Reasonable prospects revisited

By D I Cassidy QC

Section 198J(1) of the *Legal Profession Act 1987* provides that a solicitor or barrister must not provide legal services on a claim for damages unless the solicitor or barrister reasonably believes, on the basis of provable facts and a reasonably arguable view of the law, that the claim has reasonable prospect of success. Section 198L requires a barrister or solicitor filing process to certify that the claim has reasonable prospects of success. The sections apply to the representatives of both the plaintiff and the defendant and the latter to the initiating process, a defence and a cross claim. Breach of them may constitute professional misconduct or unsatisfactory professional conduct and the solicitor or barrister may be ordered to pay the costs of the client and/or the other party.[1]

Nicholas Beaumont presented the definitive paper on these provisions at a seminar of the Bar Association in March 2004. The paper was republished and updated in the December issue of the *Australian law journal*.[2] Since the paper was first written there have been several decisions on these provisions. It is not the purpose of this paper to regurgitate Beaumont's paper but to expand it in the light of these decisions and to deal with some other aspects of the problems which these sections raise.

The *Legal Profession Act 1987* is to be repealed and replaced by the *Legal Profession Act 2004*. That Act was assented to on 21 December 2004 but does not operate until it is proclaimed: s2. It has not yet been proclaimed but it is proposed that this will happen on 1 July 2005. Chapter 3, Division 10, containing ss344 to 349 replaces the equivalent sections in the 1987 Act. Though there are some differences, which I will deal with later, Beaumont's thesis remains valid.

The only assistance given by the Act to the meaning of the phrase 'reasonable prospects of success' is s198J(4) (s345(4)) which defines it as reasonable prospects of damages being recovered on the claim. Beaumont's view is that a case has reasonable prospects of success if it is not hopeless or entirely without merit.[3] He supports this view by a number of arguments - reference to the second reading speech, precedents on the award of costs against legal practitioners in other circumstances and overseas analogies.

I would respectfully agree with him but would add the analogy of statutory provisions which protect workers and workers' organisations from orders for costs. It appears that s 198J is derived from s90A of the *Industrial Relations Act 1996* (NSW), inserted in1998 but repealed in 2000. I have found no decided cases on the section. However s197A of the *Conciliation and Arbitration Act 1904* (Cth) provided that costs could only be ordered if the proceedings had been instituted without reasonable cause.[4] An order against the union was refused though the application was very weak.[5]

A stronger analogy may be provided by the tort of malicious prosecution one element of which is that the prosecutor lacked reasonable and probable cause. The classic definition of reasonable and probable cause for this purpose is:

> an honest belief founded upon reasonable grounds, of the existence of a state of circumstances which, *assuming them to be true*, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.[6]

The italicised words suggest that the prosecutor may accept facts at their face value. This is not so as later authorities have demonstrated:

> The defendant's subjective belief … must be based on evidence that persons of reasonably sound judgement would regard as sufficient for launching a prosecution. Only limited guidance can be furnished on this score, since we lack precise and universal criteria by which to measure the degree of caution and prudence that a reasonable man should observe in the evaluation of infinitely variable incriminating data. This much however is clear, that he should take reasonable steps to inform himself of the true state of the case instead acting upon mere imagination and surmise, and consider the matter in the light of such evidence alone as he reasonably believes to be sufficient to sustain a conviction. … He need not however, go to the length of verifying seemingly reliable information …[7]

Beaumont's interpretation is borne out by cases which have been decided since the sections came into force. Of particular importance is the decision in *Delgiorgio v Dunn (No 2)*[8] which will be referred to for other purposes later, in which Barrett J comes to this conclusion:

> The Legal Profession Act should not … be presumed to intend that lawyers practising in New South Wales courts must boycott every claimant with a weak case. A statutory provision denying to the community legal services in a particular class of litigation cannot be intended to stifle genuine but problematic cases. Nor do I see the statutory provisions as intended to expose a lawyer to the prospect of personal liability for costs in every case in which a court, having heard all the evidence and argument, comes to a conclusion showing that his or her client's case was not as strong as may have appeared at the outset to be. The legislation is not meant to be an instrument of intimidation, so far as lawyers are concerned. … (I would) adopt the construction of 'without reasonable prospects of success' that equates its meaning with 'so lacking in merit or substance as to be not fairly arguable'. The concept is one that falls appreciably short of 'likely to succeed'.

