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### Lawyers' Immunity

*It has long been accepted by the common law in Australia that advocates are immune from being sued in negligence by their clients in respect of their conduct of a case, or for work outside the courtroom which is intimately connected with the conduct of a case in court. On 10 March 2005, a 6-1 majority of the High Court in D'orta-Ekenaike v Victoria Legal Aid & Anor preserved the immunity of advocates from liability for negligence.*

Nicolee Dixon

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Ms Karen Sampford, Director	(07) 3406 7116
Mrs Nicolee Dixon, Senior Parliamentary Research Officer	(07) 3406 7409
Ms Renee Giskes, Parliamentary Research Officer	(07) 3406 7241

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Inquiries should be addressed to:

Director, Research Publications & Resources

Queensland Parliamentary Library

Parliament House

George Street, Brisbane QLD 4000

Ms Karen Sampford. (Tel: 07 3406 7116)

Email: [Karen.Sampford@parliament.qld.gov.au](mailto:Karen.Sampford@parliament.qld.gov.au)

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## EXECUTIVE SUMMARY

It has long been accepted by the common law in Australia that advocates are immune from being sued in negligence by their clients in respect of their conduct of a case, or for work outside the courtroom which is intimately connected with the conduct of a case in court. This is known as 'advocates' immunity' (**pages 1-2**).

There are two public policy bases for advocates' immunity that have retained the most credence in recent years. These are discussed on **pages 2-4**. First, a barrister has a duty both to his or her client and to the court before which he or she is appearing, the latter overriding the former. Counsel will often need to exercise his or her own judgement in making a decision about where the duty lies at a particular point of the hearing. Decisions about the running of the proceedings, including questions asked of witnesses, what witnesses are to be called, and what evidence is to be led are matters for counsel. To expose counsel to liability would mean that actions could be brought against counsel for merely discharging a duty.

The second public policy reason for the immunity is that an unsuccessful litigant might be encouraged to bring an action against their counsel to demonstrate that, but for counsel's negligence, they would have received a more favourable result. This scenario allows for a collateral attack involving the re-litigation of issues central to the primary case. If the plaintiff is successful, the resolution of the issue may undermine the status of the original decision. If a criminal conviction resulting in a prison term is successfully challenged, this could destroy public confidence in the administration of justice.

Advocates' immunity has recently been abolished in England and Wales and in New Zealand, leaving Australia as one of the few countries where it exists (**page 4**).

In *Giannarelli v Wraith* (1988) 165 CLR 543, Mason CJ held that advocates' immunity must extend to outside work that leads to a decision affecting the conduct of the case in the court. However, the immunity should not extend any further and should exist 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. The other majority justices substantially agreed (**page 5**).

In *D'orta-Ekenaike v Victoria Legal Aid & Anor* [2005] HCA 12 (10 March 2005), six of the seven justices held that the common law of immunity of advocates confirmed by the High Court in *Giannarelli* should stand. A feature in the reasoning of the majority justices was the public interest in the finality of proceedings.

The result of the decision is that barristers are immune from being sued in respect of the conduct of the client's case in the courtroom and this protection extends to work outside the courtroom that leads to a decision affecting the conduct of a case in court. It was also held that a solicitor would be entitled to the same immunity in respect of the same conduct as an advocate in court and for outside work that leads to a decision concerning the conduct of the case in the court (**pages 6-7**).

The reasoning of the majority justices is discussed on **pages 7-10** and that of the dissenting justice, Kirby J, is considered on **pages 10-13**.

Reactions to the decision in *D'orta-Ekenaike* are discussed on **pages 13-15**, and the agreement of the Standing Committee of Attorneys-General to commission an options paper with a view to limiting or, possibly, removing the immunity for advocates is considered on **pages 15-16**.

## **1 INTRODUCTION**

On 10 March 2005, a 6-1 majority of the High Court in *D'orta-Ekenaike v Victoria Legal Aid & Anor*<sup>1</sup> preserved the immunity of advocates from liability for negligence in the conduct of a matter in the courtroom, and for work outside the courtroom that leads to a decision affecting the conduct of the case in court.

## **2 BACKGROUND TO ADVOCATES' IMMUNITY**

It has long been accepted by the common law in Australia that barristers are immune from being sued in negligence by their clients in respect of their conduct of a case in the courtroom, or in respect of their work outside the court which is intimately connected with the conduct of a case in court.<sup>2</sup> A solicitor who acts as an advocate in court is also protected from liability. The critical thing is the function being performed at the material time. It is the advocacy function that attracts the immunity and it does not matter if the advocate is a solicitor or a barrister, or both.

Work that the courts have held to be 'intimately connected with the conduct of a cause' has included:<sup>3</sup>

- failing to raise a matter relevant to opposing a maintenance application;
- failing to claim interest in an action for damages;
- issuing a notice to admit and making admissions;
- failing to plead a statutory prohibition on the admissibility of crucial evidence;
- negligently advising a settlement;
- interviewing the plaintiff and other potential witnesses;

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<sup>1</sup> [2005] HCA 12 (10 March 2005).

<sup>2</sup> Some early cases include *Rondel v Worsley* [1969] 1 AC 191, at 240-244, 258-263, 277-279 and *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, confirmed in *Giannarelli v Wraith* (1988) 81 ALR 417 (also reported at (1988) 165 CLR 543. The ALR page references will be used in this paper).

<sup>3</sup> See *D'orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12, 10 March 2005, para 154, per McHugh J and the cases cited therein. In particular, at para 155, His Honour refers to other examples given by Gleeson CJ in *Keefe v Marks* (1989) 16 NSWLR 713, 718.

