Enright's Professional Indemnity Insurance Law

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I have a bad habit of buying books which cost several hundred dollars each and get overtaken by new editions after a couple of years. I am yet to experience the pain of an expensive text I have bought going into a new edition though, so nascent is my career as a barrister. About this time last year, I had lunch with a judge of the Supreme Court who told me to my absolute astonishment that at the height of his career at the Bar, he spent $80,000 a year on books and reports. That news did me no good at all.

Texts are good, a basic fact of legal life which young lawyers are rapidly overlooking. Without text writers, the law could not possibly survive in its current form. They have an important function. They ignore the bad decisions and explain what the long ones mean.

I picked up most of the library of John de Koning when he retired in June. So I'm seriously well stocked for insurance texts — Sutton's *Insurance Law in Australia*, Derrington's *Liability Insurance Law*, Kelly & Ball's *Principles of Insurance Law*, Mann's *Annotated Insurance Contracts Act*, Tarr's *Australian Insurance Law*, Clarke's *The Law of Insurance Contracts*, Ivamy's *General Principles of Insurance Law*, and even Mitchell's *The Law of Subrogation* (feel free to come and borrow them).

Recently I picked up a serious text: Ian Enright and Digby Jess's Anglo-Australian *Professional Indemnity Insurance Law*, Second Edition, December 2007. It has a green faux leather hard cover with gold lettering. Published by Thomson, it's almost 1,000 pages long, and retails at $541. It's a monumental work, the only one devoted exclusively to its subject, and it naturally won the 2008 British Insurance Law Association prize for the most notable contribution to the literature of insurance law for the year. It's a good book because it achieves one of Enright's aims, which was to start each topic at the start so as to make it accessible to the non-specialist reader. It is well-organised, and carefully cross-referenced. And it contains lots of answers, which is handy because that's what I'm in the business of selling.

Ian is a partner at Henry Davis York in Sydney, though at the time when he wrote this second edition, he was at Ebsworth & Ebsworth, and the preface acknowledges the input of Christopher Brierley, Matthew Harding, Jonathan Tapp, Katherine Czoch and Kaveetha Kumar of that firm. Dr Jess, a new author for the second edition, published 11 years after the first, is a barrister in England who has been doing insurance work for 25 years.

I spoke with Ian yesterday. The first edition was written during a stint he did at the English firm Simmons & Simmons. As I have previously observed, that firm publishes outstanding monthly newsletters on professional liability, and annual reviews the latest of which is here. The first edition focussed on English law, which Ian endearingly described as 'so fascinating', which is not to say that Australian cases were not relied on, because, as Ian points out, Australian courts have led the way with some of the seminal decisions in the area. Now, the English insurance law is finally getting round to modernising itself, and they are very interested in the *Insurance Contracts Act, 1984*, which seems to have been a driver for the working up of this second edition.

I asked Ian whether this is a London text about English law written by an Australian, updated with some supplements on Australian law. Yes, and no, was the answer. It is not an Australian text because Ian has not attempted to cite the Australian authority for each

proposition, and most of the authorities cited are English. But, he says, the areas where the Australian law diverges because of the work of the *Insurance Contracts Act, 1984* are quite discrete, and the rest of the law is 'virtually indistinguishable' between England and Australia. I suppose that most of the key Australian authorities on professional indemnity insurance get a mention in the text anyway — there are not so many of them after all — although *Antico v Heath Fielding Australia Pty Ltd* (1997) 188 CLR 652 is referred to only for its insight into the interpretation of s. 54 of the *Insurance Contracts Act, 1984*, rather than for the useful proposition referred to below in relation to defence costs, and the proportionate liability regime which now prevails in Australia does not seem to be mentioned despite a treatment of the law of professional liability.

The text seems intended to treat the whole of the law of insurance insofar as it is likely to be needed by a professional indemnity lawyer, much as Derrington's text does on the slightly wider topic of liability insurance. So it contains sections about the nature of insurance, the entitlement of non-insureds to enforce the policy, and the susceptibility of insurers to non-party costs orders. Insurance cases which are not professional indemnity cases are used to illustrate the general propositions. So just as I generally cross-references the standard Australian text (Sutton) with Derrington — a specialist text on liability insurance — even when researching a general insurance question, so too might it be profitable to cross-check general insurance propositions against Enright and Jess, especially while it is the most current of the texts.

The text goes beyond the narrow field suggested by its title in another way. It contains a deal of information about the regulation of the professions in England and on the liability of professionals. It is, in part, a text about professional liability, and so might be consulted for example for a lucid and brief exposition of vicarious liability as a complement to Walmsley, Abadee and Zipser's text.

Professional indemnity insurance is a difficult subject to write about. Each policy wording is different, and the foremost aid to interpretation is the words of the policy considered in the context of the policy as a whole. There is a great danger in applying too enthusiastically judicial comment about a particular wording in one policy without a proper consideration of the differing contexts of the rest of the policies in your case and the one in the law reports. Nevertheless, the policies are sufficiently similar often enough to make previous cases valuable in interpreting a professional indemnity insurance policy. In fact, vast accretions of common law hang off many of the typical clauses in professional indemnity policies, and many of the terms of an Australian professional indemnity policy mean something quite other than what they say once the work of the *Insurance Contracts Act, 1984* has been taken into account.

