SUPREME COURT OF QUEENSLAND

CITATION:	*Rogers v Roche & Ors* [2016] QCA 340
PARTIES:	**ANDREW IAN ROGERS** (appellant) **v** **STEPHEN FRANCIS ROCHE** (first respondent) **SIMON MICHAEL MORRISON** (second respondent) **MARIA SKORDOU** (third respondent)
FILE NO/S:	Appeal No 10302 of 2015 SC No 2977 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2015] QSC 272
DELIVERED ON:	16 December 2016
DELIVERED AT:	Brisbane
HEARING DATE:	20 July 2016
JUDGES:	Fraser and Gotterson JJA and Burns J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Allow the appeal.** **2. Set aside the orders made in the Trial Division on 24 September 2015.** **3. Paragraphs 27, 41-45, 49 and 52 of the Fresh Statement of Claim be struck out.** **4. Otherwise the respondents' application in the Trial Division be refused.** **5. The appellant have leave to file and serve an amended statement of claim which omits the paragraphs of the Fresh Statement of Claim mentioned in order 3 and which otherwise amends the Fresh Statement of Claim in ways which are not inconsistent with these reasons, such statement of claim to be filed and served within 21 days of judgment in this appeal.** **6. The parties have leave to make submissions about the costs of the appeal and the costs in the Trial Division in accordance with the Practice Direction or as directed by a Judge of Appeal.**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – DUTIES AND LIABILITIES – SOLICITOR AND CLIENT – NEGLIGENCE – IMMUNITY FROM SUIT – where the appellant was injured when he was riding as a pillion passenger on a jet ski – where the appellant brought proceedings in the Trial Division and was given judgment including an amount for economic loss – where the appellant considered that the award for economic loss did not fully compensate him for the economic loss he had sustained – where the appellant commenced proceedings in the Trial Division against the respondents to recover the balance of the loss he had sustained and for other relief – where the appellant's "Fresh Statement of Claim" claimed damages for breach of retainer, negligence and breach of fiduciary duty, a declaration that the first and second respondents were not entitled to the payment of fees they had charged and consequential orders for repayment of those fees – where the primary judge held that the appellant's claims for breach of retainer, negligence and breach of fiduciary duty, and the parts of the Fresh Statement of Claim relating to those claims, be struck out for a number of reasons including that the claims were not maintainable by reason of the advocate's immunity – where the appellant argued that the first and second respondents breached fiduciary duties that they owed to the appellant by preferring their own interests over the appellant's interests – where the allegations against the first and second respondents concerned solicitors' out of court conduct in relation to the appellant's personal injuries claim and as such did not attract advocate's immunity – where the respondents argued that the appellant's claim is necessarily within advocate's immunity because each alleged act and omission of the respondents led to the continuation of the claim to a judgment – whether the first and second respondents' conduct attracted advocate's immunity

PROCEDURE – STATE AND TERRITORY COURTS: JURISDICTION, POWERS AND GENERALLY – INHERENT AND GENERAL STATUTORY POWERS – TO PREVENT ABUSE OF POWER – ATTEMPTS TO RELITIGATE – where the primary judge held that the appellant's claims for breach of retainer, negligence and breach of fiduciary duty, and the parts of the Fresh Statement of Claim relating to those claims, be struck out for a number of reasons including that they were an abuse of process upon the ground that the claim involved re-litigation of an issue determined in the personal injuries judgment – where the appellant argued that none of his claims contend that the personal injuries judgment should have been different – where the respondents argued that the finality concept underlying the advocate's immunity will apply even with respect to representations at the time of the inception of the retainer or the competence of a solicitor if that involves reconsideration of an issue which has been the subject of a judicial

determination – where the respondents endorsed the conclusion that the whole of the appellant's claim for damages was an abuse of process – where it is an aspect of all parts of the appellant's claim that he was deprived of a full opportunity of obtaining the entire amount of his economic loss by the wrongful conduct of the first and second respondents – where to shut out litigation of this part of the appellant's claim would be more likely to bring the administration of justice into disrepute than would conflicting judicial decisions about the appellant's economic loss reached upon different evidence – whether the appellant's claim was a re-litigation abuse of process

PROFESSIONS AND TRADES – LAWYERS – DUTIES AND LIABILITIES – SOLICITOR AND CLIENT – NEGLIGENCE – IMMUNITY FROM SUIT – where the third respondent carried out the day-to-day conduct of the appellant's claim – where the appellant alleged that the third respondent was negligent in failing to adequately prepare the appellant's claim before and during litigation – where it was further alleged that the third respondent breached the fiduciary duty to the appellant by acting in self-interest to the appellant's detriment – where the primary judge held that the appellant's claims for breach of retainer, negligence and breach of fiduciary duty, and the parts of the Fresh Statement of Claim relating to those claims, be struck out for a number of reasons including that they were an abuse of process upon the ground that the claim involved re-litigation of an issue determined in the personal injuries judgment – where the appellant argues that the third respondent's alleged breach of fiduciary duty was outside the scope of advocate's immunity – whether the third respondent's alleged acts and omissions had the necessary effect upon the conduct of the case in court and the resolution of the case by the court to attract advocate's immunity

Personal Injuries Proceedings Act 2002 (Qld), s 4, s 32, s 35, s 42, s 48, s 56, s 59

Arthur JS Hall & Co v Simons [2002] 1 AC 615; [2000] UKHL 38, cited
Attwells v Jackson Lalic Lawyers Pty Ltd (2016) 90 ALJR 572; (2016) 331 ALR 1; [2016] HCA 16, considered
Brickenden v London Loan and Savings Co [1934] 3 DLR 465; [1934] UKPC 25, cited
Cleary v Jeans (2006) 65 NSWLR 355; [2006] NSWCA 9, cited
D'Orta-Ekenaike v Victoria Legal Aid (2005) 223 CLR 1; [2005] HCA 12, cited
Giannarelli v Wraith (1988) 165 CLR 543; [1988] HCA 52 cited
Goddard Elliot (a firm) v Fritsch [2012] VSC 87, cited
Hunter v Chief Constable of the West Midlands Police [1982] AC 529; [1981] UKHL 13, cited
Kendirjian v Lepore [2015] NSWCA 132, cited

Lewis v Hillhouse & Ors [2005] QCA 316, cited
Morgan v WorkCover Corporation (2013) 118 SASR 297; [2013] SASCFC 139, cited
O'Shane v Harbour Radio Pty Ltd (2013) 85 NSWLR 698; (2013) 85 NSWLR 698, cited
Reichel v Magrath (1889) 14 App Cas 665, cited
Rippon v Chilcotin Pty Ltd (2001) 53 NSWLR 198; [2001] NSWCA 142, cited
Rogers v Inter Pacific Resorts (Australia) Pty Ltd [2007] QSC 239, related
Rogers v Roche & Ors [2015] QSC 272, related
Sims v Chong (2015) 230 FCR 346; [2015] FCAFC 80, cited
State Bank of New South Wales Ltd v Stenhouse Ltd [1997] Aust Torts Reports 81-423, cited
Swinfen v Lord Chelmsford (1860) 5 H&N 890; [1860] 157 ER 1436; [1860] EngR 838, cited
Tomlinson v Ramsey Food Processing Pty Ltd (2015) 256 CLR 507; [2015] HCA 28, cited
Walton v Gardiner (1993) 177 CLR 378, [1993] HCA 77, cited
Young v Hones [2014] NSWCA 337, cited

COUNSEL: The appellant appeared on his own behalf
K F Holyoak for the respondent

SOLICITORS: The appellant appeared on his own behalf
McInnes Wilson Lawyers for the respondent

[1] **FRASER JA:** In 2001 the appellant was injured when he was riding as a pillion passenger on a jet ski. After taking steps with a view to complying with the pre-litigation regime in the *Personal Injuries Proceedings Act* 2002 (Qld) ("PIPA"), the appellant brought proceedings in the Trial Division against the operator of the resort where the accident occurred. In 2007 he was given judgment in those proceedings for $593,708.46.[1] That amount included $480,000 for economic loss, comprising $130,000 for past economic loss and $350,000 for future economic loss.

