ADVOCATES' IMMUNITY: FINALITY REIGNS SUPREME

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The recent decision of *D'Orta-Ekenaike v Victorian Legal Aid and Another*[1] came as a surprise to some, who expected that Australia would follow suit and abolish advocates' immunity as the House of Lords did in *Arthur J S Hall & Co v Simons*,[2] and more recently, as the New Zealand Court of Appeal did in *Chamberlains v Lai*.[3] However, the majority of the High Court, with only Kirby J dissenting, determined that the immunity was to remain in Australia. In the media, there was much criticism of this decision, with members of the public and the profession questioning the joint majority's rationale for retaining the immunity. Whilst the decision in *D'Orta-Ekenaike*[4] raises several important issues, including the scope of the immunity post-*Giannarelli v Wraith*,[5] as well as the difficulties of proving causation in lawyer negligence claims, this brief case note will concentrate upon the main justification for the retention of the immunity, that is, the 'finality' principle.

After being charged with rape, the applicant (Ryan D'Orta-Ekenaike) retained Victorian Legal Aid to act for him. When D'Orta-Ekenaike met with both the barrister and solicitor, he advised his counsel that he was not guilty of the rape charge. Notwithstanding this information, the barrister and solicitor advised him to plead guilty at his committal hearing, the rationale being that he would receive a reduced custodial sentence if he were subsequently convicted. After following their advice, he was committed for trial where he then changed his

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1 (2005) 214 ALR 92.

2 [2002] 1 AC 615; [2000] 3 All ER 673.

3 Unreported, CA (NZ), 8 March 2005.

4 (2005) 214 ALR 92.

5 (1988) 165 CLR 543.

plea to not guilty. His earlier plea however was entered into evidence and he was convicted and sentenced to three years' imprisonment. The Court of Appeal of the Supreme Court of Victoria later quashed the applicant's conviction and ordered a retrial on the ground that the trial judge's directions in respect of the plea of guilty were inadequate.[6] At the retrial in 1998, a jury acquitted D'Orta-Ekenaike of the rape conviction.

In 2001, the applicant commenced an action for damages in the County Court of Victoria against Victorian Legal Aid and Ian McIvor, which was permanently stayed. The Victorian Court of Appeal subsequently refused Mr D'Orta-Ekenaike's leave to appeal and he thus applied to the High Court for special leave to appeal the decision of the Victorian Court of Appeal. The High Court dismissed the appeal by a 6:1 majority.

In *D'Orta-Ekenaike* there were three majority judgments, being individual judgments by McHugh and Callinan JJ, as well as a joint majority judgment (Gleeson CJ, Gummow, Hayne and Hayden JJ).[7] The majority in *D'Orta-Ekenaike*[8] considered three issues: whether the decision in *Giannarelli v Wraith*[9] should be reconsidered; whether the immunity should protect solicitors who are acting as advocates as well as barristers;[10] and whether the scope of the immunity should be reconsidered. In answer to these three considerations the majority in *D'Orta-Ekenaike* found that the finality consideration was sufficient justification for retaining the decision in *Giannarelli v Wraith.*[11] In relation to the other issues it was found that the immunity should protect both the solicitor and the barrister in this case and that the 'intimate connection' test should be retained to define the scope of the immunity.

The most interesting and controversial element of the joint majority judgment was that reliance was placed predominantly on the need for finality as a justification to retain the immunity.

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6 *R v D'Orta-Ekenaike* [1998] 2 VR 140.

7 This note will concentrate on the joint majority judgment.

8 D'Orta-Ekenaike v Victoria Legal Aid and Another (2005) 214 ALR 92.

9 (1988) 165 CLR 543.

10 *D'Orta-Ekenaike v Victoria Legal Aid and Another* (2005) 214 ALR 92, 94 (Gleeson CJ, McHugh, Gummow, Hayne and Hayden JJ).

11 (1988) 165 CLR 543.

The finality issue is premised on the policy consideration that the community has a vital interest in the final suppression of controversies. The joint majority were concerned that allowing re-litigation outside of the appeals process would affect the perception of the administration of justice.[12] Interestingly though, it is at least arguable that upholding the immunity has hindered the public confidence in the legal system rather than enhanced it, which is evident in the reaction of the media and other professional organisations after the decision was handed down.[13]

The finality argument is most persuasive in the criminal context where the applicant (or plaintiff) is serving a criminal sentence whilst concurrently undertaking civil litigation. In this scenario it is clear that public confidence in the legal system may be undermined if the applicant continues to be imprisoned after it is found civilly that 'but for' the negligence of the applicant's barrister they would not have been convicted of the particular crime. This problem is particularly amplified with respect to measuring 'loss', as damages in such a civil claim would need to be assessed with reference to the applicant's time in prison. In *D'Orta-Ekenaike* however this was not a relevant consideration as the applicant had previously been acquitted of the criminal conviction. The joint majority however held that the fact that a finding of liability would not impugn a final result of litigation was not relevant, as final and intermediate results should not be treated differently.[14]

Callinan and McHugh JJ also cited the finality issue as a reason for retaining the immunity; however they also concentrated on other issues. For example, McHugh J discussed the difficulties of proving causation in claims against advocates.[15] One of the concerns that seems to motivate this thinking is that 'unsuccessful litigants whose principal action was without much

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12 *D'Orta-Ekenaike v Victoria Legal Aid and Another* (2005) 214 ALR 92, 100 (Gleeson CJ, Gummow, Hayne and Hayden JJ).

