

NO COMPROMISE ON ADVOCATE'S IMMUNITY



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By Malcolm Cameron*

For the third time in as many decades, the High Court has upheld the immunity from suit which is available to an advocate.

As the Court has now made clear in *Attwells & Anor v Jackson Lalic Lawyers Pty Limited* [2016] HCA 16 (4 May 2016) (*Attwells*), the immunity is only attracted where there is a 'functional connection' between the advocate's work and the judge's decision in a case. Where the work of the advocate leads to an agreement between parties to litigation to settle their dispute, there is not an 'intimate connection' between that work and the conduct of the case in court, as required by the authoritative test laid down in the two prior High Court decisions on the immunity: *Giannarelli v Wraith* (1988) 165 CLR 543 (*Giannarelli*) and *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 (*D'Orta*).

The protection afforded by the immunity is only invoked where the (allegedly negligent) work of the advocate 'has contributed to the judicial determination of the litigation' (*Attwells* at [5]-[6]).

A middle ground?

The High Court's decision in *Attwells* represents something of a middle ground in this area of jurisprudence. It is at odds with a number of decisions on the immunity over the last decade or so in Australian courts in which the 'intimate connection' test has been applied quite broadly, including to advice which led to agreements between the parties to settle (see, for example, *Nikolaidis v Satouris* [2014] NSWCA 448; *Young v Hones* [2014] NSWCA 337; *Goddard Elliott (A Firm) v Fritsch* [2012] VSC 87; *Donnellan v Woodland* [2012] NSWCA 433; *Chamberlain v Ormsby* [2005] NSWCA 454). But it is also at odds with decisions in New Zealand and the United Kingdom during roughly the same period,

Snapshot

- In the recent decision of *Attwells & Anor v Jackson Lalic Lawyers Pty Limited* [2016] HCA 16 (4 May 2016), the High Court of Australia upheld the common law immunity from suit which is available to an advocate.
- The Court held that the immunity is only attracted where there is a 'functional connection' between the advocate's (allegedly negligent) work and the judge's decision in a case.
- The Court's decision means that advice leading to a settlement agreed between the parties is not generally protected by the immunity from suit.

in which the immunity ceased to be recognised at all as part of the common law in those jurisdictions (see *Lai v Chamberlains* [2007] 2 NZLR 7 and *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 respectively).

So advocate's immunity remains firmly a part of the Australian common law – without perhaps having quite the same scope that may have appeared prior to the *Attwells* decision.

A time for clarity?

Both *Giannarelli* and *D'Orta* involved negligence suits arising from underlying criminal cases. In *Giannarelli*, the case had run to a contested trial and the accused (the eventual plaintiff) had been convicted. In *D'Orta*, the accused (the later plaintiff) had pleaded guilty on advice. In both cases, the advocate was held to be immune from suit. Until *Attwells*, the High Court had not considered advocate's immunity in the context of a negligence suit arising from

an earlier civil case, much less from an earlier civil case which had been settled.

There had been some tension in the authorities about the scope of the immunity, and particularly about whether it applied to advice concerning settlement of a civil case.

The decision in *Attwells* resolves that tension: advice leading to a settlement agreed between the parties is not generally protected by the immunity (*Attwells* at [38]).

Position prior to *Attwells*

The *D'Orta / Giannarelli* test is simply stated and remains authoritative (*Attwells* at [5] and [37]).

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* at [560]) or (to put the same proposition slightly differently) to work done out of court which is 'intimately connected with work in a court' (*D'Orta* at [86]).

Particularly in the time since *D'Orta*, the application of that test to cases where the alleged negligence concerned advice on the topic of settlement has revealed some differences in approach by different courts.

In *D'Orta* itself, McHugh J had said 'it is possible to sue a practitioner for the negligent settlement of proceedings or for the negligent loss or abandonment of a cause of action' (*D'Orta* at [166]). That comment was not taken up by the plurality in *D'Orta*, and it formed no part of the ratio in the case, given the facts.