[2] The appellant considered that the award for economic loss did not fully compensate him for the economic loss he had sustained. He commenced proceedings in the Trial Division against the respondents to recover the balance and for other relief. He alleged that he retained the first and second respondents as his solicitors to represent him in his personal injuries proceedings and that the third respondent was the legal practitioner who had the day-to-day conduct of his claim from March 2005 and thereafter. In the appellant's "Fresh Statement of Claim" dated 7 January 2015 he claimed damages for breach of retainer, negligence, and breach of fiduciary duty, a declaration that the first and second respondents were not entitled to the payment of fees they had charged, and consequential orders for repayment of those fees.

[3] The respondents applied to strike out parts of the Fresh Statement of Claim and the claim. The primary judge did not strike out those paragraphs of the Fresh Statement of Claim that were relevant only to the claims for a declaration that the first and

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1 *Rogers v Inter Pacific Resorts (Australia) Pty Ltd* [2007] QSC 239.

second respondents were not entitled to the payment of fees they had charged and for consequential orders for repayment of those fees. The respondents did not seek judgment upon those claims and they are not in issue in this appeal.

[4] The primary judge[2] held that the appellant's claims for breach of retainer, negligence and breach of fiduciary duty, and the parts of the Fresh Statement of Claim relating to those claims, should be struck out because they were an abuse of process, upon the ground that the claim involved re-litigation of an issue determined in the personal injuries judgment, and because the claims were not maintainable by reason of the advocate's immunity affirmed in *Giannarelli v Wraith*[3] and *D'Orta-Ekenaike v Victoria Legal Aid*.[4]

[5] The appellant has appealed against the orders striking out those claims and the paragraphs of the Fresh Statement of Claim relating to those claims.

[6] Some points should be emphasised at the outset. The allegations against the respondents are untested. Whether the appellant's claims are viable, properly pleaded, or meritorious is not in issue in this appeal.

Summary of relevant allegations in the Fresh Statement of Claim

[7] I will first summarise the relevant allegations in the Fresh Statement of Claim.

[8] The appellant retained the first and second respondents as his solicitors to represent him in his claim for damages for personal injuries by a written "Client Agreement" which was forwarded to him in September 2002, which he signed in December 2002, and a copy of which, signed on behalf of the first and second respondents, was forwarded to the appellant in January 2003. That agreement included statements by the first and second respondents that "our personal injury teams work solely on personal injury claims and therefore have specialist knowledge on the laws and tactics relating to these claims," "…we have developed specialist departments, each focusing on their own particular type of personal injury claim. …the work will be performed by our Public Liability Team…" and the first and second respondents' hourly rate recognised their "many years experience conducting personal injury litigation", their "personal injury teams work solely on personal injury claims and are therefore fully dedicated to knowing the laws and tactics relating to personal injury claims", and "our Public Liability teams only work on public liability claims and consequently have expert knowledge on all the laws and tactics relating to public liability claim. …". The first and second respondents made other representations that they had a "Public Liability Department" or "Team" specialising in claims like the appellant's claim.

[9] By virtue of the retainer the first and second respondents owed a duty of care to the appellant the scope of which was informed by their representations of specialist expertise. The third respondent owed a duty of care to the appellant by virtue of her day-to-day conduct of his claim.

[10] The retainer was personal to the first and second respondents who were required to provide specialist legal services personally or by qualified and experienced staff solicitors supervised and managed by them. Without the knowledge or authority of the appellant, the first and second respondents substantially delegated performance

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2 *Rogers v Roche & Ors* [2015] QSC 272.
3 (1988) 165 CLR 543.
4 (2005) 223 CLR 1.

of the retainer to Murshine Pty Ltd. The first and second respondents were two of the three directors of Murshine Pty Ltd. That company employed Willey (a legal practitioner), who had the day-to-day conduct of the claim from September 2002 until March 2005. From March 2005, the third respondent, another employee of Murshine Pty Ltd, attended to the day-to-day conduct of the claim. Murshine Pty Ltd was not qualified to practise law in Queensland. The first and second respondents are liable in contract for the acts and omissions of Murshine Pty Ltd and its employees Willey and the third respondent.

[11] Between about 12 December 2002 and 2 November 2005 the first and second respondents, by their delegate Murshine Pty Ltd, purported to conduct the appellant's claim (before litigation) in accordance with PIPA. During the "PIPA stage" Murshine Pty Ltd with the knowledge and authority of the first and second respondents initially assigned the conduct of the claim to Willey, and subsequently to the third respondent. Murshine Pty Ltd prepared and served a PIPA notice of claim on 19 December 2002 and thereafter took various steps, including obtaining certain evidence, engaging counsel, and on 19 November 2004 filing a claim and statement of claim on the appellant's behalf. On 2 November 2005 the third respondent appeared on behalf of the appellant at a mediated compulsory conference.

[12] During the PIPA stage, the respondents, Murshine Pty Ltd and Willey failed to obtain certain evidence, including certain proofs of evidence from the appellant and lay witnesses and certain expert reports in relation to the appellant's economic loss claim. As a result, the appellant's claim for economic loss was inadequately prepared at the PIPA stage. The third respondent was negligent in failing to adequately prepare the appellant's claim during that stage.

[13] Following the conclusion of the PIPA stage, the third respondent caused the appellant's claims and statement of claim to be served on or about 21 November 2005. During the litigation, the respondents, Murshine Pty Ltd and Willey "failed to redress the inadequate preparation during the PIPA stage…" and failed to obtain certain evidence. As a result, the appellant's claim for economic loss was inadequately prepared at the litigation stage. The third respondent was negligent in failing to adequately prepare the appellant's claim during the litigation stage. The first and second respondents were negligent in delegating performance of the retainer to Murshine Pty Ltd, Willey and the third respondent, because they lacked suitable qualifications and experience, and in failing to exercise any effective supervision or management of the performance of the retainer.

[14] By virtue of the relationship of solicitor and client pursuant to the retainer (or, in the third respondent's case, by virtue of her day-to-day conduct of the appellant's claim) the respondents owed the appellant a fiduciary duty which prohibited them from preferring their self-interest to the detriment of the appellant. The first and second respondents breached their fiduciary duty to the appellant by acting in their self-interest to the appellant's detriment in a number of respects, including:

1. "by securing his retainer on the basis that it would be performed by a team of solicitors with specialist public liability expertise (as referred to in paragraph 20 above) when it was always intended by them, and as happened, that the Plaintiff's claim would be conducted by persons without the necessary experience or qualification, without the resources of a dedicated team and without supervision and management by them;"

2. The first and second respondents charged higher fees by reason of the legal services being performed by solicitors with "specialist public liability expertise", "when it was always intended by them, and as happened, that the Plaintiff's claim would, without the knowledge and consent of the Plaintiff, be conducted by persons without the necessary experience or qualification, without the resources of a dedicated team and without supervision and management by them;" and

3. The first and second respondents delegated, "as they had always intended" performance of the retainer to Murshine Pty Ltd;

4. They failed to inform the appellant during the period of retainer of each of the matters alleged as breaches of fiduciary duty and that they "did not have the capacity and or intention to exercise any effective supervision or management of the conduct of the Plaintiff's claim", they did not in fact "exercise any effective supervision or management", the respondents "intended that legal services would be provided by persons without adequate experience or qualification and without adequate supervision", the legal services were in fact so provided, the first respondent was charged in the Solicitors Complaints Tribunal in relation to a breach of a (unrelated) fiduciary duty and excessive charges which was part heard when the appellant signed the retainer, and he was found guilty and suspended from practice for a time during the performance of the retainer.

[15] The third respondent breached her fiduciary duty to the appellant by acting in her self-interest to the appellant's detriment by failing to inform the appellant that:

1. She had not obtained or served certain expert reports;

2. Because of that failure the appellant should obtain separate and independent legal advice; and

3. He should apply for an adjournment of the trial to enable him to retain another firm of solicitors.

[16] The appellant's loss and its causal relationship with the alleged acts and omissions of the respondents were alleged in one paragraph (paragraph 56) of the Fresh Statement of Claim:

> "(a) If the first and second Defendants had properly performed their obligations pursuant to the Retainer, and or
>
> (b) if each of the Defendants had exercised reasonable care and skill in the provision of specialist public liability legal services, and or
>
> (c) if each of the Defendants had discharged their obligations as fiduciaries
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> then the Plaintiff would have obtained damages for economic loss (by settlement at the PIPA stage or, alternatively, at the Litigation stage or in the further alternative by judgment) in accordance with the most favourable scenarios expressed in the joint experts' report of $1,569,325 (from which the amount of $480,000 is to be deducted…)."

