Professional liability of barristers

By Alistmer Abadee [1]

This paper presents a survey of certain aspects of the liability of barristers, as affected by some recent appellate court decisions. It also seeks to draw out the implications of those decisions for practice at the Bar. It finally refers to some of the recent federal and NSW government recommendations and proposals for reform of the law of negligence that may impact upon barristers' professional liability.

Duties of care

Duty to instructing solicitor?

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A barrister's concern to 'protect' her negligent solicitors when advising her client on an offer of compromise was proven to be misplaced in *Moy v Pettman Smith* [2002] Lloyd's Rep PN 513. The barrister in this case was found negligent in the advice she gave to her client in a medical negligence suit against a medical authority. One of the difficulties was that the instructing solicitor had inadequately prepared the client's case. This meant that the barrister, when faced with an offer of compromise from the medical authority, had to weigh many factors, including her assessment of the likelihood that the trial judge would allow her to adduce additional evidence, but also her concern that the client might have a good claim against her instructing solicitor.

The barrister said she believed the client did have a good claim against the firm, but also believed she had a duty to the firm. The English Court of Appeal held that the barrister's belief about the client's claim against the firm should have been communicated to the client if it was relevant to the client's decision to accept the offer of compromise.

New South Wales Barristers' Rule 111 provides a procedure to deal with this type of situation. The barrister must advise the solicitor of his or her belief that the client may have a claim against it; and if the solicitor does not agree to advise the client of the barrister's belief, must seek to advise the client of that belief in the presence of the solicitor.

In modern litigation, solicitors are increasingly showing a willingness to defend actions brought by clients against them on the basis that they relied upon the advice of counsel (or, alternatively, joining the barrister in the proceeding commenced against them by the client). The times are now such that a prudent barrister, who gives advice as to the preparation of a matter for hearing (including advices on evidence) should:

- expressly and clearly communicate what steps he or she requires of the solicitor in preparing the case; and
- be ultimately prepared, in the event that those steps are not undertaken within a stipulated time period, to advise the solicitor that circumstances may arise whereby the barrister may:

  (a) conclude that the interests of the client and solicitor may conflict; and

  (b) require the solicitor to disclose to the client (in writing, copied to the barrister) the barrister's belief that a conflict has arisen; or, alternatively, to allow the barrister to directly advise the client that a conflict has arisen;
- where the barrister does not have the luxury of time, the barrister may have to disclose this belief (that the client's and the solicitor's interests conflict) to the client directly.

Duty to co – counsel acting for same client?

In *O'Doherty v Birrell* (2001) 3 VR 147 the Victorian Court of Appeal relied upon certain public policy considerations for holding that a barrister did not owe a duty of care to prevent another barrister briefed in the same matter from suffering financial loss. The case arose from a costs order visited upon two barristers, imposed as the price of an adjournment application. The barristers were briefed, at different times, to represent a group of companies sued by a liquidator of another company. One of the barristers sued the other for fees that he could no longer recover from the client. The Victorian Court of Appeal found the following considerations militated against the imposition of a duty of care owed by one co – counsel to another:

- a clear potential conflict of interest between the barristers' duties to the client and those owed to co – counsel;
- co – counsel were not, relevantly, 'vulnerable' to, or reliant upon the other, to prevent him or her suffering financial harm; and
- policy interests militated against the imposition of a duty, such as falling public confidence in the profession, and the encouragement to a spate of satellite litigation ([45] – [49]).

Scope of duty to advise beyond retainer

One difficulty arising out of the recognition of concurrent liability (in tort and contract) for which legal practitioners may be exposed[2] is that a client (or third party) may allege breach of duty in tort for the practitioner's failure to perform something not in the practitioner's retainer.

Under general law, barristers' liability to clients is in tort, but in *Heydon v NRMA* (2000) 51 NSWLR 1 an issue emerged whether the barrister, who was briefed to advise on specific questions raised in a brief from the solicitor, had a duty to advise on additional matters. Malcolm AJA described the issue as a 'nice question': at [148].

