Inaugural Specialist Accreditation Conference
Friday 8 April 2005, 9am
Sheraton Brisbane Hotel
"Negligence – the impact of specialization"

The Hon P de Jersey AC,
Chief Justice

I am very pleased to open this inaugural Specialist Accreditation Conference.

The Queensland Law Society accredits specialists in a number of fields of law: family, immigration, personal injury, property and succession, and I am assured that accreditation is not available for the asking, but is granted only to those able to demonstrate real specialist qualification through a process of stringent examination. The Society must ensure that process is sufficiently demanding, for in accrediting specialists, it holds them out to the public as specially qualified. That involves considerable responsibility.

Comparably, I suspect referees are these days much more astute to the need for objectivity than was the position two or three decades ago, although as a sentencing Judge I wonder sometimes about those who with such glowing assurance find themselves able to vouch for the inherently decent character of those convicted of extremely serious criminal activity.

I am reassured the Society takes this initiative – its own – very seriously.

The public benefit which should flow from specialization is obvious enough. The need for it is a reflection of the reality that many fields of contemporary law have become potential minefields for not only novices, but also even experienced practitioners who have fallen behind in their assimilation of changes wrought by legislation and the case law. I commend the Law Society for using this conference to draw attention to those issues.

In preparing these remarks, I sought to learn a little of the contemporary indemnity insurance landscape. What trends have emerged over recent years? Which fields of practice account for most claims? What is the profile of the typical practitioner defaulter?

To what extent do negligent solicitors default again? Does the Society monitor the quality of the work of those against whom successful claims have been brought?

I was told that at least over the last eight to nine years, about half the notifications, and claims which have been met, concerned negligence in the realms of personal injury, and cottage and commercial conveyancing. I felt the involvement of personal injury claims unsurprising, in view of the procedural minefields created by the large legislative schemes now operating in that field. In respect of mortgages and securities, notifications have apparently been low, but payments out have been at a high level. We recall the publicity surrounding defalcation in that area in recent years. Of the other claims, wills and estates and family law had some prominence.

As to the source of notifications, it has rested mainly with smaller firms, sole practitioners or firms with one to three solicitors, but probably not too much should be drawn from that, because the fact is that virtually all the larger national firms are insured solely through either the New South Wales or Victorian schemes.

There are, unsurprisingly, repeat offenders. Practitioners who generate multiple claims often leave practice because of what are termed the "deductible" consequences of claims – currently $7,500, with a maximum of five per policy period, with also the possibility of the Society's penalty levy of $15,000 in relation to certain statutorily barred personal injury matters and claims arising from conflict of interest.

The Society has the capacity to audit a firm which has shown a poor claims history. The Society has not actively utilized that process in recent times, I am told, but may re-examine the desirability of that course in the future.

This is generally cheerless territory. The prospect of a practitioner damaging the client's interests through a lack of reasonable care is nothing but dismal. The essence of our mission being public service in abstruse arenas where the client lacks the necessary skill

to do his or her own work, the notion that the supposed expert's work may be flawed is deeply discouraging. But humanity does not equal perfection, and like ethical dereliction, negligence will sadly, but inevitably, recur. Our challenge is to minimize the risk.

Which brings me to the topic I am asked to address in this opening session, "Negligence – the impact of specialization".

Let me first remind you of some recent developments in the law as to a solicitor's professional liability.

In *Astley and ors v Austrust Ltd* (1998-9) 197 CLR 1, the High Court concluded that a solicitor's retainer implies a duty to exercise reasonable care and skill, and that the general law also imposes such a duty. What is reasonable is determined, not in a vacuum, but in the context of the specialized nature of the work to be accomplished; and the particular expertise the solicitor, with training and experience, might fairly be expected to bring to its accomplishment.

As the years have progressed, the increasing sophistication of society and the assiduity of our parliaments have meant the potential burden on the solicitor has increased. The *Personal Injuries Proceedings Act* 2002 affords a good recent illustration of that. Callinan J touched on another aspect of this situation in *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209. His Honour said (272-3):

> "In the last 20 years it is possible to point to many changes in legal thinking in and as a result of decisions of this court. There are also a number of decisions of this court on important matters in which different justices have taken diametrically opposed views. All of this is to highlight the increased difficulty which lawyers face in making decisions as to the way in which to conduct some complex cases and to advise their clients."

