HIGH COURT OF AUSTRALIA

KIEFEL CJ
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

DAVID KENDIRJIAN APPELLANT

AND

EUGENE LEPORE & ANOR RESPONDENTS

Kendirjian v Lepore
[2017] HCA 13
29 March 2017
S170/2016

ORDER

1. *Appeal allowed from the Supreme Court of New South Wales Court of Appeal's decision in relation to the second respondent.*

2. *Set aside the orders of the Supreme Court of New South Wales Court of Appeal made on 21 May 2015 and 1 June 2015 insofar as they apply to the second respondent and, in lieu thereof, order that the appeal against the second respondent to the Supreme Court of New South Wales Court of Appeal be allowed and the orders made by District Court Judge Taylor SC on 16 May 2014 insofar as they relate to the second respondent be set aside and in lieu thereof order that the Notice of Motion filed by the second respondent on 31 July 2013 in the District Court of New South Wales be dismissed.*

3. *The second respondent pay the appellant's costs of and incidental to the second respondent's Notice of Motion filed in the District Court of New South Wales on 31 July 2013.*

4. *The second respondent pay the appellant's costs of and incidental to the application for leave to appeal and the appeal to the Supreme Court of New South Wales Court of Appeal below against the judgment and orders made by District Court Judge Taylor SC in favour of the second respondent.*

5. *The second respondent pay the appellant's costs of and incidental to the application for special leave to appeal and the appeal to the High Court of Australia against the judgment and orders made by the Supreme Court of New South Wales Court of Appeal on 21 May 2015 and 1 June 2015 in favour of the second respondent.*

6. *Remit the balance of the matter to the District Court of New South Wales.*

On appeal from the Supreme Court of New South Wales

Representation

B W Walker SC with D M C Aquilina for the appellant (instructed by Longton Legal)

No appearance for the first respondent

J V Agius SC with A M Hawkins for the second respondent (instructed by Carneys Lawyers)

CATCHWORDS

Kendirjian v Lepore

Legal practitioners – Negligence – Advocates' immunity from suit – Where settlement offer made and rejected on first day of trial – Where rejection of settlement offer followed by judicial decision – Where damages awarded lower than settlement offer – Where solicitor and barrister alleged to have given negligent advice in relation to settlement offer – Whether advice affected conduct of case in court by bearing upon court's determination of case – Whether advocate immune from suit.

High Court – Stare decisis – Whether *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 90 ALJR 572; 331 ALR 1; [2016] HCA 16 should be reopened.

Words and phrases – "advocates' immunity", "affecting the conduct of the case", "finality", "functional connection", "intimately connected", "judicial determination", "possibility of challenge to findings".

1 KIEFEL CJ. I agree with Edelman J.

2 BELL J. I agree with Edelman J.

GAGELER J. I agree with Edelman J.

4 KEANE J. I agree with Edelman J.

5 NETTLE J. I agree with Edelman J that, in light of the majority's reasoning in *Attwells v Jackson Lalic Lawyers Pty Ltd*[1], this appeal must be allowed. With all respect, however, I do not agree that Mr Kendirjian's negligence action against the respondents does not give rise to a possibility of a challenge to the findings of the District Court.

6 Where an advocate's advice to a plaintiff to reject an offer of settlement of the plaintiff's claim results in the claim proceeding to a judgment which is less favourable than the offer, a later claim by the plaintiff that the advocate was negligent in so advising will call into question whether the advocate had a reasonable basis to advise rejection of the offer. I remain of the view I expressed in *Attwells* that[2], where that occurs, it is likely to result in the re-litigation of issues that were determined at trial, including the strength of the plaintiff's claim; the weight to be given to evidence, taking into account considerations of credibility and reliability of witnesses; and the correct application of legal principle and authority.

