SUPREME COURT
OF QUEENSLAND

Modern Advocate Lecture Series – Advocates Immunity
Law Society House
Tuesday 25 October 2016, 6pm

The Hon Catherine Holmes
Chief Justice

I've undertaken to speak tonight on the topic of advocates' immunity after the decision in *Attwells & Anor v Jackson Lalic Lawyers Pty Ltd*[1], in which the High Court decided that advocates' immunity did not extend to advice given out of court which had led to an agreed settlement reflected in consent orders.

To understand what a contraction of the immunity (at least as it had previously been perceived in some quarters) this entailed, it's necessary to look at that case in the context of earlier High Court decisions and how they were understood by intermediate appellate courts. There is no difficulty so far as anything said by an advocate, solicitor or barrister in court is concerned; the immunity is unquestionably available. The grey area is in relation to things done outside court in connection with proceedings. *Attwells* has made clearer both the limits of the immunity and the basis on which it is said to be justified.

I need to begin with a little legal history. You will remember from your law student days *Rondel v Worsley*[2], in which the House of Lords held that a barrister was immune from an action for negligence in respect of his conduct and management of a cause and the preliminary work associated with it, on five public policy grounds: one, that the administration of justice required that counsel perform their duty to the court fearlessly; two, that the efficient conduct of the courts' business would be impaired if barristers were concerned by the prospect of actions by disappointed clients; three, that the judicial process required that all those involved – judges, jurors, witnesses and legal representatives – could speak freely in court without fear of being sued; four, the cab rank rule, which meant that barristers had to accept any client even if they had litigiousness written all over them; and five, the desirability of finality – that is, that cases having been decided should not effectively be re-litigated.

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[1] [2016] HCA 16.
[2] [1969] 1 AC 191.

As to what "conduct and management of a cause" means, McCarthy P in the New Zealand Court of Appeal in *Rees v Sinclair*[3] arrived at this formulation:

> "…protection exists only where the particular work is so intimately connected with the conduct of the cause in Court that it can be fairly said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing".[4]

That statement of the immunity's limits was endorsed by five members of the House of Lords in *Saif Ali*[5], so I'll refer to it as the *Saif Ali* test, and by the High Court in *Giannarelli v Wraith*[6].

I'll remind you briefly of the facts in *Giannarelli*. The appellants had had their convictions for perjury overturned on appeal and sued some of their barristers for negligence on the basis of their advice about admissibility of evidence. The case involved a point of statutory construction which doesn't matter here; the important point is that the majority decided in favour of the application of the immunity to things done or omitted in the making of preliminary decisions affecting the way in which the case was to be conducted in court. The public policy reasons given in *Rondel* for the immunity, with the exception of the cab rank rule, were adopted by the four judges in the majority, while one of them, Dawson J, also said that he did not regard the consideration of the barrister's duty to the court as significant.

By the time the High Court came to decide *D'Orta-Ekenaike v Victoria Legal Aid*[7], the House of Lords had decided that advocates' immunity from suit should no longer be maintained[8], although a strong minority had considered that it ought to be retained in relation to criminal proceedings. In light of that development, the High Court was asked to reconsider *Giannarelli* and take the English route. It refused to do so, but the judges in what we now call a plurality judgment (Gleeson CJ, Gummow, Hayne and Heydon JJ), discounted most of the public policy bases for the immunity referred to in *Giannarelli*, and deriving from *Rondel*, as irrelevant or insignificant. Instead, they said, what mattered was the function of the judicial branch of government in quelling controversies which should not then be re-litigated. The role of the judicial process was reflected in the principle of finality, which they described as a "central tenet" of the justice system: that controversies once

[3] [1974] 1 NZLR 180.
[4] Ibid, 187.
[5] [1980] AC 198.
[6] (1988) 165 CLR 543.
[7] (2005) 223 CLR 1.
[8] *Arthur J S Hall v Simons* [2002] 1 AC 615.

quelled should not be reopened, with certain very limited exceptions such as appeals and setting aside of judgments obtained by fraud. It was, they said, an inevitable step in demonstrating that an advocate's negligence in the conduct of the litigation had caused damage that the original controversy would be re-litigated. Even if an exception to the tenet of finality were to be permitted by abolishing immunity, any re-litigation would have to be done without examination of the role of the judge or witnesses, since it was not suggested their immunity should be abolished.

