under anti-discrimination legislation. Self employment is not included in the definition of employment under such legislation.

34. Section 789FD(1) of the FW Act.
35. Section 789FD(2) of the FW Act.
36. Clauses 11–14 of the Model Parental and Other Extended Leave BPG.
37. Clauses 15–18 of the Model Parental and Other Extended Leave BPG.
38. The NES are contained in Part 2-2 of the FW Act.
39. They apply to 'national system employees' defined in section 13 of the FW Act to be an individual 'usually employed' by a 'national system employer', which is in turn defined in section 14 as including constitutional corporations. A constitutional corporation is a 'trading corporation', or a corporation to which paragraph 51(xx) of the Constitution applies (see above). Hence they apply to all employees in NSW other than those employed by the Crown or local government entities.
40. Section 59 of the FW Act.
41. Section 44 and Part 4-1 of the FW Act.
42. See for instance *Westpac Banking Corporation v Wittenberg* (2016) 256 IR 181 particularly at [108]–[114] per Buchanan J with McKerracher and White JJ agreeing at [334], [336]–[337], [341]. Significantly, the employer in *Wittenberg* conceded that the policy in question had been incorporated, meaning the issue did not need to be decided: see [114] per Buchanan J; [338] per McKerracher J; [344]–[345] per White J.
43. For instance, the United Kingdom's Bar Standards Board provides its Equality and Diversity Rules of the BSB Handbook in hard copy and digital form (by way of an App) and produces webinars and podcasts on the applicable Equality Rules: https://www.barstandardsboard.org.uk/about-bar-standards-board/equality-and-diversity/equality-and-diversity-rules-of-the-bsb-handbook/.
44. In line with the objectives described in the BPG Explanatory Memorandum, [5] and [8].

The High Court hits 'reset' on the advocate's immunity

By Justin Hewitt

Introduction

On 4 May 2016, the High Court handed down a decision reconsidering the scope of the advocate's immunity from suit. A majority of the High Court (French CJ, Kiefel, Bell, Gageler and Keane JJ) held that the advocate's immunity from suit does not extend to negligent advice given by a lawyer which leads to the settlement of a case by agreement between the parties embodied in consent orders. The appeal from the decision of the NSW Court of Appeal in *Jackson Lalic Lawyers Pty Limited v Attwells* [2014] NSWCA 335 was allowed.

At the hearing of the special leave application on 7 August 2015 (before Bell, Gageler and Gordon JJ) special leave was granted to allow the appellant to seek a reconsideration of the advocate's immunity and the principles in *Giannarelli v Wraith* (1988) 165 CLR 543 and *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1: [2015] HCATrans 176. However, the High Court ultimately declined unanimously to reconsider its previous decisions on the advocate's immunity. Nevertheless, the majority clarified and restated the scope of the immunity under the tests stated in *Giannarelli* and *D'Orta*.

The court held, by majority, that the respondent was not immune from suit because the 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. This conclusion was not affected by the circumstance that the parties' settlement agreement was embodied in consent orders.

Decisions concerning the advocate's immunity require line drawing between work related to court proceedings that is and is not covered by the immunity. At the heart of the immunity is work done in court. The precise scope of the immunity for out of court work turns upon the connection required between the conduct of a case in court and other work performed in preparing and conducting the case. After *Giannarelli* and *D'Orta*, the application of the advocate's immunity hardened into a rule which treated the immunity as applying to 'work done out of court which leads to a decision affecting the conduct of the case in court': see *D'Orta* at [86]–[87]. The majority judgment in *Attwells*, while reaffirming the immunity for which *Giannarelli* and *D'Orta* stands, has restated the applicable rule in a manner which narrows the scope of the immunity significantly.

The facts in Attwells

The case was determined based on a statement of agreed facts which were prepared at first instance to resolve the question whether the respondent was immune from suit by virtue of the advocate's immunity.

