Immunity of *advocates* from suits for negligence

Hall v Simons Barratt v Ansell and Ors

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A recent United Kingdom House of Lords decision[1] has swept away the immunity of Barristers and Solicitors in both civil and criminal cases in the U.K. What does the future hold for immunity of advocates in Australia?

The Australian Position

The High Court last had an opportunity to directly address this issue in *Boland v Yates*, December 1999.[2] On that occasion however, the Court held by majority that the lawyers in question had not been negligent and therefore stopped short of readdressing the immunity issue last considered in the 1988 decision of *Gianarelli v Wraith*.[3]

In *Gianarelli*, the High Court had held that immunity of advocates was in the public interest. It also found that all pre-trial work with which there was an "intimate connection" with the conduct of the case in Court, should also attract the protection of immunity.

The collective attitude of the presently constituted High Court on this issue is uncertain. In the *Yates* case, Gaudron and Gummow JJ indicated a willingness to re-open the subject of immunity of advocates in appropriate factual circumstances. Gleeson CJ and Callinan J, however, appeared to be in agreement with the principle in its present form.

Kirby J. provided a strong opinion against immunity. He said that the principle upheld in *Gianarelli* was confined and should not be expanded beyond criminal proceedings.

Justice Kirby's reasons for this view included:

1. Immunity from liability at law undermines the normal accountability for wrongdoing to another, which is an ordinary feature of law and fundamental civil rights.
2. The immunity of barristers from suits in negligence is based on outdated circumstances which have changed markedly.
3. The social and economic circumstances in which the principle developed in England are now out of place "in the egalitarian social circumstances of this country".
4. The traditional argument that narrowing advocates' immunity would open the floodgates to litigation, does not stand up under scrutiny. The North American experience directly contradicts this argument and, in any case, there are remedies against unmeritorious claims.

The House of Lords decision: *Hall v Simons Barratt v Ansell and Ors*

The House of Lords undertook a detailed review of the authorities.

In *Hedley Byrne & Co Limited v Heller & Partners Limited,*[4] the principle was developed where in general English Law a remedy in damages was available for injuries suffered as a result of professional negligence.

However in *Rondel v Worsley*,[5] the Court upheld immunity of advocates on consideration of questions of public policy. The reasons for immunity included the dignity of the Bar, the "cab rank" principle, the assumption that barristers may not sue for their fees, the undesirability of re-litigating cases already settled, and the duty of a Barrister to the Court.

Saif Ali Sydney Smith Mitchell & Co,[6] examined the scope of advocate immunity. It was then said that immunity was in the public interest, on the grounds that it is against public policy for decisions to be challenged by means of collateral proceedings.

After re-visiting authorities, the House proceeded to analyse their reasoning in a modern context. The issues of relevance to Australia may be as follows:

(a) *The analogy of the immunities enjoyed by those who participate in Court proceedings.*

This immunity was created to encourage freedom of speech in Court in order to permit full access to the facts of each case. Its basis is that a person should not be in fear of prosecution for telling the truth during Court proceedings.

An interesting application of this principle was recently found in *Stanton v Callaghan*[7] in which it was decided that an expert witness was entitled to the protection of immunity from suit for reports prepared in preparation for the hearing of a matter in court even if the expert was not, at the end of the day, called as a witness. That case seems somewhat difficult to reconcile with the later House of Lords decision.

In *Darker v Chief Constable,*[8] the House of Lords held that a witness is immune from suit for all acts and statements made both in proceedings before the Court, and during the period of preparation of the matter for hearing.

The only duty of witnesses, therefore, is to tell the truth to the Court. Similarly, Judges have a public duty to administer justice in accordance with their oath. By contrast, advocates are the only people who could be sued for negligence because they are the only people who have undertaken a duty of care to their clients, so the argument goes. Although as mentioned above, it does not seem unreasonable to find a duty of care for an expert witness.

(b) *Public policy against re-litigating a decision of a Court of competent jurisdiction.*

The House of Lords was of the view that the immunity of advocates from suit in negligence could not be justified in its present width under this head. It was asserted that, unless prohibited from doing so, convicted defendants may seek to challenge convictions by suing advocates who appeared for them. On the occasion that an individual, previously convicted, has succeeded on appeal, an action in negligence could be brought against a Barrister in the event that immunity was no longer in force.

"The collective attitude of the presently constituted High Court on this issue is uncertain."

It is possible, however, that such an action could nevertheless be struck out as unsustainable under the 1999 Civil Procedure Rules 3.4(2) and 24.2. In this context, the House then considered whether the threat of collateral challenges to civil decisions remains. It was found that the principles of res judicata, issue estoppel, and abuse of process should be adequate to cope with this risk.

The existence of such protective measures to guard against collateral attacks on criminal and civil decisions was therefore said to make the additional protection of immunity of Barristers unnecessary.

(c) *The sweeping away of immunity could undermine the Barrister's overriding duty to the court.*

The House considered the question, is immunity needed to ensure that Barristers respect their overriding duty to the Court?

It was highlighted that in Canada, trial lawyers are not protected by immunity from litigation. Upon review of their experience in this area the Canadian Courts found that there was no evidence that their work was hampered at all by counsels' fear of civil liability. The House of Lords was therefore of the opinion that the fear of ▶

actions in negligence against Barristers operating to undermine public interest was unduly pessimistic.

Conclusion

Other authors have pointed out that the existing advocates immunity has already been limited in some ways, and is probably not available in answer to claims based on statute, such as an action pursuant to section 42 of the *Fair Trading Act 1987 (NSW)* (i.e. liability for misleading conduct).[9] This point was canvassed briefly in the *Yates* case.[10]

The attitude of the High Court to this issue in light of the House of Lords decision is, of course, difficult to predict. Perhaps the Court will be more willing to re-examine the issue of immunity of advocates following the recent House of Lords decision and given the disparate comments made in *Yates*.

It is the writers' opinion that the legal profession of today does not require such protection; and that the current immunity provided to advocates is likely to be abandoned, at least in civil actions. PL

Footnotes:

1 *Arthur J. S. Hall & Co. v Simons (AB) Barratt v Ansell And Others [Trading As Woolf Seddon (A Firm)] Harris v Scholfield Roberts and Hill* (conjoined appeals) [2000] UKHL 38 (20th July 2000).

2 *Boland v Yates Property Corporation Pty Limited* (1999) 74 ALJR 209.

3 [1988] 165 CLR 543.

4 [1964] AC 465.

5 [1969] 1 AC 191.

6 [1980] AC 198.

7 [2000] 1 QB 75.

8 Unreported.

9 Justice Gleeson, "House Of Lords Overturns Barristers' Immunity", *Bar News*, Spring 2000, pp. 5-6.

10 74 ALJR 209 at 281.