

THE DEMISE OF THE ADVOCATE'S IMMUNITY

David Capper, School of Law, Queen's University Belfast

Introduction

The story of this essay spans the entirety of Des Greer's academic career. When he began teaching as a Legal Method Instructor at the University of Pennsylvania in 1964 it was common knowledge that a barrister could not be sued for negligence in the presentation of a case in court. The basis for this was not entirely clear but was thought to rest on the inability of counsel to contract for the provision of his or her services and the concomitant inability to sue for fees.¹ That basis was undermined by the seminal decision of the House of Lords in *Hedley Byrne and Co Ltd v Heller and Partners Ltd*.² That case decided, *inter alia*, that the absence of a contract did not prevent the imposition of tortious liability for economic loss caused by professional negligence, just as the absence of a contract had not blocked recognition of a manufacturer's duty of care for personal injury in *Donoghue v Stevenson*.³ The potential impact of *Hedley Byrne* on the barrister's immunity was stated by Lord Denning M.R. in the Court of Appeal in *Rondel v Worsley* as follows:-

“As soon as the House in May, 1963, stated this principle, the profession were quick to see that it was wide enough to apply to a barrister in all his work, both in court and out of it. So at once they asked whether the barrister's immunity had gone. No one suggested that the House had given any thought to it. The speeches contain no word about a barrister. Nevertheless the principle was there. It made plain that the immunity can no longer be justified on the ground that a barrister cannot sue for his fees. If the rule is to be justified, it must be on some better ground.”⁴

This essay will first explain what that “better” ground was and its extension to all advocates, whether barristers or solicitors. It will then trace its gradual disintegration over a third of a century until the House of Lords consigned it to history in *Arthur JS Hall v Simons*.⁵ An effort will be made to evaluate this latter decision and to state whether the arguments for no immunity are preferable to the immunity arguments. This task is particularly interesting at the present time because the High Court of Australia has recently upheld advocates' immunity in *D'Orta-Ekenaike v Victoria Legal Aid*⁶ and the

¹ See Ronald F. Roxburgh, “*Rondel v Worsley*: The Historical Background” (1968) 84 L.Q.R. 178, and “*Rondel v Worsley*: Immunity of the Bar” (1968) 84 L.Q.R. 513.

² [1964] A.C. 465.

³ [1932] A.C. 562.

⁴ [1967] 1 Q.B. 443, at 501.

⁵ [2002] 1 A.C. 615.

⁶ [2005] H.C.A. 12.

Supreme Court of New Zealand is considering the same issue in *Chamberlains v Lai*.⁷

Immunity: Restatement and Extension

The late United States Supreme Court Justice, Louis Dembitz Brandeis, believed that a thorough knowledge of the facts of a case was critical to effective understanding of the legal issues. In a chapbook he wrote:-

“Know thoroughly each fact. Don’t believe client witnesses. Examine documents. Reason; use imagination. Know bookkeeping-the universal language of business; know persons....Know not only specific cases, but whole subjects. Can’t otherwise know the facts. Know not only those facts which bear on direct controversy, but know all the facts and law that surround.”⁸

When *Rondel v Worsley*⁹ reached the House of Lords the basis of advocates’ immunity was restated but the facts of the case were extremely important. As the summary below will show the claim was about as devoid of merit as one could possibly imagine. It is difficult to escape the thought that had the claim possessed at least some merit the outcome might have been different.¹⁰

Norbert Fred Rondel, known to his Soho comrades as “Freddie the Ear” because of his propensity for biting off ears, was a rent collector and caretaker for the notorious London East End slum landlord, Peter Rachman. He was also a professional wrestler and claimed to be proficient in judo and karate.¹¹ After an incident in the East End in the late 1950s he found himself in the dock at the Old Bailey charged with grievous bodily harm. As he had no counsel to represent him and was not granted legal aid he secured the services of Mr Worsley of counsel on a dock brief, for which Mr Worsley was paid £2 4s 6d. Mr Rondel was convicted and sentenced to six years’ imprisonment. After serving his time he brought a professional negligence claim against Mr Worsley, preposterously arguing, *inter alia*, that Mr Worsley had procured the dock brief fee fraudulently. Mr Rondel was not represented in this civil claim until the case reached the Court of Appeal but he received a great deal of help from the first instance judge, Lawton J, in rendering his statement of claim semi-intelligible. Aside from the claim of fraud Mr Rondel’s main complaint against his counsel was not so much that negligent advocacy caused him to be wrongly convicted but that the jury

⁷ [2005] N.Z.S.C. 32 (13 June 2005) granting leave to appeal. In *Lai v Chamberlains* [2005] N.Z.C.A. 37 the Court of Appeal had decided that advocates’ immunity was no longer part of the law of New Zealand.

⁸ Undated memorandum, “What the Practice of Law Includes,” Louis D. Brandeis Papers, University of Louisville Law Library, Louisville, Kentucky; quoted in Melvin I. Urofsky, “Louis D. Brandeis: Advocate Before and On the Bench” (2005) 30 *Journal of Supreme Court History* 31, at 33.

⁹ [1969] 1 A.C. 191.

¹⁰ For similar views see P.C. Heerey, “Looking Over The Advocate’s Shoulder: An Australian View of *Rondel v Worsley*” (1968) 42 A.L.J. 3.

¹¹ These fascinating details are taken from *Heerey, ibid*; R.W. Harding, “Comment” (1967-68) 8 West. Aust. L.R. 242; Marvin A. Catzman, “Comment on *Rondel v Worsley*” (1968) 46 Can. Bar Rev. 505.

were not persuaded that a man of his experience in the noble arts of self defence needed no knife to rip open his victim's hand. Mr Rondel's insistence was that he accomplished this feat with his bare hands. Before the Court of Appeal he said of the tearing of the victim's hand – "It sounds difficult in cold blood but I can demonstrate it." Lord Denning M.R. assured the reader that "[w]e did not accept the offer."¹²

