

AILA SEMINAR ON RECENT DEVELOPMENTS IN PROFESSIONAL LIABILITY

8 JUNE 2016

'The Ascendency of statutory law'

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A BACKGROUND

1. The landscape for professional liability claims has altered considerably in the last 30 years. Four forces are responsible for this.
2. First, is the introduction of *Civil Liability* legislation across the States and Territories in about 2002. By design the legislation put a brake upon civil liability claims (generally), particularly in the recovery of damages, but also in its re-statement of basic principles of liability, relating to when negligence occurs, the test for causation and, most significantly, proportionate liability for claims for damages involving economic loss and property damage (as distinct from personal injury). The general impact of civil liability legislation is a large subject, beyond the scope of this presentation, save where reference is made to certain key decisions of the High Court concerning pivotal provisions affecting professional liability, such as causation and proportionate liability.
3. Secondly, repeated decisions of the High Court arrested the trend of authorities from the 1980s which extended the responsibility of professionals, even to those persons with whom the solicitor did not contract.
4. Thirdly, state and federal legislatures have stepped in to provide, or re-fashion, certain statutory regimes of protection for consumers and investors. To the extent this has affected professionals, this development has acted as something of a counterweight to the developments in the common law. My thesis is that these statutory regimes offer opportunities to claimants who have suffered adverse results, in the sense of economic loss or property damage, from the services of their professionals and this is the area where legal representatives for claimants will increasingly devote their attention in deciding to bring and prosecute legal proceedings.
5. Finally, the legislative regimes regulating professionals are yielding opportunities for claimants to seek various means of redress, including the recovery of capped compensation orders, outside of litigation, without undertaking the risks (and stress) of litigation.

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6. The next section (B) considers the first of the two developments mentioned in tandem. The third and fourth developments are then also grouped in the final section (C) together as, collectively, they are beneficial for those persons reliant upon professional services.
7. Overall, as the title of this presentation suggests, it is statutory law that that has developed as the main source of law for professional liability claims.

B RESTRICTIONS IN COMMON LAW (AS MODIFIED)

Duties of care to third parties

8. In most cases of professional liability, the question of duty does not arise. Where the claimant is the client of the professional, it is axiomatic that the professional will be determined to owe a duty of care to the client that correlates to the implied term of care and skill in the retainer. More frequently, an issue may arise as to whether the solicitor's obligations extend (in tort) beyond the description of the obligations in the retainer – the so-called 'penumbral' duty of care. Aside from that possibility, there is also scope for differing results on a client's action against its professional service provider in tort or contract, in such matters as the measure for damages.
9. What I wish to focus upon is the rare situation of claimants who are not actually clients of the professional service provider who may yet have viable claims against the professional. In this regard, perhaps the most prominent feature of recent cases concerning professional liability has been the High Court's winding back of the march of the tort of negligence that occurred in the 1980s in cases such as *Hawkins v Clayton* (1988) 164 CLR 539, *Bryan v Maloney* (1995) 182 CLR 609 and *Hill v Van Erp* (1997) 188 CLR 159. Before I get to the recent cases, it is as well to note that the impetus to Courts recognising a duty of care to persons not in a contractual relationship developed from the House of Lords' decision in *Hedley Byrne & Co v Heller & Partners Ltd*². In that case, the liability was grounded upon a person's assumption of responsibility in providing advice or information to another and the latter's reliance upon the advice or information³.
10. The first case that I wish to discuss was not a case concerning the prevention of economic loss to third persons, but one of psychiatric injury. It is *Hunter and New England Local Health District v McKenna* (2014) 253 CLR 270. It is included because the principles referred to in the unanimous judgment of the Court show

² [1964] AC 465

³ This principle of liability has been accepted by the High Court in negligent misstatement cases such as *MLC v Evatt* (1968) 122 CLR 556 and *L Shaddock & Associates v Parramatta CC* (1970) 122 CLR 628

the significant array of hurdles that third party claimants have in sustaining the existence of a duty of care against a professional.

