The **legal case** against **financial planners**

By Gregory Curtin

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Australian financial planners are subject to considerable, and complex, Commonwealth statutory regulation. State- and territory-based modifications to the common law, in addition to common law developments, have made the common law increasingly complex. Those complexities require the prudent legal practitioner to plan the case against a financial planner very carefully.

With increasing numbers of people investing increasing amounts of money into an increasing number of financial products, the need for and rise of financial planners (the vast majority of which will be incorporated) is unsurprising. Being human, a number of planners will fail to discharge their legal obligations, causing financial loss to clients, who will then seek legal advice from practitioners.

This article outlines the more commonly pleaded statutory (excluding state and territory fair trading legislation) and common law causes of action available to investors (although practitioners should not overlook any applicable equitable rights and remedies). It is of course no substitute for a detailed reading of the relevant legislation, or a firm grasp of relevant principles applicable to that legislation and the common law.

When considering the authorities in these areas, practitioners should remember that trial judges and intermediate courts of appeal are not to depart from decisions of intermediate courts of appeal from other jurisdictions on the interpretation of Commonwealth legislation, uniform national legislation or non-statutory law, unless considered to be 'plainly wrong'.[1]

NEGLIGENCE

There is a single common law of Australia. Thus, there will be no difference on that account in the parties' rights and obligations, including the question of whether a duty of care is owed, irrespective of the jurisdiction in Australia in which those rights or obligations are litigated.[2]

Many practitioners, especially those with a personal injuries background, will be familiar with the tenderness that the common law has displayed toward injured plaintiffs when determining whether a defendant owed an injured plaintiff a duty of care.

Not so in pure economic loss cases. Prior to *Hedley Byrne v Heller*[3] and *Caltex Oil (Australia) Pty Ltd v The*

Dredge 'Willemstad',[4] damages for pure economic loss not consequential upon injury to person or property, even if foreseeable, were not recoverable.

Since that time, the common law has been unable to devise any lasting rule, or set of rules, that practitioners or judges may use to determine whether a duty of care is owed in pure economic loss cases. 'Proximity' probably reached its zenith in *Bryan v Maloney*,[5] but a series of subsequent decisions of the High Court have established that proximity is not the 'conceptual determinant' in this area.[6]

At present, common *indicia* for the existence of a duty – such as known reliance, assumption of responsibility and vulnerability (in the relevant sense) – are frequently referred to and, I suggest, would rarely be absent from a relationship between client and financial planner.[7] Vulnerability, in this sense, is not that the plaintiff was likely to suffer damage if reasonable care were not taken, but:

> 'is to be understood as a reference to the plaintiff's inability to protect itself from the consequences of a defendant's want of reasonable care, either entirely or at least in a way which would cast the consequences of loss on the defendant'.[8]

A good example is *NMFM Property Pty Ltd & Ors v Citibank Ltd (No. 10)*,[9] a case in which the existence of a duty of care said to be owed to investors by financial advisers was in dispute. Justice Lindgren rejected the argument that the financial advisers were mere salesmen, and held that a duty of care was established on the facts of that case.[10]

The existence of a duty of care is one thing, its content another. Care should be taken by plaintiffs to identify the content of the duty of care and its corollary, the particulars of breach. Particulars such as 'the defendant failed to take care for the plaintiff's interests' and the like are not particulars at all, and are helpful neither to any party to the proceedings or to the judge hearing the case.

In *Delmenico v Brannelly and Anor*,[11] a case concerning allegations of negligence and misleading and deceptive conduct by a financial planner concerning Westpoint promissory notes, the Queensland Court of Appeal quoted some of the evidence of the plaintiff's expert, namely:

> 'Financial planners should understand the nature, structure, benefits and risks of investment products that they recommend. ... Further they (the clients) expect that the ... planner will ... highlight any unusual features, benefits and risks ...'[12]

The fundamental facts of *Delmenico* are likely to exist in many client/financial planner relationships and thus, in general terms (and putting aside the facts of a particular case), the content of the duty of care expected of a reasonable financial planner would include understanding the nature, structure, benefits and risks of the investment products they recommend, explain those matters to the client, and warn the client of any unusual features, benefits and risks associated with investment products.

In *Delmenico,* the plaintiff's expert also identified, with commendable precision, seven failings, or more correctly, seven breaches of duty.[13] These may or may not exist in any case, but competent practitioners will ensure that proper particulars are indentified, pleaded and proved if they wish to maximise their client's chances of success.

