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Liability for Failure to Warn

1 The 1992 decision in *Rogers v Whitaker* [1] is perhaps the leading modern authority in relation to fail to warn claims against medical practitioners (and against professionals generally). There, a patient, Maree Whitaker was almost totally blind in the right eye. Her ophthalmic surgeon advised her to undergo surgery both to improve its cosmetic appearance and also to restore significant sight to it. The surgery, whilst correctly performed, did not restore sight to the right eye, but it resulted in a condition of sympathetic ophthalmia in the left eye; a known although remote risk of the surgery. Ms Whitaker became effectively blind in both eyes and was awarded substantial damages at trial. The surgeon appealed to the High Court. It held, dismissing the appeal, that while there was no criticism of the surgery itself, the relevant failure by the surgeon was a failure to warn of the risk of developing sympathetic ophthalmia and the finding against the surgeon was upheld.

2 Since then, and although the decision has not quite celebrated its 21st birthday, forests of papers and seas of ink have been expended, dealing with nature and content of the duty to warn, as it applies to medical and legal practitioners in Australia. In the time available for this presentation, I cannot hope to even summarise all the legal developments since *Rogers*.

3 What I will try to do, particularly as this is a medico-legal conference where we don't all necessarily speak the other language [2], is to start with some basics and then move on to some cases and analysis. In broad terms the issues to be covered include:

a. how the duty to warn arises and how the content of the duty to warn can and does vary, depending on the particular situation;

[1] [1992] HCA 58 (19 November 1992)

b. the 'guiding principles' as to what needs to be conveyed to discharge the duty

c. various ways in which the duty to warn have been characterised (eg a duty to refer for further advice)

d. 'policy' considerations both in relation to the scope of liability part of the causation test and the specific policy consideration of the so called 'advocate's immunity'

e. The so called 'penumbral duty' and how it may be relevant to claims of this kind

4 Time permitting I will also touch on a few suggestions which may assist practitioners to mitigate the risk of claims for failure to warn.

5 Not only is this paper not a comprehensive analysis of the law, or even of the discreet issues it touches on; it also does not pretend to have any simple answer to how medical and legal professionals can readily identify the 'essence' of the duty they owe, so as to prevent allegations of negligent failure to warn being made. In the immortal words of Dan Akroyd [3], ("all we want are the facts, ma'am") these cases are largely about the facts and if they show any consistency at all, it is that outcomes can be difficult to predict. However the cases considered may just throw up a degree of guidance as to preventative steps that practitioners can take to minimise, if not eliminate, the risk of claims of this kind; or at least to enliven defences to any claim that materialises.

A 'First principles'

4 This paper is delivered to an audience that does not exclusively comprise lawyers and although I have tried to make it readily understandable to the non lawyer, it will necessarily assume a degree of familiarity with legal principle. That said, to set the scene it is appropriate to briefly revisit some fundamentals relating to duties that professionals owe to their clients/patients.

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[2] And where some of the legal participants may not have had a great exposure to professional indemnity litigation

[3] From Dragnet, a 1987 crime comedy film starring Dan Akroyd and Tom Hanks, based on the television crime drama of the same name starring Jack Webb. "All we want are the facts, ma'am" and "All we know are the facts, ma'am." [And it's in Wikipedia so it must be true.]

5 In simple terms, to succeed on a claim for damages due to breach of duty to warn [4], a claimant must establish three things: that a duty existed; that it was breached; and that the particular breach(es) caused legally recognised harm.

How does/can a duty arise?

6 I deal with the substance of the duty in more detail below, but while the starting point for its existence is frequently a contractual relationship, a duty can exist in the absence of a contract, such as where a patient contracts with a hospital but not with the doctor performing a particular procedure; or where an employed solicitor does work under a contract entered between client and (employer) law firm.[5]

7 In the 'garden variety' case, there is generally either an express or an implied term of contract to take reasonable care; or an independent duty to take care, or both.

8 An area where that is sometimes 'blurred' is where the contract is to do 'x' and the allegation is that the professional should have done something beyond, or in addition to, the terms of the contract (and of the duty arising from it).

9 This concept of an extended or 'penumbral' duty was, until fairly recently, regarded as having largely been put to rest, at least in relation to claims on solicitors [6]; but as the *Zakka* case shows, the concept has found some relatively recent appellate level support.

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[4] Other than in relation to 'advocates immunity' this paper does not consider possible statutory remedies such as under the Australian Consumer Law under the Competition and Consumer Act (2010) Cth, or the Fair Trading Act (1987) NSW. I simply note that you can misrepresent (ACL s28) or mislead (ACL s 18) by omission, and thus subject to a number of qualifications, it is conceptually possible to bring statutory claims on the same factual allegations that underpin 'fail to warn' claims in contract or tort

[5] Brennan CJ in *Breen v Williams* [1996] HCA 57; (1996) ; at 78 observed: "In the absence of special contract between a doctor and a patient, the doctor undertakes by the contract between them to advise and treat the patient with reasonable skill and care … A duty, similar to the duty binding on the doctor by contract, is imposed on the doctor by the law of torts … "

[6] see cases including *Waimond Pty Limited v Byrne* (1989) 18 NSWLR 642; *Heydon v NRMA Ltd* [2000] NSWCA 37; *Curnuck v Nitscke* [2001] NSWCA 176; *Kowalczuk v Accom Finance* (2008) 77 NSWLR; *David v David* [2009] NSWCA 8. *Waimond* especially is sometimes cited as an authority for the so called 'penumbral' duty (ie a duty outside the confines of a retainer) but in fact was determined, even by Kirby P, as a 'classic' breach of contract case: see 648F – 649A, 655C. Nonetheless the issue continues to be agitated from time to time: Eg *Ballantyne v Slape & Ors* NSWSC 2010/150382 (settled on confidential terms); where it was alleged a duty arose in consequence of a prior retainer coupled with knowledge that a transaction may cause harm to former clients.

Content of Duty to Warn

10 The law imposes a comprehensive duty on medical practitioners, to exercise 'reasonable care and skill' in the provision of professional advice and treatment. [7] The duty, so far as it relates to solicitors, can be expressed in the same way, but substituting the word "representation" for "treatment". What constitutes 'reasonable care and skill' in the particular factual circumstances will vary from case to case. However it is confined to taking 'reasonable' care – professionals do not have an absolute obligation to prevent harm occurring.

11 It has long been recognised that the standard of care and skill will also vary depending on whether the professional, doctor or lawyer, is a "general practitioner" or a specialist of some kind.[8]

12 However, whether a professional is a specialist or a generalist, one 'universal' in terms of a duty to warn, is to advert to and advise on, 'reasonably foreseeable' risks of harm – sometimes expressed as 'material risks'[9].

13 As a general proposition, the more serious the consequences, if a risk materialises; the more important it is to give an adequate warning and let the patient make an informed choice. Similarly, even if the consequences of a particular risk are not catastrophic, if there is a relatively high chance of such a risk eventuating, a proper warning should be given.

14 In a medical context that most obviously includes warning of a known risk associated with particular surgery, or of a known risk if diagnostically indicated testing is not carried out. For lawyers, it includes warning of the risk that a client might, for example, acquire a valueless

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[7] *Rogers*, [5]
Heydon v Nrma Ltd & Ors; Bateman & v Nrma Ltd & Ors; Morgan & Ors v Nrma Ltd & Ors [2000] NSWCA 374 at [146] per Malcolm AJA: 'In my opinion the approach adopted in Rogers v Whitaker is applicable to the duty of care of legal practitioners and the standard of care. Both barristers and solicitors owe a duty of care to those whom they advise or for whom they act. In the present context, their duty is to exercise reasonable care and skill in the provision of professional advice. The standard of care and skill is that which may be reasonably expected of practitioners. In the case of practitioners professing to have a special skill in a particular area of the law, the standard of care required is that of the ordinary skilled person exercising and professing to have that special skill. Each of Mr Heydon, Mr Morgan and Mr Bateman were persons who were among the leaders of the profession in the fields of company and commercial law and, in the case of Mr Heydon, also in the field of trade practices law. Each was acknowledged as having special skill or competence in the relevant areas. It did not follow from this that they were to be judged by some higher standard in these areas than the ordinary skilled person exercising and professing to have that special skill: see also *Duchess of Argyll v Beuselinck* (supra) at 183.'
[9] See for example *Wallace v Kam* [2013] HCA 19 at [8]

(or overvalued) property or business [10]; or make an improvident loan [11], or enter an agreement on a misapprehension as to what benefits they will receive (such as a binding Financial Agreement that is not 'binding' [12]). It might also include warning of the risk of an adverse outcome of a litigated claim, although this is a more difficult area, as the 'advocate's immunity' can have the effect that, even if a duty is breached, there is no liability.

Two 'limbs' of Causation

15 Causation, at law, involves two related but distinct enquiries. The first is whether the breach of duty caused the damage or loss as a matter of fact. That is sometimes expressed as whether the breach was a necessary precondition of the harm; or alternatively whether the harm would have occurred 'but for' the breach of duty. The second is whether it is 'appropriate' that legal responsibility should be attributed to the person in breach of duty. That is now referred to as the 'scope of liability' enquiry, and involves matters of policy [13]. In most cases, the enquiry is a relatively easy one – for example it is appropriate that a motorist who drives negligently and runs down a pedestrian be legally responsible for the harm caused. However as we shall see, the scope of liability enquiry can be a difficult one in more complex cases.

Breach of Duty is considered Prospectively; Causation Retrospectively

16 An often misunderstood matter relates to the distinction on between how breach of duty (on the one hand) and causation (on the other) are analysed. It is important to remember (although sometimes difficult to apply in practice) that the analysis of whether any duty was breached or not, must be conducted prospectively and not in hindsight, as is the case with analysing whether the breach caused the loss.

17 The distinction is important if only because it requires a degree of mental agility in moving between a prospective framework for analysing one key determinant of liability; and a retrospective framework for another. [If these analyses are conflated, as sometimes occurs,

[10] Eg, *Thomas v Adam* [2000] NSWCA 127;
[11] As alleged in *Dominic v Riz* (2009) NSWCA 216
[12] See *Schacht's* case, discussed later.
[13] *Waller v James* [2013] NSWSC 497 at [222] In short, the test for causation involves two considerations:
(a) would the plaintiffs' harm have occurred "but for" the acts or omissions of the defendant;
(b) should the defendant have to answer for the consequences of those acts or omissions. This aspect may require consideration of value judgments and policy choices, such matters being "regarded as central to the common law concept of causation" - *Chappel v Hart* , McHugh J at [24].

there can be real risk of an adverse finding for a defendant – particularly when the issue of breach of duty is viewed in hindsight].

18 The High Court reflected on the prospective nature of the analysis of breach of duty in the context of a personal injury claim in *Vairy v Wyong Shire Council*.[14] Hayne J said:

> "*In particular, the examination of the causes of an accident that has happened cannot be equated with the examination that is to be undertaken when asking whether there was a breach of duty of care which was a cause of the plaintiff's injuries. The enquiry into the causes of an accident is wholly retrospective. It seeks to identify what happened and why. The enquiry into breach, although made after the accident, must attempt to answer what response a reasonable person, confronted with a foreseeable risk of injury, would have made to that risk. And one of the possible answers to that enquiry must be 'nothing' … the enquiry about breach of duty must attempt to identify the reasonable person's response to foresight of the risk of occurrence of the injury which the plaintiff suffered.*
>
> *That enquiry must attempt, after the event, to judge what the reasonable person would have done to avoid what is now known to have occurred. Although that judgment must be made after the event it must seek to identify what the response would have been by a person looking forward at the prospect of the risk of injury … if instead of looking forward, the so-called Shirt calculus is undertaken looking back on what is known to have happened, the tort of negligence becomes separated because, in every case where the cost of taking alleviating action at the particular place where the plaintiff was injured is markedly less than the consequences of a risk coming to pass, it is well nigh inevitable that the defendant would be found to have acted without reasonable care if alleviating action was not taken. And this would be so no matter how diffuse the risk was – diffuse in the sense that its occurrence was improbable or, as in Romeo, diffuse in the sense that the place or places where it may come to pass could not be confined within reasonable bounds.*"

19 The same position applies in claims against professionals. As was said in *Rosenberg v Pervival,*[15] a medical negligence case:

> "*In the way in which litigation proceeds, the conduct of the parties is seen through the prism of hindsight. A foreseeable risk has eventuated, and harm has resulted. The*

[14] *Vairy v Wyong Shire Council* [2005] 223 CLR 422 at [124-128]

particular risk becomes the focus of attention. But at the time of the allegedly tortious conduct, there may have been no reason to single it out from a number of adverse contingencies, or to attach to it the significance it later assumed. Recent judgments in this Court have drawn attention to the danger of failure, after the event, to take account of the context, before or at the time of the event, in which a contingency was to be evaluated. (See eg, Jones v Bartlett [2000] 205 CLR 166 at [176]; Modbury Triangle Shopping Centre Pty Limited v Anzil [2000] 205 CLR 254 at [263], [291 – 292]). This danger may be of particular significance where the alleged breach of duty of care is a failure to warn about the possible risks associated with a course of action, where there were, at the time, strong reasons in favour of pursuing the course of action."