Since I refer to this decision several times in this paper, it is convenient to refer to some salient facts about this case, as summarized in the headnote. The case arose out of the highly publicised demutualisation of the NRMA companies, from companies limited by guarantee to companies limited by both guarantees and shares. Two firms of solicitors were retained. At various times, and in respect to various issues, senior counsel's advice was sought. One such issue was whether the corporate restructuring should take place by way of a scheme of

arrangement, or whether a special resolution passed by the members would suffice. Senior counsel indicated that the latter would suffice.

At the time senior counsel gave this advice, the High Court had granted special leave to appeal in the case of *Gambotto*. The *Gambotto* decision was handed down 18 months later. It is sufficient to record, for the purposes of this paper, that *Gambotto* radically reordered the law in relation to the expropriation of shares of minorities; thereby potentially restricting the efficacy of special resolutions.

At first instance, the trial judge found that senior counsel was negligent, essentially:

(a) for failing to advert in his advice to the grant of special leave by the High Court in *Gambotto*;

(b) failing to follow up the special leave application by obtaining a copy of the transcript of argument;

(c) failing to advise that if the *Gambotto* appeal was upheld, it might be on grounds inimical to the validity of resolutions in general meeting having the desired effect. The Court of Appeal overturned these findings. An application for special leave was refused.

... the possibility cannot be discounted that the courts will look beyond the express instructions, or retainer, in assessing the liability of a barrister in tort for advice.

With that background in mind, I return to the issue posed above concerning the circumstances where a barrister, who is briefed to advise on specific questions, may have a duty of care to warn of matters which, though relevant to such advice, were not raised in instructions. This question has been looked at in cases involving solicitors, where liability may be concurrent in contract and tort. In *Hawkins v Clayton* (1988) 164 CLR 539 at 585, Deane J found that a solicitor could be under a duty to take steps, beyond the specifically agreed task (in the retainer) to avoid a real and foreseeable risk of the client suffering economic loss. This reasoning was relied upon by a majority of the New South Wales Court of Appeal in *Waimond Pty Ltd v Byrne* (1989) 18 NSWLR 642 at 652 to hold that a solicitor may be under an affirmative duty to advise even in relation to matters not directly within the ambit of the solicitor's retainer.

Both in the House of Lords[3] and in the High Court of Australia[4], primacy was given to the contract as the instrument that defined the rights and obligations of solicitor and client. In *Heydon* McPherson AJA picked up this reasoning to postulate that in the light of *Astley*, *Waimond* was no longer good law; and that there was no longer any duty in tort on the part of the solicitor to advise on matters going beyond the ambit of the retainer: at [364] – [365]. Malcolm AJA agreed with this view: at [309].

But in another solicitors' negligence case, *Curnuck v Nitschke* [2001] NSWCA 176, Davies AJA (with whom Meagher JA agreed) did not interpret Astley as foreclosing the possibility that tortious liability may arise for failing to warn a client of a matter to which it was entitled to be warned; nor interpreted *Astley* to mean that *Waimond* was no longer good law: at [13]. *Waimond* was also cited approvingly by Buchanan JA (delivering the leading judgment for) the Victorian Court of Appeal in *McGee O'Callaghan Gill Pty Ltd v Deacons Graham James* [2001] VSCA 105; [2001] ANZ Conv R 614 at [18] and was approved in *May v Mijatovic* (2002) Aust Torts Rep 81 - 668.

There is, arguably, practical reason to differentiate between the liability of a barrister and solicitor in this context. A barrister briefed to advise on a question regarding the legality of a transaction will, more often than not, be in a position of disadvantage (compared to the solicitor) as regards investigation of all factual matters relevant to such advice; particularly where more than one lawyer is involved in supplying advisory services in respect to the transaction. Nevertheless, it is submitted that the possibility cannot be discounted that the courts will look beyond the express instructions, or retainer, in assessing the liability of a barrister in tort for advice. If this is right, then a prudent barrister, asked to advise, should expressly set out in an advice or opinion:

- the question/s or issue/s upon which the barrister has been asked to advise;
- the information supplied to the barrister to supply the advice; and
- a statement that the advice is provided on the basis of this information.

