Comment

Legal Liability and Professional Responsibility[†]

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It gives me particular pleasure to open the *Sydney Law Review*'s seminar on "Legal Liability and Professional Responsibility". The *Sydney Law Review*'s decision to publish quarterly and to adopt its new format is possibly the most exciting development in Australian law journal publishing in recent times. The new format is in essence a consequence of the decision to publish quarterly. Quarterly publication entails an emphasis on what is contemporary and current. It necessitates a departure from the traditional journal format usually consisting of a clutch of four prolix articles, not always having a powerful claim to contemporary relevance, followed by random case notes and out-of-date book reviews published when the book has fallen into the maw of the remainder men. Issue three of volume 13 illustrates the point. The issue contains no less than nine succinct articles, all but one dealing with issues that are alive and awaiting solution sooner rather than later.

I am glad to say that the *Review* now devotes space to cases pending in the High Court. Quarterly publication makes that possible now that the special leave procedure enables a publisher to identify the interesting appeals and the issues to be argued. As a judge I have always marvelled at the sagacity and perception of academic lawyers who make their views known after, not before, the High Court has delivered its judgment. How much better it would be for the Court if it had the benefit of these views before judgment, preferably before argument. The *Review* now provides that opportunity, just as the *Law Quarterly Review* has done for many years, though mainly by means of editorial comment upon decisions under appeal. I hope that the opportunity is taken up. After all, on points of pure law, the writings of the Roman jurists were more influential in Roman tribunals than the arguments of Cicero or Hortensius; the magistrates before whom they appeared were not so learned in the law. Mind you, I am not suggesting that we should elevate our academic lawyers to the status accorded to the great Roman jurists. Nor is it my intention to debase the role of counsel to that of Cicero and Hortensius. All that I am saying is that it would be helpful if, from time to time, we had the advantage of reading a reasoned and critical appraisal of the judgment under appeal in the form of an article or note in a law journal. Not every case, even in the High Court, is argued with consummate skill and ability. So I congratulate the *Review* on its new approach, one which may yield real benefits to the Court and to the development of the law.

That brings me to the business of this seminar. Legal liability and professional responsibility is a large and amorphous topic. Perhaps that is the reason why it has been chosen, so as to allow the speakers to give free rein to their inclinations without subjecting them to the tyranny of relevance.

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Professional responsibility and liability is amorphous precisely because neither the common law nor equity has evolved a series of principles specifically fashioned for the regulation of professional conduct. Instead, our law has proceeded on the footing that rights, obligations and liabilities, with respect to professional conduct, are to be ascertained by reference to the application to such conduct of general principles of law capable of universal application. Thus, the liability of the professional person to his or her client falls to be governed by the law of tort and contract and now s52 of the *Trade Practices Act*, not by reference to a statutory cause of action notably directed to professional misconduct.

Of course, the duty of care as well as the standard of care and the contract with its implied, as well as its express, terms are susceptible of infinite adjustment to a vast range of situations and to the circumstances of the individual case. But, to say this only serves to emphasise that we are dealing with generalised principles and concepts that have been shaped with many other targets in mind.

That our law should have developed in this way is a little surprising. We have been told that the dominant feature of modern English society (and for English society we can confidently substitute Australian society) has been the rise of professional society since 1880.[1] The ascendancy of professional society is said to have prevailed until the 1970s when it went into decline, the consequences of which are evident in the criticisms now so often made of the medical and legal professions. One might have expected that, with the elevation of the professional class to a position of prominence in society at the turn of the last century and subsequently, our law would have evolved in a way that would have imposed special obligations on professional people and provided them with special protection. The immunity of the barrister from liability in negligence for misconduct of the client's case in court[2] is an instance of the specific rules which might have been introduced on a grander scale. Perhaps the rule in *Munster v Lamb*[3] that judges, legal practitioners and witnesses in legal proceedings have an absolute privilege in respect of defamatory utterances in court proceedings is another instance. And the decision in 1918 in *Banbury v Bank of Montreal*[4] to the effect that the branch manager of a bank had no actual or ostensible authority to advise a customer on investments proceeded on a narrow view of a bank's activities and responsibilities.

