Fiduciary Duties

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- Fiduciary duties arise when there is a trustee and a beneficiary where the trustee must put the interests of the beneficiary before its self-interests.

- Lawyers owe fiduciary duties to their clients.

- Fiduciary duties are proscriptive (negative) in nature and is closely related to:
  
  - Duty of loyalty which is “unequalled elsewhere in the law”.
  
  - Duty to avoid conflicts of interests:
    - A conflict between a practitioner and client.
    - A conflict between the new client and existing client.
    - A conflict between a new client and former client.
  
  - Duty to not make a profit from the principal’s trust.
  
  - Duty to act in the trustee’s self-interests or in the interests of a third party without the consent of the beneficiary.

- Breen v Williams (1996):
  
  - The case was concerned with a doctor-patient relationship and expressed that this relationship was characterised by a duty of care rather than the duty of loyalty in the lawyer-client relationship.
  
  - The law of fiduciary duty rests not so much on morality or conscience as on the acceptance of the implications of the biblical injunction that “no man can serve two masters”. This reveals that loyalty is at the centre of fiduciary duties.

- The fiduciary duties are reflected in the Uniform Solicitors Rules, Rule 4: “A solicitor must also act in the best interests of a client in any matter in which the solicitor represents the client”.

Maguire and Tansey v Makaronis [1997]

- The Makaronis were from Greece with a poor education and limited English skills. They bought a property in Victoria with a mortgage and entered financial difficulties.

- Maguire and Tansey were legal practitioners in Victoria. The Makaronis signed over some of their superannuation and the proceeds from the sale of their property to service the mortgage.

- The Makaronis believed that the mortgage was with the Commonwealth Bank but it was with the lawyers themselves. This is because the lawyer’s charged a procurement bank which implied that Makaronis had obtained the loan from the bank.

- The lawyers did not advise the Makaronis to obtain independent legal advice.
- The trial judge found that there was a conflict between the duty to the clients and the lawyer's personal interest in the transaction.
- This meant that the lawyers could not give their undivided attention to the client.
- The lawyer's could not discharge their fiduciary duty to the Makaronis.
- The Court held that where there is the potential for a conflict of interest, there is a heavy onus to prove that the transaction was “righteous”.

Clark Boyce v Mouat [1994]

- Where there is a fiduciary duty arising and the solicitor has a personal interest, there is an obligation for the solicitor to disclose his interest. This means that the client can consent to a conflict that would otherwise substantiate a fiduciary breach so long as they are fully aware of the extent of the conflict.
- When the client is fully informed about the extent of the conflict, the solicitor can continue to act.
- If the solicitor fails to do so, the transaction, however favourable to the client, may be set aside.
The Lawyer’s Duty of Care

Professional Rules

- Uniform Solicitors’ Rules 4.1.3:
  - “deliver legal services competently, diligently and as promptly as reasonably possible”

- Uniform Barristers’ Rules 35:
  - A barrister must promote and protect fearlessly and by all proper and lawful means the client’s best interests to the best of the barrister’s skill and diligence, and do so without regard to his or her own interest or to any consequences to the barrister or to any other person.

Tort of Negligence

- The standard of care required in tort, is the exercise of care, skill and diligence that would be expected of a reasonably competent practitioner working under similar circumstances.

- If lawyers do not reach this standard of care, then they can sue for negligence. However, a lawyer is not liable outside the scope of their retainer.

- If a lawyer advertises to be a specialist in a certain area of law, they are subjected to a stricter standard of care. The standard of care required is that of a reasonable specialist.

- The tort of negligence has three elements:
  - Duty of care owed to the plaintiff by the defendant.
  - The defendant performed an act or omission which was reasonably foreseeable to cause harm to the plaintiff.
  - The act or omission caused loss to the plaintiff.

- Unsatisfactory professional conduct but does not amount to the tort of negligence.

- Carradine Properties Limited v DJ Freeman and Co [1999]: “An inexperienced client will need and be entitled to expect the solicitor to take a much broader view of the scope of his retainer and of his duties than will be the case with an experienced client”.

- Civil Liability Act 2002 s 5o (reflective of the common law Bolam Test):

  (1) 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.

  (2) However, peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.
(3) The fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.

(4) Peer professional opinion does not have to be universally accepted to be considered widely accepted.

- Midland Bank Trust Co Ltd v Hett Stubbs and Kemp [1979]: “The standard of care required of a solicitor is that of a reasonably competent legal practitioner and not that of a “particularly meticulous and conscientious practitioner”.”

