

# AVOIDING GETTING SUED TO SETTLE

FLPA Retreat  
14 June 2019

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The writers gratefully acknowledge the assistance of law clerks Bronte Lynch, Ted Kao, Sophia Horrocks, and Hana Williams of Cooper Grace Ward Lawyers in relation to case research for this paper.

## AVOIDING GETTING SUED TO SETTLE

*“If it’s not in writing it’s like it never happened.”*

*“They like you now, but they can all turn in the end.”*

*“No single client is worth risking your reputation for honesty and integrity”*

*“I got Bollinger for Christmas from a client and their QLS complaint by August of the following year”*

1. Wisdom infused phrases like these are passed down through generations of solicitors to teach and remind us all how to do our job, manage client expectations, discharge our duties, assist clients to make good decisions and not get sued. We all need reminding sometimes. Practice is busy and no one can read absolutely everything they “should”.
2. There are two High Court cases about advocates’ immunity from suit that are probably on that “should read” list – *Attwells v Jackson Lalic Lawyers Pty Ltd*<sup>1</sup> (*Attwells*) and *Kendirjian v Lepore*<sup>2</sup> (*Kendirjian*). This is a paper we hope you will take with you and save somewhere in case you need it one day. It is also a paper we hope you never need, but one that may give you some comfort and guidance on those particularly difficult days at court when your matter has gone exactly as you feared it might.

### **Solicitors’ obligations around giving settlement advice**

3. Solicitors and barristers owe duties to clients in contract by virtue of their retainer agreements and in tort.

#### Solicitor-client duty of care

4. The standard of care owed by a solicitor to their client was stated in *Rogers v Whitaker* as being, “...while the retainer is contractual in nature, the relationship is also fiduciary and, accordingly, lawyers owe a duty of care to exercise reasonable competency and skill in the conduct of the client’s matter”.<sup>3</sup>
5. The duty involves taking reasonable care to avoid a foreseeable risk of injury,<sup>4</sup> including foreseeable risks “to which the client is reasonably likely to attach significance”.<sup>5</sup>
6. The duty of care and issue of liability was described in *Goddard Elliott v Fritsch* as follows:

*“Professionals such as solicitors and accountants owe a concurrent contractual and tortious*

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<sup>1</sup> (2016) 259 CLR 1.

<sup>2</sup> (2017) 259 CLR 275.

<sup>3</sup> *Rogers v Whitaker* (1992) 175 CLR 479, 487.

<sup>4</sup> *Jones v Bartlett* (2000) 205 CLR 166, [57].

<sup>5</sup> *Goddard Elliott v Fritsch* [2012] VSC 87, [417].

*duty to take reasonable care in the provision of advice and services to their clients. The contractual duty is implied by operation of law and the tortious duty arises out of the relationship between the parties. The liability of professionals for a breach of their duty in contract and tort is a concurrent liability. Where a breach of the duty is alleged, the client is therefore free to choose under which (or both) heads the claim is to be brought. As the standard of the duty is to take reasonable care and is the same in both contract and tort, the issue of liability will be determined according to the same standard in both cases.”<sup>6</sup>*

7. The facts of this case involved the plaintiff, who was the legal firm Goddard Elliott, and the defendant, a former client of the firm. The defendant, after resolving a s 79 application on a final basis during a family law trial, later sued the firm on the basis that he believed he had been overly generous in the settlement and followed his solicitor’s advice, which he asserted was negligent. There were other issues in this case about the defendant’s capacity to give instructions. The defendant filed a claim alleging that the firm had been negligent, breached its fiduciary duty and engaged in misleading and deceptive conduct.<sup>7</sup> Bell J found that the firm had breached its duty, which caused the defendant to lose the opportunity to proceed to trial, where he would have had strong prospects of obtaining a substantially more favourable outcome than under the consent orders.
8. In determining whether the firm had breached their duty of care, Bell J considered the conduct of the settlement proceeding as a whole.<sup>8</sup> The judge took into account:
  - (a) the case preparation, including negligent omission in relation to failing to provide expert valuations and evidence at the commencement of the hearing;<sup>9</sup>
  - (b) the breach of duty by not preparing answering affidavits on his behalf in relation to costs to the detriment of the defendant; and
  - (c) negligence in taking and acting on instructions from the defendant to settle the case when the firm ought to have known that their client lacked the mental capacity to give proper instructions. Evidence was provided indicating that the process of signing the settlement was ‘quick’ and ‘rushed’ at the behest of the firm; the defendant was also diagnosed with several mental health conditions.

#### Australian Solicitors’ Conduct Rules on settlement advice

9. The *Australian Solicitors’ Conduct Rules* provide that a solicitor who provides settlement

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<sup>6</sup> *Goddard Elliott v Fritsch* [2012] VSC 87, [405].