B Guiding Principles about content of the Duty to warn

20 The High Court in *Rogers* said that:

"*The patient's consent to the treatment may be valid once he or she is informed in broad terms of the nature of the procedure which is intended … but the choice is, in reality, meaningless unless it is made on the basis of* ***relevant information and advice****. Because the choice to be made calls for a decision by the patient on information known to the medical practitioner but not to the patient, it would be illogical to hold that the amount of information to be provided by the medical practitioner can be determined from the perspective of the practitioner alone or, for that matter, of the medical profession.*" [16]

Consequently, the obligation on the professional is to convey: "*The relevant information to the patient in terms which are* ***reasonably adequate … to the patient's apprehended capacity to understand that information***." [17] (emphasis added)

21 *Rogers* was, ultimately, a case about surgery in which a particular surgical risk eventuated. The finding of breach of a duty to warn was made on the express basis that the patient had overtly requested information about surgical risks.

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[15] [2005] HCA 62
[16] *Rogers* at [14]
[17] *Rogers* at [14]

22 The trial Judge had found the patient questioned her surgeon "incessantly"; and that as late as the day before the procedure she had requested, and her clinical notes were appropriately noted, that steps be taken to cover her "good" eye in order that it not suffer accidental damage. That was sufficient to put the surgeon on notice the patient had real concerns about risk; and was therefore sufficient to enliven an obligation to provide additional information. The trial Judge did not suggest a duty to warn would have arisen in the absence of a request for information from the patient.

23 So, one proposition that can be taken from *Rogers* is that determining what is 'relevant information and advice' will be informed, at least in part, by the conduct of the patient and/or the apprehended desire of the patient for information about a proposed procedure.

24 It follows that medical practitioners ought carefully consider, both the **conduct** of their patients and the extent to which the patient **appears to want additional or more detailed information** about a procedure (or, perhaps, about the choice between two or more possible procedures). [18]

Content of Warning – a contrast

25 In *Grinham v Tabro Meats Pty Limited* [19], a central issue was whether a medical practitioner had failed to properly advise in the first instance. There was also an issue as to whether there was a duty to *recall* a patient in order to give advice.

26 Mr Grinham had attended Dr Murray in 2002 to be immunised against Q Fever. Initial, pre-vaccination testing was inconclusive and the vaccination could not be performed. Mr Grinham was asked to re-attend for further testing but did not do so.

In 2006 he was affected by the virus and became seriously ill. He sued his employer abattoir and that case was settled.

[18] See also: *F v R* (1983) 33 SASR 189, King CJ said: "What a careful and responsible doctor would disclose depends upon the circumstances… The purpose of disclosure is to provide the patient with the information necessary to enable him to make informed decisions concerning his future.… The extent of the duty to disclose must depend greatly upon the patient's expressed or apparent desire for information.."

27 The employer (and Victorian Workcover) then sought to recover payments that had been made, from the doctor, on the grounds that she was "*negligent in her provision of advice as to the seriousness of the situation and in failing to recall Mr Grinham when he did not re-attend the clinic or undergo the requested pathology test*". [20]

28 In dispute was whether the doctor should have warned Mr Grinham not to return to the abattoir pending further testing; and whether Mr Grinham had actually been advised to return for further pathology testing after initial assessment of suitability for vaccination. The doctor conceded she did not warn Mr Grinham not to return to the abattoir pending further testing as to whether he was immune from Q Fever or not [21]; but contended she was under no duty to do so. Contemporaneous clinical notes supported the doctor's account that Mr Grinham *was* advised to return for more tests.

29 The doctor argued her advice was adequate in the circumstances, having been given to a person who "*was seemingly of reasonable intelligence and able to comprehend the meaning of a low positive result and the fact he would not be immunised at that time*". [22]

30 It was held that, even had more forceful advice been given, it was unlikely Mr Grinham would have acted differently. [23] The Court also accepted that, as Mr Grinham was of reasonable intellect and understanding, the doctor was entitled to believe and in fact reasonably believed, the patient had understood her advice to re-attend for testing. The trial judge described as a "counsel of perfection" the suggestion that the doctor should have done more than she did. [24]

31 Mr Grinham was a previously 'compliant' patient in relation to advice given to him, so there was nothing to put the doctor 'on enquiry' that she should follow him up if he did not attend for further testing. The Court was also satisfied that Mr Grinham knew, despite the absence of more detailed advice, that he remained at risk of contracting Q Fever if he returned to work pending further testing [25].

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[19] [2012] VSC 491
[20] *Grinham* at [7]
[21] *Grinham* at [65]
[22] *Grinham* at [76]
[23] *Grinham* at [156] Mr Grinham denied receiving a pathology slip, to attend for further testing, that he was in fact given. The Court considered an additional oral 'warning' to attend further testing would not have changed the patient's behaviour.
[24] *Grinham* at [154]
[25] *Grinham* at [72]

32 Mr Grinham submitted the doctor should have positively ensured he was recalled to the clinic for further tests. It was said that there was no defence available to the doctor that she had acted accordance with peer professional opinion. [26] The Court held that there was no such duty in this matter. It held it would be unreasonable to require a medical practice to implement a "recall system" for any patient who fails to re-attend for pathology testing. The doctor had received advice from other experienced medical practitioners, including a Department of Health specialist in Q Fever and that advice did not indicate it was essential or vital that the patient be followed up if he did not re-attend. In short, the Court accepted there was a respectable body of peer opinion that was of the view that a "mandatory recall" was not necessary.

33 It summary, the Court decided that, while there was a foreseeable risk of harm (contracting Q fever) to Mr Grinham, all that *reasonable care* required, was to *ask* him to re attend for further tests. The position may have been different if, for example, the patient was being tested for a contagious or a life threatening disease and initial testing was inconclusive. A more immediate personal or public health risk may have required the doctor to do more, and to actively recall the patient.

34 That was broadly what occurred in *Tai v Hatzistavrou.* [27] There, a doctor was held liable at trial for negligently failing to remind a patient, who he had referred for a procedure but who had not attended, of the risk of not undergoing the procedure. Mrs Hatzistavrou was a lady with a family history of cancer and was described by the trial judge as 'cancer phobic'.

35 She had regular pap tests and had undergone two prior 'D&C' procedures as advised by the Doctor, on a purely precautionary basis, ie, pre-operative testing had not indicated any specific risk or indicator of cancer, but the patient had undergone the procedure anyway.

36 In October 1992 she was again advised to have a D&C, and given documentation to take to the hospital at which the doctor operated, to book the surgery. It seems she lodged the document with the hospital but for reasons that are unclear, she was never scheduled for

[26] Under s59 of the Wrongs Act (Vic) but equivalent to s5O Civil Liability Act (2002) NSW. NB In *Brakoulias v Karunaharan* [2012] VSC 272, decided shortly prior to *Grinham*, the VSC expressly followed the NSW view, first expressed in *Dobler v Halverson* (2007) 70 NSWLR 151 in relation to s5O; to hold that s59 Wrongs Act was a defence and not an expression of the content of the duty; and that the burden of proof of the defence lay on the defendant asserting it.
[27] [1999] NSWCA 306.

surgery. [28] She later developed cancer, requiring quite significant treatment, although it was conceded that much of it would have been needed even if the condition had been detected sooner.

37 The doctor was held subject to a duty to contact (or follow up) the patient.

> *"…..as at 9 December 1992, Dr Tai had a patient who had been bleeding since early October; who had a family history of cancer; who he knew had an over concern about or was cancer phobic; who was bleeding and the cause of which was as yet undiagnosed; other non-invasive tests having proved negative; who had been his patient for a very long time - almost ten years; who, when on two earlier occasions a D&C was recommended by him, had lodged the form with the Hospital and had the suggested procedure within weeks of the recommendation; who had always complied with suggested procedures and tests; who was by age and history more likely to develop cancer; and who came from a non-English speaking background (although she had a good command of English). Additionally all this needs to be looked at in the context of the fact that the earlier cancer is detected the better are the prospects for a patient in reducing the likelihood of the cancer metastasising.*
>
> *It is my view that in those circumstances and probably in lesser circumstances, where a practitioner's long standing patient has not appeared for a recommended procedure on the practitioner's operating schedule after a reasonable time has elapsed, he or she has a duty to contact the patient to bring to the patient's attention that she has not presented and advise the patient of the possible consequences of the failure to have the procedure carried out. There is no reason to think that such a process would create enormous practical or administrative difficulties for a doctor or be prohibitively expensive. A letter or telephone call would suffice. The problem could also be overcome by the practitioner explaining to the patient at the time of the consultation that the Hospital should be able to carry out the procedure within a specified time limit and that if this doesn't happen then the patient should contact the practitioner or the Hospital.*
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> *There is no suggestion by Dr Tai that he said this to Mrs Hatzistavrou at either relevant consultation and the plaintiff gives no evidence that anything like this was said to her.* [29] (emphasis added)

38 The Doctor challenged the finding as to the extent of the duty; both on the basis that it was inconsistent with the policy underlying *Rogers*, viz, the autonomy of the patient and also because it was said to be onerous and impracticable. Both grounds failed. The NSWCA said that a duty to 'remind' was not inconsistent with the autonomy principle.

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[28] Mrs H initially said she was not given 'referral' documentation; but it emerged in her cross examination that she had; and that it had been submitted to the hospital. Lawyers on both sides were taken by surprise by this as each had subpoenaed the hospital but the form had not been produced. The trial was adjourned so that the hospital could be joined as a defendant, but that claim was out of time and leave to extend was refused

Priestley JA (with whom Handley JA agreed) referred to a number of authorities including an English case (unnamed in the judgment) in which it was held negligent to fail to make adequate arrangements for a patient to report to the physician on developments in his condition after treatment. He said:

> *71 The following passage then appears (at 152):*
>
> > *"A physician may expect his patient to co-operate in their common effort to restore the patient's health and, thus, may normally also expect a patient to behave reasonably in, for instance, presenting himself for an agreed appointment, heeding an important warning, ... or returning for treatment or further checks as requested." (Citations omitted)*
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> *72 The text then proceeds:*
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> > *"however, a physician may not always be justified in relying on a patient to behave reasonably in following his instructions, and certainly not in cases where difficult instructions have to be heeded and dangerous procedures are to be tried." (Citations omitted)*
>
> *73 The text then refers to various examples where the medical practitioner's duty continues notwithstanding that the patient would be expected to be anxious to co-operate.*
>
> *74 These last two passages support the position taken by this court in Kalokarinos [30] that responsibility for non-timely presentation may sometimes be shared between doctor and patient, but in doing so, also demonstrate the potential liability of the doctor.*
>
> *75 It would seem that all of the cases referred to in the text are, to a greater or lesser degree, distinguishable on their facts from those in the present appeal. They appear however generally to support the view that, depending upon the precise facts of the relationship between the doctor and the patient, when a doctor is treating a patient for what may be a serious health problem, and the doctor thinks it necessary, even if only for prudential reasons, that the patient should submit to a particular surgical procedure, then the doctor has a continuing duty to advise the patient to submit to the surgical procedure, so long as the doctor/patient relationship is on foot.*
>
> *This does not mean that the doctor should seek to impose the doctor's view upon the patient against the patient's will, but it does mean that the doctor has a duty to keep the doctor's opinion and advice before the attention of the patient so that the patient can decide upon the patient's course in light of up to date knowledge of the doctor's opinion.* [31] (my underlining)

39 A similar view was taken by Powell JA in a short separate judgment.

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[29] *Tai* at [50] (extracting from the trial judge's reasons)
[30] *Kalikarinos v Burnett* Court of Appeal 30 January 1996 (unreported)
[31] *Tai* at [72 – 75]

40 *Grinham* therefore applied the logic of *Rogers* in terms of providing '*relevant information to the patient in terms which are reasonably adequate … to the patient's apprehended capacity to understand that information'*. Mr Grinham was viewed by the Court as a reasonably intelligent man, and the advice from the doctor was characterised as suited to his apprehended intelligence.

41 There was no 'duty to recall' established on the facts in *Grinham*, but there was a finding of a 'duty to remind' in *Tai*. There is no easy way of distinguishing the decisions. The former involved a process aimed at preventing a risk of contracting a serious disease of which the patient was well aware; and the latter involved a procedure to exclude the possibility of a serious condition, which the patient's family history made her concerned might occur. Each risk, if it occurred, was likely to have grave consequences for the patient.

42 Perhaps the fact that Mrs Hatzistavrou had some specific risk factors – family history; 'cancer phobic'; prior compliance with similar precautionary procedures; undiagnosed bleeding etc – as opposed to Mr Grinham having only the 'general' risk of any worker involved in abattoir work, is enough to separate the cases, but I must say I do not find that particularly convincing.

43 The decisions perhaps best illustrate how differently constituted courts can reach different conclusions about duty and breach; and thus why it is difficult for mere legal practitioners to predict outcomes with certainty.

Duty to Warn differently described?

44 In *Paul v Cooke*[32], at issue was how far a practitioner's duty extended. Specifically, was a negligent *diagnostician* liable for adverse consequences of later surgery to treat the misdiagnosed condition?