In *D'Orta-Ekenaike*, the appellant's complaint was that he had been advised to enter a plea of guilty at a committal hearing without its being explained to him that his plea would stand as an admission of guilt; and there were other allegations about pressure being put on him to plead guilty. His conviction had been overturned on appeal, but of course he had been in custody up until then. It was argued for him that he was not seeking to impugn any final judgment, because he was happy with the appeal result; it was the intermediate consequence, his conviction at trial, that was relevant. The plurality observed, in effect, that whether the final outcome was or was not favourable would be a very arbitrary basis for deciding whether or not the immunity applied. In this case, the appellant's conviction had been set aside because of wrong directions about the effect of his plea, not because he might have been badly advised about it, so there was a disconnect.

The plurality concluded that neither the intermediate result nor final result should be capable of being impugned, and they added, by way of obiter, even if a claim were confined to wasted costs, a direct or indirect challenge to the outcome would usually be involved. There was no reason to depart from the test in *Giannarelli*: that the immunity extended to work done out of court which led to a decision affecting the conduct of the case in court; or, in an alternative statement of the test, which, they said, was not significantly different, work "intimately connected with" work in a court.

McHugh and Callinan JJ wrote separate judgments agreeing with the result, but McHugh J took a broader view of the public interest considerations, as including the importance of the advocate's independence and duty to the court, as well as the immunity of other participants in the proceedings. He endorsed the "intimately connected" test, noting that courts in the past had held certain types of work intimately connected with conduct of a cause. Interestingly for present purposes, those types of work included negligently

advising a settlement, a reference to a New Zealand decision, *Biggar v McLeod*[9]. McHugh J took the view that the immunity should extend to work where, if it were the subject of a claim of negligence, the final decision of the court would be impugned or there would be re-litigation of matters already finally determined. But, his Honour considered, where no trial had taken place, it would be possible to sue a practitioner for the negligent settlement of a proceeding or the negligent abandonment of a cause of action, notwithstanding the public interest in finality. The point was that public confidence in the administration of justice would not, in those instances, be impaired by re-litigation of issues judicially determined.

Callinan J also endorsed the considerations which underlay the judgments in *Giannarelli*. Kirby J, dissenting, considered that out-of-court immunity should be removed, while it was unnecessary to determine whether in-court immunity should remain.

So it was left to intermediate appellate courts to apply the test set out in *D'Orta-Ekenaike*: work done out of court which leads to a decision affecting the conduct of the case in the court; or its alternative, but not different, formulation, "work intimately connected with" work in a court. Now there are a couple of things about that articulation of the test which led to subsequent variations in approach, which I will go on to detail. Firstly, the plurality differed slightly from the *Saif Ali* formulation, because they used the phrase "affecting the conduct of the case" rather than "the way the case is conducted'. Secondly, they did not make any link to their rationale, the importance of the exercise of the judicial function in the quelling of controversies.

I want to give you a brief outline of how courts interpreted that test in practice. Because this seems to me a story of how a bright line can become fuzzy and of how difficult it is to formulate a principle which can be readily applied across all factual situations.