- giving advice and making decisions about what witnesses to call and not call;
- working up necessary legal arguments;
- considering the adequacy of the pleadings and, if appropriate, taking steps to have the pleadings amended.

Work that has *not* been found to be intimately connected with the conduct of a cause includes failing to advise that there might be a possible action against a third party; failing to advise about commencing proceedings in a certain jurisdiction; and negligently compromising appeal proceedings.<sup>4</sup>

The immunity from suit does not apply to work done out-of-court that is not connected with the work done in the courtroom. Thus, counsel can be liable for negligent advice in relation to out-of-court matters just as a solicitor can be held so liable. For example, negligence in giving advice about a commercial contract would not be immune from suit.

Members of most professions and trades are able to be sued for negligence, including architects, surgeons, dentists, anaesthetists, financial advisors, teachers, and builders.

## 2.1 PUBLIC POLICY CONSIDERATIONS

Various reasons, mainly connected with public policy, have been offered for why the immunity applies.

A popular historical reason was that barristers cannot sue clients for their professional fees but this rationale was rejected by the House of Lords some time ago.<sup>5</sup> Indeed, an action in negligence is grounded on there being a negligent performance of a service or act upon which another person is relying, whether or not they are paying for it.<sup>6</sup>

Advocates' immunity appears to be founded on public policy reasons, a number of which have been advanced in the legal authorities, particularly in *Giannarelli v Wraith*, one of Australia's leading authorities on the issue. The first basis for the protection is that a barrister has a duty both to his or her client and to the court before which he or she is appearing, the latter overriding the former. The second is

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<sup>4</sup> See *D'orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12, par 156, per McHugh J and cases cited therein.

<sup>5</sup> In *Rondel v Worsley* [1969] 1 AC 191.

<sup>6</sup> See *Giannarelli v Wraith* (1988) 81 ALR 417, 421.



that there would be adverse consequences for the administration of justice if matters are litigated again in collateral negligence proceedings regarding issues that were important in the original matter.

The first argument in support of the immunity – counsel’s paramount duty to the court – is said to serve a public interest in ensuring that advocates act honestly in the conduct and management of the case with an eye to both the client’s success but also to the speedy and efficient administration of justice. Thus, the barrister might need to act in a manner that the client may not like, has instructed the barrister not to do, or which disadvantages the client. For instance, the barrister might have to present certain documents or authorities which may go against the client’s case, or point out an irregularity so that it can be remedied then and there rather than using it to the client’s advantage at a later time.

The barrister may have to be selective in the witnesses to be called or authorities to be examined so that the court’s time is not unnecessarily wasted, even if the client wants an exhaustive collection of witnesses called or authorities to be examined. Decisions about the running of the proceedings, including the questions to be asked of witnesses, what witnesses are to be called, and what evidence is to be led are matters for counsel. Thus, the litigant is represented by counsel who is not a mere agent and who exercises an independent judgement in the interests of the court.<sup>7</sup>

Flowing from this is the argument that to expose counsel to liability in negligence might influence the exercise of that independent judgement because counsel might not wish to face being liable to the client if, for example, counsel does not pursue matters which counsel may not pursue otherwise. To be constrained in this way may be detrimental to the interests of the court and administration of justice generally. Hearings may become more lengthy, complicated, and costly. It appears, therefore, that the immunity is based on protecting the administration of justice, not the protection of counsel. Otherwise, actions could be brought against counsel for merely discharging a duty. The same immunity protects all those engaged in the administration of justice, including judges, jurors, witnesses, and parties.<sup>8</sup> Those persons cannot be sued even if they make false or defamatory statements in the course of the proceedings.

The second basis for the immunity of counsel rests on the notion that if counsel is exposed to liability, an unsuccessful litigant might be encouraged to bring an action against their counsel to demonstrate that, but for counsel’s negligence, they would have received a more favourable result. This scenario allows for a collateral attack involving the re-litigation of issues central to the primary case. If the plaintiff is

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<sup>7</sup> (1988) 81 ALR 417, 421-422.

<sup>8</sup> (1988) 81 ALR 417, 422. See also *Sirros v Moore* [1975] QB 118 (judge); *Cabassi v Vila* (1940) 64 CLR 130 (witness).

successful, the resolution of the issue may undermine the status of the original decision. If a criminal conviction resulting in a prison term is successfully challenged, this could destroy public confidence in the administration of justice.<sup>9</sup> If a decision of a court is wrong, the appeal process is the avenue to pursue to correct it rather than by way of a collateral action.<sup>10</sup>

There are many countervailing arguments to the conferral of the immunity. For example, it is argued that any perceived inequality of treatment under the law is capable of breeding contempt for the law, especially when the perception is that the favoured ones are lawyers themselves. It has been said that ‘*barristers, with the connivance of the judges, [have] built for themselves an ivory tower and have lived in it ever since at the expense of their clients...*’.<sup>11</sup> Many of the opposing views will be considered when the dissenting judgement of Kirby J in *D’orta-Ekenaike v Victoria Legal Aid* is discussed later in this Brief.

In *Arthur JS Hall & Co (a Firm) v Simons*, the House of Lords held that the grounds of public policy were no longer capable of supporting the immunity of counsel, at least for England and Wales. Three of the seven Law Lords indicated that the immunity could continue to apply to criminal proceedings but the majority found that the immunity did not apply to criminal or to civil matters.<sup>12</sup> In New Zealand, the Court of Appeal very recently abolished advocates’ immunity in *Lai v Chamberlain*.<sup>13</sup> It appears that while a prosecutor is immune from suit, there is no general immunity for advocates in the United States of America. Whether a public defender in the USA has immunity from suit is debateable.<sup>14</sup>

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<sup>9</sup> (1988) 81 ALR 417, 423.

