Reasonable prospect of Success

Dr Lilianthal: Good evening ladies and gentlemen. Welcome to tonight's scientific meeting of the Medico-Legal Society.

Our common practice is to have two speakers on one topic, usually someone representing the law or the legal aspect of the topic and someone from medicine. Tonight we have one speaker only and that is Mr Bret Walker, Senior Counsel.

Mr Bret Walker SC has practiced at the Bar since 1979, taking silk in 1993. He specialises in equity/commercial, public law and constitutional and appellate advocacy.

He is currently the President of the New South Wales Bar Association and has been the person principally responsible for the development of the advocacy rules relating to allegations made in litigation.

He was elected to the Executive of the Law Council of Australia in 1995 and during his precedency was responsible for the Law Council's response to the Australian Law Reform Commission's inquiry into adversarial litigation 198J.

Please welcome, Mr Bret Walker.

Mr Walker: Once upon a time there was a relatively prosperous State, in that State there was a proud medical profession and many other professionals happily plying their trades. There was, however, among those professions a legal profession, one of whose stocks in trade was litigation. In this happy State there was a court system which was set up on traditional grounds whereby anybody who wanted something, according to law, had to ask for it in an ordered way and had to persuade, against the contrary suggestions of the person from whom that claim was made, the court that it should be granted.

Then terrible things happened called, apparently, spec litigation or professional liability litigation. These things were so terrible apparently, that quite a few plaintiffs succeeded. Even worse, many defendants decided it would be better to pay some money to plaintiffs than to fight the case.

Some people thought that plaintiffs succeeded when they did because so many settled, it seemed a pity not to allow those who couldn't settle, some money. Other people thought that so many people settled because deserving cases, when they were fought, were successful for plaintiffs.

Insurance companies eventually decided that the premiums, the investment income, the cost of claims and the amounts of damages didn't always produce the correct arithmetic result, a correct arithmetic result quite properly driven by their duty to shareholders and the capitalist instinct.

Happily for this fictitious State there was a Government with an Opposition entirely co-operative, indeed, encouraging in the endeavour. As we all know, in fact and in fable, the parliament where Government and Opposition agree must be a very happy State indeed, because it means that anything the Government proposes, with which the Opposition agrees, must obviously be completely and without any doubt in the public interest.

In this happy State it was decided that there needed to be some bracing of the population, in particular that part of the population that had been so careless as to find themselves injured in circumstances which might give rise to litigation. They were to be braced by a number of measures designed to make out as less attractive, if litigation could ever be called attractive, the prospect of litigating and certainly designed to ensure that there would be some higher hurdles to clear.

In due course legislation was presented to the Parliament in a number of slices, one of which decided that this scourge called spec litigation, indeed perhaps all professional liability litigation, should be to place checks upon the legal profession which had never existed before. Checks, it was said by the Government and the Opposition, to the happy people, which would ensure that such litigation would in future be conducted in a way that ordinary people, defined to mean not lawyers, would find much more pleasant than was presently the case.

Of course all of that is fable and, presumably, none of you noticed any resemblance to the politics which gave rise to the provisions of the Civil Liability Act 2002 and, in particular, to the provisions I want to talk about tonight which were inserted into the Legal Profession Act 1997 by the cognate package of legislation.

While I have counselled it is a fable, it can be explained by two reasons. The first is that it's still too recent for me, without excessive pain, to be dissuaded in public to actually tell you the details of all of those ins and outs of the politics of which I am aware in relation to the crafting of that legislation.

Second, and most importantly, it is because the politics of this legislation were largely fabulous in the sense that they were largely based upon assertions about social phenomena, which assertions were not ever the subject of even an attempt to demonstrate empirically that they were true.

A couple of those myths need to be identified in order to understand properly the background against which the provisions I want to address tonight will have an impact on at least two professions; the law and medicine.

I say 'at least' because I have no doubt that in other areas of so-called professional negligence or professional liability

litigation, there will be impacts upon other professions as well. Finally, of course, there is an impact upon the judiciary which is yet to work itself out. The first myth is that in New South Wales, as a result of what was understood to be, by certain parliamentarians, a sudden liberty granted in 1993 to advertise by litigation solicitors that there was an explosion measurable in numbers, both numbers of cases and numbers of dollars involved, of litigation driven by people responding to advertisements either for spec litigation or for so-called class actions. I will explain a bit about each of them in a moment.

It was a myth, even if it were, in fact, true, because none of the figures ever stacked up. Eventually, to his credit, the Premier, Mr Carr, declined ever to assert that the so-called explosion of litigation was empirically demonstrable. There were some figures, none of which withstood the most obvious scientific scrutiny. To put it another way; if the figures used by and against interests about which lawyers argued last year, if that kind of use of figures was used in the most basic epidemiology used by clinicians, or resorted to by clinicians, then the clinician would, I suspect, be professionally negligent for putting up with such malarkey. The figures were complete nonsense the raw data were wrong, the way in which they compared were wrong, the percentage increases, as call collated, were wrong.

