IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY **NO S 161 OF 2015**

On Appeal From the Court of Appeal of the Supreme Court of New South Wales

BETWEEN: **GREGORY IAN ATTWELLS**
First Appellant

AND: **NOEL BRUCE ATTWELLS**
Second Appellant

JACKSON LALIC LAWYERS PTY LIMITED
Respondent

SUBMISSIONS OF THE APPELLANTS

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PART I FORM OF SUBMISSIONS

1. These submissions are in a form suitable for publication on the Internet.

PART II ISSUES

2. Three issues arise. *First*, whether the Court of Appeal applied the wrong test for the application of the immunity against civil suit of a barrister and instructing solicitor (the immunity) or, in the alternative, misapplied the correct test. *Secondly*, whether the court erred in holding that the immunity applied to a negligently advised or effected settlement, and in circumstances where the claim did not involve any collateral challenge to a judicial determination on the merits. *Thirdly*, whether this Court should reconsider *Giannarelli v Wraith* (1988) 165 CLR 543 (*Giannarelli*) and *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 (*D'Orta*), and, if so: (a) clarify the test for application of the immunity; (b) re-express the test for the application of the immunity, or (c) abolish the immunity.

3. As to the *first issue*, *D'Orta* adopted the test in *Giannarelli* and restated the principles on which it rests. The test directs attention to work done in court or work done out of court which leads to a decision affecting the conduct of the case in court, or is intimately connected with work in a court. The principles that support the immunity are the place of the judicial system as a part of the governmental structure and the need for finality. The immunity should apply only where the language of the test and the principles supporting it are engaged. Neither is presently engaged. As to the *second issue*, the claim in this case alleges that negligent advice given out of court, by a solicitor, affected a decision taken out of court by the client (*not* the advocate). That advice led to settlement of the original proceeding and had certain consequences for the client after settlement. It is not alleged that the decision of the Court in the original proceeding in which the negligence is alleged to have occurred was wrong. The claim involves no derogation from the principle of finality by requiring the re-opening of earlier litigation. It falls outside the immunity. As to the *third issue*, in the event that *D'Orta* ought not be applied as the appellants contend, there is reason for this Court either to: (a) re-express the immunity in those terms; (b) re-express the immunity in different terms, or (c) abolish the immunity.

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

4. The appellants certify that they have considered whether a notice should be given under s 78B of the *Judiciary Act 1903* (Cth) and that no notice needs to be given.

PART IV JUDGMENT OF COURT BELOW

5. The judgment of the Court of Appeal is not reported. Its citation is *Jackson Lalic Lawyers Pty Ltd* v *Attwells* [2014] NSWCA 335.

PART V FACTS

6. The proceeding at first instance and on appeal was conducted on the basis of a statement of agreed facts (the Agreed Facts): CA[8]; PJ[35].

7. The first appellant (Gregory Attwells) and Ms Barbara Jane Lord (Lord) were the guarantors of certain secured advances made by the ANZ Banking Group Limited (the bank) to a company, Wilbidgee Beef Pty Ltd (the company). The company defaulted.

8. On 23 July 2008, receivers were appointed. Shortly thereafter, the bank and the receivers commenced proceedings 2008/279905 in the Supreme Court of New South Wales (the proceedings) against Gregory Attwells, Lord and two trustee companies, seeking possession of certain properties of which Gregory Attwells and Lord were the registered proprietors, and judgment for certain outstanding moneys: CA[2], [5].[1]

9. In or about April 2010, Gregory Attwells and Lord, together with the company, in it own capacity and as trustee of the NSW Unit Trust (the trustee), retained the respondent (Jackson Lalic) to advise and act for them in defending the proceedings.[2]

10. The second appellant (Noel Attwells) is the assignee of the rights of Gregory Attwells against Jackson Lalic: CA[2].

11. Liability under the guarantee was limited to $1,750,000. At the time of the events giving rise to the proceeding, the full amount of the debt owing by the company to the bank, including accrued interest, was approximately $3.4 million: CA[4].

12. In opening, at the hearing of the proceedings before Rein J on 15 June 2010, counsel for the bank and the receivers acknowledged that the bank accepted that the amount owed by Gregory Attwells and Lord under the guarantee was $1,500,000 plus interest and enforcement costs. The bank certified that this amount was $1,856,122.28: CA[5].[3]

13. On 15 June 2010, Senior Counsel briefed by Jackson Lalic to appear for Gregory Attwells and Lord at the proceedings, negotiated a settlement of the claim upon terms that there would be judgment for the bank for $1,750,000 inclusive of costs, and that Gregory Attwells and Lord would have until the end of November to pay that amount.[4] At 2.30 pm on 15 June 2010, the parties informed the Court that the proceedings had settled. The proceedings were adjourned to permit terms of settlement and a consent order to be prepared.[5]

14. During the afternoon of 15 June 2010, draft terms of settlement in the form of a document entitled consent order (the consent order) were prepared by the solicitors for the bank and forwarded to Jackson Lalic.[6]

15. At or about 7.30 pm on 15 June 2010, Jackson Lalic, through one of its employed solicitors, advised Gregory Attwells and Lord to sign the consent order and consent to a judgment against them, in favour of the bank, in the sum of $3,399,347.67. Jackson Lalic further advised that, if Gregory Attwells and Lord defaulted in payment of the sum of $1,750,000 by 19 November 210, it would not make any difference if the judgment in favour of the bank was for $3,399,347.67 or any other sum (the advice).[7]

16. Later on 15 June 2010, the parties signed the consent order. On 16 June 2010, the parties provided the consent order the Court. On 21 June 2010, the orders were made: CA[8].

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1 *Attwells v Marsden* (2011) 16 BPR 30,831 at [1]-[6] (Pembroke J)
2 Agreed Facts [2] and [4]
3 Agreed Facts [5]
4 Agreed Facts [6(a)]
5 Agreed Facts [6(b)] and [6(c)]
6 Agreed Facts [7]
7 Agreed Facts [12]

17. Order 1 of the consent order gave a verdict and judgment for the bank against Gregory Attwells, Lord and the trustee in the sum of $3,399,347.67. Orders 2 to 9 provided that Gregory Attwells and Lord would give possession of a number of mortgage securities to the bank. Order 11 provided that Orders 1 to 9 would not be enforced if Gregory Attwells and Lord paid the bank $1,750,000 on or before 19 November 2010.[8]

18. Gregory Attwells and Lord failed to pay the bank the sum of $1,750,000 on or before 19 November 2010: PJ[3].

19. On 11 February 2011, Pembroke J dismissed an application to set aside, as an unenforceable penalty, the judgment and orders made in the proceedings.[9]

10 20. By an amended statement of claim filed on 16 August 2012, the first and third plaintiffs (the Attwells) alleged that Jackson Lalic was negligent in giving the advice: CA[5]. The alleged negligence was particularised in 15 ways, including: advising that Gregory Attwells consent to a judgment in a sum materially exceeding any possible liability; advising that, if Gregory Attwells defaulted on payment of $1,750,000 by 19 November 2010, it would not make any difference if the judgment in favour of the bank was $3,399,347.67; failing to advise as to the correct effect of the consent order; failing to advise that Gregory Attwells should refuse to consent to the orders as proposed, and causing him to incur a liability he did not owe. Damages, interest and costs were sought by way of relief.

20 21. By an amended defence filed on 31 October 2012, Jackson Lalic alleged that it was immune from suit. It contended that the work done by it pursuant to its retainer from Gregory Attwells and Lord was done either in court or alternatively out of court, but in circumstances that led to a decision affecting the conduct of the case in court, or intimately connected with work in court: CA[6], PJ[5].

