The further divergence between UK and Australian law on barristers' negligence

By Alister Abadee

Introduction

Ever since the House of Lords abolished the advocates' immunity in *Arthur J S Hall v Simons* [2002] 1 AC 615, the Australian Bar has been apprehensive as to: (a) whether the immunity would be abolished by statute or judicial abrogation; and (b) what consequences may flow from the abolition of the immunity in negligence suits for work intimately connected with the presentation of a case in court.

As to the former the High Court has now confirmed by clear majority (6 – 1) the advocate's immunity in common law for work in court or work outside of court intimately connected with work in court in *D'Orta - Ekenaike v Victoria Legal Aid* [2005] HCA 12. The common law immunity applies to civil and criminal (and other hybrid) proceedings. The High Court confirmed the correctness of *Giannarelli v Wraith* (1988) 165 CLR 543 and did so, of course, after reviewing *Hall v Simons* and expressly noting differences between the administration of justice in England, Wales and Australia. The matter is now in the hands of the state and territory attorneys who, at the time of writing, are considering whether and, if so on what terms, the immunity may be abrogated by statute.

As to the latter, the House of Lords has recently delivered opinions in *Moy v Pettman Smith (a firm)* [2005] 1 WLR 581, a case concerning alleged negligent advice by a barrister with respect to a settlement offer received from an opponent on the court doorstep. Arguably, had the case been determined under Australian law recognising advocate's immunity, now confirmed by the High Court in *D'Orta*, it may not have been necessary to determine questions of breach and causation. Be that as it may, the decision in *Moy* raises several significant issues for Australian lawyers in handling barrister negligence cases founded on advices on settlement.

Preservation of advocate's immunity in the common law of Australia

Factual context

D'Orta concerned the advice of an advocate (and legal aid office) in conference to an accused charged with rape to plead guilty two days ahead of committal proceedings. The accused entered a plea. On arraignment at the subsequent trial, he pleaded not guilty and the prosecution led evidence of his guilty plea at the committal. The accused was convicted and imprisoned. On his appeal, the Victorian Court of Appeal quashed the conviction and found that the trial judge failed to give proper directions about the use that the jury might make of the guilty plea at the committal. On retrial, the evidence of the guilty plea was not admitted. The accused was acquitted. He later brought an action against his barrister and legal aid office. He alleged (inter alia) that the advice to plead guilty was negligent and sued the barrister and legal aid office for loss and damage (including loss of liberty and loss of income) and the costs of expenses of the criminal proceedings (including the appeal and retrial). The barrister and legal aid office successfully moved the trial judge to stay the proceedings forever on the basis that the barrister and legal aid office were immune from suit. An appeal of the decision to stay before the Victorian Court of Appeal failed. The High Court heard the application for special leave to appeal at the same time as the substantive appeal.

The immediate issue in *D'Orta* was whether the High Court would reconsider its decision in *Giannarelli* in respect to two matters: the advocate's immunity in common law and whether, as at a particular date, an advocate was immune from suit under Victorian legislation. It is not proposed, for the purpose of this note, to analyse the High Court's construction of the Victorian legislation, though the interpretation of that legislation signified that the structure of the legal profession in that state differed substantially from the barristers' profession in England and Wales ([19]). Attention is focussed instead upon the High Court's treatment of the advocate's immunity in common law.

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Identifying the public policy justification for the immunity

The joint judgment (Gleeson CJ, Gummow, Hayne and Heydon JJ) structured their consideration of the immunity in common law, and the correctness of the decision in *Giannarelli*, with regard to two matters: (a) the place of the judicial system as part of the structure of government; and (b) the place that the common law immunity has in a series of rules designed to achieve finality in the quelling of disputes by the exercise of judicial power ([25]). The joint judgment regarded as peripheral other matters cited in *Giannarelli* as supporting the immunity: connection between the barrister's immunity and inability to sue for fees; potential competition between duty to the court and duty to the client; and the desirability of maintaining the cab rank rule (at [26]).

Instead the justification for the immunity is rooted squarely in the role of the advocate in facilitating, along with other participants in the exercise of judicial power (judge, witness,

juror), the administration of justice[1]. This was a fresh approach to the issue: the immunity had not previously been explicitly linked to Australia's constitutional structure. The majority determined that it is part and parcel to the judicial system that controversies, once resolved, are *finally* resolved, subject to certain narrowly defined circumstances, even if they are determined imperfectly ([31] – [42], [84], [380]). The majority found that to admit suits against advocates conducting litigation would inevitably and essentially involve the re-litigation of controversies ([43]), thereby colliding with the principle of finality. To take perhaps the most common example, in criminal proceedings, it might be claimed that the incompetence of counsel has led to a conviction[2]. To admit suits against advocates for work in court would require an exception to the tenet of finality.

