

## Advocate's Immunity – *Attwells v Jackson Lalic Lawyers Pty Ltd*

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The High Court delivered judgment in *Attwells v Jackson Lalic Lawyers Pty Ltd* [2016] HCA 16 on 4 May 2016.

The key issues for deliberation were:

- Whether the advocate's immunity extends to negligent advice which leads to the settlement of a case by agreement between the parties; and
- Whether the High Court should reconsider its decisions in *Giannarelli v Wraith* (1988) 165 CLR 543; [1988] HCA 52 and *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1; [2005] HCA 12 and abolish the advocate's immunity.

In the judgment, the High Court unanimously confirmed that the advocate's immunity remains part of the common law in Australia. By a 5:2 majority it determined that the immunity generally does not extend to advice that leads to settlement between the parties.

### Background and Lawcover's Response

- The advocate's immunity in general and in particular whether settlement advice falls within the immunity, have been contentious issues and ventilated in a series of cases and public comment over recent years.
- The advocate's immunity has been abolished in the United Kingdom and New Zealand raising concerns amongst some that the outcome of this case might see a similar occurrence in Australia.
- The application for special leave in *Attwells v Jackson Lalic* was one of several recent special leave applications in which the scope of the advocate's immunity for solicitors was in issue.
- The application to intervene in the appeal by the Law Society of New South Wales allowed the broader issues impacting settlement advice in other cases and areas of law to be put before the Court for its consideration.
- The majority judgment summarised the important public policy principles which underpin the advocate's immunity, including the finality of the resolution of disputes by the courts, the consistency and continuity of the law, and the injustice that would result to those parties who have never pursued claims or lost cases based on the state of the law as it was, if the law was now changed.
- In *Attwells*, the parties had agreed to seek a separate determination on the question of whether the advocate's immunity applied as a complete defence to the claim. Many other issues, including whether there was indeed any breach of duty by the law practice or any loss suffered by the plaintiffs, remain contested in the main proceedings.
- Lawcover welcomes the decision which reiterates that the advocate's immunity remains an integral part of the common law.

### Details of the High Court Decision overleaf

## The High Court's Decision

- Prior to the decision, there had been some speculation that the Court might abolish the immunity, as has occurred in other jurisdictions. In the judgment, the Court unanimously confirmed that the advocate's immunity remains part of the common law.
- The High Court also unanimously declined to reconsider the Court's previous decisions in *D'Orta-Ekenaike v Victoria Legal Aid* and *Giannarelli v Wraith*, which confirmed the immunity extends to "*work done out of court that leads to a decision affecting the conduct of the case in court*".
- The judgment has clarified that the immunity does not extend to advice concerning settlement that leads to the filing of consent orders, which had been a contentious issue. However, the judgment leaves open the question of whether the immunity extends to cases where the parties have agreed upon the terms of an order which the court is asked to make, where the making of the order itself requires the resolution of issues by the exercise of judicial power (such as representative proceedings, settlements involving persons under a legal incapacity or native title claims).
- The majority judgment of French CJ, and Kiefel, Bell, Gageler and Keane JJ emphasised that the "*intimate connection required to attract the immunity is a functional connection between the advocate's work and the judge's decision*". The finality principle "*which justifies the immunity at the same time limits its scope so that its protection can only be invoked where the advocate's work has contributed to the judicial determination of the litigation*".
- The majority judgment also stated that "*in order to attract the immunity, advice given out of court must affect the conduct of the case in court and the resolution of the case by the court.*" This elaboration of the "*intimate connection*" test will apply in other cases not involving settlement advice.
- The minority judgments of Gordon and Keane JJ would have dismissed the appeal on the grounds that settlement advice that leads to the filing of consent orders in court is subject to the immunity.