Mr Attwells and another person guaranteed payment of advances made by the ANZ bank to a company. The company

defaulted on its obligations and the bank commenced proceedings against the guarantors in the Supreme Court of NSW. Mr Attwells, the other guarantor and the company retained Jackson Lalic Lawyers to act for them. The amount of the company's debt to the bank was $3.4 million but the guarantors' liability under the guarantee was limited to $1.5 million. The proceedings were settled on the opening day of the trial on terms that judgment would be entered against the guarantors and the company for almost $3.4 million but the bank would not seek to enforce payment of that amount if the guarantors paid to the bank the sum of $1.75 million before a specified date. The terms of the settlement were reflected in a consent order for judgment in the amount of $3.4 million and the court's noting of the conditional non-enforcement agreement between the parties.

The guarantors failed to meet their payment obligation under the settlement before the specified date. The appellants then brought proceedings in the Supreme Court against the respondent alleging that it was negligent in advising them to consent to judgment being entered 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. The immunity question was ordered to be determined separately from the negligence proceedings. The primary judge declined to answer the separate question on the basis that, without further evidence in relation to the respondent's alleged negligence, his Honour could only form a view about the application of the advocate's immunity on a hypothetical basis. The Court of Appeal granted leave to appeal and held that the primary judge erred in declining to answer the separate question. The Court of Appeal held that the respondent was immune from suit under the tests stated in *Giannarelli* and *D'Orta*.

The majority judgment

In summary, the majority:

- held that 'there is a clear basis in principle for the existence of the immunity' and declined to reconsider *Giannarelli* and *D'Orta*: at [36];
- held that the rule stated in *D'Orta* is 'limited by' the rationale for the immunity: at [30];
- restated the connection between out of court work and work done in court required to attract the immunity: at [5], [38], [49], [50];
- held that the immunity does not extend to negligence advice which leads to the settlement of a claim in civil proceedings: at [45];
- held that this conclusion is not altered by the circumstance that the parties' agreement settling the claim was embodied in consent orders: at [6], [54]–[62].

The evolution of the rationale for the immunity

The majority in *Attwells* considered the rationale for the immunity as explained by the majority in *D'Orta* and relied on the public policy rationale of the immunity to explain the scope of the immunity: at [37]. It is instructive therefore to see how the rationale for the immunity has evolved.

In *Rondel v Worsley* [1969] 1 AC 191, the House of Lords held that a barrister was immune from an action for negligence at the suit of a client in respect of his or her 'conduct and management of a case in court' and the connected preliminary work. The House of Lords rejected the argument that the immunity was based on the absence of contract between barrister and client and the consequence that a barrister was not able to sue for his or her fee. Rather, the immunity was based on the following public policy grounds:

- the administration of justice required that a barrister should be able to carry out his duty to the court fearlessly and independently;
- actions for negligence against barristers would make the retrying of the original actions inevitable and so prolong litigation, contrary to the public interest; and
- a barrister was obliged to accept any client, however difficult, who sought his services.

Rondel v Worsley considered the immunity of a member of the English bar in a country and at a time when the professions of barrister and solicitor were completely separate. It was also held that a solicitor while acting as an advocate has the same immunity from an action for negligence as a barrister.

In *Rees v Sinclair* [1974] 1 NZLR 180, the New Zealand Court of Appeal applied *Rondel v Worsley*. At that time most practitioners in New Zealand were both barristers and solicitors. The court considered whether the public policy justifications which had been accepted as applicable to the United Kingdom in *Rondel v Worsley* were also applicable in New Zealand. In *Rees v Sinclair* the immunity was based on the following grounds:

- the administration of justice requires that a barrister should be immune from an action for negligence so that he or she may perform his or her tasks fearlessly and independently in the interests of the client, but subject to an overriding duty to the court which may

conflict with the interest of the client: at 182, 189;

- actions for negligence against barristers would make the re-trial of the original action inevitable and so prolong litigation contrary to the public interest: at 183, 189;
- public policy necessitates that in litigation a barrister should be immune because he or she is bound to undertake litigation on behalf of any client who pays his fee: at 184;
- unless a barrister was immune he or she could not be expected to prune his or her case of irrelevancies and cases would be prolonged contrary to the public interest: at 185.

In relation to the drawing of the line between work done in court and work done out of court, the judgment of McCarthy P (part of which was extracted by Mason CJ in *Giannarelli*) noted that the line drawing exercise was more difficult in New Zealand than in England because 'the delineations between the work of a barrister on the one hand and a solicitor on the other are less clearly marked than they are in England' and noted that the court 'should not be controlled by the divisional lines adopted in England'. McCarthy P said that the protection should not be confined to what is done in court and went on as follows:

> Each piece of before-trial work should, however, be tested against the one rule; that the protection exists only where the particular work is so intimately connected with the conduct of the cause in Court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing. The protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice, and that is why I would not be prepared to include anything which does not come within the test I have stated.