In other respects the general principles governing liability in tort were not unfavourable to professional advisers. In 1889 the historic decision of the House of Lords in *Derry v Peek*[5] denying liability in negligence for damage caused by a negligent mis-statement or misrepresentation conferred a valuable protection on professional advisers until it was overruled in 1964 by *Hedley Byrne & Co Ltd v Heller & Partners Ltd.*[6] At the same time professional advisers were protected by the so-called rule that damages for

1 See, generally, Perkin, H J, *The Rise of Professional Society since 1880* (1990).
2 See *Gianarelli v Wraith* (1988) 165 CLR 543.
3 (1883) 11 QBD 588.
4 [1918] AC 626.
5 (1889) 14 App Cas 337.
6 [1964] AC 465.

economic loss could not be recovered. That barrier to professional liability was dismantled in 1976 by the decision in *Caltex Oil (Aust) Pty Ltd v The Dredge "Willemstad"*.[7] The consequence was that in a short space of time professional advisers became exposed to liability on a large scale for economic loss caused by negligent mis-statements or misrepresentations.

These developments have played a significant part in the escalation of the potential legal liability to which professional people are now exposed. In the United States and Canada the increase in medical malpractice litigation has increased to an astonishing extent and has resulted in very large verdicts in a number of cases. In turn, this has brought about a rapid increase in insurance premiums and, it is reported, to the adoption of practices euphemistically called "defensive medicine".[8] The end result is a sharp increase in the cost of health care and a perception that medical practice is a less attractive occupation than it used to be.

Similar examples may be given of the impact of common law liability on accountants, auditors, solicitors and engineers. In each instance there is the possible risk of a potential liability against which individual professional people may be unable to insure, except at a level of premium which is prohibitive and which will add significantly to the cost of the service provided.

Just what are the best answers to these problems is by no means clear. But one comment that should be made is that the general principles of law governing liability for negligent words or conduct, whether professional or otherwise, do not take account of the consequences to which I have referred. This is one important area in which the legal rules applied by the courts, often but not always judge-made rules, may well have significant economic consequences for the community, consequences which the courts cannot and do not measure in deciding particular cases.

The distinctive and idealistic claim of the professional is that he or she offers a service that is expert in the sense that it is the product of special skill and knowledge and fiduciary, in the sense that it is provided for the benefit of the client and in the interests of the client, and not in the interests of the provider, except in so far as the provider receives a reasonable remuneration for the service rendered. Generally speaking, it is, or at least was, a characteristic of the professional service that the client or recipient lacks, or lacked, the requisite skill and knowledge to assess its competence and worth and therefore is, or was, forced to take it on trust. Sir Owen Dixon put the idealistic claim even more highly when he spoke of "the essence of a profession" as "an art".[9] He went on to say:

> The art must depend upon a special branch of organized knowledge and be indispensable to the progress or maintenance of society, and the skill and knowledge of the profession must be available to the service of the State or the community.

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7 (1976) 136 CLR 529.

8 See Dickens, B, "The Effects of Legal Liability on Physicians' Services", (1991) *Uni of Toronto LJ* 168.

9 Sir Owen Dixon, *Jesting Pilate*, (1965) at 192.

Anthony Trollope, the novelist, was more cynical, describing[10] a profession as "a calling by which a gentleman not born to the inheritance of a gentleman's allowance of good things might ingeniously obtain the same by some exercise of his abilities".

In the halcyon days of professional pre-eminence, professional services were accepted at face value, no doubt partly due to a general willingness to accord respect to the skill and knowledge professed by professional people in the exercise of a discipline which, to the lay person, was esoteric if not arcane. Attitudes have changed. The halcyon days have given way to weather of a more inclement kind. Professional services are no longer accepted at face value. Indeed, there is a general willingness to sue the professional if the service is thought to be below standard and to be causative of loss or injury.

The reasons for this change of attitude are varied and complex. Fortunately, this is not the occasion to identify them. But, beyond any question, one of the reasons is a community perception that professional services as rendered no longer measure up to the professional ideal as I have stated it. It is equally beyond question that some professional people have, by their actions, contributed to the formation of that perception. At the very end of his paper, Professor Finn has referred to the comment of Sir Owen Dixon that, by the failure of a profession to maintain high standards of conduct, the trust and confidence of the community is forfeited.

The organisation of professional services, notably law, medicine and accountancy, on a commercial basis has deprived them of much of their mystique. More to the point, it has contradicted the essence of the time-honoured professional ideal which set much store in the notion of service to the individual and the community rather than the pursuit of profit, that being the hallmark of trade and commerce. The emergence of megafirms of solicitors and accountants seeking commercial clients rather than individuals, and offering a range of services and fees to match, may give the public the impression that they are as interested in profit-making as the clients they seek.

There is also a concern that professional advisers might have done more to shield the community from the corporate collapses with which we have been recently beset. In the past, one had come to expect that professional people — bankers, auditors and lawyers — acting responsibly, giving sound prudential advice and making accurate considered reports, would act as a brake on the kind of commercial adventurism that has taken place in this country on such a large scale. In the absence of a reliable and comprehensive account of the role played by professional advisers in the transactions which led to these catastrophic events, we cannot answer the questions whether there was a departure from prudential standards; if so, on what scale and whether it played a significant part in the ultimate outcome. There seems to be evidence to suggest that banks departed from the prudential standards that had formerly governed their lending and monitoring activities. And, from what we have read of the collapse of the savings and loans corporations in the United States,

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10 Trollope, A, *The Bartrams*.

we know that pointed questions have been asked there about the performance of auditors and attorneys.