<sup>7</sup> *Goddard Elliott v Fritsch* [2012] VSC 87, [6].

<sup>8</sup> *Goddard Elliott v Fritsch* [2012] VSC 87, [442].

<sup>9</sup> *Goddard Elliott v Fritsch* [2012] VSC 87, [445]–[457].

advice must act in the best interests of the client<sup>10</sup> and exercise reasonable care and skill under the common law duty of care.

10. In relation to the communication of advice, rr 7.1 and 7.2 provide:

*“7.1 A solicitor must provide clear and timely advice to assist a client to understand relevant legal issues and to make informed choices about action to be taken during the course of a matter, consistent with the terms of the engagement.*

*7.2 A solicitor must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the solicitor believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client’s best interests in relation to the matter.” [emphasis added]*

#### Case law principles on settlement advice

11. In deciding whether a solicitor has discharged their duty of care and skill owed to clients, *“...the court will, ultimately, inquire into whether the [settlement] advice proffered was within the range of advice that, in the circumstances as they presented themselves at the time, could reasonably and properly be given”*.<sup>11</sup>
12. Where reasonable care and skill is exercised, the advice to settle is not negligent simply because a court later decides that a more favourable outcome would have eventuated for the client had the matter been litigated to judgment.<sup>12</sup>
13. In terms of settlement advice, *“lawyers are obliged to give the client advice, couched in terms appropriate to the client’s understanding, sufficient to afford the client the opportunity to make an informed decision whether or not to settle”*.
14. Ultimately, the duty of a solicitor in providing settlement advice is to inform and advise, not to force that advice on the client or make the decision for the client.<sup>13</sup>

#### Best interests approach to settlement advice

15. The obligation of solicitors is to *“warn ...of risks and pitfalls, correct wrong notions or unrealistic expectations and encourage the client in the direction the lawyer believes to be in the client’s best interest”*.<sup>14</sup>

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<sup>10</sup> *Australian Solicitors’ Conduct Rules* r 4.1.1.

<sup>11</sup> *Luke v Wansbroughs (a firm)* [2003] EWHC 3151 (QB), [114] per Davis J.

<sup>12</sup> *Studer v Boettcher* [2000] NSWCA 263, [63] per Fitzgerald JA.

<sup>13</sup> *Dutfield v Gilbert H Stephens & Sons* (1988) 18 Fam L 473, 474 per Lincoln J.

<sup>14</sup> *Masters v Dobson Mitchell & Allport* [2014] TASSC 31, [81] per Pearce J.

16. The above dictum by Pearce J reinforces the duty to act in the best interests of the client whilst providing settlement advice as set out in r 4.1.1 of the *Australian Solicitors' Conduct Rules*.
17. Importantly, it does not “necessitate an assessment couched in terms of a percentage likelihood of success, or the giving of a positive recommendation to settle or proceed”.<sup>15</sup>

Settlement advice solicitors need to provide

18. As alluded to by Fitzgerald JA in *Studer v Boettcher*,<sup>16</sup> providing advice to clients to settle involves consideration of matters that extend beyond the mere prospect of success if the matter was further litigated.

19. The relevant considerations are highlighted in the passage at [63] by Fitzgerald JA:

*“A lawyer’s advice to a client to make or reject an available compromise is commonly not concerned only with the client’s rights, obligations and hopes. Usually, other matters must also be considered. For example, it is often impossible to predict the outcome of litigation with a high degree of confidence. Disagreements on the law occur even in the High Court. An apparently strong case can be lost if evidence is not accepted, and it is often difficult to forecast how a witness will act in the witness-box. Many steps in the curial process involve value judgments, discretionary decisions and other subjective determinations which are inherently unpredictable. Even well-organized, efficient courts cannot routinely produce quick decisions, and appeals further delay finality. Factors personal to a client and any inequality between the client and other parties to the dispute are also potentially material. Litigation is highly stressful for most people and notoriously expensive. An obligation on a litigant to pay the costs of another party in addition to his or her own costs can be financially ruinous. Further, time spent by parties and witnesses in connection with litigation cannot be devoted to other, productive activities. Consideration of a range of competing factors such as these can reasonably lead rational people to different conclusions concerning the best course to follow.”*

20. Fitzgerald JA further elaborates on the approach that solicitors should adopt when advising on settlement at [75]:

*“Broadly, and not exhaustively, a legal practitioner should assist a client to make an informed and free choice between compromise and litigation, and, for that purpose, to assess what is*

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<sup>15</sup> *Jung v Templeton* [2010] 2 NZLR 255, [41] per Venning J.

<sup>16</sup> [2000] NSWCA 263.