Against this factual background their Lordships rejected the no contract basis for immunity and rested it upon four public policy grounds. First, it was argued that recognition of a duty of care in tort would lead to advocates preferring their duties to clients over their public duty to the administration of justice. Thus advocates might ask every conceivable question and make every conceivable argument to defend themselves against negligence suits from unsuccessful clients.¹³ In emphasising the primacy of the duty to the administration of justice Lord Morris said that "[t]o a certain extent every advocate is an *amicus curiae*."¹⁴ Lord Upjohn pointed out that counsel in a criminal trial should take the point of an irregularity when it happens instead of reserving it for appeal.¹⁵ Secondly it was pointed out that advocates have immunity from defamation for things said in court¹⁶ and that judges, jurors, parties and witnesses¹⁷ have a general immunity from negligence as well. It would be inconsistent with this if advocates could be sued in negligence.¹⁸ Thirdly, it was argued that as the cab rank rule obliged a barrister to accept a brief except in very limited circumstances, there could be no voluntary assumption of responsibility and it would be unfair to impose a duty of care.¹⁹ Fourthly, their Lordships were all troubled by the prospect that the only way of establishing whether or not an advocate had been negligent would be to re-litigate the case. Lord Reid pointed out that where the alleged negligence was in a criminal trial different standards of proof would apply between the criminal trial and the negligence case.²⁰ Lord Morris asked whether jurors or the bench might be called as witnesses to say whether they would have convicted anyway.²¹

It will be argued below that *Hall v Simons*²² has the better of the arguments on whether advocates should owe a duty of care. For the moment, however, two further matters must be addressed. First, their Lordships stated *obiter* that the immunity re-established on public policy grounds was the immunity of the advocate, not the barrister. Thus it applied to solicitors doing

¹² [1967] 1 Q.B. 443, at 494.

¹³ [1969] 1 A.C. 191, at 228 (Lord Reid), 247 (Lord Morris), 267-268 (Lord Pearce), 282-283 (Lord Upjohn).

¹⁴ *ibid.*, at 247.

¹⁵ *ibid.*, at 282.

¹⁶ Under *Munster v Lamb* (1883) 11 Q.B.D. 588.

¹⁷ The immunity of witnesses has recently been extended to the bringing of disciplinary proceedings against them for evidence given in court. See *Meadow v General Medical Council* [2006] E.W.H.C. 146 (Admin).

¹⁸ [1969] 1 A.C. 191, at 229-230 (Lord Reid), 270 (Lord Pearce).

¹⁹ *ibid.*, at 264 and 275-276 (Lord Pearce), 281 (Lord Upjohn).

²⁰ *ibid.*, at 230.

²¹ *ibid.*, at 249.

²² [2002] 1 A.C. 615.

advocacy work as much as to barristers doing the same.²³ Secondly, a majority of their Lordships believed that the immunity of barristers should not be extended to non-court work such as advisory work and drafting documents (*e.g.* wills, settlements, conveyances, real property contracts, commercial contracts, charterparties) unconnected with court proceedings.²⁴ Pleadings and subsequent steps in litigation were within the immunity as acts connected with court proceedings. Lord Upjohn suggested that the advocate's immunity should begin at the letter before action when taxation of party and party costs begins.²⁵ In principle it makes sense that an immunity based on the restated grounds of *Rondel v Worsley* should apply to advocacy work and all advocates performing it. However history has supported Lord Pearce's scepticism about delineating the "jagged edge"²⁶ between court work and other work in the context of litigation, especially when solicitors are brought into the picture.²⁷

The decision in *Rondel v Worsley* was not on the whole well received by commentators. The present author's researches only turned up two comments that were supportive of the ruling.²⁸ Among the sceptical comments contemporaneous with the decision one remarked that it did not look good for ex-barristers to rule that advocates could not be sued when all other professional persons could.²⁹ Another was sceptical of the litigation/non-litigation divide.³⁰ A third drew attention to the plaintiff's lack of worthiness as a factor in the decision.³¹ Dr. North raised a question to which further consideration will be given later – could the negligence of defence counsel in a criminal case be a ground of appeal?³² Subsequent commentary was also unfavourable. David Carey Miller³³ and Jonathan

²³ [1969] 1 A.C. 191, at 232 (Lord Reid), 267 (Lord Pearce), 284-285 (Lord Upjohn), 294 (Lord Pearson). Lords Upjohn and Pearson recognised that solicitors would remain liable for negligence in non-advocacy matters connected with litigation. Drawing the line between the two kinds of work was acknowledged to be difficult.

²⁴ *ibid.*, at 232 (Lord Reid), 285-286 (Lord Upjohn), 293-294 (Lord Pearson).

²⁵ *ibid.*, at 286.

²⁶ As Louis Blom-Cooper, counsel for Mr Rondel, put it in argument.

²⁷ [1969] 1 A.C. 191, at 276-277.

²⁸ J.A. Jolowitz, "The Immunity of the Legal Profession" (1968) 26 C.L.J. 23, described the decision as a firm and satisfactory basis for the future development of the law. Marvin A. Catzman (1968) 46 Can. Bar Rev. 505 thought it not unlikely that *Rondel v Worsley* would be followed in Canada, a prediction that *Demarco v Ungaro* (1979) 95 D.L.R. (3d) proved to be wide of the mark. A more accurate prediction of the attitude of Canadian courts thus came from the Honorable Bora Laskin in the 21st Hamlyn Lectures, *The British Tradition in Canadian Law* (1969) pp.25-26.

²⁹ P.C. Heerey, *supra* n.10.

³⁰ H. W. Wilkinson, "Public Policy and the Immunity of Advocates" (1968) 31 M.L.R. 329.

³¹ See R. W. Harding, *supra* n.11. For further sceptical comments of that time see the editorial (1967) 117 N.L.J. 1255, and Brian Davis (1968) S.L.T. 45.

³² P. M. North, "*Rondel v Worsley* and Criminal Proceedings" (1968) Crim. L.R. 183.

³³ D.L. Carey Miller, "The Advocate's Duty to Justice: Where Does it Belong?" (1981) 97 L.Q.R. 127.

