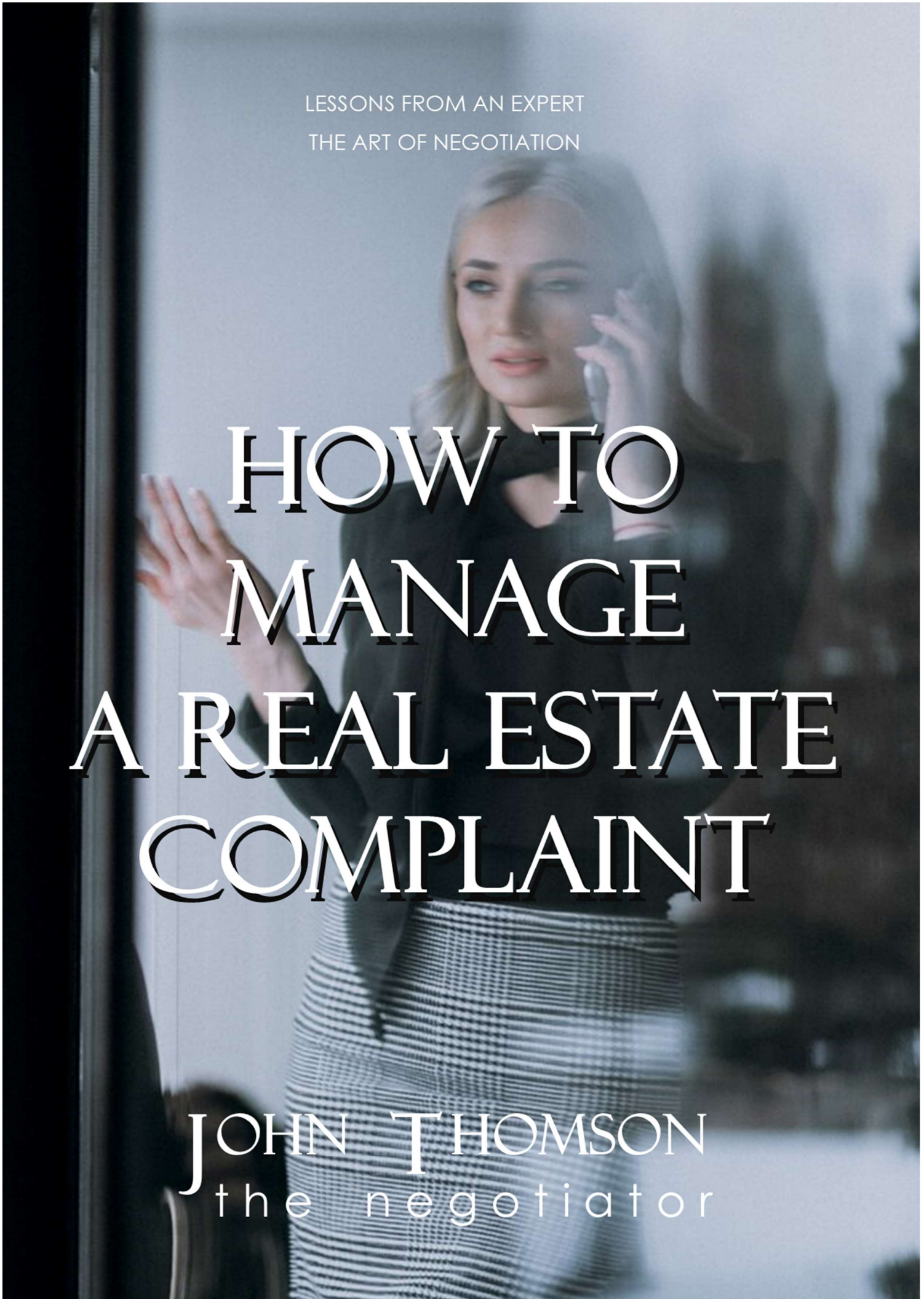
LESSONS FROM AN EXPERT
THE ART OF NEGOTIATION
HOW TO MANAGE A REAL ESTATE COMPLAINT
JOHN THOMSON
the negotiator

THE NEGØTIATØR

LESSONS NOTES FROM AN EXPERT

HOW TO MANAGE A REAL ESTATE COMPLAINT

The Negotiator, Lessons From An Expert are a unique series of invaluable lesson notes and resource information for students, teachers and those considering using professional mediation or negotiation services. Extracted from the authors books and training manuals, they offer practical insights and strategies applicable to real-life situations.

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Reference: Thomson 2020.13: How To Manage A Real Estate Complaint

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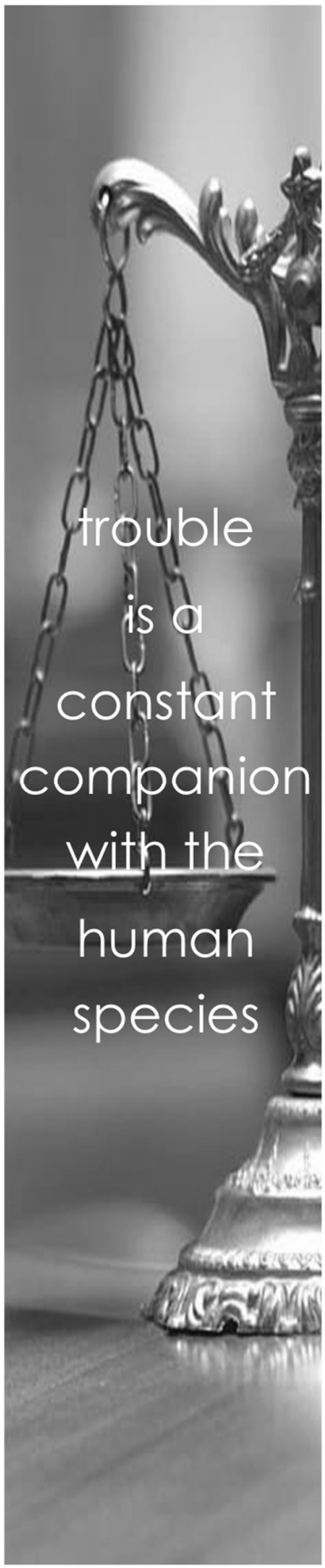
HOW TO MANAGE A REAL ESTATE COMPLAINT

a gift from the negotiator



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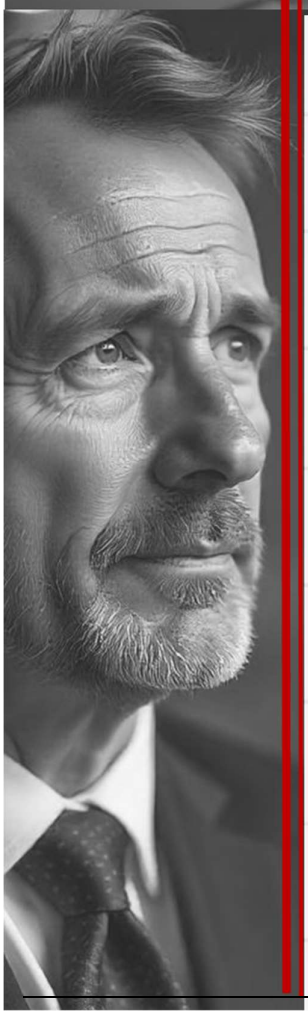

