LatAm Liability Insights - Episode 1

PLUS Staff: [00:00:00] Thank you for listening to this PLUS Podcast, *LatAm Liability Insights*.

Before we get started, we would like to remind everyone that the information and opinions expressed by our speakers today are their own and do not necessarily represent the views of their employers or of PLUS. The contents of these materials may not be relied upon as legal advice. With the housekeeping announcements out of the way, I am pleased to turn it over to our host, Andrés Amunátegui, of DAC Beachcroft

Andrés Amunátegui: Well, thank you, Bailey. I appreciate it. And good morning and good afternoon to everyone who is listening. We are here for our first podcast session of *LatAm Liability Insights* in what we hope to be a series of episodes to explore all together professional liability through a Latin American perspective.

Our DAC Beachcroft colleagues from different countries in the region will [00:01:00] share their knowledge and experience, both from their local jurisdiction and international markets. Episodes will focus on claim trends, regulatory frameworks, and developments across the different insurance lines, such as cyber, casualty, financial lines, environmental, based on what we expect to be real-world case studies.

So, this morning, three partners in my group and I are going to talk about professional liability in the context of cyber risk and artificial intelligence. [These are] all hot topics in the world and in Latin America. Miguel de la Fuente from our office in Mexico, Juan Diego Arango based in Colombia, and Nicolás Le Blanc from Chile. The three of them [are] very well experienced lawyers in handling cases involving PI, cyber, and now AI. Thanks, Miguel, Juan Diego, and Nicolás for joining our first episode [00:02:00].

Why don't we start with an introductory question regarding which professions are the most exposed in the region[whether] it relate[s] to a specific regulation or if it's a peculiar risk. Then we will take it from there to the different topics that we have prepared for this episode.

Juan Diego, why don't you start, please?

Juan Diego Arango: Thank you, Andrés. Yes, of course. I mean, it's difficult to say which one is more exposed to claims without having the statistics because on our day-to-day, we see just a lot of claims coming from different professions. I will go [in]to which one[s] are more on the side of frequency and more on severity.

I would say in [the] health industry we have more frequency because you're seeing more and more claims against medical institutions[and] medical professions. Even more today, people have more information on what's happening, so you tend to rely on [00:03:00] AI. You, as a consumer or a patient, can be looking at more information and then think if the service that you have received was well or not. So, we see more frequency there.

On severity, I will say, construction [and] architects' design. One mistake there, and you will have a big, big loss. So, you're seeing more severity from those cases.

That's what I will say from the Colombian side.

Andrés Amunátegui: A few weeks ago, Juan Diego, Colombia suffer a very heavy earthquake. We have heard that there has been lots of discussion around professional liability from those who have been involved in the construction of a specific building.

Is this something that has been regulated in the past, or is this something that is a new trend? What do you think about that?

Juan Diego Arango: No, definitely the regulation has been there from long before, regulation on seismic, construction types and [00:04:00] the standards of the industry that have to be complied with. Of course, when you have a big earthquake like this, that is not common at all here, that's where you have all these questions arising. "Was the earthquake, the main cause of this? Can [you] identify that there were breaches on the regulatory standards or not? Was [it] the designer['s] fault or the constructor fault?" So yeah, it is becoming more [prominent] with this event.

Of course, when you don't have an earthquake or an event like this, you will see if they were complying or not, and you will have failure in buildings without a seismic event. Then you will go and find [out] if it was the constructor or the designer, and if regulations were in place or not.

Andrés Amunátegui: Another country that is heavily affected by earthquake is, is Chile, Nicolás.

Is there any specific regulation in your country regarding strict liability for specific[00:05:00] professions?

Nicolás Le Blanc: Yeah, thanks, Andrés. Connecting with Juan Diego, I think the point of being a seismic country increases the standard of the professions attached to the construction area or profession. They have to comply with a number of regulations. That means that when errors are found in earthquake situations, the fact of suffering an earthquake in Chile is not an excuse for the errors.

That means that strict liability usually applies against construction professionals, as we are a country known for their seismic activity. That means they have to prove they have complied with all regulations instead of the claimants, let's say, having to prove their negligence. It's the construction professionals [that] have to prove their diligence.

Andrés Amunátegui: Okay. So far, we don't have in Chile a specific regulation that established strict liability. From that perspective [00:06:00], Miguel, thinking in the consequences of the professional liability in our jurisdictions, is it accepted in Mexico [as] punitive damage? What is the concept of punitive damage, if it exists in Mexico, as a consequence of professional liability?

Miguel De La Fuente: Thanks, Andrés. From a Mexican standpoint, punitive damages haven't been, or at least I'm not aware of judgments in which professional liability has been involved and punitive damages [are] awarded. It is a concept now in Mexico, but [it is] mostly related [to] a failure to provide a specific duty of care in respect to enterprises and mostly in the tourist sector.