On the other hand, the financial performance of insurance companies was no myth. The second myth was that the financial performance of insurance companies was that of a superbly trained race horse weighed down with too much lead in the saddle bags; the lead being over generous courts either on first instance or on appeal. The notion, when one contemplates parts of the newspapers last year, the financial pages, that the insurance companies would have performed superbly to the satisfaction of their capitalist critics but for decisions, all of which could have been named and numbered, of judges and courts of appeal has only to be stated to be rejected as too silly for words. We know, for example, the collapse of HIH is not going to be attributed to the unwarranted generosity of the District Court bench.

The third myth was that there had been something new, either new and wonderful or new and terrible, depending upon your view of matters, in relation to so-called spec litigation. I have now used that colloquialism, which is honoured by tradition in this State, several times. I should explain for those that don't use those colloquialisms what is intended to be conveyed by the expression and what its limits have always been: 'spec' is simply an abbreviation for the word 'speculative' and, one might think, from some of the speeches last year introducing this legislation, that speculative litigation was precisely the litigation we want to outlaw. 'We' being that group called 'all right thinking people'. Speculative, that is, if it meant litigation, started without a shred of evidence, in the mere hope that the defendant will find you too troubling, or too annoying, or too expensive, to fight and, therefore, will throw money at you. That's not what speculative stands for in the colloquialism at all. Quite the reverse.

Speculative stands for the fact that the lawyers in question take their chance, thus the word speculative, on whether or not there will be any wherewithal for their usually impoverished client to pay their fees at the end of the case. Most of you will appreciate that that means either a sufficiently generous settlement or a verdict with costs against the defendant who can meet that verdict and costs at the end of a contest. The speculation is by the lawyers upon the chance of being able to recover costs at the end of a very long day.

Some people, particularly at the Commonwealth level, but in fact all over the Common Law world have, for a number of years, suggested that speculative litigation, as properly understood, as I explained, is itself a scourge and a terrible thing. In introducing me Dr Lilienthal mentioned my role in relation to answering the Australian Law Reform Commission's inquiry into adversarial litigation. One thing that sticks out from the long and hard years that that involved was that the one constant which the Australian Law Reform Commission maintained, while changing many attitudes during the course of that inquiry, was that speculative litigation should be encouraged and that, of course, was because The Access to Justice Report of half a decade earlier had very strongly said that speculative litigation should be encouraged. It's the only way that people who can't afford lawyers will be able to sue rich and powerful interests. In case you don't recognise yourselves, doctors are rich or powerful interests whether or not they are insured, whether or not the true insurer is a beleaguered mutual.

The result of that particular myth was that we had partisans on one side saying traditionally this is a society which encourages and praises spec litigation as access to justice, the equaliser for the poor and down trodden; on the other side we had partisans saying spec litigation is a socially irresponsible entrepreneurial activity by lawyers who think in percentage terms. A certain high percentage of cases will produce money. A certain number of those will produce a fair bit of money and very a small percentage will go to an expensive contest. Those were the travesty positions of the rival partisans. Of course, if there is a truth capable of being described in summary it was very, very different.

As in medicine, as in accountancy, as in engineering, so in the law there are some who practice in accordance with what ought be done and there are some who don't. No statistics are available but it is clear from a scan of disciplinary complaints, all of which come to the attention of the Bar Council, that there is, in fact, virtually no cause for complaint by lay clients, or by insurers, or by judges at trial or appellate level, about lawyers engaged in speculative litigation abusing the standards laid down by law and ethics for that kind of activity.

That third myth was one which was most pernicious, in that it amounted to an attempt to weight the debate about a long established tradition in this State without any attempt to provide facts. Not a single case you will find was ever produced in any of the debate last year. Not a single case where it was said that the initiation of the case, and any other event during its course, was brought about by the abuse of lawyers' duties in relation to speculative litigation.

What are lawyers' duties in relation to speculative litigation, apart from their own and partner's purses? It is much more grand and elevated than that duty. A duty which is a perfectly proper duty to consider, in that the practice for no reward at

all is an advocation only for the extremely wealthy or for the very short lived. Duties were pronounced by the High Court in the mid 60s in a famous case in which Peter Klein was struck off. Peter Klein was struck off because in the course of some rather collateral and viciously conducted litigation he had mounted allegations against the solicitor acting for the party on the other side to the effect that the solicitor had been guilty of something then shameful known as champerty maintenance: illegitimately acting in order to obtain a share or proportion of whatever fruit may come from the litigation. At that time that was not merely a question of public policy, as it is nowadays; it was not only a tort, that is a civil wrong for which damages could be recovered; it was also a Common Law crime and, for lawyers in particular, it was an extremely serious crime.

An accusation was made by Mr Klein against, in effect, his opponent, of that kind. The accusation was entirely without substance. In rebutting the proposition that there had been any substance justifying Mr Klein raising that allegation, for which recklessness he was in due course struck off, the High Court took pains to point out just how honourable it was for lawyers to lend their assistance on the risk that they would never be paid, and in so doing they were not giving in to some post-Second World War, in New South Wales, Labor Government inspired worker's compensation, culturally changed, or decadent legal profession.