45 A claim was made on a radiologist who, over two years prior to a procedure performed by other doctors to treat an aneurism (the surgery resulted in a stroke and permanent disability), had reviewed and reported on an angiogram. It was conceded the radiologist negligently failed to detect *and warn of* the presence of the aneurism.

[32] [2012] NSW SC 840

46 Although the doctor admitted breach of a duty to diagnose, he denied this duty extended to taking reasonable care to avoid harm flowing from the subsequent treatment of a diagnosed condition; or that the plaintiff's permanent disabilities were legally caused by his breach of duty. He also argued the rupture to the aneurism was an inherent risk of the procedure the patient underwent, so that there was a statutory defence under Section 5I CLA. [33]

47 There clearly *can* be a legal connection between a prior breach of duty and the consequences of subsequent treatment. The Court in *Paul* adopted the observation of the High Court, in a personal injury claim of *Mahony v J Kruschich (Demolitions) Pty Limited* [34] in that regard.

48 The Court found that, 'but for' the defective diagnosis (and consequential failure to warn) the plaintiff would have had treatment sooner and, on the probabilities, the aneurism would have been obliterated without adverse consequences and the patient would therefore not have suffered the stroke she ultimately sustained. [35] Factual causation was therefore established.

49 However, the 'scope of liability' enquiry under Section 5D(1)(b) of the CLA was resolved in favour of the doctor. The Court held that the risk that an accurate diagnosis was intended to protect against, and thus the underlying policy rationale for the duty, was the risk of an *untreated* condition – in this case a spontaneous rupture of the aneurism - not the surgical risk of the very treatment that was obtained as a result of the diagnosis.

50 Put another way, the radiologist was only under a duty to warn of the existence of the aneurism; he was not under a duty to warn of an inherent risk of surgery to treat the diagnosed condition – being surgery the patient would have had, albeit sooner, if correctly diagnosed. As the Court said:

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[33] *Paul* at [1-2]. The section is as follows:
5I No liability for materialisation of inherent risk
(1) A person is not liable in negligence for harm suffered by another person as a result of the materialisation of an inherent risk.
(2) An "inherent risk" is a risk of something occurring that cannot be avoided by the exercise of reasonable care and skill.
(3) This section does not operate to exclude liability in connection with a duty to warn of a risk.

[34] *Mahony v J Kruschich (Demolitions) Pty Limited* [1985] HCA 37. "Provided the plaintiff acts reasonably in seeking or accepting the treatment, negligence in the administration of the treatment need not be regarded as a *novus actus interveniens* which relieves the first tortfeasor of liability for the plaintiff's subsequent condition. The original injury can be regarded as carrying some risk that medical treatment might be negligently given. It may be the very kind of thing which is likely to happen as a result of the first tortfeasor's negligence."

[35] The court concluded, based on expert evidence, that the patient would have adopted a 'clipping' procedure had it been correctly diagnosed by the radiologist; with a 99% chance of a successful outcome. [The 'coiling' technique ultimately used was also available at the time of the failure to diagnose, and had a slightly higher risk of intra operative rupture of the aneurysm.

> "*… Diagnosis is a precursor to treatment. Such treatment will usually carry some risks. Harm from the very treatment that prompt and proper diagnosis was intended to enable is not harm of the kind against which the relevant rule of responsibility was intended to protect a patient; to the contrary, it arises from performance of a duty to diagnose, rather than from breach of it*." [36]

51 The patient's condition had not materially changed between misdiagnosis and correct diagnosis/surgery, and the chance of a better surgical outcome had also not materially changed. Had it been otherwise, it would have been arguable there was indeed a direct connection between the failure to diagnose and the physical injury in which case, following *Mahony v J Kruschich (Demolitions) Pty Limited* legal responsibility would have followed. [37]

52 The doctor was successful in his defence at trial, but the decision is currently on appeal. If that appeal succeeds, a significant payment will be required. At trial damages had been agreed at $1 million, subject to the outcome of the liability decision and subject to a qualification if there was only a limited finding as to the damage caused by a breach of a duty of care. [38]

53 If nothing else *Paul* confirms that doctors can potentially (although not in this instance) be liable for the consequences, many years later, of events that might at least superficially be seen as constituting an entirely separate cause for any damage. It also shows that 'policy' considerations play a part in determining liability, that is, it is necessary to look closely at the rationale for any asserted duty, both to determine if it exists and what its extent may be.

54 *Sullivan Nicolaides Pty Limited v Pappa*[39] is a Queensland Court of Appeal case involving a diagnostician who failed to warn. It concerned a pathologist who removed a patient, Ms Pappa, from a Warfarin Care Service ("WCS") under which she was receiving a medication

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[36] *Paul* at [65]

[37] The case was distinguished from *Chappel v Hart* [1998] HCA 55 which also involved a progressive underlying condition; but the issue there was the failure to warn directly of surgical risk and whether if surgery had to be undergone anyway and a known risk materialised, that was 'damage'. There, the doctor argued the surgery was inevitable, and that as the risk that occurred was inherent to the procedure, the patient had no real chance of any better outcome. The High Court said that if properly advised (including as to the surgeon's relative inexperience) the patient would have obtained a more experienced surgeon and the probability of the risk materialising would then have been substantially less. It said the doctor's submissions confused the idea of the relative chance a risk would manifest in surgery; and the idea that had a proper warning been given, the actual physical harm would probably not have occurred. Importantly, there was a direct nexus between the failure to warn (of inexperience) and the occurrence of the surgical risk; whereas in *Paul*, there was no such direct nexus.

[38] *Paul* at [1]

[39] [2011] QCA 257

associated with an artificial mechanical mitral valve. The pathologist advised Ms Pappa and her GP, that he would no longer provide the WCS. However the pathologist failed to expressly warn either the patient, or her GP, that the patient was in a 'high risk' category. The evidence was that if the GP had been so advised, the patient would have been referred immediately to a cardiologist for review. In the event, two days after her removal from the WCS the patient suffered a stroke caused by a blood clot, resulting in severe disabilities. She obtained significant damages at trial.

55 On appeal the pathologist sought to challenge the finding that there had been a breach of a duty to warn, but was unsuccessful. The evidence was that during the period when Ms Pappa was a patient, the pathologist simply provided her with Warfarin dosage instructions and the date for her next blood test, but gave no advice about her test results or their health implications for her. This was despite there being a significant variation in test results during the doctor/patient relationship - including on at least one occasion when Ms Pappa fell into a high risk category for blood clotting.

56 When the pathologist contacted the GP to indicate the WCS would be withdrawn, no specific advice was given to the GP about the implications of the patient's test results. The expert evidence was that, had Ms Pappa been referred to a cardiologist she would have been admitted to hospital for specific, closely supervised, further treatment. The Court of Appeal declined to disturb that finding.

57 The doctors in *Paul* and *Sullivan* were both diagnosticians, rather than treaters. Despite that, a fundamental criticism made in each claim, was of a failure to warn of matters the practitioner either knew of or should have known of. The distinction in outcome is that in *Paul* the failure to diagnose (and warn a patient about) was of a particular condition which, on the evidence, did not have any adverse effect on the patient – the ultimate surgical outcome may have resulted regardless of the diagnosis. By contrast, in *Sullivan*, although accurate test results were available, their implications were not conveyed to the patient or treating family doctor (ie the pathologist failed to warn of the outcome of diagnostic testing) and this did have a significant adverse outcome for the patient's health, who suffered the very 'spontaneous' risk referred to in *Paul* (see footnote 36).

58 The different outcomes as between *Grinham* and *Tai,* were largely fact driven. In these two cases, *Paul* and *Sullivan*, the different outcomes were essentially policy driven.

59 That is, the doctor escaped legal responsibility in *Paul* because of a policy consideration associated with the scope of liability enquiry, viz, that it would be unjust that the diagnostician be responsible for the risks of a procedure which was itself what a correct diagnosis was intended to procure. The doctor in *Sullivan* did not escape because, on the evidence not only was the failure to warn a necessary precondition of the harm suffered by the patient; it was also appropriate the doctor be legally responsible as the harm resulted from the very untreated condition the diagnosis or warning was designed to mitigate against – it was not the 'mere' consequence of a later procedure the diagnosis indicated should be undergone.

Duty to refer for treatment

60 As a variant on the 'fail to warn' theme, consider the fairly well publicised recent decision of *Vairipatis v Almario* [40]. This was a successful appeal by a doctor from a trial decision finding him liable for not referring a grossly obese patient for bariatric surgery.

61 The appeal succeeded on several bases, including causation [41] and because the NSWCA said that while general practitioners have an obligation to 'counsel' and 'encourage' patients to accept and act on referrals; they have no power (based on expert evidence) and no duty to do more. [42]

62 The case also touched on the issue of the different standards of care that apply to 'generalists' and' specialists'. The court accepted expert evidence that at the time of the doctor's alleged breach of duty, it was reasonable for a specialist endocrinologist not to refer an obese patient to a bariatric surgeon. Therefore, it held, no higher standard could be imposed on a general practitioner advising a similar patient at the same time. [43]

63 The cases above all concern circumstances in which a warning should have been given (or where it was alleged it should have been given) concerning surgical risks that *actually* eventuated. *Wallace* is very different.

[40] [2013] NSWCA 76
[41] As the patient had been referred by another doctor but did not act on the referral; there was no reason to think a referral from this doctor, even if given, would have changed the patient's behaviour.
[42] *Varipatis* at [38].

Duty to warn of risks that do not occur? Wallace v Kam

64 Whereas, in *Rogers*, the central issue was whether there had been an actionable failure to warn about a risk that *actually* eventuated; *Wallace v Kam* [44] concerned circumstances where the failure to warn was about a risk that did *not* occur (but where the patient said that if warned of that particular risk, the surgery would have been declined and that consequently the risk that actually materialised would not have occurred).

65 Dr Kam performed a lumbar fusion and pedicle screw fixation. That resulted in local nerve damage (neurapraxia, an inherent risk of the procedure). The trial Judge determined there had been a failure to warn of two risks. The first was of the local nerve damage which did occur and the second was a risk of paralysis (which did not occur).

66 On the evidence, the patient would not have undergone surgery if he was aware of the risk of paralysis; but had he been warned of the risk of local nerve damage alone, he would still have undergone the surgery. [45]

67 The case involved quite complex arguments about the connection between any breach of duty, as found, and the occurrence of particular harm and whether the 'scope of liability' should extend to the harm caused as a matter of policy. [46]

68 Somewhat oversimplified, the patient's case was that an operation is an 'indivisible whole' and the decision as to whether to have it, or not, requires *all* 'relevant information and advice' to be provided. If a doctor fails to provide relevant information and advice which, if supplied would have meant the surgery would have been declined, the argument goes that the doctor is legally liable for the actual consequences of the surgery (even if the risk that occurs is one that the patient knew of and accepted).

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[43] Ibid at [54-59]
[44] *Wallace v Kam* [2012] NSW CA 82; [2013] HCA 19
[45] Appellant's submissions 13 March 2013
[46] Section 5D(1)(b) CLA.
Section 5D (1) is as follows: 5D General principles
(1) A determination that negligence caused particular harm comprises the following elements:
(a) that the negligence was a necessary condition of the occurrence of the harm ("factual causation"), and
(b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused ("scope of liability").

69 The appeal was dealt with on the *assumption* that had the patient been warned of the risk of catastrophic paralysis he would not have undergone the surgery. [47]

70 The High Court delivered its decision on 8 May 2013. In a unanimous decision of five Justices, the appeal was dismissed. Had the appeal succeeded, there was likely to have been a significant extension of the obligation of medical practitioners to warn. The scope of 'relevant information and advice', in the sense used in *Rogers,* would necessarily have expanded. Medical practitioners would have had to warn of practically all possible risks of surgery, lest they later be held liable for a risk they in fact warned of, and which the patient made an informed choice to accept. That would have been a paradigm shift, because case law to date has generally recognised the impracticability of warning of every possible risk, however unlikely (eg that the operating table may collapse) [48]

71 In fact, the High Court decision is quite helpful as it sets out or re-states several 'principles' relating to failure to warn cases involving medical practitioners. They include:

a. The compensable element of a failure to warn is (only) the occurrence and consequences of the *physical* injury sustained through undergoing the procedure. Compensation is not available for a generalised exposure to risk; or an impairment of a right to choose. [49]

b. In determining legal responsibility, there are two related but distinct questions, one being purely historical (would the harm have been suffered 'but for' the breach of duty?) and the other being normative or policy driven (is it appropriate, as a matter of legal policy, that legal responsibility attach to the practitioner who failed to warn?). [50]

c. Prior decisions provide guidance in 'established classes' of cases, as the common law principle that precedent is binding unless overruled is not displaced by the current statutory formulation of the test of causation. [51]

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[47] *Wallace* NSWCA at [11] There was no evidence based finding in that regard. Allsopp P found that the trial Judge, although having reached the right conclusion, did so for the wrong reasons and had failed to make the necessary finding on factual causation or scope of liability thus requiring the Court of Appeal to make the assumption to dispose of the matter.

[48] This is referred to in several cases as an example of a remote risk which patients may have to be warned of.