In *Giannarelli*, Mason CJ after referring to *Rees v Sinclair* noted that the statement of the limits of the immunity in that case was endorsed by four members of the House of Lords in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 at 215, 224, 232 and 236. Mason CJ stated that the rationale for the immunity rests on considerations of public policy stating (at 555):

> Of the various public policy factors which have been put forward to justify the immunity, only two warrant serious examination. The first relates to the peculiar nature of the barrister's responsibility when he appears for his client in litigation. The second arises from 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.

In *Arthur J S Hall & Co v Simons* [2002] 1 AC 615, the House of Lords re-evaluated the public policy issues and concluded that the public interest in the administration of justice no longer required that advocates enjoy immunity from suit for negligence in the conduct of civil proceedings. This did not imply that *Rondel v Worsley* was wrongly decided. Rather, the decision no longer correctly reflected public policy so that the basis of the immunity as it applied both to barristers and solicitors had gone.

In *D'Orta*, the High Court declined to follow the decision of the House of Lords in *Arthur J S Hall & Co v Simons* but the rationale for the immunity was further refined. The majority stated at [25]:

> the decision in *Giannarelli* must be understood having principal regard to two matters:
>
> (a) the place of the judicial system as a part of the governmental structure; and
>
> (b) the place that an 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.

And at [31]:

> Of the various factors advanced to justify the immunity, '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' (emphasis added) was held to be determinative.

(footnotes omitted)

At [32] their Honours emphasised the binding nature of judicial decision-making as an aspect of the government of society and stated at [45]:

> … the central justification for the advocate's immunity is the principle that controversies, once resolved, are not to be reopened except in a few narrowly defined circumstances. This is a fundamental and pervading tenet of the judicial system, reflecting the role played by the judicial process in the government of society.

In *Attwells*, the majority referred to these matters and concluded at [36] that 'there is a clear basis in principle for the existence of the immunity' and stated (also at [36]):

> The common law of Australia, as expounded in *D'Orta* and *Giannarelli*, reflects the priority accorded by this Court to the values of certainty and finality in the administration of justice as it affects the public life of the community.

In *Attwells*, the majority then relied on that discussion of the rationale to make the following statement about the scope of the immunity at [37]:

> … this review of the reasons of the majority in *D'Orta*, and the identification of the public policy on which the immunity is based, serve to show that the scope of the immunity for which *D'Orta* and *Giannarelli* stand is confined to conduct of the advocate which contributes to a judicial determination.

The immunity was abolished in New Zealand by the decision of the Supreme Court of New Zealand in *Lai v Chamberlains* [2006] NZSC 70; [2007] 2 NZLR 7. The High Court declined to follow that case in *Attwells* and noted (at [40]) that an expansive view of the scope of the immunity in cases concerning settlements (*Biggar v McLeod* [1978] 2 NZLR 9) strengthened the case for abolition in New Zealand. At [41], the majority referenced the judgment of McCarthy P in *Rees v Sinclair* suggesting that the scope of the immunity should not operate any wider than was 'absolutely necessary in the interests of the administration of justice'.

In *Attwells*, the majority confirmed expressly at [5] that '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'.

That is not the way that the rule articulated in *D'Orta* was applied prior to *Attwells*. For example, in *Attard v James Legal Pty Ltd* [2010] NSWCA 311; (2010) 80 ACSR 585, the NSW Court of Appeal considered a case of alleged negligence comprising a solicitors' failure to advise a company in administration that they were acting for in defending a cross-claim that the cross-claimant needed the leave of the court to proceed. The court held that the solicitors were immune from a claim for wasted expenses in respect of proceedings that were eventually settled with consequential orders made that they be dismissed with no order as to costs. Giles JA at [20] noted that there had not been a judicial determination and pondered what the offence to finality was if the solicitors' conduct of the proceedings had caused the incurrence of unnecessary costs. However, at [20]–[22] Giles JA explained his understanding of the law as expounded in *D'Orta* as being that 'offence to the finality principle in the particular case is not necessary'.

