

## VICTORIAN BAR SEMINAR

### PLEADINGS – COUNSEL'S RESPONSIBILITIES AND RISK MANAGEMENT ISSUES

**DATE:** 16 October 2007 – 5.15 pm to 6.15 pm  
**VENUE:** Neil McPhee Room, Level 1, Owen Dixon Chambers East  
**SPEAKERS:** Will Houghton QC and Patrick Monahan

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### **SEMINAR PAPER – PATRICK MONAHAN, MONAHAN + ROWELL**

#### **A. Introduction**

- 1 On 19 June 2007, in a paper presented by Justin Toohey of the Legal Practitioners Liability Committee, the Committee reviewed its second year of insuring Victorian Barristers.
- 2 In an earlier paper, dated 22 June 2006, the Committee had noted that few Barristers are ever sued and most claims against Barrister are either withdrawn or settled. Only 77 claims or notifications were received by the Committee from members of the Victorian Bar in the first two years the Committee has insured the Bar. The Committee identified that barristers of more than 15 years experience working in the field of commercial litigation were the most likely candidates for a claim. The Committee identified three key risk areas which were most likely to give rise to a claim:
  - *Settlement of litigation – primarily commercial litigation, but also personal injury litigation and family law;*
  - *Costs disputes giving rise to negligence actions; and*
  - *Applications for personal costs orders against Counsel which were sometimes made in relation to wasted costs of repeated amendments to complex pleadings, following successful strike-out applications.*

- 3 This seminar will address one of the ways in which Counsel can “run into trouble” – through the drafting of pleadings. I will consider the responsibilities of Counsel in relation to pleadings and the management of Counsel's exposure in that regard.

## **B. COUNSEL'S RESPONSIBILITIES IN RELATION TO PLEADINGS**

### ***General Principles - Liability in Negligence Generally***

- 4 There are a number of general principles to be borne in mind when considering the duty of Counsel to exercise due care skill and diligence:

- (a) In considering the nature of Counsel's work one must consider the distinction between negligence and errors of judgment, of which only the former is actionable in negligence (Saif Ali v. Sydney Mitchell & Co [1980] AC 198 at 214);
- (b) the Barrister's error must be such that no reasonably well informed and competent Barrister acting reasonably could have made it (Saif Ali at 220);
- (c) the particular expertise of Counsel in a certain area of law must also be considered. In Hayden v. NRMA Limited (2000) 51 NSWLR1, a Barrister who professed to be an expert in corporations and trade practices law was measured against the standard of Barrister professing expertise in that area.
- (d) Junior Counsel will not escape unscathed. In Yates Property Corporation v. Boland 1998 85 FCR 84 the Full Court commented:

*“... when a case is a difficult and complex one or when it involves a substantial sum of money the client or the solicitor will form the view that it requires the attention of two Counsel and then leading Counsel is retained. That does not mean that the role of Junior Counsel is diminished. On the contrary, as anyone who has practised as leading Counsel will know, Senior Counsel places great reliance on Junior Counsel for all aspects of the preparation of the case for trial.”*

### ***D'Orta Ekenaike and Advocates Immunity***

- 5 A further, and obvious consideration in examining Counsel's liability is the application of the principles of the recent High Court decision of D'Orta Ekenaike v Victorian Legal Aid (2005) 223 CLR 1.

- 6 In February 1996, Mr D'Orta retained Victoria Legal Aid ("VLA") as his solicitor to defend a charge of rape. VLA briefed a barrister, who I will kindly refer to as Mr Robust, to appear for Mr D'Orta at the Committal proceedings. Mr D'Orta had two meetings with Mr Robust and an employee of VLA, at which he told them that he was not guilty of the charge. He also told them of the circumstances of the alleged offence, circumstances that disclosed a possible defence of consent. Nevertheless, VLA and McIver advised him to plead guilty to the charge on the ground that he had no defence and that an early plea of guilty would most likely result in a suspended sentence. They also advised him that, if he defended the charge, he ran the risk that a jail term would be imposed. Mr D'Orta Ekenaike felt pressured. As a result, he pleaded guilty at Committal.
- 7 Mr D'Orta sued VLA and Mr Robust, alleging that they had breached their duty of care to him, by failing to exercise due care in considering possible defences available to him, failing to warn him that a guilty plea at committal might be admitted as evidence at a subsequent trial and by exerting pressure on him to plead guilty.
- 8 The High Court upheld its previous decision in Giannarelli v Wraith (1988) 165 CLR 543 which had established that, at common law, an advocate cannot be sued by a client for negligence in the conduct of a case in court, or in work out of court which led to a decision affecting the conduct of a case in court. The rationale of the majority was based on '*finality*' and the need to avoid re-litigation:

*'...the central justification for the advocate's immunity is the principle that controversies, once resolved, are not to be reopened except in a few narrowly defined circumstances. This is a fundamental and pervading tenet of the judicial system, reflecting the role played by the judicial process in the government of society.'*

- 9 For the purposes of today's seminar, the key issue is defining the extent of the immunity. This was dealt with as follows by the majority (Gleeson CJ, Gummow J, Hayne J, & Heydon J):-

*"No sufficient reason is proffered for reconsidering the Court's decision, in Giannarelli, that an advocate is immune from suit whether for negligence or*

*otherwise in the conduct of a case in Court. Should the boundary of the operation of the immunity be withdrawn?*

*Again, we consider that no sufficient reason is proffered for doing so. In particular, there is now reason to depart from the test described in Giannarelli as work done in Court or "work done out of Court which leads to a decision affecting the conduct of the case in Court", or as the latter class of case was described in the Explanatory Memorandum for the Bill that became the Practice Act, "work intimately connected with" work in a Court. (We do not consider the two statement of the test differ in any significant way).*

*As Mason CJ demonstrated in Giannarelli, "it would be artificial in the extreme to draw the line at the courtroom door". And no other geographical line can be drawn that would not encounter the same difficulties. The criterion adopted in Giannarelli accords with the purpose of the immunity. It describes the acts or omissions to which immunity attaches by reference to the conduct of the case. And it is the conduct of the case that generates the result which should not be impugned."*

- 10 On a practical level, McHugh J (in a separate supporting judgment) gave a useful set of examples of matters which would fall within the ambit of advocate's immunity:
- (a) Failing to raise a matter pertinent to the opposition of a maintenance application;
  - (b) Failing to plead or claim interest in an action for damages;
  - (c) Issuing a Notice to Admit and making admissions;
  - (d) Failing to plead a statutory prohibition on the admissibility of crucial evidence;
  - (e) Negligently advising a settlement;
  - (f) Interviewing the Plaintiff and other potential witnesses;
  - (g) Giving advice and making decisions about what witnesses to call and not to call;
  - (h) Working on any necessary legal arguments;
  - (i) Giving consideration to the adequacy of the pleadings;

(j) Causing any necessary steps to be undertaken to have the pleadings amended.

11 McHugh J also gave examples of matters which would not fall within the ambit of advocate's immunity:

(a) Failure to advise the availability of possible actions against third parties;

(b) Failure to advise commencing proceedings in a particular jurisdiction;

(c) Negligent compromise of appeal proceedings leading to the loss of benefits gained at first instance;

(d) Giving advice not for the purpose of litigation.

### ***Counsel's Responsibilities in relation to Pleadings***

12 Walmsley, Abadee and Zipser, Professional Liability in Australia (Second Edition) comment on the "mire" of pleadings as follows:

*"Pleading, no less than presentation in Court, is a matter of art, but - apart from the obviously egregious situation of failing to plead a cause of action when it might have been decisive of litigation - litigants are becoming increasingly aggressive in bringing suit against Counsel for points or claims not taken or pursued."*

13 In the UK case of McFarlane v. Wilkinson [1997] 2 LR 259 Brooke LJ held that the appropriate standard by which to measure Counsel was that of the "reasonably competent Barrister":

*"[i]f a Barrister omits to plead a cause of action in a situation where no other reasonably competent Barrister, acting with ordinary care, would have failed to plead that cause of action, then he or she will be liable to compensate the client if loss flows foreseeable from that negligence. If on the other hand other reasonably competent Barristers holding themselves out as competent to practise in the relevant field and acting with ordinary care might also have decided not to plead that cause of action, then there will be no question of professional negligence."*

