

CASE COMMENT

COUNSEL'S IMMUNITY: THE HIGH COURT'S DECISION IN *BOLAND V YATES*

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Over the last decade, Australian negligence law has undergone a vast transformation. Many of the restrictions previously imposed upon negligence suits have now been abolished. In particular, litigants may now recover damages more widely in respect of negligent advice¹ and may also recover damages for negligence causing pure economic loss.² Because of these changes, the scope of liability for most professionals has increased vastly. Doctors in particular are now subject to stringent rules protecting their clients.³

Since the 1988 High Court decision of *Giannarelli v Wraith*⁴ however, legal professionals (primarily barristers) have remained largely immune from these developments. A barrister cannot be held liable for 'in-court work', a phrase that was said by Mason CJ to encompass both the advocacy work of counsel and legal work executed in anticipation of a court appearance that is 'intimately connected with the conduct of the cause in court'.⁵ Thus, in *Giannarelli*, it was held that counsel who had failed to raise in defence of their clients certain provisions which rendered crucial evidence inadmissible in the criminal proceedings brought against them could not be sued for negligence, even though such a failure constituted a *prima facie*, indeed even an egregious breach of their duty of care.

The theme of justice before interests animated the court's reasoning. Not all the judges emphasized the same factors, but the majority placed strong emphasis on counsel's 'overriding duty' to the court. Their judgments evidenced a concern that liability to negligence actions may cause counsel to identify too strongly with the

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¹ *San Sebastian Pty Ltd v Minister Administering the Environmental Planning and Assessment Act 1979* (1986) 162 CLR 340.

² *Perre v Apand Pty Ltd* (1999) 198 CLR 180; *Hawkins v Clayton* (1988) 164 CLR 539.

³ *Rogers v Whitaker* (1992) 175 CLR 479; *Chappel v Hart* (1998) 195 CLR 232.

⁴ (1988) 165 CLR 543.

⁵ *Ibid* 559 (Mason CJ).

client (for fear of suit), or, at the very least, to perform a kind of ‘defensive advocacy’ (for example, calling every witness and discovering every document). Their Honours argued that such a one-sided commitment to their clients’ interests may in some circumstances be inconsistent with counsel’s overriding duty to the administration of justice.⁶ In addition, a number of the majority judges considered that allowing negligence actions against counsel would constitute a ‘relitigation’ of finalised cases, which would ‘be destructive of public confidence in the administration of justice’.⁷

Despite these justifications, the decision in *Giannarelli* has been strongly criticised both from within and outside of the profession. In *Giannarelli* itself, Deane J mounted a powerful dissent, arguing that the majority considerations did not:

outweigh or even balance the injustice and consequent public detriment involved in depriving a person, who is caught up in litigation and engages the professional services of a legal practitioner, of all redress under the common law for ‘in court’ negligence, however gross and callous in its nature or devastating in its consequences.⁸

The ‘relitigation’ justification put forward by the majority has also been trenchantly criticised. Indeed, it is fragrant with irony: the court is using an appeal to justice in order to prevent any action by an individual to hold a barrister responsible for his or her action, within the very system of justice under which the courts routinely hold the rest of us responsible for our actions. Is justice then immune from justice?

Despite these criticisms, *Giannarelli* remains binding authority. Nonetheless, a recent decision of the High Court suggests that the end may be near. In *Boland v Yates*,⁹ a number of members of the High Court have expressed the view that *Giannarelli* should be reconsidered. This case note considers the effect of *Boland* on the future of *Giannarelli*.

FACTS

The proceedings in *Boland v Yates* arose out of the handling of a claim for compensation made by Yates Property Corporation (‘Yates’) subsequent to the compulsorily acquisition of Yates’ property by the Darling Harbour Authority in 1985.

Yates’ claim for compensation against the Darling Harbour Authority was filed in the New South Wales Land and Environment Court. The litigation that followed was complex, and there were numerous appeals and cross-appeals to the New South Wales Court of Appeal.

⁶ Ibid 613 (Mason CJ); 620 (Wilson J) and 623 (Brennan J)

⁷ Ibid 614 (Mason CJ).

⁸ Ibid 588.

⁹ (1999) 167 ALR 575.

The issue at the heart of the appeal in *Boland v Yates* related to Yates' contention that, at the time of the acquisition, it was in a position of advantage relative to any other prospective purchaser wishing to build markets on the land. This advantage arose, so Yates argued, by reason of the activities that it had undertaken (including, *inter alia*, investigation and market research) in preparing the site for development. Yates contended that because of its time-related advantage (termed in the proceedings as a 'head start case'), it was entitled to additional compensation for 'special value' over and above the compensation that it would otherwise have recovered for the value of the land. This contention was not raised before the Land and Environment Court, nor the Court of Appeal by Yates' counsel, and when the proceedings were finally settled, the settlement was made without reference to the 'special value' of the land.

