29/05; [2005] VSC 433

SUPREME COURT OF VICTORIA

ARUNDELL v WILLIAMS WINTER & HIGGS and ORS

Morris J

20 October, 8 November 2005 — (2005) 158 A Crim R 16

LEGAL PRACTITIONERS – IMMUNITY FROM LIABILITY – DAMAGES SOUGHT BY ACCUSED FROM LEGAL PRACTITIONERS WHO REPRESENTED HIM AT CRIMINAL TRIAL – PRACTITIONERS IMMUNE FROM SUIT IN RELATION TO CONDUCT OF CASE IN COURT OR WORK OUT OF COURT INTIMATELY CONNECTED WITH CONDUCT OF TRIAL – WHETHER PROVISIONS OF *LEGAL PRACTICE ACT* 1996 AFFECTS SUCH IMMUNITY – WHETHER PROCEEDING CLAIMING DAMAGES WOULD BE AN ABUSE OF PROCESS: *LEGAL PRACTICE ACT* 1996, S442.

1. Unless and until changed by statute, the law in Victoria in relation to the immunity of a legal practitioner from suit has been authoritatively settled by the High Court in *D'Orta* [2005] HCA 12; (2005) 223 CLR 1; (2005) 214 ALR 92; (2005) 79 ALJR 755; [2005] Aust Torts Reports 81-784 and *Giannarelli* [1988] HCA 52; (1988) 165 CLR 543; (1988) 81 ALR 417; [1988] Aust Torts Reports 80-217; [1988] ANZ Conv R 541; (1988) 35 A Crim R 1; (1988) 62 ALJR 611. The majority of the court in *D'Orta* held that a legal practitioner was immune from suit, whether in negligence or on some other basis, in relation to his or her conduct of a case in court or in relation to work out of court which was intimately connected with the conduct of the case in court. This conclusion is based upon the principle that the judicial process is an aspect of government. The determinative factor is that, unless there is an immunity, there would be adverse consequences for the administration of justice that would flow from the re-litigation in collateral proceedings of issues determined in the principal proceedings. In turn this factor is based upon a central and pervading tenet of the judicial system that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances. The provisions of the *Legal Practice Act* 1996 expressly preserves the state of the law as it was determined in *Giannarelli*.

2. If the legal practitioners in the present case were not immune from suit, the proceeding should be dismissed as an abuse of process. In particular, for the plaintiff to show he has suffered damage by reason of the conduct of a defendant, he would need to show that he was wrongly convicted. Such a finding would undermine the criminal justice system.

MORRIS J:

1. In November 1997 the plaintiff was tried in the County Court of Victoria for a number of sexual offences that were said to have been committed in the 1980s. The first defendants acted as the plaintiff's solicitors in relation to the trial. The second and third defendants were barristers who represented the plaintiff at the trial. The plaintiff was convicted of many of the charges and was sentenced to imprisonment. Subsequently the Court of Appeal upheld the verdicts, but altered the sentence to be a term of imprisonment of nine years, with a non parole period of six years.[1]

2 . Almost six years after the trial in the County Court, the plaintiff commenced an action in this court seeking damages from the defendants. The Statement of Claim alleges that the defendants owed a contractual and ethical duty of care to the plaintiff as well as a statutory duty of care pursuant to the *Legal Practice Act* 1996. It further alleges that the duty of care was breached in various respects in relation to the County Court trial, such as a failure to call certain witnesses, a failure to cross-examine in relation to particular matters and a failure to take exception to aspects of the trial judge's charge to the jury. The matters complained of wholly relate to the manner in which the respondents conducted the trial of the plaintiff. And, to the extent that the alleged conduct relates to any out of court matter, such alleged conduct was integrally connected with the conduct of the trial.

3. In their defences each defendant claims, in substance, that the plaintiff's action concerns matters which involve decisions and work which were so intimately connected with the conduct of the case in court that the defendants are immune from liability. Further they say that the

proceeding involves a collateral attack on the decision of the County Court of Victoria in a criminal proceeding and is therefore an abuse of process.

4. On 1 September 2005 Master Efthim considered applications made by the defendants that the proceeding be "forever stayed" against the defendants. He upheld the application and gave judgment in the proceeding in favour of the defendants and ordered that the plaintiff pay each defendant's costs of the proceedings, including any reserved costs and the costs of the application. Master Efthim recorded that, in making these orders, he relied upon the decision of the High Court of Australia in *D'Orta-Ekenaike v Victorian Legal Aid*[2] (which, for reference, I will refer to as *D'Orta*.)

5. The plaintiff has now appealed against the order of Master Efthim, with the result that the defendants' applications are required to be considered afresh.