### ***Application of D'Orta Ekenaike Immunity to Pleadings***

- 14 There is inherent difficulty in "*considering where the line is drawn*" when determining if advocates immunity will extend to the drafting of pleadings. A number of cases, albeit prior to the D'Orta decision have considered Counsel's liability in relation to pleadings.
- 15 In Keefe v. Marks (1989) 16 NSWLR 713, the Court of Appeal considered the failure by a Barrister to plead a claim for interest in a personal injury case. In that case, a client received an award of general damages. Unfortunately, no claim was made for interest upon that award in the pleadings, or at the hearing (despite a hint by the Master during the course of his judgment that interest might have been claimed or allowed). On appeal, Mahoney JA declined to exercise his discretion to award interest. The Defendant Counsel had not drafted the initial Statement of Claim nor was he ever instructed to specifically consider or advise about the form of the pleadings.
- 16 The Supreme Court considered whether Counsel was liable for damages for professional negligence for the manner in which he performed his duties. The Court found that the Barrister's alleged negligence involved a continuing course of conduct, which extended up until the conclusion of the hearing and included a failure to claim interest or to apply for necessary amendment to the pleadings in order to enable that such a claim could be pursued. Therefore, Counsel's out of court work was "*intimately connected with the work ultimately done in Court*" and the immunity applied.
- 17 On 6 November 2001 the Full Court of the Supreme Court of Western Australia handed down the decision of Del Borrello v Friedman and Lurie (A Firm) & Anor [2001] WASCA 348.
- 18 Del Borello then was sued for breach of contract. Initially, Knott Gunning (*Firm A*) was engaged to act in Del Borello's defence. When it became apparent that Firm A could not complete the preparation for the hearing due to staff taking annual leave, Del Borello instructed Kay Goldstein (*Firm B*). However, on 5 August 1992, approximately a month before trial, Firm B indicated that they were no longer able to assist with the breach of contract matter as they lacked staff due to annual leave and overseas travel.
- 19 Del Borello retained Friedman and Lurie (*Firm C*) to act in the matter. Firm B instructed Firm C that the action was listed for hearing and that the pleadings needed to be recast to properly deal with Del Borello's defence and counterclaim and that, in

these circumstances, it may be necessary to vacate the trial date. The inadequacy of the pleadings was later confirmed by counsel engaged by Firm B.

- 20 Firm C briefed Mr Martin of Counsel to appear in the matter as the counsel engaged by Firm B was unavailable on the trial dates. Mr Martin drafted an amended defence and counterclaim, in which he deliberately omitted a claim for exemplary damages which he saw as unmeritorious and redrafted the claim under s 52 of the *Trade Practice Act* for misleading and deceptive conduct. The pleadings were amended by leave on 24 August 1992.
- 21 The Trial commenced on 7 September 1992 and was adjourned after four days. A dispute then developed between Del Borello and Firm C with respect to costs and Firm C terminated the retainer. This dispute was eventually settled by consent on 5 February 1993. During the adjournment, Mr Martin and Del Borello made contact several times. Mr Martin informed Del Borello that a new instructing solicitor was needed for Mr Martin to act. Mr Martin also indicated he would hesitate to accepting a brief from Del Borello who intended to call eight further witnesses against the wishes of the trial judge.
- 22 The Trial eventually resumed in February 1994, with barristers engaged by Firm A acting for Del Borello. The defence and counterclaim were unsuccessful and Del Borello was ordered to pay the other party \$50,000.
- 23 On 4 August 1998, Del Borello, acting in person, issued a writ against Firm C and Mr Martin alleging breach of retainer with respect to costs and negligence with respect to pleadings amongst other things. In regards to the pleadings, it was alleged that, Firm C and Mr Martin had negligently:
  - (a) Failed to plead the case properly;
  - (b) Failed to plead facts correctly;
  - (c) Amended, deleted and omitted significant pleadings without consent and contrary to the clients interests; and
  - (d) Failed to represent new admissions made to pleadings.

- 24 Summary Judgement was ordered by a Master dismissing Del Borello's action against Firm C based on the costs agreement. The action against Mr Martin was dismissed based on barrister's immunity. Del Borello appealed this decision.
- 25 The Appeal Court was unanimous that the Master had erred in summarily dismissing the claim against Firm C with respect to costs and the costs agreement. However, the Court was split 2:1 in upholding the Master's decision to dismiss the claim against Mr Martin. Kennedy J and Murray J both held that Mr Martin was protected by barrister's immunity and, that even if he was not, his acts were not negligent in the circumstances.
- 26 Wallwork J, in dissent, found that the case against Mr Martin should not have been dismissed summarily as the position of a barrister in Western Australia in the circumstances of Mr Martin was unclear and there were real questions to be tried.
- 27 Interestingly, His Honour suggested (in 2001) that the law was developing and posited that, in the future, that there could be an increase in obligations between an independent barrister and lay clients. (The D'Orta Ekenaike case has since gone in the opposite direction). His Honour suggested that a barrister in the position of Mr Martin may have an obligation to continue acting as counsel or, alternatively, to assist in obtaining the services of an instructing solicitor.
- 28 This case suggests that amendments to a pleading made prior to the commencement of a hearing attract the immunity, although the timing of the amendment could be important to determining whether the immunity applies.

### **C. CASE STUDIES**

#### **Case Study 1**

Mr Aye Q.C., Ms Bee, and Mrs See of Counsel have been briefed by Alphabet Lawyers to act for Entertainment Co Pty Ltd in relation to an attempt by the State of Victoria to evict Entertainment Co from a theatre which it leases in Ballarat.

