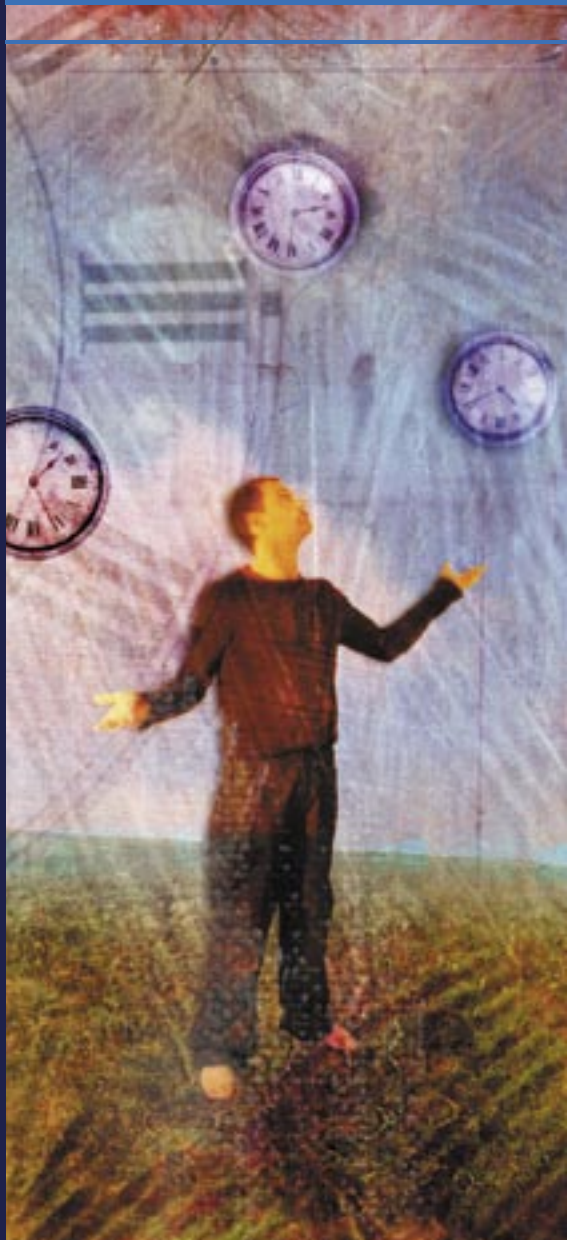


De-coding Commercial Litigation

MAY 2005
EDITION



LEGAL PRACTITIONERS
LIABILITY COMMITTEE

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Introduction

Almost inevitably, clients only seek out litigation lawyers when something has gone wrong.

This means that the relationship is going to be difficult from the start. It can be made even more difficult if litigants are faced with inconvenient delays, unexpected costs and a court system that may be unfamiliar and confusing to them.

It is not surprising, therefore, that litigation lawyers in general are faced with a significant number of claims each year. Litigation claims made up 26% of the total number of claims and 28% of the cost for the period 1 July 2003 to 30 June 2004. About half of these claims concern commercial litigation.

There are steps that you can take to minimise the risk of receiving a claim. *De-coding Commercial Litigation* explains these steps and provides a practical checklist to help you avoid claims. Our companion publication, *Pitfalls in Personal Injury Litigation*, examines the particular risks facing Plaintiff personal injury lawyers.

The mistakes catalogued in *De-coding Commercial Litigation* are drawn from LPLC's claims experience over the last three years.

Litigation lawyers will be aware of the recent High Court decision, *D'Orta-Ekenaike v Victorian Legal Aid* [2005] HCA 12, which has preserved advocates' immunity from suit for negligence in the conduct of a case in court and for out of court work intimately connected with the conduct of a case in court.

The decision also appears to extend the immunity of solicitors acting not only as advocates but also when giving advice intimately connected with the conduct of a case in court.

At the time of going to print, the scope of the immunity is under review and may be narrowed by legislative intervention.