Yates then sued its former legal representatives, alleging that they had negligently failed to identify and pursue a 'head start' case. The claims were brought both in negligence and under the *Trade Practices Act 1974* (Cth).

Yates' counsel denied that they had been negligent, contending that they had not failed to address any legally and factually supportable argument. In the alternative, they asserted that even if negligence were proved, they were protected from liability under the rule of *Giannarelli v Wraith*. Yates' solicitors mounted a similar argument, firstly denying that they had been negligent, and secondly arguing that the principle in *Giannarelli* should be extended to cover solicitor's immunity.

THE DECISIONS AT FIRST INSTANCE

At first instance, Branson J in the Federal Court found in favour of the defendants on all grounds.¹⁰ Her Honour held that there was no negligence on the part of either of the defendants. Branson J found that the counsels' professional duty did not require them to attempt to argue a 'head start' claim of the kind for which Yates contended (indeed, she found that such a claim had the potential to undermine other aspects of Yates' case). In any event, Branson J concluded, both senior and junior counsel were immune from liability under *Giannarelli v Wraith*, the relevant actions and inactions being intimately connected with the case presented in court.

The Full Court of the Federal Court (Drummond, Sundberg and Finkelstein JJ) allowed Yates' appeal, holding that the failure to argue a 'head start case' constituted negligence.¹¹ Unlike Branson J, the Full Court considered that counsel were not immune from liability by virtue of *Giannarelli*. Rather, it considered that a failure to advise on an item of loss in respect of which compensation was payable was not 'inextricably linked with the presentation of the case in Court', and was thus not subject to immunity.

¹⁰ *Yates Property Corporation Pty Ltd v Boland* (1997) 145 ALR 169.

¹¹ *Yates Property Corporation v Boland* (1998) 85 FCR 84.

The defendants then appealed to the High Court.

THE DECISION OF THE HIGH COURT

The High Court allowed the appeals by the solicitor and counsel from the decision of the Full Federal Court.¹²

The court found that there had been no negligence on the part of the solicitor, or of either counsel. In reaching this conclusion, the court considered that the 'head start case' had 'serious problems ..both as a matter of principle, and in its application to the particular facts of the case'.¹³

Although the court's findings on the negligence issue meant that it was unnecessary to consider *Giannarelli*, a number of the High Court Justices nonetheless considered the rule concerning the immunity of counsel.

The judgment of Kirby J was the most comprehensive on this issue. Kirby J indicated early in his judgment that the issue of whether negligence had in fact been proven, reliant as it was on a finding that a 'head start case' was justified (a factually complex question), was 'not a task to be embarked upon with enthusiasm or in the absence of clear necessity'.¹⁴

Kirby J accordingly began by considering whether the counsel and solicitors were severally entitled to immunity from suit. In considering this issue, he considered many of the traditional arguments against the immunity. In particular, he noted that the immunity was 'a derogation from the normal accountability for wrong-doing to another which is an ordinary feature of the rule of law and fundamental civil rights'.¹⁵ He also noted that the immunity had been widely criticised by other professionals, many of whom 'have to make decisions at least as difficult and often as urgent as those typically made by legal practitioners, including advocates'.¹⁶

Despite acknowledging the force of such criticism, Kirby J did not appear to diverge significantly from the approach finally adopted in *Giannarelli*. He merely concluded that the immunity should be confined to 'a legal practitioner advocate in respect of in-court conduct during proceedings before a court or like tribunal'.¹⁷ Because the other members of the court approached the issue by firstly considering whether negligence had been proven, they did not consider it necessary to discuss

¹² Although the plaintiffs had not appealed to the Full Court in respect of the findings in relation to the Senior Counsel, the Full Court nonetheless reversed the costs orders in respect of him. Accordingly, Senior Counsel also appealed to the High Court in respect of this order.

¹³ *Boland v Yates* (1999) 167 ALR 575 [89] (Gleeson CJ) with whom Gaudron, Gummow, Hayne and Kirby JJ agreed.

¹⁴ *Ibid* [120].

¹⁵ *Ibid* [129].

¹⁶ *Ibid*.

¹⁷ *Ibid* [150].

the rule concerning immunity from suit in the same depth as Kirby J. Nonetheless, in the course of their judgments most of the judges made limited comment concerning their view of the future applicability of *Giannarelli*.

