



LOSSES. LIABILITIES & **EFFECTIVE RECORDS MANAGEMENT**

PURPOSE:

- 0 To inform agencies of the current realities of the litigation climate in this country and the reasons for this situation.
- To consider the significance of documentation to the defence of liability claims.

WHAT IS THE CURRENT LITIGATION CLIMATE IN AUSTRALIA?

- Australia second most litigious country in the world after U.S. *Why?*
- The following factors:-
 - (i) The accountability factor: -
 - increasing consumer awareness/consumer society,

- (ii) The increasing number of lawyers and the changes to previous traditional areas of practice.

e.g. Accident Compensation Act, Transport Accident Act.

- (iii) The trend of court decisions at the appellate levels.

Examples, (a) Chappell v. Hart

(b) Bale v. Seltsam

(c) Anderson v. Mt. Isa Basketball Association

(d) Franklins Self Serve P.L. v. Bozinovska

(e) Johns v. Cosgrove

- (iv) Legislative changes such as Trades Practices Act/Fair Trading Act, Limitation of Actions Act, Class Action Legislation.

- (v) The blaming and claiming society.

- To think that it will not happen to you is a head-in-the-sand response. It is only a matter of time.
- Following the US. experience.

SIGNIFICANCE OF DOCUMENTATION IN DEFENCE OF LIABILITY

CLAIMS

DISCOVERY

What is it? What is its purpose?

- Disclosure of all documents in the possession or power of a party that are relevant to the issues in a particular piece of litigation.
- The purpose is to **ensure** that the parties to a piece of litigation have access to all documents which are relevant to the issues.

How does one discover?

- By swearing an affidavit in which states that the documents disclosed are the only documents in the possession or power of the party.

Importance of the Affidavit

- Goes to the credit of the party, whether it be an individual or an organisation
- -‘Smoking gun’ document.

- * As a general principle defendants cannot successfully defend liability claims in the absence of leading positive evidence in court.
- That evidence is either oral evidence of what occurred or documents which can be admitted as proof of certain matters.
- Litigation is very often “He said” -v- “She said” - e.g., medical negligence. If a doctor’s notes prepared contemporaneously corroborate the doctor’s version, the doctor is more likely to be believed. If not, patient more likely to be believed.
- Same principle applies throughout all types of liability claims.
- If agency is providing goods, services or advice it is important that accurate records be kept to properly record the provision of those goods, services or advice.
- What needs to be recorded must be balanced against the risk being borne.
- In recording information, it is vital to appreciate that the document prepared today may one day be subject to court scrutiny, and possibly F.O.I. scrutiny.

- The bringing of an F.O.I. application may in itself foreshadow the possibility of a claim being made.

- Therefore, in recording information, comply with the following:-
 1. Record it promptly.
 2. Make the comments objective and accurate.
 3. If they are handwritten, make them legible
 4. Date the entry.
 5. Do not make alterations subsequently.
 6. Do not make gratuitous or disparaging comments about others.

- Documents can be a double-edged sword in that if there are documented processes or procedures which have been adopted as policy and a claim arises out of the failure to follow the adopted policy, then the position on liability is significantly weakened.

- On balance, a properly documented defence is of enormous assistance not only in defending, but also in achieving negotiated settlements. Don't under-estimate this aspect.

- . Electronic recording of documents is acceptable.

CONCLUSION:

- 1 The litigation climate in this country will worsen for defendants In the foreseeable future.
2. The need to risk manage is greater than ever,
3. Preparation and retention of accurate contemporaneous documents can be of enormous assistance in the defence of liability claims.

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