

INTRODUCTION

Each year Lawguard Management Pty Ltd provides a commentary on changes to the law likely to affect the risks to Underwriters of the Legal Practitioners Professional Indemnity Insurance Scheme. This year Lawguard commissioned Mr Nigel Wilson of Bar Chambers to provide a written review of the more significant legislative and judicial developments during the period 1 January 2009 to 31 December 2009 which may bear upon a solicitor's potential liability or on a damages award generally.

OVERVIEW

A number of cases of interest in the year under review involved issues regarding the liability of legal practitioners which are relevant to legal practitioners.

More generally, during the year under review the High Court has again emphasised:

- the role of personal responsibility and autonomy in determining the circumstances in which duties of care are owed;
- the distinction between the responsibility of employers towards independent contractors as compared to employees.

As to matters of practice and procedure, the High Court has reviewed an earlier decision which it was perceived had led to an unduly permissive approach to belated amendments being made in the course of litigation.

At the Commonwealth legislative level, the Exposure Draft Bill containing the amendments to the *Insurance Contracts Act 1984 (Cth)* which was released in February 2007 still has not yet been enacted by the Commonwealth Parliament.

The Commonwealth Government has recently received a recommendation from the National Consultation Committee that a Commonwealth Charter of Human Rights be introduced but no legislation to that effect has been implemented at this stage.

In relation to South Australian legislative developments, the *Legal Profession Bill 2007 (SA)* has still not been enacted.

CASES

1. Cases involving legal practitioners and the "advocate's immunity"

- 1.1 ASIC v Somerville & Ors [2009] NSWSC 934
- 1.2 Williams v Pagliuca [2009] NSWCA 250
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- 2.2 *ACQ Pty v Cook; Aircair Moree Pty Ltd v Cook* [2009] HCA 28
- 2.3 *C.A.L. No 14 Pty Ltd v Motor Accidents Insurance Board; C.A.L. No 14 Pty Ltd v Scott* [2009] HCA 47
- 2.4 *Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem* [2009] HCA 48
- 2.5 *Kirkland-Veenstra v Stuart* [2009] HCA15
- 2.6 *Sydney Water Corporation v Turano* [2009] HCA 42

3. In matters of practice and procedure

- 3.1 *Australian Securities & Investments Commission (ASIC) v McDonald (No 5)* [2009] NSWSC 1169
- 3.2 *AON Risk Services Australia Limited v Australian National University* [2009] HCA 27

LEGISLATION AND GENERAL

4. South Australian legislation

- 4.1 The draft *Legal Profession Bill 2007*
 - 4.1.1 *Administration and Probate (Distribution on Intestacy) Amendment Act 2009*
 - 4.1.2 *Criminal Investigation (Covert Operations) Act 2009;*
 - 4.1.3 *Crown Land Management Act 2009;*
 - 4.1.4 *Fair Trading (Telemarketing) Amendment Act 2009;*
 - 4.1.5 *Statutes Amendment and Repeal (Fair Trading) Act 2009;*

5. Commonwealth legislation

- 5.1 *Insurance Contracts Act 1984*
 - 5.1.1 *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009 and Federal Court of Australia Amendment (Criminal Jurisdiction) Act 2009*
 - 5.1.2 *Corporations Legislation Amendment (Financial Services Modernisation) Act 2009*

6. Human rights and compensation

- 6.1 *Morro v Australian Capital Territory* [2009] ACTSC 118
- 6.2 *Commonwealth Charter of Human Rights*



CASES

1. Cases Involving legal practitioners and the “advocate’s immunity”

1.1 ***ASIC v Somerville & Ors [2009] NSWSC 934***

In *ASIC v Somerville & Ors* the Supreme Court of New South Wales found that eight non-related directors of separate companies had breached their duties under the Act by engaging in “phoenix” type asset-stripping.

The court found that the purpose and effect of the transactions was to take assets out of the reach of creditors.

Mr Somerville advised on and provided the documents to effect the transactions. The Court found that, but for his involvement, the transactions would not have taken place.

