WINDEYER CHAMBERS 9

REVIEW OF INTERESTING COMMON LAW CASES

DETERMINED IN 2016

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This paper has been prepared for the Claims Discussion Group seminar to be held on Monday 27 February 2017. I propose to review a number of cases determined by the New South Wales Court of Appeal where judgment was delivered by that Court during 2016. I have also included a review of a 2016 High Court decision that is relevant to all lawyers. I have categorised the cases I have selected into topic areas for ease of reference.

Workplace Accident – S.5B Civil Liability Act (CLA)

1. In *South Sydney Junior Rugby League Club Ltd v Gazis* the plaintiff, Mr Gazis, was employed by MPS Security Pty Ltd, a security company, itself engaged by another company to provide security at the club's premises. Gazis was required to be present in the counting room when cash was taken from poker machines, counted and loaded onto trolleys. In the course of performing security work Gazis took it upon himself to move a trolley and when doing so, lost his grip on the trolley and fell, landing on his bottom and thereby sustaining injury to his back. During the counting process the trolleys had to be moved from time to time. The plaintiff had not been told to move the trolley but, from time to time, he had assisted in doing so. He considered it was part of his job to move the trolley "to satisfy the customer and (to make) our company to stand out as the best". Unlike in *Thompson v Woolworths* there was no practical necessity for Gazis to move the trolley. He did so voluntarily because he considered he was being of assistance. In determining liability, the Court of Appeal noted the legal principles to be applied were stated in S.5B of the Civil Liability Act (CLA). The 3 elements of S.5B are:

    i. The risk was foreseeable

    ii. The risk was not insignificant, and

    iii. A reasonable person would have taken precaution against the risk of harm

2. The risk of harm was found to have been foreseeable but, one that *"could be dismissed as insignificant"*. It was said by Basten JA at [89], with whom the other members of the court agreed, that *"The significance of a risk will depend upon a variety of factors, including the obviousness, likelihood of occurrence and seriousness of consequences."* His Honour said that the risk of a person falling by being careless in his or her grip, whilst foreseeable, was quite unlikely to eventuate and could therefore be dismissed as insignificant. In respect to the claim against the employer His Honour found there was no evidence the employer knew or ought to have

known of the risk of harm for, even if the employer had inspected the workplace before the accident, it would not have identified the risk of harm.

Defective premises

3. In *Swift v Wearing-Smith* the plaintiff was injured when he fell from a balcony at the rear of the premises owned by the defendant. The defendant had purchased the property in 2003. The balcony had been constructed in 1993. At construction glass panelling was fixed to the surrounds of the balcony. The accident occurred when one of the glass panels gave way permitting the plaintiff to fall some 3 metres. Before purchase the defendant had obtained a report by a building inspector who did not find any fault in the glass panels. After purchase the defendant had a fencing expert inspect the glass panels and he said the glass could be replaced but did not identify any defect in the bolts holding the glass in place. The plaintiff's expert said the glass fell because the bolts holding it in place had corroded to the point that when placed under pressure they failed however, he said that the corrosion would not have been evident on visual inspection alone. The trial judge found the defendant liable on the basis guests ought not to have been allowed onto the balcony until all recommendations in the building inspection report had been implemented. Justice Hoeben JA said that a statement of the duty of care should be at *"a high level of generality with amplification being by way of a statement of its content or scope"*. His Honour said that the trial judge had framed the duty of care far too narrowly and that in considering duty and breach it was impermissible to do so retrospectively but rather it had to be done prospectively. When the building inspection report was viewed as a whole it made recommendations relating to many aspects of the home but did not recommend repair of the bolts holding the glass in place.

Public Liability

4. *Vincent v Woolworths Ltd* the plaintiff was employed by Woolworths to check on and adjust the presentation of product on display. She was provided with a safety step to enable her to access product on high shelves. On the day of accident, the plaintiff stepped backward off the safety step and into a trolley then being wheeled by a passing customer. As a result, she fell and sustained serious injury. She lost at first instant and appealed. The shopper pushing the trolley was looking away from the plaintiff at the time and the plaintiff did not look around before stepping off the safety step. The trial judge found the *"risk of harm"* was *"plainly reasonably foreseeable"* within the terms of S.5B CLA but he held that *"appreciable personal injury due to a collision between a merchandiser and a customer's trolley enjoys a very low probability of occurrence"* and therefore he held the plaintiff had not established the risk was *"not insignificant"* within the terms of S.5B (1)(b) CLA. He also found a reasonable person in the position of Woolworths would not have taken steps to avoid the risk of harm within the terms of S.5B(1)(c) CLA. On appeal the Court held that in identifying the *"risk of harm"* it was necessary to identify *"some material harm"* (see [33]). The court said that occupiers of property are in general entitled to expect that users of the property will exercise reasonable care for their own

safety and that, the plaintiff's activity of getting up and down from a step was commonplace and did not require any warning as it was an activity encountered in ordinary domestic life.

