

AUSTRALIA / JUDGMENT

MCX v GGX [2024] NSWDC 409

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District Court

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New South Wales

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Decision date: 12 August 2024

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Before: Andronos SC DCJ

Decision: See paragraph 66.

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No reasonable cause of action or defence

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OCCUPATIONS — Legal practitioners — Barristers — Advocate's immunity

OCCUPATIONS — Legal practitioners — Solicitors — Advocate's immunity

Legislation Cited: Civil Liability Act 2002 (NSW)

Civil Procedure Act 2005 (NSW), s 56, s 57, s 58, s 64

Uniform Civil Procedure Rules 2005 (NSW), r 14.28

Cases Cited: Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175;
[2009] HCA 27

Attwells v Jackson Lalic Lawyers Pty Ltd (2016) 259

CLR 1; [2016] HCA 16

Carr v Finance Corp of Australia Ltd (No 1) (1981)

147 CLR 246; [1981] HCA 20

CDW v LVE (2015) 54 Fam LR 297; [2015] WASCA

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Clough & Rogers v Frog; RPM Transport Pty Ltd v

Frog (1974) 4 ALR 615; (1974) 48 ALJR 481

D'Orta-Ekenaike v Victoria Legal Aid (2005) 223 CLR
1; [2005] HCA 12

Dey v Victorian Railways Commissioners (1949) 78

CLR 62

Donellan v Watson (1990) 21 NSWLR 335

Dyson v Attorney-General [1911] 1 KB 410

General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125; [1964] HCA 69

Giannarelli v Wraith (1988) 165 CLR 543; [1988] HCA 52

Kendirjian v Lepore (2017) 259 CLR 275; [2017] HCA 13

McGuirk v The University of New South Wales [2009] NSWSC 1424

Peru, Republic of v Peruvian Guano Co Ltd (1887) 36 Ch D 489

Re Luck [2003] HCA 70

Reader Lawyers & Mediators vABC (a pseudonym) [2020] WADC 14

Shelton v National Roads and Motorists Assn Ltd (NRMA Ltd) (2004) 51 ACSR 278

In the Marriage of L (1989) 15 Fam LR 157

Category: Procedural rulings

Parties: MCX (plaintiff)

GGX (first defendant)

HX (second defendant)

AX (third defendant)

CX (fourth defendant)

Representation: Counsel:

Mr A Maroya (plaintiff)

Mr C P O'Neill (first defendant)

Ms T Harris-Roxas (second, third and fourth defendants)

Solicitors: Rockdene Lawyers (plaintiff)
Colin Biggers & Paisley (first defendant)
Mills Oakley (second, third and fourth defendants)
File Number(s): 2023/00083011
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JUDGMENT

1. These proceedings are brought against the first defendant (the barrister) and the second, third and fourth defendants (the solicitor defendants) for alleged breaches of various duties of care in the making of consent orders in appellate proceedings in the Family Court in 2017. The defendants acted for the plaintiff, who had been a party to proceedings heard at first instance by Judge JX in 2016 in which his Honour made property and child access orders as between the plaintiff and his former wife. Both parties appealed and, on the day of the hearing of the appeal on 2017, consent orders were made, vacating all of the orders made by

Judge JX and remitting the matter for rehearing.

2. The plaintiff alleges that the consent orders were made without his instruction and that he would not have consented to them. One of the vacated orders, which had been made in 2016, had allowed the plaintiff unsupervised contact with his daughter. By its vacation, an earlier interlocutory order that had required the plaintiff to have only supervised contact with his daughter was restored. As a result of the vacation, by consent, of Judge JX's 2016 orders, the plaintiff says that he lost the opportunity to argue that he should continue to have unsupervised contact with his daughter. He says he suffered loss and damage by incurring child supervision costs and legal costs of unsuccessful attempts to have the consent orders set aside.
3. The present proceedings were commenced in March 2023. There have been several pleadings disputes and the plaintiff has made several attempts to rectify what he has accepted as defects in his pleading. Each party has brought an application with respect to recent iterations of the statement of claim: the plaintiff filed a notice on motion on 22 May 2024 seeking leave to file a Further Amended Statement of Claim in the form annexed to that motion. That draft was supplanted by a revised version handed up in court (the PASOC). Each of the barrister (22 December 2023) and solicitor defendants (25 January 2024) filed motions seeking to strike out the version of the Amended Statement of Claim which the plaintiff then propounded. The parties all approached the hearing of the motions as addressing the PASOC.
4. Both the barrister and solicitor defendants contended that the PASOC suffers from such serious defects that it is liable to be struck out and that, in light of the extensive history of the plaintiff's failure to plead a compliant statement of claim, no leave to replead ought be granted. These were primarily matters of pleading, rather than of substantive law.
5. On behalf of the barrister, however, it was further submitted that there is no cause of action available against him as the present case falls within the principle of advocate's immunity within the line of authority that includes *Giannarelli v Wraith* (1988) 165 CLR 543; [1988] HCA 52 (*Giannarelli*) and *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1; [2005] HCA 12 (*D'Orta*).
6. For reasons set out below, I have found that the pleading points raised by the defendants generally were well-taken and neither the plaintiff's current filed pleading nor the PASOC can proceed in its current form. In the exercise of my discretion, however, I consider it appropriate to give the plaintiff a further opportunity to replead his case, subject to an appropriate order for costs. With respect to the substantive argument between the plaintiff and the barrister concerning advocate's immunity, I consider the plaintiff's claim is arguable and the claim ought not be struck out.

