

EXPERT WITNESS IMMUNITY IN AUSTRALIA AFTER *ATTWELLS v JACKSON LALIC LAWYERS*: A SMALLER AND LESS PREDICTABLE SHIELD?

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*Expert witnesses act as “injury brokers” in contributing to the analysis of what qualifies as legally recognised and compensable injury in medical negligence litigation. The orthodox approach in Australia is that expert witnesses, like advocates, are immune from suit in negligence. In *Attwells v Jackson Lalic Lawyers Pty Ltd*, the High Court of Australia recently upheld, but narrowed, the advocates’ immunity. This paper outlines the decision in *Attwells v Jackson Lalic Lawyers Pty Ltd*. After reviewing Australian authority on expert witness immunity we argue that, given the recent narrowing of the scope of advocates’ immunity, similar limitations are likely to be placed on the scope of expert witness immunity with two effects - it will be less commonly available and it will be prospectively less predictably available.*

1. Introduction

In medical negligence litigation, like in all personal injury cases, expert witnesses have been described as “injury brokers” due to the important role they play in relation to the provision “of crucial raw material in adjudicators’ determinations of what qualifies as legally recognisable and compensable injury.”¹ Given this “tendency of experts to dominate proceedings ... and exert excessive influence over their outcomes,”² it is therefore not surprising that, as noted by Freckelton, “the quest for expert evidence to be accountable and reliable is not new.”³ Whilst the suggestion of ‘excessive’ influence can be debated, there is little doubt that expert evidence is central to dispute outcomes, particularly given that more than ninety five percent of

¹ Genevieve Grant and David M Studdert, ‘The Injury Brokers: An Empirical Profile of Medical Expert Witnesses in Personal Injury Litigation’ (2012) 36(3) *Melbourne University Law Review* 832, 832.

² *Dasreef Pty Ltd v Hawchar* [2011] HCA 21, [58] (Heydon J).

³ Ian Freckelton, ‘Expert Evidence Accountability: New Developments and Challenges’ (2011) 19 *JLM* 209, 209, citing *Dasreef Pty Ltd v Hawchar* [2011] HCA 21, [58] (Heydon J).

Australian medical litigation resolves through negotiation, before final judicial determination.⁴

Grant and Studdert have also recognised that “concerns about expert witnesses and the quality of their evidence abound in the civil justice literature.”⁵ Despite reforms, such as the development of expert witness codes of conduct,⁶ these concerns have led to occasional calls for the abolition of the expert witness immunity in Australia.⁷

The orthodox approach in Australia, as affirmed by the High Court in *D’Orta-Ekenaike v Victoria Legal Aid*,⁸ is that expert witnesses, like advocates and other participants in the judicial process, are immune from negligence suit in relation to court work, and work done out of court which is intimately connected with the work in court.⁹ The latter is perhaps of particular significance in medical negligence litigation given that, as noted above, such claims most often resolve without a court hearing,¹⁰ in a trend labelled as the vanishing trial.¹¹

Most recently, and contrary to recent outcomes in other common law jurisdictions including the United Kingdom,¹² Canada,¹³ and New Zealand,¹⁴ the High Court of Australia in *Attwells v Jackson Lalic Lawyers Pty Ltd*¹⁵ (*Attwells*) upheld the advocates’ immunity from suit in negligence. Crucially however, the majority took a narrower approach as to the scope of the immunity by holding that it does not usually extend to negligent advice which leads to the settlement of a case by agreement between the parties. The basis for this is explored further below.

⁴ Australian Institute of Health and Welfare, *Australia’s medical indemnity claims 2012-13*, <http://www.aihw.gov.au/publication-detail/?id=60129547940>, 19. Accessed 17 July 2016.

⁵ Grant and Studdert, above n 1.

⁶ For example, in New South Wales, the Expert Witness Code of Conduct is contained in the Uniform Civil Procedure Rules 2005 (NSW) Sch 7.

⁷ Cameron Sim, ‘Expert witness immunity after *Jones v Kaney*’ (2011) 19 *Torts Law Journal* 250, 251.

⁸ (2005) 223 CLR 1.

⁹ *Cabassi v Vila* (1940) 64 CLR.

¹⁰ Australian Institute of Health and Welfare, above n 4.

¹¹ Marc Galanter, ‘The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts’ (2004) 1 (3) *Journal of Empirical Legal Studies* 459; John Langbein, ‘The Disappearance of the Civil Trial in the United States (2012) 122 *The Yale Law Journal* 522. For a discussion in the Australian context, see Kenneth Hayne, ‘The vanishing trial’ (2008) 9 (1) *Judicial Review* 33; David Spencer, ‘The phenomenon of the vanishing civil trial’ (2005) 8 (2) *ADR Bulletin* 21.

¹² *Arthur JS Hall & Co v Simons* [2002] 1AC 615.

¹³ *Demarco v Ungaro* (1979) 95 DLR(3d) 383.

¹⁴ *Lai v Chamberlains* [2007] 2 NZLR 7.

¹⁵ [2016] HCA 16 (*Attwells*).

