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ADVOCATES' IMMUNITY: ETHICS AND THE LAW[†]

The Honorable Justice Margaret Beazley AO

Judge of the Court of Appeal of the Supreme Court of New South Wales

EXAMPLE 1

A client's case is coming up for hearing. The client informs his solicitor that the principal witness is unavailable. However, the client has a good friend who has memorised the principal witness' affidavit and is able to attend to give evidence.

As the solicitor, what course of action would you take?

EXAMPLE 2

The client was working in a service station being paid in cash. Over a period of some months the client was also helping himself to additional cash from the till. His employer discovered this and came around to the clients home one night, pointed a gun at him, and required the client to return the money, although the amount demanded by the employer was much more than the client had taken.

* While Warrane College accepts responsibility for producing these papers, the opinions expressed in these papers are those of the authors. Enquiries should be directed to the Master, Warrane College, UNSW, PO Box 123, Kensington, NSW 1465, Australia, or online info@warrane.unsw.edu.au All papers are available at: www.warrane.unsw.edu.au under Publications.

[†] An after dinner address delivered at Warrane College on 30 May 2012.

Your client seeks your advice as to whether he should flee.

EXAMPLE 3

You are the solicitor retained in a murder trial. The client tells you he 'dunnit'.

Example (1) is, I believe, fictional and was a problem posed in a legal ethics class in this university. I am told that most of the class said that they would not agree to the client's suggestion. The legal and ethical answer is obvious. The lawyer would be aiding and abetting a perjury if he agreed to the proposal. It would constitute serious professional misconduct and a criminal offence.

In example (2), the law again provides the answer. Although the client had admitted to having committed a criminal offence, that is of defrauding his employer, there was no obligation on the legal practitioner to report that crime to the police, nor to advise his client that he must report the crime to the police. Indeed, his legal obligation was to the contrary. There were no restraints upon the clients' freedom at the time that he sought the advice. The solicitor would have been within both his legal and his ethical rights to inform his client of that.

In example (3), the law provides the same protection to the murderer as does the confessional. If there are questions about the one, there may be questions about the other, although the underlying rationale/philosophy is vastly different. One has theology on its side. Interestingly, though, for the purposes of tonight's discussion, law provides the answer in each case: canon law in the former case and the civil law in the other.

I have introduced tonight's Warrane lecture with these examples because they provide an insight into a very small range of ethical issues that regularly confront lawyers. I have also provided a solution to those ethical problems. You may not find the solution comfortable. Indeed, as in the second example, where I consider the lawyer's obligation is clear, I have had lawyers question it. The question they have asked is whether, as a lawyer, they should be party to allowing gun-related crime to go unreported.

Notwithstanding any such civil concern, the rationale in each case is found within existing legal rule or principle. It can be argued, therefore, that although the answer may not be comfortable, the legal and ethical solutions are in harmony. There is always a question, however, as to whether the ethical solution should transcend the legal solution, and if so, what different solution would an ethical approach yield?

I have thus far referred to three situations involving a lawyer responding to a particular client's circumstances. The scenario I wish to raise tonight is the reverse: what is the legal and ethical answer where the lawyer is the party who wrongs the client?

I have already indicated a possible view that ethical answers to legal problems are to be found in the law itself. How then does the law deal with the negligent lawyer?

I propose to tell you what the law says about the problem. And, although my day job is judging, I propose to leave for your judgment the question whether there is cohesion between the legal and ethical answer or whether the legal and ethical outcomes are in fact in conflict.

First, a matter of definition. In discussing the negligent lawyer in this paper, I am only referring to negligence involved in court cases. I will refer to this as litigation negligence and to lawyers involved in litigation.

Now the question. Should litigation lawyers be immune from claims for negligence for their acts or omissions when they conduct a court case? In legal jargon, this question raises the issue of "*advocates' immunity*".

Every legal problem has a set of facts. So let me start there.

In February 1996, Mr D'Orta was charged with rape. He pleaded guilty at the committal (preliminary) proceeding in the Magistrates Court. He was committed to the County Court where he changed his plea to not guilty. His earlier guilty plea was led in evidence against him by the Crown. Unsurprisingly, he was convicted and sentenced to imprisonment.

He appealed and a new trial was ordered on the basis that the jury had not been properly directed as to the use that could be made of the evidence of the guilty plea. On his retrial, the Crown did not lead evidence of the guilty plea and he was acquitted.