11. In this case, relatives of a person who died after taking custody of a recently released psychiatric patient, sued the local health care service for the patient's release. This was after the former patient killed the deceased. The NSW Court of Appeal determined that the deceased was owed a duty either not to have the psychiatric patient released into his care or, alternatively, to have reasonable care to prevent the (recently released) patient causing the deceased harm. In doing so, the Court of Appeal tried to reconcile how a duty to the relatives of the deceased could fit with a duty to the deceased itself. Ultimately, the High Court did not find it necessary to determine whether any duty of care to the deceased person was synonymous with the putative duty of care to the claimant relatives. This was because the statutory powers, duties and responsibilities of doctors and hospitals (including the obligation not to continue to detain a person unless a superintendent considered no other less restrictive care was appropriate) was inconsistent with a common law duty of care.
12. The High Court in this case took the opportunity to affirm considerations that denied the existence of a duty of care, from earlier cases, including:
 - The nature of the harm;
 - The existence of statutory powers and discretions (which were determinative in this case);
 - The indeterminacy of the class of victims; and
 - Coherence in the law following flowing from recognition of a duty of care.
13. The next case is ***Brookfield Multiplex Ltd v Owners – SP No. 61288*** (2014) 254 CLR 185, which featured a claim for economic loss from the owners corporation against the builder of a large building (in respect to which apartments were to be sold to investors) for the cost of rectifying alleged latent defects in the common property. Here, there was a contract in existence between builder and developer. The Court of Appeal had determined that a duty of care to the owners corporation existed which corresponded with a duty of care owed by the builder to the developer. This determination was set aside on appeal to the High Court. The High Court took the opportunity to review its earlier decisions in ***Bryan v Maloney*** (1995) 182 CLR 609 and ***Woolcock Street Investments Pty Ltd v CDG Pty Ltd*** (2004) 216 CLR 515. In the plurality judgment of Crennan, Bell and Keane JJ, their Honours referred to *Bryan v Maloney* as an illustration of a case where there was an assumption of responsibility and known reliance (and the since discarded notion of proximity), as well as a situation where there was a congruence of responsibilities owed by the builder to the first owner, as well as subsequent owners. *Woolcock Street Investments* introduced, or at least emphasised the idea of a claimant's 'vulnerability', not just with the reasonable

foreseeability of loss if reasonable care was not taken by the defendant, but the claimant's inability to take steps to protect itself from the risk of loss.

14. In **Brookfield Multiplex**, the plurality judgment emphasised the primacy of the law of contract in protecting persons against the unintended harm to economic interests (not consequential from personal injury or property damage), where that harm consists of disappointed expectations under a contract. The common law was not designed to alter the allocation of economic risks between contracting parties by supplementing or supplanting contractual terms by duties imposed by the law of tort: at [132]. In this case, to supplement the builder's contractual obligations to the developer with an obligation to take reasonable care to avoid a reasonably foreseeable economic loss to the developer in having to make good the consequences of latent defects caused by the builder's work would alter the allocation of risks effected by the contract. Further, the circumstance that the owners corporation, or individual lot owners, had expressly restricted contractual rights was inconsistent with a duty in tort owed by the builder to the owners corporation.
15. The third and final case I wish to discuss is the High Court's decision in **Badenach v Calvert** [2016] HCA 18 (11 May 2016). This case concerned a claim by an intended beneficiary to a will against a solicitor on the basis of the latter's negligent advice to the client testator. The negligence was alleged to consist in the solicitor's failure to inquire of the client whether he had any family members and thereafter fail to advise the client of the prospect that the family member might later bring a claim on the estate under the *Testator's Family Maintenance Act*. The beneficiary claimant sought to bring his case in alignment with the High Court's earlier decision in **Hill v Van Erp** (1997) 188 CLR 159, in which a solicitor's duty of care to an intended beneficiary was recognised.
16. The claimant's argument on duty failed, and to reach that conclusion, the plurality (French CJ, Kiefel and Keane JJ) distinguished **Hill v Van Erp**. In that earlier case, the interests of the testatrix and intended beneficiary were aligned and final testamentary instructions given to the solicitor. The solicitor's obligation was limited and defined, as relating to the carrying out of the testamentary intentions. In the instant case, however, the duty of care propounded would involve the solicitor giving (what Gageler J, in his concurring judgment characterised as) estate planning advice. Gordon J held that it could not be said that the interests of the testator and the beneficiary were the same, consistent or coincident. In their separate concurring judgments, Gageler and Gordon JJ both emphasised that the critical factor was the client's instructions to the solicitor. As Gageler J put it: "where the testator's instructions stop, so does the solicitor's duty of care to the intended beneficiary" ([62]).