Preface

Despite regulators claiming reductions in the number of real estate complaints, active real estate and property practitioners are more likely to be subject to a formal complaint at any time since 2088.[1]

Heightened frustration driven by unpredictable market performances and transactional obstructions contribute to higher frequencies of complaints, while regulators are more actively promoting clients' rights to make complaints irrespective of other remedial options.

How to Manage A Real Estate Complaint is written for licensees in Australia and New Zealand as a guide to manage formal complaints, and investigative processes.

[1] Removing redundant and non-practicing licensees from the statistics, complaints against an agent selling five or more properties per year has increased by 7% and is disproportionately higher in South Australia and New Zealand.

Section One explains what a licensee should do when at risk of a complaint or notified of a complaint.

Section Two explains the obligations and duties imposed by the Laws of Tort upon practitioners, and why rulings and awards are inconsistent and unpredictable.

Australian and New Zealand real estate qualification and licensing requirement are parallel, and under mutual recognition agreements practitioners can transfer their licenses from state to state, and to or from New Zealand with minimal additional requirements.

Despite similar rules, regulations and licencing requirements, licensees in specific jurisdictions are more likely to receive a complaint, experience increased interrogation and an adverse judgement than those practicing in other states and territories.

As a principal licensee,[2] legal consultant and senior dispute resolution practitioner[3] in Australia and New Zealand, interpreting tribunal interpretations of the rules, regulations and codes of conduct is complex and inconsistent across jurisdictions.

How to Manage A Real Estate Complaint forms part of a wider series of dispute and conflict resolution subjects available free of charge from our web sites. I considered this publication critical reading for all licensees.

www.johnthomson.com.au
or:
www.nzmrs.co.nz

[2] Licenced 1985 – 2025 Western Australia, N.S.W. and New Zealand.
[3] Associate Australian Institute of Mediation (AIM) and the Arbitration, Mediation Institute on New Zealand AMINZ. Senior Partner NZ Mediation Service, Advisory Consultant, John Thomson Consulting - Australia (2008 - current).

Introduction

You answer the phone and voice say's "this is Donna, can I talk to you about a complaint made against you. Is this a convenient time to talk?"

At that moment you experience a rush of adrenaline, your mouth dries, your mind is in overload. Caught off guard you respond instinctively, the words spill out, you are saying things you should never say, and worse still, you don't know why you are saying them but know that this isn't how you should handle the situation.

Everyone does it.

This response is part of a natural primal flight or fight reaction initiated when we are threatened and forced to confront the challenges to our moral and ethical values and perceptions of self-worth.

The sudden and unexpected arrival of threatening information causes us to react in ways that may not be prudent, appropriate and in our best interest.

Criminal law investigators are required to tell you the nature of their enquiry, give you the right to remain silent and access legal representation. That obligation does not apply to real estate investigators.

While punitive fines and penalties remain relatively low, a negative finding causes significant reputational damage, disrupt work discipline and can be used to substantiate a future plaintiff claim.

If not covered by public indemnity insurance, resulting civil claims against a practitioner can be higher than their total net worth.

trouble does not want to destroy you; it is evolutions way of saying you can do things better

use its' power to motivate rather than crush you

John Thomson: from Why Trouble Comes [4]

[4] Why Trouble Comes: Ref TNS203: Available free of charge from our web site / Learning Centre

GATE KEEPERS MANAGE RISK

Jenny Destroyed Her Career

Jenny was surprised when contacted by an investigator regarding a complaint about an undisclosed driveway access. The complainant alleged that they would have made an offer to purchase had their due diligence not revealed an undisclosed encumbrance on the title which granted the neighbours right of use to access the rear of their property *(notably, there was no gate in the fence to facilitate this access)*. They claimed expenses of $5,000 for costs and time spent to undertake their due diligence.

In her defence, Jenny asserted that the claimant had attended two public viewings and never expressed an intention to make an offer. She claimed she would have disclosed the matter had the plaintiff demonstrated genuine intent to purchase the property claiming, 'genuine intent can only be established after due diligence is completed.'

The complaints investigator persisted to request more information, including diary records, documentary evidence, agency agreements, a copy of the appraisal, marketing brochures (I.M.), the eventual agreements of sale *(to another purchaser)* and final inspection records.

After five verbal sessions and twelve email exchanges, Jenny was charged with 'failing to disclose' and two other unrelated misconduct offences. She was fined $1,500 and required to pay reparations to the plaintiff of $2,500 *(their unsubstantiated claim)* and required to undergo further education.

The claimant being vexatious, contacted local media advising them of the ruling which resulted in dramatized media reporting of the event. Jennys online real estate photo appeared in the local newspaper and the incident was reported on local talk back radio and community web sites with adverse reference to real estate practices.

Consequently, her agency suffered significant reputational damage leading to the termination of Jenny's employment. After unsuccessful attempts to secure positions with three other agencies she left the industry.

Jenny's problem was, she thought she could manage the complaint without the need for legal intervention.

A year later I met Jenny and asked, 'what went wrong?'

She said, "the investigator was lovely to talk to, she shared about her family and made me feel like she was helping me as a friend. I feel really betrayed"

The Trap

'Fawning' is one of the four primal psychological human responses to sudden unexpected threat or challenge. Unlike, flight, fight or freeze, fawning seeks to pacify aggression through submission, or as seen in nature, 'lying low.'

Historical investigative techniques were adversarial, but Jenny's experience typifies recent trends by investigators to use 'fawning' interrogation techniques.'

