Limits of advocates' immunity confirmed

James Foley reports on *Kendirjian v Lepore [2017]* HCA 13

The High Court decision of *Kendirjian v Lepore* [1] confirms that advocates' immunity does not apply to the giving of negligent advice (or the negligent failure to give advice) in connection with resolving proceedings.

The High Court's decision confirmed that negligence in connection with the settlement of proceedings is not conduct which is 'intimately connected with work in court', and accordingly any claim for negligence relating to such conduct will not be barred by advocates' immunity.

Car accident proceedings

In November 1999, Mr Kendirjian was injured in a car accident. He commenced proceedings in 2004. The other driver admitted fault, and accordingly the proceedings only concerned an assessment of damages.

On the first day of the trial, a settlement offer of $600,000 plus costs was made by the defendants. This offer was rejected.

Ultimately, Mr Kendirjian obtained judgment for $318,432.75 plus costs. Mr Kendirjian appealed to the NSW Court of Appeal. The appeal was unsuccessful.

Negligence proceedings

In October 2012, Mr Kendirjian commenced proceedings in the District Court in negligence against his legal representatives in the car accident proceedings.

The essence of Mr Kendirjian's claim in negligence was that his legal representatives did not inform him of the substance of the settlement offer, only the fact that an offer had been made, and rejected the settlement offer without his instructions. He sued his legal representatives for the difference between the settlement offer and the result he ultimately obtained.

Decisions below

Mr Kendirjian's legal representatives applied to the District Court for summary dismissal of the proceedings, on the basis that the claim was doomed to fail by reason of advocates' immunity.

The District Court granted the legal representatives' application, and summarily dismissed the proceedings.

Mr Kendirjian appealed from the summary dismissal to the Court of Appeal. The Court of Appeal affirmed the decision of District Court and dismissed the appeal.

In dismissing the appeal, the Court of Appeal applied its earlier decision of *Donnellan v Woodland* [2], in which the Court found (in seriously considered *obiter dicta*) that the giving of negligent advice, or negligent failure to give advice, in relation to potential settlement would lead to a decision to continue or not continue with the case, and would accordingly affect the conduct of the case. For this reason, an action seeking to impugn such conduct would be barred by advocates' immunity.[3]

The decision was appealed to the High Court.

Intervening decision of High Court

After the Court of Appeal confirmed the summary dismissal of the proceedings, but before the appeal to the High Court was heard, the High Court delivered its decision in *Attwells v Jackson Lalic Lawyers Pty Limited* [4].

In *Attwells,* the High Court declined to overrule its earlier decisions in *D'Orta* [5] and *Giannarelli* [6], and declined to abolish advocates' immunity. The High Court confirmed the principle in *Giannarelli*, that advocates' immunity extended to 'work done out of court which leads to a decision affecting the conduct of the case'.[7]

However, while the High Court in *Attwells* maintained advocates' immunity, it limited the scope of the immunity. The High Court found that the immunity extended only to conduct outside of court which gave rise to the resolution of that case by the court.[8] The immunity did not extend to advice which contributed to the making of a voluntary agreement, such as a settlement agreement. There needed to be a 'functional connection' between the conduct outside of the court and the determination of the case, in order for the practitioners to have the benefit of advocates' immunity.[9]

High Court

Following the decision in *Attwells*, the first respondent consented to the appeal being allowed. However, the second respondent resisted the appeal, on the basis that the reasoning in *Attwells* could be distinguished, or alternatively that *Attwells* should be re-opened.

The High Court found that *Attwells* could not be distinguished. The differing feature of *Attwells* relied upon by the second respondent was that the present case would necessarily involve calling into question the correctness of the judgment of the District Court in the car accident proceedings, which would offend the principle of finality of litigation.

