

## **Advocates' Immunity**

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### **Failure to communicate**

Whenever the topic of so-called barristers' immunity is raised in the context of the medical profession, I am reminded of that famous line from the movies – “what we have here is a failure to communicate”. This failure is not necessarily always inadvertent. Nothing seems to raise the passions of medicos, who pay high premiums for professional indemnity insurance, as much as the notion that some other body of professionals - probably especially lawyers - can escape the consequences of negligent conduct, writ large for all to see in a public forum, when the doctors are unable to escape the consequences of something apparently as insignificant as a failure to warn a patient of a 1:1,000 chance of some minor surgical side-effect.

### **Immunity for advocates**

Even the formulation of this topic has a bit of an edge to it. For starters, the immunity is not an immunity of barristers but an immunity of advocates. Barristers and solicitors alike have a right of appearance in all courts. In terms of the consequences that flow from anything done, or omitted to be done, by them in the course of conducting a case, they will be treated in the same way. For that reason, if one poses the question, “Why are they special?”, the answer is that barristers are not special – the rule applies to advocates generally.

In the recent decision of *D'Orta*<sup>1</sup>, a slight difference of opinion also arose about whether or not advocates were, in fact, given an immunity from suit or were simply operating in circumstances where they owed no duty at all. For all practical purposes that distinction is somewhat esoteric - possibly interesting to lawyers but of absolutely no interest to doctors. I shall not dwell on it.

### **No special deal**

What needs to be understood and appreciated is that advocates' immunity from suit is not now the result of a rule formulated by a court for their protection. It is a collateral consequence or result of the application of a much broader, and indeed much more fundamental, principle.

The way that the question has been framed, and unfortunately the way the subject is so often discussed, make it look as though some private or special deal has been done by lawyers for lawyers, to the exclusion of all others. This has created, and continues to this day to create, resentment amongst, in particular, health care professionals.

### **Not due to the need for quick thinking**

One of the reasons for this resentment is that advocates' immunity from suit in limited circumstances was for a time erroneously promoted as a necessary function of the type of work they were required to perform in court. Decisions had to be made instantaneously, whereas minds might subsequently differ about whether their action was right or wrong. It would be unfair to impose upon them legal consequences for having chosen what ultimately turned out to be the wrong course.

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<sup>1</sup> (2001) 223 CLR 1

This never was, and certainly is not now, a proper justification for the maintenance of advocates' immunity.

### **Many professions make fast and stressful decisions**

I remember appearing some years ago at a coronial inquest into the death of a woman whose surgeon had attempted to perform an extraordinary anterior spinal fusion involving the placement of significant hardware on several levels of her lumbar spine. In the course of preparing this approach, the surgeon managed to nick either the vena cava or a significant descending arterial vessel. As a consequence, her abdominal cavity quickly filled with blood. In the absence of a vascular surgeon, no adequate repair was possible and the woman died within 24 hours. That surgeon had had to make instantaneous decisions in a very stressful situation. He would have every reason to feel slightly miffed if he were unable to defend, upon the basis of the heat of the moment and so forth, an exposure to claims for negligence, where a barrister in a cognate situation were somehow completely protected.

### **No doctrine of "agony of the moment".**

Whatever protection advocates might receive, it has absolutely nothing to do with the "agony of the moment" doctrine or anything vaguely like it. That old wives' tale has recently been hit over the square leg boundary.

As the majority in the High Court said in *D'Orta*<sup>2</sup>:

"It is as well to mention at this point a further consideration that must be put aside as irrelevant. It may readily be accepted that advocates must make some decisions in court very quickly and without pausing to articulate the reasons which warrant the choice made.

But so too do many others have to make equally difficult decisions. Reference to the difficulty of the advocate's task is distracting and irrelevant."

### **Central tenet - finality**

The "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".<sup>3</sup>

Prior to *D'Orta*, the principal Australian decision in this area of the law was *Giannarelli v Wraith*<sup>4</sup>, a case which stressed "the place that an immunity from suit has in a series of rules all of which are designed to achieve finality in the quelling of disputes by the exercise of judicial power".