There's a big case in Mexico which started the idea of punitive damages, which is Mayan Palace. It was basically a case where a minor was injured. He suffered an electrocution in an artificial lake, and the people around the hotel, or the [00:07:00] employees of the hotel, were not prepared to give a fair response [to] save the life of this minor. That's how this case brought punitive damage. Most [of] the punitive damages we're seeing is basically [from] these type[s] of cases. It is not really a liability from a professional involved.

The presence in Mexico nowadays at least has certain standards, I would say, that require a gross negligent or an intentional act that has been repeated in prior cases. That's a way in which judges might award punitive damages.

Andrés Amunátegui: Okay. Well, it's very interesting to see how these different countries have their own peculiarities. With that in mind, as a general context, let's move on with your specific cyber risk and how this risk affects professional liability.

I think we all agree that the difference between a professional error and a [00:08:00] cyber event is becoming a gray, a gray area. So potential overlaps could happen between the E&O policies and the cyber policies. Okay?

So here's for me, first question I wanted to ask Nicolás. Could a ransomware event be framed as professional negligence rather than a pure cyber event under certain circumstances?

Nicolás Le Blanc: Um, eventually, yes, Andrés. I think a ransomware attack can often generate allegations of professional negligence. For example, if the professional failed to implement any multi-factor identification systems or failed to patch known vulnerabilities or detect suspicious activity, I think that turns the ransomware into professional negligence.

It's very important to really understand the cause of those [00:09:00] attacks and if they could trigger professional liability policies. Being just a cyber-attack doesn't imply that there's no responsibility from those that are meant to keep the companies safe from those sorts of attacks.

Andrés Amunátegui: Yeah, but from that perspective, Juan Diego, could it be possible to trigger both policies at the same time, the E&O policy and the cyber policy?

Juan Diego Arango: Yes, definitely, because both policies are covering different risks. Although they may be related, they cover different risks. So, it becomes more clear when you have a technology company that will be subject of a cyber incident. They will be able to trigger their own cyber policy.

For third parties, if those parties are affected by that, and as Nicolás was saying there was some negligence that is part of the service of this company, they can then trigger [00:10:00] the professional liability policy to cover those losses that may be incurred to these third parties. So, yes, we're seeing more and more cyber policies and tech E&O policies involved.

I will even go beyond that because nowadays more professions, more companies, are technology dependent. You will see this becoming more and more[prevalent]. With this dependency on technology professionals are more

[likely to] tend to collect data and be responsible and have obligations to this data. You will have these two policies being involved in more and more cases.

Nicolás Le Blanc: Yeah. Sorry to jump in, Juan Diego. I think that there's an issue that the markets are starting to review all the exclusions related to cyber, including different policies, [such as] the general liability policies or the E&Os for instance, or even professional liability, right? So, it's quite interesting because cyber is being recognized [00:11:00] as an all-encompassing risk that could trigger a number of insurance policies in the same event.

Juan Diego Arango: Exactly.

Andrés Amunátegui: What, Miguel, in your view, what would be a good recommendation when we think in a large company that has to work with a large change of providers?

As we were discussing here, we are very technology dependent, so it's the number of professions that are exposed to a cyber-attack within that large chain of providers that are rendering services to a big company. What would be the best way for that large company to protect themself [from] those risk when you think [about how it] relies on so many providers at the same time that [they] are also exposed?

Miguel De La Fuente: Um, well, obviously, you will always say, the insurance. But I think it goes one step back on the whole process. Just jumping on what [00:12:00] Nico and Juan Diego were discussing, let me give you real life example of a case in which we had an issue with a negligent IT technician.

A couple months back, we had a case in Mexico in which malware was introduced in the systems of a big company due to the IT technician watching pornography on the internet.

Andrés Amunátegui: Wow. Wow. Wow. Wow.

Miguel De La Fuente: So basically, that was clearly a case-

Andrés Amunátegui: That's an old story, isn't it?

Miguel De La Fuente: Yeah, and that was a clear case of negligence.

Now, the whole point, and I think that's where my answer goes, is normally one of the issues we have for claims like this type is the whole contractual structure:

the clauses, the liabilities, how the liabilities are stated in the agreement. What's the limits or the scope of the supplier's activities? Who really is in charge of the IT technician, for instance, in this case?

That's basically one of the main issues we always deal with because sometimes the [00:13:00] service providers put forward an agreement in which they're completely released from liabilities even if they cause this. There might be a discussion whether that is something that you can waive or release. In any case, I think, companies and people do not watch really in detail what they are really signing for and what the main liabilities in the specific agreements [are].

Andrés Amunátegui: So, you mean that it's better to put the efforts in the prevention more than in a reaction after the incident happened?