Before I do, I'll just say that, as to Queensland cases on immunity for out of court work, there are very few. In *Ligon Sixty-Three Pty Ltd v ClarkeKann & Ors*[10]*,* Phillip McMurdo J both refused the plaintiff's application to join a firm of solicitors as a defendant and struck out an existing defendant's pleading that the firm was a concurrent wrongdoer on the basis of the immunity. The allegation was that the solicitors had negligently failed to advise the applicant plaintiff to settle proceedings. In reaching his conclusion, his Honour relied on a

[9] [1978] 2 NZLR 9
[10] [2015] QSC 153.

series of decisions in the New South Wales Court of Appeal, including the judgment in *Jackson Lalic Lawyers Pty Ltd v Attwells*,[11] which, as we know, the High Court was to overturn. In addition, in recent times, there is *Rogers v Roche*[12]. The plaintiff was successful in a personal injuries action but contended that both when working on the steps required by the *Personal Injuries Proceedings Act* 2002 process, and when litigating the trial his solicitors had negligently failed to obtain proofs of evidence concerning economic loss. Douglas J concluded that the allegations amounted to a direct attack on the conclusions and judgment in the earlier proceedings and both amounted to an abuse of process and had to be struck out because they were inconsistent with advocates' immunity. He noted, though, that the *Attwells* decision was at that time the subject of a special leave grant. And I should note that an appeal in *Rogers v Roche* is presently awaiting decision in the Court of Appeal, so I'll say no more about it.

I'll go then to decisions in other states: firstly, a group which takes a more limited view of the immunity's application, suggesting the need for a) a judicial decision b) an attack on its correctness and in some instances c) something about the relevant work which actually affected the way the case was run before immunity could arise. In *Dansar v Pagotto*,[13] Harrison J had to consider a solicitor's failure to advise that proceedings did not have a reasonable prospect of success. He held that the immunity did not apply because the solicitor was not acting as an advocate and because the advice was not connected with the conduct of the proceedings but instead the question of whether or not they should have been brought to an end. He thought that the reference to conduct in *D'Orta-Ekenaike* was a reference to how, or the manner in which, litigation should be conducted, not whether or not it should be commenced or continued. And, he reasoned, the proceeding did not involve the challenging of any decision of the court but instead relied on the correctness of the decision which showed the solicitor's advice to be wrong.

In *Alpine Holdings v Feinauer*,[14] the appellants had been successful at trial on their claim, but suffered a reduction of their damages on appeal. They sued their solicitor for negligence in respect of pre-trial advice as to the likely quantum of damages and as to whether an offer of settlement made after the trial and before the appeal should have been accepted. Their claim was struck out; the Western Australian Court of Appeal held that it should not have been, because it was arguable that immunity did not apply. Advising on

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[11]

[12] [2015] QSC 272.
[13] [2008] NSWC 112.
[14] [2008] WASCA 85.

settlement did not affect the conduct of the appeal, nor was it connected with work in court, except to the extent that it determined whether or not litigation actually proceeded. It was similar in its effect to advice on prospects before an action. The court thought it was also arguable that the claim did not involve any undermining of the finality of a court decision by requiring the reopening of earlier litigation; it did not require any consideration of the correctness of the original Court of Appeal decision reducing damages. And, in obiter, it was observed that where an advocate advised a client to pursue a cause of action or head of damage which was doomed to failure, it was hard to see that a negligence claim would involve reopening the original controversy or would fall within the *D'Orta-Ekenaike* rationale for the immunity.

In *Francis v Bunnett*[15], Lasry J, deciding an appeal against a stay order, regarded it as arguable that where proceedings were resolved before trial, the work connected with that result might fall outside the immunity. In that event there had been no exercise of judicial power to quell a controversy. He thought one reading of *D'Orta-Ekenaike* was that the immunity was based on a final determination of a dispute by a court exercising judicial power. His approach, of acknowledging that possibility, met with approval in the later Victorian case of *Finch v Arnold Thomas & Becker Pty Ltd*[16]. The Victorian Court of Appeal noted that it was "not free from doubt" whether the immunity applied where the plaintiff was not calling into question the correctness of an earlier judgment.

