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TITLE: [*1] Articles: The immunity of the advocate n1

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n1 Text of a paper presented at the 13th Commonwealth Law Conference, Melbourne, 16 April 2003.

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AUTHOR: The Hon Justice Stephen Charles n2

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n2 Judge of the Court of Appeal of Victoria.

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ABSTRACT: The purpose of this article is to re-examine the arguments for and against the advocate's immunity from liability for negligence in court, in the light of recent decisions, particularly that of the House of Lords in ***Arthur J S Hall & Co v Simons***, n3 *and to consider the arguments that exist for retaining any such immunity, particularly for Australia.*

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n3 [2002] 1 AC 615; [2000] 3 All ER 673.

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TEXT: A brief history of the immunity

The immunity of the advocate [*2] is of long-standing, not simply existing out of the barrister's inability to sue for fees. The public policy aspects had been accepted before *Swinfen v Lord Chelmsford* n4 in 1860. But the first comprehensive statement of the reasons for the rule appeared in *Rondel v Worsley*. n5 The plaintiff, Rondel, had been convicted of causing grievous bodily

harm and sentenced to 18 months' imprisonment. During his trial he was given a 'dock brief' and chose the defendant to act as his barrister. His complaint was that the respondent had failed to elicit certain evidence from witnesses at the trial, failed to cross-examine prosecution witnesses in such a way as to show that the wounds caused to the victim could not have been inflicted by a knife, and failed in examining or re-examining a defence witness to bring out evidence of the existence of associates of the victim at the scene of the accident. The House of Lords held that a barrister was immune from an action for negligence at the suit of a client in respect of his conduct and management of a cause in court and the preliminary work connected therewith, on grounds of public policy. The following policy factors contributed to the decision: [*3]

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n4 (1860) 5 H & N 890; 157 ER 1436.

n5 [1969] 1 AC 191; [1967] 3 All ER 993.

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(i) The administration of justice requires that advocates should be able to carry out their duty to the court fearlessly and independently of the demands of the client;

(ii) The undesirability of re-litigating the earlier case in the context of a collateral attack being made upon it, leading also to the prolonging of litigation;

(iii) All those directly involved in the hearing should be able to speak freely in court without the fear of being sued for their actions or comments;

(iv) Barristers are obliged to accept any client, however difficult, who seeks their services.

Rondel v Worsley actually commenced the process of diluting the advocate's immunity from suit, because the immunity was limited to the advocate's conduct and management of a cause in court and the preliminary work connected therewith such as the drawing of pleadings. The extension of this immunity outside a court and to preliminary work connected therewith was considered [*4] in the Court of Appeal in New Zealand in *Rees v Sinclair*. n6 Giving more precision to the expression 'conduct and management', McCarthy P said of this phrase:

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n6 [1974] 1 NZLR 180.

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I cannot narrow the protection to what is done in court; it must be wider than that and includes some pre-trial work. Each piece of before-trial work should, however, be tested against the one rule; that the protection exists only where the particular work is so intimately connected with the conduct of the cause in court that it can be fairly said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing. The protection

should not be given any wider application than is absolutely necessary in the interests of the administration of justice, and that is why I would not be prepared to include anything which does not come within the test I have stated. n7

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n7 Ibid, at 187.

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This issue was further considered by the House of Lords in *Saif Ali v Sydney Mitchell & Co*. n8 The plaintiff had been injured in a motor car accident between a van in which he was travelling as a passenger and a car driven by a woman, but owned by her husband. A barrister settled proceedings claiming damages against the husband, but not the woman driver. Before a relevant limitation period expired the barrister was consulted about allegations of contributory negligence by the driver of the van and that the wife was not driving as agent for her husband, but did not advise any change in the writ or the statement of claim. The original proceedings were discontinued at a time when any possible claim by the plaintiff against the wife or the van driver were timebarred.

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n8 [1980] AC 198; [1978] 3 All ER 1033.

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A third party claim was issued against the barrister claiming that he had been negligent in failing to give advice to take proceedings against either or both of the drivers concerned. The House of Lords held that [*6] the barrister's immunity was not confined to what was done in court but included some pre-trial work, but that the protection should not be given any wider application than was absolutely necessary in the interests of the administration of justice; and that each piece of pre-trial work had to be tested against the one rule, whether the particular work was so intimately connected with the conduct of the cause in court that it could fairly be said to be a preliminary decision affecting the way that cause was to be conducted when it came to a hearing. Lord Diplock said of the competing duties owed by an advocate to the client and the court that this argument:

loses much of its cogency when the scene of the exercise of the barrister's judgment as to where the balance lies between these duties is shifted from the hurly-burly of the trial to the relative tranquillity of the barrister's chambers. n9

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n9 Ibid, at AC 220.

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The 'cab-rank' principle was also put to one side, his Lordship taking the view that in reality, at [*7] least in civil litigation, it was doubtful whether it

resulted often in counsel having to accept work which he would not otherwise be willing to undertake. As to the other two grounds, however, Lord Diplock's words should be quoted at some length:

The first is that the barrister's immunity from liability for what he says and does in court is part of the general immunity from civil liability which attaches to all persons in respect of their participation in proceedings before a court of justice; judges, court officials, witnesses, parties, counsel and solicitors alike. The immunity is based on public policy, designed, as was said by Lord Morris of Borth-y-Gest [[1969] 1 AC at 251], to ensure that trials are conducted without avoidable stress and tensions of alarm and fear in those who have a part to play in them. As was pointed out by Starke J in *Cabassi v Vila* (1940) 64 CLR 130, 141, a case in the High Court of Australia, 'The law protects witnesses and others, not for their benefit, but for a higher interest, namely, the advancement of public justice.' The courts have been vigilant to prevent this immunity from indirect as well as direct attack -- for instance by suing witnesses [*8] for damages for giving perjured evidence or for conspiracy to give false evidence; *Marrinan v Vibart* [1963] 1 QB 528. In *Watson v M'Ewan* [1905] AC 480, this House held that in the case of witnesses the protection extended not only to the evidence that they give in court but to statements made by the witness to the client and to the solicitor in preparing the witness's proof for the trial; since, unless these statements were protected, the protection to which the witness would be entitled at the trial could be circumvented.

The second reason is also based upon the need to maintain the integrity of public justice. An action for negligence against a barrister for the way in which he has conducted a case in court is founded upon the supposition that his lack of skill or care has resulted in the court having reached a decision that was not merely adverse to his client as to liability or quantum of damages but was wrong in being adverse and in consequence was unjust, for otherwise no damage could be shown to have resulted from the barrister's act or omission of which complaint is made. The client cannot be heard to complain that the barrister's lack of skill or care prevented him [*9] from obtaining a wrong decision in his favour from a court of justice. So he must prove that if the action had been conducted competently by his counsel he would have succeeded instead of failed.

Under the English system of administration of justice, the appropriate method of correcting a wrong decision of a court of justice reached after a contested hearing is by appeal against the judgment to a superior court. This is not based solely on technical doctrines of res judicata but upon principles of public policy, which also discourage collateral attack on the correctness of a subsisting judgment of a court of trial upon a contested issue by a re-trial of the same issue, either directly or indirectly in a court of co-ordinate jurisdiction. Yet a re-trial of any issue decided against a barrister's client in favour of an adverse party in the action in respect of which allegations of negligent conduct by the barrister are made would be an indirect consequence of entertaining such an action.

The re-trial of the issue in the previous action, if it depended on oral evidence, would have to be undertaken de novo. This would involve calling anew after a lapse of time witnesses who had been [*10] called at the previous trial and eliciting their evidence before a different judge by questions in

examination and cross-examination that were not the same as those that had been put to them at the previous trial. The circumstances in which the barrister had made decisions as to the way in which he would conduct the previous trial, and the material on which those decisions were based, could not be reproduced in the re-trial; and the initial question in the action for negligence: whether it has been established that the decision adverse to the client reached by the court in the previous trial was wrong, would become hopelessly entangled with the second question: whether it has been established that notwithstanding the differences in the circumstances in which the previous trial was conducted, it was the negligent act or omission of the barrister in the conduct of his client's case that caused the wrong decision by the court and not any other of those differences. n10

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n10 Ibid, at AC 222-3.

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The principal statement [*11] of the rule in Australia is to be found in ***Giannarelli v Wraith***. n11 Three members of the **Giannarelli** family were convicted of perjury under s 314 of the Crimes Act 1958 (Vic) as a result of evidence which they gave to a Royal Commission into the Federated Ship Painters' and Dockers' Union. Appeals by two of the brothers were dismissed in the Court of Criminal Appeal, but allowed by the High Court and their convictions quashed on the ground that s 6DD of the Royal Commissions Act (1902) (Cth) had rendered the evidence given by them inadmissible on the perjury charges. Proceedings were then instituted in the Supreme Court of Victoria claiming damages for negligence against certain of the barristers who had represented the Giannarellis at various stages of their criminal proceedings. The negligence alleged was the defendants' supposed failure to advise that s 6DD would render the evidence given in the Royal Commission inadmissible and thus defeat the Crown case, and their failure to object on that ground to the tender of that evidence. I should say that the section had indeed been considered by the barristers involved, some of whom had given written advice that the section could [*12] not be relied upon, in light of existing High Court authority. The High Court, by majority, applied *Rondel v Worsley* and *Saif Ali* and held that at common law a barrister cannot be sued by his client for negligence in the conduct of a case in court or in work out of court which leads to a decision affecting the conduct of the case in court.

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n11 (1988) 165 CLR 543; 81 ALR 417.

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Only one judge, Brennan J, regarded the 'cab-rank' rule as relevant to the need to continue the immunity. Although his Honour emphasised the importance of the rule and the necessity of preserving it, he did so by way of obiter. The other judges did not accord the rule significant weight.

Four of the seven judges concluded that there was a strong element of public interest in supporting counsel's overriding duty to the court, the performance

of which would sometimes require counsel to act contrary to the client's specific instructions or views as to the conduct of the case. The course of litigation must depend to a considerable extent on [*13] the exercise by counsel of an independent discretion in the management of the case, for example as to which witnesses should be called, the questions put in cross-examination, the topics to be covered and the points of law to be raised. Several of the judges considered that abrogation of the immunity would put at risk the assistance the court received from counsel and that if counsel were to be exposed to liability for negligence for what was done in court, there was a serious risk that this would influence the exercise of counsel's judgment as to the conduct of the case. Mason CJ, Wilson and Dawson JJ all considered that the immunity was justified by the rule granting absolute privilege to all those who take a direct part in court proceedings. In *Munster v Lamb*, n12 it had been recognised that it is in the public interest that those who take part in court proceedings should be able to speak freely in court without being liable in damages for what they say. In this case, where the defendant's solicitor was sued for defamation in respect of words uttered by the plaintiff in earlier proceedings in which the defendant had appeared as his advocate, the Court of Appeal held the action [*14] would not lie because of the absolute privilege accorded to judges, witnesses and counsel for words uttered in the course of judicial proceedings.

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n12 (1883) 11 QBD 588.

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In *Giannarelli*, a principal concern was that the abrogation of the immunity would lead to relitigation of the principal proceedings. Three members of the court considered that an attack on the initial decision would open it to challenge, thus undermining the status of the original decision and thereby putting at risk public confidence in the decisions of courts, working also against the need for finality in litigation.

Giannarelli was followed in *Keefe v Marks*. n13 In this case a statement of claim, which pleaded that where a barrister was briefed 'to advise and appear' in a common law negligence action for damages for personal injuries, and where the barrister failed either to amend, plead or claim interest, and where no order for interest was made as a result of which the plaintiff suffered damages which gave rise to a liability in the [*15] solicitor for which the barrister was liable either for contribution or indemnity, was held not to disclose a reasonable cause of action in negligence against the barrister and was properly struck out. The case is of interest because the principal judgment in the majority was given by Gleeson CJ, before he became Chief Justice of Australia, his Honour holding n14 that the particular 'pre-trial work' of which complaint was there made was 'so intimately connected with the conduct of the cause in court that it can fairly be said to be a preliminary decision affecting the way that cause (was) to be conducted when it (came) to a hearing'.

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n13 (1989) 16 NSWLR 713.

n14 Ibid, at 719-20.

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Arthur J S Hall & Co v Simons

In *Hall v Simons*, seven members of the House of Lords heard three separate appeals, each of which involved claims for negligence made against solicitors advising in or negotiating settlements of proceedings. In the first case the solicitors brought proceedings as plaintiffs seeking recovery of their [*16] fees in protracted litigation, and the defendant counterclaimed alleging negligence on the part of the solicitors in failing to advise properly as to the liability of other parties and as to timeous settlement. The second case involved matrimonial ancillary relief proceedings in which the plaintiff husband settled, on the basis of the wife's valuation of the former matrimonial home, so that she was to receive a guaranteed sum from the proceeds of its sale. When the property was sold at a reduced figure the plaintiff applied successfully to have the previous consent order set aside and the sum payable to the wife varied. He then claimed damages for negligence from his solicitors, claiming that they had failed to provide proper advice on valuation and division of the proceeds of sale. The third case also involved matrimonial ancillary relief proceedings. The plaintiff wife had been advised to settle at a lower level of periodical payment on the incorrect basis that her husband's relationship with a cohabitee had ceased. She later discovered that her former husband had married the cohabitee and sought to appeal against the previous consent order, also commencing proceedings for negligence [*17] against the solicitor/defendants, alleging that they had failed to instruct competent counsel and to investigate properly the situation relating to the cohabitee.

In each case the judge at first instance concluded that the solicitors enjoyed an advocate's immunity from suit and struck out the client's claims against them as an abuse of process. The Court of Appeal heard the cases together but ruled that in none of the cases were the solicitors immune from suit and restored the client's claims.

All seven law lords held that the public interest in the administration of justice no longer required that advocates enjoy immunity from suit for alleged negligence in the conduct of civil proceedings. Over the dissent of two of their Lordships, it was held that since a collateral challenge in civil proceedings to a criminal conviction was prima facie an abuse of process and ordinarily would be struck out, the immunity from suit was not required to prevent collateral attacks on criminal decisions. Four of the law lords held that none of the other factors said to justify the immunity had sufficient weight to warrant its retention in relation to criminal proceedings and that once a conviction [*18] had been set aside there could be no public policy objections to an action in negligence by a client against his legal representatives at a criminal trial. Accordingly, the public interest no longer required that advocates enjoy immunity from suit for negligence in the conduct of criminal actions. The House of Lords dismissed the appeals holding that the client's claims did not invoke the advocate's immunity from suit and involved nothing which would be unfair to the solicitors or liable to bring the administration of justice into disrepute. In the majority, the two principal judgments are those of Lord Steyn and Lord Hoffmann.

At first glance the decision, on an issue of such importance, might be thought surprising in that each of the three cases arose in a fact situation which could be regarded as unsuitable for determination of the issue. Each case involved a solicitor giving advice on settlement. The Court of Appeal had decided that in none of the cases was the advocate's immunity involved. All members of the House of Lords were in complete agreement with that conclusion.

The abolition of the advocate's traditional immunity was, in that sense, unnecessary to the decision. Furthermore, [*19] the decision to overturn the advocate's immunity was made by the House of Lords in circumstances where there had been previous consideration by the English Parliament of a proposal to remove the advocate's immunity from suit for negligence and parliament had determined not to act at the time. n15 It might well be argued on several grounds that if a long-entrenched immunity from suit is to be removed, it is preferable that parliament, rather than the courts, should take this course. A decision of the House of Lords as to the existence of any such immunity must be retrospective in effect, since ordinarily the courts declare what the law is (and always has been) rather than announcing a change for the future. n16 Accordingly, the decision in *Hall v Simons* renders advocates liable to claims for negligence in relation to past actions as a result of which such advocates have been made potentially liable to very substantial damages, for which they may be either not insured at all or inadequately insured; alternatively, if such advocates are insured, their insurers may be required to indemnify in circumstances for which premiums wholly inadequate to the newly-discovered risk have been [*20] received.

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n15 [2002] 1 AC 615 at 704; [2000] 3 All ER 673.

n16 Cf, however, *Royal Bank of Scotland plc v Etridge (No 2)* [2001] 4 All ER 449.

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Subsequent consideration of *Hall v Simons*

Sun Poi Lai v Chamberlain and *Hilda Lorraine Lai v Chamberlain* n17 were appeals heard by two judges of the High Court of New Zealand involving claims against a solicitor advocate in circumstances where the trial of the proceedings had commenced and continued for some days. At the conclusion of the third day of hearing, an issue arose as to whether it was appropriate for the Lais to consent to a judgment being entered against them personally in the event that the court entered judgment against their company. A solicitor employed by the defendant firm gave advice to Mr and Mrs Lai and to their company in respect of this issue. The proceedings were adjourned and in a memorandum the solicitor advised the court that Mr and Mrs Lai would personally guarantee the payment by the company of the amount of any judgment resulting [*21] in the proceedings. Judgment was accordingly entered against all defendants in a very substantial sum inclusive of cost and interest. Following entry of the judgment the plaintiffs in the proceedings executed it against various properties owned by the company and by the Lais personally. In later proceedings Mr and Mrs Lai alleged negligence in the advice given to them in relation to the giving of the guarantee of any judgment against the company. The defendant firm relied on the

defence of the advocate's immunity. Very detailed consideration was given to the opinions of the law lords in *Hall v Simons*. Salmon J considered that there remained two good reasons for retaining the advocate's immunity, the first being maintaining that degree of independence necessary in order to fulfil the joint duties to the client and to the court, the second relating to the cab-rank principle. As to the first of these Salmon J said:

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n17 Unreported, High Court of New Zealand, Salmon and Laurenson JJ, 19 December 2002.

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So far as an [*22] advocate's duty to the court is concerned, there is no doubt that in our adversarial system the proper fulfilment of that duty is of crucial importance to the administration of justice. It can be said that an advocate should not need the reward of immunity in order to comply with his ethical obligations. However, in the often highly-charged situation of a trial it is in the public interest to remove even a sub-conscious concern that the performance of a duty to the court might lead to an action for negligence.

Comparisons have been made with other professionals, but there is in my view no other professional who, in his or her daily work, faces that divided loyalty. All professionals must abide with a code of ethics. Advocates must do that and fulfil their duty to the court. Essentially the factors which persuaded our Court of Appeal in *Rees v Sinclair* and the Australian High Court in *Giannarelli* are in my view still valid in this respect.

Salmon J also took the view n18 that the obligation of an advocate to accept any brief in the area in which he professes to practice which is offered to him at a proper professional fee commensurate with the length and difficulty of the [*23] case was still of importance to the administration of justice, particularly in the area of criminal litigation. Salmon J would therefore have maintained the immunity, departing only in one respect n19 from the previous decision of the New Zealand Court of Appeal in *Rees v Sinclair*, by limiting the extension of immunity to cover work 'intimately connected' with the conduct of the cause. In his Honour's view the justification for the immunity arose solely out of the pressures of the trial process during a court hearing and took the view that in the case of decisions made outside the courtroom the balance should come down in favour of the right to a remedy for negligence. Laurenson J on the other hand saw a clear distinction between civil, on the one hand, and criminal and family litigation, on the other. As to civil litigation, his Honour considered n20 that the public policy concerns which had applied in 1974 are significantly different today. In his view, it would no longer be unfair to counsel to remove the immunity in civil litigation. However, Laurenson J maintained a very different view in relation to criminal and family litigation, considering that there was 'an overwhelming [*24] case to justify the retention of the immunity in these fields which can still be based on grounds of public policy'. n21 Particular reliance was placed on the dissenting speeches of Lords Hope, Hutton and Hobhouse in *Hall v Simons*, having regard to what was said to be 'their obvious appreciation of the practicalities encountered in this field'.

n22 Laurenson J considered that if criminal counsel were subject to the prospect of later suit by their former client 'it will inevitably have the effect of impairing and/or inhibiting their handling of cases in which they are engaged'. Laurenson J held n23 that the retention of the immunity was necessary to preserve and encourage a strong criminal bar, making reference to the cab-rank rule and considering that the ever-present threat of a claim, whether or not vexatious, being brought against an advocate would have the potential to impair and inhibit counsels' performance of their duties. His Honour was inclined to the view that the immunity should apply only to criminal and family law litigation and to limit the immunity to work done in the courtroom, including that done in the course of pre-trial hearings. Laurenson J held that, in relation [*25] to criminal and family law litigation:

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n18 Ibid, at [56].

n19 Ibid, at [60].

n20 Ibid, at [45].

n21 Ibid, at [46].

n22 Ibid, at [47].

n23 Ibid, at [49].

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In both these fields the retention of the immunity is justified on the basis of the public interests which require the observance of counsel's duty to the court and the maintenance of a strong and independent bar. Viewed on a proportionality basis the public is, in the end, better served by preserving the immunity for these reasons, than it is by abolishing same in order to conform with the principle that a remedy should be provided for a wrong. n24

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n24 Ibid, at [74].

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Hall v Simons was also not followed in Scotland in *Wright v Paton Farrell*, n25 in which the court held that the earlier case was concerned only with English civil law and procedure and was not binding in Scotland.

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n25 Court of Session, 27 August 2002.

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I now turn to a consideration of each of the four reasons generally put for maintaining the advocate's immunity.

The cab-rank rule

The cab-rank rule obliges barristers to accept any client, however difficult, who seeks their services in courts in which they hold themselves out as practising, when properly instructed. The highest this rule has ever been put was Erskine's famous statement when defending his acceptance of the brief to act for Tom Paine. In *Giannarelli*, Brennan J supported the rule in the following terms:

Whatever the origin of the rule, its observance is essential to the availability of justice according to law. It is difficult enough to ensure that justice according to law is generally available; it is unacceptable that the privileges of legal representation should be available only according to the predilections of counsel or only on the payment of extravagant fees. If access to legal representation before the courts were dependent on counsel's predilections as to the acceptability of the cause or the munificence of the client, it would be difficult to bring unpopular causes to court and the profession would become the puppet of the powerful. If the cab rank rule [*27] be in decline -- and I do not know that it is -- it would be the duty of the leaders of the Bar and of the professional associations to ensure its restoration in full vigour. n26

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n26 (1988) 165 CLR 543 at 580; 81 ALR 417.

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The rule which, of course, binds barristers but not solicitors, serves at least three purposes. First, it should work towards making justice more generally available, especially to litigants with difficult or unpopular causes; secondly, the rule provides any barrister who accepts an unpopular brief with an unanswerable explanation for having done so -- as was the case with Erskine himself; thirdly, the rule should advance the administration of justice by reducing the number of unrepresented litigants in court.

In *Hall v Simons*, Lord Steyn said n27 that the impact of the rule on the administration of justice in England is not great, and that it was not likely that the rule often obliged barristers to undertake work which they would not otherwise accept. Lord Hoffmann considered the argument that [*28] a barrister, obliged to accept any client, would be unfairly exposed to vexatious actions by clients whom any sensible lawyer with freedom of action would have refused to act for, and on this basis dismissed the argument as without any real substance. His Lordship doubted n28 whether fear of a vexatious action is a prominent consideration upon which a barrister would prefer not to act for a client. Jonathan Hill n29 and Professor Peter Cane n30 have similarly argued that hospital doctors are unable to select their patients but are nevertheless liable for negligence, as well as asserting that barristers can raise their fees to drive away an unwanted client.

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n27 [2002] 1 AC 615 at 678; [2000] 3 All ER 673.

n28 Ibid, at AC 696.

n29 'Litigation and Negligence; a Comparative Study' (1986) 6 *Oxford Jnl of Legal Studies* 183 at 184.

n30 *Case, Tort Law and Economic Interest*, 2nd ed, Clarendon Press, Oxford, 1996, p 236.

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Many Australian barristers would, I think, regard these arguments as greatly undervaluing and, [*29] indeed, misrepresenting the cab-rank rule as it applies in this country. The Bars here certainly regard the rule as still in force and to be applied. Most Australian barristers would, I think, be offended at the suggestion that the cab-rank rule could be evaded by raising their fees, or using their clerks to ward off an unpopular brief which the barrister was otherwise obliged to accept. On the other hand, as Lord Upjohn said in *Rondel*, n31 a physician is not bound to undertake any treatment which he does not advise.

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n31 [1969] 1 AC 191 at 281; [1967] 3 All ER 993.

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Be that as it may, most of those who have expressed views appear to accept the intrinsic value of the rule. Lord Steyn described it n32 as a 'valuable professional rule', and Lord Hoffman called it n33 a 'valuable professional ethic'. In so far as the cab-rank argument bears on the question of the advocate's immunity, it is not merely that barristers may be unfairly exposed to vexatious actions. A much more serious consequence is that if barristers [*30] lose their immunity for in-court negligence, it is likely to become more difficult, if not impossible, to insist upon compliance with the rule, as I think Lord Reid n34 and Lord Pearce n35 recognised in *Rondel*. Salmon J in *Sun Poi Lai* n36 came to similar conclusions, and, I think, Laurenson J, n37 also. I question, with respect, whether those who discount the importance of the cab-rank rule have given sufficient weight to this possibility when concluding that the advocate's immunity should be abolished.

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n32 [2002] 1 AC 615 at 678; [2000] 3 All ER 673.

n33 Ibid, at AC 686.

n34 [1969] 1 AC 191 at 227; [1967] 3 All ER 993.

n35 Ibid, at AC 276.

n36 Above n 15, at [56].

n37 Ibid, at [49].

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The advocate's duty to the court, and the problem of divided loyalty

In *Rondel*, Lord Reid put counsel's duty to the court in the following terms:

Every counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's [*31] case. But, as an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is not sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce. And by so acting he may well incur the displeasure or worse of his client so that if the case is lost, his client would or might seek legal redress if that were open to him. n38

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n38 [1969] 1 AC 191 at 227-8; [1967] 3 All ER 993.

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His Lordship thought that counsel would not knowingly be influenced by the possibility of an action being raised against him to such an extent that [*32] he would knowingly depart from his duty to the court or to his profession, but said that the line between proper and improper conduct is 'by no means easy to draw in many borderline cases'. Lord Reid then said:

So I think it not at all improbable that the possibility of being sued for negligence would at least subconsciously lead some counsel to undue prolixity which would not only be harmful to the client but against the public interest in prolonging trials. Many experienced lawyers already think that the lengthening of trials is not leading to any closer approximation to ideal justice. n39

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n39 Ibid, at AC 228-9.

