# advocate IMMUNITY

By Jeremy Gormly QC

**The long-standing common law rule limiting negligence actions against lawyers for court-related work was confirmed by the High Court in the Victorian case of *D'Orta-Ekenaike v Victoria Legal Aid*.[1] Not only did the High Court refuse to abolish the immunity, as had occurred in other parts of the common law world, but it extended it to non-advocates (in this case a solicitor), who are intimately involved in a court-related decision.**

## THE FACTS

The appellant, charged with rape, was advised that he had no defence and to plead guilty. He altered his denial of rape and entered, with apparent reluctance and contrary to earlier instructions, a plea of guilty. Before trial, he changed his plea back to not guilty. At trial, his earlier plea was used against him. The jury convicted him.

There was a retrial. At the retrial, there was a *voire dire* about the admissibility of the earlier guilty plea. The new trial judge found pressure from the legal advisers and that there was an available defence. The evidence of the earlier guilty plea was excluded. The appellant was acquitted.

## THE NEGLIGENCE ACTION

The appellant brought a negligence action against both his barrister and solicitor. The action was permanently stayed on the basis of the immunity from suit of the barrister and the solicitor. It was said that *Gianarelli v Wraith*[2] barred any possible success. An application for special leave to the High Court was made in which the Court was asked to reconsider its 1988 decision in *Gianarelli*.

## THE LEGAL BACKDROP

Australia's 1998 decision of *Gianarelli* followed two major English decisions, *Rondell v Worsley*[3] and *Saif Ali v Sydney Mitchell & Co*,[4] which found the existence of an immunity for advocates.

In the USA, no immunity has ever existed except for prosecutors and, in some places, for public defenders. In Canada, the decision of a single judge of the Ontario High Court in *Demarco v Ungaro*[5] remains unchallenged, and has stood since 1979.

NZ had an immunity but, on 8 March 2005, two days before the decision of *D'Orta-Ekenaide v Victoria Legal Aid*, its Court of Appeal handed down a decision in *Lai v Chamberlains*[6] in favour of following the English decision of *Arthur J S Hall v Simons*[7] against immunity.

The House of Lords decision of *Arthur J S Hall v Simons* held that immunity was no longer part of the law (although a minority would have retained the immunity in criminal matters) because:

- the absence of an immunity would not affect the exercise of an advocate's duty to the court;
- vexatious claims should not be exaggerated;
- there had been substantial changes in the community, its perceptions and expectations;
- the problems of proof in re-trying issues and establishing causation did not justify a general immunity;
- there was a disagreement that collateral attack on judgments and the issue of re-litigation would bring into disrepute the administration of justice; and
- immunity generally should be avoided and that where possible, the common law should endeavour to find a remedy for a wrong.

## *D'ORTA-EKENAIKE V VICTORIA LEGAL AID*

### The majority

The first of four judgments was jointly delivered by Gleeson CJ, Gummow J, Hayne J and Heydon J. McHugh J and Callinan J each delivered separate judgments, with reasons in line with the joint judgment. Justice Kirby dissented.

The joint judgment identified two issues. First, whether the court should reconsider *Gianarelli* (as to the existence of a common law immunity and pursuant to *Legal Profession Practice Act* 1958 (Vic)). Secondly, whether any common law immunity applied to non-advocate solicitors involved in advocacy decisions. The reasons given for retaining immunity were:

1. Re-litigation in collateral proceedings for negligence, of issues properly decided by a court (presumably unaware of or unable to accommodate negligent representation), would have adverse consequences for the administration of justice flowing from a need for finality in litigation. That requirement, in turn, was said to flow in the nature of judicial power, the central concern of which was said to be the 'final quelling of controversy'.[8]

   Implicit in this argument is the view that the integrity of the process is of more importance than the outcome for individual litigants – a point of departure with the House of Lords. In other words, all litigants are collectively more important than any one litigant, and the integrity of the system dealing with the rights of all or any litigant is more important than any one litigant.
2. The joint judgment's second 'common law' reason was that the Victorian Parliament had already decided to retain the >>

immunity. A new provision about immunity in the 1996 Act (replacing 1954 legislation) asserted that nothing in the Act 'abrogates any immunity from liability for negligence enjoyed by legal practitioners before commencement of this section'.

3. A third reason for retaining the immunity was the High Court's rejection of the arguments adopted by the House of Lords in *Arthur J S Hall v Simons*.