17. In summary, since at least the turn of the century, the High Court has rolled back the scope of liability of professionals to third parties in common law. Particular emphasis has been put upon the need for coherence in the law: if duties are to exist to both client and third party, there is a need for congruence and consistency in the content of those duties. If duties are to exist to third parties, particular attention needs to be drawn to identifying that the third party is in a position where it is 'vulnerable', in the sense of not being able to protect itself against the risk of harm.

Causation

18. The test for causation for claims in common law has been modified by the Civil Liability legislation. As explained in *Wallace v Kam* (2013) 250 CLR 375, there are two aspects: factual causation and a determination that the 'scope of liability' (ie it is appropriate for the the scope of the defendant's liability to extend to the harm so caused). Determination of the first aspect involves the application of a 'but for' test of causation. The second aspect commonly involves consideration of whether the particular case falls within an established class of case, ie through the application of precedent. Practically, the scope of liability for the consequences of negligence is often, if not always, co-extensive with the content of a duty of care.

19. In *Badenach*, the High Court affirmed the approach it had taken in *Tabet v Gett* (2010) 240 CLR 537, by rejecting, as a test for causation, the proposition that there was a loss of a chance that the client may have undertaken certain transactions to the benefit of the beneficiary. Such approach confuses the issue of the loss caused with the issue of identifying damages flowing from the loss. An opportunity that is lost is compensable in tort, however, a claimant must, in this type of case, prove that it was more probable than not that s/he or it would have received a valuable opportunity (at [39]-[41]).

Proportionate liability

20. The most significant development affecting professional liability claims was the introduction of proportionate liability for claims for economic loss or property damage. By s 34(1) of the *Civil Liability Act* 2002 (NSW), an 'apportionable claim' will include a claim of that kind "arising from a failure to take reasonable care". There is a live controversy as to what this expression means: whether the actual cause of action has to have, as an element, the absence of reasonable care, or whether, as a matter of fact, the loss or damage has 'arisen' from the absence of care, whatever the legal source of the defendant's responsibility.

21. By section 34(2), an apportionable claim also includes a claim for economic loss or property damage in an action for damages under the Australian Consumer Law (or, formerly, the Fair Trading Act) for contravention of the statutory prohibition against misleading conduct.

22. The High Court's decision in ***Hunt & Hunt Lawyers v Mitchell Morgan*** (2013) 247 CLR 656 revealed, amongst other things, the importance of characterising the 'damage' suffered by the claimant. In that case, the damage was the lender's inability to recoup a loan advanced. Characterised in that fashion, the majority concluded that the solicitor's negligence (in drafting the loan and security documentation) separately and independently caused the same 'damage' as the conduct of the fraudster. This was enough for the solicitor to be able to invoke proportionate liability to limit its loss, by contending that the fraudster was a concurrent wrongdoer. On the minority's view, the conduct of the solicitor caused a different injury to the client to that which had been caused by the fraudster.

