

## RECURRING ISSUES IN THE COURT OF APPEAL

*The Hon Justice MJ Beazley AO\**

*President, New South Wales Court of Appeal*

### Introduction

- 1 Last year, the Court of Appeal heard 93 matters which came from the District Court. Of those matters, some 58 came to the Court of Appeal by way of appeal as of right – approximately 62%. There were seven matters heard as applications for leave to appeal only (8%) and an additional 12 matters in which an application for leave to appeal was heard concurrently with the appeal (13%). A further 16 matters came to the Court of Appeal by way of summons seeking judicial review of a decision of the District Court (17%).
- 2 The matters heard by the Court of Appeal from the District Court traversed a wide variety of subject areas. As in previous years, torts matters were the most common. For example, torts matters, including matters concerning the *Motor Accidents Compensation Act 1999* (NSW) and workers' compensation matters, accounted for almost 65% of the matters heard by way of appeal as of right. Of the matters heard by the Court of Appeal by way of summons seeking judicial review, applications for review of decisions on appeal to the District Court from the Local Court under the *Crimes (Appeal and Review) Act*

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2001 (NSW) and applications for the review of appeals from decisions of the Costs Review Panel were the most common.

3 As has been my practice in recent years, I propose this morning to focus on a small selection of topics which I believe to be of particular importance, interest and utility. The topics I will discuss this morning are:

- (1) Recent decisions concerning costs;
- (2) The blameless motor accidents regime under the *Motor Accidents Compensation Act*;
- (3) The advocates' immunity.

#### **Legal practitioners acting in person and professional costs**

4 I first wish to note that a self-represented litigant is not entitled to professional costs, other than for disbursements, or any sum reflecting time spent in preparation for and in court: *Cachia v Hanes* (1994) 179 CLR 403; [1994] HCA 14. However, a self-represented solicitor is entitled to professional costs under the so-called "Chorley exception": *London Scottish Benefit Society v Chorley* (1884) 13 QBD 87. This exception applies to self-represented barristers: *Bechara trading as Bechara and Company v Bates* [2016] NSWCA 294.

5 The *Chorley* exception will not apply where the terms of the costs legislation are clear that a costs order only relates to actual expenditure: *Wang v Farkas* (2014) 85 NSWLR 390; [2014] NSWCA 29. For example, the case of *Wang v Farkas* concerned "professional costs" in the *Criminal Procedure Act 1986* (NSW). "Professional costs" was defined in s 211 to mean:

... costs (other than court costs) relating to professional expenses and disbursements (including witnesses' expenses) in respect of proceedings before a court.

By contrast, the *Civil Procedure Act 2005* (NSW) defines “Costs” in s 3 as:

costs **payable** in or in relation to the proceedings, and includes fees, disbursements, expenses and remuneration

### **Recent decisions concerning costs**

6 In recent years, the Court of Appeal has delivered several decisions regarding costs more generally and in particular the costs assessment process and appeals from costs assessments.

#### *Wende v Horwath (NSW) Pty Limited [2014] NSWCA 170*

7 This case concerned an application for judicial review of a District Court decision dismissing an appeal from a review panel affirming the determination of a costs assessor in relation to party/party costs.

8 In 1998, the applicants suffered loss when their neighbour’s tree fell on their property. They retained the respondent to provide expert evidence of the loss sustained. In 2004, the respondent filed a claim in the Local Court seeking payment of a sum of \$18 526 for professional services rendered.

9 An arbitrator made an award in favour of the respondent. The matter proceeded to the Local Court by way of re-hearing, where an order was made in favour of the respondent. The applicants appealed to the Supreme Court and sought leave to appeal to the Court of Appeal. They were unsuccessful in both instances. Costs were ordered against the applicants following the proceedings in each court.

10 The respondent applied to have its costs in respect of the three orders assessed by a costs assessor pursuant to s 353 of the *Legal Profession Act 2004* (NSW) (the 2004 Act). The assessor issued one certificate of determination, which did not state how the costs were apportioned between each of the orders. The applicants applied to have the assessment reviewed

by a review panel under s 373 of the 2004 Act. The panel adjusted the award to correct a arithmetical error on the part of the costs assessor but otherwise rejected the applicants' grounds of review. An appeal to the District Court pursuant to s 384 of the 2004 Act was dismissed.

11 The applicants then commenced proceedings in the Court of Appeal seeking judicial review of the District Court's decision under s 69 of the *Supreme Court Act 1970* (NSW). In relation to the costs assessment process, the Court considered the following issues and reached the following conclusions:

(1) A person entitled to apply for an assessment of party/party costs can make a single application to have multiple costs orders assessed: Beazley P at [6]-[9]; Barrett JA at [195].

(2) A costs assessor making an assessment of party/party costs under several costs orders must make a separate assessment in relation to each order. Beazley P and Basten JA held that each determination must have a separate certificate of determination. Basten JA observed, at [91], that:

At least that is so in circumstances where objection to an application in that form was taken and where liability for such costs did not fall on the same parties with respect to each order.

(3) Barrett JA dissented in regards to the need for a separate certificate: [181]-[211].

(4) The respondent was not liable to pay the costs of the costs assessment because s 369(3)(c) of the 2004 Act (which addresses the liability for costs of an assessment that is reduced by 15% or more) only applies to assessments of practitioner-client costs: [265]-[273].

(5) The meaning of "review" within s 375 of the 2004 Act is not fixed. The function of a review panel under the Act will vary according to the way in which the applicant chooses to frame his or her application: [162].

- (6) The requirement to give reasons under s 380 of the Act does not require a review panel to provide its own paraphrase of the reasons of a decision under review if it agrees with the conclusions and reasons of that decision: [176]-[179].

*Wende v Horwath (No 2)* [2015] NSWCA 416

- 12 Following the decision above, the matter was remitted to the District Court to make any consequential orders and take such steps as necessary in relation to the costs of the costs assessment process.
- 13 On remittal, Taylor DCJ determined the sums payable under the separate costs orders by reference to the reasons of the costs assessor and the review panel. His Honour “note[d]” that the applicant bore no liability in respect of the costs under the Supreme Court order and that such costs were subject to a partial discharge by reason of payment by the Legal Aid Commissioner. His Honour ordered that the applicants pay the assessor’s and review panel’s costs in aggregate amounts, disaggregated the parties’ costs incurred in the assessment and ordered that they be added to the total sums determined to be payable in respect of each order. His Honour then ordered that the applicants pay 80% of the respondent’s costs in the District Court prior to the 2014 Court of Appeal decision and all of the respondent’s costs in the District Court thereafter.
- 14 The applicants commenced proceedings in the Court of Appeal seeking judicial review of the decision. The Court considered the following issues and reached the following conclusions:
  - (1) The determinations of the costs assessor and review panel did not cease to have legal effect because the certificate was set aside: Beazley ACJ at [35]-[41]; Basten JA at [99]-[100]; Adamson J at [141].
  - (2) In considering the issue whether the primary judge was permitted to disaggregate the costs as he did and determine the separate sums

payable under each costs order, the Court was required to construe s 384(2) of the 2004 Act, which in para (a) allows the District Court to:

make such determination in relation to the application as, in its opinion, should have been made by the costs assessor.