The primary judge's reasons

[17] The primary judge observed that the appellant did not clearly allege that he lost the chance of obtaining a higher award of damages by the respondents' alleged breaches

of retainer, negligence, and fiduciary duty. The appellant's pleaded allegation that he "would have obtained damages for economic loss … in accordance with the most favourable scenarios expressed in the joint experts' report" made it clear that his claim was a direct attack on the conclusions and judgment in the personal injuries proceedings. The primary judge referred to a foreshadowed amendment to the Fresh Statement of Claim to allege the loss of a chance of obtaining a higher award of damages and concluded that, even if that pleading were amended in that way, the reasoning in *Lewis v Hillhouse & Ors*[5] established that the appellant's proceeding would still be a collateral attack on the judgment in the personal injuries proceedings and would impermissibly undermine the status of that judgment. The primary judge considered that, for the reasons expressed by Keane JA (as his Honour then was) in *Lewis v Hillhouse & Ors*, the appellant's proceeding (other than the claim for costs) was doomed to fail as an abuse of process.

[18] In relation to the appellant's argument that his claim based upon the prospect that he would have achieved a better settlement at the PIPA stage did not collaterally attack the earlier assessment of damages, the primary judge considered that the desired result of the proceeding would still produce conflicting judgments about the appellant's loss and that this was capable of bringing the administration of justice into disrepute. In the primary judge's view, it would remain an infringement of the public policy that it is in the public interest that there be an end to litigation. His Honour reasoned that the attempt to isolate what might have happened at an earlier stage of litigation under the PIPA procedures was artificial; the PIPA proceedings were an integral part of the overall process, they determined when proceedings in court normally should commence or continue, and they had very significant consequences for the costs of the litigation and the evidence which might be led in the litigation.

[19] The primary judge rejected the appellant's argument that, if the proper evidence had been presented, the appellant would have had an opportunity of obtaining a better result, as it did not suggest any error made by the trial judge in the personal injuries proceedings. The primary judge considered that the claim in this respect necessarily impugned the result of the earlier proceeding and was properly described as an abuse of process because it was designed to lead to conflicting judgments about the proper award of damages which the appellant should have received.

[20] In relation to the claim for breach of fiduciary duty, the primary judge, referred to an argument by the respondents that the pleading did not explain the causative link between the alleged breaches of fiduciary duty and the loss, which was claimed as under-compensation in the original assessment of damages. The primary judge also referred to the respondents' argument that the equitable rule permitting full restitution with the benefit of hindsight applied only to breaches of a fiduciary character which engaged the conscience of the fiduciary and entitled the beneficiary to relief by way of equitable compensation unrestrained by common law principles, for example, causation. The primary judge did not decide those questions. His Honour instead accepted the respondents' further argument that, even if the Fresh Statement of Claim had alleged breaches of a fiduciary character causally linked to the claimed loss, there would still be a collateral challenge to the assessment of damages in the personal injuries proceeding and, for that reason, an abuse of process.

[21] The primary judge also accepted the respondents' argument that the respondents were entitled to advocate's immunity as a complete defence to the appellant's claims. The

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5 [2005] QCA 316.

primary judge held that where the matter had proceeded to an unchallenged determination on the merits, the immunity extended to the respondents' work as partners of the firm or as a solicitor engaged to perform particular work; even if the third respondent had been engaged to do the work through a service company that did not require any different conclusion about the scope of the immunity; and the allegations of negligence in the PIPA stage of the proceedings also attracted the immunity because of the close inter-relationship between the PIPA stage and the trial stage and because the result still would be potentially conflicting judgments about the proper award of damages to the appellant.

Advocate's Immunity

[22] The primary judge's decision was given before the High Court gave judgment in *Attwells v Jackson Lalic Lawyers Pty Ltd*.[6] An issue in *Attwells* was whether advocate's immunity extended to a solicitor's negligent advice which led to settlement of litigation on terms disadvantageous to the client. By majority (French CJ, Kiefel, Bell, Gageler and Keane JJ; Nettle and Gordon JJ dissenting) the Court held that it did not.[7] The Court:

1. Reaffirmed the holding in *D'Orta-Ekenaike* that the advocate's immunity from suit in respect of the advocate's participation in the judicial process extends to protect a solicitor involved in the conduct of litigation.[8]

2. Reaffirmed Mason CJ's explanation of the scope of the immunity in *Giannarelli*[9] as it was described by Gleeson CJ, Gummow, Hayne and Heydon JJ in *D'Orta-Ekenaike*:[10]

> "there is no reason to depart from the test described in *Giannarelli* as work done in court or 'work done out of court which leads to a decision affecting the conduct of the case in court' or … 'work intimately connected with' work in a court. (We do not consider the two statements of the test differ in any significant way.)" (Citations omitted.)

3. Held that this test is not satisfied where an advocate's work leads to an agreement to settle a litigious dispute, reasoning that although "an advice to cease litigating which leads to a settlement is connected in a general sense to the litigation which is compromised by the agreement", "… the intimate connection required to attract the immunity is a functional connection between the advocate's work and the judge's decision"; the "advice given out of court must affect the conduct of the case in court and the resolution of the case by that court."[11]

4. Held that "…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" and for that reason "… the immunity does not extend to acts or advice of the advocate which do not move litigation towards a determination by a court."[12]

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6 [2016] HCA 16; (2016) 331 ALR 1.
7 [2016] HCA 16 at [4], [53].
8 [2016] HCA 16 at [2].
9 (1988) 165 CLR 543, 559–560.
10 (2005) 223 CLR 1 at [86]. I have omitted an internal reference.
11 [2016] HCA 16 at [5]–[6].
12 [2016] HCA 16 at [38].

[23] The majority rejected an argument that it would be anomalous to hold that the immunity did not extend to advice which led to a disadvantageous compromise but that it did extend to negligent advice not to compromise which led to a judicial decision which was less beneficial to the client than a rejected offer of compromise. Importantly for the present case, the majority rejected that argument upon the ground that the assumption that negligent advice not to settle was "intimately connected" with the ensuing judicial decision so as to attract the immunity was incorrect.[13] The majority observed:

1. It was "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."[14]

2. Whilst "advice not to settle a case is "connected" to the case in the sense that the advice will, if accepted, lead to the continuation of the case", that was to refer to a "merely historical connection between events" and "to fail to observe the functional nature of the intimate connection required by the public policy which sustains the immunity."[15]

3. It was "difficult to conceive of any circumstance in which the correctness of the court's decision would be put in issue"; "[t]he central question would not be whether the court was right or wrong, but whether the advice was reasonable in all the circumstances known to the adviser at the time the advice was given"; and "if the judgment were erroneous, one would expect that this would be demonstrated on appeal; and if the error cannot be demonstrated on appeal from the record of proceedings in court in the earlier case, that would tend to confirm that the negligent advice had nothing to do with the judgment reached by court."[16]

[24] The majority made the following general statements about advocate's immunity:

> "The advocate's immunity is grounded in the necessity of ensuring that the certainty and finality of judicial decisions, values at the heart of the rule of law, are not undermined by subsequent collateral attack. The operation of the immunity may incidentally result in lawyers enjoying a degree of privilege in terms of their accountability for the performance of their professional obligations. But this incidental operation is a consequence of, and not the reason for, the immunity. 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."[17]

[25] The majority observed of their conclusion that advocate's immunity is not attracted to negligent advice which contributes to the making of settlement during litigation that the conclusion was "not altered by the circumstance that, in the present case, the

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13 [2016] HCA 16 at [47]–[48].
14 [2016] HCA 16 at [48].
15 [2016] HCA 16 at [49].
16 [2016] HCA 16 at [51].
17 [2016] HCA 16 at [52].

parties' agreement was embodied in consent orders".[18] That was a rejection of an argument that a consent judgment which embodied the compromise quelled the controversy as effectively as a judgment after a contested hearing,[19] an argument which was based upon propositions that the parties' antecedent rights merged in the consent judgment[20] and that the claim was a collateral challenge to the judgment.[21] In relation to the first proposition the majority observed that "[t]he public policy which sustains the immunity is not offended by recognising the indisputable fact that the terms of the settlement agreement, by reason of which the appellants claim to have been damaged, were not, in any way, the result of the exercise of judicial power".[22] The majority rejected the second proposition upon the ground that the terms of the consent order were settled by the parties' agreement without any exercise of judicial power.[23]

