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Is a lawyer immune from a legal suit? The doctrine of ‘Advocate’s Immunity’

A recent decision on ‘Advocate’s Immunity’ provided an opportunity for the High Court to refine the scope and application of the doctrine. Partner, Thomas Russell, and lawyer, Brendan May, review the decision and what it means for litigants and their representatives.

Top 3 points to remember

- ‘Advocate’s Immunity’ from suit prevents an unhappy litigant suing their lawyer after a case has been judicially determined.
- The High Court has recently upheld the doctrine, however has also held that it does not extend to negligent advice resulting in a settlement of civil proceedings, even if the settlement is recorded in consent orders by the court.
- 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.

What is ‘Advocate’s Immunity’?

In simple terms, advocate’s immunity is a doctrine of the common law which operates to prevent an unhappy litigant from suing their lawyer over the lawyer’s conduct of the litigation. It applies only to court proceedings (and work intimately connected to the conduct of court proceedings) that results in a judicial determination.

What is the purpose of ‘Advocate’s Immunity’?

The immunity is founded on reasons of public policy, specifically the need to avoid re-litigation of issues already decided by the judicial process through collateral proceedings (known as the “finality principle”). If a litigant lost their case, and subsequently attempted to sue their lawyer, alleging negligence in the lawyer’s handling of the case, any court hearing the negligence claim would have to re-open the original case to decide if the lawyer had, in fact, been negligent. Such re-litigation would clearly have adverse consequences for the administration of justice when society has an interest in the final and certain resolution of controversies, by the judicial branch of government, according to law.

In addition, barristers and solicitors are officers of the court, and their duties to their clients are subject to their paramount duty to the court. If the advocate was concerned about being exposed to liability in negligence, the possibility of their own potential liability might lead them to protecting their own interests ahead of those of the court and the client, and so compromise their independent and objective judgment in their presentation of the client’s case.

History of advocate’s immunity

One of the early authorities on advocate’s immunity is the High Court’s decision in Giannarelli v Wraith. This case arose when three brothers, all members of the Giannarelli family, were convicted of perjury as a result of evidence given before a Royal Commission. Two of the brothers successfully appealed to the High Court and their convictions were quashed. As a result, the Giannarelli’s began proceedings for damages arising out of negligence against the solicitors and barristers who originally represented them.

The majority of the High Court held that an advocate cannot be sued for negligence for in-court work, or out of court work that is ‘intimately connected’ with the in-court work.
Subsequently in *D’Orta Ekenaie v Victoria Legal Aid* the High Court reaffirmed the doctrine by majority. The majority’s rationale for the immunity was the importance of the court’s role in establishing the finality of legal decisions. The High Court held again that aside from in-court work, the immunity extended to ‘work done out of court which leads to a decision affecting the conduct of the case in court’.

**Latest authority from the High Court**

In the recent case of *Attwells v Jackson Lalic Lawyers Pty Limited (Attwells)*, the High Court again reviewed the immunity and made some important statements on its application.

*Attwells* was on appeal from the Court of Appeal of the Supreme Court of New South Wales. It arose out of earlier litigation over a guarantee given to a bank for the liabilities of a company. The appellants claimed that the litigation was settled on unfavourable terms because of negligent advice by the respondent, the solicitors in the earlier litigation. The solicitors claimed that advocate’s immunity prevented the case being brought against them, arguing that the immunity extended to negligent advice that resulted in an agreed settlement.

The guarantee itself was limited to $1.5 million, however as a result of what was argued to be negligent advice, the guarantors agreed to consent orders for judgment to be entered against them and the company for the full amount of the company’s indebtedness to the bank (being $3.4 million), with the bank agreeing not to enforce that amount if the guarantors paid a sum of $1.75 million within five months. The guarantors failed to meet this payment, and the appellants subsequently began proceedings in the Supreme Court of New South Wales, alleging the respondent had been negligent in advising them to settle the litigation on these terms.

At first it was decided by the primary judge that whether the respondent could claim the protection of advocate’s immunity should be decided as a separate question. This was appealed to the Court of Appeal, which held that the immunity could extend to the settlement advice. The appellants were then granted special leave to appeal to the High Court.

Before the High Court, the appellants argued that either the immunity did not extend to negligent advice that leads to a settlement of court proceedings, or in the alternative, that the immunity should be abolished entirely.

The High Court refused to abolish the immunity, noting the importance of the final resolution of disputes by the judicial branch of government, however in a majority judgment decided to limit the scope of the immunity, holding that it does not extend to negligent advice that leads to a settlement of civil proceedings. In so holding, the majority stated that considerations of public policy and finality were not infringed where the litigation resulted in a compromise between the parties, rather than a judicial determination by a court. The majority noted that while there were exceptional cases where the making of consent orders by a court did involve an exercise of judicial power, such as in representative proceedings, this was not such a case. Accordingly the appeal was allowed.

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1. *(1988) 165 CLR 543.*

2. *(2005) 223 CLR 1.*

3. *[2016] HCA 16.*

4. In a joint judgment, French CJ, Kiefel, Bell, Gageler and Keane JJ allowed the appeal. Nettle and Gordon JJ thought the appeal should be dismissed.