

By Alex Haslam and Simone Herbert-Lowe

The expanding scope of advocates' immunity

A close-up photograph of a man with dark hair, wearing a red jacket over a white shirt, holding the paw of a large brown bear. The bear's paw is raised, showing its claws. The man is looking down at the paw with a focused expression. The background is dark and out of focus.

Since the High Court's decisions in *Giannarelli* and *D'Orta*, immunity from suit for advocates appears here to stay. The courts have confirmed its application to both solicitors and barristers...

Australia is the odd cousin in the common law family: rather than abolishing or rejecting the defence of advocates' immunity, as most of our fellow family members have done¹, our courts have ratified the immunity and, over the course of the last decade, confirmed its application to most aspects of litigation.

BACKGROUND AND RATIONALE

In Australia, an advocate's immunity from suit was first expressly recognised by the High Court in *Giannarelli v Wraith*.² In that case, the High Court applied the principle adopted by the House of Lords in *Rondel v Worsley*³ to hold that, at common law, both barristers and solicitors are immune from liability for negligence in relation to the conduct of a case in court and for work undertaken out of court that is intimately connected with the conduct of a case in court.

The majority in *Giannarelli* held that the immunity was justified by public policy considerations including the 'real risk of adverse consequences for the efficient administration of justice',⁴ the public interest in the finality of the resolution of disputes, and the need to avoid re-opening proceedings to prevent collateral attack on judgments by subsequent negligence proceedings as this would 'undermine the status of the initial decision' and destroy 'public confidence in the administration of justice'.⁵

The decision in *Giannarelli* was reaffirmed some 17 years later by a 6–1 majority of the High Court in *D'Orta-Ekenaike v Victoria Legal Aid*.⁶ In *D'Orta*, the joint judgment of the majority explained the importance of finality to the resolution of disputes:

'A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances. That tenet finds reflection in the restriction upon the reopening of final orders after entry and in the rules concerning the bringing of an action to set aside a final judgment on the ground that it was procured by fraud. The tenet also finds

reflection in the doctrines of *res judicata* and issue estoppel. Those doctrines prevent a party to a proceeding raising, in a new proceeding against a party to the original proceeding, a cause of action or issue that was finally decided in the original proceeding. It is a tenet that underpins the extension of principles of preclusion to some circumstances where the issues raised in the later proceeding could have been raised in an earlier proceeding.⁷

This reasoning provides for a broad application: there cannot be subsequent proceedings against an advocate in which it is asserted that, but for the advocate's negligence, a different result would have been reached in the original matter. It does not appear to matter that the original result is not sought to be overturned; it is only relevant that the result forms the basis for the subsequent complaint.

Although this finality principle was the main foundation relied upon by the High Court in its confirmation of the immunity, other supplementary public policy considerations were also espoused, including an asserted difficulty in determining causation in cases involving advocates' liability.⁸

SCOPE OF IMMUNITY

In *D'Orta*, the High Court referred to the test formulated by McCarthy P in the New Zealand Court of Appeal in *Rees v Sinclair*,⁹ in which his Honour said:

'... the protection exists only where the particular work is so intimately connected with the conduct of the cause in court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing.'¹⁰

In *D'Orta*, McHugh J outlined some of the work that the courts had held to be intimately connected with the conduct of a case, which included:

- failing to raise a matter relevant to opposing a maintenance application;
- failing to claim interest in an action for damages;
- issuing a notice to admit and making admissions;
- failing to plead a statutory prohibition on the admissibility of crucial evidence;

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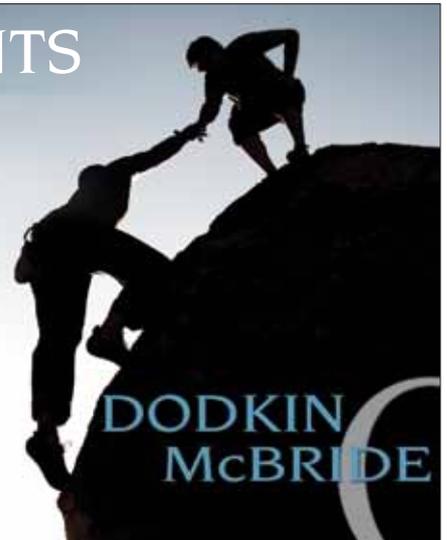
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Work that had been found **not** to be intimately connected with the conduct of a case included:

- failing to advise that there might be a possible action against a third party;
- failing to advise about commencing proceedings in a certain jurisdiction; and
- negligently compromising appeal proceedings.¹²

APPLICATION TO SOLICITORS

The High Court in *D’Orta* made it clear that the immunity should apply both to barristers and solicitors and to work done outside the court, provided the ‘intimately connected’ test was met. Since then, the courts have indicated the breadth of advocates’ immunity as it applies to solicitors.

