IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S 170 of 2016

BETWEEN:

David Kendirjian
Applicant

and

Eugene Lepore
First Respondent

and

Jim Conomos
Second Respondent

SECOND RESPONDENT'S SUBMISSIONS

Part I: Certification

1. I certify that this submission is in a form suitable for publication on the internet.

Part II:

2. The two issues are as stated by the applicant in his submission dated 21 July 2016 at paragraph 2 are correct. The second respondent disputes that as a result of the decision of *Attwells v Jackson Lalick Lawyers Pty Ltd* [2016] HCA 16 (*Attwells*) that both issues above must be resolved in favour of the appellant.

3. The decision in *Atwells* should be distinguished because the court was there dealing with a settlement of a dispute upon negligent advice where there was **no** hearing and there were no findings by a court relevant to the resolution of the dispute between the parties that settled. In the present matter the case went to a hearing and judgment. Findings were made about the extent of injury and disability the loss suffered by the appellant and adverse findings were made about the appellant's credibility. These issues will be the subject of the trial in this matter. The principle of finality will be engaged. The immunity should therefore apply.

Filed on behalf of the Second Respondent
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Part III: Section 78B *Judiciary Act* 1903

4. The second respondent has considered whether any notice should be given in compliance with section 78B *Judiciary Act* 1903. No such notice is required.

Part IV: Facts

5. For the purposes of this appeal, it is assumed that the appellant will be able to prove the facts as pleaded in the Amended Statement of Claim (ASC). The second respondent disputes the veracity of the facts pleaded should the matter be litigated.

6. Delaney DCJ arrived at figure for damages having rejected a deal of the appellant's evidence as to his disabilities and damages after he had seen hours of video evidence which was unfavourable to the appellant. In dismissing the appellant's appeal to the NSW Court of Appeal and as was noted by Macfarlan JA in this matter at CA [4], McColl JA had observed in 2008 in her judgment that the appellant's credibility "*had been at the heart of the issues*" determined by Delaney DCJ and that his Honour had made findings that the appellant "*had exaggerated or misstated the extent of his medical condition*". Her Honour's view was that Delaney DCJ had made strong findings against the appellant's credit.

7. It is significant that before the District Court at first instance and in the Court of Appeal the appellant sought to resist the stay only on the basis of a failure by the respondents to pass on the amount of the settlement offer. To succeed in the action that has been stayed the appellant would need to prove that he would have accepted the offer had he been informed of it. Although s. 5D *Civil Liability Act* (NSW) 2002 would prohibit the appellant from giving direct evidence of this fact it is undoubted that his credibility will be the central feature of any hearing.

Part V:

8. The appellant's statement of applicable constitutional provisions, statutes and regulation is accepted with the addition of s.5D *Civil Liability Act* (NSW) 2002.

Part VI: Argument

1. The majority decision in *Attwells* affirmed the principle as enunciated in *D'Orta-Ekenaike v Victoria Legal Aid (2005) 223 CLR 1* and *Giannarelli* v *Wraith* (1988) 165 CLR 534. That is, the underpinning policy supporting advocate's immunity is the principle of finality of litigation.

2. The second respondent acknowledges that the High Court in *Attwells* held there must be a functional connection between the advocate's work and the judge's decision for advocate's immunity to apply.

The appellant's submissions

3. The appellant disputes the conclusions drawn by Macfarlan JA in *Kendirjian v Lepore* [2015] NSWCA 132 at [47]. The submissions advance two reasons for this. The first is said to be that his Honour wrongly assumed that it was the appellant who decided to continue with proceedings; the second is said to be that his Honour failed to identify a 'functional connection' between the respondent's failure to convey the settlement offer to the appellant and the way in which the respondents conducted the case before Delaney DCJ.

4. The first reason is not supported by a reading of the judgment. Even if accurate the error when the whole picture is viewed it would not be material to the judgment. The appellant alleges that he was told that there had been an offer. Whilst he alleges that he wasn't told the amount of the offer (a fact upon which the respondents' application had to proceed but which is denied by the respondents and which would be contested at any hearing) he alleges that he was told by the second respondent that it was "too low" and that "it ought to be rejected". (Amended Statement of Claim (ASC) at 20.1 (vi).

5. The appellant's submission [22] of the appellant's written submissions (AS) that he ceased to be the *dominus litus* and that the case proceeded absent any instruction to do is with respect an unwarranted exercise in poetic licence. On the appellant's case he was advised that the offer was too low and that it ought to be rejected. He was part of the continuation of the case as he was the first witness called. His permission to continue was tacit if not explicit. The advice was integral to the conduct of the case in the sense used in *D'Orta.*

6. The second reason does not take account of the fact the alleged omission by counsel and solicitor led to the conduct of a trial over 5 days which exposed the appellant to cross-examination on the basis of the video recordings which ultimately led to a low assessment of damages. Further if the appellant is correct, that he would have accepted the offer of settlement, then it must follow that the facts that the matter proceeded to a hearing, that he was examined by his counsel and exposed to overstating his case, all contributed to the judicial decisions made by Delaney DCJ and the award of a low sum of damages.

7. To the extent that the majority judgment in *Attwells* indicates that what is required by the expressions "work done out of court which leads to a

decision affecting the conduct of the case in court"[1] and "work intimately connected with" work in court is the demonstration of a functional connection with "the way" a case is run, the indications so far as they can be taken to relate to a matter where advice to reject and offer was given and accepted and a matter thereafter proceeded to a hearing and judgment were obiter and inconsistent with statements made by McHugh J in *D'Orta at* 52 [154].