[26] *Attwells* is authority for the propositions that the test for advocate's immunity for out of court work by an advocate (which includes a solicitor retained to prosecute litigation) is whether that work was intimately connected with in court work, in the functional sense that the work affected both the conduct of the case in court and the resolution of the case by that court,[24] with the result that advocate's immunity is not attracted by out of court work which does not progress the litigation towards a judicial determination.[25]

[27] That test is expressed in unambiguous and quite specific terms but in some cases the result of its application may be debateable. In order to decide whether the immunity is attracted in those cases it will be necessary to take into account the underlying rationale for advocate's immunity. In that respect, *Attwells* is authority for the propositions that advocate's immunity is attracted by the advocate's participation as an officer of the court in the quelling of controversies by the exercise of judicial power[26] and that the immunity is grounded in the high value which the law attributes to certainty and finality of judicial decisions and the consequential undesirability of allowing collateral attacks on those judicial decisions.[27]

[28] The allegations in the Fresh Statement of Claim concerned solicitors' out of court conduct in relation to the appellant's personal injuries claim, including allegations of alleged wrongful conduct in relation to the retainer and the preparation of the appellant's claim before and during litigation which was a cause of the appellant not obtaining an amount for economic loss by settlement which was much greater than the amount obtained in the judgment. In considering whether advocate's immunity precludes those parts of the appellant's claims the test stated in [26] must be applied and it is necessary to bear in mind the rationale described in [27]. In addition, it is necessary to consider the result of the application of the test for immunity by the majority in *Attwells*. Of particular relevance here is the majority's conclusion that advice not to settle in a case in which litigation proceeds to judgment after a trial is not protected by the immunity. That conclusion was a step in the majority's reasoning towards the decision that advocate's immunity did not protect a solicitor's advice to enter into

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18 [2016] HCA 16 at [6].
19 [2016] HCA 16 at [54].
20 [2016] HCA 16 at [54]–[58].
21 [2016] HCA 16 at [60]–[61].
22 [2016] HCA 16 at [59].
23 [2016] HCA 16 at [62].
24 [2016] HCA 16 at [5]–[6].
25 [2016] HCA 16 at [38], [48]–[49].
26 [2016] HCA 16 at [38].
27 [2016] HCA 16 at [52].

a settlement. The context in which the conclusion was expressed makes it seem clear that the claim the majority had in mind was for the difference between the value of a lost settlement during the litigation and the amount of the subsequent judgment.

Abuse of process

[29] This appeal requires consideration of the test for abuse of process in a case in which a claim (or defence) set up by one party to litigation had been rejected in previous litigation involving that party and a person who is not party to the current litigation. For ease of reference I will describe this as "re-litigation abuse of process". Unlike the test for advocate's immunity, the test for re-litigation abuse of process incorporates generally expressed value judgments. In *Tomlinson v Ramsey Food Processing Pty Ltd*,[28] the majority (French CJ, Bell, Gageler and Keane JJ) referred to the doctrine of abuse of process for the purpose of explaining the relationship between that doctrine and the doctrine of estoppel:

> "Abuse of process, which may be invoked in areas in which estoppels also apply, is inherently broader and more flexible than estoppel. Although insusceptible of a formulation which comprises closed categories, abuse of process is capable of application in any circumstances in which the use of a court's procedures would be unjustifiably oppressive to a party or would bring the administration of justice into disrepute. It can for that reason be available to relieve against injustice to a party or impairment to the system of administration of justice which might otherwise be occasioned in circumstances where a party to a subsequent proceeding is not bound by an estoppel." (Citations omitted.)

[30] The non-prescriptive character of the re-litigation abuse of process test is reflected in subsequent statements in the same judgment that "making a claim… which was made… and determined in an earlier proceeding… can constitute an abuse of process even where the earlier proceeding might not have given rise to an estoppel…",[29] and "making such a claim… can constitute an abuse of process where the party seeking to make the claim… in the later proceeding was neither a party to that earlier proceeding, nor the privy of a party to that earlier proceeding, and therefore could not be precluded by an estoppel."[30] In a footnote, their Honours referred with apparent approval to a passage in *O'Shane v Harbour Radio Pty Ltd*[31] in which Beazley P (with which McColl JA and Tobias AJA agreed) referred to statements "that proceedings will be stayed as an abuse of process if it is intended to litigate anew a case which has already been disposed of by earlier proceedings" that there "**may** be an abuse of process even if the circumstances do not give rise to an estoppel: see *Walton v Gardiner* (1993) 177 CLR 378 at 393".

[31] In the same passage, Beazley P referred to the case cited in *Walton v Gardiner* for that proposition *Reichel v Magrath*,[32] in which Lord Halsbury said that "it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again. … [T]here must be an inherent jurisdiction

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28 (2015) 256 CLR 507 at [25].
29 (2015) 256 CLR 507 at [26].
30 (2015) 256 CLR 507 at [26].
31 (2013) 85 NSWLR 698 at 722–724. (Emphasis added).
32 (1889) 14 App Cas 665 at 668.

in every Court of Justice to prevent such an abuse of its procedure…" and noted the endorsement in *Walton v Gardiner* of Lord Diplock's observation in *Hunter v Chief Constable of the West Midlands Police*[33] "that a superior court had inherent power to stay proceedings to prevent a misuse of its procedure which "although not inconsistent with the literal application of its procedural rules, would nevertheless … bring the administration of justice into disrepute among right-thinking people." Her Honour referred to *State Bank of New South Wales Ltd v Stenhouse Ltd*,[34] in which Giles CJ Com D set out an inclusive list of factors to be considered in deciding whether an attempt to litigate an issue is or is not an abuse of process: "the importance of the issue in and to the earlier proceedings; the terms and finality of the finding as to the issue sought to be relitigated; the identity between the relevant issues in the two proceedings; the extent of the oppression and unfairness to the other party if the issue is relitigated, the impact of the relitigation upon the principle of finality and on the public confidence in the administration of justice; as well as the overall balance of justice between the parties."

Alleged breaches of fiduciary duty relating to the retainer

[32] Paragraphs 19-22 of the Fresh Statement of Claim (summarised in [8] of these reasons) plead clauses of what later became the retainer, other pre-contractual statements in a letter which enclosed the unsigned retainer, and statements in the letter which enclosed the retainer, and paragraph 23 alleges that the first and second respondents "were required to provide specialist legal services personally or by their suitably qualified and experienced staff solicitors subject to continuing appropriate supervision and management of the Plaintiff's claim by them." Those allegations implicitly inform paragraph 50 of the Fresh Statement of Claim. I quoted parts of that paragraph in [14] of these reasons, but it is useful here to set it out in full:

> "In breach of their fiduciary duty to the Plaintiff, the first and second Defendants acted in their self-interest to the detriment of the Plaintiff:
>
> (a) by securing his retainer on the basis that it would be performed by a team of solicitors with specialist public liability expertise (as referred to in paragraph 20 above) when it was always intended by them, and as happened, that the Plaintiff's claim would be conducted by persons without the necessary experience or qualification, without the resources of a dedicated team and without supervision and management by them.
>
> (b) By charging and justifying a higher fee remuneration by reason of the legal services being performed by a team of solicitors with specialist public liability expertise (as referred to in paragraph 20 above) when it was always intended by them, and as happened, that the Plaintiff's claim would, without the knowledge and consent of the Plaintiff, be conducted by persons without the necessary experience or qualification, without the resources of a dedicated team and without supervision and management by them.

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33 [1982] AC 529 at 536.

34 [1997] Aust. Torts Reports 81–423 at 64,089. (This passage was approved by Boddice J (McMurdo P agreeing) in *Robertson v Vlahos* [2011] QCA 243 at [19].

(c) By delegating, as they had always intended, the performance of the retainer to an entity, Murshine Pty Ltd, which was not entitled to practise law in Queensland.

(d) By failing to inform the Plaintiff during the period of the Retainer that:

(i) They had no team of lawyers who were specialists in Public Liability claims.

(ii) They intended to delegate the performance of the retainer to Murshine Pty Ltd.

(iii) They had delegated the performance of the retainer to Murshine Pty Ltd.