Fawning uses non-confrontational, agreeable, sympathetic language to gain trust and cooperation and creates an illusion of 'assistance,' and security, appealing to the respondent's desire to avoid conflict and seek resolution in a harmonious manner. Skilled investigators ask disconnected questions quickly to gain information, disrupting the respondent's perceived threat posed by the interrogation.

The vulnerability of this response underscores the critical need to establish an **autonomic response**[5] when a complaint is made.

[5] the coordination of autonomic nervous parasympathetic responses to maintain homeostasis (balance). This integration allows the body to respond appropriately to internal and external stimuli by automatically adjusting bodily functions.

Had Jenny deferred legal representation and responsibility to a **gate keeper** she would have avoided two additional charges, may have been subject to one minor misconduct complaint, avoided restorative penalties and experienced no reputational damage.

The cost of representation, less than 30% of one sale was a contributing factor in Jenny's decision not to engage legal assistance. That decision destroyed Jenny's vocation and financial security, wasted six months study time, and course and licensing costs. The question we must ask if we are tested by a complaint is, "how much is my career worth?"

Autonomic Responses, The Troublemaker

Referenced in the introduction, all humans experience an initial response to complaint investigation that induces an "autonomic nervous psychological state." This initial state involves a cognitive scramble to rationalise the significance of the information presented, assess the level of threat, and formulate a strategic response.

now is not a convenient time to talk!

Psychological testing proves that because of surprise and unpreparedness for the questions asked, even the most resilient respondent/defendant succumb to sudden and disruptive investigation techniques, resulting in self-incrimination.

Now Is Not Convenient

There is a direct association between risk management and autonomic responses, the involuntary reactions managed by the nervous system that regulate physiological functions without conscious awareness releasing endorphins, adrenaline, and an increase in heart rate to meet any immediate need to respond to a threat.

Dependent upon the threat response, flight, fight, freeze or fawn, individuals often describe their experiences to direct threat with phrases like, "everything was happening in slow motion" or "it was over before I

realized it," while many report a complete lack of memory recall regarding the events that transpired. These comments demonstrate the absence of pre-determined autonomic response.

For example: Soldiers entering a theatre of war are 60% more likely to suffer injury or death in the first six months of a two-year term because they have not developed autonomic responses and high situational awareness to the threat environment.

strategic defensive strategies can only be established after rationalisation of the evidence of a complaint

A practical example of learned autonomic response is evident in driver learning programs. The tiered strategy involves progressive extensions of the driving experience to increase driver situational awareness[6] which helps develops autonomic response capabilities.

Experienced drivers respond instinctively in high-risk situations, executing actions such as braking or swerving without conscious thought, and being autonomic, they often lack recall of their actions regarding those critical movements, they were simply, automatic.

When I ask respondents about their first contact with an investigator, most respond with the same comments, "it was a blur," or, "I cannot remember what I told them," all common responses to high stress environments.

When contacted by a complaint investigator, the only response should be**, "now is not a convenient time to talk."**

you should immediately contact a professional gate keeper who will take control of the complaint enquiry

[6] Recommended Reading: Mindfulness: How to Negotiate With Situational Awareness. Ref: TNS204 Available free of charge from our web site:

Exploitation of Emotions?

In recent years civil investigative practices have become more conceptual and participatory *(ie: fawning)* and can be very wide ranging. This approach is not to assist the respondent, but to extract findings of punishable misconduct and is used to substantiate findings that favour the claimant *(plaintiff)*.

Furthermore, investigators actively seek to identify wider systemic faults and failures that could further implicate the respondent, the agency and associated employees.

Why Do They Do This?

Most real estate complaints are managed under the Laws of Tort. The purpose of Laws of Tort is to present **deterrence**, **compensation**, and **social responsibility**, thereby holding societal order to fairness, accountable and equitable rights and freedoms.

Law of Tort mandates the public have guarantees of fair and responsible *(moral)* codes of conduct from sellers of goods and services *(includes retailers, trades, human services and property and real estate services)*. If there was no punishment for breeches of codes of conduct and fair trade, the enforcement of governing rules and conduct would be ineffective and social responsibility would collapse.

Deterrence is maintained by publishing findings against non-compliant practitioners, thereby setting public examples of misconduct.

The Gate Keepers

Gatekeepers play a crucial role in mitigating exemplary and punitive damages, contesting reparation claims, and managing reputational risk. Their function is essential in upholding protections of innocence and ensuring equitable and just defences against the actions of 'heavy handed,' aggressive investigators, prosecutors and litigators.

More importantly gate keepers maintain balanced interpretations of the plaintiffs' allegations, assessing the severity, legal justifications, interpretation and admissibility of evidence, and other contributing factors.

All people experience disagreement, often motivated by deliberate disruptive actions *(to cause loss),* frivolous, spurious and spiteful claims *(to cause fear and anxiety),* and utilising the complaints process to obstruct and damage respondents' reputation *(revenge and damage)*.

The psychology of, 'why people complain' is too broad to cover in this publication. I recommend reading: Negotiating With The Child Within: Ref: TNS205: *(and other titles) Free from our website learning centre*.

What Does A Gatekeeper Do?

The role of a gatekeepers is to act as a moderator, mediator and legal consultant advocating on behalf of their client to provide only what is legally required to be handed to the investigator while advocating to 'diminute[7] risk and liability.

The gatekeeper advises their client of the risks, possible outcomes and consequences associated with complaint, providing honest, up-to-date and relevant information that could mitigate rulings and awards by adjusting strategies to counter imbalances as they emerge.

The client - gatekeeper relationship is critical, requiring high levels of trust between the parties. The client *(respondent/defendant)* must not withhold any relevant information from the gatekeeper. Too often, at a tribunal or court hearing I have experienced surprise, the prosecution submitting facts that the respondent/defendant clearly knew but did not provide. This act of omission is interpreted by courts and tribunals to infer high levels of complicity. Further, being caught unaware, I was unprepared to strategically counter disputed facts and present alternative strategies in the hearing.

[7] Diminute: def: Legal term meaning, to make small or miniature or set far off.

Admitting mistakes, failings and vulnerabilities to a **gatekeeper** is not going to increase risk and liability, to the contrary, it will dimmish it through the opportunity to forearm a strategic legal challenge and counter argument.

be strong enough to stand alone,
smart enough to know when you need help,
and brave enough to ask for it

Successful defence of complaints are common but never guaranteed. Gate keepers cannot guarantee acquittal or discharge as that is determine in the judgement and award and must prepare their clients for multiple outcomes which should include 'worse case' scenarios.