C OPPORTUNITIES IN STATUTORY LAW

Representational liability

23. In ***Miller & Associates v BMW Australia*** (2010) 241 CLR 357 French CJ and Kiefel J described (at [5]) the cause of action for contravention of statutory prohibitions against misleading or deceptive conduct in trade or commerce as a 'staple of civil litigation', and compared (and contrasted) its simplicity relative to the torts of negligence, deceit and passing off.
24. One of the advantages, compared to the tort of negligence, is that it is unnecessary for the statutory action to prove fault. Another advantage, particularly for claimants who are not in contracts with the contravener, is that it is unnecessary to even establish the existence of a duty of care and, perhaps, also any assumption of responsibility, say, for the provision of a statement, information or advice. An illustration of the reach of the prohibition is where statements or information are widely disseminated to a class of persons, where the person or entity making the statement of disseminating the information does not know the recipients (nor has any contractual relationship with the recipient), and may not even subjectively intend that the statement will be relied upon. This was seen in ***ABN Amro Bank NV v Bathurst Regional Council*** (2014) 224 FCR 1, where it was found that Standard & Poors, a credit rating agency, had engaged in misleading or deceptive conduct when it assigned a credit rating to a financial instrument without a reasonable basis for the opinion underlying the rating.
25. Another illustration of the reach of the prohibition, in comparison with the tort of negligence, was the auditor case of ***Travel Compensation Fund v Tambree*** (2005) 80 ALJR 183. That was a case involving the regulatory scheme for travel agents, who had to submit audited financial statements to the TCF as a requirement for the agents to continue to receive a license. The financial statements prepared for by an accountant and audited by another were misleading in that they did not show a true and fair view of the financial position of one of the travel agents. This was relied upon by the Fund. Note here that

there was no retainer between the TCF and the accountant and auditor, but this did not prevent the operation of the statutory prohibition.

26. The basic prohibition against misleading or deceptive conduct in trade or commerce now appears in s 18 of the **Australian Consumer Law** (Sch 2 to the **Competition and Consumer Act 2010** (Cth)). Cognate provisions appear in the **Corporations Act 2001** (Cth) (s 1041H) and **Australian Securities & Investments Commission Act 2001** (Cth) (s 12DA) in respect to financial services.
27. The statutory prohibition, plainly affecting and, indeed re-shaping, norms of conduct in trade and commerce, has impacted the conduct of professionals. This is seen in many contexts: express representations, non-disclosure of information without which conduct would be misleading, incorrect statements and wrong advice. It may also extend to implied representations contained within predictions, or 'forward-looking' statements: the courts have recognised that when advice or opinions are proffered, there may be implied representations that there are reasonable grounds for the advice or opinion⁴, and that reasonable care has been exercised in providing the opinion or advice⁵.

Causation

28. **Travel Compensation Fund** is significant for another purpose, namely the issue of causation, which was the issue determined in the High Court. In the New South Wales Court of Appeal, it was determined that illegal conduct of the travel agents, in continuing to trade after it had lost its license had affected the loss that the TCF could recover from the professionals. This determination was overturned by the High Court. Gleeson CJ, and the plurality judgment of Gummow and Hayne JJ, emphasised that where the action is for damages for a statutory obligation, the objects of the statute, and policy considerations, will be relevant. In this case, it was determined that the travel agent's conduct was not relevant to the question of whether the professionals' conduct caused loss, and was certainly not any intervening cause that severed a causal connection. This was so because the professionals participated in a scheme which enabled the TCF to request and rely upon financial information about participating travel agents and the professionals engaged in misleading conduct by the part they played in providing false information. As Gleeson CJ put it (at [32]), where information about some risky undertaking (eg the financial health of a travel agent) is provided to someone for the purpose of inducing that person to rely upon it, if the provider of information engages in misleading conduct such that the risk against which the protection is sought materialises (the travel agent turns out not to be in a position of financial health), the purpose of the statute would treat the loss as resulting from the misleading conduct.

⁴ *Forrest v ASIC* (2012) 247 CLR 486 at [102]

⁵ *Heydon v NRMA Ltd* (2000) 51 NSWLR 1 at [307]

29. To be sure, normative considerations also intrude into the test of causation at common law (under the 'scope of liability' test) and, as noted, that is often, though not always, linked with identification of the content of the duty of care. But legislation such as the **Australian Consumer Law**, which has as a statutory object, advancement of consumer protection, will require courts to be more attuned to statutory policies than might be the case for the test of causation in general law.
30. Renewed impetus may have been given to the use by claimants of provisions such as s 18 of the ACL and the equivalent provisions in federal law (in preference to common law claims) by reason authorities in the Supreme Court of New South Wales and the Federal Court of Australia recognising, or perhaps affirming, that reliance is not a necessary element to a claim for damages for contravention of the statutory prohibition. The decisions that I refer to are **In the matter of HIH Insurance Ltd (in liq)** [2016] NSWSC 482 and the interlocutory decision of the Federal Court is **Caason Investments Pty Ltd v Cao** [2015] FCAFC 94. Where, for example, an announcement is made by a company or person in trade or commerce affecting the market price for a good, a claimant can establish a causal link between a misleading announcement and loss if s/he is able to prove that the announcement inflated the market price for the good even if the claimant was unaware of the announcement.

