IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S161 of 2015

BETWEEN:

GREGORY IAN ATTWELLS
First appellant

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NOEL BRUCE ATTWELLS
Second appellant

and

JACKSON LALIC LAWYERS PTY LTD
Respondent

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RESPONDENT'S ANNOTATED SUBMISSIONS

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PART I: CERTIFICATION

1. This submission is in a form suitable for publication on the internet.

PART II: ISSUES

2. The appeal presents three principal issues. *First*, whether one of the *rationales* for advocates' immunity — finality — is to be transformed into one of the elements of the *test* for the application of the immunity in particular cases. *Secondly*, whether advocates' immunity covers negligent advice as to the settlement of pending proceedings, as alleged in this case. *Thirdly*, whether advocates' immunity should be modified or abolished.

PART III: SECTION 78B OF THE *JUDICIARY ACT 1903* (CTH)

10 3. The respondent considers that no s 78B notice is required.

PART IV: CONTESTED FACTS

4. The respondent agrees with the summary of facts in the appellant's submissions (**AS**) at [6]–[24] subject to the following. The amended defence filed by the respondent **[AB 20ff]** contains matters in addition to reliance on advocates' immunity (cf AS [21]). Among other things, negligence was denied and various factual allegations were made directed to that denial **[AB 23–24 [12]–[13]]**. It was not necessary for the courts below, and it is not necessary for this Court, to determine the correctness of that denial or the factual allegations directed to it in order to determine the separate question concerning advocates' immunity which is before this Court. That question may properly be
20 determined on the facts agreed between the parties solely for the purposes of the hearing of the separate question, which substantially replicated the allegations made in the appellants' amended statement of claim, including their allegations of negligence.[1] The correctness of those allegations would, of course, need to be determined if the immunity is unavailable to the respondent, as the appellants accept in the orders they seek.

PART V: ARGUMENT

A. INTRODUCTION AND SUMMARY

5. This Court is in the business of formulating legal tests to be applied by trial judges and intermediate appellate courts. It regularly speaks in terms of what the "test" or "legal test" is on a particular issue[2] and of the "test to be applied" by lower courts.[3]

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[1] The appellants do not contend that the primary judge was correct in refusing to answer the separate question. Given that the agreed facts substantially replicated the appellants' pleading, the separate question was akin to a demurrer and suitable to answer on the agreed facts: *Brimson v Rocla Concrete Pipes Ltd* [1982] 2 NSWLR 937 at 940–943 per Cross J; *DPP (Vic) v JM* (2013) 250 CLR 135 at 154–155 [32]–[33] per *curiam*.

[2] See, eg, *Stapleton v The Queen* (1952) 86 CLR 358; *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; *Peters v The Queen* (1998) 192 CLR 493 at 554 [142] per Kirby J; *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330 at 350–351 [58] per Gummow J; *Re Minister for Immigration and Multicultural Affairs; Ex parte Cohen* (2001) 75 ALJR 542 at 549 [37] per McHugh J; 177 ALR 473 at 482; *Commonwealth Minister for Justice v Adamas* (2013) 253 CLR 43 at 52 [22] per *curiam*.

[3] See, eg, *Webb v The Queen* (1994) 181 CLR 41 at 53 per Mason CJ and McHugh J; *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 290 per Kirby J; *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49 at 60–61 [21], 66 [39] per Gleeson CJ, Gaudron and

6. The appellants' submissions accept, in terms, that this Court stated in *Giannarelli v Wraith* (***Giannarelli***),[4] and confirmed in *D'Orta-Ekenaike v Victoria Legal Aid* (***D'Orta***),[5] the test for advocates' immunity. The plurality in *D'Orta* expressly held that "there is no reason to depart from the *test* described in *Giannarelli*".[6] The test, in the language of the plurality, is that "at common law an advocate cannot be sued by his or her client for negligence in the conduct of a case in court, or in work out of court which leads to a decision affecting the conduct of a case in court".[7]

7. That legal test, as stated and confirmed in two relatively recent decisions of this Court, does not require clarification or modification, still less abolition. It has been routinely applied for almost 30 years, including in the context of allegedly negligent advice in relation to settlements of pending proceedings.[8]

8. That legal test was also correctly and faithfully applied by the Court of Appeal in the present case. Advice given on the evening of day one of a trial, concerning proposed consent orders to be made by the trial judge the following day to resolve the proceeding, in accordance with a settlement reached on the afternoon of day one of the trial, could hardly be more intimately connected with the trial.[9] Contrary to AS [48], on the appellants' case, the impugned advice *must have* affected the conduct of the hearing: if it were otherwise, the appellants could not establish causation in their negligence claim.

9. And, contrary to AS [46]–[47], no different result follows from consideration of the particulars of negligence alleged. None alters the description of the advice immediately

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Gummow JJ; *HML v The Queen* (2008) 235 CLR 334 at 358 [24] per Gleeson CJ; *MFA v The Queen* (2002) 213 CLR 606 at 614–615 [25] per Gleeson CJ, Hayne and Callinan JJ; *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 at 353 [38] per Gleeson CJ and Heydon J.

4 (1988) 165 CLR 543.

5 (2005) 223 CLR 1.

6 (2005) 223 CLR 1 at 31 [86] per Gleeson CJ, Gummow, Hayne and Heydon JJ (emphasis added).

7 (2005) 223 CLR 1 at 9 [1] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

8 For cases applying the immunity concerning settlement advice, see, eg, *Goddard Elliott (A Firm) v Fritsch* [2012] VSC 87; *Bott v Carter* [2012] NSWCA 89; *Young v Hones* [2013] NSWSC 1429; *Nikolaidis v Satouris* (2014) 317 ALR 761 (NSWCA); *Stillman v Rushbourne* [2014] NSWSC 730; *Kendirjian v Lepore* [2015] NSWCA 132. For cases which would have applied the immunity concerning settlement advice but for a conclusion that no negligence was established, see, eg, *Chamberlain v Ormsby* [2005] NSWCA 454; *Donnellan v Woodland* [2012] NSWCA 433. For cases applying the immunity outside the context of settlement advice, see, eg, *Keefe v Marks* (1989) 16 NSWLR 713 (CA); *Attorney General (NSW) v Spautz* [2001] NSWSC 66; *Del Borrello v Friedman and Laurie (a firm)* [2001] WASCA 348; *Braslin v Geason* [2004] TASSC 125; *Arundell v Williams Winter & Higgs* (2005) 158 A Crim R 16 (VSC); *Wilson v Carter* [2005] NSWSC 1351; *MM & R Pty Ltd v Grills* [2007] VSC 528; *Carey v Wojtowicz Kelly Legal (a firm)* [2009] WASC 259; *Foster James Pty Ltd v Dalton* (2010) 28 VR 204; *Foster James Pty Ltd v Dalton* [2010] VSC 133; *Wakim v Coleman* [2010] NSWCA 221; *Day v Rogers* [2011] NSWCA 124; *Attard v James Legal Pty Ltd* (2010) 80 ACSR 585 (NSWCA); *NT Pubco Pty Ltd v Strazdins* [2014] NTSC 8; *Drake v Wight & Strickland Lawyers* [2015] NSWSC 1090; *White v Forster* [2015] NSWCA 245. For cases which would have applied the immunity outside the context of settlement advice but for a conclusion that no negligence was established, see, eg, *Boland v Yates Property Corp Pty Ltd* (1999) 74 ALJR 209; 167 ALR 575; *Abriel v Rothman* [2004] NSWCA 40; *Mathews v Director of Legal Aid* [2004] WASC 225; *Coshott v Barry* [2007] NSWSC 1094; *Coshott v Barry* [2009] NSWCA 34; *Gattellaro v Spencer* [2010] NSWSC 1122; *Bird v Ford* [2013] NSWSC 264; *Suresh v WD Hunt & Associates (No 2)* [2015] NSWSC 1089.