<sup>10</sup> (1988) 81 ALR 417, 450, per Dawson J.

<sup>11</sup> (1988) 81 ALR 417, 436, per Wilson J citing *Rondel v Worsley* [1967] 1 QB 443, 468 (first instance).

<sup>12</sup> [2000] 3 All ER 673.

<sup>13</sup> Unreported, Court of Appeal of New Zealand, 8 March 2005 (insofar as civil proceedings are concerned).

<sup>14</sup> See *D’orta-Ekenaike v Victoria Legal Aid & Anor* [2005] HCA 12, para 63 per Gleeson CJ, Gummow, Hayne & Haydon JJ.

## 2.2 GIANNARELLI V WRAITH

In *Giannarelli v Wraith*,<sup>15</sup> the Giannarellis were successful in having their convictions of perjury overturned on appeal to the High Court. They then brought an action in negligence against their barristers on the ground that the barristers had failed to advise them that they had a good defence to the proceedings and, also, that they had not objected to certain inadmissible evidence tendered by the prosecution. The Giannarellis relied on a provision of the Victorian *Legal Practice Act 1958*. The issue of whether a barrister could be liable in negligence was tried as a preliminary question in the Victorian Supreme Court. The Giannarellis were successful at first instance but the judgement was overturned on appeal to the Full Court. The Giannarellis then appealed to the High Court.

Mason CJ said that it is difficult to draw a dividing line between in-court and out-of-court matters. For example, counsel will have to engage in preparatory activities such as drawing and settling pleadings and giving advice on evidence. His Honour considered that preparing a case should not be divorced from its presentation in the court and the immunity must extend to outside work that leads to a decision affecting the conduct of the case in the court. However, the immunity should not extend any further and should exist 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.<sup>16</sup>

Applying the concept of counsel's immunity, Mason CJ found that the decision about how the proceedings were to be conducted in the perjury matter – including the failure to raise a matter as a defence or to object to certain evidence – was an incident of the conduct and management of the case in court. Thus, the negligence complained of fell within the immunity afforded to counsel. Brennan, Wilson, and Dawson JJ agreed. Deane J dissented stating that there were no considerations of public policy to outweigh or balance the injustice and consequent public detriment involved in depriving a litigant, who engages the professional services of a legal practitioner, of all redress under the common law for in-court negligence, however gross and callous in its nature or devastating in its consequences.<sup>17</sup> Toohey and Gaudron JJ dissented on the basis of a provision of the *Legal Profession Act 1958* (Vic). Thus, the immunity of counsel protected the barristers in this case from an action in negligence.

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<sup>15</sup> (1988) 165 CLR 543; 81 ALR 417.

<sup>16</sup> (1988) 81 ALR 417, 424, citing *Rees v Sinclair* [1974] 1 NZLR 180, 187, per McCarthy P.

<sup>17</sup> (1988) 81 ALR 417, 445-446.

### 3 D'ORTA-EKENAIKE V VICTORIA LEGAL AID & ANOR

The applicant, Mr D'orta-Ekenaike, was charged with rape in February 1996. He sought assistance from Victoria Legal Aid (VLA) which retained a barrister, Mr M, to appear for the applicant in the committal proceedings in the Magistrates' Court. The applicant pleaded guilty to the charge and was committed for trial which took place in February 1997. On arraignment he pleaded 'not guilty'. His guilty plea at the committal was led in evidence before the County Court and the applicant was convicted and sentenced to three years' imprisonment. On appeal to the Court of Appeal, the verdict was set aside and a new trial ordered on the ground that, although the evidence of the guilty plea had been properly led in evidence, the trial judge had failed to provide sufficient directions about how the plea was to be used. The retrial of the matter resulted in the applicant being acquitted. The guilty plea was not admitted into evidence at the retrial.

Mr D'orta-Ekenaike then commenced an action against the VLA and Mr M, the barrister, arguing that he had retained the VLA as his solicitor and that both the VLA and Mr M failed in their duty to exercise reasonable skill, care, and diligence in acting on his behalf in defending the rape charge. In particular, the applicant alleged that the VLA and/or the barrister advised him that he did not have any defence to the charge and if he entered a plea of guilty, he would receive a suspended sentence. He claimed he was pressured into entering the guilty plea, particularly when advised that if he defended the charge and lost, a prison term would be imposed. He had spent seven months in prison before winning the appeal, for which he claimed damages. He also sought damages for loss of income and for a mental illness that had resulted.

At first instance, the primary judge ordered a stay of proceedings on the basis that the advice allegedly given by both the VLA and Mr M was so intimately connected with the conduct of the trial as to come within the immunity principle. The Victorian Court of Appeal refused the applicant leave to appeal so Mr D'orta-Ekenaike then sought special leave to appeal to the High Court.<sup>18</sup>

The two main issues before the Full Bench of the High Court were, first, whether the High Court's decision in *Giannarelli v Wraith* should be reconsidered and, secondly, whether the immunity applied to acts or omissions of a solicitor which, if committed by an advocate, would be immune from suit.

Six of the seven justices held that the common law of immunity of advocates confirmed by the High Court in *Giannarelli* should stand. A feature of the reasoning by the majority justices was the public interest in the finality of proceedings. Accordingly, while special leave to appeal was granted (because of

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<sup>18</sup> *D'orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12, 10 March 2005.

changes in the law in the United Kingdom which had occurred since *Giannarelli*), the appeal was dismissed.