In *Alpine Holdings Pty Ltd v Feinauer* [2008] WASCA 85, the Court of Appeal of Western Australia (in allowing an appeal against an order summarily dismissing proceedings) said it did not consider that 'it can be said with confidence where the line is to be drawn as to the application of the immunity in relation to advice given in connection with the settlement of legal proceedings' (*Alpine Holdings* at [84]).

The case against the practitioner was therefore allowed to proceed.

But in New South Wales, the *D’Orta / Giannarelli* test had been repeatedly held to extend to advice that leads to settlement of litigation, as work done out of court which led to a decision affecting the conduct of the case and which was therefore intimately connected with the conduct of the case in court (see, for example, *Bott v Carter* [2012] NSWCA 89; *Young v Hones* [2014] NSWCA 337; *Nikolaidis v Satouris* [2014] NSWCA 448; *Chamberlain v Ormsby* [2005] NSWCA 454; *Donnellan v Woodland* [2012] NSWCA 433).

Attwells has now made it clear that the boundary of the immunity stops short of advice which leads to an agreed settlement. The High Court did not address cases where parties agree on the terms of an order, but the making of the order requires the exercise of judicial power such as matters where court approval of any settlement is required (*Attwells* at [61]).

Attwells – facts in brief

The appeal in *Attwells* concerned allegedly negligent advice given by a solicitor during the first day of a five day trial. The advice was said to have led to the settlement of the case between the first appellant and his opponent (a bank). The settlement was agreed during the luncheon adjournment and in the evening following the first day’s hearing, and was subsequently recorded in consent orders.

The solicitor was acting for the first appellant (and another person) who had given guarantees to the bank in relation to the debts of a company. The bank had commenced the litigation against the first appellant and others to enforce the guarantee and for other remedies.

The company’s debt to the bank was in the order of \$3.4 million. The bank certified, during the opening of the trial, that the amount owing under the guarantee was a lesser amount (due to a cap on the guarantee): \$1,856,122.

The consent orders by which the settlement was effected gave judgment in favour of the bank for \$3.4 million against both the company and the first appellant (and his co-guarantor),

but on the basis that the bank would not enforce that judgment if it was paid \$1.75 million by a date approximately five months after the settlement.

The bank was not paid by the agreed date. The first appellant’s liability for \$3.4 million under the consent judgment became enforceable at that point.

The suit against the solicitor alleged that the advice to settle on that basis was negligent, and the appellants claimed damages. The essence of the claim was that the first appellant would not have been liable for the whole of the company’s debt (but rather for a lesser sum) but for the settlement.

Those facts (which were agreed between the parties only for the purpose of allowing the question of advocate’s immunity to be decided) (*Attwells* at [21]), ultimately provided a platform for the High Court to consider advocate’s immunity from the perspective of an underlying civil matter, which involved a settlement that occurred in close temporal proximity to the hearing of the case in court, and which was effected via consent orders which were handed up in court.

The solicitor contested the suit on a variety of bases, including disputing negligence and the causation of loss (*Attwells* at [26].) One of the matters raised in the defence was immunity from suit by virtue of advocate’s immunity.

The path to the High Court began when the parties agreed to bring forward for separate determination the question of whether the appellants’ claim against the solicitor was defeated by that immunity (*Attwells v Jackson Lalic Lawyers Pty Limited* [2013] NSWSC 925 at [4], per Schmidt J).

That is the issue which has now been decided by the High Court – namely that the plaintiffs’ claim is not defeated by the immunity.

High Court’s reasoning – why the immunity does not apply to settlement advice

The High Court unanimously confirmed that advocate’s immunity remains part of the common law.

By a 5:2 majority it determined that the immunity generally does not extend to advice that leads to settlement between the parties (the joint judgment of French CJ, and Kiefel, Bell, Gageler and Keane JJ held that the advocate’s immunity was not a defence to the claim, with

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Gordon and Nettle JJ dissenting).

The line of cases in which the immunity had been applied to negligently advised settlements rested on the proposition that settling a case leads to a decision that affects the conduct of the case in court, and is therefore intimately connected with the conduct of the case.

