

Due Diligence & Liability

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The subject of this discussion is entitled *professional due diligence and liability*. I note from material that I have been provided with that you as a professional group are concerned about your liability when acting in your professional capacity. You have asked that a barrister discuss this topic and it should be remembered that barristers are at the end of the chain in respect of liability to professionals and once you are in their hands you are unlikely to escape unscathed. Because barristers are at the end of the chain their knowledge is a necessity of decisions of the court in individual cases. They tend to relate anecdotal evidence usually in past cases they have actually appeared in and I am afraid I will probably be no different.

It should be remembered, however, that the ultimate arbiter of whether or not you have acted with professional due diligence and whether or not any liability attaches to you so that what I am going to say relates to the way courts are approaching the problem. Sometimes courts approach the problems in a completely different manner to the professionals within an industry itself and I am going to suggest to you that the approach taken by courts is the only approach which will protect you from liability for your professional actions.

What I am going to say today relates to all aspects of your professional work. It does not matter whether you are advising in respect of a small household development or a multi-storey project, a factory or a roadway the same rules apply. The only difference is that it is likely to be more expensive if you fail to act professionally on big projects rather than little projects.

You will see that I have not confined the discussion solely to professional indemnity. Although this is a most difficult area for professionals to grasp there are other areas where liability can arise which can be equally expensive to deal with unless you are careful. Some of these areas may seem obvious but I can assure you that a very large

percentage of claims against professionals, such as yourselves, do not arise out of what is termed professional indemnity instances but arise out of other areas.

The first thing to consider is just what is covered by the terms “professional due diligence” and “liability”.

Due diligence is often used in the corporate sense to describe the necessity for a company who is attempting to purchase another company to carry out a detailed search of that company to identify its value. In respect of lawyers, it simply means that a barrister should exercise his knowledge in investigating and advising in accordance with the known law at the time as would be expected from a person with knowledge or training acting reasonably. There is no difference in respect of ecological consultants it simply requires you to act in accordance with your training and knowledge and to make certain that that training and knowledge is up to date at the time you give the advice. It is the latter part of the equation which is in this day and age of great importance.

Liability is much easier to define and that applies to everyone including all those present in this room down to those who are providing us with food and drink.

The concept is simple. Everyone has a duty to act reasonably towards his neighbour in a wide sense. Everyone can be found to be liable if it is considered that they have not acted reasonably in their contact with others (*Wyong Shire Council v Shirt* 1980 146 CLR 40). In practice it means that each person depending upon their position, knowledge and status may have a liability to another if they do not act reasonably in accordance with their status, standing and knowledge.

Liability is not restricted necessarily to the actions of an ecological expert in relation to their specific field of expertise. Your responsibilities are much wider than just dealing with your expertise in the particular field. Whilst your expertise may make you more vulnerable in certain areas it should not be forgotten in conducting your businesses,

there are other areas of liability where you along with the rest of the population may become liable.

There are five areas where you may be found liable to other persons for your actions. In some of these areas you will become liable because of what might be described as a failure of due diligence. In others it will not be so clear. All of the five areas require separate consideration as to how the liability might arise and how the liability can be avoided and whether or not you can be protected from that liability by the means of insurance. The five areas are:-

- (a) Professional indemnity
- (b) Risks to the public at large
- (c) Risks that occur under contract
- (d) Risks that occur in respect of the employment of persons (Workers' Compensation)
- (e) Risks associated with motor vehicles.

The starting point in respect of any question of liability is the Common Law duty of care. This is the duty that may simply be defined as an obligation recognised by law to avoid conduct which creates unreasonable risk of danger to others. The classic formulation of the duty is found in *Donoghue v Stevenson* 1932 AC 562.

This duty has been codified by various Statutes and in New South Wales those Statutes are:-

1. *Civil Liability Act 2002*
2. *Workers' Compensation Act 1987* and its various component Acts
3. *Motor Vehicle Accident Compensation Act* (the "MAC Act")

These Statutes have counterparts in the other States and Territories.

How do these risks arise and how can they be dealt with?

It is necessary to make sure that we understand what each risk is and how it arises.