Commencement of proceedings

Advice by a solicitor to not institute proceedings does not usually attract advocates’ immunity because, if the advice is relied on, proceedings are not commenced. Therefore, issues of finality do not arise, nor is any work carried out that is ‘intimately connected with the conduct of a case’.

The exception to this appears to be when such advice is given in the context of the conduct of other, existing proceedings.

For example, in *Chamberlain v Ormsby*,¹³ the NSW Court of Appeal considered the applicability of advocates’ immunity to a barrister who advised a client in relation to settlement of the client’s application for determination of a lump sum payment in workers compensation proceedings. The settlement required him to irrevocably elect to accept compensation rather than pursue his common law entitlements. In this case, the settlement advice was given on the day the proceedings were listed for hearing in the Compensation Court. Tobias JA stated:

‘It is difficult to imagine a stronger case than the present where the advice given by the barrister led to the appellant’s decision as to the conduct of his case before the Compensation Court or which was more intimately connected with the course of that case...’

In the more recent case of *Donnellan v Woodland*,¹⁴ which related to a solicitor (see below), the NSW Court of Appeal, heard a challenge to, *inter alia*, the decision in *Chamberlain*.

... it is important to recognise that the immunity appears to apply only... in cases in which final orders have been made, and that it does not offer protection in all circumstances.

Basten JA concluded,¹⁵ albeit *obiter*, that the relevant test is whether the advice (to continue proceedings on foot or commence other proceedings) leads to a decision affecting the conduct of the case in court, namely its continuance by way of full argument before a judge.

On this basis, advice by a solicitor to institute proceedings should attract advocates’ immunity, although, depending on prospects of success of the underlying cause of action and/or the solicitor’s subsequent conduct, there may be scope for a personal/wasted costs order to be made against the solicitor in any proceedings then issued.

Drafting of pleadings

In *Symonds v Vass*,¹⁶ it was claimed the solicitors had failed, *inter alia*, to plead certain causes of action on behalf of the plaintiffs and to properly particularise their claim. The plaintiffs claimed that as a result of the solicitors’ negligence, they were compelled to settle the claim on a basis that was unsatisfactory to them, in circumstances where they could otherwise have achieved a more favourable result at a hearing had their claim been properly pleaded.

Ipp JA considered that the case fell precisely within the reach of advocates’ immunity, stating:

‘I reiterate (because it is so important in the context of this case) that a paradigm case to which advocate’s immunity applies is where the client asserts that, ‘if the case had been prepared and presented properly, a different ... result would have been reached’ (*D’Orta-Ekenaike* at [70]). The case put by Mr Bennett on behalf of the appellants is that very case. Thus, the appellants’ case falls squarely within the test for advocate’s immunity laid down in *D’Orta-Ekenaike*. In my opinion, *D’Orta-Ekenaike* compels the conclusion that the respondent is immune from the appellants’ suit.’

Again, depending on the nature of the offending conduct, there may be scope for a personal/wasted costs order to be made against the lawyer who certified the pleadings.¹⁷

Advice on settlement of proceedings

There have been three recent cases (two in NSW and one in Victoria) relating to solicitors’ ability to rely on the immunity in respect of settlement advice.

In *Donnellan v Woodland*,¹⁸ Mr Woodland brought an action against his local council for the grant of a drainage easement over council property under 88K of the *Conveyancing Act 1919* (NSW). The action failed and he was ordered to pay the council’s costs, partly on an indemnity basis, because he had earlier rejected a settlement offer made by the council. The solicitor had advised him to reject the offer and had advised that submissions would be made on behalf of Mr

Woodland that the court should either order the council to pay Mr Woodland's costs or that each party pay its own costs.

Mr Woodland then brought professional negligence proceedings against his solicitor in respect of his advice on the settlement offer. At first instance, Mr Woodland succeeded, with the trial judge finding that the solicitor had been negligent and that he could not otherwise rely on advocates' immunity.

A five-judge bench of the NSW Court of Appeal was comprised to deal with Mr Woodland's appeal, as he had given notice that he proposed to challenge the correctness of a number of decisions of the Court of Appeal relating to the principles of advocates' immunity.

The court found that the solicitor, Mr Donnellan, was not negligent in any of the advice he gave or failed to give, but still also dealt with the advocates' immunity issue.

Applying the decision in *D'Orta*, the Court confirmed that conduct in relation to which a legal practitioner is immune from suit is not confined to proceedings in court, but also extends to any work done out of court that leads to a decision affecting the conduct of the case in court. The decision to not accept the settlement offer was a direct result of the solicitor's advice and affected the conduct of the proceedings, as the plaintiff continued to press the proceedings.

