'NO WIN — NO FEE'

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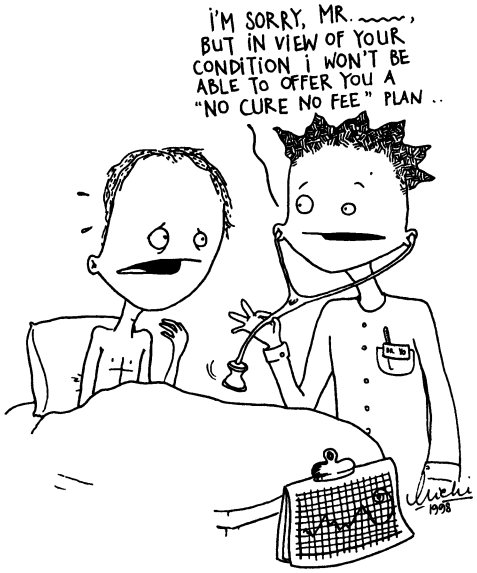
The management of medical negligence litigation on a conditional fee basis — the Victorian experience.



This article discusses the introduction of conditional fees for medical negligence litigation in the State of Victoria. Illustrating this discussion is a description of how one law firm, Slater & Gordon, has developed its own Code of Conduct in response to concerns raised following a particular case.

In recent years, a number of influences compelled fresh approaches to the conduct of litigation. Reform of the legal profession and opening up the legal industry to the principles of competition had gained considerable political momentum signalling a new attitude to advertising, and it was foreshadowed that 'extra premium' contingency fees and greater accountability in the form of regulated costs agreements would eventually be introduced.

In this environment conditional Fee Agreements were first introduced by Slater & Gordon in July 1994, launched via a significant marketing campaign. 'No Win—No Fee' was a formalisation of long-standing arrangements with some clients under which the firm would not charge for its services if it did not win. The arrangement was made available publicly for the first time in various types of litigation, to any Victorian, who could not afford litigation and whose claim was assessed by the firm to have a reasonable prospect of success.

A family law case of *Sheehan*[1] was significant because there the Full Court of the Family Court was required to deal with a costs agreement whereby the wife only had to pay her costs if successful. Implicit in the arrangement was that costs would come out of the fruits of the claim. The Court upheld that arrangement. An essential part of the Full Court's reasoning was that the solicitor had made a genuine appraisal of the merits of the woman's claim. This decision coupled with the deregulation of advertising gave further impetus to the public launch of conditional fee agreements. The firm obtained Senior Counsel's opinion that provided 'No Win—No Fee' was offered only to Plaintiffs with genuine claims who could not otherwise afford the litigation then it did not contravene the *Legal Profession Practice Act 1958* (Vic).[2]

The introduction of 'No Win—No Fee' by the firm with its associated advertising campaign was heralded with much fanfare. The scheme was seen as set to 'revolutionise' the law in Victoria, giving access to the legal system and legal services for thousands of Victorians for the first time. It was embraced as being consistent with government policy that urged more competition within the legal profession and in line with recommendations of the Trade Practices Commission and the Sackville report on access to the law.[3] Ironically the same governments committed to the rhetoric of 'access to justice' introduced extensive cost cutting that has had the effect of abolishing access to legal aid for all civil actions[4] and introduced significant increases to stamp duty associated with court processes highlighting the ambivalence of governments to reform of the legal industry.

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Under the 'No Win—No Fee' arrangement, clients were only required to pay if their lawsuits were 'successful'. A successful outcome was defined as one in which:

> settlement or resolution of the claim is reached either by a Court decision or by agreement where compensation or damages is paid to the client

or

> an offer of settlement is made which is recommended to be accepted.

In Victoria further liberalisation in the provision of legal services has occurred following the introduction of conditional fee agreements through amendments to the *Legal Practice Act 1996* effective from 1 January 1997.