Regardless of the status of the immunity and any defences that may be available as a consequence, litigation lawyers should continue taking the steps necessary to minimise the risk of a claim.

An Alarming Trend

In the past, the majority of claims arising out of litigation concerned personal injury actions. However, the past three years has seen a dramatic rise in claims arising from litigation other than personal injury claims.

These claims concern commercial litigation in its broad sense (ie. contractual disputes, debt recovery, employment claims, building disputes and insurance litigation) and now make up half of all litigation claims.

The Causes

Litigation is an unfamiliar environment for many litigants and solicitors need to manage not only the law but also the client and the retainer.

Solicitors need to communicate with their clients at all stages of the process about what is happening and likely to happen while keeping a written record of their communications.

Unfortunately, we find that the underlying causes of most of the litigation claims arise from the failure by solicitors to do so.

Claims arise for a variety of reasons:

- poor engagement management (particularly managing the client's expectations);
- poor communication with the client throughout the life of the retainer;
- lack of a "useable trail" (file notes and correspondence); and
- failure to manage the legal issues.

The Best Risk Management – An Informed Client

Effective communication is a litigation lawyer's best defence.

If you are able to guide your client through the litigation process, keeping the client informed from the start to the finish, not only will you be providing a better legal service, you are also less likely to experience a claim.

There are also many instances where the client's actions or refusal to accept advice will put you at risk. Where the client is taking a risk you must ensure that the risk is not transferred to you. Advise the client of the risks and record that advice in a file note and a confirmatory letter to the client. Also make sure you include the client's response to the advice you gave.

The Most Common Mistakes

1. Failure to issue proceedings

This category of claims covers all instances where the client has lost a right or cause of action. These often result from a lack of legal knowledge, for example, where the claim is covered by the Warsaw Convention or there are statutory limitation periods such as under the *Trade Practices Act 1974* or the *Workplace Relations Act 1996*. Others are more fundamental errors, such as failing to document advice about any limitation periods that apply.



Examples:

Overlooking the limitation period

The solicitor for a client on the receiving end of a creditor's petition contacted the creditor's solicitor seeking an undertaking that no action would be taken, as there was a genuine dispute. The creditor's solicitor said that he would seek instructions but did not respond until after the 21 day limitation period in which to apply to set aside the petition had expired. The creditor refused to provide the undertaking. The solicitor had not taken any steps to protect his client's interests (ie. chasing the undertaking or making the application).

Failing to advise on limitation period

The solicitor acted for clients who had purchased a house from an owner/builder which had defects. Before the expiration of the guarantee period, the clients made several claims on the Housing Guarantee Fund (HGF). The property was inspected by the HGF but only one claim was accepted. The solicitor advised his clients to obtain an independent report if they wished to pursue an appeal; but did not advise that the appeal must be lodged in 28 days. The report was received after the 28 day time limit expired and the solicitor had failed to follow up the clients in the meantime.



We recommend:

- Do not undertake work of a specialist nature that is outside your area of expertise.
- Tell your client of the limitation period (at the start of the retainer and where the retainer is terminated) and confirm it in writing.
- Set up systems for tracking deadlines and actively monitor their effectiveness.
- Be careful about the method of lodging applications and proceedings when deadlines are near.

2. Failure to consider or investigate causes of action

This category of claims includes the following scenarios:

- Proceedings that were not properly considered or investigated before being issued and turn out to be ill-founded.
- Cases where the client wants a claim/defence considered but the solicitor does not take steps to investigate or advise on its merits.
- Proceedings brought in the wrong jurisdiction – often overlooking VCAT's review jurisdiction.
- Failure to include one of many claims, such as a failure to include a claim for interest or a claim for loss of profits in a property damage case.



Examples:

Ill founded claim

The client was a tenderer who wished to pursue a claim for misrepresentation arising out of the tender. Proceedings were issued but withdrawn two years later on counsel's advice that the wrong plaintiff had issued proceedings, the misrepresentation claim was unlikely to succeed and the loss would be difficult, if not impossible, to establish. The client, not surprisingly, complained that it had spent two years and considerable sums of money pursuing a claim that had little merit. This could have been avoided if the claim had been properly investigated before proceedings were issued.

