

## Victorian Bar – Seminar 19 June 2008

### Update on Barristers' Claims

#### The story so far

At the end of June 2008 the LPLC will have been insuring members of the Victorian Bar for 3 years.

So how are barristers faring in terms of claims?

As at June 2008 we received 115 claims or notifications of circumstances that might give rise to claims (for ease of reference all referred to as claims) spread across the three years as follows:

|           |    |
|-----------|----|
| 2005/2006 | 36 |
| 2006/2007 | 47 |
| 2007/2008 | 32 |

This might be compared with 180 complaints made to the Legal Services Commissioner over a similar time span. The bulk of those complaints were disciplinary in nature with only 10% including a pecuniary loss element. It is this pecuniary loss element that is at the heart of a negligence claim.

#### Moving forward

Both in terms of numbers and cost of claims the biggest area of exposure remains commercial litigation. This can be contrasted with the experience of the Legal Services Commission, where the majority of complaints relate to family law, criminal law, non contentious commercial work, residential building matters and personal injuries litigation.

The claims seen at LPLC are largely caused by what clients interpret as a poor result obtained at a large price. The focus of claims is on delay in getting a claim in proper form or delay in advising that a claim or defence lacks merit resulting in delayed settlement discussions and the incurring of unnecessary costs in the interim. Often the claims are made where a client has lost a case or an expensive interlocutory argument and does not want to pay the lawyers' costs or costs awarded against them. Many claims still arise in the context of a fee dispute.

Personal costs orders are a very real liability issue for barristers and solicitors alike and these attacks can come from your client or from your opponent – particularly where your client is unable to pay. A deterrent excess of \$7,000 is payable in respect of personal costs order made against you. Advocates' immunity is not a defence to an application for a personal costs order.

With the litigation landscape set to change we expect to see more of all of these types of these claims.

The May 2008 Victorian Law Reform Commission's *Civil Justice Review* made a raft of recommendations for *Improving the Standards of Conduct of Participants in Civil Litigation*. The recommendations included overriding statutory obligations on legal

practitioners who act in civil proceedings and penalties in breach of these obligations. The penalties include giving the court power to make:

1. personal costs orders against practitioners of its own motion;
2. compensation orders against practitioners;
3. orders that practitioners remedy breaches at their own expense; and
4. orders for payments to a newly created access to justice funding body – effectively a penalty for wasting the court’s time.

While the court currently has power to make orders for penalties 1 and 3, penalty 4 is entirely new. Penalty 2 is generally something that would be pursued by way of an action for breach of a common law duty of care and/or breach of retainer in separate litigation at the conclusion of the litigation in which the breach of duty is alleged to have occurred.

The Review also recommends that practitioners be required to certify their pleadings as having merit based on the available factual material and evidence and a reasonable view of the law. This recommendation reflects a practice already established in the Federal Court and in some other jurisdictions.

The recommendations do not include prescribed penalties for acting in a sufficiently unmeritorious proceeding. However, applications for personal costs orders and claims for damages for misleading or deceptive conduct based on an incorrect representation in a certificate given by a practitioner might be a future battleground.

### **The common threads**

In analysing the claims that we see it is possible to discern some red flags and warning bells that may distinguish a brief as having a higher than usual risk. The top eight are:

1. the brief contains insufficient instructions or evidence to permit you to identify who the relevant parties to the proceeding should be;
2. the brief contains insufficient instructions or evidence to permit you to properly plead a cause of action or defence;
3. a client whose instructions continually change or who evinces a propensity to be economical with the truth and is unlikely to come up to proof;
4. a client who shows a willingness to pursue every possible point regardless of merit;
5. a case requiring the pleading of a novel or unique cause of action;
6. a client who wants to run a matter as a point of principle or is particularly emotionally invested in the matter and exhibits a greater than usual lack of objectivity;
7. an instructor with a poor payment record or no security for your fees; and
8. an instructor who is out of their depth and overly reliant on you.

## Pleadings

**The brief contains insufficient instructions or evidence to permit you to identify who the relevant parties to the proceeding should be.**

**The brief contains insufficient instructions or evidence to permit you to properly plead a cause of action or defence.**

These issues are really a reminder to go back to the basic rules of pleading. Know the elements of your cause of action or defence and plan the pleading accordingly. Use a checklist if you need to or road test the pleading to see that all elements are pleaded.

