

Introduction

A recent decision of the NSW Court of Appeal has clarified how far outside of the court room advocates' immunity will apply. In *Donnellan v Woodland*¹, a five member bench considered whether a legal practitioner found to be negligent in the provision of advice in respect of settlement was immune from suit by reason of the advocates' immunity.

The court consisted of five members as the correctness of three earlier Court of Appeal decisions² was in issue.

Facts of *Donnellan v Woodland*

In *Donnellan*, Mr Donnellan t/as P J Donnellan & Co acted as the legal representative to Mr Woodland in respect of an application made by Mr Woodland to the Supreme Court under the *Conveyancing Act 1919* for an easement over adjoining land owned by Manly Council.

Proceedings were commenced in December 1999 and in September 2001 the application was set down for hearing in February 2002. On 21 December 2001, the council made an offer of compromise by way of letter. Mr Donnellan's advice to Mr Woodland was to reject the council's offer and make a counter offer, which was done by way of letter dated 10 January 2002. Mr Donnellan also advised Mr Woodland that the *Conveyancing Act* provided that where an easement is granted to an applicant the ordinary costs order was that the applicant pay the defendant's costs. Further, Mr Donnellan advised that submissions would be made on behalf of Mr Woodland that the court should exercise its jurisdiction and should make either one of two orders: that the council pay Mr Woodland's costs; or that each party pay its own costs.

On 17 January 2002, the council made a counter offer which was rejected. It is unclear whether Mr Donnellan provided separate advice in respect of the 17 January offer.

On 12 May 2003, Mr Woodland's application was dismissed and an order was made that Mr Woodland pay the council's costs. An application for leave to appeal was refused and an additional costs order was made in favour of the council in respect of the appeal application.

Subsequently, Mr Woodland commenced proceedings in the Supreme Court of NSW against Mr Donnellan claiming damages for professional negligence alleging, inter alia, that Mr Donnellan had breached his duty of care in the course of advising Mr Woodland on the prospects of obtaining a favourable costs order and providing advice in respect of the council's offers of compromise.

At first instance, Justice R S Hulme found in favour of Mr Woodland. Justice Hulme was of the view that Mr Donnellan was negligent and found, after applying the test in *D'Orta-Ekenaike v Victoria Legal Aid*³, that Mr Donnellan was not immune from suit by virtue of the advocates' immunity. Mr Donnellan appealed on the ground, inter alia, that his Honour had erred in this respect.

Decision of the Court of Appeal

The Court of Appeal overturned the findings of negligence made by Hulme J. Given the time at the hearing dedicated to the question of whether the immunity applied, the court went on to consider it. The court ultimately found that Justice Hulme had erred in his Honour's

¹ [2012] NSWCA 433

² *Chamberlain v Ormsby t/as Ormsby Flower* [2005] NSWCA 31; *Attard v James Legal Pty Ltd* [2010] NSWCA 31; *Day v Rogers* [2011] NSWCA 124 (**challenged decisions**)

³ (2005) 223 CLR 1

application of the test in *D'Orta* and that Mr Donnellan was immune from suit. In so doing, the Court of Appeal extensively reviewed the case law on the immunity.

The test for advocates' immunity

It is helpful to briefly discuss the case law in which the advocates' immunity was first formulated in Australian law, especially the judicial statements on the extent to which advice will be protected by the immunity. In *Giannarelli v Wraith*, the High Court held that an advocate was immune from suit in negligence in the conduct of a case, or in work done out of court which leads to a decision affecting the conduct of the case in court.

On the question of the limits of the immunity, Mason CJ said:

'[It] would be artificial in the extreme to draw the line at the courtroom door. 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.'⁴

In *D'Orta*, the High Court affirmed its decision in *Giannarelli* and, in so doing, emphasised the underpinning public policy objective of the advocates' immunity to prevent re-litigation of disputes by way of collateral attack. The legislation in Victoria which was the relevant jurisdiction in *D'Orta* used the terminology 'work intimately connected with work in Court'. The High Court observed that there was no difference of significance between this language and the language of 'work out of Court which leads to a decision affecting the conduct of a case in Court'.

On the question of advice given to clients, McHugh J stated in *D'Orta*:

'The issue is whether the relevant connection with the conduct of the litigation exists, not the form of the negligence. An integral part of the advocate's role is the giving of advice on the basis of which the client will give instructions that direct the course of proceedings. The advice is critical to and often determinative of the client's decision.'⁵

Chamberlain v Ormsby t/as Ormsby Flower

Of the earlier decisions challenged by Mr Woodland, the case with the most similar facts to the matter of Donnellan was *Chamberlain v Ormsby t/as Ormsby Flower*.⁶

In *Chamberlain*, a claim was made against a solicitor by his former client arising out of workers compensation proceedings. On the day of the hearing of the client's application for determination of a lump sum payment, the barrister gave the client advice to the effect that the client should settle the matter. The client alleged that the solicitor had breached his retainer in failing properly to advise the client that he should pursue his common law entitlements rather than accepting a lump sum payment. The solicitor cross-claimed against the barrister for negligent breach of the barrister's retainer with the solicitor.

