

**Legal Practitioners' Liability Committee**

**Victorian Bar – Seminar 19 June 2007**

**“Getting Caught Short”  
Barristers’ professional liability exposures**

**Introduction**

This time last year, LPLC’s experience after one year of insuring barristers in Victoria identified the following trends:

- Barristers of more than 15 years experience working in the field of commercial litigation were the most likely candidates for a claim.
- The key risk areas (i.e. most likely to give rise to a claim) were:
  - settlement of litigation – primarily commercial litigation, but also personal injury litigation and family law
  - costs disputes giving rise to negligence allegations
  - applications for personal costs orders

Claims patterns and claim numbers for 2006/2007 are very similar to the experience of the first year (2005/2006).

*Table 1: Claims/Notifications by Area of Law*

<b>Area of Law</b>	<b>05/06</b>	<b>06/07</b>	<b>Total No.</b>	<b>Claims Cost %</b>
Commercial	-	1	1	0.3%
Property	2	3	5	5.3%
Commercial Litigation	18	27	45	76.3%
Personal Injury Litigation	7	1	8	8.5%
Criminal Law	3	-	3	-
Family Law	4	6	10	8.8%
Defamation	-	1	1	-
Other	2	2	4	0.8%
<b>Total</b>	<b>36</b>	<b>41</b>	<b>77</b>	<b>100%</b>

*Table 2: Status of Claims/Notifications*

<b>Claim Status</b>	<b>05/06</b>	<b>06/07</b>	<b>Number</b>
File Open	11	33	44
File Closed	25	8	33
<b>Total</b>	<b>36</b>	<b>41</b>	<b>77</b>

## **Commercial litigation claims**

Commercial litigation claims account for the vast majority of claims, both by number and cost. Following are three case studies based on real claims made against Counsel to illustrate some of the risks posed in this area and some risk management lessons.

### ***Scenario 1:***

Counsel represents a private company in a commercial dispute with a former employee. By Terms of Settlement reached at the door of the Court, the company agrees to pay a sum of money to the former employee, which the employee requires the company's director to personally guarantee.

The company defaults on the settlement obligation. A demand is made on the director for payment of \$25,000, and he then says he only signed the Terms of Settlement in his capacity as a director on behalf of the company and that it was not explained to him that he was accepting personal liability for the settlement.

The risk management issue here is the introduction of a non-party into the settlement agreement, and the need to recognise that the interests of the company and the director are not the same. Depending on the circumstances, the director may need to be independently advised on the settlement.

This situation calls for effective communication between Counsel, instructing solicitor and the director concerned to ensure that the Terms are understood and acknowledged. A memorandum to the solicitor when returning the brief noting the process of negotiation leading to the settlement, the discussion with the director about the basis of the settlement, and the director's reasons for agreeing to guarantee the company's obligation would be of considerable value and evidentiary weight in the event of any later challenge.

The other lesson to be drawn from this scenario is the need to remain alert to the wider issues involved with the settlement, and not just focused on the mechanical task at hand of documenting the agreement.

### ***Scenario 2:***

Counsel represents one joint venturer in a property development in a complicated dispute with a co-venturer over the terms of their venture, and the basis upon which one should buy-out the other.

The dispute is resolved after two days of tough negotiations, extending well into the evening on day two. Terms of Settlement are signed late at night after the instructing solicitor has left the negotiation to go home and look after his children, leaving Counsel and the client to finalise matters. Terms of Settlement are signed, but the basis of the settlement also involves an oral promise from the co-venturer to discharge certain securities over the joint venture property which the co-venturer refuses to include as a written term.

This scenario raises a number of important risk management issues that can emerge when it comes time to document the settlement of a protracted negotiation. Matters

such as ensuring that all the important terms are ‘on the table’ as the basis of negotiation/discussion from an early stage; the difficulty of dealing with a commercially shrewd and elusive party on the other side; the potential for such a settlement to come unstuck because of the risk that the co-venturer might later deny the oral term, or at least for issues to arise about what in fact was the settlement and would it be enforceable; advising the client of the risks of the settlement not being enforceable, and what would the client’s position be if it fell over – all of this to a client who has already endured two days of heavy negotiation and is keen to reach a settlement.

Marathon mediations can be fraught with risk for practitioners, and some key risk management tips in this context are:

- Don’t be pressured by a mediator to stay if your better instinct is to call it a day.
- Don’t go on into the evening without being properly fed and watered.
- Make sure the client is exercised and alert, and preferably has a support person or persons present (other than members of the legal team).
- Keep the negotiating team intact – letting co-Counsel or the solicitor depart from the mediation not only robs the negotiating team of continuity and expertise, but also opens up the remaining members to increased pressure at a time when they might already be feeling more tired and vulnerable.
- Keep good notes of the client’s disposition and participation in the negotiations.
- If it is necessary to negotiate late into the evening, leave the signing of documentation (if it is complex) to the following day. Drafting mistakes are most likely to occur when parties are fatigued. It may be preferable to sign Heads of Agreement only, with fuller Terms to be negotiated later.