7 I accept of course, as Edelman J observes, that the assessment of whether the advocate's advice was negligent is to be undertaken as at the time the advice was given and not at the time of the unfavourable judgment. But in the scheme of things, it is not improbable that one or other side might attempt to demonstrate the way things were, or should have appeared, when the advice was given by reference to the way things were during and at the conclusion of the trial. For example, an advocate faced with such a negligence claim might contend that the trial judge's assessment of the plaintiff's credit and reliability was so unlikely or unwarranted that it could not reasonably have been anticipated at the time of advice, or that the trial judge's assessment of damages was so remarkably parsimonious by reference to current practice that it could not reasonably have been foreseen. Equally, a plaintiff might contend that the trial judge's assessment of the issues in the case was so predictable that the advocate's failure to anticipate it was negligent. Such examples can be multiplied.

8 Of course, as between Mr Kendirjian and the defendant to the District Court proceedings, issues of that type have now been conclusively determined by the Court of Appeal's dismissal[3] of Mr Kendirjian's appeal from the judgment of the District Court. But such issues have not yet been determined conclusively as between Mr Kendirjian and the respondents. And although, as the pleadings stand in this matter, it is not clear that either of the respondents is advancing a defence of the kind alluded to above, the negligence claim has not yet proceeded

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1 (2016) 90 ALJR 572; 331 ALR 1; [2016] HCA 16.

2 (2016) 90 ALJR 572 at 586 [72]; 331 ALR 1 at 17-18.

3 *Kendirjian v Ayoub* [2008] NSWCA 194.

very far and the possibility of further amendments to the pleadings cannot be excluded.

9 This view notwithstanding, in light of the majority's reasoning in *Attwells* I agree with the orders proposed by Edelman J.

10 GORDON J. I agree with Edelman J that, in accordance with the reasoning of the majority in *Attwells v Jackson Lalic Lawyers Pty Ltd*[4], this appeal must be allowed.

11 I also agree with the additional reasons of Nettle J. Those reasons are consistent with the view I expressed in *Attwells*[5].

12 In *Attwells*, the majority said that it was "not necessary to determine whether the [advocate's] immunity attaches only to the kinds of decision which a lawyer charged with the conduct of a case in court may make *without instructions from the client*"[6] (emphasis added).

13 The central allegation in this appeal is that the lawyers charged with the conduct of Mr Kendirjian's case in earlier personal injury proceedings made a decision (to reject an offer of settlement) that could not be made without instructions from the client. Where a court has been asked to make an order to carry a compromise into effect, the court may refuse to give effect to the compromise, and may set aside an order already made, where counsel has acted contrary to instructions, at least before the order has been perfected[7]. Accordingly, in some, perhaps many, cases where it is alleged that a lawyer has acted without instructions, it will be necessary to first explore whether the result of which the client complains can be, or could have been, set aside before considering issues about immunity from suit.

14 Here, according to Mr Kendirjian, the matter went to judgment because, among other things, counsel rejected a settlement offer as being "too low" without his express instructions. It was not submitted in this Court that the judgment ultimately entered could have been set aside on account of the alleged conduct of counsel for Mr Kendirjian.

15 Counsel purported to act as the agent of Mr Kendirjian in rejecting the offer. Just as an agent gives an implied warranty of authority to the third party with whom they deal[8], it is arguable that there will be an implied contract that

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4 (2016) 90 ALJR 572; 331 ALR 1; [2016] HCA 16.

5 (2016) 90 ALJR 572 at 594 [129]; 331 ALR 1 at 28.

6 (2016) 90 ALJR 572 at 582 [45]; 331 ALR 1 at 12.

7 *Harvey v Phillips* (1956) 95 CLR 235 at 243; [1956] HCA 27. See also *Neale v Gordon Lennox* [1902] AC 465; *Shepherd v Robinson* [1919] 1 KB 474.

8 *Collen v Wright* (1857) 8 El & Bl 647 at 657-658 [120 ER 241 at 245]; *Brownett v Newton* (1941) 64 CLR 439 at 445, 448-451, 457; [1941] HCA 14.

makes an agent liable to their principal for exceeding their actual authority[9]. On that hypothesis, liability for an agent's breach of a duty to act only as authorised and without exceeding authority would arise under that implied contract[10]. And both the nature and extent of the duty, and the resulting breach, would fall to be considered and determined by reference to the law of contract[11]. The central allegation would be that the agent acted without authority, not that the agent was negligent in the exercise of their authority. That is not to say anything about whether such a case might also support a claim sounding in tort, based on a breach of some differently formulated duty[12].