[49] Wallace at [9]

[50] Ibid [11]

[51] Ibid [22]

d. In 'novel' cases, a Court must refer to the policy reasons for a finding that legal responsibility should attach to a failure to warn. [52]

e. A limiting common law principle is that a person under a duty to provide information which will be relied upon to make a decision, is not liable for every consequence of the decision; only for those flowing from the information being wrong [53].

72 On the facts, the High Court had no difficulty agreeing with the judges below that factual causation was established. The doctor failed to warn of both the risk of neurapraxia, and the risk of paralysis. Had the patient been warned of both, he would not have had the surgery and the physical harm (the neurapraxia) would not have occurred at all. [54]

73 However at a legal policy level, it was not appropriate to make the doctor legally responsible, because the risk which *actually* occurred was one which the patient had been prepared to accept. [55]

74 The decision is of some comfort to medical practitioners - at least because it does not *expand* the content of the existing duty to warn. However it probably will not change the *process* by which doctors protect themselves; they still will need to carefully consider both the conduct of their patients and the extent to which the patient appears to want additional or more detailed information about a procedure; and of course they must themselves know what the 'material risks' are, having regard to the particular patient's medical condition, so that the risks can be imparted in a way that is understood.

Solicitors Cases

75 As indicated above, the duty of a solicitor to a client is very similar to that of a doctor to a patient. At the risk of sweeping generalisation, much of what falls out of the solicitor cases in terms of duty and precautionary conduct, will have relevance to medical professionals too.

[52] Ibid [23]
[53] Ibid [24] citing: *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191
[54] Ibid [29]
[55] Ibid at [39]

Proving there has been no breach of duty to warn

76 Most solicitors will be familiar with the client who is adamant that they will not, under any circumstances, compromise a claim by or against them for damages ("it's a matter of principle") *regardless* of any advice as to their prospects of a successful claim or defence. That too ought to be prudently recorded (as it goes to factual causation), together with the actual advice (as this goes to whether any duty to warn/to advise, was discharged).

77 A good illustration of this point is *Bird v Ford* [56]. The plaintiffs sued their former solicitor for allegedly failing to warn that earlier litigation, conducted by the solicitor on the plaintiffs' instructions, had been 'misconceived and doomed to fail'. The plaintiffs sought, as damages, the recovery of their legal fees and disbursements already paid, and reimbursement for the adverse costs to which they had been exposed in the earlier litigation.

78 Two central planks of the plaintiffs' case were that there had been a failure by the solicitor to tell them that he did not have relevant skills or experience in the specialist area of law in which the underlying litigation was conducted (a claim for declaratory relief that the expulsion of the plaintiffs' child from a private school was wrongful and should be overturned); and a failure to warn that the earlier litigation itself was hopeless because the Court did not have jurisdiction to entertain the application that was pleaded.

79 Importantly, in the sense of finding a 'solicitor case' comparator for the earlier medical cases, there was no real allegation that the actual underlying litigation was not competently conducted. The complaint was that it should not have been conducted and that, had they been so advised, it would not have been commenced.

80 The solicitors were successful in their defence. The Court did not accept the proposition, implicit in the allegations, that the fact the solicitor had not been engaged in a prior case of the same kind, meant he did not have relevant expertise. [57] The Court also did not accept that the underlying case was 'hopeless'; rather it adopted the defendants' case that it was very difficult, albeit arguable.

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[56] *Bird v Ford* [2013] NSWSC 264. I acted for the defendant solicitors.

[57] The court accepted evidence the solicitor had engaged in prior analogous matters; and that his record of settling those matters without Court proceedings could itself be seen as a demonstration of having relevant skills. It is also

81 In that context, the Court held that, far from failing to warn, the solicitor with conduct had repeatedly, explicitly and in a detailed way, warned the plaintiffs about the significant risks of proceeding with the underlying litigation and urged them to compromise it. The Court found that the plaintiffs refused to accept the advice and were, in the vernacular, the authors of their own misfortune. The individual who had conduct of the plaintiffs' prior litigation, routinely made detailed file notes – not only of his *actual* personal and telephone conferences with his clients but, in addition, of his thoughts and 'musings' in anticipation of those conferences. Consequently at trial, in addition to presenting as a person with an intimate understanding of the law, and of the difficulties of the underlying litigation, he was able to amply satisfy the trial Judge that he had carefully thought about the risks of the litigation and had communicated those risks to the plaintiffs.[58]

82 The court accepted that the female plaintiff (who was the main protagonist in the negligence claim) was person of strong intelligence; and able to understand the advice given by the solicitor. Her denials that she had in fact understood certain aspects of the advice were found to be not credible.

83 In the language of *Rogers*, the advice given was relevant as it dealt with the foreseeable risk(s) of harm; and was delivered in a way suited to the apprehended capacity of the client to understand it.

84 The outcome in *Bird* contrasts to that in *Schacht* [59], a case involving a Financial Agreement under section 90G of the Family Law Act. The solicitor acting was retained, in January 2002 by Mr Schacht to prepare a Financial Agreement (FA) under Section 90C of the *Family Law Act 1975 (Cth).*

85 The FA was executed on 15 April 2002. It did not include, within the body of the document, a statement that each party had received independent legal advice prior to executing it. That is the very defect which caused the Financial Agreement that was the subject of proceedings in *Black and Black*, [60] to be set aside.

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noteworthy that the plaintiffs were referred to the solicitor by the NSWLS as an 'expert'; it wasn't the case of the solicitor volunteering a representation.

[58] One of the unsuccessful plaintiffs has lodged an appeal the decision.

[59] *Schacht v Bruce Lockhart Thompson and Dennis Michael Staunton (trading as Staunton and Thompson Lawyers) (No. 3)* [2013] NSWSC 316

[60] [2008] FamCAFC 7

86 About 12 months later, the FA was amended as a result of the acquisition of further property. Ostensibly, the amendment gave the wife greater rights than existed under the original document.

87 Mr Schacht's marriage later broke down and his former wife took proceedings to set the FA aside. The decision in *Black* was delivered between the hearing, and the decision on the wife's application. It was conceded that the outcome of *Black* meant the wife's application must succeed. The marriage parties later entered negotiations and settled their property dispute in December 2008. The terms of settlement were considerably less favourable to Mr Schacht than would have applied under FA drafted by the solicitor. Mr Schacht sued for damages.

88 The solicitor's case was that he had given express advice, in 2003, to make a new Financial Agreement to replace and supersede the (defective) 2002 FA, but the advice was rejected.

89 The solicitor was not accepted on his account of events. In part that was because there was a significant time lapse between the drafting of the agreement in 2002 and the trial in 2012 and it was disputed by the client; but fundamentally it was because the solicitor could not point to any contemporaneous notes or letters of advice that corroborated the account of events he gave in the witness box. In fact, the documents that existed were largely consistent with the client's version of events.

90 The Court stated it was "*simply inconceivable that a solicitor would permit a client to take a step against his express advice, without recording that fact in some contemporaneous document ...*". [61]

91 It was perhaps also relevant that the first time the solicitor gave his account of providing this advice was in the witness box – it apparently did not appear in his own affidavit of evidence in chief. The Court found that to the extent that records did exist, they favoured the plaintiff's version of what occurred.

92 In *Vagg v McPhee* [62] the Court considered an appeal by disappointed beneficiaries under a Will prepared by a solicitor. It was a fail to warn/advise case in the sense that the plaintiffs asserted such a failure as between solicitor and testator, resulting in loss to them.

[61] *Schacht* at [78]. See also my article (with Dr David Gawthorne) in the LSJ, June 2013 p40.

93 The deceased owned property as a joint tenant with her estranged husband. The effect of the joint tenancy was that on her death, her share of the property would pass to her husband by survivorship, not under her will.

94 She obtained legal advice after separation and in January 2005 she gave instructions to make a new Will, which was to include a 'request' that the house be sold and the sale proceeds be given to the deceased's (and her husband's) children for certain purposes. There were five children who were the residuary beneficiaries. At the time the Will was made the deceased was aware the property was owned in joint tenancy.

95 After her death, later in 2005, the house passed by survivorship. The beneficiaries sued, alleging a duty of care owed by the solicitors to them to ensure they received "the benefit of the assets" of the deceased in accordance with her wish.

96 That 'benefit' was not received, so the plaintiffs asserted, due to a negligent failure by the solicitor to advise the deceased that she could or should sever the joint tenancy (so that her share in the property did not pass by survivorship). [63] The beneficiaries failed at trial, and appealed.

97 The old common law position was that a solicitor did not owe a duty to a beneficiary. Since at least at the time of *Hill v Van Earp* [64] that position has been modified. Now, it is accepted that a solicitor's responsibility can extend to an intended beneficiary who may, as a result of the solicitor's negligence, be deprived of an intended legacy in circumstances in which *neither the testator nor his estate has a remedy against the solicitor*. [65] (my italics)

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[62] [2013] NSWCA 29

[63] *Vagg* at [4]. NB what actually happened, is that the estranged husband sold the house and, with apologies to the the Clampetts:

"Kinfolk said "Jed move away from there"
Said "Californy is the place you ought to be"
So they loaded up the truck and moved to Beverly.
Hills, that is. Swimmin pools, movie stars. "
(except it wasn't kinfolk that got him to move; and the destination was Bondi)

[64] [1997] HCA 9. A case involving a solicitor who negligently allowed the spouse of a beneficiary to be a witness to a will, thus voiding the gift to her by reason of the operation of s 15(1) of the *Succession Act* 1981 (Q) which reads as follows:

" Where any disposition of property ... is, by will, made in favour of a person who attested the signing of the will, or the spouse of such person, to be held by that person or, as the case may be, that spouse beneficially, the disposition is null and void to the extent that it entitles that person, the spouse of that person or another person claiming under that person or that spouse to take property under it."

[65] *White v Jones* [1995] 2 AC 207 at [268]

98 The appeal was unsuccessful on several grounds. Firstly, it was held that any duty of care in relation to advice was owed only to the deceased/the estate and not to the beneficiaries - such that they did not have the standing to sue. [66] The case was distinguishable from *Hill v Van Earp* in that, there, the policy rationale for extending the solicitor's liability was that the estate had suffered no loss and therefore had no standing to sue and it would have been irrational, where the beneficiary had suffered significant loss but had no formal standing, not to extend the scope of liability. [In *Vagg*, the allegation was that negligence had resulted in an asset *not being brought into* the estate for the benefit of beneficiaries. On that analysis, the loss was primarily that of the estate, and the executors *did* have a remedy in the sense used in *White v Jones,* if they wished to exercise it.]

99 Secondly it was held that, contrary to the appellant's submissions, the deceased had not sought specific advice about severing the joint tenancy and therefore no duty to advise ("warn") arose in any event.

100 The evidence was in fact consistent with the deceased being well aware there was a joint tenancy and of having drafted the Will to include the 'request' referred to above, because of that knowledge. [67]

101 An interesting aspect of the appeal decision was a challenge of the trial Judge's reliance upon the evidence of the solicitor who drafted the Will, in circumstances where her evidence was not supported by any contemporaneous corroborative documentary material. It was not suggested the solicitor had fabricated, but it was suggested she had reconstructed. [68]

102 Acceptance of the solicitor's evidence was critical to the outcome of the case, so the appeal point was pressed with vigour; relying in large part on a passage from *Watson v Foxman [1995] 49 NSW LR 315*:

> "…… *human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlayed, often subconsciously by perceptions of self interest as well as conscious*

[66] *Vagg* at [44]
[67] There are similarities to the rationale in *Rogers* here, in that in the absence of specific enquiry from the client, no duty to give specific advice arose. That said, it would be unwise to draw the comparison any further, as there are many cases in which solicitors have been held to be under a duty to advise even if not asked to do so.

consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience." [69]

103 The passage from *Watson v Foxman* is to similar effect what was said by the High Court in *Fox v Percy*, where a trial Judge's findings as to liability for a motor accident (where the central issue was which of two road users had crossed to the incorrect side of the road) was overturned on the basis that the trial Judge's decision was inconsistent with "*incontrovertible facts or uncontested testimony*". [70]

104 Despite those cautions about the lack of corroboration, the trial judge's acceptance of the evidence was not overturned, and the appeal failed. The Court of appeal did however express reservations about aspects of the solicitor's evidence, which suggests the issue was given very careful consideration. [71]

Revival of the penumbral duty? Professionals be warned

105 This area of tort law probably merits a paper of its own, but the recent history of penumbral duty can be encapsulated in a tale of three cases.

