Attwells v Jackson Lalic Lawyers Pty Limited – High Court retains advocate's immunity from suit but holds that out of court settlements are outside its scope

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Introduction

1. The High Court of Australia in *Attwells v Jackson Lalic Lawyers Pty Limited*[1] has unanimously declined to reconsider its previous decisions in *Giannarelli v Wraith* ("**Giannarelli**")[2] and *D'Orta-Ekenaike v Victoria Legal Aid* ("**D'Orta**")[3] which stated that, at common law, an advocate could not be sued by his or her client for negligence in work done in court, or work done out of court which led to a decision affecting the conduct of the case in court, or work which was intimately connected with work in court.

2. However, a majority of the High Court held that the advocate's immunity from suit did not extend to negligent advice which led to the settlement of a case by agreement between the parties because the advice to settle did not contribute to the judicial determination of the proceedings. The circumstance that the settlement was embodied in consent orders made by the court did not alter this conclusion.

3. The majority's decision is a rejection of the more expansive view of the scope of the immunity which has been applied by many courts in recent years.

Background

4. The first appellant and another person ("**Guarantors**") guaranteed payment of the liabilities of a company to a bank. The debtor company was the trustee of the Guarantors' farming business. The Guarantors also granted mortgages over certain farm properties in favour of the bank.

5. The company defaulted on its obligations to the bank.

6. The bank appointed receivers and the bank and the receivers commenced proceedings against the company and the Guarantors in the Supreme Court of New South Wales seeking possession of the farm properties and judgment for outstanding moneys ("**Guarantee Proceedings**").[4]

7. The Guarantee Proceedings came on for hearing before Rein J. By that time, the amount of the company's indebtedness to the bank was almost $3.4 million.

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[1] [2016] HCA 16.
[2] [1988] HCA 52; (1988) 165 CLR 543.
[3] [2005] HCA 12; (2005) 223 CLR 1.
[4] A mediation pursuant to the *Farm Debt Mediation Act 1994* (NSW) had taken place prior to the commencement of the Guarantee Proceedings.

However, the Guarantors' liability under the guarantee was limited to $1.5 million plus interest and enforcement costs. The total amount owing under the guarantee, as certified by the bank on the opening day of the hearing, amounted to $1,856,122.28.

8. In the afternoon of the opening day of the hearing, the Court was informed that the parties had settled the proceedings. The hearing of the proceedings was then adjourned by the Court to permit terms of settlement to be prepared.

9. On the next day, consent orders signed by the parties were submitted to the Court. The consent orders comprised the following:

    - A section containing orders of the Court which included:
        - verdict and judgment for the bank against the Guarantors and the company in the sum of $3,399,347.67;
        - orders that the Guarantors give to the bank possession of certain mortgaged properties and water rights; and
        - leave to the bank to issue writs of possession forthwith.

    - A section recording the noting by the Court of an agreement between the parties which included terms that:
        - the bank would not enforce the orders provided that the Guarantors and the company paid to the bank the sum of $1,750,000 ("**Settlement Sum**") by a specified date;[5]
        - if the Guarantors and the company failed to comply with their obligations, the bank would be at liberty to enforce the orders forthwith;
        - if the Guarantors and the company complied with their obligations, then upon payment of the Settlement Sum, the bank would provide discharges of the mortgages over the properties and water rights and would return the guarantees and covenant not to sue in respect of the guarantees.

10. The Court subsequently made the orders and noted the agreement between the parties.

11. The Settlement Sum was not paid to the bank by the specified date.

12. The Guarantors and the company sought to set aside the judgment and orders as an unenforceable penalty, but Pembroke J of the Supreme Court of New South Wales dismissed the claim.[6] His Honour said, amongst other things, that the commercial substance of what had been agreed between the parties was that, if the Guarantors paid the Settlement Sum, the Guarantors would retain the farm properties and be able to continue their farming business, something which was of considerable benefit to them. His Honour also said as follows:

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[5] The specified date was a date approximately 5 months after the settlement.
[6] *Attwells v Marsden* [2011] NSWSC 38.