At first instance, the trial judge found in favour of the solicitor. On the cross-claim, the trial judge found in favour of the barrister on the basis that the barrister's advice had not been negligent. The client appealed to the Court of Appeal and the solicitor appealed the decision on the cross-claim.

The Court of Appeal overturned the primary judge's decision and remitted the matter as between the client and the solicitor for a new trial on the basis that the primary judge had failed to take into account certain considerations which the Court of Appeal held to be central to the determination of the claim.

On the appeal of the cross-claim, the two issues were:

- whether the primary judge had erred in finding that the barrister had provided negligent advice;
- if so, was the barrister immune from suit by virtue of the advocates' immunity.

⁴ *Giannarelli v Wraith* (1988) 165 CLR 543 at 559 - 560

⁵ *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 53

⁶ [2005] NSWCA 454

Justice Tobias (Giles and Basten JJA agreeing on this point) found that the barrister had not been negligent. In obiter, Tobias J went on to consider whether or not the advocates' immunity applied. His Honour concluded that the barrister was immune from suit by reference to the test in *Giannarelli*.

Justice Tobias (with whom Giles JA agreed on the issue of the application of the immunity) said of the subject advice (as to the effect of his acceptance of permanent loss compensation):

'That advice was critical to the decision of the appellant to accept the settlement that was being offered by the employer's workers' compensation insurer...It is difficult to imagine a stronger case than the present where the advice given by the barrister led to the appellant's decision as to the conduct of his case before the Compensation Court or which was more intimately connected with the course of that case including its settlement.'

Mr Woodland's argument

Prior to the hearing of the appeal Mr Woodland had given notice that he challenged the correctness of previous decisions of the Court of Appeal. However at the hearing he accepted that the prior decisions were correctly decided and instead contended that they were distinguishable on the basis that the alleged negligence of Mr Donnellan had not occurred close in time to the hearing and therefore did not satisfy the test of being intimately connected. Mr Woodland asserted that central to the decision in *Chamberlain* was that the advice given by the solicitor had been on the doorstep of the court on the day of the hearing.

The court did not share Mr Woodland's view. While it is true that the facts of *Chamberlain* were such that there was a temporal connection between the advice given and the conduct of the case, the court emphasised that it is the test of affecting the conduct of the case in court which is relevant and which must be satisfied regardless of the length of time since the advice was given.

Mr Woodland also contended that for alleged negligent conduct to attract the immunity, the conduct must have resulted in an outcome different than that which would have occurred but for the negligent conduct. Mr Woodland submitted that this contention was a corollary of the policy objective of the immunity i.e. to avoid the re-litigation of disputes. The Court of Appeal was not persuaded by this argument.

Mr Woodland also sought to rely on the decision of Justice Harrison in *Dansar v Pagotto*⁷ in which Harrison J was of the view that the immunity did not apply to advice given to a client to agree to bring proceedings to an end. The Court of Appeal respectfully did not agree with Harrison J's decision in *Dansar* and was not obliged to follow it.

The Court of Appeal reviewed the relevant case law and came to the view that the body of case law supported a finding that Mr Donnellan was immune from suit. The court took the view that the decision to continue with proceedings satisfied the second limb of the test. Accordingly, the court found, albeit in obiter, that Mr Donnellan was immune from suit.

Advocates' immunity as a preliminary determination?

Justice Beazley gave some consideration to the question of at what stage a decision as to the applicability of the advocates' immunity should be made - prior to a determination that negligent conduct had occurred or subsequent to that finding.

Justice Beazley noted that while the immunity bars any suit and could be determined first so as to save time and costs, it may be difficult to determine whether the immunity applies when the precise negligent conduct has not been established. In her Honour's view, there ought to be no fixed rule. While it was not possible in this matter to determine the application of the immunity first, Beazley JA noted that it may be possible to do so where the alleged negligent conduct clearly falls within the parameters of the immunity. However, given the likelihood that most litigated suits in negligence against legal practitioners will arguably fall outside of those parameters, it may often be necessary to establish as a matter of fact the work done that is the subject of the complaint.

⁷ [2008] NSWSC 112

Implications of Donnellan

Absent a decision of the High Court to the contrary, the decision of *Donnellan* is a clear indication of the breadth of advocates' immunity. Albeit strictly in obiter, the Court of Appeal has expressed the view that advice given in respect of settlement, that is either to continue proceedings in response to an offer of compromise or to resolve the proceedings, is work done which affects the conduct of a matter in court. The legal principle underpinning this contention is not the proximity in time between giving the advice and the matter proceeding to court, but that a decision to continue or discontinue proceedings can satisfy the test set down in *Giannarelli* and *D'Orta*.

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DISCLAIMER

This paper was prepared by YPOL (Katherine Allsop) in February 2013.

This update is intended to provide a general summary only and does not purport to be comprehensive. It is not, and is not intended to be, legal advice.

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