The Act provides that a conditional fee agreement must be in writing and that the potential plaintiff must be advised of the possibility of an adverse cost order if the claim is not successful. An estimate of the total legal costs must be provided including an estimate of a range of costs that 'may be recovered' if the client is successful and the range of all costs and disbursements associated with the proposed litigation. The Act allowed for an agreement for an uplift factor of up to 25% of court scale costs if the case is won. The plaintiff does not pay a percentage of the verdict or settlement obtained as occurs in the 'contingency fee basis' of USA style litigation. These arrangements remain illegal throughout Australia.

Professional indemnity review

From the beginning 'No Win—No Fee' was not advertised or publicised in respect of medical negligence actions nor was there any marketing undertaken for individual medical negligence claims. Nonetheless the medical profession feared that aggressive advertising would result in an increase in unmeritorious claims and an explosion in litigation. This litigation 'crisis' theory was effectively debunked by the Commonwealth Department of Health & Human Services Professional Indemnity Review.[5] The review conducted over five years and completed in 1996 provided valuable insight into medical negligence action and the provision of indemnity by the various medical defence organisations. The final report of the Review of Professional Indemnity Arrangements for Health Care Professionals (the Final PIR Report) found no significant increase in medical negligence litigation existed on the available data.

The available evidence did demonstrate that claims made are only a small percentage of those cases in which negligence has actually occurred. Of those claims actually made a high percentage fail. The *Quality in Australian Health Care Study*, published by the Commonwealth Professional Indemnity Review in 1995, contained several unexpected findings (see Box). It indicated that 11% of hospital admissions surveyed in 1992 involved an adverse event (defined as an unintended injury resulting in disability caused by health care management) rather than a patient's underlying disease. Of adverse events, 51% were considered to be preventable (that is the result of an error in management due to failure to follow accepted practice at an individual system level) and in that year throughout Australia between 40,000 and 54,000 preventable adverse events resulted in death or permanent disability.[6]

The Final PIR Report confirmed that there was no demonstrable explosion in medical negligence litigation. This finding was also reflected in a more recent inquiry conducted by a Victorian Government Parliamentary Law Reform Committee.[7] The Law Reform Committee found that the perception of the medical profession concerning recent increases in the cost of professional indemnity was not reflected in a significant increase in either the quantity of claims or their quantum and that there was not a crisis in medical negligence litigation.[8] Both Committees went to extraordinary lengths to obtain hard data from the medical defence organisations about the incidence of claims made and settlements. All that was produced was data showing the increase in premiums and claims notifications. The Final PIR Report attributed the increased premiums to under funding over many years and the increased reporting related to stricter discipline on notification of potential claims by members.

Quality in Australian Health Care Study

In 1992–93 in Australia there were approximately:

- 172 million Medicare health care services
- 4.4 million hospital admissions
- 470,000 hospital admissions involved an adverse event and 3.3 million bed days were attributable to these adverse events
- 241,000 of these were strongly preventable
- 18,000 adverse events resulted in death
- 17,000 resulted in permanent disability greater than 50%
- 33,000 resulted in permanent disability less than 50%
- 110,000 resulted in temporary disability of between one and 12 months
- 170,000 resulted in temporary disability of less than one month
- An estimated 1500 tort claims were incurred

These findings have not prevented some medical defence organisations continuing to produce data purporting to show an increased frequency of claims notified to them. Megan Kearney, Secretary, United Medical Defence (one of Australia's largest medical defence organisations based in Sydney) states her organisation opened 572 new files in 1990, 1089 in 1994; and 1331 in 1995.[9] Given the current emphasis on claims and reporting of incidents in a timely manner by doctors, this sort of information merely confirms the risk management procedures now being adopted and is not necessarily a reflection of a 'surge' in claims. It is now known that the various medical defence organisations encourage doctors to report medico/legally significant incidents and it is now expected that consumers will pursue their legal rights in the event of an adverse outcome. It is undoubtedly the case that if an increase had been demonstrable these interest groups would have laid the blame at the feet of conditional fee arrangements.

