JOTTINGS ON THE BAR

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Escalating Medical Insurance Premiums – Australia is not alone

It seems Australia is not alone in experiencing an escalation in medical liability insurance premiums and corresponding calls for caps on damages claims.

The February 2002 Newsletter of the Association of Trial Lawyers of America (the US equivalent of the Australian Plaintiff Lawyers Association) reports that the insurance industry and doctors in the US are lobbying state legislators to introduce caps on damages pay outs following an escalation in medical liability insurance premiums.

The suggested cause of the escalation in premiums is of particular interest. The ATLA Newsletter quotes three commentators. Firstly, Carol Golin, the editor of Medical Liability Monitor, an industry newsletter wrote:

> *As the economy enjoyed a magic carpet ride in the 1990's, the insurers kept rates artificially low because they earned more money by investing than by writing policies.*

Secondly, in an article in the Tampa Tribune under the heading "Rising Malpractice Premiums Hit Florida Doctors Hardest", Rafael Gerena-Morales wrote:

> *The insurance companies wouldn't be in this position if they had not been so hungry for investment profits and had priced their products appropriately.*

Finally, Charles Kolodkin an analyst with Gallagher Health Care Insurance Services in a commentary written for the International Risk Management Institute said:

> *Regardless of the level of risk management intervention, proactive claims management, or tort reform, the fact remains that if insurance policies are constantly under priced, the insurer will lose money.*

Similar sentiments have been expressed in recent times in the Australian financial media. If they are accurate, it makes one wonder whether we dreaded lawyers are yet again being used as scapegoats for the failings of others?

What irritates the judges ?

This is a provocative question, which I am sure would prompt a variety of answers in the profession and among judges. The answers would probably range from your opponent, appeal courts, lower courts, to a drop in the judge's blood sugar levels. The more honest would include: the late delivery of lists of authorities, prolix written submissions and long rambling oral submissions. The question was the topic of an article in a recent edition of Advocate, the journal of the South African Bar Association. The author, Judge LTC Harms, is a judge of the Supreme Court of Appeal. The following are some quotes from the article:

> *Nothing can be worse than a bad case badly argued, especially if counsel is intent on making a meal (ticket) of it.*
>
> *On the other hand, good cases badly presented are a close contender as a greater source of irritation. And difficult cases being made more complicated than what they are, should not be forgotten.*

No-one would quibble with these observations. The trick for the advocate is to realize when they apply to him or her. To a large extent the ugliness or beauty is in the eye of the beholder, viz the judge. On this aspect, the article includes some amusing self-effacing comments by Judge Harms:

> *Judges by virtue of their profession or age suffer from a peculiar species of Alzheimer's disease. They tend to forget what it was like to have been a practising lawyer. They are also inclined to forget their own imperfections as advocates. But then, since they had none, there is by definition nothing to forget. They never argued a bad case; never missed an authority; never made a bad submission; never charged high fees. With the wisdom of enhanced hindsight they expect counsel to act as they believe they would have done.*

Of course, I do not for a moment suggest that any judges or magistrates in the Northern Territory suffer from this peculiar strain of Alzheimer's disease.

Conflicts of Duties - the Clients and the Court

Every now and then as counsel you can find yourself caught between your duty to your client and your duty to the court. One such situation arises where your client discloses information to you under client privilege that potentially compromises you in your duty to the court. An example is where your client has failed to make discovery of sensitive, yet relevant, material and, when found out, specifically instructs you not to provide the material to the other side. You are obligated by your duty to the court and the rules of court to make full and proper discovery of all relevant material, yet your duty to your client prevents you from disclosing information communicated to you under client privilege.

What should you do?

The answer lies in the Conduct Rules, specifically NTBA Rule 5.6. You must first seek the permission of the client to inform the court of the true position. If the client fails to give that permission you must not inform the court of the matter, but you must cease to take any further part in the proceedings and withdraw from the case.