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Abstract
In 2002, New South Wales, Australia enacted modifications to the Legal Profession Act as incorporated into the Civil Liability Act 2002. One of the more contentious provisions of the amended Act is Division 5C, Part 11, s 198J, which requires that solicitors and barristers determine whether a case has 'reasonable prospects of success' before giving legal advice or even filing the case, else be subject to costs orders at best and disbarment at worst. The purpose of this article is to examine section 198J in light of its legislative purpose, judicial interpretation, and impact on the legal profession against the backdrop of acceptable negotiation theory and principles. The author proposes that s 198J may cause the very thing it attempts to eliminate because of the fog surrounding its genesis, interpretation, implementation, and attempted regulation of the legal professional's negotiation behaviour.

Keywords
s 198J, Legal Profession Act NSW, negotiation, legal profession, acceptable negotiation theory

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THE FOG HAS *NOT* LIFTED – A STUDY OF S198J OF THE LEGAL PROFESSION ACT OF NEW SOUTH WALES IN LIGHT OF ACCEPTABLE NEGOTIATION THEORY AND PRINCIPLES

*Avnita Lakhani**

Abstract

In 2002, New South Wales, Australia enacted modifications to the *Legal Profession Act* as incorporated into the *Civil Liability Act* 2002. One of the more contentious provisions of the amended Act is Division 5C, Part 11, s 198J, which requires that solicitors and barristers determine whether a case has 'reasonable prospects of success' *before* giving legal advice or even filing the case, else be subject to costs orders at best and disbarment at worst. The purpose of this article is to examine section 198J in light of its legislative purpose, judicial interpretation, and impact on the legal profession against the backdrop of acceptable negotiation theory and principles.[1] The author proposes that s 198J may cause the very thing it attempts to eliminate because of the fog surrounding its genesis, interpretation, implementation, and attempted regulation of the legal professional's negotiation behaviour.

Introduction

Lawyers owe a duty to the court and, through it, to society at large and to the public interest.[2] As lawyers are members of a profession, as opposed to a trade or business occupation,[3] it has been argued, 'pecuniary success is not the only goal.

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1 NOTE – I use the term 'legal professional' to include solicitors, barristers, lawyers, and attorneys. Such terms are used interchangeably unless otherwise noted. Judges, though legal professionals, are considered separately as they are deemed to be neutral and impartial, though this is arguable. The names used are not all-inclusive.

2 *Campbell v Jones* 2002 WL 31111858 (QCA) (Queensland Court of Appeal) ('*Campbell*). The case was heard on 3 September 2002, 3 months after the passing of the *Civil Liability Act* in June 2002 which contains the provision, Part II, Division 5C, s 198J, at issue.

3 *Campbell* 2002 WL 31111858 (QCA) (Queensland Court of Appeal) (stating 'A trade or business is an occupation or calling in which the primary object is the pursuit of

Service is the ideal, and the earning of remuneration must always be subservient to this main purpose'.[4] As part of the legal profession, legal professionals negotiate on a daily basis.[5] In some jurisdictions, lawyers are required, by statute, to negotiate on certain matters.[6] Given that less than 5% of filed claims ever reach the trial phase and, conversely, more than 95% of cases settle[7] prior to conclusion by trial,[8] it is reasonable to conclude that negotiation is a primary day-

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pecuniary gain. Honesty and honourable dealing are, of course, expected from every man… [b]ut in a profession pecuniary success is not the only goal.' [citing *In re Foster* (1950) WN (NSW) 122 at p 124 (Full Court)].

4 *Campbell* 2002 WL 31111858 (QCA) (Queensland Court of Appeal (citing *In re Foster* (1950) 67 WN (NSW) 122 at p 124 (Full Court)).

5 Debra Lynn Zutter, 'Negotiation' (March 2002) *Family Law Quarterly* 1 available at <http://www.debzutter.com/sections_content/02_articles_pub/article0005.html> on 5 December 2005. Ms. Zutter is a lawyer and mediator in Canada.

6 Zutter, above n 6 (discussing section 9(2) Duty of Legal Advisor as it pertains to family law matters as stating: 'It is the duty of every barrister, solicitor, lawyer or advocate who undertakes to act on behalf of a spouse in a divorce proceeding to discuss with the spouse the advisability of negotiating the matters that may be the subject of a support order or a custody order and to inform the spouse of the mediation facilities known to him or her that might be able to assist the spouses in negotiating those matters.'); See also various sections of the *Legal Profession Act* 1987 (NSW) advising of negotiation of certain matters: 1) Div 3, s 309 (negotiation of costs agreement); 2) Div 3, s 313 (negotiating settlement of litigious matter); 3) Div 3, s 406 (allowing the Law Society to negotiate with insurers and others for indemnity insurance); and 4) Div 2 s 479 (negotiating regulated mortgages).

7 Marc Galanter, 'Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society' *(2003)*, 31 *UCLA L. REV. 4*, 64-65

<http://www.marcgalanter.net/Documents/papers/ReadingtheLandscapeofDisputes.pdf> at 15 November 2005 (the term 'settle' here means 'terminate' in an outcome agreed upon by the parties, sometimes formally ratified by the court, sometimes only noted as settled, and sometimes, from the court's viewpoint, abandoned. The settlement process may begin even before the suit is filed. For example, a great majority of automobile injury claims are settled before filing.').

8 Galanter, above n 8, 27 (who also coined the phrase 'litigotiation' that refers to the process where negotiation and litigation are used simultaneously or in sequence); Carrie Menkel-Meadow, 'For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference' (1985) 33 *UCLA L. Rev.* 485, 502 ('Over 90% of all cases (both civil and criminal) are currently settled and taken out of the system and, thus, are unavailable for common law rule making'.); See also Nagler, 'Litigation Management: "Reebok Rules" for Litigation Management' (1997) 15 *ACCA Docket* 12 (well over 90% of commercial cases settle); Meyer, 'The Pros and Cons of Mediation' (1996) *SB41 ALI-ABA* 335 (more than 90% of all cases settle before trial); Plevin, 'Conflict: Avoiding Problems in Joint Defense Groups' (1996) 23 *Litigation* 41 (over

to-day skill of the legal professional. Therefore, any legislative attempt to regulate the behaviour of the legal profession is, directly or indirectly, an attempt to regulate the negotiation behaviours of legal professionals.

The issue is whether such legislative attempts at regulating the negotiation behaviours of legal professionals are unnecessary encroachments on a lawyer's duty to serve and advocate for his/her client. A related issue is whether such legislative constraints take into account acceptable negotiation theory and principles as opposed to being enacted based on little more than anecdotal evidence and imperfect studies, selectively obtained and subjectively assessed.

The purpose of this article is to examine the *Legal Profession Act 1987* (NSW), Division 5C, Part 11, s 198J as an example[9] of a legislative constraint on certain negotiation tactics used by the legal profession. For example, in negotiation literature, typical positional bargaining[10] tactics include high-soft offers,[11] low-soft

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90% of all civil cases settle); McArthur, 'The Strange Case of American Civil Procedure and the Missing Uniform Discovery Time Limits' (1996), 24 *Hofstra L. Rev.* 865 (standard figure that 90% of cases settle is actually too low); Greene, 'Temper in the Court: A Forum on Judicial Civility' (1996), 23 *Fordham Urb. L. J.* 721 (greater than 99% of cases settle).

9 Note: This article only discusses s 198J as an example of legislative attempts to regulate negotiation behaviour in general and more specifically, frivolous litigation. Other examples include Trade Practices Act s 52 (AU), Uniform Court Procedure Rules s 360 (AU), Federal Rules of Civil Procedure Rule 11 (USA), and ABA Model Code of Professional Responsibility (USA). Other attempts to control frivolous litigation include: 1) Private Securities Litigation Reform Act of 1995, Pub L No 104-67, 109 Stat 737, codified at 15 USC § § 77z-1-78u-5 (Supp 1997); 2) Report of the Banking, Housing and Urban Affairs Committee, § Rep No 104-98, 104th Cong, 1st Sess (1995), reprinted in 1995 USCCAN 679, 689 ('In crafting this legislation, the Committee has sought to strike the appropriate balance between protecting the rights of victims of securities fraud and the rights of public companies to avoid costly and meritless litigation. Our economy does not benefit when strike suit artists wreak havoc on our Nation's boardrooms and deter capital formation'.); 3) Rule 11, Federal Rules of Civil Procedure (authorizes courts to sanction lawyers, law firms, and other parties who are responsible for presenting an improper submission to the courts); 4) Rule 56(C), Federal Rules of Civil Procedure (to isolate and dispose of factually unsupported claims or defences via summary judgment motion); 4) various state sanctions that are modelled on the 1983 amendments to Rule 11 (see Byron C. Keeling, 'Toward a Balanced Approach to 'Frivolous' Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions' (1994) 21 *Pepperdine L Rev* 1067, 1073 n 25. A comparative discussion and analysis of these additional regulations will be discussed in a follow-on article. This article serves as a foundational basis for future discussions.

10 John Wade (ed), '*Bond Dispute Resolution News*' (May 2005) Volume 19 p 6 ('Positional bargaining' is described as 'a process whereby two or more parties suggest solutions to a transaction or to a conflict, and then engage in various doubt

offers,[12] insult offers,[13] theatrics, threats, lies, and bluffing.[14] Although 'lies' are clearly unacceptable for lawyers, why should the residue of the standard repertoire of negotiation behaviours be legislatively denied to lawyers, while permitted for their clients? This article also examines s 198J in light of its impact on solicitors, barristers, the legal profession, and the consumer. Part II provides a background to s 198J in terms of what allegedly encouraged New South Wales (NSW) to enact the provision and what goals the legislature in NSW intended to accomplish through the provision. Part III discusses the specific statutory language of s 198J and what it means as determined by statutory interpretation via courts as well as interpretation by legal scholars. Part IV is a discussion on the impact of s 198J in terms of the concerns and disadvantages of the provision as expressed on courts, legal practitioners, and scholars. Part V is a discussion of arguable advantages of s 198J or similar legislative attempts as seen from the perspective of judicial opinion, scholarly interpretation, and current negotiation theory and principles. Part VI looks at the legislative controls imposed by s 198J and whether such attempts will result in the expected benefits when analysed in light of acceptable negotiation theory and principles. Finally, Part VII concludes with questions about the purpose and role of solicitors and barristers in light of the legislative attempts to reform the behaviour of the profession.

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creation behaviours, in order to encourage the other to make successive incremental concessions towards the "opposition's" solution.' This process is a typical one used by attorneys and accurately applies to negotiations between lawyers and insurers.

11 Wade, above n 11, 8 ('High-soft' or 'low soft' offer is a 'number which, on currently available information, is inside the Insult Zone, but is statistically unlikely to be achievable elsewhere; and the proponent of the improbable number gives code messages to indicate that (s)he will move.').

12 Ibid.

13 Wade, above n 11, 8 (an offer within the 'insult zone' is 'a number which, on currently available information, has no objective justification' whereas an offer "just inside the insult zone" is a "number which, on currently available information, has improbable objective justification.')

14 Wade, above n 11, 8 (TTLBs are 'theatrics, threats, lies, and bluffs'). See also Lewicki, Saunders & Minton, *Essentials of Negotiation* (2nd ed., 2001) 168-170 (Bluffing is a deception tactic where negotiators state that they will perform some action that they cannot or do not actually intend to perform, including false threats or promises. Lies include falsification of documents, statements, information, or intention.).

Background to s 198J, Legislative History, and Purpose

Part 11, Division 5C, s 198J of the *Legal Profession Act 1987*[15] effectively states:

> 198J Solicitor or barrister not to act unless there are reasonable prospects of success
>
> (1) A solicitor or barrister must not provide legal services[16] on a claim or defence of a claim for damages unless the solicitor or barrister reasonably believes on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success.
>
> (2) A fact is ***provable*** only if the solicitor or barrister reasonably believes that the material then available to him or her provides a proper basis for alleging that fact.
>
> (3) This Division applies despite any obligation that a solicitor or barrister may have to act in accordance with the instructions or wishes of his or her client.
>
> (4) A claim has reasonable prospects of success if there are reasonable prospects of damages being recovered on the claim. A defence has reasonable prospects of success if there are reasonable prospects of the defence defeating the claim or leading to a reduction in the damages recovered on the claim.

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15 *Legal Profession Act 1987* was repealed in 2004 and replaced by the *Legal Profession Act 2004* No 112 (NSW).

16 *Legal Profession Act 2004* No 112 (NSW) (Part 1.2, Section 4 defines 'legal services' as 'work done, or business transacted, in the ordinary course of legal practice'; 'legal practice' is not defined*). Legal Profession Act 2004* (QLD) (legal services is not defined); See also Steve Mark, *What is Legal Work – A Regulator's View* (March 2005) available at

http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/OLSC_speeches (as of 9 March 2006) (acknowledging the lack of a proper definition for 'legal services' or 'legal practice' and concluding that while it would be costly and inefficient for courts to define this, it is also important to define it. However, even Mr Mark, Legal Services Commissioner (NSW), completely side-steps the issue by concluding that '[w]hat I propose is, rather than continuing to struggle with the problem of defining what legal work actually is, we should be extending the regulatory and ethical regime which applies to legal practitioners to all those who provide legal services or perform such work whether or not they are certified legal practitioners.' Ibid p 12). The lack of clear definition is the problem, without which extending any regulatory or ethical regime will only create more 'fog' in other professions. The legal profession should clear the way for others, not impede or further confuse them.

> (5) Provision of legal services in contravention of this section constitutes for the purposes of this Division the provision of legal services ***without reasonable prospects of success***.[17]

Section 198J was incorporated into the *Civil Liability Act* of June 2002. The *Civil Liability Act 2002* was part one of the Government's two-stage tort law reforms process.[18] Stage one involves broad reforms geared to 'reduce damage done by the public liability crisis'.[19] Stage two will involve another set of broad reforms to the law of negligence.[20]

Stage one of the tort law reforms, which incorporates s 198J of the *Legal Profession Act*, was aimed at alleviating what Government considered the detrimental impact of the 'public liability crisis'.[21] According to the Second Reading Speech by The Hon. John Della Bosca (Special Minister of State, Minister for Industrial Relations, Assistant Treasurer, Minister Assisting the Premier on Public Sector Management, and Minister Assisting the Premier for the Central Coast), the reforms were essential in order to prevent the damage caused by the public liability crisis to 'sporting and cultural activities, small businesses and tourism operators, and our local communities...[and] to protect our beaches and parks, our roads and schools, from unrealistic standards.'[22] The Minister stated that he 'met with many local government and community representatives who

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17 Ibid. The provision in *Legal Profession Act 2004* is Chapter 3, Part 3.2, Division 10, Section 345. The words 'solicitor or barrister' have been replaced by 'law practice', 'legal practitioner', or 'legal practitioner associate'.

18 'Government' refers to the government of New South Wales.

19 Second Reading of the *Civil Liability Bill 2002*, Legislative Council Extract, (4 June 2002) (containing the nature of the Government's tort law reforms and the purpose of 198J of the Legal Profession Act).

20 Second Reading of the *Civil Liability Bill 2002*, Legislative Council Extract, (4 June 2002)(describing the nature of the law of negligence reforms to be incorporated as part of stage two of the tort law reforms, including a risk warnings as a defence to for engaging in risky entertainment and sporting activities, a test for professional and medical negligence, special protections for good Samaritans, no special considerations for those who are drunk and injured, and no damages for persons injured while committing a crime.).

21 Presumably the 'public liability crisis' refers to community and governmental organisations (i.e., public entities) being sued by citizens under tort law. The public liability crisis also means that plaintiffs are represented by legal professionals against defendant-insurers for large organisations.

22 Second Reading of the *Civil Liability Bill 2002*, Legislative Council Extract, (4 June 2002) (These standards are those 'imposed by the courts with hindsight and with no regard for the cost to the community'.).

have told me that the approach of the courts to public liability is unsustainable.'[23] The Minister continued to recount stories of local community businesses that have been repeat defendants against repeat claimants in suits against them and forced to settle out of court with lawyers.[24] In conclusion, the Minister states, '[t] his is ambulance chasing to the nth degree.[25] Local government cannot carry the cost of it; society cannot carry the cost of it; surf clubs, show societies and sporting organisations cannot carry the cost of it. It is a national problem.'[26]

Furthermore, The Hon. John Della Bosca states that these tort reform measures in stage one are 'are tried and tested… [and] have worked in health care liability, in motor accidents and in workers compensation.'[27] Perhaps most importantly, stage one reforms are designed to reduce significantly costs as determined by studies commissioned by the Government. The Government expects that there 'will be a 17.5 percent reduction in the cost of personal injury claims…a 14 percent reduction in the cost of public liability claims as a whole…there should be a reduction of some 12 percent in public liability premiums' depending on insurers and particular policies or classes of risk.[28] However, it is also important to note the Government's disclaimer that 'New South Wales Government cannot guarantee that premiums will fall. However, we can put in place the necessary reforms to enable them to fall and that is what we are doing with this Bill.'[29] In

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23 Second Reading of the *Civil Liability Bill 2002*, Legislative Council Extract, (4 June 2002). Note: These types of 'stories' or anecdotes are precisely the types of non-objective evidence that scholars and practitioners like Galanter and Davis object to as the basis of forming opinions about the status of the legal industry. See also Galanter, above n 8, 64-65 (specifically discussing the effects of anecdotes and horror stories in formulating incorrect perceptions of a so-called litigation explosion').

24 Ibid. See Part IV for a detailed discussion on the use of horror stories to foster reform and the impact of s 198J on lawyers, clients, and the legal profession.

25 Note: The reference to 'ambulance chasing' is a direct reference to lawyers and more specifically, to plaintiff's lawyers in personal injury and public liability claims, who generally make 'high-soft' offers. It is important to note that no reference is made to insurers and the effect of insurers making 'low-soft' offers that are way below the value of a reasonable claim. The Minister's comments and the legislative reforms are based only on one side of the story, the views of business and the insurance industry.

26 Ibid.

27 Ibid.

28 Second Reading of the *Civil Liability Bill 2002*, Legislative Council Extract, (4 June 2002) (citing statistics from the Government's actuarial advise from PricewaterhouseCoopers. It should be noted that the single focus of these reforms was to reduce personal injury and public liability premiums charged by insurers.).

29 Ibid.

short, the 'national problem' is the alleged litany of social mischiefs as painted dramatically by the press and politicians. These include: 1) injured Australians are greedy and make 'unjustified' claims for redress and compensation; 2) 'unjustified' claims are encouraged by greedy lawyers who then file claims randomly, whether the claim has little or no chance of partial or complete 'success'; 3) there is an epidemic of unmeritorious claims, causing insurance companies to pay out a flood of compensation, leading to 'necessary' increases in insurance premiums in order to maintain their (not greedy) profits; and 4) increased insurance premiums cannot be paid by small businesses and clubs, which must then close down in large numbers or risk operating while uninsured, thereby depriving Australian society of valuable (and nostalgic) services of small clubs and businesses.

The government decided that the remedy to this chain of mischief is to threaten the licenses of 'greedy' lawyers who are one of the causes of the alleged flood of unmeritorious claims. The expected benefit is that such a regulatory measure will result in 1) fewer unsuccessful claims being filed; 2) fewer unsuccessful claims will need to be defended by insurers; 3) insurance companies will have fewer and lower defence and administrative expenses; 4) insurance companies will then reduce or freeze their premiums for a 'period' of time and these savings will be passed on to the customer; 5) such savings will mean that small businesses and clubs will be able to stay in business longer; 6) some injured individuals may not recover compensation but, on balance, Australian society will be 'better off' than before.

This simplistic fairytale of social mischiefs and remedies as well its various offshoot versions is appealing, yet seriously naïve and deceptive. An intelligent judge is in an 'interesting' position – for example, when the legislative remedy clearly does not achieve, or is not expected to achieve the intended goal (i.e., lower premiums, fewer claims, more stable small organisations), and achieves some unintended consequences, should the legislative remedy be judicially emasculated, reasoning, for example, 'I know what the literal remedy is, but it is based on flawed social analysis, and unintended detrimental side-effects?' Such was the situation faced by the legal profession and the courts when s 198J was enacted.

The restriction to filing unmeritorious claims and defences is officially codified in s 198J of the *Legal Profession Act 1987* (NSW)[30] as incorporated into the Civil Liability Bill 2002 and 'affectionately' termed the 'reasonable prospects of success' legislation.