It is for this reason that insurance departments of large firms get anxious about the commercial departments giving advice on insurance policies as if they were any old contract. The learning is generally known to the small clique of lawyers who are on indemnity insurers' panels, but to no one else, because — medical negligence apart — there is, in my experience, no body of lawyers who act for plaintiffs in professional negligence suits, or in indemnity disputes with insurers on a regular basis.

I have only rarely seen professionals get independent advice except in the extreme case where indemnity has been denied. Reliant for advice on their insurer-appointed lawyer, too often, I suspect, professionals allow themselves to be trampled on, or fail to assert rights of which they are ignorant. Late notifying professionals may well be entitled to indemnity against defence costs prior to notification and prior to the insurer-appointed solicitor taking over the

conduct of the defence, for example, even if there is a clause in the policy requiring prior consent to the incurring of defence costs. That is because s. 54 of the *Insurance Contracts Act, 1984* limits insurers' rights to rely on breaches of the policy (such as the obligation to obtain prior consent before incurring defence costs) to the extent of the prejudice suffered by the insurer as a result of the breach. If the legal costs were no greater than those which would have been incurred had prior consent been sought, then there may be no prejudice: *Antico v Heath Fielding Australia Pty Ltd* (1997) 188 CLR 652. Rarely do insureds exercise that right though.

By reading this text, I realised that I myself was guilty of thinking about typical wordings in indemnity insurance policies too literally. I have always thought about the effect of dishonesty on the part of the insured as being governed by the wording of dishonesty exclusions, and had not realised that the issue extended beyond dishonesty to other kinds of wrongdoing. So quite apart from what the dishonesty exclusion clause in the policy says, cover for intentional wrongdoing may be denied by public policy, by operation of the law of illegality in contracts, regardless of whether or not the conduct is 'dishonest' (para 3-112ff) and there is at least some theoretical debate about whether there is a species of negligence so gross that it is against public policy to indemnify liability for harm occasioned by it (para 3-110).

Plaintiffs' lawyers need to know the likely insurance regime of the defendant in order to do the best for their client. In cases involving dishonesty, it may be desirable to plead only negligence to avoid the defendant's insurer denying indemnity on the basis of a fraud exclusion. On the other hand, there are limits on pleaders' ability to dress up fraud as innocent error, and too clever a pleading may backfire: the tort of negligence may not be available in respect of deliberate as opposed to inadvertent conduct, and the whole claim might fail.

But it is also possible to be too careful in this regard by avoiding fraud allegations unnecessarily. Fraud is a useful plea: the damages are better, causation easier, and claims for fraud are not apportionable under proportionate liability legislation. It is probably little known that the Legal Practitioners Liability Committee's standard policies for Victorian solicitors and barristers has no dishonesty exclusion which operates to deny cover for the post-1997 dishonesty of insureds except in relation to trust account defalcations etc. (compare the LawCover policy: *Vaccaro v Flammia* [2008] NSWSC 1322 at [18]). They do require the insured to indemnify the insurer if the latter has to pay out to a claimant for loss occasioned by fraud on the part of the insured, though, but the plaintiff gets their damages regardless of whether the insured indemnifies the insurer. The result is a shifting of the risk of the insured not being able to satisfy an order to compensate for dishonest wrongdoing away from the public to the insurer.

In the next edition of Enright and Jess's book, a chapter written specifically for the lawyers of plaintiffs in professional negligence claims, pointing out the matters they should be aware of when pleading and negotiating might be a useful (if unorthodox) addition, and expand the class of persons likely to buy it. Such a chapter could summarise the law on:

- joining the insurer as a defendant to the plaintiff's claim,
- claiming costs against the insurer in litigation in which it is a puppeteer but not a party,
- obtaining discovery of the insured's insurance cover,

- insurer-appointed solicitors' obligations in the face of a conflict between duty to the insured and duty to the insurer,
- the custom of insurers taking over the defence of a claim under cover of a reservation of rights in relation to the as yet unmade decision whether to grant or deny indemnity to the insured

and give some hints on ways of pleading multiple wrongs so as to maximise the chance of each being construed as a 'claim' attracting a separate limit of liability.

Only the other day, I heard a story about a plaintiff's lawyer who assumed by virtue of the fact that a professional indemnity insurer had taken over the defence of the professional negligence claim brought by the plaintiff, and from the fact that the insurer's lawyers had made offers of compromise, that indemnity had been admitted when in fact it had been reserved, and was subsequently denied, leaving the plaintiff with an excellent judgment but poor prospects of having it satisfied.

Stephen Warne's "Blog" on: http://lawyerslawyer.net.

The review was published in the newsletter of the Insurance and Professional Negligence sub-group of the Commercial Bar Association

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