The High Court has resisted the call for abolition of the advocates’ immunity from suit, and instead has attempted to clarify and limit the scope of its operation by emphasising the public policy behind it. Is the position clearer? We report on the decision.

In Giannarelli v Wraith,[1] the High Court held that, at common law, barristers and solicitors are immune from liability for negligence in the conduct of not only work done in court, but also work done out of court which leads to a decision affecting the conduct of the case in court (the advocate’s immunity).

In D’Orta-Ekenaike v Victoria Legal Aid[2] (the last High Court decision dealing with the advocate’s immunity), the High Court declined to reconsider its decision in Giannarelli, and confirmed the expression of the scope of the advocate’s immunity for:

“...work done in court or ‘work done out of court which leads to a decision affecting the conduct of the case in court’ or...’work intimately connected with’ work in a court. (We do not consider the two statements of the test differ in any significant way).”

The High Court emphasised the desirability of certainty and finality in the quelling of disputes by the exercise of judicial power as the rationale behind the advocate’s immunity.

Since D’Orta:

1. The New Zealand Supreme Court has abolished the advocate’s immunity in Chamberlains v Lai,[3] leaving Australia as one of the few common law countries
where lawyers are protected.

2. There have been a number of cases decided on the basis of the advocate’s immunity at the state level (particularly in New South Wales), the vast majority of which favour lawyers. These decisions seem to suggest some degree of uncertainty (and unease) as to the scope and operation of the advocate’s immunity.

3. The High Court has twice declined special leave in cases involving the application of the advocate’s immunity.[4]

4. All judges constituting the High Court in D’Orta have retired.

Some of the uncertainty post-D’Orta has been that the advocate’s immunity has extended to circumstances which do not offend the rationale of finality. One such particular area of uncertainty has been the application of the advocate’s immunity to conduct which results in the settlement of proceedings.

The New South Wales Court of Appeal decision in Jackson Lalic Lawyers Pty Limited v Attwells [2014] NSWCA 335 dealt with that issue. Last year, the High Court granted special leave to hear an appeal of that decision, and delivered its judgment on 4 May 2016.

Background

Gregory Attwells and another person guaranteed payment of the liabilities of a company to a bank. The company defaulted on its obligations to the bank and the bank commenced proceedings against the guarantors in the Supreme Court of New South Wales (“the guarantee proceedings”). The guarantors and the company retained Jackson Lalic Lawyers (the respondent) to act for them.

The company’s debt to the bank was approximately $3.4 million. The guarantors’ liability under the guarantee was limited to $1.5 million. The guarantee proceedings were settled on the opening day of the trial on terms to the effect that judgment would be entered against the guarantors and the company for the full amount of the company’s indebtedness to the bank ($3.4 million), and the bank would not enforce the order for payment of that amount if the guarantors paid the sum of $1.75 million within 5 months. Those terms were reflected in a consent order for judgment in the amount of $3.4 million, and the Court’s noting of the non-enforcement agreement between the parties.

The guarantors failed to meet their payment obligation. Attwells (and the assignee of his rights against the respondent) (the appellants) then issued proceedings in the Supreme Court of New South Wales against the respondent (the negligence proceedings...
alleging that the respondent was negligent in advising them to consent to judgment being entered against them in the terms of the consent orders, and in failing to advise them as to the effect of the consent orders.

The respondent asserted that it was immune from suit by virtue of the advocate’s immunity, and that question was ordered to be determined separately from the other issues in the negligence proceedings. After the primary judge declined to answer the separate question, the New South Wales Court of Appeal granted leave to appeal, and held that the respondent’s advice was within the scope of the advocate’s immunity because “it was intimately connected with the conduct of the guarantee proceedings”, and the negligence proceedings would necessarily involve a re-agitation (and reconsideration) of the issues determined in the guarantee proceedings in order to determine whether the respondent had been negligent (thereby offending the principle of finality).

Issues for the High Court

The appeal raised the following issues:

1. Whether the advocate’s immunity extends to negligent advice which leads to the settlement of a case by agreement between the parties; and

2. Whether the High Court should reconsider its decisions in Giannarelli and D’Orta, and abolish the advocate’s immunity.

The High Court unanimously declined to reconsider Giannarelli and D’Orta, but held (by a 5:2 majority) that the respondent was not immune from suit because its advice to settle the proceedings was not intimately connected with the conduct of the case in court, in that it did not contribute to a judicial determination of issues in the case.