In the presence of a contract, a professional's duty of care does not extend beyond the specifically agreed task or function (that is, the ambit of the retainer or contract – non-NSW practitioners are reminded of the precedential authority this decision has in other jurisdictions since *Farah Constructions*).[14] Authorities to the contrary, principally being *Waimond Pty Ltd v Byrne*,[15] have been doubted.[16] It follows that precise identification of the task or function agreed to be undertaken by the financial planner is essential to identifying the content of the duty of care.

Further, the common law may have been modified by statute in particular states, and it is the *lex loci delecti* (the law of the place where the tort was committed) that is to be applied by courts in Australia as the law governing all questions of substance in proceedings arising from an intranational tort.[17]

In NSW, for example, the introduction of the *Civil Liability Act* 2002 (NSW) modified the common law of negligence in a number of important respects. In relation to the standard of care, s5O provides:

> 'A person practising a profession ('a professional') does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.'

Similar, though not identical provisions, have been enacted in Queensland, South Australia, Tasmania, Victoria and Western Australia.[18]

In *Dobler v Halverson & Ors; Dobler v Halverson (by his tutor Kenneth Halverson)*,[19] a medical negligence case, Giles JA, with whom Ipp and Basten JJA agreed, held at [59]:

> 'Section 5O ... was intended to introduce a modified *Bolam* principle. Its importance does not lie so much in questions of onus of proof as in who determines the standard of care. Commonly, as in the present case, there will be expert evidence called by the plaintiff to the effect that the defendant's conduct fell short of acceptable professional practice and expert evidence called by the defendant that it did not; the expert evidence may or may not recognise that the opposing professional practice is one which has some currency. Apart from s5O, the court would determine the standard of care, guided by the evidence of acceptable professional practice. It would not be obliged to hold against the plaintiff if the defendant's conduct accorded with professional practice regarded as acceptable by some although not by others. Section 5O has the effect that, if the defendant's conduct accorded with professional practice regarded as acceptable by some (more fully, if he 'acted in a manner that ... was widely accepted ... by peer professional opinion as competent professional practice'), then subject to rationality that professional practice sets the standard of care.'

Thus, in NSW (and Queensland, South Australia, Tasmania, Victoria and Western Australia, but subject to those jurisdictions' statutory differences), evidence >>

(presumably supportive of their client) called by defendants of non-irrational peer professional opinions of competent professional practice will determine the standard of care.

Another example of statutory intervention in the common law of negligence, and worthy of consideration when advising a client, is the rise of proportionate liability provisions that now exist in all jurisdictions.[20] Practitioners would be advised to consider those provisions of the *Corporations Act* that may give rise to a right in damages not subject to proportionate liability or contributory negligence provisions (see below).

CONTRACT

Generally speaking, a contract will be formed between a financial planner and the client.

Often, financial planners' remuneration is received as a commission from the seller of a financial product. In such a case, although (monetary) consideration will not flow from the client to the planner, there will often be sufficient consideration to support a contract.[21]

In any proceeding involving a claim in contract, it is important to identify the relevant terms of the contract with precision, not only to properly plead and prove an advantageous contractual cause of action, but also to determine the content of any duty of care.

Plaintiffs frequently plead that it was a term of the contract that the financial planner would exercise reasonable care and skill. Although such terms are universally implied, it will be a rare case where the pleading of that term (and proof of its breach), in addition to a pleading in negligence, will add anything to the plaintiff's case (except, for example, in a rare case where the contractual and tortious measure of damages produce a different result).

Care should be taken to identify other more tangibly useful terms of any contract.

THE *CORPORATIONS ACT* 2001 (CTH)

The *Corporations Act* imposes a number of obligations upon financial planners, for which a remedy in damages is available. Some are subject to proportionate liability and contributory negligence provisions, but not all.

A more than cursory exploration of the complexities of the *Corporations Act* provisions is well beyond the scope of this article. However, some brief mention is made of its more salient provisions. A word of warning is justified. The Act is complex. Many of its provisions are subject to exceptions (and exceptions to exceptions), both in the Act and in the Regulations, so care is required.

'Financial products' are defined in Division 3 of Part 7.1. In basic terms, a 'financial product' is a facility through which, or through the acquisition of which, a person makes a financial investment, manages financial risk or makes non-cash payments (s763A).