Who Are The Gate Keepers

Industry organisations and unions form a wider interpretation of a gatekeeper representing their members by engaging with government and business entities to establish frameworks for policy, regulation, and income payments. However, these organizations lack formal legal power; instead, they employ coercive strategies to effect change. For instance, a union strike represents a direct coercive action, while industry lobbyists engage in indirect coercive efforts by influencing political decision-makers.

Lawyers are most likely to represent defendants and respondents in class actions *(representation of a large group)* and single charge claims that are referred to the High Court.

Lawyer engagement is often restricted in civil claims by high hourly fees, lengthy response times, inherently adversarial legal interpretations, the inability to undertake investigative inquiries and the constraints posed by conflicts of interest. For example, lawyers cannot represent both claimant(s) and respondent(s) simultaneously.

ADR's

Prior to the COVID-19 Pandemic response *(2020)* alternative dispute practitioners (ADR's) were largely confined to established authorities such as tenancy tribunals, small claims courts, and youth restorative justice systems. Practitioners were typically qualified in various behavioural science fields including psychology, anthropology and sociology which informed their decision making.

Arbitrators

Since 2020, the role of Alternative Dispute Resolution practitioners (ADRs) has become a preferred method for managing civil *(Law of Tort)* conflicts and disputes, evidenced by a ten percent annual growth in the number of cases resolved utilising alternative dispute resolution strategies. This growth trend is projected to continue.

Unlike direct mediation, qualified conciliators *(negotiators)* and arbitrators participate in multifaceted roles, providing legal opinion, act as investigators and negotiators, almost always communicate directly with all parties in conflict and can make binding enforceable decisions that parties are required to uphold. Unlike general legal practitioners, arbitrators typically hold a wide range of qualifications, usually a dominant legal qualification and undergraduate degrees relevant to their specific areas of practice.

My major is in criminal law, with under-graduate qualifications in business, (property and real estate), aviation and environmental management. My specialist fields are contractual and non-contractual property *(small and medium construction and development)* and real estate *(contracts, compliance, conduct, risk management etc.)*, airport development and environment disputes associated with land use and development.

It is important to note that regulatory rules governing arbitrators may limit the scope of legal representation. For instance, in New Zealand, and parts of Australia practice lawyers are barred from holding a real estate license, dual licensing is deemed a conflict of interest.

Conciliators, Arbitrators and Lawyers

Conciliation and Arbitration is a field of law but is not held to the protocols and standards required by District and High Courts but are governed by Institute Codes of Practice *(like Law Society Rules)* and are required to comply with civil and consumer law and arbitration acts.

ADR practitioners are like general medical practitioners (GP's), if the matter can be resolved without formal litigation they can prescribe solutions for resolution. If the matter escalates, they engage specialist, specific to the skills required to find resolution.

> arbitrators operate at the intersection of legal legitimacy and practical resolution methodologies.

Arbitrators have the capacity to assume the role of investigators, adjudicate for both claimants and respondents concurrently, and make final and enforceable decisions on all parties in dispute. If the matter escalates to the High Court, they may create legal frameworks for rulings and awards to be presented by barristers acting for those in dispute.

If an arbitrator's decision is tested in court, unless a high court precedence determines otherwise, the courts will in most cases affirm the arbitrator's decision.

This reinforces the legal and moral authority of arbitrators as **pivotal gatekeepers** and specialist disputes and conflict resolution professionals, **operating at the intersection of legal legitimacy and practical resolution methodologies.**

Benefits of a Mediator and Arbitrator Services:

- Lower fees and costs *(less than half the cost of a lawyer)*
- Professional legal opinion.
- Quick turnaround times, usually completed within thirty days.
- The ability to approach the other party and have direct communication with them, offering impartial, balanced alternative resolution outcomes.

- Act on your behalf with investigative regulatory agencies or Ombudsman services.
- Engage in investigative action to verify the credibility of evidence, and interview other participants and actors within the conflict.
- Act as reputation protection managers, communicating with press, radio and T.V. and issuing moderated press releases to mitigate product and reputation damage where necessary.
- Issue restraining and 'gag orders,' and other forms of compliance to protect reputational damage.
- Prepare documents, and lodgement claims in small claims courts, and may accompany a claimant to hearings *(up to $30,000.)*
- Prepare claims on behalf of a Lawyer or Barrister for matters referred to the District or High Court.
- Make binding enforceable decisions external to court process.

Note: For reasons previously explained, while holding legal qualifications, most arbitrators are not admitted to 'The Bar' under relative Lawyer and Conveyancer Acts.

What To Do When Trouble Comes

The following is a guide to assist you to understand the process required to instigate a credible defence against a complaint.

Discovery

One of two discovery events most commonly reveal a complaint.

Pre-emptive Discovery: Pre-emptive discovery informs you that a complaint is probable although not formally expressed. It may involve acknowledgement of fault before discovered by another person.

If you think trouble may result from any action you were involved in, get in early!

If you contact us prior to the lodgement of a formal complaint, we have an 87% resolution rate and, in most instances, can prevent grievances going to formal complaint or litigation.

Direct Discovery: Direct discovery informs you of a complaint through direct verbally or written format, and most commonly in real estate through an aggrieved client's lawyer or industry body representing the complainant.

What To Do: Contact a Gatekeeper immediately. In our practice we provide 15 minutes free professional advice service to assess the gravity, possible impact of the complaint and make recommendations to manage brand and reputational damage and recommended pathways to deal with regulators.

Agreement To Act

Lawyers and ADR service providers are required to provide a Letter of Engagement and estimated cost of service before they can act.

Costs associated with representation should not be a consideration. If you do not have the ability to pay, ask for help. In our practice we want to help you and can offer favourable terms and a repayment schedule.

What To Do: After the initial consultation, sign the agreement and email it back to us immediately.

Evidence

Evidence is critical to establish the facts and prepare a sustainable defence strategy.

What To Do: Gather all the information that relates to the complaint or dispute and prepare a summation *(positional statement)* identifying the five critical elements, when, where, what, who and why did a complaint arise.

Identify and explain the role of third parties including regulators, authorities and others that may influence or contest your facts.

Forward what evidence you have to the gatekeeper within twenty-four hours, even if it is not all present. Prompt initiation of process to mitigate risk is critical.

Confidentiality

This is possibly the most significant advice we can give you; **'shut your mouth.'**

This instruction has saved many respondents/defendants from self-incrimination, additional charges, excessive restorative penalties and reputational damage.

