Advocates' Immunity

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Ian Harrison and I have worked out an allocation of duties. I will discuss the background to the the most recent High Court decision upholding the immunity of barristers or advocates, including what has been happening in other jurisdictions. Ian Harrison will talk to you more about that decision and about the primary basis on which the immunity was upheld.

Immunity – negligence

I refer first to the context in which barristers' immunity arises — being the broader context of tort law and immunities generally. The immunity of barristers or advocates is one of only a few surviving express immunities in the law of negligence, which is the primary focus of that immunity.

Other express immunities: government authorities and the armed forces

Some other express immunities have been overturned quite recently. The most famous is that of a highway authority for failing to repair a roadway. That immunity was a relic transported to the colony from England, where parishes had the role of not just maintaining the roads, but also of educating the poor and looking after the sick. This immunity was overturned by the High Court in 2001 and has only been partially restored by the Civil Liability Act 2002.

Another immunity which is not often litigated is immunity of the armed forces for negligence towards combatants or civilians in the course of war, or warlike activity in peace time. The immunity does not, however, extend to civilian activities, for instance, to military personnel driving a vehicle, or to other ordinary exercises in peace time. So this immunity, for example, didn't extend to the injuries suffered in the *Voyager* disaster. This incident gave rise to a number of actions against the Commonwealth.

From an allegation of negligence to compensation

The foundation of a negligence action is the existence of a duty of care. Following on from that is the question of whether or not that duty has been breached. If so, did that breach cause the damage suffered by the plaintiff, is the damage not "too remote" from the negligent act or omission and what compensation would compensate for that damage?

Non-recognition of a duty of care for policy reasons

In other situations, rather than recognising an express immunity from action, the courts might achieve the same effect in a particular case by declining to recognise a duty of care owed by the defendant to the particular plaintiff.

For example, in *Sullivan v Moody* in 2001 the High Court rejected the claim of the father of a patient against a doctor and the hospital employing the doctor. The doctor had identified the father of the child as the likely abuser of the child, whom the doctor had examined. The High Court rejected the duty of care for a number of reasons: the most important being that to recognise that the doctor owed a duty of care to the

father in such circumstances would conflict with the doctor's statutory duty to have paramount regard to the interests of the child.
In 1989, in *Hill v The Chief Constable of West Yorkshire*, the mother of the last victim of the 'Yorkshire Ripper' sued the police for not protecting her daughter. The House of Lords refused to find a duty of care being owed by the police towards potential victims of criminals out in the community. To recognise that the police owed a duty of care towards members of the community in general would be undesirable for a number of policy reasons, including the fact that it might encourage defensive police practice rather than allowing police to get on with the job of catching criminals.

Duty of care to a third party

Duties may be limited in other ways. For example, a plaintiff must establish a duty to himself or herself. Generally this means that it is the client or the customer or the patient of a professional person who will be owed the duty and who will be the plaintiff and bring the action. In exceptional cases, however, a third party to the relationship has been able to bring a case against a professional person because of the negligent performance of the duties for the client. For example, a lawyer is liable to a potential beneficiary of a client's will if that beneficiary has missed out on a legacy because of the lawyer's bad drafting or because of negligent work or practice by the lawyer.
In 1997, the High Court in *Hill v Van Erp*, recognised such an action, holding that it would be unjust in such a case for the wrong to have no remedy. This is probably relevant to what we are discussing. The client would have had an action, but being dead, has suffered no loss. The beneficiary has suffered a loss but, without the recognition of the duty of care, would have no remedy. The court found a remedy.
More recently, courts in New South Wales have recognised that doctors too, in limited circumstances, might have a duty of care to a third party. For example, in 1999, in ***BT v Oei***, they recognised the duty of care to a sexual partner of a patient after the negligent failure to diagnose the patient's sexually transmitted disease.

Breach of the duty

But even where a legal duty of care can be established, the other ingredients of a negligence action must be met. The plaintiff must prove that the defendant breached the duty according to the relevant standard and caused damage to the plaintiff.

Reasonable standard of care

The plaintiff must show what the defendant should have done and/or said and what precautions the defendant should have taken. This has to be done according to the standard of the reasonable lawyer, the reasonable advocate, the reasonable doctor, the reasonable surgeon, the reasonable anesthetist, or whoever is responsible.
This is particularly difficult. From the example given to us by Dr Lizzio, I can see how difficult it would be to show any negligence on the part of the numerous persons who were involved in dealing with a woman who presents with such a problem in the middle of the night.

The law on negligence is no guarantee

A negligence suit is no guarantee that things will be made right; it does not guarantee safety or optimum results. It is not a strict liability, but is based on fault. The defendant's fault must be proved by the plaintiff.