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Every member of the House of Lords in *Rondel* took the view that the divided loyalty argument was an important factor in public policy for upholding the advocate's immunity. In *Rees v Sinclair*, McCarthy P quoted n40 substantially from Lord Reid's judgment on the question of divided loyalty, saying that his words applied as much in New Zealand as in the United Kingdom, and Macarthur and Beattie JJ [*33] were of the same view. In *Giannarelli*, Mason CJ, Wilson and Brennan JJ n41 concluded that if counsel were to be exposed to liability for negligence for what they did in court, there was a real risk that this would influence the exercise of counsel's independent judgment as to the conduct of

the case. In *Sun Poi Lai*, Salmon and Laurenson JJ n42 also took the same view, the latter, however, limiting the application of this factor to criminal and family litigation.

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n40 [1974] 1 NZLR 180 at 182-3.

n41 (1988) 165 CLR 543 at 556, 572-3 and 579, respectively; 81 ALR 417.

n42 Above n 15, at [54] and [46]-[54] respectively.

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In *Hall v Simons*, Lord Steyn n43 dealt with the issue of divided loyalty, describing it as a critical factor and saying that 'nothing should be done which might undermine the overriding duty of an advocate to the court'. His Lordship said that other professionals, however, had similarly divided loyalties, without being accorded immunity from suits in negligence, and that advocates have no like [*34] immunity in countries in the European Union, although the advocate in a civilian system owes a less extensive duty to the court. Lord Steyn placed some reliance on the position in Canada and the United States, saying that there was no evidence that in Canada, where there is no immunity for advocates, n44 the work of Canadian courts was hampered in any way by counsel's fear of civil liability. His Lordship then said that:

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n43 [2002] 1 AC 615 at 680; [2000] 3 All ER 673.

n44 But in Canada, advocates are only liable for 'egregious negligence': *Demarco v Ungaro* (1979) 95 DLR (3rd) 385 at 405.

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There would be benefits to be gained from the ending of immunity. First, and most importantly, it will bring to an end an anomalous exception to the basic premise that there should be a remedy for a wrong. There is no reason to fear a flood of negligence suits against barristers. The mere doing of his duty to the court by the advocate to the detriment of his client could never be called negligence.

Indeed if the advocate's conduct [*35] was bona fide dictated by his perception of his duty to the court there would be no possibility of the court holding him to be negligent. Moreover, when such claims are made courts will take into account the difficult decisions faced daily by barristers working in demanding situations to tight timetables . . . it will not be easy to establish negligence against a barrister. The courts can be trusted to differentiate between errors of judgment and true negligence. In any event, a plaintiff who claims that poor advocacy resulted in an unfavourable outcome will face the very great obstacle of showing that a better standard of advocacy would have resulted in a more favourable outcome. . . . The only argument that remains is that the

fear of unfounded actions might have a negative effect on the conduct of advocates. This is a most flimsy foundation, unsupported by empirical evidence, for the immunity. n45

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n45 [2002] 1 AC 615 at 680; [2000] 3 All ER 673.

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Lord Hoffmann considered the divided loyalty argument at greater length, [*36] n46 considering both the incentives advocates have to comply with their duty and the pressures which might induce the advocate to disregard his duty to the court in favour of pleasing the client. His Lordship said:

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n46 Ibid, at AC 689-96.

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But among these pressures I would not put high on the list the prospect of an action for negligence. It cannot possibly be negligent to act in accordance with one's duty to the court and it is hard to imagine anyone who would plead such conduct as a cause of action. So when the advocate decides that he ought to tell the judge about some authority which is contrary to his case, I do not think it would for a moment occur to him that he might be sued for negligence. I think it is of some significance that the situation in which the interests of the client and the duty to justice are most likely to come into conflict is in the preparation of the list of documents for discovery. The lawyer advising on discovery is obliged to insist that he disclose relevant documents adverse to his case [*37] which are not protected by privilege. But solicitors who undertake no advocacy usually perform this task and it has never been thought to be protected by immunity. n47

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n47 Ibid, at AC 692-3.

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Lord Hoffmann placed reliance on the ability of the court to make wasted cost orders against barristers as a result of negligent conduct, as an answer to the possibility of defensive lawyering. Reliance was also placed on the situation in Canada, while acknowledging that the immunity was retained in Australia and New Zealand.

The divided loyalty argument is very much a matter of intuition -- whether one believes that an advocate's conduct is likely to be affected by the potential for litigation. The following points may be made in support of it. Although other professions also have divided loyalties, it may be questioned whether the doctor, for example, would as often or in as public a fashion be faced by the problems arising from conflicting duties as will an advocate. As Lord Hope said in *Hall v Simons*:

As for the objection [*38] that to accord advocates an immunity on this ground which is not available to other professionals, the answer to it is as true today as it always was. The exercise by other professionals of their duty to their clients or to their patients may require them to face up to difficult decisions of a moral or ethical nature. But they do not have to perform these duties in the court room, where the exercise of an independent judgment by the advocate as to what to do and what not to do is essential to the public interest in the efficient administration of justice. n48

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n48 Ibid, at AC 717.

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As to the argument that advocates could not be found negligent for merely carrying out their duty to the court, this may be easier, with respect, for a judge to assert than for an advocate to accept. The advocate in court will be faced repeatedly with decisions such as whether to call an additional witness, pursue a line of questioning, argue a point of law or mention an authority. A judge hearing a civil case is usually obliged not to indicate [*39] at an early point in a trial whether he accepts the evidence of a particular witness either generally or in a particular area. For the criminal lawyer, the jury is of course inscrutable. The advocate must make decisions about how a trial is conducted without the certainty that the evidence of a favourable witness has been accepted, or a hostile witness disbelieved. Is it then possible to assert without fear of contradiction that, for example, a decision whether or not to call a witness could never be called 'negligent'? Furthermore, if the advocate's immunity is removed, the threat in civil proceedings of a wasted costs order if a wrong decision is made really adds only a further conflicting tension to the advocate's already divided loyalty. As Laurenson J said in *Sun Poi Lai*, n49 in the context of Lord Hoffmann's view n50 that the threat of vexatious litigation was something that every other profession has to put up with and that 'a practitioner who is properly insured can usually expect such claims to be handled by solicitors instructed by the underwriters', 'Small comfort, I suggest, to the payer of a policy excess and a professional reputation to maintain'.

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n49 Above n 15, at [53].

n50 [2002] 1 AC 615 at 691; [2000] 3 All ER 673.

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The general immunity from civil liability which attaches to all participants in proceedings before courts of justice

It would obviously be quite wrong to suggest that advocates alone have an immunity from suit for negligence. For like reasons immunity from suit protects parliamentarians for what is said or done in parliament. All participants in the court process including judges, witnesses, jurors, court officials and opposing counsel have shared in that immunity from liability for what is done in court.

In *Munster v Lamb*, n51 a solicitor was sued for defamatory words which he had spoken while defending an accused person. The Court of Appeal held that absolute privilege existed for words spoken in court, whether spoken maliciously, without any justification or excuse, or from indirect motive of personal ill-will or anger, and whether or not irrelevant. Fry LJ, dealing with the analogous cases of judges and witnesses said:

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n51 (1883) 11 QBD 588.

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The rule of law exists, not because the conduct of those persons ought [*41] not of itself to be actionable, but because if their conduct was actionable, actions would be brought against judges and witnesses in cases in which they had not spoken with malice, in which they had not spoken with falsehood. It is not a desire to prevent actions from being brought in cases where they ought to be maintained that has led to the adoption of the present rule of law; but it is the fear that if the rule were otherwise, numerous actions would be brought against persons who were merely discharging their duty. It must always be borne in mind that it is not intended to protect malicious and untruthful persons, but that it is intended to protect persons acting bona fide, who under a different rule would be liable, not perhaps to verdicts and judgments against them, but to the vexation of defending actions. n52

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n52 Ibid, at 607.

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I have already quoted Lord Diplock's words in *Saif Ali* n53 on this issue. In *Giannarelli*, Mason CJ said of it:

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n53 [1980] AC 198 at 222; [1978] 3 All ER 1033.

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The foundation for that principle is the perception that great mischief would result if those engaged in the administration of justice were not at liberty to speak freely. The immunity is not confined to actions for defamation. As McTiernan J noted in *Cabassi v Vila* n54 with reference to the rule in its application to witnesses:

'It is a rule of law that no civil action lies at the suit of any person for any statement made by a witness in the course of giving evidence in a judicial proceeding. The rule, which is founded on public policy, is not confined to actions for defamation but applies to any form of action.'

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n54 (1940) 64 CLR 130 at 141; [1941] ALR 33.

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The considerations which dictate the need to protect freedom of speech in court likewise dictate the need to protect the advocate's freedom of judgment with respect to what is said and done in court. Just as the principle protects the judge and the juror in relation to what they decide, so it protects the advocate. The advocate is as essential a participant [*43] in our system of justice as are the judge, the jury and the witness and his freedom of judgment must be protected; see the discussion by Brett MR in *Munster* n55. n56

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n55 (1883) 11 QBD 588 at 603-4.

n56 (1988) 165 CLR 543 at 557-8; 81 ALR 417.

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It is interesting to note that only seven days after the decision in *Hall v Simons* was handed down, a differently constituted House of Lords gave judgment in *Darker v Chief Constable of the West Midlands Police*, n57 which reaffirmed the position that witnesses in a civil or criminal trial have complete immunity from suit, including in negligence.

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n57 [2001] 1 AC 435; [2000] 4 All ER 193.

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Lord Steyn and Lord Hoffmann were very dismissive of the argument that this general immunity supported the advocate's immunity from suit, and very critical of the reasoning involved. Lord Steyn said of this argument [*44] that:

Those immunities are founded on the public policy which seeks to encourage freedom of speech in court so that the court will have full information about the issues in the case. For these reasons they prevent legal actions based on what is said in court. As Pannick n58 has pointed out this has little, if anything, to do with the alleged legal policy which requires immunity from actions for negligent acts: ibid, at p 202. If the latter immunity has merit it must rest on other grounds. Whilst this factor seemed at first to have some attractiveness, it has on analysis no or virtually no weight at all. n59

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n58 D Pannick, *Advocates*, Oxford University Press, 1992, p 202.

n59 [2002] 1 AC 615 at 679; [2000] 3 All ER 673.

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Lord Hoffmann said of the argument that:

A witness owes no duty of care to anyone in respect of the evidence he gives to the court. His only duty is to tell the truth. There seems to me no analogy with the position of a lawyer who owes a duty of care to his client.

Nor is there in my opinion [*45] any analogy with the position of the judge. The judge owes no duty of care to either of the parties. He has only a public duty to administer justice in accordance with his oath. 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. n60

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n60 Ibid, at AC 698.

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The protection of each of these parties, judge, jury, witness and opposing counsel, extends beyond defamation, to negligent actions and comments. The judge is protected from civil actions for negligence, malice, bias, or corruption in judicial conduct. The general immunity protects jurors from any like suit. It protects the expert witness from actions for negligence in respect of evidence given in court and the witness statement prepared out of court, and opposing counsel from like actions alleging negligence or worse. As Lord Hobhouse of Woodborough said:

If the advocate is to be treated differently, he alone of these participants [*46] in the trial will be being held civilly liable for what he does and does not say in court. This anomaly will require justification. The anomaly is not without further significance in that, if the advocate is to be held civilly liable for some adverse outcome of the trial, he would have to bear the whole loss even though other participants may have been equally, or more seriously, at fault. From the point of view of the aggrieved party, if some fault can be found with the performance of the advocate, he recovers in full from the lawyer; but, if only other participants were at fault, he recovers nothing at all. It is necessary to be very cautious before correcting one perceived anomaly by creating another. n61

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n61 Ibid, at AC 741.

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Much the same point was made by Lord Pearce in *Rondel*. n62 The passage bears both on the argument now being considered and the question of collateral attack to which I shall turn in a moment. Lord Pearce said:

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n62 [1969] 1 AC 191 at 270-1; [1967] 3 All ER 993.

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The five essential ingredients of the judicial process at the trial are the parties, the witness, the judge, the juror and the advocate. If all those are functioning at their best, only very hard coincidences of fate can cause a miscarriage of justice. If one of them is not at his best the functioning of the others tends to correct the balance. I do not believe that justice miscarries as often as some would have one believe. But of course the loser naturally has a tendency to believe and an interest in maintaining that there has been an injustice. And when justice does miscarry I think it is more often because two or three of the components were not functioning at their best, rather than because of the specific negligence of one of them.

All those essential ingredients are, under the law as it now stands, wholly protected in what they say and do (save that counsel is answerable to professional discipline for misbehaviour). Should he alone of the five be liable to his client in damages? He, like the judge and jury, has a plain duty of care and a duty to justice. He also has a duty to the judge and jury not to mislead them. But whereas the judge and jury owe this duty of care equally [*48] to both sides, he owes it primarily to one side (subject to his overriding duty to the court and justice). And whereas the judge and jury are paid by the public of whom both parties are members, the advocate is paid by one side only in many cases (though in very many he is paid by legal aid from the public purse). Should these two facts make the difference, and exclude him from the immunity which has from of old been given to him as well as to the other components of the judicial process? The answer to this depends on whether one holds that the judicial process is of paramount public importance and whether one believes that it would be harmed by excluding the independence and immunity of counsel. n63

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n63 [1980] AC 198 at 222; [1978] 3 All ER 1033.

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Why then, if the advocate is to be made liable for negligence in court, is not the paid expert witness whose negligent evidence causes a miscarriage of justice and the wrongful imprisonment of an innocent accused not liable? Or the over enthusiastic prosecutor who withholds [*49] exculpatory evidence which should have been made available to the defence? Or the incompetent or biased judge whose conduct of the trial determined the result? If the guiding principle is that no wrong should be left without a remedy, why is it only the advocate among the participants in court proceedings who is to become liable?

Collateral attack and the problem of relitigation

Lord Diplock's words in *Saif Ali* n64 have already been quoted. In *Giannarelli*, Mason CJ said:

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n64 [1980] AC 198; [1978] 3 All ER 1033.

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Exposure of counsel to liability for such negligence would unquestionably

encourage litigation by unsuccessful litigants anxious to demonstrate that, but for the negligence of counsel, they would have obtained a more favourable outcome in the initial litigation. That would be the central issue for decision in secondary litigation of this kind. If the plaintiff were to succeed, the resolution of this issue by a different court and on materials which might well differ from those presented in the initial [*50] litigation, due to lapse of time or other reasons, would undermine the status of the initial decision. Yet an appeal against that decision might not succeed with the result that it would stand, though its status would be tarnished by the outcome of the collateral proceedings. The impact of a successful challenge to a criminal conviction resulting in a sentence of imprisonment would be all the greater. It would be destructive of public confidence in the administration of justice.

And for this very reason there would be a strong incentive on the part of a disappointed litigant to sue counsel for negligence as an indirect means of calling in question the decision in the initial litigation. n65

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n65 (1988) 165 CLR 543 at 558; 81 ALR 417.

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In *Hall v Simons*, the law lords in the majority took the view that the decision in *Hunter v Chief Constable of the West Midlands Police* n66 was an answer to these arguments in so far as criminal cases were concerned, since public policy requires an accused who seeks to challenge [*51] his conviction to do so directly by seeking to appeal the conviction, and that prima facie it would be an abuse to initiate a collateral challenge to a criminal conviction. As to civil cases, Lord Steyn n67 said that the principles of res judicata, issue estoppel and abuse of process in private law should be adequate to cope with the risk. Lord Hoffmann employed similar reasoning but also said:

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n66 [1982] AC 529; [1981] 3 All ER 727.

n67 [2002] 1 AC 615 at 680; [2000] 3 All ER 673.

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The discussion in the last section shows, first, that not all relitigation of the same issue will be manifestly unfair to a party or bring the administration of justice into disrepute, and secondly, that when relitigation is for one or other of these reasons an abuse, the court has power to strike it out. This makes it very difficult to use the possibility of relitigation as a reason for giving lawyers immunity against all actions for negligence in the conduct of litigation, whether such proceedings would be an abuse of process or not. [*52] It is 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. n68

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n68 Ibid, at AC 703.

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The rule in *Hunter's* case would prevent a convicted person from suing his advocate for negligence in the absence of a successful appeal. This would be small comfort to someone who had pursued all rights of appeal, yet had suffered a miscarriage of justice. n69 But once the convicted accused has successfully appealed, the way is now open to pursue proceedings against the advocate. In any such action the plaintiff must now establish that the advocate was negligent and that that negligence was a contributing factor leading to conviction. In such an action, or in a claim of negligence arising out of civil proceedings, the plaintiff will seek to prove the loss of a chance. Causation now becomes a critical issue.

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n69 Cf Lindy Chamberlain, whose unsuccessful appeal to the High Court is reported at (1983) 153 CLR 514; 46 ALR 608. Later events showed her to be innocent of the charge of murder for which she was convicted.

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In some cases it will, no doubt, be clear that the advocate's negligence caused the plaintiff to be convicted, or to suffer an adverse result in civil proceedings. But in others it will not. In cases other than the clear-cut, the plaintiff, or the defendant advocate, one might think, should be entitled to call as witnesses the persons on whom the negligence directly impacted, members of the jury or the judge. But jurors, on public policy grounds, could not be called as witnesses, or even questioned as to their views. The view taken by the courts is that intrusion into the secrecy of the jury's deliberations would be mischievous, would inhibit the expression of their views and lead eventually to the abandonment of trial by jury. n70 So also on public policy grounds judges may not be called to give evidence of what led to their conclusions. n71

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n70 See, eg, *Boston v W S Bagshaw & Sons* [1966] 1 WLR 1135; *R. v Gallagher* [1986] VR 219 at 249.

n71 Eg, *Zanatta v McCleary* [1976] 1 NSWLR 230; *Kelley v Corston* [1998] QB 686 at 701-2; [1997] 4 All ER 466.

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The advocate may have been negligent in failing to call witnesses, may have asked too many or too few questions, may have failed to object to evidence or to argue legal points. But these failings may have made no difference whatever to the eventual result. The judge or the jury might have disbelieved the plaintiff in any event. The judge may have fixed views on the law, or be biased or incompetent in fact-finding, a much more difficult matter to correct on appeal than an error of law. If the judge cannot be called as a witness, in such a case can the defendant advocate call evidence to testify that the judge was known to be biased in a particular way? Or that the judge had discussed the case after

the trial in such a way as to indicate a bias or factual error? Surely, public policy would prevent any such evidence being given. n72 Those advising the defendant advocate may have been given information that the jury's conclusion was based on press reports and that their views were fixed before any evidence was called. Again, would not public policy prevent any such evidence being given? It follows that in some, not all, cases of alleged negligence the parties -- most likely the defendant [*55] advocate -- will be denied the most direct evidence of the alleged consequences of an advocate's negligence. This may on some occasions work serious injustice to one of the parties, usually the defendant seeking to challenge causation. In more cases, it would involve a searching re-examination of the conduct of the original trial by witnesses with failing memories attempting to reconstruct what occurred and the likely effect of such events upon the judge or jury. It is surely this to which Lord Diplock was referring in *Saif Ali* n73 as 'calculated to bring the administration of justice into disrepute'.

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n72 *Zanatta v McCleary* [1976] 1 NSWLR 230 at 234, 239-40.

n73 [1980] AC 198 at 223; [1978] 3 All ER 1033.

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Conclusion

The question whether Australia or New Zealand should now abolish or vary the advocate's immunity will not inevitably be determined by the decision in *Hall v Simons*. A number of assumptions were there made about how legal practice works in England which do not necessarily reflect conditions [*56] in Australia. Some of those factors, not least membership of the European Union, are absent here, and the judgments of the New Zealand High Court in *Sun Poi Lai* give some indication of the extent to which antipodean conditions and opinions may both differ from those upon which reliance was placed in *Hall v Simons*.

The division of opinion in the House of Lords shows in the minority judgments a strongly held view that the immunity should be retained in criminal proceedings. There is a question whether the immunity should be limited to what actually takes place in court, or at least to events occurring after a trial has commenced. The immunity would be easier to defend, and would probably attract less hostility, if it did not protect negligent acts or omissions occurring in lawyers' chambers before the trial started. There is a question, raised in New Zealand, whether the immunity should extend to family court proceedings. And if there should be no wrong without a remedy, should the immunity of the expert witness be abolished? And if any litigant who has suffered a miscarriage of justice through a judge's negligence should also be entitled to a remedy, should the state make provision [*57] for appropriate compensation, entitling that litigant to sue the state as responsible for the judge's actions?

Having regard to the difficulty of these issues and the differences of view already apparent in judicially-expressed opinions, it might be thought, at least for Australia, that any change in the established common law might best be left to the respective legislatures, rather than to a court pronouncing with retrospective effect. Legislation would not be retrospective, and could provide

for exceptions, such as maintaining the immunity in criminal proceedings, or a situation where an advocate has made a forensic decision in good faith. And, if there were any suggestion that the ethical standards of the legal profession are in decline, such as, for the Australian Bar, the cab-rank rule, it would be the duty of the leaders of the Bar and of the professional associations, as Brennan J said in *Giannarelli* n74 to ensure the restoration of professional standards in full vigour. In any reconsideration of the immunity, it should, in my view, be firmly borne in mind that the principal arguments in support of it are based not so much in a desire to protect the advocate but rather [*58] the courts, and the administration of justice as a whole.

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n74 (1988) 165 CLR 543 at 580; 81 ALR 417.

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SHOULD ADVOCATES' IMMUNITY CONTINUE?

MATTHEW GROVES* AND MARK DERHAM†

[Advocates are currently immune from actions in negligence for work that is performed in, or closely connected to, court proceedings. This immunity was recently abolished by the House of Lords. The immunity still exists in Australia, although its future is currently under consideration by the High Court. This article examines recent case law, which has confirmed the immunity in some jurisdictions and abolished it in others. The authors argue that there are sound reasons to retain the immunity. The main points made in support of this argument are: similar protection is extended to other participants in legal proceedings; abolition of the immunity could lead to conflict between an advocate's duty to the court and to the client; the immunity prevents or limits relitigation and collateral attack on court decisions; and other sanctions are available against negligent advocates. The final section considers whether a duty of care is an appropriate mechanism to regulate the behaviour of advocates.]

CONTENTS

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I INTRODUCTION

In *Arthur J S Hall & Co (a firm) v Simons*[1] the House of Lords abolished the common law doctrine under which advocates are immune from liability in negligence for work performed in court. Their Lordships unanimously abolished the immunity in civil proceedings and — by a bare majority — in criminal proceedings.[2] The decision in *Arthur Hall* was not entirely surprising. The immunity has been the subject of frequent academic criticism,[3] and no longer exists in many common law jurisdictions.[4]

The year before *Arthur Hall* was delivered the High Court of Australia briefly considered the immunity in *Boland v Yates Property Corporation Pty Ltd*.[5] While the case was decided on other grounds, the views expressed by several judges suggested that the status of the immunity may be reconsidered. *Arthur Hall* may provide an impetus for the High Court to revisit the immunity, should an appropriate case arise. An opportunity to reconsider the status of the immunity in Australia may have finally presented itself in *D'Orta-Ekenaike v Victoria Legal Aid*, the application of special leave to appeal for which is currently under consideration by the High Court.[6]

A former judge of the Supreme Court of Victoria has suggested that the fate of the immunity should be decided by Parliament because 'this avoids the percep-

[1] [2002] 1 AC 615 ('*Arthur Hall*').

[2] Lords Steyn, Browne-Wilkinson, Hoffmann and Millett abolished the immunity in both civil and criminal proceedings. Lords Hope, Hutton and Hobhouse supported the abolition of the immunity in civil proceedings only.

[3] See, eg, Jonathon Hill, 'Litigation and Negligence: A Comparative Study' (1986) 6 *Oxford Journal of Legal Studies* 183; David Pannick, *Advocates* (1992) 197–206, cited in *Arthur Hall* [2002] 1 AC 615, 678 (Lord Steyn); Melissa Newman, 'The Case against Advocates' Immunity: A Comparative Study' (1995) 9 *Georgetown Journal of Legal Ethics* 267; Stanley Yeo, 'Dismantling Barristerial Immunity' (1998) 14 *Queensland University of Technology Law Journal* 12; Peter Cane, *Tort Law and Economic Interests* (2nd ed, 1996) 233–8; Francis Trindade and Peter Cane, *The Law of Torts in Australia* (3rd ed, 1999) 429; James Goudkamp, 'Is There a Future for Advocates' Immunity?' (2002) 10 *Tort Law Review* 188. An interesting recent contribution is Justice Stephen Charles, 'The Immunity of the Advocate' (2003) 23 *Australian Bar Review* 220. Justice Charles, a sitting member of the Victorian Court of Appeal, is mindful of the many difficulties associated with the abolition of the immunity but appears resigned that the law will change. His Honour suggests that any change be made by the legislature rather than the courts, largely so that the immunity can be preserved in appropriate instances: at 237. Aspects of legal professional liability are also discussed in Stephen Warne, 'Compromise of Litigation and Lawyers' Liability: Forensic Immunity, Litigation Estoppels, the Rule against Collateral Attack, Confidentiality and the Modified Duty of Care' (2002) 10 *Torts Law Journal* 167. Warne examines the possible immunity of solicitors for certain work performed out of court and suggests that the rule against collateral attack is emerging as a separate doctrine to justify forensic immunity.

[4] See, eg, *Demarco v Ungaro* (1979) 95 DLR (3d) 385; *Ferri v Ackerman*, 444 US 193 (1979).

[5] (1999) 167 ALR 575 ('*Boland*'). See below Part III for a discussion of this case.

[6] Transcript of Proceedings, *D'Orta-Ekenaike v Victoria Legal Aid* (High Court of Australia, Gleeson CJ and Hayne J, 3 October 2003); Transcript of Proceedings, *D'Orta-Ekenaike v Victoria Legal Aid* (High Court of Australia, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 20–21 April 2004). The initial application for special leave — heard on 3 October 2003 — was referred by Gleeson CJ and Hayne J to the Full Court. Gleeson CJ concluded that hearing by instructing the parties to prepare 'to argue the matter as on an appeal.' The Court heard extensive argument but reserved its ruling on the application for special leave and the substantive decision. The application arose from a proceeding in the County Court of Victoria that was ultimately stayed: *D'Orta-Ekenaike v Victoria Legal Aid* (Unreported, County Court of Victoria, Wodak J, 13 December 2002).

tion of self-interest which cannot help but arise when the matter is decided by the courts.'[7] In our view, two arguments can be made against this suggestion. First, the immunity attaches to the work of advocates and must, therefore, be a special privilege created by lawyers for the benefit of lawyers. Any debate of the immunity is likely to raise well-rehearsed views about lawyers which will hamper any objective examination of matters affecting the legal profession. Indeed it could be argued that Parliament's view of lawyers is no more objective than that of the rest of the community.

