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Solicitor's contemporaneous file notes found determinative in professional negligence action

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A recent decision of the New South Wales District Court has highlighted the importance of solicitors maintaining file notes of discussions with their clients and any oral advice or instructions communicated during those conversations.

Background

On 21 November 1999, the plaintiff (**Mr Kendirjian**) suffered injuries as a consequence of a motor vehicle accident. Subsequently, in 2004, he commenced proceedings in the New South Wales District Court (**Personal Injuries Proceedings**).

On 13 October 2006, the plaintiff obtained judgment in the sum of $308,432.75 plus costs in his favour. Being dissatisfied with the damages award, the plaintiff appealed that decision, but was unsuccessful.

In 2012, the plaintiff commenced the current proceedings against the solicitor and barrister who acted on his behalf in both the Personal Injuries Proceedings and the appeal.

The Settlement Offer Issue

On the first morning of the hearing of the Personal Injuries Proceedings, the defendant in that case offered to settle the Personal Injuries Proceedings for the sum of $600,000 plus costs.

The plaintiff alleged that in breach of their duties of care to the plaintiff, the solicitors and barrister failed to advise him about the amount of the offer, but merely advised that the offer had been made. According to the plaintiff, the solicitor and barrister rejected the offer without '*any express instructions from the Plaintiff but based upon the advice of the* [barrister] *that the offer made by the defendant was "too low"*' (**Settlement Offer Issue**).

The damages said to have been suffered by the plaintiff as a result of the defendants' breaches were the difference between the offer in the Personal Injuries Proceedings ($600,000 plus costs) and the award of damages ($308,432.75 plus costs).

Advocates' Immunity

While it was ultimately not relevant to the decision, of some interest is that the defendants originally obtained summary judgment against the plaintiff in the New South Wales District Court on the basis that the proceedings were not maintainable against them by virtue of the operation of advocates' immunity. The plaintiff's appeal to the New South Wales Court of Appeal was unsuccessful.

The plaintiff obtained special leave to appeal to the High Court of Australia. Following a hearing in the High Court,[1] the High Court allowed the appeal based on its decision in *Attwells v Jackson Lalic Lawyers Pty Ltd*[2], in which the High Court held (in summary) that advocates' immunity did not extend to negligent advice which leads to the settlement of proceedings.

The High Court remitted the balance of the matter to the District Court for hearing.

Claim against the defendants

The plaintiff's evidence

The plaintiff's evidence was that during the course of the first morning of the Personal Injuries Proceedings and on the morning before the second day of the hearing, the solicitor and barrister engaged in three conversations with the plaintiff, in which (in summary):

1. The solicitor and the barrister informed the plaintiff that an offer had been made by the defendant
2. The plaintiff repeatedly asked the solicitor and the barrister what the amount of the offer was
3. The solicitor and the barrister did not inform the plaintiff of the amount of the offer, but instead the barrister said words to the effect that:
    a. The offer was too low;
    b. The plaintiff would be left with nothing if the offer was accepted; and
    c. The barrister was 'running the show' and the plaintiff should let him do his job.

The plaintiff gave evidence that the first he became aware that an offer of $600,000 plus costs had been made was after the appeal of the decision in the Personal Injuries Proceedings.

The plaintiff's son also provided evidence, which was largely identical to the plaintiff's.

The defendants' evidence

The defendants denied the plaintiff's version of events and asserted that:

1. They advised the plaintiff that the defendant had made an offer of $600,000 plus costs; and
2. The plaintiff instructed them to reject the offer.

The defendants' evidence was that the defendant in the Personal Injuries Proceedings initially offered to settle the matter in the sum of $500,000 inclusive of costs. That offer was met by a counter-offer by the plaintiff of $1,400,000 plus costs. The plaintiff's offer was designed to ensure that the plaintiff would receive the sum of at least $1,200,000 following the payment of costs and other monies which were recoverable out of any settlement sum. The figure of $1,200,000 after payment of those sums was alleged to be the plaintiff's '*bottom line*'.

After the offer of $1,400,000 was made, the defendant in the Personal Injuries Proceedings made a counter-offer of $600,000 plus costs. The solicitor and the barrister alleged they sought the plaintiff's instructions to make a counter-offer of $800,000 plus costs, but that the plaintiff refused to make that offer. They alleged the plaintiff was insistent that he receive $1,200,000 after all deductions.

