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Précis Paper

Advocates' Immunity in Australia

Advocates' immunity has been a controversial topic for many years. Barrister Martin Luitingh argues that Australia is alone in maintaining the immunity and should abandon it.

Discussion Includes

- Is Australia alone in keeping advocates' immunity?
- How was advocates' immunity removed in other jurisdictions?
- What are the arguments in support of advocates' immunity?
- Does the public interest require the maintenance or abolition of advocates' immunity?
- What does it mean to say that conduct is "intimately connected" with litigation?
- What carve outs ameliorate the effect of advocates' immunity?
- Is the test for advocates' immunity a temporal test?

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Advocates' Immunity in Australia

1. In this edition of BenchTV, Martin Luitingh (Barrister) and Terry Grace (Solicitor) consider whether advocate's immunity should continue to apply in Australia. Mr Luitingh has a passion for the issue as a matter of public policy and recently represented the successful plaintiff-respondent in the NSW Supreme Court's (Hall J) decision in *Stanton v Tyler [2015] NSWSC 797* which involved a summary dismissal application for a negligence suit against a barrister and solicitor in relation to their conduct of separate proceedings and appeal proceedings for the plaintiff.

What is Advocates Immunity?

2. In Australia, an advocate's immunity from lawsuit was first expressly recognised by the High Court in *Giannarelli v Wraith* [1988] HCA 52; 169 CLR 543. In that case, the High Court applied the common law principle that both barristers and solicitors are immune from civil liability in professional negligence or contract, in relation to the conduct of a case in court and for work undertaken out of court that is "intimately connected" with the conduct of a case in court.

Why Does it Exist? Arguments Against It?

3. The High Court's decision in *Giannarelli* mirrored that of the majority of the common law world in deferring to a long jurisprudence from England that established advocate's immunity e.g. *Rondel v Worsely* [1969] 1 AC 191.

4. According to the many courts that have heard argument over the existence of the immunity, the reasons why such an immunity was established can be summarized by the following:

   (a) 'Cab rank' rule

   The first basis that is often cited for the immunity is that barristers are subject to the cab rank rule. At a general level, the rule states that advocates are bound to accept briefs within their range of expertise. The contemporary notion of the rule is to be found in the *Legal Profession Uniform Conduct (Barrister's) Rules 2015* (NSW), rules 101-105. The suggestion is that if advocates' immunity is abolished, barristers can and should veto clients on the basis they may be expected to sue them – in direct contrast with the rule. Mr Luitingh doubts whether the existence of the rule remains relevant to a discussion of advocate's immunity, especially since it is now perfectly acceptable for barristers to not accept briefs where they lack the capacity to fulfil the role i.e. when they are over-encumbered with briefs.

(b) Advocate's overriding duty to the court

Rule 23 of the Barrister's Rules states: "A barrister has an overriding duty to the court to act with independence in the interests of the administration of justice." Where this duty conflicts with a barrister's duty to their clients, the duty to the court is said to be paramount. However, in circumstances where advocates face the possibility of liability as a consequence of their duties to their clients in court, it may be the case that advocates subordinate their duties to the court in preference to those owed to the client: *Giannarelli* (1988) 165 CLR 543, 572-3 (Wilson J). In the same decision, Mason CJ considered at [556-7] that there was a real risk that the exposure of advocates to potential liability in negligence would adversely affect the administration of justice. However, Wilson J further explained at [572] that an advocate "could never be in breach of any duty to the client by fulfilling the paramount duty" to the court.

(c) No contract between the advocate and the client

The immunity had traditionally been justified by the absence of a contract between advocates and their clients (since any contract was normally formed between advocates and instructing solicitors). It was long held that a duty of care could not extend to a situation in which no contractual relationship existed between the two parties. This proposition was overruled by the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. Furthermore, barristers may now accept briefs directly from clients and solicitors are able to appear as advocates.