Given some commonality of the duties and obligations of advocates and experts as participants in the judicial process,¹⁶ after advocates' immunity was abolished in the United Kingdom by the 2002 case of *Arthur JS Hall & Co v Simons*,¹⁷ expert witness immunity was also partially abrogated by the UK Supreme Court in *Jones v Kaney*,¹⁸ for the same policy reasons.¹⁹

There is also a "uniformity of approach"²⁰ between advocates' immunity and expert witness immunity in Australia.²¹ This appears from the following statement by Justice Starke in *Cabassi v Villa*:²²

No action lies in respect of evidence given by witnesses in the course of judicial proceedings, however false and malicious it may be, **any more than it lies against judges, advocates or parties** in respect of words used by them in the course of such proceedings or against jurors in respect of their verdicts. (emphasis added)²³

It is therefore likely that the principles behind the recent narrowing of the scope of advocates' immunity could also be held to apply to expert witness immunity.²⁴

2. The decision in *Attwells*

¹⁶ *Jones v Kaney* [2011] 2 WLR 823, [50] (Lord Phillips).

¹⁷ *Arthur JS Hall & Co v Simons* [2002] 1AC 615.

¹⁸ [2011] 2 WLR 823. The case concerned an action by a party against their own witness (a clinical psychologist who had provided a report that the plaintiff suffered PTSD but then signed a joint expert report with the insurers' expert which stated that he did not suffer PTSD, after which the claim was settled on a compromised basis) For a detailed discussion of this case see Freckelton above n 3 and Ian Freckelton, "Civil Liability of Health Practitioners for their Forensic Work: Further Erosion of the Witness Immunity Rule" (2012) 19(4) *Psychiatry, Psychology and Law* 45. See also Sim above n 7.

¹⁹ *Jones v Kaney* [2011] 2 WLR 823, [113] (Lord Dyson).

²⁰ Ian Freckelton and Hugh Selby, *Expert Evidence: Law Practice Procedure and Advocacy*, (Thomson Reuters, 5th ed, 2013) [18.5.420].

²¹ *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1; *Commonwealth v Griffiths* [2007] NSWCA 370, [42].

²² (1940) 64 CLR 130.

²³ *Ibid* 140. See also *R v Skinner* (1772) 98 ER 529, 530 (Lord Mansfield); *Dawkins v Lord Rokeby* (1873) LR 8 255, 263.

²⁴ *Young v Hones* [2014] NSWCA 337 [35], Bathurst CJ: "... once it is appreciated that the rationale for the immunity is the same as that for advocate's immunity, there is no reason for the test for the application of the immunity to be different in either case."

In *Attwells*, the appellants asserted that they had settled earlier litigation to enforce a guarantee on unfavourable terms, relying on the negligent advice of the respondent (their solicitors at the time).²⁵ The respondent raised advocates' immunity as a complete defence to the negligence claim.²⁶ The High Court was therefore required to consider the scope of advocates' immunity, in particular whether advocates' immunity extends to negligent advice which leads to the settlement of a case by agreement between parties. The Court was invited to consider, in the alternative, whether the immunity should be entirely abolished.²⁷

The High Court did not abolish the immunity. It unanimously refused to overrule its previous decisions in *D'Orta-Ekenaike v Victoria Legal Aid*²⁸ and *Giannarelli v Wraith*.²⁹ The majority said:

To overturn *Giannarelli* and *D'Orta* would generate a legitimate sense of injustice in those who have not pursued claims or have compromised or lost cases by reference to the state of the law as settled by these authorities during the years when they have stood as authoritative statements of the law. An alteration of the law of this kind is best left to the legislature.³⁰

2.1 Policy justification for advocates' immunity

Having preserved the immunity, the High Court examined the fundamental policy basis of the immunity as part of the consideration of its scope. All sitting members of the High Court agreed that the policy reason for advocates' immunity is the "protection of the public interest in the finality and certainty of judicial decisions"³¹ by

²⁵ Ibid [1], [7] – [12] (French CJ, Kiefel, Bell, Gageler and Keane JJ).

²⁶ Ibid [1] (French CJ, Kiefel, Bell, Gageler and Keane JJ).

²⁷ Ibid [4].

²⁸ (2005) 223 CLR 1 (High Court held that advocates' immunity from suit in respect of participation in judicial process extends to solicitor involved in the conduct of litigation in court).

²⁹ (1988) 165 CLR 543 (High Court held that advocates' immunity extends to "work done out of court which leads to a decision affecting the conduct of the case in court" at 560).

³⁰ Ibid [28]. Jeremy Gans has commented that this approach is in sharp contrast to the approach of the UK Supreme Court and the Privy Council and that the same consequences would also follow if the legislature changed the law: Jeremy Gans, *High Court refuses to overrule itself on advocates' immunity* (5 May 2016) Melbourne Law School Opinions on High <http://blogs.unimelb.edu.au/opinionsonhigh/2016/05/05/news-high-court-refuses-to-overrule-itself-on-advocates-immunity/>.

³¹ Ibid [35]. (French CJ, Kiefel, Bell, Gageler and Keane JJ). See also [30]; [36]; [46] Gordon J also referred to the policy considerations of certainty - "need for certainty and finality of decision" (at [101] and finality - "final quelling of controversy by the exercise of judicial power" (at [106]). See also Nettle J at [66]: "avoid re-

preventing “collateral attack which seeks to demonstrate that that a judicial determination was wrong.”³² The majority said that advocates’ immunity was derived, not from any special status as an advocate, but from the advocate’s role “as an officer of the court, in the exercise by the court of judicial power to quell a controversy.”³³