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30 *Legal Profession Act 1987* was repealed in 2004 and replaced by the *Legal Profession Act 2004* No 112 (NSW). The relevant section is now s 345 of the *Legal Profession Act* 2004 No 112 (NSW).

However, while the Government puts in place reforms which it *hopes* will quell insurance premiums, prevent frivolous claims, and pass the savings onto customers, the courts and legal practitioners have taken a slightly different view of the situation and the impact s 198J of the Legal Profession Act as incorporated into the Civil Liability Bill 2002. The criticisms aimed at the tort law reforms are further discussed in Parts IV and V, whilst the view of the courts and the legal profession is the focus of the next section.

III. Statutory Interpretation of the Purpose of s 198J

The Acts Interpretation Act of the Commonwealth and the States guides statutory interpretation. Section 15AA of the *Acts of Interpretation Act* 1901 (Cth) states that '…a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.'[31] New South Wales,[32] Queensland,[33] South Australia, and ACT have adopted this basic approach.[34] For purposes of this article, *Interpretation Act 1987* (NSW) s 33 states '[i]n the interpretation of a provision of an Act or statutory rule, a construction that would promote the underlying the Act or statutory rule…shall be preferred to a construction that would not promote that purpose or object.'[35]

Statutory interpretation is also guided by three common law approaches to interpretation of legislative acts in order to determine the purpose or object of the legislation. The first common law approach is the 'literal' approach.[36] This approach advocates that the primary starting point of statutory interpretation is the natural and ordinary meaning of what is actually said in the Act.[37] In the

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31 D C Pearce, *Statutory Interpretation in Australia* (1974) 72 ('Where it is necessary to set out a particular section, the Commonwealth Acts Interpretation is cited, reference being made to the equivalent provisions of the State Acts'.).

32 Interpretation Act 1987 (NSW) s 33.

33 *Acts Interpretation Act 1954* (Qld) s 14A (In the interpretation of a provision of an Act, the interpretation that would best achieve the purpose of the Act is to be preferred to any other interpretation. Section 36 states that "purpose", for an Act, includes policy objective'. This provision is similar for South Australia.

34 *Legislation Act* 2001 (ACT) s 139.

35 *Interpretation Act* 1987 (NSW) s 33.

36 Catriona Cook, Robin Creyke, Robert Geddes, David Hammer, *Laying Down the Law* (6th ed, 2005) 210.

37 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (the Engineers' Case)* (1920) 28 CLR 129 at 161-2, Higgins J ('Fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the

event that the plain language meaning of the words used do not have a single, ordinary, unambiguous meaning, the courts should 'give the words of a statutory provision the meaning that the legislature is to have intended them to have'.[38]

The second common law approach is the 'golden rule' approach.[39] Under this approach, the 'golden rule', a limitation on the 'literal' approach, is that legislative acts should be interpreted according to the grammatical and ordinary sense of the words unless that construction would produce an absurd or inconsistent result in relation to the language of the legislation.[40] In essence, the interpretation should not result in an injustice or absurdity in reference to the policy that the legislation was to give effect.

The third common law approach is the 'mischief rule'.[41] Under the 'mischief rule', an act is interpreted based on the 'mischief' (i.e., problem) that the legislation was intend to cure and the 'remedy' proposed by such legislation.[42] In this approach, the interpretation is generally based on historical or 'extrinsic' material in order to discover the social problem and its proposed remedy. It is also generally understood that the 'mischief' (sometimes called 'purposive') approach is used 'only

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intent of the Parliament that made it; and that intention has be to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or impolitic or improbable.'); *Reid v Reid* [1979] 1NZLR 572 at 594, Cook J.

38 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 ('…the duty of the court is to give the words of a statutory provision the meaning that the legislature is to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with grammatical meaning, but not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning'.).

39 Cook et al, above n 37, 211-212.

40 *Grey v Pearson* (1857) 6 HL Cas 61 at 106, Lord Wensleydale ('…the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther.').

41 Cook et al, above n 37, 212-215.

42 *Haydon's Case* (1584) 3 Co Rep 7a at 7b (purpose of the legislation is determined by looking at the statute *in toto* as well as a consideration of history). See also Cook et al, above n 37, 212-215.

when an attempt to apply the literal approach produced an ambiguity or inconsistency'.[43]

Finally, where extrinsic material, such as a Second Reading Speech as authorised by section 34(1) of the *Interpretation Act 1987* (NSW), is used to determine legislative purpose under the 'mischief' rule, '[t] he words of the Minister must not be substituted for the text of the law'.[44] Taking these approaches to statutory interpretation into account, courts and scholars have attempted to determine the purpose and meaning of s 198J of the Legal Profession Act. The next section discusses three of the most recent cases brought under s 198J and the impact on the possible negotiation behaviours of legal professionals as based on such interpretations.

Momibo Pty Ltd & Barry Bryne v John Burnett Adam and John Robert trading as Marsdens Law Group (2004) (NSW District Court)

In 2004, the New South Wales District Court in *Momibo Pty Ltd v Adam*[45] determined that the purpose of s 198J of the Legal Profession Act was to cure the mischief of 'unmeritorious' claims and 'spurious' defences,[46] but only if the mischief extends beyond the acts which the law currently regulates.[47]

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43 Ibid.

44 *Khan v Commissioner* [2001] NSWADTAP 1, [40] (quoting *Re Bolton; ex parte Beane* (1987) 70 ALR 225, 227, 228). Mason CJ, Wilson and Dawson JJ in the *Bolton* case saw a clear role for the courts on the issue of statutory construction, stating '[t]he words of a Minister must not be substituted for the text of the law ... It is always possible that through oversight or inadvertence the clear intention of the Parliament fails to be translated into the text of the law. However unfortunate it may be when that happens, the task of the court remains clear. The function of the court is to give effect to the will of parliament as expressed in the law.'). See also *Wacando v Commonwealth of Australia and the State of Queensland* (1981) 148 CLR 1 at 25; *Commissioner of Taxation (Cth) v Whitfords Beach Pty Ltd* (1982) 150 CLR 355 at 373 (a bill used to remedy a mischief can be used to determine statutes' construction); *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 Brennan CJ, Dawson, Toohey, Gummow JJ (reports of law reform bodies can be used to determine the mischief that the statute is intended to cure); *Acts Interpretation Act* 1901 (Cth) s 15AB as amended by *Acts Interpretation Amendment Act* 1984.

45 *Momibo Pty Ltd & Barry Bryne v John Burnett Adam and John Robert trading as Marsdens Law Group* (2004) WL 2476453 (NSWDC) (delivered and unreported 31 August 2004, J Neilson) ('*Momibo*').

46 Ibid. The court adopted the Mischief Rule of statutory interpretation.

47 *Momibo* (2004) WL 2476453 (NSWDC) [60]. For example, today, claims can be made against a solicitor for 'serious neglect, serious incompetence or serious misconduct'

Momibo was a lessor of commercial lease property. He leased the property for two years to the lessees doing business as 'Divine Solariums' who were represented by solicitors, Marsdens Law Group. After the lease expired, Momibo sued the lessees for unpaid rent and other expenses. Momibo obtained a default judgment in Local Court, which was set aside after lessees presented evidence that they had paid all the rent.[48] The lessees then filed proceedings in NSW District Court in August 2002, via solicitors Marsden, claiming that lessor had breached terms of the contract and served a notice of ceasing to act on the lessor.[49] The solicitors annexed an s 198L(2) certificate[50] because the claim was filed after the effective date of the *Civil Liability Act 2002*. Hearing was commenced on 22 October 2003. The Local Court dismissed the lessees' solicitors' claims and entered judgment for the defendant, Momibo.[51]

Momibo subsequently filed a notice of motion for costs against solicitors, Marsden, under s 198M of the Legal Profession Act.[52] Momibo claimed that solicitors had, at all times, a duty under s 198J to ensure that they had reasonable prospects of success.[53] Momibo claimed that between February 2003 and August 2002, Marsden presented no evidence in support of their claim for breach of contractual terms and that under s 198N(4), solicitors had not proven their clients' instructions as required by the relevant provision. The case was heard before J Neilson of the NSW District Court on 31 August 2004.[54]

There were three primary issues before the court under the *Legal Profession Act*: 1) whether there was a breach of s 198J of the *Legal Profession Act* so as to

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under s.148E of the District Court Act or similar provisions under Part 39A Rule 4 of the District Court Rules.

48 *Momibo* (2004) WL 2476453 (NSWDC) [31]. Lessees claimed they had paid the rent, but the court found after looking at all the evidence that the lessees, in fact, had been in breach of their obligation to pay rent for nearly the entire period of tenancy.

49 Ibid.

50 *Legal Profession Act 1987* s 198L (2) states 'A solicitor or barrister cannot file court documentation on a claim or defence of a claim for damages unless the solicitor or barrister **certifies** that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim or defence (as appropriate) has reasonable prospects of success'. (emphasis added).

51 *Momibo* (2004) WL 2476453 (NSWDC) [41] (Plaintiff were to pay Momibo's costs on a party-party basis).

52 *Momibo* (2004) WL 2476453 (NSWDC).

53 Ibid.

54 Ibid.

activate the cost orders provision of s 198M; 2) whether statutory provisions require each part or section of a damages claim to meet reasonable prospects of success standard; and 3) whether it was necessary for Marsden to give evidence of their client's instructions without permission from their clients, thereby potentially breaching principles of legal professional privilege.[55]

The District Court first looked at statutory interpretation of s 198J using the purposive approach (mischief rule) and determined that the mischief the legislation was intended to cure, as affirmed by the Second Reading Speech, was 'unmeritorious claims' and 'spurious defences'.[56] The court further determined that the mischief triggered by s 198J and its partner provisions must be beyond serious neglect, incompetence, or misconduct as regulated by current court rules such as section 148E of the *District Court Act*.[57]

The *Momibo* court then looked at case law to determine what kinds of mischief may be the subject of such legislation. The court determined that the 'reasonable prospects legislation' was probably aimed at remedying situations where, for example: 1) case law allowed the solicitor to act on a client's instructions where he/she was not aware that his/her acts might constitute abuse of process or brought for ulterior motives; 2) where the solicitor was only liable for negligence for failure to comport with standards of professional duty; and 3) where the solicitor would still be entitled to continue to act for the client despite becoming aware during the course of representation that the case was unmeritorious.[58]

The court then looked at the statutory language of the s 198J and identified five key elements of an objective test to clarify and determine whether there were reasonable prospects of success for a given claim or defence. The court stated that

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55 Ibid. See also Raja Balachandran, 'Reasonable Prospects of Success: What are the responsibilities cast on the legal profession?' *Law Society Journal*, November 2004, pg. 61-63 (discussing the *Momibo* decision and its effects on solicitors and barristers).

56 *Momibo* (2004) WL 2476453 (NSWDC).

57 Ibid. The presumption is that the legislature was attempting to control frivolous litigations or vexatious litigants.

58 *Momibo* (2004) WL 2476453 (NSWDC) [61] – [80] (The *Momibo* court referred to the following cases as examples of the possible 'mischief' that s 198J was intended to cure: *Levick v Commissioner of Taxation* [2000] 102 FCR 115 (lawyers acting for client can prosecute cases "which have little or no prospect of success"); *Kumar v Minister of Immigration and Multicultural and Indigenous Affairs* (No. 20) [2004] FCA 18 (lawyers can initiate proceeding which "have no prospect of success"); *White Industries (Qld) Pty Ltd v Flowers & Hart* (1998) 156 LR 169 (solicitors can act for a client who has "no or substantially no prospect of success"); *Ridehalgh v Horsefield* [1994] C.205 (solicitors can act for client who has "a hopeless case"); and *De Sousa v Minister for Immigration* (1993) 41 FCR 544 (solicitors can act for client who has 'an unmeritorious case')).

the first element, 'reasonably believes', applies to each of the other four elements and must be based on a logically arguable belief.[59] The second element, 'reasonable belief based on material then available' does not have to be the equivalent of admissible evidence per evidentiary rules. The available material should be credible evidence.[60] The court stated that the third element, 'proper basis for alleging the fact' depends on the facts of the case. The court approved first-hand hearsay as being sufficient so long as the solicitor does not doubt the provider of the information, the information's inherent reliability, or its primary source.[61] The fourth element is 'a reasonably arguable view of the law'. According to J Neilson, this does not require a strict adherence to current law and may include 'any permissible development that might foreseeably be adopted by the court.'[62] The court interpreted the fifth element, 'reasonable prospects of damages being recovered in the action', as meaning that any damages or some damages would be sufficient. The court did not restrict the meaning to the damages claimed by the plaintiff nor does anything in s 198J affect exaggerated claims.[63]

In applying the law to the facts, the District Court held that although an objective five-part test is used, the lawyer's subjective belief as to the reasonableness of the claim was of paramount importance in determining whether the claim had reasonable prospects of success. In the present case (and addressing the first, second, and third elements of the test), the attorney had affidavits from the plaintiff that was sufficient to persuade the Registrar of the Local Court as to the merits of the claim.[64] The court further stated that the solicitor must accept the truth of his client's statements unless s/he has good grounds for believing otherwise.[65] The court cautioned against the alternative of never believing the client in the early stages. The court explained that to require stronger admissible evidence at the preliminary basis would frustrate meritorious claims that can only be proven after litigation has commenced via the normal discovery process and request for production of documents.[66]
The court then addressed the fourth element, namely the question of whether there was an arguable view of the law and found questions of law and fact to support the claim. An issue of fact was whether lessees had, in fact, paid rent for

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59 *Momibo* (2004) WL 2476453 (NSWDC) [84].

60 Ibid [85].

61 Ibid [86].

62 Ibid [87].

63 Ibid [88].

64 Ibid [96].

65 Ibid [97].

66 Ibid.

the leased premises during the contested time frame.[67] An arguable question of law arose out of a potential breach of the lease agreement by locking the lessees out of the leased premises if they had paid the rent according to the terms of the contract.[68] The court found that these issues met the criteria for the fourth element of an arguable view of the law.[69]

As to the fifth element of reasonable prospects of damages being recovered, the court found that information in the pleadings was sufficient to reveal that the plaintiffs had reasonable prospects of recovering lost income for 1 month, damages for conversion of chattel, and damages for breach of the covenant of quiet enjoyment.[70] While other allegations were not substantiated and thus dismissed, the foregoing allegations were supported under the s 198J standard and thus met the test for reasonable prospects of recovery.[71]

The court also found that s 198J imposed a continuing duty on the solicitor to ensure that the claim, at all times, met the standards for reasonable prospects of success. Given the practical realities of a solicitor's practice, the court affirmed that a solicitor might act at the *first convenient opportunity* rather than at the *first available opportunity* and still be compliant with s 198J standards of a continuing duty as to the merits of the claim.[72] Furthermore, work done by the actual solicitor running the case and the solicitor of record are equally liable because the work done for a solicitor on record by a partner, associate, employed solicitor, or clerk is assumed to have been done by the former (solicitor), thus triggering *respondeat superior* liability for the solicitor in charge.[73]
In conclusion, the District Court held that given the elements of the objective test in light of the solicitor's subjective view of the reasonable prospects of success of the claim under contract law, the solicitor was not in violation of s 198J so as to impose s 198M costs orders against the solicitor.[74] The court dismissed the

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67 Ibid [98].

68 Ibid.

69 Ibid [98] – [100].

70 Ibid [99].

71 Ibid.

72 *Momibo* (2004) WL 2476453 (NSWDC) [102] – [104] (emphasis added). This goes to the nature of timing of the solicitor's actions as relating to a change in the status of the case and whether at any given point, the case still has reasonable prospects of success. The court noted that when the solicitor did act as he became aware of the situation, 'he acted promptly'. This satisfied the court's determination that the solicitor acted properly. *Momibo* at [102].

73 Ibid [94].

74 Ibid [105] – [106].

application and ordered each of the party to bear its own costs for the application.[75]

This case points out several implications for the legal professional in light of negotiation theory and principle. First, from a case management standpoint, the legal professional is still in charge of the strategic direction and tactical methods used in managing the case. This responsibility, however, does not rise to the level of *judging* the merits of the case or assessing whether the plaintiff or defendant will be successful if the case goes to trial. A potential pitfall is that 'reasonable prospects of success' and 'hopeless case' are terms laden with multiple meanings, none of which seem to be clearly defined by the courts. For example, legal professionals may see 'success' in terms of the settlement of the dispute with minimal expenditure and maximum financial reward, with lawyer's fees paid. The court, on the other hand, may define 'success' in terms of which party's case has a chance of 'winning' (e.g., gaining any damages at all). The court may also consider whether the pleadings provided by the parties designate which party is likely to 'win' the case on the law and the facts. There may even be a subjective assessment of whether 'justice'[76] is served if one party prevails over another, thereby being a 'successful' case. It is clear from the *Momibo* decision that the court's determination of the possible validity of the plaintiff or defendant's claims were based strongly and solely on pleadings, affidavits, and persuading the court of the merits of the claim or defence.[77] Indeed, as long as the court's Registrar is persuaded, the claim or defence is likely to be rostered for a hearing. Who then is making the determination of 'reasonable prospects of success'? And will this reduce the number of cases filed as envisioned by the legislature?

A second observation directly relates to negotiation theory and principle. The use of exaggerated claims (commonly termed 'high soft') is generally an acceptable tactic in negotiation.[78] In practice, a solicitor may start 'high soft' with an insurance company (who starts 'low soft) as a normal part of the negotiations

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75 Ibid.

76 It is important to note that 'justice' may also be a matter of the subjective opinion of the judge or based on the objective statistics of similar cases.

77 *Momibo* (2004) WL 2476453 (NSWDC) [96] (discussing 'provable facts' required at commencement of proceedings as opposed to admissible evidence as well as the fact that the affidavits presented 'were sufficient to persuade the Registrar of the Local Court' to set aside a default judgment under the *Local Courts (Civil Claims) Rules* 1998, Pt 11 r1).

78 Lewicki et al, above n 15.

dance.[79] Because the primary interest of the insurance company is to minimise the amount paid against a given policy or injury, the solicitor may exaggerate the claim so as eventually to settle at an amount that is reasonable given his/her client's injury and to compensate for the services of the legal professional. When negotiations begin, the insurance company is likely to make an 'insult offer' by starting 'low-soft' that is completely out of the reasonable range of acceptance as determined by the plaintiff's solicitor. In anticipation of this or perhaps in realising that this is just the way positional bargaining goes, the solicitor may also make an insult offer, but on the high-soft side. Eventually, the parties negotiate and attempt to arrive at a 'reasonable offer' that is within the acceptable range of settlement options for both parties.

When the *Momibo* court analysed the provisions of s 198J and specifically the element of 'arguable basis', it noted that the provision does not affect 'exaggerated claims'. Thus, from the standpoint of one of the primary negotiating behaviours of the legal professional, s 198J does not purport to control such behaviour and neither does the court's interpretation of the provisions take away from the legal professional's power and ability to use such negotiation behaviour as part of their tactical strategy. Thus, in a literal interpretation approach, a plaintiff can claim $6 million on any claim as long as there is a prospect of recovering even $1. In addition, as long as the defence can reasonably expect to argue that the claim is worth $0, the defence's claim has merit under the literal interpretation approach. The legislature may not be pleased to know that so long as a plaintiff's lawyer believes that there is a prospect of recovering even $6.00, s/he can *claim* $6 million. The court's view of the impact of s198J is further supported by subsequent cases involving Division 5C, Part 11, s198J and its related provisions.

In 2005, two major cases were decided surrounding the reasonable prospects legislation. On 1 February 2005, the Supreme Court of New South Wales decided *Degiorgio v Dunn (No 2)*.[80] Degiorgio involved an application for an order of costs by a successful defendant against the plaintiff's solicitor under section 198M of the *Legal Profession Act 1987* (LPA).[81] Sections 198J and 198N were also implicated I determining the merits of the claim under s 198M.[82]

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79 Wade, above n 11, 8 (discussing the general steps in the 'positional bargaining dance'). As there are certain steps expected of the parties, it is not possible to short-circuit the dance without causing confusion and inefficiency in the negotiation process.

80 *Degiorgio v Dunn (No 2)* [2005] NSWSC 3 [1] (per Barrett J) (*Degiorgio (No 2*).