The result of the decision is that barristers are immune from being sued in respect of the conduct of the client's case in the courtroom and this protection extends to work outside the courtroom that leads to a decision affecting the conduct of a case in court. It was also held that a solicitor would be entitled to the same immunity in respect of the same conduct as an advocate in court and for outside work that leads to a decision concerning the conduct of the case in the court. Note that the merits of the case were not determined so it is not established whether or not the barrister and the VLA gave the alleged advice or whether such advice was negligent.

### 3.1 MAJORITY JUDGEMENTS

In a **joint judgement**, Gleeson CJ, Gummow, Hayne, and Heydon JJ upheld *Giannarelli v Wraith*. First, the judgement confirmed the construction of a provision of the *Legal Profession Practice Act 1958* (Vic) preferred by the majority in that case<sup>19</sup> then turned to the issue of counsel's liability at common law.

The joint judgement considered that the *Giannarelli* decision had principal regard to two matters which were of importance. The first was the nature of the judicial process and the role of the advocate in it. Their Honours noted Mason CJ's discussion, in that case, of the adverse consequences for the administration of justice that would flow from re-litigating, in collateral proceedings for negligence, issues already determined in the primary proceedings. It was observed that judicial power was an element of government and its aim was wider than the concerns of the parties to an action. A central and pervading tenet of the judicial system was the finality of the resolution of disputes, apart from in narrowly defined circumstances and the limited appeals process. If an advocate is sued for negligence, the re-litigation of issues central to the primary matter in which it is alleged the negligent conduct arose would be a necessary step in establishing that negligence on the part of the advocate. Judicial immunity and immunity of witnesses is founded in considerations of finality of judgements. Thus, the central justification for the advocate's immunity is the idea that matters, once resolved, should not be reopened except in narrowly defined circumstances.<sup>20</sup> Arguments that abuse of process may provide such a circumstance could not be accepted.<sup>21</sup>

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<sup>19</sup> The majority justices held that s 10(2) of that Act did not subject a barrister to a common law duty of care in negligence.

<sup>20</sup> [2005] HCA 12, paras 31-36, 40, 43-46.

<sup>21</sup> [2005] HCA 12, paras 74ff.

The joint judgement put aside various public policy considerations as of marginal relevance to the existence of the immunity. Their Honours said that the supposed connection between the immunity and a barrister's inability to sue for professional fees was not a well founded basis for the protection. As for the immunity resting on the potential competition between the duty which an advocate owes to the court and the duty of care owed to the client,<sup>22</sup> their Honours said that these duties do not conflict because the duty to the court is supreme. Also, this reason would confine the immunity to claims in negligence which is not the extent of the immunity. In terms of the 'cab-rank rule'<sup>23</sup> providing a rationale, this did not explain why the solicitor advocate (not subject to the rule) could also be immune from suit.<sup>24</sup> Some of the justices in *Giannarelli* considered that the 'chilling' threat of being sued could cause advocates to prolong trials and that this was also a factor pointing to the need for advocates' immunity.<sup>25</sup> However, the joint judgement in *D'orta-Ekenaike* saw this element as important, but not determinative, of whether an immunity exists.<sup>26</sup>

The applicant argued that the House of Lords' decision in *Arthur JS Hall & Co (a Firm) v Simons* (that the public interest in the administration of justice in England and Wales no longer required the retention of immunity for advocates in civil or criminal proceedings) showed why the common law in Australia should be restated. The joint judgement found, however, that the case was not directly applicable to Australia because of the different constitutional and other arrangements applying to the United Kingdom and other European countries, which considerations had some impact on the Law Lords' decision. For example, the case was decided just before the introduction of a statutory right to have a civil rights related matter brought before a court or tribunal, for which there is no Australian equivalent.<sup>27</sup> In addition, the legal profession in Australia is not

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<sup>22</sup> Mason CJ in *Giannarelli* placed some importance on this point but acknowledged the paramountcy of the duty to the court.

<sup>23</sup> Which says that the advocate is not entitled to refuse a brief if offered a proper fee unless there are special circumstances. See Queensland Bar Association's 2004 Barristers Rules and 'The role of barristers' at <http://www.qldbar.asn.au/3.html>.

<sup>24</sup> [2005] HCA 12, paras 27-28.

<sup>25</sup> See, in particular, Brennan J in *Giannarelli* (1988) 81 ALR 417, 438. See also Mason CJ at 422.

<sup>26</sup> [2005] HCA 12, para 29

<sup>27</sup> [2005] HCA 12, para 64, citing Art 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* and the *Human Rights Act 1998* (UK).

organised in exactly the same way as it is in England and Wales.<sup>28</sup> Their Honours also warned that care has to be taken in looking at the experiences of other jurisdictions in considering whether the immunity should be retained in Australia.

Applying *Giannarelli* to the case at hand, the joint judgement held that the advice given by the barrister was work which an advocate did out-of-court but was work which led to the decision which affected the conduct of the case at the trial. Thus, the advocate would have immunity from suit at common law. The VLA was in the same position as the advocate. There was no reason to distinguish between a barrister and a solicitor where the solicitor is acting as advocate or as a solicitor instructing an advocate giving advice leading to a decision which affects the conduct of the case in court. Extending the protection to solicitors for providing instructions to an advocate leading to a decision affecting the conduct of the case in the courtroom is an expansion of the immunity beyond what it was previously.