***Scenario 3:***

The third scenario involves Counsel taking an overly ambitious view of the law and providing an opinion which provides the platform for the launch of litigation. If the litigation becomes protracted and expensive, the original opinion can be the breeding ground for a professional negligence claim.

A typical situation is when a client’s case is thought to turn on a point of statutory construction. This most frequently arises in disputes arising out of property transactions, such as where there might be questions concerning the rights of rescission as between vendor and purchaser. A purchaser decides that he does not wish to proceed, and looks for a way out of the contract. Conversely, the vendor wishes to hold the purchaser to the contract. These points of dispute often turn upon the construction of provisions of the *Sale of Land Act 1962 (Vic)* (both in relation to section 32 requirements and also in relation to ‘off the plan’ contract requirements) or the *Subdivision Act 1988 (Vic)*.

In this scenario, Counsel is briefed when the dispute first arises, and is asked to prepare an opinion on the client's position and makes an early evaluation whether there are good prospects of successfully maintaining that the purchaser can rescind or that the purchaser cannot rescind.

The party on the other side obtains Counsel's advice to the contrary, and the dispute crystallises. Court proceedings are issued, and the parties adopt entrenched and adversarial stances.

Litigation proceeds to finality, with or without appeals – one party wins and one party loses. By this time, the litigation process has so refined the issue between the parties that the difference between winning and losing turns on a very narrow point of construction, or of evidence. This narrow point may not have been so obvious to everyone at an earlier time when the litigation was being shaped through the pleadings, and before the evidence was heard, but to the losing party it now appears blindingly obvious.

Having lost the case, the client now sees the litigation process through a different mindset, and complains about not having been properly advised of the risks of failure.

Risk management strategies in this scenario include:

- Early warnings to the client of the inherent risks of litigation and of any specific risks evident on the facts as they appear from the materials briefed.
- To continuously review, assess and re-assess the client's claim or defence as the matter proceeds through its various interlocutory stages.
- When inheriting a brief shaped by others – the need to form one's own view about the fundamental basis of the claim or defence. If necessary, discuss the pleadings with Counsel who drew them to ascertain whether there was a specific reason for the form of the prior pleading.
- Evaluate all of the evidence and ensure that any written opinion contains adequate reasons – see *Griffin v Kingsmill and Ors* (2001) EWCA Civ 934 (a case where Counsel was held to have taken too pessimistic a view of the client's prospects of success, resulting in the plaintiff accepting an inadequate settlement offer) per Kay LJ:

*[109] The absence of reference to a piece of evidence clearly does not in itself lead to any inference it has been overlooked. If, however, that evidence is such that it would appear to be against Counsel's conclusion then a failure to explain why the point has been rejected may lead to a conclusion that insufficient or inappropriate weight has been given to the point.*

- That it is better to revise an opinion than to stick to an earlier expressed view in the hope that it 'comes good', when on further reflection (or as a result of new information) the initial opinion might be too ambitious.

It is, of course, important to emphasise that a mistaken view is not necessarily a negligent one, and that courts appreciate that a divergence of professional opinion can readily occur. The question is really whether the practitioner espouses a reasonably arguable proposition having regard to provable facts.

### **Personal costs orders**

Court Rules enable a Court to make costs orders personally against barristers – see for example *Federal Court of Australia Act 1976* (Cwth) s 43 and *Rules O 62 r 9*; *Supreme Court Rules O 63.23*; and *Family Law Act 1975* (Cwth) s 117.

Orders against practitioners under these provisions are in the discretion of the Court and are supplementary to its summary jurisdiction over practitioners. Although disciplinary in character, the main object of such an order is compensatory (per Batt JA in *Etna v Arif & Ors* [1999] VSCA 99 at [82]) and accordingly are covered by the LPLC policy (subject to the policy’s terms and conditions).

Order 63.23 is enlivened where a practitioner:

*has caused costs to be incurred improperly or without reasonable cause or to be wasted by a failure to act with reasonable competence and expedition.*

Prior to 2000 the wording of Order 63.23 was expressed in different terms, and the jurisdiction was enlivened where the practitioner:

*has caused costs to be incurred improperly or without reasonable cause or to be wasted by undue delay or negligence or by any other misconduct or default.*

Rule 63.23(2) deems it a failure to act with reasonable competence and expedition in certain situations. Insofar as is relevant to Counsel, the major reason is where any application in or trial of a proceeding cannot be conveniently heard or proceed, or fails or is adjourned without any useful progress being made by reason of the failure of Counsel to attend in person. It may also be triggered by Counsel failing to lodge or deliver any document for the use of the Court which ought to have been lodged or delivered (e.g. the late filing of submissions).