I say that in particular because some have sought to explain the positions that I have described as mythical, to people who believe they are factual, by ascribing it to the welfare policies, including worker's compensation on a much expanded scale, which blossomed after the second world war. The High Court, headed by Sir Alan Dixon, didn't have a bar of socio-logical explanations of that time. It sufficed for them to cite well established authority, and that was from the Lord Chief Justice in England and Wales in 1900 who, when you look at his reasons, was himself citing a tradition which he understood to go back too distant for him to be able to say when it started.

The tradition of spec litigation was not only well established before 1993 advertising restraints were removed, again I should point out by agreement between Government and Opposition, it went back at least a hundred years, and probably closer to 200 years, in the legal profession of which we are direct descendents. In this State, I venture to guess that it has since convicts pleaded in the 1840s, as lawyers, as advocates, I venture to guess that it was the rule rather than the exception for the whole of New South Wales's litigious history in relation to claims of a small kind by small people.

Against that mythical background then real law has been enacted. You may be forgiven for thinking, in light of my telling of the fable and attempted denouncing of myths, that I think this is bad legislation. That would be wrong. In fact I think it contains a deal of material, probably inartistically expressed and in real need of improvement, which is both traditional and radical and over all beneficial.

Let me explain. As the title of the talk tonight indicates there is a core concept introduced by way of controlling lawyers' conduct in all litigation concerning damages. Politically I can tell you that although the law is about litigation concerning claims for damages, which includes any form of financial compensation, in fact, the politics, that which produced the law, started and virtually finished with an overpowering, overwhelming preponderance of concern with personal injuries litigation. Professional negligence litigation was the next most urgent topic politically and commercial litigation, contractual litigation came in as a form of equalising fairness.

The control exerted on lawyers is of two kinds, and they are sanctions of a kind that the profession is not really used to, notwithstanding their lack of novelty. The first is a disciplinary sanction. We are used to that in concept, we are not used to that being applied in relation to what I will call the quality of our instructions, the quality of our brief, the quality of the case the client wants mounted. We are certainly used to professional obligations preventing us from being party to telling lies, from deceiving the court, to the extent that the rules have traditionally and for a long time required us, when we have innocently misled a court, as soon as we discover that fact, we are under the same obligation as would have prevented us from telling a lie, namely, we must reveal what is true to the court, notwithstanding that may be devastating, indeed fatal, to the client's claim.

We were used to sanctions of a kind that meant that loyalty in the client was paramount. What we weren't used to was the idea that we had to stand some way as guarantor, or an assurance, of the quality; either the probity or the cogency, perhaps both, of the claim that was being put forward.

The sanction is that if you breach these new provisions I am going to tell you about then you can be subject to all the disciplinary processes and outcomes applicable to those guilty of professional misconduct. Believe me, for the legal profession, as for the medical profession, those processes are tortuous and tortious and, further more, the outcomes can be as devastating to the capacity to earn a living in your chosen profession and to your personal standing as it would be for doctors.

People, at least in theory, are now susceptible for being struck off for failure to obey these new laws. I say 'at least in theory' because in many cases there will be questions of judgment involved which, in the absence of any intellectual or other dishonesty, is most unlikely, I would have thought, to receive the extreme sanction of striking off or cancellation of a practising certificate.

On the other hand, admittedly speaking as a person that reprimands - being reprimanded is not much fun either - under a new regime, the fact of reprimands will be publicly available. I don't understand that the legal profession will be able to have spent offences so that after a few years your record will no longer reveal that you were reprimanded; that applies to ordinary people defined as I earlier did.

The second sanction is the one that probably causes most fun in the dovecote. It's the one which appears radical and threatening. Of course, in form, it is not, it is very familiar. It is a Parliamentary command that courts may consider, and in certain cases should consider, that the lawyers in question, I will call them the delinquent lawyers, should refund the cost or indemnify the costs the client has suffered because of the delinquency; or as well, the double whammy, pay the costs personally, without the client being responsible, of the other party, again caused by the delinquency.

When I tell you, of course, that major cases of delinquency will involve a court being told that the whole case should never have happened you can see that the financial threat against delinquent lawyers under this scheme is that they personally; (a) will not receive a red cent from any of their work, they will have to disgorge what they received, they will be disentitled to charge anything and, (b) they will probably have to pay the other side's costs.

Contrary to public speculation about the wealth of lawyers and, I can assure you on the statistics very much contrary to the very proper public outrage about certain barristers who haven't shared any of their money with the Commonwealth, I can assure you there are very very few barristers who could survive even one such hit, let alone more than one such hit. The insurance, of course, is the means by which people entitled to the benefits of such costs orders would be paid. A question, as yet to be settled in the market place, is where that insurance will be obtained, as to whether policies will include cover for that kind of misadventure, let alone cover in the kind of amounts that one might need, and let alone cover at a premium level affordable by the many many struggling lawyers.

When I say struggling lawyers I mean that when one sees ABS and ATO income banding for lawyers there could not be another profession with such a wide range of income outcomes. There is a huge bulk of lawyers earning, either in gross or in net, sums which are quite extraordinarily small for people who are faced with quite large premiums. Every doctor present is entitled to feel real chagrin about me talking about quite large premiums, by medical levels they are the bite of a gnat, by legal levels they have been increasing and I predict will continue to increase.