> *"It is irrelevant that, prior to reaching the agreement embodied in the consent orders, the legal liability of the Guarantors was limited to $1.5 million plus further lesser amounts. The Guarantors were legally advised. By the consent orders, they negotiated and agreed to the formulation of new rights and liabilities that bound them. They asked the court to make orders reflecting their agreement. Those orders reflected a new 'bargain' which was freely entered into by them."*[7]

Proceedings against the Solicitors

13. Proceedings were then brought in the Supreme Court of New South Wales against the solicitors ("**Solicitors**") who had advised and acted for the Guarantors in the Guarantee Proceedings alleging that the Solicitors had been negligent in advising the Guarantors to consent to judgment being entered against them in the terms of the consent orders, and in failing to advise them as to the effect of the consent orders ("**Negligence Proceedings**").[8]

14. The Solicitors admitted giving certain advice in respect of the consent orders but denied negligence and also relied on the advocate's immunity from suit.

15. Schmidt J, by consent of the parties, ordered that the question of whether the claim was defeated entirely because the Solicitors were immune from suit should be decided separately from the other issues in the Negligence Proceedings.[9]

16. The matter then proceeded on the basis of a statement of agreed facts which assumed, for the purpose of the determination of the separate question, that the Solicitors had given negligent advice.

Hearing before the trial judge

17. The hearing of the separate question came before Harrison J.[10]

18. His Honour's preliminary view was that advocate's immunity applied. However, his Honour declined to answer the separate question because of his concern that this view was reached upon a hypothetical basis when what was required to properly determine the question was a comprehensive exposure and understanding of the negligence case.

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[7] Above, n 6, at [11].
[8] It seems that both guarantors were at some stage declared bankrupt. The second appellant became a party to the proceedings by virtue of an assignment to him by the first appellant's trustee in bankruptcy of the first appellant's rights against the Solicitors. The co-guarantor's trustee in bankruptcy apparently did not wish to join in the proceedings.
[9] *Attwells v Jackson Lalic Lawyers Pty Limited* [2013] NSWSC 925.
[10] *Attwells v Jackson Lalic Lawyers Pty Ltd* [2013] NSWSC 1510.

Appeal to the Court of Appeal

19. The Solicitors then sought leave to appeal to the New South Wales Court of Appeal.

20. The Court of Appeal (Bathurst CJ, Meagher and Ward JJA agreeing) granted leave to appeal and upheld the appeal.[11]

21. The Court of Appeal, applying *D'Orta* and *Giannarelli*, said that the work fell within categories of work done out of court affecting the conduct of the case in court, or was work intimately connected with the conduct of the Guarantee Proceedings, because the alleged breach had occurred in advising on settlement of the Guarantee Proceedings during the course of the hearing and that advice had led to the Guarantee Proceedings being settled.

22. The Court of Appeal further said that the Negligence Proceedings involved a re-agitation of the issues raised in the Guarantee Proceedings because it would be necessary to determine whether in fact the Solicitors' advice had been negligent and that this offended against the principle of finality of litigation.

23. Accordingly, the Court of Appeal held that the advocate's immunity from suit was a complete answer to the claim.

Appeal to the High Court

Question on appeal and decision

24. By grant of special leave, the appellants appealed to the High Court. The Law Society of New South Wales ("**Law Society**") sought leave to intervene and leave was granted.

25. The appeal was concerned solely with whether the advocate's immunity was a separate and complete answer to the appellants' claim.[12]

26. The appellants submitted that advocate's immunity did not extend to negligent advice which led to the settlement of a case by agreement between the parties. In the alternative, it was submitted that the High Court should reconsider its decisions in *Giannarelli* and *D'Orta* because these did not rest upon a principle carefully worked out from the authorities, the judgments in *D'Orta* left the scope of the immunity unclear and the degree of inconsistency between the immunity and its rationale was such that the High Court should follow other common law systems and abolish the immunity.[13]

27. The Solicitors submitted that negligent advice which led to an agreed settlement of proceedings was within the immunity and that the High Court should not reopen

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[11] *Jackson Lalic Lawyers Pty Limited v Attwells* [2014] NSWCA 335.
[12] Above, n 1, at [26].
[13] Above, n 1, at [4]; [27].

Giannarelli and *D'Orta*. The Law Society made submissions to the same effect but addressed broader considerations and interests.

28. The High Court (French CJ, Kiefel, Bell, Gageler and Keane JJ, Nettle and Gordon JJ dissenting) allowed the appeal and answered the separate question in the negative.

Joint majority's reasoning

Whether *Giannarelli* and *D'Orta* should be reconsidered

29. The joint majority (French CJ, Kiefel, Bell, Gageler and Keane JJ) noted[14] that the plurality in *D'Orta* had confirmed the statement in *Giannarelli* as to the scope of the immunity when their Honours had said:

> "*[T]here is no reason to depart from the test described in Giannarelli as work done in court or 'work done out of court which leads to a decision affecting the conduct of the case in court'… or … 'work intimately connected with' work in a court. (We do not consider the two statements of the test differ in any significant way.)*"[15]

30. The joint majority further noted that the abolition of the immunity would require the High Court to overrule *D'Orta* and *Giannerelli*.[16] The joint majority, however, declined to do this for three reasons.