A 'financial service' is provided if a person provides financial product advice, deals in a financial product, operates a registered scheme, provides a custodial or depository service or engages in conduct of a kind prescribed in the regulations (s766A).

Most significant provisions concerning financial planners and their obligations to clients are found in Chapter 7. Part 7.7 contains many of the obligations imposed upon financial planners, obligations that cannot be contracted out of – see s951A.

A threshold issue is whether the client is a 'retail client', as more obligations are owed to 'retail clients', and many plaintiffs will fall into this category. Section 761G deems that a financial product or a financial service is provided to a person as a retail client unless (the defendants proves that) the product or service falls within sub-sections (5) or (6) (basically, various general insurance or superannuation products), sub-section (7) or s761GA (sophisticated investors). The Act also refers to 'personal advice', being advice provided to a 'retail client' (s944A).

Sub-section (7), in basic terms, excludes clients from being 'retail clients' if: the price of the product equals or exceeds a regulated amount (currently $500,000); the financial product or service is provided for in connection with a business that is not a small business (employing fewer than 20 people, or fewer than 100 people if the business is or includes the manufacture of goods – sub-section (12)); the client is a professional investor (defined in s9); or, the financial product or service is not provided for use in connection with a business and the person who acquires the product provides the financial planner with a certificate from a qualified accountant (defined in s9) that is less than six months old and certifies that the person has net assets of (currently) at least $2.5 million or gross income for each of the last two financial years of (currently) at least $250,000.

If the client is a 'retail client', a financial planner is required to give the client a Financial Services Guide (ss941A and 941B), subject to the exemptions listed in s941C. This Guide must be given before the financial service is provided (s941D). The requirements for the content of the Financial Services Guide are found in ss942B and 942C.

Clients must also be given a Product Disclosure Statement if a financial product is recommended, issued or sold to a client (ss1012A, 1012B and 1012C). The most significant exception from this requirement (which is itself subject to exceptions) is that 'securities' are excluded (s1010A). 'Securities' are defined in s92 and are, in basic terms: debentures, stocks or bonds issued or proposed to be issued by a government; shares in, or debentures of, a body; interests in a managed investment scheme; or units of such shares.

The content of Product Disclosure Statements is regulated under s1013D and, among other requirements, is required to include information about significant benefits and risks associated with the relevant products.

Clients should also be given Statements of Advice (ss947B and 947C) that, among other things, set out the advice given by the financial planner and the information about the basis on which the advice was given.

A central requirement imposed upon financial planners providing 'personal advice' to 'retail clients' is that they are obliged to provide advice only if the financial planner determines the relevant personal circumstances (of the client); makes reasonable enquiries in relation to those

personal circumstances; has given such consideration to, and conducted such investigation of, the subject matter of the advice as is reasonable in all of the circumstances; and the advice is appropriate to the client, having regard to that consideration and investigation (s945A). Section 945B obliges financial planners to warn clients if the advice is based upon incomplete or inaccurate information concerning the clients' relevant personal circumstances. See also s949A in relation to 'general advice' to 'retail clients'.

A remedy in damages for failures in relation to Financial Services Guides, advice and Statements of Advice is provided in s953B. A remedy in damages for failures in relation to Product Disclosure Statements is provided in s1022B. Of particular note is that there is no proportionate liability or contributory negligence provisions that may reduce a client's damages for the relevant breaches for which resort is had to ss953B or 1022B.

The *Corporations Act* also provides a remedy in damages (s1041I) for false, dishonest, reckless, misleading or deceptive conduct (ss1041E – 1041H), but not in relation to the disclosure documents and statements that fall within ss953A or 1022A. Similarly, any remedies provided by state fair trading acts concerning these disclosure documents and statements are excluded (s1041K). Damages under this provision are subject to reduction for contributory negligence and proportionate liability (see ss1041L – 1041S).

Financial planners must not engage in unconscionable conduct (s991A). Damages are available [sub-section (2)], not being subject to reduction for contributory negligence or proportionate liability.

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION ACT 2001 (CTH)

The ASIC Act also provides a remedy in damages (s12GF) for misleading and deceptive conduct in relation to financial services (s12DA), although it also excludes such conduct in relation to the disclosure documents and statements that fall within ss953A or 1022A of the *Corporations Act* [s12DA(1A)].