Causation

Having established the duty of care and the breach thereof, the plaintiff must prove that the negligence was the necessary cause of the damage suffered. Causation is particularly difficult to prove in a case involving a barrister or an advocate. In

between the negligence of the advocate and the damage suffered by the plaintiff is the exercise of the judicial function - the judgment. It may be that although negligence has occurred, it would not be regarded as causing the ultimate damage suffered by the client or the plaintiff.

Damage

Finally, the damage must be the kind of damage that the law recognises will give rise to an action and as being compensable in money terms. So, whether there is immunity or not, a plaintiff will fail if he or she cannot prove all of those ingredients.

The advocate's immunity is limited

We need that background in mind when we look at the advocate's immunity. It is limited. It is not a general immunity from suit. It is limited to liability. The liability will usually arise in negligence or breach of contract. It can arise out of the conduct of a case in court and/or for the work done out of court which is intimately connected with the conduct of the case in court, or which leads to a decision affecting the conduct of a case in court.

Where immunity does not apply

Immunity does not, therefore, protect a barrister or solicitor-advocate from, for example, negligence in advice work or in general preparation for a hearing or a trial. It would not, for example, protect an advocate against advising the client to sue the wrong person or advising the client not to sue an appropriate person or forgetting about a person altogether. It would not apply where a limitation period is allowed to expire without commencing action. It would not apply to a failure to plead an appropriate defence to an action.

Different jurisdictions

Following decisions in the last three or four years in a number of key cases, the law differs between the United Kingdom, Australia and New Zealand.

The United Kingdom

Conflicting duties

In England, the key cases include *Rondel v Worsley.* In this criminal case in 1969, a barrister had accepted what was known as a 'dock brief'. The House of Lords upheld the immunity of the advocate in the conduct of this case in court, primarily because of the conflict which was seen to arise between the duty of the advocate to the client, and his duty to the court. (I return to this later.) In 1980, the House of Lords accepted the immunity in the civil case of *Saif Ali v Sydney Mitchell.* The House of Lords discussed the scope of the immunity, its extent, and to what it would apply.

Discouraging re-litigation

Apart from the barrister having conflicting duties, other reasons for keeping the immunity include the undesirability of allowing re-litigation of the criminal proceedings and, the 'cab rank' rule, (which I explain later). More recently, the House of Lords , in 2002, in *Arthur JS Hall v Simons* overturned the immunity. Although this was a civil claim, a majority of the House of Lords decided that the immunity should go in all cases, including criminal cases. The minority felt that the immunity should be retained in criminal cases. In this civil case, one of the plaintiffs claimed that his solicitors were negligent in failing to advise him to settle. The other two plaintiffs were in related cases concerning negligence in relation to financial settlements in divorce proceedings. In none of the cases had the case proceeded to a negligence claim. Rather, because the defendant had claimed immunity, the House of Lords was looking at it on the threshold point of whether or not the immunity applied.

Essentially, the reason for not retaining the immunity was that it was no longer necessary to protect the proper administration of justice . Their Lordships felt that the inherent jurisdiction of the court to strike out claims for abuse of process would protect the courts from vexatious and improper claims in the future. In addition, other principles apply, such as the doctrine of *res judicata*, which means that the parties cannot re-open a case after judgment – judgment is final. They would provide the protection that the a lack of immunity might not otherwise have provided.

Australia

In Australia some years ago, the High Court upheld the immunity in ***Gianarelli v Wraith***. Most recently, in ***D'Orta-Ekenaike v Victoria Legal Aid***, the High Court upheld the immunity, but on much more limited grounds.

New Zealand

In 2005, the Supreme Court overturned the immunity of advocates in a civil case. Interestingly though, in *obiter dicta* on this point, they also overturned immunity in relation to criminal cases as well. They held that any distinction between criminal and civil cases would be undesirable.

The defendants were the Lais, and a company which they owned. Their lawyer advised the court that the Lais would personally guarantee the payment of the judgment debt by the company, although, at a later time, the Lais objected to this. The Supreme Court decided that it would not extend the immunity to any out-of-court work. The Court also agreed with the House of Lords that, if immunity were to be removed, then the rules which prevent an abuse of process would provide an appropriate solution to protecting the finality of judgments.

Traditional grounds for immunity

These grounds, put up over the years in the various cases, have, one by one, been eroded until the High Court of Australia has allowed only the last ground to remain.

Ability to sue

Firstly, there has always been the argument that a barrister is not able to sue a client for non-payment of fees because there is (or was) no contract between the barrister and the client. This was seen by the High Court as irrelevant because any immunity would apply to solicitors or solicitor-advocates as well as to barristers. Therefore the immunity could not rest on this basis.

