

# Insurance Brief

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## AMBULANCE CHASING LAWYERS - A NEW INCENTIVE ?

Many of you will say that the legal profession is already enough of a burden on insurers, but the Lawyers and Conveyancers Bill currently before Parliament, arguably offers the prospect of more claims being received by liability insurers and therefore the incurring of more legal fees.

The Bill contains provisions which, if enacted, would allow lawyers to enter into a fee arrangement where the fee is dependent upon the success of the litigation.

At present, there is a prohibition on this under the ancient torts of maintenance and champerty. These rules prevent a lawyer purchasing a share in the litigation or getting part of the "spoils" of a claim.

Historically, it has been said that to allow such arrangements was against the public good. That is, lawyers and others with an interest in the litigation might succumb to the temptation to manufacture evidence or to bring an unmeritorious claim which might not otherwise see the light of day, in order to ensure that the case was won or settled to advantage.

The Bill does not get rid of these torts. However, it does allow for lawyers to enter into "conditional" fee arrangements. In essence, what will be permitted is for the lawyer not to receive payment unless the litigation is "successful". In allowing this, the Bill says that the payment to the lawyer can only be a normal fee or a normal fee plus a premium. This premium must be expressly provided for in the contract between the lawyer and his/her client.

A lawyer will not be allowed to charge on the basis of a percentage of the ultimate sum received by his/her client. For example, a fee of 40% of the ultimate judgment or settlement sum would be illegal. However, a fee based upon the time expended plus, say, a 10% additional "success" fee would seemingly be OK.

The precise rules governing the setting of the fee and premiums are to be decided by the New Zealand Law Society if the Bill is passed. Currently the Bill is before a Parliamentary Working Committee with a due date for reporting of 28 January 2004. At that time, the Bill could become law. Any conclusion on whether the impact of this provision will increase the making or lodging of claims at Court will have to await an analysis of these rules.

It could be argued that there is a public good involved in allowing such fee arrangements. At present, given the high cost of civil litigation, parties who have limited funds may apply for legal aid. However, most of the population, who earn a

modest salary or wage, are not entitled to legal aid. Under the Bill, potentially good claims which might otherwise have gone unlitigated, (due to the absence of funds to pay a lawyer), may now be filed if the lawyer's costs can be deferred.



PAUL SMITH  
PARTNER

However, another real likelihood is that cases which might not otherwise be litigated due to them being a "punt" or where the evidence is weak, could be brought with a view to forcing a settlement. The United States experience is instructive in as much as the looser rules relating to no-win/no-fee arrangements and taking a share of the judgment spoils have contributed, arguably, to the litigious nature of that society.

In New Zealand, the experience in the employment area may be a guide as many consultants and lawyers there practice on a no-win/no-fee basis. Many of these cases are settled solely on the basis that to defend an unmeritorious claims is too expensive. It is cheaper to settle rather than fight them on the facts. For the same reason, there may well be an increase in such claims in the general civil jurisdiction if the Bill comes into law.

In future, insurers may need to factor this possible increase in litigation into the calculation of premiums for liability policies.

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## SOLICITORS CONFLICT OF INTEREST - THE LATEST STATEMENT

Tuiara v Frost and Sutcliffe and Noble (2003)  
High Court, Auckland

It is now many years since the Privy Council decision in **Mouat v Clark Boyce** held that it was possible for lawyers to act for two parties to a transaction. In a case in which the writer appeared, **Taylor v Scofield Peterson**, a full bench of the High Court made it clear that **Mouat** did not give carte blanche to the legal profession, however, to act for more than one party without careful care being given to managing the conflict of interest.

In this recent case of **Tuiara v Frost and Sutcliffe and Noble**, that position has been further reinforced.

Here, Mr and Mrs Tuiara's nephew, Mr Noble approached his uncle and aunt with a proposal whereby they would sell their home to his employer, who would then re-sell it back to them, but paying them only the difference between the two sales. This was a scheme to assist Mr Noble's employers who were financially stretched.

Mr Sutcliffe of the firm of lawyers acted for the employer and also acted for the Tuiaras.

Mr Sutcliffe wrote a letter in which he clearly recorded that he had recommended independent legal advice to the Tuiaras and that they had declined that advice.

Ultimately, the Tuiaras lost their house.

Justice Baragwanath in the High Court affirmed that there was nothing to prevent solicitors acting for opposing parties to a transaction. However, in order to overcome the conflict of interest, each party must be given advice that is as good as they would have received as if an independent solicitor was acting for them. This might be seen to be a high standard indeed.

The Court found that in a number of respects, the advice did not meet that test. Nevertheless, the evidence

showed that the Tuiaras were eager to proceed with the transaction but this was not accepted by the Court as defeating their claim.



ROBERT COLTMAN  
PARTNER

For insurers of solicitors and their insureds, the decision may come as a surprise. The conflict had sought to have been managed by the firm of solicitors but not sufficiently so. It may well see a de facto return to the position reached in the Court of Appeal in **Mouat** where there was in effect an absolute prohibition on acting for more than one party to a transaction. (Unless the solicitor is a "large firm", in which case different rules apply following **Tower Corporation v Russell McVeagh**).

A final note: the decision has been appealed. Watch this space!

**Insurance**

### NEW APPOINTMENT



We are delighted to announce the appointment of Kathryn Clarke to the Fortune Manning Insurance Team.

Kathryn is an English solicitor who spent 9 years with the UK insurance firm, Weightman Vizards, specialising in insurance claims. Recently admitted to the New Zealand Bar, Kathryn will be handling a variety of fire and general and liability claims instructions for our insurer clients.

Kathryn may be contacted by telephone 915 2409 or email on [kac@fmlaw.co.nz](mailto:kac@fmlaw.co.nz).

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