D'Orta-Ekenaike v Victoria Legal Aid

MAJORITY JUDGMENT OF GLEESON CJ, GUMMOW, HAYNE AND HEYDON JJ

Facts

- February 1996: Applicant was charged with rape, sought legal assistance from VLA, and the VLA retained a barrister, Mr McIvor, to appear for the applicant.
- The applicant alleged that the barrister and VLA both exerted "undue pressure and influence" on him to plead guilty at the committal proceeding, which he did.
- February 1997: At the trial, he pleaded not guilty, but his guilty plea at the committal proceeding was used as evidence. He was sentenced to three years' imprisonment.
- The Court of Appeal ordered a new trial on the basis that the trial judge did not give sufficient directions as to the use of the guilty plea, even though the evidence was admitted properly. At the retrial, his guilty plea was not admitted into evidence, and he was acquitted.

Claim

- In 2001, he commenced an action against the VLA and the barrister, alleging that the respondents breached their duty of care towards him.
- The applicant alleges that his guilty plea was a result of the "undue pressure and influence".
- He claims for the suffering of loss and damage – loss of liberty, loss of income, illness and the costs of the trials.
- The primary judge ordered that the proceedings be permanently stayed because of the defence of advocate's immunity, which was upheld at the Court of Appeal of Victoria.
- The applicant sought leave to appeal to the High Court for the following reasons:
    1. To reconsider its opinion in *Giannarelli v Wraith*:
        a) Common law defence – advocate cannot be sued by his or her client in negligence in work related to conduct of a case in court
        b) That an advocate was immune from negligence in 1891
    2. Immunity extending to solicitors

Statutory regulation of the Victorian legal profession

- *Giannarelli* and the events in this case: *Legal Profession Practice Act* 1958 (LPPA) s 10(2)
- Re-enactment of the 1891 Act which fixed the liability of barristers as the same as that of solicitors-advocates in 1891 – held that it was a fixed-time provision in *Giannarelli*
- Fused profession in Victoria "direct attention away from any consideration of special privileges or disabilities thought to attach to the profession of barrister"
- The LPPA does not make a barrister liable for such negligence
- This question of construction was settled in *Giannarelli* and there is no reason to open it
- Question was asked in the context of section 442 of the *Legal Practice Act* 1996 (LPA), which retains any immunity for legal practitioners
- No mention of immunities in the NSW *Legal Profession Act* 2004

Common law immunity

- Specified in cases such as *Rondel v Worsley* (1969), *Saif Ali v Sydney Mitchell v Co* (1980)

- What does *Giannarelli* stand for?
    a) Judicial system as part of government structure
    b) Immunity from suit is designed to achieve finality
- The following matters are irrelevant:
    a) Inability to sue the client for professional fees
    b) Competition between duty to court and duty to client – duty to court is paramount
    c) Cabrank rule
    d) Making decisions quickly – but others have to make decisions quickly too
    e) "Chilling" effect of civil suit – prolongation of trials

Judicial process as aspect of government

- Mason CJ in *Giannarelli*: adverse consequences for the *administration of justice* which would flow from relitigation
- Central concern of judicial power is the quelling of concerns – for the parties and the public
- **Finality:** Cases are not reopened except for a few, narrowly defined circumstances – and the appellate system
- **Other immunities from suit:**
    - Parties who fail in litigation will seek to blame someone else for their failure
    - Origins of witness immunity can be traced back to 16th to 17th centuries
    - Witness privilege even if what is done is deliberate and malicious
        - Article suggests that advocate's immunity does not extend to bad faith
        - Note that gross negligence can result in a miscarriage of justice, which can then provide grounds for appeal
    - Judicial immunity for judicial acts done within jurisdiction, collateral attacks were only open for alleging excesses of jurisdiction
    - Both immunities were founded in considerations of the finality of judgments
- Once a controversy has been quelled, it is not to be relitigated – but this is essential to prove that advocate's negligence had caused harm
- **Question is not:** special status to advocates over other professions; role of advocate in public or governmental function
- **Central justification:** principle that controversies, once resolved, are not to be reopened except in a few narrowly defined circumstances
- Any relitigation would be skewed – no argument made for abolition of other immunities
- If we allow relitigation, it allows for the possibility that the litigation will never end, as it spawns more and more collateral proceedings – there will be no finality and the ancillary disputes will bring the court system to a halt