Pursuant to section 79 of the Act, a person is involved in a contravention if they have “*aided, abetted, counselled or procured the contravention.*” Acting Justice Windeyer held that:

“when advice is given by a solicitor to carry out an improper activity and the solicitor does all the work involved in carrying it out apart from signing the documents, it seems to me that there can be no question as to liability.”

1.2 ***Williams v Pagliuca [2009] NSWCA 250***

This case related to a claim for negligence against a solicitor who acted for both the vendor and the purchaser of units in a unit complex in which there was a purported exchange of contracts but the counterparts were not identical.

Whilst there were a series of claims between the vendors and the purchasers and against the solicitor (Williams) the ultimate determination of the New South Wales Court of Appeals was that a fair assessment of the value of the Vendor’s lost commercial opportunity to secure completion of the contract of sale was 30% of the difference between the contract price and the actual sale price.

1.3 ***Coshott v Barry [2009] NSWCA 34***

In this case the New South Wales Court of Appeal dismissed an appeal by Mr and Mrs Coshott who had unsuccessfully sued their former solicitor regarding the conduct of litigation on their behalf. The Court of Appeal affirmed the trial judge’s findings on the basis that, inter alia, Mr Barry was not negligent in the conduct of the actions and that it was Mr Coshott (not Mr Barry) who decided which claims should be made in their statement of claim and their amended claim (relating to a claim against Citibank).

The trial judge had rejected the claims regarding the Citibank proceedings also by reason of “advocate’s immunity”. However, the Court of Appeal held that the finding that “[d]etermining what claims for relief should be included in the pleading was work done out of court which led to a decision effecting the conduct of the case in Court” was a finding which went too far. This was because Mr Coshott’s case was that Mr Barry breached his duty to advise virtually from the inception of the retainer. Ipp JA (Beazley and Campbell JJA concurring) held that such an alleged failure “*would be too far removed from the actual conduct of the trial to be covered by the doctrine of advocate’s immunity.*” Ipp JA concluded that when the retainer commenced, a failure to advise as alleged could not be regarded, properly, as leading to a decision affecting the conduct of the case in court, applying the remarks of Mason CJ in *Giannarelli v Wraith* at 560. Ipp JA concluded that the period from the time the retainer commenced to the trial itself was too long for the requisite connection to the conduct of the case in court to be established.



1.4 ***ASIC v McDonald (No.11) [2009] NSWSC 287***

In this case ASIC commenced civil proceedings against James Hardie Industries Limited (JHIL), James Hardie Industries NV (JHINV), seven former non-executive directors and three former executives of JHIL for breaches of the *Corporations Act 2001* in the relation to the preparation and approval of announcements to the ASX regarding a sufficiency of funds to meet legitimate compensation claims anticipated by asbestos products.

On 20 August 2009 Justice Gzell refused to exonerate any of the former board members and:

- disqualified the CEO from fifteen years for managing a company and ordered that a fine be paid of \$350,000;
- disqualified the general counsel for seven years from managing a company and ordered the payment of a fine of \$75,000;
- disqualified the CFO for five years from managing a company and ordered the payment of a fine of \$35,000;
- disqualified each of the non-executive directors for five years from managing a company and ordered the payment of a fine of \$30,000 each; and
- James Hardie NV was ordered to pay a fine of \$80,000.

One of the impacts of the case is obviously the potential exposure to claims for individuals below board level, including general counsel, and their insurance policies. Appeals have been lodged.

2. **Other High Court cases of interest**

The High Court decided a number of negligence cases of interest during the year under review.

2.1 ***Leighton Contractors Pty Ltd v Fox; Calliden Insurance Limited v Fox [2009] HCA 35***

The High Court held that there was no duty on a principal a sub-contractor to provide training in the safe method of carrying on every trade and conducting every specialized activity on a construction site. The Court held that the reason for this is because the principal contractor is unlikely to possess detailed knowledge of safe work methods across the spectrum of trades involved in construction work. Further, a duty to provide training in the safe method of carrying out the contractor's specialized task was inconsistent with maintenance of the distinction that the common law draws between the obligations of employers to their employees and of principals to independent sub-contractors.

