IMPLIED TERMS IN CONTRACTS BETWEEN PROFESSIONALS AND THEIR CLIENTS: THE DOCTOR-PATIENT EXEMPLAR

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Actions for professional malpractice have traditionally been governed by the common law. But aggrieved clients are now able to supplement their common law rights with statutory provisions. This article examines one potential use of the Trade Practices Act 1974 (Cth) and the Fair Trading Act 1987 (WA) in actions against professional people generally and doctors in particular.

1. INTRODUCTION

Under the common law there are implied into contracts between professionals and their clients warranties that services will be rendered with reasonable care and skill. A standard of care is also imposed upon professionals by the tort of negligence. The Commonwealth Trade Practices Act 1974 ("TPA") and the Western Australian Fair Trading Act 1987 ("FTA") (collectively referred to as "the Trade Acts") have the potential to significantly strengthen the bases for civil actions for malpractice against professionals in Australia.

This article uses the relationship of a medical practitioner-patient as its primary vehicle for exposition. However, the analysis of implied terms in contracts under the common law and under the Trade Acts is equally relevant for malpractice in other professions.[1] This article will outline the imposing

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1. For more specific discussions of the Trade Acts relative to other professions see: B Akhurst "Responsibilities of solicitors under the Trade Practices Act 1974" (1987) 61 LIJ 909; S Charles "Professional liability and lawyers" (1988) 62 LIJ 22; E Kyrou "Section 74 Looms Over Solicitors and Accountants" (1987) 61 LIJ 46; C A Sweeney "Trade Practices Act changes widen liability for professional services" Vol 21(5) *Australian Law News* 20; K Cooper and J Jackson "The Impact of Section 74 of the Trade

obstacles facing a plaintiff in a common law action for malpractice. It will then explore the extent to which the statutory imposition of contractual terms on professionals places such a plaintiff in a more advantageous position.[2]

All the Australian States have enacted TPA "mirror legislation", at least one part of which is called the Fair Trading Act.[3] However, section 40 of the FTA is the only State provision that mirrors the current version of section 74 of the TPA.[4] As with section 74 of the TPA, section 40 of the FTA implies a warranty into a contract for services, including services of medical practitioners and other professionals.

The main distinction between the TPA and the FTA in this area is that the TPA generally reaches only those suppliers of goods and services that are incorporated while the FTA will reach individuals and unincorporated entities as well. This reflects the constitutional limitation on the competence of the Commonwealth Parliament to enumerated powers. The primary constitutional foundation for the TPA is the "corporations" head of power, under section 51(xx) of the Australian Constitution. There is no corresponding constitutional impediment to the Western Australian Parliament legislating in respect to the provision of professional services by individuals and unincorporated entities.

Practices Act 1974 (Cth) on the use of Disclaimers by Accountants and other Professionals" 19 ABLR 167.

2. Other provisions of the Trade Acts (Part V Division 1 of the TPA, and Part I of the FTA) may assist the plaintiff in that particular type of medical malpractice where there is alleged a lack of "informed consent". That topic was canvassed 2 years ago in this journal: S Laufer "Aggrieved Patients Who Claim They Were Not Told: A New Avenue of Redress?" (1990) 20 UWAL Rev 489.
3. See (NSW) Fair Trading Act 1987 and Part VIII of the (NSW) Sale of Goods Act 1923; (Vic) Fair Trading Act 1985 and (Vic) Goods (Sales and Leases) Act 1981; (Qld) Fair Trading Act 1989; (SA) Fair Trading Act 1987 and (SA) Consumer Transactions Act 1972; (Tas) Fair Trading Act 1990. The ACT and the NT are fully subject to the "extended" jurisdiction of the TPA. See ss 6(2) and 6(4) of the TPA and s 122 of the Australian Constitution.
4. The NT has recently adopted the current version s 74 into its mirror legislation, but as a territory its individual medical practitioners were already directly subject to s 74 of the TPA. A review of the WA Parliamentary proceedings has not uncovered an iota of recognition by any Parliamentarian of WA's unique position among the States.

This article will first outline the position under the "untainted" common law[5] and then examine the potential impact of terms that may be implied into the professional-client contract by the Trade Acts.

2. MALPRACTICE UNDER THE COMMON LAW

It will be convenient to look at the standard of care implied under the "untainted" common law separately from issues of causation and quantum of damages. The two primary vehicles for a malpractice suit are an action for breach of contract and an action in the tort of negligence, with the latter action currently being the more prevalent.[6] For purposes of this article, the standard of care imposed upon the professional by the "untainted" law of contract and that applicable under the tort of negligence will be treated as substantially identical.[7] The term "negligence" (in quotation marks) used in this paper will refer equally to a failure to meet the applicable standard of care implied into a contract between a professional and client and to the standard of care imposed by the tort of negligence.

The Standard of Care for a Professional

Under the common law, unless the contract or the circumstances indicate a contrary intention, there will be implied into a contract between any professional and his or her client a term that the professional will exercise reasonable care and skill.[8] The professional will have to perform up to the standard recognised as proper by the average competent professional of that type in the community.[9] Under the law of torts, and in particular the tort of negligence, a similar standard of care is imposed upon the professional.

5. An action based on a term implied into a contract by the Trade Acts is not a statutory action for contravention of the statute. Rather it is a common law action for "breach of contract". Therefore, to be technically correct, the "untainted" label will be used as necessary to distinguish common law actions not grounded on a term implied by the Trade Acts from those that are "statute-related".
6. The landmark High Court case of *Hawkins v Clayton* (1988) 164 CLR 539 has conclusively laid to rest in Australia any doubts as to whether a professional's liability to a client can lie concurrently in the tort of negligence and in contract.
7. While there may be some distinctions to be drawn, they have not yet been judicially defined. See *Petrunic v Barnes* [1988] Aust Torts Reports 80-147 at 67,324, where the possibility of such distinction is noted but left undiscussed and undecided; Kirby JA in *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553, 569-570.
8. See *Eyre v Measday* [1986] 1 All ER 488; *Greaves v Baynham Meikle* [1975] 3 All ER 99 Denning M R, 103; 28 *Halsbury's Laws of England* (3rd edn 1959) para 17-19.
9. The precise formulation of the standard is open to some question, as discussed during the rest of this section.

While this standard seems a quite fair and functional objective test, its application has provided difficulties for courts. Significant discrepancies in formulation have arisen among various jurisdictions.

In judging the quality of professional services, the layman trier of fact (be that judge or jury) will have to rely heavily on the expert testimony of practitioners. This brings into the equation a subjective taint of the prevailing practices in the profession and to some extent abrogates the function of the trier of fact. In the medical malpractice area, the English cases, beginning with the 1957 landmark case of *Bolam v Friern Hospital Management Committee* ("*Bolam*"),[10] have tended to defer to the prevailing practices of the medical profession and have rarely challenged those views. The principle enunciated by Justice McNair in *Bolam* was summarised by Lord Scarman in a recent case in the House of Lords, *Sidaway v Bethlem Royal Hospital Governors*, as follows:

> The *Bolam* principle may be formulated as a rule that a doctor is not negligent if he acts in accordance with a practice accepted at the time as proper by a responsible body of medical opinion even though other doctors adopt a different practice. *In short, the law imposes the duty of care, but the standard of care is a matter of medical judgment.*[11]

The *Bolam* case marked a turning point in the law of professional malpractice. In a critical commentary on the case published the following year, Professor Montrose noted that the *Bolam* formulation for determining the standard of care of professionals was at variance with what had previously been the norm.[12] He categorised the *Bolam* formulation as a "sociological concept" as opposed to an "ethical concept". By his reading of the case, it allowed a defence to professional malpractice claims based on conformity with what is ordinarily done by a member of a responsible school of a particular profession. In other words, instead of the guideline being what a reasonable practitioner believed *ought to be done* in the circumstances, the standard had degenerated to what a typical practitioner *might do* in those

10. [1957] 2 All ER 118.
11. [1985] 1 All ER 643, 649 (emphasis added).
12. J L Montrose "Is Negligence an Ethical or a Sociological Concept" (1958) 21 MLR 259. Montrose cited several prior English cases and also quoted from a leading authority of the day, W T S Stallybrass (ed) *Salmond on the Law of Torts* 10th edn (London: Sweet & Maxwell, 1945) 437, as follows:

> [T]he general practice itself may not conform to the standard required of a reasonably prudent man. In such a case it is not a good defence that the defendant acted in accordance with the general practice.