The ASIC Act has, in basic terms, imported previously relevant sections found in Part V of the *Trade Practices Act* 1974 (Cth) (TPA) such as prohibitions against false and misleading representations, false and misleading representations in relation to financial products that involve interests in land, provisions concerning cash prices, bait advertising, referral selling, pyramid selling, harassment and coercion and implied warranties.

The former TPA provisions voiding any term of a contract that purports to exclude, restrict or modify these implied warranties (other than a provision limiting liability) have also been imported into the ASIC Act (ss12EA – 12ED).

Damages may be reduced if the client suffered its loss partly as a result of the client's failure to take reasonable care if the financial planner did not intend to or fraudulently cause the loss [s12GF(1B)], and damages may also be reduced for proportionate liability (ss12GR – 12GW).

TRADE PRACTICES ACT 1974 (CTH)

Part V of the TPA, which includes s52, does not apply to the supply, or possible supply, of services that are financial services – see s51AF.

Nor is there a right under s51AB against unconscionable conduct in connection with the supply, or possible supply, of services that are financial services – see s51AAB – although corporations are not immune from actions for unconscionable conduct that arise within the meaning of the unwritten law of the states and territories – see ss51AAB(1) and 51AA(1).

CONCLUSION

As readers should now appreciate, bringing a case against a financial planner is attended by complexities that can only be overcome by prudent legal planning. State- and territory-based modifications to the common law, especially those relating to the standard of care, contributory negligence and proportionate liability, compel consideration of the statutory causes of action possibly available.

Prudent legal planning involves a proper understanding of the applicable law, an outline of the main areas of which is set out above. That understanding will identify the elements of any cause of action (this is especially true of the statutory causes of action), the material facts (the ones that matter) required to be pleaded and proved, an appreciation of likely or possible defences that may be raised and an ability to advise the client of the relevant advantages and disadvantages of the various causes of action that may be available to the financial planner. ■

Notes: **1** *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] 230 CLR 89 per Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ at [135]. **2** *John Pfeiffer Pty Ltd v Rogerson* [2000] 203 CLR 503 per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ at [15]. **3** [1964] AC 465. **4** [1976] 136 CLR 529. **5** [1995] 182 CLR 609. **6** *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 per Gleeson CJ, Gummow, Hayne and Heydon JJ at [18]. **7** See *Woolcock Street Investments*. **8** *Ibid*, at [23]. **9** (2000) 186 ALR 442. **10** Particularly at [378] - [402]. **11** [2008] QCA 74. **12** At [55]. **13** See *Delmenico v Brannelly & Ors* [2007] QDC 165 at [48]. **14** *Citicorp Australia Ltd v O'Brien* (1996) 40 NSWLR 398; *Kowalczuk & Anor v Accom Finance Pty Ltd & Anor* (2008) 252 ALR 55. **15** (1989) 18 NSWLR 642. **16** See Campbell JA's analysis of the precedential value of *Waimond* in *Kowalczuk* at [267] - [294]; *David v David* [2009] NSWCA 8 per Allsop P, with whom Hodgson JA and Handley AJA agreed, at [76]; *Dominic v Riz* [2009] NSWCA 216 per Allsop P, with whom Hodgson and McColl JA agreed at [90]. **17** *John Pfeiffer* at [102]. **18** *Civil Liability Act* 2003 (Qld) s22, *Civil Liability Act* 1936 (SA) s41, *Civil Liability Act* 2002 (Tas) s22, *Wrongs Act* 1958 (Vic) s59 and *Civil Liability Act* 2002 (WA) s5PB. **19** (2007) 70 NSWLR 151. **20** *Civil Law (Wrongs) Act* 2002 (ACT) Ch 7A, *Proportionate Liability Act* 2005 (NT) Pt 2, *Civil Liability Act 2002* (NSW) Pt 4, *Civil Liability Act* 2003 (Qld) Ch 2 Pt 2, *Law Reform (Contributory Negligence and Apportionment of Liability) Act* 2001 (SA) Pt 3, *Civil Liability Act* 2002 (Tas) Pt 9A, *Wrongs Act* 1958 (Vic) Pt IVAA, *Civil Liability Act* 2002 (WA) Pt 1F. **21** See, for example, Carter, Peden and Tolhurst, *Contract Law in Australia*, 5th ed, LexisNexis Butterworths, Australia, 2007, Chapter 6; Seddon, Ellinghaus, *Cheshire and Fifoot's Law of Contract*, 8th Australian ed, LexisNexis Butterworths, Australia, 2002, Chapter 4.

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