Where the barrister comes across an issue or question for which he or she has not been specifically asked to consider, the issue or question should be referred to, but the barrister may state that he or she has not been asked to, nor proposes, to consider it.

Instances of liability

Duty to follow up

Another feature of the first instance decision in *Heydon* that caused consternation amongst barristers was the proposition that a barrister might have to advise a client of its rights on the basis of putative changes to the law that might be made following a grant of special leave to appeal to the High Court. McPherson AJA (at [387] – [391]) and Ormiston AJA (at [563], [654]) rejected the proposition, and cited several reasons, including that:

- there was no evidence of any practice among barristers in 1994 to follow up special leave applications (or to obtain a transcript of argument on appeal);
- any such duty would require barristers to obtain and read applications for leave to appeal from courts anywhere in Australia; then to obtain transcripts of the appeal hearings themselves);
- consistency in principle would demand that practitioners follow up prospective legislative changes to the law (also across Australia);
- advocates are not required to read the minds of judges who engage in socratic dialogue.

As a matter of fact, the first reason may arguably no longer apply for a barrister in 2003. Transcripts of special leave applications and of appeals are readily available to legal practitioners on the High Court website and other Internet services. Bulletins (including descriptions) of cases before the High Court are also readily available in electronic form. Barristers, like solicitors, are under a duty to keep themselves informed of the law; and that certainly requires an appreciation of recent High Court decisions. It would be hard, for example, for a barrister to defend advice that is contrary to High Court

authority, even if the decision is very recent or has not yet been reported, and it may even be difficult to defend advice that is contrary to the authority of intermediate appellate courts across the country.

Barristers who practice in a particular specialty might also reasonably be expected keep themselves informed of cases that are *before* the High Court that touch upon their specialty; although even if that is correct it is difficult to see what use (in terms of advice) a barrister may put a transcript of special leave applications or appeals that touches upon an area of advice for which he or she has been briefed. To say that one's advice may be affected by a pending decision in the High Court, or that the advice may change in the event that a High Court changes the law, is not saying that much.[5]

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Heydon makes it clear that a barrister is not required to *predict* how the High Court may develop or change the law. The facts in *Heydon* showed why this was so: all judges of the New South Wales Court of Appeal agreed that *Gambotto* represented such a radical departure from existing law that no reasonably competent barrister with expertise in the field would have concluded that the client's proposed corporate restructure could reasonably have been affected by it. The barrister's duty is to advise the client on the basis of accepted principle; not to speculate on what the law might be.[6]

Advice on settlement

The decision in *Moy v Pettman Smith* [2002] Lloyd's Rep PN 513 was referred to above, in considering the barrister's duty to the client and how that may conflict with the interests of the instructing solicitor.

To reiterate, the barrister's client, the plaintiff in a medical negligence suit, received an offer of compromise. The barrister recommended that the offer not be accepted, having regard to her assessment of the likely quantum of the client's claim if *all* expert evidence was admitted. The trouble for the client was that, partly as a result of the negligence of the solicitor, the evidence had not fully been prepared. The barrister, on the morning of the trial, recognised that the prospects of obtaining the court's leave to fill in the evidentiary lacuna was no more than 50 per cent; and that if such leave was granted, it was likely that an adjournment would be necessary; with the client to bear the costs of the adjournment.

The offer of compromise was renewed on the morning of the trial. The question, which the barrister faced from her client on the morning of the appeal, was whether, in the barrister's opinion, the client could do better (if the trial proceeded) than the sum of money offered. It was found that the barrister could not have rated her prospects of persuading the trial judge to allow further evidence in at greater than 50 per cent and that even if the evidence was let in, it would be likely to be at the price of an adjournment for which the client would bear the costs. By accepting the barrister's advice, in effect, *not* to accept the offer since the client could be expected to obtain a better result by proceeding with the trial, the client suffered a loss for which the barrister was found liable in providing negligent advice.