(d) The 'finality' principle and collateral attacks

Perhaps the most enduring argument for the maintenance of the immunity has been that it prevents collateral challenges against judicial decisions by removing a potential avenue for disaffected parties to raise grievances that had been determined in an earlier proceeding. The concern with collateral challenges arises due to the possibility of different courts arriving at inconsistent decisions on the same matter, damaging public confidence in the administration of justice.

Mr Luitingh observes that the notion there would be a plethora of litigation questioning judgements where it is alleged that advocates have been negligent is entirely arbitrary and without substance. Mr Luitingh considered that the Canadian and American experience demonstrate exactly the opposite. Mr Luitingh recounts that claims against advocates in these jurisdictions are not a significant category in the course of malpractice suits largely because they are extremely difficult to establish.

Furthermore, Lord Steyn in *Arthur Hall* at [678]-[680] considered that abuse of process, res judicata and issue estoppel granted sufficient powers to a court to make a decision about whether or not a collateral challenge should be permitted and that the defence of advocate's immunity is not needed to protect the administration of justice.

(e) Immunity extends to all other participants in judicial proceedings

There is clear authority that immunity from suit also extends to the actions performed and statements made by judges, witnesses, court staff and jurors in the course of judicial proceedings. These immunities do differ in terms of scope but they are all granted to protect the operation of the legal system and not for the personal benefit of those involved: *Boland v Yates Property Corporation Pty Ltd* (1999) 167 ALR 575, 613 (Kirby J). The common theme is that participants are protected for actions done in good faith, even if wrong or negligent. The point being that to exclude advocates would be anomalous.

5. As can be seen by the brief discussion above, many of these reasons are no longer relevant to a discussion of whether the immunity should be maintained. The following sections of this paper will explore the acceptance of advocates' immunity internationally, exactly how the immunity is applied in Australia, and finally what the future might look like for the continued maintenance of the immunity.

<u>Does Advocates' Immunity Exist Internationally?</u>

6. Debate over the existence of the immunity is not new. However, over a wide range of legal systems, slowly but surely, all of those reasons for establishing the immunity have been rejected. The notion of the immunity as a bar to suing an advocate for negligence in court has been rejected in the United Kingdom (*Arthur JS Hall & Co v Simons* [2000] UK HL38), New Zealand (*Lai v Chamberlains* [2003] 2 NZLR 374), South Africa, Scotland (*Wright v Paton Farrell* (Unreported, Scottish Court of Sessions, 27 August 2002)), Canada (*Demarco v Ungaro* (1979) 95 DLR (3d) 385) and the United States of America (*Ferri v Ackerman*, 444 US 193 (1979)). It is only Australia that still holds the view through two High Court cases (*Giannarelli* & *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12; 223 CLR 1: discussed further below) that the finality principle primarily justifies a defence of the immunity. Mr Luitingh described Australia as being in "splendid isolation" on the issue of advocate's immunity.

7. The most extensive judgment on the question of the immunity is probably *Arthur Hall*, a judgement delivered by the House of Lords in 2000. In that case, Lord Steyn recognised that perceptions of society are subject to change and should be reviewed to consider where

public policy considerations apply. Mr Luitingh notes that whether one likes it or not those changes do take place, for instance in the case of gay marriage. 20 years ago the notion itself would have provoked a public outcry. Yet, in 2014-2015, the right to marry a same sex partner has been acknowledged and condoned in a sweeping change of attitudes in the Western world.

How is it Applied in Australia?

8. This section will explore the precise circumstances in which Australian courts have stated that advocates can utilize the immunity and the relevant legal tests involved.

9. First, it should be noted that the immunity extends to persons acting in the capacity of advocates. This may include solicitors performing work that "is of a kind which falls within the area of immunity": *May v Mijatovic* (2002) 26 WAR 95, 120 (Hasluck J).

10. When an advocate's conduct is called into question as being negligent, the "intimately connected to court" test must be satisfied for the advocate to be immunized from liability.

