At a Department of Defence news briefing on 12 February 2002, the then US Secretary of Defence Donald Rumsfeld famously said, (in response to a question about the lack of evidence linking the Iraqi government with the supply of weapons of mass destruction to terrorist groups):

“Reports that say something hasn’t happened are always interesting to me, because as we know, there are known knowns: there are things we know. We also know there are known unknowns: that is to say we know there are some things we do not know. But there are also unknown unknowns – the ones we don’t know we don’t know.........”

This quote has been the subject of much debate since then (and some mirth) but it does set out the concepts of “known unknowns” and “unknown unknowns” clearly and is in fact reflective of well understood analytical concepts used in various fields, including psychology, science and intelligence analysis.

These are also matters which lawyers should bear in mind when advising on matters that raise issues they are not familiar with.

An example of this is the recent NSW Court of Appeal decision in Ralston v Jurisich [2017] NSWCA 63. Mrs Jurisich held 22.5% of the shares in a family company which had owned and sold some valuable parcels of land. Her brother also held 22.5% of the shares and their mother held the remaining 55%. Ms Jurisich’s relationship with the other shareholders became strained and she wished to realise the value of her shares.
A voluntary winding-up was proposed however Mrs Jurisich was concerned about possible delays in the winding up process and whether she would be able to receive full value of her shares.

She sought advice from her solicitor, Mr Ratner, about an alternative process, namely whether she could simply sell her shares back to the company. Mr Ratner’s advice was that a share buy-back would be good idea and a buy-back agreement was executed.

Mrs Jurisich must have been happy when she received $1,308,285 for her shares, but she would not have been happy when she learnt that out of that sum she had to pay $608,172 to the Australian Taxation Office. She was likely even more disgruntled to find out that had the company been voluntarily wound up, as initially proposed, the amount she received would not have been subject to tax at all.

Unsurprisingly, Mrs Jurisich sued Mr Ratner and his firm, alleging that Mr Ratner should have advised her of the tax consequences of the share buy-back arrangement or at the very least he should have advised her to seek specialist tax advice and that in not doing so he was negligent and in breach of retainer.

Mr Ratner’s defence concentrated on arguments as to causation: he said that the fact that Mrs Jurisich had concerns about the liquidation process meant that his alleged breaches regarding the share buy-back did not cause her loss because she would not have agreed to the voluntary winding-up in any event. Both the trial judge and the judges in the NSW Court of Appeal dismissed this argument.

McDougall J in the Court of Appeal sad that the evidence in fact showed that

“Mrs Jurisich was not implacably or absolutely or resolutely opposed to liquidation. It has to be asked whether advised in effect that the speed and certainty of a share buy-back compared to liquidation would costs her in excess of $600,000, she would have proceeded as she did. I can accept that she might have been prepared to pay some premium, or price, in exchange for speed and certainty. I do not accept that she would have been prepared to pay about 45% of her notional 22.5% interest in the stated assets of [the company]”. [para 75]

As to the antecedent questions of duty of care and breach it was not contested by Mr Ratner that a duty of care to Mrs Jurisich existed and that a competent advisor would have told her that the proceeds of a share buy-back would be taxable but that a distribution of surplus assets on a voluntary winding up would not, notwithstanding the fact that Mr Ratner was not specifically asked to advise on tax matters. This concession was not criticised by any of the Judges. It seems to have been accepted that it was beyond argument that Mr Ratner’s duty to Mrs Jurisich extended to advising on any tax risks associated with the proposed transaction.
It is not clear whether the tax consequences of the transaction were, as far as Mr Ratner was concerned “known unknowns” (i.e. he knew that there might be tax consequences but he didn’t know what they might have been) or “unknown unknowns” (i.e. was he completely oblivious to anything apart from the immediate nature of the transaction?).

From the point of view of assessing liability for professional negligence it might not matter very much. What is clear, however, is that if a lawyer does know that there are some things he or she does not know, their professional duty extends to finding out and then advising accordingly (the “known unknown” situation). Further, a lawyers’ duty will often extend to considering whether or not there are matters that they don’t know they don’t know, finding out what they are and then advising accordingly (the “unknown unknown” situation). The proper advice might well be to seek specialist advice.

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