N Iles "*Curial Inconsistencies in the Doctors' Duty of Care*" (1987) 11 Adel LR 88, 90, also documents the proposition that the *Bolam* principle was a break from prior law.

circumstances. It also appeared that this formulation did not leave open to the court the power to override current custom in the profession. Professor Montrose found this a dangerous and infelicitous concept. In his words:

> Experts may blind themselves by expertise. The courts should protect citizens against risks which professional men and others may ignore.[13]

The *Bolam* formulation later came to be known, and will hereinafter be referred to, as either the "*Bolam* principle" or the "professional standard" of care.

The professional standard can also be applied where the alleged misconduct is a failure to secure an "informed consent" from the patient.[14] In this area of medical practice, a doctrine has developed that is generally referred to as "therapeutic privilege". Information can be withheld from the patient if full disclosure might worsen the patient's condition or diminish chances for recovery. When the court adopts the professional standard in informed consent cases, proof that a recognised body of medical practitioners would not have fully informed a patient will conclusively protect the medical practitioner from liability. It is not open to the court to determine that the practice of the profession is inadequate.[15]

Despite the misgivings of Professor Montrose and others, the English courts have generally adopted the professional standard and, in informed consent cases, construed the scope of the therapeutic privilege consistent with that standard. These principles were expressly endorsed in later cases by the Privy Council and the House of Lords.[16] In fact, in some later cases, jurists blatantly showed favour to the medical profession as a matter of "public policy" and went beyond the mere application of the professional standard or acceptance of therapeutic privilege. In the minds of jurists of this ilk, the prime consideration was the protection of medical practitioners from damage to their reputations so as to encourage the advancement of medicine. The spectre of American-type "defensive medicine" drove such jurists to increase the burden of proof on plaintiffs in medical malpractice cases. Lord Denning,

13. Ibid, 263.
14. The term "informed consent" is used here as a convenient label when the alleged misconduct is the failure of a medical practitioner to provide a patient with adequate information concerning the risks of a proposed treatment, the chances of failure of the treatment, the availability of alternative treatments, or the prognosis without treatment.
15. The facts and the judicial opinions from *Bolam* and later cases in the area of "informed consent" are discussed in considerable detail by D I Cassidy "Malpractice - Medical Negligence in Australia" (1992) 66 ALJ 67.
16. *Maynard v West Midlands Regional Health Authority* [1984] 1 WLR 634; *Chin Keow v Government of Malaysia* [1967] 1 WLR 813.

in particular, saw an important role for the courts in the fight against the "perversion" of the practice of medicine in England.[17] The pronouncements of this school of jurists used special terminology to support their position. Their judicial opinions would commonly state that "errors in clinical judgment" or "medical misadventure" were not the equivalent to "negligence". There is more than a germ of truth behind such terminology. Certainly the practice of medicine and other professions is imperfect, and unfortunate consequences can eventuate without the conduct of a professional falling below recognised standards. For example, in some operations the surgeon may accidently damage blood vessels or nerves within the operation site. But such an accident, no matter how severe the consequences for the patient, does not necessarily mean that the surgeon was "negligent". That consequence might be viewed as just an unfortunate materialisation of a risk known to be associated with the operation in question.[18] Nevertheless, the vagueness of the terminology, "medical misadventure" and "error of clinical judgment", provoked heated debates within legal and medical circles.[19]

Jurists outside the United Kingdom, notably in the United States, Canada and in several states in Australia, have been breaking away from the *Bolam* principle and questioning the scope of therapeutic privilege by treating expert testimony of doctors and other professionals as only advisory.[20] After considering the evidence of the expert witnesses, these courts have expressly reserved the issue of "due care and skill" for the trier of fact to determine on a wholly objective "reasonable man" test. On this objective view, the trier of fact could find that a professional acted unreasonably under the circumstances despite unrebutted expert testimony that the defendant's conduct was

17. *Whitehouse v Jordan* [1980] 1 All ER 650, 658
18. Similar examples could easily be hypothesized in other professions. A solicitor may not be as brilliant in court as his opponent or an auditor might fail to uncover a fraud perpetrated by the management of the client company, but neither professional is necessarily falling below the appropriate standard of care.
19. See G Robertson "Whitehouse v Jordan - Medical Negligence Retried" (1981) 44 MLR 457.
20. See *F v R* (1983) 33 SASR 189; *Albrighton v Royal Prince Alfred Hospital* [1979] 2 NSWLR 165 and [1980] 2 NSWLR 542; *"E" v Australian Red Cross Society* ("*Red Cross*") (1991) ATPR 41-085; *Battersby v Tottman and State of South Australia* (1985) 37 SASR 524; *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553; *Whitaker v Rogers* (1990) Australian Torts Reports 81-062; *Reibl v Hughes* (1980) 114 DLR (3d) 1; *Canterbury v Spence* 464 F 2d 772 (1972); *Cobbs v Grant* 502 P 2d 1 (1972); *Wheeldon v Madison* 374 NW 2d 367 (1985).

reasonable and in accordance with the usual practices in the profession.[21] Representative of this line of cases is the opinion of Chief Justice King in *F v R*:

> The ultimate question, however, is not whether the defendant's conduct accords with practices of his profession or some part of it, but whether it conforms to the standard of reasonable care demanded by the law. That is a question for the court and the duty of deciding it cannot be delegated to any profession or group in the community.[22]

Proving Causation and Quantum of Damages

Even when a plaintiff in a malpractice suit can satisfy the *Bolam* principle and show a failure of the defendant to meet the professional standard, there can remain immense difficulties in proving causation and assessing quantum of damages. If a doctor misses a diagnosis or muddles an operation, what causes the damage to the patient, the doctor or the disease? Does a solicitor lose a case because of a lack-lustre performance or due to the brilliance of the opposing counsel? A straight "but for" causation test is often inadequate in complex cases where there are multiple causations of the ultimate harm suffered. Slightly different, but equally perplexing, issues of causation arise in cases revolving around an alleged lack of "informed consent". Would the patient have "lost heart", refused treatment and avoided the injury if full information had been provided? Is this determination to be based on what a reasonable patient would have done (objective test) or on what the actual patient in question would have done (subjective test)?

The development of guiding principles to resolve causation issues has been severely impeded by the thin line between matters of "causation" and those which deal with quantum of damages.[23] However, there has been a considerable advance in favour of the plaintiff from the original draconian common law position. At one time multiple causations or contributory negligence by the patient might preclude any recovery, at least in a case based in the tort of negligence. This has been modified by later cases (as to contractual recovery) and by statutory intervention (as to recovery in tort),[24]

21. Which is not to say that all these cases have found for the plaintiff. Despite disavowing the *Bolam* principle, the vast majority of these cases still find on behalf of the defendant medical practitioner on one ground or another.
22. Supra n 20, 194.
23. J G Fleming *The Law of Torts* 6th edn (Sydney: Law Book Company, 1983) 170; *Malec v J C Hutton Pty Ltd* (1990) 92 ALR 545.
24. There are statutes in each Australia jurisdiction that override the common law "all or nothing" principle in recovery for tortious actions. In Western Australia, see s 4 of the (WA) Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947.

so that once a plaintiff proves *by a preponderance of the evidence*[25] that the conduct of the defendant was a *substantial cause* of the damage, courts allow at least a proportional recovery. Still, for the plaintiff in a malpractice suit, the "preponderance of the evidence" requirement can prove a very slippery slope. No profession is an exact science. There can be honest differences in the opinion of experts as to the probabilities of an alleged misconduct being a substantial cause of the loss or injury incurred.[26] There is a significant divergence of judicial opinion on this thorny topic.