It is unfortunate that the introduction of 'No Win—No Fee' coincided with the high profile case of *Maffei*.[10] This case was highly personalised, the defendant doctors, both eminent and well respected, relied heavily in their defence on their character and standing within the medical profession. The plaintiff, a hospital pharmacist, was a colourful,

artistic individual who was highly articulate. The case concerned a misdiagnosis of breast cancer and was dealt with urgently by the Court because of the plaintiff's poor prognosis. It attracted enormous attention in the media being described as one of the most emotional court cases of recent years and the outcome polarised the community. The case was assessed to have excellent prospects of success but the jury begged to differ and a verdict was given in favour of the defendants.

Development of code of practice

Following this decision there was a high level of hostility within the medical profession towards lawyers and conditional fee agreements. The case was held up to be one of the evils of 'No Win—No Fee'. It raised a public relations issue which the firm needed to deal with and affirmed the need to refocus and reorganise the medical negligence practice.

To counter the adverse publicity generated by the *Maffei* decision the firm developed a formal protocol to be used in the conduct of individual medical negligence claims and promoted the Code's benefits to the medical profession. The Code of Conduct was launched at a public conference.[11] The Code details considerations which ought to be second nature to any professional conducting medical negligence litigation. It is a document for internal purposes and all solicitors conducting medical negligence litigation within the firm are expected to abide by that code.

The Code provides as follows:

1. Proceedings will not be commenced unless:
   - the matter has been the subject of thorough investigation including the assessment of relevant and obtainable data;
   - there is substantial support for the claim from medical practitioners of good repute;
   - the claim does not relate to trivial matters; and
   - the claim relates to the standard of service provided or the level of information provided and does not solely relate to the manner in which the service was delivered (e.g. courtesy, cost, routine information provision etc.). In circumstances where the complaint does relate to the manner in which the service was provided Slater & Gordon will refuse to act in relation to such a matter and will refer a complainant to the appropriate professional association, the Health Services Commissioner or the Health Insurance Commission.
2. 'No Win—No Fee' arrangements will not be offered to a plaintiff unless all criteria in 1 above are met.
3. The firm acknowledges the need to maintain inter-professional courtesies. Accordingly, when instructed to commence legal proceedings the firm will notify the doctor(s) involved of the intention to commence such proceedings and invite them to advise the firm the name of their defence organisation or insurer and to contact that body to notify it that proceedings have been foreshadowed. The firm will then afford that insurer the opportunity to enter into discussions to facilitate early resolution through negotiation and, where appropriate, to nominate a solicitor for the service of process.
4. When legal proceedings are commenced the firm will endeavour to ensure that:
   - the matter is not publicised in a manner which may unfairly or unreasonably reflect upon the medical practitioner;
   - court sponsored mediation services are fully and genuinely utilised;
   - when a matter is fixed for hearing, the role of the firm in respect of publicity will be restricted to the management of media inquiry and the firm will not seek to promote the matter; and
   - at all times the privacy of the plaintiff and the defendant is respected.

The code was circulated to senior medical practitioners and members of some medical defence organisations who without exception applauded its development. Every opportunity has been taken to explain the code to the medical profession. The code has allayed concerns and suspicions about the manner in which medical negligence litigation is conducted and has established that publicity is not used as a blunt instrument and that the professional reputation of the defendants is publicly acknowledged and respected.

Eligibility for No Win—No Fee

To be eligible for 'No Win—No Fee' the client is required to enter into a written agreement that has the following three core conditions:

1. The client must at all times be open and honest about everything relevant to their claim. Material non disclosure will render the agreement inoperative. This is designed to avoid fraud. [To date we have not experienced any difficulties with this condition].
2. The client must fully co-operate and accept and follow our reasonable advice. In the event of a breakdown in the relationship the parties agree to accept the opinion of an independent barrister. If the parties cannot agree a barrister is nominated by the Law Institute of Victoria. The barrister acts as an expert.
3. The client agrees to retain the services of the firm until finalisation of the claim.