16 Because, as this Court now holds, there is no immunity from suit in this case, and there has yet to be a trial of Mr Kendirjian's claim against his lawyers, these are matters about which no concluded view can or should be expressed. And how the point expressly left open by the majority in *Attwells* should be determined is not decided in this appeal.

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9 *OBG Ltd v Allan* [2008] AC 1 at 41-42 [93].

10 See *OBG Ltd v Allan* [2008] AC 1 at 41-42 [93].

11 See, eg, Watts and Reynolds, *Bowstead and Reynolds on Agency*, 20th ed (2014) at 184-187 [6-002]-[6-005].

12 See *Astley v Austrust Ltd* (1999) 197 CLR 1 at 20-23 [44]-[47]; [1999] HCA 6; *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 at 193-194; Watts and Reynolds, *Bowstead and Reynolds on Agency*, 20th ed (2014) at 185-186 [6-003].

17 EDELMAN J. This appeal concerns the scope of advocates' immunity from suit. The appellant, Mr Kendirjian, brought a claim against his solicitor (Mr Lepore, the first respondent) and barrister (Mr Conomos, the second respondent). Mr Kendirjian alleged that the respondents were negligent in advising him in relation to an offer for settlement in a proceeding in which they represented him. Mr Kendirjian's allegations included that the respondents advised him that a settlement offer had been made but that they did not advise him of the amount of the offer, and that they rejected the offer as being "too low" without his express instructions. The primary judge granted summary judgment on the basis that the respondents were immune from the alleged liability for negligence. That decision was upheld by the Court of Appeal of the Supreme Court of New South Wales.

18 Subsequent to the decisions of the primary judge and the Court of Appeal, this Court decided *Attwells v Jackson Lalic Lawyers Pty Ltd*[13]. In *Attwells*, a majority of this Court held that the advocates' immunity from suit did not extend to negligent advice which leads to a compromise of litigation by agreement between the parties. As the majority joint judgment explained, by the same reasoning it is difficult to envisage how the immunity could ever extend to advice not to settle a case[14]. Following the decision in *Attwells*, the first respondent in this matter consented to orders in this Court including allowing the appeal insofar as it related to him. However, the second respondent submitted that the reasoning in *Attwells* could be distinguished or, alternatively, that part of the decision should be reopened. The reasoning of the majority in *Attwells* cannot be distinguished in this case. *Attwells* should not be reopened. The appeal in respect of the second respondent must also be allowed.

The personal injury proceedings and appeal

19 In November 1999, Mr Kendirjian was injured in a car accident with a car driven by Ms Ayoub. In 2004, he commenced legal proceedings against Ms Ayoub in the District Court of New South Wales. Ms Ayoub admitted liability so the trial concerned only the assessment of damages.

20 On the first day of the District Court trial, in August 2006, Ms Ayoub's legal representatives made an offer of settlement to the respondents, offering Mr Kendirjian $600,000 plus costs. This offer was not accepted so the trial proceeded. Ultimately, Mr Kendirjian obtained judgment for $308,432.75 plus costs, although on appeal it was common ground that the proper quantum was $10,000 more, when an omission of damage for future domestic help for heavier

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13 (2016) 90 ALJR 572; 331 ALR 1; [2016] HCA 16.

14 *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 90 ALJR 572 at 582 [48] per French CJ, Kiefel, Bell, Gageler and Keane JJ; 331 ALR 1 at 13.

household tasks was included. An appeal to the Court of Appeal was dismissed with costs. In the Court of Appeal, McColl JA (with whom Beazley JA agreed) observed that Mr Kendirjian's credibility had been at the heart of the issues to be determined at trial[15]. The primary judge had relied substantially upon video recordings of Mr Kendirjian in the years after the accident to conclude that Mr Kendirjian had exaggerated or misstated the extent of his medical condition.