Hopeless cases

Apart from the statutory[7] prohibition upon barristers providing legal services in respect to claims (or defences) for damages without a reasonable belief that the claim (or defence) has reasonable prospects of success, barristers may, of course be liable in the tort of negligence for failing to advise a client that their case is a hopeless one. The decision in *Kolavo v Pitsikas* [2003] NSWCA 59 is a recent example. That presents the potential scenario that a barrister may be exposed to a sizeable economic detriment in the event he or she acts for a client in a hopeless case: the barrister might be liable:

(a) to the client for damages for negligence, represented by the costs associated with a failed action; and

(b) to the imposition by the court of an order[8] that the barrister indemnify the client's opposing party for the costs of such action.

Liability under consumer protection legislation

A claim was leveled against a barrister in *Boland v Yates* (1999) 74 ALJR 209 that he had contravened the prohibition against engaging in misleading or deceptive conduct in trade or commerce. The factual context of Boland was, relevantly, that the respondent corporation lodged a compensation claim in the Land & Environment Court following the compulsory resumption of land. The claim went on appeal to the New South Wales Court of Appeal, where Handley JA observed that one basis – which had not been authoritatively recognised in academic works or judicial decisions concerning valuation law - for a 'special value' claim for compensation had not been pursued by the respondent. The respondent then sued the solicitors' firms and barrister for failing to identify and pursue this particular basis for the compensation claim.

The misleading conduct was put on two bases: implied representations and failure to disclose. As it happened, this statutory action did not add anything to the negligence action. The basis for that action was that the barrister failed to identify, and subsequently pursue, a special claim for the value of compensation. The trial judge found against the client on the statutory action since:

(a) the barrister's conduct was inadvertent, not deliberate; and was not misleading; and

(b) the conduct did not fall within the statutory definition of professional activities.

As a sidelight, it might be wondered how the barrister would have fared if he had pursued this cause of action. Gleeson CJ noted that no one, except for Handley JA, had discerned this particular claim before. Might the barrister have had reasonable grounds for believing that this claim had reasonable prospects of success?[9]

Barristers briefed to advise on complex matters by dint of specialist expertise may be wary of the dicta in *Heydon v NRMA* (2000) 51 NSWLR 1, to the effect that the expression of an opinion may carry with it an implied representation of underlying knowledge or expertise of the opinion giver, or that the advice or opinion was given in the exercise of reasonable care: at [330], [432] & [692]. This dicta extends the potential for liability under consumer protection legislation beyond what the trial judge held in *Yates*. Most barristers would, presumably, feel comfortable about the implication being drawn that their advice or opinion was being tendered with reasonable care. But in complex matters, a barrister who did not consider that he or she had particular expertise would, on the basis of *Heydon*, have to expressly indicate this to overcome an implication being drawn.

There are three further matters on the subject of the *Trade Practices Act 1974* (Cth) and barristers' liability that I wish to touch upon.

First, in *Boland v Yates* (1999) 74 ALJR 209, Gaudron J raised the spectre of an individual's liability under the Trade Practices Act, on the basis that its operation could extent to conduct involving the use of postal, telegraphic or telephonic services: at 229.

Secondly, in other professional standards schemes (solicitors and accountants), they do not limit liability for contravention of the federal statute.

Thirdly, barristers might, as an alternative means of limiting liability, seek to utilize sec 68A(1)(b) of the Trade Practices Act, by inserting in their retainers a provision to the effect that the barrister will resupply a service at no additional charge. This may be more difficult for a barrister to do when acting directly for a client, since a court may conclude that it was not fair and reasonable for a barrister to insert such a clause.

The imposition of costs orders against barristers for the conduct of litigation has become a very real feature of the landscape of barristers' liability.