Well, what is it that presents this threatening prospect of being struck off, at the worst; being reprimanded more likely, that going on your record; and worse still being rendered bankrupt if you haven't been able to obtain insurance for this kind of either disciplinary or adverse costs personal costs order?

I will read the words to you, there are some key phrases to which I will be coming back. It's all contained in the new division 5C of part 11 of the Legal Profession Act. A statute which by now is looking like The House That Topsy Built. 198J reads as follows:

> *"A solicitor or barrister must not provide legal services on a claim, or defence of a claim for damages, unless the solicitor or barrister reasonably believes, on the basis of provable facts, and a reasonably arguable view of the law, that the claim or the defence, as appropriate, has reasonable prospects of success."*

Before going off to those parts of the following provisions which, in the way of lawyers, has to be looked at in order to understand those words, let me just tease out what, without qualification or without the kind of gloss which I am going to attempt, those ordinary English words might mean. The prohibition is absolute. That is, it's all legal services on a claim or defence of a claim for damages. You will have all spotted the absurdity immediately encountered if this were to be read literally, without the context supplied by the statute and the context supplied by the way in which the administration of justice operates because, I assure you, when I am first sent a brief and I open the folder, the reading I do at that point in the formation of opinions is the provision of legal services. According to the statute I can't do that. I can't provide the legal service of reading the brief for the first time, or listening to an instructing solicitor for the first time, unless I have a reasonable belief, that can't be a guess obviously, on the basis of something I have not yet read, and an opinion I have not yet formed about the law, that there are reasonable prospects of success. There is, obviously, enough potential for absurdity.

It's been avoided by the draughtsman who, of course, assiduously sets out, after 198J, subsection 1, to tell the reader, aha, tricked you, these ordinary English words don't have their ordinary meaning. What about the nature of the basis of provable facts. What is a provable fact? A provable fact in English must mean, of course, something likely to emerge on the balance of probabilities when one looks at the evidence.

What is evidence to a lawyer? That's the material that can be relied upon in a court. The technical expression, of course, being 'admissible'. So that ordinary English phrase seems to say that you have to form this opinion, without which you can't do anything, by an evaluation of the evidence; again it would appear to be absurd.

Next, there is this idea of a reasonably arguable view of the law. I think everybody is more relaxed about that, if only because practically anything is arguable, and if you are doing it yourself it must be reasonably arguable.

Finally, the sting is in the tail, what does it mean to have reasonable prospects of success? It has to be said at once that it's no accident that those words appear in the statute. Others formerly have been tried at various draft levels. I, for one, am very relieved that phrase does appear, particularly given the provisions which gloss it, to which I am going to come. That phrase is time honoured in the legal profession. Some have said that it is a phrase which is so nebulous that charging for an opinion which conveys that proposition is a form of chicanery. Others have said, no, it uses a word which is both common sense outside the law and currency inside the law, namely, 'reasonable', and it is therefore finely attuned to the individual circumstances of each case. I belong in the latter school very strongly.

When somebody asks, in effect, 'should I sue?' - very few clients ask as bluntly as that, the solicitor's questions are usually to that effect, 'should I sue?' - one of the things that counsel, and for that matter a solicitor, must address is what are the prospects of success, bearing in mind that litigation for collateral purpose may itself be a civil wrong, a tort, and may be in breach of professional requirements?

'Reasonable prospects of success' has this virtue as a phrase, as a matter of ordinary English, that weighing up the circumstances of the case, will include the importance of the case, the emergency or otherwise the client may be in, what will be necessary in order to fund it, what will happen if you lost, and all those other circumstances that differentiate every case from every other case. Weighing up all of those the prospects of success are reasonable in the sense that they provide a rational base for a decision to go ahead. Many clients, of course, wish, particularly in the commercial world, you to translate that into percentage terms. An invitation

which I normally decline and then go on to do. That is, I say, this is useless information you are about to get, spurious advice is about to be given which lacks any capacity to be precise and if I were you I would not rely upon it. I hope that that will suffice against any evil day in the future. I then go on and give percentages, because many commercial clients are used to that kind of language. If you tell a client that they are 70 per cent likely to succeed in something, they are 30 per cent likely to fail. If I told him that there is a 30 per cent chance that they are going to be run over by a car when they walk out of my chambers, I bet they take the fire exit. A 30 per cent chance is, after all, an appreciable risk.

'Reasonable prospects of success' is therefore the heart of the exercise, it calls up that traditional approach we have always taken to assessing individual cases on their merits. It requires the provision of considerable legal services in order to form an opinion about it and it is, as I say, to some extent nebulous.

Parliament didn't leave it there, if it had of course, 198J would have brought all litigation to a screaming halt and, notwithstanding, some lawyers' views about what the Government and Opposition were doing, that wasn't their intention. Subsection 2, of the very same provision, we start upon the definitions. The definition of definition, for a lawyer, is that it is a provision that gives a word a definition which no dictionary would have given it.

Subsection 2: A fact is provable if it bears the following definition: "if the solicitor or barrister reasonably believes that the material then available to him or her provides a proper basis", and here comes the double pike and back flip, "a proper basis for alleging that fact." Low and behold, a provable fact has become a fact properly allegeable on the material then available. As you will see that is a very much less daunting prospect for the lawyers involved.

