New Part II Division 5C of the Legal Profession Act 1987

Expanded duties of barristers in damages cases*

By Bret Walker SC, President of the New South Wales Bar Association

The enactment of the *Civil Liability Act 2002* amended the *Legal Profession Act 1987* in a very important way for barristers in New South Wales. The insertion of the new Division 5C into Part 11, comprising secs 198J-198N, expressly imposes on barristers duties in relation to cases in which damages are claimed. Those duties involve both positive and negative obligations, disciplinary sanctions and the possibility of personal costs orders.

These provisions do not apply only in personal injuries litigation. They apply across the board in all civil litigation where the remedies sought include what are called damages.

Every barrister practising in New South Wales must be familiar with these provisions. There is no substitute for the careful reading and re-reading of the statutory text.

The Bar should be open to the political view, whether individual barristers accept it or not, that litigation without a modicum of factual support for one's case is a bad thing socially.

The comments which follow are my attempt to interpret these critical provisions for everyday practice, including consideration of some questions and perceived problems which have been raised with me already by members of the Bar. I am grateful for the assistance of those who have spoken with me or corresponded with me and the Association about these provisions and their application in practice. Discussion, debate and criticism are vital to the profession understanding them. In due course, after experience has been gained in practice, that process may well enable improvements to be made to the present legislation. It follows that my comments are really provisional, so as to promote and advance the necessary debate.

Political background

The mischief addressed by parliament, to be gathered from Hansard and the public and political discussions which preceded preparation of the Bill, was the institution and continuation of claims for damages which were speculative in the sense that essential facts were unknown to the plaintiff. During the debate, truly hopeless contentions of law were added to the vices under scrutiny. Finally, the maintenance of defences devoid of factual support or without merit as a matter of law was added as another evil to be remedied.

No-one with knowledge of legal practice in this state, and experienced in civil litigation, and who is concerned to be fair, would ever have described the state of affairs in such pessimistic terms. It should go without saying that the suggestion that this is typical of personal injuries litigation in New South Wales would be ludicrous. However, legislation does not have to be confined to remedying states of affairs which are endemic or usual.

The experience of most barristers, especially in the debt-collecting and personal injuries areas, would be that occasionally cases happen where one side or the other has precious little to go on. The Bar should be open to the political view, whether individual barristers accept it or not, that litigation without a modicum of factual support for one's case is a bad thing socially.

What these background matters indicate is that the new law is intended to make a difference but that the difference is material only in a relatively very small number of marginal cases.

Assumed features of litigation

These amendments were inserted into a statute regulating the conduct of the legal profession in New South Wales. Some important features of the administration of justice in New South Wales must be assumed by a reader of these new provisions. Certainly, they would make very little sense if these assumed features of litigation were not taken as matters regarded as real and proper by parliament when it enacted them. The first and cardinal feature is that the power of adjudication in our system is judicial, and resides with the judges (and juries on matters of fact in certain cases). It is not exercised to any degree by the parties to litigation, let alone those parties' lawyers.

This is not a charter for lawyers' professional irresponsibility – rather, it is the setting in which barristers' disinterested role is crucial. The autonomy of parties (ie clients) is vital if individual liberties are valued. The balance is attempted to be struck in eg Rules 16, 17 and 18 (noting the extended and restrictive definition of *'forensic judgements'* in Rule 15) in the *New South Wales Barristers' Rules*.

The second feature is the basically adversarial nature of litigation: by and large remedies are not granted unless the party seeking them persuades the court to do so, and the other party is entitled to a reasonable opportunity to resist that exercise. A vital ancillary element of the adversarial feature is that the parties are expected to frame the issues which are in dispute between them, and to marshal the evidence and arguments in support of their own cases and against their opponents' cases.

The third feature is that the confidentiality of instructions and advice passing between clients and lawyers, producing legal professional privilege and client legal privilege, is a fundamental substantive right of people involved in litigation. The consequence is that no-one is entitled to read his or her opponent's brief, or to rifle through the other side's solicitor's files. Nor can barristers insist on sitting in on their opponents' conferences with parties or witnesses. The law regulates access to material held by the other side by means of the law concerning pleadings, particulars, discovery and the compulsory production of documents eg upon subpoena – in the pre-trial phrase. During the trial, of course, there is the compulsion for witnesses to answer questions in cross-examination. Importantly, legal professional privilege and client legal privilege are usually available to limit even those forms of disclosure. So barristers can never really know the sum of what the other side has.