81 Ibid.

82 Ibid.

Prior to *Degiorgio v Dunn (No 2)*, the Supreme Court of New South Wales – Equity Division decided the issue of whether a partnership business existed in common between the parties.[83] That decision was delivered on 26 August 2004 (*Degiorgio v Dunn*) and established the basic facts of the case related to the costs orders sought under s 198M.

Degiorgio (plaintiff) and Dunn (defendant) are musicians. Degiorgio is a guitarist while Dunn plays drums.[84] Between 1995 and 1999, plaintiff and defendant were members of a four-person band called 'Dirty Deeds The Band' ('the first band'), which was considered a 'tribute band' for AC/DC, a highly popular rock band in Australia in the 1970s and 1980s.[85] In 1999, the group disbanded and defendant took steps to put together another band ('the second band') to perform the AC/DC music.[86] The defendant approached the plaintiff about becoming part of the second band.[87] It was alleged by the plaintiff that the involvement was in the nature of being equal partners in the new venture. However, the defendant alone registered the name of the second band under the Business Names Act and was identified as the 'person carrying on the business'.[88]

The issue before the *Degiorgio (No 1)* court was whether there was a partnership in common[89] between Degiorgio and Dunn, absent the legal formalities of a partnership under s 1(1) and s 2 of the *Partnership Act* 1892[90]. After review of the competing versions of the plaintiff's and defendant's conversations as well as relevant physical evidence, [91] the court concluded that the plaintiff had not met his burden of proof and, therefore, there was no partnership between plaintiff and

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83 *Degiorgio v Dunn* [2004] NSWSC 767 [1] ('Degiorgio (No 1)')

84 Ibid [2].

85 Ibid.

86 *Degiorgio (No 1)* [2004] NSWSC 767 [3].

87 Ibid

88 *Degiorgio (No 1)* [2004] NSWSC 767 [2].

89 Ibid [6] (citing several cases confirming the need for sharing of profits, an agency relationship, and mutuality of rights and obligations as being key factors.).

90 Ibid [5] (Section 1(1) of the Partnership Act states that a '[partnership is the relation which exists between persons carrying on a business in common with a view of profit.' Sections 2, 5, and 6 sets out the key determining factors for whether a partnership exists with agency, mutuality of obligations, and sharing of profits being principal considerations.).

91 Ibid [7] – [28].

defendant as of January 2000.[92] The court dismissed the plaintiff's claims in their entirety and awarded costs to the defendant.[93] The court requested that defendant file an order for costs,[94] which the court heard in *Degiorgio v Dunn (No 2)* in February 2005.

Dunn, the appellant in the second case, joined both Degiorgio (former plaintiff and 'first respondent') and his solicitor ('second respondent') in the first case as co-respondents.[95] The solicitor had resigned from retainer as Dunn's attorney as soon as he learned that costs orders were to be filed against him.[96] At the hearing, Dunn was unrepresented by legal counsel and had preserved and maintained the legal professional privileged nature of communications between himself and his former solicitor.[97] Dunn's former solicitor was represented by legal counsel and Degiorgio was represented by counsel.[98] Dunn sought costs of proceedings and notice of motion costs from both respondents.[99] The claim against the solicitor was brought under Part 52A r 4 of the Supreme Court Rules 1970 and/or Section 198M of the *Legal Profession Act 1987* (NSW).

The issues before the court were two-fold: 1) whether the appellant (Dunn) is entitled to an order for costs from the plaintiff on an indemnity basis as opposed to the ordinary principle that costs follow the event; and 2) whether the appellant is entitled to an order for indemnity costs against the former plaintiff's solicitor who is no longer the solicitor on record.[100] The court focused on the claim against the former solicitor having deduced that Dunn filed the claim against the solicitor presumably because of Degiorgio's statements during former cross-examination that he owned nothing but a mobile phone and thus would likely not be financially able to pay costs on his own.[101]

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92 Ibid [29] – [30].

93 Ibid [31] – [32].

94 Ibid [32].

95 *Degiorgio (No 2)* [2005] NSWSC 3 [1].

96 Ibid [3].

97 Ibid [3] and [12]. This issue of the former plaintiff having been left without proper counsel and being self-represented, especially at a costs hearing, is one of the key concerns and harmful ramifications surrounding s 198J.

98 Ibid [3].

99 Ibid [1].

100 Ibid [6] – [7].

101 *Degiorgio (No 2)* [2005] NSWSC 3 [6] – [7]. Only the case against the solicitor is discussed here. It is duly noted that the court dismissed the defendant's notice of motion filed on 1 October 2004 with respect to costs on an indemnity basis. The

As to the case against the solicitor, the appellant Dunn claimed that the solicitor failed to exercise due diligence in several primary matters: 1) he had not reviewed the relevant business register which would have shown that only Dunn was the valid owner of the business; 2) he had failed to review critical court documents (i.e., income tax forms, invoices, and remittance advices to the plaintiff) that would have shown that there was no partnership; and 3) the only evidence of the alleged partnership was the plaintiff's own oral testimony which, when combined with Degiorgio's 17-month absence in Canada, would have led a reasonable person to conclude there was no partnership.[102] The defendant argued that this lack of due diligence resulted in the solicitor filing a claim for which a reasonable person would conclude that there were no reasonable prospects of success under Division 5C, Part 11 of the *Legal Profession Act 1987* (NSW).

The solicitor, on the other hand, testified that he had reviewed numerous sets of documents including tax returns, invoices, and remittance advices.[103] He had also reviewed certain facts and actions by the parties and concluded that, in his professional opinion and '…so far as he was aware, there were no documents establishing the *non-existence* of a partnership'.[104]

The court assessed the s 198M claim first by statutory de-construction and interpretation of s 198M in context with Division 5C, Part 11 of the *Legal Profession Act 1987* (NSW) in general, and s 198J of the Act in particular.

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court ordered that the plaintiff to pay defendant's costs of the substantive proceedings on a party/party basis. Ibid [52]. Note: The fact pattern of the impoverished and unsuccessful litigant is common and likely serves to trigger cost claims against the litigant's lawyer.

102 Ibid [35].

103 Ibid [36] – [40].

104 *Degiorgio (No 2)* [2005] NSWSC 3 [36] (emphasis added). See especially [38] – [40] for the detailed cross-examination of the solicitor in which he identifies a series of 'provable facts' that led him to establish the claim for the existence of the partnership. This begs the question of what 'facts' are valid and how many 'facts' are required to make a valid determination to file a claim as some of these 'facts' are simply 'impressions' by the solicitor and not necessarily provable. Also important is the active vs. passive proving of facts – prove by inference of what does not exist (non-existence) vs. prove by showing what does exist within the meaning the statute and case law. Here the solicitor is proving the existence of a partnership by facts that do not prove the non-existence of the partnership based on a prior business relationship between the parties. Is this proper? Is this acceptable legal assessment by an attorney filing a claim?

The Court, in determining the legislative purpose of s 198J, found that the explanatory note accompanying the Civil Liability Bill 2002 did not provide sufficient guidance on 'reasonable prospects of success'. However, the Premier's second reading speech did provide some guidance in that it 'refers to "unmeritorious claims" and "spurious" defences [where] "unmeritorious" refers to something that is devoid of merit and [s]omething is "spurious"' if it is false or not genuine'.[105] J Barrett further articulates that the standard imposed on the lawyer by s 198J is a more stringent standard than general law principles for imposing costs orders against a lawyer.[106] Whereas general law principles would impose costs orders against a party's lawyer because of the lawyer's duty to the court, s 198J imposes a much higher standard in that the attorney is now also subject to personal costs orders based on a 'a statutory duty reflective of the interests of the community'.[107] The court also discussed the potential meaning of 'proceedings…taken on a claim for damages' as having broad interpretation and including even equitable damages.[108] In addition the court addressed *Momibo*'s five-element test[109] as well as the possible, varied definitions of 'reasonable prospects of success'.[110] The court adopted the construction that 'reasonable prospects of success' means 'so lacking in merit or substance as to not be fairly arguable'.[111] The Court concludes with the view that the relevant provisions of the *Legal Profession Act* are not meant such that '…lawyers practising in New South Wales courts must boycott every claimant with a weak case…[nor] deny[] to the community legal services in a particular class of litigation…[nor] stifle genuine

105 Ibid [25].

106 Ibid. See also Nicholas Beaumont, 'What are Reasonable Prospects' (2002) *Law Society Journal* 42-45 (discussing the potential interpretations of 'reasonable prospects of success' and stating that, in comparison to Rule 36 of the Bar Rules and Rule A36 of the Solicitor's Rules, s 198J imposes an additional requirement and a higher standard).

107 *Degiorgio (No 2)* [2005] NSWSC 3 [26], [44] (citing the Queensland Court of Appeal decision in *Steindl Nominees Pty Ltd v Laghaifar* [2003] 2 QdR 683) (discussing the general law approach). In contrast to *Steindl*, the *Degiorgio* court appears to allow for a greater leeway in an attorney's standard of conduct with respect to potentially unarguable cases.

108 *Degiorgio (No 2)* [2005] NSWSC 3 [13] – [15].

109 Ibid [17] (adding two observations to the notion of the claim for damages: 1) that damages are to be broadly construed to include even equitable damages; and 2) that the provision on damages is not measured by the quantum of damages and even nominal or token damages would satisfy the criteria).

110 *Degiorgio (No 2)* [2005] NSWSC 3 [16] – [28].

111 Ibid [28].

but problematic cases'.[112] The Court concluded by stating that the 'legislation is not meant to be an instrument of intimidation, so far as lawyers are concerned'.[113]

Under the legislative backdrop and the statutory construction of s 198J and s 198M, J Barrett found that 'at the time the proceedings were commenced and *at all material times* thereafter, the solicitor was in a position where he held, on the basis of *his own appraisal* of matters, a *genuine subjective opinion* that it was incorrect and inappropriate to regard as so devoid of merit or substance as to be not fairly arguable'.[114] That is to say the court determined that, because there were genuine issues of law and fact as to the existence of a partnership and the possibility of a relief by way of a claim for damages in the proceedings, the claim had merit.[115] The court further expanded on the nature of the lawyer's responsibility by stating that it was not the solicitor's responsibility to determine that 'success was likely or more likely than not'.[116] The court stated that the solicitor's responsibility was 'merely to see that there was, on the facts and the law, a cogent basis for putting forward a case not so devoid of merit or substance as to be not fairly arguable'.[117]

On the basis of this analysis, the court concluded that the solicitor had discharged his responsibility to the satisfaction of the court and the criteria as set forth under s 198J.[118] The court dismissed appellant Dunn's application for an order of costs under s 198M of the *Legal Profession Act 1987* (NSW).[119] Further, the court did not address the claims against the solicitor under Pt 52A r 43 of the Supreme Court rules because the court found the standard under ss 198J and 198M to be

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112 Ibid [27].

113 Ibid. Legal practitioner and legal scholar views on the 'intimidation' factor are discussed further in Part IV and Part V.

114 *Degiorgio (No 2)* [2005] NSWSC 3 [42] (emphasis added). The court seems to add additional criteria as to timing and opinion which further address the subjective part of the objective five-element analysis defined in *Momibo.*

115 Ibid (emphasis added).

116 *Degiorgio (No 2)* [2005] NSWSC 3 [42].

117 Ibid.

118 Ibid. Note that this is the opinion of the court and there may be some argument as to the extent of the lawyer's responsibility under s 198J.

119 Ibid [43].

more stringent than r 43 and thus disposed of the issue of the solicitor's liability.[120]

Several key observations are worth noting from this case. First, the attorney, after reviewing the preliminary documents given to him by his client did not feel the need to enter into settlement negotiations with the other party. The attorney felt he had a valid claim for damages to take it to trial on it own merits, thus using the court's resources to try the substantive claim. The attorney pursued the claim on the basis of a negative inference that there were no documents that established the *non-existence* of a partnership, thus putting forth an arguable question of fact/law. The court did not in any way punish the attorney for 'proving his case' by showing the inverse proposition i.e., that there was nothing to disprove the existence of a partnership. This begs the question of what exactly are 'provable facts' and do they really have to be proven. Secondly, the court appears to dilute the degree to which the legal profession has an on-going duty to show reasonable prospects of success as established by the *Momibo* decision. The *Degiorgio* court seems to say that the on-going duty to ensure that the case has reasonable prospects of success only applies 'at all material times thereafter'. This appears to be a less stringent standard yet the court does not define what is considered 'all material times thereafter'. Thirdly, the court relies heavily on the solicitor's subjective view of the viability of the case and does not question the solicitor's failure to enter into settlement negotiations early in the process. The court recognises that a review of business registry or review of the client's tax returns, invoices, and remittances might have established a weak case. However, the court accepts the lawyer's subjective opinion that this may have been an instance where the parties, because of status as a 'garage band' with little commercial experience in running a business, may not have established the partnership with 'the normal documentary indicia of a partnership' as may be found in such situations as a partnership of lawyers or accountants. It is clear that the *Degiorio* court relied more heavily on the lawyer's subjective assessment of the case than on conducting a detailed analysis under the *Momibo* five-element test as to the validity of the claim. While the court does not go into great length about the attorney's preliminary assessment, the case does present a question as to the nature of due diligence required by the attorney if he has to determine reasonable prospects of success before filing the claim and without benefit of discovery or production of documents by the other side. Prior to discovery, he does not even have the defendant's alleged reply to see if his alleged 'facts' are contradicted or accepted as against the alleged 'facts' of the opposing side.[121]

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120 Ibid [44]. Here, because the Court did not address the less stringent standard of r 43 versus the more stringent standard of s 198J, the question remains: if s 198J is more stringent, what examples might not pass under the stringent standard?

121 Note: The whole issue of accepted or contradicted 'facts' alone would make any claim a meritious claim with an arguable basis of law and fact.

Degiorgio No 1 and Degiorgio No 2 involved issues under contract law. As predicted, s 198J knows no substantive bounds and both proceedings of the *Degiorgio* case add only more confusion and questions to understanding the implications of s 198J and its constituent parts under Division 5C, Part 11 of the *Legal Profession Act 1987* (NSW).

Just three months after *Degiorgio No 2*, the court was faced with another claim against a solicitor under s 198J of the *Legal Profession Act 1987* (NSW), this time because the solicitor sought to appeal the decision of the lower court in a personal injury case involving an at-work injury.

Lemoto v Able Technical Pty Ltd [2005] (New South Wales Court of Appeal)

On 9 May 2005, the Court of Appeals of New South Wales decided *Lemoto v Able* and considered the power of the courts to pursue costs orders against an attorney who pursues damages claims that allegedly are without reasonable prospects of success as well as whether attorneys are entitled to the requirement of procedural fairness or natural justice when subjected to such costs orders.[122]

In late 1999, Christine Stoddart began working at B & C Mailing Pty Ltd. She had been sent to work there by Able Technical Pty Ltd, a labor/hire or employment agency.[123] On 26 November 2001, solicitor Lemoto filed a Statement of Claim in the District Court on behalf of his client, Christine Stoddart, who claimed that she sustained an injury to her lower back on 11 October 1999 as a result of being required to lift heavy boxes at her job and that the employer had failed to provide her with a safe system of work.[124] Stoddart claimed that the back injury resulted in a herniated disc that required surgery.[125] The Statement of Claim named Able Technical Pty Ltd ('first respondent') and B & C Mailing Pty Ltd ('second respondent') as co-defendants and requested compensation for the alleged work-related injury and subsequent medical costs from the surgery.

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122 *Lemoto v Able Technical Pty Ltd & 2 Ors* [2005] NSWCA 153, 153 (per Hodgson, Ipp and McColl JJA) (*Lemoto*). The idea of natural justice refers to the right to due process, i.e., notice and the opportunity to be heard and to present one's case.

123 *Lemoto* [2005] NSWCA 153 [20].

124 Ibid [20] – [21].

125 Ibid [21].

The matter was referred to arbitration. On 17 March 2003, the arbitrator ruled in favour of the co-defendants and concluded that lifting heavy boxes was not part of the second respondent's system of work and that Stoddart (plaintiff) had failed to establish a breach of any duty of care.[126] The arbitrator also ruled that plaintiff had failed to establish that the first respondent required her to work in an unsafe environment or under unsafe systems.[127] Pursuant to s 18 of the *Arbitration (Civil Actions) Act 1983*, Lemoto, acting as solicitor for Stoddart, sought a rehearing of the matter.[128] On 15 September 2003, the rehearing took place and the primary judge heard evidence until 18 September 2003. On 26 September 2003, the primary judge delivered his judgment in which he found in favour of the first and second respondents.[129] The primary judge then asked for submissions on costs. Attorneys for the second respondent (B & C Mailing) sought an order for costs against Lemoto (appellant) on an indemnity basis and attorneys for the first respondent did not seek costs against the solicitor, Lemoto. Lemoto, the appellant (Lemoto) stated that he was not in a position to deal with the second respondent's costs application so the hearing concluded and the matter was re-listed before the primary judge on 23 October 2003 to address the costs application.[130]

On 23 October 2003, Mr. Gambi, counsel for the second respondents (B & C Mailing) sought costs against Lemoto (appellant) pursuant to 198M, Part 11 Division 5C of the *Legal Profession Act 1987* (NSW) (the 'Act'). Mr. Gambi claimed that it should have been clear to the plaintiff at the conclusion of the arbitration that there really was not any real prospect of success.[131] Ms. Ryan, counsel for the third respondent (Christine Stoddart, Lemoto's former client) said they required a transcript of the hearing.[132] Presumably, because Lemoto did not appear at the 23 October 2003 hearing, the primary judge adjourned the s 198M application hearing. The primary judge requested Ms. Ryan, counsel for the third

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126 Ibid [22].

127 Ibid.

128 Ibid [23].

129 *Lemoto* [2005] NSWCA 153 [23]. Among the most interesting parts of the findings by the primary judge in the rehearing are statements and observations that despite the unreliability of the plaintiff's evidence, there was still room for an arguable basis for establishing the causal link between the work she was doing and the eventual herniation of the discs in her lower back. When read *in toto*, the primary judge's verdict and subsequent imposition of costs orders against Lemoto seem contrary to his own detailed opinion: *Lemoto* [24] – [30]. It is this contradiction that led to the concerns highlighted by the very detailed and exhaustive analysis of the Court of Appeal with regards to costs orders and ss 198J, 198M, 198N provisions.

130 *Lemoto* [2005] NSWCA 153, 153 and [31].

131 Ibid [39] – [40].

132 Ibid [53].

respondent and Lemoto, the appellant, to appear before him on 7 November 2003.[133] At the close of the hearing, he also ordered the third respondent to pay the first respondent's costs on a party-party basis.[134]

On 7 November 2003, the primary judge informed Ms. Ryan, counsel for the third respondent, and Lemoto that he had made the determination to impose costs orders against 'Ms Ryan and your instructing solicitor' under s 198M of the Legal Profession Act.[135] He invited the parties to submit affidavits and written submissions pursuant to 198N to counter the rebuttable presumptions of costs orders.

On 25 November 2003, the matter of costs orders was apparently re-listed at the request of counsel for the third respondent, Mr. Harrison SC who, with Mr. Torrington, appeared for Ms. Ryan.[136] Mr. Gambi, counsel for the second respondent appeared and re-stated that he requested costs orders only against the appellant and not against Ms. Ryan, counsel for the third respondent (Stoddart). Appellant Lemoto did not attend and presented sworn affidavits that he had not been informed of the hearing. At this hearing, the primary judge stated that while he had not made *explicit* findings that the facts in evidence established a basis for the reasonable belief that the claim had no reasonable prospects of success, the findings were *implicit* and he had 'no difficulty in formalising that'.[137] After noting that the appellant was not represented and further discussions, the primary judge adjourned the matter advising counsel that they would be informed of further proceedings.[138]

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133 Ibid [49] – [52].

134 Ibid [49].

135 Ibid [52] – [53]. While Lemoto was there, it is not clear whether the primary judge was also directing costs orders against Lemoto when he said '…and your instructing solicitor…' because he does specifically state so. It is assumed by the Court of Appeals that Lemoto was also being warned of the costs orders.

136 Ibid [58] and [59]. Mr. [Ian] Harrison SC is the President of the New South Wales Bar Association and Mr. Torrington is a member. Both appeared in support of the barrister, Ms. Ryan, against whom the primary judge was considering a costs order.