106 We start with *Citicorp v O'Brien* [72], a case where it was alleged the solicitor failed to give financial advice about the client's intended us of funds. The Court said, and it remained the orthodoxy for many years, that it was no part of the duty of a lawyer to give accounting advice. As the headnote of the decision relevantly put it:

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[68] *Vagg* at [81]
[69] *Watson* at [319], see also *Williams v Commonwealth Bank of Australia* [2013] NSWSC 335 at [7]. This passage was also relied upon by the trial Judge, Schmidt J in rejecting the evidence of the plaintiffs in *Bird v Ford* in circumstances where it was both internally inconsistent and also inconsistent with the contemporaneous corroborative document of the solicitor, particularly his meticulous file notes.
[70] [2003] HCA 22 at [28];
[71] Vagg at [88]: "Although there may be a suspicion of reconstruction involved in her affidavit evidence and some of her answers in cross-examination, nevertheless I do not consider that any relevant error has been demonstrated in the manner in which her Honour concluded that she would accept Ms Woodward-Brown's evidence such as would justify appellate intervention. If one resorts to the so-called *Fox v Percy* tests, then there is no indication that her Honour misused her position of advantage when assessing Ms Woodward-Brown's credibility. In particular, her evidence that she did advise Mrs Vagg that the joint tenancy could be severed if she wished to only leave her one half interest in the Winmalee property to her children, was not "*glaringly improbable*".
[72] *Citicorp Australia Ltd v O'Brien and Ors* [1996] NSWSC 514

> 3. *A solicitor, retained to act on a purchase or mortgage for their skill in the law, is not under a duty to inform every client of their views about the financial prospects of the purchase or mortgage where they felt or ought reasonably to have felt that there was a risk of loss. To impose such a duty would be to require solicitors to give opinions which they are not qualified to give, with the result that they would be liable in negligence if their views were incorrect and their client had acted upon the basis of those views.*
>
> *4. Given the nature of the retainer in this case, there was no obligation for the solicitor to provide investment advice; Hawkins v Clayton (1988) 164 CLR 539 at 578.*

Fast forward 10 or so years to *Dominic v Riz* [73] (which itself followed the various cases in footnote 6, amongst others). At first instance, Brereton J held that a solicitor retained to advise a borrower client was under a duty beyond the four corners of the retainer, because she was aware the client intended to apply the borrowed funds to an improvident transaction. He found a duty to warn existed; and that it was not sufficient to discharge it that the solicitor had advised the client to get accounting advice about the 'improvident' transaction before proceeding.

107 That aspect was reversed on appeal [74]. The gravemen of the appeal decision, on this issue, is also captured in a headnote which is as follows:

> *The advice given by the solicitor was adequate in the circumstances to discharge the duty of care to the client. The solicitor was not retained to advise on the underlying investment transaction and did not know the details of the investment. The solicitor thought that the investment involved large risks, however the solicitor also knew that the clients themselves thought that the investment was risky. The solicitor gave clear advice about necessity of receiving independent legal and financial advise about the proposed investment.*
>
> *(ii) The solicitor was reasonably entitled to believe that the clients had understood her advice that independent legal and financial advice about the proposed investment was required.*
>
> *(iii) To the extent that a solicitor who when executing a retainer learns of facts which put him or her on notice that the client's interests are at risk may be required to bring to attention the aspect of concern and advise of the need for further advice, that duty was discharged.*

Based on that reasoning, many defence lawyers thought 'penumbral duty' had more or less been laid to rest. The recent decision in *Zakka v Elias* [75] challenges that view.

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[73] *Dominic v Riz* [2007] NSWSC 1153.
[74] *Dominic v Riz* [2009] NSWCA 216.
[75] *Zakka v Elias* [2013] NSWCA 119 (13 May 2013)

108 It is in some respects a sad case as fundamentally it appears a young and inexperienced solicitor was prevailed upon by a relative to give 'over the kitchen table' advice about loan transactions. This was done outside the terms of her employment, with the consequence that she was uninsured for the claim against her. A claim against the employer, on vicarious liability principles, failed both at trial and on appeal.

109 One of the loan transactions involved Mr Zakka borrowing money from First Mortgage Company ('FMC') and 'on-lending' some of the FMC advance to a company known as Alispur. An issue on the appeal, was whether the trial judge was correct to find that the solicitor did not owe any duty to advise Mr Zakka more specifically about the risks of making the loan to Alispur. The trial judge had found that the solicitor was retained to advise on the FMC borrowing, but the retainer did *not* extend to advising on the Alispur loan and thus no duty to advise was owed[76].

110 She also held that if she was in error, there was no breach of duty both because the solicitor had in fact strongly advised Mr Zakka not to make the Alispur loan and because he was committed to it regardless of advice.

111 On appeal, Ward JA, with whom Emmett and Tobias JJA agreed, *expressly* held there was a 'penumbral duty' (ie a duty extending beyond the terms of the retainer) which required the solicitor to advise Mr Zakka about the risks associated with the Alispur loan. The duty was enlivened because the solicitor was on notice that the interest rate was high (20%pa); that Mr Zakka was an unemployed disability pensioner; that he could not repay FMC if Alispur defaulted; that there was apparently inadequate security for the loan; and that if there was a default Mr Zakka would lose his home. Her Honour found that the duty did not require the solicitor to give detailed advice about the Alispur loan; but did require that she advise Mr Zakka to get independent advice about the prudence of the transaction. That duty had been breached. [77]

112 However, the breach did not cause the loss claimed. The Court of Appeal, in effect, agreed with the trial judge that Mr Zakka would have proceeded with the FMC borrowing even if the

[76] Zakka at [51]
[76] Zakka at [84]; also Emmett JA at [156]

solicitor had warned him to make further enquiry as to the prudence of then on-lending to Alispur .[78]

113 To reduce the decision to the bare bones of causation analysis, and although it was not expressed in this way, the Court found breach of a (penumbral) duty but that the first limb of section 5D(1) of the Civil Liability Act had not been satisfied – there was no factual causation. It was not necessary to consider the second or normative limb of the causation test. However in terms of the concept of penumbral duty, *Zakka* makes clear that in some circumstances, a duty can exist that is wider than the strict terms of any contractual relationship. In this fact driven area, only time will tell precisely what cases are caught up in this extended duty.

Implications

114 So, what can we take from these cases? I suggest it is (at least) this:

a. In surgical cases, the decision to proceed is, with limited exceptions (eg emergency procedures) the patient's. If something goes wrong, you will need to be able to show (and it would certainly be prudent for you to be in a position to show) that the patient had all the 'relevant information' upon which to make that informed decision. Similar considerations apply to clients embarking on litigation or business transactions.

b. The content and presentation of 'relevant information' will vary: *Rogers*.

c. The greater the actual or perceived interest of the patient/client in information about the procedure/treatment/matter; the more important it is to provide information*: Rogers; Tai*.

[78] As Ward JA said at [109]: "The onus was on Mr Zakka to establish that, had Ms Rahe given the advice or warning that it is said should have been given, the First Mortgage Company loan transaction would not, on the balance of probabilities, have proceeded. Mr Zakka had already decided to lend money to Alispur and had signed a loan agreement to that effect. Mr Zakka expressed some urgency as to the documentation of the loan arrangements. Ms Rahe had advised Mr Zakka more than once that Mr Allem was or might be "a con" and that Mr Zakka risked losing his home. She had gone so far as to advise Mr Zakka (forcefully) that he should not do any deals with Mr Allem. In light of those warnings, Mr Zakka pressed for her assistance in relation to the First Mortgage Company loan. In my view the obvious inference is that Mr Zakka would have proceeded with the First Mortgage Company loan even had Ms Rahe explained more fully the basis on which the Alispur loan was risky and advised as to the steps that could be taken to investigate the security being provided."

d. If a particular risk has a relatively high chance of manifesting; or if a risk, although remote, is likely to have serious consequences for the patient, the imperative to warn of it is greater than for unlikely and less serious risks.

e. Explanations have to be 'pitched' to the 'apprehended intelligence' of the patient [79].

f. Prior compliance by a patient with advice is a 'double edged' sword. In *Grinham* it helped the Court decide that a warning, actually given, was sufficient to discharge a duty. In *Tai* it helped the Court decide a warning, had it been given, would have made a difference. For lawyers, prior compliance is almost invariably bad news, because it enables clients to argue reliance and, if there is a failure to warn, the prospects of a causation defence are weakened.

g. If in doubt about what to advise a patient/client, get another opinion (or more than one) from a specialist in the particular field; or at least from one or more experienced colleagues. If nothing else that may enliven a defence based on peer opinion.

h. Just because someone else got their hands on the patient/client after you, doesn't mean you cannot be held legally liable for a failure to warn: *Paul.* Passing on the patient or client does not automatically mean you also pass on, or draw a line under, the risk of having failed to warn (although in some circumstances you may spread the risk).

i. Even if you think you are engaged only to do a particular or limited task; it would be prudent to consider the wider implications for the client/patient. As *Zakka* shows, if you are involved in only part of the client's wider affairs and, knowing of them, don't consider how they fit together with your specific role, there is a risk of a claim.

j. Document as much of the advice you give, as possible. It is the ability to *prove* the advice, as much as the advice itself, that is critical. *Bird; Schacht* . Also document comments by the patient/client about their intentions/resolve/willingness to consider more than one particular course/ willingness to accept advice etc. This may allow you to mount a 'causation' defence, even if a breach of duty is proved.

[79] By way of analogy, longer more complex words and phrases are acceptable for judges; but probably no more than two syllables for solicitors.

k. Despite the 'favourable' decision in *Wallace,* consider developing detailed pro forma 'plain english' documents, setting out as many risks of surgery as you can, possibly broken down into 'material' or 'remote' risk categories and ensure your patients all sign them before the procedure occurs. If in doubt that the patient understands the warning, think seriously about whether to operate at all. Similar considerations apply for lawyers.

Immunity from Suit

Introduction

1. One of the particular features about claims on lawyers – and one that tends to raise the ire of other professions from time to time – is that even when found to be 'negligent', lawyers sometimes escape liability because of the principle of immunity from suit. There is much law on the topic, most of it quite complex, and this paper cannot hope to deal with all of it.

2. The most important point to make is that the immunity is now squarely based on the principle of obtaining finality in litigation and avoiding collateral attacks on earlier decisions. That is, it exists on policy grounds for the purpose of upholding an important principle in our justice system, that disputes are to be resolved by judges and once resolved (including by way of available appeal) they should not be re-litigated, indirectly. A collateral effect may sometimes be that legal practitioners who would otherwise have been liable under general law principles, escape that liability; but that results form a balancing of policy considerations – it is not the purpose of immunity, as it is sometimes perceived.

3. It remains the case that it applies only to conduct in Court, or conduct out of Court with an intimate connection to the conduct of litigation in Court. However as I have recently discovered, somewhat to my surprise, even experienced lawyers often do not appreciate basic aspects of immunity: including that it applies to solicitors as well as counsel; and that it can cover pre-litigation conduct.

4. The leading cases on immunity are *Giannarelli v Wraith* [80]; and more recently, *D'Orta-Ekenaike v Victorian Legal Aid.*

Policy Foundations of the Immunity

5. In ***Gianarelli,*** three barristers and an instructing solicitor were sued for negligently failing to raise an available defence, to the effect that the key evidence relied on in the Crown case against Mr Gianarelli on a charge of perjury, was inadmissible under section 6DD of the Royal Commissions Act 1902 (Cth). In fact the evidence, which had been obtained in a Royal Commission, was admitted and Mr Gianarelli was convicted. He sued for damages.

[80] [1988] HCA 52

6. The immunity from suit was upheld, on policy grounds, to prevent possible collateral attacks on prior decisions of the Court [81]. It was for the protection of the administration of justice, not the protection of advocates [82].

7. Other reasons given for the immunity included that, in the absence of immunity, the independence of counsel and their ability to present a client's case, or to discharge their duty to the Court, may be curtailed due to fear of being sued. [83]

8. The Court accepted it applied equally to barristers and solicitors in relation to 'in Court' work. [84].

9. ***D'Orta*** was also a case arising from an earlier criminal proceeding (and like *Giannarelli,* involved consideration of some specific provisions of, and the history of, the *Legal Profession Practice Act* 1958 (Vic) – which will not be dealt with here.)

10. The appellant had entered a guilty plea on committal for a charge of rape and was committed for trial (sentence). He later changed his plea but was convicted at trial, where evidence was led of the earlier plea on committal. That conviction was subsequently quashed [85] and, on re-trial, Mr D was acquitted. He then sued his counsel and (legal aid) solicitor for negligently advising him to enter the guilty plea at committal.

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[81] *Giannarelli* eg at Mason CJ [18]; Wilson J [34-36]

[82] *Giannarelli* at Wilson J [42]. 'It must always be remembered that the immunity is granted not for the benefit of counsel but in the interests of the administration of justice'.

[83] *Giannarelli* at Brennan J [1]: 'Counsel who take part in proceedings in court (as well as witnesses and judges) must be able to perform their primary duty free from the chilling threat of civil suit by the parties to the litigation. A similar immunity, granted for similar reasons, attaches to members of Parliament taking part in the proceedings of Parliament.; see also Wilson J at [29]: 'Five distinct grounds of public policy were advanced in Rondel in support of immunity: the concern that if counsel could be sued for negligence, they would be tempted to prefer the interests of their clients and would be deflected from observing their duty to the court; the adverse effect that the fear of litigation may have on the barrister's efficient conduct of the court proceedings; the "cab-rank" principle, whereby a barrister is not free within his field of practice to choose whether or not to act for a person who desires his services and can pay his fee; the special character of the judicial process wherein judges, jurors and witnesses are immune from civil action; lastly, the threat to the public interest centred in the finality of litigation.'; Dawson J at [15] and [18].