Hill³⁴ both wrote extensive critiques, the latter particularly questioning whether immunity was necessary in the light of the formidable difficulties a litigant would have in proving negligence and causation. In a socio-legal study Velanowski and Whelan argued that the immunity had not been empirically justified and that nothing rebutted the presumption that potential civil liability would act as a powerful incentive to high professional standards.³⁵ In his celebrated book on *Advocates* David Pannick QC offered his professional colleagues no solace in a powerful rebuttal of the arguments for immunity.³⁶ The National Consumer Council believed that the arguments in favour of immunity were not of sufficient strength to “outweigh the hardship to consumers who may fall victim to an advocate’s negligence.”³⁷

Notwithstanding the less than overwhelmingly positive reception of *Rondel v Worsley* advocates’ immunity expanded in the decade immediately after this decision. In this regard the decision of the New Zealand Court of Appeal in *Rees v Sinclair*³⁸ was particularly significant. This court held that the immunity applied to pre-trial work so intimately connected with the conduct of the cause in court that it can fairly be said to be a preliminary decision affecting the way the cause is to be conducted at hearing.³⁹ Advice to settle a matrimonial case where the hearing had already commenced was subsequently held to be included in this⁴⁰ but it was emphasised that the immunity should be no wider than necessary. Notwithstanding this cautionary guidance, however, the test has proved to be more than a little difficult to apply in practice. It is no surprise that the issue of preliminary work was first considered in detail in a jurisdiction where most practitioners practise as barristers *and* solicitors. But it must always be remembered that the immunity is that of the advocate, not the barrister.

This section of the paper may be concluded by a brief examination of the reception of advocates’ immunity in Australia. This only extended advocates’ immunity in the territorial sense but the recent refusal of the High Court of Australia to join hands with the House of Lords in rejecting advocates’ immunity gives this development considerable significance, especially in light of the New Zealand Supreme Court’s reconsideration of *Rees v Sinclair*. The reception of advocates’ immunity in Australia was perhaps a little surprising given its earlier decisive rejection by Canada, another jurisdiction where practitioners tend to be both barristers and solicitors.⁴¹ *Giannarelli v Wraith*⁴² recognised advocates’ immunity in the

³⁴ J. Hill, “Litigation and Negligence: A Comparative Study” (1986) 6 O.J.L.S. 183.

³⁵ C.G. Velanowski and C.J. Whelan, “Professional Negligence and the Quality of Legal Services – An Economic Perspective” (1983) 46 M.L.R. 700.

³⁶ D. Pannick, *Advocates* (Oxford, 1992), pp. 197-206.

³⁷ National Consumer Council, *Ordinary Justice* (London, HMSO, 1989), p. 223.

³⁸ [1974] 1 N.Z.L.R. 180.

³⁹ *ibid.*, at 187 (McCarthy P.).

⁴⁰ *Biggar v McLeod* [1978] 2 N.Z.L.R. 9 (C.A.).

⁴¹ See the decision of Krever J in *Demarco v Ungaro* (1979) 95 D.L.R. (3d) 385 (Ontario High Court). His honour pointed out that in Canada a lawyer could always contract with his or her client so the pre-*Rondel v Worsley* immunity of England never applied there. The public policy reasons favoured by the House of Lords were all rejected for reasons essentially similar to those given in *Hall v Simons*. Concern was expressed about lawyers giving lawyers sole professional immunity and it was stated that potential liability would be a good spur towards

state of Victoria. This was in part based upon various constructions of section 10(2) of the Legal Profession Practice Act (Vict.) 1958 but the majority of the High Court who recognised advocates' immunity thought this to be the common law of Australia as well. Reliance was placed upon all of the public policy grounds of *Rondel v Worsley* but Brennan J placed particular emphasis upon the need for counsel to perform their primary duty to the court "free from the chilling threat of civil suit by the parties to the litigation."⁴³ It is respectfully suggested that both the difficulty of proving negligence and that a different outcome would have been reached in its absence render this fear somewhat overblown. Discussion of *D'Orta-Elenaïke v Victoria Legal Aid*,⁴⁴ where the High Court reaffirmed advocates' immunity, will be postponed until the impact of *Hall v Simons* has been considered.

The Reduction of Advocates' Immunity

The road that led to *Hall v Simons* and the demise of the advocate's immunity began in 1978 with *Saif Ali v Sydney Mitchell & Co.*⁴⁵ The plaintiff was injured in a road traffic accident when the van in which he was travelling was in collision with a car owned by an individual whose wife was driving it. A barrister advised suing the owner and by the time this was corrected the plaintiff's action against the wife was time-barred. The plaintiff sued his solicitors for professional negligence but the proceedings reported concerned the third party action the solicitors commenced against the barrister who advised suing the husband. By a 3-2 majority the House of Lords determined that advice on the proper party to sue did not come within the advocate's immunity. This clearly disapproves *Rondel v Worsley* so far as it applies to pleadings. It also illustrates the difficulty of delineating the "jagged edge" between court and non-court work. Lord Diplock believed that only the advocate's primary duty to the court and the risk of relitigation were reasons capable of supporting the advocate's immunity.⁴⁶ In fact he thought it was unsatisfactory that the House had not heard more argument on whether *Rondel v Worsley* should still be followed in light of subsequent developments in negligence law.⁴⁷ Cases following upon *Saif Ali* will now be examined under the headings "civil cases" and "criminal cases".

Civil Cases

In *McFarlane v Wilkinson*⁴⁸ Rix J held that a professional negligence claim against two barristers (one silk and one junior) for failing to add a claim for breach of statutory duty to a statement of claim in a personal injury case came within the immunity for court related work. This seems difficult to

professional competence. For favourable commentary on *Demarco v Ungaro* see Allan C. Hutchinson (1979) 57 Can. Bar Rev. 346; for critical commentary see Stephen E. Traviss (1979) 13 *Law Soc of Upper Canada Gazette* 262.

⁴² (1988) 165 C.L.R. 543.

⁴³ *ibid.*, at 579.

⁴⁴ [2005] H.C.A. 12.

⁴⁵ [1980] A.C. 198.

⁴⁶ *ibid.*, at 221-223.

⁴⁷ *ibid.*, at 223.