There are two particular difficulties in carving such exception: first, there would be an imperfect, or peculiar type of re-litigation: one in which only the role of the advocate (not the judge, jurors or witness) was placed under the microscope of the events complained of ([45], [113], [164], [192] – [194])[3]. Thus, the barrister (and the legal aid office) in *D'Orta* could not, at the civil trial, have called any of the jurors to say what impact the trial judge's mistaken direction as to the use of a plea had on their decision. Secondly, in order to succeed with a suit, it would be necessary to impugn the final result of earlier litigation, since the 'harm' sustained by the client could not be corrected within the original litigation ([66] - [73], [165] – [168], [370]).

The joint judgment rejected the reasoning, approved by the House of Lords in *Hall v Simons*, that rules about of abuse of process (especially collateral challenges to criminal convictions in civil proceedings) could substitute for the function of advocate's immunity of avoiding the risks of re-litigation; and that distinction should be made between applying the principle in criminal and civil proceedings (at [74] – [79].

McHugh J and Callinan J delivered concurring judgments, emphasising, in particular, certain features of the profession of the Bar distinguishing it from other professionals. They cited important differences between advocates and other professionals including the occasions where advocates, as officers of the court, must occasionally subordinate the interests of the client ([113]) and the non – scientific, even intuitive, nature of the advocate's craft ([370]).

As he did in *Boland v Yates Property Corporation* (1999) 74 ALJR 209, Kirby J, in dissent, rejected public policy arguments, and all other considerations, favouring the immunity. His Honour did, however, confine his views favouring the abolition of the immunity to 'out of court' negligence, leaving *Giannarelli* to stand in respect to acts or omissions 'in court' to another day ([339] – [340], [346]).

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Identifying the boundary of work in court

The joint judgment saw no reason to depart from the test in *Giannarelli* that the immunity extends to work done in court or to work done out of court that leads to a decision affecting the conduct of a case in court, as it is the conduct of the case that generates the result which should not be impugned ([85]). Advice about a plea given out of court led to a decision (to enter the guilty plea) affecting the conduct of the case at the subsequent trial (at [88]).

McHugh J considered the boundary at some length, giving examples of cases falling on both sides of the line (at [154] – [156]). His Honour noted that the question is whether the connection with the litigation exists; not the form of the negligence, a point that is important where claimants might seek to couch their cause of action in a way that seeks to distance the conduct from occurring in the courtroom (at [167])[4]. Thus actions are commonly framed with particulars alleging a failure to advise, being an omission that can more readily be attributable to conduct in the calm of a barrister's chambers. In line with the public policy considerations expressly identified in the joint judgment, McHugh J determined that the immunity should extend to any work that, if subject to a claim of negligence, would require the impugning of a final decision of a court, or the re-litigation of matters already finally determined by the court (at [168]).

Commentary

At the time of writing this note, the question of whether to abolish the immunity was on the agenda of state and territory attorneys-general. A view appears to have taken hold in sections of the public, in the aftermath to *D'Orta*, that it is wrong, or anomalous, for advocates not to be accountable for their acts and omissions, when other professionals whose profession requires them to make intuitive, instantaneous judgment calls do not enjoy an immunity. The argument that there are no other or adequate forms of accountability deserves close attention when that argument appears to be motivating legislators in considering whether to abrogate the immunity.

First, where advocates conduct themselves so flagrantly such that the conduct constitutes a form of unsatisfactory professional conduct or professional misconduct, they may be liable to pay compensation as a sanction in disciplinary

proceedings (Legal Profession Act, s171C). Whilst statutory caps exist for compensation orders (such as they exist, for example, in victims compensation statutes) and there may be an argument to increase those caps, clients who suffer loss as a result of such conduct do not also have to prove the difficult issue of causation that they would in a private suit against the advocate.