Professional Indemnity

Professional indemnity covers those actions which are directly related to your profession. They include but are not limited to the provision of specialist advice and the carrying out of activities of a specialised nature which are directly related to your training or profession. A policy of insurance to cover such risk should be taken out on a yearly basis and should cover the claims made during the currency of the policy irrespective of when the act of negligence may have occurred. For this reason, it is essential to maintain a policy on a year to year basis including a policy which covers run off when you cease practice in your profession.

Public Risk

This covers claims which may arise from your occupation of the premises, building or construction sites or any area of which you have control. It may also arise from your conduct in the manner in which you carry out your professional duties.

Contractual Liability

This as it says, covers liability which may arise under the terms of contracts which you have entered into with other parties. Claims arise solely because of contract and do not necessarily arise because of a Common Law duty. The risks generally arise in the terms of a written agreement but may also arise in respect of oral agreements.

Employment

If you employ persons, then you have a duty of care to those persons to provide a safe place of work and a safe system of work. If you breach this duty then you may become liable to your employee.

Motor Vehicles

A special liability arises if you are the owner or driver of a motor vehicle which causes injury to a person. A second liability arises in respect of liability for damage to property which arises out of the negligent use or operation of a motor vehicle.

Do I need to protect myself from these liabilities?

Injuries to employees and personal injury arising out of motor vehicle incidents are covered by Statute and the policies are Statutory policies of insurance which in both cases you are required to have as a matter of law. If you don't have this type of policy then in both cases it is likely that you will be required to meet the whole of the claim from your assets and in the case of Workers' Compensation, subject to a fine.

The three other types of risk may be covered by insurance but that is a matter of personal choice and the policies of insurance which cover those risks may vary considerably from insurer to insurer. Some professional bodies have their own insurers (eg solicitors and the medical profession). Others have their professional bodies review any policy of insurance purporting to cover their members and advise them accordingly as to which policy may be appropriate to cover them. In respect of barristers the policies must comply with the *Legal Practitioners Act* and our professional body checks that they do. Some insurers issue composite policies which may cover all of the risks set out above in one policy.

If you need assistance then an insurance broker is usually capable of providing assistance and of course we lawyers would love to help.

There are some golden rules:-

1. Make sure you inform the broker, insurer or whoever they may be, the precise nature of the cover that you need including any contractual arrangements involved in the cover. It is a good idea to put the requirement in writing or at least have a broker or adviser assist you in putting it in writing.

2. Make sure you understand any exclusion clauses contained in the policy. If you receive more than one quote for the insurance and there is a considerable difference between the quotes, the reason is likely to be found in the exclusion clauses.
3. Make sure the policy has the correct name of the insured. This may surprise you. However, a large number of claims are rejected because the insured is a different entity to the person who has been sued in respect of the risk.
4. Related to the above is to make sure that the insured named in the policy includes any other related parties.
5. Be careful when completing proposal forms. It is better to over estimate than it is not to disclose. The bigger the claims the more closely an insurer will look at the proposal forms and decide whether it will deny indemnity. A recent example of this can be found in *CGU Insurance Limited v Porthouse* 2008 HCA 30 July. Here a barrister had been sued by a client and the barrister had won. Between when the Court handed down its decision and the time for expiry of the filing of an Appeal, the barristers professional indemnity insurance became due and a proposal form was completed indicating that the barrister knew of no likely potential claim, his client appealed and won the barrister being found to be liable. The insurer denied indemnity on the basis that this potential claim should have been notified. The High Court said that the insurer was right.

Should I have cover at all?

The answer to this is yes and I am sure other speakers will be only too happy to tell you why.

How does your liability arise?

Put simply, liability will arise if you, or persons under your direct control do something wrong which causes a loss to some other person or party. It has its genesis in principles which arose in the 19th century and were further refined in the 20th century to the principle which is now widely understood as the duty of care to act reasonably in respect of your neighbour. *Who is your neighbour and what is acting reasonably* will engage lawyers in serious debate for days on end. The classic cases are *Donoghue v Stevenson* and on acting reasonably *Wyong Shire Council v Shirt*.

The liability may arise from your actions but you also may have liability which arises under contract for which different rules will apply and which particularly may in the fields in which you are advising become extremely important.