The negligence proceedings against the respondents

21 In October 2012, Mr Kendirjian commenced proceedings against the respondents in the District Court. His allegations included numerous particulars of negligence in the advice given to him by the respondents. Central to his claim were allegations that the respondents did not advise him of the amount of the settlement offer, "but merely of the fact that an offer had been made". Mr Kendirjian also pleaded that the respondents rejected the offer "absent any express instructions" from him but "based upon the advice of the [second respondent] that the offer ... was 'too low'". Mr Kendirjian alleged that he first discovered the amount of the offer from the solicitor for Ms Ayoub in January 2009. The second respondent's pleaded defence included the plea that either he or the first respondent, or both of them, informed Mr Kendirjian of the settlement offer but that Mr Kendirjian provided instructions to reject the offer and to make a counter-offer of $1.2 million. The second respondent also pleaded that Mr Kendirjian's instructions for the counter-offer were contrary to his advice to make a counter-offer of $800,000 inclusive of costs.

22 In Mr Kendirjian's claim against the respondents, he sought damages of $312,567.25 plus interest and costs. This was said to have been calculated by subtracting the amount recovered after the personal injury trial from the settlement offer of $600,000 plus costs. Mr Kendirjian's claim against the respondents therefore relied upon the amount awarded by the District Court in the personal injury proceedings in order to quantify the loss that he allegedly suffered. Other particulars of Mr Kendirjian's claim also appeared to rely on the District Court judgment, such as his allegations against each respondent of a failure to advise that the District Court could award damages in an amount lower than the "lower range of $415,984".

The decisions of the District Court and Court of Appeal

23 The respondents successfully brought an application in the District Court for summary judgment. The District Court held that the respondents were immune from liability in negligence. This conclusion was upheld by the Court of Appeal. Both the District Court and the Court of Appeal relied upon seriously

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15 *Kendirjian v Ayoub* [2008] NSWCA 194 at [95].

considered obiter dicta in the earlier decision of the New South Wales Court of Appeal in *Donnellan v Woodland*[16]. In the Court of Appeal in this case, Macfarlan JA (with whom Leeming JA and Bergin CJ in Eq agreed) held that the decision in *Donnellan* extended to the circumstances of this case, and that the decision in *Donnellan* was not plainly wrong[17].

24 The decision of the Court of Appeal in *Donnellan* was an appeal from R S Hulme J[18]. That case concerned advice given by a solicitor, Mr Donnellan, to his former client, Mr Woodland, regarding proceedings to obtain a court-imposed drainage easement under s 88K of the *Conveyancing Act* 1919 (NSW). The easement proceedings failed and Mr Woodland was ordered to pay the costs of the Council, including on an indemnity basis from the date of one of the Council's offers of compromise. The allegations of negligence against Mr Donnellan included that he was negligent in relation to advice concerning offers to compromise the easement proceedings by the Council. The claim of negligence was upheld by the primary judge.

25 In the Court of Appeal in *Donnellan*, Beazley JA (with whom Barrett and Hoeben JJA and Sackville AJA agreed) allowed the appeal on the ground that Mr Donnellan had not been negligent. Nevertheless, their Honours also considered that even if Mr Donnellan had been negligent he would have had the benefit of the immunity. The reason given by Beazley JA was that the immunity would attach if the giving of advice, or the omission to give advice, led to a decision to continue with the case, or meant that the case was continued. The immunity was said to apply because the omission or conduct had affected the conduct of the case in court by requiring the case to continue[19].

26 A different approach to the same conclusion was taken in *Donnellan* by Basten JA, who considered it contrary to principle to determine the question of negligence before the issue concerning the immunity because the rationale of the immunity is to avoid the reopening of the dispute, and to avoid a challenge to a final determination involving the exercise of the judicial power of the State. To determine the issue of negligence before the issue concerning immunity could undermine that rationale if the immunity existed. His Honour therefore considered that the immunity attached because, based upon the pleadings rather than the course of trial, Mr Donnellan might have argued that the advice given

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16 (2013) ANZ ConvR ¶13-001; [2012] NSWCA 433.