**McHugh J** delivered a separate judgement but also found that the decision in *Giannarelli* should not be overturned.<sup>29</sup> His Honour considered that the paramount duty the advocate owes to the court was an intricate part of the administration of justice in which there was a great public interest. Immunity for advice concerning guilty pleas serves an important public interest of avoiding re-litigation of issues and maintaining confidence in the administration of criminal justice regarding finality of outcome. In cases of this type, the advocates' alleged negligence may have no bearing on the result as the jury might have disregarded the guilty plea. There is no way of ever knowing. Causation is a significant problem.<sup>30</sup>

McHugh J considered that the immunity should extend to any work, which, if the subject of a claim of negligence, would require the impugning of a final decision of a court or the re-litigation of matters already finally determined by a court. There should be no distinction between a barrister and a solicitor in that context in advising a client regarding entering of a plea. To draw such distinction and apply immunity to the barrister only would not serve the public policy purpose of avoiding re-litigation.<sup>31</sup>

**Callinan J** delivered a concurring judgement. His Honour did not believe that any societal or related changes justified dismantling advocates' immunity. It was

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<sup>28</sup> [2005] HCA 12, paras 56-60.

<sup>29</sup> [2005] HCA 12, paras 93-94.

<sup>30</sup> [2005] HCA 12, paras 162ff.

<sup>31</sup> [2005] HCA 12, para 168.

observed that advocacy was unique in the sense of having to make strategic and tactical decisions and instantaneously.<sup>32</sup>

His Honour stated that the risk of conflicting judgements, the need for freedom of expression and candour in court, the invidiousness of making comparisons between actual and notional reactions by judges and juries to arguments and counsel's conduct of a case, and the discouragement of re-litigation all led to the conclusion that the public interest in the immunity of advocates is necessary for the orderly functioning of the system of justice. The immunity applies for work done out-of-court which leads to a decision affecting the conduct of a case in court. The conduct in issue here had an intimate connection with the conduct of the case in court. Advice regarding a plea goes to the heart of proceedings in court and is fundamental to the conduct of them.<sup>33</sup> A solicitor instructing in litigation owes the same duties as the advocate to the court and to the client. The reasons favouring immunity of advocates require the same immunity for solicitors.<sup>34</sup> His Honour noted that the existence of the immunity did not depend on whether the proceedings are civil or criminal.

### 3.2 DISSENTING JUDGEMENT

**Kirby J** delivered a dissenting judgement. His Honour found that authority, principle and policy required that advocates' absolute immunity from suit should not be a part of Australian law.<sup>35</sup> Kirby J considered that the majority judgement in *Giannarelli* went far beyond the issue for decision in that case, which was limited to the liability of an advocate for work in court, and should be confined to establishing that a Victorian barrister is immune from liability for negligence in the conduct of the client's case in court during a hearing. It establishes nothing about the extent of out-of-court liability.<sup>36</sup> Much of the reasoning, Kirby J observed, was based on the construction of the *Legal Profession Practice Act 1958* as it applied at the time *Giannarelli* was decided. His Honour considered that there was no general immunity for solicitors for out-of-court work and referred to a number of authorities in support of that view.<sup>37</sup>

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<sup>32</sup> [2005] HCA 12, paras 365-367, 375

<sup>33</sup> [2005] HCA 12, paras 380-382.

<sup>34</sup> [2005] HCA 12, para 384.

<sup>35</sup> [2005] HCA 12, para 219.

<sup>36</sup> [2005] HCA 12, paras 267-271.

<sup>37</sup> [2005] HCA 12, esp. paras 294-309.



Kirby J believed that, even at common law, the immunity could not be supported and agreed with the House of Lords in *Arthur JS Hall*. His Honour considered that advocates' immunity could not be sustained on public policy grounds or based on a 'flood of litigation' argument. In terms of the need for finality of proceedings as providing a basis, His Honour commented that nearly all legal systems of the world flourish without the immunity. Kirby J also believed that the decision of the Law Lords in *Arthur JS Hall* did not rest on human rights provisions or on the *European Convention for the Protection of Human Rights and Fundamental Freedoms* as most of the Law Lords made no mention of these.<sup>38</sup>

His Honour's main reasons offered for not supporting a legal practitioner's immunity from suit can be summarised as follows –<sup>39</sup>

- the supposed arguments of public policy examined with today's eyes are insufficient;
- the arguments supporting the immunity based on the role of the legal practitioner in the governmental functions of administering justice are unconvincing;
- any rationale based on the analogy between the immunity of legal practitioners and of judges, jurors, and prosecutors breaks down when it is considered that judges, jurors, and prosecutors owe no duty of care to the litigant;
- the 'divided' loyalty of a barrister between the client and the court does not justify the immunity as it would be difficult to establish negligence where a barrister is just complying with a duty to the court;
- there is an anomaly between the solicitude of the law for its own practitioners and the accountability demanded of other professions. Instantaneous decisions expected of a surgeon or of a pilot seem just as demanding as those taken by advocates inside the courtroom yet the former two professions have no immunity from a negligence suit;
- if the test of liability was whether the 'burden' is 'intolerable' (as suggested by some judges), it would probably exempt neurosurgeons, pilots and many others carrying heavy responsibilities for fleeting acts and omissions of carelessness;
- the immunity detracts from the concept of equality before the courts and the law as required by the international covenant on civil and political rights to which Australia is party;

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<sup>38</sup> [2005] HCA 12, paras 310-330, 333.

<sup>39</sup> See [2005] HCA 12, paras 312-340, and authorities cited therein.