2.2 Narrowing the scope of advocates’ immunity

Although the High Court was unanimous in holding that advocates’ immunity should be retained and on its policy justification, there was a difference of opinion as to the scope of the immunity. A majority of five judges³⁴ limited the scope of the immunity, by taking a narrower view of the intimate connection test identified in *D’Orta-Ekenaike v Victoria Legal Aid*³⁵. Given that the underlying policy rationale is protection of the finality of judicial decisions, the majority held that the immunity does not extend to cases where there was no “functional connection between the advocate’s work and the judge’s decision.”³⁶ In other words, the immunity is limited to “work by the advocate that bears upon the judge’s determination of the case.”³⁷

In *Attwells*, the majority held that the consent order (made to document a settlement agreement) was not a judicial decision as it was not “an exercise of judicial power (which) determined the terms of the agreement or gave it effect as resolving the dispute”.³⁸ According to the majority, the immunity is limited to advice which moves the litigation towards a judicial determination,³⁹ and does not extend to advice leading to the out of court settlement because “it is the participation of the advocate as an officer of the court in the quelling of controversies by the exercise of judicial power which attracts the immunity.”⁴⁰ Thus the immunity did not extend to the advice

litigation in collateral proceedings for negligence, or other civil cause of action, of issues determined in the principal proceedings.”

³² Ibid [34] (French CJ, Kiefel Bell, Gageler and Keane JJ).

³³ Ibid [33] (French CJ, Kiefel Bell, Gageler and Keane JJ), citing the plurality in *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR.

³⁴ French CJ and Kiefel, Bell, Gageler and Keane JJ.

³⁵ (2005) 223 CLR 1 (High Court held that advocates’ immunity from suit in respect of participation in judicial process extends to solicitor involved in the conduct of litigation in court).

³⁶ *Attwells* [5]; [49].

³⁷ Ibid [46].

³⁸ Ibid [62].

³⁹ Ibid [37].

⁴⁰ Ibid [38]. See also [39]. See also *ibid*, [41] (French CJ, Kiefel Bell, Gageler and Keane JJ): “To accept that the immunity extends to advice which leads to a settlement of litigation is to decouple the immunity from the protection of the exercise of judicial power against collateral attack. Such an extension undermines the notion of equality before the law by enlarging the circumstances in which lawyers may be unaccountable to their clients.”

in relation to the “disadvantageous compromise” in this case⁴¹ because it is only available to the extent necessary to fulfil the underlying policy objective of preserving finality of judicial decisions. The majority concluded:

... the public policy, protective of finality, which justifies the immunity at the same time limits its scope so that its protection can only be invoked where the advocate's work has contributed to the judicial determination of the litigation.

In short, in order to attract the immunity, advice given out of court must affect the conduct of the case in court and the resolution of the case by that court. The immunity does not extend to preclude the possibility of a successful claim against a lawyer in respect of negligent advice which contributes to the making of a voluntary agreement between the parties merely because litigation is on foot at the time the agreement is made. That conclusion is not altered by the circumstance that, in the present case, the parties' agreement was embodied in consent orders.⁴²

By contrast, Gordon J (with whom Nettle J agreed)⁴³ took a wider view as to the effect of a consent judgement. Justice Gordon said that a consent judgement “is as much the exercise of judicial power as entry of judgment after trial” and gives rise to “a final outcome – the final quelling of a controversy by the exercise of judicial power.”⁴⁴ Her Honour therefore concluded (in the minority) that the lawyers' work was done directly towards the final quelling of the litigation⁴⁵ and therefore was “work intimately connected with” work in a court.⁴⁶

While the majority held that the consent order in the case before them did not amount to a judicial determination,⁴⁷ in an obiter comment, their Honours

⁴¹ Ibid [47] (French CJ, Kiefel Bell, Gageler and Keane JJ).

⁴² *Attwells* [5] – [6].

⁴³ Ibid [64], though adding some additional comments concerning the reasons of the majority as to when determination of a negligence claim would necessitate re-opening the controversy between the parties by way of collateral attack at [65]-[72]. She said: “where a matter is settled out of court on terms providing for the court to make an order by consent that determines the rights and liabilities of the parties, the settlement plainly does move the litigation toward a determination by the court. ... even where the parties are agreed on the orders which should be made for the determination of their rights and liabilities, it remains for the court to be satisfied that it is appropriate so to order.” (Ibid, [67] (Nettle J)).

⁴⁴ Ibid, [108] (Gordon J).

⁴⁵ Ibid [126] (Gordon J).

⁴⁶ Ibid [127] (Gordon J).

⁴⁷ See the majority at [62]: “In the present case, the consent order and associated notation by the Court reflected an agreement of the parties for the payment of money in circumstances where no exercise of judicial power

acknowledged that “there are many cases where, although the parties have agreed upon the terms of the order which a court is asked to make, the making of the order itself requires the resolution of issues by the exercise of judicial power.”⁴⁸ Although noting that it was not necessary to consider these cases, the majority identified several examples,⁴⁹ namely: settlement of representative proceedings; compromises of proceedings on behalf of a person under a legal incapacity; agreements made in relation to certain proceedings under the *Native Title Act 1993* (Cth);⁵⁰ exercise of the judicial discretion to allow an agreement to amend a patent granted under the *Patents Act 1900* (Cth); and the compromise of certain debts under provisions of the *Corporations Act 2001* (Cth).⁵¹

Having made it clear that a “mere historical connection between an advocate's work and a litigious event”⁵² is insufficient for reliance upon the immunity, the majority also stated that the immunity would not be available in respect of “negligent advice to commence proceedings which are doomed to fail.”⁵³ Further, in another obiter comment, their Honours stated that “advice to cease litigating or to continue litigating does not itself affect the judicial determination of a case” and therefore outside the scope of the immunity.⁵⁴

3. The immunity afforded to expert witnesses

In the most recent appellate consideration of expert witness immunity, *Young v Hones*,⁵⁵ Chief Justice Bathurst said:

... once it is appreciated that the rationale for the immunity is the same as that for advocate's immunity, there is no reason for the test for the application of the immunity to be different in either case.⁵⁶

determined the terms of the agreement or gave it effect as resolving the dispute. The consent order may have facilitated the enforcement of the compromise, but it was the agreement of the parties that settled its terms.”