137 *Lemoto* [2005] NSWCA 153 [64] – [65] (emphasis added). It is not clear what those findings were as they were not explained at this hearing or subsequent hearings as to the basis for the costs orders. Furthermore, the reference to explicit versus implicit findings is critical to the argument for natural justice and procedural justice put forth by solicitor Lemoto. Explicit findings would require a formal review of evidence while implicit might mean as determined by the judge based on his own internal impressions, surely a more dangerous path.

138 Ibid [66] – [67]. There is clearly a tension here between counsel for the respondent and the judge because it appears that the judge is looking to counsel for direction as

On 10 December 2003, the associate to the primary judge sent a letter to appellant Lemoto advising him that there was the potential for a cost orders against him.[139] The letter asked that Lemoto make written submissions pursuant to s 198N to rebut the presumption that the personal injury matter was brought to trial without reasonable prospects.[140]

On 17 December 2003, Lemoto replied to the associate's letter. Lemoto stated that he had just received transcripts of the trial and would not be able to submit affidavits prior to the close of the Court's term and that he would be overseas from 20 December 2003 to 20 January 2004.[141] On 30 January 2004, the associate phoned appellant's office and left a reminder of the affidavits. A second phone call was made to request that the affidavits be submitted by 11 February 2004.[142] During both phone calls, the associate spoke and left messages with the appellant's secretary.

On 19 February 2004, the primary judge found that the appellant had not yet filed any affidavits.[143] Thereafter, on 25 February 2004, the associate to the primary judge sent a letter to the appellant stating that, as a result of Lemoto not having submitted any affidavits, Judge Phegan (the primary judge) had entered a costs order against appellant under s 198M of the *Legal Profession Act* effective as of the date of the letter.[144] The letter did not provide a basis for the order or any terms of the costs order.[145]

On 4 March 2004, Lemoto filed a Notice of Motion in the District Court requesting to set aside the costs order stating that he had been denied 'procedural fairness and natural justice' prior to the order being made by the primary judge.[146] Judge

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well as not sure of pursuing the s 198M costs orders because there is no clearly defined procedure he is confidently aware of to follow. He is 'fumbling in the dark' for how to proceed while still looking capable and authoritative.

139 Ibid [69].

140 Ibid.

141 Ibid [71].

142 Ibid [72].

143 Ibid [73].

144 Ibid. A copy of the letter was also sent to Mr. Gambi, counsel for the second respondent, who initially pursued the costs order.

145 Ibid [75].

146 Ibid [76].

Phegan denied the motion on 19 May 2004.[147] Lemoto then filed for leave to appeal on 19 June 2004, which was granted by the NSW Court of Appeal.[148]

The appellant argues that the cost orders were made without affording him procedural fairness and natural justice.[149] The appellant further argued that while he did not respond to the request for affidavits, it was because the primary judge failed to inform him of the particulars of the case he was required to put forth.[150]

Counsel for the second respondent submitted that the costs orders were timely and that the appellant had been given sufficient time to respond. He also argued that the costs orders were appropriate because 'there was no evidence that the appellant could have had a reasonable belief that there were "provable facts" which could have a finding of a breach of duty of care',[151] thus increasing the reasonable prospects of success for the claim. In an ironic twist, counsel for the third respondent (former plaintiff Stoddart) also submitted that appellant had been given sufficient time to respond to the judge's orders.[152] The third respondent argued that even if the primary judge had given her case the highest regard, there was insufficient evidence for the claim to have succeeded.[153] Therefore, the primary issues before the court were three-fold: 1) whether the costs order was properly made under s 198M of the Legal Profession Act 1987 (NSW); 2) whether the primary judge erred in making the costs orders against appellant Lemoto; and 3) whether the primary judge afforded appellant procedural fairness and natural justice when he issued the costs order.[154]

One of the central tasks for the court was the interpretation and application of ss 198J, 198M, and 198N of the *Legal Profession Act 1987* (NSW) (LPA). With respect to the legislative purpose and intentions of the provisions at issue, the Court of Appeals looked to historical principles, policy concerns, and legislative

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147 Ibid.

148 bid [79].

149 Ibid [80].

150 Ibid.

151 Ibid [81].

152 Ibid [82].

153 Ibid.

154 *Lemoto* [2005] NSWCA 153.

purpose.[155] The Court, in referring to its 1994 decision in *Ridehalgh v Horsfield*,[156] concluded: 1) that Division 5C, which encompasses s 198J, represented a 'departure from the historical basis'[157] upon which legal practitioners have been subjected to personal cost orders;[158] 2) that Division 5C creates a potential for conflict not only with respect to the lawyer's duty to the courts but also with respect to the lawyer's duty to his/her client;[159] and 3) that 'legislature clearly intended Division 5C to have this chilling effect'.[160] The Court stated the purpose of Division 5C, Part 11 as 'to deter the legal practitioner at the peril of a personal costs order, and possibly disciplinary proceedings, from representing a client whose prospects in pursuing or resisting a claim for damages he or she has formed the view have no reasonable prospects of success'.[161]

The Court of Appeals accepted the construction adopted by Barret J of the Degiorgio court that the test is 'whether a claim or defence is so lacking in merit as to be not fairly arguable'. [162] However, the Court of Appeals stated that the definition should be in the context of the other parts of Division 5C, Part 11. Placed in such context, the Court of Appeals states that the primary question is whether the solicitor or barrister's belief about the provable facts 'unquestionably fell outside [or within] the range of views which could reasonably be entertained'.[163] The fact that the argument before the court is eventually unsuccessful is not cause to justify issuing a costs order against the legal

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155 Note: It appears that the court bypassed the statutory method of interpretation and jumped directly to the 'golden rule' approach to argue against an interpretation that might result in an unjust or absurd result. By looking at historical principles, policy concerns, and legislative purpose, it appears the court hopes to provide a more historical rationale, thus putting the ball back into the court's hands, so to speak. See Section III for more detail on guidelines for statutory interpretation.

156 *Lemoto* [2005] NSWCA 153 (citing *Ridehalgh v Horsfield* [1994] Ch 205).

157 *Lemoto* [2005] NSWCA 153 [124].

158 Ibid [124] – [125]. The court points out that the departure from historical basis is two-fold: 1) the legal practitioner is now required to 'become a judge of the client's cause' because s/he must ensure that the claim or defence has 'reasonable prospects of success'; and 2) the legal practitioner must now evaluate the case from the standpoint of his/her own personal exposure to costs orders and disciplinary consequences.

159 Ibid [125].

160 Ibid [126].

161 bid [1].

162 Ibid [132].

163 Ibid.

practitioner.[164] The court cautioned that the making of costs orders (especially indemnity costs) is, at all times, a *discretionary* power of the judge and should only be exercised if it is just, in considering all the circumstances, and whether it should apply to all or part of the costs.[165]

With respect to procedural matters for issuing of costs orders under s 198M, the court recognised that there is no formal procedure outlined in s 198M for dealing with an application for an order of costs.[166] The court stressed, however, that the legal practitioner must have 'full and sufficient notice of the complaint and full and sufficient opportunity to answer it'.[167]

The Court of Appeal then made several key observations about the primary judge's views[168] about the lack of procedural fairness and denial of natural justice.[169] First, the Court of Appeal found that the primary judge did not use a proper construction of s 198M insofar as realising that imposing a costs order was discretionary per the language of the provision.[170] Second, the Court of Appeal found that the primary judge lacked proper factual foundation to determine that appellant had provided legal services without reasonable prospects of success.[171] The primary judge appears to have made this determination bases on one single hearing, on 23 October 2003, at which appellant was not present and had specifically filed an affidavit stating he was not aware of what transpired at that hearing.[172] Third, the Court of Appeal rejected the primary judge's proposition that s 198J did not lend it self to a formal process with reasoned judgment.[173] The

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164 Ibid [133].

165 Ibid [138] and [163] (emphasis added). This was a point of disagreement between the primary judge and the court of appeals as the primary judge apparently thought he had no discretion under s 198M in issuing a costs order whereas the Court of Appeals has clarified this misunderstanding by pointing to the 'may' language of the provision.

166 *Lemoto* [2005] NSWCA 153 [143].

167 Ibid [146].

168 Ibid [162] (the primary judge's views cited in its entirety).

169 Ibid [163] – [171].

170 Ibid [163] (referring to the construction of s 198M(1)). The court states that the costs order should only be made if it is just under all the circumstances. This would appear to be a high threshold test.

171 Ibid [164].

172 Ibid.

173 Ibid [166].

court states that it is 'fundamental to the exercise of judicial power that reasons are given'.[174] Fourthly, the Court of Appeal found that the primary judge had not given appellant sufficient notice of the complaint against him or the basis upon which the judge had formed the view that the case was without reasonable prospects of success.[175] The court found that simply advising appellant that there was a case for an order against him under s 198M was not an order with sufficient particularity for Lemoto to determine the details of the complaint or understand the case he had to meet.[176] Fifthly, the Court of Appeal stated that a costs order could not be made without giving the opportunity to the appellant to submit affidavits, even where the appellant had not made such submissions as of 7 November 2003.[177] Finally, the Court of Appeals fully rejected the proposition that just because the third respondent (Stoddart) had failed before the primary judge for the same reasons as she had failed before the arbitrator did not logically lead to the conclusion that the appellant had provided legal services without reasonable prospects of success.[178]

With respect to the issues before the court, the court found for the appellant-solicitor Lemoto and held: 1) the primary judge erred in making the costs orders against Lemoto; 2) the primary judge erred in concluding that the case met the test for a s 198N presumption; and 3) the primary judge failed to give reasons for the making of costs order against the appellant and had failed to consider 'whether the case was "fairly arguable" on the basis of provable facts or a reasonably arguable view of the law'.[179] The court allowed the appeal and discharged the costs order against the appellant.[180] The court upheld the costs order imposed by the primary judge as against the third respondent in favor of the first and second respondents.[181] The court also issued costs orders against the first and second respondents ordering them to pay the appellant's costs for the appeal and the application for leave to appeal.[182]

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174 Ibid.

175 Ibid [167].

176 Ibid.

177 Ibid [169].

178 Ibid [170]. The Court referred to this as a 'bald proposition' not sufficient to make a finding that the legal services were provided without merit.

179 Ibid [174] – [179].

180 Ibid [197].

181 Ibid [199].

182 Ibid [201].

The Court concludes, referring again to similar tensions discussed in *Ridehalgh*,[183] that '[w]hile the Division 5C jurisdiction should not be emasculated, the due administration of justice should not be impaired by a too liberal exercise of the new powers'.[184] The court here was probably referring to its earlier statement that Division 5C was a substantial departure from the powers that judges originally had to impose costs orders in order to protect the client who had suffered and to indemnify the party injured.[185] Such orders were based on misconduct and default, serious, or gross negligence of the attorney during the proceedings. This 'new power' gives judges more latitude and more reasons to impose costs orders, though the power is discretionary.[186] Thus, viewed from the backdrop of historical principles, policy concerns, and legislative purpose, the *Lemoto* court, according to some, has 'expressed its preference for legal practitioners to be "bold spirits" rather than "timorous souls" in providing representation'.[187]

As recent case law and practitioner analysis would indicate, costs orders against legal practitioners remain within the courts' discretionary powers as the main deterrent to unmeritorious or weak claims and defences.[188] This is consistent with prior legal precedent and the court's summary power to ensure proper administration of justice. For example, per Supreme Court and District Court Rules, the court has power to summarily dispose of cases where a cause of action or defence was not stated, where the claims were frivolous or vexatious, or where

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183 *Ridehalgh v Horsfield* [1994] Ch 205, 226 (discussing the tension between two important public interest concerns with respect to costs orders against lawyers: 1) 'lawyers should not be deterred from pursuing client's interest by fear of incurring personal liability to their client's opponent', and 2) that litigants should not be financially prejudiced by the unjustifiable conduct of their or their opponent's lawyers.) (*Ridehalgh*').

184 *Lemoto* [2005] NSWCA 153 [126]; See also Michael Legg and Melissa Fai, 'Court of Appeal clarifies "Reasonable Prospects of Success" (August 2005) *Law Society Journal* 55-58 for a general discussion on the *Lemoto* decision'.

185 *Lemoto* [2005] NSWCA 153 [84] - [94] (discussing the historical precedence of costs orders with an eye towards efficient administration of justice).

186 Ibid [94] (referring to the language of s 198M(1)).

187 *Lemoto* [2005] NSWCA 153 [126] ('timorous souls' as opposed to 'bold spirits' language quoting cf *Candler v Crane Christmas & Co* [1951] 2 KB 164, 178 (per Lord Denning.) See also Michael Legg and Melissa Fai, 'Court of Appeal clarifies "Reasonable Prospects of Success", (2005) *Law Society Journal* 55-58 (citing *Smith v NSW Bar Association* (1992) 176 CLR 256, 270; *Knight v FP Special Assets Ltd* (1992) 174 CLR 178,192).

188 *Lemoto* [2005] NSWCA 153 [99] – [100].

there was an abuse of process.[189] Additionally, hopeless claims and defences have traditionally been avoided and discouraged by the fact that the losing party has to pay for the legal costs incurred by the winner.[190] As is further discussed in Section IV, arguing a 'hopeless' case has not traditionally been grounds for concluding that the attorney acted improperly or breached his/her duty to the court unless there was some other ulterior purpose that resulted in an abuse of process of serious dereliction of duty.[191] While the court recognised that Division 5C, Part 11 is a departure from the traditional standard for making costs orders, the court also appears to caution against liberal exercise of the new power.[192]

If Division 5C, Part 11 is here to stay, albeit weakened in its initial power, what exactly is the standard of measurement against which lawyers must exercise due care? After concluding observations from the aforementioned cases, Sections IV and V address the impact of s 198J as seen by various stakeholders, including courts, legal professionals, and scholars. As will be seen, the impact can be advantageous if seen with the right light.

Concluding Observations of Case Law Decisions on s 198J

Against the backdrop of the previously discussed cases brought under Division 5C, Part 11 s 198J and related provision, several important conclusions may be drawn. The following chart represents the key observations regarding s 198J as interpreted by case law in New South Wales and discussed above.

Observation	Source
• The five key elements of the *objective* analysis are: 1) 'reasonably believing'; 2) 'material then available'; 3) 'proper basis for alleging the fact'; 4) 'a reasonably arguable view of the law'; and 5) 'reasonable prospects of damages being recovered in the action' • Underpinning the objective test is deference to the lawyer's *subjective* belief as to the reasonable prospects of success of the claim or defence	*Momibo*
• 'Reasonable belief' – applies to all other elements; means belief about claim is that it is logically arguable; includes extent of belief as well as rationality of the belief; belief may be subjective	*Momibo*

189 Supreme Court Rules Pt 15, r 5 and Pt 15, r 26; District Court Rules Pt 9, r 17 and Pt 11A, r 3.

190 *Ridehalgh* [1994] Ch 205, 225.

191 *Lemoto* [2005] NSWCA 153 [101] – [108] (discussing several cases that serve as precedence to that nature of the responsibility of the legal profession to the client and the court).

192 Ibid [189] and [196].

Observation	Source
• 'Material then available' – 'then available' means at the time at which legal service is provided. 'Material' is credible information/ evidence, not necessarily rising to the level of admissible evidence (i.e., per rules of Evidence).	*Momibo*
• 'Proper basis for alleging the fact' – this is a question of judgment in each case; first hand hearsay is there is no reason to doubt the provider, its inherent reliability, or its primary source. A sworn statement of client is material that is proper basis. Similarly 'hierarchy of material that is proper basis for alleging a fact is: 1) a client's oral instructions (basic); 2) a client's written statement; 3) a client's sworn statement; 4) the latter plus admissible, corroborative evidence such as bank records.'	*Momibo*
• 'A reasonably arguable view of the law' – not to be strictly or narrowly construed; does not require strict adherence to law as it currently might be, but extends to 'any permissible development that might be foreseeably adopted by the court'.	*Momibo*
• 'Reasonable prospects of damages being recovered in the action' – only requires recovery of 'damages', not the damages claimed or all damages; very broad construction; does not appear to affect exaggerated claims or provide a remedy against them; may also include equitable damages, token damages, nominal damages	*Momibo; Degiorgio*
• 'Reasonable prospects of success' – 1) for a claim – 'if there are reasonable prospects of damages being recovered on the claim'; 2) for a defence – 'if there are reasonable prospects of the defence defeating the claim or leading to a reduction in the damages recovered on the claim'	s 198J(4) of the *Legal Profession Act 1987* (NSW)
• 'Without reasonable prospects of success' – means 'so lacking in merit or substance as to be not fairly arguable'; falls short of 'likely to succeed'; does not require determination that success was likely or more likely than not – only requires determination on basis of facts and law that there is cogent basis for putting case forward that has merit and substance and is arguable. (*Degiorgio*) • Not 'fairly arguable' if solicitor or barrister's belief as to the material then available which justified proceeding with the claim or defence 'unquestionably fell outside the range of views which could reasonably be entertained'. (*Lemoto* citing *Medcalf* at [40])	*Degiorgio* [2005]; *Lemoto*
• Continuing duty under s 198J - on-going duty on legal practitioner to assess the case against reasonable prospects of success above and beyond when the case was filed; • Obligation arises whenever legal advice is provided (Momibo) and at all material times thereafter (Degiorgio)	*Momibo*; *Degiorgio* [2005]; *Lemoto*

Observation	Source
• Legal professional obligated to review/inspect documents and make determinations at first *convenient* opportunity (not necessarily at first *available* opportunity) when taking into account practical realities of legal professional's life and priorities. (*Momibo*)	
• s 198M costs orders may be: 1) repayment order; 2) indemnity order; 3) both repayment and indemnity order – must be exercised judiciously and only after determining that it is just in light of all circumstances	s 198M of the *Legal Profession Act 1987* (NSW); *Degiorgio* [2005]; *Lemoto*
• s 198M costs orders - considered *discretionary*[193] and not mandatory even if result of hearing is judgment that claim or defence was without reasonable prospects of success or plaintiff/defendant loses case	*Lemoto*
• Appeals and s 198J obligation – appeals from arbitration awards to judicial re-hearing that issues the same verdict as arbitrator is not a sufficient foundation to conclude that claim was without reasonable prospects of success; must be assessed independent with reasoned opinion	*Lemoto*
• Procedural fairness and natural justice – legal professional who might be subject to costs orders under s 198M must be given full and sufficient notice of complaint and full and sufficient opportunity to answer and present affidavits to rebut presumption	*Lemoto*

In addition to the five elements discussed in *Momibo* and further interpreted by courts, scholars, and practitioners, the most highly debated phrase is the meaning of 'reasonable prospects of success' or 'without reasonable prospects of success'[194] as stated in the Act.

The following chart reflects the varied definitions courts have come up with to reflect 'reasonable', 'reasonable prospects of success', or 'without reasonable prospects of success'.

193 Note: This is another area where some guidelines are needed. For example, how 'discretionary' is this? How many facts or how much evidence will/might trigger 'discretion' not to punish the lawyer?

194 Both phrases are used in ss 198J – 198N as the standard which attorneys must meet before acting or commencing a legal proceeding. Per s 198J(3), this standard applies regardless of the instructions or wishes of the client.

'reasonable prospects of success'	**'without reasonable prospects of success'**[195]
• Claim - 'if there are reasonable prospects of damages being recovered' (s 198J(4))	• '…so lacking in merit or substance as to be not fairly arguable' and appreciably short of 'likely to succeed' (*Degiorgio*) • no prospects of recovering damages on the claim
• Defense - 'if there are reasonable prospects of the defence defeating the claim or leading to a reduction in damages recovered on the claim' (s 198J(4)	• No prospects of defeating the claim or no possibility of getting a reduction of damages recovered on the claim
• 'Reasonable' = 'reasonable under all circumstances of the case' (*Opera House v Devon*, Latham CJ) • Acid test is 'whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable'. (*Ridehalgh* at 232).	• not reasonable based on all circumstances of the case • 'Unreasonable' – conduct that is 'vexatious, designed to harass the other side rather than advance the resolution of the case.' (*Ridehalgh* at 232). • Not unreasonable 'simply because it leads…to an unsuccessful result or because other more cautious legal representatives would have acted differently'. (*Ridehalgh* at 232).
• 'Reasonable' = 'a relative term' (*Opera House v Devon*, Starke J)	
• 'reasonable prospect' = '…a real chance, a prospect that is strong enough to be acted upon…does not entail more likely than not…' (*Cadogan & Anor*, Saville LJ)	• does not have a real chance
• nothing more than 'arguable' (*Westend Pallets Pty Ltd*)	• not arguable
• something less than the likelihood of succeed (*Ahern*)	• no likelihood of success
• 'not hopeless or entirely without merit' (*Cadogan* and *Repartriation Commission*)	• hopeless and entirely without merit
• 'a theory that is rationally based…' (*Cadogan* and *Repatriation Commission*)	• a theory that is 'irrational, absurd, or ridiculous'

The myriad definitions and impressions only create further discrepancy in how the standard is applied on a case-by-case basis. The lack of a consistent, measurable definition is at the heart of an immeasurable yardstick for attorney conduct or misconduct.