22. On 10 July 2013, Schmidt J ordered, under r 28.2 of the *Uniform Civil Procedure Rules 2005* (NSW), and by consent, that the question of whether the Attwells' claim was defeated entirely, because Jackson Lalic was immune from suit, should be decided separately.[10]

23. On 17 October 2013, Harrison J published reasons.[11] His Honour made no order on the separate question, on the bases: (a) of the apparent or potential strength of the plaintiffs'
30 allegations that Jackson Lalic had been negligent; and (b) that it was not possible to consider that initial matter without a proper enquiry: PJ[33]-[35].

24. On 1 October 2014, the Court of Appeal (Bathurst CJ, Meagher and Ward JJA agreeing) answered the separate question as follows: the advocate's immunity from suit is a complete answer to the claim made by the plaintiffs. On 28 October 2014, orders were entered giving judgment for Jackson Lalic and in respect of costs.

PART VI ARGUMENT

25. It is convenient to address the grounds of appeal in the reverse order in which they appear in the notice of appeal.

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8 Agreed Facts [8]-[10]. See *Attwells v Marsden* (2011) 16 BPR 30,831 at [9] (Pembroke J).

9 *Attwells v Marsden* (2011) 16 BPR 30,831

10 *Attwells v Jackson Lalic Lawyers Pty Ltd* [2013] NSWSC 925

11 *Attwells v Jackson Lalic Lawyers Pty Ltd* [2013] NSWSC 1510

A GROUNDS 4 AND 5: ERRORS IN APPLICATION OF THE TEST

26. We first address the principles for which *Giannarelli* and *D'Orta* are authority. We secondly identify why this case does not fall within those principles and does not attract the immunity. We thirdly identify several errors in the reasoning of the Court of Appeal in this case. We fourthly demonstrate the manner in which a series of recent decisions of the New South Wales Court of Appeal has developed the jurisprudence concerning the immunity in a manner that deviates from *D'Orta*, particularly in respect of alleged negligent settlement of proceedings.

(1) Giannarelli and D'Orta

(a) The test for immunity and its supporting principles

27. In *Giannarelli*, the majority justices adopted an immunity for advocates against civil suit in the same terms described by McCarthy P in *Rees v Sinclair*.[12] There, his Honour said: "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."[13]

28. The difference in reasoning among the majority Justices in *Giannarelli* resulted in the case lacking a single ratio decidendi.[14] Nonetheless, it retained precedential authority and binding force for this court in *D'Orta*.[15] The plurality in *D'Orta* (Gleeson CJ, Gummow Hayne and Heydon JJ) granted special leave but did not reopen *Giannarelli*: [3].

29. The plurality confirmed, at [86], that the immunity described in *Giannarelli* applied to:

> work done in court or "work done out of court which leads to a decision affecting the conduct of the case in court"[16] or, as the latter class of case was described in the explanatory memorandum for the Bill that became the Practice Act, "work intimately connected with" work in a court. (We do not consider the two statements of the test differ in any significant way.)[17]

30. The plurality grounded the retention of the immunity in two matters (at [25] and [45]): (a) the place of the judicial system as a part of the governmental structure (see further [31]-[33]); and (b) the place that an 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 (see further [34]-[42]).

31. At [25]-[29], the plurality addressed other historical justifications for retention of the immunity, being: (a) the connection between a barrister's immunity and an inability to sue the client for professional fees; (b) the potential competition between the duties which an advocate owes to the court and a duty of care to the client, and (c) the desirability of maintaining the cab rank rule. The plurality concluded, at [29], that: "while

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12 (1988) 165 CLR 543 at 560 (Mason CJ), 571 (Wilson J), 579 (Brennan J), 596 (Dawson J)

13 [1974] 1 NZLR 180 at 187. Prior to *Arthur J S Hall & Co v Simons* [2002] 1 AC 615, the House of Lords, in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 at 215; [1978] 3 All ER 1033 at 1040–1 (Lord Wilberforce), AC 224; All ER 1046 (Lord Diplock), AC 232; All ER 1052 (Lord Salmon) also adopted this as the appropriate test.

14 *D'Orta* at [133] (McHugh J)

15 *Re Tyler; Ex Parte Foley* (1994) 181 CLR 18 at 37-38 (McHugh J); *D'Orta* at [133] (McHugh J)

16 *Giannarelli* 165 CLR 543 at 560 (Mason CJ)

17 See also McHugh J at [93] and [95]

they are considerations that do not detract from the importance of the immunity, we do not consider that they provide support in principle for its existence."

32. McHugh and Callinan JJ expressed their agreement with the plurality in this regard at [165] and [380] respectively. Kirby J dissented.

33. There is a conceptual distinction between the test or rule that a decision establishes and the principles that justify it.[18] Certain rules may be reliably applied without having regard to the reasons sustaining them. The present is not such a rule.[19] It confers an immunity upon participants within the system for the administration of justice, for reasons arising out of the proper administration of justice. The immunity ought only be applied where the language of the test, and the principles supporting it, are engaged. Hence, at [25], the plurality stated that: "the decision in *Giannarelli* must be understood as having principal regard to" the two sustaining principles. Likewise, at [84], their Honours observed:

> There may be those who will seek to characterise the result at which the court arrives in this matter as a case of lawyers looking after their own, whether because of personal inclination and sympathy, or for other base motives. But the legal principle which underpins the court's conclusion is fundamental. Of course, there is always a risk that the determination of a legal controversy is imperfect...But underpinning the system is the need for certainty and finality of decision. The immunity of advocates is a necessary consequence of that need.

Having identified the principle which supports the rule, the plurality observed at [87] that the rule is expressed in a way which is intended to marry with the principle: "The criterion adopted in *Giannarelli* accords with the purpose of the immunity".

34. Following *D'Orta*, then, the rule is to be applied having regard to the underlying principle. As Steytler P and Newnes AJA observed in *Alpine Holdings Pty Ltd v Feinauer* [2008] WASCA 85 (*Alpine Holdings*), at [87]:

> It is also arguable, having regard to the justification for the immunity as described by the majority in *D'Orta-Ekenaike*, that there is no occasion for the application of the immunity in the present case as the claim does not involve any derogation from, or undermining of, the principle of the finality of court decisions by requiring the re-opening of earlier litigation. It is not alleged that the decision of the Court of Appeal was wrong or that the negligence of the defendant brought about a decision of the court that would otherwise have been different. The claim does not require reconsideration of the correctness of the decision of the Court of Appeal. That decision is simply the basis upon which the claim is founded.

35. Similarly, in *Sims v Chong* (2015) 321 ALR 509, the Full Federal Court (Mansfield, Siopis and Rares JJ) held that the immunity did not operate in circumstances where the alleged negligence resulted in summary dismissal of the earlier proceedings because "[t]here was no judicially quelled controversy" and the merits in those proceedings had not been "judicially determined" (at [70]-[71]).

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18 *Kendirjian v Lepore* [2015] NSWCA 132 at [51]-[54] (Leeming JA); P Cane, "The New Face of Advocates' Immunity" (2005) 13 *Torts LJ* 93 at 101

19 *Donellan v Watson* (1990) 21 NSWLR 335 at 337F (Mahoney JA, Waddell AJA agreeing)

(b) Settlement

36. *D'Orta* does not support a conclusion that the immunity necessarily applies to advice concerning settlement. Neither *Giannarelli* nor *D'Orta* involved advice of that kind. Prior to *D'Orta*, the issue does not appear to have been considered by any Australian court. In *D'Orta*, McHugh J made passing reference, at [154], to the New Zealand decision in *Biggar v McLeod* [1978] 2 NZLR 9, without endorsing it. The plurality did not discuss the application of the immunity to advice on settlement.