⁴⁸ [1996] 1 Lloyds Rep. 406.

reconcile with *Saif Ali* and the decision was understandably doubted by Lord Bingham of Cornhill C.J. at the Court of Appeal stage of *Hall v Simons*.⁴⁹

*Atwell v Michael Perry*⁵⁰ also illustrates the acute difficulty in distinguishing work within from work without the immunity. The defendant barrister represented the plaintiff in a boundary dispute case in the county court. The plaintiff lost and the barrister advised that there were no prospects for an appeal. When the plaintiff changed solicitors (for the second time) another barrister advised that there was a very good prospect of success on appeal on a point not considered by the first barrister. The appeal was successful and the plaintiff sued the first barrister alleging negligence (a) in assessing the strengths of the case before trial, and (b) in advising that there were no grounds for an appeal. Sir Richard Scott V-C held that formulation of the case plan could not be distinguished from conducting the case in court so the first allegation of negligence was struck out as falling within the immunity. The second allegation of negligence was not struck out on immunity grounds because neither advice on whether to bring an action nor advice on the prospects of an appeal were sufficiently connected with the conduct of the case in court to bring it within the immunity. The jaggedness of the jagged edge can be seen in all its jaggedness in this distinction! The claim was still struck out, however, because the plaintiff had been unable to particularise the damage sustained as a result of this alleged negligence.

*Kelley v Corston*⁵¹ was concerned with a complex issue that arises in matrimonial proceedings in particular. The defendant barrister advised the plaintiff wife in ancillary relief proceedings. The proceedings were settled at the door of the court and an order of consent was made by the judge under section 33A of the Matrimonial Causes Act 1973. The order recorded that the judge had read the affidavit evidence of the parties and considered it just to make the order in the terms proposed. The plaintiff found that the effect of the order was that she was unable to finance the repayment of the mortgage on the former matrimonial home after it was transferred into her name. The Court of Appeal held that immunity applied to the barrister's actions but for reasons which differed amongst the members of the court. Judge L.J. held that the trend was increasingly to limit the extent of the immunity, that advice as to settlement once the hearing had commenced was closely connected to the conduct of the case in court, but that settlements at the door of the court were not. However the immunity applied here because the judge had to certify his consent to the settlement and a negligence action would thus be a collateral challenge to the decision of the court.⁵² Pill L.J. held that advice as to settlement once the hearing had commenced and settlements requiring the approval of the court were within the immunity. However the judicial intervention point had not been pleaded so his Lordship felt that he could not decide the case on this ground. Advice as to settlement at the door of the court did attract immunity as it could not be differentiated from settlement advice once the hearing had commenced.⁵³ Butler-Sloss L.J. held that both "at the door of the court" settlements and consent orders were

⁴⁹ [2002] 1 A.C. 615, at 646.

⁵⁰ [1998] 4 All E.R. 65.

⁵¹ [1998] Q.B. 686.

⁵² *ibid.*, at 688-702.

⁵³ *ibid.*, at 702-712.

within the immunity, although her opinion on the latter was strictly *obiter*. Settlement advice was not normally within the immunity so advice in chambers or the day before the hearing would not come within it. Notwithstanding the illogicality of the distinction between advice on the day of the hearing and other contexts, a “clear working rule” was needed for advice at the door of the court. That could not be distinguished from settlement after the hearing had commenced so would come within the immunity. It would not be in the public interest to have any kind of enquiry as to how carefully the judge had considered the consent order or as to what discussions went on in chambers before a consent order was made.⁵⁴ Lord Bingham C.J.’s comment in *Hall v Simons* that *Kelley v Corston* is difficult to follow is certainly not an overstatement.⁵⁵

Criminal Cases

The principal issue in most criminal cases has been whether allowing the client to sue would amount to a collateral challenge to the decision of the trial court. In *Somasundaram v M. Julius Melchior and Co*⁵⁶ the plaintiff pleaded guilty to a charge of maliciously wounding his wife. On the instructions he gave his counsel he had no defence and was quite properly advised to plead guilty. His appeal against conviction, on the ground that he was pressurised by his solicitors and counsel into pleading guilty, was dismissed although his sentence was reduced from two years’ imprisonment to 18 months. After serving his sentence he sued both solicitors and counsel for professional negligence on the same ground and this was struck out because the advice to plead guilty was clearly correct so the action was frivolous, vexatious and an abuse of the process of the court. The Court of Appeal said *obiter* that advice as to plea was so closely connected with the conduct of the case in court that it was within the advocate’s immunity. Allowing a negligence action like this would impugn the decision of a court of competent jurisdiction and this would be a further abuse of process. Solicitors would share this immunity only if acting as advocates so it did not avail the plaintiff’s solicitors in this case. But they had a strong defence based upon their reliance on counsel’s advice. This meant either that they had not been negligent or that counsel’s intervention broke the chain of causation. Once again problems are apparent in delineating the extent of the advocate’s immunity.

It seems that in *Smith v Linskills*⁵⁷ advocates’ immunity was not in issue and the negligence action was barred simply on the ground that it amounted to a collateral challenge to the decision of a court of competent jurisdiction. The

⁵⁴ *ibid.*, at 712-719.

⁵⁵ [2002] 1 A.C. 615, at 646. See also M. Seneviratne, “The rise and fall of advocates’ immunity” (2001) 21 L.S. 644, at 649, where it is pointed out that *Kelley v Corston* has attracted much academic criticism, principally because so little judicial consideration often goes into making the consent order. It was not followed in *Griffin v Kingsmill* [1998] P.I.Q.R. 24, where an infant’s settlement was approved by a Master because the latter was not a court of trial and did not give judgment on the merits. This looks more like an attempt to avoid *Kelley v Corston* than a genuine attempt to distinguish it.

⁵⁶ [1988] 1 W.L.R. 1394.

⁵⁷ [1996] 1 W.L.R. 763.

