

Should the model litigant defend or appeal on *sensitive legal matters*?

By Peter Gaughwin

Recently there was a report in the *Advertiser* criticising the State Crown because it had filed a defence to one of the "children in State care matters", specifically in relation to whether it had a duty of care to the children at the time.¹ There have been criticisms of the Commonwealth Crown in relation to how it has defended what are called collectively "The *Voyager* cases".² Essentially the arguments can be summarised as: the Crown is the model litigant and therefore should not be defending or appealing such sensitive matters. Sometimes it has been added that "these people have suffered enough; just pay them out and let them get on with their lives".

The "model litigant policy" is one that many persons involved in law are aware of, but such knowledge does not always segue into an understanding.

In brief, the obligation on the Crown³ to act as a model litigant requires that it act fairly and honestly in handling claims and litigation brought by or against the Crown and includes:⁴

- Dealing with claims promptly and not causing unnecessary delay in the handling of claims and litigation.
- Paying legitimate claims without litigation, including making partial settlements of claims or interim payments, where it is clear that liability is at least as much as the amount to be paid.
- Acting consistently in the handling of claims and litigation.
- Endeavouring to avoid, prevent and limit the scope of legal proceedings wherever possible.
- Where it is not possible to avoid litigation, keeping the costs of litigation to a minimum, including not requiring the plaintiff to prove a matter the Crown knows to be true, and not contesting liability when the Crown knows that the dispute is really about quantum.
- Not taking advantage against a plaintiff with limited resources when the claim is clearly arguable.

- Not relying on technical defences unless the Crown's interests would be prejudiced by failure to comply with a particular requirement.
- Not undertaking and pursuing appeals unless the Crown believes that it has reasonable prospects for success or the appeal is otherwise justified in the public interest.
- Apologising where the Crown is aware that it or its officers have acted wrongfully or improperly.

An example relating to the well-publicised *Voyager* cases may illustrate the point. The argument is something like this: P is a victim of the *Voyager* disaster. P has suffered psychiatric injury as a consequence. That injury is PTSD. Why? Because everyone knows that if you are a victim of some wrong you must have PTSD!

It is not as clear cut as this. One of the mandatory requirements that must be met before PTSD can be diagnosed is Criterion F: the person suffering from PTSD must be "clinically significantly distressed or impaired".⁵ If that criterion is not met, then PTSD cannot be diagnosed.⁶ As noted, the Crown has been criticised for the way it has dealt with these cases.⁷ However, it may be argued that the Crown has every right to challenge these claims, as there was clear evidence available that the plaintiffs relying on PTSD to pursue their claims did not meet Criterion F and/or other criteria that must be met before this serious mental illness can be diagnosed.⁸

The reason for this can be explained briefly. In the cases I researched, the lives of the plaintiffs subsequent to the collision did not suggest that they were "clinically significantly impaired" as Criterion F requires. For example, in one case a plaintiff had held a managerial position of significant responsibility for nearly 20 years subsequent to the incident; arguably he did not meet the important Criterion F.⁹ Other cases also showed that some plaintiffs had remained in the Navy as reservists after the collision and after their full-time service requirement had expired.¹⁰ For those not aware of the criteria required before a diagnosis of PTSD can be made, avoidance of anything that recalls the subject trauma is a significant feature of the illness and must

be met before a diagnosis can be reached;¹¹ courts have also stated that each of the criteria for PTSD must be met before a court will find that a plaintiff has suffered PTSD.¹²

Given this evidence, it is clearly arguable that it is in the public interest to defend these claims. Whatever sympathy people may hold for the survivors of the *Voyager* collision - and one hopes that it is positive-it does not follow that the Crown should simply pay out claims as a matter of course. The *Voyager* plaintiffs in the main have claimed that they suffered PTSD as a consequence of the collision; it is their role to prove it. If the Crown and its advisers have reached the view that such a claim is improbable, because mandatory criteria have not been met, then the Crown would be failing in its public duty not to defend such a claim. When the relevant cases are read there can be little doubt that the Crown has behaved as the model litigant should. The corollary is that, if there were little doubt that a plaintiff had suffered psychiatric injury as a consequence of the collision, it would not be model litigant behaviour for the Crown to defend such a claim, unless the question of quantum became a stumbling block.

The answer therefore to the question as to whether the model litigant should defend or appeal decisions related to sensitive matters should be answered in the affirmative, all things being equal. Not defending or appealing sensitive matters that should be defended or appealed, for fear of negative publicity or negative political repercussions, may bring plaudits from lawyers and plaintiffs; it will not, arguably, be a demonstration of a model litigant at work.

1. *The Advertiser* 2009.
2. N Bercovic. "Lawyers still battling authorities over *Voyager*". *The Australian*, 2 May 2008.
3. The word Crown in the context of this article may refer to both the State and Commonwealth Crown.
4. Adapted from "The Commonwealth's obligation to act as a model litigant". Australian Government: Australian Customs Service. Approved 25 March 2008. Similar Guidelines have been approved by individual States.
5. American Psychiatric Association. Diagnostic and Statistical Manual of Mental Disorders, 4th edn. text revision. Washington DC: American Psychiatric Association, 2000 ("the DSM-IV-TR") @ pages 463, 467-468.
6. *Ibid*
7. Op cit note 2
8. Op cit note 5. See also: J Garcia & R Mullen. "Follow up of post traumatic stress disorder symptoms in Australian servicemen hospitalised in 1942-1952." *Australian and New Zealand Journal of Psychiatry* 2008; 42 @ page 547 (letter).
9. For example, see *Burk v The Commonwealth of Australia* (2006). VSC 25; (2008) VSCA 29.
10. *Ibid*; see also *McLean v The Commonwealth of Australia* (1997) NSWSC. Butterworths Unreported Judgements.
11. Op cit note 5.
12. For example *McLean* op cit note 10.