Before those of you, not sympathetic with beleaguered lawyers, argue that Parliament has taken anything useful out of the provision, may I assure you of this, it is a highly traditional requirement of litigators, particularly advocates, that they not make allegations and they not take responsibility for allegations and they not let their client take advantage of allegations unless there is, at the relevant time in the proceedings, a proper basis for making the allegation. The proper basis will usually mean that there is a reasonable prospect of the material then available maturing into or turning up evidence which, in a court, could, all other things being equal, prove the fact.

There is a reason why I have to put all those phrases as qualification in the last sentence. In our society there is no right of anybody to barge in and take another person's secrets. The law of confidentiality is a very important part of our general law. A very important part of the law of confidentiality is the law of the secrets confided by clients in their lawyers. Such an important part of the law that in this country it is treated as a substantive part of legal doctrine, not just an aspect of what may happen in a courtroom. The High Court repeatedly having said, from Baker vs Campbell onwards, that it is such an important right, and so important to the maintenance of orderly litigation in the administration of justice, that it's not to be construed by legislation as being in any way qualified or abolished except by very plain words. If I have been briefed by somebody who wants to make a claim for damages I don't have any right to find out from the other side their secrets. They might tell them to me if I ask, but that doesn't happen all over the world, I can't take them. If one is evaluating what is provable, clearly enough Parliament could not have intended the impossible, ludicrous and invidious position of having to guess what your opponent might have. Litigation is not, contrary to what one may think, a species of poker; a situation where serious institutional structures are the basis of trying to guess. Trial by ambush is intended to be outlawed.

At the earlier stages when you are starting a claim, and that's what the politics of last year was all about, starting claims, at those earlier stages you are simply unable to know everything that the other side would have. That's why it is proper that Parliament pulled back from the notion of a provable fact. The impossible forecast involved in that, and concentrated on what lawyers can be held to by standards which are now, at least on my research, 150 years old, namely, the standard which prevents allegations being made without a proper basis to do so.

That's the first point. You can see why there are radical elements to this law but there are also very traditional matters and if the administration of the law in relation to the basis of provable facts goes as I think and hope it will go then it is likely to be salutary, rather than damaging, to the conduct of litigation. Let me give an example in relation to medical negligence. It would mean, I suppose, that if you wish to allege that a certain procedure, though competently done, had not been preceded by what I will call a Rogers and Whitaker warning, then you are certainly going to have to have two things in your brief, whether in full or informal doesn't matter, you are going to have to have clear and pretty precise instructions from the patient, assuming you are being consulted by the patient, as to what was said and what wasn't said. When I say what wasn't said I am referring, of course, to the outcome now complained about.

Second, you had better also find out what the patient already knew or already understood would be involved, because, I would insist, the Common Law is nowhere near silly enough to require warnings to be given to people who do not need the warning. That may be a controversial statement of what the Common Law is. I doubt it is controversial as to what the Common Law should be.

You do not have to know what the doctor's response is before commencing such a case. Good practice, of course, would mean you will try to elicit a response and it may well be that the management of medical litigation in the future will involve, as it were, something in the nature of compulsory or more attractive conferencing before it is started. A lot of things have to be done in the form of admissions before any of that can go forward.

The next part of 198J, which provides the qualification in question, is that a claim has reasonable prospects of success if there are reasonable prospects of damages being recovered on the claim. A defence has reasonable prospects of success if there are reasonable prospects of the defence either defeating the claim or leading to a reduction in the damages recovered on the claim. Reduction must mean a reduction below that which, at the relevant time, is claimed.

Importantly, under the next section, none of this applies to legal services provided as a preliminary matter for the purpose of proper and reasonable consideration of whether a claim or defence has reasonable prospects of success. You can open your brief.

The question arises as to whether preliminary matters occur more than once in the paradigm case. I have argued in a circular to the Bar that they can and should. That is, there is a preliminary matter involved every time you have to make a decision with forensic consequences, at least before you get in to court: Preliminary to putting on this defence; preliminary to seeking to amend this statement of claim; preliminary to deciding to call this witness. If I am correct in that, and it would appear obvious that one should be able to do the work of considering whether there are reasonable prospects of success, it seems reasonable that if this is intended to be in control of lawyers' conduct it should attach during all stages of litigation.

The exclusion in relation to preliminary matters will be a very important thing indeed. It will prevent being repeated what occurred in the first weeks of this legislation, namely, some urgent calls to me from some of my members suggesting that they had come to a dead halt in a case because they had formed the view that a certain witness's evidence could not possibly be accepted and that was the end of their ability to provide legal services. Well, yes and no. It wasn't the end of their capacity to provide the legal service of seeing whether anything could be salvaged. In other words, business as usual.

I have already told you about all of the sanctions. What is likely to happen in practice? The first thing is that you will have appreciated that the sanction about costs is a very difficult one to operate unless there is a system by which the arbiter of those costs, basically be the court of trial, but sometimes the Supreme Court, regardless of where the trial was, has a method of finding out what you had in your brief or what the client had told you.