Mr D'Orta developed a psychotic illness through the trauma of all of this. He sued his lawyers, claiming damage for their negligence. He alleged they had told him that he had no defence to the charge and that he would receive a suspended sentence if he pleaded guilty. Although he withdrew that plea, he was convicted by the jury and a sentence of imprisonment was imposed on him. He also said he was not told by his lawyers that the plea of guilty in the Magistrates Court could be used against him if he changed his plea.

The lawyers pleaded advocates' immunity in their defence to the negligence claim and applied to have the claim permanently stayed.

Advocates' immunity is a species of a wider spectrum of immunities that protect matters that happen in court. It extends to witnesses and to the judicial officer who decides the case. Judicial immunity means that a judge cannot be liable for what the judge says in court or for what the judge decides in court. Likewise with witness immunity in the case of a criminal prosecution for perjury.

Judicial immunity might be thought to be topical and particularly important at the moment, having regard to the events occurring in Papua New Guinea. The principle of judicial immunity should mean that the Chief Justice and other judges who ruled that Michael Somare was the constitutionally elected Prime Minister cannot be guilty of sedition because of a judgment they gave in court. However, the Chief Justice and one other judge have recently been arrested and charged with sedition in that very situation.

The immunity is very old. It was expressed in these simple but clear words by the eminent jurist Lord Mansfield in 1773 in *R v Skinner* (1772) Lofft 54; [1963] Eng R 35; 98 ER 529:

“Neither party, witness, counsel, jury or judge can be put to answer civilly or criminally for words spoken in office.”

But let me return to the negligent lawyer. Mr D’Orta’s claim against his lawyers was permanently stayed because the advice allegedly given in conference “*was so intimately connected with the conduct of the trial as to come within the immunity defence principle*”. I say “*allegedly*”, because the court never determined the claim. Rather, it held the claim could not be brought because the lawyers were protected by advocates’ immunity.

It was once thought that advocates’ immunity applied only to barristers, and derived from the fact that barristers could not sue for their fees. There were other concepts said to support the immunity. These included that a conflict between an advocate’s duty to the court and the duty to the client could arise if the immunity did not exist. It was also said that the cab rank rule was another underlying rationale for the immunity. The cab rank rule requires a barrister to accept a brief if the barrister has the experience, expertise and availability to take the matter and the client is willing to pay the barrister’s fee. The rule is enshrined in the Bar rules and reflects the public interest in all persons being entitled to legal representation.

Those considerations were put aside by the High Court in *D’Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12; 223 CLR 1 and the rationale for the immunity was elevated to a quite different plane. Two bases for the immunity were identified.

The first basis had regard to the structure of government and the place of the judicial system as part of that governmental structure, that is, as the third arm of government.

The second basis was the place that immunity from suit has in a series of rules, all of which are designed to achieve finality in the quelling of disputes by the exercise of judicial power.

Both concepts are deserving of further consideration, not only because the High Court says so, but because they represent a fundamental aspect of the functioning of our society and reminds us of the equal place of the judicial system in the Constitutional governance of the country.

As to the first, the High Court focused on the role of Ch III of the *Constitution* which is the chapter which relates to the judiciary. Chapter I relates to the Parliament; Chapter II to the Executive; and Chapter III to the Judiciary. Chapter III covers the issues of:

- 71 Judicial power and Courts
- 72 Judges' appointment, tenure, and remuneration
- 73 Appellate jurisdiction of High Court
- 74 Appeal to Queen in Council (repealed)
- 75 Original jurisdiction of High Court
- 76 Additional original jurisdiction
- 77 Power to define jurisdiction
- 78 Proceedings against Commonwealth or State
- 79 Number of judges
- 80 Trial by jury

Chapter III has been of particular importance in a number of High Court decisions in recent years. In particular, it has been a powerful means of protecting individuals from bureaucratic excess whereby an individual has been deprived of his liberty after his sentence had expired (*Kable v Director of Public Prosecutions (DPP)* [1996] HCA 24; 189 CLR 51) and where a person was convicted when the charge against him was not adequately particularised (*Kirk v Industrial Relations Commission (NSW)* [2010] HCA 1; 239 CLR 531).

In explaining the importance of Chapter III in relation to the immunity question, the High Court in *D'Orta* stated, at [32]:

“Judicial power is exercised as an element of the government of society. Importantly its aims are wider than, and more important than, the concerns of the particular parties to the case at hand.”

The Court said that a reference to the “*judicial branch of government*” was more than a mere collocation of words designed to instil respect for the judiciary. Rather, it reflected a fundamental observation about the way in which Australian society is governed.