195 Unless specifically noted, this column reflects the inverse proposition of the left-hand column.

While courts have attempted to clarify s 198J and it constituent parts, there remains, still, a clear lack of consistency in those clarifications combined with a lack of uniformity in the procedural aspects of dealing with the provisions of Division 5C, Part 11. This results in the natural human tendency to return to institutionalised precedence and tried-and-true remedies that have worked over the years as the means to control frivolous claims.

Each of the three significant decisions regarding s 198J as well as practitioners and scholars agree that Division 5C imposes a more stringent standard[196] upon the legal practitioner. They also agree that Division 5C represents a historical departure from general law principles used to manage unmeritorious claims and imposes a continuing duty to keep abreast of the case, determine if the claim or defence lies outside the reasonable prospects of success standard, and to act accordingly.[197] The next section highlights the fog created by attempting to synchronise the meaning of key elements of s 198J and its related provisions by discussing the implications of s 198J and how it might impact the legal profession and its clients.

IV. Impact of s 198J – Concerns and Disadvantages

Has s 198J caused reverberations throughout the legal community? Anecdotally, the 'reasonable prospects of success' legislation is anything but carefully crafted legislation designed to resolve a critical problem in society. Many argue that the reasonable prospects legislation is everything from a carefully constructed campaign by the insurers to blame attorneys, plaintiffs and the legal system for the rise in insurance premiums to infringing on the rights of potential litigants. Others contend that it creates a conflict of interest between the lawyer's duty to the courts and their duty to the client. Still others say it imposes an unattainable standard on lawyers, which will compromise the very thing that the legislature intended to achieve – a reduction in claims and insurance premiums with the

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196 Once again, by stating that s 198J imposes a 'more stringent standard' does not clarify what is now prohibited under s 198J. The only clue appears to be that courts historically imposed costs orders on attorneys under the standard of *court* rules, such as r 43 and not political or community rules. By contrast, courts seem to think that s 198J imposes a more community-based standard on top of the court rules. Still, there is no clarity or examples and this leads simply to s 198J being emasculated and cast aside as an effective remedy to the perceived mischief.

197 For example, the *Momibo* court has stated that s 198J imposes a continuing duty on the legal practitioner to cease acting at any point the lawyer concludes that there are no reasonable prospects of success. The court concludes that while the attorney should act at 'first *available* opportunity', it is sufficient if he/she acts at 'first *convenient* opportunity' given the practical realities of a legal professional's life.

savings being passed on to the customer. This section whether the concerns and disadvantages expressed by the various stakeholders of the reasonable prospects legislation clarify or simply imposes more confusion until the legislation is simply neutralised by interpretation.

a. Courts

From the standpoint of the courts, the new power of s 198J is a remedial power, to be exercised very cautiously to produce a beneficial effect, and only after utmost consideration of all circumstances of the case.[198] Judges, through the key s 198J cases discussed above, appear to be concerned about five major aspects of Division 5C, Part 11 and its related provisions, including s 198J through s 198N.

First and foremost, courts are concerned about the 'chilling effect' of Division 5C.[199] Judges recognised that the mischief intended to be cured by Division 5C is a departure from the ways courts have traditionally dealt with unmeritorious claims and spurious defences (collectively referred to here as 'frivolous litigation').[200] Courts have traditionally sought to discourage hopeless claims and defences by having the loosing party pay the winning party's costs.[201] Division 5C changes the traditional controls and attempts to prevent the legal professional from even accepting a case that may be hopeless for fear of being subject to personal costs orders in the form of repayment or indemnity costs orders in addition to being displaced from the roll of attorneys.

Read literally, Division 5C is not triggered while providing legal services[202] as to preliminary matters,[203] yet solicitors and barristers can neither provide legal

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198 *Momibo* (2004) WL 2476453 (NSWDC) [105]; *Orchard v Southern Eastern Electricity Board* [1987] 1 QB 565, 579G (discussing the power of the courts to order solicitor to pay costs personally); *Degiorgio (No 2)* [2005] NSWSC 3 [27]; *Lemoto* [2005] NSWCA 153 [188] – [196].

199 Ibid.

200 *Momibo* (2004) WL 2476453 (NSWDC) [58].

201 *Ridehalgh v Horsefield* [1994] Ch 205 at 225.

202 It is noted once again that there is no clear definition of what constitutes 'legal services' either in the Act itself or as pronounced by the Legal Services Commission. Therefore, how can you punish a legal professional for doing or not doing something when there is no definition of what s/he can or cannot do?

203 *Legal Profession Act 1987* (NSW) Part 11, Division 5C, Section 198K: Preliminary legal work not affected; *Legal Profession Act 2004*, No 112, Chapter 3, Part 3.2, Division 10, Section 346: Preliminary legal work not affected.

services nor initiate legal proceedings without first determining that the claim or defence has reasonable prospects of success.

Because of multiple levels of costs orders combined with the possibility of being removed from the roll of legal practitioners, there is a real apprehension that lawyers will refuse legitimate cases or be intimidated into bargaining positions because of personal liability for costs.[204] J Barrett attempted to alleviate such concerns by stating that the Legal Profession Act is not presumed to mean that lawyers should boycott weak cases or that the new legislation is an instrument of intimidation.[205] J Barrett echoed J Neilson's view that imposing costs orders against a solicitor or barrister is entirely at the court's discretion and the legal practitioner should be given the benefit of the doubt in all cases[206] even if, after having heard all the arguments and evidence, the court finds that the claim or defence was not as strong as initially thought by the legal professional.[207] Yet the intimidation factor is real as evidenced by the aforementioned cases and the events that have recently transpired with legal professionals using section 198M costs orders as threats against opposing counsel during negotiations.[208]

Second, courts are concerned about the Division 5C creating a conflict of interest between a lawyer's duty to the court, duty to the client, and a duty to the community. Furthermore, Division 5C is seen as potentially infringing upon the roles of lawyers and judges because it appears to put the legal professional in the precarious position of playing 'judge' by determining the potential success of the case even before the judge makes such a determination. According to Neilson J in Momibo, a lawyer is an officer of the court first and foremost and owes a primary duty to the court.[209] Courts seem unified in the position that while it is a legal professional's duty to weigh the evidence available to his client to determine whether there are triable issues of law or fact, it is not incumbent upon the lawyer to assess the final result of the case, especially where there may be a conflict of

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204 *Degiorgio (No 2)* [2005] NSWSC 3 [26] – [27].

205 Ibid [27].

206 *Orchard v Southern Eastern Electric* [1987] 1 QB 565, 572E ('Justice requires that the solicitor shall have full opportunity of rebutting the complaint…justice requires that the solicitor be given the benefit of any doubt.').

207 *Lemoto* [2005] NSWCA 153 [99]. The court, however, does acknowledge the fact that in Australia, there is a tension between decisions at the Federal Court level and the state appellate court level with regards to whether legal practitioners can act for litigants with 'hopeless' cases: *Lemoto* [103]. Clearly, s 198J only aggravated this tension.

208 See below Section IVc (discussing the concerns of the legal community).

209 *Momibo* (2004) WL 2476453 (NSWDC) [104].

evidence.[210] In attempting to reconcile the nature of the lawyer's obligation, courts have sought to define the parameters of Division 5C in terms of the preparatory stage and the hearing stage.[211] Seen in this light, Division 5C clearly applies at the preparatory stage. Material that is considered a 'proper basis for alleging a fact' for a claim or defence are the initial instructions of the client and the materials provided by the client. As established by *Medcalf*, at the preparatory stage, the requirement is that material available to counsel would lead a responsible legal professional to conclude that serious allegations could be based upon the available material.[212]

In contrast, at the hearing stage, counsel cannot continue to make or persist in making serious allegations unless supported by admissible evidence.[213] The legal professional is subject to evidentiary rules during the hearing stage whereas such rules do not apply at the preparatory stage. As J Neilson stated when advocating for the acceptance of 'credible' evidence as opposed to 'admissible' evidence at the preliminary stage, it would 'frustrate many meritorious cases to require admissible evidence at a preliminary stage since many cases can only be proved after litigation has started, through the process of discovery and issuance of subpoenas'.[214] In essence, another literal construction of Division 5C could mean that the lawyer is expected to determine whether his claim or defence has merit *without* the benefit and right of the discovery process, thus putting the cart before the horse, so to speak. This begs the question of at which point during the preliminary stages is there now a lawyer-client relationship with its inherent responsibilities? How much preliminary matter must be available to determine whether the lawyer should pursue or decline the case? In addition, what about cases that do not directly deal with damages, but involve requests for declaratory judgments such as in discrimination and harassment cases, or injunctions against continued environmental damage?

With respect to the potential conflict of interest with the lawyer's duty to the client, courts seem of the consensus that the legal professional privilege is of a higher weight than the imposition of costs orders. Legal professional privilege is the cornerstone of a lawyer's duty to the client and to the community. Division 5C

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210 Ibid [61] – [80] (reviewing various cases that discuss the duty of the legal professional, the nature of imposing costs orders, and the role of the lawyer versus the court).

211 *Momibo* (2004) WL 2476453 (NSWDC) [85]; *Medcalf* [2003] 1AC 120 at [22] and [79] (discussing the nature of the difference in 'material' or 'provable facts' required at the preparatory stage versus the hearing stage).

212 *Medcalf* [2003] 1AC 120 [22].

213 Ibid.

214 *Momibo* (2004) WL 2476453 (NSWDC) [97].

has the potential to compromise legal professional privileged at the expense of costs orders against the attorney if the former client brings an s 198M costs orders claim against his/her former solicitor. For example, in *Medcalf v Mardell*, a leader and a junior counsel representing defendants made serious allegations of fraud against the plaintiff while acting on client instructions.[215] The fraud allegations were made in a draft amended notice of appeal, in a skeleton argument, and at the hearing of the appeal.[216] When the defendants lost, the plaintiff sought wasted costs orders against the lead and junior counsel for the defendants claiming that counsel did not have 'reasonably credible material' under paragraph 606 of the Code of Conduct of the Bar of England and Wales for alleging fraud.[217] At the hearing for costs, the defendant declined to waive privilege so the solicitors were not able to present to the court privileged and confidential information that substantiated that they had 'reasonably credible evidence'.[218] The Court of Appeal held that the hearing was fair despite the inability of counsel to defend themselves because of legal privilege, found that counsel had acted improperly in seven of the allegations and used the court's discretion to order wasted costs orders against counsel.[219] On counsel's appeal, it was held that where counsel is unable to defend their conduct because of not having the legal professional privilege waived, the court is not entitled to speculate an infer that there was no material which otherwise form a valid basis for making the allegations. Furthermore, the House of Lords held that the Court of Appeal should not make wasted costs orders unless, 'proceeding with extreme care, the court could say it was satisfied that there was nothing that counsel could, if unconstrained, have said [to] resist the order and that it was in all the circumstances fair to make the order…'.

A third major concern for the courts is that Division 5C will lead to an additional rise in unrepresented litigants.[220] The Legal and Constitutional Reference Committee (the 'Committee') of the Senate of the Parliament of Australia has already documented the rise in unrepresented litigants. In June 2004, the Committee published a final report on the issue of legal aid and access to justice.[221] Among their findings, the Committee found that as of 2004, there was

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215 *Medcalf* [2003] 1AC 120 (headnote).

216 Ibid.

217 Ibid.

218 Ibid.

219 Ibid.

220 *Degiorgio (No 2)* [2005] NSWSC 3 [27]; *Lemoto* [2005] NSWCA 153 [139] – [142] and [190] – [193]. The term 'unrepresented litigant' means the same thing as 'self-represented litigant' as referred to in the Senate report.

221 Legal and Constitutional Reference Committee of the Senate of the Parliament of Australia, '*Legal Aid and Access to Justice – Chapter 10: Self-Represented Litigants*' available at

no comprehensive data across the entire legal system as to number of self-represented litigants; however, the statistics that were reported anecdotally indicate a rise in self-represented litigants, especially in Family Court.[222] According to the Australian Law Reform Commission (ALRC)'s 2000 report on the federal civil justice system, *Managing Justice*,[223] the reasons for the increase include:[224] 1) litigants choose to represent themselves; 2) many cannot afford representation or do not qualify for legal aid;[225] 3) parties may believe they can do just as good a job as a lawyer; 4) parties distrust lawyers; and 5) parties continue the case unrepresented despite legal advice that they cannot win.

Courts fear that Division 5C will only intensify the problem of unrepresented or self-represented parties. This may arise in two forms: 1) the unrepresented party self-represents because of refused representation by an attorney concerned about personal liability under Division 5C costs orders; and 2) an unrepresented party self-represents as a result of suing his/her former solicitor under Division 5C provisions. The first scenario is of much greater concern to judges. Division 5C's 'chilling effect' would appear to bar legal practitioners from accepting less than certain cases for fear of incurring personal liability. Granted that lawyers discern the merits of case in the normal course of business, Division 5C imposes a stricter and greater personal liability than that covered by standard professional indemnity insurance. These costs orders may exceed standard costs imposed in the normal course of business. As the court in *Medcalf* pointed out, wasted costs orders have a penal effect upon counsel[226] and bear a grave risk to the professional. Bearing this in mind, a more cautious legal professional or one who

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<http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/legalaidjustice/report/report.pdf> on 19 December 2005 ('*Senate Report – Chapter 10*').

222 *Senate Report - Chapter 10*, above n 222, 182 (citing the the High Court of Australia, *Annual Report 2002-2003*, p 9, which noted that the proportion of self-represented litigants in applications for special leave to appeal increased to 42 per cent from 40 per cent in 2001-02 and 33 per cent in 2000-01; Family Law Council, Litigants in person: A report to the Attorney-General prepared by the Family Law Council, August 2000, p. 81; *Committee Hansard*, 10 March 2004, p. 1 (Chief Justice citing new statistics that nearly 47 percent of litigants in the Family Court were unrepresented at some stage of the proceedings.).

223 ALRC, Managing Justice - A review of the federal civil justice system, Report No. 89, 2000 ('Report No. 89')

224 Senate Report - Chapter 10, above n 222, 183-184.

225 Ibid 185 (citing ALRC, Review of the Federal Civil Justice System - Discussion Paper 62 (1999) 376, which found that almost 54% of those responding to ALRC's 1999 survey stated that the main reason they did not have a lawyer is the inability to pay for legal representation or the unavailability or cessation of legal aid.).

226 *Medcalf* [2003] 1 AC 120 (headnote).

cannot afford significant exposure to personal costs orders may unnecessarily decline to represent a client who has a genuine, arguable case.[227]

In the second scenario, Division 5C's 'chilling effect' might also prevent legal practitioners from continuing to represent clients if there is the possibility that their own client might pursue costs orders against them or the current/former client actually does pursue cost orders against them. The effect is that Division 5C 'splits the team'[228] between lawyer and client, resulting in a potential conflict of interest and potentially unjust results. In *Degiorgio v Dunn (No 2)*, the defendant sought indemnity costs not only from the plaintiff but also from the plaintiff's solicitor. The solicitor withdrew from retainer as the former plaintiff's attorney and the former plaintiff had to appear before the court as an unrepresented party. The danger is that such unrepresented parties may be prejudiced, especially at a costs hearing, without the benefit of counsel. Furthermore, if the unrepresented party fails to waive legal privilege, the solicitor is potentially at an unfair disadvantage in terms of being able to properly defend himself/herself.[229]

Fourthly, courts fear that too liberal use of the powers of Division 5C will lead to a 'new and costly form of satellite litigation'.[230] The *Lemoto* court use this term to likely refer to a rise in cases between opposing attorneys or between attorneys and their former clients for s 198M costs orders. *Medcalf* also reiterated the concern that parties might pursue protracted costs orders in large and disproportionate sums even though many such claims have been unsuccessful.[231] Certainly the facts and outcome in *Lemoto* might serve as an example of how complex and unwieldy such costs proceedings can become yet have little merit and cause more confusion.

Finally, courts have identified that the legislation lacks a procedural basis for handling a Division 5C claim. While Division 5C identifies the punishment for operating in contravention of 'reasonable prospects of success, it does not define a procedure that would protect the rights of the allegedly offending legal practitioner.[232] In *Lemoto*, the court addressed the lack of proper procedure for

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227 *Lemoto* [2005] NSWCA 153 [190].

228 'splits the team' was coined by Prof. John Wade during discussions about the effect of s 198J.

229 *Momibo* (2004) WL 2476453 (NSWDC) [92].

230 *Lemoto* [2005] NSWCA 153 [195] (citing the House of Lords in *Medcalf* [2003] 1 AC 120 [13]).

231 Ibid [194] (citing the House of Lords in *Medcalf* [2003] 1 AC 120 [13]).

232 Ibid [150] (arguing for law reform to the Legal Profession Act to include a minimum procedure to be followed in Division 5C matters).

managing Division 5C claims. In that case, solicitor Lemoto claimed a lack of procedural fairness and a denial of natural justice in appealing from a costs order. After recognising that Division 5C does not define a minimum procedure, the *Lemoto* court held that the legal practitioner who is subject to costs orders must be given full and sufficient notice of the complaint with particularity as well as full and sufficient opportunity to answer it.[233] In addition, the court cannot issue costs orders without providing a reason for imposing such costs or the basis upon which the judge formed the view that costs orders were necessary.[234] Finally, the *Lemoto* court warned that Division 5C needs to be properly understood and applied in order to prevent the '…grave risk of [it] becoming an instrument of injustice…'[235] As expressed by the courts, the major concerns around Division 5C involve the chilling effect of its potentially 'punitive' measures against legal practitioners for representing clients with 'weak cases',[236] the fact that lawyers are placed in the position of making judgements regarding the reasonable prospects of success of their case before it has reached a trier of facts or law, and the potential conflicts of interests which will likely arise from two competing public interests of the lawyer serving the court and the lawyer serving the public and his/her client. These major themes are consistent with concerns expressed by legal professionals and interdisciplinary scholars. Therefore, while the law may exist on the books, it will either gather dust or be so severely emasculated as to have no measurable consequences.

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233 Ibid [146] and [177].

234 Ibid [178] and [179].

235 Ibid [190] – [191]. In quoting *Medcalf v Mardell* [2002] UKHL 27; [2003] 1 AC 120 at [42], the court reminds that '[t]he law reports are replete with cases which were thought to be hopeless before investigation but were decided the other way after the court allowed the matter to be tried'.

236 *Lemoto* [2005] NSWCA 153 [138]. *Lemoto* has made clear that costs orders should be exercised very judiciously and only after the court has determined 'whether it is just, in all the circumstances, that a repayment order and/or the indemnity order should be made and whether it should be as to the whole or part of the costs'. See also *Ridehalgh* [1994] Ch 205, 236-237 (stating that costs orders are only justified if the legal practitioner conduct is 'quite plainly unjustifiable').

b. Legal professionals

Predictably, some lawyers as negotiators and litigants do not like the regulatory goals of s 198J or similar legislation. This is because for some legal practioners, it fails to control such 'inefficient' behaviours as 'exaggerated claims', 'wild claims' or 'insult offers' by such parties as insurance companies who usually start with a 'low-soft'[237] offer for settlement.