Can I avoid claims?

The answer to this is yes. Most claims can be avoided. Lawyers are very good at telling people how a claim could have been avoided with the wonderful knowledge of hindsight. However, the exercise of common sense and a little caution will reduce the risk of all types of claims being made. There are some golden rules which apply generally:-

1. Make sure that you understand what it is that you have been asked to do. Make sure that your skill and expertise will enable you to do the task required.
2. If you have any doubt whatsoever about what you are going to do, and even in the most simple cases, a written document setting out any agreement will save a lot of problems in the future.
3. Do not accept any verbal explanation of, or alteration of, a written contract that you are being asked to enter into. Ask for any alteration or explanation to be in writing. Even if this writing is as simple as an exchange of emails. Again, it will save a great deal of difficulty.
4. Read any contract or agreement into which you are entering carefully, particularly in relation to the definition clauses. If the clauses in the contract are vague or

give rise to different interpretations make sure that you and the other contracting party understand and agree upon an interpretation.

5. Keep records, a written document is much more valuable to establish fact than trying to remember what may have happened years ago. This is particularly important when you are trying to remember whether you actually carried out your usual practice or not.
6. Be careful about what is said in verbal exchanges and indeed in emails, which tend from my experience to be “chatty” and therefore inclined to be misconstrued.
7. If an incident occurs try and make contemporaneous notes, particularly identifying places, persons and other relevant information such as weather conditions.

These rules apply to all of the situations that you may find yourself in. Each individual area however has its own rules.

Professional Indemnity Claims

The basis of a professional indemnity claim is that you have done or failed to do something which a person with due skill and training should have done or it has not been done in accordance with that skill and training and someone has suffered a loss as a result of your actions. Thus a claim against you will have its genesis in two areas:

- (a) Your expertise
- (b) Any agreement to perform a task.

Expertise relates not only to the tertiary qualifications which you may have, but also relates to your actual practical experience. Most of you will have lengthy CV's which usually enable you to have had experience and been involved in just about everything to do with ecological subjects. Be careful however because sometimes your expertise may simply be limited to attending a seminar on a particular subject. This would not necessarily make you an expert but you have held yourself out to be one by reason of

your CV. Be certain that you really do understand the subject you are being asked to investigate and if you have any doubts qualify your opinion either in any report that you make or even before you take the job on.

Do not rely upon other experts to provide information unless you acknowledge that you have done so. It can be very difficult if you have to acknowledge that you have sought advice from someone else when trying to explain your opinion either to your client or to a court.

It is important to inform your client if there is an area where you feel further investigations should take place whether by you or by someone in another field. Make sure you keep up to date with thinking in the profession, particularly if there is a controversial issue and if you are going to advise outside the industry standard at the time. If you do this without qualification or acknowledgment of the contrary opinion you may find yourself outside the protection of the law.

The reason for this approach lies in the *Civil Liability Act 2002*. Section 5.0 says in respect of standard of care for professionals:-

1. *A person practising a profession (a professional) does not incur a liability in negligence arising from the provisions of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional advice.*
2. *However peer professional opinion cannot be relied on for the purposes of this section if the Court considers that the opinion is irrational.*
3. *The fact that there are different peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purpose of this section.*
4. *Peer professional opinion does not have to be universally accepted to be considered widely accepted”.*

The medical profession has been unduly over-represented in matters relating to professional negligence. Probably the most well known case is *Rogers v Wittaker* (1992) 175 CLR 479. As you can see from the draftsmanship of the section it contains wording which will no doubt engage the legal profession for many years to come. The consideration by the Court of whether a professional opinion is irrational will make for lengthy argument. Likewise, the question of the difference between being “*universally accepted*” and “*widely accepted*” will occupy the minds of students of the English language. At the present moment, there have been few attempts by the Court to solve these issues. In *Vella v Permanent Mortgages Pty Limited* [2008] NSWSC 28 May 2008 Mr Justice Young in the New South Wales Supreme Court made a valiant effort to deal with the section in relation to the common terms used in lease agreements. In *Dubler v Halverson* [2007] NSWCA 20 March 2005, the Court of Appeal dealt with the section in respect to a medical practitioner and in particular, general practitioners and what might be expected as to be their widely accepted practice. The Court tried valiantly to come to grips with the meaning of the term but in the end decided the case on the basis that both the Plaintiff and the Defendant’s evidence showed accepted practice but that the Plaintiff’s evidence should be accepted rather than the Defendants. The Court did not set out to define the meaning of *widely accepted practice*. There are many arguments to be heard probably before that occurs.