Secondly, the immunity is often perceived by commentators and the media as an anachronism that is out of step with modern tort law.[8] The suggestion that any form of immunity is anomalous has influenced the debate on advocates' immunity by creating a presumption, often undetected, that the immunity ought to be abolished in the absence of compelling reasons to the contrary.

However, the wider issue regarding the role of immunities and duties in the law generally is beyond the scope of this article.[9] This article is confined to the more modest task of stating the case in support of advocates' immunity. Part II of this article analyses the modern cases that affirm advocates' immunity. Part III examines *Arthur Hall* and the status of the immunity in Australia. Parts IV and V explore the arguments that support the continued existence of the immunity and respond to the arguments that are commonly made in support of its abolition.

II THE RECENT ORIGINS OF THE IMMUNITY

A *What Is the Immunity?*

The doctrine of advocates' immunity renders advocates immune from civil claims in professional negligence for any act or omission which arises honestly in the conduct or management of a proceeding in court, and for any out-of-court act or omission that is intimately connected with in-court proceedings.[10] There are other aspects of the immunity which have not been disturbed by the decision in *Arthur Hall*. For example, advocates still enjoy immunity from civil proceedings in defamation or misrepresentation, as well as immunity from criminal proceedings in defamation or fraud arising from statements made by a party or

[7] George Hampel and Jonathan Clough, 'Abolishing the Advocate's Immunity from Suit: Reconsidering *Giannarelli v Wraith*' (2000) 24 *Melbourne University Law Review* 1016, 1026. The Hon George Hampel retired from the Supreme Court of Victoria in 2000.

[8] See, eg, Jan Wade, 'End to Ancient Lurk in Sight', *The Australian Financial Review* (Sydney), 28 July 2000, 32; Chris Merritt, 'Australia Lags behind Normal Practice', *The Australian Financial Review* (Sydney), 28 July 2000, 33; Darrin Farrant, 'A-G Seeks to Dump Barrister Immunity', *The Sunday Age* (Melbourne), 22 October 2000, 5; Ebru Yaman, 'Bid to Strip Barristers' Immunity', *The Australian* (Sydney), 23 October 2000; Editorial, 'Barristers Flip Their Wigs over Immunity', *The Australian* (Sydney), 19 April 2004. See also Belinda Baker and Desmond Manderson, 'Counsel's Immunity: The High Court's Decision in *Boland v Yates*' (2001) 1 *Macquarie Law Journal* 108, who refer to the immunity as 'antiquated': at 114.

[9] For a discussion of this issue with reference to several duties and immunities, including advocates' immunity, see Rosalind English, 'Forensic Immunity Post-*Osman*' (2001) 64 *Modern Law Review* 300.

[10] *Giannarelli v Wraith* (1988) 165 CLR 543 ('*Giannarelli*'). Such claims may be framed as a breach of a term of the contract of retainer to take care, or in tort, or both.

his or her lawyer in the ordinary course of court proceedings. This immunity also extends to statements made in an unverified pleading.[11]

B *The Rationale of the Immunity*

The origins of advocates' immunity have been described as an 'obscure' part of the 'gradual evolution of the duties and liabilities of those concerned in the legal process.'[12] The earliest cases on the immunity contain little, if any, analysis of its nature or purpose.[13] Most modern analysis of the immunity can be traced to three key decisions, each of which provides a considered analysis of the immunity. The first is *Rondel v Worsley*.[14] Rondel sued Worsley, his former advocate, for alleged negligence. The House of Lords unanimously held that the action could not proceed because advocates were immune from liability in negligence. Their Lordships relied upon several grounds of public policy — in particular, the problems that could arise if advocates were subject to conflicting duties to both the court and their client.[15] Their Lordships held that the very possibility that advocates could face liability as a consequence of the discharge of their duties in court might cause them to 'subordinate' any duties owed to the court to those owed to the client.[16]

A decade later the House of Lords reconsidered the immunity in *Saif Ali v Sydney Mitchell & Co*.[17] In this case, attention was confined largely to the scope of the immunity. The majority accepted that the special status of advocates provided a sufficient reason for the immunity.[18] Lord Diplock, however, did not. His Lordship noted that the work of advocates bore many similarities to that of

[11] *Jamieson v The Queen* (1993) 177 CLR 574, 581–3 (Deane and Dawson JJ), following *R v Skinner* (1772) Lofft 54; 98 ER 529; *Dawkins v Lord Rokeby* (1873) LR 8 QB 255. The proposition is, however, qualified by a number of exceptions related to substantive administration of justice offences such as perjury, contempt of court and perverting the course of justice: *Jamieson v The Queen* (1993) 177 CLR 574, 582.

[12] *Rondel v Worsley* [1969] 1 AC 191, 258 (Lord Pearce) ('*Rondel*').

[13] The evolution of the law and the scant reasoning in many of the cases is outlined by Lord Pearce in *Rondel* [1969] 1 AC 191, 258–60.

[14] Ibid.

[15] One longstanding basis for the immunity had been abolished only three years earlier. The immunity had traditionally been justified by the absence of a contract between advocates and their clients (since any contract was normally formed between advocates and instructing solicitors). It was long held that a duty of care could not extend to a situation in which no contractual relationship existed between the two parties. The foundation of this reasoning was removed by *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. The House of Lords held that a duty of care can arise when a person relies upon the skill of another person who applies his or her specialist skill to help that person, irrespective of whether there is a contract between the parties.

[16] *Rondel* [1969] 1 AC 191, 231 (Lord Reid), 251 (Lord Morris), 272–3 (Lord Pearce), 283 (Lord Upjohn), 293 (Lord Pearson).

[17] [1980] AC 198.

[18] Their Lordships did, however, express these views in differing terms: see *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, 213 (Lord Wilberforce, stating that 'barristers have a special status, just as a trial has a special character: some immunity is necessary in the public interest'), 229–30 (Lord Salmon, endorsing the reasons advanced in *Rondel* [1969] 1 AC 191), 223 (Lord Russell, stressing the 'public duty that rests on the Bar in particular to participate in and contribute to the orderly proper and expeditious trial of causes in our courts'), 235 (Lord Keith, emphasising a 'barrister's duty to the court and the due administration of justice ... when he directs his mind' to the many issues concerning the conduct of proceedings).

other professionals who were also required to make difficult decisions under great pressure,[19] and accepted that other classes of professional people, such as surgeons, had adjusted to the potential liability arising from the operation of a duty of care.[20] Lord Diplock concluded, however, that advocates' immunity was still warranted on two key policy grounds. First, the immunity afforded advocates the protection granted to all other participants in legal proceedings, such as witnesses, jurors, court officials and judges.[21] Secondly, the immunity prevented collateral challenge against judicial decisions by removing a potential avenue for disaffected parties to raise grievances that had been determined in an earlier proceeding.[22]

In *Giannarelli v Wraith*,[23] a majority of the High Court accepted that advocates were not subject to a common law duty of care in negligence for work performed in court.[24] The facts provide a useful illustration of the type of case in which advocates' immunity can arise. The Giannarellis were convicted of perjury for evidence given to a royal commission.[25] The High Court quashed the convictions on the ground that the Giannarellis' evidence to the commission was inadmissible at their subsequent trial.[26] The Giannarellis sued their legal advisers in negligence, alleging that their lawyers had negligently failed to advise them that their evidence to the commission was inadmissible at trial.[27] It was also alleged that the advisers had negligently failed to object to the admission of this evidence at the trial itself.

The immediate issue before the High Court was a narrow question of statutory interpretation. Section 10(2) of the *Legal Profession Practice Act 1958* (Vic) provided that:

> Every barrister shall be liable for negligence as a barrister to the client on whose behalf he has been employed to the same extent as a solicitor was on the twenty-third day of November One thousand eight hundred and ninety-one liable to his client for negligence as a solicitor.[28]

A majority of the Court held that this provision was intended to render barristers subject to the same common law duty of care applicable to solicitors at the

19 Ibid 220.
20 Ibid.
21 Ibid 221–2.
22 Ibid 222–3.
23 (1988) 165 CLR 543.
24 The majority consisted of Mason CJ, Wilson, Brennan and Dawson JJ.
25 *R v Giannarelli* (Unreported, Supreme Court of Victoria, Kaye J, 22 June 1983).
26 *Giannarelli v The Queen* (1983) 154 CLR 212.
27 On appeal it was held that the evidence had been rendered inadmissible by the operation of s 6DD of the *Royal Commissions Act 1902* (Cth). Counsel advising the Giannarellis had considered this point but disagreed on whether it could succeed. After discussion, the point was not taken during the hearing. While the point ultimately succeeded on appeal, it was not at all clear that it would have done so at trial.
28 The date mentioned in the provision is the day on which the *Legal Profession Practice Act 1891* (Vic) received Royal Assent. The *Legal Profession Practice Act 1958* (Vic) has since been repealed and has been replaced by the *Legal Practice Act 1996* (Vic).

time specified in the provision (23 November 1891).[29] The majority concluded that a solicitor acting as an advocate was, at that date, not liable in negligence for work performed in court, and that s 10 extended this protection to advocates.[30] The minority held that s 10 was not intended to determine the potential liability of barristers by reference to the equivalent liability of solicitors at a stated point in time, but rather to subject barristers to the same liability applicable to solicitors generally.[31]

The majority also accepted that the common law immunity extended to advocates for work that was performed either in court, or work performed out of court that was closely connected such in-court work. Mason CJ concluded that only two policy arguments provided any significant support for the immunity at common law. First, advocates occupy a special position: they owe a duty to both the court and their client. Mason CJ held that an advocate's duty to the court overrode their duty to the client and that this superior duty was clearly separate from any duty owed to the client. The Chief Justice drew support from the special role of the advocate. His Honour stated that

> a barrister's duty to the court epitomizes the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice. ... The judge is in no position to rule in advance on what witnesses will be called, what evidence should be led, what questions should be asked in cross-examination. Decisions on matters such as these, which necessarily influence the course of a trial and its duration, are made by counsel, not by the judge. This is why our system of justice as administered by the courts has proceeded on the footing that, in general, the litigant will be represented by a lawyer who, not being a mere agent for the litigant, exercises an independent judgment in the interests of the court.[32]

In the view of Mason CJ, there was a real risk that the exposure of advocates to potential liability in negligence would adversely affect the administration of justice. His Honour suggested that the judgements of advocates would become influenced by the need to avoid liability.[33] In particular, advocates might feel compelled to pursue issues that would not be pursued in the absence of potential liability. The Chief Justice reasoned that such cautious or defensive decisions could make litigation 'more lengthy, more complex and more costly.'[34]

The second matter of policy identified by Mason CJ concerned the adverse consequences which would flow from relitigating issues in collateral proceedings for negligence. Such consequences include the risk of inconsistent decisions on the same matter, which is incompatible with the common law principle of

[29] *Giannarelli* (1988) 165 CLR 543, 560–1 (Mason CJ), 570–1 (Wilson J), 586–7 (Brennan J), 592–3 (Dawson J).
[30] Ibid.
[31] Ibid 587–8 (Deane J), 608–9 (Toohey J, with whom Gaudron J agreed).
[32] Ibid 556–7.
[33] Ibid 557.
[34] Ibid.

avoiding such inconsistencies to maintain, rather than damage, public confidence in the administration of justice.[35]

Wilson J considered the four main policy reasons in support of the immunity advanced in *Rondel*,[36] three of which he considered very strong.[37] First, the abolition of advocates' immunity would impose on advocates a duty of care to clients that conflicted with their duty to the court.[38] Secondly, the type of relitigation that would result from suits against advocates for alleged negligence would be extremely complex and difficult to manage.[39] Thirdly, the removal of the immunity could seriously undermine public confidence in the administration of justice.[40] Wilson J also placed some reliance on the 'cab rank' rule — under which advocates are bound to accept briefs within their range of expertise if able to do so — although his Honour clearly felt this was a lesser consideration in support of the immunity.[41] In addition, his Honour considered the reluctance of the law to grant special immunities which, in the case of advocates' immunity, could be perceived as some form of 'connivance' between judges and barristers.[42] Wilson J concluded, however, that the potential adverse consequences that could flow from abolition of the immunity were a sufficient warrant for its retention.[43]

Brennan J agreed that many decisions made by advocates were taken for the benefit of the court and the administration of justice,[44] but made clear that he was particularly influenced by the value received by the courts from the work of the independent bar. Brennan J suggested that this important justification for the immunity would disappear if the standard of advocacy provided by barristers declined to a point such that courts did not receive appropriate assistance from the advocates. His Honour concluded that, until there was evidence of a clear decline in the standard of advocacy, the conduct of advocacy should be regulated by 'the publicity of court proceedings, judicial supervision, appeals, peer pressure and disciplinary procedures to prevent neglect'.[45] Brennan J also drew attention to the 'cab rank' rule. His Honour suggested that the rule was important to the administration of justice, because it helped to ensure that access to effective legal representation was dependent only on the availability of counsel, rather than the publicity that the case may attract or the 'munificence' of the client.[46] Brennan J stressed that his remarks on the 'cab rank' rule were obiter dicta, and that any decline in its observance should be corrected by the bar and

35 Ibid 558.
36 [1969] 1 AC 191.
37 *Giannarelli* (1988) 165 CLR 543, 572.
38 Ibid 572–3.
39 Ibid 573–4.
40 Ibid 576.
41 Ibid 573.
42 Ibid 575, citing *Rondel v Worsley* [1967] 1 QB 443, 468.
43 Ibid 575–6.
44 Ibid 579.
45 Ibid 580.
46 Ibid.

other professional associations.[47] It is unclear, therefore, whether his Honour thought that the 'cab rank' rule could be invoked directly to support the immunity.

Dawson J also stressed the importance of preventing relitigation,[48] but felt that the strongest argument in favour of the immunity was the need to protect *all* participants in legal proceedings from any liability for their words and conduct during proceedings. His Honour noted that witnesses, judges, jurors and advocates were immune from liability in defamation for statements made in court. This privilege was granted because the participants in legal proceedings would be unable to speak freely if they faced possible legal action. Dawson J considered that no coherent distinction could be drawn between an action in defamation and one in negligence, since the contemplation of *either* type of suit would act as a restraint on the advocate and the services that he or she provided to the administration of justice.[49]

The minority in *Giannarelli* gave scant regard to the arguments in support of the immunity. Deane J rejected the 'pragmatic considerations of public policy' that had been accepted in other cases.[50] His Honour also flatly rejected any suggestion that the policy reasons invoked in support of the immunity outweighed or could 'even balance the injustice' caused by depriving a person of redress at common law.[51] Toohey J, with whom Gaudron J agreed, considered that some of the policy justifications raised in support of the immunity might influence the nature of an advocate's duty of care. His Honour suggested that an advocate's duty to the court would be 'relevant' to any duty owed to a client, but added that this reasoning was not intended 'to suggest that there is anything irreconcilable between the duty of care owed to the client and that owed to the court.'[52]

C *The Scope of the Immunity*

Most analysis of the immunity is directed to the policy arguments for and against its retention, rather than the immunity's precise scope. In our view, many of the arguments made in favour of its abolition are weakened by the relatively limited scope of the immunity.

As a preliminary point, it should be noted that the immunity extends to persons acting in the capacity of an advocate, rather than to barristers alone. Thus the immunity applies to solicitors when performing work that 'is of a kind which falls within the area of immunity.'[53] An analysis of advocates' immunity is, therefore, equally relevant to solicitors who act as advocates.[54]

47 Ibid.
48 Ibid 594–5.
49 Ibid 595–6.
50 Ibid 588.
51 Ibid.
52 Ibid 610.
53 *May v Mijatovic* (2002) 26 WAR 95, 120 (Hasluck J).
54 Warne suggests that there may be a 'shadow immunity' for solicitors which extends to the decisions of solicitors made in conjunction with barristers: Warne, above n 3, 198–202. He argues that solicitors ought to be immune from liability in negligence for work that is done in

1 *What Is 'Intimately Connected' for the Purposes of the Immunity?*

The immunity applies both to the work of the advocate in court, and to work performed outside court where it is 'so intimately connected with the conduct of the cause in Court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing.'[55]

Mason CJ provided the best explanation of the difficulties in identifying the scope of the immunity in *Giannarelli*.[56] His Honour accepted that it was difficult to determine where the appropriate dividing line should be drawn between work that was performed in or out of court (or was closely connected to such work), and work that did not hold a sufficient connection. However, Mason CJ refused to draw a dividing line at the doors of the courtroom, on the basis that such a literal approach would be 'artificial in the extreme'.[57] His Honour observed that:

> Preparation of a case out of court cannot be divorced from presentation in court. The two are inextricably interwoven so that the immunity must extend to work done out of court which leads to a decision affecting the conduct of the case in court. But to take the immunity any further would entail a risk of taking the protection beyond the boundaries of the public policy considerations which sustain the immunity.[58]

In our view, the rationale for the 'intimately connected' test is not widely understood in most discussions of the immunity.[59] In the passage quoted above, Mason CJ alludes to the connection between the *preparation* and presentation of a case. We believe that this reasoning correctly identifies the often inseparable connection between the planning and execution of a case. Any immunity for advocacy cannot be applied literally. Advocacy, or the presentation of a case, can never be fully separated from its preparation. A case cannot be properly conducted without careful planning and preparation, nor can the behaviour of an advocate be fully understood without knowledge of the steps taken to draft, rehearse and finalise a case outside of court.

conjunction with barristers because the advocates' immunity would be circumvented if a joint party to protected work could be sued. This argument essentially adopts the 'intimately connected' test (see below Part II(C)(1)) because it suggests that other lawyers whose work is intimately connected to that of the advocate ought to receive the benefit of the immunity. In our view, this reasoning is forceful.

55 *Rees v Sinclair* [1974] 1 NZLR 180, 187 (McCarthy P), cited in *Giannarelli* (1988) 165 CLR 543, 560 (Mason CJ).

56 (1988) 165 CLR 543, 559–60. Wilson and Brennan JJ also adopted the 'intimately connected' test: at 571 (Wilson J), 579 (Brennan J). Dawson J discussed the test, but did not expressly endorse it, although his discussion of the test and other parts of his judgment strongly suggest that he supported it: at 596.

57 Ibid 559.

58 Ibid 559–60.

59 Goudkamp suggests that the real difficulty is that courts have failed to explain the 'intimately connected' test, or to provide a comprehensive explanation of the factors that determine its scope: Goudkamp, above n 3, 190–1. We believe that our explanation of the connection between the preparation and presentation of a case overcomes this criticism.

Callinan J adopted similar reasoning in *Boland*.[60] His Honour did not accept that

> simply because the work ... was done over a long period of time, that in some way divorced it from work done closer in time to the hearing even though the former answered the description of work intimately connected with the forthcoming trial.[61]

This view suggests that what is 'intimately connected' is a *strategic* rather than temporal connection, based on the relevance between work performed out of court and the conduct of the matter in court. One logical consequence of this approach is that, even if a matter does not ultimately proceed to a hearing, pre-trial work could fall within the scope of the immunity if it bears a sufficient degree of relevance to the *planned* conduct of matters in court.

Kirby J also considered the scope of the 'intimately connected' test in *Boland*,[62] but endorsed the approach of Priestley JA in *Keefe v Marks*.[63] In that case, a barrister was briefed to 'advise and appear' in a personal injury matter. He did not claim interest on behalf of the client in either the statement of claim or at trial. The client sued, alleging that the barrister was negligent in failing to consider whether a claim for interest should be made, or take the necessary steps to institute this claim.[64] Priestley JA held that the claim in negligence should succeed. His Honour accepted that an 'intimately connected' test would not apply to all pleadings because a pleading, like all other work, should be assessed to determine if it was truly a preliminary decision that affected the in-court conduct of a case. His Honour reasoned that the 'intimately connected' test was a relative one, which required an assessment of the degree of connection between the in-court and out-of-court work. Priestley JA also noted that other proponents of the 'intimately connected' test supported only one, very particular, form of connection. As his Honour explained,

> the connection must be a positive one. McCarthy P's formulation [in *Rees v Sinclair*] seems to involve an actual decision which may have a significant effect on the conduct of the case in court. Brennan J's formulation [in *Giannarelli*] in terms refers to negligence by act or omission in court, but only to the 'making' of the relevant 'decisions' out of court.[65]

Priestley JA concluded in this case that there were no 'decisions' in this positive sense. The plaintiff's claim was based on an alleged omission — the failure to consider whether a claim for interest should be made — rather than any positive act by counsel.[66]

[60] (1999) 167 ALR 575.
[61] Ibid 670–1.
[62] Ibid 611.
[63] (1989) 16 NSWLR 713.
[64] Ibid 718–19. A claim for interest was eventually included in the original proceeding. Due to its late inclusion the claim was only partially successful: at 715.
[65] Ibid 725. His Honour referred to *Rees v Sinclair* [1974] 1 NZLR 180, 187 (McCarthy P) and *Giannarelli* (1988) 165 CLR 543, 579 (Brennan J).
[66] *Keefe v Marks* (1989) 16 NSWLR 713, 725.

Gleeson CJ, with whom Meagher JA agreed, held that the plaintiff's claim must fail because the barrister's decision whether or not to plead a claim for interest, or perhaps even to consider such a claim, could not be divorced from in-court work. His Honour reasoned that the limitations of the 'intimately connected' test would be circumvented if a claim could be based on the earliest part of a continuing course of conduct that was the furthest removed from the hearing of the case. Gleeson CJ also suggested that the immunity should not 'be circumvented by drawing fine distinctions between the preparation and the conduct of the case'.[67]

In our view, the immunity is no better served by Gleeson CJ's use of fine distinctions to cast protection around a wide range of decisions.[68] Any attempt to characterise the failure to plead interest in a personal injury case or the making of a hurried amendment in court as a continuing course of conduct is not helpful. There are no clear means by which to determine whether, or why, a series of decisions may constitute a continuing course of conduct. Many decisions made by lawyers during the pre-trial conduct of a case relate to a handful of core issues. Not surprisingly, those issues will arise in court. If every matter concerning one of these core issues may be characterised as 'intimately connected' because it forms part of a continuing course of conduct, then the scope of the test extends not only to the preparation of all matters that arise in court, but also to the *failure to consider* matters that could have been raised in court.

The approach of Priestley JA provides a better means of deciding and limiting the scope of what is 'intimately connected'. While either acts or omissions may properly support a finding of negligence, the same cannot be said for conduct protected by advocates' immunity. The intimate connection is founded on the link between the preparatory decisions made out of court and the ultimate conduct of the case in court. On this view, the *decision* not to raise a matter can be intimately and properly connected to the conduct of a case in court. The same cannot be said of a *failure* to consider a point of law or fact. How can a matter be 'intimately connected' to the conduct of a case in court if it is apparently not even considered by counsel?[69] Whether the connection is intimate will fall to be determined by the test expounded by Mason CJ.[70]

67 Ibid 720.

68 One such distinction is the suggestion by Stanley Yeo. He suggests that the immunity could be confined 'to cover only work which had to be performed by a barrister without the opportunity for calm reflection': Yeo, above n 3, 18. It would be quite difficult to define 'calm reflection' within the context of litigation, and even more difficult to determine factual arguments on whether any particular matter *had* to be performed without calm reflection.

69 An example can be taken from *Giannarelli* (1988) 165 CLR 543. Some of the counsel in that case considered whether the Giannarellis' evidence would be inadmissible in light of the *Royal Commissions Act 1902* (Cth), but decided that it would be admissible according to the prevailing interpretation of the law. On the basis of this advice, the point was not pursued at trial. The failure to raise it in the hearing was within the scope of the 'intimately connected' test because the merit of the point was considered during the planning of the presentation of the case: at 560 (Mason CJ). If, however, no counsel had even considered the issue, it could not fairly be said that the failure to object to the admissibility of the evidence was somehow 'intimately connected' to the conduct of the proceedings.

70 See above nn 56–8 and accompanying text.

2 *Are Certain Acts Not 'Intimately Connected' or Just 'Beyond the Pale'?*

There is very little judicial consideration of acts that might be beyond the scope of the immunity. In one sense, this lacuna is not surprising. The practical effect of any immunity from liability is that cases in which it is pleaded rarely move to a detailed examination of the facts.

In *Del Borrello v Friedman & Lurie (a firm)*,[71] it was suggested that the immunity should not extend to gross negligence. Kennedy J did not consider the submission in detail because there was no evidence to support such an allegation, but noted that there was no precedent in support of this submission.[72] His Honour did, however, accept that the immunity did not extend to 'the conduct of counsel acting in bad faith or dishonestly'.[73]

In our view, the immunity ought to be limited in this manner. It is argued that advocates' immunity is similar in principle to the immunity granted to other participants in judicial proceedings.[74] While the immunity granted to judges, witnesses, court officials and jurors differs slightly according to the character of the function that each person performs, none of these participants are immune from liability for acting dishonestly or in bad faith.[75] If advocates' immunity is to be justified on the basis that a similar protection extends to other participants in court proceedings, as we believe it should, it ought to be subject to the same limitations that attach to those other immunities.[76]

3 *Summary*

Callinan J has suggested that the test of whether an act or conduct is 'intimately connected' to in-court work depends on a strategic rather than temporal assessment.[77] On this view, the 'intimately connected' test is purposive and extends the immunity to the extent that preparation of a matter is significantly related to its presentation and conduct in court. When viewed from this perspective, the 'intimately connected' test does no more than extend the immunity to the limited tasks that cannot sensibly be divorced from the core function of in-

[71] [2001] WASCA 348 (Unreported, Kennedy, Wallwork and Murray JJ, 6 November 2001) ('*Del Borrello*'). It should be noted that the plaintiff's subsequent application for special leave was refused by the High Court: Transcript of Proceedings, *Del Borrello v Friedman & Lurie (a firm)* (High Court of Australia, Gaudron, Gummow and Kirby JJ, 24 October 2002).