[84] *Giannarelli* at [20].- expressed to extend to solicitors 'acting as advocates' but properly understood, the immunity applies equally to counsel and solicitors provided the work relates to the conduct of a matter in Court.

[85] The admission of evidence of the plea was proper, but the conviction was quashed as the tiral judge was held to have inadequately directed the jury as to how the evidence could be used: *D'Orta* at [7]

11. The majority decision in *D'Orta* is instructive, as much for telling us about the policy considerations that do NOT underpin immunity, as about which of them do. As the majority said at [25] – [29]:

> *25 ……But, as these reasons will seek to demonstrate, the decision in Giannarelli must be understood having principal regard to two matters:*
>
> *(a) the place of the judicial system as a part of the governmental structure; and*
>
> *(b) the place that an immunity from suit has in a series of rules all of which are designed to achieve finality in the quelling of disputes by the exercise of judicial power.*
>
> *Although reference is made in Giannarelli to matters such as:*
>
> *(a) the supposed connection between a barrister's immunity and an inability to sue the client for professional fees[19];*
>
> *(b) the potential competition between the duties which an advocate owes to the court and a duty of care to the client[20]; and*
>
> *(c) the desirability of maintaining the cabrank rule[21];*
>
> *each was, and should be, put aside as being, at most, of marginal relevance to whether an immunity should be held to exist. The first of these matters, even if it were well founded (and it is not), would be irrelevant to the liability of a solicitor-advocate and there is no sound basis for distinguishing between advocates according to whether the advocate does or does not have a contract with the client.*
>
> *26 The second matter assumes, wrongly, that the duties might conflict. They do not; the duty to the court is paramount. But, more than that, the question of conflicting duties assumes that the only kind of case to be considered is one framed as a claim in negligence. That is not so. The question is whether there is an immunity from suit, not whether an advocate owes the client a duty of care.*
>
> *27 The third consideration, the cabrank principle, is also irrelevant to the solicitor-advocate. Highly desirable as the maintenance of the cabrank rule is in ensuring that the unpopular client or cause is represented in court, it does not provide a sufficient basis to justify the existence of the common law immunity.*
>
> *28 Likewise, it is as well to mention at this point a further consideration that must be put aside as irrelevant. It may readily be accepted that advocates must make some decisions in court very quickly and without pausing to articulate the reasons which warrant the choice made. But so too do many others have to make equally difficult decisions. Reference to the difficulty of the advocate's task is distracting and irrelevant.*
>
> *29 Further, although not irrelevant, we would consider the "chilling" effect of the threat of civil suit[22], with a consequent tendency to the prolongation of trials[23], as not of determinative significance in deciding whether there is an immunity from suit. That is not to say, however, that the significance, or magnitude, of such effects should be*

> *underestimated. But while they are considerations that do not detract from the importance of the immunity, we do not consider that they provide support in principle for its existence.*

12. The clear foundation of immunity under Australian law, certainly since *D'Orta*, is the concept of finality of litigation[86] . Whilst that was referred to in *Giannarelli*, other rationales were also advanced. As the extract above shows, they are not important and are in fact marginal at best.

13. The 'advocates' immunity is one of several immunities – including for judges and witnesses – which are aimed at ensuring that once a Court has made a decision (including on any available appeal) the decision cannot be re-litigated or otherwise attacked. Indeed the rules of issue estoppel and res judicata [87] – principles with which most lawyers have at least a passing familiarity – are also part of the 'suite' of rules also directed to ensuring the finality of disputes or the 'quelling of controversies'.

'Conduct of a case in Court'

14. Whatever the policy rationale(s) on which immunity was or is based, in *Gianarelli* it was said to be limited, and did not apply to 'out of court' work. [88] A crucial issue, with which the Court grappled, was drawing a distinction between 'in Court' and 'out of Court' work. The test adopted (from New Zealand) was:

> *"... 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*

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[86] *D'Orta-Ekenaike v Victorian Legal Aid* [2005] HCA 12, at [34]: "A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances."
See also the separate judgment of McHugh J, also upholding the immunity at [140]: 'The truly distinguishing feature of legal practice is that it results in enforceable judgments. Those judgments may be called into question on appeal, including by attacks on the quality of legal representation provided. However, it is inimical to the legal process and the administration of justice, that matters be re-litigated for a collateral purpose or that judgments be fundamentally called into question in ways which cannot result in their amendment. And without abandoning the rule that judges and jurors cannot be called to give evidence to explain their decisions, it can only be guesswork in many - probably most - cases whether the advocate's negligence affected the result.'

[87] See, for example, *Hoysted v Federal Commissioner of Taxation* [1925] UKPCHCA 3; (1925) 37 CLR 290; [1926] AC 155; *Blair v Curran* [1939] HCA 23; (1939) 62 CLR 464; *Jackson v Goldsmith* [1950] HCA 22; (1950) 81 CLR 446; *Administration of Papua and New Guinea v Daera Guba* [1973] HCA 59; [1973] HCA 59; (1973) 130 CLR 353.

[88] *Giannarelli* at [21] per Mason CJ: 'However, the grounds for denying liability for in-court negligence have no application to work done out of court which is unconnected with work done in court: *Saif Ali*. The public policy considerations underlying immunity from in-court negligence have no relevance to a barrister's liability for negligent advice in relation to out of court matters….'

decision affecting the way that cause is to be conducted when it comes to a hearing".[89]

15. That formulation was, as the Court recognized in *Gianarelli,* difficult to apply with precision to given factual scenarios. The line was hard to draw. However the Court equally recognized the artificiality of confining the immunity only to work actually done in Court:

> *"The problem is: where does one draw the dividing line? Is the immunity to end at the courtroom door so that the protection does not extend to preparatory activities such as the drawing and settling of pleadings and the giving of advice on evidence? To limit the immunity in this way would be to confine it to conduct and management of the case in the courtroom, thereby protecting the advocate in respect of his tactical handling of the proceedings. However, it would be artificial in the extreme to draw the line at the courtroom door. 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*." [90]

16. This difficulty continues to exist, and the resolution of whether immunity applies to a specific situation must be addressed by referring back to the policy principle: does the impugned conduct involve a challenge, directly or collaterally, to an earlier final decision of a court? If it does, the immunity is likely to apply.

Final and intermediate results; and wasted costs

17. The focus needs to be on whether a later (civil) suit, seeks to remedy a 'wrong' in earlier litigation but for which there is no, or no adequate, redress within the earlier claim. The allegation made in later civil proceedings, and for which a remedy is sought, typically takes one of three forms, viz: (a) a wrong final result; (b) a wrong intermediate result; and (c) wasted costs. To extract from the majority judgment in *D'Orta*:

> *67 A client may wish to say that the conduct of the advocate was a cause of the client losing the case because, for example, a point was not taken, or a witness was not called, or evidence was not led. The client may have no appeal, or no remedy on appeal, as, for example, would generally be the case if the evidence not called was available at trial.*

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[89] *Rees v. Sinclair* (1974) 1 NZLR 180 at 187.

[90] *Gianarelli* per Mason CJ at [21].

68 A client may wish to say, as the applicant does in this case, that the conduct of the advocate (or here, the advocate and VLA) was a cause of the client suffering an intermediate consequence (conviction at the first trial and imprisonment) which was not wholly remedied on appeal. (The conviction was set aside but the client was incarcerated for a time and complains of that and what is said to have been caused by it.)

69 A client may wish to say that the conduct of the advocate was a cause of the client incurring unnecessary expense. That may be because a costs order was made against the client or because unnecessary costs were incurred in taking a step in the litigation.

70 What unites these different kinds of consequence is that none of them has been, or could be, wholly remedied within the original litigation. The final order has not been, and cannot be, overturned on appeal. The intermediate consequence cannot be repaired or expunged on appeal. The costs order cannot be set aside; the costs incurred cannot be recovered from an opposite party. And in every one of these cases, the client would say that, but for the advocate's conduct, there would have been a different result. In particular, leaving cases of wasted costs aside, the client wishes to assert that, if the case had been prepared and presented properly, a different final, or intermediate, result would have been reached. And yet the judicial system has arrived at the result it did.(my underlining)

71 The consequences that have befallen the client are consequences flowing from what, by hypothesis, is a lawful result. So, to take the present case, the imprisonment of which the applicant seeks to complain is lawful imprisonment. In a case where the client would say the wrong final result is reached, the result in fact reached is, by hypothesis, one that was lawfully reached. Whether the lawful infliction of adverse consequences (such, for example, as imprisonment) can constitute a form of damage is a question that may be noted but need not be answered.

Wasted Costs Generally

18 In the case of a disappointed client in criminal proceedings (such as in *Giannarelli* or *D'Orta)* the question of wasted costs may not arise simply because adverse costs orders are typically not made in criminal proceedings and costs are purely a matter between solicitor and client. However the rationale for preventing claims for wasted costs was well explained in *Bott v Carter*, when it was said:

The High Court also rejected the contention that a claim for wasted costs should fall outside the immunity, "lest a dispute about wasted costs become the vehicle

for a dispute about the outcome of litigation in which it is said that the costs were wasted": at [83]. In criminal proceedings there was no entitlement to recover costs from the other party, the wastage of costs being, accordingly, purely a matter between the client and the advocate. Nevertheless, in order to demonstrate a causal link between the negligence and the incurring of costs, the client might need to demonstrate how the impugned conduct or omission would have affected the outcome at the trial.[91]

While the policy basis of immunity is now fairly well settled; there still considerable scope for debate about specific scenarios.[92]

Application of Immunity

19 However there are a number of cases on, or dealing with, immunity, from which some useful 'rules of thumb' about the immunity can be derived. Most, but not all, post date *D'Orta*, and while I do not suggest this is close to an exhaustive list, I suggest the following propositions apply or are readily arguable based on the cases listed:

Acts vs Omissions

20 The distinction is immaterial. *Rees v Sinclair* is authority for the proposition that the immunity applies to omissions as well as acts. See also *Keefe*, below.

Settlements/Decisions on the Merits

21 Immunity applies regardless of whether there is a judicial decision on the merits: the issue is not whether there was a decision on the merits but whether the later suit seeks to challenge, directly or indirectly, a decision which has 'quelled a controversy'.

22 In *Chamberlain v Ormsby* [2005] NSWCA 454, counsel advised an injured worker to accept a settlement of his workers compensation lump sum claim arising from a work injury. The client accepted the advice and settled. The effect of the settlement was to preclude any later claim for common law damages. The client later alleged the advice was negligent and that he

[91] *Bott v Carter* [2012] NSWCA 89 at [30] per Basten JA

[92] See *D'Orta* at [95] where McHugh J held that:..'lawyers owed 'no actionable duty of care in respect of out-of-court conduct that is intimately connected with in-court conduct. They do, however, owe actionable duties of care in respect of conduct that is not intimately connected with in-court advocacy.'(emphasis added)

had thereby lost valuable rights. He sued the solicitor and the solicitor cross claimed on counsel.

23 The primary claim on the solicitor succeeded but the cross claim was dismissed; although those findings were flawed as the trial judge made some serious errors of law. However an issue on appeal was whether, assuming the barrister's advice on settlement to be negligent (it was held on appeal not to be negligent) it was covered by the immunity. Tobias J said, at [118]:

> *118 In any event, in my opinion the barrister was in the circumstances immune from being sued for negligence by the solicitor. In D'Orta-Ekenaike the High Court refused to reconsider its decision in Giannarelli v Wraith [1988] HCA 52; (1988) 165 CLR 543 notwithstanding the decision of the House of Lords in Arthur J S Hall & Co v Simons [2002] 1 AC 615. In particular, in their joint judgment Gleeson CJ, Gummow, Hayne and Heydon JJ held (at 770 [86]) that*
>
> *"... 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, as a latter class of case was described in an Explanatory Memorandum for the Bill that became the Practice Act, 'work intimately connected with' work in a court. (We do not consider the two statements of the test differ in any significant way)."*
>
> *119 McHugh J, whilst agreeing with the joint judgment, referred to the meaning of "intimately connected" and said (at 783 [157]):*
>
> *"The issue is whether the relevant connection with the conduct of the litigation exists, not the form of the negligence. An integral part of the advocate's role is the giving of advice on the basis of which the client will give instructions that direct the course of proceedings. The advice is critical to and often determinative of the client's decision."*
>
> *120 In the present case, the barrister gave the subject advice in the context of advising the appellant as to the effect his acceptance of permanent loss compensation would have upon such common law rights as to damages as he may have had. That advice was critical to the decision of the appellant to accept the settlement that was being offered by the employer's workers' compensation insurer with respect to the appellant's ss66 and 67 claims. His acceptance of that settlement was dependant upon firstly, the advice given by the barrister as to the likelihood of any claim for common law damages exceeding the thresholds and, secondly, the effect that acceptance of permanent loss compensation would have upon his common law rights, such as they were. It is difficult to imagine a stronger case than the present where the advice given by the barrister led to the appellant's decision as to the conduct of his case before the Compensation Court or*

> *which was more intimately connected with the course of that case including its settlement. (my emphasis)*
>
> *121 It follows that in my opinion even if the barrister was negligent (which in my opinion he was not), he was immune from being sued by either the appellant or the solicitor. Accordingly, the solicitor's cross appeal against the barrister should be dismissed with costs.*

24 The issue of the immunity for negligent advice on settlements was also considered in Victoria in 2012. The trial judge would have accepted a submission that a negotiated settlement not involving a hearing on the merits was not immune; however the judge was bound by the High Court to adopt the opposite view, viz, that a claim alleging negligent advice resulting in a settlement, was immune. [93]

25 It is worth noting, in the Family Law context, that 'settlements' which are reflected in Court orders are in any even in a slightly different class than a 'settlement contract' at common law; because the judicial officer must, under s 79 (2) of the Family Law Act, still give consideration to whether the settlement is 'just and equitable'. The same general position would apply, in my view, to any settlement that is approved by a Court, such as for an infant or other legally disable person.