37. The only Justice to discuss the application of the immunity to advice on settlement in *D'Orta* was McHugh J. At [166], his Honour observed:

> [I]t 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.

His Honour's discussion makes clear that his earlier reference to *Biggar v McLeod* should not be read as an endorsement of the correctness of that decision.

38. McHugh J's observation at [166] is consistent with the rationale for the immunity identified by the plurality in *D'Orta*. A negligent settlement or abandonment of a cause of action does not necessarily involve any collateral attack on a judicially quelled controversy. There may well have been no interposition of a judicial actor between the negligence of the advocate and the causally-connected injury, such as would attract the operation of the immunity (at [164]).

(2) The present case does not attract the immunity

39. The test articulated by the plurality in *D'Orta* – 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 – does not apply to the present case. That is so for two reasons.

40. *First*, the claim in this case alleges that negligent advice given out of court, by a solicitor, affected a decision taken out of court by the client (*not* the advocate). That advice led to settlement of the original proceeding and had certain consequences for the client after settlement.

41. *Secondly*, the present case does not engage the supporting principle of finality. This is not a case in which it will be necessary to impugn the final result of the proceedings. No fact in issue in the proceeding will be re-opened or re-agitated. The Attwells seek to rely upon the judgment and orders, recorded in the consent order, as evidence of the negligence of which they complain.

42. That the immunity does not attach to the current case emerges when regard is had to the reasoning of the Court of Appeal.

(3) Errors in the reasoning of the Court of Appeal

43. The court reasoned in five stages. Error emerges at each of the second to fifth stages as correspondingly addressed below.

44. ***First***, the Court of Appeal held that, in *D'Orta* the plurality stated at [86] that there was no reason to depart from the test for advocates' immunity, described in *Giannarelli* at 560, as extending to work done in court or work done out of court which leads to a decision affecting the conduct of the case in court. The plurality did not consider that there was any difference in stating the latter part of the test as work "intimately connected with work" in court: CA[36]. This first step, respectfully, was correct.

45. ***Secondly***, the Court of Appeal concluded that the work in the present case fell within categories of work done out of court affecting the conduct of the case in court. It held that the alleged breach occurred in advising on settlement of the guarantee proceedings. It led to the proceedings being settled and was accordingly intimately connected with their conduct. The court considered that this conclusion accorded with authority: CA[37] - [39]. The conclusion was mistaken.

46. In order to answer the separate question, it was necessary to establish whether the immunity is sufficiently wide to cover *all* of the negligent conduct alleged against Jackson Lalic. To do so, it was necessary to identify the conduct complained of, by reference to the allegations recorded in the Agreed Facts. The correct question was to ask, whether, as a question of law, any of those allegations was capable of supporting a cause of action in negligence that is outside the immunity. The answer should have been given having regard to the principles that sustain the immunity.[20]

47. At CA[37], Bathurst CJ observed: "The alleged breach occurred in advising on settlement of the guarantee proceedings during the luncheon adjournment on the first day of the hearing and more importantly on the evening of that day" (see also [38] and [43]). That characterisation fails to capture the multiple formulations of negligence recorded in the Agreed Facts. Attention to certain particulars reveals that the test in *D'Orta* is not engaged. Particular of negligence 13(d) identifies a failure to advise as to the effect of the consent order. Particular 13(l) states that Jackson Lalic failed to advise Gregory Attwells and Lord of the way in which the consent order worked. Particular 13(m) states that Jackson Lalic caused Gregory Attwells to incur a liability he did not owe.

48. As noted above, the claim in this case alleges that negligent advice given out of court, by a solicitor, affected a decision taken out of court by the client, as opposed to the advocate. That advice led to settlement of the original proceeding and had certain consequences for the client after settlement. Indeed, certain of the alleged negligent acts or omissions could only cause loss after the litigation concluded (i.e., on and before 19 November 2010). This is not a mere point as to temporality. Rather, it is necessary that there be a sufficient causal nexus between the conduct complained of and steps taken in court. The impugned advice did not affect the conduct of the hearing.

49. The rule in *D'Orta* has a relative aspect. It is necessary to assess the degree of connection between work undertaken out of court and steps taken in court. The present claim lacks the requisite nexus. There has been, here, no interposition of a judicial actor between the

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[20] *Bott v Carter* [2012] NSWCA 89 at [11] and [23] (Basten JA) (McColl and Whealy JJA agreeing at [1] and [47])

alleged negligence of the solicitor and the causally-connected injury, such as would attract the operation of the immunity (*D'Orta* at [164], McHugh J). The consent order was signed on 15 June 2010. At that time, the settlement was concluded. The consent order was provided to the Court the next day, and entered on 21 June 2010.

50. ***Thirdly***, the Court of Appeal held that *D'Orta* makes clear that the test remains that stated in *Giannarelli*, although the justification is finality of litigation. Bathurst CJ concluded that, in *Bott v Carter* [2012] NSWCA 89, Basten JA was not propounding a different test. He was instead making it clear that in cases where it is uncertain that the advocates' immunity applies, consideration of that issue will be informed by its justification: CA[40].

51. This stage of the analysis errs in separating the verbal formulation of the rule from the principles that support it and by endorsing a position in which the court has resort to those principles only in cases of uncertainty.

52. ***Fourthly***, the Court of Appeal concluded that the current proceedings involve a re-agitation of the issues raised in the earlier litigation. It found that it is fundamental to the claim that the judgment entered was wrong and the incorrect result was due to Jackson Lalic's negligence. This, the Court held, involves consideration of the issues raised in the earlier litigation to determine whether the applicant's advice was negligent: CA[41]. Linked to this, the Court ***fifthly*** held, that nothing in *D'Orta* or *Donellan v Watson* (1990) 21 NSWLR 335 was inconsistent with its conclusion: CA[42]-[47].

53. The Court correctly enquired whether the claim offended the principle of finality, but answered that question incorrectly. This case does not impugn the correctness of the consent order. There is no suggestion that the Court erred in making that order. So too, the present claims do not trespass into issues disputed in the proceedings. By the time counsel for the bank opened the bank's case in the guarantee proceedings, the parties to the proceedings agreed that Gregory Attwells and Lord did not owe the bank $3,399,347.67. The allegation in this case is that, despite this, Gregory Attwells and Lord *subsequently* incurred such a liability by reason of Jackson Lalic's alleged negligence. As in *Donellan v Watson*, this case does not offend the principle of finality.[21] Particulars of negligence 13(d), (l) and (m) discussed above, make clear that, at least in certain respects, the current claim does not involve a collateral challenge to the outcome of the original proceeding. The negligence claim in the proceeding assumes that the consent order was correctly made and is effective on the basis of what Rein J was told.