⁴⁸ Ibid [61].

⁴⁹ Ibid.

⁵⁰ ss 86F, 87 and 87A *Native Title Act 1993* (Cth).

⁵¹ ss 477(2A) and 477(2B) *Corporations Act 2001* (Cth).

⁵² *Attwells* [50].

⁵³ Ibid.

⁵⁴ Ibid [50]. See generally [47]-[52]. This was because “it is difficult to envisage how advice not to settle a case could ever have any bearing on how the case would thereafter be conducted in court, much less how such advice could shape the judicial determination of the case.”: [48]. Their Honours left open the question as to whether the immunity “attaches only to the kinds of decision which a lawyer charged with the conduct of a case in court may make without instructions from the client”: [45].

⁵⁵ [2014] NSWCA 337.

Given the “uniformity of approach”⁵⁷ between advocates’ immunity and expert witness immunity,⁵⁸ it is therefore timely to consider the implications of the *Attwells* narrowed scope of advocates’ immunity on expert witness immunity.

The last time expert witness immunity was considered (albeit obiter) by the High Court was in the case of *D’Orta-Ekenaike v Victoria Legal Aid*.⁵⁹ In that case, the High Court held that, like advocates, expert witnesses in Australia have immunity from civil suit in respect of what is said or done in court, and in preparatory steps.⁶⁰ Gleeson CJ, Gummow J, Hayne J and Heydon J said:

No action lay, or now lies, against a witness for what is said or done in court. It does not matter whether what is done is alleged to have been done negligently or even deliberately and maliciously with the intention that it harmed the person who would complain of it. The witness is immune from suit and the immunity extends to preparatory steps.⁶¹

The question now to be answered, following *Attwells*, is the remaining content of the reference to preparatory steps.

Before addressing this question it should be noted that the expert witness immunity is in any event subject to a number of well recognised exceptions,⁶² namely, “substantive administration of justice offences” which would include perjury, contempt of court and perhaps, depending on the circumstances, perverting the

⁵⁶ *Ibid* [35].

⁵⁷ Freckelton and Selby, above n 20, [18.5.420]; *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1; *Commonwealth v Griffiths* [2007] NSWCA 370, [42]; *Cabassi v Villa* (1940) 64 CLR 130, 140 (Starke J).

⁵⁸ *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1; *Commonwealth v Griffiths* [2007] NSWCA 370, [42].

⁵⁹ (2005) 223 CLR 1.

⁶⁰ *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1. For a discussion of the Australian authorities see: Freckelton and Selby, above n 20, [8.5.420] – [8.5.430]. In the context of defamation actions, the defence of absolute privilege applies to all statements made by parties (including witnesses) in the course of judicial proceedings by parties and statements made outside court but forming an integral and necessary part of the preparation for and pursuit of the litigation. In this context, absolute privilege arises from “inherent necessity” and “because it is an indispensable attribute of the judicial process.”: *Mann v O’Neill* (1997) 191 CLR 204.

⁶¹ *D’Orta Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, [39], citing *Cabassi v Vila* (1940) 64 CLR; *Watson v M’Ewan* [1905] AC 480 and *Gibbons v Duffell* (1932) 47 CLR 520, 525. An employer of a person with immunity who is sued is also protected: *Commonwealth of Australia v Griffiths* [2007] NSWCA 307, [115]; discussed Freckelton and Selby, above n 20, [8.5.430].

⁶² For a discussion, see The Honourable Justice Peter Garling RFD, ‘Expert Witness Immunity’ (Speech delivered at the Medico-Legal Society of New South Wales, Sydney, 14 March 2012 <http://www.austlii.edu.au/au/journals/NSWJSchol/2012/13.pdf>, [49]-[53].

course of justice;”⁶³ and “any clear statutory provision to the contrary.”⁶⁴ Furthermore, the immunity does not extend to disciplinary proceedings.⁶⁵

3.1 Policy justification for expert witness immunity

Given that the absolute immunity of experts is inconsistent with the rule of law,⁶⁶ it has been argued that because “the immunity is based upon public policy (it) should therefore only be conferred where it is absolutely necessary to do so.”⁶⁷

The public policy justification for expert witness immunity has been expressed to be the necessity to promote “the advancement of public justice,”⁶⁸ by ensuring that witnesses can give evidence without fear of being sued⁶⁹ and (consistent with *Attwells*) to preserve the finality of judgements.⁷⁰

In *Sovereign Motor Inns Pty Ltd v Howarth Asia Pacific Pty Ltd*⁷¹ Master Harrison summarised the public policy justification for the immunity in somewhat broad terms, as follows:

The public policy reasons for the immunity are firstly, so as to encourage honest and well meaning persons to assist the higher interest of the

⁶³ *Ollis v NSW Crime Commission; Jamieson and Brugmans v R* (1993) 177 CLR 574, [6]. While no civil claim may arise, an expert may still be vulnerable to criminal proceedings: *Cabassi v Villa* (1940) 64 CLR 130, 141 (Starke J): “The remedy against a witness who has given or procured false evidence is by means of the criminal law or by the punitive process of contempt of court.” For a discussion of the criminal liability of experts see Freckelton and Selby, above n 20, [8.5.460].

