

Professional Liability Insurance for Counsellors: Second Thoughts

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Abstract

Professional liability insurance for counsellors is a topic about which little has been written. There is an assumed need for it. This article discusses some of the negative implications of such insurance for counsellors and the practice of counselling in New Zealand.

Background

Although members of NZAC currently are able to join a group professional liability scheme, the history of the scheme is rather brief. The need for professional liability insurance was first mentioned in the Association's *Newsletter* as recently as November, 1991. In that issue a report on the 'Professional Issues' portfolio listed as a task the "Investigation, for executive, of professional liability insurance, with recommendation that we find a suitable policy and endorse it," (p.26). Regular updates of progress were made in subsequent *Newsletters* and Annual Reports of the Association as follows:

Annual Report, May 1991-1992, p.28: proposals had been obtained from two insurance companies; cover up to \$500,000 was possible; cost was likely to be \$100-150.

Newsletter, June, 1992, p.26: Executive had selected the proposal from Marsh & McLennan at its May meeting. The cost of cover (\$100) was based on a minimum of 50 members joining.

Newsletter, August, 1992, p.23: Still awaiting a detailed proposal.

Newsletter, December, 1992, pp 29-34: A policy was offered for the consideration of members. Cost was to be \$85 + GST if a

minimum of 60 members joined by February, 1993. The protection offered covered public liability, professional indemnity, legal costs associated with the defence and investigation of claims, loss of documents.

Newsletter, April, 1993, p.27: By the February deadline 35 proposals had been received, less than half the expected number. For this lesser number of subscribers the cost was to be \$100 + GST. The deadline for joining was extended to May 5, 1993.

Newsletter, July, 1993, p.22: It was reported that 55 members had sent in proposals. The cost was reported as \$110 + GST. The scheme was up and running!

Newsletter, October, 1993, p.4: Almost all individuals who indicated an interest in the Marsh and McLennan insurance scheme had paid.

Comment

My 'second thoughts' about such insurance stem from several pieces of information. I mention them not as a criticism of the work that NZAC has done to date in setting up an insurance scheme for its members, but as an attempt to get the NZAC and its members to consider more carefully the implications and practicalities that such insurance schemes have for counsellors and the practice of counselling.

1. The New Zealand Psychological Society has already travelled this path. Based on a discussion paper that appeared in their *Bulletin*, 1988 (No.58, pp.25-29), a Working Party on Psychology in Private Practice recommended that the Society establish a mandatory professional indemnity insurance scheme. In the report it was said that a law lecturer from Otago had advised in 1986 "that the need for malpractice insurance was extremely low" and that he knew of "no

instances of a psychologist having been taken to court, even in the USA". Nevertheless, the author(s) of the discussion paper said the issue had "become more prominent due to some actual incidents of threatened action and partially due to the initiative by some insurance companies seeking to interest the Society in various schemes".¹ It is interesting to note that one of the insurance companies who originally approached the Society was Marsh & McLennan. It would also be interesting to know if NZAC's interest in such insurance was triggered by an approach from this (or another) insurance company or by knowledge of actual evidence of the need for insurance.

At present the Psychological Society has a voluntary group scheme that started in 1990. It costs, I believe, \$96 per annum for members of the Society.

What is notable in this is the fact that the Psychological Society published a 'discussion' paper for its members before proceeding. In spite of a lack of any evidence for its need, the Society recommended that an insurance scheme be adopted, albeit on a voluntary basis. To the best of my knowledge NZAC has never conducted an investigation nor published a background or discussion paper on this matter. The 'need' for members to be insured has been taken for granted.

2. Available evidence here and overseas indicates that the likelihood of a counsellor being sued for malpractice is minimal. For example, even in the USA, a country with a stronger tradition of malpractice litigation than New Zealand, the chance of a psychologist being sued was estimated to be as low as .5% (Pope, 1986). In addition, Wilbert and Fulero (1988) said of counsellors/psychologists in the USA: "a careful practitioner who follows the prescribed guidelines for proper professional practice and who refrains from sexual improprieties appears to run a very small risk of malpractice litigation" (p.382). This view clearly supported an earlier, similar opinion expressed by Greenberg and Greenberg (1988). The same is true for social workers, where the rate of suits has remained "extraordinarily low, both in absolute terms and relative to other professions" e.g., physicians and

lawyers (Jones & Alcabas, 1989, p.414). In England, to date only one case for negligent psychotherapy has appeared in the Law Reports (Cohen, 1992). Thus, the need for insurance there appears to be 'low' as well.