Immunity

Crown Prosecutor immunity

In *Cannon v Tahche* [2002] VSCA 84, a member of the independent Bar in Victoria, acting as crown prosecutor, was sued, along with his instructing solicitor, for the tort of misfeasance in public office. The misfeasance was alleged to consist of a failure to disclose material information relevant to the accused's defence in a rape trial. At first instance, the trial judge determined, at an interlocutory level, that the barrister and solicitor not only acted as holders of public office, but that the immunity protecting them from suit for damages did not apply.

The findings that the barrister and solicitors each held public office were overturned on appeal. This made it unnecessary to consider the immunity issue. An application for special leave to appeal the decision to the High Court has been filed.

On the immunity issue, the judge at first instance equated the tort of malfeasance in public office with the torts of abuse of power and malicious prosecution. Smith J also found that the policy considerations underscoring the immunity that were recognised in *Giannarelli* did not apply to the tort of misfeasance in public office.

There are several difficulties with this finding on immunity:

- the court should not have dealt with the issue at an interlocutory level when the factual matrix was not settled: there was a real issue as to whether the information the accused said he was entitled to was disclosed by the crown prosecutor;
- the court might, with some plausibility, have found that the misfeasance complained of – failure to disclose information – did not have an 'intimate connection' with work performed in court. In this respect, the court equated the act with the failure to properly discover documents in civil proceedings;
- the finding on immunity may lead to the incongruous situation of a crown prosecutor being exposed to liability for misfeasance; whilst the defence's team of legal representatives continue to enjoy the immunity. This may have real practical consequences if the defence team obtained, but did not competently use, the information from another source. Issues of causation and contribution may be problematic in this context;
- there was little evidence to support the notion that judicial reinforcement was needed to reinforce the prosecutor's 'duty to disclose'; and
- the judge gave no consideration to the notion[10] that, because of the special nature of criminal trials, the participants should simply be subject to the court's inherent disciplinary powers.

Cannon is presently the subject of a special leave application to the High Court. Should the High Court grant leave and allow the appeal, it is likely that the matter will be remitted back to the Victorian Court of Appeal to deal with the immunity issue.

Costs

The imposition of costs orders against barristers for the conduct of litigation has become a very real feature of the landscape of barristers' liability.

Section 198N(4) of the *Legal Profession Act 1987* (NSW) creates a limited statutory exception to a barrister's duty of confidentiality to the client. The provision is triggered by a finding of the court – in any civil claim for damages – that the facts established by the evidence did not form the basis for a reasonable belief that the claim or defence had reasonable prospects of success (sec 198N(1)). That finding will result in a presumption that legal services provided on a claim or defence were provided without reasonable prospects of success.

Section 198N(4) permits a barrister, who seeks to get around the presumption, to produce information or a document, despite any duty of confidentiality in respect of a communication between the solicitor and barrister if:

> (a) the client consents to its disclosure; or
>
> (b) the court is satisfied that it is necessary for the barrister to produce the information or document in order to rebut the presumption.

The House of Lords' decision in *Medcalf v Mardell* [2002] 3 WLR 172 provides some further comfort for barristers who, when faced with an application brought against them for wasted costs, find it difficult to get the client to agree to the disclosure of confidential information. In *Medcalf*, the barrister alleged fraud and impropriety against the client's opponent. That opponent ultimately sought costs against the barrister personally, on the basis that the barrister did not have sufficient material to sustain those serious allegations.

Lord Bingham, who delivered the leading judgment, laid out a very careful sequence of steps for courts to follow when tempted to make wasted costs orders against barristers who are precluded from giving a full explanation for their conduct. Lord Bingham said that a court should not make a wasted costs order against a practitioner precluded from privilege from providing a full answer without satisfying itself that it was fair to do so. In particular, the court ('proceeding with extreme care') should be satisfied that:

> (a) there was nothing the practitioner could say, if unconstrained, to resist the making of the order; and
>
> (b) in all the circumstances, it was fair to make the order.

