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Barristers and professional negligence

INTRODUCTION

Prior to the important case of *Hedley Byrne v Heller*,[1] barristers were virtually immune from being sued in respect of their work. There were two reasons for this. First, barristers could not be sued in negligence because prior to *Hedley Byrne* the law of negligence did not recognise liability for pure economic loss. Second, barristers could not be sued in contract because the law said there was no contract between barristers and those to whom they provided services.[2]

Times have changed. First, the case of *Hedley Byrne* recognised liability in negligence for pure economic loss, opening the way for individuals to sue information and advice providers. Second, the law now recognises a contractual relationship between barristers and their instructing solicitors,[3] opening the way for barristers to be sued in contract. Third, a trend over the last 25 years has been to improve the accountability of legal practitioners to their clients. While this has been a positive development, a consequence has been a greater willingness by dissatisfied clients to sue their legal advisers.

This article considers three issues relevant to the liability of barristers in negligence. They are the standard of care required of barristers, categories and instances of liability, and the scope and status of the barrister's immunity from suit for in-court work.

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STANDARD OF CARE REQUIRED OF BARRISTERS

A barrister is required 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.'[4]

Where a barrister professes to have a special skill in an area of the law, 'the standard of care required is that of the ordinary skilled person exercising and professing to have that special skill'.[5]

In contrast, where a barrister is a novice, he or she is likely to be judged against the standard of care and skill expected of barristers generally, rather than the lower standard displayed by novice barristers.

In considering the standard of care required of barristers in the provision of advice, a barrister will not be liable

merely because their advice turns out to be wrong. There is a distinction between an error in judgment and negligence.

In *Saif Ali v Sydney Mitchell & Co*,[6] Lord Wilberforce noted that 'much if not most of the barrister's work involves exercise of judgment – it is in the realm of art not science'.[7]

He continued: 'No matter what profession it may be, the common law does not impose on those who practice it any liability for damage resulting from what in the result turn out to have been errors of judgment, unless the error was such as no reasonably well-informed and competent member of that profession could have made it.'[8]

This point was exemplified in *Cook v S*[9] where a barrister was held to be 'mistaken' but not negligent in relation to advice given to a client.

CATEGORIES AND INSTANCES OF LIABILITY

The instances in which barristers might be found liable in negligence can be categorised into groups as follows. First, a barrister may be liable for giving wrong advice. As stated above, it is not sufficient that the advice was merely wrong. The error made by the barrister must be such that 'no reasonably well-informed and competent member of that profession could have made it'.[10]

There have been a number of cases in which barristers have been found liable for giving wrong advice. In *Wakim v HIH Casualty & General Insurance Ltd*,[11] a barrister was found liable in relation to advice given. A feature of the case was that although the barrister professed expertise in the relevant field of law, the advice was contrary to a line of authorities in that field.

In *Macrae v Stevens*,[12] a barrister was found liable in relation to advice given to a client on the jurisdiction in which to commence personal injury proceedings. The advice was plainly and obviously wrong.

In *Griffin v Kingsmill*,[13] a barrister was found liable in his evaluation of evidence.

In *Moy v Pettman Smith*,[14] a barrister was found liable in advising a client not to accept an offer of compromise. In recommending that the client not accept the offer, the barrister failed to inform the client of a number of difficulties with the case. Equally, a barrister may be found liable for undervaluing a client's claim in settlement negotiations.[15]

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Second, a barrister may be liable for failing to advise where, in the circumstances, they should have done so. Obviously, the scope of the barrister's retainer will be relevant to this matter. For example, in *Macrae*,[16] a barrister was briefed to 'advise and prepare statement of claim'. It was clear from the papers included in the brief given to the barrister that a limitation period expired a few months later. Yet the barrister failed to advise on this point, as a result of which the limitation period expired before proceedings were commenced. In the circumstances, the barrister was found liable for failing to advise on the expiry of the limitation period.

In contrast, in *Heydon v NRMA Ltd*,[17] a claim against a barrister by a client for failing to advise the client that its prospectus potentially contravened the *Trade Practices Act* 1974 (Cth) failed. The trial judge and Court of Appeal held that this issue was not within the barrister's retainer.

Third, in the context of advising on causes of action and drafting pleadings, if 'a barrister omits to plead a cause of action in a situation where no other reasonably competent barrister, acting with ordinary care, would have failed to plead that cause of action, then he or she will be liable to compensate the client if loss flows foreseeably from that negligence'.[18]

Fourth, barristers have occasionally been sued for work performed in court. In Australia, the High Court has stated that barristers are immune from suit for in-court work and related work performed out of court.[19] The scope and status of the immunity is discussed below. In the event the immunity is abolished, it is useful to be aware of the instances of barristers' liability in jurisdictions where the immunity never existed or has now been abolished.[20]

SCOPE AND STATUS OF BARRISTER'S IMMUNITY FROM SUIT

In Australia, the High Court has stated that barristers cannot be sued in negligence for work they perform in court and certain related work performed out of court.[21] The reasons for this immunity from suit are explained in the various judgments in *Gianarelli v Wraith*.

Two issues arise in considering the immunity. The first is the scope of the immunity. In *Giannarelli*, the High Court stated that the immunity applies to work done by a barrister in court and to 'work...so intimately connected with the conduct of the cause in court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing'.[22]

In relation to the latter part of this test, there have been divergences in judicial opinion as to its application. For ▶

example, in *Keefe v Marks*[23] a barrister failed to plead a claim for interest in a personal injury case under rules of court, and failed to advise the client of the potential for such a claim. The Court of Appeal divided on the question of whether the barrister's omissions were protected by the immunity from suit.

> "The future of the barrister's immunity from suit in Australian law is uncertain."

Similarly, in *Boland v Yates Property Corporation Pty Ltd*[24] a barrister failed to consider, advise upon and pursue a special claim for compensation for land resumption. Again, there was a difference of opinion between the judge at first instance and Full Court of the Federal Court on appeal as to whether the immunity applied.

The second issue in considering the barrister's immunity is the status of the immunity. In *Giannarelli*, the barrister's immunity from suit was recognised by only a bare majority of the High Court. In England, the House of Lords recently abolished the immunity.[25] In light of these matters, the future of the immunity in Australian law is uncertain. PL

Endnotes: **1** [1964] AC 465. **2** See *Rondel v Worsley* [1969] 1 AC 191 at 236, 261-2. **3** See *Shand v Doyle* [1997] ANZ Conv R 134. **4** *Heydon v NRMA Ltd* (2000) 51 NSWLR 1 at [146]. **5** ibid at [146], [362]. **6** [1980] AC 198. **7** at 214. **8** at 220. **9** [1966] 1 WLR 635. **10** *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 at 220. **11** (2001) 111 FCR 58. **12** (1996) Aust Torts Reports 81-405. **13** [2001] Lloyds Rep PN 716. **14** [2002] EWCA Civ 875. **15** See *Hodgins v Cantrill* (1997) 26 MVR 481. **16** supra 12. **17** supra 4. **18** *McFarlane v Wilkinson* [1997] 2 LR 259. **19** see *Giannarelli v Wraith* (1988) 165 CLR 543. **20** For a collection of Canadian and United States cases demonstrating suits brought against barristers for in-court work, see Walmsley, Abadee and Zipser (2002) *Professional Liability in Australia*, Lawbook Co, 424-25. **21** supra 19. **22** at 560, 596. **23** (1989) 16 NSWLR 713. **24** (1999) 74 ALJR 209. **25** see *Arthur J S Hall & Co v Simons* [2000] 3 WLR 543.