Secondly, where the advocate's conduct has arisen in the civil jurisdiction of superior courts, advocates may be amenable to costs orders under the court's inherent jurisdiction, as well as provisions such as Part 52A r 43A which permit the making of orders in respect of costs incurred improperly or without reasonable cause; or costs which are wasted by undue delay or by other misconduct or default[5]. A long time ago, the court had the power, in its disciplinary jurisdiction over officers of the court, to penalise advocates by way of fine, by 'mulcting' the court officer[6]. Such forms of accountability are apt to hit the hip pocket of advocates and may not necessarily be covered by professional indemnity policies.

Thirdly, unlike other professionals forced to make intuitive and instantaneous decisions, and quite apart from the multiple and sometimes conflicting duties owed by them, advocates make their decisions in the public gaze, with their conduct scrutinised by judges, jurors, court officials, solicitors, clients, the media and the general public. Conceivably, over time, there may be audio or television broadcasting of court proceedings, so that the advocate's conduct may be exposed to broader sections of the community. Further, it is not unknown for criticisms of the way parties (and implicitly, the advocates representing them) run their cases to emerge in judgments. These forms of public scrutiny keep advocates accountable in a competitive profession.

Moy v Pettmann

The context

Moy was a case about a client's decision to accept one of a number of settlement offers at an undervalue, and litigation brought against his solicitors and barrister to sue for the difference between what he received on settlement and what he would have received in the highest settlement offer made by his opponent. A barrister was briefed to appear for a claimant in a personal injuries case arising from surgical treatment received at a hospital. The claimant faced a number of evidentiary difficulties in his case against the hospital; which was partly the result of inadequate preparation by the claimant's solicitors. The hospital authority made several payments into court. As the trial approached, the defendant barrister was informed, contrary to her expectations, that the hospital would raise an issue of causation concerning the claimant's pain and disability and consequential future loss. She understood that she would need the court's leave to adduce evidence to close the evidentiary gap. She considered that she had a better than 50:50 chance of succeeding in getting that leave. The trial commenced. At the door of the court, the defendant barrister was told that the hospital authority's last offer was still open for acceptance before the judge came on the Bench.

The barrister advised the client essentially in the following terms: he could still accept the hospital's last offer, but she was hopeful that the evidence would be allowed in, and that it was better for him if the case went on, since he should beat the hospital's last offer, but it was a matter for him whether to accept the offer to avoid the risks. The claimant proceeded. The judge came on the Bench. Discussion between the Bench and the Bar made it apparent that the claimant was unlikely to get the new evidence in. The case was briefly adjourned, during which time the hospital withdrew its immediate past offer and substituted a previous lesser offer (which also deducted costs incurred from the date of payment into court of that lesser amount). In the interval, the barrister advised the client to accept the reduced offer and this advice was accepted.

It was claimed that the barrister negligently failed to advise the claimant to accept the hospital's highest offer before trial and but for that negligence, the claimant's losses would have been less. Eventually, there was no issue that the barrister's assessment of the prospects of persuading the trial judge to admit the necessary evidence was one that a reasonably competent barrister would make. The case turned upon the adequacy of her advice to the client. The English Court of Appeal found that notwithstanding the reasonableness of her assessment of getting the new evidence in, since the barrister did not actually tell the client that her *assessment* of the prospects of getting the evidence in was only 50:50, this was negligent advice. It then inferred that had the claimant been given this advice, he would have decided to accept the hospital's highest offer.

The reasoning

The House of Lords allowed the barrister's appeal. Lord Carswell delivered the leading opinion. At the outset, Lord Carswell emphasised (at [60]) that it was not intended that the abolition of the immunity in England and Wales should lead to barristers adopting 'defensive' advocacy, to abdicate responsibility for making hard decisions and a reluctance to give clients advice that they need. Turning to the question of breach, Lord Carswell accepted the barrister's counsel's submission that it followed, by clear implication from the finding that the barrister was not negligent in *assessing* the prospects of succeeding with her application to adduce the new evidence, that she was not negligent in *advising* the client to proceed with the action, rather than accepting the hospital's highest offer (at [61] – [63]). The other lords agreed with Lord Carswell ([1], [2], [21], [23], [71]). Lord Carswell also doubted (without deciding) the Court of Appeal's finding that the client would have accepted the hospital authority's highest

offer if given the more specific advice concerning the prospects ([64] – [65]). This was the causation issue.