2.2 ***ACQ Pty v Cook; Aircair Moree Pty Ltd v Cook [2009] HCA 28***

This was an unusual case in which a crop dusting plane damaged an electrical conductor in a cotton field. An electrical linesman was injured when approaching line to repair it. The High Court held that the claim was available pursuant to Damage by Aircraft Act 1999 (Cth) as it was "something" that was the result of an impact of an aircraft in flight.

The High Court found that:

- The words of the legislation were brief and general;
- The circumstances in which they may or may not apply were numerous and diverse;
- It was undesirable to deal with possible applications of the legislation which were not essential for the decision in this case. Having said that, the High Court refused to differentiate between a fire fighter who was summoned to fight a fire which had been started by a plane exploding or landing and the situation in this case.



Whilst the case was the first occasion in which the Courts had applied the legislation, the Court's decision is a timely reminder that sometimes legislation which has not been applied before must be considered and can give rise to liabilities in unusual circumstances.

2.3 C.A.L. No 14 Pty Ltd v Motor Accidents Insurance Board; C.A.L. No 14 Pty Ltd v Scott [2009] HCA 47

This was a case in which the High Court held that no duty of care was owed by licensed premises to call the wife of patron to collect the patron.

The Court emphasised that one of the difficulties in the imposition of such a duty was that the duty conflicted with Mr Scott's autonomy. The duty on the Licensee would have prevented Mr Scott from acting in accordance with his emphatic desire, in the case at hand, to ride his wife's motorcycle home.

Critically, the majority held – *“The reason is that outside exceptional cases, which this case is not, persons in the position of the Proprietor and the Licensee, while bound by important statutory duties in relation to the service of alcohol and the conduct of the premises in which it is served, owe no general duty of care at common law to customers which requires them to monitor and minimise the service of alcohol or to protect customers from the consequences of the alcohol they choose to consume.”*

The High Court emphasised that its decision was not a determination on more general questions about the duty of care owed by publicans to their customers or to persons other than their customers and that the resolution of these questions in future will be likely to require consideration of the liquor licensing laws and the civil liability statutes of the relevant State or Territory.

2.4 Adeels Palace Pty Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem [2009] HCA 48

The High Court held that a duty was owed by operator of licensed premises to a patron to take reasonable care to prevent injury from the violent, quarrelsome or disorderly conduct of other persons. However, the High Court held that causation was not established.

The majority of the High Court held that, contrary to the submissions on behalf of Adeels Palace, its decision its earlier decision in the *Modbury Triangle* case did not dictate the conclusion that Adeels Palace owed no relevant duty of care to the plaintiffs in the present cases.

The High Court held that like the claims now under consideration, the claim that was made in *Modbury Triangle* was for damages for personal injury suffered as a result of a criminal assault.

The High Court held that several considerations set the present case apart from *Modbury Triangle* and pointed to the conclusion that Adeels Palace owed each plaintiff a relevant duty of care:

- the complaint that was made in these cases was that the occupier of premises failed to control access to, or continued presence on, its premises.
- the premises concerned were licensed premises where liquor was sold. They were, therefore, premises where it is and was well recognised that care must be taken lest, through misuse and abuse of liquor, "harm [arise] from violence and other anti-social behaviour".
- thirdly, the particular duty said to have rested on the occupier of the premises (who was the operator of the business that was conducted on the premises) is a duty to take reasonable care to prevent or hinder the occurrence of events which, under the Liquor Act, the licensee was bound to prevent occurring – violent, quarrelsome or disorderly conduct. The High Court noted that although variously expressed in the legislation of other Australian jurisdictions, the evident scheme of all liquor licensing laws in Australia is to minimise anti-social conduct both on and off licensed premises associated with consumption of alcohol.



The High Court held that in the circumstances reasonably to be contemplated before the restaurant opened for business on 31 December 2002 as likely to prevail on that night, Adeels Palace owed each plaintiff a duty to take reasonable care to prevent injury to patrons from the violent, quarrelsome or disorderly conduct of other persons.

The Court did not resolve the question of breach of the duty of care and held that it would not be useful to do so and “would not establish any rule about when or whether security personnel should be engaged by the operators of licensed premises.”