Application for leave to appeal to the Court of Appeal

5. It is not uncommon for a first instant decision to involve an assessment of damage below $100,000. S.127 District Court Act 1973 provides that a dissatisfied party to a District Court action that involves a final judgment or order of $100,000 or less may only appeal to the Supreme Court by leave of the Court of Appeal. There is no right of appeal in respect to a District Court judgment or order where the amount "*in issue*" is $100,000 or less.

6. Where leave to appeal is necessary it is necessary for an applicant for leave to show at the leave application that the matter involves issues of principle, questions of general public importance or an injustice which is reasonably clear meaning more than just an arguable case (*see Brockman v Serco Sodexo Defence Services Pty Ltd 2016 NSWCA 41*).

Damages – buffer for future treatment expenses

7. In *Taylor v Walker* the appellant complained that the trial judge had allowed a global sum of $250,000 for future treatment expenses out of a total verdict of just over $3m.

8. The plaintiff had suffered server injuries in a motor accident that occurred when the defendant reversed out of a driveway into the path of the plaintiff.

9. The parties had agreed on the cost of certain future treatment items such as medication, cost of future surgery and life span for prosthetics. Whilst there was specific evidence of those agreed items the trial judge concluded that those items were unlikely to be the totality of the plaintiff's future treatment needs and, given there was no specific evidence regarding the cost of other future treatment, she proceeded to provide a buffer for future treatment costs.

10. The Court of Appeal said the award of a global sum for future treatment expenses was permissible (see [21]) and cited *Nominal Defendant v Lane (2004) NSWCA and Penrith City Council v Parks (2004) NSWCA 201*) in support of the proposition. The Court of Appeal held the trial judge had correctly assessed future medical treatment expenses.

11. In this case, there was medical evidence that the plaintiff would need future treatment that included x-rays, a knee brace, custom made boots, compression stockings, rehabilitation and hospitalisation. The precise cost of those items was not provided at trial and hence Her Honour proceeded by way of a buffer when assessing future treatment costs.

Medical Negligence – warning – interpreter – causation – witness expenses

12. In *Biggs v George* the plaintiff, George, was a Macedonian speaker with a poor grasp of English. She consulted Dr Biggs regarding an operation to remove a neuroma. The operation carried with it a significant risk of damage to facial nerves. During the actual operation, an adjoining facial nerve was severed leaving her with facial palsy. She sued Dr Biggs claiming he had not properly warned her of the risks associated with the surgery.

13. The Court of Appeal referred to *Rogers v Whitaker 175 CLR 479* in which the High Court said *"except in cases of emergency or necessity, all medical treatment is preceded by the patient's choice to undergo it"* and that it was a choice which is *"in reality, meaningless unless it is made on the basis of relevant information and advice"*. Justice Basten in Biggs said *"The duty to warn is identified as extending to "material risks"* which may attend a proposed treatment; the risk is "material", relevantly for present purposes, if it is a risk to which a reasonable person in the position of the patient *"would be likely to attach significance in choosing whether or not to undergo the proposed treatment"* (see [22]).

14. At various consultations, the plaintiff was accompanied by a person fluent in Macedonian and that person translated between doctor and the plaintiff. The factual finding was that the doctor had provided adequate warning and in response to that finding the plaintiff sought to argue that she had not properly understood the warning due to a breakdown between she and the interpreter. The issue therefore was had the medical practitioner taken reasonable steps to ensure that the relevant information was conveyed to the plaintiff.

