The High Court has confirmed barristers’ and solicitors’ immunity from claims of negligence in the conduct of a case in court or for out of court work that leads to a decision affecting the conduct of a case in court. This case is also potentially significant in those common law countries that have not revisited the issue since the UK House of Lords abolished advocates’ immunity in 2000. Partner Michael Quinlan and Lawyer Chris Peadon explain.

Introduction

In 1998, Australia’s High Court held in Giannarelli v Wraith1 (Giannarelli) that:

• at common law, barristers and solicitors are immune from liability for negligence in the conduct of court work or work out of court that leads to a decision affecting the conduct of a case in court (advocates’ immunity); and

• the Legal Profession Practice Act 1958 (Vic) (the 1958 Act) also provided for advocates’ immunity.

At the time, the decision in Giannarelli was consistent with the position in, inter alia, the UK and New Zealand. However, this predated the change in the UK approach and the New Zealand’s Court of Appeal decision in March 2005,2 which followed the approach of the House of Lords.3 In this context, Australia’s High Court again considered the issue of advocates’ immunity in D’Orta-Ekenaie v Victoria Legal Aid4 and, by a majority of

2 Lai v Chamberlains, New Zealand Court of Appeal, unreported, 8 March 2005.
confirmed that barristers and solicitors still enjoy the benefit of advocates’ immunity. In response, state and territory governments are considering whether to wind back the scope of the immunity or to abolish it completely.

Background
In February 1996, Mr D’Orta-Ekenaike was charged with a criminal offence and sought legal assistance from Victoria Legal Aid (the VLA), which retained a barrister to appear for him at the committal hearing in the Magistrates’ Court.

Mr D’Orta-Ekenaike alleged that the VLA solicitor and the barrister each exerted ‘undue pressure and influence’ on him to plead guilty at the committal and that, as a result, he did so.

However, at his trial in February 1997, Mr D’Orta-Ekenaike changed his plea to not guilty. The court admitted evidence of Mr D’Orta-Ekenaike’s earlier guilty plea and he was convicted and sentenced to three years’ imprisonment.

On appeal, the Victorian Court of Appeal quashed the conviction and ordered a new trial. The Court of Appeal held that, while the guilty plea had properly been admitted into evidence at trial, the trial judge failed to give sufficient directions as to the use that may be made of it.

At the re-trial, Mr D’Orta-Ekenaike’s earlier guilty plea was not admitted into evidence and he was acquitted.

The claim
In 2001, Mr D’Orta-Ekenaike commenced proceedings in the Victorian County Court against the VLA and the barrister alleging that:

• he pleaded guilty at the committal because the VLA solicitor and the barrister had exerted ‘undue pressure and influence’ on him to do so;
• in so doing, the VLA solicitor and the barrister breached their duty of care to him; and
• as a result, he suffered loss and damage in the form of loss of liberty while incarcerated, loss of income, psychotic illness and legal costs.

Judge Wodak of the County Court ordered that the proceedings be permanently stayed because advocates’ immunity was a complete answer to Mr D’Orta-Ekenaike’s claim against both the VLA and the barrister.

The Victorian Court of Appeal refused Mr D’Orta-Ekenaike leave to appeal from Judge Wodak’s decision as it was consistent with the reasoning of the High Court in Giannarelli.

Application to the High Court
Mr D’Orta-Ekenaike applied to the High Court for special leave to appeal the decision of the Victorian Court of Appeal and asked the High Court to:

• reconsider its decision in Giannarelli; and
• determine whether advocates’ immunity applies to the acts or omissions of a solicitor which, if committed by a barrister, would be immune from suit.

Judgment of the High Court
Is advocates’ immunity a defence under section 442 of the Legal Practice Act 1996?

In a joint judgment, Chief Justice Gleeson and Justices Gummow, Hayne and Heydon (the majority) first pondered whether the construction of the 1958 Act preferred in Giannarelli should be reconsidered. The majority examined this question in the context of the repeal of the 1958 Act by the Legal Practice Act 1996 (Vic) (the 1996 Act). Section 442 of the 1996 Act relevantly provides that ‘[n]othing in this Act abrogates any immunity from liability for negligence enjoyed by legal practitioners before the commencement of this section.’

