COOPER GRACE WARD
LAWYERS

Avoid getting sued to settle

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What we'll discuss today

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1. What is advocate's immunity
2. Circumstances that may give rise to liability
3. Risks to practitioners where they engage in settlement negotiations and 'out of court' work
4. Other areas of practice which pose a risk to practitioners
5. Some best practice suggestions

Attwells v *Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1

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- *Attwells* v *Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1
  - Held by French CJ, Kiefel, Bell, Gageler (Keane JJ, Nettle and Gordon JJ Dissenting)-
  - The advocate's immunity from suit:
    - is confined to conduct of the advocate which contributes to a judicial determination
    - does not extend to acts or advice that do not move litigation towards a determination by a court, including negligent advice which leads to a settlement by agreement between the parties.
    - does not extend to negligent advice not to settle proceedings

Attwells - Timeline

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Attwells and Lord guarantee a payment of liabilities of a company to a bank. The company defaults on its obligations to pay the bank and the bank commences proceedings.

Atwells and Lord and the company retain Jackson Lalic Lawyers Pty Ltd to advise and act for them.

Company debt of $3.4M.
Guarantees of $1.5M.
At trial total amount guaranteed alleged to be $1,856,122.

SC for the guarantors negotiate a settlement on the morning of trial whereby if the guarantors paid a sum of $1.75M within 5 months, the bank would not then enforce the full extent of the debt.

Guarantors allege they were told by Jackson Lalic to sign the draft consent orders as even if they defaulted they would not have to pay the full amount of the company debt

Atwells and Lord do not make payment of $1.75M and the bank commences proceedings to recoverall of the $3.4M debt

It was agreed that the advice given by Jackson Lalic was negligent, but it was argued advocates immunity was a complete defence

Attwells v *Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1

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- "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 parties' agreement was embodied in consent orders." (at para 6)

Is a consent order under s79 a different kind of consent order?

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- “The decision in *Chamberlain* does not assist the respondent. 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” (Attwells at at para 59)

Is a consent order under s79 a different kind of consent order?

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- “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.”
- Attwells at para 60

Is a consent order under s79 a different kind of consent order?

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- “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).

Is a consent order under s79 a different kind of consent order?

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- Other examples include the exercise of the judicial discretion to allow an agreement to amend a patent granted under the *Patents Act* 1900 (Cth) (See Novartis AG v Bausch & Lomb (Australia) Pty Ltd (2004) 62 IPR 71 at 75 [14]), 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".
- *Attwells* at para 61

Kendirjian v Lepore

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Kendirjian was injured in car accident. He engaged Lepore to act as his solicitor and commenced proceedings for damages

Lepore retained Conomos of counsel to appear at trial

Liability was admitted and the trial involved the assessment of damages only

On the first day of trial an offer was made to settle matters by the payment of $600,000. Kendirijan says Lepore and Conomos rejected the offer as ‘too low’ without telling him the amount of the offer and without having his written instructions to do so

Trial proceeds and Kendirijian receives an award of $308,432.75.

Kendirijan commences proceedings for damages of $312,567.25 plus interest and costs

Held at first instance that immunity from suit applied and matter was dismissed. Upheld on appeal. Special leave to appeal to the High Court granted.

Kendirjian v *Lepore* (2017) CLR 275

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- Argued for the plaintiff:
  - The scope of immunity is confined to conduct of the advocate which contributes to the judicial determination of litigation
  - Immunity does not extend to acts or advice which does not move a matter to judicial determination or advice which advances a settlement, or the rejection of an offer without instructions
- Argued for the defendants:
  - Immunity applies to work done out of court which leads to a decision affecting the conduct of the case in court
  - Immunity applies to giving advice, continuation of a proceeding in court, calling evidence and running a case to judgment
  - Advice not to settle a case is intimately connected with the conduct of the litigation

Kendirjian v *Lepore* (2017) CLR 275

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- Held:
  - The advocate's immunity from suit does not extend to advice not to compromise a proceeding
  - Court's approach in *Attwells* applied
  - Appeal from the decision of the NSW Supreme Court was allowed
  - Second respondent (Conomos) pay costs of the proceedings (Lepore had consented to the appeal as it related to him but Conomos maintained his position that *Attwells* should be distinguished or reopened in part)
  - Balance of matters remitted to the District Court of NSW

Rogers and Roche (no 1) [2017] 2 QdR 306

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"[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.