The file note

The solicitor gave evidence that on the afternoon of the first day of the hearing of the Personal Injuries Proceedings, after he had returned to his office from Court, he prepared a file note, which he had dictated to be typed by a member of his staff. The file note provided (relevantly) as follows:

> *'30 August, 2006*
>
> *Mr Conomos for the Plaintiff.*
>
> *Before starting the matter Mr Conomos tried to obtain instructions from Mr Kendirjian if we could put an offer of settlement to the other side. Mr Kendirjian was adamant that he would not accept anything less than 1.2 million clear to him.*
>
> *Mr Kendirjian indicated that unless this amount of money was paid to him he would rather run the case.*
>
> *Prior to commencing proceedings Mr Ronzani for the defendant put an offer of settlement in the sum of $600,000.00 all inclusive. This offer was rejected by Mr Kendirjian. Mr Conomos was trying to see whether Mr Kendirjian was prepared to negotiate. Mr Conomos asked Mr Kendirjian whether he would give him instructions to put a counter offer of $800,000.00 to which Mr Kendirjian replied indicating that the offer would be extremely low and would not entertain anything below 1.2 million.'*

The Decision

Breach of duty

The defendants accepted that if the Court found they had not conveyed the settlement offer to the plaintiff, they had breached the duty of care they owed the plaintiff. The Court's decision therefore turned solely on whether it accepted the version of events as proffered by the plaintiff and his son or the defendants.

The Court found the plaintiff to be an unsatisfactory witness and formed the view that the plaintiff '*used the occasion of giving evidence on oath as an occasion for advocacy, not an occasion for telling the truth*'. Of key importance to the Court was that the plaintiff's evidence contradicted four file notes taken by the solicitor of conversations he had with the plaintiff during the course of the retainer.

In addition to the file note outlined above, the file notes included the following information:

1. The plaintiff stated he would not settle for less than $8 million.
2. The solicitor indicated the plaintiff would unlikely receive an offer of that nature.
3. The plaintiff said he would therefore prefer to run his case to trial.
4. The solicitor said that the barrister and he would advise the plaintiff of any offers made and he would need to make a decision in relation to those offers.

The Court found that the file notes corroborated the defendants' position that there was an established regime between the plaintiff and the defendants for the conveying of offers, and taking instructions on them.

The file note of 30 August 2006 (set out above) was considered to be the most significant file note and the Court considered that if it was found to be genuine it was '*fatal to the plaintiff's case*'. The Court found that there was no basis to impugn the file note and as the file note corroborated the defendants' evidence, the Court accepted that the settlement offer had been communicated to the plaintiff. In the circumstances, the Court found the defendants had not breached their duty of care to the plaintiff and found in favour of the defendants.

Causation

Although it was strictly unnecessary for the Court to consider the issue of causation, it did so briefly.

Assuming that the settlement offer had not been communicated, the Court considered what subjectively the plaintiff was likely to have done if he had been told of the $600,000 plus costs offer on the first morning of the trial. The Court found that the file notes made it clear that:

1. The plaintiff instructed the solicitor that he would not settle the case for less than $1,800,000; and
2. On the first day of the hearing, the plaintiff said that he wanted $1,200,000 after all deductions and that he would otherwise run the case to judgment.

The Court found that in light of the content of the file notes, the plaintiff was unable to prove that on the balance of probabilities the defendants' negligence was a necessary condition of the rejection of the $600,000 offer. That is, even if the $600,000 offer been communicated to him, the Court considered he would have rejected it. In the circumstances, even if the plaintiff was able to demonstrate the alleged breach of duty, he would have failed in any event to demonstrate the necessary causative link between that breach of duty and his alleged loss.

Summary

The case provides a useful reminder to solicitors and barristers that maintaining contemporaneous file notes is not simply prudent professional practice, but something that can assist them in the event a client's recollection differs from theirs.

When it comes to conflicting recollections, there is always a significant risk a Court will find in favour of the client where a professional advisor is being sued. Courts are generally more likely to accept that a lay witness's recollection of events is more reliable than a professional advisor's recollection. Courts often assume any matter discussed between a professional and their client is likely to be of more importance to the lay person (who it affects directly) and who would therefore be likely to remember more accurately the contents of a conversation, as opposed to the professional who will have had many similar matters with other clients.

The presence of contemporaneous file notes taken by the professional advisor can however assist to swing the balance back in their favour when there is a conflict of oral evidence.

We also recommend that solicitors and barristers carefully consider whether advice or instructions provided orally should be confirmed in writing to the client shortly after a meeting with the client. While they are unlikely to be found negligent for failing to do so, it can leave them at a forensic disadvantage if the content of those discussions is disputed. While a file note can potentially be impugned (e.g. on the basis that it is not contemporaneously prepared or does not accurately record events) it is far more difficult to impugn written correspondence in the same manner.

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[1] Kendirjian v Lepore [2017] HCA 13.

[2] [2016] HCA 16.

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