However, the Court decided in relation to causation that the evidence at trial did not show that the presence of security personnel would have deterred the re-entry of the gunman into the restaurant. That conclusion could have been reached only if it was assumed that the gunman would have acted rationally. But, as was pointed out in *Modbury Triangle*, “[t]he conduct of criminal assailants is not necessarily dictated by reason or prudential considerations”. The gunman’s conduct at the restaurant on this night was dictated neither by reason nor by prudential considerations. He had shot a man who had struck him during a mêlée that broke out after the confrontation on the dance floor. And before shooting that man, the gunman had shot another man who had done nothing to him and who, defenceless, begged for mercy.

2.5 *Kirkland-Veenstra v Stuart [2009] HCA15*

The High Court held that no duty of care was owed by police officers to a person whom they saw who was proposing to commit suicide and that no duty of care was owed to the deceased’s wife for the psychiatric harm which she suffered.

Chief Justice French emphasised that:

“This is not a case about moral or ethical obligations or what common sense might or might not have dictated as an appropriate course of action for the officers. Those questions may be open to debate and there may be different views about what more the officers could have done in the situation which they found themselves. Their power to apprehend Mr Veenstra was limited and conditional. The case is about whether they owed a legal duty to Mr Veenstra and his wife, breach of which could expose them and the State of Victoria to liability for damages for negligence. Mr Veenstra’s death was a tragedy for him and his wife. That sad fact does not answer the legal question for decision.”

The Chief Justice held that the power to apprehend Mr Veenstra had not been enlivened because he had not “attempted” suicide within the meaning of Section 10 of the *Mental Health Act*.

Justices Gummow, Hayne and Heydon JJ emphasised that Section 10 gave a power to the police officers whereby they “**may** apprehend a person but does not in it terms impose on police officers any obligation to exercise that power of apprehension.”

The majority held that to impose a duty in those *circumstances* “would mark a significant departure from an underlying value of the common law which gives primacy to personal autonomy, for its performance would have the officers control, conduct of Mr Veenstra deliberately directed at himself.”

Justices Crennan and Kiefel also agreed that the appeal should be allowed. Their Honours emphasised that the common law does not recognize a duty to rescue another person and that the plaintiff’s case therefore relied upon the power of apprehension contained in Section 10 of the *Mental Health Act*. Their Honours held that absent the holding of an opinion that the plaintiff’s husband was mentally ill, the power to apprehend was not available. Therefore their Honours held that a condition necessary to the power did not exist in law.



The decision of the High Court emphasises the role of personal autonomy and responsibility where adults are concerned which has been one of the hallmarks of recent negligence decisions of the Court. The other critical feature of the case is the very fine reading of the statute in relation to the non-existence of a duty of care.

2.6 ***Sydney Water Corporation v Turano [2009] HCA 42***

The High Court held that no duty of care was owed by a water authority which was responsible for laying a water main for the risk posed by a tree to a road user when a tree limb subsequently fell killing a driver in the absence of any control over the risk posed by the tree.

The High Court concluded that *"Sydney Water's conduct in laying the water main in this location in 1981 with the consequential alteration to drainage flows from the culvert and any foreseeable risk to the health of the tree did not impose on it a legal duty of care for Mrs Turano's benefit. The reason for this may be expressed as a conclusion that injury to road users as the result of the tree's eventual collapse was not a reasonably foreseeable consequence of laying the water main, as the primary judge held. Alternatively, it may be expressed as a conclusion that in the absence of control over any risk posed by the tree in the years after the installation of the water main there was not a sufficiently close and direct connection between Sydney Water and Mrs Turano, a person present on Edmondson Avenue in 2001, for her to be a "neighbour" within Lord Atkin's statement of the principle."*

3. **In matters of practice and procedure**

3.1 ***Australian Securities & Investments Commission (ASIC) v McDonald (No 5) [2009] NSWSC 1169***

A ruling by Justice Gzell in the ASIC v McDonald litigation which is referred to above emphasises the importance of the proper definition, and compliance with, discovery protocols in litigation.

One of the rulings made involved compliance with discovery protocols which had been ordered by the Court in relation to the management of electronic evidence. The Judge refused to allow ASIC to use evidence which had been obtained outside the terms of the discovery protocols and subsequently refused to allow it to reopen its case to lead evidence which it wanted to tender against the James Hardie interests.

