

The importance in evidence of usual practices

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It is unfortunately the case that in many professional negligence claims, including claims against solicitors, the usual practice of the professional often looms large in determining whether there may have been a breach of retainer or of duty. This is generally because the professional's file does not contain any, or any adequate, written evidence of the advice given or steps taken which the professional is contending amounted to discharge of the term of retainer or of the duty.

Two relatively recent decisions illustrate how the courts can deal with usual-practice evidence. They show that having a usual practice is not as good as being able to demonstrate that specific advice was actually given, but that, in at least some routine situations, having a usual practice, and being able to establish that practice by objective means, can be very important to a defence.

Elayoubi v Zipser

In *Elayoubi v Zipser* [2008] NSW CA 335 the court was dealing with a medical negligence claim. An infant suffered oxygen deprivation during birth, resulting in spastic quadriplegia and intellectual disability. The plaintiff's tutor claimed against both the hospital at which the mother's previous child had been born (for failure to warn of the consequences of having a further vaginal birth) and against the hospital at which the relevant birth actually occurred.

The first hospital asserted the plaintiff's mother had been warned of the risks of a further vaginal delivery, and that there had been no breach of duty.

On appeal, the hospital said the trial judge should have accepted a doctor's evidence of her usual practice "in the absence of evidence that the doctor had departed from it".

The Court of Appeal found that "properly understood, Dr Bhardwarj's evidence was a reconstruction of what she would have done on the particular occasion of which she had no memory, based on her professional expertise and understanding of the significance of the particular procedure which had been undertaken".

This reconstruction was contrasted with evidence from the plaintiff's mother to the effect that no relevant warning had been given; and in circumstances where the plaintiff's mother could expressly recollect having received other medical advice from different doctors relating to her pregnancies.

The Court of Appeal also said: "Evidence of usual practice may be of assistance in circumstances where mechanical steps or routine tasks are in issue and the witness who supposedly undertook the task on a particular occasion has no recollection of the occasion. The weight to be given to such evidence will depend upon the possibility or likelihood of departure from such practice. However, the present case was not concerned with a mechanical step or routine task; it was concerned with a quite unusual procedure in professional practice. Nor was the task itself in any sense mechanical; rather, it involved conveying important medical information to a patient in a hospital ward."

The evidence of the plaintiff's mother was preferred and the first hospital was held (partly) liable for damages.

Luxford & Anor v Sidhu & Ors

A different outcome resulted in *Luxford & Anor v Sidhu & Ors* [2007] NSW SC1356. The case involved a failure by a purchaser to complete a contract for the purchase of residential land and improvements, resulting in a claim by the vendor both for forfeiture of the deposit and for damages for a deficiency on resale. The purchaser cross-claimed, inter alia, against her former solicitor, alleging a failure to advise on zoning matters.

Relevantly, the purchaser claimed the solicitor failed to give adequate advice concerning the fact that adjoining properties, but not the property to be purchased, was zoned to permit medium density housing.

Bryson AJ found in favour of the solicitor on the cross-claim, principally on the basis that it was not part of ordinary residential conveyancing practice to investigate town planning issues relating to neighbouring or nearby properties, unless the solicitor was expressly retained to carry out those investigations or the solicitor had some specific knowledge of the client's intended use of the property which indicated that such investigations were necessary. However, he also accepted the solicitors' evidence of usual practice.

That included a practice of telling clients words to the effect: "We do not search with regards to surrounding properties, but only the property you are buying. As to what goes on in the neighbourhood, you must

make your own enquiries of council." There was a dispute between the solicitor and the former client/purchaser as to whether that advice had in fact been given. The solicitor was able to adduce evidence that he had previously acted on two separate occasions for the same client on residential purchases and that on each occasion he had written to the client in similar terms.

The court's willingness to accept that the solicitor had followed his stated usual practice was assisted by the solicitor's ability to call objective evidence demonstrating the actual prior implementation of the claimed usual practice.

'Usual practice' tips

So, what can practitioners glean from these cases? I would suggest the following:

- It is better to have a usual practice than not, since its absence means that a solicitor with no independent recollection, or corroborative material is simply unable to adduce any evidence as to what occurred in a particular transaction.
- Having a usual practice will not be enough in many cases, particularly where a client gives evidence of specific actual recollection.
- If the particular transaction or matter is not routine, usual practice evidence will be far less persuasive and a court may be less likely to accept it. Consequently, for unusual matters in particular, corroborative evidence of advice given is important.
- Where evidence of usual practice is considered to be a reconstruction, it is less likely to be persuasive, particularly if contrasted with a client who gives evidence of actual specific recollection. A court is more likely to construe usual practice evidence as a reconstruction if it relates to a non-routine matter.
- If the usual practice relates to oral advice, it is always desirable to confirm the advice in writing, so that the confirmation itself becomes part of the usual practice. That means the solicitor will be able to give both oral/affidavit evidence of the practice, and tender copies of letters written in accordance with the usual practice.

So to maximise your prospects of defending a claim, practitioners should develop, document and follow routine practices for routine matters. Any out-of-the-ordinary matters merit specific customised advice, which should be properly recorded on file. And it's worth noting that while these steps will help to defend claims, if practitioners adopt them, they're less likely to be exposed to a claim at all, since the systems should assist them to give proper advice in the first instance.