Relevant principles: strike outs and amendments

1. The principles concerning the striking out of pleadings and the amendment of pleadings are not controversial and were not disputed in this matter.

Rule 14.28 UCPR

1. The defendants' motions were brought under r 14.28(1) of the Uniform Civil Procedure Rules 2005 (NSW) (UCPR).
2. Rule 14.28(1) provides:

14.28 Circumstances in which court may strike out pleadings (cf SCR Part 15, rule 26; DCR Part 9, rule 17; LCR Part 8, rule 3)

- (1) The court may at any stage of the proceedings order that the whole or any part of a pleading be struck out if the pleading—
 - (a) discloses no reasonable cause of action or defence or other case appropriate to the nature of the pleading, or
 - (b) has a tendency to cause prejudice, embarrassment or delay in the proceedings, or
 - (c) is otherwise an abuse of the process of the court.

...

1. The power to strike out pleadings because they disclose no reasonable cause of action should be exercised only in plain and obvious cases: *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125; [1964] HCA 69. A case is not "plain and obvious" and the power to strike out should generally not be exercised where there is a real issue to be tried, whether it is one of fact or law: *Dyson v Attorney-General* [1911] 1 KB 410. An order may be made on the basis of an assessment of the pleadings if, on their face, the case is absolutely hopeless or that there is no possibility of the facts pleaded giving rise to a good cause of action: *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 90.
2. A pleading may be struck out on the ground that it is embarrassing, in the sense that it is unintelligible, ambiguous, or so imprecise in its identification of material factual allegations as to deprive the opposing party of proper notice of the real substance of the claim or defence: *McGuirk v The University of New South Wales* [2009] NSWSC 1424 at [21]-[35]. Similarly, a pleading may be embarrassing if it contains inconsistent, confusing or irrelevant allegations: *Shelton v National Roads and Motorists Assn Ltd (NRMA Ltd)* (2004) 51 ACSR 278.
3. If the pleading defect can be cured by amendment, the court ought grant leave to amend rather than exercise the power to strike out: *Peru, Republic of v Peruvian Guano Co Ltd* (1887) 36 Ch D 489 at 496.

Amendment

1. Section 64 of the Civil Procedure Act 2005 (NSW) (the CPA) relevantly provides:

64 Amendment of documents generally (cf SCR Part 20, rules 1 and 4; DCR Part 17, rules 1 and 4)

- (1) At any stage of proceedings, the court may order:

(a) that any document in the proceedings be amended, or

(b) that leave be granted to a party to amend any document in the proceedings.

- (2) Subject to section 58, all necessary amendments are to be made for the purpose of determining the real questions raised by or otherwise depending on the proceedings, correcting any defect or error in the proceedings and avoiding multiplicity of proceedings.

...

1. In determining an application for leave to amend, the court must have regard to the overriding purpose of the CPA and UCPR and to the dictates of justice in accordance with ss 56 to 58 of the CPA. The nature of the proposed amendment, its consequences for the other parties, and the expeditious conduct of the proceedings, are all proper matters for consideration in determining such an application.
2. Generally, leave to amend should be granted if the application is made in a timely manner and for a proper purpose: *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175; [2009] HCA 27 at [98].
3. Within the general parameters governing the discretion with respect to the granting of leave to amend, leave will nevertheless usually not be granted if the proposed amendment is not proper in terms of substance and form or is liable to be struck out. Amendments must comply with the rules in relation to form and must, at least when read with the original pleading, disclose an arguable cause of action or defence: *Clough & Rogers v Frog; RPM Transport Pty Ltd v Frog* (1974) 4 ALR 615; (1974) 48 ALJR 481.

The PASOC

1. The PASOC makes several uncontroversial drafting changes which are not objected to by the defendants. One such change is that the plaintiff no longer wishes to proceed against the current second defendant, an employee of the third and fourth defendants.
2. Those paragraphs which are objected to, whether having comprised part of the current filed iteration of the Amended Statement of Claim, or are proposed amendments in the PASOC, are addressed below.