In *Makita v Sprowles* (2001) NSWLR Justice Heydon in a wide ranging decision on expert evidence, said this:

“Thus it is not permissible to conclude simply because a person expresses an opinion on a particular subject, referring to particular technology that that person has any specialised knowledge in relation to that subject. There must be specific evidence as to specialised knowledge of the person in relation to that subject and as to the training, study or experience Upon which that specialised knowledge is based.

The further requirement that an opinion be based on specialised knowledge would normally be satisfied by the person who expresses the opinion demonstrating the reasoning processes by which the opinion was reached. Thus, a report in which an opinion is recorded should expose the reasoning of its author in a way that would demonstrate that the opinion is based on

particular specialised knowledge”.

The case is worth reading for other aspects of the role of experts providing professional opinion however for the purposes of this paper do not undertake projects outside your field of expertise otherwise you may well come to grief.

If you have persons working for you, either as employees or sub contractors carrying out any form of activity in relation to your expertise make sure that those persons also have the expertise that is required to perform that part of the agreement. I am sure that you can think of many examples where you may have untrained persons working in the field with you and you request them to carry out searches of areas. You must make certain that they understand what they are looking for even in the most basic of situations. If they are not properly trained to carry out those searches you will be responsible.

It follows that you should look carefully at the terms of any retainer that you have and do not assume responsibility for matters outside your expertise and control.

It should go without saying that you should not provide a report which support your client's needs, but which if subject to challenge will show that your professional expertise is at risk. Your own professional integrity is of course a most important part of any professionals existence. There is often a temptation however to tailor that opinion to the wishes of those who foot the bill. If you have any doubt at all you must in my view qualify your opinion, not only to protect your own integrity but to prevent you finishing up as a cross defendant in litigation if the persons have relied upon your opinion.

It is a simple matter when preparing reports to state what information you have been provided with and that you have accepted that information as at the date of the report as being correct. If you have had to assume certain factors, then note those assumptions. If there is information missing, then this also should be noted.

In fact you are required if giving evidence in court proceedings to comply with the Code of Conduct of experts under the Uniform Civil Procedure Rules current in the New South Wales Court.

These steps are relatively simple but you would be amazed at the number of times that experts of all varieties do not carry them out.

Public Risk

The first rule in avoiding claims under a public risk policy is to use common sense. Some of you may work from home, some will no doubt work from offices. Wherever you are, make sure that the premises where persons, be they clients or members of the public, are able to enter, that are under your control, are safe. Be careful when in the field with equipment. Do not leave tools or equipment in areas where the public are likely to be and where they can fall over them or handle them and receive injury. Even though you may not have control of the area in which you are working, you may still be responsible for your conduct in that area.

The question of how far this responsibility goes will often be determined by the contract under which you are performing your duties. However, if it relies upon Common Law it comes down to the question of control. If you control a piece of machinery then you are responsible for accidents caused by it. If you control an area of land or of a building then you are responsible for it. A basic rule as to whether you control or not is whether you have the right to exclude persons from the area in question. If you are working in an area and need to make certain that nobody else goes in there, make sure that there are signs indicating that factor. You must make certain that any signs and barriers are suitable and that they can be understood by a person who may be entering the area. It becomes very difficult in respect of children. There are a litany of court cases over what is reasonable signage and what is not.

Above all, remember to keep notes and records of any particular incident. This includes incidents where you have people slipping and falling and who initially say that there is

no problem. That may be the case until they go and see their local personal injury lawyer.

Contractors All risk policy

Breach of contract may take many forms but as I have said before in this paper these claims can be avoided by making sure that you understand the terms of your contract.