Recent cases in the United Kingdom demonstrate the heavy onus placed on the plaintiff to prove causation in malpractice cases. The issue is brought into sharp focus by *Hotson v East Berkshire Area Health Authority* ("*Hotson*").[27] A 13 year old boy was brought into hospital with a hip injury and was mis-diagnosed and sent home. By the time the diagnosis was corrected, five days later, the probability of successful treatment was reduced from 25 per cent to nil. The trial court awarded 25 per cent of the total damages suffered and this was affirmed by the Court of Appeal. The House of Lords unanimously reversed and held that both lower courts had confused the issue of causation with the issue of quantum of damages. Their Lordships stated that no damages for "loss of chance" could be awarded unless causation had first been proved. It was first necessary to show, by a preponderance of the evidence, that the treatment would have been successful had treatment been given upon the patient's original arrival at hospital.[28]

The logical and unfortunate consequence of this holding is that plaintiffs in malpractice cases will be faced with an absolute block to recovery if their chances of successful treatment (or their chance of winning their law suit) were less than 50 per cent before the alleged malpractice. In effect, in those

25. C Lewis *Medical Negligence. A Plaintiff's Guide* (London: Frank Cass, 1988) 145-146; and the cases cited therein for certain exceptions to the "preponderance of evidence requirement" in England, all outside the area of medical malpractice.

26. The issue here is "causation" rather than "standard of care". Therefore, even under the *Bolam* principle, the trier of fact retains some discretion and can choose between the conflicting probability estimates of the experts.

27. [1987] 2 All ER 909, reversing Court of Appeal decision sub nom *Hotson v Fitzgerald* [1987] 2 WLR 287 which had affirmed the court of first instance [1985] 1 WLR 1036.

28. On the other hand, there was some good news for plaintiffs that are able to overcome this evidentiary huddle. In dicta, their Lordships stated that once it is shown that causation is more probable than not, the award of damages should not be reduced by the degree to which the probability of causation is less than 100%. This *dicta* conflicted with at least two earlier United Kingdom lower court opinions: *Bagley v North Herts Health Authority* (1986) NLJ 1014; *Clark v MacLennan* [1983] 1 All ER 416. It also conflicts with the High Court of Australia opinion in *Malec v J C Hutton* supra n 23.

situations the professional will be insulated against any "negligence" that just *increases the likelihood* of the service or treatment being unsuccessful. This type of "all or nothing" analysis is exactly what the House of Lords tried to avoid in the earlier decision of *McGhee v National Coal Board* ("*McGhee*").[29] In that case, the court was faced with a situation where the failure of an employer to provide showers for its brick kiln workers was clearly negligent. It was an accepted fact that the lack of showers significantly increased the workers' chances of developing dermatitis from prolonged contact with brick dust. However, it could not be proved that the availability of showers would have decreased the chances of contracting dermatitis to less than a 50 per cent probability.[30] In other words, the legal issue was whether the conduct complained of could be held to have made a "material contribution" to the injury suffered if that conduct (or the failure to act) could not be proved to have raised or lowered the probabilities across the 50 per cent barrier. In *McGhee*, their Lordships chose to deal with this issue on a common sense level and not split hairs on an academic philosophical plane. In the words of Lord Reid:

> Nor can I accept the distinction ... between materially increasing the risk that the disease will occur and making a material contribution to its occurrence ... (I)t has often been said that the legal concept of causation is not based on logic or philosophy. It is based on the practical way in which the ordinary man's mind works in the every-day affairs of life. From a broad and practical viewpoint I can see no substantial difference between saying that what the respondents did materially increased the risk of injury to the appellant and saying that what the respondents did made a material contribution to his injury.[31]

It is difficult to reconcile the decisions in *Hotson* and *McGhee*.[32] Lord MacKay in *Hotson* attempted to distinguish *McGhee* by noting that the extra exposure to brick dust caused by the defendant's negligence in that case was accepted as having made some definite contribution towards the later dermatitis. In *Hotson*, it was not conceded that the delay in treatment had any negative effect as the ultimate harm had a 75 per cent chance of developing

29. [1972] 3 All ER 1008.
30. This is despite the later flight of fancy by Lord MacKay when he hypothesized statistics in an attempt to distinguish *McGhee*: *Hotson* supra n 27, 916. See infra n 33.
31. Supra n 29, 1011.
32. It is noted that the make-up of the House of Lords in these two cases consisted of 5 completely different Lords Justices.

in any event. With respect, this writer finds that reasoning unconvincing.[33] However, as *Hotson* is the later pronouncement of the House of Lords, the *McGhee* precedent cannot be relied upon with great confidence.[34] The current position in the United Kingdom seems to deny or very severely restrict recovery for loss of chance relative to professional services.

There have been other attempts in England to ameliorate the difficult burden of proof on causation in professional malpractice cases. In *Wilsher v Essex Area Health Authority*,[35] the plaintiff tried to reverse the burden of proof. His proposition was that the burden of disproving causation fell on the defendant practitioner when that practitioner had failed to take an accepted precaution in serving as client and the client suffered the very type of injury that the precaution was meant to guard against. The House of Lords unanimously rejected that principle. Also, attempts to use the hoary maxim res ipsa loquitur on behalf of the plaintiff have rarely been successful.[36]

In Australia, the professional malpractice cases have not as clearly delineated this "loss of chance" issue as have the United Kingdom cases.[37]

33. Lord MacKay even went so far as to hypothesize that in *McGhee*, 70 out of 100 workers would have developed dermatitis under the conditions endured by the plaintiff but only 30 out of 100 would have developed the disease had showers been available. His Lordship however concedes that this example has no basis in the recorded facts of *McGhee* and was only an illustration: Hotson supra n 27, 916. The other Lordships in *Hotson* did not take such flights of fancy or in any serious way attempt to distinguish *McGhee*.

34. Lord MacKay noted that they were not going so far as to state that *McGhee* was wrongly decided:

> In these circumstances I think it unwise to do more than say that unless and until this House departs from the decision in *McGhee* your Lordships cannot affirm the proposition that in no circumstances can evidence of loss of a chance resulting from the breach of a duty of care found a successful claim of damages, although there was no suggestion that the House regarded such a chance as an asset in any sense: *Hoston* supra n 27, 916.

35. [1988] 1 All ER 871.

36. Lord Denning commented that due to the presence of unavoidable risks in the practice of medicine, "[it] is not right to invoke against ... [the medical practitioner] the maxim of res ipsa loquitur save in an extreme case": *Hucks v Cole* (1968) 118 NLJ 469. Even jurists that do not exhibit a bias in favour of the medical profession have commented that the maxim is rarely useful. See *Albrighton v Royal Prince Alfred Hospital* [1980] 2 NSWLR 542, 553-554; *Sianis v Barlow* (1987) 48 SASR 469, 478. The maxim retains some legitimacy for extreme cases: eg where a clamp or sponge is left inside a patient after an operation, or where a patient's shoulder is injured during an operation on his appendix.

37. *Diane Francis Putnam v Miodrag Huber* (unreported) Supreme Court of New South Wales 18 February 1992 no 12691/90 discusses the issue but only in passing. In that case the plaintiff's chances of 10 year survival from cancer were estimated by the court at 60% before medical "negligence" reduced the chance to well below 50%. Therefore, causation was proved by a preponderance of the evidence.