The High Court has now explained that, while it is true to say that advice concerning settlement is ‘connected’ to the case in the sense that the advice will, if accepted, lead to the end of the case (if settlement is advised) or its continuation (if the advice is not to settle), that is to ‘speak of a merely historical connection between events’.

A merely historical connection between the advice and the outcome of the case is not the intimate, or functional, connection on which the test in *Giannarelli* and *D’Orta* insists (*Attwells* at [49]).

The critical thing is the nature of the connection between the work of the advocate and the judicial determination.

The adjective used by the High Court to describe that connection is ‘functional’. But the nature of the connection is more fully revealed in the joint judgment in a number of places (emphasis added in parts):

‘[I]t is difficult to envisage how advice not to settle a case could ever have any bearing on how the case would thereafter be conducted in court, much



less how such advice could *shape the judicial determination* of the case (at [48]).

'[A]dvice to cease litigating or to continue litigating does not itself *affect the judicial determination* of a case (at [50]).

'Once it is appreciated that the basis of the immunity is the protection of the finality and certainty of judicial determinations, it can be more clearly understood that that "intimate connection" between the advocate's work and "the conduct of the case in court" must be such that the work affects the way the case is to be conducted so *as to affect its outcome by judicial decision*. The notion of an "intimate connection" ... is concerned only with work by the advocate that bears upon *the judge's determination* of the case (at [46]).

One way of summarising that reasoning is this: to be protected by the immunity, it is necessary to link something in the practitioner's (alleged) conduct with the way the case was presented in court, and therefore to the way the judge decided it. Settlement means that the case does not get presented for decision by the judge at all. Advice not to settle means that the case does get presented to the judge, without that advice necessarily affecting the way the case gets presented or the way it is decided.

Remaining uncertainties?

The Law Society of New South Wales applied for and was granted leave to intervene in the appeal, which enabled broader issues impacting settlement advice to be put before the High Court, although strictly they were not in issue in the proceedings between the parties.

The High Court acknowledged that there are cases involving settlement where, although the parties have agreed upon the terms of the order which a court is asked to make, the making of the order itself requires the resolution of issues by the exercise of judicial power – for example, settlements which require court approval. It was not necessary for the High Court to consider cases of that nature given the facts in *Attwells*, and it did not do so (at [61]).

Whether, and how, the immunity may be applied to matters where the

impugned conduct concerns advice in relation to a settlement where court approval is required, is therefore somewhat uncertain. The reasoning in *Attwells* nevertheless provides a guide to where the boundary of the immunity may lie, even in those cases.

Perhaps more importantly, as with any use of language by the High Court, the phrase 'functional connection' may be expected to attract close attention from litigants on both sides of the record.

Implications for the profession

With the High Court having affirmed its application to civil suits (but not settlements of civil suits) the position of the advocate's immunity in Australian law is now clearer than it has ever been. The immunity applies to both solicitors and counsel. It applies where there is a functional connection between work done by the practitioner and a judicial outcome. Errors in the presentation of a case remain within the immunity.

Advice which leads to a case not being presented (for example because it is settled; or because it was not commenced in time) is not.

Australian law continues to recognise the immunity as an important element in 'ensuring that the certainty and finality of judicial decisions, values at the heart of the rule of law, are not undermined by subsequent collateral attacks'.

As the High Court has explained, it is that concern, and not the incidental consequence that lawyers enjoy a degree of privilege in terms of their accountability for the performance of their professional obligations, which provides the basis for this immunity (at [52]). **LSJ**

Note: A follow up article on the subject of advocate's immunity will also be published in the next edition of the Journal.

It will examine the implications of the *Attwell* judgment for litigation solicitors and will present some practical ways in which practitioners can manage risk in this area.

* The author is the solicitor on the record for the respondent in the proceedings. The suit between the appellants and the respondent remains on foot following the High Court's judgment now that the separate question has been answered favourably to the appellants.

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