plaintiff had been convicted of aggravated burglary and sentenced to seven years' imprisonment. After an unsuccessful appeal and his release from prison the plaintiff commenced this action against his solicitors alleging that the negligent preparation of his defence led to his conviction. The particulars of negligence were as follows – failure to request an old-style committal; failure to visit the plaintiff sufficiently while in prison to take instructions from him; failure to provide the plaintiff with copies of the case depositions and to take his instructions on them; failure to arrange an identity parade; failure to take statements from three witnesses despite the plaintiff's repeated requests; failure to trace and take a statement from another witness; failure to follow an obvious enquiry as to the motives of key prosecution witnesses for giving evidence against the plaintiff; and failure to brief counsel in timely fashion and to arrange a pre-trial conference before the day of the trial. It is no denigration of the importance of these steps to say that none of it amounts to advocacy work. The case was struck out as an abusive collateral challenge upon the decision of the trial court. The importance of the decision lies in its explanation of what amounts to an abusive collateral challenge. Sir Thomas Bingham M.R. first stated that not all collateral attacks were necessarily abusive. Where the plaintiff has had a full opportunity of contesting the decision of the trial court the negligence action would be abusive. The negligence of the plaintiff's lawyers would not mean there had been no such opportunity as otherwise every convicted defendant could have some plausible ground for a civil claim.⁵⁸ In general the better approach to situations where the defendant in a criminal case may have been wrongly convicted would be an appeal against conviction. In criminal cases there is a relatively low threshold for the admission of new evidence and wide powers for the Court of Appeal to order a new trial. The Home Secretary may refer a case back to the Court of Appeal, now after a recommendation from the Criminal Cases Review Commission. These routes were better ways to rectify an injustice than allowing a civil court to come to a different conclusion.⁵⁹ It will be argued below that this is the preferable way to afford justice to criminal defendants who have been victims of negligence either from their advocates or their solicitors in pre-advocacy preparation. In *Smith v Linskills* it was also said that two further considerations militated against allowing civil claims by unsuccessful parties to previous litigation. A long time after the event the conditions of the previous trial cannot be recreated and finality in litigation is very important. As Sir Thomas Bingham M.R. pointed out there was a wide perception that the present rule was created by judges to protect their professional brethren. But the legal profession's interests were arguably better served by endless re-litigation. "If, as suggested in *Bleak House*, "The one great principle of English law is, to make business for itself..." there could be no better way of doing so."⁶⁰

*Acton v Graham Pearce and Co*⁶¹ concerned similar issues, although on this occasion the plaintiff's conviction had been quashed on appeal. No negligence action was allowed on the last two grounds of *Smith v Linskills*.

⁵⁸ *ibid.*, at 769-770.

⁵⁹ *ibid.*, at 773.

⁶⁰ *ibid.*

⁶¹ [1997] 3 All E.R. 909.

Chadwick J was particularly worried about the prospect of an acquittal in the Court of Appeal followed by a civil trial which decided that even with the negligence of the advocate the defendant would have been convicted anyway.⁶² The initial reaction to this could be “damned if you win your appeal and damned if you don’t”, but this would be unfair. The decision illustrates how appeal against conviction is, as will be argued below, the better way of addressing professional negligence in this area. Another important feature of this decision is Chadwick J’s acknowledgement that for “out of court” work the “intimate connection” test of McCarthy P in *Rees v Sinclair*⁶³ is the law.⁶⁴

*Walpole v Partridge & Wilson*⁶⁵ was another case of collateral challenge absent advocates’ immunity. The alleged negligence was the failure of a firm of solicitors to lodge a case stated appeal against conviction despite counsel’s advice that the Crown Court had arguably erred in law. The Court of Appeal decided that there was no abuse of process here because no re-litigation of issues decided in earlier proceedings would be involved. An argument that the point of law could have been taken before the current proceedings and should not be taken now was rejected on the basis that such a stance would bring the law into disrepute more than any apparent re-litigation. This is surely correct as the significance of points of law is often not apparent before the facts have been found. Where new evidence comes to light the test is quite rightly different – was it previously available? The decision of the Crown Court was not final and the plaintiff had been deprived of an opportunity of securing justice in the most appropriate way. This case shows that some times advocates’ negligence cannot always be addressed via an appeal against conviction.

Summary

Decisions post *Saif Ali v Sydney Mitchell* threw up a lot of problems. In civil cases it became increasingly clear that advocates’ immunity rested upon unsustainable distinctions. In criminal cases there was the understandable reluctance to allow civil courts to come to potentially different conclusions than criminal trial courts, whether the defendant’s conviction were quashed or not. But it can not be right to refuse to address the effects of professional negligence in criminal cases altogether. If a negligence action is barred then the appellate process has to fill the void. The whole area was ripe for the re-examination it received in *Hall v Simons*.

Hall v Simons and the End of Advocates’ Immunity in the United Kingdom

The seven member panel of the House of Lords which decided *Arthur JS Hall & Co v Simons*⁶⁶ was unanimous that advocates’ immunity should not be retained for civil cases and, by a majority of four to three, also abolished the immunity for criminal cases. *Rondel v Worsley* was not overruled;

⁶² *ibid*, at 925.

⁶³ [1974] 1 N.Z.L.R. 180, at 187.

⁶⁴ [1997] 3 All E.R. 909, at 924.

⁶⁵ [1994] Q.B. 106.

⁶⁶ [2002] 1 A.C. 615.

merely described as no longer reflecting public policy. The discussion which follows will focus first on civil cases. The arguments for rejecting advocates' immunity in general terms were mainly considered there. Then the focus will shift to criminal cases and why these were thought to present special difficulties.

Civil Cases

The speeches of their Lordships largely demolished the four reasons for advocates' immunity originally set out in *Rondel v Worsley*.

First, their Lordships did not believe that the recognition of a duty of care to clients would lead to advocates preferring it over their overriding duty to the court. Lawyers are not the only professionals that have to reconcile ethical conflicts. Doctors often have to grapple with similar problems and nobody argues that they should be immune from suits in negligence.⁶⁷ Lord Hoffmann said this was really a vexation argument – as advocates have to perform a difficult task it would be unfair to impose a duty of care on them. Like Lord Steyn he could see no reason why advocates should have more protection here than other professionals like doctors.⁶⁸ Reforms to civil procedure introduced by the Civil Procedure Rules 1998, such as summary dismissal of unsustainable claims under rule 24.2, and the obvious difficulty in obtaining legal representation for these cases provide as much protection as lawyers deserve in this area.⁶⁹ Prolixity was a serious problem as things stood and it was difficult to believe that the abolition of immunity would make the situation worse.⁷⁰ Lord Steyn was much impressed by Canadian experience. There is no immunity there as the discussion above has shown and no sign that this has been inimical to the public interest.⁷¹ Aside from all of this it will be difficult for disappointed clients either to prove negligence or that better advocacy would have produced a different outcome.⁷² Negligence requires proof that the advocate presented the case as no qualified person should reasonably have done.⁷³ There is a world of a difference between that and proof that with the benefit of hindsight different tactics might have been more fruitful.