The fact is, regrettable though it may be, that professional advisers are subject to pressures of a kind not experienced many years ago. The firm of solicitors or auditors, who acts for a very large group of companies, stands to lose a great deal if the giving of unpalatable advice or the delivery of a report containing an unwelcome qualification leads to the loss of the group as clients. Our expectation has been and still is that this consideration will not affect the quality of the advice or that of the report.

What I have said relates to some of the substantial problems which beset the professions. Perhaps these problems are not reflected in the precise legal issues to be discussed at this seminar. As I see it, the legal issues concern the application to professional people of legal principles and concepts which range more widely. Curiously enough, the application of these principles does not depend upon whether the defendant is a professional. That interesting question is not a relevant legal issue because the status of the defendant as a professional is not an essential element in the formulation of the principles of legal liability. That is just as well because we have not been able to articulate an acceptable definition or even an acceptable description of a profession. Our inability to do so may be attributed to the changing denotation of the concept. Initially confined to law, medicine and the church, it now extends more widely to bankers, accountants, architects, engineers, arbitrators and a host of other occupations. Real estate agents, realtors as they prefer to call themselves, assert that they are professionals. I very much doubt that Sir Owen Dixon would have accepted the validity of that assertion but nowadays we would have little difficulty in recognising that valuers constitute a profession. Perhaps that is because the liability of valuers is a well-recognised instance of professional legal liability. Our notion of a profession is largely influenced by the spirit of the age in which we live. It is a mistake "to treat profession as if it were a generic concept rather than a changing historic concept, with particular roots in an industrial nation strongly influenced by Anglo-American institutions".[11]

For fairly obvious reasons I should refrain from discussing live questions which will be considered in the papers to be presented. As the expression "cones of silence" had its origin in high farce, I can scarcely credit that it now gives rise to a serious legal question. I cannot afford to be so dismissive of "Chinese walls". I acknowledge the strength of Ipp J's comment in *Mallesons Stephen Jaques v KPMG Peat Marwick*:

> [I]f, by a solicitor acting for a new client, there is a real and sensible possibility that his interest in advancing the case of the new client might conflict with his duty to keep information given to him by the former client confidential, ought to refrain from using that information to the detriment of the former client, then an injunction will lie.[12]

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11 *The Sociology of The Professions*, (Dingwall and Lewis eds, 1983) at 22.

12 Supreme Court of Western Australia, unreported 19 October 1990.

Relevant policy issues were identified and examined by the Supreme Court of Canada in *MacDonald Estate v Martin*,[13] a case discussed by Professor Finn. Both the majority and the minority refer to the cogent remarks of Posner J, in *Analytica Inc v NPD Research Inc*,[14] which set out the rationale for the "substantial" relationship test, which gives rise to an irrebuttable presumption that confidences have been disclosed by the client. His Honour said:

> The "substantial relationship" test has its problems, but conducting a factual inquiry in every case into whether confidences had actually been revealed would not be a satisfactory alternative, particularly in a case such as this where the issue is not just whether they have been revealed but also whether they will be revealed during a pending litigation. Apart from the difficulty of taking evidence on the question without compromising the confidences themselves, the only witnesses would be the very lawyers whose firm was sought to be disqualified (unlike a case where the issue is what confidences a lawyer received while at a former law firm), and their interest not only in retaining a client but in denying a serious breach of professional ethics might outweigh any felt obligation to "come clean". While "appearance of impropriety" as a principle of professional ethics invites and maybe has undergone uncritical expansion because of its vague and open-ended character, in this case it has meaning and weight. For a law firm to represent one client today, and the client's adversary tomorrow in a closely related matter, creates an unsavoury appearance of conflict of interest that is difficult to dispel in the eyes of the lay public — or for that matter the bench and bar — by the filing of affidavits, difficult to verify objectively, denying that improper communication has taken place or will take place between the lawyers in the firm handling the two sides.

As Professor Finn observes, there may not be a great deal of difference between a rebuttable and an irrebuttable presumption, if the judgments in *MacDonaldEstate* are to be taken as a guide. In conclusion, I have pleasure in declaring the seminar open and I trust that it proves to be both stimulating and enjoyable.

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13 [1991] 1 WWR 705.
14 (1983) 708 F 2d 1263, at 1269.