For legal practitioners, s 198J may be seen as an additional standard of conduct on top of the Bar Rules and the Solicitor's Rules. First, s 198J may add to existing ethical obligations when compared with Rule 36 of the Bar Rules and Rule A36 of the Solicitor's Rules [238] in that the attorney may now have to also take on the role of a judge and determine whether the case is likely to succeed in a court of law. [239] If the court adopts the construction that 'reasonable prospects of success' is based on the principle of proportionality, then lawyers would be placed in the position of 'making difficult value judgments at peril of a potential finding of professional misconduct against them'.[240] In addition, such additional obligations may lead both to practitioner-shopping and an increase in unrepresented litigation'.[241]

Secondly, even if a solicitor acts in good faith based on client instructions, s/he may still be subject to costs orders. [242] While costs orders are a standard aspect of the legal system and legal professionals make professional judgments on a daily basis, the difference now is that Division 5C provisions impose a greater *personal*

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237 Wade, above n 8 (A 'low-soft' offer is one which, 'on currently available information, is inside the Insult Zone', but open to negotiation. An offer within the 'insult zone' is a number 'which, on currently available information, has no objective justification.'). In the case of the insurance company, this number is a very low number used as a strategy to demonstrate to the plaintiff that his/her case has very little value and/or an opening move in the negotiations process. It is also designed to ensure that insurance companies do not pay out a premium benefit amount. It effectively will never be a reasonable offer.

238 Nicholas Beaumont, 'What are Reasonable Prospects?' (2004) *Law Society Journal* 42 (noting that Rule A36 of the Solicitor's Rules is identical to Rule 36 of the Bar Rules).

239 Beaumont, above n 239.

240 Beaumont, above n 239, 45.

241 Beaumont, above n 239, 45. These concerns are echoed by the NSW Court of Appeals in *Lemoto*. I would argue that, with respect to practitioner-shopping, this occurs regardless of s 198J, though s 198J would certainly exacerbate the issue because lawyers might turn down clients, not that clients are turning down lawyers because they are not happy with the latter's services.

242 See generally Greg Couston & Shayne Thompson, Some Guidelines at last on 'without reasonable prospects' and personal costs orders' (2005) *Law Society Journal* 35.

liability and create greater professional conduct liability issues that generally fall outside of the professional indemnity insurance maintained by solicitors.[243] As compared with other professions, legal professionals must serve the public and listen to client instructions. In fact, the courts are very clear that 'the legal practitioner must accept the truth of his client's statements unless he has good grounds for believing otherwise'.[244] In contrast, accountants are not obligated to listen to their clients. They are bound by external standards such as GAAP (General Accepted Accounting Principles in the US), which allow them greater flexibility to control their interactions with the client and still retain freedom from liability. By imposing the Division 5C standard, legislature has effectively divided legal professionals from their clients and imposed penalties, while still requiring that they meet their professional standards. Therefore, the potential effect of these provisions is to impose personal liability on solicitors and barristers, which may, in turn, cause lawyers to not take on certain cases or to have to procure personal liability insurance in addition to professional indemnity insurance.[245] Some legal professionals will not be able to afford dual premiums or may simply 'opt out' of the game, creating more backlogs in the court systems.

Thirdly, even after such detailed decisions as Momibo and Lemoto, practioners are still wary about how the courts will manage the competing interests of reducing unmeritorious claims while still allowing access to adequate legal representation.[246] For example, legal practitioners are now subject to repayment and/or indemnity costs orders and penalties set out in s.198M. They are also subject to penalties set out in Part 10 of the LPA. In addition, the lawyer may be subject to professional misconduct or unsatisfactory professional conduct proceedings[247] as well as having his or her name removed from the roll of legal professionals.[248] For some, these would certainly serve as a major deterrent to taking on cases which merit representation but whose transaction costs outweigh the potential for adequate recovery in court.

Fourthly, legal practitioners as litigators and negotiators are not protected from 'wild claims' or from 'exaggerated claims'. As interpreted by the court in *Momibo*,

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243 Ibid.

244 *Momibo* (2004) WL 2476453 (NSWDC) [97].

245 Similar issues are echoed by the court in *Lemoto*.

246 See generally Michael Legg and Melissa Fai, 'Court of Appeals clarifies 'Reasonable Prospects of Success" (2005) *Law Society Journal* 55, 58.

247 *Lemoto* [2005] NSWCA 153 [122]; *Legal Profession Act 1987* (NSW) s 198L(1).

248 Ibid.

s 198J does not restrict the nature of damages or guard 'exaggerated claims'.[249] Therefore, a lawyer-negotiator may still be subject to 'insult offers' before s/he is able to agree on a 'reasonable offer' with opposing counsel, especially if it involves an insurer. The only remedy for an applicant who is faced with exaggerated claims is section 148E of the District Court Act under DCR Pt 29A r 14.[250]

Legal practitioners may also argue that Division 5C affects their ability to manage their cases properly. If they are to make assessments of their cases before even filing them, they may run up against a statute of limitations problem deprive a potential litigant the right to have their day in court. The counter-argument is, of course, that Division 5C does not require admissible evidence at the preliminary stages such that even the client's written and sworn statement can serve as 'credible' material' to file a case well within the statute of limitations for a given cause of action.

Another potential cause for concern for legal professionals may be that requesting certification of documents prior to filing the case may be premature because the lawyer does not have the opportunity to assess the validity of the information. The information may be from biased persons or from those who may have a personal interest in the litigation. The attorney may not have the opportunity to question opposing counsel, follow-up with questioning of his client's witnesses or do any preliminary checks whilst still keeping in mind that s/he is not allowed to give advice and the statute of limitations clock is ticking. A related concern is who pays the cost of the preparatory stage activities in the face of having to meet the reasonable prospects of success standard. Of course, seen from the standpoint of potentially being subject to personal costs orders, the legal professional can be a bit more demanding of the prospective client if the client seeks to pursue the case. The lawyer can also agree to an arrangement with the prospective client with respect to preliminary costs of filing the case or pursuing the claim or defence. In addition, the reasonable prospects provisions may have an impact on the legal professional's duty with respect a prospective client. During the preliminary, preparatory stages where the reasonable prospects standard applies, when is the client a 'real client' within the meaning of the Legal Profession Act where the attorney is bound by confidentiality and legal professional privilege? If, after preliminary analysis, the attorney finds that he declines the case, how does he protect himself against claims by a potential client as to his decision and his assessment to decline the case where another lawyer may decide to take the case? These are some of the concerns, which may plague legal professionals.
As evidenced by practitioners' remarks, s 198J has invoked much concern, equal to that if not more so, than by courts and judges who will be the recipients of potential Division 5C claims.

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249 *Momibo* (2004) WL 2476453 (NSWDC) [88].

250 Ibid.

c. Legal Community

Furthermore, s 198J produced ripples across the legal community. Even before the 31 August 2004 *Momibo* decision, reports were already surfacing about s 198J being used as a negotiating chip between opposing attorneys.
In the April 2004 New South Wales Bar Association Bar Brief, Bar President Mr. Ian Harrison SC foreshadowed the *Momibo* case and the impact on the legal profession. He reported the use, by some large firms of solicitors, of Division 5C as a threat against their opponents, stating reminders of the obligation imposed by section 198J in the context of litigation is unnecessary and unprofessional…[and]…threats to invoke the legislation are professionally offensive'.[251] Four months later, on 6 August 2005, Mr. Gordon Salier, President of the Law Society of New South Wales, after receiving reports of 'widespread use of threats…by some practitioners…pursuant to Part 11, Division 5C', sent an e-mail reminding practitioners that such improper conduct affects the integrity and reputation of the profession.[252] Mr. Salier reminded the NSW Law Society practitioners of their obligations under Rule 25 and 34 of the Revised Professional Conduct & Practice Rules 1995[253] and outlined alternative means of managing the issue of cases not having reasonable prospects of success under Division 5C.[254]

The concern by the law societies and the bar associations is that Division 5C, if not properly managed, will potentially: 1) 'split the team' between the lawyer and client, with the lawyer now having to also worry about personal liability; 2) reduce cooperation and consideration between legal professionals as s 198J is now being used as a threat during negotiations;[255] and 3) affect the integrity and reputation of the legal profession because of the loss of client trust and opposing partner respect and cooperation. The reforms apparently became another adversarial bargaining chip in an already adversarial system where unintended, but entirely foreseeable consequences, proliferated.

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251 New South Wales Bar Association *Bar Brief No. 112* (2004) 2.

252 Gordon Salier, 'Solicitors Making Threats to Seek Personal Costs against other Solicitors pursuant to Part 11 Div 5c of the Legal Profession Act, 1987' (e-mail sent Friday, August 6, 2004).

253 The rules on communicating with fellow legal practitioners.

254 Salier, above n 253.

255 See also *Lemoto* at [194], where the court expresses the concern of '…the risk of a practice developing whereby solicitors endeavour to browbeat their opponents into abandoning clients or particular issues or arguments for fear of personal costs orders being made against them'.

d. Scholars

One of the primary criticisms of s 198J and similar legislation by legal and social science scholars is that it is based on faulty foundations consisting of a lack of empirical data to prove the social mischief of 'too many' litigious claims. Similarly, there is a lack of objective criteria to assess its potential success. As recently as December 2005, Mr. John North, President of the Law Council of Australia, commented that recent findings of the South Australian Parliament's Economic and Finance Committee's report on public liability[256] is further proof that 'the case for tort law change in Australia was not supported by any objective evidence or empirical fact'.[257] Scholars argue that this is further proof of the lack of relevant, objective evidence within the legal system when imposing rules and regulations to cure a perceived mischief.

One of the primary arguments in favour of Division 5C legislation was a tort crisis in which, it is alleged, the insurance industry initiated a campaign of 'blaming recent premium increases on lawyers, the legal system, and injury victims'.[258] Many scholars argue that this campaign was based on a foundation of unsubstantiated claims and misinformation,[259] which will not only deprive ordinary citizens of fair compensation for legitimate claims but also do permanent

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256 The Law Council of Australia Newsletter (December 2005) '*Changes To Compensation Laws Are Not Working: Report* ('*LCA December 2005 Newsletter*') (citing the South Australian Parliament Economic and Finance Committee's report on public liability which 'heavily questions the effectiveness of tort law reform measures in reducing the magnitude of the so-called tort law crisis' since evidence in the report suggests that 'community groups, small businesses and professional organisations have experienced exorbitant increases in premiums, regardless of claims history, and are finding it difficult to get insurance at any price'. The report further states that any evidence between 'tort law reforms' and the alleged 4% reduction in insurance premiums, after a 150% increase in such premiums, has 'yet to be demonstrated'.).

257 Ibid.

258 Rob Davis, 'The Tort Reform Crisis' (2003) *University of New South Wales Law Journal*, Vol 25 No 3, 1-2

<http://www.davislegal.com.au/Resources/Tort_Reform_Crisis.pdf> at 15 November 2005.

259 Ibid (arguing that the insurers public campaign for tort reform was '…big on rhetoric but scant on facts'.). Davis is past president of the Australian Plaintiffs Lawyer's Association. He is currently President of the Queensland Law Society and has his own firm in Gold Coast, Queensland – Davis Strategic and Legal. While his views may be somewhat biased, his concerns about the lack of objective, substantiated evidence in the legal system is a shared concern among many legal and non-legal scholars.

damage to the integrity of the Australian legal system.[260] Mr. North echoes these concerns by stating that the Australian public continues to bear the cost of tort law reforms 'for which no real case has ever been made'.[261] The result of not having objective, empirically based evidence for the need for reform is legislation, which is equally flawed. The aim of the legislation has been perceived as unnecessarily controlling litigation and negotiation behaviour of legal professionals while restricting the ability of ordinary citizens from getting fair compensation for legitimate injuries.[262] While Davis and North may be biased in their views given their professional positions, many scholars share their concerns about the lack of empirical, objective evidence to justify such legislation.

A second concern expressed by scholars is that the lack of objective, substantiated evidence only perpetuates the myth of the so-called 'litigation explosion', which was at the heart of Parliament's concerns when enacting s 198J. Scholars such as Marc Galanter are outspoken critics of those who would use horror stories, personal anecdotal evidence, interpretations based on perceptions and judgements, and unsubstantiated data to make generalisations about the legal system and about the so-called 'litigation explosion'.[263] Galanter argues that the lack of proper scholarly development in the legal system combined with competing interpretations of personal anecdotal evidence does not serve the legal profession and only increases the perception of lawyers and litigants as being 'petty, exploitative, oversensitive, obsessed, intoxicated, and despairing'.[264] As the Second Reading Speech indicates, the foundation of the legislation is primarily through horror stories, personal anecdotal evidence of one side of the issue, data that affirms the insurance industry crisis and reform targets that even the government will not guarantee.[265] If Galanter is correct, have the New South Wales legislators fallen into the common trap of 'garbage in-garbage out'? Were they trapped in the legislative 'fog of war' amidst countless anecdotes that made the perceived problem appear larger than it actually was?

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260 Davis, above n 259; *Cf* Stuart Clark, 'Tort reform, a change for the better' (14 June 2004) *Lawyer's Weekly*

<http://www.lawyersweekly.com.au/articles/4a/0c02134a.asp> at 15 November 2005 (arguing that Davis' 'conspiracy theory' about tort law reform in Australia lacks merit, calling the reforms a hallmark of 'co-operation and bipartisanship' on an issue that required that something be done).

261 LCA December 2005 Newsletter, above n 257.

262 Davis, above n 259, 6.

263 Galanter, above n 8, 64-65.

264 Galanter, above n 8, 66.

265 Second Reading Speech; see also Section I for more information on the legislative purpose and history of s 198J and its related provisions in Division 5C, Part 11.

Thirdly, there are other possible ramifications of the impact of s 198J. For example, the attorney is considered a third-party in the conflict and, as a result, already imposes his/her own interests in terms of billing hours, reputation, and winning cases.[266] If there is now an additional interest imposed on the third party, then the possibility of conflict is even greater. In addition, if the lawyer now has to determine whether to forward the case on the reasonable prospects of success standard, the legal professional will have to make value judgments regarding available resources.[267] According to Aubert, a profound conflict of value 'will keep the antagonists apart…[as] they do not value the same things and tend therefore to encounter each other less frequently than would otherwise have been the case'.[268] The classic illustration is the values and interests of defence attorneys and plaintiff's attorneys as depicted by the reports of using s 198J as threats against opposing counsel. In that example, s 198J brings to light a clash of values – between providing access to legal representation versus defendant's goals to be free from unmeritorious claims and reducing insurance premiums. If attorneys place different values on these objects, then s 198J will foster even more antagonism.

A fifth area of possible concern is that s 198J represents a new set of rights for attorneys and clients. In the context of the conflict pyramid, this would, theoretically, mean there will be more 'naming, claiming, and blaming'[269] by those asserting their right under the new provision, thus expanding the conflict pyramid

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266 Vilhelm Aubert, 'Competition and Dissensus: Two Types of Conflict and Conflict Resolution' (1963) 7 *Journal of Conflict Resolution* 25, 39. See also Robert H. Mnookin, 'Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict' (1993) 8 *Ohio State Journal of Dispute Resolution* 2, 239-241(discussing the strategic, principal/agent, cognitive, and reactive devaluation barriers to the negotiation and resolution of conflict. The strategic barrier or 'negotiator's dilemma' is relevant here.).

267 Aubert, above n 267, 29. For example, does the lawyer have sufficient resources to try the case, taking into account possible costs orders by his client or the opposing attorney or does the lawyer value offering his legal services to the client in this case over the fear that the case may not have 'reasonable prospects of success' and he/she may be subject to costs orders under s.198M? Aubert would consider these value-resource conflicts.

268 Aubert, above n 267, 29. The antagonists in this case are the opposing attorneys. The value conflict is the tension between those who believe in access to adequate legal representation for all and those who would argue that representation should not be available to those who have weak cases (i.e., a selective representation model).

269 Richard E. Miller and Austin Sarat, 'Grievances, Claims, and Disputes: Adressing the Adversary Culture Miller' (1980-1981) *15 L. & Soc'y Rev. 525*; See also Galanter, above n 8, 64-65.

at its base and generating new grievances.[270] In addition, Miller and Sarat found that where the remedy system is highly institutionalised,[271] the result is 'higher rates of grievance perception and claiming, lower rates of disputes, and higher rates of success in recovery for meritorious claims'.[272] In the present situation, attorneys now have the right to refuse to representation to clients whom they believe do not have reasonable prospects of success. In turn, clients have the right to bring costs orders against their own attorneys or against attorneys of the opposing party for filing a case for which there were no reasonable prospects of success. If Miller and Sarat's findings apply, then this might result in an additional set of court proceedings in *already* overflowing court dockets.[273]
The result, so far, is a series of cases with claims for personal costs orders against attorneys for advancing cases where there were no reasonable prospects of success, all of which have been unsuccessful for various reasons. Furthermore, the lack of an institutionalised remedy system has led to members of the legal profession proposing a system, which will address the issue yet not reflect so harshly on the integrity and reputation of the legal system.

As discussed earlier, Mr. Salier, President of the Law Society of New South Wales, received reports that solicitors were predictably using s 198J as a threat against opposing attorneys. These attorneys were trying to handle the issue by engaging in contending behaviour tactics such as threats and intimidation.[274] Such

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270 Miller and Sarat, above n 268 (describing and defining the structure of conflict in stages: grievances, claims, disputes, and civil/legal disputes).

271 Miller and Sarat, above n 268, 563.

272 Miller and Sarat, above n 268, 564.

273 Note: Per an e-mail conversation with Mr Rob Davis, the assertion that court dockets are already overflowing is 'an untested and unsupported assumption, in fact dockets are under filled in many courts these days'. (e-mail dated 14-Mar-06, on file with the author) In addition there have been other studies to indicate that there has been a decrease in the number of claims filed and court dockets have decreased generally. However, there is still active concern about the inefficient use of judicial and administrative resources, timely resolution of disputes, and diverting some matters to other dispute resolution processes. *ALRC 89*, para 1.154, p 103 (one of the key reform goals is to ensure the efficient use of judicial and administrative resources); See also Bobette Wolski, '*Reform of the Civil Justice System a Decade Past – Implications for the Legal Profession and Law Teachers*' presented at the Commonwealth Legal Education Association Conference 2005 (hearinafter 'W*olski*')(discussing some of the ALRC's reform goals in light of the issues in the legal profession and impact on legal education).

274 Lewicki *Negotiation: International Edition* (2006) at 22, 57, and 66(discussing the dual-concern model of conflict management, conflict management strategies under the model and tactics associated with such strategies, including contending and inaction).

solicitors and barristers would allegedly threaten the opposing attorney with a s 198M costs order and then intimidate them and their reputation and professional status via threats of professional misconduct proceedings. Because such conduct may itself cross the line of 'undeserved' allegations,[275] Mr. Salier sought to remind practitioners of their professional duty and to outline an alternative means of modifying such behaviour, especially that of reporting and complaining to the Law Society. Mr. Salier suggested that, instead of complaining to the Law Society or even filing claims for personal costs orders under s.198M, legal practitioners, in the event of finding that the opposing attorney's case is 'so ill founded or so lacking in credible defence'[276], should: 1) give a warning to the opposing practitioner as a matter of professional courtesy as to the evidentiary basis for forming such an opinion; 2) initiate an interlocutory proceeding for dismissal; and/or 3) initiate an interlocutory proceeding for strike out.[277]

Each of these measures discourages the use of the Division 5C costs orders against each other and each one, in turn, encourages the use of existing, institutionalised procedures for handling the situation. While the expected result of this proposed alternative procedure is a decrease in s.198M costs orders, it is also likely to increase the number of interlocutory proceedings. In addition, this tactic completely frustrates the legislative aim to split the team!

V. Impact of s 198J – Arguable Advantages

Clearly Division 5C in general and s 198J in particular, raised a number of valid concerns and questions regarding the manner in which attorneys may now manage their cases. Despite such concerns, however, there are numerous, potentially positive outcomes of Division 5C.

The first and perhaps most arguable advantage is that s 198J and related provisions have put attorneys on notice with respect to proper, cost effective case preparation, another ALRC reform goal. Whereas before, solicitors and barristers would be able to file a case and then invoke the court's resources to put together the evidentiary basis for their claim or defense, the new legislation 'put a premium on realistic assessment of cases…'[278]. By so doing, the legislation is presumed to

275 Note: Such 'undeserved' allegations now make the remedy part of the alleged historical problem instead of trying to define the actual cause, thus creating a vicious cycle of misinformation.