The immunity for those participating in court proceedings, *i.e.* the parties, witnesses, and judges, was dismissed as having little to do with the immunity claimed for advocates. The former is designed to encourage freedom of speech but the latter is an excuse for negligence.⁷⁴ As Lord Hoffmann explained – “The fact that the advocate is the only person involved in the trial process who is liable to be sued for negligence is because he is the only person who has undertaken a duty of care to his client.”⁷⁵

⁶⁷ *ibid.*, at 680 (Lord Steyn).

⁶⁸ *ibid.*, at 690.

⁶⁹ *ibid.*, at 691-692 (Lord Hoffmann). See also Lord Steyn at 682.

⁷⁰ *ibid.*, at 693 (Lord Hoffmann).

⁷¹ *ibid.*, at 681.

⁷² *ibid.*, at 682 (Lord Steyn).

⁷³ *ibid.*, at 737 (Lord Hobhouse).

⁷⁴ *ibid.*, at 679 (Lord Steyn).

⁷⁵ *ibid.*, at 698. Lord Hope said (at 714) that the witness immunity argument was a “make-weight argument.”

Their Lordships did not believe that the “cab rank” rule had sufficient impact on the administration of justice to justify depriving a client of a remedy in negligence for serious financial loss. Thus Lord Steyn pointed out that barristers’ clerks could filter out unwelcome cases. Fees could be raised within limits. Work could be declined if not within the advocate’s field of practice.⁷⁶ Lord Hoffmann pointed out that a vexatious client will usually have acquired the services of a solicitor first.⁷⁷ Those more familiar with a Bar Library system, like Lord Hope of Craighead, should be similarly sceptical of the significance of the “cab rank” rule in practice.⁷⁸ Lord Hobhouse pointed out that other professions, doctors and common carriers for example, were obliged to serve all who requested their services, and were subject to duties of care.

The re-litigation of cases or collateral challenges to decisions of courts of competent jurisdiction is not a reason for advocates’ immunity in civil cases. As Lord Steyn argued the principles of *res judicata*, issue estoppel and abuse of process should be sufficient to prevent any inappropriate re-litigation.⁷⁹ Lord Browne-Wilkinson said that in civil cases conflicting decisions were undesirable but far from unknown.⁸⁰ Lord Hoffmann described the collateral challenge rule as “burning down the house to roast the pig; using a broad-spectrum remedy when a more specific remedy without side effects can handle the problem equally well.”⁸¹ Referring to matrimonial cases where terms of settlement are put before the judge for incorporation into an order of the court, Lord Hoffmann pointed out that the judge’s approval was dependent on the information provided by the advocates.⁸² In relation to civil (including matrimonial) cases generally Lord Hoffmann thought that it would seldom be an abuse of process to sue an advocate for the handling of the case. One case where the original successful party might have reason to complain about subsequent proceedings against the losing party’s advocate is where a defendant fails to justify a serious libel.⁸³ Lord Hope drew attention to the difficulty in civil cases of defining the limits of immunity, especially in the context of out of court settlements.⁸⁴ Lord Hobhouse placed considerable reliance on what he saw as the fundamental difference between civil and criminal cases in this regard. He believed that a successful claim against a negligent lawyer does not attack the position of the other party to the original litigation. And the boundary between advocacy attracting immunity and other work outside the immunity could not be drawn clearly, a problem amplified under the Civil Procedure Rules.⁸⁵

In addition to the above the House of Lords believed that abolition of the immunity would be a force for good. Lord Steyn stressed that “one of the

⁷⁶ *ibid.*, at 678.

⁷⁷ *ibid.*, at 696.

⁷⁸ *ibid.*, at 714.

⁷⁹ *ibid.*, at 680.

⁸⁰ *ibid.*, at 684.

⁸¹ *ibid.*, at 703.

⁸² *ibid.*, at 705.

⁸³ *ibid.*, at 707.

⁸⁴ *ibid.*, at 724, referring to *Rees v Sinclair* [1974] 1 N.Z.L.R. 180 and *Kelley v Corston* [1998] Q.B. 686. See also Lord Hutton at 729.

⁸⁵ *ibid.*, at 745.

functions of tort law is to set external standards of behaviour for the benefit of the public.”⁸⁶ While he was confident that general standards at the Bar were high “[a]n exposure of isolated acts of incompetence ... will strengthen rather than weaken the legal system.”⁸⁷ Public confidence in the legal system could not be enhanced by the law singling out its own for protection no matter how flagrant the negligence.⁸⁸

Criminal Cases

A defendant in a criminal case who alleges that he was convicted or received a harsher sentence because of his advocate's negligence should ordinarily appeal conviction or sentence before entertaining any thoughts of suing the advocate in negligence.⁸⁹ As Lord Hoffmann pointed out there may be some cases like *Walpole v Partridge & Wilson*⁹⁰ where taking the line that failure to appeal bars a negligence action would be a denial of justice because the negligence consists of a lawyer's failure to process the appeal. From this it follows that the negligence of the defence advocate has to be a ground for appeal. Apparently it is. In *R v Irwin*⁹¹ defence counsel's failure to consult the defendant about a decision not to call two alibi witnesses rendered the conviction unsafe. In *R v Clinton (Dean)*⁹² a conviction was held to be unsafe because defence counsel failed to call evidence on the defendant's behalf to rebut the prosecution case.

If the principal remedy for advocates' negligence in criminal cases lies in appeal against conviction and/or sentence then any negligence action against the advocate would be in respect of losses not made good by a successful appeal. These losses may well be substantial. A defendant may have spent time in prison serving a sentence he would not have received if his counsel had done a competent job. Loss of earnings, including loss of employment, could have been considerable.⁹³ Despite this there is strength in the argument of those members of the House who would have preferred to preserve advocates' immunity in criminal cases. A meaningful appeal based on the negligence of an advocate will have to be undertaken by a different advocate. But the assistance of the allegedly negligent advocate will be needed to allow the appellate court to determine whether anything went seriously wrong in the court below. If a defence advocate knows that any assistance rendered to the appellate court is likely to provide ammunition for a subsequent negligence action against him how candid is that advocate

⁸⁶ *ibid.*, at 682.

⁸⁷ *ibid.*

⁸⁸ *ibid.* See also Lord Hoffmann at 689.

⁸⁹ *ibid.*, at 679 (Lord Steyn), 685 (Lord Browne-Wilkinson – save in truly exceptional circumstances the only permissible challenge to a criminal conviction is by way of appeal), 703 (Lord Hoffmann), 730 (Lord Hutton).