11. The test requires a court to consider whether the advocate's work was done in court or outside court but "intimately connected" to a case in court: *Giannarelli* at 560 (Mason CJ). Callinan J in *Boland* at [670-1] indicates that what is "intimately connected" is a strategic rather than temporal connection:

> (His Honour did not accept that) simply because the work … was done over a long period of time, that in some way divorced it from work done closer in time to the hearing even though the former answered the description of work intimately connected with the forthcoming trial.

12. Nonetheless, what exactly falls within the category of "intimately connected" is unclear, with Kirby J describing the test as "imprecise" in *Boland* at [611]. Mr Luitingh suggests that this is a "kind description" and the test brings no comfort to a practitioner or a judge in trying to determine what the limits of the immunity might be.

13. Bell J in *Goddard Elliot (a firm) v Fritsch* [2012] VSC 87 gave a particularly wide interpretation to the phrase. His Honour found that he was bound by the interpretations of the High Court in *Giannarelli* and *D'Orta*. Despite this, he found that the application of the immunity in circumstances where a client's capacity to give instructions was questioned "deeply troubling" (at [1145]). This case illustrates that Australian courts are unlikely to adopt a restrictive approach in applying the immunity although there is clearly judicial unease associated with it.

The erosion of the principle in Australia

14. In the above sections of this paper, the reasons for the establishment of the immunity, its current international acceptance, and the test applied in Australia for its use were discussed. This section will explore the degree to which the immunity has been eroded, providing further arguments against its maintenance in Australia.

15. A major erosion of the immunity occurred when it was decided (*Eurobodalla Shire Council v Wells & Ors.* [2006] NSWCA 5) under the rules of court that a barrister or a legal practitioner could be held liable for costs in circumstances where they advocated a case that was without merit. The rule is further incorporated in legislative provisions such as *Civil Procedure Act 2005* (NSW) s 99. Such a costs order clearly stands in conflict with the traditional immunity and one might wonder how they could continue to co-exist.

16. In addition to costs orders against advocates, the immunity has been further eroded by a number of further "carve outs" (in the words of Mr Luitingh) which exclude the immunity from being applied in relation to certain subject matters, including:

    (a) matters which cannot be said to be intimately connected with the conduct of a case in court;
    (b) advice in relation to questions of jurisdiction - if you are in the wrong court then you automatically lose, the arguments prepared are not in question at all and hence negligence in this regard cannot be said to be intimately connected with the conduct of a case in court: *Donnellan v Woodland* [2012] NSWCA 433, Beazley JA;
    (c) a failure to provide advice in relation to questions of who should be joined to proceedings - again it does not matter how you conduct yourself in court, you are going to lose: *Donnellan*;
    (d) providing advice for purposes not related to the proceedings (advice as to pre-trial investigations prior to summons etc): *Donnellan*;
    (e) advice on the prospects of success in an appeal: *Symonds v Vass* (2009) 257 ALR 689;
    (f) sheer delay or mere inaction: *MM & R Pty Ltd v Grills* [2007] VSC 528;
    (g) the negligent compromise of appeal proceedings leading to the loss of benefits gained at first instance, *Donellan* at [248];

17. Mr Grace argued that the quantity and significance of these 'carve-outs' might actually mean that a reversal of the current position is more difficult to achieve given the degree to which it has already been achieved.

18. Mr Luitingh noted that apart from anything else, the immunity rule is an offence to the principal that where there is a wrong there should be a remedy. That is a central principle to

the law of contract and tort. In these circumstances, such an anomaly would ordinarily require cogent reasons for its application. It is certainly true that at one stage society thought such reasons existed. However, over a long period of time and through developments in the law, the rules of court and the safeguards built into the inherent powers of a court, these reasons have been relinquished in other jurisdictions – this is not yet so in Australia.

