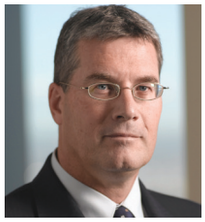
EXTENT OF DUTY: HOW FAR SHOULD YOU GO?

By Peter Moran and Amy Malaquin, CBP Lawyers

Lawcover



Partner Peter Moran and solicitor Amy Malaquin.

The decision in *Moss v Eagleston* [2014] NSWSC 6 was recently handed down in the NSW Supreme Court. In these proceedings a solicitor, Eagleston, was sued by his former client, Moss, in an action for damages for professional negligence, where it was alleged that in preparing his client's statement of claim, the solicitor had failed to include claims for misleading and deceptive conduct or unconscionable conduct, and an action in defamation.

Background

These proceedings arose in connection with Schapelle Corby's original arrest.

Moss alleged that he provided information about the case to a journalist from *The Daily Telegraph* on the basis that he would be paid $250,000. However, after the publication of two articles using his information, the paper refused to pay him. Moss sought to retain a law firm at which Eagleston was an employed solicitor, with a view to commencing legal proceedings.

Moss paid $200 to the firm to draft and send a letter of demand for payment in accordance with the alleged agreement between Moss and *The Daily Telegraph*. The claim was rejected by the paper and Moss was unable to retain the firm to pursue the claim any further due to his financial constraints.

Eagleston, however, had further dealings with Moss outside of Moss' retainer with the firm. He said Moss called him almost daily asking what could be done about his claim. Eagleston said he began to feel sorry for him and ultimately agreed to assist him in drafting a statement of claim on a pro bono basis, but told Moss he would have to run the proceedings himself.

Moss, however, alleged that he and Eagleston entered an agreement whereby Eagleston would receive a percentage of any amount recovered by Moss, and that drafting the statement of claim was done in connection with this agreement. Moss ran the proceedings himself and lost.

Was there a duty to consider other causes of action?

An issue for the Court to consider was whether – following *Fleeton v Fitzgerald* (1998) 9 BPR 16, 715 – a solicitor's duty is confined to the retainer.

Justice McCallum noted at [82] that although it was important to consider the subject matter of the retainer, "the duty of care can transcend that contained in the express or implied terms of the retainer, according to the circumstances of the case". Conversely, her Honour also stated that "the terms of the retainer are an important and often determinative consideration".

Snapshot

- If doing legal work on a pro bono basis, lawyers must provide clients with the same level of knowledge and skill afforded to a paying client
- A solicitor's duty of care can transcend that contained in the express or implied terms of a retainer
- Lawyers should not undertake work for clients without a written retainer

The Court found that, during the period of the retainer, the solicitor was not aware of any further instructions beyond those contained in a letter to the client which confirmed that the solicitor would proceed on the basis of an alleged breach of contract. It was then queried by the Court whether the solicitor had assumed a broader responsibility when later agreeing to draft the statement of claim.

Her Honour found that all the solicitor had agreed to do was prepare a statement of claim. She was not convinced "on the balance of probabilities that Mr Eagleston assumed responsibility or otherwise fell under a duty of care to advise Mr Moss as to the cause of action in defamation or to include any other causes of action in the statement of claim drafted by him" at [109].

Obligations of solicitors who agree to draft a statement of claim on a pro bono basis

It was submitted for the solicitor that, as the statement of claim was prepared on a pro bono basis, there was a lesser standard of care owed than if the work had been paid for by the client.

Her Honour was of the view that the proposition of there being a lower standard of care owed to the client when providing services on a pro bono basis should be rejected.

Her Honour said at [81]: "The degree of care and skill required in the performance of a professional task cannot logically be informed by the extent of remuneration which the lawyer agrees to accept for the task. The task is the same in any case.

No lawyer is obliged to undertake work on a pro bono basis, but those who choose to do so must in my view be held to the same standard of care as those who request payment for their services."

It can be taken from the above that every lawyer should and must adhere to the same standard of service when undertaking agreed work for their clients – pro bono or full fee paying.

Assessing damages on a "loss of chance" basis

Her Honour further stated that if she had made a finding that there was a breach of duty, which she had not, then it would be necessary for her to determine the value of the lost chance.

The judge was satisfied she would have determined that Moss would have instructed his solicitor to pursue other claims.

Her Honour concluded that, at best, Moss had about a 30 per cent chance of obtaining an extension of the limitation period in order to pursue an action in defamation, which itself would have had about a 30 per cent chance of success.

Conclusion

Lawyers should not undertake work for clients without a written retainer. They should make their clients aware of how the work they do relates to that retainer and further ensure that they do not act outside its scope.

If the scope of a retainer requires altering, ensure that it is well documented in writing, and that both you and your client understand and agree on its parameters.

If a lawyer is performing legal work on a pro bono basis, they must provide their clients with the same level of knowledge and skill afforded to a paying client. **LSJ**