Not considering or advising on the merits

The solicitor defended proceedings on behalf of a joint venture partner against a bank seeking to enforce securities after the joint venture failed. The client complained that the bank had made unauthorised withdrawals. It appears that this was never investigated or pleaded by the solicitor. The client later settled the action on the advice of counsel and the solicitor. He subsequently alleged that if the investigations had been carried out then a better settlement would have been achieved. The solicitor maintained that the claim would have been too difficult to prove but never advised the client of this.



We recommend:

- Adopt a forensic approach to instruction taking.
- Take full instructions prior to issuing proceedings. Assemble the facts and the key documents necessary to support the case.
- Recommend to your client that further investigation be undertaken, if necessary, and advise on the likely cost.
- Provide a preliminary assessment of the merits of the case in writing, including your assessment of possible claims or defences your client has raised.
- Advise on the risks of litigation and cost consequences in writing.

3. Failure to act resulting in delays and/or strike out applications

There are a number of reasons why these claims occur:

- the case or an issue in the case is “too hard” or the solicitor has a ‘mental block’;
- the solicitor is too busy or becomes side tracked;
- the client is non-responsive or difficult; or
- counsel ‘sits’ on the brief.



Examples:

The “too hard” case - cumulative delays by solicitor

The client’s mother transferred her house to the client shortly before her death. The client’s sister brought two sets of proceedings: one to set aside the transfer and the other, a claim pursuant to Part IV of the *Administration and Probate Act* 1958. After failing to grapple with the issues and not attending to interlocutory steps, the defence in one of the proceedings was struck out. The client was eventually referred elsewhere.

The ‘mental block’

The solicitor acted for a company, the director of which he had known for 30 years. The company had been sued and the solicitor appointed interstate agents to represent its interests. The agents requested “money up front”. The solicitor was uncomfortable asking the director of the company for the money because of the unstated implication that the client may not otherwise pay. As a result, the solicitor procrastinated and eventually the interstate agents withdrew, the client’s defence was struck out, judgement was entered and damages assessed. Only at this point was the client referred elsewhere.



We recommend:

- Do not allow the 'too hard basket' cases to drag on. Refer that file you have a 'mental block' about to a colleague or seek advice from appropriate counsel. Remember, what may be a difficult issue for one solicitor may not be for another and vice versa. Consider a reciprocal rights arrangement or an exchange program to deal with this problem.
- Communicate with your client about the delays in a case and, where the client is causing the delay, set out in writing the consequences of continued delay and any relevant time limits.
- Consider terminating the retainer where your client fails to give you instructions to proceed over a significant period of time and written warnings have not been heeded. If you do terminate the retainer, advise your client in writing, giving details of any time limits.
- Do not allow briefs to languish with a barrister. Find out, and act on, what further information the barrister requires. Do not accept excuses for delay from counsel. Have an office policy about retrieving briefs from non performing counsel. Set time limits in which counsel must perform.
- Review files on a regular basis.

4. Failure to join a party or party misdescribed

These claims arise where there is -

- a complicated proceeding;
- a proceeding involving a lot of paper evidence; or
- difficulties in finding any supporting evidence.

Such cases are often characterised by different solicitors and barristers being brought in over time with different views on how the matter should be run. It is not until the limitation period has expired that it is realised that directors of defendant companies or related companies should have been joined as parties.

Another common scenario is where the proceeding is issued in the name of the client when, in fact, the cause of action belongs to the client's company. A careful reading of the client's documentation would have clarified the mistake.



We recommend:

- Read the documentation available carefully to ensure you issue the proceeding in the name of the correct plaintiff(s) and against the correct defendant(s) (responsibility does not rest solely with the barrister settling the statement of claim).
- Actively track the limitation period with specific reference to the possibility that further defendants may need to be joined, especially in cases where the evidence, and possibly the causes of action, are evolving as the matter proceeds.