54. This is not a case in which it will be necessary to impugn the final result of the proceedings. No fact in issue in the proceeding will be re-opened or re-agitated. The Attwells seek to rely upon the judgment and orders, recorded in the consent order, as

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[21] *Donellan* was heard after *Giannarelli* and before *D'Orta*. A solicitor, instructed by his client to compromise appeal proceedings, consented to orders to a different effect to those he was instructed to obtain. The immunity was held not to apply. Mahoney JA, with whom Waddell AJA agreed, observed that there had been no contested hearing and the negligence action did not seek to attack collaterally the decision of the judge to make the consent order. On the contrary, the action proceeded on the basis that the decision was correctly made by the judge on the basis of what he was told. Mahoney JA concluded that the negligence action did not fall within the rationale of the reasons for which the immunity is given. The case did not concern the making of the compromise and its carrying out, but negligence in failing to carry an authorised compromise into effect (at 338). Handley JA considered, at 340–341, that the immunity should be strictly confined to those situations where the circumstances that justify the immunity are present.

evidence of the negligence complained of. The Attwells do not challenge "the result arrived at in the earlier proceedings" or contend "that a different final outcome should have been reached" (*D'Orta* at [75] and [80]). Moreover, judgment was here entered without a contested hearing[22] and absent any court approval as to its merits.[23]

55. One can test this aspect of the operation of the rule by asking: What cannot be challenged? One cannot, in any central way, impugn the correctness of an earlier judicial decision. One cannot challenge an intermediate outcome.[24] One cannot claim for recovery of amounts expended by way of legal costs. None of these here occurs. There is no occasion to apply the immunity in this case. The claim does not involve any derogation from, or undermining of, the principle of the finality. There is nothing offensive to public policy in confirming an actionable duty of care in respect of conduct that leads clients to misapprehend the effect and consequences of consent orders.[25]

(4) Deviations since *D'Orta*

56. While *D'Orta* clarified both the basis of the immunity and the underlying principle to which it is directed, a series of subsequent decisions by the New South Wales Court of Appeal has developed the jurisprudence in a manner that is ultimately not faithful to the reasoning in *D'Orta*. The errors that affect the decision of the Court of Appeal reflect those developments.

57. This deviation has occurred in two principal ways: *first*, in focusing upon the verbal formulae identified in *D'Orta* as expressing the 'test' for the immunity, and applying those formulae without sufficient regard to the principles that sustain the immunity. And, *secondly*, by extending the immunity to work done by the advocate in advising or effecting settlement, even where a claim concerning such work has no tendency to result in re-litigation of a controversy that has been quelled by judicial determination.

(a) The relationship between the rule and its supporting principles

58. The possibility of reading disjuncture between the verbal formulations identified by the plurality in *D'Orta* at [86], and the principles identified as sustaining the immunity, has been recognised.[26] It is apparent, however, from the reasons of the plurality in *D'Orta*, at [87], that no such disjuncture was intended.

59. It is for this reason that the plurality in *D'Orta* observed, at [86], that there was no substantive difference between the formulation of the relevant test by Mason CJ in *Giannarelli* (work done in court or work done out of court which leads to a decision affecting the conduct of the case in court) and the "intimately connected" test. Having identified the principles that sustained the immunity, the plurality needed neither to revisit, nor reword, the alternative tests. Each was merely an alternative verbal formula

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22 *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 at 223E (Lord Diplock); *Donellan v Watson* at 343E (Handley JA)

23 *Kelley v Corston* [1998] QB 686

24 Cf *D'Orta* at [70] and [75]

25 *D'Orta* at [97] (McHugh J)

26 Professor Cane identified a "lack of fit between the rationale for the immunity (the finality principle) and the formula specifying its scope": *op cit*, footnote 18, at 100. See also, *Alpine Holdings* at [87]-[89] (Steytler P and Newnes AJA); *Attard v James Legal Pty Ltd* (2010) 80 ACSR 585; [2010] NSWCA 311 at [31] (Giles JA), [188]-[190] (Tobias JA).

describing the boundaries of the immunity, once regard was duly had to the principle of finality. So much is apparent from the observation of McHugh J, at [97], that:

> [T]he immunity exists not to protect advocates from the consequences of their misconduct but solely for the enhancement of the administration of justice and public confidence in it. That analysis also explains the dividing line between the well-recognised exposure to liability for work not connected with the conduct of a matter in court and work covered by the immunity. It is the interjection of policy arising from the difficulties of proving that a different result would have ensued but for the carelessness of the advocate and the legal principle of finality that prevents an actionable duty of care arising.

As his Honour indicated, the rule identified in *Giannarelli* and confirmed in *D'Orta* is an expression of the underlying principles the immunity serves.

60. Despite this, in *Walton t/as Pitcher Walton & Co v Efato Pty Ltd* [2008] NSWCA 86, Tobias JA (Giles JA agreeing) expressed a preference for Mason CJ's formulation of the test from *Giannarelli* over the "intimately connected" formulation, on the basis that it was "more readily and easily applied to the facts of any particular case" (at [84]).[27] This statement of preference marks the beginning of an approach to the immunity, by the New South Wales Court of Appeal, that focuses on the verbal formulations at [86] of *D'Orta* to the increasing exclusion of the principles that support the immunity. That position was expressly adopted by Giles JA (Beazley JA agreeing) in *Attard v James Legal Pty Ltd* (2010) 80 ACSR 585 (*Attard*) [28]-[30]:

> [28] As I understand the reasons [in *D'Orta*] then, it is not asked whether in the particular case there would be offence to finality, or such offence to finality that the claim against the advocate should not be permitted...
>
> [30] Viewing the present case as a wasted costs case, on the finality principle as applied in such a case to justify advocate's immunity there need not be a challenge to finality of a judicial act at all. There is none the less immunity.[28]

61. Giles JA's observations in *Attard* were cited by Macfarlan JA (Leeming JA and Bergin CJ in Eq agreeing) in *Kendirijian v Lepore* [2015] NSWCA 132 at [42] as authority for the proposition that "offence to the finality principle in particular cases is not necessary" for the immunity to be engaged. With respect, these statements by the New South Wales Court of Appeal are not in conformity with the reasoning of the majority in *D'Orta.* Those acknowledged, at [84], that the immunity of advocates is a necessary consequence of the need for certainty and finality. Further, they are inconsistent with judicial indications that the immunity should extend no more broadly than its rationale.[29]

62. The correct approach after *D'Orta* is to apply the verbal formulae identified in the plurality's judgment, but having regard to the underlying principle served by the immunity.[30] Hence, Basten JA was correct in *Bott v Carter* [2012] NSWCA 89, at [23], in observing:

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27 Tobias JA repeated that preference in *Attard* at [106]-[107], (Beazley JA and Giles JA agreeing at [1] and [4]).

28 See, also at [22] and *Day v Rogers* [2011] NSWCA 124 at [132] (Giles JA).

29 See further, *Giannarelli* at 560 (Mason CJ); *Donnellan v Watson* (1990) 21 NSWLR 335 at 337 (Mahoney JA); *Rees v Sinclair* [1974] 1 NZLR 180 at 187 (McCarthy P); *Kelley v Corston* [1998] QB 686 at 695 (Judge LJ).

30 See *Alpine Holdings* at [84] (Steytler P and Newnes AJA).

> The scope of the immunity is no longer to be determined by differences in language but by the tendency of the claim to result in re-litigation of a controversy which has been quelled.

It may be accepted that, as the Chief Justice noted at CA[39], Basten JA was not seeking to propound a "different test" in *Bott v Carter* to that stated by the Court in *Giannarelli* and *D'Orta*. To the contrary, Basten JA recognised that the proper application of those tests requires a court to have regard to the principles that sustain the immunity.