The court rejected Mr Woodland's argument that, for advocates' immunity to apply, there needed to be a temporal

connection between the alleged negligence and the hearing of the proceedings. In this case, the settlement offer was made seven weeks prior to the scheduled hearing. The court also rejected Mr Woodland's argument that, for the work done out of court to have the necessary link to work done in court, the negligence must have resulted in a different order being made by the court than would have been made if there were no negligence. The court found, *obiter*, that Mr Donnellan was immune from suit.

In *Goddard Elliott v Fritsch*,¹⁹ the solicitors agreed to act for Mr Fritsch in property settlement proceedings in the Family Court. At the time of accepting instructions, the solicitor knew the proceedings raised complex commercial and tax issues and that Mr Fritsch was mentally ill.

Mr Fritsch's case was not ready to proceed at the commencement of the trial, causing an adjournment of three days. When the matter came back before the Court, the proceedings were settled at the door of the Court on terms which appeared overly generous to Mr Fritsch's wife. Soon afterwards, Mr Fritsch was admitted to a psychiatric hospital.

Mr Fritsch later contended that the settlement resulted from the negligence of Goddard Elliott, his former solicitors, particularly taking and acting on settlement instructions which he did not have the mental capacity to give.

In the Supreme Court of Victoria, Bell J expressly stated that he was bound by the decisions in *Giannarelli* and *D'Orta*, and therefore held that the solicitors were immune from >>

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suit for their advice on settlement; however, his Honour was deeply troubled by the requirement for him to apply the immunity to the circumstances of the case:

‘After examining decisions of the High Court of Australia which bind me, I have decided that advocates’ immunity supplies a complete defence to Mr Fritsch’s claim for damages against Goddard Elliott. Its capacity negligence (as does its preparation negligence) falls within the immunity because it occurred in the course of work leading to decisions about, or intimately connected with, the conduct of a case in court, which is a very wide test. By reason of the immunity, Goddard Elliott is not liable to pay damages for the loss which its negligence caused Mr Fritsch, a conclusion to which I am driven by the binding authorities and find deeply troubling.’²⁰

Notably, though, his Honour also stated that practitioners

‘...do, however, owe actionable duties of care in respect of conduct that is not intimately connected with in-court advocacy.’²¹

In *Bott v Carter*,²² Mr Bott claimed that he had been injured twice in the course of his employment. He commenced proceedings against his employer, but lost and was ordered to pay the employer’s costs of the proceedings.

Mr Bott then commenced professional negligence proceedings in seeking damages said to have been incurred as a result of, *inter alia*, his solicitor’s failure to take steps to accept an invitation from the employer’s solicitors to discuss a potential settlement offer from the employer.

Those proceedings were summarily dismissed. Mr Bott appealed.

In the NSW Court of Appeal, McColl, Basten and Whealy JJ dismissed the appeal and found that the doctrine of advocates’ immunity was sufficiently wide enough to cover all of the conduct by the solicitors.²³ The Court relevantly held:

‘Once a controversy has been quelled, it is not to be re-litigated. Yet re-litigation of the controversy would be an inevitable and essential step in demonstrating that an advocate’s negligence in the conduct of litigation had caused damage to the client.’²⁴

The Court also stated that there may well be acts or omissions of a solicitor with respect to pending litigation that fall outside the scope of the immunity. This appears to be a reference to Mr Bott’s assertion that he had lost the opportunity to respond to the possibility of settlement offer. However, this issue was ultimately not decided by the Court.²⁵

Bell J expressly stated that he was bound by the decisions in *Giannarelli* and *D’Orta*, and therefore held that the solicitors were immune from suit for their advice on settlement; however, [he] was deeply troubled...

These cases demonstrate that, following the High Court’s decision in *D’Orta*, Australian courts have not adopted a restrictive approach in applying the immunity to out-of-court work. Indeed, the decision in *Donnellan*, in particular, clearly indicates how broadly the immunity may apply to the conduct of solicitors.

RISK MANAGEMENT IMPLICATIONS FOR SOLICITORS

Legal practitioners and their insurers will increasingly seek to rely on the immunity as a complete defence to professional negligence claims, where the allegedly negligent conduct occurred in the course of litigation. However, it is important to recognise that the immunity appears to apply only to conduct by practitioners in cases in which final orders have been made, and that it does not offer protection in all circumstances.

