

DETAILED FILE NOTES WORTH MORE THAN ADVOCATES' IMMUNITY

MARCH 26, 2019 | LAWYERS' NEGLIGENCE

A solicitor and barrister were unsuccessfully sued by their former client for an alleged failure to advise of a settlement offer. The solicitor and barrister escaped a finding of negligence due to their detailed and contemporaneous file notes. It was found that the plaintiff was advised of a \$600,000 settlement offer and regardless, never would have accepted an offer for that amount.

In Issue

- Whether a solicitor and barrister were negligent in failing to advise the plaintiff of a \$600,000 offer to settle.

THE BACKGROUND

In 1999, Mr Kendirjian (the plaintiff) sustained personal injuries as a result of a motor vehicle accident. In 2004, the plaintiff commenced proceedings in the NSW District Court (the Personal Injuries Proceedings) against the driver who collided with his vehicle. Judgment was handed down in the plaintiff's favour; awarding him the sum of \$308,432.75 plus costs. The plaintiff was dissatisfied with this award and lodged an appeal (the appeal) which was dismissed with costs in 2008.

Application for Summary Judgment

In 2012, the plaintiff commenced proceedings against the solicitor and barrister who conducted the Personal Injuries Proceedings and the appeal. The plaintiff alleged that he was not advised of a \$600,000 settlement offer made by the defendant driver.

The solicitor and barrister relied upon advocates' immunity in defence of the claim and subsequently sought summary judgment on that basis.

The District Court and Court of Appeal both accepted that advocates' immunity applied and awarded summary judgment in favour of the barrister and solicitor. The High Court overturned the decisions of the two lower courts on the basis that advocates' immunity does not extend to the provision of negligent advice which leads to the settlement of proceedings. The High Court confirmed that advocates' immunity does not apply to lawyers' work unless it has a 'functional' or 'intimate' connection with the conduct of the case in a court such that the work 'bears upon' the way the case is progressed to a court determination and conducted when heard by the court. The issue of negligence was then remitted back to the District Court for consideration.

THE DECISION AT TRIAL

The plaintiff alleged that he asked his solicitor and barrister on two occasions about the quantum of the offer, and that they refused to answer. In response, the solicitor and barrister presented multiple contemporaneous file notes which evidenced that they had delivered the offer to the plaintiff, that the plaintiff had refused the offer, and that the plaintiff was insistent on going to trial unless he could recover at least \$1,200,000 clear of all deductions.

The District Court ultimately held, in preferring the defendants' account of what transpired, and in dismissing the plaintiff's claim, that:

- The plaintiff was an unreliable witness having regard to the exaggerated evidence of his ongoing disabilities in the Personal Injuries Proceedings and his conduct during cross-examination in the present case;
- The plaintiff's testimony was inconsistent with the objective circumstances of the case; and
- Even if the plaintiff's evidence was accepted, causation was not established as the evidence supported an inference that the plaintiff would have rejected a \$600,000 offer if it was presented to him.

IMPLICATIONS FOR YOU

This decision is a timely reminder that professionals, particularly lawyers, should keep detailed and contemporaneous file notes to record their interactions with clients. In that regard, documentary evidence will generally be treated by courts as more reliable than undocumented oral witness testimony.

Consistent with the views it expressed in *Attwells v Jackson Lalic Lawyers Pty Limited* [2016] HCA 16, the High Court found that advocate's immunity did not apply to a claim for negligent advice not to settle a case. The rationale to avoid re-litigation of disputes is not a blanket justification for advocate's immunity, which the High Court has decided must still be confined, on established principles, to conduct in court or conduct out of court which has an intimate connection with the conduct of the case in court and a functional connection with the ensuing judicial determination.

[Kendirjian v Lepore \[2019\] NSWDC 43](#)

Author: Mitchell Page, a graduate in our Insurance & Health team