The Court held that this does not allow the District Court to make findings of fact or exercise a rehearing function. Beazley ACJ observed, at [58], that:

There is a long line of authority that where an appeal is limited to a question of law, the appellate body is limited to a determination of the question of law and is not permitted to engage in a fact finding process or to otherwise engage in a merits review of the decision of the lower court or tribunal.

As a result, as Basten JA explained, at [112], “*on the proper construction of s 384(2), the judge did not have the power to undertake the exercise of disaggregation*”. Rather, it fell to the District Court to remit the matter to the costs assessor under s 384(2)(b) and “*order the costs assessor to re-determine the application*”. In re-determining such a matter, s 384(3) allows:

fresh evidence, or evidence in addition to or in substitution for the evidence received at the original proceedings.

See Beazley ACJ at [55]-[65]; Basten JA at [104]-[113]; Adamson J at [141].

- (3) The primary judge’s “note” that the applicant bore no liability was not expressed in a form or manner which impacted on the orders made, making it necessary to set aside the orders as made: Beazley ACJ at [87]; Basten JA at [130]-[131]; Adamson J at [141].
- (4) It is necessary to give a separate certificate in respect of the costs of each separate certificate issued. The primary judge erred in making the orders aggregate: Beazley ACJ at [67]-[69]; Adamson J at [141].

- (5) Basten JA held that amounts for the parties' costs of a costs assessment should be included in a certificate issued under s 369 of the 2004 Act (relating to the costs of costs assessment), rather than s 368 (relating to a certification of determination). However, Beazley P and Adamson J found it unnecessary to resolve this issue as the orders would be set aside in any case and the point had not been fully argued: Beazley ACJ at [70]-[76]; Basten JA at [117]-[128]; Adamson J at [141].

*Daley v Hughes* [2014] NSWCA 268

- 15 In 2003, the respondent retained the applicants to act for her in making a claim arising from a motor vehicle accident. The claim settled and the respondent sought a costs assessment, arguing that the applicants were only entitled to costs in an amount capped by the operation of the Motor Vehicle Compensation Regulation (No 2) 1999 (NSW). The applicants argued that they had contracted out of this statutory cap.
- 16 The costs assessor issued what he described as "Draft Reasons", which indicated that he would assess costs on the basis that the caps applied from the time the retainer commenced in 2003 until the time a costs disclosure was made in 2005 and not thereafter.
- 17 The respondent brought an appeal against this "decision" pursuant to s 208L of the *Legal Profession Act 1987* (NSW). The primary judge found the appeal was competent and that the applicants' costs were subject to the cap. The applicants appealed.
- 18 The Court held that the "Draft Reasons" were no more than an "*expression of opinion or intention*" and were not binding on the parties or the costs assessor. Accordingly, there was no "decision" from which an appeal could be brought: Meagher JA at [9]-[11]; Emmett JA at [37]; Tobias AJA at [77]-[84].

*eInduct Systems Pty Ltd v 3D Safety Services Pty Ltd* [2015] NSWCA 284

- 19 In 2012, eInduct Systems Pty Ltd commenced proceedings against 3D Safety Services Pty Ltd alleging breach of contract and breach of equitable duties of confidence. Following the determination of two Notices of Motion, Stevenson J made two orders for costs in 3D's favour. The solicitors for 3D submitted a composite bill.
- 20 eInduct applied to have the costs assessed by a costs assessor pursuant to s 353 of the 2004 Act, claiming that they were "excessive and unreasonable". The costs assessor issued a single certificate of determination in relation to both costs orders and later issued his reasons.
- 21 eInduct applied for review of the determination by a costs review panel pursuant to s 373 of the 2004 Act. The panel set aside the original certificate and issued a new certificate assessing costs in a slightly higher amount than that fixed by the assessor.
- 22 eInduct appealed to the District Court under s 384 of the 2004 Act. At hearing, counsel for eInduct sought leave to amend the Notice of Appeal to raise two additional grounds, these being issues regarding the liability of certain parties for the costs and the form of the certificates issued by the review panel. Leave was refused and the appeal was dismissed.
- 23 eInduct commenced proceedings in the Court of Appeal, seeking judicial review under s 69 of the *Supreme Court Act 1970* (NSW). The principle issues were whether the primary judge erred in declining to allow the Notice of Appeal to be amended and in failing to take into account the proportionality of costs to the outcome of proceedings.
- 24 With respect to the attempt to raise the issue regarding the form of the certificates for each costs order, no error of principle was shown in the primary judge's conclusion that, in the absence of prejudice, the appellant should not be allowed to raise a point not before the assessors. Basten JA, at



[41]-[42], noted that *Wende* did not necessarily require separate certificates to be issued in cases where a single application for costs assessment was made in relation to more than one order.

I note that this is now addressed by s 70(3) of the *Legal Profession Uniform Law Application Act 2014* (NSW), which allows a costs assessor to:

issue one certificate in relation to a single application for an assessment of costs that are payable under multiple orders, rules or awards made between the same parties in one or related proceedings, as long as the certificate specifies the amount determined for each order, rule or award separately.

- 25 In relation to the proportionality of costs, the Court held that s 60 of the *Civil Procedure Act* is not directed to costs assessors or costs review panels. Basten JA expressed doubt as to whether it applies to the costs assessment process at all. Meanwhile, s 364 of the 2004 Act does not use the language of proportionality but rather is directed to what is a “*fair and reasonable amount of costs for the work concerned*”: s 364(1)(c). Basten JA noted that “the language of reasonableness ... may, depending on the circumstances, involve (and even require) some form of proportionality”. Despite this, no error was demonstrated in the primary judge’s approach in this case: Beazley P at [9]; Basten JA at [63]; Simpson JA at [124].

*eInduct Systems Pty Ltd v 3D Safety Services Pty Ltd (No 2)* [2015] NSWCA 422

- 26 In response to the decision above, the applicant was ordered to pay the respondents’ costs in the proceedings. The respondents sought a “*specific gross sum*” instead of assessed costs, relying on the power of the Court to make such an order pursuant to s 98(4) of the *Civil Procedure Act 2005* (NSW) “*at any time before costs are referred for assessment*”.
- 27 Beazley P and Basten JA began by observing, at [3], that:

[t]here is a small though not significant number of cases in which disputes over costs appear to overwhelm the initial dispute between the parties.