⁹⁰ [1994] Q.B. 106.

⁹¹ [1987] 2 All E.R. 1085.

⁹² [1993] 1 W.L.R. 1181. See also *Anderson v HM Advocate* 1996 S.C. 29.

⁹³ Lord Hobhouse believed that the remedy for advocates' negligence in criminal cases was only by way of appeal. Defendants acquitted on appeal in the absence of negligent advocacy receive no compensation so the successful appellant (on whatever ground) has to accept any loss accompanying conviction as the price to be paid for “enjoying the protection of the criminal law.” See [2002] 1 A.C. 615, at 748.

likely to be in assisting the appellate court?⁹⁴ It is worth stating that none of the appeals before the House concerned criminal cases so that, as Lord Hobhouse pointed out, full argument had not been heard on this issue.⁹⁵ In a short speech Lord Millett rejected retention of the immunity for criminal cases for two reasons – one the difficulty of distinguishing all criminal cases from civil cases, and the other his perception that the public would be unlikely to understand the distinction.⁹⁶

Discussion

In abolishing the advocate's immunity the speeches do not place great reliance on the difficulty of distinguishing advocacy work from non-court work. In the main they appear to treat the issue as one of general principle and, with the exception of criminal cases, find no substantial merit in the immunity. Yet it remains very likely that two decades of gradual attrition sufficiently weakened the immunity that it was ripe for plucking by the time *Hall v Simons* came to be decided. It is submitted that the only arguments for advocates' immunity worthy of any respect are the arguments from conflict between the duty owed to the client and the duty to the court and the re-litigation/collateral challenge argument.

The conflict of duty argument is ultimately unpersuasive because proof of negligence is such a difficult task and any preference of the duty to the court should not ever raise any question of negligence. The advocate's immunity is a classic example of the dilemma courts have faced in contexts like medical negligence, police investigation of crime, and the discharge of statutory duties by public authorities. It is necessary in these situations to control the floodgates of liability. This can be done either by requiring very clear proof of negligence⁹⁷ or by denying the existence of a duty of care altogether.⁹⁸ The House of Lords has emphasised that the striking out of a negligence case on the ground that no duty of care is owed can only be justified in the most exceptional of circumstances.⁹⁹ One case where this was done, *D v East Berkshire Health NHS Trust*,¹⁰⁰ was a claim brought by parents suspected of sexually abusing their children. This is clearly different from advocates' immunity. A duty of care was owed to the children so recognition of a duty of care to the parents would have left professionals vulnerable to civil suit in a notoriously difficult field from whichever party

⁹⁴ [2002] 1 A.C. 615, at 719 (Lord Hope), 747 (Lord Hobhouse).

⁹⁵ *ibid.*, at 735.

⁹⁶ *ibid.*, at 752.

⁹⁷ Such as the medical negligence test of *Bolam v Friern Hospital Management Committee* [1957] 1 W.L.R. 582, at 587 – “A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art.” (McNair J).

⁹⁸ For police investigation of crime see *Hill v Chief Constable of West Yorkshire* [1989] A.C. 53 and *Brooks v Metropolitan Police Commissioner* [2005] U.K.H.L. 24, [2005] 2 All E.R. 489. For claims against health care professionals and social workers investigating child sexual abuse see *D v East Berkshire Health NHS Trust* [2005] U.K.H.L. 23, [2005] 2 All E.R. 443.

⁹⁹ The infamous decision of the European Court of Human Rights in *Osman v United Kingdom* (2000) 29 E.H.R.R. 245 is thought to have made the courts more cautious in striking out cases.

¹⁰⁰ *Supra* n.98.

proved to be the victim of misdiagnosis. The conflicting duties in advocates' cases are not conflicting duties of care.

Initial experience after *Hall v Simons* suggested that the difficulty of proving negligence was controlling the floodgates.¹⁰¹ Unfortunately a less sanguine perspective is offered by the case of *Moy v Pettmann Smith*.¹⁰² The claimant had earlier been a claimant in a personal injury case seriously mishandled by his solicitors. They had failed, despite the advice of counsel, to obtain all necessary evidence relating to causation and prognosis. Before trial the defendants in this case offered to settle for £150,000, a sum which the claimant's counsel, who was very experienced in personal injury litigation, considered to be inadequate. To have a realistic chance of beating the offer and escaping liability for costs counsel knew she had to persuade the trial court to admit up to date evidence on causation and prognosis late. Counsel advised her client to reject the offer, whereupon she made the application for admission of the new evidence. The judge rejected that application and the claimant was awarded a sum less than £150,000 from which he had to meet the defendants' costs. Of course he was able to recover his liability in costs and the shortfall in damages from his solicitors for negligent case preparation. But the Court of Appeal held that counsel had to share in the responsibility for the debacle because she should have advised her client that he had a choice. He could either allow her to make the application for late admission of evidence and go on to try and obtain full compensation on the day of the trial; or he could accept the £150,000 and sue his solicitors for the inadequate compensation he obtained due to their negligence. Of course the option of suing the solicitors for all losses incurred was still open after counsel's plan failed and would not have been necessary had her plan succeeded. Counsel's reasoning in acting as she did was prompted by two considerations. One was trying to get her client full compensation on the day. The other was trying to save her instructing solicitors from a negligence action in the knowledge that her client could still sue them if her preferred course of action did not succeed. The Court of Appeal took the view that counsel should have told her client the full story and left it to him to decide which course of action to follow. But with respect to the Court of Appeal it could not be said that counsel had followed a course of action which no responsible body of professional opinion would have sanctioned. It is disturbing that it took a further appeal to the House of Lords where a unanimous appellate committee joined in the leading speech of Lord Carswell and corrected this fundamental error.

In relation to the re-litigation/collateral challenge argument the House of Lords was correct in seeing that civil and criminal cases presented different issues. In a criminal case there is no public interest in seeing someone wrongly convicted through advocates' negligence. Save for exceptional cases, such as losing a right to appeal because of lawyers' negligence, the better way of dealing with advocates' negligence in criminal cases is to make

¹⁰¹ See M. Seneviratne, "The rise and fall of advocates' immunity" (2001) 21 L.S. 644, at 662, where it was reported that little over a year after the House of Lords' decision there had only been two cases where barristers had been found liable in negligence and liability premiums charged by the Bar Mutual Management Company had not been increased.