17 *Kendirjian v Lepore* [2015] NSWCA 132 at [28]. See also at [51] per Leeming JA.

18 *Woodland v Donnellan* [2011] NSWSC 777.

19 *Donnellan v Woodland* (2013) ANZ ConvR ¶13-001 at 35 [198].

was reasonable because the orders made were improbable at the date the advice was given, thus casting doubt upon the correctness of the decision[20].

27 In applying the decision in *Donnellan* in this case, Macfarlan JA in the Court of Appeal correctly observed that there is no difference in principle between an allegation that negligent advice was given about the amount of likely damages (as alleged in this case) and an allegation that negligent advice was given to reject an offer of a disclosed amount (as alleged in *Donnellan*)[21]. However, the conclusions of the Court of Appeal in this case and the Court of Appeal in *Donnellan*, that both instances engage the immunity from suit, are inconsistent with the course of the development of the principle of advocates' immunity.

The decisions in *Giannarelli*, *Attwells* and *D'Orta*

28 In *Giannarelli v Wraith*[22], a majority of this Court upheld the common law immunity from suit of an advocate. In the majority, Mason CJ described the boundaries of the immunity in the following terms[23]:

> "Preparation of a case out of court cannot be divorced from presentation in court. The two are inextricably interwoven so that the immunity must extend to work done out of court which leads to a decision affecting the conduct of the case in court. But to take the immunity any further would entail a risk of taking the protection beyond the boundaries of the public policy considerations which sustain the immunity. I would agree with McCarthy P in *Rees v Sinclair*[24] where his Honour said:
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> > '... the protection exists only where the particular work is so intimately connected with the conduct of the cause in Court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing.'"

29 Sixteen years later, in *D'Orta-Ekenaike v Victoria Legal Aid*[25], a majority of this Court rejected a submission that the decision of the majority in

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20 *Donnellan v Woodland* (2013) ANZ ConvR ¶13-001 at 46 [273]-[274].

21 *Kendirjian v Lepore* [2015] NSWCA 132 at [28].

22 (1988) 165 CLR 543; [1988] HCA 52.

23 *Giannarelli v Wraith* (1988) 165 CLR 543 at 559-560.

24 [1974] 1 NZLR 180 at 187.

25 (2005) 223 CLR 1; [2005] HCA 12.

Giannarelli should be reconsidered. A joint judgment of Gleeson CJ, Gummow, Hayne and Heydon JJ said that there was no reason to depart from the test described in *Giannarelli*. The joint judgment summarised that test in terms which included work done in court and, quoting from part of the passage above from Mason CJ, "work done out of court which leads to a decision affecting the conduct of the case in court"[26]; or, to express the approach in relation to work done out of court in another way, "'work intimately connected with' work in a court"[27].

30 A further eleven years later, in *Attwells*, this Court again unanimously rejected a submission that the immunity should be abolished. The majority declined to extend the immunity to acts or advice of an advocate which do not move litigation towards a determination by a court. In the joint majority reasons, French CJ, Kiefel, Bell, Gageler and Keane JJ reiterated the remarks from the joint judgment in *D'Orta* that there was no reason to depart from the test described in *Giannarelli*, and quoted the whole of the passage from Mason CJ set out above[28].

31 The joint reasons of the majority in *Attwells* explained the rationale for the immunity when declining to extend it to compromises. Since the immunity attaches by the "participation of the advocate as an officer of the court in the quelling of controversies by the exercise of judicial power", it followed that the immunity did not extend to advice that leads to a settlement between the parties[29]. Advice leading to a compromise of a dispute cannot lead to the possibility of collateral attack upon a non-existent exercise of judicial power to quell disputes. For this reason, the expression of the test concerning work done out of court which "leads to a decision affecting the conduct of the case in court"[30], or which is "intimately connected with"[31] work in court, is not engaged

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26 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 31 [86].