Legislative reform affecting barristers' professional liability

Finally, I want to address some of the reform proposals arising from the Ipp Panel's *Review of the Law of Negligence* and the NSW Government's *Civil Liability Act 2002*. The latter will apply, with certain exceptions, to any claim against a barrister for damages for 'harm' resulting from negligence, whether the claim is brought in tort, under statute or otherwise.[12] The concept of 'harm' includes economic loss.[13]

Peer professional opinion

The Ipp Panel's proposal to re – introduce a modified version of what was known as the *Bolam* test was, in terms, restricted to medical practitioners. Nevertheless, the panel contemplated that the courts would extend the test to other occupations. I have argued that it is likely that the courts across Australia will take up that invitation.[14] The New South Wales Parliament pre – empted this possibility, however, by legislating its own test for the standard of care expected of all professionals.

The standard of care for barristers in NSW has now broadly been brought into line with the Ipp Panel's recommendation...

The Ipp Panel's proposal, as applicable to barristers (as a 'service – provider'), is that it will *not* be negligent if he or she supplied the service in accordance with a practice widely held by a significant number of respected practitioners in the field, unless the court considers the practice irrational. The standard of care for barristers in NSW[15] has now[16] broadly been brought into line with the Ipp Panel's recommendation and is to the following effect:

1. A barrister will not incur a liability arising from the provision of a professional service if it is established that he or she was acting in a manner that (at the time the service was provided) was widely accepted in Australia by professional peer opinion as competent professional practice.

2. However, peer professional opinion cannot be relied on for the purposes of the section if the court considers that the opinion is irrational.

3. The fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of the provision.

4. Peer professional opinion does not have to be 'universally' accepted to be considered 'widely' accepted.

No doubt this defence will encourage the incidence of defendant barristers adducing expert opinion evidence on the issue of the standard of care in contested hearings, but defendants would do that anyway in cases where there was a serious issue of whether the barrister's conduct discharged the standard. A barrister the subject of a claim could, arguably, have previously adduced expert opinion evidence to the effect that his or her acts or omissions were in accordance with reasonably competent practice.[17] Where a credible barrister gives expert opinion evidence, based upon proved facts, that a barrister acted in a manner widely accepted by peer professional opinion as competent professional practice, it would be a rare case that the defendant barrister would be found negligent. Further, with court rules these days providing for joint expert conferences, it may become even less likely that a judge would have to adjudicate on conflicting expert evidence concerning practices 'widely held by respected practitioners' or 'peer professional opinion (of) competent professional practice'.

This legislative 'defence' goes one step further, however, by requiring defendant barristers to also establish that the relevant practice was 'widely accepted'. Presumably, this might be proved by the defendant barrister leading expert opinion evidence from a number of barristers (preferably those with stature and eminence) who will say the same thing: that, in their experience, the practice was as follows etc. They might also say that their view about whether a practice was 'widely accepted' was formed from conferring with barrister colleagues at seminars, or lunch – times in the Bar Association Common Room. A defendant barrister may even seek support from the practices of barristers in other parts of the country; if those practices vary, but that is hard to imagine.

The 'defence' has nothing to say about whether the barrister's conduct has caused loss and one might expect that a judge may still disbelieve, or place little weight on expert opinion evidence of this nature, having regard to the usual reasons why judges do not accept expert evidence: that the facts sustaining the opinion are not established; that the barrister does not fully elaborate the basis for the opinion; that the so – called 'expert' was not sufficiently qualified etc.

How might the defence work in practice? Let us go back to the *Heydon* case as an example of a situation where a barrister, with special expertise, is sued for alleged negligent advice on a special point in a technical area of the law. The defendant barrister says he had regard to the terms of the relevant statute, legal textbooks in the area, and specialist law reports. But the plaintiff (client) case is that there was some mention, during a special leave application, of a point that is relevant to the transaction upon which the barrister was briefed to advise; and the barrister did not advise as to the significance of that point, nor the grant of special leave. For the purpose of this hypothetical, let us confine the alleged negligence to the failure to advert to the discussion of the point in special leave argument (and let us not consider questions of causation).

