

IMPLICATIONS OF THE HIGH COURT'S DECISION ON ADVOCATE'S IMMUNITY



Simone Herbert-Lowe is a senior claims solicitor at Lawcover.

By Simone Herbert-Lowe

In *Attwells & Anor v Jackson Lalic Lawyers Pty Limited* [2016] HCA 16 ('Attwells') the High Court reiterated that advocate's immunity from suit remains an integral part of the common law. However, in *Attwells* the court clarified that while an advocate is immune from suit in relation to in-court work, and in relation to 'work done out of court which leads to a decision affecting the conduct of the case in court' (*Giannarelli v Wraith* (1988) 165 CLR 543 at [560]), a functional connection between the work of the advocate and the determination of the case by the court is necessary to engage the immunity (*Attwells*, at [49]). The immunity generally does not extend to settlement advice, subject to some possible exceptions.

So does the decision in *Attwells* impact on Lawcover's advice for solicitors who act in litigation?

Ensuring that clients are fully advised in relation to litigation is always good business practice, is consistent with ethical requirements, and helps minimise the risk of a claim occurring. The decision in *Attwells* provides lawyers who practice in litigation with an opportunity to pause and consider whether the way in which their clients' litigation is conducted is both satisfactory to the client and also managed in a way that prevents possible negligence claims.

There are a number of ways in which solicitors can manage risk in this area.

Limitation periods

In most cases, advocate's immunity will not prevent a lawyer from being sued for missing a limitation period to join a correct defendant. Consider not only the limitation period for the most obvious defendant, but other potential defendants as well. Claims can arise where a lawyer has commenced proceedings against one defendant but later investigations (including financial investigations) reveal that another

Snapshot

- The recent decision of *Attwells & Anor v Jackson Lalic Lawyers Pty Limited* confirmed that advocate's immunity from suit applies where there is a functional connection between work done by a lawyer and the judicial determination in a case.
- The immunity generally does not apply to settlement advice, subject to a possible exception for some cases involving judicially approved settlements.
- Advising on the merits of settlement is an essential part of a solicitor's role in litigation and the *Attwells* decision does not impact upon that duty.
- Settlement advice and discussions should be documented to reduce the prospects of a successful negligence claim.

defendant was the more appropriate party. Make sure your client knows when any limitation dates are due to expire and ensure the advice is confirmed in writing.

Define your retainer

Use your costs agreement to make clear which of your client's matters you are acting in. Claims are sometimes made against lawyers who act in one set of proceedings without advising that another cause of action might be available. If you are taking over the conduct of a matter from another firm, ensure that both you and your client are clear as to whether you are acting

in the litigation only or whether you have also been retained to advise on any related matters. Consider whether your client might be expecting you to revisit the advice that has been provided by previous lawyers or on related transactions that are the subject of the litigation.

Settlement advice

Solicitors who act for a party to litigation have always been expected to provide competent settlement advice. Difficulties often occur later, though, in terms of a lack of evidence available to prove the advice that was provided. The following is a guide to what you can do to satisfy your client that you are protecting their interests and, at the same time, minimising your own risk.

Record all offers of settlement and any settlement discussions

When solicitors are sued in relation to advice it is often many years after the event. It is unrealistic for solicitors to expect they will be able to remember all the details of settlement discussions many years later. It is prudent to document all settlement offers and keep a record on file. The more information that is recorded to explain how the offer was calculated, the better.

Ideally, if a client does not wish to accept an offer that you regard as reasonable, written instructions should be obtained.

Don't be reluctant to provide settlement advice based on this decision

Solicitors are not only sued for allegedly providing negligent advice in relation to settlement, they are frequently sued for not providing advice in relation to settlement. For this reason, it could be unwise to construe the decision in *Attwells* as somehow discouraging appropriate settlement advice.

Solicitors can be sued for negligent settlement advice in different ways. They can be sued for failing to pass on an offer, for failing to recommend an

early settlement offer, for recommending an insufficient settlement, and so on. Solicitors are sometimes also sued for failing to recommend settlement in cases in which the client was ultimately unsuccessful or in which the client obtained a disappointing result. Advising on the merits of settlement is an essential part of the solicitor's role while acting in civil litigation, and the decision in *Attwells* does not impact on that duty.

Consider, throughout the course of a matter, whether settlement is appropriate, and on what terms. Consider making offers that are capable of providing your client with costs protection, such as formal offers of compromise.

Always pass on an offer of settlement, even if you do not recommend acceptance of that offer. After all, it is the client's matter and ultimately they are entitled to make the call whether to settle or continue the case. This will also avoid claims from disgruntled clients who later allege they would have accepted an offer that was more attractive than the final judgment received.

Settlements subject to judicial approval

The High Court has determined that advocate's immunity does not extend to advice concerning settlement that leads to the filing of consent orders. However, the judgment leaves open the possibility that the immunity could extend to cases involving judicially approved settlements, because those cases involve the exercise of judicial power (at [61]). Generally, it is the nature of the case that determines whether or not approval is needed, but in some cases, such as acting for a liquidator or trustee, there may be an option to seek judicial approval or directions relating to a settlement. In other cases, there may be difficulties in determining whether a client is suffering under a legal incapacity. Where a solicitor is unsure whether judicial approval should be sought, the decision in *Attwells* may be a factor to take into account.

Briefing counsel

In many litigated cases, counsel is briefed to advise and appear. Counsel are usually actively involved in conveying settlement offers and providing advice.

However, in many cases, barristers do not keep records of settlement discussions and they return or destroy the brief. This means that, often, only the solicitor's records are available in the event of a claim against either the solicitor or barrister.

If counsel provides settlement advice, a note should be made on the file.

Although a solicitor is required to turn his or her own mind to any settlement offers, the fact that the solicitor has relied on counsel's advice will often enhance the prospects of a successful defence, assuming that suitable counsel was briefed and provided with all appropriate information.

Also, the saying 'two heads are better than one' is apt to apply. If a court ultimately finds the settlement advice was not reasonable, the solicitor will be more likely to establish a defence of proportionate liability on the basis that both the solicitor and counsel provided the relevant advice. **LSJ**

Lawcover offers specialist briefings for lawyers who act in litigation: <http://www.lawcover.com.au/risk-management-education-program/>

ONE DAY CONFERENCE

Small Business: Still the Centre of Attention

DISCOVER CUTTING EDGE OPPORTUNITIES TO ASSIST YOUR SME CLIENTS

Date: Thursday 25 August 2016
Time: 10.00am – 6.00pm
Venue: The Law Society of New South Wales
 Level 3, 170 Phillip Street, Sydney NSW 2000
CLE: 6 points

Register online: lawsociety.com.au/sme



THE LAW SOCIETY
OF NEW SOUTH WALES



Law Council
OF AUSTRALIA

Co-sponsored by The Law Society of New South Wales Business Law Committee and the Law Council of Australia Business Law Section SME Business Law Committee.



lawsociety.com.au



THE LAW SOCIETY
OF NEW SOUTH WALES