However, in *Malec v J C Hutton,*[38] a case concerning the duty of care of an employer to an employee, the High Court dealt in some depth with the distinction between causation and quantum of damages. Their Honours opined that issues of causation which deal with a happening in the past are to be decided by a preponderance of the evidence. They are treated as either a certainty or as non-existent, "all or nothing". Issues of damages, which deal with possibilities, or lost possibilities, for the future, are to be decided by probabilities and apportioned.[39]

Plaintiffs in professional malpractice cases in the United States generally have an easier burden of proof on causation than in England or Australia. The American Law Institute's *Restatement 2d Torts* states relative to a "Negligent Performance of Undertaking to Render Services":

> 323 One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if:
>
> (a) his failure to exercise such care *increases the risk of such harm*, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.[40]

Several American jurisdictions have adopted this principle in determining causation in malpractice cases. In *Herskovits v Group Health Cooperative of Puget Sound,*[41] a medical practitioner negligently failed to diagnose lung cancer, thereby delaying treatment and reducing the patient's chances for five-year survival from 39 per cent to 25 per cent. The estate of the patient sued but the defendants won a summary judgment in the court of first instance. It was an agreed fact that the chances of survival were never above 50 per cent. The first appeal court reversed and held that there was sufficient evidence for the issue of proximate cause to go to the jury. The full bench of the Supreme Court of Washington State affirmed the case (by a margin of six to three) and sent it back for a full trial, though it noted that any eventual damage award should be apportioned to the percentage reduction in the survival rate. It is interesting to note that the majority was made up of two separate groups of judges. Two judges totally supported the *Restatement 2d Torts*. However, the other four judges in the majority held that causation must

38. Supra n 23.
39. This is contrary to the *dicta* by the House of Lords in *Hotson* supra n 27, 922.
40. American Law Institute St Paul, Minnesota, 1979. The publication is not a "statute" and is not binding on American courts. However, it is prepared by the eminent scholars in the field and has a strong influence on American courts (emphasis added).
41. 664 P 2d 474 (1983).

still be shown to be more likely than not. But this group of four judges categorised the injury as the loss of chance for extended survival rather than as the death of the patient. It was an agreed fact (for purposes of the motion for summary judgment) that the "negligence" of the medical practitioner caused this "loss of chance". The summary judgment against the plaintiff could not stand and the plaintiff was entitled to have the case go to the jury.[42]

The United Kingdom position is favoured by C Lewis, in his book *Medical Negligence: A Plaintiff's Guide*. The author notes that the "fickleness" of statistics is a good reason to leave the courts with the broader standard of either above or below 50 per cent. Statistics are known to be very malleable in the hands of expert manipulators and the "aetiology of medical conditions is notoriously complex and obscure".[43] It is doubtful that the practice of law or accountancy constitutes a field of endeavour where the reliability of statistics is greater than the norm. In accord with this view is a statement by Lord Ackner in *Hotson*. His Lordship warned that changing the "preponderance" rule "would give rise to many complications in the search for mathematical or statistical exactitude".[44]

At present, the Australian position is in line with the United Kingdom authorities rather than the "pro-plaintiff" tilt of some American jurisdictions. Due to this causation hurdle, it would seem that an Australian plaintiff bringing an action in contract or tort will fail to prove damages against a professional when the client's chances of success in the project at hand were less than 50 per cent at the time services were rendered.

42. See *Hicks v United States* 368 F 2d 626, 632 (1966) where the court held that a medical practitioner whose negligent action had effectively terminated a patient's chance for survival would not be permitted to raise conjectures as to the measure of the chance for survival. The case held that if there was any substantial possibility of survival and the doctor destroyed it, he or she is answerable. For other American cases, both pro and con on this issue, see the cases listed in *Herskovits* ibid, 476.
43. Supra n 25, ch 22.
44. Supra n 27, 922.

3. TERMS IMPLIED UNDER STATUTE: THE CRITERIA[45]

Section 74 of the TPA provides, in relevant part:

> (1) In every contract for the supply by a corporation in the course of a business of services to a consumer there is an implied warranty that the services will be rendered with due care and skill and that any materials supplied in connexion with those services will be reasonably fit for the purpose for which they are supplied.
>
> (2) Where a corporation supplies services (other than services of a professional nature provided by a qualified architect or engineer) to a consumer in the course of a business and the consumer, expressly or by implication, makes known to the corporation any particular purpose for which the services are required or the result that he desires to achieve, there is an implied warranty that the services supplied under the contract for the supply of the services and any materials supplied in connexion with those services will be reasonably fit for that purpose or are of such a nature and quality that they might reasonably be expected to achieve that result, except where the circumstances show that the consumer does not rely, or that it is unreasonable for him to rely, on the corporation's skill or judgment.

In terms of professional malpractice, section 74 of the TPA, on its face, requires that the practitioner be a "corporation" and that the patient be a "consumer".

The "Corporation Criterion"

Most professionals in Australia practise in a business structure other than that of an incorporated entity. However, in a minority of cases, especially in the medical field, there will be an incorporated defendant (for example, a hospital, a medical laboratory or a medical supplies or pharmaceutical house).[46] Even more relevant as far as the medical profession is concerned is a trend in Australia to permit medical practices to incorporate.[47] Subsections

45. The analysis of substantive provisions will be restricted to Part V Division 2 of the TPA and Part III of the FTA (both of which are entitled "Conditions and Warranties in Consumer Transactions").
46. Such cases might raise issues of vicarious liability and accessory liability under the common law, and under several statutes, including ss 75B or 84 of the TPA and ss 68 or 82 of the FTA. These issues are beyond the scope of this article. In particular, TPA accessory liability is outside the scope of this topic since it only relates to contravention of the statute and not to breaches of contractual terms implied under the statute.
47. All Australian states except NSW and Vic now have provisions for registration of incorporated medical practices. See Div V ss 37-43 of the (SA) Medical Practitioners Act 1983; Pt XI ss 80-86 of the (Qld) Medical Act 1939; Pt 111A ss 23A-23V of the (Tas) Medical Act 1959; s 42C of the (NT) Medical Practitioners Registration Act (1935-1980). This article will not delve into provisions applicable to other professions in Australia.

11(3) - 11(6) of the Western Australian Medical Act 1894 ("Medical Act")[48] authorise the registration of a body corporate as a medical practitioner. The corporation must be composed entirely of individuals registered as medical practitioners or it must be composed of two members, one of whom is an individual registered medical practitioner and the other of which the Medical Board determines is of "good fame and character". This latter alternative would allow even a single practitioner to operate in the form of a corporation, with the other member being a spouse or relative rather than a fully-fledged business associate.

It should be noted that, even in an action for breach of contract, the medical practitioner does not receive the full protection of the "corporate shield" by way of these permitted incorporations of medical practices. An aggrieved patient may lift the corporate veil and reach the assets of the individual medical practitioners who actually carry on the medical practices. Subsection 11(5) of the Medical Act provides:

> Any civil liability in connection with the practice of medicine incurred by a body corporate that is a registered medical practitioner under this Act is enforceable jointly and severally against the body corporate *and any person who at the time that the liability was incurred was a member of the body corporate.*[49]

The other Australian jurisdictions allowing incorporation of medical practices have provisions to similar effect.[50] Even without this statutory assistance, an action in tort (for negligence or battery) against an individual medical practitioner should be unimpeded by the corporate shield.

48. Amended by the (WA) Medical Amendment Act 1985 and the (WA) Medical Act Amendment Act 1988, this particular section was proclaimed and effective as of 17 November 1989.

49. This provision is *not* contained in the reprint of the Medical Act as at 10 March 1988 because the relevant section of the 1985 amendments was not proclaimed until after that date. See s 9 of the (WA) Medical Amendment Act 1985 as amended by s 3 of the (WA) Medical Amendment Act 1988 (emphasis added).