28 Their Honours went on to note, at [4], that:

[a]lthough the amount and liability to pay legal fees is undoubtedly of great significance to the parties, it should not be forgotten that there is a public interest in minimising unnecessary costs to the public purse through the provision of courts and other institutions to allow for the orderly settlement of civil disputes.

29 Their Honours observed that a gross costs order involves a departure from the usual process by which costs are assessed in accordance with the statutory procedures now found in the *Legal Profession Uniform Law* (NSW). The factors relevant in determining whether such an order should be made include:

- (a) the complexity (and hence likely costs of) the assessment process;
- (b) if the costs of the assessment process are likely to be significant, whether they are likely to be unrecoverable;
- (c) the confidence with which the Court can estimate an approximate amount within reasonable limits;
- (d) the willingness of the applicant to discount the likely amount of costs recoverable on assessment, and
- (e) factors attending the particular application, including delay.

30 In determining not to make an order, their Honours had regard to the delay in making an application, which meant that there was no opportunity for considered submissions.

31 Simpson JA allowed the order. In doing so, she observed, at [30], that:

“Relevant considerations include the apparent impecuniosity (where it exists) of the party liable to pay the costs; delays that will be encountered by the requirement for assessment; the history of the proceedings between the parties. It has more than once been suggested that the power is appropriately exercised where the sum of costs in question is relatively modest.” (citations omitted)

## **Developments in relation to the blameless motor accidents regime**

32 The next topic I wish to discuss this morning is the blameless motor accident regime in Part 1.2 of the *Motor Accidents Compensation Act*. There were a number of decisions on the blameless motor accident regime handed down by the Court of Appeal in the past year, and I propose to discuss: (1) the application of the regime to single vehicle accidents; and (2) recurring issues with the significance of contributory negligence.

### *Single vehicle blameless motor accidents*

33 In *Whitfield v Melenewycz* [2016] NSWCA 235, the Court gave consideration to the application of the blameless motor accidents regime to a single vehicle accident. The facts of the matter may be shortly stated. The respondent was injured in 2011 when the motorcycle he was riding on an unsealed road in rural New South Wales collided with a kangaroo. The respondent brought proceedings in the Supreme Court against the first appellant, as the owner of the motorcycle, and the second appellant third party insurer under the *Motor Accidents Compensation Act*. The matter proceeded on the basis that the respondent was not personally negligent.

34 There was never any contention that the first appellant owner had caused or contributed to the accident. Rather, damages were sought on the basis that the accident was a “blameless motor accident” and on the argument that the respondent’s injuries were deemed to have been caused by the first appellant owner in the use or operation of the vehicle. The primary judge, Hamill J, found that the accident was “blameless” in the relevant sense, that the deeming provision was engaged, and that the appellants were liable to the respondent for damages.

35 Meagher JA, Simpson JA and Sackville AJA agreeing, allowed the appeal, set aside the primary judgment, and directed that judgment be given for the appellants as the defendants in the first instance proceedings. Before

considering the reasoning of the Court, it is appropriate to set out the text of the most relevant provisions of Part 1.2:

#### **7A Definition of “blameless motor accident”**

In this Division:

*"blameless motor accident"* means a motor accident not caused by the fault of the owner or driver of any motor vehicle involved in the accident in the use or operation of the vehicle and not caused by the fault of any other person.

#### **7B Liability for damages in case of blameless motor accident**

(1) The death of or injury to a person that results from a blameless motor accident involving a motor vehicle that has motor accident insurance cover for the accident is, for the purposes of and in connection with any claim for damages in respect of the death or injury, deemed to have been caused by the fault of the owner or driver of the motor vehicle in the use or operation of the vehicle.

(2) If the blameless motor accident involved more than one motor vehicle that has motor accident insurance cover for the accident, the death or injury is deemed to have been caused by the fault of the owner or driver of each of those motor vehicles in the use or operation of the vehicle.

36 It is also necessary to set out the definition of “motor accident” under s 3 of the Act:

#### **3 Definitions**

...

"motor accident" means an incident or accident involving the use or operation of a motor vehicle that causes the death of or injury to a person where the death or injury is a result of and is caused (whether or not as a result of a defect in the vehicle) during:

- (a) the driving of the vehicle, or
- (b) a collision, or action taken to avoid a collision, with the vehicle, or
- (c) the vehicle's running out of control, or
- (d) a dangerous situation caused by the driving of the vehicle, a collision or action taken to avoid a collision with the vehicle, or the vehicle's running out of control.

37 The main issue on the appeal was whether, by virtue of the combined operation of ss 7A and 7B, the respondent could claim damages from the first appellant owner of the motorcycle on the basis that his injuries were deemed

to have been caused by the owner's fault in the use of operation of the vehicle.

- 38 Meagher JA first gave consideration to the position that would have obtained had the respondent been the owner of the motorcycle. In such circumstances, Meagher JA noted that "*he could not have had a claim for damages against himself as owner*".<sup>1</sup> In this regard, his Honour explained that:

Section 7B deems fault for the purposes of a claim which depends on the claimant establishing liability under the common law. It does not deem liability. Under the common law a driver cannot have a claim in negligence against him or herself.<sup>2</sup>

- 39 Turning to the circumstances of the case at hand, Meagher JA explained that the accident in question clearly involved the use or operation of the motorcycle by the respondent and it was uncontroversial that that use or operation did not involve fault. On that basis, Meagher JA acknowledged that the first part of the s 7A definition of a blameless motor accident would be met.<sup>3</sup> That is, there was no fault of the driver in the use or operation of the vehicle.

- 40 What the respondent sought to do was rely on the deeming provision in s 7B in circumstances in which he had undoubtedly been in use or operation of the motorcycle but which did not involve any use or operation of the motorcycle by the owner, either in a causal or temporal sense.