⁶⁴ *Jamieson and Brugmans v R* (1993) 177 CLR 574, [6].

⁶⁵ For a discussion of the potential for disciplinary proceedings against experts, see Garling, above n 62.

Disciplinary proceedings may also arise where the expert purports to give expert evidence beyond his or her area of competence: *General Medical Council v Meadow* [2007] 1 All ER 1; *Mustac v Medical Board of Western Australia* [2004] WASCA 156; *Nikolaidis v Satouris* [2014] NSWCA 448, [42] (Barrett JA, Beazley P and Ward JA agreeing).

⁶⁶ *Darker v Chief Constable of West Midlands* [2001] 1 AC 435, 453 (Lord Cooke of Thornton).

⁶⁷ *Palmer v Durnford Ford* (1992) QB 483, 488 - 489 (Simon Tuckey QC). In the context of the similar absolute privilege from defamation, see *Mann v O’Neill* (1997) 191 CLR 204, 221 (McHugh J): who warned against “the temptation to recognise the availability of the defence for new factual circumstances simply because they are closely analogous to an existing category (or cases within an existing category) without examining the case for recognition in light of the underlying rationale for the defence.” See also *Attwells v Jackson Lalic Lawyers Pty Limited* [2016] HCA 16, [52]: “Because this incidental operation of the immunity comes at the expense of equality before the law, the inroad of the immunity upon this important aspect of the rule of law is not to be expanded simply because some social purpose, other than ensuring the certainty and finality of decisions, might arguably be advanced thereby.”

⁶⁸ *Cabassi v Villa* (1940) 64 CLR 130, 141 (Starke J).

⁶⁹ *Ibid*, 144 (McTiernan J): “The origin of the rule was the great mischief that would result, if witnesses in courts of justice were not at liberty to speak freely, subject only to the animadversion of the court”.

⁷⁰ *Cabassi v Villa* (1940) 64 CLR 130, 139 (Rich ACJ). See also *Commonwealth of Australia v Griffiths* [2007] NSWCA 307, [43] (Beazley J), citing *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, 17-20; *Meadow v General Medical Council* [2007] QB 462, 476.

⁷¹ [2003] NSWSC 1120; discussed Freckelton and Selby, above n 20, [8.5.420].

advancement of public justice even if a dishonest and malicious person may on occasions benefit from the immunity; secondly, the rule is designed to encourage freedom of speech and communication in judicial proceedings by protecting persons who take part in the judicial process from fear of being sued for something they say; thirdly, to ensure that there is finality to litigation, so there is no opportunity for relitigating the same issues by means of subsequent actions.⁷²

However subsequently, in *Commonwealth v Griffiths*,⁷³ Justice Beazley concluded that “the immunity is founded ultimately in the narrower consideration of the finality of judgments.”⁷⁴

Similarly, in *Attwells*, in the context of advocates’ immunity, the High Court made it clear that it is “the public policy, protective of finality, which justifies the immunity” and “at the same time limits its scope so that its protection can only be invoked where the advocate’s work has contributed to the judicial determination of the litigation.”⁷⁵

If therefore “the rationale for the (expert witness) immunity is the same as that for advocate’s immunity,”⁷⁶ namely “the principle of finality,”⁷⁷ it is likely that, while expert witness immunity will be maintained, its scope for extension to preparatory steps will be narrowed.

Like advocates, it is likely that experts can longer be assumed to be immune simply by reason of their status as an expert, but rather because of their role. Thus in future cases, in determining whether expert witnesses are immune from suit, the focus should be squarely on whether the work of the expert meets the policy justification for the immunity, that is, whether the work of the expert contributes to the exercise by the court of judicial power to determine a matter.⁷⁸ This shift in focus would seem to address an earlier criticism that “(t)o date, Australian courts have failed to

⁷² Ibid [34].

⁷³ [2007] NSWCA 370.

⁷⁴ Ibid, [93], citing *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1. See also *Young v Hones* [2014] NSWCA 337, [17], [35] (Bathurst CJ); [247] (Ward JA).

⁷⁵ *Attwells*, [5] – [6].

⁷⁶ *Young v Hones* [2014] NSWCA 337, [35] (Bathurst CJ).

⁷⁷ Ibid [17] (Bathurst CJ); [236] (Ward JA).

⁷⁸ *Attwells* [33] (French CJ, Kiefel Bell, Gageler and Keane JJ), citing the plurality in *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR.

recognise this inconsistency between the purpose of the immunity and the scope of its application.”⁷⁹

3.2 Scope of expert witness immunity

The core expert witness immunity protects experts from being sued as a result of evidence given in Court.⁸⁰

As for preparatory steps, expert witnesses have been protected against suit in respect of out of court conduct, where that conduct was sufficiently connected with the court proceedings.⁸¹ Out of court work which has previously been held to be within the scope of expert witness immunity includes: making a witness statement as a preliminary step to giving evidence in court;⁸² swearing an affidavit;⁸³ and the preparation of expert reports in contemplation of giving evidence in court.⁸⁴

Where the dominant purpose of the work done by the expert is not work preliminary to giving evidence in court but rather to advise a client, for example providing an opinion to a client prior to commencing proceedings as part of the investigative process, the expert witness immunity has never been applied.⁸⁵ This is analogous with the position of advocates in respect of advice to commence proceedings.⁸⁶

⁷⁹ Sim above n 7, 269.