50. In Qld, a contract for medical services is deemed in law to arise between the patient and the individual medical practitioner, although the medical company may sue for fees. In SA, the liabilities of the medical company are enforceable against both the medical company and its directors. In Tas, the medical company, the management of that company and the individual medical practitioners are exposed to liability. In the NT, the medical practitioner members (shareholders) of the medical company are also responsible for the liabilities of that company. See statutory citations: supra n 47.

To the extent that Australian jurisdictions allow professionals to incorporate their practices and the defendant is such a corporation, it would seem that the corporation criterion will be satisfied though the wrongdoer is an individual practitioner working for the corporation. But, at least until recently, that legal conclusion was open to some doubt. It had been questioned whether an incorporated professional practice would be a "trading corporation" and so fall within the constitutional reach of the TPA or within the definition of "corporation" in section 4(1) of the Medical Act.[51] This legal issue is closely related to the question of whether a professional person provides services in "trade or commerce" or pursuant to their profession. As discussed in the next section of this article, recent authority has come down firmly in favour of treating professional practice as an activity in "trade or commerce".[52] It is almost certain that an incorporated professional practice will come within the normal reach of the TPA without infringing the constitutional limits of the competence of the Commonwealth Parliament.[53]

Another avenue to satisfy or evade the corporation criterion in Part V, Division 2 of the TPA is the use of the "extended" jurisdiction created under sections 6(2)(c) and 6(2)(h) of the TPA. The TPA can reach individuals who provide services in the course of, or in relation to, international, interstate, or territory-related "trade or commerce". This extension is of little relevance to the typical individual professional practitioner, but brings within the jurisdiction of the TPA the large "national" professional practices.

In Western Australia, we can avoid further constitutional analysis, or excursions into the outer reaches of the TPA "extended" or "accessory" jurisdiction, by turning to the FTA. Where the professional practice is not incorporated, the easiest way to circumvent the corporation criterion is by use of the "copy-cat" provisions in the FTA. Section 40 of the FTA is identical to section 74 of the TPA except for the substitution of the word "person" for the word "corporation". In Western Australia, the corporation criterion will

51. See Kyrou supra n 1, 47.

52. See French J in *Bond Corporation Pty Ltd v Theiss Contractors Pty Ltd* (1987) 9 ATPR 40-771. But this issue is expressly left undecided in the later opinion of the Full Federal Court in *Helco Pty Ltd v O'Haire* (1991) ATPR 41-099.

53. The Commonwealth Parliamentarians debating the *Trade Practices Revision Bill 1986* had no doubts on this point. Senator Haines cited the increasing trend to such incorporation as one of the reasons to exempt certain professionals (engineers and architects) from the revised reach of the warranty on services granted under s 74 of the TPA: Australia, Senate 1986 *Debates* Vol S114, 2053. The Law Council of Australia's submission opposing the amendment of s 74 of the TPA is quoted at 1699 as expressing that same viewpoint.

present no obstacle to the plaintiff proceeding against an individual practitioner.[54]

The "Consumer Criterion"

Both the Trade Acts require that the services in question be provided to a "consumer", and in both Acts a patient of a medical practitioner should easily satisfy that criterion. Section 4B of the TPA describes a consumer as a person who has acquired services which *either* cost less than the prescribed amount (presently $40 000) *or* "were of a kind ordinarily acquired for personal domestic or household use or consumption". Most medical services will be for less than $40 000, and it is difficult to think of a type of service that could be more "personal".[55] In *"E" v Australian Red Cross Society* (*"Red Cross"*), the facts of which are set out below, Justice Wilcox readily categorised hospital care as the provision of services for the patient's personal use. The patient in that case was considered a "consumer" within the meaning of the TPA.[56]

Section 6 of the FTA is almost identical to section 4B of the TPA except for the additional requirement that a person purporting to be a "consumer" come within the meaning of that term as defined in s 4(1) of the Western Australian Consumer Affairs Act 1971. That Act sets out a very broad definition which includes "a person who uses or is a potential user of ... any service rendered for fee or award". Other than charity cases, a patient of a medical practitioner will qualify as a "consumer" under the FTA.[57]

54. Indeed, an action based solely on a breach of TPA's implied warranty would generally be tried in the same WA court rather than in a Federal court as an action based on a warranty implied under the FTA. These statutory provisions only imply a term into the contract for services between a professional and client; they do not make a breach of the term a contravention of the statute. Rather than a cause of action under one of the remedy sections of the statutes, this provides a common law action for breach of contract. See *Red Cross* supra n 20, 52,361 and the cases cited therein.

55. The onus would be on the defendant medical practitioner to prove that a particular person was not a "consumer". S 4B(3) of the TPA provides a presumption that a person is a "consumer" unless the contrary is established.

56. Ultimately, it was held that these medical services were not "services" within the reach of s 74 of the TPA as it existed prior to its 1986 revision. See *Red Cross* supra n 20, 52,363.

57. In a charity case, the plaintiff would probably have to rely on a cause of action in tort (negligence or battery). There would be difficulty maintaining a contractual action since there is a lack of consideration flowing from the patient to the doctor, unless the patient volunteers to be the subject of an experiment or a vehicle for "learning" by medical practitioners in training.

Certain plaintiffs complaining about other types of professional services might have some difficulty coming within this criterion. Large clients of auditors or solicitors might not be deemed "consumers". The services might be for more than $40 000 and of a type not normally used for personal, domestic or household purposes. Even if the professional practice were incorporated, such clients would be disenfranchised from protection under section 74 of the TPA or section 40 of the FTA.

Supply of "Services" and the "Trade or Commerce" Criterion

Section 74 of the TPA and section 40 of the FTA are primarily concerned with the supply of "services". The term "services" is defined in section 4(1) of the TPA and section 5(1) of the FTA as follows:

> "services" includes any rights ... benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce ...[including] the performance of work (including work of a professional nature), whether with or without the supply of goods.

Under the common law and, in particular, under some cases decided relative to the "external affairs" head of power in section 51(i) of the Australian Constitution, there were conflicting lines of authority on the issue of whether professionals provide their services in "trade or commerce" or only pursuant to their profession.[58] The term "trade or commerce" does not appear in the substantive sections presently under examination in this article, but its presence in the definition of "services" and elsewhere in the TPA (particularly in section 52 of the TPA) has caused some difficulties. The legislative use of the term raises the question of whether it indicates a legislative intent to preclude professional activities from the coverage of the provision in question. The TPA definition of "trade or commerce" is not very helpful. Section 4(1) simply states:

> "trade or commerce" means trade or commerce within Australia or between Australia and places outside Australia.

This initially sent the judicial pundits back to the meaning of "trade and commerce" under the common law and in constitutional law "external

58. Compare the very broad definition of "trade or commerce" by Nimmo J in *Larmer v Power Machinery Pty Ltd* (1977) ATPR 40-021, 17,313:

> ... the expression is intended to cover the whole field in which the nation's trade or commerce is carried on

with the restrictive view in *Fawke v Holloway* [1986] VR 411; *Holman v Deol* [1979] 1 NSWLR 640; *R v Small Claims Tribunal; ex parte Gibson* [1973] Qld R 490.

affairs" cases. The pundits would have been better served focussing on the wording in various sections of the TPA that indicate a clear legislative intention to include professional services within the potential reach of the TPA.[59]

This issue was tackled directly by Justice French in *Bond Corporation Pty Ltd v Theiss Contractors*.[60] An action under sections 52 and 53 of the TPA (where the "trade or commerce" criterion is found in the substantive provisions) was brought in the Federal court against consulting and supervising engineers for a residential subdivision. His Honour rejected a submission for the defence that "trade or commerce" denoted some form of mercantile or commercial activity not applicable to a member of a profession. The opinion notes that such a submission was expressly rejected in the *S*wanson Report.[61] Justice French also pointed to the parenthetical words "including work of a professional nature" in the definition of "services". That definition would be internally inconsistent if the earlier use of the words "trade or commerce" was meant to exclude all professional services. His Honour concluded by firmly stating that:

> ... where the conduct of a profession involves the provision of services for reward, then in my opinion, even allowing for widely differing approaches to definition, there is no conceivable attribute of that aspect of professional activity which will take it outside the class of conduct falling within the description "trade or commerce".[62]

The legislative history of section 74 of the TPA provides further evidence of the trend towards increased regulation of professional services. Until the 1986 revision of the TPA, the definition of "services" in section 4(1) was mostly irrelevant for purposes of section 74. Up to that time, section 74(3) of the TPA excluded from the coverage of the section all but a narrow category of services. Professional services were not within that narrow category. The Trade Practices Revision Bill 1986 - Explanatory Memorandum noted the restrictive coverage and stated: "[T]he basic warranties implied by s 74 should apply, as far as possible, to all contracts for the supply of services".[63]

59. The Trade Practices Commission has not been shy about asserting jurisdiction over professional services in the area of "restrictive trade practices" (regulated under Part IV of the TPA). On 26 April 1990, the Commission announced a study into "the regulation of the markets for professional services in Australia".
60. Supra n 52; See also *Argy v Blunts* (1990) ATPR 41-015. However, as previously noted, this issue is expressly left undecided in the later opinion of the Full Federal Court in *Helco Pty Ltd v O' Haire* supra n 52.
61. *1976 Report of the Trade Practices Review Committee*, para. 10.31.
62. Supra n 52, 48,386.
63. See *Australian Trade Practices Legislation* 9th edn (CCH Australia Ltd, 1987) 20,159.

Accordingly, the section was modified to include all services as defined in section 4(1) except those specifically excluded under the revised section 74(3) (namely transportation and storage of goods and insurance services). The Parliamentary debates on the proposed amendment leave no doubt that the legislators recognised that professional services would come within the reach of the revised section 74 of the TPA.[64]

Section 40 of the TPA was modelled on the revised and expanded version of section 74 TPA. In addition, the definition of "trade or commerce" in section 5(1) of the FTA expressly "includes any business or professional activity". In light of this clear legislative policy in both statutes which favour an expansive interpretation of "services", it is surprising to find a dearth of reported cases on professional liability in relation to section 74 of the TPA or section 40 of the FTA.

"In the Course of a Business" Criterion

This criterion raises many of the same issues as the "services" criterion and for similar reasons clearly covers the provision of professional services for a fee. The FTA definition of "business" expressly includes "a trade or profession". The TPA definition of "business" simply states that "business includes a business not carried on for profit". However, the express exclusion of the services of architects and engineers in section 74(2) of the TPA provides a persuasive argument, expressio unius est exclusio alterius, that provision of other professional services is within the definition of "business". There would be no need to expressly exclude such professional services from coverage if professional services were not generally within the reach of the provision.[65] In the *Red Cross* case, Justice Wilcox found no reason to doubt that a hospital's nursing services were provided "in the course of a business".[66]

64. Supra n 53, 1697-1702 and 2053-2057.
65. The Parliamentary debates on the 1986 revision of s 74 provide additional support for this proposition: supra n 53, 1697-1702 and 2053-2057.
66. Supra n 20, 52,363.

4. COMPARISON OF ACTIONS BASED ON TERMS IMPLIED UNDER STATUTE WITH COMMON LAW

The first point of comparison is the implied term under section 74(1) of the TPA and section 40(1) of the FTA.

Duty of Care and Skill

Under both provisions there is "an implied warranty[67] that the services will be rendered with due care and skill". Does this statutory warranty afford the plaintiff in a malpractice suit any advantage over the situation at common law? Unfortunately, in enacting section 74(1) of the TPA and section 40(1) of the FTA, the Commonwealth and State Parliaments have not provided any clarification of the appropriate standard of care nor provided a technique for determining causation or the quantum of damages. It would seem that the warranties of due care and skill under these particular sub-sections leave the plaintiff with the same difficulties as exist under the unmodified common law. This may be attributed to the fact that section 74 of the TPA was originally conceived as a warranty of services supplied by tradespersons rather than professionals. When amending section 74 to broaden its coverage of "services", the Commonwealth Parliament did not directly tackle the difficult and politically sensitive issues that arise in the practice of medicine or other professions.[68] In Western Australia, the State Parliament has copied the words from the revised section 74 into section 40 of the FTA without any refinement other than the application to individuals in addition to corporations. Accordingly, neither the controversial issue of the standard of care, nor the difficulties in proving causation and damages, have been broached or ameliorated by these particular subsections of the Trade Acts.

67. While the distinction between a "condition" and a "warranty" can be of the utmost importance, especially in the sale of goods, this article will not examine that distinction in any depth in terms of professional *services*. In malpractice cases, the plaintiff is almost invariably seeking money damages rather than termination of a contract. Insofar as professional services include the provision of materials, this distinction between "conditions" and "warranties" may have some relevance.

68. Supra n 53. The Parliamentary debates on the *Trade Practices Revision Bill 1986* provide interesting insights into how, with respect, the revision was botched. The Parliamentary proceedings will be discussed in more detail in the footnotes below.

Provision of Materials Reasonably Fit for the Purpose

The second aspect to terms implied under both provisions is a warranty that "materials supplied in connexion with those services will be reasonably fit for the purpose for which they are supplied". Similar terms are implied under section 71 of the TPA and section 38 of the FTA,[69] except that these implied terms are treated as "conditions" rather than "warranties".[70]

Does this add anything to the plaintiff's common law rights? Even under the common law, there may be implied into a "contract for work and materials" an implied warranty that the materials used are of good quality and free from latent defects and that they are reasonably fit for their intended purposes.[71] However, classifying a professional contract as a "contract for work and materials" may be stretching that category beyond its normal bounds. Lord Denning, in *Greaves v Baynham Meikle*,[72] distinguishes between the contract of a surgeon who only warrants due care and skill from that of a dentist supplying a set of false teeth. In the latter case, there would also be a warranty that the false teeth are fit for their purpose. It seems, then, that section 74 of the TPA (and section 40 of the FTA) may be providing a new advantage to a plaintiff in a malpractice case. In the medical area, it is not uncommon that a patient will be supplied with "materials" such as medicines, blood, plaster casts, a new set of teeth, and so on. In such situations, an implied term protecting the patient against latent defects in materials could provide the plaintiff with significant advantages. For example, it would give a broader protection than the tort of negligence in that the term would impose a "strict" liability without proven culpability. To make out a case in negligence, the plaintiff would have to prove that the medical practitioner failed to meet the appropriate standard of care.[73]

69. Similar terms are also implied under s 14 of the (WA) Sale of Goods Act 1895, but the parties may easily "contract out" of those implied conditions.
70. The remedy for breach of a warranty is usually restricted to the award of damages. A breach of a condition will also entitle the injured party to a discharge from future obligations under the contract. See *Bettini v Gye* (1876) 1 QBD 183.
71. *Helicopter Sales (Australia) Pty Ltd v Rotor Works Pty Ltd* (1974) 132 CLR 1, although in that case the court ultimately decided that the surrounding circumstances negated any implied term on the quality of the materials supplied: *Young & Marten Ltd v McManus Childs Ltd* [1968] 2 All ER 1169.
72. Supra n 8, 103-104. Lord Denning viewed this implied warranty as one "of fact" and distinguished it from the warranty of "due care and skill" which is implied as one "of law". A warranty implied as "of law" is not dependent on a supposed actual intent of the parties.
73. Even with the occasional assistance of res ipsa loquitur.