What was the content of the advice that should have been given? On this the lords were unclear. Lord Carswell said that the barrister should give clear and readily understood advice and appeared to find that since her reasoning was reasonable, it was not incumbent upon her to spell out the reasoning ([65]). Lord Hope (with whose opinion Lords Nicholls, Baroness Hale and Lord Brown also agreed) said that the client would be entitled to know once the defendant had paid a sum into court: (a) whether s/he is likely to better the sum paid into court if the matter was left to the judge; and (b) any costs liability that the client may have if s/he fails to better that sum from the trial judge ([14]). Lord Hope also said that it is the substance of the advice that needs to be communicated ([21]). Baroness Hale described Lord Hope's analysis of the content of the advice to be given as the 'minimum' that a client should know when deciding whether to accept a payment into court, but distinguished that situation from where the offer is made at the court – door (at [28]). Baroness Hale frankly conceded that there were no clear principles governing the terms in which advice in this context could be given (whilst noting that there was no expert evidence to indicate that a reasonable barrister would have acted any differently to this barrister) (at [28]).

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Issues arising from Moy for Australian advocates

First, there is, as indicated, a real argument as to whether the advocate's immunity at common law might have been invoked by an Australian barrister in the same position as the barrister in Moy. In the pre – *Hall v Simons* decision of *Kelley v Corston* [1998] QB 686, the English Court of Appeal considered another case of alleged negligent advice on settlement offers at or close to the court door. In that case, an important factor that led to the immunity being invoked in *Kelly* was the fact that to fully test the reasonableness of the barrister's conduct, it was necessary to consider how a judge might have responded. The client's complaint in *Moy* arose because a judge indicated that, contrary to the expectation of his counsel, the court was not likely to admit the evidence. It is very likely that in *Moy* this judicial indication, which was thereafter exploited by the hospital, had some causative role to play in the client's loss and disappointment. The judge's comments doubtless contributed to the hospital's decision to withdraw its highest offer; which decision, in turn, contributed to the client's loss. Had the judge rejected (as was apparently likely) the application to admit the evidence, in Australia, conceivably the decision might potentially (depending upon the precise circumstances) have offended the principle from *Queensland v JL Holdings* (1997) 189 CLR 146. It would bring to bear the point made by Callinan J in *D'Orta* (at [369]) that sometimes it might be *judicial* error that has caused a client loss. Had another judge taken a more sympathetic view, and the evidence had gone in, the case would have been more likely presented in a way that reflected its true value and it is possible that no loss (or at least a lesser amount of loss) would have occurred.

For a barrister to defend a claim of negligent advice (and for a client to prove the issue of causation) would and did in this instance, require some other court to inquire into the actual or likely conduct of the judge. This was the sort of case where the barrister might, under the common law, have interposed the judge's conduct, in expressing the negative indications towards the application, between herself and the client's loss; but in circumstances where the judge was not only immune, but barrister could not ordinarily call the judge as a witness[7].

Secondly, how persuasive is the reasoning that because a barrister's assessment of the merits of a settlement offer is not negligent, then it followed that a failure to articulate the reasoning underlying such assessment could not be negligent? In *Moy* the lords appeared to be mindful of the analogy of doctors advising patients of the risks of surgical treatment (e.g. [28], [64]). In the Australian context, ever since *Rogers v Whitaker* (1992) 175 CLR 479 it has been the common law that there is a difference between a doctor's treatment and disclosure of advice and information (albeit that both are components of the single comprehensive duty): doctors have the duty to warn patients of material risks inherent in the proposed treatment[8], and it has been demonstrated that liability may result for failure to warn even if the treatment is carried out competently (*Chappel v Hart* (1998) 195 CLR 232). In this medical context, there are a range of factors that a practitioner would ordinarily be expected to consider in deciding whether to advise and what to advise the patient, including the nature of the risk (and the likelihood of its eventuating), the existence of reasonably available alternative treatments, the patient's desire for information, the characteristics of the patient and all surrounding circumstances (such as emergencies)[9]. Perhaps not all of these matters could readily be transposed to the context of a barrister's advice to the client about settlement offers at the door of court[10] . Nevertheless, as the High Court noted in *Rogers* (at 486), a

consequence of the application of the 'Bolam' principle, which gave the medical profession the right to determine for itself the standard of care, was that no matter whether a patient asks a direct question about possible risks or complications of treatment, no matter whether or not it was ultimately performed competently, the making of that inquiry would have no significance. It is suggested that the lords' reasoning does not admit of a proper role for the inquisitive client and the other factors of the kind considered in the medical advice cases.