[72] *Del Borrello* [2001] WASCA 348 (Unreported, Kennedy, Wallwork and Murray JJ, 6 November 2001) [122].

[73] Ibid [122]–[123]. Wallwork and Murray JJ did not comment on this point.

[74] See below Part IV(A).

[75] For example, a witness is generally immune from any liability in tort for statements made during the course of giving evidence, but may face liability for perjury for knowingly giving false evidence: *Jamieson v The Queen* (1993) 177 CLR 574, 582 (Deane and Dawson JJ), 594 (Gaudron J); *Darker v Chief Constable of West Midlands Police* [2001] 1 AC 435, 460–1 (Lord Clyde) ('*Darker*'). *Darker* suggests that a witness may also incur civil liability in such circumstances. The position for judges is similar. A judge is immune from liability for actions made in the exercise of his or her judicial powers, but not if he or she acts knowingly without, or in excess of, jurisdiction: *Sirros v Moore* [1975] 1 QB 118; *Rajski v Powell* (1987) 11 NSWLR 522.

[76] An advocate who acts in bad faith or dishonestly in a manner relevant to his or her professional duties would, rightly in our view, also face harsh sanction from both the court and the Bar. See below Part IV(G) for a consideration of the potential sanctions that may apply to advocates.

[77] *Boland* (1999) 167 ALR 575, 670–1.

court work. In our view, if the test is strategic and purposive, and does not cover a failure by an advocate to consider a point of law or fact, the immunity has a limited and reasonable scope.

III *ARTHUR HALL* AND BEYOND

A Arthur Hall

Arthur Hall[78] provided a surprising vehicle for the reconsideration of advocates' immunity. The case concerned three instances, joined for appeal purposes, of alleged negligence by solicitors.[79] In each case, the solicitors had acted as advocates and relied on the immunity as a complete defence. The claims were struck out at first instance, but were reinstated by the Court of Appeal. The Court held that the solicitors in each case were not acting as advocates and therefore could not invoke the immunity.[80] The Court of Appeal also dismissed two of the three cases on other grounds.

The applications proceeded to the House of Lords on the issue of advocates' immunity.[81] Their Lordships unanimously abolished the immunity for civil proceedings, holding that none of the various policy reasons provided in support of the immunity could justify its continued operation. Accepting that any immunity ought not be regarded as fixed or immutable,[82] the House of Lords noted that two significant changes had occurred since it had last endorsed the immunity on policy grounds.[83] First, the law of negligence had changed dramatically. Lord Hutton noted that the nature and extent of liability in negligence to

[78] [2002] 1 AC 615.

[79] One case involved an attempt by the solicitors to recover fees for services provided in a building dispute that was settled nine years before the decision of the House of Lords. The other claims arose from separate divorce proceedings.

[80] *Arthur J S Hall & Co (a firm) v Simons* [1999] 3 WLR 873. The reasons differed in each of the three actions. In the first action, *Arthur J S Hall & Co (a firm) v Simons*, a firm sued for its fees from a building dispute that settled the day before trial. The client counterclaimed, alleging that the solicitors gave negligent advice on the potential liability of other parties and the most appropriate time to settle. The trial judge made a preliminary ruling that the solicitors were immune from suit for their conduct of the settlement, and struck out the client's counterclaim in consequence of this ruling: at 878. On appeal the Court held that the solicitors were not acting as advocates when performing the allegedly negligent actions and, even if they were, their actions would not have been subject to immunity: at 908. The second action, *Barratt v Woolf Seddon (a firm)*, concerned a failure to include the correct value of an asset in a form filed in a family law dispute, which caused the client to maintain further proceedings. The Court decided this action on a similar basis: at 911. In the action of *Harris v Scholfield Roberts & Hill (a firm)*, another family law matter, the Court held that the solicitors were not acting as advocates during an alleged failure to instruct competent counsel and investigate factual aspects of the opponent's living arrangements: at 920–1.

[81] In each case the solicitors appealed, essentially on the ground that their allegedly negligent conduct fell within the scope of the immunity. Lord Hope also dismissed the solicitors' appeals on the basis that none of the claims actually involved conduct that fell within the scope of the immunity: *Arthur Hall* [2002] 1 AC 615, 709, 726.

[82] For example, Lord Steyn concluded that 'in today's world' the leading case of *Rondel* [1969] 1 AC 191 'no longer correctly reflects public policy': ibid 683.

[83] The House of Lords last endorsed the immunity in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, where it discussed and refined the policy considerations relied on in *Rondel* [1969] 1 AC 191.

which professional persons are subject had changed considerably.[84] On this view, the immunity could be reconsidered and abolished in light of wider social and legal changes. Secondly, the operation of the legal profession and the administration of justice had changed significantly. For example, courts could now monitor and effectively sanction negligent advocacy by making wasted costs orders against legal practitioners.[85] In addition, English law had developed and refined mechanisms to control relitigation more effectively.[86]

The majority also held that the immunity should be abolished in criminal proceedings if the conviction had been set aside because none of the policy justifications for the immunity provided a sufficient reason for its retention.[87] The majority was strongly influenced by the strict common law rules that preclude any form of collateral attack on the verdict of a criminal trial until it has been set aside.[88]

The minority held that the differences between civil and criminal proceedings were sufficient to retain the immunity for criminal proceedings.[89] Their Lordships noted that criminal proceedings were conducted on behalf of society as a whole and that wider social interests — which were not suited to resolution by civil proceedings — were at stake.[90] In addition, the criminal process provided other sufficient remedies to disaffected defendants.[91] We discuss some of the particular problems that the abolition of the immunity might raise for criminal proceedings below.[92]

B *Post*-Arthur Hall

Arthur Hall has been mentioned in several decisions of State Supreme Courts or Courts of Appeal.[93] In each instance, the relevant court has declined to

[84] *Arthur Hall* [2002] 1 AC 615, 728. Lord Hoffmann, with whom Lord Browne-Wilkinson agreed, also alluded to this trend when he referred to 'great changes in the law of negligence': at 688. His Lordship concluded, however, that it would not be helpful to examine those changes in detail: at 688.

[85] See, eg, ibid 693–5 (Lord Hoffmann). See below Part IV(F)(1) for a consideration of this issue.

[86] *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 ('*Hunter*'). This case was decided after *Rondel* [1969] 1 AC 191. See below Part IV(E) for a discussion of relitigation.

[87] *Arthur Hall* [2002] 1 AC 615, 679–80 (Lord Steyn), 685 (Lord Browne-Wilkinson), 705 (Lord Hoffmann). Lord Millett agreed with Lords Steyn and Hoffmann.

[88] The leading English case is *Hunter* [1982] AC 529. In that case the House of Lords effectively held that any civil claim that sought to challenge a conviction could be struck out as an abuse of process if the conviction had not been overturned. The strict manner in which this rule was explained suggests that a civil claim that impeaches a conviction in a collateral manner may only be maintained in the most exceptional circumstances.

[89] *Arthur Hall* [2002] 1 AC 615, 717–24 (Lord Hope), 730–5 (Lord Hutton), 745–50 (Lord Hobhouse).

[90] Lord Hobhouse gave the example of a defendant acquitted at trial, after spending a long period held in custody on remand, or an even longer period if acquitted after a second trial. His Lordship noted that such defendants had no civil remedy for the period of their detention. His Lordship suggested that hardships of this nature were an unfortunate but necessary part of the price paid by all citizens. On this view, the interest of a defendant in the criminal process is the right to vindication rather than liberty: ibid 747.

[91] Ibid 718–24 (Lord Hope), 730–5 (Lord Hutton), 745–52 (Lord Hobhouse).

[92] See below Part IV(H).

[93] See, eg, *O'Doherty v Birrell* [2001] 3 VR 147, 168 fn 26 (Winneke P, Phillips and Batt JJA); *Del Borrello* [2001] WASCA 348 (Unreported, Kennedy, Wallwork and Murray JJ, 6 November

provide any indication of the possible effect *Arthur Hall* might have on the law of Australia, no doubt because the reconsideration of *Giannarelli* is a matter for the High Court alone.[94] In *Boland*,[95] the High Court did not reconsider *Giannarelli*, largely because there was no negligence on the facts of the case at hand. Four members of the Court did, however, provide varying degrees of insight into their attitude to *Giannarelli*.[96]

Specifically, Gaudron J stated that she would have granted leave to reconsider *Giannarelli* had the immunity been relevant. Her Honour suggested that the lawyer–client relationship might not warrant immunity from suit, but it could affect the nature of the duty of care, if any, that a lawyer might owe to a client. Her Honour explained that

> proximity — [or] more precisely, the nature of the relationship mandated by that notion — may exclude the existence of a duty of care on the part of legal practitioners with respect to work in court. Whatever the position, it is one that derives from the law of tort, not notions of 'immunity from suit'.[97]

We will discuss this interesting suggestion below.[98]

A recent case which considered the immunity is the decision of the High Court of New Zealand in *Lai v Chamberlains*.[99] The Lais were joined as parties to a legal action against a company of which they were directors. In the course of the hearing, the trial judge indicated that judgment would be entered against the company. The trial judge asked whether the Lais would consent to judgment being entered against them. The hearing was adjourned while the Lais took advice from their solicitor. The Lais' solicitor advised that they could guarantee the judgment against their company. Judgment was then entered against the company. The company could not meet the judgment debt, so payment was sought from the Lais. The Lais sued their solicitor, on the ground that the advice on the guarantee of the debt was negligent.

2001); *Tahche v Abboud* [2002] VSC 42 (Unreported, Smith J, 1 March 2002); *May v Mijatovic* (2002) 26 WAR 95, 120 (Hasluck J); *Sovereign Motor Inns Pty Ltd v Howarth Asia Pacific Pty Ltd* [2003] NSWSC 1120 (Unreported, Master Harrison, 4 December 2003) [30].

94 It remains to be seen whether the High Court might consider that *Giannarelli* was wrong or simply that it should not be followed. In *Arthur Hall*, the House of Lords pointedly declined to overrule *Rondel*, which affirmed the immunity: [2002] 1 AC 615, 682–3 (Lord Steyn). On the difficulties faced by courts of final jurisdiction in such cases, see Bruce Harris, 'Final Appellate Courts Overruling Their Own "Wrong" Precedents: The Ongoing Search for Principle' (2002) 118 *Law Quarterly Review* 408.

95 (1999) 167 ALR 575.

96 Gleeson CJ and Hayne J concluded that it was not necessary to consider the immunity: ibid 600 (Gleeson CJ), 624 (Hayne J). Gummow J indicated that he would not have granted leave to reconsider *Giannarelli*, but pointedly refrained from stating any view of the standing of the case: at 603. Callinan J also accepted that the case did not provide any reason to reconsider *Giannarelli*, but added that *Giannarelli* was 'a recent decision ... based on sound policy and legal grounds': at 670. Kirby undertook a detailed analysis of the immunity and suggested that *Giannarelli*, 'so far as it expresses the immunity from suit enjoyed by legal practitioners in Australia, is confined in its holding and should not be expanded': at 610. His Honour did not provide a clear indication of his views as to whether the immunity should be abolished, but did express support for the minority view of Priestley JA in *Keefe* (1989) 16 NSWLR 713, 725.

97 *Boland* (1999) 167 ALR 575, 602–3.

98 See below Part V.

99 [2003] 2 NZLR 374.

The solicitor's firm applied to have the claims struck out on the basis that their advice was entirely protected by the immunity. The High Court, constituted by Salmon and Laurenson JJ, dismissed the application, holding that the evidence could support a finding that the advice was given after a sufficient period of time had lapsed since the hearing, such that it was not 'intimately connected' with the hearing. Consequently, the advice was not protected by the immunity.[100] Salmon and Laurenson JJ held that the immunity remained in force in New Zealand, but suggested that it should be modified to narrow its scope.[101]

Salmon J accepted that the Court was bound by the decision in *Rees v Sinclair*.[102] His Honour also frankly acknowledged that the future of the immunity was destined for the Court of Appeal of New Zealand and suggested that his reasoning was intended to assist any eventual decision of that court.[103] Salmon J accepted the force of many criticisms of the immunity but thought that there were two main reasons justifying its retention. First, the duties owed by an advocate to both the client and the court required advocates to maintain a strong level of independence.[104] Secondly, Salmon J held that the 'cab rank' rule supported the immunity. His Honour characterised it as an obligation that remained important to the operation of the legal system, particularly in the context of criminal proceedings.[105] Salmon J reasoned that it was 'essential that advocates should be prepared to act in a proper case for even the most difficult of litigants, free from concern that his or her decisions ... will form the basis of a claim for negligence.'[106]

Laurenson J also accepted that the immunity ought to be retained, but thought that it should be narrowed considerably. His Honour held the immunity should be abolished in civil proceedings as the policy concerns underpinning previous decisions had lost much of their force.[107] The main changes that his Honour identified were the decline of the oral tradition in litigation (other than in criminal proceedings), more effective case management, greater legal aid, the impact of the *Bill of Rights Act 1990* (NZ), and the growth in administrative and family law litigation.[108]

Laurenson J held that there was 'an overwhelming case to justify the retention of the immunity ... on grounds of public policy' in criminal and family law proceedings.[109] His Honour felt that the immunity was warranted for criminal

100 Ibid 387 (Salmon J), 389 (Laurenson J).
101 Ibid 386–7 (Salmon J), 396–402 (Laurenson J).
102 [1974] 1 NZLR 180 (Court of Appeal).
103 *Lai v Chamberlains* [2003] 2 NZLR 374, 376. The immunity was also considered in *Wright v Paton Farrell* (Unreported, Scottish Court of Sessions, 27 August 2002). In that case, the Court essentially held that the change of English law made by *Arthur Hall* did not effect a change to the law of Scotland. The Court held that the law of Scotland was stated by previous decisions that had accepted and applied the immunity. For a brief discussion of the case, see James Chalmers, 'Advocates' Immunity from Suit in Respect of Conduct in Court' (2002) 67 *Journal of Criminal Law* 401.
104 *Lai v Chamberlains* [2003] 2 NZLR 374, 385.
105 Ibid 386.
106 Ibid.
107 Ibid 396.
108 Ibid 393–6.
109 Ibid 396–7.

proceedings because clients in such proceedings 'frequently seek to attach blame to their counsel.'[110] His Honour was also of the opinion that the immunity ought to be retained in family law proceedings because the desirability of finality in litigation was particularly strong when the rights of children were involved.[111]

Both judges suggested that the immunity ought to be modified in one respect — namely, that it should to be limited to decisions made in the courtroom. Salmon J reasoned that decisions made in court were often made 'solely out of the pressures of the trial process during a Court hearing', but decisions made outside court did not possess this same quality.[112] Laurenson J suggested that limiting the immunity to decisions made in court might make the purpose of the immunity 'more readily apparent to, and hence more acceptable by, the public.'[113] Whilst limiting advocates' immunity to decisions made in court has some immediate practical appeal, we suggest that it provides a narrow focus on the scope and purpose of an advocate's work.[114]

IV Reasons to Retain the Immunity

We now turn to the main reasons that can be offered for the maintenance of the immunity. The following sections both examine the reasons in support of the immunity and respond to the arguments that are commonly made to support its abolition.

A *Immunity Extends to Other Participants in Judicial Proceedings*

Some commentators argue that advocates' immunity is anomalous because it grants a special protection to advocates not available to other professionals.[115] In our view, the converse is true, since a similar immunity extends to other participants in legal proceedings.[116] There is clear authority that immunity from suit also extends to the actions performed and statements made by judges,[117] witnesses,[118] court staff[119] and jurors[120] in the course of judicial proceedings. A

[110] Ibid 400. His Honour also drew general support from the dissenting judgment of Lord Hobhouse in *Arthur Hall* on this point: *Arthur Hall* [2002] 1 AC 615, 747, 749.

[111] *Lai v Chamberlains* [2003] 2 NZLR 374, 400.

[112] Ibid 386.

[113] Ibid 401.

[114] See above Part II(C) regarding the 'intimately connected' test. It was explained that the test provides a strategic rather than temporal connection to the work of an advocate. On this view, the immunity should not be determined by superficial issues, such as where an advocate is at any point in time, but by the substantive issues, such as the character of the work in question.

[115] See, eg, Goudkamp, above n 3, 199; David Weisbrot, *Australian Lawyers* (1990) 211.

[116] *Contra* Goudkamp, who argues that no parallel can be drawn between advocates and other participants in legal proceedings because advocates owe a duty of care to their clients while all other participants do not: Goudkamp, above n 3, 197. In our view, this distinction focuses on the form of protection provided to the various participants in legal proceedings rather than the effect of that protection.

[117] See, eg, *Sirros v Moore* [1975] 1 QB 118; *Re McC (A Minor)* [1985] AC 528; *Yeldham v Rajski* (1989) 18 NSWLR 48; *Rawlinson v Rice* [1998] 1 NZLR 454. Judicial immunity operates in a remarkably similar manner throughout the common law world: Abimbola Olowofoyeku, 'State Liability for the Exercise of Judicial Power' [1998] *Public Law* 444.

[118] See, eg, *Cabassi v Vila* (1940) 64 CLR 130; *R v Skinner* (1772) Lofft 54; 98 ER 529, as applied in *Munnings v Australian Government Solicitor* (1994) 118 ALR 385; *Mann v O'Neill* (1997)

similar immunity extends to quasi-judicial proceedings.[121] Although the immunity enjoyed by each is slightly different, the common theme is that the immunity granted to participants in legal proceedings is not for their personal benefit, but to protect the operation of the legal system. In *Rajski v Powell*, Kirby P explained that judicial immunity was granted

> not to protect judges as individuals but to protect the interests of society ... and to ensure that justice may be administered by such judges in the courts, independently and on the basis of their unbiased opinion — not influenced by any apprehension of personal consequences.[122]

In *Boland*,[123] Kirby J suggested that similar considerations underpinned the extension of the immunity to other participants in legal proceedings. This included advocates, because 'the advocate is, with judge, juror, witness and court official, an actor in the public functions of the state and not ... simply another professional person engaged in private practice for personal reward.'[124] The description of the participants in legal proceedings as actors is perhaps apt in more ways than one. For present purposes, it is simply relevant to note that advocates perform a public function during the conduct of legal proceedings. They are members of an ensemble cast.

In *Arthur Hall*,[125] Lord Hoffmann rejected the view that the immunity granted to other participants in judicial proceedings provided a sound reason for advocates' immunity. His Lordship accepted that witness immunity was necessary to enable witnesses to speak freely during proceedings, but concluded that any attempt to invoke witness immunity in support of advocates' immunity 'involves generalising the policy of the witness immunity and expressing it ... as a "general immunity"'.[126] The absolute immunity granted to other participants in judicial proceedings had been extended to advocates, his Lordship reasoned, so they could also perform their duty effectively and without fear of the stress and tension that would result from the potential to incur liability.[127] Lord Hoffmann held that the true rationale of witness immunity was to provide limited freedom of expression to witnesses.[128] For this reason, the immunity protected witnesses from a suit based solely on their statements. By contrast, an action that was based on the testimony *and* the witness' conduct out of court was permissible

191 CLR 204. Not long after delivering judgment in *Arthur Hall*, the House of Lords affirmed witness immunity in *Darker* [2001] 1 AC 435. See also *Taylor v Director of Serious Fraud Office* [1999] 2 AC 177.

119 *Harvey v Derrick* [1995] 1 NZLR 314.

120 *R v Skinner* (1772) Lofft 54, 56; 98 ER 529, 530, as applied in *Munnings v Australian Government Solicitor* (1994) 118 ALR 385.

121 *Hercules v Phease* [1994] 2 VR 411. The main difficulty in such cases is establishing whether the relevant function is sufficiently judicial in character to warrant protection. See Susan Kneebone, *Tort Liability of Public Authorities* (1998) 273–9.

122 (1987) 11 NSWLR 522, 528.

123 (1999) 167 ALR 575.

124 Ibid 613.

125 [2002] 1 AC 615.

126 Ibid 697, citing *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, 222.

127 *Arthur Hall* [2002] 1 AC 615, 697.

128 Ibid.

because the testimony provided evidence of a wider course of impropriety which should not be protected.[129] In such a case the testimony of the witness is, ultimately, the fruit of a poisonous chain of conduct.

In our view, there are three reasons why this conclusion does not accurately reflect the purpose of the connection between witness immunity and advocates' immunity. First, advocates are not necessarily immune from an action that is based upon their statements and conduct both in *and* out of court. It appears that advocates may be liable for litigation conducted in bad faith,[130] and that statements and conduct occurring within and outside court may be led in evidence to support such a claim. Advocates who engage in such conduct can and should be liable in tort.[131] It would be churlish to remove an advocate's conduct in court from the scope of evidence that may be called in support of an action alleging bad faith on the part of an advocate. On this view, any immunity provided to advocates that draws from the witness analogy is subject to the same general limitations applicable to all other beneficiaries of witness immunity.[132]

The second and more important reason why witness immunity can provide a suitable analogy to support advocates' immunity is the wide nature of witness immunity. Witness immunity is the most limited of all immunities provided to participants in judicial proceedings, yet it is still very broad.[133] Witnesses are granted immunity for their evidence, even if the evidence is wrong or negligent.[134] A witness has no function other than to give evidence. Accordingly, immunity for the evidence given effectively covers all of the actions of a witness in judicial proceedings. Other participants do much more in judicial proceedings, and they receive a wider immunity for doing so. Jurors, for example, are immune from the consequences of any verdict that is subsequently quashed on appeal.[135] Judges are immune from the consequences of a decision or order made and issued, even one that is mistaken or grossly wrong, so long as the judge does not act knowingly beyond his or her jurisdiction.[136]

The common theme in such immunities is that participants are protected for actions done in good faith, even if wrong or negligent. In our view, advocates'

[129] Lord Hoffmann did not make this point clearly but, in our view, it is the best explanation of *Taylor v Director of Serious Fraud Office* [1999] 2 AC 177, 215, upon which his Lordship relied: ibid 697.

[130] *Del Borrello* [2001] WASCA 348 (Unreported, Kennedy, Wallwork and Murray JJ, 6 November 2001) [123] (Kennedy J).

[131] They may be joined as a party to the various torts that are based on some form of abuse of legal proceedings, such as the misuse of civil proceedings.

[132] In *Mann v O'Neill* (1997) 191 CLR 204, Kirby J noted that there was a lack of authority on the precise point at which witness immunity ended: at 260. Recently, the House of Lords confirmed that improper out-of-court conduct by a witness is not privileged, despite its apparent connection to the testimony of the witness: *Darker* [2001] 1 AC 435.

[133] On the scope of expert witness immunity, see Michael McSweeney, 'Immunity from Suit of Expert Witnesses' (2002) 22 *Australian Bar Review* 131, 136–42.

[134] *Munster v Lamb* (1883) 11 QBD 588.

[135] Our research has not uncovered a reported judicial decision where any such action has even been attempted.

[136] *Sirros v Moore* [1975] 1 QB 118. In *Arthur Hall* [2002] 1 AC 615, Lord Hutton affirmed that 'the clearly established immunity of a judge' for any action in negligence extended to both civil and criminal proceedings. His Lordship noted that the judges of the European Court of Justice were expressly protected from civil liability: at 731.

immunity grants an equivalent protection because it extends protection to the core functions of advocates in legal proceedings, including the conduct of a case in court and work performed that is intimately connected to in-court work.[137] For this reason, we believe that Lord Hoffmann was not justified in suggesting that any attempt to invoke witness immunity involves an attempt to generalise the policy of witness immunity for a wider immunity, since that general immunity already exists. His Lordship was in fact seeking to support the creation of an exception to the general immunity that extends to participants in judicial proceedings by suggesting that witnesses provided the only analogous example. Had Lord Hoffmann acknowledged that he was creating an exception to a wide-ranging immunity, his Lordship may have developed positive arguments for the distinct treatment of advocates.

The third reason why witness immunity can provide a useful analogy for advocates' immunity is its similar operation.[138] The similarities were revealed in *Darker v Chief Constable of West Midlands*.[139] Darker sued several police officers, whom he alleged had engaged in a conspiracy to create false evidence and provide perjured testimony against him. The Chief Constable submitted that witness immunity precluded the use of the officers' testimony in Darker's claim. The House of Lords accepted that the immunity could normally protect careless or incorrect evidence, and the reports and preparation undertaken by witnesses.[140] However, their Lordships held that the immunity did not extend to testimony provided as part of a conspiracy to give false evidence.[141] This finding marked out a narrow exception to an otherwise wide immunity.

In our view, the House of Lords correctly distinguished between incorrect or negligent behaviour by a witness (which could not give rise to liability in tort), and the deliberate creation and presentation of false testimony (which could give rise to liability in tort). We believe that this clear distinction between wrong or negligent behaviour on the one hand, and deliberate or malicious misbehaviour

[137] Lord Hutton adopted similar reasoning in his support of maintaining the immunity for criminal proceedings. His Lordship reasoned that the work of advocates was very similar in principle to that of other participants in a criminal trial: *Arthur Hall* [2002] 1 AC 615, 733.

[138] Peter Cane seems to inadvertently concede this with his suggestion that the removal or narrowing of advocates' immunity might strengthen the case to remove the immunity of expert witnesses: Cane, above n 3, 237. This reasoning presupposes that the two immunities have a similar foundation.

[139] [2001] 1 AC 435.

[140] Ibid 447–8 (Lord Hope), 472 (Lord Hutton). Support for this view was drawn from *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177. Other members of the House of Lords in *Darker* did not directly suggest that the immunity might extend to careless or incorrect evidence, but they did accept that the immunity should only be precluded in cases where there is an allegation of the deliberate fabrication of facts: [2001] 1 AC 435, 461 (Lord Clyde). See also Lord Mackay, who generally endorsed the immunity, but held that it should not extend to the conduct of an officer who deliberately fabricates evidence with no intention of revealing that fabrication: at 452. We believe that the views of Lords Clyde and Mackay anticipate the extension of the immunity to cases in which evidence has been infected by careless or inadvertent error.

[141] *Darker* [2001] 1 AC 435, 449–50 (Lord Hope), 461 (Lord Clyde), 469 (Lord Hutton). See also Lord Cooke, who held that police witnesses should be entitled to the immunity that is normally extended to other witnesses, but not if there were allegations of a conspiracy to give false evidence: at 453.

on the other, provides the same boundary that should determine whether an advocate is or is not liable.