*in his or her own best interests. The respective advantages and disadvantages of the courses which are open should be explained. The lawyer is entitled, and if requested by the client obliged, to give his or her opinion and to explain the basis of that opinion in terms which the client can understand. The lawyer is also entitled to seek to persuade, but not to coerce, the client to accept and act on that opinion in the client's interests. The advice given and any attempted persuasion undertaken by the lawyer must be devoid of self-interest. Further, when the client alone must bear the consequences, he or she is entitled to make the final decision."*

Circumstances that may give rise to liability

21. Courts are generally willing to provide protection against liability in negligence where a solicitor is providing settlement advice due to the nature of settlement advice which may involve difficult questions of judgment that ought not to be impugned.
22. For example, errors in judgment regarding advice as to settlement and the strength of a client's case may not amount to liability in negligence.<sup>17</sup>
23. However, advice that is patently wrong in law or involves a misstatement of fact will lead to the solicitor's liability in negligence.<sup>18</sup>
24. In *Seamez (Australia) Pty Ltd v McLaughlin*, Sperling J listed the following considerations as constituting a breach of duty by the solicitors:
  - (a) statements that the clients could not win, even though the solicitors were of the view that there was better than a 50:50 chance of winning;
  - (b) statements at an application for adjournment would be unsuccessful and/or futile, whereas an adjournment would very likely have been granted, sufficient to enable a new leading counsel to be found and briefed;
  - (c) statements that both counsel had withdrawn from the case whereas one had not; and
  - (d) the incorrect statement that a threatened injunction would prevent the clients from continuing in business.<sup>19</sup>

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<sup>17</sup> See, for example, *Hodgins v Cantrill* (1997) 26 MVR 481 and *Hickman v Laphorn* [2006] EWHC 12 (QB).

<sup>18</sup> *Seamez (Australia) Pty Ltd v McLaughlin* [1999] NSWSC 9.

<sup>19</sup> *Seamez (Australia) Pty Ltd v McLaughlin* [1999] NSWSC 9, [236].

## Advocates' immunity

### The principle

25. At common law, an advocate is immune from suit 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.<sup>20</sup>
26. A solicitor who is not acting as an advocate enjoys the same immunity as an advocate in respect of advice which leads to a decision affecting the conduct of the case in court.<sup>21</sup>

### The policy considerations underpinning the principle

27. In analysing the reasoning in both *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 ('*D'Orta*') and *Giannarelli v Wraith* (1988) 165 CLR 543 ('*Giannarelli*'), the Court held in *Attwells* that the public policy of protecting the finality of legal decisions reached by judicial officers and not allowing a collateral attack on those decisions later (through subsequent proceedings asserting negligence on the behalf of the solicitor) is the public policy underpinning the immunity. The Court held that the negligence of an advocate producing a different result is not sufficient to invoke the immunity, as it is objectionable for public policy:

"35 ... *The advocate's immunity is, therefore, justified as an aspect of the protection of the public interest in the finality and certainty of judicial decisions by precluding a contention that the decisions were not reached lawfully.*"<sup>22</sup>

### The scope of the immunity

28. The High Court further held that advocates' immunity is limited so that its protection:

"5 ...*can only be invoked where the advocate's work has contributed to the judicial determination of the litigation.*

6 *In short, in order to attract the immunity, advice given out of court must affect the conduct of the case in court and the resolution of the case by that court. The immunity does not extend to preclude the possibility of a successful claim against a lawyer in respect of negligent advice which contributes to the making of a voluntary agreement between the parties merely because litigation is on foot at the time the agreement is made. That conclusion is not altered by the circumstance that, in the present case, the*

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<sup>20</sup> Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Hayden JJ in *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1.

<sup>21</sup> Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Hayden JJ in *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1.

<sup>22</sup> *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1, 21 [35].

*parties' agreement was embodied in consent orders.*<sup>23</sup>

29. The High Court also held, as to the scope of advocates' immunity:

*"38 It is apparent from the passages set out above from D'Orta that it is the participation of the advocate as an officer of the court in the quelling of controversies by the exercise of judicial power which attracts the immunity. Because that is so, the immunity does not extend to acts or advice of the advocate which do not move litigation towards a determination by a court. In particular, the immunity does not extend to advice that leads to a settlement agreed between the parties. ..."*<sup>24</sup>

30. In *Attwells*, the plaintiffs settled their dispute on the first day of the trial and later asserted that the advice given to them by their solicitors in relation to the acceptance of the settlement was negligent. The plaintiffs were guarantors who had guaranteed \$1.5 million of a total debt owned by the company debtor. A Consent to Judgment was entered against the plaintiffs in the terms agreed between the parties to that litigation and part of the plaintiffs' claim against their solicitors was that the solicitors had failed to advise them as to the correct effect of the consent orders. The Consent to Judgment included a judgment being entered for the bank against the company and guarantors to pay \$3.4 million, but that the bank would not seek to enforce that sum if the guarantors paid \$1.75 million by a specified day. The settlement terms therefore imposed greater obligations upon the guarantors than could have been imposed at the end of the trial in the event that the borrowers did not pay the amount owing.