In *Sims v Chong*[17] the Full Federal Court considered that no immunity applied where there was alleged misleading or deceptive conduct in relation to the drafting of versions of a statement of claim which was struck out, leading to summary dismissal of the action. The assertions of negligence did not involve a collateral attack on the decision which had been made on the defective pleadings and would not provoke any lack of confidence in the administration of justice. The Court observed that while a final judgment entered by consent might reflect a judicial quelling of a controversy, an interlocutory order striking out an action which could be re-instituted was in a different category. At the least, the immunity was not sufficiently clear to have justified summary dismissal of the negligence claim.

[15] [2007] VSC 527.
[16] [2014] VSCA 45.
[17] [2015] FCAFC 80.

On the other side of the not-so-bright line are some New South Wales cases. In *Chamberlain v Ormsby*,[18] the New South Wales Court of Appeal found that a barrister who gave advice which led to the settlement of a claim was immune from suit, observing that it was "difficult to imagine a stronger case", because the barrister's advice led to the appellant's decision as to the conduct of his case before the court; which was not to proceed with it. No judicial decision needed there, then.

In *Attard v James Legal Pty Ltd*,[19] the appellants' lawyers had failed to advise that a cross claim they were busy defending was in fact stayed. The appellants wanted to sue for their resulting wasted costs. Giles JA observed, with the agreement of the other judges on the Court of Appeal, that it was not necessary to consider whether in the particular case there was any offence to finality; instead it was a matter of applying the test in *D'Orta-Ekenaike;* which in that case resulted in a conclusion that the immunity applied.

The approach in *Alpine Holdings* and *Dansar* appealed to the trial judge in *Donnellan v Woodlands*, which went on appeal. The trial judge held that advice on prospects of success was negligently given, with the consequence that the client did not settle, and that it was not within the scope of advocates' immunity. The issues in that case led to the convening of a court of five in the New South Wales Court of Appeal.[20] It held that if advice given in respect of settlement resulted in proceedings being pursued in court, it would be protected by advocates' immunity, because it led to a decision affecting the conduct of the matter of the court. In this case the lawyer's omission to give appropriate advice as to an offer resulted in the decision to continue proceedings and was thus protected. Harrison J's view in *Dansar* that the relevant concern was with how, not whether, the case was conducted was rejected, as was his view that immunity didn't arise if the principle of finality and the importance of the judicial function were not involved. And on the Court of Appeal's understanding of the *D'Orta-Ekenaike* articulation of the test, it was a mistake to focus on the closeness of the connection, as opposed to whether the allegedly negligent conduct led to a decision affecting the conduct of the matter in the court.

And now I come to *Attwells v Jackson Lalic Lawyers Pty Limited*,[21] the High Court's judgment given on 4 May 2016, simplifying matters a little. The appellants were liable for roughly $1.8M under a guarantee of part of a company's debt to a bank. The company's

[18] [2005] NSWCA 454.
[19] [2010] NSWCA 31.
[20] [2012] NSWCA 433.
[21] [2016] HCA 16.

total indebtedness was closer to $3.4M, and it defaulted. The bank commenced proceeding against both guarantors and company, who retained the respondent to act for them. The case was settled on the basis that judgment would be entered against both the guarantors and the company for the full amount of the company's debt of $3.4M, and the bank would not seek to enforce the judgment if the guarantors paid $1.75M by a certain date. The terms were reflected in a consent order for judgment in the amount of $3.4M which the court made with a further noting of the conditional non enforcement agreement. Of course the guarantors weren't able to meet the payment obligation and were stuck with the full $3.4M judgment. They sued the respondent, alleging it had negligently advised them to agree to the terms of the consent order and failed to advise them as to its effect.

The respondent succeeded in a claim of immunity from suit. The New South Wales Court of Appeal's conclusion was that the advice which led to the settlement was "intimately connected" with the conduct of the guarantee proceedings. The negligence proceeding would involve re-agitating the issues determined in the guarantee proceedings, thus offending the principal of finality. The appellants obtained special leave to appeal to the High Court arguing that either the advocates' immunity should be abolished altogether[22] or the court should conclude that *D'Orta-Ekenaike* did not support the extension of the immunity to negligent advice leading to the settlement of the case by agreement. The New South Wales Law Society was given leave to intervene.