Think about what you need to prove to make out the cause of action or defence. Do you have the necessary evidence either by way of witness statements or documents to prove your case? Think about who the proper parties are. Who is entitled to relief and who is obliged to provide that relief?

Keep it as simple as you can while descending into the proper level of detail. Prolix pleadings are the bane of a judge's existence and many are quick to criticise them. It is becoming more common for judges to raise in reasons for judgment the question of who should pay the cost of such pleadings; the client or the legal advisers.

**A case requiring the pleading of a novel or unique cause of action.**

It is quite rare for barristers to be sued for getting the law wrong. Although it is not negligent *per se* to plead a cause of action that is not known to law, novel causes of action should only be pleaded in conjunction with a warning to the client. Preferably, the warning will be in writing that the matter is novel and a judge at first instance is unlikely to act other than in accordance with the law as it stands. The risk of pleading a novel cause of action needs to be transferred to the client by identifying the risk of failure and having them decide for themselves that they wish to proceed in spite of that risk.

## Communications

**A client whose instructions continually change or who evinces a propensity to be economical with the truth and is unlikely to come up to proof.**

**A client who wants to run a matter as a point of principle or is particularly emotionally invested in the matter and exhibits a greater than usual lack of objectivity.**

Prepare your client early for the possibility of a loss and a consequent costs order. The discussion as to credit is never an easy one but it needs to be had sooner rather than later. The risks of the litigation, including the risk that the client might not be believed should be confirmed in writing. Your written advice in this regard should be

updated from time to time as the matter develops. Talk and write to the client in terms that they can understand.

### **Retainer management**

#### **A client who shows a willingness to pursue every possible point regardless of merit**

This concerns managing the client's expectations. With serial litigants and those who know best and will not take advice, the best risk management strategy is to give written advice identifying the key risks in the litigation. It won't prevent these types of clients making claims but it will certainly make them easier to defend.

#### **An instructor who is out of their depth and overly reliant on you**

Make it clear what you are and are not doing and what you expect your instructor to do.

### **Practice management**

#### **An instructor with a poor payment record or no security for your fees**

Secure your fees at the start. Don't let bad debts accumulate. If they do, consider whether ethically you are entitled to cease to and if so whether you should cease to act. If in doubt do not hesitate to seek a ruling from the Ethics Committee. If you are going to sue for your fees do it sooner rather than later and critically assess the promises to pay that you receive.

### **Plaintiffs' claims**

Historically, plaintiffs complained that proceedings were not issued within time. More recently, plaintiffs' complaints seem to focus on defective drafting and not getting the statement of claim right the first time either by reference to a cause of action or the appropriate parties.

These claims cover the spectrum. At one end is the client who suffers an order for costs thrown away on a single application to amend. A claim of this type can often be dealt with in fairly short order at minimal cost. At the other end of the spectrum is the client with a difficult case who is determined to see it run. Multiple versions of the statement of claim are filed and subject to successive attack. The matter usually comes to a head when the statement of claim, or a part of it, is struck out with costs and leave to further amend is refused, accompanied by harsh criticism from the presiding judicial officer. A new legal team is retained, the pleading substantially recast, often simplified and your pleading subjected to further scrutiny and criticism from the next barrister in line. All of this leads to the question –who pays the costs of the struck out pleading or pleadings?

## **Defendants' claims**

Defendants tend to complain that they were not advised, either adequately or at all, regarding their prospects of successfully defending the claim in a timely fashion. The client says that this led to the failure to seek a settlement of the litigation at an early time with a much smaller legal bill.

These claims can occur in a variety of circumstances but often follow an adverse judgment in a case where the client was determined to fight to the death because they did not expect to lose.

Defendants preoccupied with delay, obfuscation and putting off the inevitable will often complain when they meet an opponent who is not worn down by their tactics, who persists and obtains judgment with costs. Typically, the client projects their own behaviour onto their legal advisers and seeks to transfer liability for adverse costs orders, particularly costs awarded on an indemnity basis. The usual allegation is that the practitioner lost objectivity, became emotionally invested in the case, and failed to warn the client of the looming disaster.

We have also seen allegations made by liquidators of corporate clients that barristers have failed to appreciate that the directors' instructions may have been given in circumstances that amount to a breach of the directors' duties to the corporate client.