Duty to the court

A second important factor, probably the key factor in the earlier House of Lords cases, was the special role of the advocate, as an officer of the court with duties to the court, in the conduct of litigation. These duties exist at common law as part of the inherent jurisdiction of the court to regulate its process. This has since been confirmed by statute. The Legal Practitioners' Act, updated in most States, sets out the duties of officers of the court — duties which ensure that proceedings are concluded justly and fairly and with due regard to the integrity of the administration of justice. Did this situation give rise to a potential conflict if the advocate also had a duty to the court? The New Zealand Supreme Court saw these duties as complementary, and not in conflict. The duties to the court are the rules by which the litigation for the client is conducted. The client knows that. Therefore, the client could not object if what the advocate did was something which they were obliged to do because of their duty to the court.

In the *D'Orta* case, the High Court felt that there was no conflict between the advocate's duty to the court and their duty to the client. because the duty to the court

is paramount; in any event, they felt that the immunity was not just about duties, but had a much broader basis.

The 'cab rank' principle

The next traditional reason for the immunity was said to be the 'cab rank' principle. This encourages barristers to take any case that comes before them, thus ensuring that everybody has access to justice. The High Court thought that this, too, was irrelevant. The New Zealand Supreme Court felt that this argument for immunity was a factor that should not be exaggerated as it is an ethic shared by all professionals.

Urgent decision-making

The fact that advocates have to make decisions quickly and without pausing to articulate reasons is another argument for immunity. Surgeons will be comforted to know that the High Court said that, as with advocates, difficult immediate decisions have to be made by many others. Many professionals have to make equally difficult decisions at short notice and without time to think carefully about which way to go and without giving reasons. The courts felt that this was an irrelevant and distracting argument.

Threat of negligence proceedings

Another argument for immunity is the 'chilling' effect of the threat of negligence proceedings. The idea here is that, if barristers knew they were going to be sued, they would prolong trials because they would "pursue every rabbit down every burrow". Trials are long enough, hearings are long enough and there is a fear that they would be even longer if a barrister had to take every point because of the fear that his or her client might sue them if they didn't.

Defensive practice

Note, however, that a court can take into account the effect of encouraging or causing undesirably defensive practice when deciding whether a duty of care should, or should not, be recognised; in deciding what the scope of that duty is; whether or not it includes a duty to do a particular thing or to omit to do a particular thing; and also in deciding whether a defendant should be regarded as having breached a duty according to ordinary standards of reasonable care.

This is a factor relevant to medical practice. It is relevant, say, to the practice of the police. The court can take it into account when deciding whether or not a particular defendant was negligent. The High Court in the *D'Orta* case thought that while relevant, this argument again did not, on its own, support the immunity.

Absolute privilege of others involved in court proceedings

Another reason given to uphold immunity is that there is absolute privilege to those who conduct or are involved in court proceedings. There is certainly absolute privilege from liability in defamation. The New Zealand Supreme Court pointed out that this is an entirely different policy; it is one which encourages candour of participants in court proceedings. In their view, this has nothing to do with immunity from negligent claims. Finally, there is an analogy with the immunity given to others in the judicial system, for example judges, members of the jury, and so on. In New Zealand, the Supreme Court felt that this should not be a factor because judges, juries and others do not assume a duty of care to the particular party or client.

The primary reason for upholding immunity

So what was the reason that was held by the High Court of Australia to be the primary or sole reason for upholding the immunity? The High Court talked about the public interest, the integrity of the judicial system and, most particularly, the need for finality in court decision-making. They said, "a central and pervading tenet of the judicial

system is that controversies, once resolved, are not to be reopened except in a few narrowly defined circumstances." This was the key factor in the High Court's decision.

Criticism of upholding immunity

Peter Cane, a professor at the Australian National University, recently played quite a key role in drafting the recent civil liability legislation which has restricted liability. He has criticised the *D'Orta* decision. I quote from his article in the 2005 *Torts Law Journal*, where he criticises the High Court's decision on advocates' immunity. Professor Peter Cane said: *The conclusion must be then that by undermining most of the traditional foundations for the edifice of advocates' immunity and putting the full weight of the structure on the finality argument, the majority has so destabilised it, that D'Orta is unlikely to be other than a temporary staging post on the road to resolution of the important issues and principles it raises. It presents us with a dilemma. If we take the reasoning seriously, we are forced to brand the dismissal of the appeal as a mistake. On the other hand, if we accept the argument as correct, we must reject most of the reasoning as mistaken and irrelevant. Neither conclusion is satisfactory and I believe that the rule is in a state of considerable confusion.*

So having given you the other side of the debate, I hand you over to Ian Harrison, who has the unenviable task of defending the immunity.