Reasons to reconsider *Giannarelli*

- **Statutory changes:**
    - LPA repealed the LPPA, new section 442 preserves immunity – enacted on presumption that it would preserve an existing immunity
    - Victoria's Law Reform Commission recommended that this immunity be removed by legislation, but the recommendation was not adopted
    - Statutory recognition of obligations that all legal practitioners owe to their clients and to the court – e.g. BR16-17B in NSW – Section 64 in Victoria

    - Disciplinary arrangements – e.g. section 4.9 in NSW, fiduciary fund
    - Court should not reconsider *Giannarelli* – section 442, State legislature chose not to implement recommendations
- **Arthur Hall:**
    - The House of Lords restated the common law about advocate's immunity
    - Appropriate in the light of:
        - Changes in law of negligence
        - *Human Rights Act* 1998 (UK)
        - European human rights conventions – requirements that all civil rights and obligations proceed to a court (*Osman v United Kingdom*)
            - Kirby J in his judgment suggests that there are obligations under the ICCPR
    - Relies on abuse of process procedures – collateral challenges and abuse of process was critical to the outcome in *Arthur Hall*
    - UK decisions may not apply – legal profession organised differently, decision relies upon social and other changes in UK
- **Other jurisdictions:**
    - No more immunity in: US, Canada, UK
    - Not reconsidered or considered in: Ireland, Hong Kong, Fiji, Bermuda, Cayman Islands
    - But in Canada and US, prosecutor is immune, US immunity for judges

Abuse of process – is that sufficient?

- Three chief wrongs:
    - Final wrong result
    - Wrong intermediate result
    - Wasted costs
- None of them could be remedied within the original litigation – *but for* the advocate's conduct, those would not have occurred
- But they were *lawful* results for intermediate results
- To allow litigation – there are obviously cases where the final result of earlier litigation would have to be changed – not in the current case though
- Abuse of process: manifestly unfair to a party before litigation before it, OR bring the administration of justice into disrepute among right-thinking people
- *Class discussion notes:*
    - Professional rules (e.g. prohibitions against misuse of the court process) might not be sufficient to prevent abuse of processes because professional rules can be easily massaged
    - The decision of the majority could stem from angst and self-interest

Criminal cases

- Difficult to split the world into civil and criminal
- In *Arthur Hall*, they distinguished (in a criminal case) between a conviction and an acquittal – there is no reason to distinguish between the two, as you still need to accept the decisions of courts as being correct

- It is also wrong to view civil cases as being less worthy than criminal cases
    - Allowing relitigation could result in criminal cases being discussed in civil cases
- Because the final outcome of the proceeding must be "incontrovertible" to the parties involved in it, the majority concluded that cases where a different final result should have been reached should be disallowed

Challenges to intermediate outcomes

- Intermediate results set aside on appeal
- It is often the case that the reason for setting aside the result has nothing to do with the negligence of counsel – in this case, it was the judge's directions to the jury
- This would only cover a very small number of cases – the notion of remedying wrongs becomes "too attenuated"

Wasted costs

- Because costs follow the event, you will need to challenge the outcome to examine costs
- The majority did not want to allow for even the possibility that an outcome be relitigated

Conclusions

- They note that the decision could be seen as one of self-interest, but they cannot allow inroads into a "fundamental and pervading tenet" of the judicial system
- They could find no reason to redraw the dividing line of what falls within the immunity:
    - The test is "work done out of court which leads to a decision affecting the conduct of the case in court", or equivalently "work intimately connected with" work in court
    - Other geographical lines such as the courtroom door would be artificial
- Applying *Giannarelli*, there is a close relationship between committal proceedings and trial
- VLA was deemed to be a firm of solicitors
- In this case, the content of the advice from the solicitors and from the barrister was identical – "it cannot be said that the advice of one is more closely related to the court proceedings than the other" – so the advocate's immunity extends to all practitioners