



Being held accountable to standards

By Ben Zipser

Professionals, like all other providers of goods and services, may be liable to clients, and in some cases to third parties, if they breach standards of behaviour causing loss to the clients or third parties. They may also be liable in disciplinary proceedings if they breach standards of ethical behaviour. The sources of the standards of behaviour are principally the contract between the professional and his or her client, the tort of negligence, the law concerning fiduciary obligations, and statute. In the past 30 years a large body of case law has developed in Australia concerning the liability of professionals. On the one hand, there are many common principles among cases concerning different professional groups, such as principles determining when a professional owes a duty of care to a third party (see, for example, *Hill v Van Erp* (1997) 188 CLR 159, and *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515), the standard of care applicable to professionals (see, for example, *Rogers v Whitaker* (1992) 175 CLR 479), the interpretation of relevant provisions of the Civil Liability Acts in the various state and territory jurisdictions (see, for example, *Strong v Woolworths Ltd* (2012) 246 CLR 182, and *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 656), and the interpretation of 'misleading or deceptive conduct' in statutes which create liability for such conduct.

On the other hand, for each professional group, there are issues particular, and in some cases unique, to that group. Examples are the advocates' immunity in claims against lawyers (see, for example *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1), the 'failure to warn' cases in claims against health professionals (see, for example, *Rogers v Whitaker* (1992) 175 CLR 479), and the circumstances in which building professionals may be liable in negligence for personal injury to independent contractors or other workers on a building site (see, for example, *Leighton Contractors Pty Ltd v Fox* (2009) 240 CLR 1).

This edition of *Precedent* addresses a collection of issues concerning various professional groups. Two articles address the liability of lawyers. Stephen Warne considers the obligations imposed on a lawyer to be satisfied that there is an adequate foundation for any claim of fraud or other serious misconduct before advancing it on behalf of a client.

Alex Haslam and Simone Herbert-Lowe consider recent decisions of Australian courts which have addressed the advocates' immunity from suit.

Four contributions in this edition concern the liability of health professionals. Julian Johnson reviews recent decisions of Australian courts which have considered 'failure to warn' claims against health professionals. His article includes guidance for practitioners who have clients with such claims. Janine McIlwraith considers the increase in litigation against bariatric surgeons by patients, the causes of the trend, and solutions to reduce the number of claims in the future. There are also case notes on two recent NSW court decisions concerning claims against health professionals.

Claims against financial services professionals are a relatively recent development. Today the industry of financial services professionals in Australia is large, and complaints about their conduct are increasingly frequent. Josh Mennen considers recent legislative reform concerning the obligation of financial advisers and, where a negligent financial adviser becomes insolvent, the challenges involved in recovering from their professional indemnity insurer. Ben Whitwell provides an overview of causes of action against financial advisers and matters relevant to considering a class action.

There are also two contributions which consider statutory schemes which, where applicable, limit the liability of professionals. Daniel Aghion considers the proportionate liability legislation contained in Civil Liability Acts in each state and territory jurisdiction. This is a useful overview of the legislation and its interpretation by case law. In her article, Anne Durack considers the professional standards legislation in each jurisdiction. Where a scheme under the legislation is approved for a professional group, the liability of members of the scheme is limited or capped.

The spread of articles in this informative edition of *Precedent* exemplifies the diversity of issues which arise in professional liability litigation. ■

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