5. Revisited settlements

This category of claims relates to matters that have been settled but the client later regrets the settlement and seeks to blame the solicitor. The main underlying causes for these claims relate to failing to manage the client's expectations and failing to properly communicate with the client. As a result, the client often has an unrealistic appreciation of what his or her claim is worth or does not understand the mediation or settlement process or the risks faced in litigation. Claims fall into two categories:

- The client believes that his or her claim was worth more and felt pressured into settlement, usually from a perception that the case was not properly prepared.
- The client, either on the advice or against the advice of the solicitor, refuses an earlier settlement offer and later resolves the claim on less favourable terms.



Examples:

Not managing the client's expectations; inadequate preparation

The solicitor's clients brought proceedings against defendants who, it was alleged, failed to detect termite damage while inspecting a house which the clients later bought. The solicitor obtained several expert reports, one of which indicated further testing may be required.

Two weeks before mediation, the solicitor wrote to his clients setting out details of the mediation and confirming that an offer of compromise had been made on the clients' behalf for \$100,000 plus costs. Two days before mediation, having

studied the reports more closely, the solicitor sent a further letter noting there was no proof of termite damage inside the walls and further tests would be needed if the clients wanted to prove this. The solicitor noted that, on the proof currently available, settlement of around \$30,000 plus costs would be acceptable at mediation.

The clients attended mediation with a barrister they had only just met, without the solicitor present and without knowing what outstanding costs were to be paid. The matter settled for \$30,000 all in. The clients were subsequently disillusioned because the costs were higher than the barrister estimated and they did not have enough money to repair their home. They felt that no one had listened to them or prepared their case properly!

No record of advice, particularly when the client does not follow advice

The client was involved in a dispute with the manufacturer of an allegedly defective vehicle. The solicitor engaged in settlement negotiations with the manufacturer's solicitors. At the same time, the client and the manufacturer were also engaged in discussions. The client gave instructions to accept an offer and then withdrew these instructions, asking for a higher figure. Settlement negotiations then broke down. Having not achieved a better settlement result, the client blamed the solicitor for not advising him to accept the earlier offer. The solicitor maintained that the advice was given but it was not recorded in writing.



We recommend:

- Manage the client's expectations in relation to the value of the claim throughout the life of the case:
 - give your client preliminary advice about the value of the case early on and inform your client that this may change as evidence is obtained; and
 - update your client on the value of the case as new evidence is obtained.
- Advise your client about how any settlement conference/mediation will be conducted and what will be expected of the client well before the conference.

- When advising your client in relation to settlement, provide up to date information on costs.
- Where an offer is made and rejected, either on or against your advice, confirm these instructions and the advice in writing.
- Where the client wants to settle for an amount you think is too low, make a contemporaneous file note of your advice to the client (including the reasons the client has given you for settling) and confirm this in writing.

6. Settlement without authority

Claims in this category often arise due to a lack of communication. They usually involve a failure to obtain -

- an insured's instructions when acting on instructions from an insurer;
- both parties' authority when acting for a husband and wife; or
- full instructions on the terms on which the client is prepared to settle.



Examples:

Insured's consent

The solicitor, on instructions from an insurer, was defending an action against a professional. The solicitor engaged in settlement negotiations and had "virtually settled" the case with a 50/50 contribution from a co-defendant when he realised that the client's insured had not consented to settlement. The client's insured refused to consent to a settlement as it had a high excess and did not consider itself liable in any way. The co-defendant issued an application seeking to have the settlement enforced. The trial date had to be vacated and the client referred elsewhere.

Proper instructions

The client had an action for recovery of monies due for goods supplied. The client's solicitor had settlement discussions with the defendant's solicitor which the defendant's solicitor claimed had settled the action. The client wished to amend the claim to include further invoices and, in response to the amended statement of claim, the defendant pleaded that the matter had already settled. The issue of settlement fell to be determined at trial.