9 See similarly *Biggar v McLeod* [1978] 2 NZLR 9 (CA) at 12 per Woodhouse J, 14 per Richardson J; *Chamberlain v Ormsby* [2005] NSWCA 454 at [120] per Tobias JA.

above. For any of the negligence alleged to be causative of the appellants' loss, the appellants must demonstrate that it was a cause of the decision of the first appellant and Ms Lord to consent to the orders proposed.

10. The appellants' submission (AS [40], [48]) that the test was misapplied because the decision to settle was that of the client, not that of the advocate, is unsustainable. It is unable to be reconciled with *D'Orta*. The decision in *D'Orta* to plead guilty was that of the client on advice; so too here, the decision to settle. As the plurality in *D'Orta* concluded:[10]

> where a legal practitioner (whether acting as advocate, or as solicitor instructing an advocate) gives advice which leads to a decision (*here the client's decision to enter a guilty plea at committal*) which affects the conduct of a case in court, the practitioner cannot be sued for negligence on that account.

That passage shows that the submission at AS [64] — that the "decision" affecting the conduct of the case in court must be a decision of the advocate — is wrong (see also AS [48]).[11] There was no misapplication of the correct legal test by the Court of Appeal.

11. It follows that the appellants' case involves, in truth, a challenge to the well-established legal test for advocates' immunity. That challenge — which the appellants relegate to the end of their written submissions — is put in terms of either modification or abolition of the immunity (see AS [71]–[72]). Either way, leave of the Court is required for such a challenge to be made. There are powerful reasons why it should not be granted, and equally powerful reasons why, if leave is granted, the immunity, as clearly stated in *Giannarelli* and confirmed in *D'Orta*, should be neither modified nor abolished, both in the case of settlement advice and more generally.

12. In summary, the respondent submits as follows:

(a) Applying the test for advocates' immunity does not require a court to consider, as a separate element, whether the principle of finality is undermined by allowing the case to proceed. That is illegitimately to conflate the *test* with one (but not the only)[12] *rationale* advanced as supporting the immunity (see section B below).

(b) The application of the immunity to advice as to the settlement of pending proceedings, as in this case, is entirely warranted by the principle of finality. The appellants' argument involves an unduly narrow view of that principle; but even on the narrowest view, settlement advice should be covered. Excluding settlement advice would be anomalous, detrimental to the interests of the administration of justice and productive of incoherence (see section C below).

(c) This Court should not reopen *Giannarelli* and *D'Orta*, in order either to modify or abolish advocates' immunity (see section D below).

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[10] (2005) 223 CLR 1 at 32 [91] per Gleeson CJ, Gummow, Hayne and Heydon JJ (emphasis added).

[11] That is not to say that *all* decisions of the client connected with litigation are sufficient to establish the application of the immunity (cf AS [64]). The decision must affect the conduct of the case in court, such that the lawyer's work — advising the client — can be said to be "intimately connected with" work in court.

[12] See paragraphs 32–35 below.

B. THE TEST FOR ADVOCATES' IMMUNITY

13. It is a "cautious cliché"[13] that reasons for judgment are not to be read as if they were provisions of an Act.[14] However, it is equally true that, where it is established by authority that the application of a common law legal doctrine is determined by a particular legal test, it is the duty of lower courts simply to apply that test. It is neither necessary nor appropriate for such courts to consider, in each case, whether the application of the test in that case is consistent with the rationale for the doctrine. Once this Court has authoritatively determined the test for the application of a particular common law legal doctrine, such as advocates' immunity, that test is to be followed.[15]

14. To illustrate this point by reference to another well-established legal test, this Court has stated authoritatively that, at common law, a confidential communication attracts legal professional privilege if it is for the dominant purpose of a lawyer providing legal advice or legal services.[16] That is the legal test. This Court has also stated that the privilege exists to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers;[17] and this has been adjudged to outweigh the public interest in cases being decided on the basis of the fullest possible evidence. That is the rationale for the test. If the test is satisfied, no further inquiry is required as to whether, in the particular case, the public interest in encouraging frank disclosure to lawyers outweighs the public interest in the case being decided on the fullest possible evidence. The privilege is itself the product of a balancing between competing public interests and, in the application of the test in any particular case, no further balancing is required.[18] That is so even if, in a particular case, it may be thought that the test does not "fit" the rationale, because the public interest would be better served by disclosure.

15. In the case of advocates' immunity, the test was authoritatively confirmed by the plurality in *D'Orta*[19] (constituting a majority of this Court):

> there 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.)

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[13] *Bridge Trustees Ltd v Houldsworth* [2010] 4 All ER 1069 (CA) at 1084 [57] per Mummery LJ.

[14] See, eg, *Mills v Mills* (1938) 60 CLR 150 at 169 per Rich J; *Benning v Wong* (1969) 122 CLR 249 at 299 per Windeyer J; *Scott v Davis* (2000) 204 CLR 333 at 370 [108] per McHugh J; *Papaconstuntinos v Holmes à Court* (2012) 249 CLR 534 at 548 [29] per French CJ, Crennan, Kiefel and Bell JJ.

[15] *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 403 [17] per Gaudron, McHugh, Gummow and Hayne JJ; *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45 at 62–63 [39] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.

[16] *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49.

[17] *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 64 [35] per Gleeson CJ, Gaudron and Gummow JJ.

[18] *Waterford v The Commonwealth* (1987) 163 CLR 54 at 64–65 per Mason and Wilson JJ. See also *R v Derby Magistrates Court; Ex parte B* [1996] AC 487 at 507–508 per Lord Taylor CJ: "if a balancing exercise was ever required in the case of legal professional privilege, it was performed once and for all in the 16th century, and since then has applied across the board in every case, irrespective of the client's individual merits".

[19] (2005) 223 CLR 1 at 31 [86] per Gleeson CJ, Gummow, Hayne and Heydon JJ (emphasis added).

16. The appellants seek to minimise this statement, expressly described as a "test", as merely a "verbal formulation" (AS [51], [57]–[62]). That is no more so than the test for the application of legal professional privilege. And as with that test, it is not necessary for a court called upon to apply the test for advocates' immunity to consider whether the rationale for the immunity is served by its application in the instant case.

17. The Court of Appeal was thus correct to approach the matter by considering whether the case fell within or outside the test for the immunity stated by this Court **[AB 94 [40]]**. As observed in other cases,[20] offence to a principle of finality is not necessary for the immunity to be engaged in a particular case. The appellants' submission that the Court of Appeal erred because "[t]he immunity ought only be applied where the language of the test, *and the principles supporting it*, are engaged" (AS [33]; emphasis added) should be rejected. That submission involves a conflation of a clearly stated legal test with an asserted underlying rationale; or, as Leeming JA has subsequently described a similar argument, a conflation of principles and rules.[21]

18. In truth, the appellants seek to modify the test for advocates' immunity, just like the unsuccessful appellant in *D'Orta*. This is made plain in AS [71]–[72], where the appellants submit that this Court should alter the test for the immunity so that it is expressed in terms of the finality of judicial decisions. The Court should not accede to that submission. So far as the submission is sought to be justified by the argument that settlement advice is not within the rationale for the immunity, that argument is wrong for the reasons in section C below. It provides no foundation to reopen *Giannarelli* and *D'Orta* and there are compelling reasons why that should not be permitted in any event, as explained in section D below.

C. SETTLEMENT ADVICE IS WITHIN THE IMMUNITY AND ITS RATIONALE

19. The appellants' contention that the lack of "fit" between the rationale for the immunity and its application in cases of settlement advice warrants the modification or abolition of the immunity should be rejected. It is based on a false premise. Settlements further finality, and that concept would be undermined if settlement advice intimately connected with the conduct of litigation were to be placed outside the immunity, either as a matter of "clarification" or modification of the test. In addition, such a step would be detrimental to the interests of the administration of justice and productive of incoherence.

Finality — A broad concept

20. Contrary to the appellants' submissions, the plurality in *D'Orta* drew attention to a broader notion of finality than simply the undesirability of impugning reasoned judicial decisions. The plurality said that "the central justification for the advocate's immunity

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[20] *Attard v James Legal Pty Ltd* (2010) 80 ACSR 585 (NSWCA) at 591–592 [28]–[30] per Giles JA (quoted in AS [60]); *Kendirjian v Lepore* [2015] NSWCA 132 at [42] per Macfarlan JA (quoted in AS [61]).