(b) Settlement and an intimate connection with the conduct of proceedings

63. Since *D'Orta*, the New South Wales Court of Appeal has extended the operation of the immunity to negligent advice on settlement in a line of cases commencing with *Chamberlain v Ormsby t/as Ormsby Flower* [2005] NSWCA 454. In that case, Tobias JA (Giles JA agreeing) held that the immunity applied to negligent advice on settlement, because the client determined to settle the proceedings in reliance on that advice. His Honour observed at [120] (emphasis added):

> That advice was critical to the decision of the appellant to accept the settlement that was being offered by the employer's workers' compensation insurer with respect to the appellant's ss66 and 67 claims. His acceptance of that settlement was dependant upon firstly, the advice given by the barrister as to the likelihood of any claim for common law damages exceeding the thresholds and, secondly, the effect that acceptance of permanent loss compensation would have upon his common law rights, such as they were. *It is difficult to imagine a stronger case than the present where the advice given by the barrister led to the appellant's decision as to the conduct of his case before the Compensation Court or which was more intimately connected with the course of that case including its settlement.*

64. There is an evident error in this passage. The reference in *D'Orta* to a "decision" in the phrase "work done out of court which leads to a decision affecting the conduct of the case in court" is to a decision of the *advocate*, not the *client*. The immunity covers in-court decisions by the advocate as to the conduct of the case and out-of-court work which affects such decisions by the advocate. It does not necessarily extend to negligent work that induces a decision by a client to commence, maintain or abandon proceedings, merely because the client's decision can be said to affect the conduct of the case in court: see *Alpine Holdings* at [81]. Were it otherwise, any negligent work that affected the client's decision-making regarding litigation would necessarily be covered by the immunity, regardless of the circumstances in which it occurs.

65. Since *Chamberlain*, the New South Wales Court of Appeal has confirmed its conclusion that the immunity applies to negligent advice given by an advocate in relation to settlement.[31] Those decisions begin with Giles JA's conclusion in *Attard* that the immunity extends to any claim by a client in respect of "wasted costs" incurred by them in legal proceedings. The reference to "wasted costs" is to the discussion by the plurality, in *D'Orta* at [65], of the three chief consequences about which a client might complain in respect of a solicitor or barrister's former representation of the client in court proceedings: (a) a wrong final result; (b) a wrong intermediate result, and (c) wasted

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31 See *Donnellan v Woodland* [2012] NSWCA 433 at [225]-[223] (per Beazley JA, Basten, Barrett, Hoeben JJA and Sackville AJA agreeing); *Young v Hones* [2014] NSWCA 337 at [208]-[217] (per Ward JA, Bathurst CJ and Emmett JA agreeing at [1] and [315]); *Kendirjian v Lepore* [2015] NSWCA 132 at [29]-[33] (per Macfarlan JA, Leeming JA and Bergin CJ in Eq agreeing at [50] and [59]).

costs. The plurality noted that both (a) and (b) involve a challenge to a result judicially reached and hence offend the principle of finality for which the immunity exists (at [70], [81]-[82], [84]). With respect to "wasted costs", the plurality said the following, at [83]:

> There remains for separate consideration the last of the three kinds of consequence identified earlier as consequences of which a client may wish to complain: wasted costs. Again, at first sight it might be thought that seeking to recover wasted costs would not cut across any principle of finality. But it is necessary to recall that the general rule is that costs follow the event. To challenge the costs order, therefore, will often (even, usually) involve a direct or indirect challenge to the outcome on which the disposition of costs depended. For the reasons given earlier, that should not be permitted lest a dispute about wasted costs become the vehicle for a dispute about the outcome of the litigation in which it is said that the costs were wasted.

66. Respectfully, this paragraph of the judgment of *D'Orta* is capable of various constructions, in part because it is unclear whether the plurality is referring to costs following an adjudicated determination, costs incurred in proceedings that are abandoned or settled, or both. At its broadest, the passage may be read as an endorsement of the proposition that any action for wasted costs (whether costs owed from client to advocate, or payable as a result of a costs order), cannot be maintained in light of the immunity. The reasoning in the rest of the passage, however, does not support so broad a reading. It makes explicit reference to a "costs order" and the circumstance that, ordinarily, "costs follow the event". Those references favour a narrower reading, whereby the plurality was discussing only those circumstances where a wasted costs claim is maintained in respect of a judicially-quelled controversy.

67. If this narrower reading is correct, the plurality's discussion of wasted costs coheres with the finality principle it identifies as sustaining the immunity. Where a case has been adjudicated, any claim for wasted costs may involve re-litigation, because the question of whether the costs were properly incurred may require examination of the claims in the concluded proceedings. Absent any judicial determination of the earlier proceedings, however, it is unclear how a claim over wasted costs could be said to offend the principle of finality. This suggests that the plurality was not seeking to lay down an alternative test for determining the scope of the immunity by discussing wasted costs. Rather, their Honours were seeking to demonstrate that, in some circumstances, a wasted costs claim could amount to a collateral attack on an earlier judicial determination.

68. The New South Wales Court of Appeal has adopted the broadest possible reading of the plurality's discussion of wasted costs in *D'Orta*, elevating it to the level of a freestanding test for determining the boundaries of the immunity.[32] The Court of Appeal's reading of *D'Orta* at [65] should not be accepted. Nothing in that paragraph requires the conclusion that any claim for wasted costs will necessarily be within the immunity (though some such claims will be).

69. Against this background, it can be seen that the present case exemplifies a jurisprudence that has developed in the New South Wales Court of Appeal, but which deviates from *D'Orta*.

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32 Giles JA in *Attard* at [27] and [30]; *Donnellan v Woodland* [2012] NSWCA 433 at [227], [229]-[230] (Beazley JA)

(5) Conclusion on Grounds 4 and 5

70. The Court of Appeal erred in its application of the test in *D'Orta* and wrongly concluded that the immunity applied to a negligently advised and effected settlement, and in respect of an outcome not the result of a judicial determination on the merits. The appeal can be resolved in favour of the appellants on these grounds.

B GROUNDS 2 AND 3: REOPENING *GIANNARELLI* AND *D'ORTA*

(1) An intermediate approach

71. Grounds 4 and 5 of the Notice of Appeal invite this Court to reconsider its decisions in *Giannarelli* and *D'Orta*. Having regard to the contentions above, an intermediate approach is available. In the event that *D'Orta* is not to be applied as the appellants contend, it is open to this Court to re-express the immunity in those terms. Such a re-expression would anchor the immunity in the principles that sustain it, and avoid deviations of the kind revealed by recent decisions of the New South Wales Court of Appeal. Further, it would, for the reasons developed in Section A(2) and (3) above, resolve this appeal in favour of the appellants.

72. Beyond this, the Court could elect to re-express the immunity in different terms. An alternative formulation might be based upon McHugh J's observation in *D'Orta* at [168], that: "the immunity should extend to any work, which, if the subject of a claim of negligence, would require the impugning of a final decision of a court or the re-litigation of matters already finally determined by a court." The final alternative is to abolish the immunity.[33] We now turn to this.

(2) Principles applicable to departure from an earlier case

73. This Court exercises its power to review and depart from its previous decisions subject to a strongly conservative cautionary principle adopted in the interests of continuity and principle.[34] While there is "no very definite rule as to the circumstances in which [the Court] will reconsider an earlier decision",[35] in *Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49, at 56-8, Gibbs CJ identified four matters justifying departure from earlier decisions:[36] (a) the earlier decisions did not rest upon a principle carefully worked out in a significant succession of cases; (b) a difference between the reasons of the justices constituting the majority in one of the earlier decisions; (c) the earlier decisions had achieved no useful result, but on the contrary had led to considerable inconvenience; and (d) the earlier decisions had not been independently acted upon in a manner which militated against reconsideration.