Entertainment Co issues proceedings in VCAT and the parties become deeply entrenched.

Entertainment Co make twelve different interim applications, in relation to discovery, particulars, pleadings and evidence. Two applications are made seeking to have the judicial member hearing the matter recuse himself. Entertainment Co loses each application. Not to

be discouraged, Entertainment Co appeals on three occasions. Each hearing is furiously contested, and the appeals are all lost.

The Proceedings culminate in a five day trial.

Mr Aye and Ms Bee are briefed prior to and throughout the Proceedings, whilst Mrs See is only briefed midway through as Junior Counsel, to review the "swags" of discovered documents in the Proceedings.

Ultimately, VCAT finds that the Proceedings were without merit and were conducted vexatiously by Entertainment Co and in a manner which unnecessarily disadvantaged the state of Victoria. VCAT orders indemnity costs against Entertainment Co

Entertainment Co retains new solicitors and Counsel and makes application for an order against Counsel pursuant to Section 109(4) of the VCAT Act 1998 *"that it's legal representatives compensate the State of Victoria for the costs that Entertainment Co was ordered to pay..."* Entertainment Co criticises the strategies and approach which Counsel adopted throughout the case, accusing them of a vexatious strategy aimed at advancing the commercial interests of Entertainment Co by creating delay and obfuscation, and pursuing applications which were without substantial merit or done so in a particularly time consuming and dilatory way.

Section 109(4) of the VCAT Act provides relevantly that:-

*"If the Tribunal considers that the representative of a party, rather than the party, is responsible for conduct described in sub-section 3(a) or (b), the Tribunal may order that the representative in his or her own capacity compensate another party for any costs incurred unnecessarily".*

Relevantly, those sub-paragraphs refer to a party being responsible for prolonging unreasonably the time taken to complete the proceeding or conducting the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by (for instance) failing without reasonable excuse to comply with an order or direction of the Tribunal, causing an adjournment, attempting to deceive another party or the Tribunal, vexatiously conducting the proceeding, etc.

## **Case Study 2**

Mr Aye Q.C., Ms Bee and Mrs See have been briefed again by Alphabet Lawyers to act for Home Development Pty Ltd in relation to a complicated Supreme Court commercial litigation matter.

Home Development claim that a former employee, Mr Smith, used his position and knowledge as an employee, and later as an officer holder of the company, to undertake a development of land in conjunction with another company, to the exclusion of Home Development

The corporate structure of Home Development is extremely complex. When Home Development invests in a particular property development, it purchases the land, and then assigns the development to one of many unit trusts to develop.

The development of the land in question was to have been undertaken by a unit trust of which Home Development was trustee. Therefore there are complex issues as to who has suffered the loss as a result of Mr Smith's actions.

During the course of the litigation, Mr Aye forms the view that the unit holders in the trust must be joined as Plaintiffs to the Proceedings. The Proceedings are amended accordingly.

The Defendants take issue with this and a number of interlocutory hearings are held, leading to repeated amendment of the Plaintiffs' pleadings on multiple occasions over a period of years. Eventually, the Court finds that the unit holders in the trust have no standing or cause of action against Mr Smith.

Eventually, Home Development terminates its retainer of Alphabet Lawyers and sues Alphabet for negligence. In turn, Alphabet Lawyers claim Mr Aye, Ms Bee and Mrs See, as Counsel, are liable to indemnify them, and join them as Third Parties.

### Case Study 3

Mr Alphabet is retained to act for an organic butcher, Black Sheep Co Pty Ltd, who is exporting lamb to China. A dispute has arisen in relation to the quality of the lamb sold by Black Sheep to an exporter, Lambtoy Pty Ltd. Lambtoy claim that Black Sheep has sold them "B class" lamb, but labelled it "A class", and charged Lambtoy at A class prices.

Lambtoy have issued Federal Court Proceedings, which they are prosecuting strenuously - Lambtoy are motivated and well funded.

Mr Alphabet was out of his depth. The issues in relation to the classification of the lamb were extremely technical and the documentation was vast and Mr Alphabet found himself relying heavily on the instructions of his client, and the assistance of Counsel.

Mr Alphabet briefs Mr Aye and Mrs Bee to advise in relation to each and every step in the Proceeding. Mr Alphabet runs everything important past Counsel prior to doing anything. In particular, Mr Alphabet is guided by Counsel in relation to three contentious areas:

- (a) the preparation of the Defence of Black Sheep, and any necessary amends to the Defence;
- (b) a most comprehensive Notice to Admit served by Lambtoy; and
- (c) some complex micro-issues concerning Discovery.

