

Victorian Bar – Seminar 22 June 2006

Why Do Barristers Get Sued?

Introduction

It is now almost a year since the LPLC commenced insuring Victorian barristers

The LPLC expected to receive 50 – 60 claims per annum, based on the experiences of prior years. With a week of the financial year to go, it looks like we'll end up with about 40 claims for the 2005/2006 year, so the performance in terms of numbers of claims has been good.

When claims against Counsel are made, the LPLC and our panel solicitors do work very hard to see if they can be resolved at the earliest opportunity. There will always be matters where this is not possible, but I am pleased to be able to say that we have resolved nearly all of the litigated claims made so far in this policy year.

The message overall is to “keep up the good work”.

Why do barristers get sued?

The first point to note is that not many barristers do in fact get sued. There is not a whole lot of case law (particularly by way of comparison with solicitors), and very little by way of recent reported or even unreported case law involving barrister's professional liability – other than on the subject of advocate's immunity, which we won't be traversing this evening.

Most claims against barristers are either withdrawn or settled. There is a high proportion of what we still refer to as Ethics Committee complaints (although under the *Legal Profession Act* 2004 complaints are now made in the first instance to the Legal Services Commissioner and delegated back to the Ethics Committee) which principally raise conduct questions that which fall outside the terms of the LPLC policy. But an increasing proportion of these complaints are now also raising allegations of pecuniary loss which are heard in the Legal Practice List at VCAT which has jurisdiction to make compensation orders of up to \$25,000.

Claims by area of law

Refer to the attached pie chart which identifies the areas of law in which claims have arisen in the past year.

Given that the vast majority of barrister's work is in relation to contentious matters, the domination of litigation as the genesis of almost all professional negligence claims against barristers is unsurprising.

Focus on commercial litigation claims

What is interesting in the figures though is the preponderance of *commercial litigation* matters ahead of other areas – more than double the next area of law which is personal injury litigation.

In effect, civil litigation (commercial and personal injury disputes) account for about 75% of the claims we deal with. The corresponding figure for solicitors is about 30% of the claims, although a comparison with solicitors in this context is probably unhelpful because solicitors do a lot of transactional conveyancing and commercial work that barristers don't do. But it is clear that litigation claims against solicitors have also been trending upwards over the past few years.

It is an upward trend which probably has a lot to do with the relative decline in personal injury work, the development and growth of commercial litigation as an area of specialist practice; the cost of litigation; and the emergence of the 'win at all costs' approach to Court work.

When we drill down into the types of commercial litigation claims that have caused problems for barristers in the past year, we find they invariably arise in relation to either of two types of client:

- The strongly opinionated client who is a 'poor loser' and will seek to blame others no matter what happens. This is the client who remains committed to their case and won't hear of its weaknesses – the problem has to be with the calibre of the legal advisers and the representation afforded because in the client's mind there's nothing wrong with the case. Serial litigants fall into this category.
- The second category is the novice litigant – typically a small business person who gets caught up in a debt claim, or a partnership dispute or a dispute over some goods and services – an 'unsophisticated' client who ends up in a much bigger dispute than was ever contemplated as a result of the case getting onto the litigation juggernaut

It is very infrequent that Counsel will be sued by a major Corporation or experienced professional litigant (such as a Bank or insurance company) unless Counsel gets the law wrong.

Risk management strategies that need to be employed in each case have a different emphasis.

For the '*poor loser*' clients, one of the key skills of Counsel is to assess the type of client for whom you are acting early on, and be careful not to build that client's expectations beyond a manageable level. This can be a tricky exercise for Counsel – striking the delicate balance between being positive enough to win the client's trust and confidence that you will fearlessly advocate the client's cause, but at the same time maintaining the professional distance and detachment that is needed to continually and clinically identify the key issues in the case that are in dispute, assess the probable factual findings, and then apply the law to the facts. For this type of

client, advice in writing of the key risk factors confronting the client in the litigation is essential to be able to fall back on later if the client's case goes awry.