74. Other factors have been identified by this Court in *Wurridjal v Commonwealth of Australia* (2009) 237 CLR 309, *Attorney-General (NSW) v Perpetual Trustee Co (Ltd)* (1952) 85 CLR 237 and *Queensland v Commonwealth* (1977) 139 CLR 585. These include: whether the

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33 Grounds 2(b) and (c) in the Notice of Appeal are pressed as part of a possible broader reconsideration of *D'Orta* and *Giannarelli*.

34 *Queensland v Commonwealth* (1977) 139 CLR 585, especially at 599, 602 and 620; *Wurridjal v Commonwealth of Australia* (2009) 237 CLR 309 at [70] (French CJ); *John v Federal Commissioner of Taxation* (1989) 166 CLR 417; *Beckett v New South Wales* (2013) 248 CLR 432

35 *Attorney-General (NSW) v Perpetual Trustee Co (Ltd)* (1952) 85 CLR 237 at 243–4 (Dixon J)

36 Stephen J (at 59) and Aickin J (at 66) agreeing

proposition for which the earlier decision is authority has become part of a stream of jurisprudence and been accepted in subsequent decisions (*Wurridjal* at [64]); whether the error in the prior decision has been made manifest by later cases not directly overruling it (*Wurridjal* at [68]); whether the prior decision goes with a definite stream of authority and does not conflict with established principle (*Wurridjal* at [68]; *Perpetual Trustee* at 244; *Queensland v Commonwealth* at 630); whether the earlier decision has proved to be incompatible with the ongoing development of jurisprudence (*Wurridjal* at [71]); and whether the decision is manifestly wrong and whether its maintenance is injurious to the public interest (*Queensland v Commonwealth* at 621-624, 626, 628).[37]

10 75. It is not always necessary to make a finding that a prior decision was erroneous in order to justify overruling it. That is particularly so, where the former decision was founded upon legal conceptions that are capable of subsequent evolution and development, such as in the case of constitutional jurisprudence.[38] These considerations operate here, because both *Giannarelli* and *D'Orta* reveal that the foundation of the immunity rests in public policy.[39] As Lord Pearce explained in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 at 324: "[p]ublic policy, unlike other unruly horses, is apt to change its stance".[40]

76. Of the factors identified in *Hospital Contribution Fund*, the first, second and third are presently relevant. The matters that engage them can also be understood under the rubric
20 of other factors emerging from *Wurridjal*, *Perpetual Trustee* and *Queensland v Commonwealth*.

77. As to the first factor, while *Giannarelli* and *D'Orta* rest upon a principle worked out in a succession of cases, both cases were decided at a time when there was a relative paucity of case law concerning the precise boundaries of the immunity. Only 9 Australian cases concerning the immunity were determined in the 17 years between the decision in *Giannarelli* and that in *D'Orta*.[41] By contrast, in the 10 years since *D'Orta*, there have been over 40 such cases, including 14 judgments by appellate courts.[42] That number of cases, and the variety of legal and factual issues they raise, 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.

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37 Other matters include: whether the prior decision can be confined as an authority to the precise question which it decided or whether its consequences would extend beyond that question (*Wurridjal* at [68]); whether the prior decision is isolated and forms no part of a stream of authority (*Wurridjal* at [68]); whether subsequent events have rendered the earlier decision an anomaly (*Wurridjal* at [182] and [189]); whether the earlier decision features fundamental defects of reasoning or errors in basic principle (*Wurridjal* at [182] and [189]); whether the reasoning in the earlier decision is at odds with significant authority (*Wurridjal* at [188]); whether the prior decision was recent (*Perpetual Trustee* at 244; *Queensland v Commonwealth* at 631), and whether any compelling consideration or important authority was overlooked (*Perpetual Trustee* at 244).

38 *Wurridjal* at [71] (French CJ)

39 *Giannarelli* at 555 (Mason CJ), 565, 572, 573 (Wilson J), 579 (Brennan J) 593-595 (Dawson J); *D'Orta* at [25], [31] (Gleeson CJ, Gummow, Hayne and Heydon JJ); [95], [97], [190] (McHugh J)

40 Cited by Callinan J in *Magabury Pty Ltd v Hafele Australia Pty Ltd* (2010) 210 CLR 181 at [97].

41 *Keefe v Marks* (1989) 16 NSWLR 713; *Donellan v Watson* (1990) 21 NSWLR 335; *MacRae v Stevens* (1996) Aust Torts Reports 81-405; *Boland v Yates Property Group Pty Ltd* (1999) 167 ALR 575; *Re Dunstan (No 2)* (2000) 155 FLR 189, *Attorney-General (NSW) v Spautz* (unreported, Supreme Court of New South Wales, O'Keefe J, 6 April 2001), *Del Borrello v Friedman and Laurie (a firm)* [2001] WASCA 348; *Abriel v Rothman* [2002] NSWSC 1056, *Braslin v Geason* [2004] TASSC 125

42 *Chamberlain v Ormsby t/as Ormsby Flower; Alpine Holdings; Walton t/as Pitcher Walton & Co; Coshott v Barry; Symonds v Vass* (2009) 257 ALR 689; *Attard; Day v Rogers; Bott v Carter; Donnellan v Woodland; Young v Hones; Nikolaidis v Satouris* (2014) 317 ALR 761; *Sims v Chong; Kendirijian v Lepore; White v Forster* [2015] NSWCA 245

78. As to the second factor, there was no clear ratio in *Giannarelli*. Similarly, there are four separate judgments in *D'Orta*, and significant differences between the reasoning of the plurality and the reasons of McHugh and Callinan JJ.

79. The third factor from *Hospital Contribution Fund* is likewise engaged here, at least insofar as the breadth of the test stated in *Giannarelli* and *D'Orta* has transpired, in its application, to be disconsonant with the principles that supply the rationale for the immunity.[43] Put differently, difficulties in the prior decision have been made manifest by later cases. Indeed, the confusion that has been expressed by intermediate appellate courts as to how to apply the verbal formulae from *Giannarelli* and *D'Orta* provides a sound basis for concluding that lower courts have not found those formulae to be useful in delimiting conduct that is within and without the immunity.[44] The extent of that confusion is apparent from Tobias JA's observations in *Attard* at [188]-[190]:

> [188] ... [A]s Giles JA demonstrates, there are problems in some cases with the finality principle, being the central justification for the continued existence of the immunity. At present it is a one size fits all approach.
>
> [189] Another unsatisfactory feature of the principle concerns cases involving out of court conduct which precedes, often by a lengthy period, the conduct of the case in court, a matter to which I referred in *Philip Walton* at [82].
>
> [190] For present purposes, it is sufficient for me to reconfirm what I said in *Philip Walton* and to express my agreement with the unsatisfactory state of the law as to advocates' immunity referred to by Giles JA and with his Honour's reasons for coming to that conclusion.[45]

80. This confusion is further demonstrated by an inconsistency in approach to the immunity between different intermediate courts.[46] Again, put differently, the earlier decision has proved to be incompatible with the ongoing development of jurisprudence. The immunity is a common law doctrine that should be uniformly applied in each State or Territory given the unity of the Australian common law.[47] For so long as such intermediate disagreement continues, there is a possibility of inconsistent results that could be productive of injustice. As Mason CJ noted in *Giannarelli* (at 557), to deny a litigant a cause of action for negligence on the part of his legal representative is a "serious step" given its consequences. The metes and bounds of that step must be readily identifiable if unjust outcomes are to be avoided. If they cannot be readily identified, there is a risk that the immunity will operate in a manner injurious to the public interest.