(iv) They did not have the capacity and or intention to exercise any effective supervision or management of the conduct of the Plaintiff's claim.

(v) They did not exercise any effective supervision or management of the conduct of the Plaintiff's claim.

(vi) They intended that legal services would be provided by persons without adequate experience or qualification and without adequate supervision.

(vii) The legal services were being provided by persons without adequate experience of qualification and without adequate supervision.

(viii) That the first Defendant had been charged in the Solicitors Complaints Tribunal in relation to a breach of fiduciary duty and excessive charges which was part heard before the Tribunal when the Plaintiff signed the Retainer and ultimately he was found guilty and suspended from practice for 12 months from 28 March 2003."

[33] The appellant's case, so far as it can be derived from this paragraph and his arguments, is that the first and second respondents breached fiduciary duties they owed to the appellant as his solicitors by preferring their own interests to the appellant's interests in two ways:

1. Entering into the retainer whilst not intending to fulfil their pre-contractual and contractual representations that the appellant's claim would be conducted by expert, appropriately resourced solicitors employed by them who specialised in such claims and whose work would be supervised by the first and second respondents, in exchange for which the appellant contracted to pay them a commensurate level of professional fees, and whilst intending to incur less cost than would be incurred if they fulfilled the representations and to obtain a tax advantage by delegating performance of the retainer to their service company, which was not entitled to practise law in Queensland, which employed staff who did not have the necessary experience, qualifications and resources to prosecute the claim, and whose work the first and second respondents would not supervise.

2. After the retainer was formed, failing to inform the appellant of those facts and of the first respondent's charge and subsequent suspension of practice for 12 months during the appellant's retainer for a breach of fiduciary duty and excessive charges.

[34] The appellant's argument about the cause of the loss or compensation he claimed in respect of this alleged breach of fiduciary duty is not reflected in the express terms of paragraph 56 of the Fresh Statement of Claim (see [16] of these reasons). In argument the appellant acknowledged that he had left out some steps. They are, or include, allegations that: if the respondents had not engaged in the alleged conduct, or if they had fulfilled an alleged duty to inform him of the true situation, he would not have retained them, or he would have terminated their retainer; he would instead have engaged an appropriately qualified solicitor to prosecute his claim; and, that solicitor would have prosecuted his claim in a way which led to recovery of the balance of the full amount of the appellant's economic loss by settlement or by judgment. In relation to the last point, I note that the appellant also relied upon *Brickenden v London Loan and Savings Co of Canada*[35] for a contention that he was entitled to recover the difference between what he contends is the full amount of his economic loss on the scenario most favourable to him in a joint expert report in evidence at his trial (which was not accepted by the trial judge because, according to the appellant's case, available evidence of underlying assumptions was not obtained by the respondents) and the amount assessed by the trial judge, without proving a causal link been the alleged breach of fiduciary duty and that claimed loss. The proposition that no causal link between the breach of fiduciary duty and the claimed loss is required involves some difficulties.[36] At first glance the appellant's argument seems to require, without proof, unjustifiable assumptions as to the amount of economic loss he sustained in the accident and that his claimed loss was connected with the alleged breaches of fiduciary duty, but those questions are not in issue in this appeal.

[35] The appellant cited a paragraph in the judgment of the Full Court of the Federal Court in *Sims v Chong*[37] for the proposition that advocate's immunity is not applicable in claims for breaches of fiduciary duty. That paragraph concerned the application of the immunity in connection with contravention of statutory provisions the application of which depended upon the resolution of complex questions of law and the precise articulation of the alleged conduct. In other paragraphs, the court referred to imprecision in the pleading, the circumstance that the pleading might yet be amended and further particularised, and (of more relevance to the appellant's argument) that the question whether advocate's immunity applied in relation to certain allegations of breach of fiduciary duty might require reference to public policy considerations which differed from those in cases of negligence, such as were considered in *D'Orta-Ekenaike*; with those and other matters in mind, the court considered that it was not appropriate summarily to dismiss the claim in that case.[38] The appellant also relied upon a statement by Pollock CB in *Swinfen v Lord Chelmsford*[39] that "[I]f he [a barrister] intentionally did a wrong and acted with malice, fraud or treachery, we think he would be responsible, like every other wrong-doer, for the mischief thereby occasioned, notwithstanding his position as a barrister."

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35 [1934] 3 DLR 465.

36 See *Mantonella Pty Ltd v Thompson* [2009] 2 Qd R 524 at [90]–[111].

37 [2015] FCAFC 80 at [87] (Mansfield, Siopis and Rares JJ).

38 [2015] FCAFC 80 at [86] with reference to [85].

39 (1860) 5 H&N 890; [1860] 157 ER 1436. The appellant also cited *Del Borrello v Friedman and Lurie (a firm)* [2001] WASCA 348 in which Pollock CB's statement was approved in obiter dicta by Kennedy J at [123].

[36] The same argument was rejected by Bell J in *Goddard Elliot (a firm) v Fritsch*.[40] His Honour acknowledged that some considerations favoured the argument, but held that the application of the immunity depended upon the substance of the wrong which was done rather than whether it was a breach of duty of care or a breach of fiduciary duty. That decision has been cited with approval in first instance decisions.[41] In *Young v Hones*[42] Ward JA, with whose reasons in this respect Bathurst CJ and Emmett JA agreed, discussed the authorities upon this question and concluded that advocate's immunity was an immunity from suit rather than an immunity from a particular cause of action.[43] *Goddard Elliot (a firm) v Fritsch* was cited with approval[44] for the proposition that the immunity may apply in defence of a claim for breach of the *Trade Practices Act*.[45] It was also held in *Young v Hones* that advocate's immunity comprehends conduct of an advocate which is *mala fide*.[46] Those decisions are irreconcilable with the immunity being automatically inapplicable in relation to any kind of claim for breach of fiduciary duty.

[37] Putting aside any impact upon the immunity of any statutory provision, the applicability of the immunity turns upon the application of the test approved in *Attwells* to the acts and omissions of the advocate upon which the claim is based, rather than upon the identification of the particular cause of action upon which a plaintiff relies.

[38] The respondents argued that it was held in *Sims v Chong*,[47] that the finality concept underlying the advocate's immunity will apply even with respect to representations at the time of the inception of the retainer about the conduct of a claim or the competence of a solicitor if that involves reconsideration of an issue which has been the subject of a judicial determination. In the cited passages, the court referred to difficulties expressed by some judges in deciding whether advocate's immunity was available for representations concerning the competence of the legal representative to conduct a claim and that the immunity "has been said to apply wherever the proposed claim against the advocate might require damage to be assessed for the loss of an opportunity to have had the claim presented in a different way, with a potentially different result…". In the following paragraph the court stated that it was "not clear that the reach of advocate's immunity extends to circumstances where the "advocate" has misrepresented the skill and experience possessed, even though … the damages relate to the loss of the opportunity to be properly advised. …".[48]

[39] Those statements were expressed in tentative terms and the court's decision was that the summary judgment entered on the pleadings should be set aside. *Sims v Chong* did not decide the questions in issue in this matter. I also do not accept the respondents' broader argument that the appellant's claim is necessarily within advocate's immunity merely because each alleged act and omission of the respondents led to the continuation of the claim to a judgment which included an assessment of economic loss in an amount claimed by the appellant to be inadequate. The decision in

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40 [2012] VSC 87 at [544].

41 *NT Pubco Pty Ltd v Dowling* [2014] NTSC 8 (Hiley J) at [106]–[114] and *Stillman v Rushbourne* [2014] NSWSC 730 at [68]–[70].

42 [2014] NSWCA 337.

43 [2014] NSWCA 337 at [168], referring to *D'Orta* at [85].

44 [2014] NSWCA 337 at [173].

45 That question was left open in *Gray v Morris* [2004] 2 Qd R 118, which was discussed in *Young v Hones* at [168].

46 [2014] NSWCA 337 at [228]–[229].

47 (2015) 230 FCR 346 at [93]–[94].

48 [2015] FCAFC 80 at [95].

