

THE LIABILITY OF PROFESSIONALS: THE WAY AHEAD?

THE HONOURABLE MR JUSTICE J E H BROWNIE*

Claims for damages for negligence against professionals often produce complex litigation, with results that displease one or both parties. Plaintiffs sometimes complain that the defendants against whom they recover judgments cannot satisfy those judgments; defendants complain that the cost of obtaining appropriate insurance cover is financially crippling; and defendants and their insurers complain about the enormous delay which sometimes occurs before litigation is commenced, making it difficult or even impossible for them to adequately defend themselves.

The rules of the common law as to when a cause of action for damages for 'pure economic loss' accrues, and therefore when the limitation period commences, have been the subject of several decisions over the last twenty years, and it is fair to say that the present state of authority does not satisfy anyone very much, and has left many people advocating legislative intervention.

This problem is not confined to claims against professionals, but claims against professionals feature prominently in the litigation of this genre, including claims against architects and engineers in respect of the design, or the superintending of the construction of buildings, as do claims against professional advisers generally. To take some obvious examples of a problem arising as to when a limitation period commences, a building may contain

* Judge of the Supreme Court of New South Wales.

defects which will not become apparent for many years; the drafting of a will may be negligent, but the negligence may not become apparent until after the death of the testator; the negligent auditing of the affairs of a company may not cause loss for years; and negligent advice generally may be prone to cause economic loss, but not in the short term.

The way in which the common law has searched cautiously for a satisfactory solution may be demonstrated by reference to the position in the United Kingdom in relation to defects in buildings, in respect of which a plaintiff claims damages for pure economic loss. In 1972, in *Dutton v Bognor Regis Urban District Council*,¹ it was held that the cause of action was complete at the time of the construction of the building; in 1976, in *Sparham-Souter v Town and Country Developments (Essex) Limited*,² when the plaintiff discovered or with reasonable diligence ought to have discovered the defect; in 1978, in *Anns v Merton London Borough Council*,³ when the state of the building was such that there was a present or imminent danger to the safety or health of the occupants, a finding which involved the notion that it was then reasonable to incur expense in remedying the defect; in 1982, in *Pirelli General Cable Works Ltd v Oscar Faber & Partners*,⁴ when the damage was sustained, whether that damage was then discernible or not, although with a qualification in respect of a building "so defective as to be doomed from the start", whatever that expression might mean; and in 1991, in *Murphy v Brentwood District Council*,⁵ it was held that the cost of remedying a defect in a building was not recoverable, notwithstanding that there was then a threat to the safety or health of the occupants, a decision which involved the notion that the cause of action, if any, had not then arisen.

In Australia, there has been less litigation concerning this topic, but in 1985, in *Sutherland Shire Council v Heyman*,⁶ it was held that *Anns* should not be followed; and in 1988, in *Hawkins v Clayton*,⁷ it was held that the cause of action had accrued when the plaintiff suffered damage.

That is, it is for the moment settled law both in the United Kingdom and in Australia that a cause of action is complete, and the limitation period commences to run, when the damage occurs. It follows that a plaintiff, acting perfectly reasonably, may become statute barred before he first knows of the existence of any damage, and therefore that he has a grievance against the defendant, much less that he has a cause of action, or - less spectacularly

1 [1972] 1 QB 373.

2 [1976] QB 858.

3 [1978] AC 728.

4 [1983] 2 AC 1.

5 [1991] 1 AC 398.

6 (157) CLR 424.

7 (164) CLR 539.

unsatisfactory, but still thoroughly unsatisfactory - he will become statute barred because, although he realises within the limitation period that there is a defect in the building, he reasonably believes that it is of little significance, or that the extent of the damage is so slight as not to warrant his suing the defendant, with all of the attendant expense, stress and problems involved in litigation.

At the same time the defendants and their insurers complain about the existing state of the law, with what sometimes seems to be justification, for it may happen that when a plaintiff sues, many years after the events said to constitute negligence on the part of the defendant, the defendant and/or his insurer may regard the plaintiff's claim as lacking merit, but the witness who could have once proved this lack of merit will be dead, or he will no longer be a persuasive witness, perhaps because of supervening illness or old age, or he will not be able to be found, or the records relating to the events in question will have been lost or destroyed, or will be incomplete. Problems about records can be particularly acute where the defendant has retired, and the records of his former business have not been kept.