Roberts v Cashman [2000]

- In 1986, Robert purchased a banana chair which later collapsed. She landed on the concrete ground and suffered injuries.

- Throughout her treatment, she had two epidural injections with one with a certain drug in it. This drug worsened her condition.

- In 1992, Robert saw a program on television, about the drug that was used in her treatment. She joined a class action.

- Robert filled a questionnaire but the lawyers did nothing about her injuries arising from the banana chair incident.

- Robert sued the law firm because the statute of limitations led her loosing the chance to sue the manufacturer or distributer.

- The lawyers argued that she was never personally interviewed. If she had been, the lawyer would have identified the need for her to sue the manufacturer.

- Robert argued that she took a course of action from the lawyer’s advice and that the terms of the retainer were not limited to a specific matter.

- The Court held that the lawyer’s actions were negligent.

Hawkins v Clayton (1988)

- In 1975, the testatrix died but there was no attempt to locate the executor or beneficiary until 1981. The main asset had deteriorated and decreased in value.

- The High Court found that the lawyers had breached their duty to a third party.

- The Court applied a proximity test where the court held that the duty of care to the third party arose due to three factors: reasonable foreseeability, reliance of the party and assumption of responsibility.

- The lawyers had assumed responsibility and the client replaced reliance on them to locate the executor once they knew of the testatrix’ death.

- As a result of the breach of the duty, the executor was able to sue the solicitor for the loss suffered.
Hill (t/a RF Hill & Associates) v Van Erp (1997)

- The solicitor was instructed to prepare a will for a woman which was witnessed by her husband, who was also the beneficiary. Under Queensland law, this was void.
- Issue: Whether the lawyer owed a duty to the third party and whether it arose by tort?
- The High Court found that there was a duty of care to the client’s husband under tort.
- “Although a solicitor’s contractual duty is owed solely to the client, the existence of that duty does not necessarily negate a duty of care owed to a third party in tort. To the contrary, the undertakings of a specialist task pursuant to a contract between A and B may be the occasion that gives rise to a duty of care owed to C who may be damaged if the task is carelessly performed.”

Australian Consumer Law – Deceptive and Misleading Conduct

- Lawyers can be held for deceptive and misleading conduct under the ACL as services provided by lawyers occur in “trade or commerce” (e.g. proprietary limited firms).
- Goddard Elliott v Fritsch [2012]: “The relationship between the lawyers and the client was commercial in the sense that the lawyers were providing legal services to him for fee and reward”.
- A failure by a lawyer to exercise a duty of care can be held to be deceptive and misleading conduct.

Lawcover

- A lawyer is usually indemnified by their professional indemnity insurance but it only covers actions or omissions by a lawyer in connection to the practice of law (e.g. if a lawyer acts dishonestly, this is not covered).
- Communication breakdown with clients is the largest cause of professional negligence claims against solicitors.
Lawyer's Immunity From Suit

- Barristers or solicitors acting as advocates are immune from being liable in negligence for work conducted in connection with litigation.

- The immunity covers counsel's conduct and management of a case “in court” and does not cover work performed “out of court” lacking connection with in-court work.

- The immunity does not apply to a solicitor who opted to brief counsel.

- The immunity rests on public policy grounds (“floodgates” argument) and ensures the finality of decisions.

- If a lawyer was not immune from suit, then they may prefer their duty to the client than their duty to the court.

- Barristers should enjoy immunity because they have to take on all types of clients (cab rank principle).

- Immunity is important as few other professions require practitioners to attempt to see into the minds and anticipate reactions and opinions of other humans as does the profession of advocacy.

- Other legal professionals including court officials, judges and witnesses, enjoy immunity. However, as Lord Hoffman expressed, counsel is different from other participants as he is the only one who has a duty of care to the client.

- Justice Brennan has stated that the immunity is “impermissibly vague”.

- Australia is in a unique position as in other jurisdictions, they have abolished the immunity, but Australia has continuously affirmed the immunity.

- Counsel's immunity only applies to negligent acts and omissions in court but not intentional torts such as battery and assault.

Ridealgh v Horsefield [1994]

- “... an advocate in court, like a commander in battle, often has to make decisions quickly and under pressure, in the fog of war and ignorant of developments on the other side of the hill. Mistakes will inevitably be made, things done which the outcome shows to have been unwise. But advocacy is more an art than a science. It cannot be conducted according to formulae. Individuals differ in their style and approach. It is only when, with all allowances made, an advocate's conduct of court proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order against him.”