Like the real estate agent who talks up the value of your house, Counsel who builds an unrealistic expectation in the client's mind that the case is worth a very large sum of money, under-estimating the defendant's capacity and resolve to mount a strong and vigorous defence, does him or herself no favours when the matter gets to the door of the Court and the client is suddenly advised to settle the "gilt-edged" case for only 20% of the sum at which it was previously assessed.

For the *novice litigant*, a key risk management skill is to effectively communicate with the client how you plan to present their case – what are the key elements of the cause of action that need to be proved, and how are you going to do it? What is meant by "effectively communicate", is to be able to communicate at the client's level of understanding, which is something you can only assess on a case by case basis. One of the great problems facing lay clients is that the language of the law can still be very arcane.

One useful tip if you are labouring over a particular point and want to satisfy yourself that the client has understood your explanation, is to ask the client to repeat their understanding of what you have said to them back to you in their own words.

Other frequent issues for barristers in the litigation sphere include:

- ***Personal costs orders***
The jurisdiction to make costs orders against Counsel of the type made in *Flower & Hart v White Industries* has traditionally been sparingly exercised. But in today's commercial environment, when the cost of litigation is so high, we are seeing more and more use being made of the threat of personal liability for the successful party's costs as a litigation tactic. Increasingly, Counsel are being made the target of such applications, on the grounds that the client's claim was hopeless and was commenced or continued in circumstances where there was no tenable cause of action, based on a reasonably arguable view of the law as it applied to objectively provable facts.

One of the dilemmas for Counsel is pleading a case in which the client's instructions on factual issues are unclear or incomplete. There is an onus to plead with sufficient particularity so the opposition knows the case it has to meet, and we have seen instances where strike out applications by defendants have been successful, and Counsel is then faced with questions of who should bear the costs of the struck out pleading.

Bear in mind also that personal costs orders attract a deterrent excess under the policy.

- ***Failing to attend to the brief***
This is a recurring theme in all litigation fields, often more prevalent in the personal injury area than in commercial litigation, but we see claims in both.

In the personal injury context, the usual scenario is where the limitation period has ticked over whilst the brief was sitting on Counsel's desk, and had been sitting there for 3 months unattended because of pressures of other work.

Identifying limitation dates in the personal injury arena is not as straightforward as it once was, and is one of those 'specialisation' risks to be discussed later in this paper. This is particularly the case where the date of discoverability is the determinant of the commencement of the limitation period, and where a plaintiff's injuries have not stabilised and might be progressively deteriorating.

First, we recommend that the brief be reviewed by Counsel immediately on receipt to check whether there are limitation issues that need to be addressed in the context of the work briefed, and that if there are, the date be marked on the backsheet and diarised.

Secondly, if Counsel is too busy to attend to the brief in a timely way, it is preferable to return it than to have it as a potential time bomb waiting to explode in chambers.

Claims by level of seniority

The attached pie chart details the claims profile by seniority of barrister.

In terms of risk profile, the most notable feature of the pie chart is that approximately 60% of all claims (and this applies whether you look at the number of claims or the costs of claims) are made against barristers of 15+ years of experience at the Bar.

Barrister's claims – areas of exposure to liability claims

Fee disputes

25-30% of claims arise in the context of a dispute over fees. Of these, the vast majority arise from the conduct of commercial litigation. The commencement of proceedings to recover fees leads to a counterclaim for negligence.

The reason for this is probably because fees in this context are less regulated (in the sense there is no legal aid, and the application of scales is less prevalent)

There are cases in which the fees charged are the catalyst for the dispute, but most are complaints that the result achieved by the barrister was not to the client's liking.

In many cases these claims might have been avoided entirely with better attention to the management of costs. Regular issues include:

- Accepting briefs from solicitors who have a track record of being bad payers, and without security for fees being put in place.
- Delegating authority to the clerk – resulting in briefs being accepted without the barrister knowing the nature of the work involved and whether arrangements with respect to fees have been properly made.