In 198N, in what is clearly one the most radical elements of this legislative scheme, yet to be worked in practice so far as I know, and an extremely important entrenchment upon the confidentiality I spoke about earlier, Parliament has laid down that once a court forms a prima facie view, which it may form by observing the facts, perhaps the extent to which the case failed, once that prima facie position has been reached the onus is on the unfortunate lawyer to demonstrate that at the relevant time or times he or she did have, to go back to the formula, material already available which provides a proper basis for alleging the relevant facts. That will involve, of course, saying things like; but when I pleaded that in the statement of claim I had this piece of paper, or my solicitor had this piece of paper, in which the client had said the doctor said only 'she'll be right mate' and nothing else.

It's an extreme example because one of the things in practice, which is a serious problem, is working out what kind of scepticism, as applied by a lawyer to instructions in order that that lawyer have a reasonable basis for assessing so-called available material, that scrap of paper would have been available and would be material, providing a proper basis for alleging a matter.

I wish I knew a simple answer in that. I can fudge it in this way: it is a not a new problem. The advocacy rules enforced around the country, and the ethical standards for at least the last 120 years, make it clear that it will be a judgment in each particular case as to whether something told to you by your client may be simply accepted by you, because you are not Perry Mason, or whether some probing is required.

Cross-examining a client on first conference is not a pretty sight and is not, in my view, the proper way to engender confidence. I doubt that doctors regard even the most probing taking of history in the anyway of cross-examination. The trouble with cross-examination style is that normally it has a point to make and, being adversarial by nature, there is a huge danger, in a sceptical or hostile approach to ones own client, that you will start to seek to establish, by concession or otherwise, the opposite point of view for which you have no instructions whatever, against your own client, in chambers. It's too much to ask, I think, of the kind of trusting relationship which, whether we like it or not, characterises most lay clients and certainly individual client's positions in relation to their chosen advocates.

For those reasons it seems to me a fudging answer I concede. We have to content ourselves with the proposition that some instructions will, on their face, strike the kind of hypothetical fair minded colleague sitting on your shoulder as being not something upon which it is safe to proceed. The 'she'll be right mate' example is a good one for that purpose. At least I hope there are not surgeons who say things like that as the one and only Rogers and Whitaker compliance.

Otherwise I would maintain that the tradition, none of which was said to be under attack in any of the material in or out of Parliament when this law was enacted, by which advocates are disinterested, that is they do not identify with and are not subject to these professional obligations responsible for the claim the client wants to make and, in particular, they do not become the agents or mouth piece of the client, then that tradition which is so strongly supported by presently binding authority in the High Court, see Janelli vs Wraith, makes it crystal clear that in the absence of plain words in this statute no obligation has been imposed upon advocates, and those who instruct them, in claims for damages, or defences of such claims, to become Perry Mason.

But there is a far more important political and constitutional issue at stake here than not becoming Perry Mason. That is, that we can't be allowed to become judges. Nothing would be more unseemly in a system where, as our constitution act in this State shows, and the Supreme and District and Local Court acts show, all adjudication power is placed in the hands of judges, judicial officers, nothing would be more bizarre than Parliaments commands in 198J, and following, being interpreted as a positive requirement that you conclusively judge your client in advance.

In another important context, namely whether costs can be ordered against individual trade unionists or trade unions in industrial cases, the High Court has several times looked at what it means to have had reasonable prospects, in a very similar phrase, and they have made it clear that one doesn't lack that measure of prospect by having an argument which failed, that should be obvious, or most importantly in having an argument that was going to be difficult. Anybody who has ever prepared or argued a case in the High Court would

know that it is quite ridiculous to suggest that a case that most people 'pooh pooh' thereby lacks prospects of success, let alone reasonable prospects of success. The law, in fact, changes as Parliament requires the Judges to change the law, by reason of the incremental effect of arguments succeeding, which either had never been put before or had never succeeded before.

There is one final matter to which I would like to turn by way of a coder in relation to this extremely important new set of professional obligations imposed upon lawyers in relation to claims for damages: This can be seen, in my view, as just the latest, probably the single most important, but certainly the latest, in a suite of measures taken both by the Judges, not as Judges but as delegated legislators, people who make rules given binding effect by Parliament, and by Parliament, as well as by the executive in the form of the Legal Aid authorities; what is happening inexorably is that the 'hands off don't blame me I'm only the lawyer approach' is being whittled away leaving, I hope, the disinterestedness, that is the lack of attachment, but most importantly no longer entitling lawyers to say, 'it's a matter for the Judge to judge, I have no responsibility for the quality of the material before the court'. As part of that suite of measure and directly effecting, in a very important fashion, the medical profession in a way which may not yet have sufficiently sunk in, are the by no means new practice directions and notes in relation to expert evidence.