3. In short, the defendants say the defects in the pleading are such that it does not disclose a proper cause of action as the plaintiff has failed to articulate, with sufficient precision, the necessary elements of the causes of action he propounds. The defendants say that, as a result, they are unable to understand the case against them and would be prejudiced if the proceedings were to continue on the basis of the existing or proposed iteration of the statement of claim.
4. At a high level of generality, the plaintiff's claims are in contract and in common law, to which the Civil Liability Act 2002 (NSW) (the CLA) applies. The contract claim is advanced only against the solicitor defendants, whereas the common law claim is advanced against all defendants.
5. The plaintiff's key facts, as alleged in the PASOC, are as follows:
 1. The plaintiff was a party to contested Family Law proceedings in the Federal Circuit and Family Court of Australia (the Circuit Court proceedings). The solicitor defendants acted for him in those proceedings, pursuant to a written retainer agreement entered in or about 2014.
 2. In the Circuit Court proceedings, interim orders that the plaintiff was to have only supervised contact with the daughter of the marriage were made in 2014 and continued in 2015. Evidence before me established that the 2014 orders provided a timetable for the child to spend time with the plaintiff, subject to supervision by an employee or contractor of a named organisation, at the plaintiff's cost.
 3. The Circuit Court proceedings went to trial before Judge JX, who made orders in 2016. Those orders were, in part, adverse to the plaintiff, however, the interim order requiring the plaintiff to have supervised contact with his daughter was discharged. In his reasons for judgment, delivered when making the consent orders in 2017, Justice JJX recited Order 5 made in 2016 as follows:

"If the [plaintiff] obtains from a registered assessor an assessment that his risk of recidivism for sexual assault of a child is low, then [the child] shall spend time with her father [according to a timetable for whole weekend and part school holiday access thereafter set out]."

1. Although there was no evidence before me as to the whole of the orders made by Judge JX concerning access, I infer that orders other than Order 5 were made, which had the effect contended for by the plaintiff, namely that he was granted unsupervised contact with his daughter at other times, even in the event that the plaintiff did not obtain a favourable assessment as to his risk of recidivism.
2. In about 2017, the plaintiff filed an appeal against Judge JX's orders, other than those concerning the plaintiff's unsupervised contact with his daughter.
3. In about 2017, the plaintiff's former wife sought (out of time) to file an appeal against Judge JX's orders.

4. The appeal was set down for hearing in 2017.
5. The solicitor defendants retained the barrister to appear at the appeal when other counsel, who had been retained, became unavailable.
6. In 2017, the day before the appeal hearing, the solicitors for the plaintiff's former wife sent to the solicitor with carriage of the plaintiff's matter (the current second defendant, HX), an employee of the third and fourth defendants, a draft minute of consent orders which would have granted the wife leave to file her cross-appeal out of time and made certain programming directions. HX did not see the email until later that afternoon.
7. On the day of the hearing of the appeal, HX was unavailable to attend the hearing and advised the plaintiff to meet the barrister at court. At 9:32am on that day, the solicitors for the plaintiff's former wife sent by email to HX and the independent children's lawyer revised proposed consent orders (the revised proposed consent orders) which, inter alia, had the effect of discharging all of the orders made by Judge JX in 2016. Relevantly, the proposed order had the effect of reinstating the earlier order that the plaintiff have only supervised contact with his daughter.
8. The plaintiff says he would not have given his instructions to consent to an order that had that effect and the revised proposed consent orders did not reflect his instructions.
9. HX did not read the 9:32am email or the revised proposed consent orders, did not draw them to the barrister's attention and did not properly instruct him that the plaintiff did not consent to them.
10. The barrister appeared for the plaintiff on the hearing day, but it is alleged that he did not seek instructions from HX, the third and fourth defendants, or the plaintiff as to whether the plaintiff consented to the revised proposed consent orders.
11. The barrister proceeded to consent to the revised proposed consent orders on the plaintiff's behalf, without instructions to do so and without perceiving that such consent would be against the plaintiff's instructions.
12. The appeal judge, Justice JJX, made orders in accordance with the revised proposed consent orders and delivered a short judgment in respect of them.
13. The plaintiff says he suffered loss and damage as a result of the making of the consent orders in 2017.
1. The plaintiff goes on to allege that the barrister's consent to the revised proposed consent orders was or ought to have been known to the barrister as likely to cause him harm in that Judge JX's 2016 orders with respect to unsupervised contact would be vacated. At [26] of the marked up PASOC, the plaintiff alleges:

"Had the Revised Consent Orders not been made, the appeal before the Hon Justice JJX would have proceeded on a different footing; namely, that the orders made by Judge JX on 2016 reflected the appropriate outcome on the parenting and supervision aspect of the Plaintiff's contentions in the Family Law proceedings; represented a state of affairs which ought to have been maintained, rather than disturbed on appeal, and which ought to have been maintained pending the hearing of the parties' respective appeal and cross-appeal from Judge JX's orders."

[Emphasis in bold added].