The fourth feature is that much of the substantive law governing the outcome of litigation is case-law, or judicial interpretation of statutes. Especially in the area of the common law duty of care, its breach, its actionable consequences and the measure of damages in negligence, the pronouncements of even the highest authority are not

to be seen as the last word – ie they are not ultimate even if they are the most recent. The law changes, or our understanding of the law changes (depending upon one's taste in fictions). It is not true that what the High Court has most recently said in an area of law cannot reasonably be argued to justify its reconsideration, or even contradiction, by the High Court in future. And the close reading of precedent authorities for what they really decided, and thus for what they do not decide, is an everyday exercise.

The fifth feature is that practically all final decisions in civil litigation are susceptible of appeal, with the notorious corollary that many first instance and intermediate appellate decisions are overturned, on the basis that they were wrong.

There is nothing in the Civil Liability Act, or its travaux préparatoire, to indicate the slightest encroachment was intended on any of these features. They are so fundamental that they must be considered as assumptions made by parliament about the system of litigation into which these new provisions were inserted.

These assumed features should be understood as basically undisturbed by these new provisions. That approach could have important results in the practical application of the provisions.

The task imposed on us is not the impossible and invidious exercise of predicting an ultimate outcome.

Interpretation of Part 11 Division 5C

Prohibition of legal services without reasonable prospects of success

The scheme begins with a prohibition against providing legal services on a claim or a defence of a claim for damages unless the barrister reasonably believes that the claim or defence has reasonable prospects of success: sub-sec 198J(1). A claim for damages includes a claim for any form of monetary compensation: sec 3 of the Civil Liability Act.

Critically, the reasonable belief of reasonable prospects of success is to be on the basis of provable facts and a reasonably arguably view of the law: sub-sec 198J(1). In my view, it is these two components which provide guidance for the principled and ethical practical application of these new provisions.

A fact is provable only if a barrister reasonably believes that the material then available provides a proper basis for alleging it: sub-sec 198J(2). The conceptual and verbal similarities between this provision and the terms of Rule 36 of the *New South Wales Barristers' Rules* are no coincidence. Emphasis is placed on the availability of material (as opposed to presently admissible evidence) and on the test of propriety to allege a matter (as opposed to sufficiency to prove a matter).

Given that we do not know everything in our opponents' briefs, let alone how witnesses will perform on the day, and only in our wildest dreams how all the evidence will ultimately impress an as-yet unknown judge during a future hearing, it would be ridiculous to suppose parliament intended that barristers must be able to predict a win before they can even start the process of trying to achieve one.

As it happens, we know that the first exposure draft of the Bill was (unintentionally) phrased as if this impossible prediction was required of us – and the government very promptly withdrew that version as soon as the Bar pointed out its fatal defect.

So, the new law does not require us to guess the outcome of a future contested hearing on the factual merits.

As to reasonably arguable views of the law, it would be wrong to regard the new provisions as freezing the judicial development of doctrine. It is precisely by means of reasonably arguable (and ultimately persuasive) views of the law that the reasoning for individual decisions by the courts alters an overall understanding of the law. Bluntly, the law as made by the judges changes with the success of arguments, many of which are novel even if only incrementally.

Once again, the task imposed on us is not the impossible and invidious exercise of predicting an ultimate outcome. For one thing, for most cases the ultimate stage is at first instance, for quite a few at the level of the Court of Appeal or some other intermediate court of appeal, and for a very few only after the decision of the High Court. One does not always know into which of these classes one's case falls, especially if the brief is difficult and the point of law a matter of serious debate. There is no sign that parliament has intended to put us at peril for failing to guess correctly about these matters.

In an area that may be comparable, the High Court has made it clear that nothing so crude as an opinion that a case will succeed is necessary in order to pass the related test against litigation being instituted 'without reasonable cause'. For example, Gibbs J held in *R v Moore; ex parte Federated Miscellaneous Workers Union of Australia* (1978) 140 CLR 470 at 473 that:

> a party cannot be said to have commenced a proceeding 'without reasonable cause'…simply because his argument proves unsuccessful … the argument presented … was not unworthy of consideration and it found some support in … two decisions of this Court … The fact that those decisions have been distinguished, and that the argument has failed, is no justification for ordering costs ….