## **Claims common to plaintiffs and defendants**

We are seeing more and more claims arising from bitterly contested matters between members of wealthy families. The clients cannot be objective. The dispute often arises from what is perceived as a breach of trust (in the moral rather than legal sense). A desire to hurt and punish drives the litigation. The availability of resources to fund litigation means that commercial incentives to settlement are often non-existent and the matter runs to verdict. Someone loses, generally on a credit issue and the exposure to adverse costs orders coupled with a realisation that the whole process has been a waste of time and money prompts a claim against the legal advisers that they 'should have saved me from myself'.

Claims between commercial competitors can be just as bitterly fought. Imagine a client who has worked long and hard to build up a business. The client sees that business as a significant part of his or her identity. The continuing viability of the business is threatened. Litigation, either proactive but more often defensive, is sometimes embraced in a vain attempt to save the business. The commitment in cost and other resources ultimately leads to insolvency and the decline of the business in any event. Again the complaint is that 'I should have been saved from myself with advice to settle early and I could have saved my business'.

## Claims stemming from judicial criticism

When parties are locked into litigation mode you need to be prepared, and prepare your client, for the possibility that your client might be the loser in litigation with a consequent costs order. Clients can seize on judicial criticisms of the manner in which a case was conducted to launch a claim.

Examples of such judicial criticisms are:

1. a failure to appreciate that a claim or defence was doomed to fail;
2. a failure to raise an alternative cause of action or defence with better prospects of success;
3. a failure to call a relevant witness or lead evidence of a particular type;
4. amendments to pleadings at trial that make the case at trial significantly different to the pleaded case;
5. a failure to achieve settlement of a matter where the costs of litigation far outweigh the amount of the claim; and
6. persisting with a claim or defence at trial that becomes unviable as the evidence comes out.

## Case study

Counsel was briefed at a relatively late stage in a bitterly disputed matter between fallen out friends regarding responsibility for the loss of certain personal property. The matter had been on foot for at least three years. It had been uplifted to the Supreme Court because of the client's large, but unparticularised, counterclaim.

Initially, the brief was to prepare an application for leave to appeal from an order of a Master on a discovery issue. The leave application had limited prospects of success. It was adjourned from time to time and ultimately abandoned, the client having become focussed on pursuing an unrelated but unmeritorious application that he believed would dispose of the entire case once and for all and vindicate him entirely. The second application, prepared and run by counsel, was dismissed. Costs were awarded against the client on both the leave application and the second application with strong criticism from the bench levelled at the client.

In the meantime a further brief, to prepare an application for leave to join further parties to the proceeding, was delivered. The basis for the joinder was an alleged conspiracy against the client. This was something that the client had been trying to plead without success - due to a lack of evidence - well before counsel became involved in the proceeding. The application was prepared, run and refused with costs on the basis that the conspiracy allegations in the proposed amended pleading were insufficiently particularised. The judge was critical of the pleading.

The client then refused to pay the barrister for any of the work he had done and demanded the barrister indemnify him against the adverse costs orders.

The claim was made on the basis that the applications having been made and lost the work done in pursuing them had no value to the client or alternatively the applications were so lacking in merit that they never should have been pressed before the court. The client also seized upon the critical comments of the various judges as evidence of the barrister's negligence even though many of those criticisms were directed at the client.

Here the barrister was instructed to bring application after application; all of which failed with costs. The client bombarded the barrister with demands to pursue or argue obscure points. The client was dictating his required outcome but not, despite continued promises to do so, providing adequate instructions or evidence to permit that outcome to be obtained. He then sought to absolve himself from the responsibility for the poor outcome.

The barrister had given oral advice as to the difficulties attaching to the various applications. The lack of written advice permitted the client to maintain his allegation that he was not told that the steps he wanted to take in the proceeding were ill advised. It is unlikely that this client would have taken such advice even if it was given to him but written advice that had been ignored would have made the claim easier to defend.

Independent judgment needs to be exercised and in this case a firmer hand should have been taken with the client. Fees had accumulated. With the applications run and lost the client was disinclined to pay.

## **Claims handling**

The claims solicitors at LPLC are approachable and want you to make use of our services when you have a claim or notifiable circumstance. You will not be penalised for notifying matters to us. It is our experience that barristers who do contact us to discuss problem matters, and this is done in a confidential environment, are assisted by and appreciate our objectivity.

**Bronwyn Hine**  
**Legal Practitioners Liability Committee**

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