We recommend:

- Ensure that you have instructions from all interested parties. Do not assume that one party has authority to deal on behalf of another.
- Explain the basis of the settlement to your client clearly before seeking authority to settle.
- Keep a detailed file note of your client's instructions to settle and follow up with a prompt written confirmation.

7. Inappropriate terms of settlement

This category of claims includes the following scenarios:

- a settlement that does not accurately reflect the client's authority;
- a settlement which has been orally agreed or agreed in principle but the terms are subsequently disputed; and
- a release which is inadequate or drafted too widely.



Examples:

Disputed terms of orally agreed settlement

The solicitor negotiated settlement which was to embrace "all monies due" between the parties as at a certain date. The arrangement between the parties was that work performed in one month was not billed until the following month. A dispute then arose as to whether the settlement included payment for work done up until the agreed date or whether it was only for amounts invoiced up until the agreed date. The terms of settlement were ambiguous.

Release inadequate

The client was the lessor of a shopping centre and was in dispute with one of its tenants concerning arrears of rent. Part of the dispute arose out of representations said to have been made by the lessor about complementary businesses that would operate within the shopping centre. The dispute was settled by a surrender of the lease. The terms provided that the tenant would give up all rights against the lessor which, but for the execution of the surrender of lease documents, the tenant would have against the lessor. This did not preclude claims for misrepresentation which the tenant then issued.



We recommend:

- Stop to consider if the release covers the matters raised by the proceeding/ dispute and your client's instructions. Has GST been considered?
- If the release is wider than the matters raised by the proceeding, advise your client about this and the ramifications. Where possible, negotiate a reduction in scope of the release.
- Document your client's instructions and your advice in relation to settlement negotiations.

8. Costs orders against client or solicitor

Claims in this category arise where, as a result of the solicitor's action or inaction, the client is ordered to pay costs or the solicitor is ordered to pay costs personally, either pursuant to Order 63.23 of the *Supreme Court (General Civil Procedure) Rules* 1996 or Order 63A.23 of the *County Court Rules of Procedure in Civil Proceedings* 1999 or section 109 of the *Victorian Civil and Administrative Tribunal Act* 1998.



Examples:

Costs of setting aside judgment in default

The solicitor obtained a judgment in default of an appearance and then issued a statutory demand. The defendant was successful in its application to set aside the default judgment and the statutory demand on the basis that the judgment had been entered prematurely. The solicitor had failed to take into account 2-3 days for service when calculating time to file an appearance. The client looked to the solicitor to pay the costs ordered against it.

Costs order against solicitor

A hearing date was adjourned at the defendant's request when the plaintiff's solicitor filed contentious evidence late in the proceedings. The judge ordered costs of the adjournment to be paid by the plaintiff's solicitor.

In another case, the solicitor had sought several adjournments to the opposing party's interlocutory applications on instructions from the client. The opposing party claimed that the requests for the adjournments were an abuse of process and, as such, the solicitor was aiding and abetting that abuse. The opposing party sought costs to

be paid by the solicitor personally because the client had no assets in Australia.

9. Sue for costs and receive a counterclaim for negligence

This unusual category of claims arises mainly in litigation and family law cases. The claims occur when the solicitor takes steps to recover costs and is met with allegations of negligence in response.

The allegations of negligence may be unfounded and come 'out of the blue'. In some cases, they are designed to obtain a reduction in the amount of costs to be paid. In other cases, the client feels he or she has a legitimate complaint about treatment by the solicitor and objects to paying the bill.

Sometimes the client has unrealistic expectations about the costs likely to be incurred and the likelihood of losing the case. In other cases, the solicitor has not kept the client promptly informed of the delays experienced in getting to court and the effect on the costs incurred.



We recommend:

- Keep your client informed, on an ongoing basis, on key issues:
 - costs;
 - the likely success of the case; and
 - any delays that occur and how they will affect the costs.
- Consider the possibility of any allegations of negligence before issuing cost recovery proceedings and weigh up the cost involved.