- Under-estimating the amount of work involved – and failing to communicate this to the solicitor early enough.
- Long running litigation – where at the end of a trial the outstanding fees can run into tens of thousands of dollars.

How to spot such a client who might not pay?

- If the client’s case involves an attempt to avoid a contractual obligation (e.g. under a contract of sale) it might be a safe starting assumption that the client regards all contracts as negotiable.
- If the client talks about his or her case but calls it ‘your case’ – i.e. giving you ownership of his problems – then the loss of the case will be your fault.
- The client asks you what answer he or she should give to a particular question, or otherwise demonstrates a propensity to be flexible with the truth.
- The client that tells you the case involves a point of principle.

What can you do?

- Where possible, require the solicitor to accept responsibility for payment of your fees.
 - A clear and express retainer enabling you to cease acting, subject of course to your duty to the Court (which means some planning and foresight to extricate yourself from a case sufficiently in advance of any trial date so as to give the client ample opportunity to brief alternate Counsel).
 - Don’t let bad debts accumulate.
 - Keep a record of all those promises to pay, and don’t hesitate to confirm them in writing with the client or the solicitor.
- Poor ‘debt collection’ procedures – leaving it for several years before chasing fees, only to be met with contrived allegations of negligence in order for the solicitor or the client to avoid payment.

Overall these claims are not that costly for the Insurer – primarily it is defence costs that are incurred, with most claims resolving prior to a formal hearing. However, from a barrister’s perspective, these claims can be amongst the most irritating. Not only are they a distraction from the barrister’s work, there is an element of personal sensitivity because allegations of excessive fees attack the barrister’s professional reputation and ethical propriety.

Lack of teamwork between Counsel and the instructing solicitor

One of Counsel’s worst nightmares is to receive an under-prepared brief in a difficult and complex matter. In these circumstances Counsel is taking an increased responsibility if the solicitor is not attending to the tasks that are normally within the solicitor’s domain.

From a risk management perspective, Counsel should not hesitate to send a memorandum or an email to the solicitor (which does not need to be expressed in a

manifestly self-serving way, but which will achieve the purpose) to confirm advice that has been given and recording who is responsible for what part of the preparation work that has to be done.

A clear feature of a number of the claims we have seen involving briefs delivered to Counsel from small firms or sole practitioners is the extent to which such solicitors are reliant on Counsel for advice and guidance. It is a reliance which grows over time, and which is usually satisfactory for both parties until a problem arises, at which point the solicitor will be heard to say (for example) “I had a standing arrangement with the barrister that he would look at all aspects of the case and advise accordingly” and the barrister will say “I was not briefed to advise on common law, I was only briefed to appear in relation to a weekly compensation claim”.

Fault in these cases can lie on either side, depending upon the circumstances. The solicitor should be express in his or her instructions to Counsel, but equally Counsel should make sure that his or her engagement is clear. In the above scenario, if Counsel was briefed in relation to a weekly compensation case, but could also see a glaring common law claim and said nothing to the solicitor about it, knowing that the solicitor was a sole practitioner from the country with no real expertise in personal injury cases, Counsel would probably be taking a real risk in not drawing the potential common law claim to the solicitor’s attention and clarifying the breadth of the retainer.

Getting the law wrong - recent legislative changes and failure to take them into account in drafting pleadings and giving advice regarding settlement.

There has obviously been very substantial change to the law throughout Australia as a result of the tort law reforms of the past few years and these changes create practical issues for barristers in drafting pleadings and giving advice regarding settlement.