31. The Court quoted with approval the previous decisions of *D'Orta* and *Giannarelli*, which confirmed that advocates' immunity did not extend to all work in any way connected to litigation:

*"2 Attwells concerned whether advocates' immunity extended to negligent advice which led to the settlement of a case by agreement between the parties. The Court held that advocates' immunity does not extend where the work of an advocate leads to an agreement between the parties to litigation to settle the dispute.<sup>25</sup> The majority (French CJ, Kiefel, Bell, Gageler and Keane JJ) held that "...the intimate connection required to attract immunity is a functional connection between the advocate's work and the judge's decision"<sup>26</sup> and that functional connection was not present where proceedings were resolved by consent.*

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<sup>23</sup> *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1, 13 [5]–[6].

<sup>24</sup> *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1, 22 [38].

<sup>25</sup> *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1, 13 [5].

<sup>26</sup> *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1, 13 [5].

32. However, in order for the immunity to apply, “...*advice given out of court must affect the conduct of the case in court and the resolution of the case by that court.*”<sup>27</sup>
33. The Court distinguished between a “functional” or “intimate” connection between the role of the advocate as an officer of the Court in the exercise by the Court of judicial power to quell a controversy<sup>28</sup> and a mere “historic” connection. A “historic” connection is based on the fact that a settlement ends the litigation and the fact that settlement advice is part of litigation. It is clear from *Attwells* that the immunity will apply only where there is a functional connection. A historic connection is insufficient.
34. The necessary functional connection can also be summarised as “*work done out of court which leads to a decision affecting the conduct of the case in court*”,<sup>29</sup> or, to express the approach in relation to work done out of court in another way, “*work intimately connected with work in a court*”.<sup>30</sup>

#### **‘Out of court work’**

35. In *Giannarelli*, a majority of the High Court upheld the common law immunity from suit of an advocate. Mason CJ described the boundaries of the immunity in the following terms:

*“Preparation of a case out of court cannot be divorced from presentation in court. The two are inextricably interwoven so that the immunity must extend to work done out of court which leads to a decision affecting the conduct of the case in court. But to take the immunity any further would entail a risk of taking the protection beyond the boundaries of the public policy considerations which sustain the immunity. I would agree with McCarthy P. in Rees v. Sinclair where his Honour said:*

*‘... the protection exists only where the particular work is so intimately connected with the conduct of the cause in Court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing.’*<sup>31</sup>

36. The majority in *Attwells* held that there was no reason to depart from the test in *Giannarelli*.<sup>32</sup>

#### **‘Settlement’ work usually not covered**

37. Advocates’ immunity does not apply where the work of an advocate leads to an agreement

<sup>27</sup> *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1, 13 [6].

<sup>28</sup> *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1, 13 [6], 20–21 [33], 22 [38].

<sup>29</sup> *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, 31 [86].

<sup>30</sup> *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, 31 [86].

<sup>31</sup> *Giannarelli v Wraith* (1988) 165 CLR 543, 559–560.

<sup>32</sup> *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1, 21 [36].

between the parties to litigation to settle the dispute.<sup>33</sup> The majority in *Attwells* (French CJ, Kiefel, Bell, Gageler and Keane JJ) held that “...the intimate connection required to attract immunity is a functional connection between the advocate’s work and the judge’s decision”<sup>34</sup> and that functional connection was not present where proceedings were resolved by consent.

38. In concluding that the immunity does not extend to negligent advice which leads to settlement of a claim in civil proceedings, the majority held:

“38 *It is apparent from the passages set out above from D’Orta that it is the participation of the advocate as an officer of the court in the quelling of controversies by the exercise of judicial power which attracts the immunity. Because that is so, the immunity does not extend to acts or advice of the advocate which do not move litigation towards a determination by a court. In particular, the immunity does not extend to advice that leads to a settlement agreed between the parties. ...*”

39 *While the plurality in D’Orta did not state explicitly that advice leading to an out of court settlement was outside the scope of the immunity, it is apparent on a fair reading of their Honours’ reasons that the rationale of the immunity does not extend to advice which does not move the case in court toward a judicial determination.*”

[footnotes omitted]

and

“45 *... It is sufficient to conclude that the immunity does not extend to negligent advice which leads to the settlement of a claim in civil proceedings.*

46 *Once it is appreciated that the basis of the immunity is the protection of the finality and certainty of judicial determinations, it can be more clearly understood that the “intimate connection” between the advocate’s work and “the conduct of the case in court” must be such that the work affects the way the case is to be conducted so as to affect its outcome by judicial decision. The notion of an “intimate connection” between the work the subject of the claim by the disappointed client and the conduct of the case does not encompass any plausible historical connection between the advocate’s work and the client’s loss; rather, it is concerned only with work by the advocate that bears upon the judge’s determination of the case.*”<sup>35</sup>

[footnotes omitted]

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<sup>33</sup> *Attwells* at [5], [6], [38] and [46]; *Kendirjian* at 285–286 [31]–[32]; *Rogers* at [22]–[27].