10. Revisited results by dissatisfied litigants

These claims arise when clients do not obtain the results that they wanted at trial and complain:

- the case was not properly prepared or the evidence properly presented; or
- they should have been advised to accept an earlier settlement offer.

Of course, some of these claims may be subject to immunity defences available under *Giannarelli v Wraith* (1988) 165 CLR 543 or *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12.



Examples:

Failing to engineer a successful defence

The solicitor acted for engineers in a multi-party building dispute which went to trial. Despite settlement attempts, contribution could not be agreed between the defendants. All defendants were found liable and the clients were faced with not only a judgment but also a substantial liability for the plaintiff's costs and its own. The clients complained that the solicitor had not prepared and presented the case properly, in particular, failing to provide reports by experts and not calling evidence to support matters pleaded in the defence.

Not good enough

The solicitor acted for the applicants in Federal Court proceedings alleging infringement of a trade name and trade mark Australia wide. The clients were successful but only in restraining the defendants in Victoria and not Australia wide. The clients alleged that the solicitor failed to call evidence to support infringement outside Victoria. The solicitor said that the real reason for the outcome was that the court did not accept the clients' evidence.

Missed settlement opportunity

The solicitor acted for the employer in relation to three unfair dismissal claims. The employer was ordered to reinstate the employees and pay back pay. The employees sought costs on the basis that the employer unreasonably refused to settle the claims. The employer complained that the solicitor had not fully advised on the employees' prospects of success and failed to properly advise in relation to earlier settlement offers.



We recommend:

- Warn your client about the specific risks of litigation.
- Advise your client in writing of the cost consequences of winning or losing.
- Advise your client about the progress of the trial and make settlement recommendations, if necessary.
- Confirm your advice and your client's instructions in writing, particularly where an offer is made and/or rejected against your advice.

Proportionate Liability

Litigation solicitors should be aware of recent legislation at both the Victorian and Commonwealth levels relating to proportionate liability.

There are important differences in the legislation.

Legislation

Victoria

The *Wrongs and Limitation of Actions Act (Insurance Reform) Act 2003* introduced Part IVAA into the *Wrongs Act 1958*.

Commonwealth

The *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* amended the -

- *Australian Securities and Investments Commission Act 2001* (ASIC Act);
- *Corporations Act 2001*; and
- *Trade Practices Act 1974* (TPA).

Commencement Times

Victoria

The Victorian reforms apply to **proceedings commenced after 1 January 2004**.

Commonwealth

The Commonwealth reforms apply to **causes of action which arise on or after 26 July 2004**.

Proceedings Covered

Victoria

The Victorian legislation applies to the following proceedings (section 24AF(1)):

- a claim for damages for economic loss or property damage arising from the failure to take reasonable care whether that claim is brought in tort, contract, pursuant to statute or otherwise; and
- a claim for damages for a contravention of section 9 of the *Fair Trading Act* 1999 (misleading or deceptive conduct).

The Victorian Act does not apply to claims arising out of a personal or bodily injury or claims made pursuant to a number of statutes, **including** -

- Part III, VI or X of the *Transport Accident Act* 1986;
- Part IV of the *Accident Compensation Act* 1985;
- A work injury under the *Workers Compensation Act* 1958;
- A complaint under the *Equal Opportunity Act* 1995;
- A claim for compensation under Division 6 of Part II of the *Education Act* 1958 applying to volunteers engaging in work at state schools and students engaging in voluntary approved community work.

Commonwealth

The Commonwealth reforms apply to claims for damages brought under the relevant sections of each Act (section 12GP of ASIC Act, section 1041L of the *Corporations Act* 2001 and section 87CB of the TPA) for economic loss or damage to property caused by conduct in contravention of the relevant consumer protection sections of the legislation.

How does it work?