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[93] *Goddard Elliot (a firm) v Fritsch* [2012] VSC 87 at [807 – 808; 811]

> 807 There is an argument that, if a case is settled without a hearing and the court does not pronounce a judgment on the issues, the public policy consideration of ensuring finality and preventing re-litigation of matters which have been judicially determined is not engaged. There is no final judicial determination to protect in the interests of justice. The controversy has been resolved by the agreement of the parties and not by a determination of a court. It is not absolutely necessary in the public interest to apply the immunity in that situation. There is no justification for abrogating a client's legal right to recover from a lawyer the loss and damage which the client has suffered as a result of the lawyer's settlement-related negligence.
>
> 808 It might equally be argued that there is no material difference between negligent advice given by a lawyer in a case where a dispute has been settled without litigation, which is actionable, and negligent advice given by a lawyer in a case where a dispute has been settled in litigation without the court determining the issues. The public policy foundation of the immunity is not engaged in either case and the immunity does not apply. The legal right of the client to obtain redress for the civil wrong of negligence, and the liability of the lawyer for such negligence when established, is not overridden in such cases.
>
> 811 If it was open to me to accept these arguments I would do so. However, I do not see anything in the several judgments in Giannarelli and D'Orta-Ekenaike (including the judgment of McHugh J) permitting me to distinguish between various kinds of binding court orders. Kelley has not been approved by the High Court and I cannot myself see how the analysis of the Court of Appeal in that case could fit into the framework of the analysis of the High Court in Giannarelli and D'Orta-Ekenaike. The test approved in those cases is (relevantly) whether the negligence or other cause of action occurred in the course of work leading to a decision about, or intimately connected with, the conduct of the case in court. As was held in *Chamberlain v Ormsby*,[263] giving settlement advice leading to court orders which deal with the action answers that description.

Failure to sue/Delay

26 There are a number of cases suggesting that a claim based on negligent failure to sue, or to advise a client to sue within limitation, are not within the immunity. [94] In theory, that is because the negligence relates not to the *conduct* of a case, but to its commencement (or more accurately, to the failure to commence).

27 In *MacRae v Stevens* [95], counsel negligently advised that certain proceedings could only be commenced in Queensland; and also negligently failed to advise of the (imminent) limitation date in Queensland. By the time this was discovered, the limitation date had passed for a claim in Queensland. In fact the claim could also have been commenced in NSW, but was not. [Although the solicitor knew of the Queensland limitation problem prior to the expiry of the NSW limitation period, counsel's advice was that no NSW claim was available]. The client sued the solicitor, who settled. The solicitor cross claimed on counsel, but failed at first instance due to the immunity. That decision was reversed on appeal.

28 The advice that the client could only sue in Queensland was said not to be given for a forensic purpose, such as determining in which of two or more jurisdictions a case ought to be commenced having regard to available damages in each, and thus could not be said to be advice leading to the conduct of a case in Court.

29 In *MM&R Pty Limited v Grills & Ors* [96], a dispute about the transfer of a radio license was considered. One of four 'co-venturers' using a corporate vehicle for their business, Mr Pieter Marchant, transferred the license to his own name without the knowledge of the others. MM&R (formerly a partnership but an incorporated legal practice at date of trial) was retained to 'recover' the license. MM&R was successful in the AAT, but Marchant appealed to the Federal Court. Pending the appeal hearing he effectively disposed of the license.

30 Shortly prior to the hearing it was discovered the appeal was incompetent, based on a prior Federal Court decision of which MM&R was unaware. The clients sued, asserting the immunity did not apply, because had there been correct advice there would have been no case at all.[97]

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[94] See for example: *Nicolaou v Papasavas, Phillips & Co* (1988) Aust Torts Reports 80-225; *Golec v Scott* (1995) 38 NSWLR 168; *Saif Ali v Sydney Mitchell & Co* [1980] AC 198; *Bott v Carter* [2012] NSWCA 89 at [21].
[95] *MacRae v Stevens* (1996) Aust Torts Reports 81-405
[96] *MM&R Pty Ltd v Grills & Ors* [2007] VSC 528
[97] *MM&R* at [28]: They argue that the failure of the solicitors to properly advise as to the incompetency of Marchant's appeal to the Federal Court cannot be said to be "a decision which affects the conduct of a case in court".

31 They relied on the fact that there was delay in identifying the correct legal position and that conduct of this character had not previously been identified in case law as so intimately connected to the conduct of a case in Court as to attract immunity. Cavanaogh J [98] held that on a proper characterization, the substance of the clients' complaint was negligent advice about the Federal Court appeal, and that the immunity therefore applied [99]; but commented that:

> 30 *I am prepared to assume that conduct by a legal practitioner which can properly be characterised as a mere failure to act promptly might, in some circumstances, fall outside the immunity, even when it occurs in connection with litigation already on foot.*
>
> *and,*
>
> 55 *I am not prepared to hold that it is clear beyond argument that the immunity precludes any claim at all against a solicitor for conduct which can properly be characterised as sheer delay or mere inaction. Counsel for the solicitors argued that everything done or not done by a solicitor in connection with litigation was protected by the immunity, except in the case of "fraud or reckless indifference, not acting honestly...[or failing to] follow specific instructions"[38]. However he was unable to point to any clear authority for such a sweeping proposition. In my view it is at least arguable that Giannarelli and D'Orta leave room for solicitors (and barristers) to be found liable in negligence for, at least, conduct which can properly be characterised as sheer delay or mere inaction (where action is required).*

Statutory actions

32 While not absolutely free of doubt, in my view the immunity applies regardless of whether the later suit is pleaded as a common law action in contract or tort; or as a statutory action eg under the Australian Consumer Law or Fair Trading Act.

They say that it had nothing to do with how the case was to be conducted in court, because "if the correct advice had been provided from the outset then there would have been no case to conduct at all".

[98] Different spelling to me, clearly from the wealth branch of the family.

[99] Properly characterized, the complaint was similar to that in *Giannarelli*, viz, failing to take an available point. MM&R at [32]: ' The facts of the present case cannot sensibly be distinguished from those of Giannarelli. In Giannarelli, counsel omitted during the trial and during the intermediate appeal to take the point which eventually succeeded in the High Court. As a result, the clients spent time in custody which they would not otherwise have spent, and incurred wasted legal costs. Now that D'Orta confirms or establishes that both solicitor-advocates and solicitors instructing counsel are covered by the immunity to the same extent as counsel, that coverage must be seen to extend to the omission of the solicitors to take the point in question in the present case. '

33 *Attard v James Legal Pty Ltd* [2010] NSWCA 311, was a case pleaded both in negligence and under s52 of the Trade Practices Act and s42 of the Fair Trading Act. It was a 'wasted costs' action, the appellant alleging that, due to solicitor negligence, it incurred unnecessary costs in defending a cross claim. The immunity was upheld in relation to one part of the suit. Whilst there is no express finding that the immunity *applies* to statutory claims, one would expect that if the reverse proposition were correct, the immunity would not have been upheld. Having regard to the principle underpinning immunity, that is entirely unsurprising.

34 Further, as a matter of statutory interpretation, legislation is not taken to limit or extinguish existing legal rights except by clear words. In the absence of a clear statement of parliamentary intention that the ACL or any other statute was intended to abrogate the immunity, my view is that it applies as much to allegations pleaded under statute as to common law claims.

35 This issue was specifically considered in *Goddard.* While allegations of misleading and deceptive conduct under the Victorian Fair Trading Act were dismissed on the evidence; the trial judge canvassed the applicability of the immunity to that cause of action, against the possibility she was reversed on appeal.

36 Bell J held, fairly unequivocally that, despite a contrary view being expressed by Gaudron J in *Giannarelli*, immunity applied to *all* causes of action. [100]

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[100] *Goddard* at [835 – 838; 1145] (footnotes omitted):
835 Reflecting the usual context in which the issue arises, it is easy to find statements expressed in terms of immunity from liability for loss and damage caused by negligence. However, the scope of the immunity is wider. Where applicable, it is a general immunity from suit. As was held in D'Orta-Ekenaike by Gleeson CJ, Gummow, Hayne and Hayden JJ, the principle is that 'an advocate is immune from suit whether for negligence or otherwise in the conduct of a case in court'.That is consistent with the public policy rationale for the immunity – finality of judicial determination – which applies equally to negligence and other causes of action.
836 In Yates, Branson J considered whether the immunity applied to an action based on s 42 of the Fair Trading Act 1987 (NSW), which is analogous to s 9 of our Fair Trading Act. Her Honour decided (obiter) the immunity did apply. Taking into account the interpretative principle that legislation is presumed not to interfere with fundamental common law rights or principles unless the intention to do so is manifest, she held there was no such intention in the New South Wales legislation. The judgment of Gaudron J in that case in the High Court contains an oracular statement to the contrary. The other judgments of that court do not deal with the issue. The matter has since been regarded as not settled and not appropriate for determination on an interlocutory basis.
837 The principle of interpretation relied on by Branson J in Yates is the one which was applied in Baker v Campbell. This is the principle as stated by Brennan J: 'The relevant rule requires a presumption that Parliament does not intend to exclude the operation of a fundamental principle of law unless it says so...' The principle was restated in Coco v The Queen by Mason CJ, Brennan, Gaudron and McHugh JJ as follows:

> The insistence on express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them.

37 Richard Douglas SC and Simon Cleary have argued[101] that the statutory regime under the Australian Consumer Law ('ACL') may displace the immunity. They contend there are six features of the ACL that point towards a parliamentary intention that the ACL circumvents the immunity. For myself, the argument is unconvincing. Fundamentally, had parliament intended to circumvent immunity it could (and should [102]) have done so in clear terms. It did not.

Are Pre-Litigation Acts/Omissions immune?

38 It is sometimes said that an act (or omission) was so long before any conduct of a claim in Court that it cannot be said to have any connection to the litigation and is therefore not covered by the immunity.

39 In *Bird v Ford* the plaintiffs sued to recover costs they paid their former solicitor, and costs they were ordered to pay the successful defendant, in earlier proceedings. The allegation was of negligent (positive) advice to commence the earlier proceedings at all. The claim was dismissed both because it offended the immunity principle and because on the evidence, the solicitor was not in breach of duty or retainer.

40 One of the allegations was that the client had given pre-litigation instructions to seek a pseudonym order. This was not done and the solicitor actually conceded such an application should have been made earlier in time [103].

The principle has frequently been applied in recent years. In *Lacy v Attorney-General of Queensland,* French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ said:
The objective of statutory construction was defined in *Project Blue Sky Inc v Australian Broadcasting Authority*[as giving to the words of a statutory provision the meaning which the legislature is taken to have intended them to have. An example of a canon [sic] of construction directed to that objective and given in *Project Blue Sky* is 'the presumption that, in the absence of unmistakable and unambiguous language, the legislature has not intended to interfere with basic rights, freedoms or immunities' That is frequently called the principle of legality
838 The immunity of advocates comes within this interpretative principle. Advocates personally have the immunity in the public interest. It could not be taken away by legislation without the language being unmistakable and unambiguous. Section 9 of the Fair Trading Act was enacted into Victoria's general system of law, which includes that immunity. The legislation does not exhibit a manifest intention to abrogate the immunity and it does not have that effect.
1145 Advocates' immunity operates in Australia to shield solicitors and barristers from liability for negligence (and other wrongs) occurring in the course of work leading to decisions about, or intimately connected with, the conduct of a case in court.

[101] 'Has advocates immunity from suit survived the Australian Consumer Law' (2013) 87 ALJ 172.

[102] *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, described as a 'cannon of statutory construction that " …in the absence of unmistakeable and unambiguous language, the legislature has bnot intended to interfere with basis rights, freedoms, or immunities'

41 Fundamentally, this allegation assumed that, had the application been made sooner there would have been a different outcome (Einstein J had refused the application when it was in fact made shortly prior to trial). This was a paradigm case of a collateral challenge to an intermediate outcome in a case, but for which there was no remedy within the case.