Gaudron and Callinan JJ expressly indicated competing views concerning *Giannarelli*. Gaudron J declared that if the question of 'immunity' had arisen, she would have granted leave to re-open the decision.¹⁸ Moreover, she indicated that, in her opinion, *Giannarelli* should be reconceptualised better to accord with the general principles of negligence, stating:

... proximity - more precisely, the nature of the relationship mandated by that notion - may exclude the existence of a duty of care on the part of legal practitioners with respect to work in court. Whatever the position, it is one that derives from the law of tort, not notions of 'immunity from suit'.¹⁹

In Callinan J's view, on the contrary, *Giannarelli* was based on 'sound policy and legal grounds'.²⁰ In reaching this view, Callinan J endorsed Mason CJ's opinion that the immunity was required to 'protect the administration of justice'.²¹ Perhaps it is not coincidental that Gaudron J, who was for most of her career not a barrister in private practice, found little merit in the current immunity, while Callinan J, the court's most recent recruit directly from practice, was its staunchest supporter.

The positions of Gleeson CJ, Hayne and Gummow JJ on the issue of immunity from suit are more difficult to ascertain. Gleeson CJ and Hayne J did not express an opinion on whether *Giannarelli* should be overruled, stating that comment on the issue was unnecessary due to their findings that negligence had not been proven.²²

Gummow J similarly indicated that, since he had found that negligence had not been proven, the respondent's application for leave to re-open *Giannarelli* should be refused. Significantly however, he stated that disposing of the applicant's submission by refusing leave to appeal in this case should not be taken as indicating that he had 'any enthusiasm for such a course had the question of reconsideration of *Giannarelli* squarely arisen'.²³ Those questions, he foreshadowed, 'are for another day'.²⁴

DISCUSSION

Boland v Yates leaves many questions unanswered. Firstly, although *Giannarelli* remains binding, its current ambit remains unclear. In the decisions at first and second instance, Branson J and the Full Court expressed quite different opinions as

¹⁸ Ibid [107].

¹⁹ Ibid.

²⁰ Ibid [363].

²¹ Ibid [361].

²² Ibid [96] (Gleeson CJ), [176] (Hayne J).

²³ Ibid [112].

²⁴ Ibid [115].

to the proper application of *Giannarelli*. Branson J considered that advice and action relating to decisions as to which claims to pursue clearly fell within the test, being ‘intimately connected with the case presented in court’. In contrast, the Full Court took a much narrower view of the immunity, considering that preliminary work did not fall within the ambit of *Giannarelli*.

Similarly, the legal position is unclear in relation to the liability of solicitors (as opposed to barristers), in those jurisdictions (such as NSW) where the profession is divided. As Gummow J pointed out, neither of the judgments (of Branson J or the Full Court) on these issues remain *ratio decidendi* after the High Court’s decision.²⁵ Because of her conclusions that negligence had not been proven, Branson J’s opinion on the issues surrounding immunity from suit are, and have always been, mere *obiter*. Similarly, as the Full Court’s judgment was overturned, its findings on these issues now lack authority as precedent, and given their defective factual foundations, also lack persuasive force.²⁶

Neither do any of the High Court judgments assist in the future application of the rule. In his judgment, Kirby J opined that the Full Court’s application of *Giannarelli* was to be preferred over that of Branson J.²⁷ Against this, Gleeson CJ and Callinan J indicated that they believed that Branson J’s application was to be preferred.²⁸ Accordingly, for the time being at least, it is unclear whether the more limited approach of the Full Court, or the wider approach of Branson J should be followed.

More importantly, a majority of the judgments in *Boland* suggest that the very rule in *Giannarelli* may be short-lived. Kirby, Gummow and Gaudron JJ clearly indicated that in an appropriate case, they would be prepared to reconsider the applicability of counsel’s immunity. Only Callinan J stated that he considered that *Giannarelli* should stand.

The question of how the court might go about such a reconsideration of the rule merits serious consideration. In this regard, *Boland* offers two approaches, that propounded by Kirby J, and that propounded by Gaudron J.

Kirby J’s approach is somewhat difficult to follow. Although he strongly criticised the *Giannarelli* rule, he nonetheless appeared to favour retaining the immunity (albeit in its narrowest form). Yet many of the criticisms that Kirby J accepts are equally applicable to the narrow formulation of the rule. The immunity that he ultimately accepts may be equally criticised for its ‘derogation’ from general principles concerning wrongdoing.

²⁵ Ibid [114].

²⁶ Ibid.

²⁷ Ibid [128].

²⁸ Ibid [97] (Gleeson CJ), [363] (Callinan J).