### **Example 1 – A civil trial**

The following example illustrates the importance of this tenet. A mother, who gives birth to a child suffering from spastic quadriplegia, sues the hospital in which the child was born. As well as suing her obstetrician, she sues the anaesthetist (the child was ultimately delivered by Caesarian section), a neonatologist and a paediatrician, alleging all manner of failings on their part as a cause of the child's condition. Each defendant, as well as the plaintiff, is represented by a separate barrister and probably senior and junior counsel. The mother recovers damages on behalf of the child, but is dissatisfied with the outcome, even following an appeal. She proposes to sue her barrister for not asking a series of questions which she had prepared for him or her to ask the defendants.

Coincidentally, one or other of the defendants is dissatisfied with the performance of their barrister at the trial. They neither cross-examined the mother with sufficient vigour to make good some defence to the claim for negligence, nor, in the alternative, did they cross-examine one or other of the defendants to bring forth failings on their part which wholly caused the

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<sup>2</sup> *id*

<sup>3</sup> *id.*

<sup>4</sup> (1988) 165 CLR 543

problem. This would have excluded that particular doctor from the claim. The original decision, in this case conclusively sealed by the Court of Appeal, is therefore, all of a sudden, up for grabs.

### **Re-litigation**

Did the plaintiff succeed in establishing her case because the evidence at the trial satisfied the judge and the Court of Appeal that she had made out her case? Or did she succeed because the line of communication between the advocates and the court was somehow so corrupted by negligence that the judge's decision was, in effect, made on a false premise or on a series of them, leading to an award of damages inadequately assessed? Should the plaintiff's barristers in those circumstances be required to make up the difference?

Success by the mother in a suit against her barrister, if that occurred, would effectively contradict both the original decision and that of the appellate court in the findings made at the end of the trial and the appeal. There would necessarily need to be a re-litigation of significant portions of the original case, with the prospect of a quite different outcome.

### **Administration of justice**

As a matter of policy, this is a very dangerous thing to ignore. As Chief Justice Mason said in *Giannarelli*<sup>5</sup>, "The barrister's immunity, if it is to be sustained, must rest on considerations of public policy". He stressed "the injury to the public interest that would arise in the absence of the immunity". As the majority said in *D'Orta*:<sup>6</sup>

"Of the various factors advanced to justify the immunity 'the adverse consequences for the administration of justice which would flow from the re-litigation in collateral proceedings for negligence of issues determined in the principal proceedings' was held to be determinative. The significance of the reference to the administration of justice is of fundamental importance to the proper understanding of the immunity and its foundation."

### **Example 2 – A criminal trial**

Another example emphasises the point in a slightly different way. The accused is put on trial for a series of brutal child sex offences, including murder, is convicted and sentenced to a considerable period in gaol.

Dissatisfied with the performance of his counsel at the trial, he commences proceedings against him or her, claiming damages for negligence. The damages particularised in the claim include loss of income for the next 30 years, general damages associated with the pain and inconvenience of lengthy incarceration and so forth.

### **Re-litigation**

The trial proceeds in the absence of a rule providing for advocates' immunity. The barrister is found to have negligently failed to call a particular witness or a series of them or to have raised, contrary to instructions, a particular defence or to have failed to take some technical point on the admission of evidence.

The civil court, dealing with the issues on the balance of probabilities, comes to the conclusion that the barrister made one or some of the mistakes complained of and orders damages to the long-term inmate amounting to some millions of dollars. (I should note in passing that the theoretical murdering child molester in this case was a prominent colo-rectal surgeon earning a very nice income; hence the correspondingly high loss and damage.)

### **Confidence in the justice system**

The tabloid papers, of course, have a field day with the idea that a vicious murderer should be entitled to recover seven figure damages for his own use, even though a criminal jury had

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<sup>5</sup> *id.*

<sup>6</sup> *ibid.*

convicted him and a judge had considered that he should be locked away for the rest of his life. Even though the finality of the original criminal conviction is not called in question, the circumstances which led to that conviction are immediately shown to be shaky.

In terms of public confidence in the criminal justice system, a policy of maintaining advocates' immunity is directly aimed at avoiding or preventing the slightest possibility of erosion of confidence in that system. Moreover, the possibility of the inconsistency between the two decisions - one criminal, one civil - does not, of itself, demonstrate that the original conviction was flawed, but it will obviously not prevent speculation on this score.

In the long term interests of the administration of justice, even speculation about such matters cannot be permitted to arise.

### **Consistency of outcomes**

It should not pass without notice that the disgruntled prisoner would, in any event, have had an opportunity to raise perceived failings on the part of his barrister in an appeal to the Court of Criminal Appeal. However, in the absence of the immunity, exoneration of the barrister by the Court of Criminal Appeal would not operate as a bar to the commencement of civil proceedings by the client against that barrister. This is another obvious source of apparent inconsistency which the immunity, as a matter of policy, seeks to avoid.