1. The PASOC goes on to allege breaches by the solicitor defendants of contractual and common law duties of care and breach by the barrister of a common law duty of care. I will address the question of loss and damage further below.
2. The evidence before me included the interlocutory orders that had been made in the Circuit Court on 2014, the effect of which was restored by the orders made by Justice JJX by consent in 2017. It also included the proposed consent orders circulated by the wife's solicitor in 2017 and the revised proposed consent orders circulated by the wife's solicitor at 9:32am on 2017. Although not strictly evidence, I was also provided with a copy of the orders made by Justice JJX, which broadly mirrored the orders proposed by the wife in the 2017 email, and his Honour's ex tempore reasons for judgment.

The barrister's immunity argument

1. Mr O'Neill, counsel for the barrister, contended that the whole of the claim against the barrister ought be struck out as not disclosing a reasonable cause of action against him. The basis for this submission lies in the immunity from suit afforded to advocates for negligence, or otherwise, in the conduct of a case in court, or for work done out of court which leads to a decision affecting the conduct of the case in court. It was submitted on behalf of the barrister that, on the facts as pleaded by the plaintiff, the immunity applies. Mr O'Neill accepted that the General Steel standard applied.
2. Mr Maroya, for the plaintiff, submitted that the immunity does not presently apply because the impugned outcome was intermediate, rather than final. Accordingly, he submitted that the plaintiff has an arguable case that ought be permitted to proceed to trial. He also relied on *Donellan v Watson* (1990) 21 NSWLR 335, which provides that there is no immunity for the negligent carrying out of an agreed compromise that is subsequently recorded in consent orders. This latter point raises the treatment of compromise and consent orders, which ultimately engages the question of whether the exercise of judicial power in the quelling of a dispute would be impugned by the present claim.
3. For reasons set out below, on the material before me, I consider that it is sufficiently arguable that advocates' immunity does not apply to the plaintiff's claim that the plaintiff's claim ought not be struck out. This is in summary because I consider that it is open to the plaintiff to argue:

1. that the current state of the common law does not extend the immunity to circumstances where the conduct of the advocate does not functionally lead to the final quelling of a dispute by the exercise of judicial power; and
2. at least on the material presently before me, it has not been established that the making of the orders in 2017 by Justice JJX was an exercise of judicial power that quelled any dispute, final or otherwise.

Were the orders interlocutory or final?

1. An order will be final, rather than interlocutory, when it finally determines the rights of the parties in a principal cause pending between them. The question is determined according to the legal effect of the judgment, rather than its practical consequences: *Re Luck* [2003] HCA 70 at [4]; *Carr v Finance Corp of Australia Ltd (No 1)* (1981) 147 CLR 246 at 248; [1981] HCA 20.

2. In *In the Marriage of L* (1989) 15 Fam LR 157 at 163-4, the Full Court of the Family Court said:

"It has become a well established principle that custody and access orders can never be final orders incapable of change. Although, as we have said, frequent applications in relation to both custody and access are undesirable, a party should not be deprived of approaching the court for a change in either custodial or access arrangements if such application is in the children's best interests and there are reasonable grounds for doing so."

1. This passage was quoted with approval by Martin CJ in *CDW v LVE* (2015) 54 Fam LR 297; [2015] WASCA 247 and by Vernon DCJ in *Reader Lawyers & Mediators v ABC* (a pseudonym) [2020] WADC 14 at [26].
2. In the present case, the relevant order was made in the context of remitting the entire proceedings back to the Circuit Court to be redetermined. It did not purport to finally determine the parties' respective rights with respect to access and would likely not have been a final order in the relevant legal sense even if it had.
3. I, therefore, find that the relevant consent orders were interlocutory and not final.

The extent of the advocates' immunity: exercise of judicial power and finality in litigation

1. In *Giannarelli*, the High Court held that, at common law, an advocate cannot be sued by his or her client for negligence in the conduct of a case, or in work out of court which is intimately connected with the conduct of a case in court.
2. In a number of subsequent decisions, including *D'Orta*, *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1; [2016] HCA 16 and *Kendirjian v Lepore* (2017) 259 CLR 275; [2017] HCA 13, the High Court addressed the juridical basis for the retention of advocates' immunity under the common law of Australia.

