

# Lawcover tips for managing some key risks in litigation practice

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**L**itigation is often complex and multifaceted. Not surprisingly, it is an area where we continue to see a high number of professional negligence claims. The following cases highlight some of the key risk areas.

## Settlement advice

In *Spralja v Bullard & Ors* [2018] VCC 437, Mr Spralja was in litigation in relation to the sale of a fishing permit and shark catch quota. The litigation settled, but he later claimed his solicitor and barristers had not properly advised him in relation to the settlement and had forced him to sign settlement terms he had not agreed to.

Woodward J held that the solicitor and barristers were negligent and liable to Mr Spralja, specifically noting:

- The advice provided to Mr Spralja was superficial, unbalanced and, in part, misconceived. It did not adequately equip him to engage meaningfully with potential settlement options. As a consequence, the basis for any assent to ongoing settlement negotiations was not sound;
- Advice on prospects was wholly focussed on the risks to Mr Spralja and gave no attention to what success might look like;
- The advice was pitched at a very general level with no attempt to unpack the claims and counterclaims in the proceedings, and work through the likelihood and consequences of success/ failure in respect of the different parts;
- There was no written record (preferably signed by Mr Spralja) of his instructions on the offer that was finally agreed.

## Tips for managing the risks of the settlement process

- Ensure all settlement offers are communicated to the client and confirmed/notified in writing;
- In complex cases, prepare a table showing the minimum and maximum likely awards for each head of damage;
- Seek Counsel's advice as to a suitable settlement range, but remember the ultimate decision is the client's;
- Balance the advice (e.g. strengths and weaknesses, likelihood of success or failure, outcome/consequences);
- Where an offer is made and rejected, on or against your advice, confirm the instructions and advice provided in writing;
- Advise your client about the progress of a hearing and make settlement recommendations where appropriate;
- Take detailed and contemporaneous file notes.

## Snapshot

- Litigation is an area in which Lawcover continues to see a high number of professional negligence claims against solicitors.
- Recognising when, where and how risk can arise in a litigation matter is key to managing it effectively.

## Third-party payers

*Rahme v Satouris* [2018] NSWSC 1753 is a good example of what to do if you are conducting litigation and require a third-party payer.

The solicitor was acting in litigation involving Mr Rahme and his companies, but neither he nor his companies had any real assets. The assets were in

Mrs Rahme's name and she was asked to enter into an agreement to pay the costs of the litigation and to grant a charge over property to secure her liability under the costs agreement.

The solicitors undertaking the work were very clear that Mrs Rahme was not their client and that she needed to seek independent legal advice in relation to the costs agreement and the charge. Mr Rahme did receive independent legal advice in relation to the costs agreement and the security documents. Later, when the litigation failed and Mrs Rahme was called on to pay those costs, she asserted that the solicitor had breached fiduciary obligations to her in entering into the costs agreement with her and taking security over her property. She also asserted they gave negligent advice as to the prospects of success of the litigation.

Emmett J was satisfied the solicitor was not acting for Mrs Rahme at the relevant time and that they had correctly referred her for independent advice with respect to the costs agreement and the security documents. Although the solicitor was not found negligent, there are a number of steps that can be taken to further manage the risk in these situations.

## Tips for managing the risks of engaging third-party payers

- In addition to clarifying the need for independent legal advice (in writing) before accepting liability for the cost of litigation, advise the client to obtain advice about the substance of the litigation i.e. the case they are being asked to fund;
- When dealing with a third-party payer, differentiate between the client and the payer and make this abundantly clear to both. Clearly outline the relationship as per the arrangement e.g. X is my client; Y is the payer. I am not giving advice to Y.

While each matter is different and can present a different set of risks, it is important that solicitors recognise when, where and how risks can arise in a litigation matter if they are to manage them effectively. **LSJ**