- 41 It is necessary in this respect to have regard to the definition of "motor accident", forming as it does part of the compound term "blameless motor accident". As Meagher JA explained, "[a] *"motor accident" is one involving use or operation of a vehicle that causes death or injury*". His Honour continued:

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<sup>1</sup> *Whitfield v Melenewycz* [2016] NSWCA 235 at [31]

<sup>2</sup> *Ibid* [31]

<sup>3</sup> *Ibid* [35]

Although not expressly stated, that causative use or operation must be by the owner or driver (or both of them). A “blameless” motor accident is one in which there was causative use or operation by the owner or driver (or both) but no fault in that use or operation. It is in relation to such an accident that the deeming applies.<sup>4</sup>

- 42 The problem with the respondent’s argument was that there was no causally relevant use or operation on the part of the owner upon which the deemed fault effect of s 7B(1) could operate. As Meagher JA explained:

Section 7B(1) deems death or injury caused by the use or operation of the vehicle by the owner or driver “to have been caused by the fault of the owner or driver ... in the use or operation of the vehicle”. The use or operation is, in each case, the causative use or operation of the owner or driver (or of both). So understood ***the deeming is of fault on the part of the owner or driver (or of both) whose use or operation caused the death or injury.***<sup>5</sup> (emphasis added)

- 43 In a concurring judgment, Sackville AJA explained the point in this way:

Section 7B(1) of the MAC Act, in my view, operates to deem a blameless motor accident to have been caused by whichever of the owner or driver of the vehicle was involved “in the use or operation of the vehicle” at the relevant time... s 7B(1) does not deem an owner of a vehicle to be at fault in the use or operation of the vehicle if there is no relevant act or omission of the owner that can be described as “in the use or operation of the vehicle”. Section 7B(1) is intended to deem, contrary to the fact, an owner or driver of a vehicle to be at fault for the purposes of a claim for damages arising out of injuries sustained in a blameless motor accident. It is not intended to deem an owner to have been involved in the use or operation of the vehicle, when in fact the owner had no such involvement at the relevant time.<sup>6</sup>

### *Contributory negligence under the blameless motor accidents regime*

- 44 The other two decisions of the Court of Appeal I would like to discuss, *Nominal Defendant v Dowdeit* [2016] NSWCA 332 and *Serrao v Cornelius (No 2)* [2016] NSWCA 231, both raised the issue of contributory negligence under the blameless motor accidents regime. Although neither decision departs substantially from the existing understanding of Part 1.2 of the *Motor*

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<sup>4</sup> Ibid [37]

<sup>5</sup> Ibid [38]

<sup>6</sup> Ibid [57]-[58]

*Accidents Compensation Act*, they do serve to emphasise two issues in relation to contributory negligence – (1) the construction of s 7A and the definition of “blameless motor accident”; and (2) the approach to apportioning contributory negligence in the context of a blameless motor accident.

(1) *the construction of s 7A:*

- 45 One of the recurring issues in relation to the significance of contributory negligence under the blameless motor accidents regime has been whether the reference to “*fault*” in the s 7A definition of “*blameless motor accident*” encompasses contributory negligence by the plaintiff seeking recovery.
- 46 This is the argument that was run by the unsuccessful respondent in *Axiak v Ingram* (2012) 82 NSWLR 36; [2012] NSWCA 311. That decision arose from circumstances in which the first appellant, a 14 year old girl, after alighting from a school-bus on her way home, darted onto the road from behind the bus and was struck by an on-coming vehicle. It was uncontroversial in *Axiak* that the motor accident was not caused by the fault of the respondent, the driver of the on-coming vehicle. However, it was contended by the respondent that the motor accident was caused by the first appellant such that, having been caused by the fault of a person other than the driver, the accident did not constitute a “*blameless motor accident*” as defined by s 7A. The primary judge, Adamson J, accepted this argument with the effect that the first appellant’s claim failed in its entirety.
- 47 The Court of Appeal allowed the appeal and found that the primary judge had erred in finding that the first appellant was not entitled to rely on the blameless motor accidents regime under Part 1.2. Tobias AJA gave the lead judgment, with myself and Sackville AJA agreeing.
- 48 In construing the definition of “*blameless motor accident*” under s 7A, Tobias AJA emphasised that, in accordance with the definition in s 3, “*fault*” means

“*negligence or any other tort*”.<sup>7</sup> Indeed, his Honour noted that the *Motor Accidents Compensation Act* is replete with references to fault, reflecting its operation as a:

...fault-based scheme whereby a person injured in a motor vehicle accident can claim damages where the accident is caused by the tortious conduct of, relevantly, the driver of the relevant vehicle.<sup>8</sup>

49 Turning to the language of s 7A, Tobias AJA observed that:

The evident purpose of the addition of the words "and not caused by the fault of any other person" is to render Division 1 inapplicable to a situation where, although the motor accident is not caused by the "fault" (as defined) of the driver of the relevant motor vehicle, the accident is caused by the "fault" of a third party. Where such fault exists, the injured person would be entitled to pursue that third party for damages in the usual way. In those circumstances there is no necessity for the injured person to claim damages pursuant to Division 1 of Part 1.2 as the tortious third party can be made liable for damages which would not be modified under Chapter 5 of the Act, subject only to any applicable provisions of the *Civil Liability Act 2002*.<sup>9</sup>

50 Continuing, Tobias AJA emphasised that the phrase “*any other person*” “*cannot be divorced from its context*”.<sup>10</sup> With that in mind, his Honour reasoned that:

Once it is accepted that the expression "fault of any other person" refers only to the tortious conduct of that person, it must follow that the "person" referred to cannot include the injured person whose "fault" in the form of non-tortious contributory negligence is excluded from the definition of "blameless motor accident" in s 7A. That conclusion is reinforced once the words of the definition of "fault" are inserted into the definition of "blameless motor accident"...<sup>11</sup>

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<sup>7</sup> *Axiak v Ingram* (2012) 82 NSWLR 36; [2012] NSWCA 311 at [58]ff

<sup>8</sup> *Ibid* [60]

<sup>9</sup> *Ibid* [63]

<sup>10</sup> *Ibid* [66]

<sup>11</sup> *Ibid* [66]



51 In the subsequent decision of *Davis v Swift* (2014) 69 MVR 375; [2014] NSWCA 458, Meagher JA explained *Axiak* as having decided:

...the closing words of the definition of blameless accident - "and not caused by the fault of any other person" - refer only to tortious conduct of a person other than the injured person. That is principally because "fault" is defined in s 3 as meaning "negligence or any other tort". It follows that a "blameless accident" can include one in which there has been contributory negligence of the injured person.<sup>12</sup>

52 In the latter of the cases decided last year I have mentioned, *Serrao v Cornelius (No 2)*, the Court of Appeal was invited to reconsider the construction of s 7A articulated in *Axiak*. In *Serrao*, the appellant had been injured as a result of being struck by the respondent's vehicle whilst walking along an unlit road. The appellant's primary case at first instance had been that the respondent was negligent. The primary judge, Hatzistergos DCJ, found that the respondent had been negligent, but reduced the damages awarded to the appellant on the basis of a finding of contributory negligence. The appellant's alternative case, that he was entitled to recover under the blameless motor accident regime, was dealt with by the Court of Appeal after a cross-appeal by the respondent was allowed and the primary judgment set aside.

53 The argument advanced by the respondent in relation to s 7A was essentially that which had been run, and rejected, in *Axiak*. That is, that a plaintiff cannot rely on the blameless motor accidents regime in circumstances where they were themselves guilty of contributory negligence. The respondent sought to contend that *Axiak* was wrongly decided on this point.