B *Misfeasance in Public Office*

The arguments in the previous section suggest that advocates' immunity is warranted because it provides an appropriate recognition of the role played by advocates in judicial proceedings, and places advocates in the same position as other participants. It is important to note that the special character of the duties and functions of advocates have been accepted to provide a good reason to limit advocates' liability for torts other than negligence. A notable exception is misfeasance in public office.

An action in misfeasance in public office enables a person to recover for loss or damage suffered by reason of the action of the holder of a public office, if the officer acted either maliciously or with the knowledge that his or her action was beyond their power and likely to cause harm to the plaintiff.[142] The recent case of *Cannon v Tahche*[143] suggests that the tort cannot be used by a defendant against his or her former prosecutors. Tahche had been convicted of rape, on two separate occasions, of the same victim. Subsequently, doubt arose over the soundness of the second conviction, and it was set aside.[144] The Director of Public Prosecutions ultimately entered a nolle prosequi in relation to the second conviction. Tahche commenced an action in malicious prosecution against the State of Victoria and several people associated with his prosecution, including a solicitor of the Office of Public Prosecutions and a barrister ('the prosecutors'). Tahche argued that the prosecutors had maliciously failed to disclose evidence that would have cast significant doubt on the evidence of the complainant. The Victorian Court of Appeal held that the prosecutors did not hold a 'public office' for the purposes of the tort of misfeasance in public office, and, even if they had, any duty of disclosure to which the prosecutors were subject was owed to the court rather than to the defendant.[145] On either view, Tahche had no cause of action against the prosecutors.

Importantly, the Court of Appeal held that any duty of disclosure to which prosecutors were subject was ethical in nature. Accordingly, any breach of the duty could be corrected by professional disciplinary proceedings against the practitioner and, where prosecution behaviour caused a miscarriage of justice, the trial could be set aside.[146]

The reasoning adopted by the Court of Appeal invoked reasons similar to those we raise in support of advocates' immunity. First, the Court suggested that any duty upon prosecuting advocates was owed to the court. This finding confirms

[142] The elements of the tort are explained in Rosalie Balkin and Jim Davis, *Law of Torts* (2nd ed, 1996) 726–30.

[143] [2002] 5 VR 317.

[144] *R v Tahche* (Unreported, Supreme Court of Victoria, Court of Appeal, Winneke P, Ormiston and Hayne JJA, 27 September 1995).

[145] *Cannon v Tahche* [2002] 5 VR 317, 347. At first instance, Smith J held that the prosecutors did hold a public office for the purposes of the tort: *Tahche v Abboud* [2002] VSC 42 (Unreported, Smith J, 1 March 2002) [101].

[146] *Cannon v Tahche* [2002] 5 VR 317, 340–1.

that the suggestion that an advocate may not owe a duty of care to a client or any other person (at least in respect of particular conduct in court, or out-of-court acts that are intimately connected with such conduct) is not unique to immunity in negligence. Secondly, the Court accepted that the duties of prosecutors should not be enforceable by an action in tort.[147] Thirdly, the Court of Appeal clearly accepted that the *potential* adverse effect of a duty that could be enforced in tort was a strong reason to rule against the existence of such a duty. It is important to note that the Court did not have the benefit of any empirical evidence on this issue and, therefore, decided the issue on principle.

C *Abolishing the Immunity May Lead to Conflicting Duties*

All lawyers are officers of the court. As such, lawyers have a duty to assist the administration of justice. This duty gives rise to many specific obligations. For example, advocates owe a duty to the court to behave honestly, fairly and to present the law in a fair and accurate manner.[148] Supporters of advocates' immunity suggest that a duty of care to clients could conflict with the duty owed to the courts, sometimes dramatically, and that any such conflict should be avoided.[149] Two practical reasons can be provided in support of this argument. First, there is often no clear basis upon which advocates could decide whether a conflict existed and how it could be resolved.[150] Secondly, it is unwise and unfair to render any person subject to potentially conflicting duties.

In *Arthur Hall*, neither point was accepted to provide a substantial justification for the immunity.[151] Several of their Lordships suggested that the apparently narrow range of cases in which advocates' duties to the court and the client were in conflict would not give rise to liability if an advocate acted in good faith and in obedience to the duty owed to the court. The terms in which this point was explained are illuminating. Lord Hutton accepted that where a conflict of duty arose, an advocate was not bound by the wishes of the client. Accordingly, the 'mere fact' that an advocate had 'declined to do' what the client wished would not expose the advocate to any form of liability.[152] Lord Hobhouse reasoned that an advocate's duty to the court effectively imposed ethical constraints upon his or her behaviour. His Lordship concluded that the decisions made in good faith by 'any competent advocate' to discharge this duty to the court would be upheld

147 The Court of Appeal stated this principle in very wide terms, holding that the duties of prosecutors could not be 'enforceable at the suit of the accused or anyone else by prerogative writ, judicial order or action for damages': ibid 347.

148 See *Clyne v New South Wales Bar Association* (1960) 104 CLR 186, 200; *Copeland v Smith* [2000] 1 WLR 1371, 1375–6 (Brooke LJ).

149 See Charles, above n 3, 231–2; Trindade and Cane, above n 3, 428.

150 Justice Charles states that the problem of divided loyalties is 'very much a matter of intuition': Charles, above n 3, 231. In our view, this correctly highlights the subjective, and often subtle, nature of this issue. The interpretation and application of lawyers' duties often involve instinct and experience, which often are not capable of easy application. These difficulties are increased when more than one duty is involved, and further increased when those duties conflict.

151 *Arthur Hall* [2002] 1 AC 615, 681 (Lord Steyn), 689–95 (Lord Hoffmann), 715–17, 725–6 (Lord Hope), 738–9 (Lord Hobhouse).

152 Ibid 726.

by a subsequent court.[153] Lord Hoffmann attempted to assuage potential fears when he bluntly asserted that '[i]t cannot possibly be negligent to act in accordance with one's duty to the court and it is hard to imagine anyone who would plead such conduct as a cause of action.'[154] Note that Lord Hoffmann did not suggest that a cause of action of this nature could *never* be pleaded. In *Giannarelli*, by contrast, Wilson J accepted that an advocate 'could never be in breach of any duty to the client by fulfilling the paramount duty' to the court.[155]

In our view, the suggestion that an advocate could not, or would not, be liable in negligence for actions taken in discharging any duty to the court is an attempt to minimise the potential consequences of the abolition of the immunity. Perhaps the suggestion also provides comfort to opponents of the immunity, because it implies that any conflict between the duties owed by an advocate to the court and the client may be easily identified and resolved.[156]

There are several reasons to doubt this assumption. First, it is not clear how a conflict between duties may be identified. Even courts have admitted this difficulty. In *Giannarelli*, for example, Wilson J acknowledged that 'counsel's duty to the court is often easier to state than to apply in specific situations.'[157] Secondly, it is not clear who may decide how a conflict should be resolved. While the conflict will involve the advocate, it also involves the court. Can the advocate seek the view of the court? If so, when? Should the advocate seek the view of the court whenever a conflict arises, or wait to seek the view of the court during the course of any subsequent litigation commenced by the client? If it is not always clear when an advocate is discharging his or her duty to the court, it will often not be easy to determine when allegedly negligent behaviour falls within the scope of behaviour upon which a claim of negligence can be based.[158]

These problems are due in some part to the wide-ranging scope of an advocate's duty to the court. The duty to behave honestly, fairly and to present the law in a fair manner flows largely from the character of adversarial proceedings.[159] It is widely accepted that because adversarial proceedings rely on the use of oral argument, it is necessary that 'judges rely heavily upon advocates appearing before them for a fair presentation of the facts and adequate instruc-

153 Ibid 739.

154 Ibid 692–3.

155 (1988) 165 CLR 543, 572.

156 This assumption seems to underpin the reasoning of many critics of the immunity. For example, Cane rejects the suggestion that conflicting duties might present a problem because 'the mere doing of one's duty to the court to the detriment of one's client could never be called negligent': Cane, above n 3, 235. This assertion clearly accepts that there may be conflicts, but Cane provides no way to identify or resolve such conflicts.

157 (1988) 165 CLR 543, 572. Justice Charles comments: 'As to the argument that advocates could not be found negligent for merely carrying out their duty to the court, this may be easier, with respect, for a judge to assert than for an advocate to accept': Charles, above n 3, 232.

158 Justice Charles expresses similar doubts. He argues that the difficult nature of many decisions that an advocate must take means that it is difficult to accept that some decisions can never be the subject of an action in negligence: Charles, above n 3, 232.

159 See David Ipp, 'Lawyers' Duties to the Court' (1998) 114 *Law Quarterly Review* 63, 68–71. The relationship between the duties of candour and fairness and the adversarial system is due in large part to the great reliance that judges place on those who appear before them to inform the court about the law.

tion in the law.'[160] The professional conduct rules governing advocates impose similar obligations additional to those imposed by the court. They may be invoked by way of a complaint made by a client, the court or another advocate.[161]

The duty to the court may oblige an advocate to behave apparently to the detriment of his or her client. For example, an advocate who presents the law fairly must include case law that is inconvenient, perhaps even fatal, to the client's case. Similarly, an advocate who is pressed by the court may abandon an unlikely ground of argument, or concede a strong point made by an opponent. In many instances an advocate will make a spontaneous, unilateral, tactical decision, for the perceived benefit of the case. For example, counsel who is asked by a judge whether a line of argument is *really* worth pursuing may decide that the point should be abandoned. Advocates are of course influenced by the manner in which the question is posed,[162] but they often have to decide whether to pursue or abandon particular arguments during a hearing in a unilateral manner.

It may not always be possible for an advocate to explain these decisions to a client. In some instances, the client may not understand the technical legal reasons for such a decision.[163] Although an advocate might *theoretically* be able to explain many decisions, often neither the opportunity nor the time are available.[164] Indeed, legal practitioners who charge fees according to the time devoted to work would most likely be criticised for providing unnecessary or excessive services. Even if an advocate could explain all of his or her decisions to a client, this has the potential to invite argument and second-guessing of their professional judgement and strategy. While an advocate who carefully recorded such exchanges could almost certainly preserve sufficient evidence of the client's involvement in technical decisions about the conduct of proceedings, we believe this would occur at the expense of the effective conduct of legal proceedings.

160 *Arthur Hall* [2002] 1 AC 615, 692 (Lord Hoffmann). This principle is adopted in the rules of all Bar Associations and Law Societies in Australia and the Australian Bar Association *Model Rules* (2002). See Gino dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand* (2nd ed, 2001) 443–75.

161 In many jurisdictions, any person may complain about the conduct of a legal practitioner. See, eg, *Legal Practice Act 1996* (Vic) s 138(1) which entitles '[a]ny person' to complain about the conduct of a practitioner or a firm.

162 Every experienced participant in, or observer of, court proceedings has witnessed exchanges in which a judge has heard carefully prepared submissions on a particular point and turned to the advocate and asked: 'Counsel ... are you *sure* you want to pursue that point?' A judge who believes that a point is hopeless can normally indicate this view with a tone of voice and raised eyebrows that would leave no doubt as to the view of the court. A judge's demeanour often indicates that he or she does not want the court's time wasted, and counsel takes the point without complaint. Transcript can never capture such moments.

163 Justice Charles notes that there are many matters that an advocate must determine which cannot be easily explained because they involve intuitive decisions, such as whether the evidence of a witness appears to have been accepted or how a jury may perceive a point: Charles, above n 3, 232.

164 We do not intend to suggest that lawyers cannot, or should not, provide explanations for their decisions. However there are instances during the conduct of proceedings where this is not possible.

Some of the problems that can arise from such conflicts were explained in *Grimwade v Victoria*.[165] Grimwade was acquitted of several corporate law offences after lengthy proceedings (including an appeal). He sued his former prosecutors in several causes of action, including negligence. A dispute arose as to whether the prosecutors could, or should, owe a duty of care to an accused person. Harper J concluded that no such duty should be imposed because it would conflict with the duty owed by a prosecutor to the state (on whose behalf prosecutions were conducted) and the court. Harper J explained that:

> The law should be meticulously careful to avoid the imposition of conflicting yet inescapable duties on the same person. Nobody should be damned if they do and damned if they do not. Indeed, whenever possible, the law should avoid placing the citizen in a situation in which regard must be had to two competing and legitimate interests, with penalties being imposed if one is favoured above the other.[166]

In our view, the unfairness that can flow from the inherent tension between conflicting duties is an equally appropriate description of the tension between an advocate's duty to the court and to the client. Many of the judgments in *Arthur Hall* were based on the premise that a conflict would rarely arise, or that when it did, would probably not give rise to liability on the part of an advocate.[167] However, these views did not grapple with the fundamental unfairness that two competing duties would present to advocates, or how advocates and the courts would work to resolve these conflicts in a manner that was satisfactory to a client. In our view, this basic unfairness should not be imposed before it is fully considered.

It is worth noting that Harper J declined to hold that a prosecutor should be subject to a duty of care towards an accused, even though a duty would not necessarily be inconsistent with their existing duties.[168] While a prosecutor must press the Crown case as far as possible, this cannot be done in a manner that infringes the accused person's right to a fair trial. Why then, would a duty of care towards an accused person introduce so many difficulties? Harper J accepted that there were many instances in which conflicting duties appeared to coexist comfortably. His Honour gave examples in which one person was granted power over another, and might be required to act contrary to the wishes of that other person whilst also owing them a duty of care, such as prison officials and prisoners, and medical practitioners and mentally ill patients.[169] Harper J did not accept that such examples were analogous to the function of prosecutors because

> in these cases the person in authority has defined, and therefore limited, duties attaching to the office or calling through which the power is derived; and the duties are placed in a hierarchical structure, so that when they are in conflict, choices between them are relatively easy to make. More to the point, the duties attaching to the position do not require those upon whom they are imposed to

[165] (1997) 90 A Crim R 526.
[166] Ibid 545.
[167] See, eg, *Arthur Hall* [2002] 1 AC 615, 681 (Lord Steyn), 693 (Lord Hoffmann).
[168] *Grimwade v Victoria* (1997) 90 A Crim R 526, 545–6.
[169] Ibid 545.

> act in ways which do, or which might, adversely impact upon the very interests which the duty of care is (or, if it existed, would be) designed to protect.[170]

In one sense, the problems identified by Harper J might not arise in the context of advocates' duties, since courts have declared that the advocate's duty to the court clearly prevails over the duty to the client. The far more difficult problem which Harper J identifies is the contradictory nature of the authority and duty of an advocate. His Honour correctly notes that an advocate's duty to the court can adversely impact on the interests of a client. The duty to draw all relevant judicial authorities to the attention of the court, for example, may cause an advocate to highlight a precedent that has a serious adverse effect on the client's case. The corresponding nature of other conflicting duties, such as that which exists between a psychiatrist and their patient, do not carry the same potential of harm to the person to whom the duty is owed. While Harper J was concerned with the position of prosecutors, we believe that the same issues apply to all advocates.

D *The 'Cab Rank' Rule*

While we have discussed the potential conflict that may arise between an advocate's duty to the court and to the client, another important consideration is that an independent bar may also impose certain obligations upon its members. One of the most important is the 'cab rank' principle, under which a barrister must accept a brief that is within their field of expertise and does not conflict with any of their existing commitments.[171] This obligation does not apply to solicitors.[172] In *Giannarelli*,[173] Brennan J explained that the 'cab rank' rule provided an important means of ensuring equality of access to the law. His Honour stated that:

> its observance is essential to the availability of justice according to the law. It is difficult enough to ensure that justice according to law is generally available; it is unacceptable that the privileges of legal representation should be available only according to the predilections of counsel or only on the payment of extravagant fees. If access to legal representation before the courts were dependent on counsel's predilections as to the acceptability of the cause or the munificence of the client, it would be difficult to bring unpopular causes to court and the profession would become the puppet of the powerful. If the cab-rank rule be in decline — and I do not know that it is — it would be the duty of the lead-

[170] Ibid 545–6.

[171] The rule is embodied in the Australian Bar Association, *Advocacy Rules* (2002) r 85 and the rules of individual Bar Associations: see, eg, Victorian Bar, *Rules of Conduct* (2004) rr 86–92. Barristers are bound to decline briefs that may give rise to some form of conflict with the spirit of independence and disinterestedness that the 'cab rank' rules seek to foster. An example is where counsel has advised or settled pleadings for another party: Victorian Bar, *Rules of Conduct* (2004) r 92(h).

[172] Cane suggests that a similar obligation extends to doctors employed by the English National Health System: Cane, above n 3, 236. Cf Australian Medical Association, *Code of Ethics* (2004), which does not contain an obligation that appears directly equivalent to the 'cab rank' rule.

[173] (1988) 165 CLR 543.

> ers of the Bar and of the professional associations to ensure its restoration in full vigour.[174]

In *Arthur Hall*, it was suggested that the 'cab rank' rule did not provide a good reason to support advocates' immunity. Lords Steyn and Hope accepted that the principle was a useful professional rule, but doubted that it had any significant impact on the administration of justice.[175] In particular, Lord Steyn suggested that the rule had lost much of its value since solicitors were now able to appear as advocates, although his Lordship did praise the tradition of the bar in supporting the principle.[176] His Lordship also rejected any suggestion that barristers would refuse to appear on behalf of difficult clients if the immunity was abolished, because advocacy in such circumstances was 'a public duty which advocates perform without regard to such private considerations as personal gain or personal inconvenience.'[177]

In our view, the manner in which Lords Steyn and Hope considered the 'cab rank' rule raised more issues than it resolved. Much of the difficulty comes from the inherent tension in their attempts to both praise and cast aside the rule. If the rule has no significant influence, as their Lordships suggested, it is not clear why they felt compelled to laud its continued operation. More specifically, Lord Steyn's suggestion that advocates would continue to observe the 'cab rank' rule for reasons of honour and public duty creates further difficulties. If the 'cab rank' rule can be explained as a 'public duty' to be discharged in the interests of justice and fairness, surely those who discharge it are (like other participants in judicial proceedings) performing a function for the benefit of the administration of justice? This reasoning strengthens the claim that advocates' immunity can draw support from an analogy with witness immunity.[178]

The suggestion that the 'cab rank' rule is a public duty raises another difficulty. In our view, it is unfair for judicial authorities to abolish advocates' immunity while also insisting that a public duty in the form of the 'cab rank' rule should remain, and be obeyed by advocates for reasons of public interest. To suggest that a barrister can use informal means to evade a potentially difficult client, who may pursue the barrister in negligence if the brief is not satisfactorily resolved, implies that there are difficult clients who may exploit the abolition of the immunity despite Lord Steyn's own assertion to the contrary.[179] It also implies that barristers ought to observe the 'cab rank' rule in form rather than substance.[180] His Lordship inadvertently acknowledged these problems when he suggested that '[i]n real life a barrister has a clerk whose enthusiasm for the unwanted brief may not be great, and he is free to raise the fee within limits.'[181]

174 Ibid 580.
175 [2002] 1 AC 615, 678–9 (Lord Steyn), 714 (Lord Hope).
176 Ibid 714.
177 Ibid.
178 See above Part IV(A).
179 *Arthur Hall* [2002] 1 AC 615, 679, citing Cane, above n 3, 236.
180 Justice Charles has similarly commented that the criticisms of the 'cab rank' rule made by Lord Steyn and various academic commentators greatly undervalue, or even misrepresent, the rule as it applies in Australia: Charles, above n 3, 229.
181 *Arthur Hall* [2002] 1 AC 615, 678. Cane makes the same suggestion: Cane, above n 3, 236.

In our view, this is a poor suggestion resulting from a failure to confront a difficult issue.

The 'cab rank' system remains an important aspect of the fair administration of justice in common law systems that adopt the adversarial system because it enhances access to justice. Judicial officers who suggest that the rule exerts little or no influence over the behaviour of barristers do so without the benefit of evidence from the bar. They also fail to confront the inevitable problems that would arise if the 'cab rank' rule fell into decline. One consequence of the approach taken by Lord Steyn is that, if advocates' immunity is abolished, barristers can and should veto clients on the basis of whether they may be expected to sue. With respect, his Lordship ought to have provided guidance on how the legal system is to deal with clients who are turned away. To take that course would undermine the legal profession, the administration of justice and public confidence in both the legal profession and the justice system.

E *The Immunity Limits Relitigation and Collateral Attack*

Relitigation can seriously erode public confidence in the legal system, because it is wasteful and undermines the original decision. The need to prevent relitigation, or collateral attack, was seen as an important justification in earlier decisions concerning advocates' immunity. In *Giannarelli*, for example, Mason CJ concluded that abolition of the immunity 'would unquestionably encourage litigation by unsuccessful litigants anxious to demonstrate that, but for the negligence of counsel they would have obtained a more favourable outcome'.[182]

In *Arthur Hall*, the House of Lords concluded that the possibility of relitigation was either not significant or could not support the immunity.[183] We will respond to each of the points made in support of this conclusion with a counterargument. First, however, it is worth noting that the reasoning of the House of Lords on the possible impact of collateral challenge was strongly influenced by procedural changes in England and Wales which, in the view of the House of Lords, made it more likely that proceedings that involved a collateral attack could be dismissed at a relatively early stage.[184] Equivalent procedural changes have not occurred in Australia. It follows that the dangers of collateral challenge in Australia cannot be dismissed with the same ease as was done in *Arthur Hall*.

The House of Lords argued that the possibility of relitigation did not extend to cases that did not have a final verdict or judgment.[185] It is true that any attempt to reargue a case that was subject to a final decision or order presents a particularly unacceptable challenge to the authority of the courts and the need for finality in litigation.[186] Another problem is that the duplication resulting from relitigation is

[182] (1988) 165 CLR 543, 558. See also at 573–4 (Wilson J), 594–5 (Dawson J).

[183] The issue was considered in detail by Lord Hoffmann: [2002] 1 AC 615, 698–704.

[184] This is due to amendments to the *Civil Procedure (Amendment) Rules 1999* (UK), amending the *Civil Procedure Rules 1998* (UK). The content of the amendments is not relevant to our analysis.

[185] *Arthur Hall* [2002] 1 AC 615, 679 (Lord Steyn).

[186] Ibid 679 (Lord Steyn), 699–703 (Lord Hoffmann), 715 (Lord Hope), 740–2 (Lord Hobhouse) A very different view was taken by the Ontario Court of Appeal in *Wernikowski v Kirkland, Murphy & Ain* (2000) 181 DLR (4th) 625. The Court held that any damage to the court system that might flow from relitigation was outweighed by the values fostered by allowing cases to pro-

wasteful, and imposes a particularly unfair burden on parties who have already endured the difficulty of a legal proceeding.[187] However, in our view, both problems can arise also in cases that have not been the subject of a verdict or final decision. The inherent waste of relitigation does not arise from the fact that earlier proceedings were concluded, but because the parties undertook preparation in the course of reaching a final determination. In most instances the work involved, and the issues raised, in a proceeding will not vary according to whether the matter is the subject of a verdict or final order after full presentation and argument, or is resolved prior to judgment.

Furthermore, relitigation can also undermine the authority of the legal system even though a case was not subject to a final decision or verdict. Most cases that are not subject to a final judicial decision or jury verdict are discontinued voluntarily, or settled on agreed terms. Some cases may be struck out for want of prosecution. In each instance, a case has been concluded by a legitimate means, often involving the consent of the parties or the failure of one party to adequately pursue its case. In our view, the moral imperative against relitigation is even stronger when the earlier proceedings are halted by the voluntary conduct of the party who seeks to reactivate substantially the same point in later proceedings. An attempt to reargue a decision that was decided against one's will, as arguably occurs when a case is resolved by a jury verdict or a judicial decision, can be understood as a natural instinct to continue a dispute that one believes was not resolved correctly. The same empathy cannot extend to cases that are settled or discontinued by reason of a party's own conduct. Neither the administration of justice nor public confidence in the courts is enhanced by a rule that permits actions for the purposes of re-examining such matters.[188]

The House of Lords also held that evidentiary difficulties arising in relitigation did not present a sufficient reason to decline jurisdiction to hear such claims. Lord Hoffmann suggested that many cases would be resolved quickly due to a lack of evidence, and that this problem would be exacerbated by the passage of time between the original and subsequent litigation. His Honour reasoned that such evidentiary problems would cause many cases to be struck out.[189] We will discuss the practical problems that may arise in actions against advocates below. At present it is sufficient to suggest that evidentiary problems may still exist even if the case is not struck out for lack of evidence. It is probable that the

ceed. Those values included accountability, fairness and professional competence: at 638–9, citing *Demarco v Ungaro* (1979) 95 DLR (3d) 385 (Krever J).

187 *Arthur Hall* [2002] 1 AC 615, 701–3 (Lord Hoffmann, Lords Browne-Wilkinson and Millett agreeing).

188 For this reason, we do not accept the argument of Cane, who asserts that it is anomalous and unfair that the policy against relitigation can be invoked to prevent an action against a decision that has not been the subject of a decision in the formal sense: Cane, above n 3, 236. We acknowledge that, strictly speaking, it is possible in some circumstances to relitigate proceedings that have been settled — for example where a practitioner has settled a matter without authority from the client. This is normally done by a separate action that seeks to undo the judgment and the settlement that lies behind it. Fraud by an opposing party is also a common reason to relitigate a settled proceeding. We would suggest that the reversal of such cases does not represent relitigation because the original proceeding was not discontinued by the voluntary and informed conduct of the party.

189 *Arthur Hall* [2002] 1 AC 615, 699.

nature of litigation would provide a sufficiently detailed documentary record to survive for some time. Tapes of proceedings, for example, are normally stored for at least a decade even if they are not transcribed. Evidentiary difficulties are more likely to arise from the differing interpretations placed on such material. In our view, it is unlikely that such claims could be struck out as easily as implied by Lord Hoffmann. This is particularly so because in most Australian jurisdictions, the test for deciding whether a case should be struck out is more onerous than that in the United Kingdom, requiring the plaintiff's claim to be hopeless and bound to fail.[190] As every practitioner knows, claims which may well fail at trial are often sustainable at an interlocutory level by the construction of finely balanced arguments, and it is difficult to accept that such claims could be struck out easily.

