

COMMON PITFALLS IN MODERN PROCEEDINGS

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In *Liprini v McIntyre* [2019] NSWSC 355, Acting Justice Simpson extensively discussed some of the common pitfalls in the progression of modern proceedings, in the context of a professional negligence claim against solicitors, focusing on risk of harm, causation and professional standards defences.

IN ISSUE

Whether the plaintiff was able to establish the risk of harm and whether the plaintiff had satisfied the *Civil Liability Act 2002* (NSW) (CLA) in respect of causation. The Court also considered whether the defendant could rely upon a section 50 CLA (professional standards) defence or advocates' immunity.

THE BACKGROUND

The proceedings were the result of a long and bitter legal history between Ken Liprini (the plaintiff) and his brother Dr Allan Liprini (Dr Liprini) in relation to the estate of their father, and later the estate of their mother. The plaintiff was not named as a beneficiary in either his father or mother's will. On the other hand, Dr Liprini was named as a beneficiary in both wills.

In 2005, the plaintiff instructed the defendants, Redmond Hale Simpson (RHS), to commence proceedings under the *Family Provision Act 1982* (FPA) in respect of his father's will. On 3 April 2007, the plaintiff instructed RHS to commence proceedings in relation to the estate of the mother. However, this did not occur.

On 6 December 2007, the plaintiff and Dr Liprini participated in a mediation where an agreement was reached whereby a substantial provision of both estates was to be provided to the plaintiff (regardless of the fact that proceedings had not yet been commenced in relation to the mother's estate), and orders were drafted that reflected the agreement. Notwithstanding the orders, Dr Liprini never made a payment pursuant to the orders and a long process of litigation followed which culminated in the bankruptcy of Dr Liprini.

The plaintiff subsequently commenced proceedings against RHS. The plaintiff's case against RHS was framed in two ways. The primary case was that RHS failed to commence proceedings in respect of Mrs Liprini's estate prior to the mediation, and by failing to do so breached their duty of care. The alternative case called into question RHS' formulation of the orders that were agreed at the mediation, and alleged that RHS failed to properly advise in relation to the orders or to warn the plaintiff of the risks associated with the orders.

THE DECISION AT TRIAL

The Court found that whichever way the plaintiff's primary case was framed, there was simply no risk of harm to the plaintiff from RHS' failure to commence proceedings before the mediation, and therefore the primary case failed at the first barrier, being the identification of the risk of harm. This finding was based on

the conclusion that the risk of harm (namely, that Dr Liprini would fail to make payment pursuant to the orders) was not a risk that flowed from the failure to commence proceedings.

In relation to the alternative case, the Court found that the plaintiff was unable to establish that RHS breached its duty of care. The Court noted the deficiencies in the alternative case, specifically, that the plaintiff failed to establish any causal connection between the economic loss he claimed, and any negligence on the part of RHS.

Given these deficiencies in the plaintiff's case, the Court only briefly discussed the deficiencies in the expert evidence tendered to support RHS' reliance on a section 5O defence. However, it was noted that advocates' immunity would not apply as there was no intimate connection between the breach and the conduct of the case.

Consequently, judgment was entered for RHS and the statement of claim was dismissed with the plaintiff to pay RHS' costs of the proceedings.

IMPLICATIONS FOR YOU

The decision emphasises the need to properly identify the potential risk of harm to the injured party in cases of negligence as well as establishing a causal connection between the alleged loss and the negligence of a defendant.

[Liprini v McIntyre \[2019\] NSWSC 355](#)

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