The report of the Ipp Committee has led to some recent statutory articulation of the test. The *Civil Liability Act* 2003 reinstated, with respect to professionals broadly, the test for

negligence established for medical practitioners in *Bolam v Friern Hospital Management Committee* (1957) 1 WLR 582, but with a modification. Under s 22 of the Act, which applies to breaches occurring on or after 2 December 2002, a solicitor will not breach his or her duty of care provided the solicitor acts in a way "widely accepted by peer professional opinion by a significant number of respected practitioners in the field as competent professional practice".

The modification to *Bolam* was introduced by subs(2) in excluding exculpatory reliance on any "peer professional opinion" considered by the court to be irrational or contrary to a written law. That reflects the position in the United Kingdom, as covered in *Bolitho v Hackney Health Authority* (1998) AC 232. Irrational in this context means incapable of withstanding logical analysis.

Against this background, we are here today to discuss the impact of specialization. It is axiomatic that a specialist should ordinarily render higher quality service in a particular field than rendered by a generalist, or by a practitioner lacking that heightened learning, experience and capacity. The question arises, in the field of professional negligence, whether the duty borne by the specialist solicitor, when applying or purporting to apply that speciality, is higher than would otherwise apply.

In *Yates Property Corporation v Boland* (1998) 85 FCR 84, the Full Court of the Federal Court said this (105):

> "When a client retains a firm that is or professes to be especially experienced in a discrete branch of the law that client is entitled to expect that the standard of care with which his retainer will be performed is consistent with the expertise that the firm has or professes to have."

That is consistent with the observation 25 years earlier of Megarry J in *Duchess of Argyll v Beuselinck* (1972) 2 Lloyd's Rep 172. His Lordship was contrasting the positions of the specialist and the generalist, and pinned the standard of care on reasonable client expectations. He said (183):

> "The essence of the contract of retainer…is that the client is retaining the particular solicitor or firm in question, and he is therefore entitled to expect from that solicitor or firm a standard of care and skill commensurate with the skill and experience which that solicitor or firm has."

In *Heydon v NRMA Ltd* (2000) 51 NSWLR 1, para 362, McPherson JA, as an acting Judge of Appeal of the Supreme Court of New South Wales, addressed the point with respect to the position of the now Justice Heydon of the High Court:

> "In terms of reputation and prominence, the defendants were and are among the leaders of the profession in the field of company law, and especially in Mr Heydon's case, trade practices law. This, it was submitted by Mr Sher QC, had the consequence that they were to be judged by more exacting standards than others of lesser ability in the same field of expertise; but that is plainly neither good law nor sound policy. It would penalize those who were better at doing the same work, and reward increasing proficiency with progressively heavier liabilities. There is only one standard, which is the standard appropriate to a member of the profession with the relevant specialist skills…",

and His Honour cited *Duchess of Argyll v Beuselinck*.

The end position is that what may reasonably be expected of a specialist solicitor, retained in that capacity to do work within the field of his or her specialty, takes account of that speciality.

Now obviously this does not mean that one eschews specialization because a particular standard is in practice expected. Specialization means a higher standard of public service. It also undoubtedly engenders stronger self-fulfilment in the practitioner. But it should also reduce, commensurately with the extent of the specialization, the risk of tortious breach.

Looking at the obverse, it is plainly of great importance for a practitioner not to take on work beyond his or her capacity, but that should not give rise to undue timidity where the capacity exists. Where the capacity is lacking, it is not only potentially negligent, but in my

view unethical as well, for the practitioner to act. As said in *Vulic v Bilinsky* (1983) 2 NSWLR 472, 483:

> "…If a solicitor inexperienced and lacking knowledge in the field accepts instructions to act for a person injured at work, he should inform the client of his lack of experience and give the client the alternative to instruct a solicitor who has a degree of experience and expertise in that field. At the very least, if such an inexperienced solicitor wishes to accept those instructions he should protect himself and his client by seeking advice from counsel, and this means the furnishing of proper material to counsel upon which advice might be given."