Lord Hoffmann accorded greater weight to the general danger that relitigation presented to the *credibility* of the legal system. His Honour noted that the legal system strongly discouraged relitigation by any means other than appeal.[191] More particularly, the inherent power of courts enables them to strike out a case that constitutes relitigation if it would be unfair to one party to allow the case to proceed, or the case would amount to nothing more than a collateral challenge upon the final decision of another court.[192] However, this rule does not prohibit relitigation, but merely indicates the instances in which the inherent power of the court may be used to halt relitigation.[193] Lord Hobhouse noted that the leading case of *Hunter v Chief Constable of the West Midlands Police*[194] concerned an action by a disaffected defendant against the police rather than his lawyers.[195] His Lordship suggested that the matter could have proceeded in the form of an action in negligence against the defendant's lawyers, even if to impugn an earlier verdict.[196] There is one misconception arising from this explanation of *Hunter* that should firstly be clarified. It would not have been appropriate for Hunter to sue his legal advisers since his complaint concerned misconduct on the part of the police; however it may have been appropriate for Hunter to consider joining the prosecution lawyers in any subsequent legal proceedings.[197] While Hunter's claim against the police was rejected as an abuse of process, his allegations were later proved to be completely correct.[198]

[190] See, eg, *Dey v Victorian Railway Commissioners* (1949) 78 CLR 62, 90–1 (Dixon J); *Wentworth v Rogers [No 5]* (1986) 6 NSWLR 534; *David v Commonwealth* (1986) 68 ALR 18.

[191] *Arthur Hall* [2002] 1 AC 615, 701.

[192] Ibid 702–3, citing *Hunter* [1982] AC 529.

[193] Ibid 703, citing *Walpole v Partridge & Wilson* [1994] QB 106.

[194] [1982] AC 529.

[195] Hunter was one of the 'Birmingham Six', all of whom were convicted of an IRA bombing. The convictions of all defendants were later quashed after evidence of significant police misconduct was uncovered: *McIlkenny v The Queen* [1992] 2 All ER 417.

[196] *Arthur Hall* [2002] 1 AC 615, 742–3, 750–2.

[197] In Hunter's case, he might have joined the prosecution lawyers, on the basis that the somewhat implausible nature of some of the police evidence should have concerned the prosecution lawyers. Any such claim would have faced great difficulty as there was no evidence to suggest that the prosecution lawyers were aware of the irregularities that arose in the collection of evidence or behaved improperly during trial.

[198] We do not intend to comment on the prosecution lawyers who acted in Hunter's trial, but rather the wider problem in England that arose during the 1970s and 1980s from the systematic crea-

We believe that any consideration of whether the legal system includes sufficient mechanisms to detect and strike out relitigation at an early stage raises many difficult issues. Lord Hoffmann conceded this much when he accepted that the abolition of advocates' immunity would lead to more cases that clarified the limits of the abuse of process doctrine established in *Hunter*.[199] His Lordship also accepted that it was difficult to derive clear guidance from the abuse of process doctrine to guide the speedy resolution of other cases, because power to strike out relitigation cases as an abuse of process was 'peculiarly a matter of judicial application to the facts of each case.'[200] Lord Hoffmann did, however, provide some guidance on the issue. The question whether a claim involving collateral review of an earlier case amounted to an abuse of process would not depend on the weight given to the judgment of the court. It would normally be very difficult to prove that a different result could have been achieved for reasons alleged in a new claim. A more likely claim would be one alleging that a better result could have been achieved if better advice had been given. Lord Hoffmann concluded that such cases did not involve an attack on the judicial process, and ought to be allowed to proceed if the plaintiff had a real prospect of success.[201]

Lord Hoffmann's explanation of the principles governing the exercise of the power to strike out cases that raise relitigation issues does not dispel the particular form of relitigation that could arise with the abolition of advocates' immunity. As Mason CJ noted, some clients would be likely to say that, while another advocate may not have been able to change the result of a case, a better advocate could have achieved a more favourable outcome.[202] Perhaps an award of damages would have been higher, or the non-parole period of a sentence would have been somewhat shorter. This last point highlights a significant problem with the issue of collateral attack cases. Virtually all judicial and academic discussion of relitigation assumes that a plaintiff would seek to indirectly reopen a previously argued case, with a view to questioning the original result.[203] In our view, this conception of relitigation is unduly narrow, since in many instances a client may be equally aggrieved about the terms of a decision as the decision itself.

Cases that have not been through a hearing would also present more difficult evidentiary problems, because there would be significantly less evidence available in a convenient form to the parties. In particular, such cases would lack a transcript of proceedings, information contained in the examination and cross-

tion of false evidence by police, exacerbated by an uncritical acceptance of such evidence by prosecutors, courts and jurors. The House of Lords has belatedly acknowledged the systemic nature of this problem: see, eg, *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115.

199 [1982] AC 529.

200 *Arthur Hall* [2002] 1 AC 615, 705.

201 Ibid 705–6.

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

203 See, eg, Goudkamp, above n 3, 195–6; Charles, above n 3, 235–7. In *Arthur Hall* [2002] 1 AC 615, Lord Hoffmann gave the example of a defendant who might sue his lawyer for negligence and gain an award of damages, whilst remaining in prison: at 687. One exception is Cane, who believes that the collateral challenge argument is only relevant to cases in which there was no settlement. He does not discuss in any detail the differences or difficulties that such cases might present: Cane, above n 3, 236–7.

examination of witnesses, oral arguments, and comments by a presiding judge. In the absence of such material it is difficult to accept that claims of negligence could be struck out easily, or at an early stage, if the claimant alleged that the deficiencies in evidence were due to the decision of an advocate to refrain from collecting or analysing evidence.[204]

F *Other Sanctions Apply to Advocates*

1 *Sanctions from the Profession and Professional Regulatory Bodies*

Advocates are, like all other legal practitioners, subject to a regime of professional regulation. Disciplinary bodies may penalise, strike off, suspend, reprimand or fine a practitioner.[205] All legal practitioners are amenable to the jurisdiction of statutory regulatory bodies.[206] In most cases they are also amenable to regulation by either a Bar Association or a Law Society. It is well-settled that professional disciplinary schemes are intended to operate in the public interest, by protecting the public from misconduct by legal practitioners.[207] Disciplinary schemes also serve to maintain appropriate standards of professional behaviour among lawyers by imposing sanctions upon inappropriate conduct and providing guidance to other practitioners.[208] Furthermore, practitioners are normally prosecuted for disciplinary offences of a general nature, such as unprofessional conduct or professional misconduct. A range of conduct may warrant disciplinary proceedings, including the general duty of a legal practitioner to be reasonably competent in the practice of law.[209]

2 *Sanctions from the Court*

The Supreme Courts of each state and territory possess an inherent jurisdiction over the legal practitioners who are admitted in their particular jurisdiction.[210]

[204] We exclude potential actions over cases that have been settled but are subsequently subject to dispute, as described previously: see above n 188. In such cases, any evidentiary disputes would not be over the evidence presented in the substantive case but rather evidence of the acts alleged to have led to the inappropriate conclusion of the case, such as evidence that a settlement was made without authority of the client or that it was tainted by fraud.

[205] The disciplinary proceedings of professional legal bodies and statutory legal regulators that apply to all Australian jurisdictions, and the differing considerations for each of the various penalties, are explained in dal Pont, above n 160, 587–622.

[206] The jurisdiction of the various legal regulatory bodies of Australia is explained in ibid 597–638.

[207] See, eg, *Weaver v Law Society of New South Wales* (1979) 142 CLR 201, 207 (Mason J); *A-G (NT) v Legal Practitioner* (1981) 10 NTR 7, 21 (Forster CJ, Muirhead and Gallop JJ); *Smith v New South Wales Bar Association* (1992) 176 CLR 256, 270 (Deane J).

[208] See, eg, *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279, 286 (Dixon CJ); *A-G (NT) v Legal Practitioner* (1981) 10 NTR 7, 21 (Forster CJ, Muirhead and Gallop JJ).

[209] The description of this widely neglected principle is taken from dal Pont: above n 160, 77–81. Dal Pont notes that the main difficulty with a duty of professional competence is that competence lies in the eye of the beholder. It could also be added that what makes this external assessment so difficult is that the beholder is often a layperson who is attempting to assess another person's professional conduct and judgement.

[210] See, eg, *Weaver v Law Society of New South Wales* (1979) 142 CLR 201, 207 (Mason J); *Wentworth v Law Society of New South Wales* (1992) 176 CLR 239, 250–2 (Deane, Dawson Toohey and Gaudron JJ). In *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* (1998) 156 ALR 169 ('*White Industries*'), Goldberg J explained that the Federal Court also possessed this jurisdiction, even though it did not maintain a roll of practitioners or have jurisdiction to strike

This jurisdiction enables courts to impose a range of sanctions upon a practitioner, such as reprimanding them, suspending them or striking them off the roll.[211] These sanctions are commonly viewed as powers of last resort, particularly when legal practitioners may also be subject to statutory disciplinary proceedings.[212] Those proceedings do not, however, detract from the general power of courts to impose sanctions against a practitioner who has breached a duty owed to the court. It may in fact be more appropriate that the court remedy the breach of any duty owed to it by a practitioner, rather than refer the matter to a statutory disciplinary tribunal, in order to remove the potential difficulties that could arise if a judicial officer acted as the complainant before a statutory tribunal.[213]

One potential means by which a court may enforce appropriate standards of advocacy is the award of costs against practitioners. Orders of this nature may counteract a problem that could arise whether or not advocates' immunity exists. In *Arthur Hall*, counsel for the defendants submitted that removal of the immunity would lead to 'defensive lawyering', so that an advocate might make every possible point when he or she might otherwise be willing to concede some weaker points.[214] Lord Hoffmann rejected this argument, largely because courts had developed an appropriate range of remedies to prevent the apparently small amount of defensive lawyering that already occurred.[215] In particular, English courts are expressly empowered to make wasted costs orders against legal practitioners.[216] In *Ridehalgh v Horsefield*,[217] the first English case in which a

off practitioners, as the jurisdiction was based on the Court's general power to enforce duties owed by practitioners to the Court: at 229.

211 Which remedy is suitable depends on the extent of the inappropriate or unprofessional conduct or misconduct. On these differing standards, see *Re Nelson and the Legal Practitioners Act 1970* (1991) 106 ACTR 1, 25 (Higgins and Foster JJ) (reprimand); *Re a Practitioner* (1984) 36 SASR 590, 593 (King CJ) (suspension); *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279, 298–300 (Kitto J) (striking off); *Re Maraj (A Legal Practitioner)* (1995) 15 WAR 12, 25 (Malcolm CJ) (striking off). Courts may also penalise practitioners for contempt, although this power is not limited to legal practitioners. On the principles governing contempt, see *A-G (UK) v Times Newspapers Ltd* [1974] AC 273, 309 (Lord Diplock) and *Australian Meat Industry Employees Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98, 106–9 (Gibbs CJ, Mason, Wilson and Deane JJ).

212 These procedures are contained in: *Legal Practitioners Act 1893* (WA); *Queensland Law Society Act 1952* (Qld); *Legal Practitioners Act 1970* (ACT); *Legal Practitioners Act 1974* (NT); *Legal Practitioners Act 1981* (SA); *Legal Profession Act 1987* (NSW); *Legal Profession Act 1993* (Tas); *Legal Practice Act 1996* (Vic).

213 Those difficulties mainly relate to the potential embarrassment that a judge would face in acting as a complainant before a statutory tribunal. For example, if the judge was required to provide evidence or lead submissions about the conduct of the practitioner in question, he or she might be required to express an opinion on decided cases, or perhaps also the competence of the practitioner compared to others. Any public expression of views by a judge on the competence of a practitioner could be invoked as a reason for the judge to stand aside from future proceedings concerning the practitioner, on the ground that the views expressed could give rise to a reasonable apprehension of bias on the part of the judge. The very decision of a judge to prefer disciplinary proceedings could be seen to give rise to such an apprehension. It could also be suggested that a judge who prefers disciplinary charges which are not found to be proved could face questions about his or her own judgment.

214 [2002] 1 AC 615, 693.

215 Ibid.

216 *Supreme Court Act 1981* (UK) c 54, s 51. This power was introduced in 1990 as part of more general reforms effected in the *Courts and Legal Services Act 1990* (UK) c 41, s 4.

217 [1994] Ch 205. This case was recently approved by the House of Lords in *Medcalf v Mardell* [2003] 1 AC 120.

court considered making an order against an advocate, the Bar Council of England submitted that advocates' immunity would be undermined if this power could be exercised against barristers. The Court of Appeal flatly rejected the submission. In *Arthur Hall*, the House of Lords noted that the decision had apparently 'not been detrimental to the functioning of the court system or indeed the interests of the Bar.'[218]

Remedies of this nature are available in all Australian jurisdictions. The inherent jurisdiction of courts over both legal practitioner and legal proceedings enables courts to order an award of costs against a legal practitioner if the lawyer has incurred the costs improperly, without reasonable cause, by reason of undue delay, or by some other form of default.[219] Three recent decisions concerning the power to award costs against legal practitioners suggest that this jurisdiction enables courts to regulate the standard of advocacy and punish negligent advocacy.

In *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)*,[220] Goldberg J concluded that orders against legal practitioners could be made for several reasons, including cases where the practitioner was guilty of 'a serious dereliction of duty or serious misconduct in promoting the cause of and the proper administration of justice.'[221] After reviewing the relevant law, his Honour held that this test could be satisfied if a practitioner failed to give reasonable or proper attention to the relevant facts or law.[222] On this view, an award of costs can provide a de facto means of regulating the conduct of legal practitioners, because it enables courts to provide some compensation to the client where the conduct of a legal practitioner falls significantly below the standard which both the court and the client have a right to expect.

In *Harley v McDonald*,[223] the Privy Council overturned an award of costs made against a firm of solicitors after the trial judge found that the case was hopeless and should not have been maintained.[224] Three aspects of the reasoning

218 [2002] 1 AC 615, 678 (Lord Steyn).

219 For a survey of the statute and judicial law of all Australian jurisdictions see dal Pont, above n 160, 374–9. A particular instance is r 63.23 of the *Supreme Court (General Civil Procedure) Rules 1996* (Vic).

220 (1998) 156 ALR 169; aff'd (1999) 87 FCR 134.

221 *White Industries* (1998) 156 ALR 169, 239.

222 Ibid. *White Industries* involved an allegation that solicitors had commenced and continued an action knowing that the action had no prospect of success. Goldberg J held that where such conduct was unreasonable, the jurisdiction to award costs against a practitioner would be enlivened.

223 [2001] 2 AC 678.

224 Harley invested money with a firm of solicitors. Upon the liquidation of the firm, he successfully sued but was not paid because the partners were declared bankrupt. Harley then sued the firm's professional insurers and later joined the New Zealand Law Society as defendants. The trial judge dismissed the claim against the insurers, but found for Harley against the Law Society. The judge held that the proceedings against the insurers were utterly hopeless and should not have been maintained. He held that his remarks to this effect during an interlocutory ruling should have alerted Harley's legal advisers to consider carefully whether to maintain the proceeding: *McDonald v FAI (NZ) General Insurance Co Ltd* [1999] 1 NZLR 583, 587 (Giles J). The trial judge ordered Harley's barrister and solicitor to pay a significant part of Harley's costs on the basis that they had been guilty of negligence and dereliction of their duty to the court in pursuing such a hopeless case: at 594–5. This order was upheld by the Court of Appeal of New Zealand: *Harley v McDonald* [1999] 3 NZLR 545.

of the Privy Council are relevant to advocates' immunity. First, the Privy Council held that any policy considerations that might be invoked to support advocates' immunity did not operate to prevent a court from awarding costs against an advocate in an appropriate case,[225] because any possible immunity from liability was related to the advocate's duty to the client, while the potential liability for an award of costs arose from an advocate's duty to the court.

Secondly, the advocate's duty to the court gave rise to a further important finding that the power of the court to make an order of costs against a practitioner arose from the inherent jurisdiction of the court, and was one that should be exercised in the public interest. The Privy Council explained that the jurisdiction

> rests upon the principle that, as officers of the court, [practitioners] owe a duty to the court, while the court for its part has a duty to ensure that its officers achieve and maintain an appropriate professional level of competence and do not abuse the court's process. The court's duty is founded in the public interest that the procedures of the court to which litigants and others are subjected are conducted by its officers as economically and efficiently as possible.[226]

In our view, this passage acknowledges that the jurisdiction of superior courts to supervise the duties owed by practitioners casts a corresponding duty upon courts to enforce those duties. The Privy Council held that this jurisdiction should be exercised in cases where a practitioner has been guilty of a serious dereliction of duty to the court[227] — for example, commencing or maintaining a proceeding that a reasonably competent practitioner ought to have known had no prospect of success. More particularly, the Privy Council reasoned that an order of costs against a practitioner was a sanction imposed by the court, and should be crafted in a manner that enabled the court to provide some form of compensation for the litigant who suffered by reason of the practitioner's behaviour.[228] While any order would be expressed in compensatory terms, it would also serve a punitive purpose to the practitioner.[229]

Thirdly, it is important to note that the standard of behaviour that the Privy Council would qualify as a 'serious dereliction' for the purposes of an award of costs was not unlike that which the House of Lords thought would support a finding of negligence against a practitioner in *Arthur Hall*.[230] The Privy Council accepted that a simple mistake, oversight or error of judgement would not be

225 *Harley v McDonald* [2001] 2 AC 678, 701. The Privy Council pointedly declined to consider whether *Arthur Hall* had the effect of removing the immunity in New Zealand. Their Lordships stated that they 'would wish to have the advantage of judgments of the courts in New Zealand before expressing any opinion' on this point: at 701.

226 Ibid 701–2. While the case involved the role of solicitors as officers of the court and their potential liability to an award of costs, the Privy Council expressly held that the same reasoning applied to barristers: at 702. Although the Privy Council was examining the position of practitioners before the High Court of New Zealand, in our view its remarks are of general application to any superior court. Justice David Ipp also seems to favour the view that the jurisdiction of courts to enforce duties owed to it by lawyers does not distinguish between barristers and solicitors: Justice David Ipp, 'Lawyers' Duties to the Court' (1988) 114 *Law Quarterly Review* 63, 66–7. In our view, the award of costs against lawyers is but one example.

227 *Harley v McDonald* [2001] 2 AC 678, 702–3.

228 Ibid 703.

229 Ibid, citing *Myers v Elman* [1940] AC 282, 319 (Lord Wright).

230 [2002] 1 AC 615.

sufficient.[231] While the Privy Council pointedly declined to adopt a precise standard of behaviour, it accepted that a serious dereliction of duty or gross negligence would clearly be sufficient, and that lesser behaviour might also suffice.[232] As the Privy Council explained, '[t]he essential point is that it is not errors of judgment that attract the exercise of the jurisdiction, but errors of a duty owed to the court.'[233]

The Victorian Court of Appeal adopted similar reasoning in *Etna v Arif*.[234] In that case, the Court held that an award of costs against a legal practitioner was within the Court's disciplinary jurisdiction, even though the main function of the order was to compensate the litigant.[235] The Court also held that the power to award costs was supplementary to the general jurisdiction that courts held over legal practitioners which is expressly preserved by s 172 of the *Legal Practice Act 1996* (Vic).[236] The Court of Appeal concluded that the relevant Victorian rule enabled the court to award costs where a legal practitioner had been guilty of gross negligence or unprofessional conduct, rather than 'ordinary' or 'mere' negligence.[237] While this finding was based largely on the history and language of the rule in question, the Court was also influenced by the view that the jurisdiction to award costs for disciplinary purposes should reflect the same high standard required for other sanctions imposed for disciplinary reasons.[238]

The relevant rule has since been amended to enable an award to be made against a practitioner who fails 'to act with the competence reasonably to be expected of ordinary members of the profession.'[239] This amendment clearly removes the high standard of negligence required by *Etna*,[240] and, in our view, restores the ability of courts to correct professional negligence by practitioners. The reasoning in *Etna* complicated the determination of awards of costs against

231 *Harley v McDonald* [2001] 2 AC 678, 704.

232 Ibid 705.

233 Ibid 706. The Privy Council explained elsewhere that there was no rule that 'mere' negligence could not support an adverse award of costs, and that such conduct 'must be put in its proper context': at 705, citing *Myers v Elman* [1940] AC 282, 319 (Lord Wright). See also *Steindl Nominees Pty Ltd v Laghaifar* [2003] 1 Qd R 683.

234 [1999] 2 VR 353 ('*Etna*'). The alleged negligence comprised the solicitor's failure to examine several key attachments to an affidavit. The trial judge held that had the solicitors read the documents, they would have realised that key assertions in the affidavit were untenable. The Court of Appeal held that this did not constitute gross negligence, essentially because the affidavit was required to be filed urgently, and there was clearly insufficient time to read the documents: at 386 (Batt JA).

235 Ibid 379 (Batt JA). The power is contained in *Supreme Court (General Civil Procedure) Rules 1996* (Vic) r 63.23(1).

236 Ibid 385 (Batt JA). The regulatory statutes of other jurisdictions contain similar provisions to generally preserve the jurisdiction of the Supreme Court. See, eg, *Legal Practitioners Act 1893* (WA) s 31H; *Legal Profession Act 1987* (NSW) s 171M.

237 *Etna* [1999] 2 VR 353, 383 (Batt JA).

238 Ibid 383–6 (Batt JA).

239 Ibid 395. The amendment was effected by the *Supreme Court (Chapter I Amendment No 12) Rules 2000* (Vic) s 4.

240 *Guss v Geelong Building Society (in liq)* [2001] VSC 299 (Unreported, Ashley J, 20 February 2001) [13].

lawyers in an unnecessary and undesirable manner, and should not be adopted by other courts.[241]

The jurisdiction to make an award of costs against a practitioner is only one aspect of the supervisory jurisdiction that courts may exercise over legal practitioners; however it does provide aggrieved clients with a remedy containing many benefits that are absent in a separate action for negligence. First, a client is not required to institute an entirely separate proceeding for an application for costs, as this can be made at the conclusion of an existing proceeding. Secondly, such applications are heard by the judge who presided over the case in which the practitioner is alleged to have acted in a manner that warrants an award of costs, thereby removing the need to reargue most points of fact. Thirdly, the expeditious manner in which judges normally dispose of costs applications ensures that clients who have a grievance about the behaviour of their advocate are subjected to as little further litigation as possible.

There are, of course, many practical problems associated with the wasted costs jurisdiction. The most obvious, which we mention without any easy solution, is how this jurisdiction may be exercised when the party who might benefit from such an order is still represented by the 'guilty' practitioner. Since the court normally only exercises this jurisdiction when it sees incompetence leading to unnecessary costs, it is difficult, if not impossible, for a party to make an application for costs without forcing the immediate withdrawal of his or her lawyers. The disruption caused to a case by such a withdrawal, albeit that of an incompetent lawyer, strongly discourages parties from invoking the jurisdiction at the earliest possible time. In our view, however, such problems are outweighed by the benefits of the wasted costs jurisdiction which suggest that it provides a particularly useful means of granting redress for negligent and inappropriate conduct by legal practitioners.[242]

G *How Could an Action in Negligence Be Determined?*

Almost all of the discussions of the difficulties associated with claims in negligence against advocates mention, in passing, the potential evidentiary difficulties that would arise in such cases.[243] Several of the judgments in *Giannarelli* and *Arthur Hall* refer to particular problems that could arise in legal proceedings against advocates, such as the difficulty in gathering evidence or establishing a clear understanding of negligence in the context of advocacy.[244] In *Arthur Hall*, no member of the House of Lords concluded that the potential practical problems in negligence claims against advocates were sufficient to

241 But see *Steindl Nominees Pty Ltd v Laghaifar* [2003] 1 Qd R 683, where it was suggested that, in view of the serious implications involved in any award of costs against an advocate, the claim must be clearly proved and the advocate was entitled to the benefit of any doubt that might be present on the facts: at 692–3 (Williams JA, Philippides J agreeing).

242 Justice Charles takes a quite different view. He suggests that an order for wasted costs 'adds only a further conflicting tension to the advocate's already divided loyalty': Charles, above n 3, 222.

243 See, eg, the grounds for which Lord Steyn concluded it would not be easy to establish a claim of negligence against a barrister: *Arthur Hall* [2002] 1 AC 615, 681–2.

244 See, eg, *Arthur Hall* [2002] 1 AC 615, 698–9 (Lord Hoffmann).

warrant caution in the abolition of the immunity, although the issue was not considered in detail.

Several important issues regarding the determination of claims against advocates remain to be settled. The most contentious is the evidence that may be called by each party. As a matter of principle, parties should be able to rely upon all relevant evidence. In a negligence action against an advocate, this rule would naturally enable the parties to call the advocates who appeared in the earlier case, most documentary evidence[245] and the transcript of proceedings. But such evidence will provide only a partial insight into the conduct of the earlier proceeding. There must also be an assessment of the judgement exercised by an advocate and the effect of the decisions made by the advocate. In other words, a subsequent court must appraise an advocate's performance, the wisdom of the advocate's decision and the context within which those decisions were made.[246] Such evidence raises a difficult issue for judges. The judge who presided over the earlier proceedings would certainly have been well placed, and perhaps uniquely placed, to assess the judgement of the participants. In addition, judges may also draw upon their experience as former practitioners of high standing.[247]

We believe there are sound reasons of principle why judges should be competent, and perhaps even compellable, witnesses in such cases. The problems for judges are of both principle and practice. The theoretical problem lies in the difficulty of judges suggesting that advocates be treated like all other professionals, largely because working within the judicial system does not itself provide any reason for special treatment, while declining to apply this principle to themselves. This is ultimately a moral problem, which must be faced by judges. If judges support the abolition of the immunity partly on the basis that advocates should be treated like other professional people, it would be anomalous if they did so while also supporting a testimonial immunity for themselves. This approach would also run counter to many clear judicial statements to the contrary.[248]

There are several practical considerations that can be used to counter the inevitable suggestions that it would be inappropriate to call judicial officers as witnesses.[249] First, there is no possibility that a judge would face any civil

245 Material held by the other party to the original proceeding would be likely to include documents subject to legal professional privilege, though the other party may waive privilege.

246 This appears to be the best explanation of Lord Steyn's suggestion that 'it will not be easy to establish negligence against a barrister. The courts can be trusted to differentiate between errors of judgment and true negligence': *Arthur Hall* [2002] 1 AC 615, 682.