Kendirjian v Lepore,[49] upon which the respondents relied, was based upon a conclusion that advocate's immunity protects advice leading to a case being settled as well as advice leading to a case not being settled.[50] That conclusion is inconsistent with the more recent High Court decision in *Attwells*. In a supplementary outline filed by the respondents, they argued that all of the allegations of breach satisfied the "functional connection" required by the test for advocate's immunity because the claimed loss and damage required a finding that the appellant would have received an award of compensation for economic loss greater than that allowed for in the personal injuries judgment if the alleged wrongful conduct of the respondents had not occurred. This was said to support a conclusion that each of the alleged acts and omissions affected the personal injuries judgment and amounted to work done out of court which led to a decision affecting the conduct of the case in court or work intimately connected with in court work, in terms of the test for advocate's immunity in *Giannarelli* as it was described in *D'Orta-Ekenaike*.

[40] The appellant's case includes express or implicit allegations that the alleged conduct summarised in [33](a) and (b) of these reasons was a cause of avoidable shortcomings in the evidence of economic loss upon which the appellant relied upon during the subsequent litigation. Furthermore, the alleged non-disclosures mentioned in [33](b) comprehended failures to disclose during the litigation. It does not follow from these matters that advocate's immunity is applicable. I accept the appellant's contention that it is not applicable. The alleged conduct of the first and second respondents which is charged as breaches of fiduciary duty was not the work of an advocate. It concerned the formation and continuing existence of the retainer of the first and second respondents, rather than any decision by them which affected the taking of any particular step in court. The alleged conduct (including non-disclosures) did not have a direct or functional connection with the in court conduct of the appellant's personal injuries claim. The test for advocate's immunity is not satisfied in relation to this part of the appellant's claim.

[41] In relation to re-litigation abuse of process, the appellant argued that none of his claims contend that the personal injuries judgment should have been different. He argued that he does not contend for any error by the trial judge upon the evidence adduced in that litigation; his claims merely avoid double recovery by allowing a set off of the amount of the economic loss component of the personal injuries judgment against the value of a hypothetical judgment in hypothetical personal injuries litigation, or against the value of a hypothetical settlement (or opportunity to settle) which he would have obtained during the PIPA processes or the personal injuries litigation. He also advanced the argument about causation and measure of loss for breach of fiduciary duty mentioned in [34] of these reasons.

[42] All of the appellant's claims are nevertheless collateral challenges to the judicial decision in the personal injuries litigation in the sense that the decision he seeks in this litigation about the economic loss he sustained as a result of his accident would conflict with a judicial decision upon the same issue in the personal injuries litigation. Even so, for the following reasons, I accept the appellant's contention that no part of the appellant's claim is a re-litigation abuse of process.

[43] The respondents endorsed the primary judge's adoption of passages in Keane JA's reasons in *Lewis v Hillhouse & Ors* for the conclusion that the whole of the appellant's

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49 [2015] NSWCA 132 at [45].

50 [2015] NSWCA 132 at [33]–[41], [56].

claim for damages was an abuse of process. In *Lewis v Hillhouse & Ors*, this Court held a plaintiff's claim for damages for the loss of a chance of his convictions being quashed on appeal as a result of the alleged conduct of his solicitor in abandoning a ground of appeal contrary to his instructions to be an abuse of process. In passages quoted by the primary judge, Keane JA emphasised the importance of the policy of not permitting collateral attacks upon judicial decisions[51] and cited supporting authority for that proposition, including authoritative statements in *Giannarelli*[52] and *D'Orta-Ekenaike*.[53] Keane JA pointed out that in *D'Orta-Ekenaike*[54] the High Court concluded that advocate's immunity was "fully supported by this consideration, rather than being rendered superfluous by it".[55]

[44] *Lewis v Hillhouse & Ors* was very different from this case. The question was whether the appellant's focus upon a case that he had lost the chance of a successful appeal and a re-trial avoided the objection that a collateral attack in civil proceeding upon an extant conviction is impermissible.[56] In giving a negative answer to that question, Keane JA concluded both that the cases about compensation for the loss of a chance were inapplicable, so that the appellant could not recover damages without proving that he would have been acquitted at the postulated re-trial,[57] and that the appellant's claim "calls into question the justice of the appellant's convictions" and infringed upon public policy as it was elaborated in authorities cited by his Honour.[58] The first point is not submitted to be relevant here. In relation to the second point, Keane JA referred with approval to statements in *Arthur JS Hall & Co v Simons*[59] to the effect that "an action for damages for negligence against an advocate in criminal proceedings may be allowed to proceed only where the conviction has been set aside … because it is only when the conviction has been set aside that the risk of conflicting judgements capable of bringing the administration of justice into disrepute can be avoided".

[45] Accepting that the principle favouring finality and certainty of judgments underlies re-litigation abuse of process in both civil and criminal litigation, in does not follow that it has equal force in all cases as a factor in the decision whether re-litigation is an abuse of process. The collateral attack in *Lewis v Hillhouse & Ors* was upon a conviction for an offence following a jury verdict. That conviction altered the plaintiff's status in the eyes of the law and founded the court's authority to impose sentence, whereas the appellant's claim involves an inconsistency with the judicial determination of only one of a number of issues about the amount of loss the appellant sustained as a result of an accident. The respondents argued that the appellant's claim would open up all the issues in the personal injuries litigation. Even if that is so, and I express no view about it, there remains a significant difference between a challenge to a conviction upon a jury verdict and inconsistent judgments about liability and quantum in civil litigation.

[46] Blue J (with whose reasons Kourakis CJ and Sulan J agreed) held in *Morgan v WorkCover Corporation*[60] that the mere fact that a person against whom a re-litigation abuse of

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51 [2005] QCA 316 at [11], [13]–[15], [17].
52 (1988) 165 CLR 543 at 558 (Mason CJ), 573–574 (Wilson J), 595 (Dawson J).
53 (2005) 223 CLR 1 at [34] (Gleeson CJ, Gummow, Hayne, and Heydon JJ).
54 (2005) 223 CLR 1 at [34].
55 [2005] QCA 316 at [19].
56 [2005] QCA 316 at [7]–[12].
57 [2005] QCA 316 at [21]–[26].
58 [2005] QCA 316 at [13]–[20].
59 [2002] 1 AC 615 at 679, 685, and 706.
60 (2013) 118 SASR 297 at [145](5).

process is alleged was a party in two sets of proceedings and seeks to litigate an issue decided in the earlier proceedings is not sufficient to give rise to abuse of process. I agree. The decisions discussed in [29]–[31] of these reasons make it clear that it may but not necessarily will be an abuse of process for a litigant to rely upon a claim which was determined adversely to that litigant in previous litigation; it is necessary to examine the circumstances of each case and to decide whether or not litigation of the second claim would be unjustifiably oppressive to a party or would bring the administration of justice into disrepute. There is no inconsistency between that analysis and the reasons given by the majority in *Attwells* for rejecting arguments that a consent judgment "quelled the controversy" and was the subject of an impermissible collateral attack in that case (see [25] of these reasons).

[47] In the seminal case about re-litigation abuse of process in the context of civil litigation, *Reichel v Magrath*, a vicar sued a bishop to establish his claim that he was entitled to a benefice. The court found for the bishop. A different person subsequently claimed to be entitled to the benefice in litigation against the vicar. The vicar defended by substantially repeating his earlier claim that he was entitled to the benefice. That was held to be an abuse of process. As Lord Halsbury explained, the vicar sought "…by changing the form of the proceedings to set up the same case again." *Rippon v Chilcotin Pty Ltd*[61] was a similar case. A plaintiff failed to persuade a judge that he had relied to his detriment upon certain allegedly misleading accounts. His attempt to rely upon that same allegation in a subsequent proceeding against a different defendant was held to amount to an abuse of process. A significant distinction between cases of that kind and this case lies in the appellant's claim that the issue which the respondents contend has already been decided was decided adversely to the appellant as a result of wrongful conduct of the respondents. It is not easy to see that allowing redress against a solicitor whose wrongful conduct in connection with litigation is responsible for a plaintiff's misadventure in a civil case is unjustifiably oppressive to that solicitor or would be likely to bring the administration of justice into disrepute.