31. First, the joint majority said that such an alteration of the law should be left to the legislature as overturning *Giannarelli* and *D'Orta* would create a legitimate sense of injustice in those who had not pursued claims or who had compromised or lost cases by reference to the state of the law as settled by those cases during the years when they were authoritative statements of the law.[17]

32. Second, the joint majority said that the questions raised as to the rationale for the immunity and its scope had been fully argued in *Giannarelli* and *D'Orta* and that no argument of principle or public policy had been advanced by the appellants which had not been appreciated or addressed in those cases.[18]

33. Third, and as the joint majority said, "more importantly", *D'Orta* stated a rule which was:

> "*consistent with, and limited by, a rationale which reflects the strong value attached to the certainty and finality of the resolution of disputes by the judicial organ of the State.*"[19]

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[14] Above, n 1, at [3].
[15] Above, n 3, at [86].
[16] Above, n 1, at [5].
[17] Above, n 1, at [28].
[18] Above, n 1, at [29].
[19] Above, n 1, at [30].

34. To explain why this was so, the joint majority reviewed the reasons of the plurality in *D'Orta* and:

- noted that the plurality had referred to the various reasons for the immunity discussed in *Giannarelli* and had said that, of those various reasons, 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 had been held to be determinative;[20]

- said that the plurality had accepted that the rationale of the immunity was rooted in the role of the advocate engaged, as an officer of the court, in the exercise by the court of judicial power to quell a controversy and that the plurality had then gone on to emphasise the binding nature of judicial decision-making as an aspect of the government of society;[21]

- indicated that the plurality considered that, to speak of the exercise of judicial power to quell a controversy as an aspect of government, was to make it clear that the immunity was not justified by a general concern that controversies should be brought to an end, but by the specific concern that once a dispute had been finally resolved by the exercise of the judicial power of the State, the dispute should not be reopened by a collateral attack which sought to show that that judicial determination was wrong;[22] and

- said that the plurality had explained that where a final order had been made resolving litigation, a claim that "but for the advocate's conduct, there would have been a different result" was objectionable as a matter of public policy because the claimant would be seeking to complain about consequences flowing from a lawful result lawfully reached and that, therefore, the advocate's immunity was justified as an aspect of the protection of the public interest in the finality and certainty of judicial decisions by preventing a contention that the decisions were not lawfully reached.[23]

35. Thus, the joint majority concluded that:

- there was a clear basis in principle for the existence of the advocate's immunity; and

- the common law of Australia, as expounded in *D'Orta* and *Giannarelli*, reflected the priority accorded by the High Court to the values of certainty and finality in the administration of justice as it affected the public life of the community.[24]

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[20] Above, n 1, at [32].
[21] Above, n 1, at [33].
[22] Above, n 1, at [34].
[23] Above, n 1, at [35].
[24] Above, n 1, at [36].

36. Accordingly, the joint majority declined to reconsider *Giannarelli* and *D'Orta*.[25]

Whether the immunity extended to settlements

37. The joint majority however, went on to say that its review of *D'Orta*, and the identification of the public policy underpinning advocate's immunity showed that the scope of the immunity for which *D'Orta* and *Giannarelli* stood was confined to conduct of the advocate which contributed to a judicial determination.[26] According to the joint majority, it was clear from *D'Orta* that:

> "*it is the participation of the advocate as an officer of the court in the quelling of controversies by the exercise of judicial power which attracts the immunity. Because that is so, the immunity does not extend to acts or advice of the advocate which do not move litigation towards a determination by a court. In particular, the immunity does not extend to advice that leads to a settlement agreed between the parties. …*
>
> *… While the plurality in D'Orta did not state explicitly that advice leading to an out of court settlement was outside the scope of the immunity, it is apparent on a fair reading of their Honours' reasons that the rationale of the immunity does not extend to advice which does not move the case in court toward a judicial determination.*"[27]

38. The Solicitors had relied on the decision of the Court of Appeal of New Zealand in *Biggar v McLeod*[28] to support their argument for a wider reach to the immunity but the joint majority said, amongst other things, that the expansive view of the scope of the immunity which had been taken in that case had "effectively strengthened" the case for the abolition of the immunity that had later occurred in New Zealand[29] and that an extension of the immunity to advice which led to a settlement of proceedings:

> "*undermines the notion of equality before the law by enlarging the circumstances in which lawyers may be unaccountable to their clients.*"[30]

39. Nevertheless, the joint majority accepted that negligent advice to plead guilty in a criminal case, as had been allegedly given in *D'Orta*, did affect the determination of the case by the court and was within the operation of the immunity. This was said to be because the court could not proceed to conclude its function until a conviction was recorded. The timing of the plea would affect the sentence imposed, in particular, whether the plea was entered at the first reasonable opportunity and the judicial

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[25] Above, n 1, at [37].
[26] Above, n 1, at [37].
[27] Above, n 1, at [38]-[39].
[28] [1978] 2 NZLR 9.
[29] Above, n 1, at [41].
[30] Above, n 1, at [41].

function would be squarely engaged in determining whether to accept a guilty plea as a court might not accept it unless satisfied that it was freely made by the accused.[31]

40. The joint majority went on to say:

> "*Once it is appreciated that the basis of the immunity is the protection of the finality and certainty of judicial determinations, it can be more clearly understood that the 'intimate connection' between the advocate's work and 'the conduct of the case in court' must be such that the work affects the way the case is to be conducted so as to affect its outcome by judicial decision. The notion of an 'intimate connection' between the work the subject of the claim by the disappointed client and the conduct of the case does not encompass any plausible historical connection between the advocate's work and the client's loss; rather, it is concerned only with work by the advocate that bears upon the judge's determination of the case.*"[32]

41. The Solicitors had also argued that it would be anomalous to hold that the immunity did not cover negligent advice which led to a disadvantageous settlement but did cover negligent advice not to settle which led to a judicial decision which was less advantageous to the client than a rejected offer of settlement. It was submitted that in both cases the advice would be intimately connected with the proceedings.[33]

42. The joint majority, however, described the assumption that negligent advice not to settle was "intimately connected" with the ensuing judicial decision as unsound because such advice would not have any bearing on how the case would thereafter be conducted in court nor would it shape the judicial determination of the case. Furthermore, the joint majority said that this assumption depended on the view that a mere historical connection between the negligent advice and the outcome of the case, in the sense that one event preceded the other as a necessary condition of its occurrence, was the intimate connection which was required to engage the immunity when what was required was a functional connection between the work of the advocate and the determination of the case by the court.[34]

43. The joint majority also rejected a submission by the Solicitors that in the case of an alleged negligent advice not to settle, it could be expected that the advocate would seek to defend himself or herself by arguing that the judgment was wrong and that his or her advice was right. The joint majority said in answer to this submission that:

    - the question would not be whether the judgment was right or wrong, but rather whether the advice was reasonable in all the circumstances known to the advocate at the time he or she gave the advice; and

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[31] Above, n 1, at [43]-[44].
[32] Above, n 1, at [46].
[33] Above, n 1, at [47].
[34] Above, n 1, at [48]-[49].

- if the judgment was wrong, this should be able to be shown on appeal and, if it could not be so shown, then that would tend to confirm that the negligent advice had nothing to do with the judgment.[35]

44. The Solicitors had also submitted that to differentiate between the two types of cases could discourage advocates from giving frank advice in favour of settlement. This submission had been supported by the Law Society which had emphasised that public policy favoured the settlement of litigation.[36] The joint majority, however, stressed that, while there was a public interest in the resolution of disputes, the public policy which justified advocate's immunity was not concerned with the desirability or otherwise of settlements, but with the finality and certainty of judicial decisions.[37] The joint majority further said:

> "*Decisions by the courts, as the judicial organ of the State, are necessary precisely because the parties cannot achieve a compromise of their disputes. The advocate's immunity is grounded in the necessity of ensuring that the certainty and finality of judicial decisions, values at the heart of the rule of law, are not undermined by subsequent collateral attack. The operation of the immunity may incidentally result in lawyers enjoying a degree of privilege in terms of their accountability for the performance of their professional obligations. But this incidental operation is a consequence of, and not the reason for, the immunity. Because this incidental operation of the immunity comes at the expense of equality before the law, the inroad of the immunity upon this important aspect of the rule of law is not to be expanded simply because some social purpose, other than ensuring the certainty and finality of decisions, might arguably be advanced thereby.*"[38]

Whether the consent orders had the effect of attracting the immunity

45. The joint majority then went on to hold that the circumstance that the settlement was embodied in consent orders was not sufficient to attract the operation of the immunity.