247 This would also be the case if the test favoured by Yeo was adopted: Yeo, above n 3. Yeo suggests that advocates could be subject to a standard of care determined by reference to 'a practice accepted ... as permissible by a responsible body of barristerial opinion even though other barristers may adopt a different practice': at 14. The experience and standing of judges would be relevant to the evidence required to administer such a standard of care.

248 See, eg, *Darker* [2001] 1 AC 435, 457 (Lord Clyde).

249 Justice Charles simply argues that it would be contrary to public policy to allow judges to be called as witnesses: Charles, above n 3, 236. In our view, this assertion would have to be reconsidered by the High Court if it chose to abolish advocates' immunity. If the High Court accepts that public policy provides a sound reason why judges cannot be called, we argue that the Court would be compelled to provide clear reasons for this.

liability.[250] Accordingly, it could not be suggested that the fear of providing evidence in a subsequent civil proceeding against parties other than the judge could inhibit a judge from discharging his or her judicial duties. Secondly, a judge could provide a uniquely informed opinion about the earlier proceeding and the standard of advocacy. Justice requires that parties should be able to rely on the best evidence available,[251] and this principle should extend to evidence from presiding judicial officers.[252] Thirdly, a judge would breach no confidence by providing his or her opinion on proceedings that were conducted in public, since he or she would simply be commenting on matters that had occurred in the public domain. Fourthly, the evidence of a judge could expedite cases involving negligent advocacy. The uniquely informed position of a judge could clarify issues between the parties and before the subsequent court, which would save considerable time and resources. In addition, it cannot realistically be suggested that judges would be intimidated or adversely affected by any requirement to give evidence, or lack the knowledge and ability to provide useful evidence or withstand the rigours of providing evidence. A person who presides over legal proceedings should be able to withstand the pressures of legal proceedings better than most.[253]

The final consideration is perhaps the most awkward for judges. In *Arthur Hall*, several of their Lordships drew upon their own experience or personal impressions to draw conclusions on how cases involving allegations of negligent advocacy might proceed.[254] While it is no longer controversial to suggest that judges draw from their experience and personal views in the formation of judicial law, such reliance raises a special problem when judges are dealing with potential litigation involving advocates. It is very difficult to accept that judges can rely upon their own expertise to reject the practical problems that might arise in litigation due to the abolition of advocates' immunity without also accepting that judges should be available to apply that same expertise to cases over which they have presided.

Perhaps the most forceful argument to compel the appearance of judges was provided by the House of Lords itself. Only seven days after the *Arthur Hall* decision was delivered, the House of Lords unanimously affirmed that witnesses were generally immune from any civil liability based upon their testimony.[255] Lord Clyde explained that '[t]hose engaged in the judicial process should be

250 On judicial immunity, see above Part IV(A).

251 At this point we assume that the opinion of the judge could be admissible as a 'fact' that was relevant to a subsequent case. This point would depend on the many circumstances of each case.

252 Importantly, this principle would not enable judges to be compelled to give evidence in cases in which they had no involvement. There is authority that a court will not compel an expert witness to give evidence against his or her will if the expert has no connection with the case: *Application of Forsyth; Re Cordova v Philips Roxane Laboratories Inc* (1984) 2 NSWLR 327, 335.

253 There is also the additional problem of how the opinion and reasoning of a judge could be presented and considered by a subsequent judge and/or jury. We offer no solution to this problem, but note that it would involve considerable forensic difficulty.

254 See, eg, *Arthur Hall* [2002] 1 AC 615, 680 (Lord Steyn).

255 *Darker* [2001] 1 AC 435. The House of Lords held that an allegation that witnesses had fabricated evidence would not be protected because the fabrication, if true, was comprised of a conspiracy that was commenced well before any evidence was given. The House of Lords held that the immunity did not extend to protect evidence given in the course of that conspiracy.

under no restraint from saying what has to be said and doing what has to be done for the proper conduct of that process.'[256] This rule surely cannot exclude judicial officers.

H *Considerations for Criminal Proceedings*

In *Arthur Hall*, the majority also held that the immunity should be abolished for criminal proceedings, essentially for the same reasons invoked to abolish the immunity for civil proceedings.[257] The majority assumed that any right of action would only be available once a conviction had been overturned. Their Lordships also affirmed existing law that prosecuting counsel owed no duty of care to an accused.[258] These findings essentially suggest that a defendant might be able to sue his or her advocate if a conviction was never valid, but never the prosecutor.

The minority concluded that criminal proceedings were sufficiently different from civil proceedings to warrant retention of the immunity in the criminal context.[259] Lord Hutton identified two public policy reasons why advocates involved in criminal proceedings should not face liability in negligence. First, an advocate should be protected so that he or she may not be influenced by the fear of litigation.[260] Secondly, it is inappropriate that any person performing a public duty such as advocacy in a criminal proceeding might be 'vexed by an unmeritorious action and that such an action should be summarily struck out.'[261] Lord Hutton drew a close parallel between the functions performed by judges and prosecutors in criminal proceedings.[262] His Lordship concluded that the need to protect advocates against vexatious litigation was markedly stronger in criminal proceedings, while the potential avenues to stymie such litigation might not be as effective as they would be in civil proceedings.[263]

In our view, granting defendants the right to sue their advocates once their conviction has been overturned provides an inadequate and ad hoc form of redress. This criticism arises from the various reasons why a conviction may be overturned. Inaccurate evidence may be reviewed and either corrected by public investigators, or successfully challenged by an accused person. Misconduct by investigating officials or prosecutors may be uncovered and established. Negligence by the advocate of an accused person may also be uncovered, although it is usually alleged in conjunction with another reason. The common theme is that

256 Ibid 457. See also the similar statement by Rich ACJ in *Cabassi v Vila* (1940) 64 CLR 130, 139.

257 Lord Steyn also drew on his own experience on the Northern Circuit and as the member of the Criminal Division of the Court of Appeal: [2002] 1 AC 615, 680.

258 Ibid 679 (Lord Steyn), 747 (Lord Hobhouse). Lord Browne-Wilkinson agreed with Lord Steyn: at 684.

259 Ibid 717–25 (Lord Hope), 730–5 (Lord Hutton), 745–52 (Lord Hobhouse). Lord Hutton also suggested that retaining the immunity for criminal proceedings would not breach the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953): at 734.

260 *Arthur Hall* [2002] 1 AC 615, 731. Similar considerations exerted a strong influence over Laurenson J in *Lai v Chamberlains* [2003] 2 NZLR 374, 397–400.

261 *Arthur Hall* [2002] 1 AC 615, 731.

262 Ibid 732–3.

263 His Lordship also concluded that maintenance of the immunity for criminal proceedings would not violate European law: ibid 734.

an accused person has been the victim of a grave injustice. The main problem is that the justice system itself has erred. The source of the error is less important than the need to quash an erroneous conviction or the need to compensate the defendant.

The suggestion of the majority of the House of Lords that the immunity for criminal proceedings be abolished only after a conviction had been overturned involves a very narrow conception of the circumstances in which an allegation of negligence may arise in a criminal trial. There are many circumstances where an allegation of negligence could be made against an advocate that is not related to the conviction itself. A defendant may not seek to overturn his or her conviction because the sentence has been served, or the procedure for a special appeal is simply too arduous. The latter is a particularly important factor if the defendant must endure this process before he or she can even commence an action in negligence. It is also possible that a defendant may accept the soundness of a conviction but still claim negligence. For example, a defendant could admit that he or she was guilty of homicide but argue that he or she should have been convicted of manslaughter rather than murder. A defendant could also concede that he or she was convicted of an appropriate crime, but received an unduly severe sentence by reason of the negligence of counsel. Such instances would provide an aggrieved defendant with a good reason to pursue legal action if the complaint was well-founded.

In each example it is *possible* for a defendant to have suffered significant damage as a result of negligent advocacy. There is no compelling reason to limit any right of action against advocates simply on the basis of whether a defendant's conviction remains. Lord Hoffmann accepted this point in relation to civil proceedings, when his Lordship acknowledged that claims which alleged that a better outcome could have been achieved but for the negligence of the advocate did not necessarily involve an attack on the judicial process and, therefore, could not be struck out as an abuse of process.[264] In our view, there is no justification to limit this reasoning to civil proceedings.

Negligence on the part of defence counsel is only one of several means by which a person may suffer damage, yet, according to the majority of the House of Lords, it is one of the few avenues for which a right of action is available, as prosecutorial and judicial negligence provide no right of action.[265] Past cases suggest that any legal action against the police is strenuously defended.[266] It is difficult to justify any finding of law that grants a defendant a right of action against only some of the potential sources of an incorrect conviction. It would be more appropriate to compensate *all* defendants on a no fault basis. This would be an important benefit to persons who were the victim of flawed proceedings. Any allegations of negligence or misconduct ought to be the subject of separate professional disciplinary proceedings.

264 Ibid 705.

265 See above Part IV(A).

266 See, eg, the strong defence of the police mounted to proceedings commenced as a result of a raid on a nightclub, as discussed in Ian Freckleton, 'Suing the Police: The Moral of the Disappointing Morsel' (1996) 21 *Alternative Law Journal* 173.

V IS A DUTY OF CARE APPROPRIATE?

In an illuminating passage in *Arthur Hall*, Lord Hoffmann explained that the immunities granted to judicial officers were of no relevance to advocates because:

> The judge owes no duty of care to either of the parties. He has only a public duty to administer justice in accordance with his oath. 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.[267]

In our view, this passage does not correctly state the basis for the liability of advocates in negligence. Any possible liability exists as a result of its creation by judicial officers, as does the judicial immunity from liability. Duties of care are not undertaken, they are imposed.[268] Lord Hoffmann attempted to expand the scope of that immunity by asserting that judges also do not owe a duty of care to parties appearing before them. While the wisdom of that assertion, for which his Lordship offered no authority, lies beyond the scope of this article, it does emphasise how both the existence and character of any duty of care are dependent upon conscious judicial decisions to create and regulate a duty. It is, therefore, appropriate to ask whether a duty of care is an appropriate device by which the functions and duties of an advocate may be conceived and enforced.

Gaudron J hinted at this issue in *Boland*, when she suggested that the relationship between lawyers and their clients may affect the nature of any duty of care that a lawyer might owe to a client.[269] The issue may not, however, be so simple. In recent years the High Court has clearly struggled with the question of how to best articulate the elements of a duty of care.[270] The source of many of these recent problems can be traced to Lord Atkin's classic ruling in *Donoghue v Stevenson*,[271] which expounded a duty of care based largely on the 'neighbourhood principle' without precisely defining the elements of the duty of care. Lord Atkin's conception of 'neighbourhood' encompassed people who are 'closely and directly affected' by one person's actions.[272] This principle enabled his Lordship to move beyond the relatively simplistic notions which, until that time, had conceived a relationship between a plaintiff and defendant in terms of time and space, to embrace the connection of a causal nature.

Later courts have developed both structure and guidance to this concept of neighbourhood by use of the concept of 'proximity'. For a long period proximity was perceived by the High Court as a unifying principle that underpinned

267 [2002] 1 AC 615, 698.

268 We draw a distinction between the creation or imposition of a duty of care as a general legal principle, and the assumption of that duty by a person in a particular case.

269 (1999) 167 ALR 575, 602–3. See above Part III(B).

270 The lack of agreement in the Court was highlighted in *Perre v Apand Pty Ltd* (1999) 198 CLR 180. Evidence of the impending doctrinal fragmentation in the Court was apparent in preceding decisions: see, eg, *Hill v Van Erp* (1997) 188 CLR 159; *Pyrenees Shire Council v Day* (1998) 192 CLR 330. See also the more recent decision of *Cattanach v Melchior* (2003) 199 ALR 131.

271 [1932] AC 562.

272 Ibid 580.

neighbourhood. In recent years, however, the Court has strongly questioned the value of the proximity concept.[273] Unfortunately the Court has not developed a coherent doctrine to replace proximity.[274] McHugh J has conceded that the divergence of opinion within the Court is so great that 'the search for a unifying element may be a long one.'[275]

While these wider problems facing the High Court in tort law are beyond the scope of this article, two relevant points may be drawn from the current uncertainties. First, it is difficult to predict the doctrinal basis upon which the Court might abolish advocates' immunity. This point assumes that the Court would conceive the abolition of the immunity as involving the further step of the imposition of a duty of care upon advocates.[276] The most recent decisions of the Court suggest that it will not impose or extend a duty of care in the absence of a good reason to do so.[277] Secondly, the manner in which the Court may take account of policy considerations when approaching a new or novel duty of care remains unclear. More particularly, the Court's doctrinal shift away from the concept of proximity has not been replaced by a coherent means for the Court to take account of the policy considerations that underpin the recognition of new duties of care.[278]

The remarks of Gaudron J in *Boland* acknowledge one important aspect of the debate over proximity. Her Honour correctly notes that the doctrine itself does not determine whether a duty of care exists, but that it provides a necessary process of reasoning in which a court must examine the circumstances of a case before determining whether a duty of care may be imposed.[279] Her Honour's more intriguing suggestion is that the 'nature of the relationship' managed by proximity could operate to exclude the existence of a duty of care for work performed by advocates in court.[280] In our view, the relationship between advocate and client provides an important reason for courts to hesitate to impose a duty of care in this regard. It is useful to compare the work of an advocate with a surgeon. The apparent similarity between the two professions is often raised by those who seek to limit the liability of medical practitioners or complain about

273 The most graphic example is *Sullivan v Moody* (2001) 207 CLR 562. The Court stated that proximity 'might be a convenient short-hand method of formulating the ultimate question in the case, but it provides no assistance in deciding how to answer the question': at 579.

274 Recent disagreement in the High Court is explained in Harold Luntz, 'Torts Turnaround Downunder' (2001) 1 *Oxford University Commonwealth Law Journal* 95 and Christian Witting, 'The Three-Stage Test Abandoned in Australia — Or Not?' (2002) 118 *Law Quarterly Review* 214. See also Justice David Ipp, 'Policy and the Swing of the Negligence Pendulum' (2003) 77 *Australian Law Journal* 732. Justice Ipp argues that much of the recent change and uncertainty in negligence is due to difficulties that judges have in articulating the influence of matters of policy in a coherent manner.

275 *Perre v Apand Pty Ltd* (1998) 198 CLR 180, 210.

276 The current doctrinal problems in the High Court suggest that abolition of the immunity may not be difficult, but the development of a coherent basis for the imposition of a duty of care upon advocates would be.

277 This is the conclusion drawn by Luntz: above n 274, 106. Luntz also suggests that recent decisions of the High Court show a discernible shift to a 'pro-defendant' stance: at 96–8.

278 This seems to be the best explanation of the fragmented reasoning in *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254.

279 [1999] 167 ALR 575, 602–3.

280 Ibid 602.

the special treatment granted to lawyers by advocates' immunity.[281] In many ways the work of a surgeon and an advocate are very similar. Both must draw upon substantial professional experience to make decisions of tremendous importance, the effect of which will be felt entirely by another person. Both decide the most appropriate course of action, and both retain a professional and moral responsibility for their conduct. But the work of a surgeon differs in one crucial aspect. A surgeon *uses* a scalpel and, in doing so, performs the most important aspect of surgery. Whether this function is described as responsibility, authority or power, it is the very essence of the medical procedure. By contrast, an advocate retains no such responsibility. In any judicial proceeding, the equivalent power to *administer* justice is in the hands of the judge, sometimes with the assistance of a jury. While an advocate may provide submissions or examine and cross-examine witnesses, he or she will never hold the responsibility, authority or power to determine the proceeding before the court. This role remains the province of the judge and jury. The scalpel is never passed to the advocate.[282]

VI CONCLUSION

One common theme of the arguments made in support of the abolition of advocates' immunity is that they fail to take account of the peculiar position that advocates occupy in the legal process. Advocates are officers of the court. Ultimately, they are also servants of the court. In this capacity, they are subject to special duties, and where those duties conflict with any obligations owed to the client, an advocate is bound to accord priority to any duty owed to the court. For this reason the analogy between advocates' immunity and the immunities granted to other participants in legal proceedings is particularly attractive, because it places advocates under the same protective umbrella that applies to these other participants.

Furthermore, the immunity removes advocates from potential conflicts in the duties that he or she may owe to the court and the client. No other participant in legal proceedings faces potentially conflicting duties of this nature. The unique position that advocates occupy — as the connection between the court and the client — provides additional support for retaining advocates' immunity, as special care should be taken to avoid the imposition of a tortious duty of care to enforce one of these duties.

Many of the problems that could arise if a duty of care was imposed have the potential to affect parties other than advocates. The problem of relitigation,

[281] But see Yeo, above n 3. Yeo believes that advocates' immunity should be narrowed. He suggests that a limited, but continued, immunity for advocates could be justified partly because they exercise greater discretion and independent judgement than medical practitioners: at 18–21. Goudkamp also suggests that if the immunity is to be retained it should be narrowed so that it is limited more directly to conduct in court. He suggests that it would be unrealistic to limit the immunity to criminal proceedings: Goudkamp, above n 3, 206.

[282] We accept that there are cases in which, according to this analogy, the advocate comes close to holding the scalpel (such as when a matter is settled on the advice of an advocate). In our view an advocate does not grasp the scalpel because a decision to settle is made ultimately by a client. An agreement between the parties or a consent judgment gains its authority from the agreement of the parties or the court or both, not the advocate.

which we have suggested may be far greater than courts have admitted, could create significant evidentiary and practical problems for courts and all parties to such litigation.

Much of the analysis in this article has focused on the arguments for and against advocates' immunity. This should not obscure what we believe is the relatively simple and forceful basis for the immunity. Advocates are subject to a range of obligations in the performance of their professional duties. It is appropriate that most of these duties are owed directly to the court, rather than to other parties such as clients, because advocates appear before and remain answerable to courts. The immunity grants advocates a relatively narrow protection, and operates to protect only those actions performed in good faith that are significantly related to the presentation and conduct of a matter in court. This conception of the immunity provides limited protection that is directly linked to the status of advocates as officers of the court. Our emphasis on advocates as officers of the court fortifies the view that the immunity can be justified in principle because it provides advocates with a similar form of protection that is granted to other participants in legal proceedings. Accordingly, we have not argued that advocates should receive special protection, but rather that they should not be denied the similar protection granted to others.

GIANNARELLI v WRAITH*

ABOLISHING THE ADVOCATE'S IMMUNITY FROM SUIT: RECONSIDERING *GIANNARELLI V WRAITH*

I INTRODUCTION

One of the most notable features of 20th century legal history was the expansion of tortious liability in negligence, particularly in the area of professional negligence. The threat of actions in negligence impacts considerably upon the way in which professionals conduct their businesses, perhaps most significantly upon health professionals. However, one group of professionals is immune from such claims. In *Giannarelli*[1] the High Court confirmed by a 4:3 majority the existence of the advocate's immunity from suit for in-court work. Not surprisingly, this decision has been criticised, particularly by those professionals who 'contrast the imposition upon them of ever more stringent obligations of care with the immunity accorded by the law to its own.'[2] Most recently, the Victorian Attorney-General has called for a national review of the immunity and put the matter before the Standing Committee of Attorneys-General.[3] It is therefore timely to revisit the decision in *Giannarelli*. How the High Court arrived at its decision, and whether it should be reconsidered, is the subject of this commentary.

II HISTORY AND SCOPE OF THE IMMUNITY

While the advocate's immunity from liability for negligence in respect of in-court work is of long standing, its rationale was not fully articulated until the decisions of the House of Lords in *Rondel v Worsley*[4] and *Saif Ali v Sydney Mitchell & Co*.[5] Although, historically, the immunity was said to exist because a barrister could not sue for his fees, this rationale was clearly inadequate once it was recognised that a professional could be liable in negligence where there was reliance but no contract.[6] Consequently, it is now accepted that the immunity is based on considerations of public policy rather than absence of contract.[7]

* (1988) 165 CLR 543 ('*Giannarelli*').

1 (1988) 165 CLR 543.

2 *Boland v Yates Property Corp Pty Ltd* (1999) 167 ALR 575, 611 (Kirby J) ('*Boland*').

3 Rob Hulls, *Negligent Barristers Should Be Sued: Hulls*, Press Release (20 October 2000) <http://www.dpc.vic.gov.au/pressrel> at 30 November 2000 (copy on file with authors).

4 [1969] 1 AC 191.

5 [1980] AC 198.

6 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

7 *Giannarelli* (1988) 165 CLR 543, 555 (Mason CJ); *Rondel v Worsley* [1969] 1 AC 191, 227 (Lord Reid).

The immunity applies equally to barristers and solicitors, but only in respect of work as an advocate.[8] It does not apply to work done out of court and which has no connection with work done in court, for example negligent advice. The dividing line is difficult to draw, but is stated as being 'where the particular work is so intimately connected with the conduct of the cause in Court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing.'[9] However, this lack of certainty in defining the scope of the immunity has added to criticism of its continuing existence.[10]

III *GIANNARELLI V WRAITH*

The appellants were convicted of perjury under s 314 of the *Crimes Act 1958* (Vic) in respect of evidence given to the Commonwealth and Victorian Royal Commission into the Federated Ship Painters' and Dockers' Union. Two of the appellants successfully appealed their convictions before the High Court, and their convictions were quashed.[11] The successful ground of appeal was that their evidence before the Royal Commission had been inadmissible. They then brought actions in negligence against their legal advisers alleging a negligent failure to advise that the evidence would be inadmissible and to object to the admissibility of that evidence.

Marks J, at first instance, held that the respondents were not immune from suit by virtue of s 10(2) of the *Legal Profession Practice Act 1958* (Vic).[12] The respondents' appeal to the Full Court[13] was allowed and the appellants then appealed to the High Court. The appellants' submissions before the High Court were that s 10(2) imposed liability on the respondents for negligence or alternatively that the respondents were subject to a common law duty of care. A majority of the Court[14] dismissed the appeal and held that an advocate is not liable for negligence in respect of in-court work. Nor, according to the majority, did s 10(2) have the effect of imposing a common law duty of care.

While the focus of this commentary is on the arguments supporting the common law immunity which are of more general interest,[15] we will briefly consider the statutory issue which formed the basis of the minority judgments. Section 10 provided:

> (1) Every barrister shall be entitled to maintain an action for and recover from the solicitor or client respectively by whom he has been employed his fees costs and charges for any professional work done by him.

[8] *Giannarelli* (1988) 165 CLR 543, 559 (Mason CJ), 579 (Brennan J).

[9] *Rees v Sinclair* [1974] 1 NZLR 180, 187 (McCarthy P), cited with approval in *Giannarelli* (1988) 165 CLR 543, 560 (Mason CJ).

[10] *Arthur J S Hall & Co v Simons* [2000] 3 All ER 673, 707 (Lord Hoffmann) ('*Hall*').

[11] *Giannarelli v The Queen* (1983) 154 CLR 212.

[12] *Giannarelli v Shulkes* (Unreported, Supreme Court of Victoria, Marks J, 9 May 1986).

[13] *Wraith v Giannarelli* [1988] VR 713.

[14] Mason CJ, Wilson, Brennan and Dawson JJ.

[15] There is no equivalent to s 10 in other Australian jurisdictions, and that section has since been repealed in Victoria.

> (2) Every barrister shall be liable for negligence as a barrister to the client on whose behalf he has been employed to the same extent as a solicitor was on the twenty-third day of November One thousand eight hundred and ninety-one[16] liable to his client for negligence as a solicitor.

The majority view was that this provision had to be seen in the context of an attempt to fuse the two branches of the profession. Its purpose was to put barristers on the same footing as solicitors, not to subject them to a common law duty of care. Otherwise, there would be no need for the words of limitation. These words obviously prompt the question, 'to what extent was a solicitor liable in 1891 for his work as a solicitor?'. The majority considered that there was no acceptable support for the proposition that a solicitor acting as an advocate in 1891 was liable for in-court negligence.[17] Therefore, as solicitors at that time were not subject to liability for in-court work, barristers were not also.[18]

Toohey J, with whom Deane and Gaudron JJ agreed, delivered the leading minority judgment. His Honour disagreed with the majority on the meaning of the words of limitation. Rather than requiring a determination of the extent to which a solicitor was liable in negligence at that date, the provision simply identified the relevant duty of care owed by a barrister to his client. Just as solicitors owed a duty of care to their clients, the section provided that barristers also owed a duty of care to their clients. Therefore, as a result of the Act, both barristers and solicitors owed a common law duty of care to their respective clients for which they might be liable for breach in negligence. The section rendered the barrister liable to the same extent as a solicitor. That is, a barrister was liable for his or her work as a barrister, to the same extent as a solicitor was liable for his or her work as a solicitor.[19] Further, even if the majority were asking the right question, in his Honour's view they arrived at the wrong answer as 'there is no authority to support the proposition that solicitors were immune from suit for negligence in the conduct of litigation'[20] in 1891.

Of the minority judges, only Deane J expressed an opinion on the more general question of whether the common law of Australia recognises the advocate's immunity.[21] His Honour dissented from the majority view on the basis that:

> I do not consider that the considerations of public policy ... outweigh or even balance the injustice and consequent public detriment involved in depriving a person ... of all redress under the common law for 'in court' negligence, however gross and callous in its nature or devastating in its consequences.[22]

16 This was the day on which the *Legal Profession Practice Act 1891* (Vic) received royal assent.

17 *Giannarelli* (1988) 165 CLR 543, 559 (Mason CJ), see also 567–70, 572 (Wilson J), 586–7 (Brennan J), 593 (Dawson J).

18 Ibid 561 (Mason CJ), 563–71 (Wilson J), 586–7 (Brennan J), 593 (Dawson J).

19 Ibid 603 (Toohey J), 587 (Deane J).

20 Ibid 604.

21 Ibid 588. Toohey J alluded briefly to the 'obvious problems arising from the relitigation of issues already decided': at 609.

22 Ibid 588.

IV THE CASE FOR CHANGE

There are essentially three grounds for suggesting that *Giannarelli* should be reconsidered. First, while a 4:3 decision should not be appealed in the hope that the balance may be tipped with a differently constituted bench, two of the minority judges based their decisions solely upon the interpretation of the Victorian statute rather than upon general principles. It was, therefore, a decision of 'a divided court'.[23]

Secondly, the House of Lords in *Hall*[24] has recently abolished the immunity. This decision involved three conjoined appeals in which the respondents, all firms of solicitors, were sued in negligence by their clients. The trial judges in each case ruled that the solicitors were immune from suit by virtue of the advocate's immunity. The claims were struck out but then restored by the Court of Appeal which held that none of the solicitors was immune from suit.[25] On appeal, the House of Lords agreed to reconsider its earlier decision in *Rondel v Worsley*.[26] In a unanimous decision, it was held that the public policy considerations which supported the immunity were not immutable and had changed sufficiently since that decision such that the existence of the immunity could no longer be justified.