## Comparing the views

The High Court and the House of Lords differ fundamentally, notably in the different value placed on the individual litigant compared with the demands of the institutions of justice. The House of Lords thought the immunity too high a price for litigants to pay for the benefits it offered to the administration of justice, and focused on the litigant who had suffered a loss caused by negligence. Furthermore, as McHugh J saw it, it 'valued the role of tort as a promoter of standards of performance in the legal profession and the maintenance of public confidence in the legal system by the removal of a self-serving immunity'.[9] The High Court's joint judgment on the other hand, appears to have reservations about the 'chilling' effect of litigation.[10] It also rejects what it asserts is a premise of the applicant that there should be no wrong without a remedy.

The difference in approach is highlighted in the use of language distinguishing the judicial function from other functions. For example, using the expression 'quelling of controversy' to describe the judicial function has a history in Chapter III Constitutional cases, but probably relates more to the categorisation of the judicial role in the separation of powers. It has poor application to the exercise of the power itself. 'Quell' means to suppress by force. The description of the issue between litigants as a 'controversy' barely acknowledges the existence of the individual litigants, and perceives the controversy as a social disturbance rather than an issue to be determined by the personal attention of a court.

## The judgments of McHugh J and Callinan J

McHugh J approached the issues quite differently from the joint judgment, pointing to the critical functional role of the Bar to the court that distinguishes it from other professions.

He highlighted the problems of proving an action for in-court negligence and, in particular, of establishing causation where the principal witness (the judge or jury) could not be called. Identifying the many situations where no duty is said to exist, McHugh J reflected the joint judgment's view that the community and the profession should accept that not every wrong should have a remedy. He otherwise agreed with the joint judgment and disagreed with Kirby J.

Callinan J expressly dealt with the position of a non-advocate accepting a submission that the immunity of a solicitor who advises jointly with counsel cannot be considered in isolation from the immunity of counsel. He said:

> "A decision of the kind taken here as with many decisions as to the conduct of the case, is taken after discussion and is usually taken jointly. What may have started as a tentative suggestion by one of the lawyers may well emerge as a firm joint decision, a separate author of which cannot reasonably be identified. A solicitor, instructing in litigation, owes the same duties as the advocate to court and client. The reasons favouring immunity of advocates in work connected with the conduct of litigation accordingly requires that the same immunity obtain for solicitors."[11]

## The dissenting judgment

Kirby J differs markedly from the majority. He does not distinguish the legal profession from other professions. He emphasises the dissent in *Gianarelli*. He looks to the public perception of the administration of justice and to the turning away from tort as a remedy for loss.

Like the House of Lords, he is more inclined to value the administration of justice according to its capacity to meet the needs of the individual litigant[12] and to regard a trial as an ordinary civil right.[13] He also points to the global stage, noting that Australia is heading in the other direction, and notes that Canada and the US, 'a most litigious country',[14] does not suffer from floods of litigation by discontented litigants. The difficulties of proof generally, and of causation, would limit the number of claims to those that were meritorious and provable.

## CONCLUSION

Advocates in court and lawyers involved in work intimately connected with a hearing have an immunity from suit.

New legislation regulating the profession was assented to in NSW last year (as in Victoria in 1996), but has not yet commenced. It will replace the previous 1987 Act. The common law immunity from suit was not abrogated, but must have been considered in the formulation of s726, which provides:

> 'No privilege from suit in any court or tribunal is to be allowed to any Australian lawyer by reason only that the lawyer is an officer of the Supreme Court.'

The abolition of the immunity in both the UK and NZ has occurred not because it was found to be wrong, but because of changes said to have taken place in those jurisdictions. Given the recognition by Parliament of the immunity, the High Court's view is that its abolition is a matter for Parliament, not the common law courts. Whatever approach the NSW Parliament adopts, it is fair to say that the immunity – a creature of the common law – is now in the hands of Parliament. ■

**1** [2005] HCA 12 decided 8 March 2005. **2** (1988) 165 CLR 543. **3** [1969] 1 AC 191. **4** [1980] AC 198. **5** (1979) 95 DLR (3d) 385 (see *D'Orta* para 61). **6** Court of Appeal of New Zealand (unreported, 8 March 2005) (CA 17/03). **7** [2002] 1 AC 615. **8** Para 32. **9** As described by McHugh J, para 186 of *D'Orta Ekenaike v Victoria Legal Aid*. **10** Para 29. **11** Para 384. **12** See paras. 225-7. **13** Para. 228. **14** Para. 328.

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