276 Salier, above n 253.

277 Salier, above n 253.

278 *Maitland Hospital v Fisher (No 2)* (1992) 27 NSWLR 721 (CA)(discussing the fact that the rule on costs orders does nothing more than oblige litigants to make a more realistic assessment of cases and its prospects of success, but does not mean that it will reduce the prospects of litigation) (hereinafter '*Maitland Hospital*').

protect the interests of litigants and of the public interest in 'prompt and economical disposal of litigation'.[279]

Secondly, as argued by Stuart Clark,[280] the Government's tort reforms and ensuing changes only reflected a proper correction to the predictable and negative effects of the changes in Australia's legal system that began in 1992. Clark argues that such changes as removing the historical restrictions on attorney advertising, allowing for a modified form of the contingency fee agreement, and a class action system 'that is more plaintiff friendly than even that in the United States'[281] resulted in a decade where there was a 'shift away from any concept of personal responsibility to a culture of blame'.[282] The resulting culture, as argued by some, is one that has caused damage to business and society.[283] Therefore, Clark argues, the reforms are a means to 'restore a little balance to the process'.[284] Presumably this means that Division 5C, Part 11 is meant to reign in out-of-control attorney behaviour by imposing personal responsibility and liability on attorneys, especially those who would be considered 'ambulance chasers'.

Thirdly, the concern that potential clients may be unnecessarily denied legal representation[285] begs a counter-argument in that this will only create a new industry of greater *pro se* (Litigants in Person) representation. Professor John Wade, Director of the Bond University Dispute Resolution Centre predicts that one change in the future of dispute management will be an increase in *pro se* representation[286] because

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279 See Wolski, above n 274, 2 (discussing *Maitland Hospital*).

280 Stuart Clark, 'Tort reform, a change for the better' (14 June 2004) *Lawyer's Weekly* <http://www.lawyersweekly.com.au/articles/4a/0c02134a.asp> at 15 November 2005 (arguing that Rob Davis' 'conspiracy theory' about tort law reform in Australia lacks merit, calling the reforms a hallmark of 'co-operation and bipartisanship' on an issue that required that something be done). Stuart Clark is a litigator and dispute resolution partner with Clayton Utz.

281 Ibid.

282 Ibid.

283 Ibid. See also Second Reading Speech of the *Civil Liability Bill 2002* (describing how the impact to business and society was the impetus for the reforms).

284 Stuart Clark, 'Tort reform, a change for the better' (14 June 2004) *Lawyer's Weekly* <http://www.lawyersweekly.com.au/articles/4a/0c02134a.asp> at 15 November 2005.

285 *Lemoto* at [141], [142], and [193]; Beaumont at 45; Beardow at 3.

286 John Wade, 'Pressures on "Legal" Services and the Dispute Management Industry: General Characteristics of Emerging DR Industries' (October 1993) 5. The article is on file with the author.

parties will be more educated[287] and demand more control over the process.[288] In addition, the unbundling of the legal professional's portfolio of services will mean that some clients will not be able to afford traditional legal representation and pursue the case in a *pro se* manner.[289] With regards to the *Lemoto* court's concern that a client will have to decide whether to pursue legal services without the aid of an attorney, resulting in less efficiency in the administration of justice,[290] other complementary services will emerge to aid the *pro se* litigant, such as *pro se* legal education providers that will aid the *pro se* litigant through the legal process.[291] Such new service organisations will probably employ former attorneys or judges much like the arbitration field today is filled with retired judges, current and former attorneys, and other qualified legal professionals. The net result is that the current fear caused by the impact of s 198J may be modified by market economics, resulting in a new crop of service organisations to aid the unrepresented litigant, perhaps challenging, to some extent, the legislation's goal of reducing personal injury claims, public liability claims, and insurance premiums.

Fourthly, assuming *arguendo* that Division 5C and s 198J, in particular, imposes an additional ethical requirement on legal professionals over and above the standard of due diligence of demonstrating provable facts and an arguable view of the law, this would seem to benefit clients and legal practitioners. Clients may have to be more active in the process, fully assist the legal professional in putting forth an arguable claim or defence, and actively engage in ensuring that the services of the legal professional are in direct proportion to the expected benefit. With a greater vested stake in pursing the claim or defence, legal professionals, in theory, should see greater commitment and participation from their clients, making their jobs a little easier. Clients, in turn, will receive greater and better attention to their cases by their legal professionals if they decide to pursue them. In the same vein, solicitors or barristers or other legal professionals will now have more freedom to work with their clients and determine which cases require the effort and expense towards a full trial and which are best managed through early settlement. The legal professional can now be strategic as well as tactical, thus

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287 Ibid.

288 Ibid.

289 Ibid.

290 *Lemoto* [2005] NSWCA 153 [141] – [142] (quoting *Kumar v Minister for Immigration & Multicultural & Indigenous Affairs (No 2)* [2004] FCA 18; (2004) 133 FCR 582, [15] and Mansfield J's view that the administration of justice will be better served where a party is represented and noting the 'public interest for the client to be represented'.).

291 Wade, above n 288, 5, 7.

improving overall case management.[292] In effect, it puts the power back into the hands of the legal professional to be objective and realistic counsellors *at law* instead of zealous advocates for their clients in the *shadow of the law*.

Finally, as predicted by well-known scholars, there is a change occurring within the legal system – a paradigm shift that will move the legal system in its present form towards a more dynamic business-oriented paradigm to accommodate the demands of a changing world.[293] One of these changes is the unbundling of legal services into its discrete, deliverable tasks.[294] While this may cause some discomfort, it also presents opportunities for legal professionals to make improvements to the legal culture and the way it wishes to serve the public interest. As seen from this light, s 198J may simply be a symptom of and a catalyst to a larger evolution that is taking place within the legal profession, one that is sure to generate interest as well as indigestion.

VI. Legislative Controls in Light of Acceptable Negotiation Theory and Principles

a. Introduction

It is duly noted that this section discusses the application of certain theories and principles regarding alleged litigant and non-litigant behaviour as developed and analysed in a U.S. or European setting. It is recognised that such models may not exactly correspond to the behaviour of legal professionals or litigants in Australia. For example, while US plaintiffs' lawyers are allowed to charge true contingent fees, the UK and Australia models only allow for recovery of legal fees under either a scaled or a marked-up version of a scale that takes into onsideration the risks involved in the action.[295] This would likely affect the behaviours of both the

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292 See generally John Wade, '*Which Conflicts Need Judges? Which Conflicts Need Filing? Some Diagnostic Checkslists*' (July 1999) 1-26 (providing an analytical framework and useful checklists to aid lawyers in making strategic and tactical decisions towards effective case management). The article is on file with the author. A list of relevant articles available at

http://www.bond.edu.au/law/staff/wadepubl.htm at 15 November 2005.

293 Wade, above n 286, 4-9; Richard Susskind, *The Future of Law* (Oxford University Press, 1996; Revised Paperback, 1998).

294 Wade, above n 286, 6.

295 Rob Davis (e-mail dated 13 March 2006 discussing the differences in the risk/gain matrix in the US, Australia, and the UK. Rob Davis also points out that because 'Australian lawyers cannot charge percentage contingent fees, and because damages are often lower here anyway…plaintiff's lawyers already avoid cases in which they will lose even if they win'.). This memo is on file with the author of this article. The

legal professional and the litigant while deciding whether to file a claim or when negotiating for a settlement. The purpose of this section is not to advocate for a specific approach. Rather the purpose of this section is to present one possible option of addressing the issue of a lack of objective, empirical methods to assess the impact of regulations when enacting legislation that inevitably affects a large constituency, especially as it affects the legal profession. To the extent that a given theory or principle may possibly be relevant, it is arguably more useful to the presumed alternative of 'shooting in the dark'.

One of the major complaints discussed above is that the reasonable prospects legislation was enacted without the benefit of a solid empirical and objective set of findings that the legislation would result in the proposed benefits. Were there credible materials or provable facts that warranted such legislation? Was such information of the character as to lead a reasonable mind to conclude that the regulatory legislation would have reasonable prospects of 'success' (without defining success or side-effects)? Finally, it is common ground, and previously established, that controlling the behaviour of legal professionals is akin to controlling the negotiation behaviour of lawyers. As s 198J appears to attempt unsuccessfully to control such behaviour, was sufficient weight given to acceptable negotiation theory and principles in order to provide a solid foundation that controlling such behaviour would result in the targeted benefits? This section attempts to address the potential success of the legislative controls imposed by s 198J and its related provisions as against negotiation theory and principles to determine whether Division 5C, Part 11 legislation has 'reasonable prospects of success' for the future.

b. Understanding the Context and Content of the Division 5C, Part 11

According to the Second Reading Speech, Division 5C, Part 11 and its provisions are intended to reduce unmeritorious claims and spurious defences. Unmeritorious means something that is 'devoid of merit'. [296] Spurious means something, which is 'false or not genuine'. [297] In essence, the Second Reading Speech was addressing what is commonly known as frivolous or vexatious litigation.[298] As a working definition for this section, *frivolous litigation* in the

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subject of the risk/gain matrix as another means to control the behaviour of legal professionals is the subject of a future article.

296 *Degiorgio v Dunn (No 2)* [2005] NSWSC 3 [25].

297 Ibid [25].

298 See, for example, the *Vexatious Litigants Act* 1981 (Qld), which grants courts the power to treat certain litigants as vexatious and restrict their access to the court. While the Act is not discussed in detail here, it is important to note that the Act covers the court's power while Division 5C directly affects the helper who might be assisting the vexatious litigant. The Act will be addressed in future articles.

civil justice system is defined as 'a case in which the plaintiff has a [very] low probability of prevailing[299] at trial'.[300] This is to be distinguished from *ordinary litigation* in which the plaintiff, as compared with the defendant, may have an equal or better chance of prevailing at trial.[301]

Controlling frivolous litigation was obviously a concern of the Parliament of New South Wales when it enacted s 198J as it has been for many political, legal, academic and public constituents,[302] despite the fact that is it is not very clear that there is a frivolous litigation 'problem'.[303] Nevertheless, it is common ground that frivolous suits are a cause of concern and should be controlled and minimised[304] to the extent that they represent the alleged 'waste' of judicial and administrative resources, which would be better utilised in resolving non-frivolous, meritorious claims.

c. Typical Behaviour Patterns of Legal Professionals in Ordinary versus Frivolous Litigation under Negotiation Theory/ Principles

Legal professionals appear to have different patterns of behaviour when they are litigants[305] in a potentially *frivolous* litigation as opposed to *ordinary* litigation where there is a high probability to obtain a monetary return.

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299 In this context, 'prevail' means 'any gross or net financial return'.

300 Chris Guthrie 'Framing Frivolous Litigation: A Psychological Theory' 67 *U. Chi. L. Rev.* 163, 186 (2000).

301 Ibid. Note: I am using definitions as presented by the scholar for simplicity's sake. Obviously, there may be numerous discussions on what is 'ordinary' as opposed to 'non-ordinary' litigation.

302 Guthrie, above n 299, 163 n1.

303 Guthrie, above n 299, 163 n2.

304 Guthrie, above n 299, 163 n3-6 (discussing various ways in which the United States Congress has tried to control frivolous litigation).

305 Note: With respect to Prof Chris Guthrie's work, he frequently distinguishes between 'litigants' and 'legal professional' and the extent to which 'framing' might be more influential as to non-lawyer litigants and less influential over lawyers. 'Legal professionals' are agents in the dispute resolution process while 'litigants' are clients, actual parties, and/or non-lawyers to the litigation. See e.g., Russell Korobkin and Chris Guthrie, Psychology, 'Economics and Settlement: A New Look at the Role of the Lawyer' (1997) 76 *Texas Law Review* 77, 79-83 and n 24 (discussing the nature of the lawyer in relation to the litigant); Chris Guthrie, Jeffrey J. Rachlinski, Andrew J. Wistrich, 'Inside the Judicial Mind' (2001) 86 *Cornell Law Review* 777, 816-818 (analysis of a study designed to look at the extent to which the decision-making process of 167 federal magistrate judges is affected by five common cognitive

According to some legal scholars, litigation behaviour in 'ordinary' civil cases may fall under two main categories. The first and prevailing category, 'rational actor accounts', assumes that litigants are rational actors who will make decisions that will maximise the value of their outcomes in the litigation system (outcome-maximisers).[306] This means that the individual will weigh multiple options, determine which gives them the greatest benefit or value, and select that option. The two primary rational actor accounts views are the Economic Theory of Suit and Settlement[307] and the Strategic Bargaining Theory.[308]

The second category is the non-rational actor accounts of litigation behaviour, with its foundations on psychology-based theories and relies on empirical evidence of predictable patterns of mental behaviour.[309] Litigants in this category want to maximise their outcomes in the litigation system but have trouble doing so because of non-rational factors, such as emotions, the current state of affairs, and settlement factors like anchoring and reciprocity.[310] The common non-rational

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illusions (anchoring, framing, hindsight bias, the representativeness heuristic, and egocentric biases).

306 Chris Guthrie, 'Understanding Settlement in Damages (and Beyond)' 2004 *J. Disp. Resol.* 89, 89-90.

307 Guthrie, above n 304, 90-91 (Under the Economic Theory of Suit and Settlement, litigants will 'compare the value of settlement to the expected value of trial and select whichever option will likely provide the most value', which generally is to settle as a way of saving costs since the costs of trial are invariably more than the costs to settle.). NOTE: For the leading work on the economic theory of suit and settlement, see George L. Priest and Benjamin Klein 'The Selection of Disputes for Litigation' (1984) 13 *J Legal Stud* 1.

308 Guthrie, above n 304, 91-92 (Notable strategic bargaining theorists are Robert Mnookin and Lewis Kornhauser. The Strategic Bargaining Theory states that rational litigants will attempt to bargain with one another to get a favourable settlement. Therefore, the negotiated settlements are the result of likely litigation outcomes as well as the strategic bargaining behaviour of litigants.). In this model, it appears that negotiation is expected and a certain bargaining process is expected by all parties. Such a process cannot be short-circuited.

309 Guthrie, above n 304, 94.

310 Guthrie, above n 304, 94, 100-101.

account views are the Framing Theory,[311] the Regret Aversion Theory,[312] and Settlement Factors.[313]

Of primary importance to understanding litigant (and thus attorney/client) behaviour in *ordinary litigation* is the Framing Theory, based on 'prospect theory' as formalised by Kahneman and Tversky's fourfold pattern of risk attitudes and insights into how people make decisions when faced with risk or uncertainty.[314] Prospect Theory holds that individuals do not make 'rational' decisions as argued by the economic models but those individuals 'exhibit different risk preferences depending upon the characteristics of the decision problem'.[315] According to Kahneman and Tversky, the 'fourfold pattern of risk attitudes' when making risky decisions are: 1) risk aversion for moderate-to-high probability gains; 2) risk seeking for moderate-to-high probability losses; 3) risk seeking for low-probability gains; and 4) risk aversion for low-probability losses.[316]

As applied to *ordinary litigation*, the Framing Theory of Litigation corresponds to the first half of prospect theory's fourfold pattern of risk attitudes, namely risk attitudes #1 and #2.[317] The Framing Theory states that litigants are like all general decision-makers. When faced with a decision, such litigants will evaluate the decision options 'relative to the current state of affairs and make risk-averse decisions when choosing between gains and risk-seeking decisions when choosing between losses'.[318] In a scenario where the relevant comparison is between a certain settlement amount and an expected trial value of the case at the same amount, if deciding whether to try the case, plaintiffs will likely choose a risk-

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311 Guthrie, above n 304, 94-95. This theory is discussed further as it is considered the more modern theory applicable to understanding litigation behaviour.

312 Guthrie, above n 304, 96-98 (The Regret Aversion Theory basically means that litigants will select the decision that will minimize the likelihood of post-trial regret. Therefore, litigants are more likely to choose settlement over trial to 'avoid feelings of regret associated with learning after trial that they should have settled'.).

313 Guthrie, above n 304, 94, 100-106 (discussing four major settlement factors: 1) anchoring; 2) reciprocity; 3) scarcity; and 4) vindication seeking as systematically affecting and influencing litigation behaviour).

314 Guthrie, above n 304, 94; Guthrie, above n 299, 167-168.

315 Guthrie, above n 299, 176.

316 Guthrie, above n 299, 166 (citing works of Kahneman and Tversky)

317 Guthrie, above n 299, 167.

318 Guthrie, above n 304, 94-95.

averse option (settlement) because they see settlement and trial as gains.[319] Conversely, defendants will likely choose to go to trial (a risk-seeking option) because they see both trial and settlement as losses.[320] Similarly, individuals will generally prefer a certain $1,000 prize to a 50% chance of winning a $2,000 prize (risk-averse choice between gains). However, the same individual would rather take a 50% chance at paying a $5,000 fine than to pay a $50 fine for certain (risk-seeking choice between losses). Most of the attention regarding litigation behaviour has been concentrated on the first half of the prospect theory model to develop the Framing Theory. Therefore, it is reasonable to argue that most legislative attempts to control litigation/negotiation behaviour is based on the Framing Theory and the first half of prospect theory's fourfold pattern of risk attitudes.

This aspect of Framing Theory corresponds with studies on risk aversion and risk seeking behaviour by plaintiffs. In ordinary personal injury litigation, for example, plaintiffs-victims battling with defendant-insurance companies generally settle 90% of the time for a number of reasons, including lack of funds, reduced bargaining power when compared with insurers, poor legal counsel, etc. despite evidence that plaintiffs will generally win at trial.[321] Plaintiff's attorneys may also face added pressure to settle early because they generally must carry the plaintiff's expenses and litigation loans.[322] Similarily, defendant insurers who have little personal vested interest because it is not their money that may be lost are willing to make low-soft/insult offers, go to trial, and take their chances[323] despite the fact that there is a high statistical probability that they will lose at trial.[324] Plaintiffs take the risk averse choice rather than the risk-seeking choice while defendants generally pursue the risk seeking path.

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319 Guthrie, above n 299, 167. Note: The comparisons in the examples involve a settlement amount that is identical to the (expected) trial value of the same case.

320 Guthrie, above n 304, 95; See also Robin M. Hogarth, *Judgment and Choice* (2d ed. 1987) 105 ('Prospect theory therefore predicts that whereas the plaintiff would settle out of court (i.e. take the safe option), the defendant would prefer to go to court (i.e., the risky alternative)'.).

321 Rob Davis, 'Negotiating Personal Injury Cases: A Survey of the Attitudes and Beliefs of Personal Injury Lawyers' (1994) 68 *ALJ* 734, 741-721.

322 Ibid.

323 Davis, above n 319, 744-745 (discussing the factors that make the defendant insurer more likely to try a case or negotiate a low settlement rate).

324 Davis, above n 319, 742-743 (discussing a 1990 study by Rachlinski of 722 cases that went to trial in California between 1981 and 1988. The study found that while the defendant's number of wins was larger than the plaintiffs, the defendants always lost in financial terms. Across all cases averaged, the defendant lost, on average, $US31,772 (or $A47,500) per case when taken to trial.).

Controlling *frivolous* litigation, according to Guthrie, is another ballgame, though the second half of prospect theory's fourfold pattern of risk attitudes regarding low-probability gains and losses, #3 and #4, may provide some insight. The risk attitudes associated with low-probability gains and losses posit that 'decision-makers faced with low-probability gains tend to make risk-seeking decisions, while decision-makers faced with low-probability losses tend to make risk-averse decisions',[325] the opposite of the first half of prospect theory's fourfold pattern. In this half of prospect theory, for example, an individual will take a 5% chance at winning a $1,000 prize rather than getting a $50 prize for sure (risk seeking in low probability gain).[326] In addition, the individual would rather pay a certain $50 fine than take a 5% chance of paying a $1,000 fine (risk averse in low probability loss).[327]

Guthrie argues that the second half of prospect theory's risk attitudes can help explain behaviour of litigants in frivolous claims and defences because such unmeritorious cases are essentially cases where the plaintiff has very low expectations of obtaining a financial settlement. Even taking that into account, plaintiffs will make the more risky choice because they have nothing to loose (i.e., low-probability gain/loss scenarios).[328] Better understanding of litigant behaviour in frivolous claims and defences will aid in achieving better and effective regulatory reform in controlling such behaviour. At the same time, without a proper diagnosis, there cannot be an effective remedy. Based on the understanding of rational actor accounts and the second half of prospect theory's fourfold pattern of risk attitudes, Guthrie proposes a Frivolous Framing Theory that explains how litigants are likely to behave in frivolous litigation.