What about New Zealand? As reported earlier, an Otago law lecturer advised the NZ Psychological Society in 1986 that the need for insurance was "extremely low" and that there were no instances of psychologists having been taken to court in New Zealand. Ludbrook (1992) reported that there was no reported case of a school counsellor being sued for damages for negligence. A recent cd-rom search of the New Zealand law records, 'briefcase' and 'linx' databases failed to find a single counselling malpractice case on record as of 1993. Similarly, a Christchurch insurance agent said he had no knowledge of any malpractice cases against counsellors or therapists in New Zealand (personal communication, 10/93). The only conclusion one can draw from all of this is that counsellors are buying professional liability insurance as a precautionary measure, or as the insurance agent suggested, in response to the 'fear' of being sued rather than an objective assessment of the real risk involved.

3. Once enrolled in a scheme, the costs (premiums) will, in all likelihood, escalate, even without, it seems, a large number of malpractice cases appearing in the courts. For example, concern has been expressed in the USA for several years about the rise in insurance premiums (see, for example, Wilbert & Fulero, 1988; a general notice about claims-made policy premiums to Psychologists in the APA Monitor, June, 1992). Terry (1986), writing about medical malpractice insurance, even suggested that insurance companies themselves manipulated 'crises' to justify increases in premiums in order to generate greater income in times of low interest rates.

However, as both the NZ Psychological Society and the NZAC have pointed out, recommended insurance covers more than professional indemnity. A comprehensive policy also covers such things as public liability, legal costs associated with the defence and investigation of claims, and loss of documents. And, as Wilbert and Fulero (1988) noted "many

of the changes in professional practice that have been stimulated [in the state of Ohio] by the threat of malpractice litigation could be viewed as positive changes that work to promote sound and ethical practice" (p.381). Thus, there may be good reasons for practitioners carrying such insurance, but again, there are no readily available New Zealand data that would allow NZAC members to estimate their risk of vulnerability in any of those areas. One could assume that Marsh & McLennan have such data. If they do, could NZAC gain access to it and make it available to their membership?

4. Another likely consequence of widespread professional liability insurance would be the increased influence over professional codes or modes of practice by the paying or funding source, i.e. the insurance companies. If an insurance company agrees to insure a counsellor or psychologist, it will then want to have more direct control over what counts as accepted practice by their clients. This is already accepted procedure in many types of personal, health and indemnity insurance policies. Certain behaviours or risks are excluded from cover, e.g. skydiving, motorcycle racing. The same would almost surely eventuate in the counselling/therapy field. The range of 'acceptable' practices or interventions would be restricted to the 'tried and true'; membership in certain professional organisation would be essential for coverage; specified training or qualifications would be required for coverage. In the end the insurer could exert an inordinate amount of control over the practice of the helping professions.

Something of a similar nature is already happening to some extent in New Zealand, albeit from the client insurer's point of view. ACC is a major funding source for counselling and therapy services. Because of its major investment in these services, it naturally wants some guarantee of service quality. Thus it has begun to compile its own list of acceptable counsellors. The professional associations' responses have been predictable: they have lobbied for all their "members in good standing" to be included on the ACC list. In order to strengthen their cases, most associations have reviewed their membership criteria and modified them in the

direction of the ACC's guidelines. Unfortunately, these changes will still leave many counsellors with non-traditional, non-formal training short of meeting the ACC criteria (e.g. many Maori and Pacific Island counsellors, women's refuge counsellors, violence prevention counsellors). Another consequence might be an increase in competition between associations, as has happened in the USA with psychologists having to prove their worth in relation to psychiatrists (Fretz & Simon, 1992) and counsellors striving for equal status with the better established professions (Brooks & Gerstein, 1990).

Individual counsellors' responses to this situation have also been predictable: many have quickly applied for membership in the 'highest ranking' association for which they are eligible. The NZAC, for example, has experienced a 300% rise in membership in just over three years. Only an optimist would suggest that this increase was due to the new members' new-found interest in professional issues, self-development and collegial support.

This process of increasing control by funding agents will be hastened by the advent of the first malpractice case that goes to court. The insurer will immediately move to prevent having to pay out on such claims in the future, particularly if there was an obvious 'weakness' in the counsellor's training, supervision, or professional practice.

If You don't have Professional Liability Insurance, What is the Alternative?

The most direct answer is to conduct your counselling practice according to accepted legal requirements and ethical guidelines, and to do so "in a reasonably competent manner" (Ludbrook, 1992, p.25). If that is done, the chances of being sued are minimal, it would seem. One positive outcome of a perceived threat of being sued could be to stimulate changes in counselling practices that promote sound and ethical therapy, an outcome found in a survey of licensed psychologists in the state of Ohio by Wilbert and Fulero (1988).