As to the bar, its ranks include advocates attuned to the landscape of court procedure, but as well, many who have attained high level speciality in areas which, if not abstruse, are at least complicated. Even long ago when I was at the bar, there were specialist solicitors whose aptitude in particular arenas was unrivalled. But now, even the highly specialized solicitor will still be astute to the involvement of counsel where that may benefit the client.

Having entered upon the field of professional negligence today, I should for completeness make brief mention at least of two very recently reported decisions out of the United Kingdom. Each is reported in the 18 February part of the Weekly Law Reports.

Moy v Peetman Smith (2005) 1 WLR 581 concerned the liability of a barrister in relation to door of court advice to a client, in the context of a finding that the briefing solicitor had been negligent. The House of Lords reversed the Court of Appeal's finding of negligence against the barrister, and its approach recognized the minute by minute exigencies of the situation confronting a barrister required to make a quick decision. (Mention may also be made of the recent High Court decision of *D'orta-Ekenaike v Victoria Legal Aid* (2005) HCA 12 upholding *Giannarelli v Wraith* (1988) 165 CLR 543 as to Counsel's immunity.)

Hilton v Barker Booth and Eastwood (2005) 1 WLR 567, concerned a solicitor's conflict of interest styled by the House of Lords as "particularly shocking". The errant solicitor acted both for the claimant in a property development scheme, and the third party, who the

solicitor knew – but the client did not know – was a convicted fraudster. The solicitor facilitated the claimant's commercial dealings with the fraudster. Differing from the Court of Appeal, the House of Lords took the view that the solicitor, having put himself into a position of impossible conflict, should have disclosed the fraudster's criminal past to the claimant. As pithily put by Lord Walker (p 580): "…if a solicitor is unwise enough to undertake irreconcilable duties it is his own fault, and he cannot use his discomfiture as a reason why his duty to either client should be taken to have been modified".

Each set of reasons is plainly worth reading. Commercial considerations may insidiously encroach on our traditional professionalism. I say that recognizing an ideal of utter public service. It would be absurd not to acknowledge the encroachment of business considerations. The weak-kneed among us must be jerked back from time to time in salutary fashion.

Let me revert more directly to the role of the specialist lawyer. The law has become so diverse and complex that even in the comparatively relaxed atmosphere of tertiary courses spanning some years, law school curricula can focus only on core subject areas. No one admitted to practice could claim to command knowledge of and expertise in all fields. The days of the "all rounder" are well and truly over. That aside, it has long been the pattern for practitioners, and firms, to concentrate on particular areas, presenting themselves as notably qualified to work in those fields. The accreditation in issue today constitutes a step or steps beyond that platform.

None of this detracts from the high standard of performance which equates to "reasonable care" on the part of every practitioner. I was rather intrigued by the court's need, in *Vulic*, to confirm that even an inexperienced solicitor should in an unfamiliar field be aware of, or take the trouble to ascertain, an applicable limitation period.

In summary, the potential impact of specialization on the part of solicitors is broad and varied: enhancing the quality of services delivered by the practitioner; reducing claims in

negligence, with, in theory, the prospect of a reduction in professional indemnity premiums; and higher levels of achievement and thence satisfaction and fulfilment for the practitioner.

The formalization of the continuing legal education requirement for the granting of practising certificates has been a most desirable consequence of the new regime introduced by the *Legal Profession Act* 2004. I was delighted to hear of the uptake rate at the recent advocacy skills seminar run by the Bar Association. My own Bar Practice Course final lecture recently rated, for professional development purposes, only one point, I am told, but I humbly accept that evaluation. This seminar exemplifies the Society's commitment to this goal so critical to the good working of our profession.

It is reassuring to me, and should be encouraging to the community generally, to recognize the determination of lawyers to hone their skills to optimal levels. Lawyers are now effectively obliged to participate in ventures like this. But as a long-term participant myself, I know that an interest in continuing expert education is part of the legal culture: out-of-date credentials are pointless – absolutely so far as the client is concerned. I believe those who participate do so in a spirit of true professionalism – not only to accrue points. That is what my own professional observation would suggest.

I compliment you on your participation, and have pleasure in formally opening this conference.