54 Sackville AJA, Leeming JA and Emmett AJA agreeing, refused to reopen the decision in *Axiak* as to the construction of s 7A.<sup>13</sup> His Honour emphasised that the respondent's counsel had stated at the outset of the trial that no defence

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<sup>12</sup> *Davis v Swift* (2014) 69 MVR 375; [2014] NSWCA 458 at [32]

<sup>13</sup> *Serrao v Cornelius (No 2)* [2016] NSWCA 231 at [51]

was pressed that the appellant had not been injured in a blameless motor accident.<sup>14</sup> More importantly for present purposes, Sackville AJA observed that “*the reasoning of the majority in Davis v Swift does not cast doubt on the construction of s 7A of the MAC Act adopted in Axiak v Ingram*”,<sup>15</sup> and that no error had been identified of the kind that might justify reopening the decision.<sup>16</sup>

*(2) the assessment of contributory negligence in blameless motor accidents*

55 The other recurring issue in relation to the significance of contributory negligence under the blameless motor accidents regime is the assessment of contributory negligence. It is necessary to set out the relevant provisions of the *Motor Accidents Compensation Act* in this regard:

**7F Contributory negligence**

This Division does not prevent the reduction of damages by reason of the contributory negligence of the deceased or injured person.

...

**138 Contributory negligence-generally**

(1) The common law and enacted law as to contributory negligence apply to an award of damages in respect of a motor accident, except as provided by this section.

...

(3) The damages recoverable in respect of the motor accident are to be reduced by such percentage as the court thinks just and equitable in the circumstances of the case.

56 Additionally, by virtue of s 3B(2)(a) of the *Civil Liability Act 2002* (NSW), ss 5R and 5S of that Act will apply to the assessment of contributory negligence in motor accidents claims.

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<sup>14</sup> Ibid [48]

<sup>15</sup> Ibid [49]

<sup>16</sup> Ibid [50]

57 As I explained last year, the classic approach to the assessment of contributory negligence is in accordance with s 9 of the *Law Reform (Miscellaneous Provisions) Act 1965* (NSW) and as expounded by the High Court in *Podrebersek v Australian Iron & Steel Pty Ltd* [1985] HCA 34; 59 ALJR 492. Under that approach, the Court makes comparison both of culpability and of the relative importance of the acts of the parties in causing the damage. However, in *Axiak*, Tobias AJA was of the view that that approach “*can have no application to a case*” under the blameless motor accidents regime because:

...the Act proceeds upon the assumption that the defendant driver is not at fault. Accordingly, comparisons of culpability and of the relevant importance of the acts of the parties in causing the first appellant's injuries is inappropriate.<sup>17</sup>

58 In his Honour's view, the deemed fault arising from the operation of s 7B does not assist in assessing contributory negligence “*because it is simply impossible to determine the degree of fault which is to be attributed to the driver*”.<sup>18</sup> Rather, Tobias AJA reasoned that:

...the concept of "contributory negligence" in s 7F of the Act has to be applied in a different manner to the usual comparative analysis of responsibility undertaken in personal injuries cases. This can be done consistently with the objectives of the legislation by inquiring how far the plaintiff has departed from the standard of care he or she is required to observe in the interests of his or her own safety. The reduction of damages under Division 1 of Part 1.2 by reason of contributory negligence will therefore be determined by assessing the extent to which the plaintiff departed from that standard.<sup>19</sup>

59 Meagher JA expressed some reservations about this approach in *Davis v Swift*, noting in particular that the aspect of Tobias AJA's reasoning that I have just quoted did not explicitly advert to the operation of ss 7F and 138(3).<sup>20</sup>

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<sup>17</sup> *Axiak v Ingram* (2012) 82 NSWLR 36; [2012] NSWCA 311 at [83]

<sup>18</sup> *Ibid* [84]

<sup>19</sup> *Ibid* [85]

<sup>20</sup> *Davis v Swift* (2014) 69 MVR 375; [2014] NSWCA 458 at [37]

60 As Meagher JA noted, s 138(3) “requires that where a finding of contributory negligence is made the damages should be reduced by such percentage as the court thinks just and equitable in the circumstances”.<sup>21</sup> In his Honour’s view, with a blameless motor accident, “those circumstances include the fact that it is such an accident as well as the conduct of each of claimant and driver or owner which has resulted in that accident”.<sup>22</sup> It was suggested by Meagher JA that:

Consideration of those circumstances, having regard to the purpose and object of Pt 1.2..., may require that a different approach be taken to that adopted in *Axiak*, at least in a case which involves a "blameless accident" of the kind referred to in the Second Reading Speech.<sup>23</sup>

61 His Honour went on to explain the sorts of case he was referring to:

Where the driver is incapacitated from continuing in control of the vehicle, but not in circumstances involving fault, an assessment of what is "just and equitable" as between the injured plaintiff and driver could have regard to their respective shares in the responsibility for the injuries, making the assumption that the driver had not been incapacitated or otherwise prevented from continuing in control of the vehicle. The conduct which caused the accident would be treated as having involved fault on the part of the driver and responsibility would be apportioned on that basis. The injured person would be put in the position he or she might reasonably have expected to be in as a result of another person's driving that in other circumstances would have involved fault. Such an outcome is consistent with a stated purpose of the "blameless accident" provisions being to provide for compensation in cases where the application of the "fault" principle has "unfortunate and even undesirable consequences".<sup>24</sup>

62 Leeming JA agreed “that it may be desirable for this court to revisit the approach stated in *Axiak*”.<sup>25</sup> However, as neither party had submitted that

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<sup>21</sup> Ibid [44]

<sup>22</sup> Ibid [44]

<sup>23</sup> Ibid [44]

<sup>24</sup> Ibid [45]

<sup>25</sup> Ibid [84]

*Axiak* was wrongly decided, the issue of contributory negligence was ultimately decided by reference to the approach articulated in *Axiak*.<sup>26</sup>

63 In the first of the decisions from last year I have mentioned, *Nominal Defendant v Dowedeit*, the primary judge, Taylor DCJ, had correctly followed the binding authority of the *Axiak* approach and it was not suggested on the appeal that the primary judge had applied the incorrect approach.<sup>27</sup> Gleeson JA identified *Axiak* as standing for the proposition that the “*balancing exercise*” approach described in *Podrebersek* has no application in the context of blameless motor accidents:

...because Part 1.2 of the MACA proceeds upon the assumption that the defendant driver is not at fault. It is for this reason that “comparisons of culpability and of relative importance of the acts of the parties in causing the [plaintiff’s] injury is inappropriate”.<sup>28</sup>