The defendant barrister might lead expert opinion evidence, from a barrister in this technical field of the law, in effect, to indicate that other barristers in that field would have followed exactly the same steps as the defendant did in reaching the advice; and, further, lead evidence that there was no widely accepted practice that required a barrister to look up transcripts of special leave applications (generally, or at all). However, the plaintiff might lead expert opinion evidence, from a barrister with comparable expertise in the technical field, in response to indicate that it was a widely held practice that barristers, with particular expertise, briefed to supply advice in technical areas of the law, looked up transcripts of argument in special leave applications.

In this example, for the defence to apply, the essential question is whether what the defendant barrister did was in accordance with widely accepted opinion concerning competent professional practice. Assuming that the defendant's experts' evidence was admissible and had weight, then it might be expected that this defence would ordinarily apply; unless the plaintiff could effectively destroy the expert evidence (by proving that the defendant barrister did not act in accordance with widely accepted practice). In this sense, the defence will undoubtedly be to the benefit of the defendant barrister.

On the other hand, the judge (and let us assume the judge was, as a former barrister, very experienced in the field of law

the subject of the dispute) might think that the ready availability of transcripts on the web site makes it 'irrational' for specialist barristers, asked to supply advice in technical area of the law, to disregard them, in supplying the advice in the circumstances it was supplied by the defendant. I suspect that in professional negligence suits against barristers (and solicitors), judges may more readily conclude that a practice that exposes a client to a foreseeable and avoidable risk will be irrational, regardless of the fact that it was widely accepted.[18]

Proportionate liability

One reform, which, if implemented, might be expected to have substantial impact upon the liability of barristers, is the proposal that proportionate liability replace solidary liability. This proposal is contained in Part 4 of the Civil Liability Act. The proposal, in broad terms, applies to claims against barristers for economic loss, as well as claims for damages for contravention of the prohibition against misleading or deceptive conduct in the *Fair Trading Act 1987* (NSW).[19] For constitutional reasons, the proposal cannot extend to any claims against barristers under the Trade Practices Act,[20] although there are indications[21] that the Commonwealth may amend that legislation to allow the states and territories to effectively introduce the concept.

Time does not permit me to trace through in detail the legislative proposal in this paper. If enacted, the proposal will have clear application in cases where a barrister is joined as a defendant by a former client in a negligence suit against the client's solicitors; or even where the solicitor joins the barrister to the proceeding. The important aspect of the proposal is that the barrister's liability in an 'apportionable claim', as a 'concurrent wrongdoer', is limited to the amount that reflects that portion of the damage or loss claimed which the court considers just, having regard to the extent of the barrister's responsibility or loss; and the court may give judgment against the barrister for no more than that amount (sec 35).

Some of the concerns expressed about proportionate liability – including that the risk of insolvency of a defendant is transferred to the claimant – arguably, in this context, lose force. In most cases where a barrister is joined, as concurrent wrongdoer, to an 'apportionable claim' the other 'concurrent wrongdoers' (solicitors, accountants etc) would ordinarily be insured. This may explain why the New South Wales Government (and Ipp Panel) distinguished between claims for economic loss (and property damage) and claims for personal injury; and restricted the proposal for proportionate liability to the former.

Capping of barristers' liability

The achievement of statutory caps on barristers' liability under the *Professional Standards Act 1994* (NSW) would, in combination with the new standard of care and proportionate liability, amount to a trifecta of benefits to barristers, in terms of statutory limitations on liability. Solicitors already have a professional standards scheme. Walker SC has announced the Bar Association's intention to seek approval for a barristers scheme under the Act.