15. Justice Basten said *"A correct statement of the content of the duty would have involved no more than that the medical practitioners were to take reasonable care to ensure that the material risks attending the surgical procedures were conveyed to the claimant. The need for translation may involve an additional element and...it may be necessary for the practitioners to satisfy themselves that the substance of the information conveyed had been understood"* (see [28])

16. The trial judge found that *"It is improbable that (the interpreter) told the plaintiff that Dr Biggs had outlined the detail of the complications of a facial nerve injury as there described...If the plaintiff had been given such details, I consider that she would have recalled them as being significant matters for consideration at the time."* The trial judge went on to find the more probable fact was that the interpreter had not passed on to the plaintiff the detail of the warning provided by the doctor. On appeal Basten JA held that *"The evidence may have allowed for a conclusion that there was a misunderstanding on the part of the claimant but the evidence failed to demonstrate affirmatively that there had been a breach of the duty of care (to warn)"* (see [50]).

17. The Court of Appeal also dealt with causation within the terms of S.5D CLA. That section provides that a determination that negligence caused a particular harm comprises two elements being:

    (a) That the negligence was a necessary condition of the occurrence of harm described as factual causation;

    (b) That it is appropriate for the scope of the negligent person's liability to extend to the harm so caused, described as scope of liability.

18. In Briggs Basten JA said: *"In order to be satisfied, for the purpose of S.5D(1)...that negligence caused particular harm it was necessary for the Court to find that 'the negligence was a necessary condition of the occurrence of the harm.' That required, in the circumstances, a finding as to what the claimant would have done if the relevant practitioners and hospital had not been negligent (see [106])."* The evidence at trial led to a finding that she had a belief concerning her tumour and the subsequent need for surgery and that belief was not attributable to any breach of duty by her treating doctors or hospital. She had formed her belief from extraneous matters and therefore she had not established causation beause she would have had the operation in any event.

19. An interesting question also arose as to payment of an **expert's expenses**. The plaintiff had qualified a Dr Havas as an expert witness. The defendant required that expert for cross examination and, in accord with the rules, issued a subpoena for the attendance of that witness at court. Pursuant to Rule 31.3 the defendant wrote to Dr Havas enclosing the subpoena to give evidence and attached $50 conduct money. The letter informed that the case was listed for 4 days and that the plaintiff's legal advisor had control over the timing of the plaintiff's witnesses and therefore doctor should liaise with that solicitor to find out when he should attend court. Correspondence then passed between doctor and the plaintiff's legal advisor and as a consequence doctor set aside 4 hours on a particular day. Ultimately doctor was not required that day and issue arose as to who would pay doctor's fees.

20. Justice Basten said *"It is clear, therefore, that a party procuring the attendance of an expert is liable to pay conduct money or witness expenses pursuant to (Rule 31.30 (4))."* His Honour said that witness expenses were to be distinguished from reasonable loss or expense. Witness expenses were limited to money necessary for the witness to travel to and from the court and would include accommodation and sustenance (see [141-142]). The Court held that where a party had instructed a doctor/expert for its case and that party had control over the course of the litigation (usually the plaintiff) and that party did not properly inform the expert of the timing of his appearance then the witness's expenses, other than conduct money, should be met by that controlling party.

21. Another case dealing with causation and S.5D was *Carangelo v State of NSW*. There the plaintiff had been employed by the State in various capacities as a police officer over many years. He was a bit like Dirty Harry in that he was, from time to time, given the dirtiest jobs to perform. He carried out criminal investigations, worked in internal affairs, investigated suicides at prison and took on other stressful tasks. To compound his stress, he applied for a position as inspector and was, initially informed he had passed and then later told he had not passed and could never be considered for that position. He faced a further stressful situation when he was informed that he was being investigated by PIC (Police Integrity Commission) but not informed of the subject matter of the investigation. Following the PIC investigation, he was told there had been an adverse finding which meant he could be removed from office. Before that step could be taken he had to be given notice of the grounds upon which he was to be dismissed. He was informed he had been placed on a watch list and that an advisory panel had been asked to review his case. Following that review he was informed that there were no adverse findings against him. Needless to say, the officer felt his career in the Force was over and by this stage he was suffering stress, depression and hypertension. He then lodged a claim for Hurt on Duty (like

Worker's Compensation) but his benefits were declined as it was considered his condition did not qualify as Hurt on Duty. He challenged that finding on causation.

22. In discussing S.5D the Court said that it involved two steps being **factual causation** and **scope of liability.** The factual causation focused on whether the negligent act played a part in bringing about the harm; thus, it was a necessary condition of the occurrence of harm. The second step arose if the first step was answered in the affirmative and that second set involved a normative inquiry as to whether the defendant ought to be held liable to pay damages for the harm occasioned.

23. The Court said that in some circumstances it was permissible to establish factual causation by showing that negligent conduct "*materially contributed*" to the harm and that that could be established on the balance of probabilities.