If there is a failure to comply with any of these conditions the agreement is terminated and the client is charged the accumulated legal fees and any disbursements incurred. Every effort is made to avoid withdrawal of representation occurring when the trial date is imminent. Each Fee & Retainer Agreement is reviewed at the various stages in the litigation process. If appropriate a variation of the estimates of costs and disbursements is provided. Progress reports are provided to the client at regular intervals. The client must be notified of any substantial change to anything included in the conditional costs agreement as soon as practicable.[12]

The firm's experience of conditional fee agreements in the two years following the introduction of the Code of Conduct has been one of positive outcomes in terms of the nature of the litigation now being undertaken and the outcomes achieved. It has meant a concentration of quality files, better rapport with the medical profession and an increasing acceptance of the necessity for the medical profession to cooperate with the lawyers to provide competent expert opinion to enable proper assessments to be made at an early stage of any potential claim.

'No Win—No Fee' is now seen as acceptable by at least some medical defence organisations.[13]

Through the implementation of the Code of Conduct in conjunction with 'No Win—No Fee' this firm has attempted to redress areas of concern to the medical defence organisations. Through the availability of conditional fee agreements consumers have a wide choice of lawyer and the agreements are offered on that basis. Whilst some general legal practitioners are competent and properly resourced litigators, this is the exception rather than the rule in medical negligence

litigation. A conditional fee agreement requires a lawyer to make a competent and skilled judgement about the viability of the claim. Poorly resourced or non-expert lawyers are unable to compete with these arrangements. Inevitably, therefore, the work has gravitated to specialist litigators, which is in everyone's best interests.

The firm's experience has been better prepared cases, greater respect, and better quality outcomes.

How does it work in practice?

The scheme operates with a heavy emphasis on front end filtration and investigation to determine the merits of the claim at an early stage.

Filtration commences at the initial point of contact usually by telephone. A telephone advisory service has been established and is staffed by junior but well trained solicitors who are required to look for indicators of a viable claim. Where the complaint relates to trivial or vexatious matters or is unrelated to the adequacy of the procedure those claims are dealt with, excluded and advice provided as to appropriate complaint forums.

In Victoria, there is the Office of the Health Services Commissioner.[14] Any consumer can make a written complaint against any health care provider whether public, private, individual or institution, provided they are within Victoria. This complaint system complements and supports the traditional litigation approach to medical negligence. It provides a means of conciliation by mutual agreement between the parties and where there are serious questions of medical negligence arising from a complaint the Commissioner encourages both parties to seek legal advice before any negotiated outcome is concluded.

The primary limitation to this process is that it is voluntary and either party may choose not to participate. It is also inevitable that the health service provider will have either direct or ambient legal representation at all stages and this may not be available to the complainant.

Where the telephone advisory service solicitor has some doubt, the inquiry is directed to the specialist solicitor for review prior to a response. Every caller who is excluded is provided with clear written advice on statute of limitations provisions and the necessarily provisional basis of our opinion. Dealing with callers' expectations raises difficulties. It is important to ensure callers understand that :

- a less than perfect outcome is not an adverse outcome;
- an adverse outcome is not the same as a preventable adverse outcome;
- a preventable adverse outcome is not automatically a negligent outcome; and
- a negligent outcome is not necessarily litigable.

Once a decision is made whether to accept the matter on a 'No Win—No Fee' basis, a conditional fee 'Litigation' agreement is entered into between the client and the firm. 'No Win—No Fee' and the Code of Conduct dictates that cases are now only commenced after careful analysis and investigation of the issues such that the majority of claims are well founded and result in compensation paid to the client. All of this is in the context of knowing that offers are not made in unmeritorious cases and even where there is substantial support for a claim with genuine disagreement between the parties' experts, medical defence organisations sometimes do maintain a 'no offers' stance.