46. According to the joint majority, although a consent order could, by the rules of the court, be given the same legal effect as an order made after a court hearing, this did not impute any finding to the court.[39] The joint majority emphasised that the trial judge had made no finding of fact or law which resolved the dispute between the parties and said that the fact that the claim against the Solicitors related, not to the resolution of the issues which had arisen in the Guarantee Proceedings, but to the terms of a new charter of rights between the parties, tended to confirm that this was

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[35] Above, n 1, at [51].
[36] Above, n 1, at [47].
[37] Above, n 1, at [52].
[38] Above, n 1, at [52].
[39] Above, n 1, at [55], relying on *Newcrest Mining Limited v Thornton* [2012] HCA 60; (2012) 248 CLR 555 at [17].

so.[40] Accordingly, while the consent orders may have facilitated the enforcement of the compromise, it was the agreement of the parties that had settled its terms.[41]

47. The Solicitors had raised a previous decision of the High Court in *Chamberlain v Deputy Commissioner of Taxation*[42] to argue that the settlement agreement had "merged" in the judgment of the court. However, the joint majority stated that, whether or not the settlement agreement had a legal existence independent of the consent orders, such as for the purposes of its enforcement, had nothing to do with the substantive content of the rights and obligations established by it and that the substantive content of those rights and obligations had been decided by the parties without any determination by the court.[43]

48. The joint majority acknowledged that there were many cases where, although the parties had agreed upon the terms of the court order, the making of the order itself required the resolution of issues by the exercise of judicial power, for example, where representative proceedings were settled or where proceedings on behalf of a person under a legal incapacity were to be compromised. However, the joint majority said that it was not necessary to consider such cases in the matter before it [44]

Conclusion of the joint majority

49. The joint majority's conclusion then was that the "authoritative test for the application of the immunity stated in *D'Orta* and *Giannarelli"* was not satisfied where the advocate's work led to an agreement between parties to litigation to settle their dispute. While advice to cease litigating which led to a settlement was connected in a general sense to the litigation which was compromised, the intimate connection required to attract advocate's immunity was a functional connection between the advocate's work and the judge's decision. The public policy, protective of finality, which justified the immunity, at the same time, limited its scope so that the immunity was only engaged where the advocate's work had contributed to the judicial determination of the litigation.[45] The joint majority then summarised its decision as follows:

> "*In short, in order to attract the immunity, advice given out of court must affect the conduct of the case in court and the resolution of the case by that court. The immunity does not extend to preclude the possibility of a successful claim against a lawyer in respect of negligent advice which contributes to the making of a voluntary agreement between the parties merely because litigation is on foot at the time the agreement is made. That conclusion is not altered by the circumstance that, in the present case, the parties' agreement was embodied in consent orders.*"[46]

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[40] Above, n 1, at [55].
[41] Above, n 1, at [62].
[42] [1988] HCA 21; (1988) 164 CLR 502.
[43] Above, n 1, at [56]-[59].
[44] Above, n 1, at [61].
[45] Above, n 1, at [5].
[46] Above, n 1, at [6].

Minority's reasoning

50. The two dissenting judges (Nettle and Gordon JJ) agreed with the reasons of the joint majority that the High Court should not reconsider *Giannarelli* and *D'Orta*[47] but held that the alleged negligent advice was covered by the advocate's immunity.

51. Gordon J (with whom Nettle J agreed) identified "two points of chief importance" which, her Honour said, together dictated that the immunity extended to the advice.[48] Her Honour's points can be summarised as follows:

    - First, *D'Orta* showed that the immunity revolved around finality – the final quelling of a controversy by the exercise of judicial power. A challenge to finality was not permitted, except in a few narrowly defined circumstances. In *D'Orta*, it had been found that advice which led to a decision (in that case, the client's decision to enter a guilty plea at committal) affected the conduct of a case in court and was subject to the immunity. There was a similar final outcome in the present case to that in *D'Orta*. In each case, admissions were given legal effect by authority of the court; in one case, by entry of conviction, in the other, by entry of verdict and judgment. In each case, there was a final quelling of the controversy by the exercise of judicial power because the pre-existing rights and liabilities of the parties were determined. Indeed, the rights and obligations in dispute, as between those persons, ceased to have an independent existence: they 'merged' in the final judgment.[49]