One cloud on this horizon is the Commonwealth's reservations on the concept of statutory capping of liability, expressed in CLERP 9.[22] Any benefits that would accrue to barristers from having a capped liability for claims in tort, contract and the Fair Trading Act would not shield a barrister from exposure under Trade Practices legislation.

Causation

I should conclude with a final word on the proposed test for causation, which will apply generally across the board to litigation, including claims against barristers.

The test is contained in sec 5D of the Civil Liability Act.

Plaintiffs bringing claims for loss against barristers will, henceforth, have to prove:

(a) that the barrister's negligence was a necessary condition of the occurrence of harm to the plaintiff; and

(b) that it is appropriate for the scope of the barrister's liability to extend to the harm so caused.

The legislation does provide some guidance as to the circumstances in which these elements may be proved (sec 5D(2) – (4)) and whilst the terms of the new test may alarm those concerned as to the potential uncertainty surrounding the intrusion of policy factors into assessments of what is 'appropriate' to the 'scope' of a barrister's liability, arguably, such factors were previously quietly subsumed under the former test for causation; with its notions of 'common sense' or 'material contribution'. The new statutory test is likely to force the courts to articulate more clearly these policy factors. The most difficult cases are likely to be where a barrister's negligence is one of multiple causes for a client's loss.

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1 This paper was originally presented as part of the Continuing Professional Development Programme of the NSW Bar Association on 18 November 2002, and was subsequently edited in May 2003.

2 See the discussion of concurrent liability by the High Court in *Astley v Austrust Limited* (1999) 197 CLR 1

3 *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145

4 *Astley v Austrust Ltd* (1999) 197 CLR 1

5 This might be an 'obvious risk', for which a barrister is under no duty to warn: secs 5F – 5G of the *Civil Liability Act 2002* (NSW).

6 per Ormiston AJA in *Heydon* at [460], [653]

7 *Legal Profession Act 1987* (NSW) s 198J

8 Under sec 198M of the *Legal Profession Act 1987* (NSW)

9 per *Legal Profession Act 1987* (NSW), sec 198J

10 see *Arthur J S Hall & Co v Simons* [2000] 3 WLR 543 at 620.

11 These exclusions are referred to in sec 3B of the *Civil Liability Act 2002* (NSW)

12 Section 5A of the *Civil Liability Act 2002* (NSW)

13 Section 5 of the *Civil Liability Act 2002* (NSW)

14 Walmsley, Abadee & Zipser, *Professional Liability in Australia* (2002, LBC) at [3.760]

15 Section 5O of the *Civil Liability Act 2002* (NSW)

16 In its original state, there was no 'judicial override' given to the courts. Further, the scope of the rule was previously expressly confined to claims against professionals in tort and contract, but not to claims under the Fair Trading legislation.

17 *Heydon v NRMA Ltd* (2000) 51 NSWLR 1. It would be difficult for the barrister's opponent to argue that this type of evidence was inadmissible as going to the ultimate issue: sec 80 of the *Evidence Act 1995* (NSW)

18 see, for example, the rigour with which the English Court of Appeal analysed a standard practice in the solicitors' negligence case of *Patel v Daybells (a firm)* [2001] EWCA Civ 1229 at [59].

19 Section 34 of the *Civil Liability Act 2002* (NSW).

20 *Boland v Yates* (1999) 74 ALJR 209 per Gaudron J at 229

21 In the Federal Government's CLERP 9 report.

22 By contrast, a Senate Economics Reference Committee report in October 2002 considered that the NSW (& WA) legislation had the potential to reduce the number of claims through pro – active risk management and through establishing procedures to resolve disputes at an early stage. The Senate committee suggested that the Commonwealth encourage states and territories to consider adopting similar legislation with a view to achieving uniformity: [4.54], p.71. Interestingly, the committee did not consider whether the Trade Practices Act should be amended so as to prevent claimants suing under this legislation. There have been press reports that the Assistant Treasurer, Senator Coonan, is enthusiastic of ushering in a national system of capping for lawyers: *The Australian Financial Review*, 30 October 2002, p 13.