8. The restrictive approach to the concepts of "conduct of the case in court" and "work in court" indicated in *Attwells* is not required in order to satisfy the justification of the rule which is now accepted as being rooted in the finality of litigation.

9. The test in *D'Orta* at [86] and [87] is not restricted to "the way" the matter is conducted. In [87] the plurality wrote of it being "the conduct of the case that generates the result that should not be impugned". The judgment does not speak of "the way" the case is conducted but of the fact of the conduct.

10. There is no logic in an interpretation which leads to a result where the immunity is available if the negligence leads to only 99% of a litigant's case being conducted whilst the immunity is not available if the negligence leads to 100% of a case being conducted when that case should have been resolved by settlement. In both cases the key is that negligence or error has infected the running of the case. The type of negligence or how the default is characterized is immaterial. The real issue is the link to the conduct of the litigation and *"not the form of the negligence"* see McHugh J in *D'Orta* at [157]. McHugh J went on to say:

> "An integral part of the advocate's role is the giving of advice on the basis of which the client will give instructions that direct the course of proceedings. The advice is critical to and often determinative of the client's decision. There is no relevant distinction between instructions given on negligent advice and the negligent carrying out of instructions if both are intimately connected with the conduct of litigation[2]."

11. If this statement of principle means anything then means that the immunity applies to a case where advice is given and action upon that advice is determinative of a decision to proceed with a case. That is this case.

Finality and Further Hearing

12. It is an underpinning principle of advocate's immunity that the principle of finality is paramount in providing a rationale for the immunity and to ensure disputes and controversies are quelled:

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[1] *Giannarelli v Wraith* (1988) 165 CLR 534 at 560 per Mason CJ; *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 31 [86] per Gleeson CJ, Gummow, Hayne and Heydon JJ.
[22] *D'Orta* per McHugh J at [157

> [30] "More importantly, the decision in *D'Orta* states a rule which is consistent with, and limited by, a rationale which reflects the strong value attached to the certainty and finality of the resolution of disputes by the judicial organ of the State".[3]

13. And further:

> "The common law of Australia, as expounded in *D'Orta* and *Giannarelli*, reflects the priority accorded by this Court to the values of certainty and finality in the administration of justice as it affects the public life of the community"[4]

14. The principle of finality is engaged in this matter because unlike in *Attwells* there was a hearing on the merits before a trial judge. Absent the immunity in this matter there will be another hearing where the reality is that issues canvassed in the hearing that has been completed will be recanvassed.

15. By his submissions the appellant attempts to have the court view the case through a lens which identifies only as necessary elements of any case to be run against the second respondent:
    a. the quantum of the offer ($600,000 plus costs),
    b. the failure of the second respondent to advise the quantum of the offer,
    c. the fact of an award of damages of $300,432.75,
    d. proof that the appellant would have accepted the offer had he been told of it rather than press on with the proceedings, and
    e. calculation of the difference between $600,000 and $300,432.75 ($299,567.25)

16. This is however an unwarranted simplification. The realistic position is that identified by Macfarlan JA at CA [40] when dealing with the case as it would be :

> "His case would therefore involve an examination of, and possibly departure from, the views expressed in the judgments of Delaney DCJ and the Court of Appeal in the personal injury action. The respondents would seek to use the findings concerning Mr Kendirjian's credibility to explain the fact that the judgment was significantly lower than the settlement offer. In these circumstances it might be held that the amounts awarded were quite different from the amounts that reasonable lawyers in the position of the respondents could have assessed as the appropriate range of damages award (because these lawyers might well not have been able to foresee the attack on Mr Kendirjian's credibility and its results). This would lead

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[3] *Attwells* per French CJ, Kiefel, Bell, Gaegler and Keane JJ at [30]
[4] *Attwells* per French CJ, Kiefel, Bell, Gaegler and Keane JJ at [36]

> to an apparent conflict between the judgment in the professional negligence action and those in the personal injury action. I therefore consider, contrary to Mr Kendirjian's submissions, that the role of the personal injury judgment in his professional negligence action would not simply be as an integer in his damages calculation (the amount sought being the difference between the settlement offer and the judgment). Rather, a re-examination of the issues determined in the personal injuries judgment would be required."

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17. Notwithstanding the observation of the majority in *Attwells that*:

> "It is difficult to conceive of any circumstance in which the correctness of the court's decision would be put in issue. The central question would not be whether the court was right or wrong, but whether the advice was reasonable in all the circumstances known to the adviser at the time the advice was given[5]."

20 in this case the court of trial will be asked to rule upon the credibility of the appellant and his claims of injury, disability, loss and damage as they were at the times he was medically examined, instructed counsel and when he gave evidence. The court may well come to a conclusion about the veracity of his claims which conflicts with that of Delaney DCJ. Confining the issue in subsequent litigation to the reasonableness of the advisor to provide the advice provided does not prevent the same issues as litigated in the first action being litigated in the second. To speculate that the prayers and particulars asserted in the statement of claim could be resolved in a manner avoiding any such re-examination is with the greatest respect unrealistic.

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18. The appeal should be dismissed with costs.

Part VII:

19. There is no notice of contention or cross appeal.

40 **Part VIII:**

20. The second respondent's estimate co-insides with the appellant's estimate of no more than two (2) hours for his oral argument.

Dated: 19 August 2016

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[5] *Attwells* per French CJ, Kiefel, Bell, Gaegler and Keane JJ at [49]

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