[48] That view is consistent with *Cleary v Jeans*,[62] in which the New South Wales Court of Appeal referred with approval to decisions that it was not an abuse of process for a litigant to sue the litigant's solicitor to recover loss resulting from negligence which did not attract advocate's immunity:

> "An action against a solicitor for negligence in which damages are claimed for the loss of an earlier case is not a collateral challenge to the earlier decision where the plaintiff claims that but for the negligence there would have been a more favourable result. In *Walpole v Partridge and Wilson*[63] Ralph Gibson LJ said:
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> > "If there is a sufficiently arguable case to show that the defendant solicitors, by their breach of duty, put the plaintiffs in the position of being unable properly to contest the first decision, so that the plaintiffs were reasonably compelled to submit to judgment on the issue, then, in my judgment, the plaintiffs' claim is not shown to be an abuse of the process of the court merely because it will, if it succeeds, require the court to assess damages on the basis that the prior decision of the court

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61 (2001) 53 NSWLR 198.

62 (2006) 65 NSWLR 355 (Handley and Bryson JJA, and Young CJ in Eq).

63 [1994] QB 106 at 124–5.

> would not have been made if the solicitors had not been in breach of duty."

The same point was made by Sir Thomas Bingham MR in *Smith v Linskills*[64];

> "It is evident in civil cases particularly that a party may lack any opportunity to resist a hostile claim, as for example where judgment is entered against him on the ground of procedural default, or may lack a full opportunity as when summary judgment is given against him. We understand Lord Diplock [*Hunter v Chief Constable of the West Midlands Police*[65]] to have been intending to preserve a party's right to make a collateral attack on a decision made against him in such circumstances.""[66]

[49] In *Hunter v Chief Constable of the West Midlands Police* the House of Lords dismissed an appeal from an order that statements of claim by plaintiffs, against Chief Constables vicariously liable for the tortious acts of police officers, alleging that the plaintiffs had been assaulted by those police officers, be struck out as abuses of the process of the courts. At a criminal trial the trial judge had ruled that the plaintiffs' confessions of serious offences were admissible, rejecting the plaintiffs' allegations that the admissions were rendered involuntary by reason of the same assaults of which they complained in the subsequent civil proceeding. The plaintiffs were convicted on the counts of murder charged against them. In one of the passages cited in *Cleary v Jeans*, Lord Diplock said:

> "The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made."[67]

[50] It is an aspect of all parts of the appellant's claim that he was deprived of a full opportunity of obtaining the entire amount of his economic loss by the wrongful conduct of the first and second respondents. To shut out litigation of this part of the appellant's claim would be more likely to bring the administration of justice into disrepute than would conflicting judicial decisions about the appellant's economic loss reached upon different evidence.

[51] I respectfully conclude that the primary judge erred in holding that this part of the appellant's claim attracted advocate's immunity and in holding it, or any part of the appellant's claim was a re-litigation abuse of process.

The PIPA processes and litigation: the appellant's additional arguments

[52] The appellant argued that advocate's immunity was inapplicable to any of his claims because the first and second respondents were alleged not to have acted as advocates at all: their failures could not be characterised as negligence by omissions because

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64 [1996] 1 WLR 763 at 769–770.
65 [1982] AC 529, 536, 541.
66 [2006] NSWCA 9 at [27]–[28] (Handley JA).
67 [1982] AC 529 at 541.

they did nothing to conduct the appellant's case; the first respondent was charged with misconduct and suspended during part of the period during which he was retained to conduct the claim; the first and second respondents did nothing that was intimately connected with the conduct of the case in court or which led to a decision affecting the conduct of the case; the appellant did not allege that they were vicariously liable for the negligent conduct of the third respondent but that the third respondent was employed by Murshine Pty Ltd; that company was not entitled to practise law in Queensland; and the appellant's claim was not based upon any omission by the first and second respondents because they could not fail to do anything in the conduct of the appellant's case in circumstances in which they did not embark upon the running of that case. The appellant argued that because there was total non-performance of the contract and the work was done by a company not entitled to practise law, his damages should be assessed by putting him in the position he would have been in if the respondents had performed their obligations; there would have been a trial with the appropriate lay and expert witnesses, properly proofed and in compliance with the procedural rules. Because he could not be compensated twice it would be necessary to deduct the amount he had already received for economic loss. The appellant argued that damages quantified in that way would not be referrable to the original judgement or mistakes made in the original litigation.

[53] These arguments do not justify disregard of the pleaded foundation of the appellant's claims against the first and second respondents. The appellant charges the respondents with negligent failures in their conduct of the appellant's claim as his solicitors. The Fresh Statement of Claim includes allegations that the appellant retained the first and second respondents as his solicitors to represent him in his claim for damages for personal injuries, they thereby owed him a duty of care in carrying out that retainer, they were thereby required to provide specialist legal services personally or by qualified and experienced staff solicitors supervised and managed by them, they by their delegate Murshine Pty Ltd purported to conduct the appellant's claim, during the litigation each of the respondents failed to address inadequate preparation during the PIPA stage and failed to take further steps, as a result the appellant's claim was inadequately prepared at the litigation stage, and the first and second respondents were negligent in delegating performance to Murshine Pty Ltd, Willey and the third respondent and in failing to exercise any effective supervision or management of the performance of the retainer.

[54] The allegations that the first and second respondents were negligent or breached their retainer in those various ways advances a case that their conduct of the appellant's claim was adversely affected by acts and omissions for which legal liability for breach of contract or in negligence is to be sheeted home to them. That is so even if (which seems to be the result of the appellant's arguments) those respondents purported to fulfil their retainer only by negligently and in breach of contract delegating the entire performance of the retainer to Murshine Pty Ltd and causing it to break the law by conducting the litigation by its employees. (It is appropriate here again to emphasise that these are merely untested allegations.) The appellant's claimed loss (see [16] of these reasons) is again the difference between the amount for economic loss which the appellant should have obtained by judgment if the respondents had conducted his litigation properly and the amount included in the personal injuries judgment included for that component.

[55] The question is whether those alleged acts and omissions satisfy the test for advocate's immunity.

Alleged wrongful conduct during the processes required by PIPA

[56] The majority's conclusion in *Attwells* that advocate's immunity does not protect a solicitor's negligent advice not to settle litigation which results in a potential settlement being lost suggests that the negligent preparation of a claim for use in settlement negotiations before litigation which results in a potential settlement being lost during that process also may not be protected by advocate's immunity. Furthermore, whether the claimed loss is the lost chance of a settlement or an adverse judgment, advocate's immunity ordinarily is not attracted to conduct occurring before the commencement of litigation. In this case, however, the respondents argued that the provisions of PIPA requiring pre-litigation settlement processes attract advocate's immunity.

[57] Section 4(1) of PIPA describes the main purpose of that Act as being "to assist the ongoing affordability of insurance through appropriate and sustainable awards of damages for personal injury". Section 4(2) sets out six means by which that purpose is to be achieved:

> "(a) providing a procedure for the speedy resolution of claims for damages for personal injury to which this Act applies; and
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> (b) promoting settlement of claims at an early stage wherever possible; and
>
> (c) ensuring that a person may not start a proceeding in a court based on a claim without being fully prepared for resolution of the claim by settlement or trial; and
>
> (d) putting reasonable limits on awards of damages based on claims; and
>
> (e) minimising the costs of claims; and
>
> (f) regulating inappropriate advertising and touting."

[58] It is sufficient to give a simplified description of the main elements of the relevant part of the statutory scheme. An intending plaintiff in litigation (a "claimant") must give a notice of claim containing information about the claim within specified time limits. A potential defendant (a "respondent" to a notice of claim) must give a response containing information about the response to the claim within specified time limits. The respondent is obliged to notify the claimant whether liability is admitted or denied and in relation to any alleged contributory negligence. The claimant and the respondent are obliged to give each other specified information and documents about specified matters; in summary, the exchanged information and documents should ensure that each party is in a position to assess liability and quantum. Section 35 empowers courts to enforce those obligations by orders. Section 32 provides that if a party fails to comply with one of those provisions requiring the party to disclose a document to another party, the document cannot be used by that party in a subsequent court proceeding based on the claim, or the deciding of the claim, unless the court orders otherwise. Provisions are made for a compulsory conference between the parties, for the exchange of information shortly before that conference, and for an exchange of mandatory offers to settle if the claim is not settled at the compulsory conference. Section 42 imposes a time limit of 60 days after the conclusion of a compulsory settlement conference within which a personal injuries proceeding in court must be commenced (subject to the parties' agreement or a court order to the contrary, and

with qualifications including in cases where a court dispenses with the compulsory settlement conference or mandatory offers). If a party incurs costs as a result of the other party's default in complying with the specified pre-court procedures, s 48 empowers a court to award those costs against the defaulting party. Pursuant to s 56, an award of costs in the litigation may be influenced by differences between the amount of a judgment and a party's mandatory final offer. Section 56(5) provides that unless an award of damages is affected by factors that were not reasonably foreseeable at the time of the exchange of mandatory final offers, the court must not award costs to a party related to investigations or gathering of evidence by the party after the conclusion of the compulsory conference (or, if the parties or the court dispensed with the compulsory conference, after the day when the parties completed the exchange of mandatory final offers). Sections 59(1) and (2) effectively extend the period of limitation for starting a claim until six months (or a longer period allowed by a court) after the giving of a complying notice of claim if that is given before the end of the limitation period.