Some examples which may have led or may lead to claims include:

- Failure to appreciate that in dust disease claims, general damages and damages for loss of expectation of life only survive for the benefit of the estate when proceedings are commenced in the lifetime of the deceased. As people can die very suddenly from dust diseases one can see the need to ensure that all reasonable steps are taken to ensure that proceedings are commenced as soon as possible. Where counsel is briefed to draw a statement of claim in such a matter there is a need to identify urgently the appropriate defendants and, if the plaintiff's health is very poor, even advise the solicitor to issue a generally endorsed writ to protect the estate's position.
- In drafting pleadings or advising on settlement of matters to which the tort law amendments may apply it is vital to look at issues such as:
 - Is the cause of action Victorian or may the law of another State or Territory apply?
 - What limitations issues, if any, exist?
 - Is there a threshold for recovery of non-economic loss damages?
 - Are there any and, if so, what limits on the damages recoverable?

- Are there any specific statutory provisions affecting liability that must be considered? (e.g. voluntary assumption of risk)
- In commercial litigation the proportionate liability provisions need to be fully considered and advised upon.

Specialisation

The strong recommendation to barristers is to be very careful not to accept a brief in an area of practice in which you are not familiar and do not have the backup to assist you to develop expertise in the area.

This is particularly so where the barrister is aware that the solicitor does not have the requisite expertise in the area and is therefore specifically briefing to obtain the benefit of specialist expertise.

Acting for “friends”

The strong recommendation is to be very careful about acting for friends in litigious matters unless the briefing is on a truly professional basis with an instructing solicitor. There is often a desire to assist friends and help them out pro bono or at reduced rates. There needs to exist true professional boundaries. Otherwise there can exist a practical “conflict” in that the barrister has his or her “paying” and “non-paying” briefs and usually the non-paying gets less attention and this has led on some occasions to claims being made against barristers. Not only is the barrister miffed by the “friend” making a claim but the “friendship” usually terminates. The message simply is keep it professional.

This excludes of course true pro bono work, it only relates to acting for friends.

Multiple clients

Barristers need to be especially careful in acting for multiple clients to ensure that one is not in any position of conflict and that when proceeding to settlement the barrister has instructions from all clients and that they all have had the proposed settlement fully explained to them prior to providing instructions.

Some examples where claims have arisen and could possibly arise in the future are -

- Most defendants in professional indemnity type claims have a deductible under their policy of insurance and it is always important in taking instructions for any settlement to have instructions from the insured and the insurer. With increasingly high deductibles in some types of insurance, such as medical malpractice, this is an issue that has the potential for conflict between the interests of the insured and the insurer. It is important that the barrister clarify with his or her instructing solicitor who is giving instructions and who the barrister is to take instructions from.
- Many insurance policies for major risks have multiple insurers taking proportions of the total cover provided. In acting for the lead underwriter who generally has the conduct of the defence on behalf of all insurers the barrister needs to clarify with his or her instructing solicitor that the person giving instructions is doing so on behalf of all insurers with authority to do so and

preferably this should be confirmed in a memo. There is then the issue upon settlement whether the settlement documents record the various insurers as being liable for the total settlement jointly or whether they are severally liable for their respective proportions of the risk.

Judicial criticism

The increasing activism of some of the judiciary to impose sanctions personally on lawyers, including counsel, resulting from the manner in which litigation before them has been conducted. Whilst this may not necessarily lead to a claim against counsel by the client, it may lead to a disciplinary inquiry and all that flows from the same. The point to make is that society is much more inquisitive than ever before and there has been an increase in the seeking of “accountability” of all professionals.

Risk management - maintenance of records

The maintenance of appropriate records of work done is an essential risk management aspect of any professional's practice.

The same applies to barristers, although the experience is that many do not maintain records to any great degree.

The types of records to maintain include -

- Records of the date of receipt of each brief - very relevant for limitations type issues, noting there is a deterrent deductible for missing limitation periods.
- Records of clarification with instructing solicitors of matters such as the authority of the person giving instructions to do so on behalf of others, the limit of the brief, confirmation of settlement instructions, etc.
- Records of negotiations leading to a settlement.
- Memos prepared when:
 - Counsel's assessment of the case differs markedly from the client or instructing solicitor.
 - The client's instructions change from statements previously made.
 - The client has been through a succession of other lawyers.
 - There are signs of tension between the client and the solicitor.
 - When you have a “sixth sense” that all is not what it seems from either the client or the instructing solicitor.