The advantage of shifting the risk of inherent defects onto the defendant has not gone unnoticed by the Bar. The *Red Cross* case touches on the interesting interrelationship between common law actions and terms implied under the various provisions of the Trade Acts. In *Red Cross*, the plaintiff received a transfusion of AIDS infected blood plasma in 1984 and brought actions against the Red Cross, which collected and distributed the infected plasma, and against the hospital where the transfusion occurred.[74] The actions were based in negligence, contract, and under several provisions of the TPA, including contractual terms purportedly implied under sections 71 and 74 of the TPA.

The action in negligence did not succeed because in 1984 the medical profession had no reliable, nor specific, test for analysing the plasma to see if it was HIV positive. The plaintiff argued unsuccessfully that the Red Cross could have been more diligent in screening their its donors or in warning the plaintiff that the testing could not guarantee that the blood was not infected with the HIV virus. This was rebutted by evidence that additional precautions could have reduced blood supplies by 5 per cent, potentially endangering other lives. Justice Wilcox stated that the burden of proof regarding failure to meet the standard of care was on the plaintiff. The plaintiff did not satisfy the court that in 1984 a "reasonable" blood collector and supplier would necessarily have taken the additional precautions in such circumstances. Also, on the issue of causation, there was no convincing proof (objective or subjective) that the plaintiff would have taken the dire risk of refusing a transfusion had he been more fully informed. In light of the limits of knowledge in 1984, Justice Wilcox found no lack of reasonable care or skill. The issue could not be judged with the hindsight of later developed knowledge and procedure.

There was no contract between the plaintiff and the Red Cross so a common law or statutory implied term could not be asserted against that particular defendant. There was a contract with the hospital where the plaintiff was transfused but the court held that the contract was for "nursing

74. Supra n 20. Since the events underlying *Red Cross*, all Australian jurisdictions except Qld have enacted legislation limiting the liability of donors, suppliers (including the Australian Red Cross Society), hospitals, medical practitioners, employees and volunteers for the inadvertent transmission of AIDS through transfusion of blood and blood products. In WA, see Parts II and III of the (WA) Blood Donation (Limitation of Liability) Act 1985.

services" and that the plasma was "supplied for free".[75] Thus, the court found there was no contract for the "sale of goods". It followed that a term under section 71 of the TPA or under common law as to the "fitness for purpose" or "merchantability" of the plasma could not be asserted against the hospital. This was a crucial finding because the case was decided before the 1986 revision of section 74 of the TPA and that section clearly did not apply to professional services in 1984, the time of the conduct in question.[76] If the court had accepted the applicability of section 71, or, it is suggested, if section 74 were applicable, the outcome might have been different. Under section 71, the vendor takes the risk of latent defects, even if detection or correction of those defects is beyond the skill of existing science. A case decided under the section 71 equivalent of the English Sale of Goods Act 1893 is directly on point. In *Ashington Piggeries Ltd v Christopher Hill Ltd*,[77] a chemical reaction that was beyond the knowledge of the then existing science caused animal foodstuffs to develop a toxic substance. The unknown risk was one that had to be borne by the supplier.[78]

A similar circumstance recently arose in South Australia in *Battersby v Tottman* ("*Battersby*").[79] The state of medical knowledge of a "reasonable" medical practitioner at the date in question did not include the knowledge that a certain drug could cause irreversible eye damage that would continue to deteriorate even after the drug treatment was discontinued. Accordingly, the plaintiff failed on its negligence cause of action. However, if the plaintiff in *Battersby* had been able to assert a cause of action for breach of an implied warranty under sections 71 or 74 of the TPA, there would almost certainly have been liability for such an inherent defect in the goods and services provided.

75. The court did not deal directly with the possibility of a common law "fitness for purpose" implied term for materials (ie, the plasma) provided in a work and materials contract. This might be an oversight or it might be due to the interpretation that the contract was just to provide "services". As will be noted later in this article, the implied term of "fitness for purpose" is easily negated under common law, and that might have been a "silent" factor in the decision.

76. Wilcox J left open the question of whether blood plasma could be defined as "goods" within the meaning of s 71 of the TPA since the sale of "body parts" is apparently against public policy. His Honour, in dicta, was ready to classify plasma or other "reusable human tissue" as "materials" for purposes of s 74 of the TPA.

77. [1972] AC 441.

78. The vendor was in turn allowed a claim against a third-party defendant, one of its suppliers.

79. Supra n 20, 526.

The *Red Cross* case gives an indication that courts will prefer to deal with professional malpractice "service and materials" cases under section 74 of the TPA (or section 40 of the FTA) rather than fall back onto the sale of goods provisions in the Trade Acts. The case also suggests that the "fitness of materials" warranty under section 74(1) of the TPA or section 40(1) of the FTA, when properly invoked by the plaintiff concerning goods with inherent defects, can provide an important advantage over a common law action in the tort of negligence. The advantages over a common law implied term that materials supplied be "fit for their purpose" are not as evident until one realises that professionals can "contract out" of that term implied under common law.[80] It is not generally possible to "contract out" of a term implied under the Trade Acts. A discussion of negating implied terms is taken up below.

Services Fit for Purpose, and Services and Materials of such a Nature and Quality that They might Reasonably be Expected to Achieve Desired Results

The previously discussed warranty of "due care and skill" (whether invoked under common law or under the Trade Acts) will not constitute a warranty or promise that the professional service will be successful.[81] The implied term is only that the care and skill of the professional will be commensurate with that of the average competent professional in that area of practice (subject to the controversy on the standard of care noted above).[82] On their face, the warranties implied under section 74(2) of the TPA and section 40(2) of the FTA (the "subsection (2) warranties") provide the plaintiff with considerably more clout, and a cause of action without parallel at common law.

80. This assumes that a contract for professional services plus materials would be a "contract for work and materials" under common law. This point is not of enough relevance to the main topic to warrant additional analysis, but if this assumption is incorrect, then the Trade Acts provide the malpractice plaintiff with a cause of action where one did not exist under "untainted" common law.

81. In some rare cases, almost all involving cosmetic surgery, the court has found an *express* warranty that the treatment will result in a particular result. See *Sullivan v O'Connor* (1973) NE 2d 183 (1973); and *LaFleur v Cornelis* 28 NBR (2d) 569 (1979).

82. *Thake v Maurice* [1986] 1 All ER 497. J Kennedy and A Grubb *Medical Law. Text and Materials* (London: Butterworths, 1989) 129-132; C A Sweeney "Trade Practices Act changes widen liability for professional services" (1986) Vol 21(5) *Australian Law News* 20.

If the subsection (2) warranties are read literally, the practitioner will be in breach of contract if the services and materials provided are not likely to achieve the result sought by the client. As previously noted, it is axiomatic under the common law, whether under a cause of action in contract or the tort of negligence, that a professional does not guarantee results. A lawyer does not guarantee that litigation will be won and a doctor does not guarantee that a patient will be cured. The subsection (2) warranties come dangerously close to implying such a contractual promise.

The subsection (2) warranties have an exemption proviso "where the circumstances show that the consumer does not rely, or that it is unreasonable for him to rely" on the supplier's skill or judgment. That wording of this proviso is inadequate for application to professional services. The exemption is not based on whether a "reasonable" consumer (or client) would have had more modest expectations, but on whether it was reasonable to rely on the professional's skill or judgment. In the circumstances of a professional and client, and in particular of a doctor and patient, it is difficult to see how this proviso will give much comfort to the defendant practitioner. The very nature of the relationship between a professional and client, where the supplier of services is generally far superior in knowledge and experience in the area in question, is not only one of almost complete reliance, but it is sometimes referred to as a "fiduciary" relationship.[83] How is the client to know what reliance is reasonable? From whose point of view must it be reasonable: the typical professional, the typical client, or a court exercising independent objective judgment by divine reckoning? In order to come under the protection of this exclupatory proviso, will the professional now have to purposefully deflate the client's expectations? In the practice of medicine, in order to escape the potential reach of the subsection (2) warranties, will doctors be forced to practise defensive medicine contrary to their honest "clinical" or "therapeutic" judgments?