Gianerelli v Wraith (1988)

- The barrister's immunity was applied in this case.
- It involved three brothers who were convicted of perjury. Their testimony used at the Royal Commission was used in the trial, even though testimony from a royal commission cannot be used in criminal proceedings. The High Court quashed the three brothers’ convictions.

- Two of the brothers sued their barristers for negligence as the barrister should have raised the defence which would result in them not receiving guilty convictions. The majority held that the barrister was immune.

- The Court commented that it was artificial to draw a line at the courtroom door for work conducted “in court”. Activities conducted “out of court” cannot be divorced from “in court activities”.

- As a result, the immunity extends to work conducted out of court which leads a decision affecting the conduct of the case in court.

Kneefe v Marks (1989)

- This case involved an injured person bringing a claim for damages.

- His lawyers did not make any claim for interest.

- The plaintiff tried to sue his lawyers but failed because the court held that the barrister had immunity for work “intimately connected with or ancillary to courtroom work”) e.g. interviewing the plaintiff, giving legal advice, making legal arguments etc.

D’Orta-Ekenaike v Victoria Legal Aid (2005)

- The plaintiff was charged with a criminal offence and was granted Legal Aid.

- The plaintiff alleged the solicitor and barrister advised and pressured him to plead guilty, when he expressed to them that he was innocent.

- At the committal hearing, he entered a plea of guilty but later changed it. This was used at evidence at the trial. As a result, an appeal against conviction was allowed.

- The High Court held that an advocate is immune from suit for the conduct of work conducted in court or connected with the court work.

- When this occurred, the UK had already abolished the immunity.

Immunity Abolished In the UK

- Arthur JS Hall and Co (a firm) v Simons [2002]:
  - There were three claims against solicitors in three separate family law matters.
  - The Lords removed immunity in civil cases in this unanimous decision and a majority in criminal cases.
  - The Court commented that the cab rank rule cannot justify depriving all clients a remedy to negligence.
• The Court commented that there is no reason “to fear a flood of negligence suits against barristers” as a lawyer acting on their duty to the court would not be regarded as negligent.

• The lack of immunity strengthens the client confidence in the legal system.

**Negligent Settlement Advice**

- **Atwells v Jackson Lalic Lawyers Pty Limited [2016]**

  • In this case, a person was experiencing financial troubles.

  • If the case went to trial, the outcome would most likely be that the person would owe around $2 million.

  • In a civil settlement, the parties came to an agreement whereby the person would repay the bank $1.75 million but if it was not paid in five months, then the amount owed would increase to $3 million. The person did not pay by the due date and owed the $3 million.

  • The High Court held that the immunity does not apply to negligent settlement advice as it does not have a functional connection to the matter in court.
Confidentiality

Duty of Confidentiality

- The fiduciary duties conclude when the retainer concludes. Confidentiality survives the conclusion of the retainer.

- Confidentiality is a duty to encourage full and frank disclosure by clients and has a public policy rationale.

- Sources of the duty:
  
  • Contract (implied term prescribes its scope).
  
  • Equity (protects confidential information from unauthorised use and centres around whether the information is public knowledge). It is an “immortal duty to a former client” in the words of Lord Millett.
  
  • Professional rules

- Disclosing confidential information may lead to a loss of reputation or loss of clients for the lawyer. It can also lead to disciplinary hearings.

- Some state that the duty of confidentiality that encourages amoral representation and protects lawyers more than clients.

- The duty punishes honest clients with nothing to hide.

- There is a tension between confidentiality and protecting society.
  
  • American Lake Pleasant case: the client disclosed that he had committed two other unsolved murders but the lawyer did not come forward. This propelled many commentators to argue that the rules should be amended.

- It is important to have consideration of technology when data is stored on it e.g. secure storage, cyber security requirements and communication of confidential information.

- The exceptions to confidentiality in Australia imposes no obligation, only a mere discretion. This is not the same in other jurisdictions.

- Lawyers can disclose information that is already in the public domain, but lawyers should exercise caution as the information in the public domain may not be accurate and the client’s affairs may reveal more in-depth information than what is published. Therefore, there is a danger of inadvertent disclosure of confidential information.

Confidentiality Rules – Uniform Solicitors Rule 9

9.1 A solicitor must not disclose any information which is confidential to a client and acquired by the solicitor during the client’s engagement to any person who is not:

9.1.1 a solicitor who is a partner, principal, director, or employee of the solicitor’s law practice, or