The majority held that ‘it is clear ... that [section 442] was enacted on the assumption that it would preserve an existing immunity’, such as advocates’ immunity, and declined to reconsider the construction issue that was resolved in Giannarelli. Justice Kirby, in dissent, considered that the ratio in Giannarelli was confined to the immunity of barristers during hearings in court and, based on a review of the authorities,


6 D’Orta-Ekenaike v Victorian Legal Aid & McIvor, unreported, County Court of Victoria, 13 December 2002.
7 D’Orta Ekenaike v Victoria Legal Aid, unreported, Victorian Court of Appeal, 14 March 2003.
8 [2005] HCA 12 at [1].
9 [2005] HCA 12 at [50].
10 [2005] HCA 12 at [267].
The majority stated that the decision in Giannarelli must be understood having regard to two principal matters, namely:

• the place of the judicial system as part of the governmental structure;
• the place that immunity from suit has in a series of rules all of which are designed to achieve finality in the quelling of disputes by the exercise of judicial power.18

The majority recognised that finality of litigation is a central and pervading tenet of our judicial system; that is, ‘controversies, once resolved, are not to be reopened except in a few narrowly defined circumstances’.19 While Justice Kirby contended that a claim against an advocate for negligence is necessarily different, in fact and law, from the issue that has been earlier litigated and determined, the majority observed that, in any suit against an advocate for negligence, ‘the relitigation of the controversy would be an inevitable and essential step in demonstrating that an advocate’s negligence in the conduct of litigation had caused damage to the client’.20 Moreover, the majority stated that such relitigation would be ‘of a skewed and limited kind’ because, due to the immunity of witnesses and judges, the ‘relitigation could not and would not examine the contribution of judge or witness to the events complained of.’21 In light of this, the majority concluded that the creation of an exception to the rule against re-opening controversies by abolishing advocates’ immunity would be ‘inefficient and anomalous’.22

In support of his conclusion that advocates’ immunity should be abolished in Australia, Justice Kirby contended that other common law jurisdictions in which it had been abolished, such as the US, the UK, Canada and New Zealand, continued to flourish. His Honour stated that: ‘[o]thers may not find this direction of Australian law, running against the global tide, anomalous and unjustifiable. I do.’ In making that statement, Justice Kirby seems to have assumed that the approach of the countries he mentioned constituted a ‘global tide’. Whether or not this is so will depend on whether other common law countries, which have traditionally recognised advocates’ immunity but in

Should advocates’ immunity be abolished under the common law?

The second aspect of Mr D’Orta-Ekenaie’s argument was that the court should reconsider whether advocates’ immunity should be abolished at common law, particularly in light of the decision of the House of Lords in Arthur J S Hall v Simons13 to do so in the UK.

The majority declined to follow the decision of the House of Lords because, in their view, it was influenced by the imminent introduction of a statutory right in the UK to have any claim relating to civil rights and obligations brought before a court or tribunal, a right for which there is no equivalent under Australian law.14 It is also clear from the judgment of Justice Hammond of the New Zealand Court of Appeal (with whom Justices McGrath, Glazebrook and O’Regan agreed15) in Lai v Chamberlains that a similar right in s27 of the New Zealand Bill of Rights 1990 influenced that decision.16 In declining to follow the lead of the House of Lords, the High Court observed that various legislatures had chosen not to abolish advocates’ immunity during the civil liability reforms enacted since 2000.17 Somewhat ironically, the High Court’s decision has motivated the state and territory governments to consider whether to wind back or completely abolish advocates’ immunity.

13 [2002] 1 AC 615.
14 [2005] HCA 12 at [64]; Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms was understood as securing this right (see Osman v United Kingdom (1998) EHRR 245) and was to apply by virtue of the operation of the Human Rights Act 1998 (UK).
15 Lai v Chamberlains, New Zealand Court of Appeal, unreported, 8 March 2005 at [124].
16 Lai v Chamberlains, New Zealand Court of Appeal, unreported, 8 March 2005 at [175]. This decision may be subject to an appeal to the newly established New Zealand Supreme Court, which has replaced the Privy Council as the court of last resort in New Zealand.
17 [2005] HCA 12 at [53-54].
18 [2005] HCA 12 at [25].
19 [2005] HCA 12 at [34] and [45].
20 [2005] HCA 12 at [43].
21 [2005] HCA 12 at [45].
22 [2005] HCA 12 at [45].
which the issue has not been reconsidered since the House of Lords decision (such as Ireland23 and Hong Kong24) and countries in which the issue has not been considered but that traditionally follow the position in the UK (such as Fiji,25 Bermuda and the Cayman Islands26), ultimately opt to follow the approach of the countries mentioned by Justice Kirby rather than opting to maintain the status quo along with Australia for the reasons identified by the majority.27

Further, the majority reasoned that rules in other jurisdictions (such as the binding nature of a finding of negligence against a lawyer in an appeal in any subsequent malpractice suit in the US) were different expressions of the need for finality that underpins the principle of advocates’ immunity in Australia.