24. S,5D (2) provides that, in exceptional cases, where negligent conduct cannot be shown as a necessary condition for the harm it is still possible to establish factual causation but to do so the Court must inquire into "*whether or not and why responsibility for the harm should be imposed on the negligent party*".

25. The Common Law requires proof by a plaintiff that the negligent act or omission caused the loss or injury constituting the damage. All that is necessary is for a plaintiff to show that it is more probable than not that the defendant's negligence caused the injury. S.5D(1) introduced the "but for" test for causation and thus a claimant will "*fail if the evidence does not establish that, but for the act or omission of the defendant, the claimant would not have suffered injury or damage*". It is sufficient for a plaintiff to prove that the negligence of the defendant caused or materially contributed to the injury but the material contribution must still satisfy the "but for" test; meaning "but for" the material contribution of the defendant's act or omission the plaintiff would not have suffered injury or damage.

26. S.5D (2) makes special provision in cases where the claimant cannot establish causation on the "but for" test. These, the subsection describes as "*exceptional cases*". Thus negligent conduct of the defendant that materially contributes to the plaintiff's harm but which cannot be shown as a necessary condition on the "but for" test, may nevertheless be accepted as establishing factual causation if the normative considerations in S.5D (2) are met (being whether or not and why liability should be imposed).

27. In Carangelo the claimant claimed psychiatric injury by reason of the defendant' failure to warn and/or provide early medical intervention. The plaintiff could not establish that warning or early intervention would, on the balance of probabilities, have resulted in a materially different outcome. At best, all he could show was that he <u>may</u> have lost a chance of avoiding or ameliorating his psychiatric injury. He tried to rely on S.5D (2) to bridge the gap in his evidence on causation; being that he could not show that "but for" the defendant's conduct he would not have suffered the harm. The Court said S.5D (2) cannot be used to support a finding of causation in circumstances where a claimant cannot obtain evidence to support such finding and further said that this was not an "exceptional case" to engage the subsection.

<u>Trespass to person - battery</u>

28. *Croucher v Cachia* was a case involving a dispute between 2 neighbours in Panania. Some years before the altercation Croucher had erected a metal dividing fence between the two properties and that had caused friction between the two neighbours. Each had planted a hedge on their respective sides of the dividing fence. On the day in issue Cachia was trimming his hedge when Croucher picked up his gardening shears and went to the nature strip and looked at Cachia working. Cachia asked Croucher if he was all right and Croucher said he was but *"don't let your trimmings fall into my yard"*. Cachia replied *"Fuck Off"*. An altercation then followed and Cachia suffered injury to his right thumb and left elbow.

29. The claim by Cachia was framed in trespass and negligence.

30. Battery is one of three form of trespass to the person, the others being assault and false imprisonment. A defendant who directly causes physical contact with a plaintiff will commit a battery unless he can show that he acted *"utterly without fault"*. Although battery is an intentional tort it may arise when a defendant is merely negligent. At [23] the Court said *"It is clear law in this country that trespass to the person caused by a blow does not require the plaintiff to prove anything about intention"*.

31. In pleading his case the plaintiff sought to rely upon S.3B (1)(a) CLA that provides that the CLA Act does not apply in respect to *"an intentional act"* done by a person with *"intent to cause injury"*. The section focuses attention upon the act and the whether the act was done with intent to cause injury. As has been stated battery may arise without proof of intent and therefore, pleading battery alone will not necessary engage S.3B (1)(a). The section directs attention to the character of the conduct rather than the nature of the cause of action (see Leeming JA at [35]).

32. If S.3B (1)(a) is engaged then the limitation contained in S.21 CLA on awarding damages for exemplary, punitive and aggravated damages is avoided. Further the assessment of damages will, where S.3B (1)(a) is engaged proceed under common law and not pursuant to the CLA.

33. The real point that I wish to draw attention to out of his case is the need to distinguish between the cause of action and the actual act and intention of the defendant when considering S.3B (1)(a) CLA. It is necessary to look at the actual conduct in question not the cause of action in determining whether the section applies. Further the section will only be engaged where the conduct can be shown to have been intended to cause injury.

Pleadings - CLA

34. *Nepean Blue Mountains Local Health District v Starkey* concerned a plaintiff who was employed by the defendant and who slipped and fell on a toilet floor whilst she was carrying out her work duties at the defendant's premises. The trial judge found for the plaintiff.