<sup>34</sup> *Attwells* at [5].

<sup>35</sup> *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1, 22 [38]–[39], 24 [45]–[46].

## **Kendirjian**

39. In *Kendirjian*, the plaintiff rejected an offer of settlement on the first day of trial on the assessment of damages and did so on the basis of negligent advice. The plaintiff ultimately received an award from the Court, following the trial, of less than the offer. The primary judgment in *Kendirjian* was written by Edelman J, with whom all other members of the Court agreed.
40. Both Nettle and Edelman JJ observed that the assessment of whether an advocate’s advice is negligent is to be undertaken at the time the advice is given and not at the time of the unfavourable judgment.<sup>36</sup>
41. The Court in *Kendirjian* upheld the “functional connection” test in *Attwells*:

*“31 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.*

*32 ... As the joint judgment concluded, the giving of advice either to cease or to continue litigating does not itself affect the judicial determination of a case.”<sup>37</sup>*

[footnotes omitted]

## **Advice leading to settlement**

42. In considering the nature of the consent order made in *Attwells*, the Court held:

*“59 ... 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*

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<sup>36</sup> *Kendirjian v Lepore* (2017) 259 CLR 275, per Nettle J at 279 [7], per Edelman J at 287 [34].

<sup>37</sup> *Kendirjian v Lepore* (2017) 259 CLR 275, 285–286 [31]–[32].

*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.*<sup>38</sup>

43. The difficulty with the orders made by consent pursuant to s 79 or s 90SM of the *Family Law Act 1975* (Cth) stems from the following paragraphs of the majority in *Attwells*:

*“60 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.*

*61 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 s 477(2A) and(2B) of the Corporations Act 2001 (Cth). It is not necessary to consider such cases here.*

*62 In the present case, the consent order and associated notation by the Court reflected an agreement of the parties for the payment of money in circumstances where no exercise of judicial power determined the terms of the agreement or gave it effect as resolving the dispute. The consent order may have facilitated the enforcement of the compromise, but it was the agreement of the parties that settled its terms.*<sup>39</sup>

[footnotes omitted]

44. It is important to note that the mechanism that the parties in *Attwells* used to formalise the settlement reached between the parties on the first day of trial may be materially different to an order made by consent pursuant to s 79 or s 90SM of the *Family Law Act 1975* (Cth).
45. The consent order for judgment in *Attwells* simply reflected that a judgment was entered against the plaintiff guarantors for the full amount of the company's indebtedness to the bank

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<sup>38</sup> *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1, 27 [59].

<sup>39</sup> *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1, 28 [60]–[62].

and the Court noted the “...conditional non-enforcement agreement between the parties, which was not itself embodied or reflected in an order of the Court.”<sup>40</sup>

46. An order made by consent under s 79 or s 90SM of the *Family Law Act 1975* (Cth) still requires the exercise of judicial discretion as to whether the making of the order is just and equitable,<sup>41</sup> and also as to whether the order itself is just and equitable.
47. The High Court considered the making of a consent order by a Registrar of the Family Court of Australia in *Harris v Caladine* (1991) 172 CLR 84. In doing so, the High Court held:
- (a) that the power exercised by a Registrar in making a consent order was a judicial power, not an administrative power:<sup>42</sup>
- “... It follows that the making of a consent order by a Registrar, in exercise of delegated power, is a judicial function.”<sup>43</sup>
- (b) that a Registrar making an order under s 79 of the Act had to consider the matters in s 79(4) and determine that the order was just and equitable according to s 79. The Court held that the making of an order pursuant to s 79 by consent was not a “mere formality” and the Court could not simply “rubber stamp” the parties’ agreement.<sup>44</sup>
48. The High Court in *Harris v Caladine* has held that the making of an order under s 79 requires the consideration of the legislation, and determination of whether to make the order by consent through a process involving judicial discretion and the exercise of judicial power. That proposition has been supported in the context of a Registrar decision maker by the Full Court of the Family Court in *Maxwell & Miltiadis*<sup>45</sup> and in the context of a Judge decision maker in *Goddard Elliott v Fritsch*.

#### **Are orders by consent under s 79 or s 90SM a different kind of ‘settlement’?**

49. The difficulty with the orders made by consent pursuant to s 79 or s 90SM of the *Family Law Act 1975* (Cth) stems from paragraphs 59–61 of the majority in *Attwells* (quoted above at paragraph 43).