First, it is important to note that it is common ground that the litigation process is filled with uncertainties. There are uncertainties about the facts, the actual evidence, the actual value of the case, the application of law to the facts, the attitudes and biases of the judge with respect to the substantive and procedural law, as well as the skills of the attorneys.[329] These uncertainties lay the

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325 Guthrie, above n 299, 183.

326 Guthrie, above n 299, 167. Note: The comparisons in the examples involve a settlement amount that is identical to the (expected) trial value of the same case.

327 Guthrie, above n 299, 167. Many subsequent research projects have corroborated this decision making pattern: Ibid at 183-185.

328 Guthrie, above n 299, 186-187.

329 Guthrie, above n 299, 186-187. Each of the foregoing judicial decisions, *Momibo*, *Degiorgio*, and *Lemoto*, fully recognized that it is because of the uncertainties and the fact that judges do not know the full breath of a lawyer's interactions with his client, that the plaintiff may *seem* to have a hopeless case, only to find that during

foundation for the reasonable assertion that while a litigant may file a claim that 'both litigants recognise has no possibility of success, most litigants will predict that such claims have at least some chance of prevailing – maybe a 1 in 10 chance or a 1 in 20 chance or a 1 in 100 chance', but still a chance because of such inherent uncertainties.[330] Therefore, it may also be said that the plaintiff has a probability of recovering some damages, however nominal, and that his probability is a low-probability gain. At the same time, because lawyers generally incur the costs for plaintiffs in personal injury and public liability claims,[331] the plaintiff is in a low-probability loss situation.

Guthrie, through his Frivolous Framing Theory for how litigants act in frivolous suits (i.e., unmeritorious claims and spurious defences), makes two propositions: 1) plaintiffs in frivolous litigation are likely to prefer trial (risk seeking option) while defendants prefer settlement (risk-averse); and 2) plaintiffs and defendants in frivolous litigation are 'likely to either settle on terms advantageous to the plaintiff or to reach bargaining impasse',[332] which will result in the case getting resolve through motions or a trial. In frivolous cases, the plaintiff has greater power.[333] In other words, the plaintiff's power in a frivolous litigation is a greater tolerance for risk than his/her adversary because, for example, the plaintiff has very little to lose by pursuing the case, the plaintiff may actually wins some damages, or the plaintiff have a 'psychological leverage' in settlement negotiations even though they may have a very low probability of winning at trial.[334] In frivolous litigation, unlike ordinary litigation, plaintiffs are more risk seeking than defendants and, therefore, have more power in bargaining.[335]

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the course of trial, the case is a strong, meritorious case. Therefore, legal professionals are to be given the benefit of the doubt and nominal damages are still damages won at trial by the plaintiff.

330 Guthrie, above n 299, 186-187.

331 This is assuming contingent fee agreements or 'no win-no fee' arrangements, whereby the legal professional gets 30% - 33% of the final judgement as fees if he wins.

332 Guthrie, above n 299, 185-186.

333 Guthrie, above n 299, 191-192 (quoting negotiation scholars Samuel Bacharach and Edward Lawler in defining power as '…the essence of bargaining'.).

334 Guthrie, above n 299, 190-192; 195-206 (providing four potential explanations of why plaintiffs are risk-seeking in frivolous litigation, including 1) psychological; 2) motivational; 3) cognitive; and 4) rational). These are not discussed in this article, though they will be in future articles. It is worth noting that these are arguable factors.

335 Guthrie, above n 299, 187-192 (discussing experiments that Guthrie performed or analysed to support the Frivolous Framing Theory).

This understanding has implications for legislative regulatory controls as well as legal reforms. Based on a more accurate understanding of the behaviour of legal actors, noted scholars Russell Korobkin and Tom Ulen argue that 'the legal system may wish to focus its efforts on encouraging defendants (rather than plaintiffs) to settle' because defendants have risk-seeking tendencies in ordinary litigation and will prefer to trial over settlement.[336] Conversely, in frivolous litigation scenarios, Guthrie's Frivolous Framing Theory would contend that because risk attitudes are reversed, the legal system reforms should focus on encouraging plaintiffs to settle (rather than defendants) because plaintiffs are risk-seeking in frivolous claims and defences and would prefer trial over settlement.[337]

With respect to controlling frivolous litigation and focusing on plaintiffs' behavioural tendencies, reforms can include 'combating plaintiff's tendencies to overweight their low-probability of prevailing at trial' or 'change the frivolous litigation decision frame so that plaintiffs face at least some prospect of loss' and thereby may decide not to pursue the case.[338]

Taking this understanding of theory and principle at face value, does Division 5C, Part 11, s 198J and its related provisions pass the test? What perspective did the legislature take when deciding whose behaviour to control? Was such a perspective arguably valid in light of the legislation's goals? Finally, do the regulatory controls put into place by the legislation (i.e., the reasonable prospects of success standard) actually have a reasonable prospect of success in achieving the goals of preventing unmeritorious claims and spurious defences when assessed against the foregoing theories of litigant behaviour in such frivolous litigations? The next section is an attempt to assess whether the reasonable prospects legislation might succeed in achieving its goals of reduced claims being filed by 'greedy' plaintiffs and plaintiffs' attorneys under the presumption that Frivolous Framing Theory discussed above applies and is relevant means to measure the 'success' of NSW's legislative attempts to control unmeritorious claims and spurious defences.

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336 Guthrie, above n 299, 169.

337 Guthrie, above n 299, 169.

338 Guthrie, above n 299, 210 (proposing two ways to target plaintiff risk-seeking behaviour in frivolous litigation and arguing that the second method would be more successful). Though Guthrie provides only two options, I suspect that there may be other ways to achieve the same result. That is the topic of future discussions and articles.

c. Assessing the Reasonable Prospects of Success for Division 5C, Part 11 Legislation against Negotiation Theory/Principles

In the present case of the reasonable prospects legislation, Parliament in New South Wales perceived a litigation explosion that resulted in a rise in personal injury and public liability claims. Based on anecdotal evidence, media recounts of million-dollar verdicts, and horror stories by those defendants-organisations affected by the civil suits, parliament sought to control what are considered 'unmeritorious' and 'spurious' defences – collectively defined as 'frivolous' litigation, where the claimant is not likely to succeed at trial. The legislature sought to control such frivolous litigation by preventing legal professionals from filing a case or giving legal advise to a client without first determining whether the case has reasonable prospects of success. The legal professional, not the client, is subject to personal indemnity costs orders, personal repayment costs orders, or both if it is established that s/he pursued the claim or defence in contravention of s 198J. In addition, in extreme circumstances, the legal professional, not the client, may be subject to improper conduct or professional malpractice proceedings and/or having his/her name withdrawn from the roll of attorneys, thus facing additional personal financial risks.

Traditional meritorious personal injury and public liability claims would appear to be moderate-to-high probability gain scenarios because the plaintiff is pitted against a defendant insurer who has the authoritative advantages as well as the bargaining advantage because of being a repeat player. The plaintiff will be risk-averse, preferring settlement and the defendant will be risk seeking, preferring trial in an effort to minimise the other party's case. The defendant-insurer will invariably start with a low-soft or insult offer. The plaintiff will counter or exaggerate their opening offer in the form of a high-soft offer in order to eventually get a fair settlement.[339] It is important to note that both parties expect to engage in a negotiation process that includes these various, allegedly inefficient tactics. Yet both parties seem to accept that such tactics are part of the negotiations 'dance' and that such tactics are efficient and necessary in arriving at a fair resolution to the matter, a resolution that is acceptable to both parties.[340] In fact, in a recent study of negotiating personal injury matters, plaintiff and defendant attorneys acknowledge that neither would automatically present a reasonable offer as their first or opening offer,[341] presumably because that is not

339 See Davis, above n 319 (discussing results of study where plaintiff lawyers say they have to exaggerate their offers in order to get a fair settlement).

340 Lewicki et al, above n 15 (discussing the efficiency of low-soft, high-soft opening offers, etc.)

341 See Davis, above n 319.

how the game is played. To change the rules is to confuse the players. Therefore, under the aforementioned discussion in Part VI regarding ordinary litigation behaviour, if reformers want to discourage the filing of meritorious personal injury or public liability cases and encourage greater settlements, reforms should be directed at defendant insurers. Conversely if reformers want to discourage filing of unmeritorious personal injury or public liability cases and encourage settlement, reforms need to be directed at plaintiffs because in the context of frivolous litigation, plaintiffs are more risk seeking than defendants.

It seems apparent from the Second Reading Speech and judicial interpretation that s 198J and its related sections are targeted at plaintiffs since much of the Premier's Second Reading Speech appears to be based on information obtained from defendant insurers and organisations. The approach under s 198J is a tactic that could be associated with what Guthrie referred to as 'combating plaintiff's tendencies to overweight their low-probability of prevailing at trial'.[342] Presumably, by requiring that the attorney make the initial determination and present credible, certified 'proof' that the plaintiff will have reasonable prospects of success of winning[343] damages at trial, the legislators impose a potentially expensive 'reality-check' to the plaintiff and his/her attorney by putting a premium on effective case preparation and a penalty for overreaching the low-probability gains boundary. By forcing a re-evaluation of the case, legislators hope that plaintiffs will realise that they have little chance of winning and will abandon the case. Meanwhile, defendant insurers are <u>not</u> forced to re-appraise their assessment of the case nor are they required to change their existing negotiation behaviours in the form of low-soft offers to prevent the plaintiff from going to trial. The idea was good on paper, but has proved an ineffective legislative strategy for several reasons. First, as the decisions in *Momibo*, *Degiorgio*, and *Lemoto* address, punishing the legal professional is not the answer because the legal professional serves the courts and courts serve the hands of justice. Since access to justice is a major reform concern of the ALRC and the Senate in its 1999 study, discussed above, courts are not likely to take such a risk.

Second, discussions in Momibo and Lemoto, in particular, serve as a reminder on the division of responsibilities between legal professionals and judges to ensure efficient and fair administration of justice. This requires a clear division of roles to protect judges and legal professionals from a potentially compromising position of having to make value and legal judgments that are presumably beyond the scope of their roles. Furthermore, courts and legal professionals are required to avoid conflict of interest issues that may potentially affect the sanctity of

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342 Guthrie, above n 299, 210.

343 In this context, 'winning' means achieving some net economic/financial return.

professional legal privilege between attorney and client. Therefore, courts are not likely to adopt measures, which appear to be in contradiction with well-established principles.

Finally, the current legislative strategy is ineffective simply because despite the fact that the reality check of the reasonable prospects standard serves to demonstrate the plaintiff's low probability of success, the plaintiff in a frivolous litigation is the power player and has the bargaining advantage. The plaintiff has something, however small, to gain and very little to lose. The plaintiff has low expectations, low costs outlays, and high bargaining advantage. Why should not the plaintiff pursue the case, especially if the defendant-insurer continues to use low-soft and insult offers as a means to deny redress to the plaintiff's alleged injuries? Furthermore, none of the acceptable negotiation theory/principles discussed above recommends punishing or penalising the helper (i.e., the legal professional) as the means of achieving reform goals. Yet, s 198J specifically attempts to split the team between client and helper, punishing the helper who is acting on instructions of and benefit for the client whilst outlaying costs for the client's case.

In sum, the current tactic of imposing an additional standard of proof in the preparatory stages before filing the case in an attempt to force the plaintiff in a frivolous litigation scenario to second-guess the validity of their claim does not, as the aforementioned cases demonstrate, have reasonable prospects of success in terms of achieving legislative goals of reducing or eliminating such claims.

An alternative approach suggested by Guthrie is to 'change' the frivolous litigation decision frame so that plaintiffs face at least some prospect of loss.[344] What this likely means is that the plaintiff must, somehow, be put in the position he/she would be in as if s/he were in ordinary litigation, thus inducing risk-averse behaviour instead of risk-seeking behaviour. The plaintiff must be faced with some prospect of loss so that there is some doubt as to the attractiveness of filing or pursuing a frivolous claim or defence.[345] If this can be done, then the plaintiff will, presumably, likely abandon or settle a frivolous claim or defence rather than pursue it to trial. One option, as recommended by Guthrie, is to amend the current ethics codes to require that plaintiffs advance the costs of filing fees, service fees, discovery costs, etc. if they wish to continue with a case that the legal professional has determined has little or no reasonable prospects of success.

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344 Guthrie, above n 299, 210. Note: Guthrie is a U.S. scholar and thus is presumably speaking from the standpoint of costs orders within a U.S. context and providing U.S. examples. However, the theory could to apply broadly, though has not yet been tested in Australia.

345 Guthrie, above n 299, 211.

First, under the current costs regime, especially in the US, ethical codes prohibit attorneys from providing clients with litigation-related financial assistance.[346] However, there is an exception for the advancement of costs. Therefore, especially in personal injury cases, attorneys will generally advance the client's litigation costs with the understanding that the advancement will be deducted and repaid to the attorney from the final settlement.[347] This is usually an understood risk and attorneys likely consider this in the evaluation of the case as well as the claim for damages.

The same scenario may not work so well where the legal professional has determined and advised the client that the case does not have reasonable prospects of success. A legal professional who pursues a potentially frivolous claim does so at his/her own expense and the litigation would essentially be a free ride for the plaintiff. The plaintiff has little to no costs so s/he is likely to file suit.[348] If the ethical codes were changed and plaintiffs were required or asked to advance costs for cases where there is little prospects of success, then the plaintiff would immediately be faced with the risk of incurring a loss and will be more selective in the cases they pursue as well as be more risk averse, thereby choosing to abandon or settle rather than risk loosing at trial.[349]

However, requiring plaintiffs or defendants to advance costs in frivolous litigation may also have its disadvantages. One of these includes the very fact that many of these cases are those where there is loss of limb, loss of income, or loss of a loved one that has already financially burdened the plaintiff. The plaintiff counts on the settlement of the case to help defray some of these unexpected expenses. Imposing even additional costs might have the adverse effect of driving away clients or impairing access to justice.

A second potential concern is that even if the plaintiff advances the costs, there is no guarantee that they will abandon the case or that attorneys will abandon the current practice of advancing litigation costs in order to keep or gain clients. It is currently part of doing business and like the nature of the negotiation process, changing the rules mid-stream only confuses the players.

A third concern is the extent to which there is a lack of control on defendant-insurer negotiation behaviour in light of requiring plaintiffs to advance costs. If you ask one party to change their behaviour and you do not impose a

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346 Guthrie, above n 299, 211-212.

347 Guthrie, above n 299, 211-212.

348 Guthrie, above n 299, 211-212 (stating that 'as a practical matter, frivolous litigation is costless for plaintiffs'.).

349 Guthrie, above n 299, 211-212.

complementary obligation on the other party, then there is no incentive to cooperate and the rule of reciprocity will kick in. The principle of reciprocity means that one side gives up something (e.g., a concession) and expects the other side to reciprocate in kind, but because the other side does not respond in kind and continues with the old way, there is a bargaining impasse and we're back to filing the suit or escalating the dispute until it is out of control, even from the hands of a court-mandated dispute resolution mechanism. As long as defendant insurers continue to undervalue cases and make low-soft offers, plaintiffs will have to respond by exaggerating claims or opening high-soft in order to eventually come within the target zone of acceptable settlement offers.

In recent years, Queensland has experimented with attempts at better modifying the behaviour of plaintiffs and defendants with regards to frivolous claims.[350] This has come about via the introduction of the *Motor Accident Insurance Act*,[351] the *Workcover Act*,[352] and the *Personal Injury Proceedings Act*.[353] Each of these Acts requires that all parties engage in a mandatory pre-trial conference (Compulsory Conference Stage) to exchange information before the plaintiff can initiate legal proceedings. If parties do not agree to a settlement, each side must exchange a Mandatory Final Offer (MFO). Each side must then decide whether to accept or reject this offer. If, during trial, the plaintiff recovers more than his or her MFO, the defendant must pay the plaintiff's full indemnity costs, which are usually higher than standard recoverable costs under Australia's 'loser pays' system. However, if the defendant loses but is required to pay less than his/her own MFO, the 'loser pays' rule is disregarded and the plaintiff must pay the defendant's costs on a standard basis. As observed by Mr Rob Davis, this legislation, in effect, 'directly alters the payoff matrix…used [during] negotiations by tilting the win/lose odds to favour those who have the best case and the most reasonable negotiation posture with respect to their prospects of success'.[354] The result of

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350 Rob Davis (e-mail conversation with Rob Davis on 13 March 2006 regarding the issue of ways in which legislation may be able to better modify the behaviour of plaintiffs and defendants). I am grateful to Rob Davis for this example. This e-mail conversation is on file with the author.

351 *Motor Accident Insurance Amendment Act 1994* No. 9 (Principal Act); *Motor Accident Insurance Amendment Act 2001* No. 85 (Amending Act).

352 *Workcover Queensland Amendment Act 2001* No. 67.

353 *Personal Injuries Proceedings Act 2002*. An overview of the proposed changes can be found at http://www.justice.qld.gov.au/ourlaws/pinjury.htm (as of March 2006).

354 Davis, above n 352. Note that further formal studies on how effective the Queensland legislation has been to manage the behaviour of legal professionals from taking on frivolous claims would be useful. The key point, going back to the seminal principles highlighted by s 198J case law discussed above, is that lawyers should not have to be 'timorous souls' and *deny* parties their day in court or to reject potentially frivolous claims under penalty of costs.

Queensland legislation appears to be that most cases are settled at or before the Compulsory Conference Stage rather than at the steps of the courthouse.[355] It is interesting to observe that even the Queensland legislation appears to be aimed at appeasing community concerns about a rise in public liability insurance claims because of a perceived public liability claims 'crisis' through punishing the legal professional via costs orders. In sum, regardless of the proposed method, there must be changes and controls on both sides of the fence, not just plaintiffs and not just defendants, especially when dealing with the enigmatic and elusive frivolous litigation 'problem'.

However, despite concerns about the viability of certain proposed theories or principles as a basis for making decisions, the insights into plaintiff and defendant litigation behaviours offer the opportunity for legislators and legal reformers to draft regulations that have a sound basis in objective, measurable evidence of how legal actors behave within the legal system. If nothing else, such established theory provides some realistic assessment criteria from which to draft effective legislation that might actually have the chance to achieve the desired effect.

VII. Conclusion

As of Division 5C and s 198J, legal practitioners cannot provide legal advice or commence legal proceedings *prior to* their claim or defence having reasonable prospects of success. Legal practitioners, it seems, must make this determination *before* they have access to the formal process of discovery and *before* they may request for production of documents from the opposing party under the discover rules.

The legislature's goal when enacting Division 5C was to reduce unmeritorious claims and spurious defences, more specifically as they relate to personal injury and public liability claims. The legislature imposed behavioural controls on negotiation tactics of legal professionals *before* considering the potential side effects of such behavioural controls.

In addressing the competing goals of reducing frivolous litigation while allowing access to the courts to handle meritorious claims, Section 198 J of the *Legal Profession Act 1987* momentarily moved the 'solution' towards controlling the standard negotiation/litigation strategies of high-soft, low-soft, exaggerated offers, and wild claims. In practice, however, courts have diluted the force of s 198J and swung the pendulum back towards an objective test seen primarily through the subjective assessment of the legal professional, thus giving deference to the professional opinion of the attorney. While legislature attempted to split the team

355 Davis, above n 352.

between helper/client and even helper/courts, the courts have reaffirmed the judgment of the legal professional.

This paper has discussed one attempt among many legislative attempts designed to control the negotiation behaviours of legal professionals via regulatory measures. In addition, this paper has analysed such legislative attempts in light of its potential for success if scrutinised under the prevailing and acceptable negotiation theory and principle. If society and the legal profession are to benefit from regulatory measures to reform the legal profession and its actors, this paper argues that such measures must integrate theory and principle as well as attempt to predict side effects before it is put into practice.[356] This will ensure an objective, reliable foundation from which to evaluate its success as well as justification for the taxpayer expense in supporting such reform measures.

356 Teresa A. Sullivan et al., *As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America* (1989) 336 ('To advocate law reforms without a shred of evidence as to how the system currently works, who is likely to be affected, and how those effects may reverberate throughout the system is breathtakingly negligent'.).