35. The Court of Appeal was asked to overturn the decision on the basis the trial judge had not directed attention to the CLA. However, the trial judge's failure to refer to the CLA was, at least in part, brought about because the statement of claim made no reference to the CLA and in particular the preconditions for a finding of negligence set out by S.5B and only relied on out dated common law pleadings. Further counsel did not address the CLA during the trial.

36. Justice Garling, who sat on the appeal, said *"As the High Court observed in Adeels Palace Pty Ltd v Moubarak...if attention is not directed to the provisions of the Act '...there is a serious risk that the inquiries about duty, breach and causation will miscarry...' The proper starting point for the Court's determination of the existence of a duty of care, breach of that duty and causation is the Act"* (see [85]). His Honour went on to say *"...it is necessary for a plaintiff to identify and articulate, first in their pleading and then in submissions to the Court, the 'risk of harm' against which it is alleged a defendant is obliged to take reasonable precautions* (see [87])".

37. Justice McColl said that it was incumbent on the legal profession to address the trial judge in terms of the issues posed by the CLA and for pleadings to be framed by reference to relevant provisions of that Act (see [9]).

MACA – Blameless Accident

38. *Serrao v Cornelius* required the court to re-consider *Axiak v Ingram (2012) 82 NSWLR 36*. At the initial trial the trial judge found both plaintiff and defendant to have been at fault. On the first appeal the Court of Appeal set aside the finding of negligence in the defendant. The plaintiff had pleaded an alternate case based on blameless accident and, in 2016, the Court of Appeal dealt with the blameless accident claim.

39. The plaintiff was walking along an unlit road at night in Orchard Hill when he was struck from behind by a car driven by the defendant. Both plaintiff and defendant were affected by alcohol. The plaintiff's negligence was in walking along an unlit road at night.

40. S.7A MACA defines a blameless accident as one *"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"*. *"Fault"* is defined as *"negligence or any other tort"*.

41. In Axiak the defendant argued that, by reason of the plaintiff's negligence, a finding of blameless accident could not be sustained. The Court of Appeal in that case rejected the argument on the basis *"Fault"* did not include non-tortious negligence such as contributory negligence.

42. In Serrao it was sought to argue that the Court of Appeal in *Davis v Swift (2014) 69 MVR 375* had cast doubt upon the correctness of the decision in Axiak and that the Court should reconsider S.7A in terms of whether the contributory negligence of the injured person fell within the definition of "Fault".

43. In order to challenge the correctness of the earlier decision of the Court of Appeal it was necessary to show there was a *"compelling reason"* for the court to depart from its earlier decision (see *Nightingale v Blacktown City Council (2015) NSWCA 423 at [23])*. The Court determined that there was no basis for a challenge to the decision in Axiak finding that Davis v Swift did not case doubt upon Axiak, there was no conflict in the authorities and that no error in Axiak had been identified (see [48-50]).

44. Therefore, the decision in Axiak stands.

S.86 MACA and the Lifetime Care and Support Scheme (LCSS)

45. The *Nominal Defendant v Adilzada* called in question whether a CTP insurer could use S.86 MACA to compel a claimant to undergo a medical examination in order to determine whether the claimant was eligible for entry into the LCSS.

46. S.86 MACA enables an insurer to require a claimant to undergo a medical examination by a person nominated by the insurer. The MACA provides that either the claimant or insurer can apply for a claimant to be admitted into the LCSS. Thus, the CTP insurer can override the claimant's choice of applying for admission to the LCSS.

47. The plaintiff had been an interim member of the LCSS but had not accepted treatment during his time in the scheme. At the end of the interim period the insurer sought to have the claimant further tested to determine his eligibility to remain in the LCSS. S.86 (4)(b) provides that if a claimant refuses to undergo a medical examination he cannot commence or continue court proceedings whilst the failure continues.

48. The Court of Appeal determined that an insurer or a person against whom a motor accident claim is made may, by reason of S.86 MACA, request a claimant to undergo a medical examination to determine that person's eligibility for admission to the LCSS and that if the person fails to undergo the examination he cannot commence or maintain proceedings in respect to the claim (see [36]).

49. Court held that S.86 was concerned with the provision of information of a certain kind so that the insurer may respond to the claim made. The Lifetime Care and Support Act (LCS Act) confers a choice on a CTP insurer (and claimant) to apply to the LCSS. The provision of information under S.86 enables the insurer to properly exercise its choice under the LCS Act.