The requisite connection between work done in court and out of court work

In *Giannarelli v Wraith* (1988) 165 CLR 543, Mason CJ explained the scope of the advocate's immunity and the public policy underlying it. Mason CJ observed (at 559) that the grounds for denying liability 'have no application to work done out of court which is unconnected with work done in court'. In relation to the drawing of the line between 'in-court negligence' and 'work done out of court', Mason CJ stated (at 560):

> Preparation of a case out of court cannot be divorced from presentation in court. The two are inextricably interwoven so that the immunity must extend to work done out of court which leads to a decision affecting the conduct of the case in court. But to take the immunity any further would entail a risk of taking the protection beyond the boundaries of the public policy considerations which sustain the immunity. I would agree with McCarthy P in *Rees v Sinclair* ([1974] 1 NZLR 180 at 187) where his Honour said:
>
> > ... the protection exists only where the particular work is so intimately connected with the conduct of the cause in Court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing.

In *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 the majority (Gleeson CJ, Gummow, Hayne and Heydon JJ) declined to depart from *Giannarelli* and stated at [86] that 'there is no reason to depart from the test described in *Giannarelli* as work done in court or "work done out of court which leads to a decision affecting the conduct of the case in court"'.

However, the majority in *Attwells* described the scope of the immunity in terms that differ from those used in *D'Orta* at [86]. In particular, the majority stated:

- that 'the intimate connection required to attract the immunity is a functional connection between the advocate's work and the judge's decision': at [5];
- the immunity 'can only be invoked where the advocate's work has contributed to the judicial determination of the litigation': at [5];
- the immunity 'does not extend to acts or advice of the advocate which do not move litigation towards a determination by a court': at [38];

- 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: at [46], [49];
- rather, the 'intimate connection' between the advocate's work and 'the conduct of the case in court' must be such that the work by the advocate affects the way the case is to be conducted so as to affect its outcome by judicial decision: at [46].

Under the *D'Orta* test ('work done out of court which leads to a decision affecting the conduct of the case in court') a court would proceed by first identifying a 'decision' by the advocate that affected the conduct of a case in court and then asking whether the work that was alleged to be negligent led to that decision: see, for example, *Attard v James Legal Pty Ltd* at [111]. The case would not turn upon an evaluation of the extent to which the justifying principle of finality was impacted by the particular case: see, for example, *Kendirjian v Lepore* [2015] NSWCA 132 at [54], [57]. Under the *Attwells* test, the focus of inquiry is the work of the advocate that is alleged to be negligent and the question is whether that work 'affects the way the case is to be conducted so as to affect its outcome by judicial decision': see at [46]. In order to attract the immunity, the work of the advocate 'must affect the conduct of the case in court and the resolution of the case by that court': at [6]. The principle of finality limits the scope of the immunity so that its protection can only be invoked where the advocate's work 'contributed to the judicial determination of the litigation': at [5].

Settlements embodied in consent orders

To resolve the case at hand, the majority applied the principles noted above to a settlement agreement, the terms of which were embodied in consent orders.

The majority reasoned at [38] that because the immunity does not extend to acts or advice which does not move litigation towards a determination by a court, it does not extend to negligent advice that leads to a settlement agreed between the parties.

The issue that divided the majority from the dissenting judges related to the consequence of the settlement being embodied in consent orders.

The majority considered that the result was not altered by the fact that the settlement was recorded in consent orders because the primary judge made no finding of fact or law which resolved the controversy between the parties: at [55]. According to the majority the 'substantive content' of the rights and obligations established by the settlement agreement was determined by the parties without any determination by the court: at [59]. Therefore, according to the majority, the public policy which sustains the immunity is not offended by recognising the fact that the terms of the settlement agreement were not the result of the exercise of judicial power.

Gordon J in dissent considered at [104] that there was a final quelling of a controversy between the parties by the making of an order, albeit a final outcome which was entered by consent. Nettle J agreed with Gordon J at [64]. In his Honour's view (at [67]) 'where a matter is settled out of court on terms providing for the court to make an order by consent that determines the rights and liabilities of the parties, the settlement plainly does move the litigation toward a determination by the court'.