Limitations on recovery may not extend to certain actions

31. The limitations on recovery of damages found in the common law (contract and tort) arising from contributory negligence and proportionate liability are also reflected when a claim for damages is brought (under s 236 of the **ACL**, s 1041I of the **Corporations Act** and s 12GF of the **ASIC Act**) for contravention of the statutory prohibition. But where, in the case of professionals who engage in misleading or deceptive conduct in relation to the provision of financial services, some other, more specific, obligation is contravened, conceivably those limitations may not apply.
32. Thus, a financial services professional say, who has misleadingly marketed, or promoted his or her ability to provide certain services, may be vulnerable to a claim by a third person (be it client or possibly a third party) who has suffered loss or damage. This is not far away from a professional that is sued because of impliedly representing that he or she has the expertise to provide a service. In this type of situation, the professional may be liable to an action for damages for contravening s 12DB(1)(a) of the ASIC Act.
33. Similarly, a professional who makes or disseminates a materially false statement or information which is likely to induce an investor, say, to make an investment,

either without caring that it is true (or false) or actually or constructively knows that it is materially false, will be liable to an action for damages for contravening s 1041E of the **Corporations Act**.

34. In both these cases, following the High Court's decision in **Selig v Wealthsure** (2015) 320 ALR 47, there would be no deductions for the quantum of damages on account of any contributory fault or proportionate liability, notwithstanding that the conduct would generally be characterised as 'misleading'.

Professional services to 'consumers' under the Australian Consumer Law

35. Clients who pay less than \$40,000 for services rendered by a professional (under a retainer) are treated as 'consumers' for the purposes of the *Australian Consumer Law* (s 3).
36. Plainly, in this context, we are not dealing with large corporates engaging professionals in a complex corporate restructuring, or other such transaction. But for the run of the mill preparation of a will, or conveyancing, (in the case of lawyers) preparation of an individual's tax return (in the case of accountants), or undertaking of a small-scale home renovation (in the case of builders) the provisions of the **Australian Consumer Law** should be of concern to professionals: professional activity is treated by the law as conduct constituting 'trade or commerce' (s 2).
37. That being so, a client ('consumer') has the benefit of several consumer guarantees:
- a. The guarantee of due care and skill (s 60);
 - b. The guarantee that the services will be reasonably fit for the purpose that a client wishes to achieve (s 61(1));
 - c. The guarantee that the services will be reasonably expected to achieve the result.
38. The first of these guarantees is synonymous with the implied term of reasonable care and skill in a retainer and the duty of care that arises in tort.
39. The last two guarantees are predicated upon the client making known (expressly or by implication) the purpose or result that the client wishes to obtain from the services. In the context of a professional-client relationship, it would ordinarily be expected that the client would make known the purpose or result s/he or it wishes to achieve.
40. There is a real advantage to a claimant from these last two guarantees: liability is strict. It is not absolute, but it is strict, in that liability will not depend upon proof of negligence. Liability can result from a mis-match between the purpose or

result made known prior to the delivery of the service and the actual outcome; at least where the service is not reasonably fit for the purpose or result made known.