The answer to this apparent inconsistency may be that there are policy considerations in retaining a narrow, purely 'in-court' immunity that outweigh the criticisms that Kirby J accepted in relation to 'out-of-court' work. These policy decisions relate primarily to the protection of counsel for decisions made in accordance with their duty to the court. As he stated:

It is here [in the court-room] only that the advocate is in a position analogous to that of the judge, juror, witness or court official who cannot by law be sued for their acts and omissions as such. It is here that instant decisions must be made and judgments exercised which involve the advocate in the inexact but important functions of advocacy with its special contribution, in the adversary system, to the administration of justice. It is here, primarily, that the advocate must fulfil the 'paramount' duties to the court even where these incur 'the displeasure or worse of his client'.²⁹

In this way, Kirby J's formulation of the 'in-court/out-of-court' distinction aims to protect counsel for decisions made in the interests of the court, or in the interests of justice, or in making judgment calls as to the nature of their advocacy. Thus, for example, a decision by counsel not to pursue a particular line of cross-examination (made, for example, because the counsel believes that the argument has little chance of success, and would likely waste the court's time), is not subject to liability; whilst a failure to properly consider a particular line of argument when formulating pleadings would be subject to liability.

Nonetheless, with respect, the 'in-court/out-of-court' distinction simply cannot adequately differentiate between the policy demands that Kirby J articulates. Although Kirby J argues that it is 'primarily' decisions made in court in which counsel is likely to be required to fulfil his or her duty to the court at the expense of the client's interests, it is not true to say that such 'in-court' conduct is necessarily one made in the court's interests. Nor is it necessarily true that the 'out-of-court' conduct of counsel (or a solicitor for that matter) will never be controlled by counsel's overriding duty to the court or to the interests of justice. The former application of the rule is particularly disconcerting when considered in a criminal context, where pleadings are rare, and the majority of counsel's work is performed 'in-court'. Indeed, in this context, any negligent failure of counsel, including a failure to lead an exculpatory defence, would be covered by the immunity, however dire the consequences for the client and however unrelated the error to counsel's duty to the court.

Given that Kirby J's distinction does not resolve the dilemma he propounds, it is undoubtedly open to His Honour to abandon the immunity and instead to address any policy issues that might arise in considering the alleged negligence of counsel, directly and in their specific factual context. Such an approach would be consistent not only with Kirby J's stated concerns, but also with the approach the court has recently taken in several areas, not least in respect of pure economic loss. *Perre v Apand* clearly indicates that the court now prefers an explicit analysis of policy

²⁹ Ibid [135].

arguments for and against liability in the context of a specific case. As Kirby J himself explained:

In later decisions of this court, in cases where liability for pure economic loss was claimed, the acknowledgment of the place of policy that has come to characterise this area of the law (and to which Callinan J correctly refers in his reasons) entered with growing candour into this court's discourse. ... Even if foreseeability and proximity are first established, there is no escaping the evaluation of the competing arguments of policy for and against the attachment of legal liability in the particular case.³⁰

It would certainly be consistent with the court's emerging jurisprudence to apply a similar approach in this area.

An alternate approach is outlined by Gaudron J. Because of her conclusions on the negligence issue, Gaudron J's discussion of the immunity was brief, and her approach to the issue accordingly remains largely unformulated. Nonetheless, her judgment suggests that she would abolish any immunity that did not stem from the general law of tort as now understood by the court.

This aspect of Gaudron J's formulation appears to have much justification. Indeed, it has been frequently argued that counsel's immunity could be completely abolished without jeopardising in any way the policy considerations at stake. As the Law Reform Commission of Victoria recognised:

An error in making a 'close call' would not be negligence, and nor would it be negligent for an advocate to err in favour of his or her duty to the court. The circumstances under which advocates have to make decisions can all be taken into account when deciding what constitutes a breach of duty.³¹

Indeed, it is undoubtedly the case that a judgment call or a decision made out of respect for the interests of the court would not constitute a breach of duty under the principles of negligence normally understood. This is particularly so in light of the deference normally shown by the court to the judgment of fellow professionals.³²

On the other hand, there is no reason to suppose that a simple display of incompetence by counsel could fairly be characterized as arising from the advocate's countervailing duty to the court or to justice. The means to distinguish the policy issues of relevance are, as Gaudron J implies, already immanent within the law of negligence and require no special supervening immunity.

³⁰ *Perre v Apand Pty Ltd* (1999) 198 CLR 180, [286-89].

³¹ Law Reform Commission of Victoria, *Access to the Law: Accountability of the Legal Profession*, Report No 48 (1992).

³² Although the Court no longer considers that a professional is not negligent 'if he act in accordance with a practice accepted at the time as proper by a reasonable body of ... opinion', evidence of acceptable professional practice is nonetheless strongly probative, and remains a 'useful guide for the courts': *Rogers v Whitaker* (1992) 175 CLR 479, 487 (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ).