Rogers and Roche (no 1) [2017] 2 QdR 306

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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.)

Rogers and Roche (no 1) [2017] 2 QdR 306

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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 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."

Rogers and Roche (no 1) [2017] 2 QdR 306

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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."

Rogers v Roche (No 1) [2017] 2 Qd R 306, 314–315 [22].

Circumstances that may give rise to liability

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- Negligent advice which contributes to settlement of a matter
- Negligent advice not to settle a matter which results in a lost opportunity to settle
- Negligent conduct which arises prior to the commencement of litigation (such as work done under PIPA legislation in the pre-action stage)
- Failing to provide advice
- Providing incorrect advice

Circumstances that may give rise to liability generally in practice

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- Solicitors failing to keep contemporaneous file notes
  - Denning LJ (in dissent) in the matter of *Griffiths v Evans* [1953] 1 WLR 1424 at 1428 is the authority
    - "where there is a difference between a solicitor and his client….the word of the client is to be preferred to the word of the solicitor, or, at any rate, more weight given to it….If the solicitor does not take the precaution of getting a written retained, he has only himself to thank for being at variance with his client over it and must take the consequences'.
  - After considering that judgement Chesterman, J noted in the matter of *Dew v Richardson* [1999] QSC 192:
    - "I cannot accept it is a principle of law that wherever a solicitor and his client disagree about the terms of a retainer (or advice) and the solicitor has not made a written note of the communication the client's evidence must be accepted…..Which of their respective versions is to be accepted will depend on the persuasiveness of their evidence as judged by surrounding objective circumstances"

Circumstances that may give rise to liability generally in practice

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- *Hoult* v *Hoult* [2011] FamCA 1023
  - A case we know well in respect to its application to Financial Agreements
  - However, also contains cautionary tale in respect of maintaining file notes and detailing advice which has been given
  - The contents of the Wife's lawyer's file was relevant when the Court attempted to ascertain if certain schedules were present in the agreement when advice was given, and, whether the advice was actually provided.
  - In the absence of contemporaneous notes, Murphy J discussed the weight which could be given to the Wife's solicitor's evidence

Circumstances that may give rise to liability generally in practice

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- “I do not regard [the Wife’s lawyer’s] evidence as untruthful. I consider she was doing her best to give evidence which was as accurate as possible. But her evidence reveals a recall that is significantly impaired in respect of important aspects of the matter” (at para 47)
- “The absence of notes or other documents, the gaps in the solicitor’s recall, the total failure to recall anything of important matters (for example, what advice was given about the disadvantages of the agreement) and the patchiness of the recall of other aspects of the consultation with the wife (for example, exactly what advice was given as to the wife’s rights) cause me to have significant concerns about the reliability of the solicitor’s evidence.” (at para 50)

Circumstances that may give rise to liability generally in practice

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- “Despite my general reservations about the wife’s evidence…I also consider the wife’s evidence in that respect is consistent with the actions of the solicitor in not forthwith providing written confirmation of such advice as was given and the failure to take any diary note of any such advice.” (at para 91)
- “I consider [the wife’s lawyer’s] failure to recall any advice about any advantages or disadvantages (save the assertion that advice was given about the advantage of certainty which such answer, I consider, was prompted) to of itself lend weight to the wife’s evidence that little or no such advice was provided” (at para 92)