[21] *Kendirjian v Lepore* [2015] NSWCA 132 at [52]–[54] per Leeming JA. It is not clear whether, and if so how, this submission differs from that at AS [62] that the correct approach is "to apply the verbal formulae identified in the plurality's judgment, *but having regard to* the underlying principle served by the immunity" (emphasis added).

is the principle that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances".[22]

21. One way in which a controversy may be quelled by the judicial process is a reasoned decision. But another way a controversy may equally be quelled is compromise. Such a compromise may often be reflected, as here, in a judgment. Such a judgment is no less effective to quell the controversy by reason that it is made by consent than if it followed a contested hearing. The parties' antecedent rights merge in the judgment.[23] To permit litigation in relation to advice as to settlements of pending proceedings which result in such judgments runs counter to this broader notion of finality in three ways.

10 22. *First*, and in the most practical sense, litigation continues concerning the subject matter of the settled proceeding. Though in a somewhat different form, the issues at play in the settled proceeding will necessarily be traversed in the claim against the lawyer.

23. *Secondly*, as the plurality observed in *D'Orta*,[24] any such subsequent litigation:

> would be re-litigation of a skewed and limited kind. No argument was advanced to this Court urging the abolition of judicial or witness immunity. If those immunities remain, it follows that the re-litigation could not and would not examine the contribution of judge or witness to the events complained of, only the contribution of the advocate. An exception to the rule against the reopening of controversies would exist, but one of an inefficient and anomalous kind.

20 Given the facts before the Court in *D'Orta*, that observation was not directed to cases specifically involving settlements. But it applies equally, and perhaps even more readily, in such cases: settlements during trials due to the poor performance of witnesses or judicial conduct perceived by advisers and parties to be adverse are well known. Except in the barest of passing references (AS [96]), the appellants do not mention these other immunities. Yet a lawyer sued by a client for conduct presently within the immunity is considerably hamstrung while they subsist. The lawyer cannot seek to apportion blame to witnesses, including expert witnesses, or the judge, all of whom are immune from suit.[25] Proportionate liability defences or contribution claims in respect of such third parties would be unavailable. So too the ordinary processes for compulsory production
30 of documents and attendance of witnesses are not available against judges, witnesses and members of a jury.[26] In the case of a settlement, any trial may be further skewed by the inability of the lawyer to adduce evidence of settlement negotiations with their client's opponent by reason of s 131 of the Uniform Evidence Acts or common law without prejudice privilege.

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[22] *D'Orta* (2005) 223 CLR 1 at 20 [45] per Gleeson CJ, Gummow, Hayne and Heydon JJ; see also at 17 [34].

[23] *Chamberlain v Deputy Commissioner of Taxation* (1988) 164 CLR 502 at 508 per Deane, Toohey and Gaudron JJ.

[24] (2005) 223 CLR 1 at 21 [45] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

[25] See *D'Orta* (2005) 223 CLR 1 at 18–20 [37]–[42] per Gleeson CJ, Gummow, Hayne and Heydon JJ. See further the cases concerning witness and judicial immunity in nn 36 and 37 below.

[26] See also *Rondel v Worsley* [1969] 1 AC 191 at 249–250 per Lord Morris; *Giannarelli* (1988) 165 CLR 543 at 574 per Wilson J.

24. *Thirdly*, as the Court of Appeal observed in this matter **[AB 94 [41]]**, a claim against a lawyer for negligent advice leading to a settlement reflected in a consent judgment necessarily involves a contention that the judgment should not have been given if the lawyer had acted properly. While that does not impugn any particular findings or conclusions reached by the judge, it undermines finality in the broader sense explained above.[27] It is no answer to say that the appellants' negligence claim assumes that the consent order was "correctly made and is effective on the basis of what Rein J was told" (AS [53]). That is the premise even in cases of a reasoned judgment: the plaintiff's claim is not that the reasoned judgment was incorrect on what the trial judge was told, but that it would have been different had the trial judge been told something else. In all such cases, the judgment actually delivered by the trial judge is simply evidence in the negligence claim (AS [54]).

A narrower focus on finality

25. Turning from these broader notions of finality, even in the narrowest sense of that concept, placing settlement advice outside the boundary of the existing immunity undermines the finality of judicial decisions. That narrow concept of finality may be seen in the case of a judgment given by a judge following a contested hearing in which the judge makes factual findings and reaches legal conclusions recorded in reasons for judgment. Taking the paradigm case where the client seeks to allege that the lawyer was negligent because "a point was not taken, or a witness was not called, or evidence was not led",[28] the client's claim necessarily involves a contention that a finding or conclusion recorded in the reasons for judgment would have been different but for the lawyer's conduct. For the judge hearing the client's claim to uphold that claim, he or she must conclude that the finding or conclusion in fact reached by the judge in the first proceeding, and recorded in the reasons for judgment, would not have been reached had the lawyer conducted themselves differently.

26. This re-litigation in collateral proceedings of issues determined in the first proceeding undermines the finality of the reasons and outcome in that proceeding: the reasons of the judge hearing the client's claim have a tendency to undermine the result and reasons in the first proceeding, because the judge must consider whether and, for the claimant to succeed, deny that the result and reasons in the first claim were correct.[29] That is so even if, ultimately, the judge concludes that the lawyer was not negligent, as the judge will still likely make findings on causation in case his or her finding on negligence is reversed on appeal. And even if all findings are favourable to the lawyer, the finality of the result and reasons in the first proceeding are undermined merely by their reconsideration in the subsequent proceeding.

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[27] cf *Saif Ali v Sydney Mitchell and Co* [1980] AC 198 at 223 per Lord Diplock, compare at 234 per Lord Russell, 237 per Lord Keith. The penultimate sentence of AS [53] implicitly concedes that at least some aspects of the claim involve a collateral challenge to the outcome of the original proceedings.

[28] *D'Orta* (2005) 223 CLR 1 at 26 [67] per Gleeson CJ, Gummow, Hayne and Callinan JJ.

[29] Casting the claim as a loss of chance claim (see further paragraph 36 below) complicates but does not alter the analysis. The conclusion that the result and reasons in the first proceeding *might* not have occurred had the lawyer conducted themselves properly is sufficient to undermine the decision in the first proceeding.

27. This same vice is present in a case involving settlements of pending proceedings where a client chooses, on advice, *not to settle the proceeding* (the converse of the present case). The client, dissatisfied with the result in fact achieved, may seek to sue their lawyer for negligent settlement advice claiming that the advice ought to have been more pessimistic. In such a case, the lawyer will seek to defend the reasonableness of his or her advice and, in doing so, may seek to impugn the reasons of the judge in the first proceeding. Thus, if the lawyer, in advising against settlement, had advised that evidence was likely to be accepted which the judge rejected, or that an argument was likely to be persuasive which the judge found unpersuasive, the reasonableness of the lawyer's advice will invariably entail a collateral examination of the correctness or reasonableness of those aspects of the original decision. A lawyer's defence may in substance amount to the contention: my advice was sound; it was the judge's reasons which were wrong. The second judge hearing the client's negligence claim will have to consider that defence and, in doing so, the prospect mentioned above arises: that the judge will conclude that the reasons of the judge in the first proceeding were, indeed, wrong or unreasonable.[30]

28. It follows that negligent settlement advice which results in the client's decision *not to settle* proceedings has precisely the same adverse consequences for the principle of finality even in its narrowest sense as the paradigm case referred to in paragraph 25 above. What, then, of cases where the allegedly negligent settlement advice results in the client making a decision *to settle* proceedings?