This writer is not the first commentator to note the inadequate wording of section 74(2) of the TPA and the potential dangers and inequities relative to professionals. In the proceedings leading up to the revision of section 74, the

83. A Holder *Medical Malpractice Law* (New York: John Wiley & Sons, 1975) states that the relationship between a doctor and patient is a "fiduciary" one. With respect, while this may be true in some minor aspects, it certainly is not a "full-blown" fiduciary relationship. If it were, it could be argued that the onus of disproving causation should be shifted onto the defendant professional once a failure to meet the standard of care is proved. Lord Scarman rejected such an assertion in *Sidaway* supra n 11, 650-651.

Law Council of Australia made similar observations and warned that the revision did not recognise the essential differences between services rendered by professionals and those rendered by artisans and tradespersons.[84] Senator Haines responded to that submission by rejecting the proposition that there were any essential differences, and she was supported on this point by the Government spokesman, Senator Evans (speaking on behalf of the Attorney-General). She went on to treat the revised section 74(2) of the TPA as if it did no more than recognise the warranties on professional services already implied under common law.[85] For the reasons already stated in this article, the writer must respectfully disagree with the Senator.

Unfortunately, neither the statutory language nor the legislative history gives sufficient guidance on the true import of the subsection (2) warranties. This writer can, at best, raise these issues. In order to make the subsection (2) warranties workable, it is likely that we will see some strained interpretations in their application to cases of alleged professional malpractice. The professional "subjective" standards are likely to again be seen in the courts of Australia. Such a reading down of the subsection (2) warranties would make a mockery of the usual principles of statutory interpretation. It would result in those warranties being essentially identical to the warranties already provided in subsection (1) or under the common law.

Negation of Implied Terms: Exclusion Clauses, Disclaimers, Waivers and Releases

Even under common law based causes of action, the courts hesitate to give full effect to "exclusion clauses" and other devices to limit in advance potential liability for "wrongdoing". For example, exclusion clauses tend to be interpreted contra proferentem (against the interest of the party who proffered it) should they have the slightest ambiguity. In cases involving

84. Supra n 53, 1699. The Law Council submitted that:

> The amendment would impose on (professionals) a statutory warranty that their services will achieve whatever result the client desires... This is tantamount to a warranty by a doctor that the patient will be cured ...

Similar sentiments were expressed by Opposition speakers in the Committee of the Senate, including Senators Durack, Baume, Sheil and Jessop supra n 53, 2053-2057.

85. Supra n 53, 1697-1698 (Senator Haines) and 2055 (Senator Evans). However, in a strangely inconsistent action, Senator Haines was the initiator of the amendments that totally exempted professional architects and engineers. Her rationale was that a significant third party, a builder or contractor, would usually intervene between the services of these professionals and the finished product.

personal injury to a "consumer", the courts have given very strained interpretations to contracts in order to defeat exclusion clauses.[86]

Still, the one sphere in which it can be said with some confidence that implied terms under the Trade Acts are more effective than those implied under common law (from the plaintiff's point of view) is in the area of the "negation" or "contracting out" of liability.[87] Under the common law[88] it is relatively easy for circumstances to negate implied terms as to the quality of the services or materials to be provided.[89]

Under the Trade Acts, it will be extremely difficult for a professional to effectively limit liability through an exclusion clause in a contract or through a "release" or "waiver" signed by the client. Section 68 of the TPA provides, in relevant part:

> 68(1) Any term of a contract ... that purports to exclude, restrict or modify or has the effect of excluding, restricting or modifying -
>
> (a) the application of all or any of the provisions of this Division [which includes sections 71 and 74];
>
> (b) the exercise of a right conferred by such a provision;
>
> (c) any liability ... for a breach of a condition or warranty implied by such a provision ...
>
> is void.

Section 35 of the FTA is to similar effect. In short, the potential benefit that a plaintiff in a malpractice case secures through terms implied under the Trade Acts is safeguarded against contracting out.[90]

86. *White v John Warwick & Co Ltd* [1953] 2 All ER 1021.
87. In the Parliamentary debates on s 74 of the TPA revision, Senator Evans, speaking on behalf of the Attorney-General, used this point as a principal reason to support the proposed amendment to s 74 fo the TPA. Supra n 53, 2054-2055.
88. And under the Sale of Goods Act in various jurisdictions (in WA and England, see s 54), if an express negating clause is placed in the contract or the course of dealing so indicates.
89. See *Helicopter Sales (Australia) Pty Ltd v Rotor Works Pty Ltd* (1974) supra n 71. There was no exculpation clause in the contract but the plaintiff knew that the defendant did not have the means to check spare parts for latent defects. The High Court held that the implied warranties as to the quality of parts supplied under a maintenance contract were negated.
90. S 68A of the TPA and s 35 of the FTA provide a small exemption which validates certain limited exclusion clauses, but the exemption is inapplicable to contracts for goods or services "of a kind ordinarily acquired for personal, domestic or household use". Many professional services, and almost all medical services, would fall within this description. There will be not be any exemption for exclusion clauses or other liability limiting devices relative to terms implied into the doctor-patient contract under the Trade Acts.

5. CONCLUSION

The trend in the law concerning professional malpractice has been to increasing (and usually beneficial) intervention into the professional-client relationship. At first this incursion was by way of common law actions, particularly, in recent times, through the expansion of the tort of negligence. Now, through "back-door legislation",[91] without open and full discourse on the thorny moral and legal issues involved, the implied terms under the Trade Acts relating to the provision of services have been made applicable to professionals. This may provide some interesting gambits for the plaintiff's bar relative to terms implied into contracts of service. So far the plaintiff's bar has not availed itself of this new opportunity, but it is only a matter of time before the limits of these implied terms are tested in the courts. If the courts literally interpret the statute-implied terms (particularly the subsection (2) warranties), the professions in Australia (and their insurance companies) could have a rocky legal road ahead.

However, the relevant sections of the Trade Acts were drafted without the "professional" in mind. While there is little precedent to go on, it is likely that court deference to the professions, and in particular the medical profession, will continue to be reflected in the law as it further develops. This will result in strained court interpretations that will dilute the potential of the implied terms provisions of the Trade Acts. The "professional standard of care" and the defence of "therapeutic privilege" will somehow find their way back into the criteria for liability. There is also the possibility that there will be further legislative intervention to provide special defences against or limitations to professional liability.[92]

The issue of causation will continue to plague the plaintiff under any foreseeable interpretation of the Trade Acts. Before a civil remedy for damages is available to the plaintiff, "causation in fact" must be proven. Unless the courts allow the subject matter of the injury to be the "loss of chance" (thereby using a formula of proportional recovery rather than the absolute requirement for preponderance of the evidence), it will continue to

91. In particular referring to the amendment of s 74 of the TPA in 1986 and the unquestioning adoption of the amended provision in s 40 of the FTA. If the comments of Senator Baume in the Senate debate are accurate, the *Trade Practices Revision Bill 1986* was rushed through the House of Representatives in great haste and meaningful examination and debate was only possible in the Senate, supra n 53, 1698.

92. At least 24 states in the US have enacted some form of protective legislation for medical practitioners.

be a hard slog for plaintiffs in professional malpractice cases. Clients whose chances for success were less than 50 per cent at the time services were rendered will be left without effective legal recourse.

While the Parliaments may continue to strive for a legislative solution, there will be no "magic pill" in this area. Professionals and their clients, after all, are prone to all the human frailties. Every day, somewhere, there will be a professional practitioner breaching his or her duty of care. Every day, somewhere, a disappointed and bitter client who has received competent but ultimately unsuccessful services will be looking for a scapegoat for the vicissitudes of life and the all too real limitations of modern professional practice.