Justice Gzell held: *"This is not a case of mere breach of contract. Minimum standards that our society should expect of ASIC require it, in exercise of its wide powers of discovery, to ensure that it acts within the terms of any protocol with which it has agreed to comply when given direct access to digitally stored information. Otherwise essential privileges against self-incrimination, client legal privilege and privilege against exposure to penalties are at risk."*

3.2 ***AON Risk Services Australia Limited v Australian National University [2009] HCA 27***

In this case the High Court allowed an appeal relating to the matter of practice and procedure in a significant insurance claim.

The High Court rejected the permissive approach to amendments to pleadings based on the decision in *The State of Queensland v JL Holdings Pty Ltd* and held that it should not to be applied in the future.

Australian National University had issued a claim against three insurers and claimed indemnity for losses which it suffered by reason of the destruction of damaged buildings and their contents at the Mount Stromlo Complex by fire in January 2003. ANU's insurance broker (AON Risk Insurance) was joined to the proceedings in June 2005. The claim against it was limited to its failure to arrange the renewal of insurance over some of the property which the insurers claimed was not the subject of insurance.



Two of the insurers also claimed in their defences filed in April 2005 to be entitled to reduce their liability to indemnify ANU with respect to the property which was insured, because the value of the property had been substantially understated by ANU.

On 15 November 2006 which was the third day of a four week period which had been allocated for the trial of the action in the Supreme Court of the Australian Capital Territory, ANU reached a settlement with the insurers. ANU sought an adjournment of the trial of its claim against AON and foreshadowed an application for leave to amend that claim to allege a substantially different case.

It then sought to allege that, under a different contract of services, AON had been obliged to ascertain and declare correct values to the insurers and provide certain advice as to ANU regarding insurance.

The trial judge and a majority of the Court of Appeal of the ACT Supreme Court had granted leave to amend and was influenced by the decision in *The State of Queensland v J L Holdings Pty Ltd*.

The issue to be determined by the High Court was whether or not substantial amendments could be made on the third day of a four week trial. Chief Justice French held that *“Save for the dissenting judgment of Lander J in the Court of Appeal the history of these proceedings reveals an unduly permissive approach at both trial and appellate level to an application which was made late in the day, was inadequately explained, necessitated the vacation or adjournment of the dates set down for trial, and raised new claims not previously agitated apparently because of a deliberate tactical decision not to do so. In such circumstances, the party making the application bears a heavy burden to show why, under a proper reading of the applicable Rules of Court, leave should be granted.”*

The Chief Justice held that insofar as the earlier decision of the High Court in *J L Holdings* may be read to emphasise with the exercise of the discretion to amend pleadings suggested that case management considerations and questions of proper use of court resources are to be discounted or to be given little weight should not be regarded as authoritative.

The joint judgment of Justices Gummow, Hayne, Crennan, Kiefel and Bell also allowed the appeal. Their Honours held:

*“An application for leave to amend the pleadings should not be approached on the basis that a party is entitled to raise an arguable claim, subject to permanent costs by way of compensation. There is no such entitlement. All matters relevant to the exercise of the power to permit amendments should be weighed. The fact of substantial delay and wasted costs, the concerns of case management, will assume importance on an application for leave to amend. Statements in *JL Holdings* which suggest only a limited application for case management do not rest upon a principle which has been carefully worked out in a significant succession of cases. On the contrary, the statements are not consonant with this court’s earlier recognition of the affects of delay, not only upon the parties to the proceedings in question, but upon the court and other litigants. Such statements should not be applied in the future.*

A party has the right to bring proceedings. Parties have choices as to what claims are to be made and how they are to be framed. But limits will be placed upon their ability to affect changes to their pleadings particularly if litigation is advanced. That is why, in seeking the just resolution of the dispute, reference is made to parties having a sufficient opportunity to identify the issues they seek to agitate.

In the past it has been left largely to the parties to prepare for trial and to seek the court’s assistance as required. Those times are long gone. The allocation of power between litigants and the courts arises from tradition and from principle and policy. It is recognized by the courts that the resolution dispute serves the public as a whole, not merely the parties to the proceedings.”