6. Essentially the defendants contend that the plaintiff's action is bound to fail. First, it is said that by reason of *D'Orta* and the earlier case of *Giannarelli v Wraith*[3] a legal practitioner is immune from suit in relation to the conduct of a case in court or in relation to work done out of court which is intimately connected with the conduct of a case in court. Second, it is said that the plaintiff's action constitutes an abuse of process because it involves a collateral attack upon the result of the criminal proceeding in the County Court of Victoria, as, to succeed in the claim for damages, the plaintiff would need to establish that his conviction was wrong.

Immunity from suit

7. Unless and until changed by statute, the law in Victoria in relation to the immunity of a legal practitioner from suit has been authoritatively settled by the High Court in *D'Orta* and *Giannarelli*. The majority of the court in *D'Orta* held that a legal practitioner was immune from suit, whether in negligence or on some other basis, in relation to his or her conduct of a case in court or in relation to work out of court which was intimately connected with the conduct of the case in court. This conclusion was based upon the principle that the judicial process is an aspect of government. The determinative factor was that, unless there was an immunity, there would be adverse consequences for the administration of justice that would flow from the re-litigation in collateral proceedings of issues determined in the principal proceedings. In turn this factor is based upon a central and pervading tenet of the judicial system that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances.

8. The plaintiff contended that his case did not fall under the same statutory provisions as those which applied in *D'Orta*. He pointed out that the alleged negligence in the *D'Orta* case occurred in February 1996, when the relevant statutory law applying in Victoria was the *Legal Profession Practice Act* 1958. By contrast, he submitted, the present action concerned conduct at a trial conducted in November 1997, at which time the operative statute law was the *Legal Practice Act* 1996.[4] However, in my opinion, this does not make any difference. The majority of the High Court in *D'Orta* considered this question in the context of whether that case was an appropriate one for leave to be granted and concluded:

> "Nothing in any of the legislative steps taken since *Giannarelli* suggests that the court should now reconsider the decision reached in that case. On the contrary, the enactment of section 442 of the *Legal Practice Act* 1996 suggests that the court should not do so. One State legislature, directly confronted with a recommendation that the law should be changed to the form for which the applicant now contends, chose not to do so. That legislature expressly preserved the state of the law as it was determined in *Giannarelli* supplementing that with a limited right to compensation in cases (among others) where a practitioner had failed to act with due skill and care."[5]

9. Even if I am not bound to apply the decision of the High Court in *D'Orta*, my own view of the law that is applicable in the present proceeding is the same as that expressed by the majority in *D'Orta*.

10. It follows that the plaintiff's action is bound to fail. It does not disclose a cause of action. There should be judgment in favour of the defendants.

Abuse of Process

11. In the circumstances, it is unnecessary to deal with the defendants' submission that the proceeding was an abuse of process. In truth, (at least in the context of this case) this issue is

closely connected with the question of whether a legal practitioner is immune from suit in relation to the conduct of a proceeding in court. It is sufficient to say that, if the defendants were not immune from suit, my inclination would be to summarily dismiss the proceeding as an abuse of process. In particular, I would have thought that for the plaintiff to show he has suffered damage by reason of the conduct of a defendant, he would need to show that he was wrongly convicted. Such a finding would undermine the criminal justice system.

Costs

12. In my opinion, the plaintiff, having lost the appeal, should pay costs. These should be assessed on a party and party basis, not on a solicitor client basis: compare *Rajendran v Tonkin* (2004) 9 VR 423-4. Although the defendants warned the plaintiff that the action was doomed, the plaintiff was able to raise a point by which the *D'Orta* could be distinguished. The fact that I do not accept that the point has merit is not sufficient to warrant solicitor client costs.

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[1] See *R v Arundell* [1998] VSCA 102; [1999] 2 VR 228; (1998) 104 A Crim R 78.
[2] [2005] HCA 12; (2005) 223 CLR 1; (2005) 214 ALR 92; (2005) 79 ALJR 755; [2005] Aust Torts Reports 81-784.
[3] [1988] HCA 52; (1988) 165 CLR 543; (1988) 81 ALR 417; [1988] Aust Torts Reports 80-217; [1988] ANZ Conv R 541; (1988) 35 A Crim R 1; (1988) 62 ALJR 611.
[4] The *Legal Practice Act* 1996 came into operation on 1 January 1997.
[5] [2005] HCA 12; (2005) 223 CLR 1; 214 ALR 92, at [54]; (2005) 79 ALJR 755; [2005] Aust Torts Reports 81-784.

APPEARANCES: The plaintiff Arundell appeared in person. For the first defendant: Mr P Crutchfield, counsel. Wisewoulds Lawyers. For the second defendant: Mr J Livitsanos, counsel. Gallagher Holcroft Lawyers. For the third defendant: Mr P Crutchfield, counsel. Middletons Lawyers.