19. On the issue of collateral challenges leading to inconsistent decisions, Mr Luitingh suggests that there is a great body of lawyers that dispute the reasoning. Where a court comes to a finding on the evidence placed before it, this does not mean that another court should not be entitled to arrive at a different conclusion where different evidence is placed before it. Perhaps one example of this would be the famous O.J. Simpson trial in the United States of America where he was found not guilty of murder with particular emphasis placed on it being established that the police had "planted" evidence at the scene of the crime to implicate Simpson. In a subsequent civil trial for damages, Simpson was found liable because the issue of the so-called "planted evidence" was less relevant. These seemingly inconsistent results did not provoke criticisms of the judgment in the criminal matter as it was widely accepted that the evidence before the two courts differed and that the administration of justice was not impugned.

20. Furthermore, Mr Luitingh emphasises that the public's unease is amplified by the provision of an immunity from suit by the law to practising professionals of its own discipline. Lord Diplock in *Saif Ali v Sydney Mitchell Co (a Firm)* [1978] UK HL6 at [220] noted that the work of advocates bore many similarities to that of other professionals who were also required to make difficult decisions under great pressure. Mr Luitingh thinks that the immunity actually harms the Bar in that it seems ridiculous that the only profession that does not have to suffer scrutiny is the legal profession whereas all others have to. Finally, it is difficult to accept the High Court's contention that the public policy considerations that apply in Australia are somehow different to those that apply in the rest of the common law world.

<u>The Future?</u>

21. Mr Luitingh is unsure about precisely what the future will hold for the immunity and the particular process through which it might change.

22. In terms of a substantive change, Mr Luitingh wonders whether a tort which allows clients to plead negligence against their advocates would not be appropriate. He reflects on the hurdles of proving causation, remoteness and breach of duty as adequately protecting barristers from vexatious attacks and the court process from being unduly abused. This is particularly likely given the provisions for the summary dismissal of baseless claims. Mr Luitingh goes so far as to say that the immunity is an offence to a judge in that they should

be able to determine whether there really is a dispute and hence there should be no need for a blanket immunity. Mr Luitingh also notes that allowing such a summary dismissal hearing is surely not as intolerable as allowing the suffering of a plaintiff who has been negligently advocated for without any recourse. This is especially so when considering the high costs of litigation in today's legal climate.

23. On the other hand, Brennan J concluded that until there was evidence of a clear decline in the standard of advocacy, the conduct of advocacy should be regulated by "the publicity of court proceedings, judicial supervision, appeals, peer pressure and disciplinary procedures to prevent neglect": *Giannarelli* [580]. In this regard, one would think that removing the immunity might only improve the standard of advocacy applied by lawyers and this is something that should be sought after rather than considered as a secondary objective.

24. In terms of how any change might practically occur, attempting reform through the courts is likely to be frustrating and expensive. In order for the High Court to hear a matter, it requires that some hapless victim take the risk to bring it there through a series of hearings from lower courts bound by *Giannarelli*, through a special leave application and to a forum where the prospects of success can only be marginal in light of the previous authorities.

25. Mr Grace wondered whether the future of the immunity should properly be decided by the legislature as opposed to the courts, who seem to be confined in their ability to reform by the lack of ambiguity in their past rulings on the issue. However, Mr Luitingh notes that the current test for the application of the immunity remains imprecise and that the High Court could clarify the test with a more specific construction that limits the application of the immunity. Further, the presenters note that the public interest motivation for the immunity leaves the door open to the High Court reinterpreting the application of the test in line with the changed public perception of the immunity, to restrict its scope.

26. Whether or not you agree with the arguments presented by Mr Luitingh for removing the immunity, it certainly appears to be time for a newly constituted High Court to re-examine the issue.

BIOGRAPHY

Martin Luitingh

Barrister, Edmund Barton Chambers, Sydney

Martin commenced practice as a lawyer in South Africa in 1970, where he did extensive human rights work. He was active in the struggle against Apartheid and the release of Nelson Mandela. He then moved to Australia, where he commenced practice as a solicitor in 2000. He was called to the NSW bar in 2004.

Terry Grace

Solicitor, AJ Lucas Group Ltd, Sydney

Terry commenced practice as a lawyer in New Zealand in 1977. He spent four years practicing in Samoa, where he was appointed Attorney-General on various occasions. He commenced practice as a solicitor in Australia in 1990.

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