64 Gleeson JA also identified *Axiak* with the proposition that “*the fact that a plaintiff guilty of contributory negligence in a “blameless motor accident” case must always be the sole cause of his or her injuries does not of itself warrant a finding of 100% contributory negligence*”.<sup>29</sup> Although his Honour acknowledged Meagher JA’s observations in *Davis v Swift* that *Axiak* may require further consideration, Gleeson JA noted that the case under consideration provided no occasion for such reconsideration and that it had not been submitted that *Axiak* was wrongly decided.<sup>30</sup>

65 Likewise, Sackville AJA was of the view that *Serrao v Cornelius (No 2)* was an inappropriate vehicle to undertake reconsideration of *Axiak*.<sup>31</sup> His Honour

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<sup>26</sup> *Ibid* [41]

<sup>27</sup> *Nominal Defendant v Dowedeit* [2016] NSWCA 332 at [118], [123]

<sup>28</sup> *Ibid* [123]

<sup>29</sup> *Ibid* [124]

<sup>30</sup> *Ibid* [125]

<sup>31</sup> *Serrao v Cornelius (No 2)* [2016] NSWCA 231 at [56]

noted that Meagher and Leeming JJA in *Davis v Swift* both expressed the view that *Axiak* may require further consideration, and that Meagher JA had observed that the relevant aspects of Tobias AJA's reasoning in *Axiak* did not refer to ss 7F and 138(3).<sup>32</sup> Sackville AJA reasoned, however, that:

If the approach suggested by Meagher JA was to be applied to the circumstances of the present case, some difficult questions would arise. Given the findings of the Court in the Principal Judgment, it is not clear what counterfactual assumptions (if any) would have to be made about the respondent's driving in order to compare her degree of responsibility with that of the appellant.<sup>33</sup>

66 Turning to the question of contributory negligence actually at hand, Sackville AJA explained that the question under the *Axiak* approach is "*how far the plaintiff has departed from the standard of care he or she is required to observe in the interests of his or her own safety*".<sup>34</sup> His Honour then observed that this approach:

...is consistent with the language of s 138(3) of the MAC Act which, unlike s 9(1) of the Law Reform (Miscellaneous Provisions) Act 1965 (NSW), does not assume that any reduction of damages must be based on an apportionment of responsibility between the plaintiff and defendant. It also reflects the common law principle that contributory negligence does not involve breach of a duty of care owed to others.<sup>35</sup>

67 Sackville AJA then explained the relevance of s 5R of the *Civil Liability Act* in assessing contributory negligence, as follows:

Section 5R(2) of the CL Act has been construed to require the determination of whether a plaintiff has been contributorily negligent to be decided objectively on the basis of the facts and circumstances of the case. Allowance can be made for the particular circumstances of a child or of a plaintiff whose capacity to appreciate or avoid the risk of harm is limited by physical or mental disability. However, no such allowance is made for a plaintiff whose neglect for his or her safety is the result of self-induced

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<sup>32</sup> Ibid [52]

<sup>33</sup> Ibid [53]

<sup>34</sup> Ibid [60]

<sup>35</sup> Ibid [60]

intoxication. In this respect, s 5R accords with the common law as expounded by McHugh J in *Joslyn v Berryman*.<sup>36</sup>

### **Advocates' immunity**

68 In the past year, the High Court has handed down two judgments concerning the scope of the advocates' immunity – *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 331 ALR 1; [2016] HCA 16 and *Kendirjian v Lepore* [2017] HCA 13. Both of those judgments were appeals from the New South Wales Court of Appeal, one with its origins in the District Court.

69 I should, however, first recount the existing state of the law in Australia as to the advocates' immunity. The well-known decisions of the High Court in *Giannarelli v Wraith* (1988) 165 CLR 543 and *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1; [2005] HCA 12 remain good law and inform the more recent decisions which I will discuss.

70 As is well known, *Giannarelli v Wraith* is the seminal decision of the High Court affirming the existence of the advocates' immunity in the common law of Australia. In the majority, Mason CJ, Wilson, Brennan, and Dawson JJ held that, at common law, a barrister cannot be sued for negligence in relation to the conduct of a case in court or work out of court which leads to a decision affecting the conduct of a case in court. Although the case concerned a Victorian barrister, the High Court also made clear that, at least in relation to liability for in-court negligence, the same immunity extends to solicitors acting as an advocate.<sup>37</sup>

71 The public policy bases articulated by the High Court in affirming the existence of the advocates' immunity are important in understanding the subsequent decisions. Without setting out the High Court's reasoning in detail, some illustrative passages should be cited. Mason CJ drew attention to:

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<sup>36</sup> *Ibid* [61]

<sup>37</sup> See, eg, *Giannarelli v Wraith* (1988) 165 CLR 543, 559 (Mason CJ); 579 (Brennan J)

[T]he impact on the administration of justice of allowing court decisions to become the subject of collateral attack by means of actions against counsel for in-court negligence... If the plaintiff were to succeed, the resolution of this issue by a different court and on materials which might well differ from those presented in the initial litigation, due to lapse of time or other reasons, would undermine the status of the initial decision. Yet an appeal against that decision might not succeed with the result that it would stand, though its status would be tarnished by the outcome of the collateral proceedings. The impact of a successful challenge to a criminal conviction resulting in a sentence of imprisonment would be all the greater. It would be destructive of public confidence in the administration of justice.<sup>38</sup>

72 Dawson J instanced as a weighty consideration the fact that “*the availability of an action in negligence for the conduct of a case in court would subject the decision of the court to collateral attack*”,<sup>39</sup> and observed that “[n]othing could be more calculated to destroy confidence in the processes of the courts or be more inimical to the policy that there be an end to litigation”.<sup>40</sup>

73 In *D’Orta-Ekenaike v Victoria Legal Aid*, the plurality judgment of Gleeson CJ, Gummow, Hayne and Heydon JJ gave particular emphasis to the administration of justice and the role of the judiciary as a branch of government. As their Honours observed:

The “unique and essential function” of the judicial branch is the quelling of controversies by the ascertainment of the facts and the application of the law. Once a controversy has been quelled, it is not to be relitigated. Yet relitigation of the controversy would be an inevitable and essential step in demonstrating that an advocate’s negligence in the conduct of litigation had caused damage to the client.<sup>41</sup>

74 In their Honours’ view:

[T]he central justification for the advocate’s immunity is the principle that controversies, once resolved, are not to be reopened except in a few narrowly defined circumstances. This is a fundamental and pervading tenet of the

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<sup>38</sup> Ibid 558

<sup>39</sup> Ibid 594

<sup>40</sup> Ibid 595

<sup>41</sup> *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1; [2005] HCA 12 at [43]



judicial system, reflecting the role played by the judicial process in the government of society.<sup>42</sup>

