, the prospect of being sued frustrates innovation and risk-taking in new areas. For example, the Institution of Engineers and Architects says the threat of litigation leads to over-cautious designs, avoidance of innovation and new ideas and inhibition in the use of new materials.
- Last, there is a tendency among professionals to protect themselves by 'going bare', that is, by divesting themselves of their assets and insurance in order to deter claims against them.

Is it better to have unlimited damages against a professional at a

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level which is incapable of being insured at reasonable rates and being paid by the professional? This leaves the consumer in an uncertain position. Or is it better to adopt the NSW approach in limiting liability? Limitation of liability to insurable and sustainable levels is nothing new. International conventions such as those in maritime and aviation law cater for liability limitation to be linked to the assets available to satisfy claims.

NSW is the only State to have such a law. Western Australia is considering a similar bill, and it is understood Queensland and possibly Victoria are contemplating similar laws. Having a law like this in just one State

leads to 'forum shopping', with claimants seeking a court somewhere in Australia where there is no limitation against the professional. This is an undesirable situation. Also, professionals can be sued under the Trade Practices Act. This is federal law giving the right to bring an action in a federal court. Anyone facing a limitation of liability in NSW could seek redress in the federal court under the federal legislation. It is not affected by the limitation.

It is understood that the Attorney-General, Mr Lavarch, is not considering federal legislation limiting liability. It might be that he thinks such law lets the professionals escape their liabilities. For the reasons outlined I think this is an incorrect assumption and an incorrect approach.

There are good reasons why parties

should be compensated. There are equally good reasons why that compensation should be at reasonable levels. It is becoming impossible and expensive for the community to maintain the levels of insurance required for some of the big damages pay-outs of the last few years.

A Professional Standards Act proposed in any State and federally should be supported by everyone, not just the professional or the insurance industry, but the community as a whole. It is beneficial to the community to have a scheme which promotes affordable professional indemnity insurance, the availability of reasonable compensation, certainty on the limitation of actions and effective risk management. It is in no one's interest to leave consumers without adequate redress for their injuries or to have highly-qualified and competent people deserting their professions.

Lawasia takes a room with a view

Local dignitaries, including the Administrator and the Chief Minister joined members of the Australian legal fraternity and representatives of the profession from Asia and the Pacific as well as diplomatic representatives of the region at the opening of the LAWASIA premises in NT House on Friday 1 March.



Left to right:

*Mr Zou Yu (President, China Law Society and Vice President of Lawasia),
Mr Malcolm Brown QC, The Hon Shane Stone MLA (Chief Minister),
Mr Donald Yap (President Lawasia), Mr Takeo Kosugi (Vice President Lawasia),
Mr Mervyn Encanto (Country Counsellor from the Philippines to Lawasia)*

The gathering was addressed by the President of LAWASIA, Donald Yap from Hong Kong. Mr Yap acknowledged with thanks those involved in the relocation of LAWASIA from its previous offices in WA.

He mentioned in particular the local committee responsible for the move, the government of the Northern Territory and the staff of the Attorney-General's department.

Mr Yap went on to give some background to the organisation, reminding his audience that LAWASIA had 22 member countries and five sections and was now thirty years old.

He paid tribute to its profile in the world arena, mentioning its links with the United

Nations and UNESCO.

The Chief Minister, the Honourable Shane Stone MLA, also made a short speech in which he noted that Darwin, whilst not pretending to be an Asian city, confirmed its role as the city with a view into Asia through links with organisations like LAWASIA.

This was supported by the the NT government's grant to the organisation, along with a the gift of a lease of the premises, previously occupied by members of the Legislative Assembly.

Mr Stone and Mr Yap unveiled a plaque to commemorate the occasion and guests were invited to continue the proceedings at a reception at Government House.

Public Purpose Trust Sponsors successful students

The Law Society's Public Purposes Trust has generously contributed \$4,000 to the cost of sending a team of students from the Law Faculty at NTU to the Australasian Law Students Association Annual Conference which was held in July at the University of Tasmania.

The NTU contingent were ranked second out of 25 competing universities in the Paper Presentation Competition and attained ninth place in the Mooting Competition. The NTU also participated in the Client Interviewing and Witness Examination Competitions.

In addition to the competitions, students were able to attend workshops and seminars on a diverse range of topics.

The conference was felt to be a very valuable exercise for NTU law students, in particular as a counter to the remoteness factor.

ALSA membership includes universities from Australia, New Zealand, Malaysia, Singapore and Papua New Guinea.

BALANCE

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