42 A similar situation was considered in *Keefe v Marks* [104]. The barrister was briefed to act as counsel for a plaintiff in a personal injuries case. He did not at any relevant time either prior to the hearing or at the hearing, direct his mind to the desirability of making a claim for interest. In consequence the plaintiff was not awarded interest at the trial. Gleeson CJ, with whom Meagher JA agreed, said at 719-720 –

> *"The barrister's alleged negligence involved a continuing course of conduct, or inaction, which extended up until the conclusion of the hearing before Master Greenwood and manifested itself in a failure to make a claim for interest, and to apply for any necessary amendment to the pleadings in order to enable that claim to be pursued*

[In the language of *D'Orta*, the claim on the barrister was a collateral challenge to the final decision in the underlying suit as it was implicit that a different outcome would have resulted had the interest claim been included.]

43 See also *Day v Rogers* which applied *Keefe* in finding that an error in the content of affidavits relied on at trial although initially, perhaps, the result of a negligent failure to consider what was needed to make out the clients case, was nonetheless work connected with the conduct of the matter in court and was therefore immune despite having occurred prior to the litigation commencing. [105]

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[103] *Bird* v Ford [2013] NSWSC 264 at [173]
[104] *Keefe v Marks* (1989) 16 NSWLR 713.
[105] *Day v Rogers* [2011] NSWCA 124 at 116 – 117. In my opinion, this was work done out of court leading to a decision affecting the conduct of the case in court. The work and decision were combined; there was a decision out of court, maintained as a decision at the hearing, upon how the case should be conducted in court. The appellant's work was within the test restated in *D'Orta-Ekenaike v Victoria Legal Aid* at [86], and within the alternative restated test of work intimately connected with work in court. The appellant in due course conducted the case in accordance with the decision he had made, relying on the affidavit evidence. His conduct of the case met at an early point with the application under r 29.9, but it was nonetheless conduct of the case in accordance with that decision. Calling what the appellant did failure to advise upon what evidence was required and marshalling the evidence does not change its character. The negligent conduct alleged in *D'Orta-Ekenaike v Victoria Legal Aid* was advice to enter a plea of guilty at committal. It was acted upon, and the guilty plea was led against the plaintiff in a subsequent trial. The advice "was work which an advocate did out of court but was work which led to a decision which affected the conduct of the case at the subsequent trial": *D'Orta-Ekenaike v Victoria Legal Aid* at [88]. Indeed, the effect was on a subsequent trial; it was more remote than an effect on the committal in relation to which the advice was given.

Claims by Lawyers *for* fees:

44 The vast majority of cases invoke immunity as a defensive tool, in response to allegations by disappointed clients of negligence or other causes of action. However, it 'cuts both ways' and can be invoked to prevent a suit by a lawyer for unpaid fees for acting in prior litigation, on the grounds that such a suit may result in allegations of negligence etc. such that the fees ought not be paid. This has the potential to involve a collateral challenge to the earlier decision (because for a Court to unravel which, if any, part of the unpaid fees were 'non-negligently' incurred, it would have to look at the conduct and outcome of the underlying litigation).

45 In *Foster James Pty Ltd v Dalton* [2010] VSC 327, a Mr Dalton of counsel had appeared for a client on instructions from Foster James. He was not fully paid (it was asserted, inter alia, that his conduct of the hearing had been affected by illness or drugs; that he made concessions without instructions and had otherwise conducted the claim such that the solicitor had been unable to obtain funds form the ultimate client to pay counsel). The solicitors pleaded defences of breach of retainer and set off. Counsel contended the defences were bound to fail because they offended the immunity.

46 The solicitors argued that immunity only applies where a lawyer is *being sued* for loss in relation to the conduct of the case; and could not apply to a purely defensive position.

47 To better understand the argument, it is helpful to see Foster James as 'the client' and Mr Dalton as 'the lawyer'. In that context the client asserted that whilst the immunity was a shield for claims against lawyers, it could not operate to prevent a defence to a claim by a lawyer for fees. The Court said:

> [35] *The contention is that it (the immunity) cannot apply in this case because Foster James' position is merely defensive – it does not seek to sue Mr Dalton.*
>
> *[36] The High Court authorities do concern claims by clients against their lawyers. The judgments talk in terms of lawyers not being liable to be sued in damages by their clients and reference is made in some of the judgments to the influence that the potential for being sued for negligence may have on counsel. However, one should look at the central justification for the immunity as expressed by the majority of the High Court in D'Orta-Ekenaike; that is, that controversies, once resolved, are not to be re-opened. That justification alone must also apply in circumstances where the client seeks to raise as a defence to a claim for fees, the conduct of counsel of the type alleged by Foster James against Mr Dalton. The same vice of collateral agitation of the substance of the matter*

will arise where there is subsequent litigation between persons involved in the original litigation although not parties to it.

The *particular case* need not offend the finality principle

48 *Attard* is also relevant here. On its facts it may not have involved a specific challenge to an earlier decision. The consent settlement (dismissing the impugned cross claim) had the same effect as would likely have resulted if the 'non-negligent' advice had been given: that is the Cross Claim would have been stayed. However the claim for wasted costs had *potential* to be a vehicle for a dispute about the outcome of earlier litigation. As was said in *D'Orta* at [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." [106]

Immunity doesn't depend on whether the *plaintiff* challenges an earlier decision:

49 Whilst this may initially seem counter intuitive, it is entirely logical. In *Bird,* the disappointed client sued their former lawyer for wasted costs of initiating allegedly misconceived proceedings.

50 The plaintiff positively contended the earlier decision, dismissing the underlying litigation, was correct. However such an allegation effectively invites a defendant to challenge the correctness of the earlier decision, to make out a defence. That involves a collateral or indirect attack on the correctness of the earlier decision. Such an attack cannot be made and accordingly the suit against the lawyer is immune despite the plaintiff overtly seeking to uphold the earlier decision.

[106] See also the extract from *Day v Rogers* at [132] , below

51 Similarly in *Day v Rogers* [107] the plaintiff had asserted no collateral challenge was involved, as the proceedings on which he sued were simply 'non-suited' and he was able to and in fact did commence later proceedings on the same cause of action which he settled. Briefly, solicitors and counsel had each acted for and advised Mr Rogers, as applicant, in a claim under the Property Relationships Act. The case was 'non-suited' or dismissed at hearing, as the evidence adduced in chief did not include any valuation evidence so as to establish the value of the property pool. [108] Mr Rogers, after settling his later claim, sued for the costs he had incurred in eth non-suited action. Both the solicitor and barrister were held liable at trial.

52 Rolfe DCJ had not considered either was immune from suit, as the relevant breach of duty was, in his view, failing to obtain (or advise Mr Rogers to obtain) proper valuation evidence and to adduce it properly. The barrister appealed [109].

53 Although the plaintiff had argued at trial that the rationale for advocates' immunity, namely, the finality principle, was absent: that is, Mr Rogers contended that as he could (and did) recommence his de facto case, there was no 'final' decision that was being challenged. However he also argued before the Court of Appeal that the trial judge in the initial Property Relationships Act case had been in error in exercising the discretion conferred by UCPR, r 29.9 to dismiss those proceedings.

54 Giles JA (Allsop P and Sackville AJA agreeing), having referred to the statement in *D'Orta-Ekenaike* at [83], said at [132]:

> *"Litigation of the [client's] claim against the [barrister] does in fact call in question the correctness of [the trial judge's] disposal of the proceedings by granting the application for dismissal under r 29.9, ...although at the instance of the [defendant] rather than the [plaintiff]. As I endeavoured to explain in Attard v James Legal Pty Ltd at [15]-[30], the rationale explained in D'Orta-Ekenaike v Victoria Legal Aid does not require a challenge to finality of a judicial act in the particular case ..."*

[107] [2011] NSWCA 124 (a case I was involved in at trial, although not on appeal)
[108] Put simply an error had been made because evidence was available; but had been put on only 'in reply' to the respondent's case. At the time Mr Rogers closed his application in chief, that evidence was not formally before the Court.

Agency

55 In *Donnellan v Watson* [110] the agent for the plaintiff's solicitor agreed to a compromise, contrary for his instructions. [111] The principal was liable for the actions of the agent. The case was decided on agency principles, and Mahoney and Waddell JJA each held that the claim did not involve any collateral challenge to a decision because there was no challenge to the correctness of the consent order; only to the negligence of the agent for agreeing to it, other than as instructed. Handley JA expressly held that the decision in *Giannarelli* was:

> "*…directed to cases where the claim against the solicitor is based on negligence and was] not applicable to an action of breach of the duty of the solicitor as agent not to compromise litigation otherwise than in accordance with the instruction of the client"*[112]

Personal Injury

56 In at least one case, the consequence of the alleged negligence by lawyers was a personal injury. Such a claim does not, at first glance, fall within the categories described in *D'Orta*, ie a wrong final result; a wrong intermediate result, or wasted costs. On closer examination it does, however, potentially involve a collateral attack on a prior final decision.

57 In *Bott v Carter*, the plaintiff had failed in a District Court work injury claim. His appeal to the NSWCA was struck out. Special leave to appeal to the High Court was refused. He then sued his solicitor and counsel for the alleged negligent conduct of the work injury claim. That action was also struck out [113] and Mr Bott appealed that decision too.

58 The key issue on appeal was whether, even if Mr Bott could make out any of his allegations, any cause of action could survive the immunity. One of his claims was for 'distress and anxiety' due to the conduct of his claim; with a secondary pleading of an inability to recover due to the absence of rehabilitation and other services which, he said, would otherwise have been available to him. These claims were all said to fall within the immunity [114].

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[109] The solicitors did not, on commercial grounds – the amount awarded against them was modest and the view was taken that the cost of an appeal, which were probably unrecoverable even if the appeal succeeded, may have been more than the judgment.
[110] *Donnellan v Watson & Anor* (1990) Aust Torts Reports 81-066; 21 NSWLR 335.
[111] It appears the agent agreed to an appeal being dismissed rather than withdrawn, with the result that the plaintiff lost the benefit of the trial decision.
[112] Cited by Beazley JA in *MacRae* at [63,689]
[113] It appears Mr Bott was acting for himself; and that his pleadings were not as good as they might have been.
[114] *Bott* at [36]: 'The third loss was a claim for compensation for "depression, feelings of anxiety and helplessness" caused by the conduct of his lawyers: par 75(c). He also sought damages for the loss of an opportunity "to recover from injuries suffered ... through continued physiotherapy and rehabilitation following a proper resolution of his

Donnellan v Woodland

59 Immunity has most recently been examined in the NSW Court of Appeal in *Donnellan v Woodland* [115]. A solicitor was held liable, at trial, for negligent advice concerning a litigated dispute with a local council concerning the grant of an easement. The NSWCA said, at [66]:

'R S Hulme J summarized his findings of negligence, at [172]:

"To summarize, Mr Donnellan was negligent in advising the Plaintiff to the effect that his case for the granting of the easement was strong and in failing to advise that there was a real or substantial risk that the easement would not be granted. Mr Donnellan was negligent also in not advising the Plaintiff that there was a probability that, even if the easement was granted, Mr Woodland would be ordered to pay the Council's costs. This negligence was repeated on a number of occasions when contrary views were expressed. Mr Donnellan was negligent in not advising the Plaintiff that there was a risk that any costs ordered might be on an indemnity basis."

60 The damages sought, and awarded, were for the costs incurred in the earlier litigation, including costs awarded against Mr Woodland in favour of the council.

61 The Court of Appeal reversed the finding of negligent advice, but also dealt with the solicitor's argument that, even if the finding of negligent advice was confirmed on appeal, he was immune from suit.

62 In doing so it reviewed a number of recent decisions in Australian superior Courts, most of which have been touched on in this paper [116]. It upheld the principle of finality as the rationale for immunity [117]

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claim": par 75(d). Apart from the fact that these claims did not, by contrast with the similar claims in *D'Orta-Ekenaike*, rise to the level of psychiatric illness, they cannot be maintained in conformity with the judgment of the High Court in that case.

[115] *Donnellan v Woodland* [2012] NSWCA 433

[116] Including in particular - *Giannarelli v Wraith* [1988] HCA 52; *D'Orta-Ekenaike v Victorian Legal Aid* [2005] HCA 12; *Chamberlain v Ormsby t/as Ormsby Flower*; *Attard v James Legal Pty Ltd* [2010] NSWCA 31; *Day v Rogers* [2011] NSWCA 124; *Attard v James Legal* [2010] NSWCA 31; *Symonds v Vass* [2009] NSWCA 139, *Keefe v Marks* (1989) 16 NSWLR 713

[117] Per Basten AJ at 259: "It was held in *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12; 223 CLR 1, that the immunity from proceedings brought by a former client against a legal practitioner alleging negligence (or a related cause of action) in relation to the conduct of litigation depends on the principle of finality. That principle is offended by a reconsideration of the circumstances in which a final judgment has been obtained, otherwise than by way of appeal from, or judicial review of, the earlier proceedings. (There may be other exceptions, such as a challenge to a judgment procured by fraud.)"

Conclusion

63 In short, the principle exists to protect the finality and certainty of our legal system *per se*. It does not exist to protect incompetent lawyers - although that may be an unintended side effect in some cases.

64 There is still room for debate over the application of immunity to particular situations, and the test of application must always be whether allowing the claim or argument would, or might, involve a challenge to a prior decision, including by an indirect re-litigation of matters already resolved, other than by recognized avenues such as an appeal.