In this regard, Gaudron J's statement that proximity may exclude the existence of a duty of care on the part of legal practitioners with respect to work in court is somewhat opaque. But perhaps her Honour means to suggest that an act or omission by counsel, in court, which can be explained in terms of counsel's countervailing duty suggests that there may be, in those circumstances, a proximate relationship with the court which will subrogate that owing to his or her client *to the extent that they are in conflict*. But when such an argument is not tenable, there is no reason to override the proximity clearly present between client and counsel. On this approach, it would be a question of the nature of the relationship³³ and an inquiry as to whom the duty was, in the very specific circumstances of the act or omission called in question, owed - an analysis which, in the realm of tort, goes by the familiar if generalised name of proximity.

Such an approach would not necessarily be different to that which would be adopted under Kirby J's approach in *Perre v Apand*. As Gaudron J recognised in that judgment, the doctrine of proximity does not of itself provide the criterion of liability. Rather, it merely:

[signifies] that it is necessary to identify a factor or factors of special significance in addition to the foreseeability of harm before the law will impose liability for the negligent infliction of economic loss.³⁴

On either approach then, the court would be required to carefully evaluate competing policy demands in considering suits against council. The difference between the approaches would only relate to whether such evaluation is performed under the proximity test, or outside of it.

CONCLUSION

The High Court's decision in *Boland v Yates* is promising in its suggestion that the antiquated rule concerning counsel's immunity from suit established by *Giannarelli v Wraith* may be reconsidered.

However, a number of issues remain to be resolved. Importantly, if the court chooses to undertake a reconsideration, it is important that it consider what is to replace the doctrine. If some immunity is to remain, the court should carefully consider the basis for such immunity. Any such basis should be grounded either in principle or an articulated policy consideration, so that the boundaries of the immunity may be precisely delineated.

Equally, as Gaudron J suggests, it may be preferable for the immunity to be abolished in its entirety. Existing negligence doctrine is able to accommodate the policy considerations at issue; proximity and policy may play a role in limiting the

³³ *Cook v Cook* (1923) 33 CLR 369.

³⁴ *Perre v Apand Pty Ltd* (1999) 198 CLR 180 [27].

liability of counsel for decisions made in accordance with their countervailing duty to the court.

Of course, if the immunity were to be abolished, courts will be required to grapple with a number of difficult issues. As *Boland v Yates* demonstrates, the question of whether a legal representative is in fact guilty of negligence may require the court to answer questions that should have been litigated before the court at first instance. Causation (particularly in criminal cases such as *Giannarelli*) will also be difficult to establish, requiring a determination of whether the court at first instance would have reached a different verdict if not for the negligence of the legal representative. Indeed, 'relitigation' was one of the concerns that first led the majority judges to accept the immunity in *Giannarelli*.

Yet these problems do not justify the immunity. In innumerable negligence cases courts are called upon to answer questions every bit as difficult (Would the damage have occurred even if the negligent advice had not been given? Would the patient have died even if the doctor had followed proper procedure?). Furthermore, as Kirby J pointed out in *Boland v Yates*, many other jurisdictions have abolished or never adopted the immunity.³⁵ (Significantly, the House of Lords recently abolished in the immunity in *Arthur J.S Hall & Co v Simons (AP)*).³⁶ The experiences of those jurisdictions is proof against the argument that the immunity is a necessary component of the Australian legal system.

More importantly however, it is no answer to say that such 'relitigation' may bring the legal system into disrepute. The continued conferral of immunity at best preserves an image of justice at the expense of tolerating specific instances of actual injustice. This was precisely the point of Deane J's dissent. It appears to have been conceded in *Giannarelli* by Mason CJ in his warning that relitigation of finalised cases through collateral negligence suits would be 'destructive of public confidence in the administration of justice'.³⁷ For Mason CJ, then, public confidence in justice is to be maintained even through a concealment of its periodic failures.

Yet, ironically, in a society increasingly literate about the law, the knowledge of this dissonance must ultimately impact on the public image of justice *itself*, and thus serve to defeat the very goal, which, on some readings, lies at the heart of the immunity from suit. It may well be the case that, even from the point of view of protecting the dignity and repute of the court, immunity does rather more harm than good. If that is the case, and it is at least arguable that it is, then *Giannarelli* is a wraith that ought no longer haunt the law.

³⁵ *Boland v Yates* [138-140].

³⁶ [2000] 3 WLR 543.

³⁷ *Giannarelli* (1988) 165 CLR 543, 558.