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<sup>40</sup> *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1, 14 [10].

<sup>41</sup> *Family Law Act 1975* (Cth) ss 79(2), 90SM(3).

<sup>42</sup> *Harris v Caladine* (1991) 172 CLR 84, per Brennan J at 101–102 and 106, per Dawson J at 115, per Toohey J at 133 and 140 [Toohey J is in dissent on the outcome of the appeal generally, though not on this point].

<sup>43</sup> *Harris v Caladine* (1991) 172 CLR 84, per Toohey J at 133.

<sup>44</sup> *Harris v Caladine* (1991) 172 CLR 84, per Brennan J at 102

<sup>45</sup> (2015) FLC 93-644.

Goddard Elliott (A Firm) v Fritsch<sup>46</sup>

50. *Goddard Elliott* was decided prior to *Attwells* and *Kendirjian*.

51. The trial judge gave short reasons in support of his decision to make the final orders by consent. Bell J considered that “...*there is personal participation by the judge in the merits of the orders and they represent a final determination of the proceeding for the purposes of the application of the immunity.*”<sup>47</sup> In that decision, Bell J considered he was bound by *Giannarelli* and *D’Orta* not to distinguish between various kinds of binding court orders.<sup>48</sup>

52. Nettle J (in dissent and holding that the immunity applied) gave separate reasons for judgment in *Attwells*. He held that:

“67 *When a matter is settled wholly out of court, the settlement does not move the litigation toward a determination by the court. Consequently, advice to enter into such a settlement does not attract the immunity. But where a matter is settled out of court on terms providing for the court to make an order by consent that determines the rights and liabilities of the parties, the settlement plainly does move the litigation toward a determination by the court.*

68 *It is true that, in the latter class of case, the determination will largely be the result of agreement as opposed to a working out by the court of the parties’ rights and liabilities. But even where the parties are agreed on the orders which should be made for the determination of their rights and liabilities, it remains for the court to be satisfied that it is appropriate so to order. Thus, for one party later to contend that it was negligent of an advocate to advise in favour of such a settlement will involve calling into question the rectitude of the court’s order.*”<sup>49</sup>

[footnotes omitted]

53. Gordon J also delivered a judgment in dissent in *Attwells*. Her Honour considered the nature of a consent order, including the fact that the making of a consent order under the *Uniform Civil Procedure Rules 2005* (NSW), which governed the making of the order by the New South Wales Supreme Court in *Attwells*, provided a discretionary power (“the court may give judgment”).<sup>50</sup> Her Honour’s view was that, as the Court had made a consent order that recorded the final quelling of the controversy by exercise of judicial power, the fact that a judgment was entered by admission or consent “... *in no way denies that the controversy*

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<sup>46</sup> [2012] VSC 87.

<sup>47</sup> *Goddard Elliott (A Firm) v Fritsch* [2012] VSC 87, 215 [813].

<sup>48</sup> *Goddard Elliott (A Firm) v Fritsch* [2012] VSC 87, 212 [811].

<sup>49</sup> *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1, 29–30 [68]–[69].

<sup>50</sup> *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1, 42 [120].

*between the parties was finally quelled by verdict and judgment. And the rights of the parties merged in that “final” judgment.*<sup>51</sup>

54. In our view, it may be held that the nature of an order made pursuant to s 79 or s 90SM of the *Family Law Act 1975* (Cth) is more analogous to the undecided categories of case referred to by the majority in *Attwells* at paragraphs 59–61 and as referred to in the dissenting judgments of Nettle and Gordon JJ.

*Rogers v Roche (No 1)*<sup>52</sup>

55. *Rogers v Roche (No 1)* was decided by the Queensland Court of Appeal after *Attwells* but before *Kendirjian* and provides a useful summary of the High Court’s reasoning in *Attwells* as follows:

*“[22] The primary judge’s decision was given before the High Court gave judgment in Attwells v Jackson Lalic Lawyers Pty Ltd. An issue in Attwells was whether advocate’s immunity extended to a solicitor’s negligent advice which led to settlement of litigation on terms disadvantageous to the client. By majority (French CJ, Kiefel, Bell, Gageler and Keane JJ; Nettle and Gordon JJ dissenting) the Court held that it did not. The Court:*

1. *reaffirmed the holding in D’Orta-Ekenaike that the advocate’s immunity from suit in respect of the advocate’s participation in the judicial process extends to protect a solicitor involved in the conduct of litigation.*
2. *reaffirmed Mason CJ’s explanation of the scope of the immunity in Giannarelli as it was described by Gleeson CJ, Gummow, Hayne and Heydon JJ in D’Orta-Ekenaike:*

*“there is no reason to depart from the test described in Giannarelli as work done in court or ‘work done out of court which leads to a decision affecting the conduct of the case in court’ or ... ‘work intimately connected with’ work in a court. (We do not consider the two statements of the test differ in any significant way.)”*  
*(Citations omitted.)*

3. *held that this test is not satisfied where an advocate’s work leads to an agreement to settle a litigious dispute, reasoning that although “an advice to cease litigating which leads to a settlement is connected in a general sense to*

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<sup>51</sup> *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1, 44 [126].