In *D'Orta*, McHugh J (at [157]) and Callinan J (at [387]) rejected the application of the principle in the circumstances of the case. Nevertheless, it is submitted that merely because a barrister's assessment of the merits of accepting an offer of settlement against the alternative courses is reasonable does not, by itself, answer a complaint that the provision of information or advice was negligent. The causation issue is another matter. This is not to say that the lords' determination was wrong and it appears that the claimant's case was likely to have foundered on the causation ground that it would have made no difference to the client to receive the fully elaborated advice: what mattered to him was the substance of the advice. Further, the circumstance that an offer is put at the court door and thereby requires urgent consideration might be regarded as analogous to the circumstance that a surgeon might be required to advise a patient on treatment in an emergency. However, as the list of factors in *F v R* indicated, this is but one of many circumstances to be weighed in the balance.

Thirdly, there cannot be hard and fast rules as to the content of advice on settlement offers, whether at the court door – step or not. In *Studer v Boettcher* [2003] NSWCA 263, the client complained about the pressure brought to bear by his solicitor to settle a case at a mediation on the best terms. The court agreed that there are circumstances in which an advocate may bring legitimate pressure to bear upon a client to settle, but not to such extent so as to coerce the client. On the point of interest in this note, Fitzgerald JA (in obiter) indicated that the lawyer's advice on a settlement offer is not merely a matter of considering upon and advising how the client's rights and obligations are affected by the offer, but requires a consideration of other matters, including the 'value judgements, discretionary decisions and other subjective determinations' involved in continuing with the curial process, such as the delay, the stress associated with litigation for parties, potential costs liability of the client, and the diversion of the client away from other more productive activities (at [65]). More specifically, his Honour noted that the lawyer should advise of the advantages and disadvantages of the courses open to the client, the lawyer's opinion and the basis for it, in terms that the lawyer can understand (at [75]). As to this last matter, as some of the lords noted in *Moy*, lawyers in this context are paid for expressing their opinions; not their doubts ([28], [65])[11]. These are the sorts of matters capable of being reasonably adapted to the *F v R* criteria from the medical negligence cases.

Fourthly, the House of Lords emphasised the problematic requirement of causation for claimants that they prove, after the event, that after receiving proper advice, they would have declined the settlement offer that they actually accepted. This is akin to the medical negligence context of a patient having to prove that s/he would not have undergone the treatment if advised of its material risks. As indicated, the lords did not need to decide the causation point, but did emphasise that it was unlikely that the client would have acted any differently if given more detailed information to support the substance of the opinion expressed (at [64]). In the imperfect and artificial forum of the evidence given after the event, the High Court has noted that, under the common law, particular care needs to be given to accepting the subjective evidence of claimants and the court will pay close attention to the objective factors in assessing the credibility of such evidence[12]. For proceedings in New South Wales, the ability of claimants to give evidence as to what they would have done had they received proper advice is now also severely constrained by statute (s5D(3)(b) of the *Civil Liability Act 2002* (NSW).[13]

Fifthly, the lords' decision raises the question of the significance of expert opinion evidence and whether to call it in advice on settlement cases. As indicated, there was no dispute but that the barrister's assessment of the prospects of getting the evidence in set against the advisability of accepting the offer was reasonable and the only question was whether she was negligent for failing to give adequate advice. In this case, no expert evidence on reasonably competent practice in advising clients in the situation that this barrister was confronted was adduced. Instead the matter was left to the judge. That step is not unremarkable in barristers' negligence proceedings given the prevalence amongst the Bench of former experienced barristers (though, of course, appointments are increasingly being drawn from the solicitors' branch and the academy). A possible drawback of relying upon the judge alone is that unless s/he is forced to deal with expert evidence (especially that which has been contested), judges may have differing (and possibly unarticulated) standards upon which judicial minds may reasonably differ (at [19] and [26])[14]. The ultimate question is not what the judge would have advised, but whether the advocate's advice accorded with reasonable practice. Where there is an absence of authority or a commonly held view as to what constitutes reasonable practice, than the absence of expert evidence can be significant and, indeed, such omission may be relied upon to support a view that the barrister should receive the benefit of the doubt. This was an important point to Lord Hope (at [22]) and Baroness Hale ([28]) in *Moy*.