This and other cases have adopted a restrictive reading of the sections:

- The sections are not to stifle the development of the law.[9] Had the sections applied in Scotland in 1930, they would not have prevented Mr Morton KC from appearing for May M'Allister. The solicitor for General Jones could safely have filed a defence denying absolute liability for the escape of

the fire in the face of a host of High Court authority applying *Rylands v Fletcher*.[10]

- As long as there are reasonable prospects of establishing the cause of action it does not matter that the damages awarded are nominal.[11] However since nominal damages are not available in negligence actions this escape would be limited to breaches of contract, trespass and intellectual property.[12]
- A defence has reasonable prospects of success if it only goes to quantum: s198J(4); 345(4). Does this mean that the defendant's counsel is free to dispute liability if there are grounds for reducing the damages even though liability is a lay down *misere*? Clearly the defendant can file a defence denying liability in such a case as the form prescribed for the purposes of s198L does not distinguish between liability and quantum.
- However this approach sits uncomfortably with the view that the practitioner has to evaluate the prospects of bettering an offer of compromise from the other side – the effect of rejection of such an offer by a plaintiff is not judgment for the defendant.[13]
- The material on which the practitioner bases his view of the facts does not have to be admissible evidence.[14] Query whether this proposition is limited to s198L and the position up to the commencement of the hearing?

The provisions raise a number of other problems apart from the meaning of the phrase reasonable prospects of success:

1. What is a claim for damages? Barrett J has provided a non exhaustive list:

   'Damages may be claimed for tort, for breach of contract, for infringement of copyright, for breach of statutory duty, under statutory provisions such as s82 of the *Trade Practices Act 1974* (Cth) or under an undertaking as to damages given to the court. … In addition, equitable compensation is sometimes referred to as a species of 'damages'. … One thing may, however, be said with confidence. Although the relevant provisions were introduced into the Legal Profession Act by the *Civil Liability Act 2002* which is concerned overwhelmingly with claims in negligence for personal injuries, the parliamentary materials make it clear that the Legal Profession Act aspects are not so confined.'[15]

   Clearly a liquidated claim, for example for rent or on a quantum merruit would not constitute a claim for damages. Neither would a claim for partnership accounts.[16] But would it catch a claim for mesne profits

2. More controversial is Barrett J's suggestion, echoing that of David Cochran, that the sections apply to claims for an injunction because s68 of the Supreme Court Act empowers the court to grant damages in lieu of an injunction.[17] I would suggest that what the plaintiff seeks in the statement of claim or originating summons determines the nature of the claim – if all that is claimed is an injunction the fact that the court has power to give some other relief on its, or the defendant's, motion would be irrelevant. My submission would appear to be supported by Barrett J's view in *Delgiorgio* that the inclusion of a claim for damages in addition to one for partnership accounts was sufficient to attract the section.[18] But what if it is the defence which seeks damages in lieu of the injunction sought by the plaintiff?
3. This raises another question, perhaps theoretical. If a plaintiff in the originating process claims damages but the court gives some other relief, is the pleader at risk of an order for costs? I can only think of one example which arises in a case in which I am presently involved, a plaintiff mistakenly claiming damages for breach of contract pursuant to a default summons where the real cause of action is on a common money count for work done and materials provided.
4. Is there a territorial limit to either of the sections? Fairly clearly, s128L could not apply to proceedings commenced in the Federal Court even if they were cross-vested to a state court.[19] But would s198J apply to a NSW barrister appearing in the Supreme Court of Victoria. The 2004 Act makes it clear that the substantive provisions apply to an interstate barrister appearing before the Supreme Court of New South Wales: Section 4(1)- barrister.
5. Section 198J, unlike s198L, appears to be ambulatory, requiring a reassessment of the prospects as the particulars and evidence come to hand and as, during the trial, the evidence unfolds. Must counsel return the brief if, in the course of the trial, it becomes apparent that the claim, or the defence, as the case may be must fail? How does this fit in with counsel's obligation not to return the brief so late that alternative representation can be obtained and the solicitor's obligation to give written notice of ceasing to act. And what does he or she say to the judge once coming to the view that the prospects are no longer reasonable. The problem will be the same as that of the criminal advocate whose client admits guilt during the trial.
6. It has been proposed that expert witnesses should not be permitted to charge on a speculative basis and that only one expert should be allowed, either agreed to by the parties or appointed by the court. The latter proposal has been adopted in the Supreme Court.[20] Fortunately the practice note is so restricted that it will not have much effect - it applies only in personal injury cases but not in relation to liability, causation or the nature or extent of injury or disability.[21]
7. The first proposal is more dangerous – how is the solicitor for an impecunious plaintiff to give the certificate required by s198L if the expert must be paid up front? The view that the practitioner's belief does not have to be based on admissible evidence may not apply to inadmissible experts'

> reports if , at the time the proceedings are commenced, the practitioner knows that the client will not prior to the hearing be in a position to pay up front for another report.