29. The *first* and obvious point to be made is that it would be anomalous in the extreme if negligent advice *not to settle* proceedings attracted the immunity, but negligent advice *to settle* proceedings did not. Both have the same intimate connection with the conduct of the proceedings and, as in the present case, will frequently be given in the very midst of the trial. Neither the timing nor context nor nature of the advice would affect the existence of the immunity. Rather, it would be determined solely by the client's decision whether or not to settle, for it is this that will dictate whether there is a reasoned judgment or simply a consent judgment. It may further be noted that such a distinction would, contrary to the general policy of the law,[31] tend to discourage lawyers from giving frank advice which might encourage their clients to settle, because it would be in their interests (so as to be covered by the immunity) for the client to choose not to settle.

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[30] See also *Kendirjian v Lepore* [2015] NSWCA 132 at [45] per Macfarlan JA. For examples in England, see *Moy v Pettman Smith (a firm)* [2005] 1 WLR 581 (HL), esp at 593–594 [41]–[43], 600 [61] per Lord Carswell; *First City Insurance Group Ltd v Orchard* [2003] PNLR 9 (QBD) at [87]–[88] per Forbes J, noting that his Lordship would have interpreted an agreement in the same manner as counsel, rather than that accepted by the Court of Appeal, and concluding: "much, if not all, of the criticism of the advice, acts and omissions of the Defendants in this case has been made with the benefit of hindsight, derived from a decision of the Court of Appeal that, despite its unanimous and authoritative nature, can properly be regarded as a controversial decision reached in very unusual circumstances"; *West Wallasey Car Hire Ltd v Berkson & Berkson (A Firm)* [2009] EWHC B39; [2010] PNLR 14 at [114]: "He, and everyone else at court, apart from the judge, considered the point a bad one and that he had arguments to defeat it. ... However, since the learned judge found the case otherwise, it is necessary to add that in my judgment, Mr Pugh is 'not answerable for error of Judgment upon points of new occurrence or of nice or doubtful occurrence'."

[31] *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603 at 623 [55], 625–626 [63] per Gummow J, 637–638 [97(1)] per Kirby J, 651 [124], 652 [128] per Hayne J; *CSR Ltd v Eddy* (2005) 226 CLR 1 at 50 [126] per Callinan J.

30. *Secondly*, even in the absence of a reasoned final judgment, cases involving settlements may often involve a collateral challenge to judicial conduct. The role played by the judge *up until the time of settlement* may need to be explored. That may include observations from the Bench in the course of the hearing, interlocutory rulings, and even informal and sometimes "coded" encouragement of settlement from the Bench or in chambers.[32] It may include approbation of a settlement whose terms have been disclosed in the course of making consent orders (eg a statement that a particular settlement was very sensible in light of how the case was proceeding). The allegedly negligent settlement advice will often have been informed by the lawyer's observations on these matters; if so, the client's attack on the settlement advice may necessarily lead to an inquiry as to the correctness or reasonableness of the trial judge's rulings and conduct.

31. *Thirdly*, in a subset of cases, where settlement *requires* the judge to do more than simply make orders by consent but to be satisfied that the orders should be made, there will be a reasoned final judgment even in cases of settlement. That may be so, for instance, in a case involving a declaration[33] or group proceeding.[34] Any subsequent attack on the advice that led to such a settlement may directly or indirectly open up an inquiry as to the correctness of the reasons given by the judge for his or her satisfaction that the orders giving effect to a settlement should be made.

Administration of justice

32. In addition to these matters, it should be noted that the ultimate concern of the plurality in *D'Orta* was "the adverse consequences for the administration of justice which would flow" [35] if the immunity were abolished. That likewise supplies the justification of the immunities granted to witnesses[36] and judges.[37] Where there is a settlement of proceedings in the course of litigation, subsequent negligence proceedings involve uniquely adverse consequences for the administration of justice. That is because giving frank advice about settlement where litigation is in progress invariably involves or includes a frank assessment of the judge, both generally and in the context of the proceeding to date, and his or her conduct of, and demeanour in, the proceeding.

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[32] See also *Biggar v McLeod* [1978] 2 NZLR 9 (CA) at 14 per Richardson J: "when a settlement is reached in the course of the trial itself, the compromise must surely be influenced by the barrister's assessment of the way the trial is going; how the evidence has come out; what admissions have been made; any indication the trial judge has given of his thinking".

[33] See, eg, *Re F* [1990] 2 AC 1 at 82 per Lord Goff, quoted in *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at 356 [47] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

[34] *Federal Court of Australia Act 1976* (Cth), s 33V. See, eg, *Hodges v Waters (No 7)* [2015] FCA 264 at [9]–[15].

[35] *D'Orta* (2005) 223 CLR 1 at 16 [31] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

[36] *Cabassi v Vila* (1940) 64 CLR 130 at 139 per Rich ACJ, 141 per Starke J, 144 per McTiernan J, 149 per Williams J; *Marrinan v Vibart* [1963] 1 QB 234 at 237 per Salmon J; *Stanton College v Callaghan* [2000] QB 75 (CA) at 107 per Otton LJ; *Darker v Chief Constable of the West Midlands Police* [2001] 1 AC 435 at 457 per Lord Clyde; *James v Medical Board of South Australia* (2006) 95 SASR 445 (FC) at 459 [78]–[79] per Anderson J

[37] *Anderson v Gorrie* [1895] 1 QB 668 (CA) at 670–671 per Lord Esher MR; *Sirros v Moore* [1975] 1 QB 118 (CA) at 132 per Lord Denning MR; *Rajski v Powell* (1987) 11 NSWLR 522 (CA) at 528 per Kirby P; *Fingleton v The Queen* (2005) 227 CLR 166 at 186 [38], 190 [51] per Gleeson CJ, 211–21 [130] per Kirby J.

33. If a plaintiff settles on the basis that the trial judge has a tendency to be "pro-defendant" or if a defendant settles on the basis of advice that the judge has a tendency to be "pro-plaintiff", and that advice is later claimed to be negligent, the lawyers may seek to lead evidence supporting their advice. The judge hearing the negligence claim would then be required to rule on whether the trial judge in the first proceeding, perhaps a judge of the same court, is indeed "pro-defendant" or "pro-plaintiff". The same may be said of advice that a particular judge is "pro" or "anti" employer, "pro" or "anti" union, or "pro-prosecution" or "pro-accused".

34. At the least, the judge in the negligence suit would be required to rule on whether it was reasonable for the lawyers to consider that the trial judge had this characteristic. If such a finding were made, what would be the consequence for the trial judge's ability to sit on any such future cases? Even if the finding were not that the trial judge *was*, say, pro-plaintiff in personal injuries cases, a finding that it was reasonable for the lawyers to *think* that the trial judge was would be sufficient to ground an apprehended bias claim against that judge in every future personal injuries case.[38]

35. The same kind of issue arises if a client settles on the basis of advice (or which includes as a component of the advice) that the trial judge is erratic and often overturned on appeal. The judge hearing a negligence claim concerning that advice would be required to rule on whether that was so or, at the least, whether it might reasonably be thought to be so. Either way, the finding would be destructive of confidence in the trial judge's ability to conduct cases in the future, and deleterious to the administration of justice.

Incoherence

36. A further issue arises if negligence claims against lawyers outside the immunity, including for advice as to the settlement of pending proceedings, are to be decided on a "loss of chance" basis. That is so in England[39] and appears also to be so in Australia based on cases outside the immunity.[40] Because legal problems are inherently uncertain and almost always arguable one way or the other, it will almost always be possible to say that there is *some* chance that a particular argument or evidence would have made a

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[38] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344–345 [6]–[7] per Gleeson CJ, McHugh, Gummow and Hayne JJ, 363 [83] per Gaudron J; *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 at 322 [104] per Heydon, Kiefel and Bell JJ; *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 at 437 [31] per Gummow ACJ, Hayne, Crennan and Bell JJ.