In times of vulnerability, it is a natural human response to talk, and too often, we talk too much. We all instinctively want empathy, affirmation and the protection of others, all part of the 'herd' psychology,' seeking safety in numbers. Everyone has a prejudicial opinion that can influence accurate assessment of the facts and undermine a high value defence.

'Shut your mouth.'

Delegate and Let Go

The purpose of a gatekeeper is to act **'as though they are you.'**

Gatekeepers understand your anxiety and stress, but do not share the turmoil you experience, they are professionals and have become auto responsive, well-adjusted to adversarial conflicts.

Once you have met the requirements to provide all evidence needed, let go! The journey through the complaint process is predictable, almost ritual with requests for further information, questioning, presentation of facts, argument and counter argument and finally, a ruling and/or award.

Civil claims law, and the Law of Tort never feels fair to those who experience judgement arising from a complaint. Unfortunately, unlike a criminal court, this is the way the law works. Section Two of this publication summarises how Law of Tort functions and understanding it will help clarify the process.

Refocus

Across Australia and New Zealand, the number of licensees losing their license as a result of a tribunal hearing is low, most cancellations are a result of the failure of the licensee to meet the 'fit and proper' persons test after a conviction for crimes of dishonesty.

Punitive penalties are relatively low, rarely exceeding $5,000. The two areas of risk are;

- Awards for restitution: Determined by the presiding authority, or a claimant's court action, the amount awarded can vary from 'token' acknowledgement to substantial judgements.
- Reputational damage: Two forms of reputational damage can occur, personal and brand damage.

Our role as ADR practitioners extends past legal advisory services and risk mitigation and includes restorative mentoring.

We have not retained data to quantify the impact of a complaint on a practitioner's income, but anecdotal evidence suggest during the complaint management period licensees are distracted, experience significant loss of confidence, less likely to contact clients and are more likely to make further mistakes. Refocusing on what licensees do is critical.

Our post complaint mentoring program is both practical and motivational. We establish strategies to manage reputational damage, overcome the hurdles imposed by a loss of confidence and celebrate in the victories that are the rewards of disciplined hard work.

Why Trouble Comes is a critical reading guide for licensees confronted with the challenges of a complaint. **Why Trouble Comes** is free of charge

and downloadable from our web sites in print or audio-visual form. *Ref: TNS203:*

Mentoring Healthy Relationships

Our associated business 'The Negotiators' provides two free services to clients we represent through our complaints management service.

- **Press and public relations management.**
  This service includes contacting relative media and utilising diversion strategies, cause reporting to focus on non-specific characteristics of the wider issues that give rise to complaints.

  We write redemptive advertising script, blogs, and social media posts specific to each client's individual circumstance.

- **Mentoring service**
  We provide four free mentoring sessions to ensure our clients emotional, financial and reputational integrity remains robust and consistent with their long-term goals and ambitions.

The initial thirty-minute assessment is provided after the licensee has met all requests for information relating to the complaint and usually coincides with the dismissal of the complaint or confirmation by the regulator that the complaint will proceed.

Conducted 'online' in real time, face to face, utilising 'zoom' or 'teams' clients receive a thirty minute 're-direction' session and are invited to join four, thirty-minute weekly workshops free of charge.

Guides to this service can be found on our web site.

www.johnthomson.com.au/learning centre

www.nzmrs.co.nz/learning centre

sometimes we must experience hardships, breakups, and narcissistic abuse to shake us awake, to realise life is short and help us focus on those things that really matter, and in doing so, see we are worth so much more than they said we were

Negotiating With Narcissists: John Thomson

VULNERABILITIES AND RISK WITHIN LAW OF TORT

Risk Management and Law of Tort

Disclaimer:

This section is not a comprehensive treatise of the nuances of the Law of Tort. It is written for real estate and property practitioners as a guide to advise the need to develop and maintain robust risk management procedures. If you are subject to a complaint, you cannot act or rely upon the information provided but should immediately consult with a legal professional.

For a more comprehensive guide to the Law of Tort you should download and read, ***When They Do Wrong: Understanding Law Of Tort,*** *a more comprehensive free publication available from our website. (Refer to Education Learning Centre Ref: TNS010)*

The author, John Thomson, is a Senior Mediation and Arbitration Practitioner in Australia and New Zealand specialising in property, real estate, aviation, and environmental contractual and non-contractual dispute resolution and consultancy services.

This section is a summary of the Law of Tort and provides insights into why navigating a complaint response is complex and requires professional guidance.

Introduction

The law of Tort is inherently complex, often described as a 'legal twilight zone' due to the fluid interpretations that govern civil liability and the unpredictable justifications for rulings, punitive damages, and awards determined by regulators and disciplinary panels.

I have sympathy for many respondents, those subject to disciplinary action often claiming the process was unfair and unjust. More than half of respondents/defendants assert bias, inaccurate reporting, and prejudicial interpretive statements by plaintiffs being given precedence, while their own *(accurate)* accounts of events appeared to be irrelevant or dismissed.

Tort Weakness

Strict processes and the laws of evidence govern legal processes in criminal justice and small claims courts, but due to the obscure interpretive definitions, the law of Tort is vulnerable to interpretation, subject to social and cultural bias and government policy guidance.

Within the real estate sector, governance regulators determine codes of conduct, enforce cultural-based training, prevent cross-examination of a claimant's evidence, impose inconsistent penalties and judgements, and rulings often appear disconnected from the statements of respondents and defendants.

play the hand you are dealt
as though it was the hand you wanted

Further, respondents typically cannot attend tribunal hearings and contest prosecution evidence, which often appears' selectively' summarised against the balance of evidence and may not fully represent balanced facts or genuine intent.

This is more evident if the complainant is socially or culturally marginalised as investigators appear to have an active bias and prejudice in favour of the complainant. This is evidenced in compulsory education programs, social engineering policies and divisive language used in regulators reports and publications and influences rulings, distorts precedence and creates perceptions of bias and miscarriages of justice.

Regulators rarely provide respondents with a summation of facts or recommendations to be presented to adjudicating tribunals which has led to further criticism, with some respondents characterizing the tribunals as "kangaroo courts."

Such decisions give rise to significant animosity and distrust of the regulator and are viewed as prejudicial and a fundamental

disparagement of the interpretation of the law. Our surveys indicate that distrust of the regulators is the highest it has been since 2008.[8]

My experiences with real estate regulators have been notably "frustrating" due to systemic investigative biases, subjective interpretive social guidance, a tendency to overextend moral and legal interpretations, and an unwillingness to keep respondents and legal counsel informed of investigative progress and their recommendations to the tribunals.