- the immunity is a derogation from the rule of law and fundamental rights;
- various justifications for the immunity of barristers are no longer persuasive, including the inability to sue for fees. Many professionals do work in an honorary capacity and can be held liable at common law;
- the Bar is now much larger than when the immunity first arose and the organisation of legal practice has changed considerably with more lawyers practising in national and international firms dealing with lawyers from other countries who do not have the immunity;
- subsuming the legal practitioner into the category of public officials and extending an absolute immunity whatever the negligence or wrongdoing cannot be sustained on functional analysis;
- as was found by the House of Lords in *Arthur JS Hall*, the arguments that removing the immunity will lead to a ‘flood of litigation’, collateral challenges to decisions, vexatious suits by disgruntled litigants etc. do not support an absolute immunity from suit for lawyers for just doing their job. The ‘flood of litigation’ has not occurred in the USA, a very litigious country where there has not been any immunity for ordinary attorney advocates. Nor has it occurred in England where the immunity was recently abolished;
- the unavailability of legal aid in Australia for bringing negligence actions against lawyers; the availability of summary relief against vexatious proceedings; and the rules against abuse of process by re-litigation make it unnecessary to retain an absolute immunity of the broad kind propounded by the majority. The law thus provides measured relief from unwarranted claims;
- the appeal to the ‘undeniable public interest in the maintenance of the independent Bar’ introduces a false trail as independent Bars have long existed in many other common law countries. To suggest that the removal of the out-of-court immunity for lawyers in Australia would, uniquely, destroy that professional independence is to display lack of confidence in the local profession.

However, Kirby J said that as *Giannarelli* concerned allegations of negligence in court, which was not the situation in the case before him, he would leave that decision standing until that issue actually arose for determination.<sup>40</sup>

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<sup>40</sup> [2005] HCA 12, para 340.

#### 4 REACTIONS TO HIGH COURT'S RETENTION OF THE IMMUNITY

The chair of the Victorian Bar Council supported the High Court judgement in *D'orta-Ekenaike*, considering that the decision was one which protected the justice system and the administration of justice.<sup>41</sup> The President of the New South Wales Bar Association claims that to abolish the immunity could be unfair to advocates because they cannot join, as defendants, other persons in the courtroom who may have contributed to the loss (e.g. a judge, because judges are immune from being sued). In addition, a judge or juror cannot be called as a witness in any hearing of the claim against the advocate and the judge or juror might be the key person to call as a witness. It would also be difficult for an advocate to establish that the breach of the duty of care to the client made no difference to the outcome.<sup>42</sup>

On the other hand, a member of the Tasmanian Independent Bar, Mr Greg Barns, argues that unlike a judge or juror, counsel owes a duty of care to a client to act professionally and a judge hearing the negligence proceedings would be qualified to determine if negligence can be established. Mr Barns also argues that if there was no immunity for negligence in the courtroom, advocates would take more time to explain their litigation tactics to their clients so that the clients can follow what is occurring in the court and understand why a particular approach – such as not to call a witness – is being taken. The removal of the immunity might also guard against barristers, finding themselves double-booked in two hearings, handing a case to another barrister just hours before a court hearing.<sup>43</sup>

A further argument in support of the immunity, offered by the President of the NSW Bar Association, is that advocates, even if not liable in a negligence action, can still be disciplined under legislation regulating the profession, including being 'struck off' the roll and/or being ordered to pay compensation for professional misconduct or unsatisfactory professional conduct.<sup>44</sup>

Some commentators consider that if the law is to be reformed by abolishing advocates' immunity, this should be done by the legislature, not by the courts. This would allow for contribution by experienced policy-makers, consideration by Parliamentary committees, and input by relevant stakeholders such as law societies,

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<sup>41</sup> Norrie Ross, 'Barristers keep their immunity to lawsuits', *Courier Mail*, 11 March 2005, p 12.

<sup>42</sup> Ian Harrison, 'Removal of immunity defies logic', *Australian Financial Review*, 18 March 2005, p 59.

<sup>43</sup> Greg Barns, 'States can end injustice of immunity', *Australian* 21 March 2003, p 7.

<sup>44</sup> Ian Harrison.

bar associations, plaintiff groups, community legal aid organisations etc. when developing the relevant law.<sup>45</sup>

Members of some other professions and callings do not appear to believe that the nature of the advocates' in court work, involving quick judgements and reactions, provides any basis for the immunity. The chair of the medico-legal section of the Royal Australasian College of Surgeons points out that a surgeon may be called into an operating theatre at 2am for a ruptured aorta.<sup>46</sup>

If lawyers' immunity was removed, it is possible that insurance premiums for barristers, and for solicitors who do advocacy work, would increase because of the exposure to liability in negligence. This could mean that legal fees for clients would rise as the increases are passed on. However, this concern has not prevented courts from extending the liability of professionals in the past.<sup>47</sup>

One Senior Counsel has suggested that if legislative reform was pursued it could be tailored so that the immunity was retained but would not apply to 'flagrant incompetence of counsel or perhaps some other reprehensible factor causing miscarriage of justice'. Queensland Attorney-General, the Hon Rod Welford MP, has also suggested that gross blunders in managing litigation which risks a considerable amount of clients' money in legal costs should not be totally immune.<sup>48</sup> This approach would remove the immunity from liability for, at least, the worst types of negligent actions by advocates.