    - Second, whereas the order giving verdict and judgment for the bank took effect through the authority of the Court, the agreement made between the parties which delayed its enforcement did not. The order giving verdict and judgment was made and entered, consistent with the *Civil Procedure Act 2005* (NSW) and the *Uniform Civil Procedure Rules 2005* (NSW) ("**UCPR**").[50] Under the UCPR, the Court could have refused to make the consent order. However, once the consent order was entered, there were only limited powers to set it aside. This reflected the general principle of finality of litigation which underpinned advocate's immunity. Attempts to set aside the judgment in the Guarantee Proceedings had failed. Therefore, the judgment stood unimpeached. The claim against the Solicitors was that the Guarantors were not indebted to the bank in the amount recorded in the judgment and so necessarily disputed that judgment. This was a direct challenge to finality and was impermissible.[51]

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[47] Above, n 1, at [131] and [64].
[48] Above, n 1, at [105].
[49] Above, n 1, at [106]-[110].
[50] See ss 90 and 133(1) of the Civil Procedure Act 2005 (NSW) and rr 36.1 and 36.1A of the *Uniform Civil Procedure Rules 2005* (NSW).
[51] Above, n 1, at [111]-[125].

52. In conclusion, her Honour said that the verdict and judgment entered against the Guarantors recorded the final quelling of a controversy by the exercise of judicial power and the rights of the parties had merged in that final judgment. The work done by the Solicitors was done directly for the final quelling of the Guarantee Proceedings, by the exercise of judicial power. It was "work intimately connected with" work in a court.[52]

53. Nettle J made the following additional comments concerning the reasoning of the joint majority:

- While on a fair reading of *D'Orta*, it could be said that the rationale of the advocate's immunity from suit did not extend to advice unless it was advice which moved the case in court toward a judicial determination, it did not follow that the immunity could not apply to advice to settle a proceeding or to advice not to settle a proceeding.[53]

- The purpose of the immunity was to avoid the re-litigation in collateral proceedings of issues determined in the principal proceedings. The immunity was based in policy that a dispute should not be re-opened by a collateral attack which sought to demonstrate that a judicial determination was wrong. Where, therefore, a final order had been made resolving litigation, a contention that, but for an advocate's conduct, there would have been a different result was necessarily objectionable.[54]

- When a matter was settled wholly out of court, the settlement did not move the case toward a determination by the court and, therefore, negligent advice to enter into such a settlement would not attract the immunity. By contrast, where a matter was settled out of court on terms providing for the court to make an order by consent that determined the rights and liabilities of the parties, the settlement clearly moved the case toward a determination by the court. While the determination would have largely resulted from the agreement between the parties, it still remained for the court to be satisfied that it should make the order. Thus, for one party later to claim that it was negligent of an advocate to advise in favour of such a settlement would involve calling into question the correctness of the court's order.[55]

- By way of example, if a plaintiff's claim for $200,000 was settled on terms that the parties consent to an order that the defendant pay the plaintiff $150,000, and such an order was made by the court, the order would determine the rights and liabilities of the parties. A claim then that the defendant's lawyer was negligent in advising the defendant to consent to the order would involve a collateral attack on the order because it would require the defendant to establish that, but for the lawyer's negligent advice, the court would have

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[52] Above, n 1, at [126]-[127].
[53] Above, n 1, at [65].
[54] Above, n 1, at [66].
[55] Above, n 1, at [67]-[68].

determined that the defendant's liability to the plaintiff was less than $150,000, and thus that the order that the defendant pay the plaintiff $150,000 was, in that sense, wrong.[56]

- It would be similar if the plaintiff's claim were settled on terms that the defendant pay the plaintiff $150,000, the proceeding be struck out and, in default of timely payment, the defendant consent to judgment for $200,000. If the defendant defaulted and the plaintiff obtained judgment for $200,000, the court's order would determine the rights and liabilities of the parties, namely, that the defendant was liable to the plaintiff for $200,000. A claim then that the defendant's lawyer was negligent in advising the defendant to agree to the terms of settlement would also involve a collateral attack on the order because the defendant would need to establish that, but for the lawyer's negligent advice, the court would have determined that the defendant's liability to the plaintiff was less than $200,000, and thus that the order that the defendant pay the plaintiff $200,000 was wrong.[57]

Final note

54. The High Court determined the separate question of whether the claim was defeated entirely because the Solicitors were immune from suit on the assumption that the Solicitors had given negligent advice. As the advocate's immunity from suit was found not to be engaged, it can be expected that the correctness of the allegations of negligence will now be determined.

K Ottesen 18 May 2016

[56] Above, n 1, at [70].
[57] Above, n 1, at [71].