This passage was cited with approval by McHugh J in *Re Commonwealth; ex parte Marks* [2000] HCA 67 at [26], [27] (75 ALJR 470), who noted that notwithstanding advice to an applicant that intended arguments were unlikely to succeed, and that on one view it had only *'some chance of success (albeit minor)'*, that nonetheless:

> Certainly the fact that an application fails does not mean that it was commenced without reasonable cause.

Another familiar context, viz the peremptory termination of proceedings by summary judgment or dismissal, or by striking out pleadings, or by permanent stays on various grounds, provides a useful analogy. For example, in rejecting an assessment of likely prospects as necessary or appropriate in relation to stays on the ground of *forum non conveniens*, Gaudron, McHugh, Gummow and Hayne JJ said in *Agar v Hyde* (2000) 201 CLR 552 at 576, [58]:

> Are proceedings to be terminated upon a prediction (on what almost invariably will be less evidence and argument than would be available at trial) of the 'likely' or 'probable' outcome of the proceeding? That cannot be so. It would be wrong to deny a plaintiff resort to the ordinary processes of court on the basis of a prediction made at the outset of a proceeding if that prediction is to be made simply on a preponderance of probabilities.

Helpfully, if unnecessarily, the provision is to apply despite any so-called obligation that a barrister may have to act in accordance with the instructions or wishes of the client: subsec 198J(3). Of course, this is against the background of the well-known and undisturbed requirement of law that a barrister must never be a mere mouthpiece: Rules 18 and 19 of the *New South Wales Barristers' Rules*. And the classical statement of our traditional position is to be found in the judgment of Mason CJ in *Giannarelli v Wraith* (1988) 165 CLR 543 at 556 – 556, in the passage stressing counsel's exercise of:

> an independent judgment in the interests of the court … [with] an eye, not only to his client's success, but also to the speedy and efficient administration of justice.

In the same vein, Barwick CJ and McTiernan and Mason JJ stressed in *Richardson v R* (1974) 131 CLR 116 at 123 that:

> It needs to be stated clearly and explicitly that counsel have a responsibility to the court not to use public time in the pursuit of submissions which are really unarguable.

In relation to defences, it is to be noted that reasonable prospects include simply leading to a reduction in the damages recovered: sub-sec 198J(4). This can only mean a reduction below the amount demanded, whether in a pleading, particulars or to be gathered from the evidence.

Preliminary legal work

These new provisions do not apply to legal services provided as a preliminary matter for the purposes of a proper and reasonable consideration of whether a claim or defence has reasonable prospects of success: sec 198K.

Of course, the nature of litigation in our system and of serious professional responsibility renders it ludicrous to suppose that this so-called preliminary matter occurs only once and only at the earliest stage in contentious proceedings. In my view, the notion of a matter being preliminary has to be read purposively, and the purpose of this new legislation certainly does not involve a restriction of professional responsibility to the time in a barrister's work on a brief when he or she is likely to know least about the matter viz at the very beginning. Rather, such consideration remains, in a sense, preliminary to the series of decisions from time to time to do things (such as alleging facts, denying facts, cross-examining, or arguing points) which depend on the propriety or cogency of the material available at that time to justify doing that thing.

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There can be no real doubt that the expression *'reasonable prospects of success'* in sec 198K should receive a cognate interpretation with the express provisions of sub-sec 198J(5).

Accordingly, we do not have the absurdity of not being able to open our briefs for the first time (which would be so, otherwise, because no-one could know of prospects of success beforehand), or the equal absurdity of not being able to reconsider those prospects from time to time as facts or our mature reflexions alter.

Disciplinary sanctions

Breach of the new prohibition is not an offence, but is capable of being professional misconduct or unsatisfactory professional conduct: sub-sec 198L(1). Those pivotal concepts are addressed in sec 127.

This, at least for extreme cases, is far from new. Peter Clyne was struck off for breach of his professional obligation not to abuse the privilege granted counsel by making allegations of discreditable conduct without adequate material available to justify them being made: see *Clyne v New South Wales Bar Association* (1960) 104 CLR 186 esp at 200-201; cf Rule 35 of the *New South Wales Barristers' Rules*.

Certification

Originating process or a defence, on a claim for damages, now requires a certificate, in a form required by any relevant rules of court: sub-sec 198L(3). The certification which must accompany such process is that *'required by this section'* viz sec 198L. That requirement is found in sub-sec 198L(2).

Clearly, in my view, sub-sec 198L(2) applies only where a lawyer is filing process. It therefore does not apply to litigants in person – which is obvious given the irrelevance of professional obligations in such cases.