The relevant principles as developed through case law under the pre-2000 version of Order 63.23 are that costs will not be awarded in exercise of the Court’s inherent jurisdiction or under Rule 63 in cases of mere mistake, error of judgment or ordinary negligence, but the jurisdiction will be enlivened when necessary to enforce the duty owed by practitioners to the Court not to act with impropriety or in a manner that defeats the cause of justice.

However, Ashley J in *Guss v Geelong Building Society (in liq)* [2001] VSC 288 commented that:

*What was said, particularly in Etna, concerning “negligence” has, I think, been overtaken by the change in the language of the rule. But even if a failure*

*to act with reasonable competence bespeaks something more stringent than would make out a case of negligence in a professional negligence claim – which I doubt is the case – it would not touch the present matter having regard to the way counsel for the defendant advanced his client’s case.*

This suggests there might be a softening of the judicial test and a possible substitution of a test of ordinary negligence for something akin to gross negligence or misconduct that previous authorities had applied. However, it does not appear that Ashley J’s views have been either considered or applied in subsequent cases, and to that extent, there is some uncertainty about the way Order 63.23 might be applied in future cases.

What can, however, be said with confidence is that the jurisdiction to award costs personally will be enlivened if conduct meets any of the following expressions:

- Gross neglect or inaccuracy in a manner which it is the practitioner’s duty to ascertain with accuracy.
- Serious dereliction of duty, professional misconduct or serious misconduct.
- Serious failure to give reasonable attention to the relevant law and facts.
- Using the Court’s processes for improper and ulterior purposes.
- Evading rules intended to safeguard the interests of justice.
- Knowingly conniving at incomplete disclosure of documents.

In *White Industries (Qld) Pty Ltd v Flower & Hart* [1998] 806 FCA (affirmed on appeal – see *Flower & Hart v White Industries (Qld) Pty Ltd* [1999] FCA 773) Goldberg J held that:

- Simply instituting or maintaining a proceeding with no prospect of success would not on its own invoke the jurisdiction.
- There must be unreasonableness involved in that conduct or some ulterior purpose resulting in an abuse of process.
- Unreasonableness or ulterior purpose is not to be assumed simply from the fact that the case has no prospect of success – there must be some evidence of ulterior purpose or other explanation for the solicitor’s conduct.
- Making an unwarranted allegation of fraud is a serious dereliction of duty.
- Simply doing what the client wants is no answer where there is an ulterior motive in seeking to achieve an outcome for the client (in that case by deferring payment due by the client).

- Using obstructionist and delaying tactics could invoke the jurisdiction, but there needs to be an element of unreasonableness or ulterior purpose proved. Litigation is by its nature adversarial and there is no prohibition against making life difficult for your opponent within the confines of the Rules of Court or putting the other party strictly to its proof.

In any application for a personal costs order, Counsel is entitled to be heard and to receive particulars of the basis upon which an order is sought to be made against him or her personally. See *Shire of Gisborne v King* [1995] 1 VR 103.

The courts traditionally exercise the jurisdiction to award costs personally against practitioners sparingly.

Drummond J in *Re Bendeich (No. 2)* (1993) 53 FCR 422 at 426-427 explained the rationale for such caution as follows:

*There is good reason for caution. Too ready an exposure of the lawyer for a party to personal liability for the costs of his client or of the other party is likely to inhibit the way the lawyer acts in conducting the litigation. It frequently happens that a lawyer will have to make judgments as to which of a number of courses is the optimum one to follow, bearing in mind his duty to advance his client's interests by all proper means and his duty to the court to conduct the litigation in proper fashion. The introduction of a third consideration into every day litigation that requires a solicitor to keep in mind the need to minimise the chances of a costs order being made against him personally, would raise a conflict between the lawyer's duties to his client and to the court, on the one hand, and his own interests, on the other. As is understandable, such a conflict would likely be resolved by the solicitor concentrating on identifying and adopting the course most likely to minimise his own personal exposure at the expense of following courses best fitted to advantage his client and to bring the action to an expeditious end.*

Another reason for caution is the difficulty for the Court to know all the details and circumstances of the practitioner's instructions, particularly bearing in mind issues of privilege, which may well constrain the ability of the practitioner to defend him or herself (see *Medcalf v Mardell* [2003] 1 AC 120 at [23]).