Immediately following the High Court's decision, the Victorian Attorney-General, the Hon Rob Hulls MLA, undertook to raise the issue at the March 2005 meeting of the Standing Committee of the Attorneys-General (SCAG). Mr Hulls did not believe there should be one rule for barristers and another for other professional or occupational groups.<sup>49</sup>

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<sup>45</sup> Janet Albrechtson, 'Parliament's role to raise the bar', *Australian*, 16 March 2005, p 15. Compare this with the opposing view of Kirby J in *D'orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12, paras 341-344.

<sup>46</sup> Michael Pelly, 'High Court fences lawyers off from blame', *Sydney Morning Herald* online, 11 March 2005. A consideration not given much weight by the joint judgement in *D'orta-Ekenaike* but was discussed by Callinan J.

<sup>47</sup> Luntz H & Hambly D, *Torts: Cases and Commentary*, (5<sup>th</sup> ed.), LexisNexis Butterworths, Australia, 2002, [para 2.7.17].

<sup>48</sup> Michael Pelly, 'A little backbone needed in legal immunity case', *Sydney Morning Herald* online, 21 March 2005.

<sup>49</sup> Rob Hulls, 'Barristers should be liable for negligence', *Australian Financial Review*, 23 March 2005, p 55.

The New South Wales Attorney-General, the Hon Bob Debus MP, commented that the High Court decision was anomalous. Queensland Attorney-General, the Hon Rod Welford MP, and Western Australia Attorney-General, the Hon Jim McGinty MLA, are reported as indicating that they will support reforms to remove the immunity. However, Hon Mr Welford MP is reported to have warned that any new legislation should not prevent advocates from pursuing all reasonable means needed to achieve justice for their clients or deter them from taking cases not likely to succeed.<sup>50</sup> The Queensland Attorney-General is reported as describing negligence laws as a quality control mechanism that would impact on the way advocates conducted themselves in court. In an article in the Australian Financial Review, Hon Mr Welford MP said that there was 'no reason why the same accountability, applying to every other professional, should not also apply to lawyers' and that 'it is only a matter of time before the jurisprudence of this country was aligned with reforms adopted elsewhere'.<sup>51</sup>

#### 4.1 MEETING OF STANDING COMMITTEE OF THE ATTORNEYS-GENERAL

SCAG considered the abolition of advocates' immunity at its meeting on 21-22 March 2005, with the push for reform led by the Victorian Attorney-General.<sup>52</sup>

It is reported that, at the Gold Coast meeting, SCAG agreed to commission an Options Paper to examine the matter and outline options, to be presented at the July 2005 meeting. Whereas the Victorian Attorney-General appears to favour total abolition of the immunity, it is reported that Queensland Attorney-General, Mr Rod Welford, would appear to favour a compromise suggested by NSW Attorney-General, Mr Bob Debus. That proposal would not totally remove the immunity but would define when it will and will not apply. This more limited approach appears to have been welcomed by the NSW Bar Association which is a strong supporter of retention of the protection for advocates.<sup>53</sup>

The Commonwealth Attorney-General, Mr Phillip Ruddock, has not expressed a strong view for or against retaining the immunity but has been reported as saying that any reforms must be uniform between all jurisdictions.<sup>54</sup>

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<sup>50</sup> 'Campaign to end lawyers' immunity', *Courier Mail*, 12 March 2005.

<sup>51</sup> Katherine Towers, 'States to break barrier', *Australian Financial Review*, 18 March 2005, p 58.

<sup>52</sup> Rob Hulls.

<sup>53</sup> Marcus Priest, 'Bad advice: barristers in the dock', *Australian Financial Review*, 22 March 2005, p 1.

<sup>54</sup> Marcus Priest.

## APPENDIX A – NEWSPAPER ARTICLES

**Title**            **Campaign to end lawyers' immunity**  
**Author**  
**Source**          **Courier Mail**  
**Date Issue**    **12 March 2005**  
**Page**            **7**

NEW laws allowing people to sue their negligent lawyers will be proposed at a national meeting of attorneys-general next week.

In an attack on the High Court yesterday, NSW Attorney-General Bob Debus said it was "absurd" and "ridiculous" that lawyers were protected from negligence claims.

The plans to override the existing immunity for lawyers is in response to a High Court ruling that not only confirmed the immunity but expanded it.

Queensland Attorney-General Rod Welford said he would support new laws removing lawyers' immunity from prosecution.

"There's no particular reason why lawyers should be exempt from negligence," he said. "I'm interested in reform of the law in this area."

But Mr Welford said the attorneys-general would have to ensure the laws did not prevent lawyers from pursuing all reasonable means to achieve justice for their clients or deter lawyers from taking cases they were unlikely to win.

Lawyers are the only professionals who have immunity from negligence claims in relation to court work.

Australia is one of the last common law countries to have such an immunity for lawyers.

Thursday's High Court decision was in response to Victorian man Ryan D'Orta-Ekenaïke, who wanted to sue his lawyer for wrongly advising him to plead guilty in a rape trial. The decision also expanded the protection to out-of-court work and extended the protection from barristers to solicitors.

**Title**            **Bad Advice: barristers in the dock**  
**Author**        **Marcus Priest**  
**Source**        **The Australian Financial Review**  
**Date Issue**    **22 March 2005**  
**Page**          **1**

State governments will consider keeping the immunity of barristers from being sued for negligent actions in the courtroom but scrapping the protection for advice they give clients before court appearances.

The compromise proposal to narrow barristers' immunity has won cautious support from the NSW Bar Association, which has so far been the most outspoken organisation in opposition of any reform.

Barristers have always been open to negligence actions for out-of-court advice - for example, in commercial matters - but in some cases they have been able to claim that the advice they gave was in the preparation for a court hearing and was therefore immune from a negligence action.