81. What has changed since *D'Orta*, then, is that there is now a considerable body of appellate case law reflecting uncertainty as to how to apply the immunity, endorsed by this Court, particularly in light of the majority's emphasis in *D'Orta* on the principle of finality as the principal rationale for retaining the immunity. That state of affairs did not exist when either *Giannarelli* or *D'Orta* was decided. And it is a mischief that the High Court did not need to address in those cases. As a result, the utility of *Giannarelli* and *D'Orta* as authorities dictating the boundaries of the immunity has been compromised.

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43 *Lai v Chamberlains* [2007] 2 NZLR 7 at [52] (Elias CJ, Gault and Keith JJ)

44 See *Attard* at [31] (Giles JA); *Alpine Holdings* at [84]; *Symonds* at [40] (Giles JA); *Sims* at [62].

45 See further *Goddard Elliott v Fritsch* [2012] VSC 87 (Bell J).

46 Compare *Alpine Holdings* at [86]-[87] and *Donellan v Woodward* at [202]. See also *Sims* at [74].

47 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at [2], [15]

82. The other significant change since *D'Orta* is the development of a body of precedent in comparable common law systems as to the effect, on the administration of justice, of abolishing the immunity. *D'Orta* was decided only two years after the House of Lords abolished the immunity in England and Wales in *Arthur J S Hall & Co v Simmons* [2002] 1 AC 615, and in the period between the judgments of the New Zealand Court of Appeal and Supreme Court in *Lai v Chamberlains* (*Lai*).[48] For this reason, at the time *D'Orta* was decided, there was a paucity of data or evidence from those jurisdictions as to whether alternative common law protections were sufficient to protect the courts' processes and the administration of justice in the absence of the immunity. Similarly, at the time of *Giannarelli* there was "simply no hard empirical evidence" to assist the court in respect of certain matters (at 575-76, per Wilson J).

83. The two principal judgments in the New Zealand Supreme Court in *Lai,* extensively considered the rationale for the immunity in *D'Orta.* In deciding to abolish the immunity, Elias CJ, Gault and Keith JJ concluded (at [72]) that the substantive doctrines that prevent litigation,[49] and the power of the court to strike out proceedings for abuse of process,[50] are sufficient to protect the public interest in judicial process without recourse to any common law immunity for advocates. Tipping J (at [159]) likewise held that the preferable course for achieving the objective of protecting the judicial system from collateral attack was "by means of a developed doctrine of abuse of process" rather than retention of the immunity. Since *Lai,* a New Zealand court has resolved a negligence claim that involved a collateral attack to earlier determined proceedings, by recourse to the principles governing abuse of process.[51] The result was identical to that which would obtain by application of the immunity, but without the need to rely on such an immunity.

84. Similarly, in England and Wales, the abolition of the immunity has not resulted in a torrent of contested litigation. The decision in *Moy v Pettman Smith (a firm)* [2005] 1 WLR 581 tends to confirm the observation of McHugh J in *D'Orta*, that the application of principles of causation to negligence claims against advocates will, in large measure, operate to defeat such claims because of the impossibility of demonstrating an alternative outcome would have obtained absent the negligence.[52] Lower court decisions since *Moy* likewise confirm that prediction.[53] This Court is now in a position different to that which it faced when *Giannarelli* and *D'Orta* were determined. England, Wales and New Zealand provide real world comparators to assess the likely effect of abolishing the immunity.

(3) The immunity should no longer form part of the common law

85. In the alternative to the intermediate approach described at paragraphs 71 and 72 above, this Court should now reconsider the utility and necessity for the immunity afresh. Upon such reconsideration, three matters are apparent: (1) the principle of finality is not an absolute principle of the common law and therefore cannot sustain a blanket rule of immunity applicable to advocates' work intimately connected with the conduct of a case

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48 [2007] 2 NZLR 7

49 *Lai* at [58]

50 *Lai* at [59]-[66]

51 *Khan v Cassidy* [2009] BCL 750

52 *D'Orta* at [164]

53 See *West Wallasey Car Hire Ltd v Berkson & Berkson (A Firm)* [2009] EWHC B39 (Mercantile) at [86] (even if the defendant barrister had been negligent in failing to advise correctly as to the value of a claim, the correct advice would not have been followed by the client if given); *McFaddens (a firm) v Graham Platford* [2009] EWHC 126 (TCC) at [386] (the conduct of the client broke the chain of causation).

in court; (2) to the extent that the principle of finality is a necessary and fundamental aspect of the administration of justice in Australia, that principle can be realised more directly through recourse to the principles governing abuse of process; and (3) a range of additional matters justify the abolition of the immunity.

(a) Finality is insufficient to justify the immunity

86. Since *D'Orta*, the rationale for the ongoing operation of the immunity in Australia is the need to ensure that judicially-determined controversies are quelled with finality.[54] The principle of finality which the immunity serves was described by the plurality in *D'Orta* as follows (at [34]): "A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few narrowly defined circumstances." So much may be accepted. Nevertheless, as the plurality immediately recognised in stating the principle, it is one that has always been subject to exception. One such exception is appellate intervention.[55]

87. Further exceptions operate. Res judicata estoppels arising from actions in personam do not bind persons who were not parties and privies to the decision in question.[56] Lord Hobhouse observed in *Arthur J S Hall & Co* at 743:[57]

> There is no general rule preventing a party inviting a court to arrive at a decision inconsistent with that arrived at in another case. The law of estoppel per rem judicatem (and issue estoppel) define when a party is entitled to this. Generally there must be an identification of the parties in the instant case with those in the previous case and there are exceptions.

88. Principles of abuse of process can operate more broadly, and will in some circumstances foreclose subsequent proceedings that collaterally attack earlier proceedings, notwithstanding that the requirements for a res judicata estoppel do not arise.[58] That is the principle from *Reichel v Macgrath* (1889) 14 App Cas 665, which has been endorsed in numerous subsequent cases, including *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 542 and *Walton v Gardiner* (1993) 177 CLR 378 at 393.[59]

89. Nevertheless, the principle from *Reichel v Macgrath* has itself always been subject to exceptions.[60] Those exceptions have arisen in at least two ways. First, there are circumstances in which the principle is simply not engaged due to the way in which the plaintiff seeks to deal with the earlier proceedings. Thus, in *O'Shane v Harbour Radio Pty Ltd* (2013) 85 NSWLR 698 at [114]-[115], [121], the New South Wales Court of Appeal held that there was no abuse of process where a plaintiff sought to prove that a judicial officer had made errors in seven earlier decisions, but sought to do so only by relying on the reasoning of the appellate court in each case.[61] Similarly, in *Sudath v Health Care Complaints Commission* (2012) 84 NSWLR 474 at [101]-[103], it was held that there was no abuse of process where a medical practitioner sought to adduce evidence in an inquiry

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54 *Bott v Carter* at [23] (Basten JA)

55 *D'Orta* at [35]

56 KR Handley, *Spencer Bower and Handley: Res Judicata* (4th ed) (LexisNexis, 2014), at [9.05], [9.38]

57 This passage was cited by McHugh J in *D'Orta* at [201]. See also *Lai* at [61].

58 *Walton v Gardiner* (1993) 177 CLR 378 at 393; *Rippon v Chilcotin Pty Ltd* (2001) 53 NSWLR 198 (*Rippon*) at [15]; *O'Shane v Harbour Radio Pty Ltd* (2013) 85 NSWLR 698 at [99]

59 *Walton v Gardiner* (1993) 177 CLR 378 at 393

60 *Rippon* at [31] quoting *Haines v Australian Broadcasting Corporation* (1995) 43 NSWLR 404 at [203]

61 (2013) 85 NSWLR 698 at at [114]-[115], [121]

before the Health Care Complaints Commission that was inconsistent with the findings in earlier criminal proceedings in which he had been convicted, provided that it was not adduced to impugn the medical practitioner's conviction or the fairness of the trial.