By a 5:2 majority the High Court declined to reconsider *D'Orta-Ekenaike* and *Giannarelli*, while accepting the appellant's argument as to the scope of the immunity. On the first point, they stressed the need for consistency and continuity in the law and observed that an alteration of law in this regard was best left to the legislature. Although courts in other legal systems had come to different conclusions on principle and policy, they had not raised anything that had not been dealt with in *Giannarelli* and *D'Orta-Ekenaike*.

The Court reviewed the reasoning in *D'Orta-Ekenaike*, observing that the rationale of the immunity expressed in that case was not merely the desirability of finality of disputes, but the more specific concern that when the judicial power of the state had been exercised to resolve a controversy, it should not be reopened by a collateral attack seeking to show the judicial determination was wrong. It followed that the scope of the immunity was confined to conduct by an advocate which contributed to a judicial determination. The court noted

[22] New Zealand had abandoned it not long after *D'Orta-Ekenaike,* in the Court of Appeal's decision in *Lai v Chamberlains* [2007] 2 NZLR 7.

what McHugh J had said in *D'Orta-Ekenaike* about the availability of suit for the negligent settlement of proceedings or abandonment of a cause of action, and observed that while the plurality had not expressly said as much, it was obvious from their reasons that the rationale of the immunity did not extend to advice which did not move the case in court towards a judicial determination.

In *Biggar v McLeod*,[23] the Court of Appeal of New Zealand had said that advising on compromise was an inherent feature of the conduct of the cause by counsel; but that, the High Court said, did not mean that it was conduct which affected the judicial determination of the case. And the members of the majority noted that by taking that expansive view of the immunity, *Biggar v McLeod* had effectively strengthened the case for abolition of the immunity of New Zealand. (There seems to be a pragmatic hint of "limit it or lose it" in this judgment.) While an advice to settle was in a general way connected to the litigation, the "intimate" connection needed to attract the immunity was a "functional connection" between the advocate's work and the judge's decision.

The majority in *Attwells* distinguished what had been involved in *D'Orta-Ekenaike,* advice by a legal practitioner which led to entering of a guilty plea. Negligent advice to plead guilty did affect the court's determination of the case. It could not conclude its function until a conviction was recorded and in any event, there was an exercise of judicial function in deciding whether to accept a plea of guilty.

The respondent had raised an argument that it would be anomalous to hold that the immunity did not cover advice leading to a disadvantageous compromise but did extend to negligent advice not to compromise which led to a less favourable judicial decision than the rejected offer; and, it was said, differentiating between the cases might discourage lawyers from giving frank advice in favour of settlement because they would then lose their immunity. The Law Society supported that argument, suggesting that public policy favoured settlement of litigation. Significantly, the majority said this:

> "It is difficult to envisage how advice not to settle a case could ever have any bearing on how the case thereafter be conducted in court, much less how such advice could shape the judicial determination of the case".[24]

[23] [1978] 2 NZLR 9.
[24] [2016] HCA 16, 48.

A merely historical connection between advice and the case's outcome in the sense that one was necessary to the other was not sufficient to establish a functional connection between the advocate's work and the court's determination of the case. (In other words, meeting the "but for" test is not enough.) And the argument that the negligence claim would then be an attack on the judgment was rejected. The question would not be whether the judgment was correct but whether the advice was reasonable in the circumstances and at the time when it was given. And while there was a public interest in the resolution of disputes, the advocates' immunity rested on the need to ensure that the certainty and finality of judicial decision were not undermined by collateral attack. The operation of the immunity came at the expense of equality before the law and it ought not to be expanded simply because of some other social purpose to be advanced.