¹⁰² [2005] U.K.H.L. 7.

it a ground for appeal against conviction and/or sentence. All that remains after that is to decide whether someone acquitted on appeal should be allowed to sue their advocate for loss not made good by the appeal. Notwithstanding Lord Millett's concern that retention of immunity in criminal cases would be difficult to explain to the general public,¹⁰³ it is submitted that Lord Hope's concerns about the effect of a negligence action upon the assistance defence counsel gives to the appellate court should carry the greatest weight here. The first priority here must be to rectify the miscarriage of justice and if this is obstructed because of defence counsel's concerns that co-operation with the appeal will provide a basis for suing him then miscarriages may not be rectified as they should.

In civil cases it seems that their Lordships got their priorities correct. There is no public interest in upsetting the verdict of the civil court by allowing an appeal based on advocates' negligence. Neither is there any reason why the winning party should be deprived of success fairly won because an opponent's advocate has represented his or her client inadequately. The opponent's advocate should be accountable to his or her client for losses negligently caused, and this will only rarely have any impact upon the decision of the civil court.

The Antipodes: A Twist in the Tail

Rumours of the demise of the advocate's immunity may be exaggerated, at least so far as jurisdictions in the southern hemisphere are concerned. It has already been seen that the High Court of Australia upheld advocates' immunity in *Giannarelli v Wraith*.¹⁰⁴ That decision was clearly enough on the common law of Australia but was sufficiently influenced by the Legal Profession Practice Act 1958 (Vict.) that a reconsideration of the issue would have been easier than the task facing the House of Lords in *Hall v Simons*. In between the Court of Appeal and House of Lords' decisions in *Hall v Simons* the High Court was able to avoid the issue in *Boland v Yates Property Corporation Pty Ltd*,¹⁰⁵ although Kirby J delivered an opinion sceptical about drawing the "jagged edge" between court and non-court work and confining *Giannarelli v Wraith* to criminal cases.

When *D'Orta Elkenaike v Victoria Legal Aid*¹⁰⁶ another Victorian case, came before the High Court five years after *Hall v Simons*, the issue seemed ripe for reconsideration. The very strong reaffirmation of *Giannarelli* given by a majority of the High Court¹⁰⁷ is surprising and the reasons seem tired and unconvincing. Essentially the High Court took the opposite view to the House of Lords on the main policy questions without basing this on any arguments insufficiently answered by the House of Lords. Two arguments are worthy of specific comment. First, it was said in some of the opinions that the House of Lords' decision was influenced by the imminent coming

¹⁰³ Lord Millett's other argument about the difficulty of distinguishing between civil and criminal cases is a point not likely to be troublesome very often.

¹⁰⁴ (1988) 165 C.L.R. 543.

¹⁰⁵ (2000) 74 A.L.J.R. 209.

¹⁰⁶ (2005) H.C.A. 12.

¹⁰⁷ Only Kirby J dissented and he repudiated the preparedness he had shown in *Boland* to confine advocates' immunity to criminal cases.

into force of the Human Rights Act 1998. With respect, this is simply not so, and the absence of any discussion of this issue in the commentary above is an accurate reflection of the importance their Lordships attached to it. Secondly, it was said that the organisation of the legal profession in Australia was different so a different rule on negligence liability was appropriate. One should always exercise restraint when commenting upon developments in a jurisdiction with which one is unfamiliar. But the principal difference between the legal professions in Australia on the one hand and the United Kingdom and Ireland on the other seems to be that in the former practitioners are often barristers *and* solicitors whereas in the latter they are either one or the other. As the “jagged edge” between court work and non-court work must be more difficult to delineate in a profession that is not so clearly split this looks more like an argument *in favour* of adopting *Hall v Simons* than against it. One cannot help thinking that it was just too soon after *Giannarelli* for the High Court to change and that Australia may just have wanted to go its own way in any event.

The situation in New Zealand is uncertain at present. Two days before *D’Orta Elkenaike* was decided the New Zealand Court of Appeal handed down judgment in *Lai v Chamberlains*.¹⁰⁸ By a four to one majority (Anderson P dissenting) the Court of Appeal decided to abolish advocates’ immunity in civil cases. Criminal cases were left undecided as that issue was not before the court and family cases were also left in an uncertain position. In addition to viewing the policy issues differently from the House of Lords in *Hall v Simons* the dissenting judgment of the President of the Court stressed the absence in New Zealand of the same sort of case management processes as existed in England for weeding out vexatious claims and the apparently easier task a litigant would have in New Zealand in obtaining legal aid. It is, with respect, doubtful whether these issues were regarded as particularly weighty by the House of Lords. The President also argued that the matter was governed by section 61 of the Law Practitioners Act 1982 in any event. That provision states that “barristers of the Court shall have the powers, privileges, duties, and responsibilities that barristers have in England.” Anderson P held that this provision had no ambulatory effect and conferred on advocates the same *privilege* against negligence suits that advocates had in England under *Saif Ali v Sydney Mitchell & Co*. More plausible, it is submitted, is the argument of the majority of the court delivered by Hammond J, that whether section 61 is ambulatory or not, advocates had an *immunity* and not a *privilege*. An appeal to the Supreme Court was heard in mid-October 2005 but judgment is not expected until late April 2006 or even later. It is very difficult to predict which way the appeal will go. The issue is less one of principle than one which is a mixture of values and empirical questions not easy to assess in civil proceedings. The author takes the position that *Hall v Simons* had the better of the arguments but it should also be accepted that New Zealand may prefer to go the same way as Australia on this question.

¹⁰⁸ [2005] NZCA 37.

Conclusion

Little point is served in producing a conclusion that is a summary of all that has been said already. The author believes that advocates' immunity cannot be justified for civil cases but that there may be good reason for preserving it in criminal cases. The law in England and Wales has now largely been brought into line with other parts of the common law world with the exception of the antipodes. To that extent one can comfortably speak of the demise of the advocate's immunity. If the New Zealand Supreme Court allows the appeal in *Lai v Chamberlains* it may be necessary to retitile this essay "The Fall and Rise of the Advocate's Immunity".