41. The remedy for non-compliance with these guarantees is also comparatively generous: where, as is often the case with a professional service, the non-compliance with a consumer guarantee cannot be remedied, the client may be able to recover compensation reflecting a loss of value in the services provided (s 267(3)) and/or for consequential loss that foreseeably arises from the non-compliance with a guarantee (s 267(4)).
42. At least where the consumer brings claims for compensation or damages under these provisions, it is unlikely that the quantum will be reduced because of contributory fault (per s 137B of the **Competition and Consumer Act**) or proportionate liability (Part VIA of the **Competition and Consumer Act**), because those regimes are, by their terms, restrictions on actions for damages under s 236 of the **Australian Consumer Law**.
43. Matters are not all bleak for professionals, however, for two reasons. First, the purpose and result guarantees will not arise at all if circumstances show that the consumer did not rely upon, or it was unreasonable for him or her to rely upon, the professional's skill or expertise⁶. Thus a meddling client who instructs a professional to perform a service in a certain way, perhaps subject to certain restrictions, and who suffers loss may fall foul of this exception. By way of further example, where the professional emphatically indicates that the result or purpose that the consumer makes known cannot be achieved. A lawyer who tells the client that s/he cannot warrant that the client will win the case, or the doctor who tells a patient that s/he cannot warrant the success of surgical treatment will have taken steps along the path to rely upon this exception.
44. Secondly, the right to claim compensation or damages under s 267 will not arise because of events beyond the professional's control after the service has been delivered⁷.

Other regimes for client recovery of compensation

45. Certain legislative regimes alleviate the position of clients who have suffered loss through the negligence of their professionals and the existence of those regimes may encourage courts to not extend coverage any further by the development of the tort of negligence. This conservative approach by courts serves the value of legal coherence referred to above.

⁶ Section 61(3) of the Australian Consumer Law

⁷ Section 267(1)(c) of the Australian Consumer Law

Implied warranties

46. An example of this is Part 2C of the **Home Building Act** 1989 (NSW), which provides protection for persons who buy homes that turn out to be defective, through the use of statutory warranties. This regime, and its limitations, avowedly deterred some of the Justices of the High Court from finding liability on the part of a developer to the owners corporation (and, by extension, individual lot owners) of commercial property in **Brookfield Multiplex**.
47. Implied warranties – similar in nature to consumer guarantees - also arise in connection with contracts for the supply of financial services: s 12ED of the **ASIC Act** 2001 (Cth).

Advisory obligations

48. Still in the realm of financial services professionals, the relatively new ‘best interest’ obligations in Part 7.7 of the *Corporations Act* provide a direct cause of action (s 961M of the *Corporations Act*) for a client; where the quantum of damages is unaffected by the regimes for contributory fault or proportionate liability.

Dispute resolution agencies & Discipline

49. It is often an incident to the grant of a license that the license-holder be made amenable to an external dispute resolution agency to deal, expeditiously and cost-effectively, with small disputes. An example of this is the Financial Ombudsman Service. This scheme covers most financial services licensees. The essence of the scheme is a 2-step determination. First, FOS makes a ‘recommendation’ which, if accepted by the parties, resolves the dispute. Secondly, FOS makes a determination that is binding on all parties if the applicant accepts it.
50. Separately, disgruntled clients may seek to avoid the cost and uncertainty of litigation by making complaints to professional associations. For example, a client may complain about his or her lawyer for engaging in ‘unsatisfactory professional conduct’ (a concept apt to embrace professional negligence). The remedy might well include not only repayment of professional fees but also the recovery of compensation in respect to loss suffered by a client as a result of the professional’s conduct.

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List of cases

Early authorities: expansion of liability of professionals to third parties

Hawkins v Clayton (1988) 164 CLR 539

Bryan v Maloney (1995) 182 CLR 609

Hill v Van Erp (1997) 188 CLR 159

Recent authorities: narrowing liability of professionals to third parties

Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515

Hunter and New England Local Health District v McKenna (2014) 253 CLR 270

Brookfield Multiplex Ltd v Owners – SP No. 61288 (2014) 254 CLR 185

Badenach v Calvert [2016] HCA 18 (11 May 2016)

Other important cases

Wallace v Kam (2013) 250 CLR 375

Hunt & Hunt Lawyers v Mitchell Morgan (2013) 247 CLR 656

ABN Amro Bank NV v Bathurst Regional Council (2014) 224 FCR 1

Travel Compensation Fund v Tambree (2005) 80 ALJR 183

In the matter of HIH Insurance Ltd (in liq) [2016] NSWSC 482

Selig v Wealthsure (2015) 320 ALR 47

Statutory remedies

Australian Consumer Law

Australian Securities & Investments Commission Act 2001 (Cth)