<sup>52</sup> [2017] 2 Qd R 306.

*the litigation which is compromised by the agreement”, “ ... the intimate connection required to attract the immunity is a functional connection between the advocate’s work and the judge’s decision”; the “advice given out of court must affect the conduct of the case in court and the resolution of the case by that court.”*

4. *held that “... it is the participation of the advocate as an officer of the court in the quelling of controversies by the exercise of judicial power which attracts the immunity” and for that reason “... the immunity does not extend to acts or advice of the advocate which do not move litigation towards a determination by a court.”*<sup>53</sup>

56. In that case, the Court commented that courts can have regard to the underlying rationale for the immunity where the application for the test of immunity is debatable.<sup>54</sup> In that case, the Court held that conduct in failing to properly prepare the claim before litigation commenced had no more than a historical connection with the subsequent litigation and therefore did not attract the immunity.<sup>55</sup> The conduct asserted to be negligent in that case included failing to obtain relevant evidence, including expert reports, and the Court ultimately held that pre-litigation work was not subject to the immunity.
57. The Court further held that “...*the applicability of the immunity turns upon the application of the test approved in Attwells to the acts and omissions of the advocate upon which the claim is based, rather than upon the identification of the particular cause of action upon which a plaintiff relies.*”<sup>56</sup> The Court distinguished between pre-litigation and litigation phase itself, holding that the acts and omissions of the advocate in the pre-litigation phase did not attract the immunity.
58. The Court ultimately held that the advocates’ immunity precluded only the parts of the appellant’s claim that relied on allegations of wrongful conduct by the respondents in relation to the preparation of the appellant’s claim during the litigation stage, including alleged failures by the third respondent to inform the appellant about her alleged conduct in the preparation of the litigation.<sup>57</sup> The Court held that the respondents’ alleged conduct in failing to properly prepare the claim, including obtaining available supporting documents and evidence and presenting it to the defendant as required by the *Personal Injuries Proceedings Act 2002*, had no more than a historical connection with the subsequent litigation and that

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<sup>53</sup> *Rogers v Roche (No 1)* [2017] 2 Qd R 306, 314–315 [22].

<sup>54</sup> *Rogers v Roche (No 1)* [2017] 2 Qd R 306, 317 [27].

<sup>55</sup> *Rogers v Roche (No 1)* [2017] 2 Qd R 306, 330 [60].

<sup>56</sup> *Rogers v Roche (No 1)* [2017] 2 Qd R 306, 322 [37].

<sup>57</sup> *Rogers v Roche (No 1)* [2017] 2 Qd R 306, 331–332 [65].

there was not the “...intimate and functional connection between the work of an advocate and the conduct of the case in court and its resolution by judicial decision which is required to attract advocate’s immunity.”<sup>58</sup>

### When is there a ‘functional connection’?

59. Given that *Attwells* (judgment delivered 4 May 2016) and *Kendirjian* (judgment delivered 17 March 2017) are still relatively recent in the context of the lifespan of commercial litigation, most post-*Attwells* and post-*Kendirjian* reported cases to date are largely applications for summary dismissal. Namely, a defendant to a proceeding where negligence is asserted applies to a court for summary judgment against the plaintiff, claiming that their actions are entirely immune from suit due to advocates’ immunity. Where advocates’ immunity presents an entire defence to the proceeding, it follows that the plaintiff’s case is bound to fail or has no reasonable prospects of success and, as such, summary dismissal is tactically a sound and relatively inexpensive way to favourably resolve the litigation on a final basis.

### *Manny v David Lardner & Associates*<sup>59</sup>

60. This case was an application to reinstate a struck-off company in the Supreme Court of the Australian Capital Territory. The plaintiff was the sole director and shareholder of three entities who ultimately sued the former solicitor of he and the three companies, who were all parties to an order in family law proceedings. There were injunctions against the companies restraining them from dealing with property.

61. The Court held in that case that it was arguable that advocates’ immunity from suit did not apply to the type of conduct likely to be in question because that conduct led to a consent or settled position between the parties. The Court held that “*whether or not it was so intimately connected with work in court so as to attract the immunity may be a question of fact and degree.*”<sup>60</sup>

62. On the advocates’ immunity point, and noting that in this preliminary application the facts and the application of the principles in *Attwells* may differ from that ultimately found by the Court in possession of all of the facts, the Court declined to strike out the plaintiff’s case on the basis that it was not satisfied, in the preliminary application argued, that the application of advocates’ immunity would amount to a complete and conclusive defence of the litigation such that the claim by the companies would be considered hopeless and should be summarily dismissed.<sup>61</sup>

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<sup>58</sup> *Rogers v Roche (No 1)* [2017] 2 Qd R 306, 330 [60].