3. As I read the authorities, as collected by Vernon DCJ in Reader Lawyers & Mediators, there appear to be two fundamental propositions that underpin the immunity.
4. First, the immunity exists to protect the exercise of judicial power in the quelling of disputes. The exercise of judicial power is subject to review, and judgments are subject to amendment, on appeal. However, if a party seeks to challenge collaterally the correctness of a decision or orders outside the appellate structure, the judgment or orders are not capable of amendment, but their correctness may be called into question. This would be detrimental to the administration of justice and forms the basis of the policy to confer immunity on advocates in their conduct which is functionally connected to a judicial determination or order. In other words, the correctness of decisions is only to be challenged through the structure of appeals. It would be inimical to the administration of justice if their correctness could be challenged collaterally by bringing a claim against an advocate for breach of duty where that claim would have the effect of establishing that, but for the breach of duty, the outcome, as determined by the Court, would have been different.
5. Secondly, the immunity exists to protect the principle of finality in litigation. This might be nothing more than a different way of expressing the same principle, albeit emphasising a different aspect of the policy basis for the immunity.
6. The plaintiff contends that this has the effect that only where there have been final decisions that determine parties' rights can the immunity be engaged and that the orders did not do that as the proceedings were remitted for redetermination.
7. Counsel for the barrister did not demur from the proposition that there had to be a final determination of rights for the immunity to be engaged, but chose to argue the application on the basis that the orders of 2017 were final because they determined the parties' respective rights in the appeal.
8. There are abundant statements of principle in the authorities to the effect that the immunity exists to protect the exercise of judicial power in the final quelling of controversy. For example, the plurality of the High Court in D'Orta stated, at [45]:

"... the 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 judicial system, reflecting the role played by the judicial process in the government of society. If an exception to that tenet were to be created by abolishing that immunity, a peculiar type of relitigation would arise. There would be relitigation of a controversy (already determined) as a result of what had happened during, or in preparation for, the hearing that had been designed to quell that controversy."

1. Similarly, the plurality in D'Orta emphasised that the central concern is the exercise of judicial power in the quelling of controversies at [32]:

"To adopt the language found in the cases considering Ch III of the Constitution, the central concern of the exercise of judicial power is the quelling of controversies. Judicial power is exercised as an element of the government of society and its aims are wider than, and more important than, the concerns of the particular parties to the controversy in question, be they private persons, corporations, polities, or the community as personified in the Crown or represented by a Director of Public Prosecutions. No doubt the immediate parties to a controversy are very interested in the way in which it is resolved. But the community at large has a vital interest in the final quelling of that controversy. And that is why reference to the "judicial branch of government" is more than a mere collocation of words designed to instil respect for the judiciary. It reflects a fundamental observation about the way in which this society is governed."

1. At [97], McHugh J added:

[T]he immunity afforded advocates in Australia involves a recognition of the existence of obligations of due care and skill owed to clients, but for policy reasons denies a duty of care that gives rise to a cause of action in damages. That analysis accords with judicial statements that the immunity exists not to protect advocates from the consequences of their misconduct but solely for the enhancement of the administration of justice and public confidence in it. That analysis also explains the dividing line between the well-recognised exposure to liability for work not connected with the conduct of a matter in court and work covered by the immunity. It is the interjection of policy arising from the difficulties of proving that a different result would have ensued but for the carelessness of the advocate and the legal principle of finality that prevents an actionable duty of care arising."

1. As to the second expression of principle concerning the public interest in the finality of litigation, the plurality in *D'Orta* appeared sceptical as to whether orders had to be final in order to invoke the privilege, so long as there had been an exercise of judicial power. Although obiter in the circumstances of that case, they stated at [81] to [83]:

"An exception for challenges to intermediate outcomes?

[81] The existence of cases in which there would be an intermediate result of which complaint could be made would depend upon that intermediate result having been set aside on appeal. Here it is important to recognise that, just as was the case in the present matter, the grounds on which an intermediate result is set aside may be unrelated to what is now alleged to have been the advocate's negligent conduct. In this case, the conviction at the first trial was quashed for want of proper direction about how the plea of guilty at committal might be used, not because the guilty plea was improvidently entered.

[82] Incompetence of counsel is not a separate ground of appeal. As was pointed out in *TKWJ v R*, the relevant question on appeal in a criminal matter will be whether there was a miscarriage of justice. In general, then, if an intermediate result is set aside, it will be for reasons unconnected or, at best, only indirectly connected, with the client's contention that the advocate was negligent. It follows, therefore, that the class of cases in which an intermediate result would be open to challenge not only would be exceptional, in the sense

of standing apart from challenges to final decisions, but also would be a class of case whose membership would depend upon the application of criteria unconnected with what, for present purposes, is the central focus of debate, namely the alleged negligence of the advocate. By this stage of the argument, in which attention is directed solely to exceptional cases, the proposition that for every wrong there should be a remedy has become too attenuated to be of any relevant application. Especially is that so when the very existence of the relevant exceptional case depends for the most part upon considerations that are irrelevant to the wrong that is to be remedied. If final results cannot be challenged, intermediate results should not be treated differently.

[83] There remains for separate consideration the last of the three kinds of consequence identified earlier as consequences of which a client may wish to complain: wasted costs. Again, at first sight it might be thought that seeking to recover wasted costs would not cut across any principle of finality. But it is necessary to recall that the general rule is that costs follow the event. To challenge the costs order, therefore, will often (even, usually) involve a direct or indirect challenge to the outcome on which the disposition of costs depended. For the reasons given earlier, that should not be permitted lest a dispute about wasted costs become the vehicle for a dispute about the outcome of the litigation in which it is said that the costs were wasted."