### *The scope of the advocates' immunity*

75 In the end, however, it is the expositions of the *scope* of the advocates' immunity that are most important for present purposes. As Mason CJ himself remarked, "*t[he] problem is: where does one draw the dividing line? Is the immunity to end at the courtroom door...?*" His Honour's subsequent exposition delimited the scope of the immunity as follows:

[I]t would be artificial in the extreme to draw the line at the courtroom door. Preparation of a case out of court cannot be divorced from presentation in court. The two are inextricably interwoven so that the immunity must extend to work done out of court which leads to a decision affecting the conduct of the case in court. But to take the immunity any further would entail a risk of taking the protection beyond the boundaries of the public policy considerations which sustain the immunity. I would agree with McCarthy P in *Rees v Sinclair* (1974) 1 NZLR 180 where his Honour said (at p 187):

"... 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".<sup>43</sup>

76 Mason CJ's exposition of the scope of the advocates' immunity was cited with approval in each of the later decisions of *D'Orta-Ekenaike v Victoria Legal Aid*; *Attwells v Jackson Lalic Lawyers Pty Ltd* and *Kendirjian v Lepore*. In *D'Orta*, for example, the plurality judgment observed:

[T]here is no reason to depart from the test described in *Giannarelli* as 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. (We do not consider the two statements of the test differ in any significant way.)

As Mason CJ demonstrated in *Giannarelli*, "it would be artificial in the extreme to draw the line at the courtroom door". And no other geographical line can be drawn that would not encounter the same difficulties. The criterion adopted in *Giannarelli* accords with the purpose of the immunity. It describes the acts or

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<sup>42</sup> *Ibid* [45]

<sup>43</sup> *Giannarelli v Wraith* (1988) 165 CLR 543, 560

omissions to which immunity attaches by reference to the conduct of the case. And it is the conduct of the case that generates the result which should not be impugned.<sup>44</sup>

### *Advocates' immunity and advice to settle*

77 The first of the two recent High Court decisions I want to discuss is the decision in *Attwells v Jackson Lalic Lawyers Pty Ltd*. The decision answers, in the negative, the question whether the advocates' immunity extends to advice concerning entry into a settlement agreement.

78 The factual background to the case is as follows. The appellant, Mr Attwells, and another individual each executed guarantees in favour of the ANZ Bank in relation to certain company liabilities. When the company later defaulted on its obligations, the Bank commenced proceedings against the company and the guarantors. The respondent firm, Jackson Lalic Lawyers Pty Ltd, was retained by the company and the guarantors in relation to those proceedings.

79 The company was indebted to the Bank in an amount of almost \$3.4 million. The liability of the individual guarantors, however, was limited under their respective guarantees to \$1.5 million. On the opening day of the trial, counsel for the company and the guarantors informed the Court that the proceedings had been settled on terms that judgment would be entered against the guarantors for the full amount of \$3.4 million, but that the Bank would not seek to enforce the judgment if the guarantors paid a sum of \$1.75 million before a particular date. Consent orders were made for judgment in the amount of \$3.4 million. The conditional non-enforcement agreement was not included in the consent orders.

80 As events unfolded, the guarantors were unable to make the initial payment of \$1.75 million. The appellant subsequently commenced proceedings in the Supreme Court of New South Wales alleging that the respondent had been negligent in advising the guarantors to consent to judgment being entered

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<sup>44</sup> *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [86]-[87]

against them in the terms of the consent orders and in failing to advise as to the effect of those orders. The crux of the appellant's complaint was summarised by the majority judgment of the High Court in the following terms:

...the advice was not advice to the guarantors as to their liability under their guarantee. The consent orders and associated agreement appear, on their face, to have created a new charter of rights between the parties. The liability which the guarantors assumed under that new charter was distinctly not their liability under the guarantee. If the guarantors met their liability under the guarantee within the extended time for which the settlement agreement provided, they would be released from all liability to the bank. In return for extra time to pay their true debt, the guarantors agreed to consent to a judgment for the total indebtedness of the company with a collateral agreement that the judgment would not be enforced should the amount they owed under the guarantee be paid within that extended time.<sup>45</sup>

81 By way of separate question, the question whether the respondent was entitled to immunity from suit by virtue of the advocates' immunity came before Harrison J for determination. His Honour declined to answer the separate question on the basis that without further evidence in relation to the alleged negligence, he would only be able to form a hypothetical view as to the application of the advocates' immunity.<sup>46</sup>

82 On appeal, Bathurst CJ (Meagher and Ward JJA agreeing) held that Harrison J had erred in declining to answer the separate question.<sup>47</sup> Bathurst CJ then proceeded to consider the applicability of the advocates' immunity. In concluding that the advocates' immunity *did* apply in the circumstances, his Honour reasoned as follows:

[T]he work fell within categories of work done out of court affecting the conduct of the case in court. 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. The Agreed Facts also state that the consent order the first respondent and Ms Lord were advised to sign were signed on that evening and submitted to the Court on the following day.

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<sup>45</sup> *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 331 ALR 1; [2016] HCA 16 at [25]

<sup>46</sup> *Attwells v Jackson Lalic Lawyers Pty Ltd* [2016] NSWSC 1510

<sup>47</sup> *Jackson Lalic Lawyers Pty Ltd v Attwells* [2014] NSWCA 335 at [30]

The advice thus led to the case being settled. Put another way it was intimately connected with the conduct of the guarantee proceedings.<sup>48</sup>

83 Following a grant of special leave, the matter came before the High Court. A majority of the Court, comprising French CJ, Kiefel, Bell, Gageler and Keane JJ, allowed the appeal from the decision of the New South Wales Court of Appeal and held that the advocates' immunity does not extend to advice in relation to an out-of-court agreement to settle proceedings even if that settlement is ultimately embodied in consent orders. Nettle and Gordon JJ dissented.

84 The majority judgment commenced by declining to reconsider the previous decisions of *Giannarelli* and *D'Orta*, stressing that “[n]o argument of principle or public policy was advanced by the appellants which had not been addressed in *Giannarelli* and *D'Orta*”.<sup>49</sup> In order to better understand why the majority ultimately held the advocates' immunity does not extend to advice in relation to entry into an out-of-court settlement, it is necessary to set out the policy justifications for the immunity which the majority drew from the High Court's earlier decisions.