Barristers and expert witnesses

Medical negligence is a small, discrete and specialised area of practice within personal injuries litigation. To undertake the work necessarily involves a significant investment of both financial and material resources and a dedication to employing specialist lawyers who must be strongly committed to the conduct of litigation within the framework of the Code of Conduct. The professional and financial commitment is significant. The cost of engaging specialist experts with relevant expertise can be at times prohibitive. It is also necessary to be in a position to deal with inevitable criticisms that arise and to have a public relations policy to deal with inevitable attacks. It is recognised in Victoria that if you hold yourself out as being a specialist personal injuries litigator you cannot avoid providing conditional fee agreements with respect to any potential plaintiff with a viable claim.

The successful offering of conditional fee agreements has required the co-operation and support of barristers. When the agreements were introduced there was a degree of conservatism with barristers fearing they might conduct large volumes of unpaid work. However, filtration, front end investigation and optimal preparation ensures that matters prepared by our firm are in good order and have reasonable prospects of success and, therefore, there is a preparedness to undertake the work on a conditional fee basis.

In contrast, we do not approach medical witnesses on this basis. The issue of witness expenses is a delicate one and we consider it unethical to seek medical witnesses to undertake the work on the understanding that to be paid the case must win. Such an arrangement is assiduously avoided by our firm. The experts already suffer from being targeted as partisan even though the relationship is strictly on a fee for service basis.

Despite the fears of the medical defence organisations of 'No Win—No Fee' promoting unmeritorious claims, the reality is that it has not led to an opening of the floodgates. The truth has been the reverse with conditional fee agreements operating to effectively distil matters so that only meritorious claims are being litigated.

This area of litigation is fraught with traps. Both sides fight hard, especially in detailed and complex disputes with a high quantum of damages. The medical defence organisations fight hardest where they do not consider there to be negligence, particularly, if the sole issue is one of credit and the doctor is a person of good repute. With the use of conditional fee agreements and adherence to the Code of Conduct, we have demonstrated that this litigation can and should be conducted in a professional manner.

The real benefit to our clients is that we continue to provide an avenue for redress where the claim is properly assessed and justified, and promote continued access to common law rights for medical negligence claims. Public interest demands that issues of principle, medical ethics and serious malpractice be given the weight and authority of judicial arbitration and law making.

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victim of abuse by the clergy, health practitioners or other professional groups.

There have been critics of gender-based justifications for sanctions on professional–client sex. The emphasis on the vulnerability of women clients may simply reinforce Victorian-era notions of women being inherently fragile and asexual. Women may freely and knowingly choose to lust after even the most domineering and power-hungry male.

Even allowing for such criticisms, the relative immunity of lawyers who engage in sexual activity with their clients may not last too much longer. There are now at least three States in the US which specifically ban 'attorney–client sex'. More jurisdictions are sure to follow. The depressing fact is that the law does not solve the problem of lawyer–client sex any more than it does for abuse by health professionals. A review of California's 'sex ban' laws for lawyers, carried out one year after the legislation was passed, revealed that most cases were still in the 'investigatory' stage, many were dropped due to insufficient evidence and others could not even be investigated because the complaints were mounted by third parties.[6] It seems likely, therefore, that sexual exploitation by professionals, whatever their discipline will continue to produce many more victims, for a long time to come.

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the first stage of public consultation. Given that AHEC has the responsibility of co-ordinating and assisting institutional ethics committees in reviewing research, and its functions involve promoting community debate and monitoring international developments in health and ethical issues, it is reasonable to expect that the issue of women in clinical trials would at least be debated. To date, AHEC's decision in this matter seems to be at odds with its role and its functions.

These issues may yet be addressed in the final revised statement or in the operating manual for institutional ethics committees. The NHMRC is currently preparing an operating manual for institutional ethics committees which should be available in late 1998. It is being developed by a consultant in consultation with AHEC and 'key stakeholders'. With regard to the *Statement on Human Experimentation,* there has been a second stage of public consultation and submissions on the *Draft Statement* were received up until 14 August 1998. The new statement should be released in the new year.

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