[39] Powell et al, *Jackson & Powell on Professional Liability* (7th ed, 2012) at 912–925 [11-296]–[11-314], 972 [12-041]; Walton et al, *Charlesworth & Percy on Negligence* (13th ed, 2014) at 743–748 [9-294]–[9-303]. See, eg, *Hanif v Middleweeks* [2000] Lloyd's Rep PN 920 (CA); *Griffin v Kingsmill* [2001] EWCA Civ 934; [2001] Lloyd's Rep PN 716; *Sharif v Garrett & Co* [2002] 1 WLR 3118 (CA); *Channon v Lindley Johnstone (A Firm)* [2002] EWCA Civ 353; [2002] PNLR 41; *Luke v Wansbroughs* [2003] EWHC 3151; [2005] PNLR 2; *Browning v Brachers (A Firm)* [2005] EWCA Civ 753; [2005] PNLR 44; *Feakins v Burstow* [2005] EWHC 1931; [2006] PNLR 6; *Hickman v Blake Lapthorn* [2005] EWHC 2714; [2006] PNLR 20; *Haithwaite v Thomson Snell & Passmore (A Firm)* [2009] EWHC 647 (QB); [2009] PNLR 27. See also *Phillips & Co v Whatley* [2007] PNLR 27 (PC).

[40] *Nikolaou v Papasavas, Phillips & Co* [1988] VR 682 (CA); aff'd (1989) 166 CLR 394; *Scott v Echegaray* (1991) Aust Torts Reports ¶81-120 (NSWCA); *Leitch v Reynolds* (2005) Aust Torts Reports ¶81-806 (NSWCA); *Firth v Sutton* [2010] NSWCA 90; *Moss v Eaglestone* (2011) 83 NSWLR 476 (CA); *Rosa v Galbally and O'Bryan* [2013] VSCA 116; *Rosa v Galbally and Bryan (No 2)* [2013] VSCA 154; *Falkingham v Hoffmans (a firm)* (2014) 46 WAR 510 (CA).

difference to the outcome. In the case of a settlement, there will almost always be *some* chance that the client would have done better had the matter proceeded to trial. Indeed, compared with the case of a reasoned judgment where it is said that a particular decision by the lawyer may have made a difference, it may often be harder to predict what would have occurred but for a settlement because of the absence of reasons for judgment and other materials produced where a proceeding is litigated to judgment.

37. The conclusion that there is some chance of a better outcome than that achieved in the settlement would be sufficient for the client to obtain some recovery, even if the chance is well below 50%.[41] In effect, almost every case of negligent settlement advice involving a settlement would lead to an award of damages. That is so even if the underlying proceeding which was settled was not one in which a loss of chance was claimed or even one in which a loss of chance could be claimed as a matter of law.[42] A claim in the first proceeding which is not amenable to a loss of chance analysis is transformed into a loss of chance case against the lawyer. Accordingly, even if the judge concludes that, on the balance of probabilities, the first claim would have failed, the claimant may nevertheless recover from the lawyer.

38. That is productive of incoherence. This Court has said on a number of occasions that the common law should not be developed in a way that feeds this vice.[43] It may be accepted that, to some extent, this incoherence already exists, in relation to cases outside the immunity. But it would be substantially multiplied by the abolition of the immunity or its modification to exclude settlement advice.

39. Further, as explained in paragraphs 23 and 32 above, advocates' immunity takes its place with other immunities connected with the court process. Abolition or modification of advocates' immunity has a tendency to undermine the existence of those other immunities.[44]

Previous authorities

40. Although a small number of cases can be identified that have not applied the immunity to advice in respect of settlement of pending proceedings,[45] the vast majority have.[46] For the reasons above, such application has not only been consistent with the test for the existence of the immunity but also with its justifications.

41. The only judge to consider the application of the immunity to settlements in *D'Orta* itself was McHugh J, albeit briefly. Citing *Biggar v McLeod*,[47] his Honour referred to the fact

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[41] *Malec v Hutton* (1990) 169 CLR 638 at 642–643 per Deane, Gaudron and McHugh JJ.

[42] See, eg, *Falkingham v Hoffmans (a firm)* (2014) 46 WAR 510 (CA), involving a personal injury claim which would not have been amenable to a loss of chance analysis: *Tabet v Gett* (2010) 240 CLR 537.

[43] See, eg, *Sullivan v Moody* (2001) 207 CLR 562 at 579–580 [50]–[53] per *curiam*; *Brookfield Multiplex Ltd v Owners Corp Strata Plan 61288* (2014) 88 ALJR 911; 313 ALR 408 at 417 [25] per French CJ, 427 [69] per Crennan, Bell and Keane JJ; *Hunter and New England Local Health District v McKenna* (2014) 253 CLR 270 at 278–279 [17]–[19] per *curiam*.

[44] See esp *Jones v Kaney* [2011] 2 AC 398.

[45] *Donellan v Watson* (1990) 21 NSWLR 335 (CA); *Alpine Holdings Pty Ltd v Feinauer* [2008] WASCA 85.

[46] See, eg, *Biggar v McLeod* [1978] 2 NZLR 9 (CA); and the cases referred to in footnote 8 above.

[47] [1978] 2 NZLR 9 (CA).

that "[w]ork that courts have held was intimately connected with the conduct of a cause includes ... negligently advising a settlement".[48] However, two paragraphs later, his Honour noted "the negligent compromise of appeal proceedings leading to the loss of benefits gained at first instance" in *Donellan v Watson*[49] as an instance that had been held not to fall within the immunity. Later, after agreeing with the analysis of the plurality concerning finality, his Honour said:[50]

> ... it is possible to sue a practitioner for the negligent settlement of proceedings or for the negligent loss or abandonment of a cause of action. Such claims lead to the litigation of a primary claim even if that claim can no longer be pursued. These results flow even though there is a public interest in the finality achieved through the statutes of limitations and the promotion of out-of-court dispute settlement. But where a trial has taken place, as the judgment of Gleeson CJ, Gummow, Hayne and Heydon JJ demonstrates, public confidence in the administration of justice is likely to be impaired by the re-litigation in a negligence action of issues already judicially determined.

42. This passage is not easy to reconcile with his Honour's citation of *Biggar v McLeod* (cf AS [37]). *Donellan v Watson* was a very particular case, involving a compromise not authorised by the client, which could hardly justify McHugh J's broad statement. It is most readily understood and justified on the basis that, as explained by Mahoney JA, the negligence did not lie in advice given, which his Honour said ordinarily would fall within the immunity, but rather in the "negligent failure to carry an authorized compromise into effect".[51] McHugh J's statement in *D'Orta* was not otherwise explained. It was not necessary for the decision. It did not reflect a view of the majority of the Court. It does not engage with the matters set out above.

43. Likewise, McHugh J's explanation[52] that a claim against an advocate differs from all other claims in negligence because the chain of causation depends on the interposition of a judge or jury does not find reflection in the reasons of the plurality. In any event, for the reasons given above, cases involving settlement advice will, to varying extents and in different ways, often involve the "interposition of a judicial actor" (cf AS [49]).

44. More generally, the facts in *D'Orta*, concerning a plea of guilty at committal proceedings, provide a close analogy to a settlement. It is true that such a plea did not bring the proceeding to an end but was merely evidence at the trial.[53] But if advice about a plea of guilty at committal proceedings is sufficiently closely connected to the conduct of the trial as to attract the immunity, so too must be advice about a plea of guilty at the trial. A court will act on such a plea when it is entered in open court by an accused of full age and apparently of sound mind and understanding, in exercise of a free choice in the interests of the accused, such that there is then no further proof required of the accused's

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[48] (2005) 223 CLR 1 at 52 [154].

[49] (1990) 21 NSWLR 335 (CA).

[50] (2005) 223 CLR 1 at 56 [166].

[51] *Donellan v Watson* (1990) 21 NSWLR 335 (CA) at 338.

[52] (2005) 223 CLR 1 at 55 [164].

[53] *D'Orta* (2005) 223 CLR 1 at 31–32 [88] per Gleeson CJ, Gummow, Hayne and Heydon JJ; cf *Criminal Procedure Act 1986* (NSW), s 105.

guilt.[54] Further judicial decision-making is required in order to sentence the accused, just as further judicial decision-making may be required in some cases of settlement, as discussed in paragraph 31 above. But the entry of the plea, when acted on by the court, obviates the need for any deliberation by a judge or jury on the question of the accused's guilt. The disposition of this question on the basis of the plea is functionally equivalent to the disposition of civil proceedings on the basis of proposed consent orders submitted by the parties. If the finality of the accused's conviction is undermined by collateral proceedings concerning advice which led to the entry of that plea, so too is it undermined by collateral proceedings concerning advice which led to consent orders.