More significantly for the Bar, in my view it equally clearly does not apply to barristers at all, given that barristers are forbidden ever to file any process: Rule 75(a) of the *New South Wales Barristers' Rules*. I understand some have argued that sub-sec 198L(2) should be read as if a barrister's certificate is required on a pleading notwithstanding the pleading is filed by a solicitor or even by a direct-access client. With respect, this lacks any textual support. The provision commences 'A solicitor or barrister cannot file…' and continues *'unless the solicitor or barrister certifies …'*: syntax and the use of the indefinite and then the definite article which make it obvious that it is the lawyer who files who must certify.

This is not to say that rules of court may not require barristers to sign, or certify, pleadings. It is not yet the custom in New South Wales. It is so in other jurisdictions in this country.

Costs sanctions against barristers

If it appears to a court that proceedings in it on a claim for damages have involved a barrister providing legal services without reasonable prospects of success (as defined in and by sec 198J), of its own motion or on a party's application, that court can order the barrister to repay to the client the whole or any part of costs the client has been ordered to pay to another party, and/or can order the barrister to indemnify a party other than the client against the whole or any part of the costs payable by that party: sub-sec 198M(1).

The Supreme Court may on a party's application make any such order, as well, whether or not it was the court in which the proceedings were taken: sub-sec 198M(2).

The barrister is not entitled to get back from the client any amount the barrister has been directed to indemnify under these provisions: sub-sec 198M(4).

Applications for orders under sec 198M cannot be made after a costs assessor has made a final determination: sub-sec 198M(3).

These provisions, as well, are scarcely revolutionary. For example, the provisions of Part 52A rule 43A of the *Supreme Court Rules* already provide (since January 2000) for barristers to be ordered to give up fees or pay costs when they have been *'incurred improperly or without reasonable cause, or are wasted by undue delay or by any other misconduct or default'*. The provisions of Part 1 rule 3, esp sub-rule 3(4), are also thus relevant, as they impose an obligation on barristers not, by their conduct, to cause their clients to be put in breach of parties' duty to assist the Court in facilitating *'the just, quick and cheap resolution of the real issues …'*.

These provisions, with their companion amendments to the *New South Wales Barristers' Rules*, were circularised and explained in a Special Edition of *Bar Brief* for February 2000.

Reversed onus and waived privilege in cost claims

A presumption that legal services were provided without reasonable prospects of success (as defined) arises if the trial court finds that the facts established by the evidence do not form a basis for a reasonable belief that the claim or defence had reasonable prospects of success: sub-sec 198M(1). The Supreme Court, including in cases where it was not the trial court, can also create the same presumption by its satisfaction to the same effect, either from a trial court finding or otherwise on the basis of the trial court's judgment: sub-sec 198M(2).

This presumption arises in circumstances which plainly do

not mirror the obligations imposed by sec 198J. It arises by something found in or inferred from the conclusions of the trial court – thus, on the basis of the outcome of the contested evidentiary hearing, a matter which was by definition unknowable by the barrister at any time when he or she was actually providing the legal services in question.

This does not mean that we barristers somehow have to guess at factual outcomes at peril of costs sanctions in the event of adverse outcomes. What it does mean is that the trial court does not have to, itself, engage in the impossible and invidious task of speculating as to the quality of the instructions held by counsel in a case where the result suggests a real lack of merit in that counsel's client's position.

In my opinion, it would be an error of law, and a seriously disruptive one for the efficient administration of justice, if judges were simply to equate any defeat with the conditions sufficient to create this presumption. Something more is needed, viz such a rejection of the defeated case's factual foundation as to suggest – if nothing else were to emerge – that there never was a proper factual foundation for it. Whether or not my opinion in this regard is correct, the Bar now has to deal with this new presumption.

To meet that situation, the presumption is rebuttable, the onus being to establish that at the time the legal services were provided there were provable facts providing a basis for a reasonable belief that the claim or defence had reasonable prospects of success (all as defined in sec 198J): sub-sec 198N(3). In this way, the issue returns to the obligation as imposed by sec 198J – and not to the idea of predicted success – for the purposes of considering a personal costs order against a barrister.

A barrister may produce information or a document for the purpose of rebutting that presumption, notwithstanding any duty of confidentiality between the barrister and the client, so long as the client is the one to whom the legal services were provided, or the client consents, or the court is satisfied that it is necessary in order to rebut the presumption: sub-sec 198N(4). As the foundation of legal professional privilege or client legal privilege is confidentiality, in my opinion a purposive reading has this provision prevailing over those privileges. It would be monstrously unfair to barristers were this not so.