85 The majority observed that “[t]he advocates' immunity is... justified as an aspect of the protection of the public interest in the finality and certainty of judicial decisions by precluding a contention that the decisions were not reached lawfully”.<sup>50</sup> It is necessary to be precise as to what is meant in this regard by reference to finality and certainty of decisions. Importantly, the majority expanded that:

To speak of the exercise of judicial power to quell controversies as an aspect of government is to make it clear that the immunity is not justified by a general concern that disputes should be brought to an end, but by the specific

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<sup>48</sup> *Ibid* [37]-[38]

<sup>49</sup> *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 331 ALR 1; [2016] HCA 16 at [29]

<sup>50</sup> *Ibid* [35]

concern that once a controversy has been finally resolved by the exercise of the judicial power of the State, the controversy should not be reopened by a collateral attack which seeks to demonstrate that that judicial determination was wrong.<sup>51</sup>

- 86 It was on this basis that the majority concluded that the scope of the advocates' immunity "*is confined to conduct of the advocate which contributes to a judicial determination*".<sup>52</sup> Framed in the negative, "*the immunity does not extend to acts or advice of the advocate which do not move litigation towards a determination by the court*".<sup>53</sup> The majority was adamant that advice in relation to an out-of-court settlement does not warrant such description, observing that:

To accept that the immunity extends to advice which leads to a settlement of litigation is to decouple the immunity from the protection of the exercise of judicial power against collateral attack. Such an extension undermines the notion of equality before the law by enlarging the circumstances in which lawyers may be unaccountable to their clients.<sup>54</sup>

- 87 The fact that an out-of-court settlement may be embodied in consent orders did not dissuade the High Court from this conclusion. The majority observed:

In the present case, the consent order and associated notation by the Court reflected an agreement of the parties for the payment of money in circumstances where no exercise of judicial power determined the terms of the agreement or gave it effect as resolving the dispute. The consent order may have facilitated the enforcement of the compromise, but it was the agreement of the parties that settled its terms.<sup>55</sup>

#### *Advocates' immunity and decisions not to settle*

- 88 The other recent decision of the High Court on the advocates' immunity is the decision in *Kendirjian v Lepore* which was handed down last month. In that

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<sup>51</sup> Ibid [34]

<sup>52</sup> Ibid [37]

<sup>53</sup> Ibid [38]

<sup>54</sup> Ibid [41]

<sup>55</sup> Ibid [62]

decision, the High Court allowed an appeal from the New South Wales Court of Appeal on the question of whether the advocates' immunity extends to allegations of negligence in relation to the rejection of an offer to settle. In light of the reasoning in *Atwells*, the High Court held that the immunity does not so extend.

89 The background to the matter may be relatively shortly stated. The appellant, Mr Kendirjian, was injured in a car accident in 1999, in relation to which he commenced proceedings in the District Court of New South Wales in 2004. When the trial commenced in August 2006, the defendant's legal representatives made an offer of settlement to Mr Kendirjian's lawyers of \$60,000 plus costs. The offer was not accepted, the trial proceeded, and Delaney DCJ ultimately gave judgment for Mr Kendirjian in the sum of \$308,432.75. An appeal from that decision was dismissed with costs by McColl JA, myself agreeing.<sup>56</sup>

90 Some four years later, in October 2012, Mr Kendirjian commenced proceedings in the District Court against the respondents, his legal representatives in the original trial. The crux of Mr Kendirjian's complaint was that the respondents did not advise him of the amount of the settlement offer that had been made – but rather, only of the fact that an offer had been made. It was also alleged that the respondents rejected the offer without express instructions to do so on the basis that the offer was “too low”. On the respondents' motion, Taylor DCJ ordered that the proceedings be summarily dismissed on the basis that the respondents were immune from suit by virtue of the advocates' immunity.

91 In an unfortunate stroke of timing, the matter came before the New South Wales Court of Appeal *before* the High Court handed down its decision in *Atwells*. Macfarlan JA, Leeming JA and Bergin CJ in Eq agreeing, dismissed

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<sup>56</sup> *Kendirjian v Ayoub* [2008] NSWCA 194

the appeal on the view that advice leading to a case not being settled is work done out of court which attracts the immunity.<sup>57</sup>

- 92 Significant in Macfarlan JA reasoning was the view that for Mr Kendirjian's negligence claim against the respondents to succeed, he would have to prove what advice the respondents should have given him.<sup>58</sup> It followed, in Macfarlan JA's view, that this would 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.<sup>59</sup> It was this potential re-opening or collateral challenge that led his Honour to conclude that the immunity should apply. In a short concurring judgment, Leeming JA observed that:

It is now clear law that the work done out of court which attracts the immunity includes advice leading to a case being settled. It is also clear law that advice leading to a case not being settled is work done out of court which attracts the immunity. Both are examples of decisions affecting the conduct of the case in court.<sup>60</sup>

- 93 The High Court disagreed. Giving the lead judgment, Edelman J noted in opening his judgment that:

In *Atwells*, a majority of this Court held that the advocates' immunity from suit did not extend to negligent advice which leads to a compromise of litigation by agreement between the parties. As the majority joint judgment explained, by the same reasoning it is difficult to envisage how the immunity could ever extend to advice not to settle a case.<sup>61</sup>

- 94 In further expanding upon what had been held in *Atwells*, his Honour recounted that the majority had "*declined to extend the immunity to acts or advice of an advocate which do not move litigation towards a determination by*

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<sup>57</sup> *Kendirjian v Lepore* [2015] NSWCA 132

<sup>58</sup> *Ibid* [39]

<sup>59</sup> *Ibid* [40]

<sup>60</sup> *Ibid* [51]

<sup>61</sup> *Kendirjian v Lepore* [2017] HCA 13

*a court*".<sup>62</sup> In terms of the rationale for the immunity not extending to compromises, Edelman J explained that "[a]dvice leading to a compromise of a dispute cannot lead to the possibility of collateral attack upon a non-existent exercise of judicial power to quell disputes".<sup>63</sup> His Honour continued:

[T]he expression of the test concerning work done out of court which "leads to a decision affecting the conduct of the case in court", or which is "intimately connected with" work in court, is not engaged merely by "any plausible historical connection" between an advocate's work and a client's loss. The test requires that the work bear upon the court's determination of the case. There must be a "functional connection" between the work of the advocate and the determination of the case.<sup>64</sup>

95 Edelman J rejected an argument that *Atwells* could be distinguished on the basis that, as had been Macfarlan JA's view, Mr Kendirjian's negligence action could involve departing from the decisions of the District Court and the Court of Appeal in the personal injury proceedings. His Honour observed:

From the perspective of the second respondent, issues concerning the reasonableness of advice given will be assessed at the time the advice was given, not at the time of the District Court judgment. The assessment of reasonableness will not involve any consideration of whether the decision of the District Court, affirmed by the Court of Appeal, was right or wrong whether in relation to credibility or otherwise. It was not suggested that any questions of reasonable foreseeability of loss could conceivably lead to a challenge to the reasoning or decision in the District Court. Indeed, nothing in the second respondent's pleaded defence raises any suggestion of a challenge to the reasoning or decision in the District Court.<sup>65</sup>

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<sup>62</sup> Ibid [30]

<sup>63</sup> Ibid [31]

<sup>64</sup> Ibid [31]

<sup>65</sup> Ibid [34]