This argument was rejected by the High Court[10], which found that judgment would not be called into question. Rather, the court found that whether the conduct of the legal representatives was negligent would be assessed at the time of the conduct (the first day of the final hearing), and would not involve any consideration of whether the final decision of the District Court in the car accident proceedings was right or wrong.[11]

All seven members of the High Court declined to re-open *Attwells*. The second respondent sought to draw a distinction

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between the principle of the scope of advocates' immunity stated in *Attwells* (citing the remarks of McCarthy P in *Rees v Sinclair* [12]), and the principle as articulated by the High Court in *Giannarelli*. The High Court found that any such distinction was 'illusory' and 'artificial'.[13]

Endnotes

1 [2017] HCA 13 (29 March 2017).
2 (2013) ANZ ConvR 13-001; [2012] NSWCA 433.
3 *Kendirjian v Lepore* [2015] NSWCA 132 at [27]-[28].
4 (2016) 90 ALJR 572; 331 ALR 1; [2016] HCA 16.
5 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1; [2005] HCA 12.
6 *Giannarelli v Wraith (1988)* 165 CLR 543.
7 Id at 560.
8 *See at [52], [59] per French CJ, Kiefel, Bell, Gageler and Keane JJ.*
9 *See at [5] per French CJ, Kiefel, Bell, Gageler and Keane JJ.*
10 *Edelman J, with whom Kiefel CJ, Bell, Gageler and Keane JJ agreed.*
11 *At [34] per Edelman J.*
12 [2005] HCA 12; (2005) 223 CLR 1 at 25-26 [61]-[64].
13 *At [38]-[39] per Edelman J, with Nettle and Gordon JJ also agreed as to this aspect.*

VERBATIM

In June 2017 Martin Shkreli stood trial in the United States on charges relating to securities and wire fraud. Mr Shkreli became very well known in the States in recent years while he was chief executive officer of a pharmaceutical company at a time when the company drastically increased the price of various drugs, making them unaffordable for many. A recent issue of *Harper's Magazine* included the transcript of the jury selection process at the outset of Mr Shkreli's trial, during which the Court ended up excusing more than two hundred potential jurors. Benjamin Brafman is Mr Shkreli's attorney. In case anyone is not familiar with the Wu-Tang Clan, it is a well known hip hop group from New York. Now read on ...

THE COURT: Juror Number 144, tell us what you have heard.

JUROR NO. 144: I heard through the news of how the defendant changed the price of a pill by up-selling it. I heard he bought an album from the Wu-Tang Clan for a million dollars.

THE COURT: The question is, have you heard anything that would affect your ability to decide this case with an open mind. Can you do that?

JUROR NO. 144: I don't think I can because he kind of looks like a dick.

THE COURT: You are Juror Number 144 and we will excuse you. Come forward, Juror Number 155.

JUROR NO. 155: I have read a lot of articles about the case. I think he is as guilty as they come.

THE COURT: Then I will excuse you from this case. Juror Number 10, please come forward.

JUROR NO. 10: The only thing I'd be impartial about is what prison this guy goes to.

THE COURT: Okay. We will excuse you. Juror 28, do you need to be heard?

JUROR NO. 28: I don't like this person at all. I just can't understand why he would be so stupid as to take an antibiotic which H.I.V. people need and jack it up five thousand percent. I would honestly, like, seriously like to go over there —

THE COURT: Sir, thank you.

JUROR NO. 28: Is he stupid or greedy? I can't understand.

THE COURT: We will excuse you. Juror 41, are you coming up?

JUROR NO. 41: I was looking yesterday in the newspaper and I saw the defendant. There was something about him. I can't be fair. There was something that didn't look right.

THE COURT: All right. I'm going to excuse you. Juror Number 59, come on up.

JUROR NO. 59: Your Honor, totally he is guilty and in no way can I let him slide out of anything because —

THE COURT: Okay. Is that your attitude toward anyone charged with a crime who has not been proven guilty?

JUROR NO. 59: It's my attitude toward his entire demeanor, what he has done to people.

THE COURT: All right. We are going to excuse you, sir.

JUROR NO. 59: And he disrespected the Wu-Tang Clan.