# Advocates' Immunity: *Attwells* & *Kendirjian*

***By Jennifer Kim and James Li***

In a recent seminar address at the Australian Disputes Centre ("ADC"),[1] the Honourable Chief Justice of New South Wales, Tom F Bathurst AC discussed several issues regarding advocate's immunity in the context of alternative dispute resolution ("ADR"). In his address, the Chief Justice referred to two recent High Court decisions where the scope of the advocate's immunity was tested: see *Attwells v Jackson Lalic Lawyers Pty Ltd*,[2] and *Kendirjian v Lepore*.[3]

In light of the comments by Bathurst CJ at the ADC, this article will briefly outline the High Court's decision in these two cases regarding advocates' immunity.

***Attwells v Jackson Lalic Lawyers Pty Ltd***

In *Attwells v Jackson Lalic Lawyers Pty Ltd*, the High Court of Australia allowed an appeal from the New South Wales Court of Appeal, reaffirming that advocate's immunity in Australia extends to work done in and outside of the court.

Jackson Lalic Lawyers had previously acted as legal representatives for the guarantors ("Attwells") in a bank recovery claim. The bank was owed almost $3.4 million. The guarantor's liability were limited to $1.5m but Jackson Lalic Lawyers advised the guarantors to enter into settlement agreement to pay the bank $1.75m by a specified date and advised the guarantors to sign the consent order, advising the Guarantors to accept liability for the $3.4 million because it "would not make any difference" whether they defaulted for $3.4 million or a lesser sum.[4] The guarantors did not make the payment in the specified time period. The bank commenced proceedings against Attwells. Attwells commenced proceedings against their legal representatives, alleging that they were negligently advised on the settlement agreement.

On appeal from the NSW Court of Appeal to the High Court, Attwell's primary contention was that the advocate's immunity should be abolished in Australia. The secondary contention was that advocate's immunity does not extend to negligent advice that leads to a settlement.

**High Court Declined to abolish Advocate's Immunity**

The High Court unanimously declined to abolish the advocate's immunity in Australia for the following main reasons:

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[1] Chief Justice Tom Bathurst, 'Off with the wig: Issues that arise for advocates when switching from the courtroom to negotiating table' (Speech delivered at the Australian Disputes Centre, Sydney, 30 March 2017) <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2017%20Speeches/Bathurst%20CJ/Bathurst_20170330.pdf>.

[2] *Attwells v Jackson Lalic Lawyers Pty Limited* [2016] HCA 16.

[3] *David Kendirjian v Eugene Lepore & Anor* [2017] HCA 13.

[4] *Attwells v Jackson Lalic Lawyers Pty Limited* [2016] HCA 16 [7]-[12], [23].

- There is a need for continuity and consistency in the interpretation of the law as settled by previous High Court decisions;[5]

- The case *D'Orta*[6] considered principles of advocate's immunity that are consistent with, and reflect the strong value attached to the certainty and finality of the resolution of disputes;[7]

- Abolishing the immunity would create injustice for those who have not pursued claims or lost cases in the past because of the principle;[8]

- A decision to abolish advocate's immunity should be left to the legislature.[9]

**Did Advocate's Immunity Extend to Advice on Settlement?**

The majority held that advocate's immunity does not extend to negligent advice that leads to the settlement of a claim in civil proceedings, even where the agreement is embodied in a consent order.[10] As advocate's immunity is fundamentally concerned with protecting the finality and certainty of judicial decisions,[11] the immunity only arises where an advocate's work affects the way the case is to be conducted as it affects the outcome of a judicial decision.[12] Citing the ratio of *D'Orta*, to be protected by the immunity, the advocate's negligence must relate to conduct of a case in court, or work out of court that affects the conduct of a case in court, i.e. work intimately connected with work in a court.[13] Advice to settle, or to continue proceedings, lacks the "intimate" or "functional connection" with the judge's determination of the case required to sustain the immunity.[14] Similarly, advising a client to enter into consent orders that gives effect to a settlement agreement is not sufficient to attract the immunity, because the substantive rights and obligations under the settlement are determined by the parties and not by the court.[15]

By a 5:2 majority, the High Court allowed the appeal and held that the respondent's conduct was not work that was intimately connected with the judicial determination of the case to attract the advocate's immunity from suit. Importantly, the court held the advocate's immunity did not extend to negligent advice given to a client that lead to the settlement of a case by agreement between parties, even where the settlement agreement is embodied in a consent order.