They are a result of a trend led by Judges, trial and appellate Judges, all over the Common Law world. In many ways it is the Judges alone who have led this because, I regret to say, with some exceptions in this country the legal profession has not taken kindly to the reforms, and Parliament have not known about them. I refer to the positive obligation required to be recited, as if it were a litany, in ones expert opinion or statement of evidence that you, in effect, I paraphrase, are not a partisan, have given your opinions as fully as you can on specified material, have expressed where you lack expertise to go into an area, and have said where you lack material properly to opine. When conferring with an expert on the other side will not do so as an advocate but a colleague and expert designed to help the court in the elicitation of the truth. Judges have absolute privilege in what they say about people whom they have seen in the witness box, both in this country and in England and Wales, and certainly in various jurisdictions of United States of America, in the later case the bench trials, obviously rather than jury verdicts. There have been the most scarifying condemnations of experts found either to be dishonest, incompetent, or the deadly combination of both of those, and I would have thought that that could be, for many a professional, whether this is their only time of giving expert evidence or whether it is a very tidy side line or indeed their real business, that could be the kiss of death.

So, as part of the suite of this reform approach in litigation it's not to be forgotten that just as the lawyers have had imposed upon them traditional burdens with higher sanctions by these new provisions of the Legal Profession Act requiring an opinion about reasonable prospects of success, so it must be said that colleagues in the medical profession, who so often provide the wherewithal for the formation of that opinion by an advocate, so they too face important sanctions under new expressions of standards applying to their own conduct.

Dr Lilienthal: We now have some time for questions and answers and Mr Walker is more than happy to answer questions from the floor.

Mr McConachie: John McConachie, barrister. Bret, the wasted costs orders that have been so frequently reported in the Weekly Law Reports from Britain – what relevance, if any, does the discussion in Britain, and the approach taken by the Judges in Britain, have to tell us about the sorts of things you have been talking about today?

Mr Walker: I think the first thing is that the English and Welsh experience reminds me of a comment I read during the ALRC days in the United States of America; rule 11 of the Federal Rules of Procedure was amended in radical fashion in the early 80s in the United States, whereas it should be made clear where losers aren't ordinarily ordered to pay costs, rule 11 required lawyers to satisfy themselves, in effect, that the case was genuine, just as the law has always, in this country, required lawyers engaged in speculative litigation to be satisfied that the case was genuine and reasonable basis. Part of the sanction the Americans decided to experiment with was cost orders. Ten years later they changed the law, quite importantly because there had grown up what was called by the commentators a cottage industry of costs applications. It seems to me in England and Wales something of that nature has been spawned.

Now, my personal view, as somebody who has been engaged in law reform now for over ten years and who feels strongly about it, is that it is not an improvement to litigation systems to multiply litigation. The only multiplication of litigation that should be regarded as a good thing in a law reformist view is litigation by which claims which formally could not have been heard, for reasons extraneous to their merits, can now be heard. Claims for real relief. Costs arguments are=, correctly seen, I think, by most practising lawyers as a kind of desert. Of course for clients they are very important, cost shifting is an extremely important part of the discipline of the litigation system in this country, as it is in England and Wales, however, I think that one of the most serious defects in the new legislation in this State is that there was absolutely no attention of any kind paid to any facts and figures estimating what impact there would be if hearings of a kind called for by the law, before imposing cost sanctions on lawyers become a frequent phenomenon, that fitted it within the history supporting the fable with which I started. This is not law reform that has ever been embarrassed. It has never been embarrassed by lack of fact and figure. It continued that right through to what might be called the litigation impact statement, which was never tried.

I think that the most unhappy aspect of what John McConachie has raised for consideration is that it's not so much the actual arguing about costs, sometimes maybe for longer than the case itself took, which is the real threat, it's the breakdown in professional courtesy, which is already observable, by which the threat of that awful prospect is being used increasingly between opponents in correspondence and, alas, that I'm afraid, means solicitors, I hope it always means solicitors. Whether barristers have been

responsible for advising on or settling such correspondence I don't know. In the nature of things it must have sometimes been the case.

In my view the awful prospect of convoluted, detailed and extremely expensive fighting about costs, fighting about costs according to what might be called psychological inquiries concerning lawyers months or years before that has been accompanied already in real life by these, as I have seen them, quite nasty threats which has introduced a tone into litigation which is quite inappropriate.

Mr Dwyer: Peter Dwyer, barrister. Bret, given the apparent intention of the legislation, and to perhaps further that intention, do you think there is any place locally for US style pre-trial depositions in looking at the achievement of the apparent legislative intention?

Mr Walker: Yes. I touched on this very briefly in my main remarks. In my view the paradox of any reforms designed to improve litigation is as follows: The less horrible you make it, the more efficient you make it, the more attractive you make it as a course to be followed to the end. The great thing about litigation is that it decides rights and obligations and if, as I hope we are, we are a society that lives according to law rather than a simple balance of force, then having an adjudication of rights and obligations can't be seen as a bad thing. Of course, getting the adjudication means a fight to the end, including all the appeals that might follow.

If you improve litigation you are not going to reduce the number of people who find it an attractive prospect, that is if you improve it properly. Some people like putting barbed wire around anything, making it so unattractive that no one wants to touch it. That is inhuman and is a position taken by people who don't care about good claims by poor people against powerful interests. I do, as do most people interested in the reform of the litigation system.