As the majority considered that a claim against an advocate would involve either a direct or indirect challenge to the outcome of the earlier proceeding, it held that there were no exceptions to the rule that would be consistent with the public policy imperatives identified by the court.28

The majority also declined to redraw the line and depart from the test described in Giannarelli because of the artificiality in the extreme of redrawing the line at the court room door.29

**Is advocates’ immunity a complete defence for both barristers and solicitors?**

The majority also held that there was no reason that advocates’ immunity should distinguish between barristers and solicitors, stating that ‘where a legal practitioner (whether acting as advocate, or as a solicitor instructing an advocate) gives advice which leads to a decision which affects the conduct of a case in court, the practitioner cannot be sued for negligence on that account’ [emphasis added].30

Accordingly, the appeal was dismissed with costs.

**Likely developments**

This decision means that currently in Australia advocates’ immunity continues to protect both barristers and solicitors from any liability for negligent acts or omissions in the conduct of court work or work out of court that leads to a decision affecting the conduct of the case in court. It is important to note, as Justice McHugh did,31 that advocates’ immunity is limited in scope and does not extend to matters such as:

- failing to advise a client of the availability of possible actions against third parties32;
- failing to advise a client to commence proceedings in a particular jurisdiction33; or
- the negligent compromise of an appeal leading to the loss of benefits gained at first instance.34

Should the issue of advocates’ immunity arise in other common law countries, the Australian High Court’s position will no doubt be considered along with the positions now adopted in the UK, New Zealand, Canada and the US. So this decision is

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23 W V Ireland [1997] 2 IR; we are grateful to Liam Kennedy of A & L Goodbody, Dublin, Ireland for this information.

24 We are grateful to Simon McConnell, partner, and Angela Hui, articled clerk, in our Hong Kong office for this information.

25 This issue has not been considered in Fiji in the past five years. We are grateful to Shayne Sorby of Howards Law for this information. It is the view of Peter Knight of Cromptons, Suva, Fiji, that Fiji would be likely to follow the English common law on this point. We are grateful to Cromptons for their views on this issue.

26 It is the view of Jennifer Fraser, partner, Appleby Spurling Hunter, Bermuda, and of Andrew Bolton, partner, Appleby Spurling Hunter, Cayman Islands, that those jurisdictions would follow the English common law on this point. We are grateful to Appleby Spurling Hunter for their views on this issue.

27 Our preliminary research suggests that a range of approaches exist on this issue, but that in many countries the position has not been considered afresh since the decisions altering the established position in the UK and New Zealand and the High Court’s decision confirming the status quo in Australia. Interestingly, it appears from the decision of a single judge in Papua New Guinea’s National Court in Takai Kapi v Maladinias Lawyers 2003 NZ232 that it was determined that it was inappropriate to maintain advocates’ immunity in Papua New Guinea because it has a fused profession. We are grateful to Vincent Bull and Ben Passington in our Papua New Guinea office for this information.

28 [2005] HCA 12 at [66-84].


30 [2005] HCA 12 at [91].

31 [2005] HCA 12 at [154].


34 Donnellan v Watson (1990) 21 NSWLR 335.
not only of importance to Australians and it will be interesting to watch whether one or other approach gains ascendency throughout the common law world countries yet to reconsider the issue.

As for the position in Australia, despite the High Court’s decision, it is not secure. State and territory governments have stated an intention to consider winding back or abolishing advocates’ immunity, primarily on the basis that it is said to place Australia out of step with other common law countries.\textsuperscript{35}

The ultimate position adopted by the state and territory governments is likely to be influenced by the report commissioned by the Standing Committee of Attorneys-General at its meeting at the end of March to examine the issue. It is to be hoped that whatever position is ultimately adopted, it is adopted uniformly throughout Australia to avoid the problems associated with a non-uniform approach as exemplified by the approach of the state and territory governments to civil liability reform.

\textsuperscript{35} This view seems to depend on which countries you consider – refer footnotes 23 and 27 above.

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