27 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 31 [86], quoting the Explanatory Memorandum for the Bill that became the *Legal Practice Act* 1996 (Vic).

28 *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 90 ALJR 572 at 575 [2]; 331 ALR 1 at 3.

29 *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 90 ALJR 572 at 581 [38]; 331 ALR 1 at 11.

30 *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 90 ALJR 572 at 575 [2]; 331 ALR 1 at 3, citing *Giannarelli v Wraith* (1988) 165 CLR 543 at 560.

31 *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 90 ALJR 572 at 575 [2]; 331 ALR 1 at 3, citing *Giannarelli v Wraith* (1988) 165 CLR 543 at 560.

merely by "any plausible historical connection"[32] between an advocate's work and a client's loss. The test requires that the work bear upon the court's determination of the case[33]. There must be a "functional connection" between the work of the advocate and the determination of the case[34].

32 In *Attwells*, the respondent submitted that an anomaly would arise if the immunity did not extend to negligent advice which leads to a compromise of the proceeding, but did extend to negligent advice not to compromise a proceeding which leads to a judicial decision. The joint reasons of the majority explained that the assumption underlying the respondent's submission was that the immunity would extend to negligent advice not to compromise a proceeding because that advice was intimately connected with the ensuing judicial determination[35]. The joint reasons rejected this assumption on the basis that negligent advice not to compromise a proceeding gives rise only to an historical connection between the advice and the continuation of the litigation[36]. As the joint judgment concluded, the giving of advice either to cease or to continue litigating does not itself affect the judicial determination of a case[37].

Attwells cannot be distinguished

33 The primary submission of the second respondent was that the decision in *Attwells* should be distinguished. He relied upon the reasoning of Macfarlan JA in the Court of Appeal, handed down prior to *Attwells*, where his Honour said that Mr Kendirjian's negligence action could involve departing from the views expressed in the District Court and Court of Appeal judgments in the personal injury proceedings[38]. The second respondent submitted that a departure from the

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32 *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 90 ALJR 572 at 582 [46]; 331 ALR 1 at 12.

33 *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 90 ALJR 572 at 582 [46]; 331 ALR 1 at 12.

34 *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 90 ALJR 572 at 582 [49]; 331 ALR 1 at 13.

35 *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 90 ALJR 572 at 582 [48]; 331 ALR 1 at 13.

36 *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 90 ALJR 572 at 582 [49]; 331 ALR 1 at 13.

37 *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 90 ALJR 572 at 583 [50]; 331 ALR 1 at 13.

38 *Kendirjian v Lepore* [2015] NSWCA 132 at [40].

reasoning in the personal injury proceedings could arise because the respondents might seek to use the adverse findings about Mr Kendirjian's credibility to explain why the judgment awarded was much lower than the settlement offer of $600,000 plus costs.

34 With respect, the negligence action by Mr Kendirjian against the respondents does not give rise to the possibility of any challenge to the findings of the District Court concerning Mr Kendirjian's credibility or otherwise. From Mr Kendirjian's perspective, he relies on the decision of the District Court in order to prove his alleged loss. From the perspective of the second respondent, issues concerning the reasonableness of advice given will be assessed at the time the advice was given, not at the time of the District Court judgment. The assessment of reasonableness will not involve any consideration of whether the decision of the District Court, affirmed by the Court of Appeal, was right or wrong whether in relation to credibility or otherwise. It was not suggested that any questions of reasonable foreseeability of loss could conceivably lead to a challenge to the reasoning or decision in the District Court. Indeed, nothing in the second respondent's pleaded defence raises any suggestion of a challenge to the reasoning or decision in the District Court.

35 In oral submissions, senior counsel for the second respondent submitted that the respondents might challenge the credibility of Mr Kendirjian concerning "what [Mr Kendirjian] said to the lawyers about his disability". However, a credibility challenge of that nature, in separate proceedings based on separate evidence, is independent of the different credibility findings by the District Court concerning Mr Kendirjian's evidence in the personal injury proceedings. It does not call any of those findings into question.