The legislation in both the Victorian and Commonwealth jurisdictions limits the liability of a defendant who is a “concurrent wrongdoer” to an amount reflecting the proportion of loss or damage that the court considers just, having regard to the extent of the defendant’s responsibility for the loss and damage. The court is obliged to apportion liability in a claim to which the regime applies.

The key difference between the Victorian and Commonwealth reforms

The key difference between the two reforms is in their application to concurrent wrongdoers who are **not** parties to the litigation.

In Victoria, the court may only apportion responsibility between “defendants” to the proceeding (which includes third and subsequent parties for these purposes). The court cannot have regard to the comparative responsibility of a concurrent wrongdoer who is not a party to the proceeding (unless the concurrent wrongdoer is not a party because they are dead or wound up). In essence, the responsibility rests with the **defendants’ solicitors** to ensure all responsible parties have been joined to the proceeding for the purposes of apportionment.

In the Commonwealth reforms, the court is empowered (but not obliged) to apportion responsibility between “defendants” (which includes third and subsequent parties for these purposes) having regard to the comparative responsibility of any concurrent wrongdoer who is not a party to the proceeding. Therefore, responsibility will essentially be left with the **plaintiff’s solicitor** to ensure that all relevant parties are before the court.

The Commonwealth reform does put the onus on the existing defendants to an apportionable claim to notify the plaintiff of any information as to the identity of other concurrent wrongdoers. Failure to do so may result in cost orders on an indemnity basis against the relevant defendants.

The Commonwealth reforms also provide for the plaintiff to bring a second proceeding in respect of the same loss to recover any proportion of loss not recovered from the first proceeding by reason of the non joinder of concurrent wrongdoers.

Fraud

The Victorian legislation provides that the defendant in a proceeding in relation to an apportionable claim who is found liable for damages and against whom a finding of fraud is made is **jointly and severally liable** for the damages awarded against **any other defendant** in the proceeding. It appears any finding of fraud, whether it is related to the apportionable claim or not, will result in the fraudulent defendant being jointly and severally liable for damages for the **whole** proceeding.

The Commonwealth reforms exclude operation of the proportionate liability rules from a wrongdoer who fraudulently or intentionally caused the loss or damage. In those circumstances, liability, so far as it applies to that person, is to be determined in accordance with the usual legal rules.

Conclusion

Solicitors need to carefully consider these legislative reforms and ensure they understand fully the implications of the reforms in order to properly protect the interests of their clients.

GST and Commercial Litigation

On 20 June 2001, the ATO released a final ruling, GSTR 2001/4 *Goods and Services Tax: GST consequences of court orders and out of court settlements*. The ruling means that litigation does not, of itself, attract GST consequences.

In general, the consequences are as follows.

No GST payable

If -

- a payment of damages;
- a payment of party/party costs;
- a payment to a plaintiff/claimant by an insurer through and/or on behalf of an insured/defendant; or
- an undertaking to discontinue proceedings as part of a settlement

is made or given, that payment or undertaking standing alone attracts no GST consequences.

GST payable

If -

- the underlying transaction giving rise to the litigation (an "earlier supply");
- a component of a settlement or judgment (a "current supply")

is a taxable supply (ie. not GST-free or input taxed)

AND

If -

- the party receiving the payment is or should be registered for GST purposes; and
- the payment relates to a supply made in the course of carrying on an enterprise

then the GST consequences of the underlying transaction or fresh component carry through to the settlement or judgment.

**Examples:**

1. Company A sells goods to Company B for \$1,000 plus \$100 GST. Company B does not pay. Company A sues Company B. Judgment or settlement is effected for the total of the claim - note the claim should be on a GST inclusive basis. Payment of \$1,100 is made; the plaintiff must then pay or account for GST of \$100 to the ATO, unless it has already done so on the original supply.
2. Costs paid by the defendant to the plaintiff in Example 1 will not have GST consequences.
3. Plaintiff claims damages for breach of copyright. Damages are paid by way of settlement. No GST is payable as the claim for damages is not regarded as constituting a "supply".
4. Plaintiff claims damages for breach of copyright. Action is settled on terms that -
 - defendant pays damages for past breaches: \$50,000;
 - defendant pays \$50,000 to plaintiff in return for agreement to use subject of copyright.GST is not payable on the damages but is payable on the payment for use of the copyright as a "current supply" is made within the terms of settlement.