At the conclusion of trial, Lambtoy obtains a judgment against Black Sheep, which promptly goes into liquidation.

Lambtoy has spent \$1.3 million on solicitor client costs to the date of judgment. Lambtoy sued Mr Alphabet seek a personal costs orders against him, claiming that:

- (a) Mr Alphabet had been instructed by Black Sheep, or alternatively knew from his own investigations and documentation, that B class meat had been supplied, and therefore ought not to have filed a Defence for Black Sheep denying the allegations against it, or effectively denied the matters set out in the extensive Notice to Admit;
- (b) Mr Alphabet deliberately hid important documents in amongst hundreds of other documents in the discovery process, whilst Black Sheep had first held those documents in one easily understandable key folder;

- (c) Had Mr Alphabet required his clients to make appropriate admissions and provided proper discovery, Lambtoy you would have proceeded to trial on a far more limited basis and would have saved substantially on costs.
- (d) Lambtoy you estimated that their wasted costs referable to Mr Alphabet's conduct amount to \$500,000.

In making its claim against the solicitor, Lambtoy you relied on Rule 62.9 of the Federal Court Rules which provides effectively that the Court may disallow the legal practitioners costs,, direct a legal practitioner to repay a client ordered to pay costs or direct the legal practitioner to indemnify any party other than the client against costs payable, in circumstances where:

*"...costs are incurred improperly or without reasonable cause, or are wasted by undue delay or any other misconduct or default and it appears to the Court that a legal practitioner is responsible."*

Mr Aye and Bee drafted the Defence and response to the Notice to Admit and advised extensively on discovery. Mr Alphabet puts Mr Aye and Mrs Bee on notice of the claim and the potential that they may be joined to the proceeding by Lambtoy you.

### **C. RISK MANAGEMENT – WAYS TO AVOID PROBLEMS FROM PLEADINGS**

29 A number of matters should be kept in mind by Counsel to manage risk in relation to pleadings.

- (a) **Communication with your Instructing Solicitor – Avoid *"The brief gathering dust on Counsel's floor"***

Problem In an article in *Bar Defence*, the LPLC reported that it's analysis of VicBar's claims statistics shows that communications failures between barrister and instructing solicitor are the most frequent underlying cause of claims involving barristers.

#### Solution

- Counsel should, where possible, keep in frequent contact with their instructing solicitors, by telephone, email and memorandum.

- Counsel should record the date of receipt of a brief and diarise a follow up on each brief.
- File notes should be kept of discussions with both solicitor and client, and those notes should be retained.
- Solicitors should be warned of due dates in writing, for example where an amended pleading is to be filed and served by a particular date.
- A conference is an invaluable aid prior to finalising pleadings – meeting one's client may give a completely different perspective and allows the client to raise issues which the instructing solicitor may not have regarded as irrelevant.

(b) **The Poorly Prepared Brief**

Problem Counsel may receive a brief to draw pleadings which contains inadequate information, provides little or no documentation and contains no statements from clients and witnesses.

Solution Barristers are often mindful of embarrassing their instructing solicitors. However, a polite phone call, followed by a clearly but carefully worded memorandum, outlining what else must be done by the solicitor, and within what time frame, can provide considerable protection to Counsel.

(c) **Written advices and memos**

Problem Having lost their case, a client may come to see the litigation process as an expensive and futile experience. At that stage, the "*finger pointing*" can begin.

Solution This is one of the key issues in protecting yourself against issues arising from the pleading process. Where possible:

- (i) Counsel should give an early written advice and, if necessary, warnings to the client of the risks of the particular litigation apparent from the brief, as well of the inherent risks in all litigation;
- (ii) Alternatively, if this is not part of your brief, do a short note to your instructing solicitor recording this.

- (iii) Counsel should continue to review this advice and the client's claim/defence as the matter progresses;
- (iv) Where pleadings have been drafted by another practitioner, Counsel should form their own view on the basis of the claim or defence, and even speak to the previous practitioner as to the adequacy of the prior pleading;
- (v) If an opinion needs to be revised, this should be done, rather than hoping the problem will "*come out in the wash*".

(d) **Area of Expertise**

Problem Counsel may be briefed in a matter in an area in which you have no previous experience. This may cause many problems. Counsel may delay in completing pleadings, because they are uncertain as to the law. Unusual limitation periods might apply, of which Counsel might be oblivious. A cause of action may inadvertently be left out, or mistakenly included, leading to a strike out application and repeated amendments

Solution The solution to this issue is simple. If a brief is outside of Counsel's area of expertise, it should be returned, perhaps with an alternative Counsel suggested.

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