36 For these reasons, the reasoning in the majority joint judgment in *Attwells* requires that the appeal be allowed.

The application to reopen *Attwells*

37 As an alternative to the second respondent's submission that *Attwells* should be distinguished, he sought to reopen that part of the decision in *Attwells* where the joint judgment approved the remarks of Mason CJ, which had relied upon the remarks of McCarthy P in *Rees v Sinclair*[39]. The second respondent submitted that that part of the quotation from Mason CJ in *Giannarelli* had not been approved by the joint judgment in *D'Orta*. It followed, he argued, that the scope of the immunity should extend to "work done out of court which leads to a decision affecting the conduct of the case in court" but not work done "affecting the way that cause is to be conducted when it comes to a hearing". The second

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39 [1974] 1 NZLR 180.

respondent's submission was based upon the reasoning of Macfarlan JA in the Court of Appeal in this case but, as I have explained, that decision was given prior to *Attwells*.

38 The second respondent did not refer to any of the principles commonly considered by this Court when deciding whether to reopen a previous decision[40]. But, in any event, his submission is premised upon an illusory distinction. In relation to work done out of court, there is no real distinction between work done which leads to a decision *affecting the conduct* of the case in court and work done *affecting the way* that case is to be conducted at a hearing. A decision affecting the way that a case is conducted is the principal method, or perhaps the only method, by which an advocate affects the conduct of a case in court.

39 Even if some artificial distinction between these formulations could be drawn, it is not evident in the joint judgment in *D'Orta*. The passage from Mason CJ, which was quoted in part by the joint judgment in *D'Orta*, was part of a single paragraph of integrated reasoning explaining why the immunity should not cease at the courtroom door[41]. No submission had been made in *D'Orta* that some parts of the passage from Mason CJ, such as the words "affecting the conduct of the case", should be accepted but other parts, such as the words two sentences later, "the way that cause is to be conducted", should not. The second respondent's submission that *Attwells* should be reopened to revisit this point should not be accepted.

Conclusion

40 On 11 November 2016, this Court made orders by consent to give effect to allowing the appeal in respect of the first respondent and remitting that part of the appeal to the District Court of New South Wales. For the reasons above, the appeal should also be allowed in respect of the second respondent. Corresponding orders should be made in relation to the second respondent as follows:

1. Appeal allowed from the Supreme Court of New South Wales Court of Appeal's decision in relation to the second respondent.

2. Set aside the orders of the Supreme Court of New South Wales Court of Appeal made on 21 May 2015 and 1 June 2015 insofar as

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40 See *Queensland v The Commonwealth* (1977) 139 CLR 585 at 599 per Gibbs J, 602 per Stephen J, 620 per Aickin J; [1977] HCA 60; *John v Federal Commissioner of Taxation* (1989) 166 CLR 417 at 438-439 per Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ; [1989] HCA 5.

41 *Giannarelli v Wraith* (1988) 165 CLR 543 at 559-560 per Mason CJ.

they apply to the second respondent and, in lieu thereof, order that the appeal against the second respondent to the Supreme Court of New South Wales Court of Appeal be allowed and the orders made by District Court Judge Taylor SC on 16 May 2014 insofar as they relate to the second respondent be set aside and in lieu thereof order that the Notice of Motion filed by the second respondent on 31 July 2013 in the District Court of New South Wales be dismissed.

3. The second respondent pay the appellant's costs of and incidental to the second respondent's Notice of Motion filed in the District Court of New South Wales on 31 July 2013.

4. The second respondent pay the appellant's costs of and incidental to the application for leave to appeal and the appeal to the Supreme Court of New South Wales Court of Appeal below against the judgment and orders made by District Court Judge Taylor SC in favour of the second respondent.

5. The second respondent pay the appellant's costs of and incidental to the application for special leave to appeal and the appeal to the High Court of Australia against the judgment and orders made by the Supreme Court of New South Wales Court of Appeal on 21 May 2015 and 1 June 2015 in favour of the second respondent.

6. Remit the balance of the matter to the District Court of New South Wales.