[59] These provisions require solicitors to carry out before the commencement of litigation much of the work which previously was done after the commencement of litigation as preparation for the trial of a personal injuries claim. The solicitor's work now includes doing that which is required to obtain and produce information and documents with a view both to use in the PIPA processes and, if the claim is not settled earlier, their use as evidence at a trial. Perhaps the most significant provisions for present purposes are those provisions which prevent a party from using in litigation a document which should have been but was not disclosed as required in the pre-litigation process and the provisions for costs orders in the litigation to be influenced by defaults in complying with the PIPA processes.

[60] This is not a case, however, of a court refusing an order under s 32 to permit a party to rely upon a document notwithstanding non-disclosure in the PIPA process. Nor is the claim for the recovery of loss sustained by an adverse cost order resulting from a default in complying with the PIPA processes. Whether advocate's immunity would preclude a claim against an advocate for negligent conduct which resulted in loss of that kind is not in issue. In this case the claim is for loss said to have been caused by the conduct of the solicitors in failing properly to prepare the claim, including by obtaining available supporting documents and evidence, and presenting it to the defendant as required by PIPA. The appellant does not claim that this alleged negligence, together with the operation of any provision of PIPA, made it impracticable to redress the inadequacies in the evidence during the subsequent litigation. On the contrary, in the claim based upon the respondents' alleged conduct during the litigation, the appellant claims as an aspect of the alleged negligence that the respondents "failed to redress the inadequate preparation during the PIPA stage". The conduct of the respondents alleged in this section of the claim had no more than an historical connection with the subsequent litigation. There is not here that intimate and functional connection between the work of an advocate and the conduct of the case in court and its resolution by judicial decision which is required to attract advocate's immunity.

Alleged wrongful conduct during litigation

[61] All of the appellant's allegations about the third respondent's negligent preparation of the appellant's claim in the course of the litigation involve acts or omissions which affected in court conduct and express or imply the conclusion that the alleged negligence resulted in the economic loss component of the personal injuries judgment

in his favour being less than it ought to have been. It follows from what I have already written that, as the appellant acknowledged in the course of argument,[68] his claim against the third respondent for negligent preparation of his claim during the litigation stage is precluded by advocate's immunity. The same is true of all of the appellant's claims seeking to hold the respondents legally liable for loss said to result from the allegedly inadequate preparation of his claim during the litigation.

[62] The appellant argued that his claims against the third respondent for breach of fiduciary duty were outside the scope of the immunity. This claim is very different from the claim for breach of fiduciary duty against the first and second respondents. The breaches of fiduciary duty alleged against the third respondent concern alleged failures to give information to the appellant during the litigation: see [15] of these reasons. The substance of those allegations is that the third respondent failed to inform the appellant of; her own alleged negligence in an aspect of her preparation for trial, that he should obtain separate legal advice; and, that he should apply for an adjournment of the trial to enable him to retain other solicitors. The alleged negligence which the appellant alleges the third respondent was obliged to disclose to him during the litigation was itself intimately connected with and allegedly influenced the conduct of the trial and the trial judge's decision. The appellant's case necessarily is that, if the third respondent had advised the appellant to seek an adjournment, such advice would have had an effect upon the conduct of the case in court (by an adjournment of the trial and the tendering of additional evidence in a later trial). A consequence of the third respondent's alleged failure to inform the appellant of her alleged negligence and the desirability of an adjournment is necessarily that the trial proceeded to judgment when the appellant's claim was alleged to have been inadequately prepared; that also illustrates the closeness of the connection between the alleged conduct and both the conduct of the case in court and the trial judge's decision. The third respondent's alleged acts and omissions had the necessary effect upon the conduct of the case in court and the resolution of the case by the court to attract advocate's immunity.

Striking out: the test

[63] As the appellant argued, it was not open to the primary judge to strike out his claim unless the claim was clearly doomed to failure: *General Steel Industries Inc v Commissioner for Railways (NSW).*[69] In *Agar v Hyde,*[70] Gaudron, McHugh, Gummow and Hayne JJ stated:

> "It is, of course, well accepted that a court whose jurisdiction is regularly invoked in respect of a local defendant… should not decide the issues raised in those proceedings in a summary way except in the clearest of cases. Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes. The test to be applied has been expressed in various ways, but all of the verbal formulae which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way." (Citations omitted.)

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68 Appellant's further outline following *Attwells*' case, paragraph 13.

69 (1964) 112 CLR 125.

70 (2000) 201 CLR 552 at 575–576 [57]. See also *Spencer v The Commonwealth* (2010) 241 CLR 118 at 139–140 [53]–[55].

[64] In some cases the generality or complexity of pleaded allegations, or uncertainty about the final shape of a claim at trial, might make it difficult to conclude at an interlocutory stage that advocate's immunity or re-litigation abuse of process is applicable. In this case, although the appellant's pleading admittedly requires amendment, the appellant was able to articulate his claims with precision and in detail. I am satisfied that the appellant's claims against the respondents based upon the allegedly inadequate preparation and conduct of his claim during the litigation stage, including the alleged breaches of fiduciary duty by the third respondent, are doomed to fail on the ground that they are precluded by advocate's immunity.

Disposition and orders

[65] In summary, I conclude that advocate's immunity precludes only so much of the appellant's claim as relies upon allegations of wrongful conduct by the respondents in relation to the preparation of the appellant's claim during the litigation stage (paragraphs 41–45 and 49 of the Fresh Statement of Claim), including alleged failures by the third respondent to inform the appellant about her alleged conduct in the preparation of the litigation (paragraphs 27 and 52 of the Fresh Statement of Claim).

[66] Because the primary judge found to be unsustainable any of the allegations of wrongful conduct by the first and second respondents in the performance of their retainer, his Honour made an order which required amendment of paragraph 67(c) ("…the first and second defendant were not entitled to any payment for their fees and disbursements … by reason of the failure by the first and second defendants to perform the Retainer.") A result of my conclusions is that the appellant is entitled to claim that the first and second respondents did not perform their retainer (except in so far as that allegation is referrable to the alleged inadequacies in preparation of the claim during the litigation stage). The subparagraph struck out by the primary judge therefore did not necessarily attract advocate's immunity and it was also not a re-litigation abuse of process.

[67] It followed from the primary judge's conclusions that the third respondent should be removed from the proceeding. My contrary conclusions require the order for removal of the third respondent and the order for judgment in her favour to be set aside.

[68] Upon my analysis, the appellant should be substantially successful in his appeal, which ordinarily would bring with it an order for costs of the appeal in his favour (although, since he represented himself in the appeal, presumably he would recover only appropriate disbursements). At the hearing of the appeal the Court indicated that it would give the parties leave to make submissions about costs, so it is inappropriate to make any costs order until after those submissions have been received.

[69] I propose the following orders:

1. Allow the appeal.
2. Set aside the orders made in the Trial Division on 24 September 2015.
3. Paragraphs 27, 41-45, 49 and 52 of the Fresh Statement of Claim be struck out.
4. Otherwise the respondents' application in the Trial Division be refused.

5. The appellant have leave to file and serve an amended statement of claim which omits the paragraphs of the Fresh Statement of Claim mentioned in order 3 and which otherwise amends the Fresh Statement of Claim in ways which are not inconsistent with these reasons, such statement of claim to be filed and served within 21 days of judgment in this appeal.

6. The parties have leave to make submissions about the costs of the appeal and the costs in the Trial Division in accordance with the Practice Direction or as directed by a Judge of Appeal.

[70] **GOTTERSON JA:** I agree with the orders proposed by Fraser JA and with the reasons given by his Honour.

[71] **BURNS J:** I agree with the reasons of, and the orders proposed by, Fraser JA.