90. Secondly, exceptions to *Reichel v Macgrath* have arisen by reason of the fact that the principle is not applied in a formulaic manner and instead requires that regard be had to all the circumstances.[62] In *State Bank of New South Wales v Stenhouse Ltd* (1997) Aust Torts Reports 81-423 at 64,089, Giles CJ Comm D identified seven factors relevant to the determination of whether subsequent proceedings are an abuse of process in light of earlier proceedings, including such matters as "the terms and finality of the finding as to the issue", "the opportunity available and taken to fully litigate the issue", "any plea of fresh evidence", and "an overall balancing of justice to the alleged abuser against the matters supportive of abuse of process".[63]

91. While the principle of finality doubtless represents an important value of the common law, it has never operated to impose an overriding and inflexible requirement that forecloses a claim that is inconsistent with a prior judicial determination of separate proceedings.[64] As the plurality noted in *Lai*, "[c]ollateral challenge will not... always be an abuse."[65] That being so, the operation of a blanket immunity for advocates in all cases is anomalous. It is not consistent with the way in which the principle of finality is served by other doctrines of the common law. It is a disproportionate response to a concern that is otherwise treated by the common law with a degree of circumspection and restraint. As Lord Hoffmann memorably put it, it is "burning down the house to roast the pig".[66]

(b) The immunity is not necessary to ensure finality

92. The immunity is also unnecessary to achieve the principle of finality. The inherent power of superior courts to prevent abuse of process is unconfined and inherently flexible.[67] To the extent that the abolition of the immunity gives rise to a prospect of collateral attack in subsequent proceedings, such cases may be dealt with by application of the principle from *Reichel v Macgrath*, which itself will develop, as necessary, to prevent any vacuum that might otherwise compromise the principle of finality absent the immunity.

93. In *D'Orta*, McHugh J expressed concern that the powers of Australian courts to address these issues by means of the doctrine of abuse of process are more limited than those enjoyed by the courts of England and Wales owing to differences in the respective courts' rules.[68] That concern overlooks the flexible nature of superior courts' inherent jurisdiction to deal with such abuses. If the principle of finality is as fundamental to the administration of justice as suggested by the majority in *D'Orta*, it is unlikely that the inherent jurisdiction of Australian superior courts to prevent abuse of process would prove insufficient to preserve such finality.

94. Further, preserving finality by means of the principle in *Reichel v Macgrath* has the benefit that a claim will only be foreclosed in circumstances where it in fact imperils finality and

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62 *Lai* at [62] (Elias CJ, Gault and Keith JJ)
63 Endorsed in *Rippon* at [32] and *R v O'Halloran* (2000) 182 ALR 431 at [112].
64 See *Arthur J S Hall* at 705-706 per Hoffmann LJ.
65 *Lai* at [61] and [71]
66 *Arthur J S Hall* at 703
67 *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 74 (Gaudron J)
68 *D'Orta* at [202]-[203]. See to similar effect, *Wright v Paton Farrell* [2006] CSIH 7; 2006 SCLR 371.

the administration of justice. As Tipping J noted in *Lai*, "[i]t is better to address the need to protect the judicial system in a direct way rather than indirectly through the overreaching vehicle of barristers' immunity."[69]

(c) Other reasons for abolishing the immunity

95. Several other reasons have been advanced in support of abolishing the immunity: see *Arthur J S Hall*, *Lai* and Kirby J's dissent in *D'Orta*. They include the following.

96. *First*, abolition of the immunity would remove an anomaly in the law of professional negligence.[70] Since the decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, the law has recognised that, irrespective of contract, if someone possessed of a special skill undertakes to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The immunity is an exception to that rule in the law of professional negligence. In recent years, the law of negligence in Australia has developed to abolish other anomalous immunities,[71] and has refused to recognise new immunities or exceptions.[72] If the immunity is abolished, it may follow that the immunity for expert witnesses should also be abolished as well, to the extent that professionals acting as expert witnesses enjoy immunity from liability for negligence in similar circumstances as advocates.[73] However, that issue does not arise in this appeal.

97. *Second*, the immunity tends to undermine public confidence in the legal system. Because the immunity is anomalous, and not enjoyed by other professionals, it can be perceived as an example of lawyers looking after their own.[74] The justifiable public policy rationale for the immunity (that is, finality) is obscured by the belief that lawyers consider the public interest requires them (but not others) to have a special immunity from liability for negligence. Where the rationale for the immunity is finality in the quelling of controversies, it is likely to engender greater public confidence in the legal system if that rationale is pursued directly.[75]

98. *Third*, the abolition of the immunity is most likely to benefit persons who suffer loss as a result of a blatant or egregious error of their advocate, where presently that person is denied a remedy, whilst it is unlikely to create a flood of unmeritorious or vexatious claims. This is because of the likely difficulty in proving negligence in many types of claims that could be made against advocates, for example proving that a better standard of advocacy would have resulted in a more favourable outcome.[76] Therefore, abolition of the immunity will promote the policy of the law that for every wrong there should be a remedy, whilst not undermining the efficacy of the legal system.

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69 *Lai* at [156]

70 *Arthur J S Hall* at 688 (Lord Hoffmann); *Lai* [3] (Elias CJ, Gault and Keith JJ); *D'Orta* [210], [345] (Kirby J).

71 *Brodie v Singleton Shire Council* (2001) 206 CLR 512.

72 *Cattanach v Melchior* (2003) 215 CLR 1.

73 *Jones v Kaney* [2011] 2 AC 398.

74 *Arthur J S Hall* at 682 (Lord Steyn), at 689, 703 (Lord Hoffmann); *D'Orta* at [314] (Kirby J); *Giannarelli* at 575 (Wilson J). See also Gerber, "Burning Down the House to Roast the Pig: The High Court Retains Advocates' Immunity" (2005) 28 *University of New South Wales Law Journal* 646.

75 *Lai* at [76] (Elias CJ, Keith and Gault JJ), [80], [155], [159] (Tipping J); cf *D'Orta* at [81]-[83] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

76 *Arthur J S Hall* at 682 (Lord Steyn), 684 (Lord Browne-Wilkinson), 682 (Lord Hoffmann); *D'Orta* at [327]-[238] (Kirby J).

(4) Conclusion of Grounds 2 and 3

99. The factors warranting reconsideration by this Court of its own previous decisions are engaged. Further, sufficient grounds exist to reconsider or abolish the immunity.

PART VII ORDERS SOUGHT

100. The appellants seek the following orders:

(a) That compliance with sub-rule 41.02.1 in Part 41 of the High Court Rules be dispensed with.

(b) That the separate question ordered by Schmidt J of the Supreme Court of New South Wales on 10 July 2013 whether the immunity is a complete answer to the Applicants' claims against the respondent be answered in the negative (the **Separate Question**).

(c) That the proceedings be remitted to the Supreme Court of New South Wales to be determined according to law.

(d) Costs of this appeal and of the application for determination of the Separate Question before Harrison J of the Supreme Court of New South Wales and of the respondent's appeal to the Court of Appeal.

PART VIII ESTIMATED HOURS

101. It is estimated that 2.5 hours will be required for the presentation of the oral argument of the appellants.

Dated: 18 September 2015

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