13 See, for example, Richard Ackland, 'Majority ruling gives the minnows little chance', *Sydney Morning Herald* (Sydney), 11 March 2005, 11; and ABC Radio National, 'Suing Your Legal Representatives', *The Law Report*, 22 March 2005, <http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s1329117.htm> at 9 June 2005.

14 *D'Orta-Ekenaike v Victoria Legal Aid and Another* (2005) 214 ALR 92, 110 (Gleeson CJ, Gummow, Hayne and Hayden JJ).

15 Ibid 133, 141 (McHugh J).

substance are those most likely to bring a later, equally unsubstantiated, claim against their representative'.[16] The desirability of containing frivolous and vexatious claims is evidenced in recent tort reform, as well as in many contemporary High Court judgments.[17] Viewed in isolation, the argument may seem persuasive; however, quashing potential litigation so as to avoid unsuccessful litigation is certainly not a compelling argument on its own to retain advocates' immunity.

Kirby J, in declaring that the immunity was unjustifiable and unnecessary, provided the only dissenting judgment in *D'Orta-Ekenaike.*[18] For Kirby J, the retention of the immunity placed the High Court 'out of step with the rest of the legal world'[19] given that other common law countries have either rejected or restricted the immunity. Kirby J first drew on the fact that other comparable jurisdictions, such as Canada, England, and the United States of America,[20] continued to operate without the immunity. He noted that in those jurisdictions, there was no real evidence to suggest that a lack of finality or re-litigation through collateral means was any more of a risk in the absence of the immunity than when some form of immunity or protection had existed.[21] Further, he pointed towards the fact that other professionals within Australia, including surgeons, financial advisors, and teachers,[22] did not enjoy any immunity from suit. Based upon these two grounds, Kirby J reasoned that there needed to be proof of 'local divergencies' which required a different approach within Australia with respect to advocate's immunity.[23] The finality argument, as proffered by the Majority

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16 Ibid 133, 127 (McHugh J).

17 See for example the *Legal Profession Act 1987* (NSW) ss 198L, 198N, 198J, 198M and *Tame v New South Wales* (2002) 191 ALR 449.

18 (2005) 214 ALR 92.

19 Ibid 178 (Kirby J).

20 Ibid 145 (Kirby J).

21 Ibid 173 per Kirby J. Kirby J adopted similar reasoning in the decision in *New South Wales v Lepore; Samin v Queensland; Rich v Queensland* (2003) 212 CLR 511; (2003) 195 ALR 412, where he stated at 482 that the "reasons that persuaded unanimous decisions of the House of Lords and the Supreme Court of Canada should persuade this court to accept similar legal principles governing liability" with respect to finading a school authority vicariously liable for sexual assault of a pupil by a teacher.

22 Ibid 144 per Kirby J.

23 Ibid 146 per Kirby J.

in *D'Orta-Ekenaike*,[24] was not, in Kirby J's view, a sufficient example of such a difference.

The majority's emphasis on finality alone in *D'Orta-Ekenaike*[25] is not a sufficient justification for retaining advocate's immunity, especially in regards to the particular facts in the principal case. Evidence from other comparable jurisdictions, as outlined in Kirby J's judgment, offers more compelling arguments as to why the immunity should be removed. In the United Kingdom for example, post-*Arthur J S Hall & Co v Simons*,[26] the finality of matters has not been compromised nor has a surge in re-litigation been witnessed. In any event, more specific remedies (such as issue estoppel and *res judicata*) are available to quash any claims that are an abuse of process.[27] Ultimately, positive public perception of the judicial system has been encouraged where the immunity has been abolished, restoring the community's faith in the accountability and honesty of the profession.[28]

In the immediate future, it is certainly clear that advocates' immunity is to remain in Australia, and further, that it has been extended from the previous position expounded in *Giannarelli v Wraith*.[29] However, the narrow foundation upon which the immunity now rests in Australia is not a sufficient justification for maintaining the immunity, especially when concerns about re-litigation or excessive litigation have not materialised in other jurisdictions. It is increasingly evident, however, with a decision of 6:1 in *D'Orta-Ekenaike*, that the judiciary is not going to overturn advocates immunity anytime soon. However, several State Governments have nonetheless expressed a desire to either narrow or abolish the immunity. Whether or not it would be more appropriate for the legislature or the judiciary to enact such changes however is questionable.[30] In the meantime though,

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24 (2005) 214 ALR 92.

25 (2005) 214 ALR 92.

26 [2002] 1 AC 615; [2000] 3 All ER 673.

27 *D'Orta-Ekenaike v Victoria Legal Aid and Another* (2005) 214 ALR 92, 173 (Kirby J).

28 Ibid per Kirby J, citing Seneviratne, 'The rise and fall of advocates' immunity', (2001) *Legal Studies* 644, 662.

29 (1988) 165 CLR 543.

30 See Peter Cane, 'The New Face of Advocates' Immunity' (2003) 13 *Torts Law Journal* 93. Cane questions whether legislation abolishing immunity would be "unconstitutional in its application to decisions, made in exercise

diminished public confidence in the legal system is almost a certainty.[31]

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of federal judicial power, on the basis that negligence liability of advocates for protected work would undermine an essential feature of judicial power as embodied in Chapter III of the Constitution" (at 98).

[31] See note 13 above.