For instance, as the doctrine of advocates’ immunity relies on the principle of finality, it does not protect legal practitioners from adverse costs orders while proceedings are still on foot. While each jurisdiction has different rules governing personal costs orders,²⁶ in NSW, for example, such orders can be made where a practitioner is found to have certified pleadings that had no reasonable prospects of success, or where it appears to a court that costs have been incurred by reason of the ‘serious neglect, serious incompetence, or serious misconduct of a legal practitioner’ or ‘improperly, or without reasonable cause, in circumstances in which a legal practitioner is responsible’.²⁷

Where a solicitor advises on the issue of proceedings and/or certifies them when they have no reasonable prospects of success, the client will generally have suffered no loss in relation to the asserted cause of action, as the cause of action either does not exist or has no reasonable prospects of success. However, it is likely there will be costs consequences for the client in bringing such proceedings, both in fees paid to the client’s own lawyers and as adverse costs orders in favour of the other party (or parties). If so, the client may seek an order that their lawyers’ costs or their opponent’s costs be met by the solicitor pursuant to a personal/wasted costs order. Such orders can also be sought by other parties, or indeed made of the court’s own volition.

The courts have wide-ranging powers to make personal/wasted costs orders and, in the writers’ experience, they are increasingly likely to make them. The finality principle is not breached as any personal/wasted costs order is made within the original proceedings and does not affect the substantive decision.

Also, as can be seen in the comments by Bell J in *Goddard Elliott*, courts can be reluctant to apply the defence of

advocates' immunity, and it is possible they may seek to distinguish cases by finding that a solicitor has breached a duty that goes beyond matters that are intimately connected with the conduct of proceedings. In many, if not most, cases, solicitors are retained to advise on a client's rights generally, whereas barristers can more easily argue that their duty is confined to the matters on which they are specifically briefed. For example, in *Chamberlain*, while the barrister successfully relied on the immunity on the basis that he was briefed to advise only on the Compensation Court proceedings, the solicitor was nevertheless held liable to the client because of a broader duty to advise in relation to the client's rights generally, following an injury at work. In such cases, a solicitor may be liable for all of the client's loss, without any right of contribution from/apportionment in respect of the barrister briefed, if the barrister was briefed only to advise on the proceedings. For this reason, where the solicitor is seeking more general advice, care should be taken in briefing counsel to ensure that he/she is specifically asked to advise on all relevant matters. ■

Notes: **1** England and Wales: *Arthur JS Hall & Co v Simons* [2002] 1 AC 615; New Zealand: *Lai v Chamberlain* [2005] 3 NZLR 291; Republic of Ireland: *McMullen v McGinley* [2005] IESC 10; Singapore: *Ching Yeo and Partners v Guan Ming Hardware and Engineering Pty Ltd* (1997) 2 SLR 729; India: *Kaur v Deol Bus Services Ltd AIR* [1989] P&H 183; Malaysia: *Miranda v Khoo Yew Boon* [1968] 1 MLJ 161; the defence of advocates' immunity was never accepted in Canada (*Demarco v*

Ungaro (1979) 95 DLR (3d) 385) or in the federal jurisdiction in the United States of America (*Ferri v Ackerman* 444 US 193). **2** *Giannarelli and Others v Wraith and Others* (1988) 81 ALR 417. **3** [1969] 1 AC 191. **4** *Giannarelli*, see note 2 above, at [422]. **5** *Ibid*, at [423]. **6** *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12; (2005) 223 CLR 1. **7** *Ibid*, at [34]. **8** As well as the importance of maintaining the 'cab-rank rule' for barristers and an advocate's duty to the court. **9** [1974] 1 NZLR 180 at [187]. **10** *Ibid*, at [151]. **11** *D'Orta*, see note 6 above, at [154] and [155]. **12** *Ibid*, at [156]. **13** [2005] NSWCA 31. **14** [2012] NSWCA 433. **15** *Ibid*, at [221] to [225]. **16** [2009] NSWCA 139. **17** See *Pinbelt Pty Ltd v Bagley* [2000] NSWSC 655. **18** [2012] NSWCA 433. **19** [2012] VSC 87. **20** *Ibid*, at [1145]. **21** *Ibid*, at [791]. **22** [2012] NSWCA 89. **23** *Ibid*, at [8]. **24** *Ibid*, at [24]. **25** *Ibid*, at [37]–[42]. **26** NSW: *Civil Procedure Act* 2005 (NSW) s99 and *Legal Profession Act* 2004 (NSW) s345–348; VIC: *Civil Procedure Act* 2010 (Vic) s29; QLD: *Uniform Civil Procedure Rules* 1999 (QLD) s690 and *Vexatious Proceedings Act* 2005 (QLD) s6; SA: *Legal Practitioners Act* 1981 (SA) s85; NT: *Supreme Court Rules*, regulation 63.21; WA: *Legal Profession Act* 2008 (WA) Part 13; TAS: *Legal Profession Act* 2007 (Tas) s493; CTH: *Civil Dispute Resolution Act* 2011 (Cth) s12; *Federal Court of Australia Act* 1976 (Cth) s37P, s43(3)(f); *Federal Court Rules* 2011 (Cth) r40.07. **27** *Civil Procedure Act* 2005 (NSW) s99.

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