The task of an insurer is trying to assess an appropriate premium to charge is a difficult one in the case of liability insurance for professionals, and other people who will be at risk of being sued many years after the relevant activity has ceased: the extent of the loss of any plaintiff will be measured years after the premiums are collected, at unpredictable times and after inflation at unpredictable levels in the meantime, and past experience offers only an incomplete guide to the measure of likely future claims.

To change the law to make it compulsory for professionals (and/or others) to hold liability insurance is, by itself, at best an unsatisfactory answer in the long run: witness how compulsory workers' compensation insurance and compulsory third party motor vehicle insurance, hailed as significant steps forward in decades gone by, finally produced what politicians of all persuasions regarded as extraordinarily difficult problems: the premiums eventually became so high that the community rebelled at paying them, so that the benefits payable to injured people had to be reduced, a solution which injured people and their families can hardly be expected to regard as just.

On the other hand, most people urging some form of law reform find that some element of liability insurance is an essential ingredient in the preferred package: insurance is an efficient means of distributing the risks, or spreading the losses involved, with the result that most plaintiffs will be adequately compensated, and most defendants will escape financial ruin.

Against this background, pressure groups are urging legislators to change the law, and law reform bodies have been examining the problems involved. A convenient summary of at least some of the proposals is to be found in the Discussion Paper, issued in March 1991, by the Legislation and Policy Division of the (NSW) Attorney-General's Department titled *Latent Damage, Limitation*

Periods and Project Insurance, collecting the proposals made in Australia, New Zealand, the United Kingdom, the USA and Canada.

No proposal has found enthusiastic universal acceptance, but I venture to suggest that the innovative approach embodied in the Occupational Liability Bill, introduced into the New South Wales Parliament in 1990 is worthy of further detailed examination, and general support, although no doubt there is plenty of room for debate about the finer details of the scheme there set forth. For the moment, the Bill has foundered on the rock of Federalism, and the scheme has passed (perhaps one should say progressed) to the stage where it is being discussed as worthy of uniform national legislation, ie legislation by the Commonwealth Parliament and also by the various State and Territorial Parliaments.

It seems clear that no State or Territory can effectively legislate in this field, without complementary Commonwealth legislation, for any well advised plaintiff claiming damages for negligence arising out of some statement or representation by the defendant will also bring a claim for damages for misleading and deceptive conduct, in breach of s 52 of the *Trade Practices Act*; and the Commonwealth Parliament cannot legislate to take away claims for damages in tort or for breach of State or Territorial legislation. That is, any legislative scheme which includes as a component the taking away of the rights of plaintiffs to sue must effectively be based upon both Commonwealth and State/Territorial legislation. Such a legislative scheme may perhaps be modelled upon the Corporations Law.

To state the obvious, a scheme to compensate worthy claimants, without imposing excessive costs upon others, if it is to be effective, is likely to include provisions preventing plaintiffs suing except in conformity with the scheme; and if it is to be effective, in achieving the aim of actually as distinct from theoretically compensating claimants, it must include provisions to the effect that the defendants are insured, unless of course it prevents all but the very rich from practising in the relevant field. That is, in Australia today, and in the context of which I am speaking, it is difficult to see how one can avoid having both the elements of some national legislative scheme, and an economically viable insurance scheme.

As well as providing potential plaintiffs with the certainty or near certainty of the satisfaction of any judgments they might obtain, such a scheme ought to protect professionals, and other potential defendants, against the hazards of litigation, long after the events sued upon have occurred, and when memories have faded, witnesses are unavailable, and records are lost; and these two features effectively mean that the financial burden must be shifted on to some insurance scheme, coupled with provisions calculated to reduce the likelihood of loss. To give reasonable protection to defendants seems to necessarily involve placing some monetary cap upon the potential damages to be awarded to plaintiffs. Of course, such a cap should not be fixed at too low a figure, for that would lead to injustice to plaintiffs.

The Occupational Liability Bill adopts these features, and several others, in an interesting mix of 'carrot and stick' measures. Fundamentally, any 'occupational association' (a body corporate representing people who are members of the same occupational group, and the membership of which body is limited to members of that group) may opt to be a party to either of two schemes, but not both. Both schemes fix the maximum amount of liability of a scheme member, the difference between the two schemes being the method by which that maximum sum is fixed: in 'Division 1' schemes, it is a number of dollars, whereas in 'Division 2' schemes, it is a multiple of the sum which is a reasonable charge made by the scheme member for the work done.