In describing judicial power in these terms, the High Court linked the first basis for the immunity, that is, the governmental basis, with the second, explaining that the essential function of the judicial branch of government is the quelling of controversies by the ascertainment of the facts and the application of the law.

The Court recognised the interest that the parties to a legal proceeding had both in the result and in the way it was resolved. However, it was said that the community also has a vital interest in the final quelling of the controversy.

This second basis for the immunity may not seem as intellectually lofty as the first. But it is an underpinning principle of the law. “*Once a controversy has been quelled, it is not to be relitigated*” other than within the structure of the appellate process or, exceptionally, where there is a judicial inquiry. The Lindy Chamberlain case was such an exception.

In legal jargon, this is the principle of finality and was stated by the High Court to be the central justification for advocates’ immunity. The High Court described it as a fundamental and pervading tenet of the judicial system, reflecting the role played by the judicial process in the government of society. The principle of finality of litigation operates in a number of spheres. For example, an acquittal of a criminal offence cannot be revisited.

Having identified the justification for the immunity, the High Court then said that no distinction could be drawn between the position of a barrister or solicitor:

“Because the immunity now in question is rooted in [these considerations] where a legal practitioner (whether acting as advocate, or as a 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 sue for negligence on that account.”

The High Court put to one side the argument that advocates' immunity could be seen as conferring some special status upon legal professionals as against other professionals. That was irrelevant on the High Court's view, because members of the legal profession may be required to act contrary to their client's interests. This principle requires that a legal practitioner is not to mislead the court; and must not withhold relevant legal cases from the Court's consideration, even if they are contrary to the client's case.

One of the High Court Justices (Callinan J) considered that few other professions required their practitioners to attempt to see into the minds and anticipate the thinking, reactions and opinions of other human beings, as does the profession of advocacy. (I must say I watched the Federer/Nadal match at the Australian open this year. I think both of those professionals would identify with his Honour's observations, and they did it running around and hitting a ball.)

I commenced this evening's lecture with the proposition, which is at least arguable, that the law provides the ethical answers to the lawyer's dilemma. In the examples I gave, it seems to do so in a way that is logical and cohesive.

Can the same be said of the law's answer to the negligence of the litigation lawyer? There are a number of questions that might be asked in seeking the answer to that fundamental question. The most important, perhaps, is whether the High Court is correct.

Lawyers research the law in other jurisdictions when they wish to find a case that deals with a problem that is not resolved within Australian jurisprudence. In the case of advocates' immunity, Australian law provides the answer for Australia, but it is an answer that is different from every other major common law jurisdiction around the world. The answers found in other jurisdictions adopt some of the arguments for

rejecting the immunity that were specifically put to one side by the High Court in *D'Orta*. The differential treatment of litigation lawyers compared to other professionals was one which has not found favour elsewhere.

It is interesting to examine the decision of the House of Lords in *Arthur JS Hall & Co v Simons* [2002] 1 AC 615. This is not the occasion to deal with all of the cases, or indeed all of the arguments in the case. Their Lordships started with the proposition that it was anomalous that there should be no remedy for a wrong.

If there was to an exception to a rule it required a justification, otherwise the Court would fail to observe “*the fundamental principle of justice which requires that people should be treated equally and like cases treated alike*”.

Lord Hoffman considered that the justification for retaining the immunity, which was analogous, had to be strong enough to convince a fair minded member of the public that it ought to be retained. This comment was made in the context that in every other profession, claims may be brought for professional negligence. His Lordship warned, in particular, against the dangers of the Law Lords being merely empathetic to their own kind. As he said, borrowing from Professor Peter Cane, an “*empathy heuristic will not do*”.

The House of Lords was not persuaded by the argument that advocates' immunity should maintain its conformity with other aspects of the immunity (that is, judicial and witness immunity). The underlying rationale for the other immunities was very different. For example, the rationale for witness immunity was to protect persons who gave evidence in court, sometimes under compulsion, from the threat of being sued, and perhaps sued vexatiously, for what they said in court. This is sometimes described as being a fundamental protection of freedom of speech.

The House of Lords also took a robust attitude both to the expressed fear that lawyers would be sued frequently and sometimes without cause and to the court's ability to deal with unmeritorious cases. After all, that is a court's daily fare: to hear cases, to grant a remedy where the facts and the law warrants it and to dismiss the claim if the case is not made out. Such a case may or may not have had arguable

merit. But the court has to, and should be, adept at making such decisions and does so in every claim against a professional in other disciplines.