Another rationale for the need for caution is the summary nature of the jurisdiction. In *Harley v McDonald* [2001] 2 AC 678 at [50] the Privy Council stated in its opinion:

*As a general rule allegations of breach of duty relating to the conduct of the case by a barrister or solicitor with a view to the making of a costs order should be confined strictly to questions which are apt for summary disposal by the court. Failures to appear, conduct which leads to an otherwise avoidable step in the proceedings or the prolongation of a hearing by gross repetition or extreme slowness in the presentation of evidence or argument are typical examples. The factual basis for the exercise of the jurisdiction in such*

*circumstances is likely to be found in facts which are within judicial knowledge because the relevant events took place in court or are facts that can easily be verified. Wasting the time of the court or an abuse of its processes which results in excessive or unnecessary costs to litigants can thus be dealt with summarily on agreed facts or after a brief enquiry if the facts are not all agreed.*

This principle was endorsed by Phillips JA in *Abrahams & Anor v Wainwright Ryan* [1999] 1 VR 102 who said:

*As I see it, r.63.23 provides for summary relief where, by reason of some specific act, neglect or default on the part of a practitioner, a procedural step along the way has been so taken or not taken as to occasion costs improperly or unnecessarily or to cause costs to be wasted; where the case is plain enough, a summary remedy is available under r.63.23 - subject always, of course, to para (3).*

Personal costs orders against Counsel in relation to unmeritorious or prolonged proceedings are difficult to get: see *Steindl Nominees Pty Ltd v Laghaifar* [2003] QCA 157.

For those practising in New South Wales, there is an alternate jurisdiction under section 198M and 198N of the *Legal Profession Act 1987* (NSW) where proceedings are commenced without reasonable prospects of success. For a recent case where a barrister and solicitor were ordered by Ipp J to pay costs personally in that jurisdiction see *Eurobodalla Shire Council v Wells & Ors* [2006] NSWCA 5.

Experience shows that although many applications might be threatened and some might occasionally be commenced, a much smaller number result in personal costs orders actually being made.

More often, the risk for a barrister in relation to such applications turns out to be 'reputation' risk.

Applications for costs orders against barristers can be initiated by:

- the opposing party;
- the client; or
- the Court of its own motion.

In reality, many of the applications made by the opposing party or by clients nowadays are 'negligence claims' dressed up as costs applications. They are claims where the opposing party has incurred costs, or the client has been ordered to pay costs, and feels that Counsel is partly responsible. Such claims for costs are commonly made because the claimant perceives that a conventional negligence claim will be defeated by advocates' immunity, since the conduct complained of falls within the 'in Court' or 'intimately connected' test of *D'Orta Ekenaike* [2005] HCA 12.

Applications will often be targeted at solicitors or Counsel representing parties perceived to be persons of straw.

Applications of an interlocutory nature raise complicated questions of whether the practitioner has a conflict of interest in continuing to act, and whether or not the practitioner's capacity to defend himself or herself is constrained by questions of privilege. It may be necessary for the client to be independently advised. Courts are acutely aware of the potential for 'tactical' applications to be made, and from the practitioner's perspective, each application simply has to be considered in its own context and on its own merits. There is often no easy answer as to what Counsel's particular ethical and legal obligations are, so the best advice is to seek assistance from others to navigate through the potential minefield – notify the LPLC if a claim is being made against you, do not be afraid to consult with colleagues, and make use of the excellent service provided by the Bar Ethics Committee.

Some examples of the sorts of claims that are made from time to time include applications in the following contexts:

- Wasted costs of repeated amendments to complex pleadings, following successful strike-out applications.
- Costs incurred where fraud has been alleged in pleadings without a proper foundation and without proper particulars being provided.
- Wasted costs associated with repeated discovery applications alleged to be necessitated by the practitioner's failure to advise the client of discovery rules or unmeritorious claims for privilege.
- Costs of additional parties joined to litigation unnecessarily – a growing trend in Family Court cases where parents or siblings who are thought to share or control ownership of matrimonial assets are joined, and if the joinder proves to have been unnecessary (e.g. because a simple subpoena would have been adequate) they require their costs to be paid by someone.
- Applications where it is alleged that Counsel represented more than one party in a proceeding, and where a conflict between the clients emerged mid-trial causing an adjournment and delay – in circumstances where the other party asserts that the conflict ought have been apprehended.
- Counsel making prolix, repetitive or untenable submissions.

#### ***VCAT – personal costs orders***

VCAT has no inherent jurisdiction, and therefore the only power to award costs is that which is contained in S.109 of the *Victorian Civil and Administrative Tribunal Act 1988 (Vic)*.

Importantly, section 109(4) empowers the Tribunal to make personal costs orders against solicitors and barristers. It provides that if the Tribunal considers that the representative of a party, rather than the party, is responsible for the conduct that enlivens the making of a costs order under section 109(2) and section 109(3)(a) or (b), the Tribunal may order that a representative in his or her own capacity compensate

another party for any costs incurred unnecessarily. Before making an order under sub-section (4), the Tribunal must give the representative a reasonable opportunity to be heard.

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