45. The only Australian case relied upon by the appellants since *D'Orta* casting doubt on the application of the immunity in cases of settlement is *Alpine Holdings Pty Ltd v Feinauer*.[55] That was a case determined on a strike out. All that was held was thus that the claim sought to be brought against the lawyer was not unarguable. Be that as it may, to the extent that it is inconsistent with the submissions above, it should be overruled.

D. MODIFYING OR ABOLISHING ADVOCATES' IMMUNITY

46. It is telling that the appellants have structured their written submissions in a way that suggests that they can succeed without modifying or altering the test for advocates' immunity stated in *Giannarelli* and confirmed in *D'Orta*. Thus they have sought to defer the question of reopening to the final third of their written submissions. As demonstrated above, however, however they are put, the appellants' submissions involve an alteration of the test for the immunity and thus require both *Giannarelli* and *D'Orta* to be reopened and departed from. For the following reasons, that step should not be taken.

Leave to reopen is required

47. This Court has repeatedly held that the leave of the Court is required to reopen and reargue its prior decisions.[56] The contrary view[57] has never commanded the acceptance of a majority of the Court. The reasons for the requirement for leave are not only practical[58] but profound: any significant modification or overruling of a previous decision, especially one involving the content of the common law, has ramifications for

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[54] *Meissner v The Queen* (1995) 184 CLR 132 at 141 per Brennan, Toohey and McHugh JJ.

[55] [2008] WASCA 85.

[56] See, eg, *Evda Nominees Pty Ltd v Victoria* (1994) 154 CLR 311 at 316; *Phillip Morris Ltd v Commissioner of Business Franchises (Vic)* (1989) 167 CLR 399 at 409; *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232 at 267 per Brennan J; *British American Tobacco v Western Australia* (2003) 217 CLR 30 at 62–63 [74] per McHugh, Gummow and Hayne JJ; *Swain v Waverley Municipal Council* (2005) 220 CLR 517 at 556–557 [108] per Gummow J.

[57] *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311 at 316 per Deane J; *Philip Morris Ltd v Commissioner of Business Franchises (Vic)* (1989) 167 CLR 399 at 409 per Deane J; *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at 80–81 [134]–[135] per Kirby J; *Wong v The Commonwealth* (2009) 236 CLR 573 at 609 [111]–[113] per Kirby J. The point was left open in *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 by Heydon J (at 137–138 [350]) and Bell J (at 193 [533]).

[58] In the course of argument in *Evda Nominees Pty Ltd v Victoria* (1994) 154 CLR 311 at 313, Gibbs CJ stated: "It would reduce the operation of the Court to an absurdity for it to be permissible for counsel to keep on challenging settled decisions with full argument. There must reside in the Court a power to say whether or not counsel may address full argument to the question whether a previous decision is right or wrong."

respect both for the rule of law and this Court's position at the apex of the Australian judiciary. More than a century ago, Griffith CJ warned of the "grave danger of a want of continuity in the interpretation of the law" in rejecting the view that members of a later constituted court could arrive at a different conclusion as though the matter was *res integra*.[59] In the *Second Territory Senators' Case*,[60] Gibbs J (as his Honour then was) said: "A Justice, unlike a legislator, cannot introduce a programme of reform which sets at nought decisions formerly made and principles formerly established".

48. It is a matter for the Court as to whether or not to address the question of leave as a threshold decision[61] or after full argument.

10 **The criteria for reopening and overruling**

49. Whether or not leave to reopen is required and granted, there is a separate question whether the decision of the Court permitted to be reopened should be departed from or, instead, followed. The Court has consistently said that a previous decision should only be departed from where:

(a) it is "manifestly"[62] or "clearly" [63] wrongly decided, or there is a "clear case" or "strong reasons"[64] or "powerful" [65] reasons for overruling;

(b) it was not the subject of full argument;[66] or

(c) there has relevantly been a change in circumstance.[67]

A change in the composition of the Court is *not* a relevant change in circumstance.[68]

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[59] *The Tramways Case [No 1]* (1914) 18 CLR 54 at 58. See also *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 569 [246] per Kirby J: "care should be taken to avoid (especially within a very short interval) the reopening and re-examination of issues that had substantially decided by earlier decision in closely analogous circumstances".

[60] *Queensland v The Commonwealth* (1977) 139 CLR 585 at 599.

[61] As was done in, for example, *Phillip Morris Ltd v Commissioner of Business Franchises (Vic)* (1989) 167 CLR 399 at 405.

[62] *Australian Agricultural Co v Federated Engine Drivers and Firemen's Association of Australia* (1913) 17 CLR 261 at 279 per Isaacs J; *The Tramways Case [No 1]* (1914) 18 CLR 54 at 58 per Griffith CJ, 69 per Barton J; *Cain v Malone* (1942) 66 CLR 10 at 15 per Latham CJ. Although such epithets as "manifestly" or "clearly" have been occasionally deprecated as not providing adequate criteria, nonetheless the very use of the epithets emphasises the seriousness involved in reconsidering a previous decision of the Court. That seriousness is more acute where the decisions are recent decisions and where the matter has been fully argued. It is instructive that in *The Tramways Case [No 1]*, Griffith CJ gave the example of a manifestly wrong decision as one that had proceeded on a mistaken assumption as to the continuance of a repealed or expired statute.

[63] *The Tramways Case [No 1]* (1914) 18 CLR 54 at 87 per Powers J.

[64] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 554.

[65] *D'Orta* (2005) 223 CLR 1 at 14 [24] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

[66] *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 385 [179] per Gummow and Hayne JJ, see also at 358 [85] per French CJ; *Plaintiff 47/2012 v Director-General of Security* (2012) 251 CLR 1 at 137–138 [350] per Heydon J.

[67] *Hughes and Vale Pty Ltd v New South Wales* (1953) 87 CLR 49 at 70 per Dixon J.

[68] *The Tramways Case [No 1]* (1914) 18 CLR 54 at 69 per Barton J; *Queensland v The Commonwealth* (1977) 139 CLR 585 at 600 per Gibbs J; *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322 at 365–366 [125] per Hayne J.

50. The Court has also held that the fact that the opposite conclusion is to be preferred[69] or the fact that the prior decision is only a majority decision of the Court[70] is an insufficient basis for reopening and reconsidering, and *a fortiori* departing from, a previous decision.

51. In *Northern Territory v Mengel*,[71] Mason CJ, Dawson, Toohey, Gordon and McHugh JJ described the four well known matters set out in *John v Federal Commissioner of Taxation*[72] as "the criteria which determine whether this court should review or depart from an earlier decision". In any event, any approach to the question of leave to reopen, and if granted the question of departure from *Giannarelli* and *D'Orta*, should be informed by a strongly conservative cautionary principle adopted in the interests of continuity and consistency in the law.[73] Such a cautionary and conservative approach is even more justified where a question of the correctness of the earlier decision has already been reconsidered by the Court, the decision and or its reconsideration was very recent[74] and the previous decision is one amenable to alteration by the legislature (as opposed to one concerning the Constitution).[75] All of those considerations are present in the instant case.

Leave to reopen should not be granted; alternatively, *Giannarelli* and *D'Orta* should be followed

52. Applying the cautionary and conservative approach mandated by previous decisions of the Court, leave to reopen *Giannarelli* and *D'Orta* should not be granted; and for the same reasons, if granted, those decisions should be followed.

Giannarelli and D'Orta were fully argued, and state a clear principle with a useful result

53. There can be no question that both *Giannarelli* and *D'Orta* were fully argued. Each was heard over two days, and all parties were represented by eminent counsel. The matters relied upon by the appellants to impugn the immunity at AS [85]–[98] were all argued.