Reconsidering Giannarelli and D’Orta

The High Court was unanimous in declining to reconsider Giannarelli and D’Orta. Noting the “grave danger of a want of continuity in the interpretation of the law”[5], the majority[6] (in a joint judgment) said that “to overturn Giannarelli and D’Orta would generate a legitimate sense of injustice in those who have not pursued claims or have compromised or lost cases by reference to the state of the law as settled by these authorities”, and that “an alteration of the law of this kind is best left to the legislature.”[7]

Fundamentally, however, the High Court supported the expression of the rationale for the immunity in D’Orta, which “reflects the strong value attached to the certainty and finality of the resolution of disputes by the judicial organ of the State”.[8] The
majority noted[9] that, in Giannarelli and D’Orta, “the adverse consequences for the administration of justice which would flow from the re-litigation in collateral proceedings for negligence of issues determined in the principal proceedings”[10] were determinative factors justifying the advocate’s immunity. Citing those views with approval, the High Court held that “the advocate’s immunity is, therefore, justified as an aspect of the protection of the public interest in the finality and certainty of judicial decisions”. [11]

Application of the immunity to settlements

Importantly, in deciding that the advocate’s immunity does not extend to negligent advice which leads to the settlement of a case, the High Court fused the rationale for the advocate’s immunity with the test for (and the scope of) its application. The majority held that:

“The authoritative test for the application of the immunity stated in D’Orta and Giannarelli is not satisfied where the work of the advocate leads to an agreement between parties to litigation to settle their dispute. No doubt an advice to cease litigating which leads to a settlement is connected in a general sense to the litigation which is compromised by the agreement. But the intimate connection required to attract the immunity is a functional connection between the advocate’s work and the judge’s decision... As will be seen from a closer consideration of the reasoning in D’Orta, the public policy, protective of finality, which justifies the immunity at the same time limits its scope so that its protection can only be invoked where the advocate’s work has contributed to the judicial determination of the litigation.

In short, in order to attract the immunity, advice given out of court must affect the conduct of the case in court and the resolution of the case by that court. The immunity does not extend to preclude the possibility of a successful claim against a lawyer in respect of negligent advice which contributes to the making of a voluntary agreement between the parties merely because litigation is on foot at the time the agreement is made. That conclusion is not altered by the circumstance that, in the present case, the parties' agreement was embodied in consent orders.”[12]

Expressed this way, the High Court has effectively imported the public policy behind the advocate’s immunity into the test for its application. The majority stated that “the immunity does not extend to acts or advice of the advocate which do not move litigation towards a determination by a court”[13], and observed that to extend the advocate’s immunity to advice leading to settlement would be to “decouple the immunity from the protection of the exercise of judicial power against collateral attack”. [14] In conclusion on this point, the majority held that:

“Once it is appreciated that the basis of the immunity is the protection of the finality and certainty of judicial determinations, it can be more clearly understood that 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. The notion of an "intimate connection"
between the work the subject of the claim by the disappointed client and the
conduct of the case does not encompass any plausible historical connection
between the advocate’s work and the client’s loss; rather, it is concerned only with
work by the advocate that bears upon the judge’s determination of the case."[15]

The majority described the connection between advice in relation to settlement
(including negligent advice not to settle) and the ensuing outcome of litigation as a
"merely historical" one which “fail[s] to observe the functional nature of the intimate
connection required by the policy which sustains the immunity.”[16]

In dissent, Nettle J and Gordon J considered that the advocate’s immunity applied
because “there was a final quelling of the controversy between the parties by the
Order”[17] and the appeal should be dismissed.

Conclusion

The effect of the High Court’s decision is to limit the scope of the advocate’s
immunity by emphasising its rationale (the protection of the finality and certainty of
judicial determinations) to identify the “intimate connection” required between a
lawyer’s work and the conduct of a case in court to attract its operation.

In short, unless a lawyer’s work affects the judicial determination of a case on its
merits, the advocate’s immunity will not apply. In cases where there is such a judicial
determination, the battleground will continue to be whether there is the requisite
“intimate connection”.

As noted by the majority, “the operation of the immunity may incidentally result in
lawyers enjoying a degree of privilege in terms of their accountability for the
performance of their professional obligations.”[18] That is one of the major
complaints against the advocate’s immunity, as other professionals do not enjoy a
similar privilege.

The clear message from the High Court seems to be that if the advocate’s immunity
is to be removed altogether, it will have to be done by the legislature.


[3] [2006] NZSC 70


[5] The Tramways Case [No 1] (1914) 18 CLR 54 at 58; [1914] HCA 15


[8] At [30].

[9] At [32] and [34]


[13] At [38]
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