Focus on Risk Management

As a sector educator, my observation is that salespeople also contribute, having poor skills to assess and manage 'practice risk.' There are multiple reasons for this, including the motivations and personality types that attract individuals to a real estate or property-based career, but most significantly is the lack of education about the purpose and function of the Law of Tort.

Wherever the term 'duty of care' is used, the Law of Tort applies. Tort establishes the legal framework governing conduct, behaviour, and legal practice as regulated by various governing bodies, including trade practices, consumer protection, industry regulations, and codes of conduct, all intended to protect consumers in providing services and selling goods.

Tort holds any person causing interference, restraint, threat, damage or loss, liable and undergirds the right claim or self-defence.

Tort prosecution is intended to provide **deterrence**, **compensation**, and **social responsibility**, thereby maintaining societal order, fairness, accountability, equitable rights and freedoms. While specific language may vary across states, territories, and international borders, the fundamental principles remain the same in all democratic societies.

[8] Sample: 200 licensees per state: VIC, NSW, S.A. W.A. 74% N.Z. 79%: licensee did not trust the regulator to handle a complaint fairly:

History Tells Us What Tort Is

The Law of Tort originates from ancient Grecian and Roman societies, and by the 17th century, it had become well-documented and interpreted in Spain and France. The landmark case of **Donoghue v. Stevenson**[9], established a governing precedent affirming that civil liability and moral obligations extend beyond contractual agreements. This case formulated the principle of a broad duty of care, grounded fairness and justice for all people, which continues to shape modern civil responsibility.

Unlike criminal law, where the evidence points to a single legislative provision *(e.g., a dead body leads to a charge of murder),* the evidence established under tort considers multiple factors, including the type of tort *(form)*, causation *(justification)*, and fault *(contribution)*.

law of tort is the chameleon clown
you should never dance with

This complexity could infer that a single action requires twenty-seven considerations and possible outcomes, each influenced by claimant, investigator, and respondent prejudice and bias.

Confusing?

Adverse rulings and 'awards' in New Zealand and South Australia are distinguishable from those filed in other states and territories, evidence of the subjective way in which the law is interpreted. Real estate practitioners do not need to understand these nuances, but awareness helps formulate strategic risk management strategies and, if a complaint is made, should cause them to seek immediate professional help.

[9] Donoghue V Stevenson: English High Court 1932: Ruled liability extended past contractual agreements and was a moral obligation on all people.

Three Types of Tort

Tort law has three main categories: **intentional, negligence**, and **strict liability tort**, often termed the 'unholy trinity.' Prosecution can shift between these categories as seen when an intentional tort claim fails but is revived under a different tort type.

Intentional torts involve deliberate actions intended to cause harm. If found culpable *(guilty)*, rulings will elevate a respondent's reparations to the plaintiff. This concept extends **beyond legal disputes** to include **personal conduct** and **moral and ethical accountability.**

Being **subjective** and socially **interpretive,** claims often arise from issues affecting respondents' conduct and language to include a wide range of social and cultural sensitivities, including gender identity, racial disparity, and personal freedoms. More recently, regulators increasingly require agents to undertake educational instruction relating to social interaction, including alcohol consumption, religious, cultural or political expression, and requirements to identify gender and pronouns before addressing clients.

Negligence involves failing to meet a duty of care that leads to real or perceived harm. It is central to many injury and loss claims, including emotional offence and social prejudice *(harm)* claims.

For a claim to succeed, **duty, breach, Causation, damages,** and **foreseeability** must be proven. In today's world, this is not difficult for a claimant to prove. Example:

A middle-aged woman entered a real estate office and introduced herself as 'Starlight Venus.' She wished to inspect an advertised rural property located 40 minutes' drive from the office. She had blue and white streaks in her hair, wore no shoes, and used unfamiliar language about her intended use of the property. The real estate agent justifiably asked basic questions about affordability, financing, and the terms and conditions of a prospective sale.

The agent decided not to drive Starlight to the property but referred her to an 'open for inspection' to be held in five days.

Starlight made a complaint stating she was prejudiced because of her name, appearance, and stated use for the land. She claimed that when she said she did not own a motor vehicle and could not attend the open for inspection, the agent, a male agent, laughed at her and 'brushed her off.'

Investigations proved Starlight had a history of approaching agents to view property; she had no money, was unemployed and was prone to unusual behavioural episodes. Notwithstanding, because the agent did not know she had no money, the regulators ruled that the agent demonstrated bias toward Starlight, which caused her emotional harm. The agent was fined and ordered to undertake further education.

(My Opinion: This is a manifest overreach of the interpretation of the law of tort by the regulator, and the estimated $8,000 cost to appeal the decision makes it unreasonable to defend)

The **"reasonable person standard"** often measures acceptable conduct with stricter expectations for licensed professionals. An act of negligence can become intentional, based on cultural or emotional considerations, and the determination of fault varies between investigators.

every right implies a responsibility, every opportunity an obligation, every possession a duty, every word and action, a moral commitment

Strict liability holds parties responsible for harm caused **regardless of intent or negligence**. It applies to defective products or harmful acts and is reinforced by statutory laws in areas like environmental and workplace safety. This places agents at significant risk where third-party promissory obligations are required to ensure the performance of a contract of sale.

An example may be when a sales agent sells a property with an unknown fault or impediment and is later held accountable to the professional standard **'should have known.'**

Recent changes in property zoning and threat definitions have led to asset devaluation based on hypothetical weather and climate events,

prompting claims that test agents accountability under the 'should have known' standard.

It appears unfair to pursue a real estate agent using coercive obscure legal strategies, but claimants desperate to recover loss of valuation seek any means possible to recover losses, including testing agent liability, which is a primary driver for increased costs for real estate public liability insurance.

Three Levels of Causation

While the 'but for' test is foundational in establishing Causation, it may not apply or may diminish liability in cases with **multiple contributing factors**.

Multiple Causation considers various participants or actions contributing to the harm and may assign proportional fault to others. The test should include the plaintiffs' *(claimants)* actions and responses during and after the event.

This test may shift a portion of the fault to a salesperson's principal licensee, company director, auctioneer, or training institution. Regulators almost always use Multiple Causation to justify charges against principals for failing to supervise.