54. A majority in *Giannarelli*[76] adopted the formulation subsequently confirmed in *D'Orta*: that advocates' immunity applies to in-court work and out-of-court work intimately connected with the conduct of proceedings in court. In this light, it is difficult to understand why McHugh J in *D'Orta*[77] thought that *Giannarelli* had no *ratio*. Be that as it may, *D'Orta* plainly did. Both *Giannarelli* and *D'Orta* thus state a clear and

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[69] *Attorney General (NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237 at 243–244 per Dixon J; *D'Orta* (2005) 223 CLR 1 at 14 [24] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

[70] *Perpetual Executors and Trustees Association of Australia Ltd v Federal Commissioner of Taxation* (1949) 77 CLR 493 at 496 per Latham CJ, Rich, Dixon, McTiernan and Webb JJ.

[71] (1995) 185 CLR 307 at 338 per Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ (emphasis added).

[72] (1989) 166 CLR 417 at 438–439 per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ.

[73] *Wurridjal v The Commonwealth* (2009) 237 CLR 309 at 350–353 [65]–[72] per French CJ.

[74] *Attorney General (NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237 at 244 per Dixon J; *Hughes and Vale Pty Ltd v New South Wales* (1953) 87 CLR 49 at 70 per Dixon CJ; *D'Orta* (2005) 223 CLR 1 at 117 [372] per Callinan J.

[75] *Cain v Malone* (1942) 66 CLR 10 at 15 per Latham CJ; *D'Orta* (2005) 223 CLR 1 at 119 [378] per Callinan J.

[76] (1988) 165 CLR 543 at 560 per Mason CJ, 571 per Wilson J, 579 per Brennan J, 596 per Dawson J.

[77] (2005) 223 CLR 1 at 46 [133].

authoritative legal test. The formulation of that test was based on a line of previous decisions.[78]

55. The suggestion by the appellants of confusion in the application of the test in intermediate appellate courts (AS [79]–[80]) is misplaced. For one thing, it is largely explained by the same conflation identified in respect of the appellants' own submissions between the test and what is considered to be the rationale for the test. For another, the submission that there is doubt as to what is encompassed within the expression "intimately connected" — said by the appellants to be a critical feature comprising the authority of *Giannarelli* and *D'Orta* — was an argument made and rejected in *D'Orta*.[79]

10 56. Nor can it be said that *D'Orta* has achieved no useful result: its very rationale is based upon a cogent assessment of the *inutility* of opening up a collateral review of earlier court proceedings. This Court, in both *Giannarelli* and *D'Orta*, must be taken to have been fully cognisant of the fact that upholding the immunity may result in cases where a party is left without a remedy; but this consequence flows from the very nature of an immunity.

Giannarelli and D'Orta have been regularly applied

57. *Giannarelli* has stood for almost 30 years and, of course, it did not represent a departure from established common law principle. The words of Gummow J in *Swain v Waverley Municipal Council*,[80] concerning *Wyong Shire Council v Shirt*,[81] can be readily adapted to the current case: it had "stood for some 25 years and must have that applied across the
20 country on numerous occasions and supplied the understanding of the law on which many cases were settled". So far as decided cases are concerned, this can be readily demonstrated.[82] It is, of course, impossible to know how many additional cases have either not been brought at all — and would now be statute barred — or, alternatively, were settled by reference to those decisions.

58. Given that the exercise of judicial power is inconsistent with prospective overruling,[83] it is obvious, from the sheer volume of cases referred to in the previous paragraph, together with the unknowable number of cases that were settled or never brought, how much damage would be done to respect for the rule of law if leave to reopen *Giannarelli* and *D'Orta* were granted and those decisions overruled or significantly altered. The negative
30 impacts of overruling extend well beyond corroding respect for the rule of law. They are immensely practical. As observed by Anderson P (in dissent) in *Lai v Chamberlains*:[84]

> I would think it inappropriate for a Court rather than Parliament to modify or extinguish immunity because of the retrospective implications of a Court decision. The present causes of action extend back more than six years and if a Court were to remove immunity counsel in every case, whether at first instance or on appeal, for

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78 See, esp, *Rondel v Worsley* [1969] 1 AC 191; *Rees v Sinclair* [1974] 1 NZLR 180 (CA) at 187 per McCarthy P; *Saif Ali v Sydney Mitchell & Co* [1980] AC 198.

79 *D'Orta* (2005) 223 CLR 1 at 5.

80 (2005) 220 CLR 517 at 556–557 [108].

81 (1990) 146 CLR 40.

82 See the cases in n 8 above.

83 *Ha v New South Wales* (1997) 189 CLR 465 at 503 per Brennan CJ, McHugh, Gummow and Kirby JJ.

84 [2005] 3 NZLR 291 (CA) at 315–316 [121].

> at least the past six years would be potentially liable to a proceeding, vexatious or otherwise. The acceptance of briefs which they might have been ethically entitled to decline, the fixing of fees, or the arrangements for professional indemnity insurance in a context of assumed immunity, would all have been undertaken on a false basis. Courts are not the Legislature and cannot prevent retro-activity in the sense of purporting to affect previously arising causes of action which have not yet been the subject of litigation.

59. A great sense of injustice will be generated in those who have never commenced, compromised or run and lost cases by reference to the settled law as stated in *Giannarelli* and *D'Orta*. Equally, it can readily be assumed that many legal practitioners have made their insurance arrangements by reference to the settled law. But if the law is changed retrospectively, as it is bound to be in light of the constitutional inhibition on prospective overruling, those practitioners run the risk of being exposed to suit for a six-year period on a fundamentally different premise to that by reference to which their work in that period was undertaken.

No legislative intervention to reverse or modify Giannarelli or D'Orta

60. It is notable that there has been no legislative intervention to reverse or modify *Giannarelli* in the almost 30 years since that decision, nor in the 10 years since it was reaffirmed in *D'Orta*.

61. In *D'Orta*, the plurality noted that, after *Giannarelli*, the Victorian Law Reform Commission had recommended abolition of the immunity in Victoria but that recommendation had been rejected. In respect of the *Legal Practice Act 1996* (Vic), the plurality stated: "it is clear from the course of events described that it was enacted on the assumption that it would preserve an existing immunity".[85] Their Honours continued:[86]

> Since 1999, state legislatures have given close attention to what has been called "tort law reform". In particular, close attention has been paid to the law of negligence, and a number of statutes have been passed since 2000 which have dealt with that general subject. In none of that legislation has there been any reference to the immunities from suit of advocates, witnesses or judges.
>
> Nothing in any of the legislative steps taken since *Giannarelli* suggests that the court should now reconsider the decision reached in that case. On the contrary, the enactment of s 442 of the Practice Act suggests that the court should not do so. *One state legislature, directly confronted with a recommendation that the law should be changed to the form for which the applicant now contends, chose not to do so.* That legislature expressly preserved the state of the law as it was determined in *Giannarelli,* supplementing that with a limited right to compensation in cases (among others) where a practitioner had failed to act with due skill and care.

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[85] (2005) 223 CLR 1 at 22 [50] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

[86] (2005) 223 CLR 1 at 23 [53]–[54] per Gleeson CJ, Gummow, Hayne and Heydon JJ (emphasis added). See also at 119 [378] per Callinan J.

62. The observations in the above passage continue to apply. They may be supplemented by reference to the passage in New South Wales and Victoria of uniform legal practice legislation[87] which does not purport to alter, modify or abolish the immunity.

63. Perhaps most significantly in this context, shortly following *D'Orta*, the Standing Committee of Attorneys-General, as it was then known, issued an Options Paper entitled "Advocates' Immunity from Civil Suit".[88] It noted (at p 4 [9]) that "[t]he recent decision of *D'Orta* has prompted renewed interest in the position under Australian law in relation to advocates' immunity." A number of submissions were received opposing the abolition of the immunity (see p 8 [32]) and, self-evidently, no legislative intervention followed. This is a powerful, albeit tacit, acceptance and endorsement by Federal and State Parliaments of the immunity, and the appropriateness of its current formulation.