As Justice Hope said in *Albrighton v RPAH* in relation to medical records -

“The records are likely to be a far more reliable source of truth than memory. They are often the only source of truth.”

In defending claims against barristers it is of enormous assistance to have records of what transpired rather than rely on memory of some matter that was resolved months or years ago.

Problems with settlement of contentious matters

There are some recurring themes in claims against barristers arising from the settlement of litigation.

In family law cases, the allegations visited on Counsel commonly arise in the context of property settlements, and commonly take either (or both) of two forms:

- Pressure to settle

Whilst not a family law case, there is a very helpful discussion by Fitzgerald JA in *Studer v Boettcher* (2000) NSWCA 263 of the extent to which it is permissible for pressure to be placed on a client to settle. The law is pretty clear that so long as the practitioner is not acting from self-interest, it is appropriate to persuade the client, and do so in strong terms if required, but not to co-erce the client into settlement.

What Counsel cannot do is to settle a case without authority to do so.

- Errors in the settlement documentation:
 - Agreements that are not in accordance with client's instructions.
 - Incomplete or ambiguous agreements – where the settlement document has drafting flaws that necessitate making applications back to the Court for correction, or if this is not possible, result in a claim for damages against the barrister (and usually the solicitor as well).

In the commercial litigation arena, particular problems with settlements that we have seen in the past 12 months have involved ***allegations*** against Counsel arising from:

- The conduct of Counsel at mediations – the primary theme here is pressure to settle.
- Problems arising from terms of settlement. Recurring themes in this context are:
 - Including non-parties to the litigation as a party to the terms of settlement. For example, adding a director of a company as guarantor of the company's obligations to pay a sum of money.
 - Assertions that forms of release prepared and signed were insufficient to close out the risk of further claims being made by any parties.

Conclusion

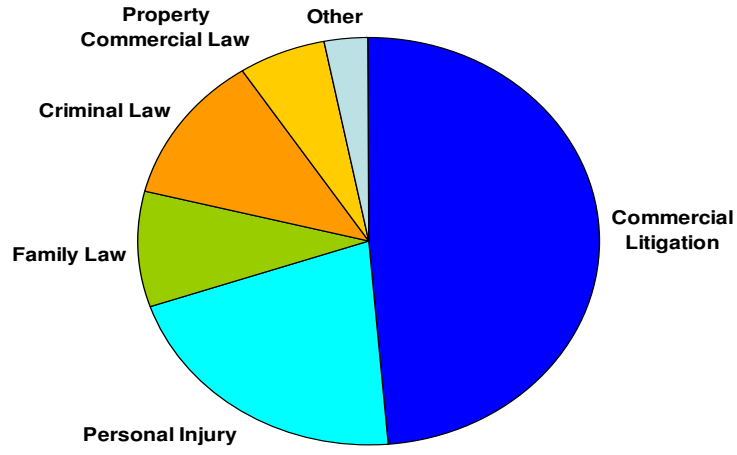
The matters outlined in this paper will assist members of Counsel in lessening the likelihood of negligence claims arising.

The LPLC is there to help when you encounter professional liability problems.

Justin Toohey
Legal Practitioners' Liability Committee
22 June 2006

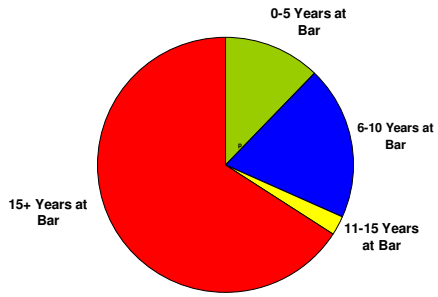
Philip Rowell
Monahan + Rowell

NUMBER OF CLAIMS BY AREA OF LAW



CLAIMS BY SENIORITY 2003-2005

PAID CLAIMS



NUMBER OF CLAIMS