For proceedings in New South Wales, again, the position in the common law has, since late 2002, been affected by s5O (1) of

the *Civil Liability Act 2002* which provides a defence for a professional in negligence proceedings if s/he acted in a manner which (at the time of the act or omission) was widely accepted in Australia by peer professional opinion as competent professional practice. Section 5O(2) provides a qualification to this defence where the court considers that the peer opinion is 'irrational' and it is perhaps, here, that an adventurous judge might water down the application of the defence. Nevertheless, in most cases of barristers negligence involving alleged negligent advice this statutory defence makes it virtually irresistible for lawyers acting for barristers in professional negligence suits to serve before trial expert opinion evidence that the barrister acted in accordance with a competent professional practice widely accepted in Australia. This defence is not applicable to the *failure* to advise/warn cases[15]. In these types of cases lawyers for claimants can put on expert evidence on reasonable practice in the provision of advice about settlements in the knowledge that whatever the barrister might put on in response will not, under the statute, be determinative.

Conclusion

In these two decisions, the High Court and the House of Lords have shown their common concern to ensure that advocates are not diverted from performing their role of serving and facilitating the administration of justice. That common endeavour is, however, reflected by two very different standpoints when considering the 'in court' conduct of advocates.

The English and Welsh courts have, since *Hall v Simons*, been required to treat with complaints about the reasonableness of an advocate's conduct where the key issues will be breach and causation, as developed in the common law; with the courts also hoping that rules regarding abuse of process may deter vexatious claims. *Moy* demonstrates that in one area where an advocate's craft is brought to the fore – advices on settlement – and where there is no scientific or ritualistic formula for advocates to apply, expert opinion evidence of reasonable practice will be essential, for both claimant and the advocate.

Australian courts will not (under the common law) even consider the reasonableness of an advocate's conduct in court or intimately connected with it, no matter how egregious, when to do so would risk bringing into disrepute the administration of justice by re – litigating controversies that the judicial process is designed to quell. The majority in *D'Orta* has taken a strong stand, contrary to some sections of public opinion, but a stand that places advocates on no different footing than other participants in that process. For those complaints of advocates' conduct that are on the borderline of out of court acts intimately connected with the conduct of a case in court, recent statutory provisions brought into this and other states relating to breach and causation will present additional hurdles for complainants.

1 McHugh J also said that the independence of the Bar largely secured the independence of the judiciary, yielding an efficient and economical system of justice at [105] – [106].

2 *R v Birks* (1990) 19 NSWLR 677.

3 In his concurring judgment, McHugh J noted that as a consequence, a determination whether an advocate's negligence caused damage would in most cases be a matter of 'guesswork': [190]. Callinan J also instanced the *Boland v Yates Property Corporation* litigation as an occasion where the client's 'loss' (through the eventual costs of protracted legal proceedings) resulted from an error of the court: at [369].

4 Approving *Keefe v Marks* (1989) 16 NSWLR 713; and noting *Boland v Yates Property Corporation* (1999) 74 ALJR 209 at 228 – 29 [97]; and at 280 [361].

5 Eg *Hickey v Davistown RSL Club Ltd* [2003] NSWCA 110

6 JM Bennett, *A history of solicitors in New South Wales* (1984) p 209.

7 *D'Orta* at [43], [45]; *Giannarelli v Wraith* (1988) 165 CLR 543 at 569, 573 – 74, 595; *Boland v Yates* (1999) 74 ALJR 209 at 237

8 The position at common law in New South Wales is not affected by the revival of the 'Bolam' standard in the *Civil Liability Act 2002* (NSW), s5P. In *D'Orta* McHugh J noted the position in other states at [189] fn 229.

9 *F v R* (1983) 33 SASR 189 at 192 – 193, approved in *Rogers* at 490. In *Rosenberg v Percival* (2001) 205 CLR 434, Gummow J at 458 [76] equated this summary with the criteria for breach of duty under the principles of *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47 – 8.

10 The *Rogers v Whitaker* principle was applied in *Heydon v NRMA Ltd* (2000) 51 NSWLR 1, a case concerning a barrister's advice regarding a transaction: at 53 [145] – [146]

11 Or, as Callinan J said in *D'Orta*, advice that is not clear is advice that may not be worth having ([386]).

12 *Rosenberg* at 442 [17]; 449 [44] – [45]; 463 [91]; 488 – 489 [164]

13 See the evidentiary and constitutional difficulties associated with this provision in Gleeson SC and Evans 'The question that plaintiff's counsel cannot ask' (Summer 2004/05) *Bar News* 36

14 As they differed in the *Heydon v NRMA* litigation.

15 Section 5P