⁸⁰ *R v Skinner* (1722) 98 ER 529, 530 (Lord Mansfield); *Cabassi v Villa* (1940) 64 CLR 130, 140 (Starke J); 149 (Williams J); *Commonwealth v Griffiths* [2007] NSWCA 370, [42] (Beazley JA).

⁸¹ *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1; *Commonwealth v Griffiths* [2007] NSWCA 370, [42] (Beazley JA).

⁸² *Watson v McEwan* [1905] AC 480, 487 (Lord Halsbury); *R v Beydoun* (1990) 22 NSWLR 256, 259.

⁸³ *Commonwealth v Griffiths* [2007] NSWCA 370, [42] (Beazley JA) citing *D’Orta-Ekenaike v Victoria Legal Aid & Anor* (2005) 223 CLR 1; *Ollis v New South Wales Crime Commission* [2007] NSWCA 311.

⁸⁴ “The immunity of witnesses is not confined to evidence actually given in Court. It applies even in the early stages where evidence is being prepared or collected for proceedings in contemplation.”: *Jovanovic v Woods* [2001] TASSC 96, [7] (Master Holt) Discussed Freckelton and Selby, above n 20, [8.5.420]. See also *Sovereign Motor Inns Pty Ltd v Howarth Asia Pacific Pty Ltd* [2003] NSWSC 1120 discussed Freckelton [8.5.420].

⁸⁵ *Palmer v Durnford Ford* [1992] QB 483; *Darker v Chief Constable of the West Midlands Policier* [2001] 1 AC 435, [23] See also *Stanton v Callaghan* [2000] QB 75, 100 (Chadwick LJ): “the immunity does not extend to protect an expert who has been retained to advise as to the merits of a party’s claim in litigation from a suit by the party by whom he has been retained in respect of that advice, notwithstanding that it was in contemplation at the time when the advice was given that the expert would be a witness at the trial if that litigation were to proceed.”; cited with approval in *Sovereign Motor Inns Pty Ltd v Howarth Asia Pacific Pty Ltd* [2003] NSWSC 1120, [28] (Harrison J) cf. *Commonwealth v Griffiths* [2007] NSWCA 370, [92] (Beazley JA): “Mr Ballard gave evidence about all of the tests he conducted and there was no suggestion that the certificate of analysis was prepared other than as part of the steps preparatory to trial. There was no possible basis to suggest his earlier or later testing was carried out for any other purpose unassociated with the prosecution of Mr Griffiths.”

⁸⁶ *Attwells* [50].

The decision of the New South Wales Court of Appeal in *Young v Hones*⁸⁷ is the most recent appellate consideration of the scope of expert witness immunity in Australia. The appeal arose from a separate determination that, as an issue of law, witness immunity was a complete defence to a negligence claim against the engineer respondents who had participated in a conclave of experts which led directly to the settlement of the matter.⁸⁸ The only issue left outstanding in that settlement was who should bear the costs of the proceedings, which was determined in favour of Ms Young following a short hearing in the course of which evidence was given by expert engineering witnesses called by each of the parties.⁸⁹ This led to McClellan J finding that as Ms Young had succeeded in the litigation costs should follow the event.⁹⁰

Dismissing the appeal, the court held that the out-of-court work undertaken by the engineers fell within the scope of expert witness immunity. As to the scope of the immunity, Chief Justice Bathurst said:

... the immunity will apply where the work in question is work done in court or work done out of court which leads to a decision affecting the conduct of the case in court or putting it another way, is work intimately connected with the work in court.

Applying the intimate connection test,⁹¹ as the expert engineers' retainer extended not only to advice as to the appropriate remediation plan and participation in the expert conclave but also the giving of expert evidence, and the claim arose directly out of the work undertaken in the experts' conclave (which formed part of the proceedings), this case was held to be within the immunity.⁹² It may be important to

⁸⁷ [2014] NSWCA 337.

⁸⁸ The claim alleged that the expert negligently agreed at the expert conclave to inadequate remediation work as being necessary, which caused the entry into settlement, resulting in loss to the appellant: at [39] (Bathurst CJ). *Ibid* [99] (Ward JA).

⁸⁹ *Young v King* [2004] NSWLEC 93.

⁹⁰ *Ibid* [81].

⁹¹ *Young v Hones* [2014] NSWCA 337, [35], [40] (Bathurst CJ); [251]-[253], [280] (Ward JA); Emmett JA agreed with Ward JA at [315].

⁹² *Young v Hones* [2014] NSWCA 337, [40] (Bathurst CJ); [261], [271], [274]-[275] (Ward JA); Emmett JA agreed with Ward JA at [315]. Bathurst CJ concluded at [40]: "It follows that the work done by the engineers was work done out of court which affected the conduct of the case in court. The claim arose directly out of the result of an expert conclave which formed part of the proceedings in the Land and Environment Court. In those circumstances, in my opinion, the primary judge was correct in deciding that the engineers were immune from suit."

note that the settlement led to a final determination by the court as to costs, after expert evidence was heard.

An application in 2015 for special leave to appeal to the High Court from this decision, arguing that the High Court should reconsider the “retention” or “boundaries of the application of, or the test for” immunity as stated in *D’Orta-Ekenaike v Victoria Legal Aid*,⁹³ was refused⁹⁴ on the basis that the case did not provide a suitable vehicle and the case did not otherwise raise a question of principle warranting leave.⁹⁵

Given the approach taken by the majority in *Attwells*, decisions such as *Young v Hones* now arguably require closer examination.