[Emphasis added, footnotes omitted]

1. Notwithstanding this apparent scepticism, both Gordon and Nettle JJ, in their dissenting judgments in *Attwells*, appeared to stress the finality of judgments as a key element in the maintenance of the immunity. For example, at [106] to [107] Gordon J said:

"... [A]s D'Orta demonstrates, the immunity revolves around finality - the final quelling of a controversy by the exercise of judicial power. A legal practitioner is not liable for '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. Work that contributes to the final quelling of a controversy by the exercise of judicial power is work intimately connected with' work in a court. That conclusion is fortified by the fact that the 'test' for whether the immunity applies must be considered in light of the principles which underpin it.

A challenge to finality is not permitted, except in a few narrowly defined circumstances. It is not permitted for the reasons addressed in *D'Orta*, to which reference has already been made."

[Emphasis added, footnotes omitted.]

1. Similarly, Nettle J stated at [66]:

"The purpose of the advocate's immunity is to avoid the re-litigation in collateral proceedings for negligence, or other civil cause of action, of issues determined in the principal proceedings. As Gordon J explains, it is based in policy that a controversy should not be re-opened by a collateral attack which seeks to demonstrate that a judicial determination was wrong. Where, therefore, a final order has been made resolving litigation, a claim that, but for an advocate's conduct, there would have been a different result is necessarily objectionable."

[Emphasis added, footnotes omitted.]

1. Notwithstanding the obiter statement of the plurality in D'Orta set out above, I consider the above passages to demonstrate that the issue remains alive, and it is sufficiently open to the plaintiff to argue that the immunity does not apply where orders do not finally quell any controversy between the parties to the appeal.

Consent orders: functional connection and the exercise of judicial power

1. The other aspect of the immunity raised by the parties is whether it is engaged when consent orders are made.
2. Where a proceeding is settled by consent, the principal issue appears to be whether there has also been an exercise of judicial power in the making of the order. As Edelman J explained in Kendirjian, referring to the joint reasons of the majority in Attwells:

"The joint reasons of the majority in Attwells explained the rationale for the immunity when declining to extend it to compromises. Since the immunity attaches by the 'participation of the advocate as an officer of the court in the quelling of controversies by the exercise of judicial power', it followed that the immunity did not extend to advice that leads to a settlement between the parties. Advice 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. For this reason, the 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."

1. Where consent orders are made disposing of proceedings, much may therefore depend on the nature of the power exercised by the Court to make such orders.
2. Mr Maroya referred me to Donellan, where a solicitor had been instructed to consent to certain orders compromising appeal proceedings, but consented to different orders being made, thereby depriving the client of his successful orders in the first instance proceedings. Mahoney JA, with whom Waddell AJA agreed, found that the immunity in Giannarelli did not apply because the negligence proceedings against the solicitor did not attack the consent orders collaterally. The predicate of the negligence claim was that the consent orders were properly made, but were different to the agreement reached with the other party and the consequence of that variance was that the client suffered loss.

3. The analysis in the judgment of Handley JA (who decided the case on the narrower basis of the personal liability of an agent for acts done in excess of authority which nevertheless bind the principal) makes clear that there had been no exercise of judicial power in the relevant sense by the judge who made the consent orders. The orders were simply agreed between the legal representatives, proposed to the Court and made by the judge. In the absence of a functional connection between the work of the advocate and any exercise of judicial power in making the consent orders, the immunity did not apply.
4. It may be, however, that there are circumstances where the making of a consent order requires more than simply giving effect to an agreement reached by the parties. In obiter, the majority in *Attwells* said:

"... The present case is not concerned with whether the bank's original cause of action had merged in the judgment of the court, or even with whether the bank's rights under the settlement agreement had merged in the consent order of the court. Whether or not the settlement agreement has a legal existence independent of the consent order, such as for the purposes of its enforcement, has nothing to do with the substantive content of the rights and obligations established by it. The substantive content of those rights and obligations was determined by the parties without any determination by the court. The public policy which sustains the immunity is not offended by recognising the indisputable fact that the terms of the settlement agreement, by reason of which the appellants claim to have been damaged, were not, in any way, the result of the exercise of judicial power.

The respondent also argued that cases involving settlements may involve a collateral challenge to judicial conduct because, in some cases where a case is resolved by settlement, the judge is required to be satisfied that the orders should be made.