In the facts of the particular case, the parties had determined the substantive content of their rights and obligations by way of the consent order; the terms of the settlement agreement which it reflected were not in any way the result of the exercise of judicial power. It was unnecessary to consider cases where, although the parties had agreed in the terms of the order, its making still required the court to exercise judicial power in resolving issues; for example where there was a sanction of a settlement for a person under legal incapacity. Here the consent order facilitated the enforcement of the compromise, but it entailed no exercise of judicial power to determine the terms of the parties' agreement or give it effect.

(I will just mention here for comparison a Victorian first instance decision, the facts of which fall into the unnecessary to decide basket in *Attwells*. In *Goddard Elliott v Fritsch*,[25] solicitors were held to be entitled to claim immunity for acts of negligent omission in the preparation of a case for a Family Court property proceeding. The trial judge in the Family Court had made consent orders after considering whether the orders proposed were "just and equitable" as the Family Law Act required. Bell J, in the Victorian Supreme Court, regarded that personal participation by the judge in the merits of the orders as representing a final determination, so that the immunity applied.)

Nettle and Gordon JJ both disagreed. They took the view that the consent order did amount to a final quelling of the controversy between parties. The *Uniform Civil Procedure Rules* provided for a consent order in terms which gave the court a discretion to give judgment. By the exercise of judicial power the rights and obligations of the party and the

[25] [2012] VSC 87.

controversy had merged in the judgment. The claimant necessarily disputed the judgment because he argued that he was not indebted to the bank in the amount that the judgment recorded. That amounted to a direct and impermissible challenge to finality. Justice Nettle considered that advice not to settle would also affect the conduct of the case in court, and a claim based on it would involve an impermissible re-litigation of issues. But both Justices Nettle and Gordon took the view that the advocates' immunity did not extend to negligent advice to commence proceedings doomed to fail. Work of that kind was not done for the final quelling of the controversy by the exercise of judicial power; to the contrary it started a controversy.

The High Court is not done on this topic for the near future. On 17 June 2016, special leave was given in *Kendirjian v Lepore.*[26] In that case, the appellant claimed that the respondents, his solicitor and barrister, had advised him that a settlement offer which was too low had been made, but had not told him the amount. In the event he obtained judgment for about half that amount and lost an appeal on the quantum. He sued his representatives, claiming the difference between the settlement offer and judgment as damages caused by their negligence. His action was dismissed on the basis of the immunity and his appeal against that result was also dismissed. The appellant argued that the Court of Appeal should consider the rationale for the immunity; the finality principle would not be infringed because there was no contention that the judgment was wrong, merely that the failure to advise of the offer was negligent. The Court said that what it had to do was apply the test, not consider the rationale for it. Macfarlan J, with whom the other members of the court agreed, said that there was a distinction between the *Saif Ali* formulation of the test as applying where work affected *the way* a case was conducted and what was said in *D'Orta-Ekenaike,* which was that the principle applied to "work done out of court which led to a decision affecting the conduct of the case in court". That attempted distinction, however, cannot survive what the High Court said in *Attwells*:

> "The '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."[27]

The second respondent has put in submissions in the High Court appeal, arguing that *Attwells* is to be distinguished because in *Kendirjian* there was a hearing on the merits before the trial judge. If the immunity were not allowed, there would be another hearing

[26] [2015] NSWCA 132.
[27] At 44.

where the same issues canvassed in the hearing would have to be considered again. But it is difficult to see that the argument will find favour, given what the High Court said in *Attwells* about advice to settle not having a bearing on the way a case is conducted.

So I think you can safely say that the decisions favouring a restricted view of the immunity have prevailed. As it seems to me, there are now three aspects of what must be established to attach immunity: that the work which is the subject of claimed negligence must have an effect on the way the case is conducted in court; that there must be a "functional" connection between that work and the judge's decision; and that a controversy must have been quelled by the court, as opposed to by agreement of the parties.