Circumstances that may give rise to liability generally in practice

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- By way of contrast, the matter of *Howarth v Miotti* [2009] QSC 096
- In that matter the solicitor's evidence was preferred over that of the client despite there being sparse file notes
- Action for breach of contract and negligence
- "The great difficulty with these two telephone calls is that, Miotti, did not make file notes or document these instructions in any way. Furthermore he did not write to the Howarths confirming what had occurred and he did not confirm in writing what the Howarth's instructions to him had been. Neither did he set out in writing the advice he had given them. Miotti is obviously open to criticism for these failures." (at para 86)

Circumstances that may give rise to liability generally in practice

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- The Court was referred to the dissenting judgment of Denning LJ in *Griffiths* v *Evans* and the judgment of Chersterman J in *Dew* v *Richardson*
- “Even accepting these obvious failings I prefer the evidence of Miotti to that of the Howarths because I consider that the evidence supports Miotti’s verson of events”.

Circumstances that may give rise to liability generally in practice

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- Scope of work – Financial Agreements and Consent Orders
  - Specifically, who is doing what?
  - For example:
    - who is managing the super splitting provisions after the Order or Agreement is finalised
    - who has undertaken the task of determining if a Trust or Company can actually do what is contemplated under the Order or Agreement
    - what disclosure is required and have steps been taken to actually review any disclosure
    - have you clarified what you are not advising on
    - have you clearly defined the scope of work in writing
    - have you taken a moment before the Agreement or Order is signed to confirm with the client the terms of settlement meets their objectives

Circumstances that may give rise to liability generally in practice

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- Client expectations versus the operative clauses of the settlement
  - Do the written terms of settlement consider what is to happen if everything does not go to plan
    - what happens if a party doesn't get their refinance
    - what happens if a property sells for less / more than is expected
    - are you requiring parties who are totally unable to communicate to somehow manage and agree on sale provisions for a property or business
  - One tool which is recommended here is the 'Pre-execution sign off letter' which is available through Lexon and relates to advice to be given to the client after negotiation in a commercial deal and prior to execution of the settlement
  - The letter can be easily adapted to our area of practice
  - The purpose of the letter is to refocus attention on the client's objectives and whether the terms of settlement achieve them

Circumstances that may give rise to liability generally in practice

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- Lack of curiosity or ‘digging’
  - have you made sufficient enquiries into the structure and composition of the asset pool
  - Relying solely on a client’s version of events or information without making any enquiries or accepting what the client tells you their financial adviser told them about a structure, are also examples where we can be drawn into error
- Lastly, cyber fraud and payment of settlement monies
  - have all clients been warned about the risks when paying settlement monies
  - have you / your firm implemented a policy of verifying all account details by phone before any payment is made

Do

Maintain file notes of your contact with clients Where that contact is mediation or Court, you should record specifics of offers exchanged, confirm the client's instructions to accept or reject the offer in writing, note the time and client's demeanor

Mark your archived files for Financial Agreements 'Do Not Destroy'. These original notes and documents may be the best evidence you have as to advice which was given

Give advice about settlement options and advantages and disadvantages often and early. Ensure you have updated your costs estimates and the cost implications of the choices the client is being asked to consider around settlement

Get instructions from the client in writing.

Pause before any settlement is signed and consider whether the settlement reached achieves the client's objectives. Have you contemplated that everything in the settlement may not go to plan and is that reflected in your terms of settlement

Don't

Assume your recall of a meeting or mediation will be able to satisfy an enquiry which may come many months or years after the event. Do not assume your version of events and the client's version will align

Forget that in relation to Financial Agreements they are challenged often many years after the deal is done; you need to ensure you have evidence of the advice you provided, enquiries which were made about structures and disclosure

Assume your client has understood your advice and won't need it repeated over the course of the matter. Don't assume that written advice about settlement provided for the first time on the morning of trial will be considered reasonable.

Assume the client won't change their mind or that they can't be persuaded later in time by a well meaning friend or colleague, that they should have gotten a better deal.

Assume the client will have stopped to consider if the settlement meets their objectives

Any questions?

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