As a defensive strategy, multiple Causation liability could be used to deflected focus onto external factors, reducing individual responsibility. In such cases, investigators and courts use alternative tests, such as the **substantial factor test**, to evaluate Causation.

Proximate Causation *(foreseeability)* tests whether the harm was a foreseeable result of the defendant's conduct, helping to limit liability to directly linked consequences. The foreseeability test determines if the damage, injury, or loss was a natural consequence of the wrongful act, balancing accountability and the scope of liability.

An example could be permitting a person of questionable character to attend a property inspection at which valuable assets went missing. While there is no evidence that the person stole the assets, the fact that

the person attended, and the asset went missing could be attributed to Proximate Causation.

Intervening Cause tests whether the cause was foreseeable and related to the original act. It almost always applies to a minor event that had the potential to escalate, and nothing was done to mitigate the risk of a more significant event.

An agent attended an open inspection and discovered a tap running in the bath containing a pot plant. Despite knowing the homeowner was away, the agent thought the homeowner may have deliberately left the tap on. When the owner return, the bath had overflowed, and carpets and flooring were damaged. The homeowner claimed she had told the agent to turn the tap off when attending the open for inspection, a fact the agent passionately disputed. The agent was found guilty of misconduct *(the agent should have foreseen the risk)*, and while the home was insured, the agency was ordered to pay $6,000 to cover other out-of-pocket expenses.

Breach of Duty

Breach of duty refers to the **failure to meet the expected standard** of care in each given situation and is typically defined by **what a reasonably informed, responsible person would have done** in a similar circumstance. Unlike case law precedence, 'reasonably informed' is widely interpreted and almost always subjective.

Duty of Care requires individuals and entities to take reasonable steps to inform themselves and act responsibly, considering existing legal precedents. This historical view is complicated when there is a philosophical shift of culture and policy within the regulators and until a new precedent is established, agents and defence lawyers are usually uninformed as to the interpretive value of the new policy.

Causation is crucial in determining liability and the **value of restorative damages.** In 2018, a purchaser paid an $80,000 deposit for a property sold by an agent with LJ Hookers but later sought to cancel the sale upon

learning a murder had occurred in the home, which the purchaser, a Buddhist, claimed was not disclosed. To prevent reputational damage, LJ Hookers refunded the deposit and purchased the property.

The case failed the "actual causation" or "cause in fact" test since the agents were not involved in the murder however, it passed the **"proximate causation"** test because the agents knew about the murder. Actual Causation examines whether the harm would have occurred **"but for"** the defendant's actions, considering factors like negligence or omissions. The Hooker case met the proximate causation criteria through omission.

Statutory Defences, There Is Some Good News

Statutory defences in tort law are established through trial precedence and provide specific protections to respondents.

The Law of Good Samaritan is a provision within tort social justice and fairness interpretation that permits actions that would be otherwise criminal but are used to protect and defend vulnerable and at-risk people.

A man kicked a dog to death he perceived threatened his children while they were playing in a public playground. The dog's owner argued that the dog had never attacked anyone. However, witnesses also testified that they felt threatened by the dog. The court dismissed the RSPCA's prosecution and the owner's claim, ruling that the man's actions were in defence of children in the playground and the dog did pose a justifiable threat.

Laws of Self Défense have substantial precedent and permit acts of physical aggression and violence proportional to the threat of loss, injury and harm likely to be inflicted upon a person.

Crown v. Moffa[10] established that killing an assailant *(in this case his wife)* was justifiable because the assailant's intention was to kill or cause serious wounding to the victim.

Comparative Fault Negligence Theory. Unlike contributory negligence *(explained below),* which can completely bar recovery, comparative negligence may reduce a plaintiff's claim in proportion to their fault.

Pure Comparative Fault *(negligence)* is where a plaintiff can recover damages regardless of their fault percentage.

Modified Comparative Fault *(negligence)* recovery is limited if the plaintiff's fault surpasses a certain threshold. This approach encourages accountability, acknowledging that multiple parties might contribute to an incident.

For instance, if a builder fails to waterproof a window and homeowners ignore the leak, hoping for new carpets, the comparative fault doctrine would reduce the builder's liability due to the homeowner's inaction.

Contributory Fault (negligence) can either reduce or entirely prevent recovery if the plaintiff is found partially at fault. Its application varies across jurisdictions; some completely bar recovery on finding any plaintiff fault, while others allow partial recovery based on fault percentage. Courts evaluate contributory negligence by looking at the plaintiff's actions, their awareness of risks, and the 'reasonableness' of their behaviour.

Contributory negligence allocates personal responsibility, making it important for respondents/defendants to present evidence of all parties' behaviours.

Comparative negligence requires thorough investigation and evidence from plaintiffs and defendants to highlight all parties' actions. Mastery of these principles is crucial in tort law to ensure fair outcomes.

[10] Crown v. Moffa 1977 Australia High Court: Precedent applies to Australia and guides New Zealand legal interpretation.

Three Levels Of Tort Evidence

It is important to note that this publication is written from a defence of complaint or claim perspective. To develop strategic defensive strategies, negotiators, arbitrators, and litigators (lawyers) assess the balance of probability against the veracity and sustainability of the evidence presented, as this determines decisions if the matter is referred to a Court for judgment. The following is considered.

Beyond Reasonable Doubt Standard

Beyond reasonable doubt is the highest standard of proof in the criminal justice system. It signifies the certainty required to convict a defendant. This standard requires that the evidence presented be so convincing that no reasonable person would doubt the defendant's guilt. It does not mean there is no doubt; any doubt must be reasonable and based on the evidence.

Beyond reasonable doubt places a substantial burden on the prosecution or plaintiffs' claim to establish the defendant's guilt so jurors or judges can firmly believe in the case's truth.

The term "reasonable" indicates that doubts must be logical and based on evidence presented during the trial. Speculative or unreasonable doubt does not negate the prosecution's burden of proof.

Reasonableness serves as a fundamental protection for defendants in the criminal justice system, reinforcing the presumption of innocence; however, it applies to all cases where standards of fairness and justice apply. This standard embodies the commitment to justice and safeguards against wrongful convictions, ensuring that the rights of individuals are protected within the legal framework.

Clear and Convincing Evidence

The clear and convincing standard balances the more lenient 'preponderance' of evidence against the stringent 'beyond reasonable' doubt standard. It is a standard of proof commonly used in civil cases.