Defendants putting plaintiffs to proof

A position which some have argued has been transformed by these new provisions is that of a defendant who simply puts the plaintiff to proof, presumably by a non-admission or denial, without any positive allegations of fact to answer the plaintiff's claim for damages. I wonder whether this position is much altered from the pre-existing law, whether the new provisions raise any difficulty in their application, and whether it all really matters much at all.

First, long ago eg in the Supreme Court it was forbidden to plead the general issue: Part 15 rule 27 of the *Supreme Court Rules*. Certain specific matters have long had to be pleaded in a defence, so as to allege a matter making the claim not maintainable, so as to avoid surprise, and so as to raise new matters of fact: Part 15 sub-rule 13(2). A traverse of an allegation in proceedings by a pleaded denial or non-admission (Part 15 sub-rule 20(2)) may involve quite specific statements as to available material where verification is required: Part 15 sub-rule 23(4).

Second, since January 2000 the important provisions of Part 15A of the *Supreme Court Rules* have forbidden putting an allegation of fact in issue unless it is reasonable to do so in light of steps taken by the party to ascertain whether there is a reasonable basis for doing so. By the eventual application of Part 1 rule 3 and Part 52A rule 43A, the sanctions on barristers responsible for their clients breaching these provisions include the possibility of personal costs orders.

Third, if the only point in issue is the suffering of damage or the amount of damages, a general plea will suffice: Part 15 sub-rule 20(3). The policy of the judges as rule-makers, by way of delegated legislation under the supervision of the houses of parliament, is firmly to leave the onus of proof on such matters where the general law places it, viz on the plaintiff – without any special responsibility for the defendant to specify why the defendant puts the plaintiff to proof of the suffering of damage or the quantum of damages.

Fourth, in practice there are very few cases where reasonable investigation on behalf of a defendant reveals no matter of fact or argument of law which justify resistance against the plaintiff's claim, and the defendant chooses nonetheless neither to admit the claim nor let the court or the plaintiff into the secret of how it is proposed to resist the claim at the final hearing.

It seems to me that a matter which should not be overlooked in the terms of sec 198J, and in its practical application to these rare cases of defendants who are more or less simply hoping something might turn up, is that the obligations imposed on barristers with respect to matters of fact have to do with those things which are proper to allege. A defendant who is simply relying on the requirement for the plaintiff to prove its case, or its loss and quantum, does not have to allege anything. It may well follow that the *'basis of provable facts'* upon which sec 198J pivots has no substantive application in such cases.

Certainly, if the approach to pleadings and case-management of which I have given examples in the Supreme Court were intended by parliament to have been swept aside by the provisions of sec 198J, one could have expected a lot more explicit indication of that intention than the statutory text contains. Nor is there anything in Hansard to this effect.

Overall, however, I doubt whether the plight of defendants who have no positive case and simply wish to adopt the stance of Micawber is so affecting or critical to the administration of justice as to be a major problem in understanding and applying these new provisions. Experience shows that some defendants are not above stonewall defences which simply use the inevitable delays of a court list to bring unmeritorious financial pressure on plaintiffs. I for one will not regret their position becoming less easy.

Explanation to clients

We have probably all experienced the puzzlement of some clients when they learn that their barrister is not just a gun for hire. One of our skills should be the polite, informative and practical explanation to clients of why there are some things we cannot do for them – whether it is allowing a judge to proceed in ignorance of the law, or failing to correct an error of certain kinds.

The independence and disinterestedness of the advocate's position are traditional, and are currently referred to in eg Rules 16, 18, 19, 20, 22 and 23 of the *New South Wales Barristers' Rules*. The new provisions are so important, however, that it will be prudent to advise clients about them whenever work to be done comes close to the permissible line.

Indemnity insurance

Whether the policies individual barristers have against professional liability will cover the costs of resisting claims for costs orders under secs 198M and 198N, and the costs which may be awarded under those provisions, will probably depend on the same question in relation to the court's long-standing inherent jurisdiction

and more recent provisions such as Part 52A rule 43A of the *Supreme Court Rules*.

It would be a good idea to check one's own policy wording in order to understand whether these liabilities are likely to be covered or not.