The issue of barristers' immunity was discussed yesterday at a meeting of the Standing Committee of Attorneys-General on the Gold Coast, which commissioned a paper to examine the issue and detail options on the matter.

Victorian Attorney-General Rob Hulls was most in favour of totally abolishing the immunity, but Queensland appeared to support the compromise proposed by NSW Attorney-General Bob Debus.

"There are obvious cases where there is negligence where the immunity is indefensible, but we have agreed to explore whether there are certain aspects of in-court professional representation which deserves a measure of protection," Queensland Attorney-General Rod Welford said. "Everyone accepts that in defending the rights of a client an advocate should be free to aggressively explore all arguments without risk of a law suit hanging over their heads to make them more conservative in their attempts to press their client's case."

Two weeks ago, the High Court ruled in D'Orta-Ekenaike that a barrister who had advised a client to plead guilty to murder could not be subject to a claim for negligence after the client was later found not guilty.

The case sparked calls for immunity to be scrapped and Victoria is leading a push for reform.

Yesterday, Mr Debus said he did not want to scrap immunity but define with more precision when it applied.

On the weekend Mr Debus told a NSW Bar Association dinner in Sydney that, in the face of evidence from countries where immunity had been abolished, it was not simply not possible for barristers to say the "sky would fall" if immunity were significantly constrained here.

However, extreme and populist views on the issue, which all too "eagerly embraces Dickensian caricatures" of the legal profession and the judiciary as tax dodgers, shonks, drunks and shysters all too eager to evade any measure of accountability were unhelpful, he said. Mr Debus's remarks echo those expressed by NSW Bar Association president Ian Harrison, SC, in an article in *The Australian Financial Review* last Friday in which he said it was unrealistic to abolish immunity for barristers and not for other participants in court proceedings.

Yesterday, Mr Harrison said he was happy with amendments which removed perceptions of gross unfairness while not destroying the maintenance of immunity in cases where it clearly should be maintained.

Federal Attorney-General Philip Ruddock said he wanted to see the further examination of the issue, but whatever action was taken had to be taken by all states. "I don't think it is going to be helpful that in one state this can be litigated and others it can't."

Victorian Attorney-General Rob Hulls said it was unrealistic for one group of people to be immune from negligence actions. "No public-interest reasons exist in contemporary Australian culture for allowing advocates an elevated status through immunity from suit, when all other socially useful and sometimes intensely demanding professions do not enjoy such immunity," Mr Hulls said.

"It is ridiculous to say that a surgeon can't be sued for what they did in an operating theatre, but they can be sued for advice they give in their rooms.

The irony is that a couple of years ago we had the same people arguing in the context of tort law reform that clients should not have their right to sue taken away from them and now they are saying that clients should not be given the right to sue them."

The state attorneys-general also yesterday agreed that they would finalise details of uniform national defamation laws at their meeting, after Mr Ruddock agreed that he and Mr Debus would resolve a disagreement between the state and federal governments over the rights of companies.

While Mr Ruddock has previously stated that a state proposal to abolish the right of companies to sue would unfairly affect small businesses, the agreement between



the states and the commonwealth to resolve the issue before the next meeting is being seen as a major breakthrough.

**Title**            **Barristers should be liable for negligence**  
**Author**        **Rob Hulls**  
**Source**        **The Australian Financial Review**  
**Date Issue**    **23 March 2005**  
**Page**         **55**

This month's majority finding of the High Court in the case of D'Orta-Ekenaike v Victorian Legal Aid upheld the law as it stands to continue to allow barristers who are negligent for the work they do in court, or in connection with court, to be immune from civil liability.

In doing so the High Court has placed Australia at odds with Britain, the United States, the European Union, New Zealand and Canada.

Michael Kirby, the only dissenting voice on the bench, rejected the notion that accomplished advocates and their instructing solicitors are in greater need of legal immunity than their counterparts elsewhere.

Kirby argued that barristers can no longer be considered gentlemen of an elevated status in contemporary society and that the nature of the modern provision of legal services suggests that advocacy is performed by lawyers generally, not just those who practise exclusively as barristers.

I agree with him. It is difficult to argue in 2005 that members of a particular occupational group should be exempt from laws relating to professional negligence when this immunity is not available to any other professions or occupational groups.

It is also difficult to see what sets lawyers apart from all other professionals.

The law is clear that people who suffer from a result of negligence by doctors, for example, can take legal action against the practitioner.

It is worth remembering that we are considering a group of professionals who, only a few years ago, expressed their strong and sustained outrage at changes to torts law on the basis that these would reduce individuals' ability to sue.

Now the same group is saying that clients should not be given the right to sue them.

Being a barrister in our society carries with it many privileges, including the ability to earn a high income.

It also carries with it serious responsibilities, such as providing advice and representation in their clients' best interests.

Where barristers are grossly negligent, clients should be able to pursue their basic right to seek legal redress.

Now fearful they will be treated like every other profession in Australia - and barristers in the rest of the common-law world - Australian barristers are drowning each other out with cries that the courts will be deluged with suits from discontented clients.

Instead they should be showing more faith in their own profession, which for the greater part conduct their cases with the utmost professionalism.

The Standing Committee of Attorneys-General agreed this week to consider nationally consistent reforms in this area, including abolishing barristers' immunity from civil liability.

It is expected that other options could include confining the immunity to criminal proceedings, restricting the immunity to work done in court or to work which is intimately connected with work done in court.

I hope these considerations are monitored by consumers of legal services as closely as they will be by barristers.

Rob Hulls is the Attorney-General of Victoria

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