



JULY 2017

Advocate's Immunity Revisited, Revisited.

Practitioners will recall that in May 2016, in *Attwells v Jackson Lalic Lawyers Pty Ltd [2016] HCA 16*, the High Court affirmed the basic tenets of the doctrine of advocate's immunity (as explained in *Giannerelli v Wraith [1998] HCA 52* and *D'Orta Ekenaike v Victorian Legal Aid [2005] HCA 12*) in the face of calls for the doctrine to be abolished as has occurred in the United Kingdom and New Zealand. At the end of March this year the High Court again looked at the question of advocate's immunity in the case of *Kendirjian v Lepore [2017] HCA 13*.

In *Attwells* the High Court found that the policy underlying the doctrine (i.e. that the public interest in ensuring finality of court judgments meant that re-litigation of decided cases by collateral attack on the judgment and reasoning in those decided cases should be prevented) was sound. The facts of *Attwells* involved advice given to settle a litigious matter where the amount paid was greater than that which the client could have been liable for had the matter proceeded to judgment, even though it did not so proceed, because of the settlement. The Court said, that the immunity, whilst it should be abolished should not extend to cases where the conduct in question led to a settlement *by the parties* and no exercise of judicial power was involved.

The *Kendirjian* case also involved advice about settlements, however, this time the facts were reversed: an offer of settlement was rejected and the matter **did** proceed to judgment. What occurred was that in 1999 Mr Kendirjian was injured in a motor vehicle accident and his solicitor (Mr Lepore) commenced proceedings against the driver for damages. On the first day of the trial of this action the driver's lawyers made a settlement offer of a payment to Mr Kendirjian of \$600,000 plus costs. Mr Lepore and the barrister instructed in relation to the trial (Mr Conomos) rejected the offer as being "*too low*". The trial proceeded and Mr Kendirjian obtained judgment for \$308,432.75 plus costs.

Mr Kendirjian subsequently took proceedings against Mr Lepore and Mr Conomos alleging that they had been negligent in that on the first day of the trial neither of them had told him of the amount of the offer, they merely told him that an offer had been made. Mr Lepore and Mr Conomos filed defences relying on the immunity.

After the judgment in *Attwells*, Mr Lepore decided to no longer rely upon the immunity but Mr Conomos maintained his reliance on the immunity because the matter had been the subject of judicial determination.

The High Court found that the immunity doctrine did not extend to the advice given in relation to the settlement offer because the advice did not affect the judicial determination of the case, notwithstanding that there was in *Kendirjian* (unlike in *Attwells*) a judgment of the Court.

Edelman J stated that negligent advice not to settle a proceeding gives rise only to *historical* connection between the advice and the continuation of the litigation and that “*the giving of advice either to cease or to continue litigating does not **of itself** affect the judicial determination of a case*” (at [32]) (emphasis added). For the immunity to arise the relevant work must “*bear upon the court’s determination of the case*” such that there must be a “*functional connection between the work of the advocate and the determination of the case*” (at [31]).

Some lawyers (notably plaintiff lawyers who act in professional negligence matters – see *Advocates’s immunity – without fear or without favour, but not both, Alexander Hickson, Shine Lawyers, Lawyers Weekly 10 May 2017*) have called for immunity to be abolished, either by the High Court or by legislation.

The cases of *Attwells* and *Kendirjian* shows that the High Court is not about to abolish immunity but that it is going to be concerned to keep the doctrine within strict boundaries.

The specific lesson for practitioners from the facts in *Kendirjian* is never to assume what your instructions might be. Had Mr Lepore and Mr Conomos put the actual settlement offer to Mr Kendirjian on the first day of the trial and given him appropriate advice as to the risks of continuing with the litigation it is hard to think that their conduct would have ended up in the High Court. The general lesson for practitioners from these cases is to remain vigilant as to your duties when conducting litigation, irrespective of whether that litigation be concluded by a settlement or by a judgment.

GRANT FEARY

Deputy Director (Law Claims)

Email: gfeary@lawclaims.com.au