Professional courtesy

As I understand it, it is still the case that before a barrister advises that an application should be brought to strike out the other side's pleading, the barrister should advise that fair notice be given to the other side so as to provide an opportunity for matters to be rectified without the need for argument in court. I hope my understanding remains correct as to what the practice should universally be.

What about the phenomenon I understand to have sprung up like mushrooms after rain, of solicitors writing letters to each other threatening dire consequences under secs 198M and 198N if the obligation imposed by sec 198J has not been observed? I think it represents an unpleasant attitude, in any case where there is not already a fair inference that the other side has been reckless in their pleading or other allegations. It surely cannot be enough that one's own client is indignant that a claim has been made against them or that their own claim has not been admitted in full.

I trust the Bar will not participate in the degeneration of dealings among colleagues, all of which should start with the assumption that colleagues are professional. I have not observed barristers officiously and aggressively reminding each other of ethical requirements, let alone of the disciplinary consequences which may follow upon their breach. It would be a sad development were these new provisions to give rise to equally unacceptable incivility between counsel.

Barristers should not lend themselves to the threatening of each other, or of solicitor colleagues, with consequences under Part 11 Division 5C of the Legal Profession Act. In cases where there is substantial ground for an inference that costs or other detrimental effects on the administration of justice are being incurred by a colleague's failure to observe its provisions, there should always be a civil dialogue before anything in the nature of a threat is contemplated: and in any event threats are quite inappropriate between colleagues.

Conclusion

There is no doubt these new provisions do add important aspects to our duties as barristers. There is much to be said for the view that the additions are in line with tradition and pre-existing requirements. They should not be allowed to stifle argumentative creativity, forensic boldness or professional civility.

* This article was originally printed as a special edition of ***Bar Brief***, No.97 (September 2002). Another review of these provisions can be found in Nicholas Beaumont, 'What are "reasonable prospects of success"?', ***Law Society Journal***, August 2002, p.42.

Liability of public officers*

By Alan Robertson SC

Public officers referred to in the title are those exercising statutory and non-statutory governmental powers. I leave aside legislators and those who exercise judicial power. It may be seen that I have already begged a number of questions:

- What are governmental powers?
- Where does executive power shade into judicial power?
- Are all statutory powers governmental?

But what I am speaking about is, broadly, 'When may a public servant be sued in tort?'[1]

I put it this way rather than 'When is a public servant liable to pay damages?' because the administrative law remedies do not, of themselves, give rise to a claim in damages.[2] It may of course be necessary to have administrative action or an administrative decision set aside on the way to a claim for damages but this is because, outside negligent acts or omissions, there is no claim for damages in respect of a lawful administrative action. 'There can be no tortious liability for an act or omission which is done or made in valid exercise of a power.'[3] I take this to mean that there is no such thing as a negligent/actionable exercise of a discretionary power where the exercise of the power is valid.

I should spend a minute or two on this point because it is sometimes overlooked. It is one thing to have a decision set aside when it is the justification for a positive act. For example, where you are being sued for a sum of money by a government agency and there is an administrative decision imposing the liability, you can defend yourself by attacking the validity of the administrative decision and, if successful, the agency's action founded on debt may disappear.[4] Similarly, where a statute is relied upon by a defendant government in an action for trespass to goods, if the statute is invalid then the claim for damages for trespass may succeed.[5] A revocation of a licence, if invalid, would sustain a similar analysis. So may detention, if invalid, give rise to an action for false imprisonment.

But the result would not follow where a positive grant or licence is fundamental to the plaintiff's cause of action, the activity being otherwise prohibited. This is because invalidating a decision not to grant would leave a causal gap: the plaintiff would still not have the necessary grant or licence unless and until the matter were remitted and a positive decision in favour of the plaintiff were made. To give an example, the absence of a licence or approval may mean that a person is denied the opportunity to conduct a business. But where the positive grant of a licence is, by legislation, a prerequisite to conducting the business, then the mere setting aside of the decision to refuse to grant would not found an action for damages. The lack of legal justification removes a shield, but does not provide a sword.[6]

Now that the action on the case exemplified by *Beaudesert Shire Council v Smith*[7] has gone the way of nominate torts,[8] there are only two torts which merit detailed consideration and as to one of them, misfeasance in public office, I will be encouraging you to look past its current fashionability to see that success in such a claim would be rare. This leaves the tort of negligence as it impacts on public officials and those dealing with them. For administrative lawyers this means, largely, the negligent exercise of a discretionary power.

Misfeasance in public office

The High Court has twice looked at this tort in recent times,

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