I hope the paradox will continue. If the paradox continues, it is that the better it gets the worse it gets, like highway construction. If that paradox continues then the real difficulty is trying to work out where should the Rolls Royce resources be employed. All of us believe that they should be applied to the causes where, without improper pressure being applied, people have not been able to agree. They should be applied to cases, real cases, where they deserve resources to be applied to them. Much of the long judicatory exact system introduced in the 1860s in England and Wales were procedures by which summary dismissal and other like remedies could be adopted by which an argument could be had, instead of a trial, saying there should not be a trial.

As we all know there are peaks and troughs in relation to legal practise and the legal profession and there have been periods where those so-called summary applications have, in fact, extended the agony of litigation which have been better off fought as a short trial. Leaving that aside, it seems to me that we should not despair of expedience designed to filter out and improve the quality of that which is started at the point when it is started.

I think there is anecdotal evidence - there is some thin decent survey evidence in the United States, but it is too remote in time and space to be applicable here - I think there is anecdotal evidence, and certainly it is my intuition, that if a claim is pretty fully supported at the outset there are much better prospects of the issues being stripped down to the real issues quickly, to compromises being reached where comprise is sensible before too much money has been spent on us, the lawyers. Thirdly, to the truncation of the time necessary for the whole of the case to be conducted because, obviously, the time will have been spent before commencement on putting together material which otherwise would have to be extracted sometimes in what seems like a dental operation over months or years between the parties.

One way of doing that, using medical negligence litigation as very good example, is to learn something from America in a gingerly fashion, about the capacity to find out things from the opposing party in advance. We already have it in the Federal Court, I won't say they are frequent but they are by no means uncommon applications, I am involved in one at the moment, which is a good example because things are being found out which may well mean that there will be either no issue or a very narrow issue if and when the substantive litigation is commenced.

Particularly with medical negligence cases it seems to me that there needs to be an overthrow of Brinn and Williams by legislation. It seems to me that though that is undoubtedly a correct decision in my view as to the equities involved, it was not a useful decision. It was not for their Honours to make useful decisions of course. It wasn't a useful decision in terms of clearing the decks and stripping down for a proper decent sensible efficient medical negligence claim. By proper and decent I mean one which doesn't involve scattergun allegations which are not merely hurtful and insulting against the medical profession, they are a complete waste of money, time and public energy.

I think that if files of particular kinds could be made available, notwithstanding strict proprietorship and notwithstanding confidentiality; I think if forms of deposition, preferably in writing because I believe Americans have abused that tool terribly, then I suspect most serious medical negligence cases would be much better presented when they come on and a whole lot of them wouldn't come on at all.

Dr Lee: Julian Lee, non-legal. At the outset you talked about spec and that raised the question in my mind, and I guess you might clarify this for the audience, what is the distinction, if any, between spec and contingency and as a rider to that question, do you believe that the development of contingency litigation in Australia has been advantageous?

Mr Walker: A little bit of history; the 'access to justice' proponents of the 70s and 80s, ALRC in the mid 90s, and the New South Wales Parliament in 93, took the view that speculative litigation was a good thing and contingent fee litigation was an even better thing. The 'access to justice' proponents wanted there to be a double fee incentive, one hundred per cent uplift. I am about to get myself pilloried yet again; let me confess this, I was among the legal profession leaders who successfully dissuaded the Government here from anything so outrageous as a one hundred per cent uplift. By that I mean the capacity, if you are prepared to spec the case, to double your usual fee. In New South Wales a 25 per cent limit is put on.

In my view, the whole endeavour by those well meaning reformers, who were interested in more people being able to advance good claims, something with which I am very sympathetic, the difficulty was that they totally underestimated the demonstrated willingness and capacity of the New South Wales legal profession to spec cases without any such incentive. I have never understood why, to lawyers of all people, you had to hold out carrots to litigate. We were litigating and we were litigating on spec and we were litigating on spec charging the ordinary fee. Because in many spec cases the risk is not very high, and the kicker point is this, it is the one I like best, I have had mixed fortunes in persuading politicians, the great thing about a spec brief is you are not obliged to take it. That means you only take it if you have assessed the risk as worthwhile. It enlists self interest, at least momentarily, and it is an important moment, it enlists self interest momentarily in the public interest because it applies in the most thorough going fashion, the filter of 'has this case got reasonable prospects of success'.

I thought, whether accidentally or deliberately, the legal system devised an adaptable method which can ride economical cycles, which can ride changes in fashion in litigation and which was robust and readily understandable. I have no idea why contingent fees had to come in. The truth is that there were a number of those reformers who were enamoured of all things American. I wouldn't say it about any of them in particular. My guess or suspicion is that because the Americans have it, it was seen as prima facie likely to be a good thing. As much as I admire Americans and American lawyers I don't wish to have their litigation system, for a number of reasons we don't have anywhere near the time to go in to. I don't mean to black out everything American in litigation, far from it.

I think it was a wrong term to allow any uplift, even the 25 per cent. If I had my druthers it would be abolished tomorrow. I think looking back on it the notion of there being a hundred per cent uplift is a joke, complete joke. That you would give people the incentive of double fees when they are prepared to do it for single fees is an imposition upon clients. The money should be devoted to the purpose of which it is awarded, namely, compensation of the client. I think that answers your question.