The majority of claims against professional persons such as yourselves arise from accepting contracts which require you to indemnify your head contractor or your client from any liability which may arise from anyone else's negligence, including your own. The clauses in the contract often require you to note under your public risk policy in particular the interest of the head contractor and have him covered by your policy on any particular job. Often you do not convey that requirement to your insurer or your broker and it is essential that you do so and have your policy of insurance endorsed. If you don't do this, you will be in breach of your contract and none of the other policies will pick up the claim.

The second problem under the terms of a contract which often arises is where the principal or head contractor decide that the terms of the contract will have you virtually act as not only your own insurer but the insurer of the head contractor as well. I have one piece of advice in respect of that type of clause: *do not sign it!* Only sign contracts which require you to cover your own negligence or that of your employees under the terms of any agreement.

The third area of problem that I have dealt with above is make sure you understand the contract and make sure the contract in written form expresses what you understand to be the agreement.

Make sure that if there is any variation in the parties to any agreement that the alterations are noted in the policy. It does not cut a great deal of ice with insurers if they have been insuring company X but the contract is with company Y because someone

has changed the name. It is even more likely to cause problems if you have been for instance acting as a sole trader and then again change to some other form of trading.

Workers' Compensation

Workers' compensation stands in a different light to claims under policies to which I have already referred. At Workers' Compensation there is no question of fault. It is just solely whether the injury occurred during the course of a person's employment and arose out of that employment. There is no question of liability for the payment of compensation attaching to the person other than by this means. However, you may still be liable as an employer at Common Law for damages if you have been negligent. In the present climate very few cases against employers are to be found. This is because the *Workers' Compensation Act* has restricted recovery by injured workers at Common Law to loss of wages. The amendments to the Workers' Compensation Act in 2002 were for the purposes of attempting to remove in its entirety the worker's right to sue at Common Law. Thus, you will mainly be faced with claims under the *Workers' Compensation Act* for compensation and not damages.

Why should you worry about these claims given that you have Statutory protection? The reason you need to worry about these claims is because two things occur if a claim is made. One is that it immediately affects the premium that you pay in a very substantial way and the second problem is that it gives rise to prosecution under the *Occupational Health & Safety Act* for which your insurance policy will not indemnify you.

Discussion of the *Occupational Health & Safety Act* and its provisions are outside the scope of this talk but it is an area where employers face almost impossible odds in defending any cases which are usually based on the very simple view of employers set out under s 8 of the Act.

Compliance with the Act is the province of the WorkCover Authority and there are a myriad of requirements which are available in publications provided by the authority. You need to comply with all of these requirements. You further need to make sure that those who control the site upon which you and your employees might be working also

comply with the Act. Your duty of care as an employer is non delegable so that if you notice that your employees are required to work under conditions which are in breach of the Act then it is your responsibility to make certain that they do not work under those conditions and that the conditions are varied to comply with the Act.

It can be very painful for an employer to be hauled into a prosecution under the *Occupational Health & Safety Act* simply because he did not check with the fact that the set of steps which his employees had to use to gain access to their worksite complied with the Act.

The Act provides specific requirements in relation to training. As I have set out above, training is important in respect of the knowledge that your employees might have to carry out the various tasks. It is also important in relation to training persons to carry out any activity even though it may not be directly associated with your profession. For instance, do not suggest to an employee to drive a truck, or for that matter any piece of machinery even for short distances if he or she does not have the required licences. This may get you into trouble with various insurers as well as the WorkCover Authority.

Motor vehicle insurance

There is not a lot I need to say about avoiding liability in respect of motor vehicle insurance claims. At least you do not have the problem with third party insurance that claims will necessarily affect the premium. This may not be the same with property damage claims but at least there is one area of the insurance industry which does not subject you to an increase in premium.

In concluding you all have liabilities. As I have set out above you can avoid those liabilities to some extent by taking the steps that I have outlined above. You may all be very familiar with the steps that I have indicated but luckily for insurance lawyers such as myself, familiarity breeds contempt or alternatively people perhaps do not know as much as they thought they did, and therefore I am kept in business. Apply the golden

rules that are set out at the beginning of this paper and you will hopefully avoid having a discussion on liability in a witness box.