Miguel De La Fuente: No, for sure. For sure. That's one, but there's always human errors, you know?

Andrés Amunátegui: Yeah.

Miguel De La Fuente: And there's always somebody who might be negligent.

I think on the other side, on the side of the reaction, it's always having a very clear protocol. [Its all about] understanding if they already contract an insurance policy, how it works, who should be communicating the issues, how the crisis management is dealt with and who [00:14:00] should be responsible for at least teaming up with the company, with the first respondent [and] with the suppliers or the providers that are engaged in remediating the incident,

Andrés Amunátegui: Yeah, sure. I mean, there are lots of questions that, that comes to my mind around that, but let's move forward to the AI thing. I think that that's a very hot topic at the moment. It is a fact. I believe an emerging issue is determining who bears responsibility when an AI-supported recommendation, report, or decision causes financial loss to a client.

I'm thinking especially [for] lawyers, especially in law firms. What has been so far your experience [regarding] responsibility in your different jurisdictions? Are there any cases that [you] are facing, for example, or any claim[s], that are facing law firms or lawyers due to a recommendation[s] based on an AI or the use of the AI [00:15:00] that has caused damage to clients?

What do you think your courts will rule around that? Juan Diego, if you want to start-

Juan Diego Arango: Yeah ...

Andrés Amunátegui: with this one.

Juan Diego Arango: We already have a precedent, a judicial precedent, on this. Not exactly is it damage caused to a client by use of AI, but there was a lawyer that presented an appeal within a case, and this appeal had wrong citations. Yeah, [it had] jurisprudence that was just invented and it was hallucination from an AI. The judge just imposed a fine in this against this lawyer.

It was said all lawyers still have the responsibility of act[ing] in accordance with [the] profession, the standard of a lawyer and a good professional. Therefore, the AI is no excuse to circumvent that obligation. So, it's more rather than if you have a justification for negligence [00:16:00], but rather than you have and still maintain this obligation and standard of care.

You always have to have the human in the loop, as it is said, regardless [of whether] you're using these tools, you still have to be there and supervise this. We do have this precedent, and we expect this to become the standard of the industry to maintain that liability.

Andrés Amunátegui: Yeah, sure. Miguel, do you think that the fact that we as lawyers are very exposed before clients in the use of the AI [this] should prevent us [from] us[ing] [this] revolutionary tool?

Miguel De La Fuente: No, I, I, I don't think so.

Andrés Amunátegui: Is there a stance that we can take on that, a very conservative one? What's your position on that?

Miguel De La Fuente: My position is basically I support having these type[s] of tools or using these type[s] of tools in our day-to-day activities. It makes sense [for] everybody [00:17:00]. We can have better results for it or better outcomes for the client if we know how to use it.

I think my first approach, obviously, is to do it with caution. But on the other side, using the tool is like using any other tool that you might have at hand in order to provide the best services for your client.

The thing is I think negligence comes when the professional has no real knowledge of how a tool like this works and the advantages of using it.

Obviously, there needs to be supervision. I wouldn't say it's the tool per se who creates liability. It's the lawyers who create liability because in some ways, the lawyer just relies heavily on it and does not do the corresponding due diligence over the product that this type of tool creates or provides.

I think it's in the [00:18:00] same sense as if we review a file and we just overpass the specific documents and we don't give the attention or the focus on specific points on a case. It would be negligent on our side. It's the same thing. I mean-

Andrés Amunátegui: Yes ...

Miguel De La Fuente: The tool does some specific work, and we need to include it as part of our daily services.

Andrés Amunátegui: Yeah, sure. From that perspective, Nicolás, what do you think? Should lawyers disclose to their clients that they are using AI as a tool to prepare advice, reports or recommendations?

Is this something that you should recommend?

Nicolas Le Blanc: Yeah. I think from a legal perspective, there's no obligations at the moment. Though I do acknowledge, and I believe that's for the whole region, that the legal position on that is evolving, so we're going down that road. In many circumstances, the disclosure is not really required as it assists the professionals in performing what they're doing, right? I guess [00:19:00] that the disclosure may become quite important in the future as a form of risk management for law firms. In terms of transparency, I think that's quite preferable rather than concealment.

So, to answer your question, Andrés, I think even though there's no legal requirements, I think we have to include that as best practice when giving advice to our clients.

Andrés Amunátegui: And that makes sense. That makes sense. Okay, uh, guys, I think times goes by [so fast]. So many topics to be [00:21:00] discussed around cyber, AI, and professional liability, and how these three topics now are very well connected.

I hope this has been useful and gave you all an insight about these three different topics. If anybody has any questions or comments about anything we talk about, feel free to give us a call or shoot us an email to DAC Beachcroft.

Thank you very much, and we hope to see you in our next episode, where we will be addressing [00:20:00] more interesting topics. Thank you very much.

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