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[5] *Ibid* [28].
[6] *D'Orta-Ekenaike v Victoria Legal Aid [2005]* HCA 12.
[7] *Attwells v Jackson Lalic Lawyers Pty Limited* [2016] HCA 16 [30].
[8] *Ibid* [28].
[9] *Ibid*.
[10] *Ibid* [45].
[11] *Ibid* [52].
[12] *Ibid* [46].
[13] *Ibid* [98].
[14] *Ibid* [49].
[15] *Ibid* [58]-[62].

**Court's position strengthened at *Kendirjian v Lepore* [16]**

Bathurst CJ also shed light on the recent case of *Kendirjian v Lepore* handed down by the High Court in March 2017. As in *Attwells*, this case concerned whether a legal practitioner was covered by advocates' immunity for advice given out of court. This case further strengthens the High Court's position against allowing advocate's immunity to extend to settlement.

In this case, Mr Kendirjian was injured in a car accident by Ms Ayoub and commenced proceedings. Ms Ayoub's legal representatives offered Mr Kendirjian settlement of $600,000 plus costs. This offer was rejected by Mr Kendirjian's representatives who informed Mr Kendirjian that an offer was made, but not the amount. Ultimately, Mr Kendirjian was awarded $308,432.75 plus costs at the District Court.[17] After being informed of the original settlement offer, Mr Kendirjian commenced proceedings against his representatives, claiming that they were negligent in not advising him of the amount in the offer of settlement when that offer was made.

The District Court held that the legal representatives' conduct was covered by advocates' immunity. This was upheld by the Court of Appeal but overturned at the High Court. The High Court declined to distinguish or reopen application of advocates' immunity from *Attwells*.[18] The appeal was allowed unanimously but attracted criticism from Nettle and Gordon JJ.[19]

At his address at the Australian Disputes Centre, Bathurst CJ noted the criticisms from Nettle and Gordon JJ's judgements. Nettle J did not agree that the representative's negligent action does not give rise to the possibility of a challenge to the findings of the District Court.[20] Gordon J voiced out similar concerns; that in determining a case where a lawyer has allegedly acted without the client's instructions, the court might need to consider whether the case should be set aside before considering advocate's immunity.[21]

**Implications for ADR practitioners**

The giving of 'advice either to cease litigating or continue litigating does not itself affect judicial determination of the case',[22] and as such, does not attract advocates immunity. As noted by Bathurst CJ, with the strong positions given by the High Court in these two cases, lawyers should be wary that advocates immunity will not protect them from negligent advice or representation made during mediations.

As an additional observation, Bathurst CJ also highlighted the issue of confidentiality in mediation. Confidentiality is a crucial aspect in mediations, ensuring efficacy of the process and fostering frank negotiations between parties. However, whether advocates can utilise confidentiality as a shield from negligent representations made in reaching a settlement in mediations remains very much a live question.

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[16] *Kendirjian v Lepore [2017] HCA 13.*
[17] Kendirjian v Lepore & Anor ([2017] HCA 13) Case Summary [2017] HCASum 10.
[18] *Kendirjian v Lepore [2017] HCA 13* [33]-[39].
[19] *Ibid* [5]-[9], [10]-[16].
[20] *Ibid* [5]-[7].
[21] *Ibid* [10] – [16].
[22] *Ibid* [32].

At the conclusion of the address, Bathurst CJ urges advocates to be aware of the duties and immunities that apply at each role and "wear two hats – or wigs".

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