No relevant change in circumstances

64. There has been no relevant change in circumstances. In particular, the law in New Zealand has not changed since *D'Orta*. All that has occurred is that the Supreme Court upheld the decision of the Court of Appeal abolishing the immunity in that jurisdiction,[89] a decision that was noted by this Court in *D'Orta*.[90]

65. There has been no change to the public policy which the plurality in *D'Orta* explained justified the immunity (cf AS [75]). The interests of the administration of justice, in particular in finality of judicial decisions, remains. The appellants point to no judicial decisions or legislation which have undermined or qualified that public policy. To the contrary, since *D'Orta*, this Court has repeatedly emphasised that rationale.[91]

66. The contention that the number of decided Australian cases concerning the immunity "provides a more certain foundation for this Court to consider the ongoing necessity of the immunity than was afforded to the Court at the time *Giannarelli* and *D'Orta* were decided" (AS [77], [81]) is a red herring. For the reasons above, none of those decided cases provide a reason for abolishing or modifying the immunity.

67. AS [82]–[84] suggest that a changed circumstance in *Giannarelli* and *D'Orta* is that the experience in jurisdictions in which the immunity has been abolished has not borne out the concerns in those cases, in particular whether existing common law protections were sufficient to protect the administration of justice. There are three answers to this. The

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87 *Legal Profession Uniform Law Application Act 2014* (NSW); *Legal Profession Uniform Law Application Act 2014* (Vic); *Legal Profession Uniform Law*; the *Legal Profession Uniform Admission Rules 2015*; the *Legal Profession Uniform Conduct (Barristers) Rules 2015;* the *Legal Profession Uniform Continuing Professional Development (Barristers) Rules 2015;* the *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015*; the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*; and the *Legal Profession Uniform Legal Practice (Solicitors) Rules 2015.*

88 See *http://www.justice.nsw.gov.au/justicepolicy/Documents/advocates_immunity_-_scag_options_paper.pdf.*

89 *Lai v Chamberlains* [2007] 2 NZLR 7 affirming *Lai v Chamberlains* [2005] 3 NZLR 291.

90 (2005) 223 CLR 1 at 25 [61] per Gleeson CJ, Gummow, Hayne and Heydon JJ, 68 [205] per McHugh J, 120 [381] per Callinan J.

91 See, eg, *Burrell v The Queen* (2008) 238 CLR 218 at 223 [15] per Gummow ACJ, Hayne, Heydon, Crennan and Kiefel JJ; *Achurch v The Queen* (2014) 253 CLR 141 at 152 [14] per French CJ, Crennan and Bell JJ.

first is that essentially the same submission was made in *D'Orta*.[92] Among other reasons for its rejection, the plurality pointed out important differences in the processes available to protect to the administration of justice in such other jurisdictions.[93] *Secondly*, and contrary to AS [82]–[84], experience in other jurisdictions has in fact demonstrated how *ineffective* are the other common law protections upon which the appellants rely. To take an example, in England, the doctrines of *res judicata*, issue estoppel and abuse of process "will rarely be an impediment on a client suing his lawyer".[94] Whether or not there has been in those jurisdictions, or would be in Australia, a "torrent" of contested litigation is not to the point (though many English cases may be identified).[95] In cases in which claims are made, the existing processes are not effective to protect the finality of judicial decisions. It is equally not to the point to observe that many cases may fail on causation grounds. Those that do not, impugn finality. And even in those that do, as explained above, the matters the trial judge must consider will, even if rejected, have that tendency.

68. In truth, the only changed circumstance that can be pointed to is the composition of the Bench, and that circumstance, as noted in paragraph 49 above, is not a proper basis to depart from this Court's previous decisions. It would convey the wholly undesirable message that the content of the law is a function of the current incumbents of the High Court and that what is the law today may not be the law in ten years' time, when it may be expected that the composition of at least a majority of the Bench will have changed. That is not a consequence conducive to engendering respect for the rule of law.[96]

Other matters

69. None of the matters referred to in AS [86]–[98] warrant reopening, still less the abolition of the immunity. They were all thoroughly considered in *D'Orta*. The fact that there are narrow, and tightly controlled, exceptions to the finality of judicial decisions does not undermine the general principle; at the least, it does not support such a radical departure as the abolition of advocates' immunity (cf AS [86]–[90]). The operation of the advocates' immunity is not "anomalous" (cf AS [91], [96]). To the contrary, it is consistent with the other immunities connected with the court process. As explained in paragraph 67 above, other doctrines of the law, in particular abuse of process, are not capable of ensuring finality of judicial decisions (cf AS [92]–[94]). For the reasons in paragraphs 19–38 above, abolition of the immunity would more significantly undermine public confidence in the legal system than its retention (cf AS [97]). The detriment of denying recovery to those who may have been wronged is outweighed by the systemic benefits of the immunity (cf AS [98]).

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92 (2005) 223 CLR 1 at 4.

93 *D'Orta* (2005) 223 CLR 1 at 25 [61] per Gleeson CJ, Gummow, Hayne and Heydon JJ.

94 Powell et al, *Jackson & Powell on Professional Liability* (7th ed, 2012) at 798 at [11-119]. See also *Laing v Taylor Walton (a firm)* [2008] EWCA Civ 1146; [2008] PNLR 11 at 311–312 [27] per Buxton LJ, 313–314 [36]–[38] per Moses LJ. For further examples, see *Griffin v Kingsmill* [2001] EWCA Civ 934; [2001] Lloyd's Rep PN 716; *Feakins v Burstow* [2005] EWHC 1931; [2006] PNLR 6; Walton et al, *Charlesworth & Percy on Negligence* (13th ed, 2014) at 646 [9-98] ("the likelihood of a second action amount to an abuse would appear to be small"), 721–722 [9-252]–[9-253].

95 See, eg, the cases in n 39.

96 cf *Plaintiff M76/2013 v Minister for Immigration and Citizenship* (2013) 251 CLR 322 at 383 [198] per Kiefel and Keane JJ: "Regularity and consistency are important attributes of the rule of law".

The test should not be modified so as to turn on undermining finality

70. As a fall back to outright abolition of the immunity, the appellants contend that the test should be modified so as to turn expressly on the notion of finality (AS [71]–[72]). The premise for that submission is that the application of the immunity in cases of settlement advice does not fit with a rationale based on finality. For the reasons above, that premise should be rejected. But the submission should be rejected for further reasons.

71. As the analysis concerning settlements at paragraphs 25–31 above shows, finality may be undermined to different degrees and different ways, and that the degree to which finality is undermined may vary within what otherwise appear similar categories of case. To draw a precise distinction between cases in which finality is undermined and cases in which it is not is unworkable. A test expressly based on undermining finality would rapidly descend into a wilderness of single instance decisions.

72. Further, its application in any particular case could not be determined without a very detailed examination of the facts and circumstances of the previous proceeding. In short, the application of the immunity would become a triable issue and the rationale of avoiding re-litigation compromised. A test expressed in terms of finality thus has the effect of undermining that very thing. While the immunity may be an immunity from liability, it would not in truth be an immunity from suit.

73. In contrast, the present statement of the test is suited to application at a summary dismissal or strike out stage, or determination by way of preliminary question. While that will not always be possible, the simple inquiry mandated by the test — namely, the connection between the lawyer's work and the court process — is suited to this kind of early determination. This is better directed to the rationale of finality, by permitting re-litigation which would undermine that rationale to be arrested at an early stage.

E. THE APPLICATION OF THE IMMUNITY IN THIS CASE AND CONCLUSION

74. The conduct in this case was within the test stated in *D'Orta*. It was of a kind which, if allowed to be the subject of a claim, would undermine the administration of justice, including the finality of judicial decisions. The test and the rationale for the test are satisfied. The circumstances thus provide no justification for this Court to modify or abolish advocates' immunity. In any case, such a change should be left to the legislatures.

PART VIII: ESTIMATE

75. The respondent estimates that approximately 2 hours will be required for presentation of its oral argument.

Dated: 12 October 2015

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