Finally, the House of Lords considered that the policy context in which the immunity had developed had changed. The changed policy context included the obligations placed on lawyers not to commence proceedings that would constitute an abuse of the court. In addition and lurking in the background was the European Convention of Human Rights, in particular, Art 6, which provides that:

“In the determination of his civil rights and obligations ... everyone is entitled to a ... hearing by [a] tribunal”.

I mentioned earlier that the immunity is part of the collocation of immunities that protect conduct in court proceedings. I have already mentioned the sedition charges that have been laid against the Chief Justice of Papua New Guinea, and now against another judge of that bench. It is a palpable and frightening example of what can happen if judicial immunity is not strictly observed. There are examples in modern Australian jurisprudence where, had the executive arm of government not honoured the immunity, democracy may have been compromised (the Malaysian solution is one example; the *Mabo* decision, the anniversary of which is on June 3, is another).

An example of witness immunity that had a deleterious result on proceedings was the decision of *Commonwealth v Griffiths* [2007] NSWCA 370; 245 ALR 172. That case involved a drug raid on premises conducted by a pharmacist, whom, it was alleged, was manufacturing prohibited drugs. The analytical chemist who tested the drugs knew that he was testing to determine whether the seized drugs were a particular prohibited drug. He took a short cut and pre-calibrated his instruments to get the result. The pharmacist was initially found guilty and spent time in gaol. He was eventually acquitted, but lost his case against the Commonwealth for damages because the chemist was protected by advocate's immunity.

A stark example of the application of advocates immunity was failure to plead a statutory prohibition on the admissibility of crucial evidence: *Giannarelli v Wraith* [1988] HCA 52; 165 CLR 543. This case involved evidence given at the Royal

Commission into the Painters and Dockers Union. The Giannarelli brothers were subsequently charged with perjury and two were sentenced to imprisonment. They appealed to the High Court. Their conviction was quashed because, by statute, the evidence given at the Royal Commission was not admissible in criminal proceedings.

Each of the immunities have their “*end of spectrum*” examples and their important rationale. There is presently no agitation to discard the other immunities. Should the advocates’ immunity be retained? This invites a consideration of the consequences of the rule and raises the question whether they are consequences with which we, as a society, can comfortably and conformably with our ethical values, live.

A number of things can be said against the retention of the immunity.

- (1) It entrenches an anomalous rule as between other professionals and litigation lawyers, which is also anomalous as between lawyers. Lawyers may still be found to be both negligent and liable in transactional cases of all sorts from conveyances to billion dollar merger and acquisition deals.
- (2) Part of the function of the law of negligence is to establish on a case by case basis appropriate standards of care for professionals. It does so in a public forum. The decisions are available so as to inform the particular professional community and the wider community of the standard of care that the law requires of the professional. The effect of advocates’ immunity is that appropriate standards of care will not develop in that open, examinable and public way. With the immunity protecting practitioners, there is an undoubted question whether the profession’s own educative and disciplinary processes are sufficient to set and maintain standards.
- (3) Internationally, Australia stands alone in the maintenance of the immunity. This may have interesting consequences for the bringing of cross-jurisdictional litigation in an era of global legal services. This has an important commercial aspect, as all jurisdictions seek to attract

work. Would a client feel more legally and commercially secure bringing a claim in Australian courts rather than in another common law jurisdiction? Perhaps not. Turning to look at it from a lawyer's perspective, in an era where aspects of legal services are outsourced internationally, would a law firm, say, in London, be more attracted to bringing proceedings in Australia, rather than in England, or the US or Canada? The answer to that question is, perhaps, "yes".

- (4) Will the litigious world fall apart if the immunity is abolished? Will there be a tsunami of litigation against lawyers? The experience in the UK since abolition and in Canada where the immunity has never existed would appear to answer that question in the negative.

On the positive side of the immunity, it can be seen that the client would not have to confront the rigours of another court case.

I have posed a number of questions tonight. There are others that can be asked.

1. Should the practitioner still charge fees, even if negligent?
2. Should the practitioner resist the making of a costs order against him or her under the *Civil Liability Act 2002*, s 98?
3. Should the practitioner make good the damage?
4. Should the practitioner offer an apology? Or would that add insult to injury?

Would any of those steps:

1. Undermine the rationale for the immunity and, if so, should a legal practitioner act in a way that would do so?
2. Undermine the status of the profession?

3. Would any such step be protected by client privilege?
4. Should a client be required to enter into a confidentiality agreement should the lawyer voluntarily make some reparation?

These are matters that are at least worthy of debate at both a practical and an ethical level, as young professionals and young professional lawyers in particular embark upon their future careers in their chosen professions.