I do not suggest that, interpreted in accordance with Beaumont's thesis, the legislation is a bad thing. If it focuses both branches of the profession on the need to evaluate and prepare their cases early, the solicitor to obtain reports and statements and counsel to think about the law, it is to be applauded.

I turn to another matter.

The Commonwealth attorney-general, on 15 March 2005, introduced in the House of Representatives the *Migration Litigation Reform Bill 2005*. It does other things, for example directing simple matters to the Federal Magistrates Court and giving power of summary dismissal to the courts and the Administrative Appeals Tribunal. But the provisions with which I am concerned today are in Part 8B containing sections 486E to 486K which the Bill would add to the *Migration Act 1958*.

The explanatory memorandum issued with the text of the Bill gives as the reason for the Bill:

> The government is very concerned about the large increase in the number of migration cases in the federal courts in recent years and the very low success rate of this litigation.

I doubt that that is true. I would wager that the attorney-general is overjoyed at the poor success rate of this litigation.

The memorandum draws attention to a constitutional problem:

> The proposal may raise constitutional issues, especially the possible intrusion of the legislature into the 'judicial power' of the Commonwealth, in contravention of Chapter III of the Constitution.

This is of course a reminder of *Kable v DPP* (1997) 189 CLR 51 and, more recently, *Baker v The Queen* (2004) 78 ALJR 1483.

The memorandum warned the parliament to consider a number of policy issues some of which could well apply to the New South Wales Act:

> Whether this would discourage lawyers and/or migration agents offering advice to potential applicants, leading to more unrepresented (and potentially less meritorious) applications.

And one might add applications which would take much longer to hear and would generate more appeals. The memorandum continued:

> A practical issue may be whether applicants with no ability to pay in any case if the decision goes against them would be discouraged by the threat of a personal costs order.

A copy of the Bill and the memorandum are available on the Commonwealth Parliament web site at www.aph.gov.au

To return to compare the main features of the Bill to those of the Legal Profession Acts.

There is of course a number of differences between s198J and s486E:

- In addition to the costs penalties the section presumably creates an offence. I have not looked at the offence provisions of the Act to see whether they cover this section but if they do not presumably there is a common law misdemeanour.
- Giving encouragement is very different from providing legal services. Would giving advice to commence proceedings be an offence.
- Sub section 2 would appear to be intended to spell out the Beaumont thesis. If so it contains a typographical error and is a nonsense.

Note that s486I, like s198L, only applies to lawyers. Neither prevents a litigant appearing in person from filing process.

---

1 Sections 198L(1), 198M.

2 'What are ''reasonable prospects of success"? (2004) 78 ALJ 812.

3 78 ALJ at 814.

4 For analogous provisions see *Workplace Relations Act 1996* (Cth) s347(1); *Workers Compensation Act 1926* (NSW) s38(g).

5 *Re Commonwealth; ex parte Marks* (2000) 75 ALJR 470 per McHugh J at 477. See also *Westend Pallets Pty Ltd v Lally* (1996) 69 IR 1.

6 *Hicks v Falkner* (1878) 8 QBD 167 at 171.

7 *Fleming* on *torts*, 9th ed (1988) at 681.

8 [2005] NSWSC 3; BC200500375 at [27] & [28].

9 *Momibo v Adam* (2004) 1 DCLR (NSW) 316

10 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520. For example *Hazlewood v Webber* (1934) 52 CLR

11 *Momibo v Adam*, above.

12 *Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd* (1938) 61 CLR 286; *Cell Tech Communications Pty Ltd v Nokia Mobile Phones (UK) Ltd* (1995) 58 FCR 368.

13 *Bakarich v Commonwealth Bank of Australia* [2004] NSWSC 660; BC200404774 at [24]-[25].

14 *Momibo v Adam*, above.

15 *Delgiorgio v Dunn (No 2)* [2005] NSWSC 3; BC200500375 at [13] & [15].

16 *Delgiorgio v Dunn (No 2)*, above at [32]-[34].

17 Quadrature.

18 At [34].

19 *Pedersen v Young* (1964) 110 CLR 162.

20 Practice Note 128, operative from 1 January 2005.

21 Paragraph 6.