Corey and Corey's (1989) definition of malpractice is the "failure to render proper

service, through ignorance or negligence, resulting in injury or loss to the client" (p.198). In a more recent book (Corey, Corey & Callanan, 1992) they included a very useful discussion about and detailed suggestions for protecting yourself from malpractice suits. The essence of their suggestions is that counsellors should practice only within the limits of their competence, follow an accepted code of ethical practice and know their legal responsibilities. Examples of their suggestions include:

- * define your fees at the outset
- * document treatment plans
- * keep adequate business records
- * take steps to maintain your competence
- * avoid sexual relationships with past or current clients, supervisees, students
- * know the law in regard to responsibilities and requirements
- * avoid dual relationships with clients
- * make sure you provide coverage for clients when you are away
- * receive regular supervision
- * refer clients that have problems outside your limits of competence
- * use informed consent procedures
- * know how to assess and intervene with clients that pose a danger to themselves or others
- * have a rationale for the interventions you use
- * be reasonable about what counselling can and cannot do
- * (and, they say, have adequate professional-liability insurance)

Another useful article that discusses legal issues in counselling from a British point of view is that by Cohen (1992). Finally, every New Zealand counsellor should read Robert Ludbrook's 1992 version of *The School Counsellor and the Law*, available from the NZAC.

Should You have Professional Liability Insurance?

That is a question that every counsellor must answer for her or himself. However, there is no

clear evidence of an increase in professional liability suits in New Zealand, or a rise in the risk of an individual counsellor being sued. On the contrary, counsellors here seem to fit Jones and Alcabes' (1989) 'service-ideal model' of help-giving (with its image of self-less service) rather than the 'fee-for-service' model. That is, they strive "to do the very best for each help seeker that the technology of the profession permits, regardless of whether that person can pay" (p.415). However, one threat to that aura of self-less service, they suggested, was the proliferation of private practitioners (social workers, counsellors, etc), a trend that is noticeable over recent years in New Zealand. Thus, if the present trend to private practice continues, perhaps the risk of being sued will also rise.

New Zealand counsellors have a chance to stand back and think more critically and carefully about the longer term implications of professional liability insurance on the practice of counselling. There has been virtually no debate about the issue in either the NZAC's Journal or its Newsletter. In my opinion there are several worrying consequences of an insured profession. Do we want to or need to follow in the footsteps of the North American model of service provision? There may be better alternatives, but we may never know about and discuss them if the majority of counsellors quickly sign on as liability insurance customers.

1. They also noted that in 1985 the British Psychological Society recommended that their members should be considering insurance cover. This is interesting given the claim by Cohen (1992, p.11) that "it is almost unheard of for counsellors or therapists to be sued by their clients" and "in England, only one case involving negligent psychotherapy has appeared in the recognised Law Reports". Furthermore, Cohen did not foresee an increase in such cases "because of the uncertain state of our knowledge about counselling and psychotherapy, and because of the general obstacles placed by the law in the path of any plaintiff in a negligence action" (p.11). One must surely wonder why it would be any different here.

References

- APA Monitor, (1992). 23:6, 27.
 Brooks, Jr., D.K., & Gerstein, L.H. (1990). Counselor credentialing and interprofessional collaboration. *Journal*

of *Counseling & Development*, 68, 477-484.

Cohen, K. (1992). Some legal issues in counselling and psychotherapy. *British Journal of Guidance and Counselling*, 20, 10-26.

Corey, M.S., and Corey, G. (1989). *Becoming a Helper*. Pacific Grove, CA: Brooks/Cole.

Corey, G., Corey, M.S., and Callanan, P. (1993). 4th ed. *Issues and Ethics in the Helping Professions*. Pacific Grove, CA: Brooks/Cole.

Fretz, B.R., & Simon N.P. (1992). Professional issues in counseling psychology: continuity, change and challenge. In S.D. Brown and R.W. Lent (eds.) (2nd ed.) *Handbook of Counseling Psychology*. New York: John Wiley & Sons.

Greenburg, S.L., & Greenburg, J.H. (1988). Malpractice litigation: fears and facts. *Psychotherapy in Private Practice*, 6, 47-62.

Jones, J., A. & Alcabas, A. (1989). Clients don't sue: the invulnerable social worker. *Social Casework*, 70, 414-420.

Ludbrook, R. (1992). *The School Counsellor and the Law*. NZAC.

Pope, K. (1986). New trends in malpractice cases and changes in APA liability insurance. *The Independent Practitioner*, 6, 23-26.

Terry, N.P. (1986). The malpractice crisis in the US: a dispatch from the trenches. *Personal Negligence*, 2, 145-150.

Wilbert, J.R., & Fulero S. M. (1988). Impact of malpractice litigation on professional psychology: survey of practitioners. *Professional Psychology: Research and Practice*, 19, 379-382.