<sup>59</sup> [2018] ACTSC 159.

<sup>60</sup> *Manny v David Lardner & Associates* [2018] ACTSC 159, 9 [32].

<sup>61</sup> *Manny v David Lardner & Associates* [2018] ACTSC 159, 9 [35].

Port Ballidu Pty Ltd v Mullins Lawyers<sup>62</sup>

63. This case involved a challenge to whether a director on behalf of a company had necessary authority to enter into a loan secured over real property. Ultimately, the plaintiff was not able to prevent a mortgagee from taking possession of the property and selling it, notwithstanding findings that the conduct of a director of the mortgagee constituted statutory fraud. Port Ballidu therefore lost the property to the mortgagee exercising its power of sale and sued a number of parties they asserted were knowingly concerned in the fraud perpetrated on Port Ballidu by its director and thus liable for the loss of the property. The defendant was a firm of solicitors who acted for Port Ballidu in proceedings.
64. Dalton J of the Supreme Court of Queensland distinguished between the functional connection and the historical connection in these terms, while commenting on the observation by the majority in *Attwells*:

*“...A decision to commence proceedings or to settle proceedings has massive consequences: the proceeding either goes forward, or does not go forward in Court... But it seems to me that the dicta extracted immediately above, and indeed the following paragraph of Attwells, shows that this is not enough. At paragraph [50] the majority in Attwells said:*

*“The insufficiency of a mere historical connection between an advocate’s work and a litigious event may be illustrated by reference to negligent advice to commence proceedings which are doomed to fail. No one suggests that the immunity is available in such a case. Likewise, advice to cease litigating or to continue litigating does not itself affect the judicial determination of a case.”*<sup>63</sup>

65. Dalton J went on to hold that the criticism of the defendant is that it did not commence a case against other parties. Ultimately, Dalton J dismissed the application to strike out the proceedings, holding that she was not satisfied that advocates’ immunity applied.

MSP v Adams Maguire Sier Lawyers (Legal Practice)<sup>64</sup>

66. In this case, Vice President Judge Hampel of the Victorian Civil and Administrative Tribunal held that a registrar considering matters under s 90SM(4) of the *Family Law Act 1975* (Cth) in the context of making orders the parties had reached by consent, was in fact exercising judicial powers.<sup>65</sup> Her Honour concluded that the case before her was distinguishable from the facts in *Attwells* and fell squarely within the exception carved out by the majority (in

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<sup>62</sup> [2017] QSC 91.

<sup>63</sup> *Port Ballidu Pty Ltd v Mullins Lawyers* [2017] QSC 91, 6 [16].

<sup>64</sup> [2017] VCAT 658.

<sup>65</sup> *MSP v Adams Maguire Sier Lawyers (Legal Practice)* [2017] VCAT 658, 9 [31].

paragraph of 61 of *Attwells*).<sup>66</sup>

67. To date, this case seems to be the only case considering advocates' immunity in the context of property adjustment orders made by consent under the *Family Law Act 1975* (Cth).

## Conclusion

68. Post *Attwells*, the law is not settled where court approval and consideration of a matter on its merits is required before the court can make an order resolving proceedings finally by consent. It is likely that a decision of Registrar or Judge in making the final orders by consent pursuant to s 79 or s 90SM of the *Family Law Act 1975* (Cth) may fall within the categories of case that the High Court did not decide, as set out in paragraphs 59-61 of *Attwells*.
69. What the cases highlight is that advocate's immunity has limits. In our view, the continuing work pressures on the Court and the increased focus for parties to resolve matters prior to trial, means practitioners need to be vigilant in protecting themselves in respect to settlement discussions and final settlements.
70. The risk for practitioners is that where we do not ensure there is a record that a client has been provided advice about their options and about any settlement they are considering we are leaving ourselves vulnerable to litigation about our professional conduct, even after the matter has settled. This is particularly the case where there are questions about a client's capacity to provide instructions.
71. Settlement of a matter by consent, does not prevent a client from making a complaint against their solicitor or barrister in relation to that very settlement.
72. As legal practitioners, more will be expected of us over a client. It is important then to be mindful of the professional risks we face when dealing with litigation, mediation and settlement of matters without participating in a trial. Turning our minds to the things we could have done to minimise our professional risks after a client has filed a claim against us alleging negligence, is simply too late.

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<sup>66</sup> *MSP v Adams Maguire Sier Lawyers (Legal Practice)* [2017] VCAT 658, 9 [32].