Preponderance of Evidence

This standard means that one party's evidence is more convincing or has greater weight than the opposing party's evidence and only requires that a claim is more likely valid than not, meaning the evidence appears to be more than 50% in one party's favour.

When preponderance evidence is considered, the evidence becomes highly subjective, which can lead to ambiguity of facts, speculative statements, and expressed bias, all of which influence investigators' comparative fault-based decisions.

It is critical where risk of a complaint is probable that that there is a strategy to secure credible evidence to enable the defence to move the plaintiff's evidence out of this low-level speculative category.

An example of the risk of improper assessment of a complaint is where there is a failure to provide documents and statements on request which is interpreted as 'frustration of due process' and is viewed as an admission of guilt, thereby jeopardising respondents/defendants' ability to raise a vigorous and sustainable defence later if the matter were to escalate.

I often advised clients that investigative and interpretive preponderance bias creates a 'you are dammed if you do and dammed if you do not' culture by regulators.

(I oppose regulators' right to use, present or express preponderance-based evidence due to the slewed interpretive bias demonstrated in many cases and have justifiably criticised the regulator where a blatant miscarriage of justice has occurred. Regrettably appeal costs are usually higher than the penalties imposed).

Damages

Statutes of Limitation

A statute of limitations establishes a specific time frame for initiating legal actions. Once that time expires, a claimant may be barred from pursuing the claim regardless of its merits.

Australia and New Zealand share similar limitation periods. The following are civil claims statute periods, but they do not apply to criminal code prosecutions.

- Personal Injury Claims 3 years
- Contracts (breach of and performance failures) 6 years
- Tort Non Injury (fraud, privacy invasion, nuisance) 6 years
- Land Claims (easements, titles, boundaries, adverse possession, land use and zoning, partition actions) 12 years
- Defamation false accusation, slander, libel 1 year

The primary goal of the law of tort is to restore the aggrieved party to their pre-tort position. Damages are classified into three categories: compensatory, punitive, and nominal.

Compensatory Damages are the most common form of restitution, providing for economic losses *(e.g., medical expenses, lost wages, property damage)* and non-economic losses *(e.g., pain and suffering, emotional distress)*. Courts assess the appropriate amount based on evidence and factors like injury severity.

Punitive Damages aim to punish the wrongdoer and deter future misconduct. Awarded less frequently, they apply in cases of egregious behaviour *(e.g., fraud or intentional harm)* and require higher burdens of evidential proof than compensatory damages. If a matter includes a criminal conviction, the conviction can help substantiate a civil claim, while the absence of a criminal conviction does not disqualify a civil claim.

This is evident in the Donald Trump 'hush money' scandal, where prosecutors failed to find Trump guilty of fraud, bribery and contempt of court, but Daniels, the plaintiff, won civil damages.

Nominal Damages may be awarded when a legal wrong occurs without substantial loss. They recognise that a tort has been committed, affirming the injured party's rights and serving as a symbolic gesture.

Summary

The Law of Tort is complex, interpretations are subjective, and outcomes vary across jurisdictions. All defence strategies focus on raising substantive evidence that is more compelling than the claimant's purported statements and should content legal interpretations more substantively than those submitted by the claimants.

Most regulatory investigators have limited legal qualifications. Their primary role is to collect information and present it to an overseer who decides whether the matter will be referred to a panel for assessment or is substantial enough to impose a decision.

In all complaints against practitioners, civil law principles apply, and as such, they fall within the definition of legal practice. I cannot stress the importance of the need for legal representation.

Recommended Reading In This Series

THE NEGOTIATOR CØDE RED Master Class Lesson Notes are available in downloadable and printable format from our online platforms. With over forty titles they constitute the framework of our **Master Class** Training and education programs.

The following subjects are closely linked with the contents of this lesson and are recommended reading.

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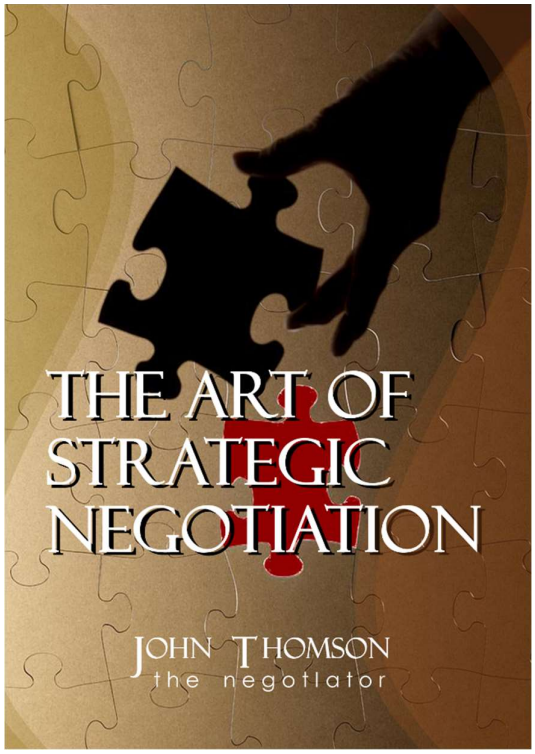
A Greater Lesson

This lesson is an overview from a section of the book, **The Art Of Strategic Negotiation,** by the author, John Thomson.

The Art Of Strategic Negotiation is a comprehensive guide and compelling reading for all practitioners required to negotiate terms of settlement, whether they are salespeople, contract negotiators, dispute resolution specialists and family relationship mediators.

It is strongly recommended as substantive reading material for behavioural science students and those seeking to negotiate within vocational and occupational endeavours.



In E Book Format

We recommend you purchase this book on Amazon or as an 'E'Book from our web site.

www.johnthomson.com.au.

'E'book price: AU $29.95

About John Thomson

With a reputation for getting 'tough deals done,' John Thomson is 'the negotiator.'

Known for his novel and hybrid problem solving methodologies, John is a veteran 'deal maker,' negotiator, and active resolution specialist.

With a major in criminology and undergraduate qualification in law, business, aviation and environmental management, John is a Senior Mediation, Negotiation and Arbitration Partner, Consultant Advisor and critical event manager, specialising in property, environmental and aviation sectors. Working with a team of professionals in Australia and New Zealand, John is an associate member with governing institutes in both countries,

He is an author, educator, keynote and plenary speaker, and professional educator, encouraging practitioners to explore alternative resolution solutions with their clients.

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LESSONS FROM AN EXPERT
THE ART OF NEGOTIATION
HOW TO MANAGE A REAL ESTATE COMPLAINT
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