Additional Matters

Solicitors who deal in insurance claims should be aware of the ATO ruling GSTR 2000/36 *Goods and Services Tax: insurance settlements by making supplies of goods and services*.

It deals with the issues, mainly, of where insurers are entitled to an input tax credit when making payment or supplies in settlement of insurance claims.

The ruling should be studied by solicitors who practice in this area.

LPLC Commercial Litigation Checklist

This is not a comprehensive checklist but it will help you to avoid most of the mistakes made by solicitors in commercial litigation matters. The checklist can be photocopied for ongoing use.

Client

Matter

Client	Matter

Initially

- Make a detailed file note of your initial conference with your client, including -
 - the information the client gave you;
 - the advice you gave the client; and
 - what both of you agreed to do after the conference.
- Send your client a retainer letter after the initial conference which includes -
 - your notes of the conference, asking the client for any further instructions forgotten during the conference (or convert your file note into a proof of evidence and send that instead);
 - your arrangement for costs;
 - confirmation of any advice you gave the client;
 - confirmation of what you will undertake for the client; and
 - confirmation of any limitation periods.

Managing the proceeding and the client

- ❑ Manage the client's expectations in relation to the value of the case throughout the life of the case:
 - give your client preliminary advice about the value of the case early on;
 - inform your client that this advice may change as further evidence is obtained; and
 - regularly update your client on the value of the case.
- ❑ Regularly update your client about -
 - costs; and
 - any delays that occur and how these will affect the costs.
- ❑ Do not allow a 'too hard basket' case to drag on. Refer the matter to a colleague or seek advice from appropriate counsel.
- ❑ Do not let briefs languish with a barrister:
 - find out, and act on, what further information the barrister requires;
 - do not accept excuses for delay from counsel;
 - have an office policy about retrieving briefs.
- ❑ Communicate with your client about the delays in a case:
 - where the client is causing the delay, set out in writing the consequences of continued delay and any relevant time limits;
 - where the client fails to give you instructions to proceed, consider terminating the retainer; and
 - if you do terminate the retainer, advise the client in writing and give the client details of any time limits.

Settlement

- Ensure you have authority to settle from all interested parties.
- Advise your client about how any settlement conference will be conducted and what will be expected of the client well in advance of the conference.
- Where the client wants to settle against your advice, make a contemporaneous file note of your advice to the client. Confirm this in writing.
- Does the release cover the matters raised by the proceeding and your client's instructions? Has GST been considered?
- If the release is wider than the matters raised by the proceeding, advise your client about this and the ramifications.
- Document your client's instructions and your advice in relation to settlement negotiations.

Deadlines

- Create a well developed system for tracking deadlines, including follow up reminders. Actively monitor its effectiveness.
- Act quickly in obtaining evidence.
- If your client wants to delay in obtaining evidence, set out the risks of doing so in writing and confirm that the client is taking the risk.
- Ensure you issue the proceeding in the name of the correct plaintiff(s) and against the correct defendant(s).
- Be careful about the method of lodging applications and proceedings when deadlines are near.
- Take note of, and diarise carefully, any self-executing orders.
- Review files on a regular basis.

Generally

- ❑ Keep detailed file notes of all conferences and all telephone conversations with your client and others.
- ❑ Your file notes should -
 - be dated;
 - identify the author;
 - record the duration of the attendance;
 - record who was present or on the telephone;
 - be legible to you and someone else;
 - record the substance of the advice given and the client's response/instructions; and
 - be a note to the file rather than a note to yourself.
- ❑ Confirm all of your advice in writing to the client.

**Legal Practitioners'
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