Justice Heydon held:

“The presentation and adjudication of the case in the courts below do cause it to merit a place in the precedent books. The reasons for placing it there turn on the numerous examples it affords of how litigation should not be conducted or dealt with. The proceedings reveal a strange alliance. A party which has a duty to assist the court in achieving certain objectives fails to do so. A court which has a duty to achieve those objectives does not achieve them. The torpid languor of one hand washes the drowsy procrastination of the other. Are these phenomena indications of something chronic in the modern state of litigation? Or are they merely acute and atypical breakdowns in an otherwise functional system? Are they signs of a trend, or do they reveal only an anomaly? One hopes for one set of answers. One fears that, in reality, there must be another.”

Not surprising, Justice Heydon also agreed that the appeal should be allowed.

The case reflects the need for a vigilant approach to pleadings and whether amendments may need to be made. In the event that they do, the courts are expecting an explanation for the basis of the amendment. Often this will involve questions of waiver of legal professional privilege.

LEGISLATION AND GENERAL

4. South Australian legislation

4.1 The draft *Legal Profession Bill 2007* was the subject of the 2007 review, but has not yet been enacted.

Other legislation or amending legislation was passed by the South Australian Parliament during the period in review in the following areas which may be of importance for legal practitioners to note in their general practice:

4.1.1 *Administration and Probate (Distribution on Intestacy) Amendment Act 2009* has increased from \$10,000 to \$100,000 (or an amount greater than that amount if prescribed by regulation) the circumstances in which the rules of distribution of an intestate estate will apply where the intestate is survived by a spouse or domestic partner and by issue;

4.1.2 *Criminal Investigation (Covert Operations) Act 2009*;

4.1.3 *Crown Land Management Act 2009*;

4.1.4 *Fair Trading (Telemarketing) Amendment Act 2009*;

4.1.5 *Statutes Amendment and Repeal (Fair Trading) Act 2009*;

5. Commonwealth legislation

5.1 The Exposure Draft Bill to amend the *Insurance Contracts Act 1984* which was the subject of the 2007 review, has still not yet been enacted.

Other legislation or amending legislation was passed by the Commonwealth Parliament during the period in review in the following areas which it may be of importance for legal practitioners to note in their general practice:

5.1.1 The *Trade Practices Amendment (Cartel Conduct and Other Measures) Act 2009* and the *Federal Court of Australia Amendment (Criminal Jurisdiction) Act 2009* which provides for criminal penalties for contraventions of the anti-competitive arrangements provisions of the Trade Practices Act and for the Federal Court to hear such matters with a jury;



Corporations Legislation Amendment (Financial Services Modernisation) Act 2009 relating to responsible lending obligations of financial services providers for margin lending facilities.

6. Human rights and compensation

As referred to in previous years' reviews, human rights principles have been adopted into Australian domestic law in the Australian Capital Territory (2004) and Victoria (2006) but not in South Australia.

6.1 *Morro v Australian Capital Territory [2009] ACTSC 118*

In *Morro* the Australian Capital Territory Supreme Court considered that section 18(7) of the Human Rights Act (ACT) which provided that anyone who has been unlawfully arrested or detained has the right to compensation for the arrest or detention. On their face the provision gave "a statutory right to compensation" and the Court held that this conferred a "substantive statutory right to compensation", namely damages.

Mr *Morro* had been detained in circumstances in which the Australian Government Solicitor ACT admitted that the orders whereby he had been placed in custody were invalid and had been based on an "incorrect interpretation of the *Crimes (Sentence Administration) Act 2005 (ACT)*". Damages were awarded and, essentially, assessed in accordance with principles for the assessment of damages where someone successfully sues for the tort of false imprisonment.

6.2 *Commonwealth Charter of Human Rights?*

Recently the Commonwealth Government has received a report regarding whether a Charter of Human Rights should be enacted in Australia in which a recommendation is made for one to be adopted by the Federal Government. The recommendation includes an independent cause of action against federal public authorities for breach of human rights but not in relation to economic, social and cultural rights.

At this stage there has been no decision as to whether a Human Rights Charter, let alone one with a statutory right to compensation, will be implemented by the Commonwealth Government.

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