The liability for negligence (other than for damages for personal injuries) of a person who becomes a member of one of these schemes is limited to the aggregate of the sum insured under the policy of insurance which must be obtained, plus the member's 'business assets'. That is, the spectre of unlimited personal liability is effectively removed, from the point of view of the potential defendant, at the price of his joining the occupational association, and procuring an insurance policy, where the sum insured is at least the amount fixed in relation to that occupational association. The existing problem of the member being sued many years after the event, when he will have difficulty proving his lack of negligence, is effectively passed to the insurer of members of the same occupational association.

Potential defendants are further encouraged to join the appropriate occupational association, and to obtain the limit to their liability for which the Bill provides, in that the Bill leaves it to the appropriate occupational association to procure the necessary insurance arrangements, and to review them from time to time, and at the same time the occupational associations are effectively given a variety of powers over their members. The measure of these powers will vary from association to association, presumably in the light of the circumstances individual to the occupation in question, but a body called the 'Occupational Standards Council' was to be created with advisory and general supervisory powers, and which was also to have these functions:

- (c) to encourage and assist in the improvement of occupational standards of members of occupational associations;
- (d) to encourage and assist in the development of self-regulation of occupational associations, including the giving of advice and assistance concerning the following:
 - (i) codes of ethics
 - (ii) codes of practice;
 - (iii) quality management;
 - (iv) risk management;
 - (v) resolution of complaints by clients;
 - (vi) voluntary mediation services;
 - (vii) membership requirements;
 - (viii) discipline of members;
 - (ix) continuing occupational education
- (e) to monitor the occupational standards of persons to whom this Act applies;

According to the second reading speech, it was thought better that the individual occupational associations should carry out these functions, this being better than the introduction of wide spread government regulation. An association might be expected to have the right to sanction its members, including powers relating to admission, suspension and dismissal, powers relating to giving good practice advice, promoting risk management through good practice codes, participating in drawing up standard conditions of employment and encouraging the use of quality control, providing mechanisms for dealing with complaints, providing mediations systems, imposing mandatory continuing education provisions, developing ethical codes of practice, introducing quality management and issuing quality assurance certificates to properly qualified persons. It was said that it would be in the interests of the association and its members generally to see that the standards were maintained and indeed improved: the higher the standards, the less likely it would be that claims would be made against members, and the lower the insurance premiums would be, and the more attractive membership of the scheme would be.

The amount which represents the sum insured is to be fixed by regulation, and scheme members will be compelled to disclose generally the fact that their liability is limited, for example on their letterheads, and they will have to provide details of their insurance policies upon request.

In summary, the Bill offers benefits to potential plaintiffs in the form of a guarantee that any judgment obtained against a scheme member will be satisfied, and the likelihood that most defendants will be scheme members. The disadvantage for plaintiffs is that there will be an effective cap upon the amount recoverable, but assuming the regulations are kept under regular review by the Occupational Standards Council, this ought not be very much of a problem, for at least in many cases, a plaintiff who does not wish to have his potential judgment limited might be able to opt out of the scheme by choosing to do business only with people who have additional insurance, or who are not scheme members. The scheme also offers benefits to potential defendants in the form of limited liability, and the prospect, eventually, of cheaper insurance premiums. It offers other benefits to the community at large, including, over a period, raised standards, the reduced risk that individual plaintiffs or defendants will be financially ruined and diminished litigation.

The existing problem about fixing the date when a limitation period commences is not solved, but it is effectively side stepped in the most troublesome of cases frequently encountered, namely cases against professionals, people giving advice, and - probably - builders. Assuming that builders join the appropriate occupational association, they will be effectively insured. Given the current regime of licensing of builders in Australia, this is very likely to happen.

A plaintiff may still become statute barred without fault on his part, but at least a future plaintiff who learns of some loss is more likely to sue, without

waiting for further damage to occur, as is the position today, for he will be buoyed up by the knowledge that the defendant is insured; and in reality it will happen very rarely indeed that a plaintiff will actually become statute barred before learning that he has a claim to pursue.

No doubt it will be a long time before the proposal has worked its way through the labyrinth of Commonwealth, State and Territorial legislatures, and has survived the multitude of submissions from professional bodies and other pressure groups, but it does not seem foolish to hope that in the not too distant future, claims of this type, presently the subject of great practical difficulties and the occasional financial disaster for litigants, will have been made more manageable, and any litigation that is fought is more likely to result in an outcome which will be regarded by all concerned as satisfactory.