It may be acknowledged that there are many cases where, although the parties have agreed upon the terms of the order which a court is asked to make, the making of the order itself requires the resolution of issues by the exercise of judicial power. Examples include where representative proceedings are settled, or where proceedings on behalf of a person under a legal incapacity are to be compromised, or where agreements are made in relation to proceedings under ss 86F, 87 and 87A of the Native Title Act 1993 (Cth). Other examples include the exercise of the judicial discretion to allow an agreement to amend a patent granted under the Patents Act 1900 (Cth), and the compromise of certain debts under ss 477(2A) and 477(2B) of the Corporations Act 2001 (Cth). It is not necessary to consider such cases here."

[Emphasis added and footnotes omitted].

Application

1. As set out above, parenting orders usually cannot be characterised as final orders for the reasons set out in *In the Marriage of L*. In any event, as the orders in question were made in the context of remitting the proceedings for redetermination, I consider they were interlocutory. The orders were expressly contemplated to be reviewed and subject to a redetermination on a rehearing. As it appears to still be arguable that the immunity does not apply to interlocutory orders, I consider that the barrister's strike out application must fail.
2. Although that is sufficient, in my view, to dispose of the strike out application to the extent that it relies on the principle of advocates' immunity, I have also considered whether the fact that orders were made by consent excludes the principle in the present case.
3. The orders made by Justice JJX in 2017 were made by consent and the proceedings were remitted to the Federal Circuit Court (as it then was) for redetermination. The chapeau to the orders was, "On the application of both parties". His Honour delivered brief ex tempore reasons, which included the following:

"[1] ... The parties and the Independent Children's Lawyer have resolved [the] application, and proffer to the Court some orders by consent which I will make shortly.

- [2] The parties have agreed on the outcome of the appeal and asked the Court to find that both the appeal and the cross-appeal should be allowed and the orders of the primary judge set aside and the matter remitted for hearing.

...

- [4] The error that has been identified by the parties lies in Order 5 made by the primary judge.

[His Honour then set out the terms of Order 5 which provided for assessment by a 'registered assessor' of the father's risk of recidivism and contingent orders for unsupervised whole of weekend and part school holiday access in the event such an assessment was that the risk was low]

- [5] As is apparent from that order, the case before his Honour required considerations of allegations of sexual abuse by the father in the past, and Order 5 is obviously an order designed for the protection of the child.
- [6] However, at least two issues flow from that Order. Firstly, it is entirely unclear as to what the words 'registered assessor' mean and who would fit within that description. Secondly, and more importantly, the order in effect gives the registered assessor the power to make a parenting order for the child, by finding that the risk of recidivism is low. That is not, in my opinion, an appropriate exercise of judicial power, in that it hands the jurisdiction of the Court to the assessor. Further, if the Court is considering making a parenting order, such as the time a child is to spend with a parent, it needs to have regard to all of the then relevant provisions of Part VII of the Act and not just whether or not there is at any particular time a low risk of recidivism.

- [7] I am accordingly satisfied that there is an error in his Honour's orders and that the appeal and the cross-appeal should be allowed."
1. His Honour did not express any view as to the correctness of the order vacating the order for unsupervised contact or any other order that was being vacated. While the chapeau to the orders suggests that Justice JJX may have exercised judicial power in making the orders, it is not sufficiently clear on the material before me that he did so. It is certainly unclear as to whether his Honour was asked to consider the appropriateness of the access order the subject of the plaintiff's complaint. In any event, in light of the fact that in *Attwells* the High Court eschewed determining whether cases involving settlements also involve a collateral challenge to judicial conduct where the judge is required to be satisfied that the orders should be made, I consider that it is arguable that the immunity does not apply in the present case on this basis as well.
 2. Accordingly, I do not consider that the barrister has demonstrated, on the material before me, that there is no reasonably arguable claim due to the application of the principles regarding advocates' immunity. I, therefore, decline to strike out the plaintiff's claim against the barrister on that basis.

Pleading defects

1. The defendants identified a number of pleading defects, which Mr Maroya frankly conceded were points that were generally well-made.
 2. In summary, the defendants' complaints are that the PASOC does not plead necessary elements of the plaintiff's causes of action, makes factually inconsistent allegations, and fails to articulate the basis for the plaintiff's allegation of causation and the components of his claim for quantum. Other than the contention in respect of inconsistent factual allegations, I consider the defendants' criticisms are well-made. Even with respect to the factual allegations, which have been criticised, the allegations made in the PASOC ought be clarified so that the defendants may understand, with sufficient clarity, the case that is put against them.
 3. As there was no real contest with respect to most of the defendants' complaints, I will deal with them in short form by reference to the paragraph number of the PASOC (where relevant) and the nature of the complaint.
1. No complaint is made in respect of paragraphs 1 to 6. The solicitor defendants embrace the removal of HX as a defendant, which is articulated in paragraph 3 and reflected throughout the draft.