3.3 Expert witness immunity in Australia after Attwells

The Court in *Young v Hones*⁹⁶ identified the policy rationale for the expert witness immunity as the “principle of finality”.⁹⁷ Given the approach taken by the majority in *Attwells*, in future cases it is likely that in determining the scope of the immunity greater attention will be paid to the underlying purpose of the immunity when evaluating whether there is a sufficient connection between the work and the litigation.⁹⁸ The question to be asked, consistent with *Attwells*, is whether the expert’s evidence affected the conduct of the case (whether in court or in preparatory steps) so as to affect its outcome by judicial decision. Three scenarios are considered below.

3.3.1 Expert opinion given in evidence during a court hearing, leading to a judgment

⁹³ (2005) 223 CLR 1.

⁹⁴ Special leave was refused on 6 May 2015. On 7 August 2015 special leave was subsequently granted in *Attwells & Anor v Jackson Lalic Lawyers Pty Limited* [2015] HCATrans 176.

⁹⁵ [2015] HCASL 73, [3]-[4] (Bell and Gageler JJ).

⁹⁶ [2014] NSWCA 337.

⁹⁷ *Ibid* [17] (Bathurst CJ).

⁹⁸ Cf. the reasoning of Master Harrison in *Sovereign Motor Inns v Howarth Asia Pacific* [2003] NSWSC 1120, [39]. Although in *Young v Hones* [2014] NSWCA 337, Justice Ward referred to the test applied by Beazley J in *Commonwealth of Australia v Griffiths* as “a test as to the connection between the conduct of which complaint was made and the hearing, having regard to the underlying rationale of the immunity namely the principle of finality,” (at [247]) she did not expand on her consideration of the application of the finality principle in the context of the case before her.

Given that it is the same public policy as recognised in *Attwells*, protective of finality, which justifies the expert witness immunity, then its protection can be invoked where the expert evidence of the witness has contributed to the judicial determination of the litigation. That would seem like a relatively easy hurdle if the expert gives oral evidence in court, which is then taken into account by the trial judge in determining a judgment. This is the core immunity.⁹⁹

Indeed, in *Commonwealth v Griffiths*,¹⁰⁰ Justice Beazley took this approach, stating:

The matter may then be tested further by having regard to the underlying rationale for the immunity. As was stated by the High Court in *D’Orta-Ekenaike* the immunity is founded ultimately in consideration of the finality of judgments. If this matter were to proceed to trial, it would involve a suit based upon negligent conduct of a series of tests carried out. Those tests were relied upon by the Crown for the purpose of proving that the substance found in Mr Griffiths’ possession was methcathinone. Mr Ballard gave evidence of all of the testing that he undertook. That could only have been relevant and admissible evidence if the whole of the testing was relied upon as proof that the substance was methcathinone. Accordingly, a trial based upon the negligent performance of that testing would involve the retrial, not only of the evidence given at trial but also of the preparatory steps taken to prove an essential ingredient of the charge brought against Mr Griffiths, namely, that the substance was the prohibited substance methcathinone.¹⁰¹

3.3.2 Expert opinion given in evidence during a court hearing, leading to a settlement

Perhaps the most difficult question following *Attwells* arises when the expert witness has given evidence during a court hearing which has contributed to the making of a voluntary agreement between the parties part way through a hearing, rather than leading to finalisation of a dispute by a judicial determination.

After *Attwells*, it seems arguable that merely because litigation is on foot at the time the agreement is made, even though there has been a partial hearing, this may be

⁹⁹ *R v Skinner* (1722) 98 ER 529, 530 (Lord Mansfield); *Cabassi v Villa* (1940) 64 CLR 130, 140 (Starke J); 149 (Williams J); *Commonwealth v Griffiths* [2007] NSWCA 370, [42] (Beazley JA).

¹⁰⁰ [2007] NSWCA 370.

¹⁰¹ *Ibid* [93].

considered as a “mere historical connection”¹⁰² between an expert’s evidence and a litigious event and therefore insufficient to justify reliance upon the expert witness immunity.

However, against this is an ancillary policy consideration, which aims to prevent witnesses being deterred from giving truthful evidence by reason of fear of being sued over something they say in evidence. This was identified by Justice McTiernan in *Cabassi v Vila*:¹⁰³

"The origin of the rule was the great mischief that would result, if witnesses in courts of justice were not at liberty to speak freely, subject only to the animadversion¹⁰⁴ of the court."¹⁰⁵

There is an argument that if the primary duty is to the court when an expert gives evidence in a court hearing, it would be inconsistent to find that a duty is owed to any other party.

This argument was considered but rejected by the majority in *Jones v Kaney*¹⁰⁶ on the basis that there could be no conflict between an expert’s duty to the court and his/her duty to the client¹⁰⁷ because the expert’s duty to the court is paramount,¹⁰⁸ and therefore discharging the duty to the court would not be a breach of duty to the client.¹⁰⁹ Although that approach was taken by the majority in the United Kingdom Supreme Court, it does not appear to have been mentioned by the Australian High Court in a recent case when considering potentially conflicting duties.¹¹⁰

Furthermore, as argued by Sim, on assuming their role expert witnesses agree that they understand the nature of their duties, therefore “protection should not be

¹⁰² *Attwells* 16, [50].

¹⁰³ (1940) 64 CLR 130.

¹⁰⁴ Criticism or censure.