MACA – medical assessor's function

50. *AAI Limited v State Insurance Regulatory Authority of NSW* involved a claimant named [redacted] who was injured in a motor accident and subsequently claimed compensation in respect to the consequences of the injuries she sustained. A dispute arose as to [redacted]'s level of whole person impairment (WPI). A medical assessor carried out a MAS assessment and determined her WPI at 14%. The insurer argued that not all of [redacted]'s injuries were related to the motor accident and that some were related to being assaulted by her ex-boyfriend. The evidence was she was involved in a motor accident and that some months later she had an altercation with her boyfriend. He apparently physically assaulted her punching her about the face and head before pushing her out of a moving vehicle and then later reversing towards her causing her to jump a fence. The boyfriend then grabbed her forcing her back into the car and then drove at high speed. Fearing for her safety she then jumped from the moving vehicle and hid until relief arrived.

51. The plaintiff claimed she suffered both physical and psychological injury but only sought to have her psychological injury assessed by a MAS assessor.

52. McColl JA stated the critical issue in the case was whether the MACA required a medical assessor conducting an assessment of WPI under Part 3.4 to determine the legal issue whether the injuries suffered by the claimant were caused by a *"motor accident"* within the meaning of that phrase in the MACA.

53. The Court held that the MACA did not require a medical assessor conducting a MAS assessment of WPI to determine what elements of the incident were a "motor accident" within the meaning of the MACA (see [123]). McColl JA said *"The question whether the plaintiff was injured in a 'motor accident' is a liability issue. It is a larger issue than that relating to recovery of one head of damages, namely that for non-economic loss. In the ordinary course one would expect a liability issue would be resolved before the question whether the plaintiff qualifies for any damages arises* (see [133]). Further she said *"...medical assessors are only appointed for the purposes of Pt 3.4. Their function is to resolve the medical disputes referred to in S.58 which may be referred to them by either party to the dispute, a court or a claims assessor"* (see [136]). Assessors do not play a role in determining issues under Chapter 4 (claims process) and Chapter 5 (awarding damages).

54. McColl JA held *"It was not ...incumbent upon (the MAS assessor) to determine whether the series of incidents AAMI contended occurred on 5 July 2009 and led to* [redacted] *s injuries constituted a 'motor accident' within S.3 of the MAC Act. That was a question which had to be determined by a court ... A matter should not be referred to a medical assessor where there is any doubt about the issue of whether the events which occurred fell within the statutory definition. That liability issue should be determined before a medical assessor is asked to determine the ...issue. The medical assessor can then 'take note of the court's reasons'. If, however, in a matter referred to a medical assessor, it is apparent that doubt about whether an incident falls within the statutory definition exists, the medical assessor should make findings about causation by reference to physical event or events, and leave it to the court to determine whether or not the events constitute a 'motor accident'"* (see [159-161]).

55. Therefore, where there are multiple events possibly leading to injury and there is doubt about whether any of those events constitute a *"motor accidents"* a court should determine, **before** the MAS assessment, the issue of whether any or which of those events constitute a *"motor accident"*. If a MAS referral has already occurred then the medical assessor should be asked to make findings on causation based on certain assumed facts and then it must be left to the court to determine, whether any and, if so which, of those assumed facts constitute a *"motor accident"*.

Advocate's immunity

56. The High Court in *Attwells v Jackson Lalic Lawyers Pty Ltd was* asked to reconsider the issue of advocate's immunity. The appellant claimed that earlier litigation had been settled unfavourably due to the negligent advice from his solicitor, the respondent to the appeal. The respondent claimed that advocates immunity extended to negligent advice which leads to an agreed settlement. In the appeal the High Court was asked to reconsider or overturn *Giannarelli v Wraith (1988) 162 CLR 543 and D'Orta-Ekenaike v Victorian Legal Aid (2008) 223 CLR 1.*

57. *Giannarelli v Wraith* held that advocates immunity extends to work done out of court which leads to a decision affecting the conduct of the case in court. *D'Orta-Ekenaike* extended the immunity to work done in preparation for the litigation.

58. In *Attwells* the High Court refused to extend the immunity as contended and said it only applies to work done that contributes to the *"judicial determination"* of the litigation. Advice that leads to a settlement of litigation is only connected in a general sense to the litigation and does not contribute to the judicial determination. Despite the immunity being abolished in other jurisdictions the High Court determined there remained good reasons based on public policy and the administration of justice for preserving the immunity in Australia.

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