2. Paragraphs 7 and 8 comprise the plaintiff's allegations as to the solicitor defendants' duty of care to the plaintiff. The solicitor defendants criticise the present draft as failing to identify the nature and scope of the alleged duty. The paragraphs do not set out with adequate description the risk of harm or the precautions which a reasonable person, in the position of the solicitor defendants, ought to have taken in response to the identified risk of harm. The point is well-taken and the paragraphs ought be struck out.
3. Paragraphs 9 and 10 comprise the plaintiff's allegations as to the barrister's duty of care to the plaintiff. The same complaints are made as made by the solicitor defendants in the previous paragraph. For the same reasons, the paragraphs ought be struck out.
4. As to the factual allegations, it is not clear to me that the factual allegations concerning the defendants are inconsistent. Care must be taken, however, to specify where factual allegations are cumulative. At present, the allegations in paragraphs 22, 23 and 26 can be construed as propounding impermissible alternative factual allegations. The allegation of a failure to seek instructions or to act in accordance with instructions ought be clarified in a way which is factually consistent. If the allegations are put cumulatively, this should be clarified. If they make alternative factual allegations, such a pleading cannot stand.
5. In order to address the matters at paragraphs 28 to 46 above, consistent with the plaintiff's submissions before me, paragraph 26 ought specify the interim nature of the orders and plead the facts as to why they should be characterised as such.
6. Paragraphs 27 to 30 are criticised as failing to articulate the plaintiff's causation allegations properly. The pleading was criticised by both the solicitor defendants and the barrister as not setting out the alleged counterfactual, i.e. what would the position have been had the defendants' respective duties been complied with. The present pleading is also criticised as failing to identify what, if any, other operative factors would have otherwise prevailed and fails to grapple with the position of the wife and the matters which would have been taken into account had there been a contested hearing on 7 March 2017. These points are well-taken and the paragraphs cannot stand in their current form.
7. Paragraph 31 is criticised as failing to articulate with sufficient clarity the plaintiff's allegations as to quantum. The alleged loss is pleaded as a compendious sum of \$449,361.41, comprising wasted legal costs and the costs incurred in complying with the supervised contact order. There is no demarcation of costs referable to each head of alleged loss and the pleading does not specify whether the legal costs exceed those which would have been incurred, in any event, in the future conduct of the proceedings. These matters ought to be at least particularised.

Leave to replead

1. Both Mr O'Neill and Ms Harris-Roxas contended that, in light of the extensive history of attempts by the plaintiff to formulate a satisfactory pleading, the end of the line had been reached and no further leave to replead ought be granted.
2. While it is clear from the court file that the plaintiff has had multiple opportunities (six, on one count) to amend his pleading, I do not consider that the point has yet been reached where leave to amend ought be refused. That is not to say that leave would continue to be granted ad infinitum. On this occasion, however, I am satisfied both that the plaintiff has an arguable case and that it is in the interests of justice that he be granted the opportunity to amend his pleading, having now received the benefit of the defendants' critique of the PASOC.

Orders and costs

1. The solicitor defendants have been successful, although notwithstanding their submission to the contrary, I will grant the plaintiff leave to replead. On the pleading points, the barrister has also been successful, however, I was not persuaded that the PASOC ought be disallowed and the existing pleading struck out on the basis that no arguable cause of action was disclosed.
2. Costs ordinarily follow the event and, where there has been an indulgence, it is common for the price of that indulgence to be the benefitting party is to pay the costs of the opposing party unless the opposition was unreasonable. I will hear the parties on costs, however, my preliminary view is that the solicitor defendants should have their costs and the barrister ought have 50% of his costs of the applications before me on 19 July 2024.
3. The defendants ought also to have their costs thrown away by reason of the amendment for which I will grant leave.
4. The orders I propose are:
 1. Pursuant to r 14.28 Uniform Civil Procedure Rules 2005, the Further Amended Statement of Claim filed 1 December 2023 is struck out.
 2. The plaintiff's motion of 22 May 2024 is dismissed.
 3. The plaintiff has leave to file and serve a Second Further Amended Statement of Claim in accordance with these reasons on or before 9 September 2024.
 4. The plaintiff is to pay the costs of the defendants thrown away by reason of the filing of the Second Further Amended Statement of Claim in accordance with order (3) above, such costs to be as agreed or assessed on the ordinary basis.

5. The plaintiff is to pay the costs of the second, third and fourth defendants of their motion of 25 January 2024 and of the plaintiff's motion of 22 May 2024, such costs to be as agreed or assessed on the ordinary basis.
6. The plaintiff is to pay 50% of the costs of the first defendant of his motion of 22 December 2023 and of the plaintiff's motion of 22 May 2024, such costs to be as agreed or assessed on the ordinary basis.
7. Stand the proceedings over for directions to Monday, 16 September 2024 at 9.30am before the Judicial Registrar.
1. I will hear the parties on the form of the orders and, if they wish to be heard on costs, in that respect as well.

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Decision last updated: 10 September 2024

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