### **Quelling controversies**

As the court in *D'Orta*<sup>7</sup> made clear, the "unique and essential function" of the judicial branch is the quelling of controversies by the ascertainment of the facts and the application of law. Once the controversy has been quelled, it is not to be re-litigated. Yet re-litigation of the controversy would be an inevitable and essential step in demonstrating that an advocate's negligence in the conduct of the litigation had caused damage to the client.

The court in *D'Orta*<sup>8</sup> clarified emphatically that the issue is not that of advocates' being accorded some special status above that presently occupied by members of other professions.

### **Immunity for all in the trial process**

Another way of bringing the point into some focus is to realise that not only advocates, but others in the trial equation, are similarly protected.

As a barrister for the past almost 30 years, and in particular as President of the Bar Association, I was concerned to ensure that the rules governing advocates' immunity were not altered. There was considerable political flurry about this issue towards the end of my term, in 2005.

### **Immunity for judges**

Recent events have led me to turn my attention with heightened interest to the fact that immunity from suit also extends to any judicial act done within jurisdiction.

### **Immunity for witnesses**

More importantly, for the benefit of those called upon to give expert medical or technical evidence, the immunity also extends to them.

It is said that the immunity of witnesses serves to encourage "freedom of expression" or "freedom of speech", so that the court has full information about the issues raised in the case.

### **Immunity for the jury**

Presumably also, although the High Court made no specific reference to it, members of a jury are also immune from suit for what might later be alleged to be the consequences of a decision arrived at negligently, perversely and so on.

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<sup>7</sup> *id.*

<sup>8</sup> *id.*

### **Abolish all Immunities**

The majority in *D'Orta*<sup>9</sup> drew attention to the fact that those urging the abolition of advocates' immunity advanced no argument to the court in favour of the abolition of judicial or witness immunity. As the majority judgment pointed out, if those immunities remain, it follows that re-litigation of a dispute could not and would not examine the contribution of a judge or a witness to the events complained of, but only the contribution of the advocate. In that circumstance, an exception to the rule against the reopening of controversies would exist, but one of an inefficient and anomalous kind.

### **Public policy - the only proper justification**

It is also worth noting that no argument in support of maintaining advocates' immunity, apart from the underpinning matter of policy to which I have referred, was accepted by any member of the majority in *D'Orta*<sup>10</sup>. For example, arguments that, were the immunity abolished, barristers' and solicitors' legal professional indemnity premiums might go up if they were rendered liable to suit for in-court work, were simply discarded as irrelevant.

Similarly, the suggestion that the cab rank rule (affording access for all prospective litigants to counsel of their choice) might in some fashion be ignored or distorted to the detriment of those seeking representation, was also treated as an insufficient justification, either alone or in combination with any other non-policy principle, for the abolition of the immunity.

The majority of the court consistently reverted to the notion that the existence of advocates' immunity was a collateral consequence of the enforcement of a larger principle - one overriding public policy. It was not the result of a decision to favour advocates for one or a number of other specific reasons why they should be treated in a special way. Indeed, to answer the question posed in the title, "Why are advocates special", the answer is, quite bluntly, that they are not.

### **Barristers can be Sued**

Finally, I hasten to remind you that barristers and solicitors are liable to be, and regularly are, sued for work performed by them in other capacities. Examples are negligent advice, negligent drafting and indeed, failure to turn up at court. You might chuckle, but it has happened. It is only in-court work as an advocate, or out-of-court work so intimately connected with advocacy that it should be treated as in-court work, which is the subject of the immunity.

### **Justice Kirby's reasoning to abolish advocates' immunity**

Justice Kirby was a lone minority in *D'Orta*<sup>11</sup>. I have, in this paper, not dealt with his reasoning, but in allowing the appeal and arguing for abolition of the immunity, Justice Kirby summarises his conclusions at paragraphs 346 and 347 of the judgments. No doubt many doctors with sufficient interest in this topic will have pored over paragraph 346 and 347 in the fond hope that it will, one day, be given some impetus and be catapulted into law. If not, the doctors amongst you might, before long, feel impelled by the papers on this topic to do so.

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<sup>9</sup> *id.*

<sup>10</sup> *id.*

<sup>11</sup> *id.*