¹⁰⁵ *Cabassi v Vila* (1940) 64 CLR 130, 144. See also *Sovereign Motor Inns Pty Ltd v Howarth Asia Pacific Pty Ltd* [2003] NSWSC 1120, [39] (Master Harrison): “the expert should be able to give his evidence freely and not be in fear of being sued.”

¹⁰⁶ *Jones v Kaney* [2011] 2 WLR 823

¹⁰⁷ *Ibid* [49] (Lord Phillips); [99] (Lord Dyson). The dissentients were Lady Hale and Lord Hope: see [189], [177] (Lady Hale); [130]-[131] (Lord Hope). For a discussion of this issue, see Cameron Sim, ‘Expert witness immunity after *Jones v Kaney*’ (2011) 19 *Torts Law Journal* 250, 261-262.

¹⁰⁸ *Ibid* [55]-[57] (Lord Phillips).

¹⁰⁹ *Ibid* [99] (Lord Dyson).

¹¹⁰ *Hunter and New England Local Health District v McKenna ; Hunter and New England Local Health District v Simon* [2014] HCA 44.

afforded to protect individuals, particularly individuals acting for a fee, from misunderstanding the nature of their legal duties.”¹¹¹

If this policy approach is adopted by Australian courts, there would be no reason not to apply the test in *Attwells*, such that immunity would only be afforded where evidence leads to a judicial determination and does not apply to cases which settle.¹¹²

3.3.3 Expert opinion given before a court hearing, leading to a settlement

A less controversial conclusion arises where pre-hearing evidence or expert opinion of the witness has contributed to the making of a voluntary agreement between the parties before a hearing. Consistent with the approach in *Attwells*, it should follow that the immunity will not be available merely because litigation is on foot at the time the agreement is made.¹¹³

Examples may include the provision of reports before hearing, as often required by court rules, based on which a decision is made to proceed to a settlement.¹¹⁴ Perhaps more frequent in practice may be a shift in opinion at a pre-hearing conclave, assuming of course that a failure to exercise reasonable care can be proven – either in respect of the initial or the changed opinion (whether under a claim in contract or in negligence).¹¹⁵ Such an outcome would appear to be at odds with *Young v Hones*,¹¹⁶ although perhaps a distinction may be drawn given that there was a judicial determination in that matter – albeit only on costs.

5 Conclusion

¹¹¹ Sim, above n 7, 262.

¹¹² Ibid, 268: “Given that their immunity is not founded on the risk of chilling their evidence, then there should be no prohibition on proceeding with a claim against an expert witness, because that would not fall within the scope and purpose of the immunity.”

¹¹³ *Attwells*, [47]-[53].

¹¹⁴ The issue was left open in *Sovereign Motor Inns v Howarth Asia Pacific* [2003] NSWSC 1120, [28], referring to *Stanton v Callaghan* [2000] QB 75, 100.

¹¹⁵ Cf. *Sovereign Motor Inns Pty Ltd v Howarth Asia Pacific Pty Ltd* [2003] NSWSC 1120, [39]; “If an expert is to adhere to Schedule K, it can be expected that when confronted with that of another expert in the same field’s opinion, he or she may make concessions and even change their view. In these circumstances the expert should be able to give his evidence freely and not be in fear of being sued. The rationales of not relitigating the same issues and the higher interest of the advancement of public justice are all applicable.” discussed Freckelton and Selby, above n 20, [8.5.420].

¹¹⁶ [2014] NSWCA 337.

As noted above, although the expert witness immunity is well established, the shield it provides has never been recognised as all encompassing. Where the work done is the negligent provision of an opinion to a client prior to commencing proceedings as part of the investigative process, the expert witness immunity has never been applied.

Following *Attwells*, Australian law retains advocates' immunity, but with a narrower scope. Given the common aspects of the policy justification for advocates' immunity and expert witness immunity, that narrower scope could well be applicable to expert witness immunity. The expert witness immunity shield would appear to be much smaller, limited to scenarios where the evidence has led to finalisation of a dispute by a judicial determination. At least in the medical litigation sphere, only a small percentage of disputes are resolved by judicial determination. On this basis, in practice, the shield is smaller.

The expert witness immunity shield is also less predictable as, at the time the expert witness provides an expert opinion, he or she will not know whether the immunity will apply because usually, at that time, it will not be known whether the relevant dispute will eventually be finalised by judicial determination.

Although the smaller and less predictable expert witness immunity shield still exists, experts still owe obligations directly to the Court to assist the Court to meet the objective of the just, quick and cheap resolution of the real issues in the proceedings.¹¹⁷

The importance and relevance of an ultimate judicial determination in the context of settlements may be better understood following the upcoming consideration by the High Court of an appeal from the decision in *Kendirjian v Lepore*.¹¹⁸ In that case a personal injury claimant who was awarded \$310,000 (by judicial determination) sued his solicitor and barrister for allegedly failing to tell him that the defendant had offered to settle for \$600,000, and rejecting the offer without his instructions. The NSW Court of Appeal upheld summary dismissal of the claim on the grounds of advocates' immunity. Special leave in this matter was granted after the *Attwells* decision, on 17 June 2016.¹¹⁹

¹¹⁷ *Macquarie International Health Clinic Pty Ltd v Sydney Local Health District* [2013]NSWSC 970, [3];[6] (Kunc J).

¹¹⁸ [2015] NSWCA 132.

¹¹⁹ *Kendirjian v Lepore & Anor* [2016] HCATrans 141; [2016] HCASL 140.