Thirdly, in *Boland*[27] some members of the High Court indicated a willingness to reconsider the issue. In this case the respondents had initially sued their legal advisers (a firm of solicitors and a barrister) for negligence in the conduct of a compensation claim in the Land and Environment Court. On appeal, the High Court was invited to reconsider its decision in *Giannarelli*. However, only Kirby J considered immunity from suit as a threshold issue, and even then found that it did not dispose of the appeals. While his Honour commented that the policy reasons advanced in support of the immunity do not always bear close analysis,[28] his comments were directed more to the limits of the immunity than to its abolition. '[W]here the immunity exists as a matter of law, it should be confined to cases where it is clearly essential and fully justified by undisputed legal authority resting on compelling legal policy.'[29]

The remaining judges held that as the appellants had not been negligent, there was no need to address the issue of immunity from suit.[30] Gaudron J stated that had the issue of immunity arisen, she would have granted leave to reopen the decision in *Giannarelli*. She stated by way of obiter that, while the issue of proximity may exclude a duty of care on the part of advocates for in-court work, this derives from the law of tort and not immunity from suit.[31] In contrast, Callinan J held that the immunity would have applied in this case and referred to

[23] *Boland* (1999) 167 ALR 575, 617 (Kirby J).
[24] [2000] 3 All ER 673.
[25] *Arthur J S Hall & Co v Simons* [1999] 3 WLR 873.
[26] [1969] 1 AC 191.
[27] (1999) 167 ALR 575.
[28] Ibid 613.
[29] Ibid 612.
[30] Ibid 600 (Gleeson CJ), 603 (Gummow J), 624 (Hayne J).
[31] Ibid 602–3.

Giannarelli as 'a recent decision of this Court ... based on sound policy and legal grounds'.[32]

These arguments seem insufficient to justify the High Court's reconsidering such a recent decision. Although the judges were divided 4:3, the majority all delivered carefully considered judgments. Unlike the decision in *Hall*, where the House of Lords was reconsidering a decision made in 1967, it is questionable whether times have changed sufficiently since *Giannarelli* was decided in 1988. Further, this is not a situation in which the decision of the High Court was based on English authority. While the public policy considerations are the same, the Court considered them independently and arrived at its own conclusion. Finally, while the decision in *Boland* indicates there is a clear need for the scope of the immunity to be defined, it can hardly be said that there is an apparent willingness by the Court to reconsider its existence.

V THE RATIONALES FOR THE IMMUNITY

As outlined above, it is now accepted that the immunity is based on notions of public policy and requires a balancing of two competing interests. On the one hand is the general principle that for every wrong there should be a remedy. On the other lie the interests of justice which the immunity is said to serve. The arguments in favour of retaining the immunity can be reduced essentially to two categories.[33] The first relates to the special role of the advocate and the potential impact on the administration of justice if advocates were subject to actions in negligence for in-court work. The second relates to the negative effect on the administration of justice if issues were relitigated and court decisions subject to collateral attack. What follows is a summary of the key arguments raised before both the High Court and the House of Lords.

A *The Special Role of the Advocate*

The essence of this argument is that the advocate is in a unique position because the duty to his or her client is subject to the advocate's overriding duty to the court. This duty may require the advocate to act to the disadvantage of the client's case, even if the client instructs to the contrary. For example, the advocate must not mislead the court and must not withhold documents or authorities, even if they detract from his or her client's case.[34]

In considering this argument, it must be stressed that the concern is with the potential impact upon the administration of justice rather than the special position of the advocate as such. Arguments suggesting that advocacy is a 'difficult art'[35] and that advocates alone amongst professionals deserve special

[32] Ibid 670.
[33] *Giannarelli* (1988) 165 CLR 543, 555 (Mason CJ).
[34] Ibid 556 (Mason CJ).
[35] *Hall* [2000] 3 All ER 673, 690 (Lord Hoffmann).

protection are unconvincing, as similar arguments could equally be made in relation to a number of professions, none of which enjoys special immunity.[36]

Similarly, a number of judges in *Giannarelli* were dismissive of support found in the so-called 'cab-rank' rule; that is, the argument that the immunity is justified because barristers, unlike other professionals, cannot select the cases in which they are involved. The 'cab-rank' rule requires them to accept any brief which is offered at a reasonable fee provided it is in a field in which the advocate ordinarily practises and in which he or she is not otherwise committed. Dawson J, for example, commented that one may query whether the principle has 'as much practical operation as is sometimes suggested'.[37] In any event, it is certainly not sufficient to differentiate barristers from other professions,[38] particularly as it does not apply to solicitor–advocates.[39]

Also lacking in force are arguments suggesting that there is no need to abolish the immunity while the standards of advocacy which the courts expect, and on which they rely, are generally observed. Unless and until there is such a general failure, it is argued,

> it is better to maintain the immunity and to rely on the publicity of court proceedings, judicial supervision, appeals, peer pressure and disciplinary procedures to prevent neglect in the performance of counsel's duty and to avoid any injustice which might result therefrom in an individual case.[40]

While there may be no general failure, there are undoubtedly individual failures for which clients are to be denied a remedy in negligence. Apart from sounding more than a little self-interested, this argument is arguably supportive of abolition as it highlights the fact that there are other measures in place for ensuring that counsel adhere to the requisite standards. An absolute immunity from claims in negligence is not required.[41] In addition, the imposition of a duty of care may have the effect of improving standards at the bar. '[W]hile standards at the Bar are generally high, in some respects there is room for improvement. An exposure of isolated acts of incompetence at the Bar will strengthen rather than weaken the legal system.'[42]

It is therefore important to emphasise that the immunity is not for the benefit of counsel, but for the administration of justice, and it is in this respect that the advocate differs from other professionals. The adversarial system, it is argued, relies to a large extent on counsel exercising independent judgment in the conduct of a case. The witnesses to be called, the scope of cross-examination, the points of law to be raised, and the like, are all determined by the advocate, not the judge. The exercise of this judgment is important not only for the client's

[36] Ibid 691 (Lord Hoffmann); *Giannarelli* (1988) 165 CLR 543, 594 (Dawson J); *Boland* (1999) 167 ALR 575, 611 (Kirby J).
[37] *Giannarelli* (1988) 165 CLR 543, 594.
[38] Ibid 573 (Wilson J); *Hall* [2000] 3 All ER 673, 680 (Lord Steyn), 697 (Lord Hoffmann), 713–14 (Lord Hope), 738 (Lord Hobhouse).
[39] *Hall* [2000] 3 All ER 673, 680 (Lord Steyn).
[40] *Giannarelli* (1988) 165 CLR 543, 580 (Brennan J).
[41] *Hall* [2000] 3 All ER 673, 693–4 (Lord Hoffmann).
[42] Ibid 684 (Lord Steyn).

success, but for the efficient administration of justice, and the courts must rely upon the advocate's observing that duty.[43]

It is argued that potential liability in negligence would influence the way in which counsel exercise their judgment. The modern advocate is encouraged and trained to be selective and efficient and to focus upon particular issues. If they were potentially to be liable in negligence, it is feared they would not exercise the independent judgment which is expected, but would be overly concerned with avoiding potential liability. There would be a risk that some counsel would prefer the interests of their client to the interests of the court. There may also be a tendency for counsel to pursue matters which would not otherwise be pursued, thereby adding unnecessarily to the length of trials.[44] The concern in both instances is the potentially detrimental impact on the administration of justice, rather than the consequences for counsel personally. It is in this respect that the advocate is different from other professionals. That is, unlike other professionals, the exercise of his or her duty impacts upon the administration of justice.[45]

The contrary argument is that the fear of a flood of claims is exaggerated, and the suggestion that it may have a negative effect on the conduct of advocates is 'a most flimsy foundation, unsupported by empirical evidence'.[46] In any event, advocates receive sufficient protection through existing principles. The courts can differentiate between errors of judgment and true negligence, and unmeritorious claims will be struck out.[47] The obvious difficulty of establishing causation and other evidential difficulties would also mean that many actions would be unlikely to succeed.[48] Further, most practitioners are insured, and the difficulty of funding private litigation is also likely to deter vexatious claims.[49] In short, the solution to the problem of unmeritorious claims 'does not involve bolting the door against meritorious plaintiffs'.[50]

However, it may be said that such arguments miss the point. The likely success of vexatious claims is not the issue; it is the likely impact the possibility of such claims may have on the advocate.

> [I]t is the *threat* of litigation, not the likelihood of defeating such litigation, which is material. The expectation that an action in negligence brought against him would fail does not counter the instinctive motivation of counsel to err on the side of caution by bending to the client's interests and avoiding the possibility of troublesome litigation.[51]

As for the protection of existing principles,

[43] *Giannarelli* (1988) 165 CLR 543, 557 (Mason CJ), 594 (Dawson J).
[44] Ibid 557 (Mason CJ), 573 (Wilson J), 579 (Brennan J).
[45] *Hall* [2000] 3 All ER 673, 717 (Lord Hope).
[46] Ibid 683 (Lord Steyn).
[47] Ibid.
[48] *Giannarelli* (1988) 165 CLR 543, 574 (Wilson J); *Hall* [2000] 3 All ER 673, 699 (Lord Hoffmann).
[49] *Hall* [2000] 3 All ER 673, 691–3 (Lord Hoffmann), 736 (Lord Hobhouse).
[50] Peter Heerey, 'Looking over the Advocate's Shoulder: An Australian View of *Rondel v Worsley*' (1968) 42 *Australian Law Journal* 3, 8.
[51] *Giannarelli* (1988) 165 CLR 543, 573 (Wilson J) (emphasis in original), see also 557 (Mason CJ). See also *Hall* [2000] 3 All ER 673, 737 (Lord Hobhouse).

> the dividing line between a non-negligent error of judgment and a negligent error of judgment in particular factual situations is by no means easy to draw. ... It would be a mistake to attach too much importance to this concept as affording a substantial brake on counsel's liability.[52]

Finally, there is the related argument that the immunity is based on a similar rationale to the privilege which attaches to what is said in court, whether by judges, advocates or witnesses. Dawson J, for example, held that in his view the weightiest consideration justifying the immunity is the rationale that all those who participate in court proceedings must be able to speak and act freely without fear of civil liability as a result.[53] This policy underpins the immunity as well as the privilege, as it is in the interests of justice that the advocate be able to carry out his or her role without fear of civil liability.[54] Although caution is usually desirable in other professions, it is not so in the case of the advocate.[55]

However, such an analogy seems misconceived. The privilege is based on the principle that freedom of speech must be encouraged before the court and has little, if anything, to do with immunity for negligent acts.[56] Neither the witness nor the judge owes a duty of care to anyone. The witness has a duty to tell the truth. The judge has a duty to administer the trial according to law. The advocate is the only person with an additional duty of care to his or her client.[57] While there is clearly a public interest in ensuring that all participants are able to speak freely, the privilege would remain even if the immunity were to be abolished.

B *Relitigation of Collateral Matters*

The second rationale is that abolition of the immunity would lead to relitigation of issues and collateral attack upon court decisions. That is, litigants would wish to show that, but for the negligence of counsel, the result in the earlier proceedings would have been different. Success in the negligence action would therefore cast doubt upon the primary decision, which could undermine public confidence in the administration of justice.[58] While this would be undesirable in the context of civil proceedings, it would be 'intolerable'[59] in the context of criminal proceedings. Such collateral attacks are contrary to the general principle that appellate procedures are the appropriate means by which error should be corrected. 'Nothing could be more calculated to destroy confidence in the process of the courts or be more inimical to the policy that there be an end to litigation.'[60]

52 *Giannarelli* (1988) 165 CLR 543, 558–9 (Mason CJ).
53 Ibid 595.
54 Ibid 557–8 (Mason CJ), 573 (Wilson J); *Hall* [2000] 3 All ER 673, 739 (Lord Hobhouse), 714 (Lord Hope).
55 *Giannarelli* (1988) 165 CLR 543, 596 (Dawson J).
56 *Hall* [2000] 3 All ER 673, 680 (Lord Steyn); *Giannarelli* (1988) 165 CLR 543, 607–8 (Toohey J).
57 *Hall* [2000] 3 All ER 673, 697–9 (Lord Hoffmann).
58 *Giannarelli* (1988) 165 CLR 543, 558 (Mason CJ), 574 (Wilson J).
59 Ibid 595 (Dawson J).
60 Ibid.

The contrary argument is that a blanket immunity is not necessary. The doctrines of *res judicata* and issue estoppel and the court's ability to strike out claims as an abuse of process are sufficient to deal with the risk.[61] In most cases involving the relitigation of criminal proceedings, for the action in negligence to succeed, it must be shown that the original verdict was incorrect. If it was not, it would not be possible to show that the negligence was causative of any loss.[62] However, a challenge to a conviction by alleging negligence against an advocate is 'the paradigm of an abusive challenge'[63] and would be struck out as such.[64] Where these principles have no application, or where there has been no verdict or decision by the court, or where the decision has been set aside, then this particular rationale has no application and the claim should proceed.[65]

Whether these principles are in fact sufficient to address the concerns raised was the pivotal point on which the House of Lords was divided in *Hall*. While their Lordships were unanimous in rejecting the immunity in respect of civil proceedings, a minority, Lords Hope, Hutton and Hobhouse, considered that the risks to the administration of criminal justice were sufficiently great to warrant its retention in respect of criminal proceedings.[66] Although a decision on this issue was not necessary for the disposition of the appeals, the majority all stated that the immunity should be abolished in its entirety.[67]

All would agree that the risk to the administration of justice is greater in relation to criminal cases. The courts have less control over the conduct of proceedings, and the ability of counsel to exercise independent judgment is of greater importance. The consequences of relitigation and collateral attack are far greater in criminal cases.[68] The crucial issue in *Hall* was whether the independent principles referred to provide sufficient protection.[69]

On the one hand, Lord Hoffmann, for example, considered that concerns that abolition of the immunity would have an impact on the administration of criminal justice were intuitive, and the likely class of cases was so narrow that it was not a sound basis on which to maintain an absolute immunity.[70] However,

[61] *Hall* [2000] 3 All ER 673, 681 (Lord Steyn), 701–4 (Lord Hoffmann); *Giannarelli* (1988) 165 CLR 543, 575 (Wilson J).

[62] *Hall* [2000] 3 All ER 673, 685–6 (Lord Browne-Wilkinson).

[63] Ibid 681 (Lord Steyn); see also 706 (Lord Hoffmann), 714–15 (Lord Hope).

[64] See, eg, *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, in which it was held that a court may strike out as an abuse of process an action which would be manifestly unfair to one of the parties or would bring the administration of justice into disrepute.

[65] *Hall* [2000] 3 All ER 673, 686 (Lord Browne-Wilkinson), 705–6 (Lord Hoffmann).

[66] Ibid 719–20 (Lord Hope), 733 (Lord Hutton), 747 (Lord Hobhouse). See also *Boland* (1999) 167 ALR 575, 617–18 (Kirby J).

[67] In a disappointingly brief judgment Lord Millett tipped the balance by agreeing with Lords Steyn and Hoffmann that the immunity should also be abolished in criminal proceedings: *Hall* [2000] 3 All ER 673, 750–1.

[68] Less persuasive is the perception offered by Lord Hutton that practitioners in criminal proceedings are at greater risk of vexatious claims than those in civil proceedings on the basis that '[m]any defendants in criminal cases are highly unscrupulous and disreputable persons and I consider that some of them would be ready to sue their counsel if they knew it was open to them to do so': ibid 729, see also 732 (Lord Hutton).

[69] Ibid 686 (Lord Browne-Wilkinson), 721–2 (Lord Hope), 740–1, 748–9 (Lord Hobhouse).

[70] Ibid 696–7, see also 748 (Lord Hobhouse).

the obvious retort is that Lord Hoffmann was himself basing his conclusion largely on intuition.

Others held that to focus on the principle in *Hunter v Chief Constable of the West Midlands Police* and similar principles is to focus on the wrong issue. 'The immunity exists and should be maintained because it serves the public interest by making a significant contribution to the working of the criminal justice system and not because it provides protection to lawyers.'[71] However, this addresses the earlier point that such actions are likely to have an effect on the way in which an advocate discharges his or her duties. If this is the proposition from which one starts, then nothing short of absolute immunity will provide the necessary protection.

VI OTHER JURISDICTIONS

While the immunity existed until very recently in the United Kingdom, and continues to exist in New Zealand,[72] it does not exist in either Canada,[73] the United States[74] or countries in the European Union.[75] One would expect that Canada, in particular, would provide valuable empirical evidence as to whether the fears related to the abolition of the immunity are soundly based or, as some found, 'unnecessarily pessimistic'.[76] Given that the nature of the public policy arguments is such that 'one is bound to a considerable extent to rely on intuitive judgments',[77] it is surprising that this point has been cursorily dismissed by some judges on the basis that the legal profession is differently structured in those jurisdictions.[78]

In addition, since 1990 courts in England have had power to order legal representatives to pay costs wasted by any party as a result of any improper, unreasonable or negligent act or omission.[79] While not the same as general liability for negligence, it provides some empirical evidence of the effect of such orders on the profession. Lord Hoffmann concluded that there has been 'no suggestion that it has changed standards of advocacy for the worse.'[80]

71 Ibid 748 (Lord Hobhouse).
72 *Rees v Sinclair* [1974] 1 NZLR 180.
73 *Demarco v Ungaro* (1979) 95 DLR (3rd) 385.
74 *Ferri v Ackerman*, 444 US 193 (1979).
75 *Hall* [2000] 3 All ER 673, 682–3 (Lord Steyn).
76 Ibid 683 (Lord Steyn), see also 695–6 (Lord Hoffmann). See also *Boland* (1999) 167 ALR 575, 614–15 (Kirby J).
77 *Hall* [2000] 3 All ER 673, 680 (Lord Steyn).
78 Ibid 721 (Lord Hope); *Giannarelli* (1988) 165 CLR 543, 555 (Mason CJ), 577–8 (Wilson J), 596 (Dawson J).
79 *Courts and Legal Services Act 1990* (UK) c 41, s 4. Prior to 1990 barristers were not subject to such orders.
80 *Hall* [2000] 3 All ER 673, 695.

VII A MATTER FOR PARLIAMENT?

In 1991 the Law Reform Commission of Victoria proposed for discussion that the immunity be removed by legislation.[81] Nothing came of this proposal, and the immunity was in fact retained by s 442(1) of the *Legal Practice Act 1996* (Vic). However, as noted above, the Victorian Attorney-General has recently stated his intention to put the issue before the Standing Committee of Attorneys-General with a view to conducting a national review.[82] This raises the question of whether the matter should be addressed by Parliament or is best left to the courts. On the one hand, it may be argued that the immunity is concerned with protecting the administration of justice and the courts are especially competent to decide where the interests of justice lie.[83] 'The judges created the immunity and the judges should say that the grounds for maintaining it no longer exist.'[84] On the other, it may be said that this is

> a change, potentially with significant retrospective operation on the civil liabilities of many persons, such that it should only be introduced by a legislature, able to consider the limitations to be imposed and with notice which would afford those affected the opportunity of securing insurance or taking other steps to minimise their exposure to liability hitherto thought not to exist.[85]

On balance, it is suggested that this matter is one which should be left to Parliament. This avoids the perception of self-interest which cannot help but arise when the matter is decided by the courts. More significantly, much of the reasoning in these decisions is based on supposition and intuition as to what might or might not occur were the immunity to be abolished. High Court judges, as much as members of the House of Lords, are likely to differ in their assessment of what the position would probably be. These are issues which it is beyond the nature of court proceedings to consider in sufficient depth. A law reform body would be able to consider in detail overseas experience and the sufficiency of existing measures to strike out unmeritorious claims and avoid relitigation and collateral attack.

VIII CONCLUSION

Any infringement of the general principle of equal treatment before the law must be carefully considered and justified on compelling grounds. While the arguments are finely balanced, the importance of the administration of justice is such that, if there is substance in the view that abolition would have significant negative consequences, then the immunity must be retained.[86] However, no one knows if there is real substance in these arguments because the decisions have been based on a largely intuitive assessment of the risks. Another appeal to the

[81] Law Reform Commission of Victoria, *Access to the Law: Accountability of the Legal Profession*, Discussion Paper No 24 (1991) 22–3.
[82] Hulls, above n 3.
[83] *Hall* [2000] 3 All ER 673, 735–6 (Lord Hobhouse).
[84] Ibid 704 (Lord Hoffmann).
[85] *Boland* (1999) 167 ALR 575, 607 (Kirby J).
[86] *Giannarelli* (1988) 165 CLR 543, 576 (Wilson J).

High Court will not alter this. Nor will it change the fact that the assessment is being carried out by judges who were previously barristers. It is appropriate that the matter should now be considered by an independent body which can consider the risks to the administration of justice in a way that the courts will never be able to achieve. However, it is not enough that the government simply asks for the opinions of interested parties. It is important that there be detailed research into two issues in particular: first, the experience in overseas jurisdictions, especially Canada and, secondly, whether existing measures to strike out unmeritorious claims and avoid relitigation and collateral attack are sufficient. Only then will it be possible to assess empirically, rather than intuitively, whether the immunity should be maintained.

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TITLE: [*1] Articles: Is it deleterious to the administration of justice to allow a barrister to be sued or is it simply a question of the courts 'looking after their own'?

AUTHOR: Maria Mancuso n1

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

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- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

ABSTRACT: This article examines the arguments advanced to support barristers maintaining an immunity from liability for negligence regarding their acts and/or omissions in-court and out-of-court, against the case law on this issue predominantly in the United Kingdom and Australia. It is argued that the immunity should be abolished and that the present test of 'intimate connection' is vague and susceptible to misuse and that if the immunity is to be retained, then it should only apply to the barrister's conduct within the courtroom.

TEXT: That the incompetent should be allowed to practice their incompetence on the innocent and the innocent have no redress is a strange thing . . . that it should be lawyers who allow this state of affairs to exist and that lawyers [*2] should be the lucky beneficiaries of the rule is both remarkable and understandable. Remarkable because lawyers are trained in the principles of justice and know that such a proposition is unjust. Understandable because it is the lawyers themselves who receive the benefit of the rule. n2

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n2 A Grant, 'The Negligent Advocate'' (1980) 12 *New Zealand L Jnl* 260 at 260.

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This article examines the arguments advanced to support barristers n3 maintaining an immunity from liability for negligence regarding their acts and/or omissions in-court and out-of-court, against the case law on this issue predominantly in the United Kingdom and Australia. It is argued that the immunity should be abolished, on the basis that:

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n3 In this article any reference to 'barrister', 'counsel', 'advocate' or 'barristerial immunity' includes solicitors acting as advocates.

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(a) The [*3] public policy considerations advanced to support the immunity do not, in the author's view, justify its retention; and

(b) Continuation of the immunity will only reinforce the community's perception of the legal profession (including the professional community) 'simply looking after their own', n4 which attacks the integrity of the legal system and undermines its very purpose.

The author also argues that the present test of 'intimate connection' n5 is vague and susceptible to misuse and that if the immunity is to be retained, then it should only apply to the barrister's conduct within the courtroom. Finally, the article considers the case of *Hunter v Chief Constable of the West Midlands Police* n6 (the Hunter principle). It is argued that the Hunter principle is a satisfactory replacement for the immunity against impermissible attacks.

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n4 K Gibbs, 'Immunity hands in the balance' (2004) *Lawyers Weekly*, < http://www.lawyersweekly.com.au/articles/27/0c01ff27.asp > (accessed 11 November 2004).

n5 Set out in the case of *Rees v Sinclair* [1974] 1 NZLR 180 (*Rees*).

n6 [1982] AC 529; [1981] 3 All ER 727 (*Hunter*).

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Introduction

For a very long time, the common law in relation to certain activities has recognised that a barrister is not subject to an actionable duty of care. n7 However, the argument over whether and to what extent a barrister should be granted immunity is contentious and continues to attract widespread discussion amongst many, including judges, lawyers, medical practitioners, community participants and the media. It is argued that the immunity is anomalous as compared with other professions, such as the medical profession, which does not enjoy immunity from suit.

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n7 In *Rondel v Worsley* [1969] 1 AC 191 at 227, Lord Reid stated, 'for at least two hundred years, no judge or text writer has questioned the fact that a barrister cannot be so sued'; [1967] 3 All ER 993.

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An examination of ***Giannarelli v Wraith***, n8 literature on the immunity and cases on the immunity in other common law jurisdictions reveals that, in forming a view about whether the immunity should be retained on public policy grounds, judges have [*5] been required to balance two competing interests: on the one hand, the interest in the administration of justice which proponents of the immunity argue is reliant on the existence of the immunity; on the other hand, the fundamental legal tenet that for every wrong there should be a remedy. The essential tension is well captured in the following passage by Wilson J in *Giannarelli*:

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n8 (1988) 165 CLR 543; 81 ALR 417 (*Giannarelli)*.

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the law ought not readily grant privileges or immunities. Favouritism and inequality of treatment under the law are capable of breeding contempt for the law, particularly when it is perceived that those who are favoured are themselves lawyers . . . The administration of justice is of transcendent importance

to the public interest. If . . . the imposition of liability for in-court negligence raises a real risk of grave damage to that public interest, or of a serious loss of public confidence in the administration of justice, then the countervailing considerations . . . cannot stand in [*6] the way of [the] immunity. n9

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n9 Ibid, at CLR 575.

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The High Court of Australia in the case of *Giannarelli* by a 4:3 majority held that at common law, a barrister could not be sued for the negligent conduct and management of a case in court, or for the negligent performance of out-of-court work, provided the out-of-court work 'cannot be divorced from' n10 or is 'inexplicably interwoven with' n11 or affects the conduct of the case in court. The court also held that the same common law immunity applied to a solicitor acting as an advocate in a hearing. n12 This has represented the law in Australia since October 1988. However, in 2004, the issue of whether a barrister should be granted immunity was challenged and brought before the High Court of Australia for reconsideration in *D'Orta v Victoria Legal Aid and McIvor*. n13 Accordingly, whether a barrister will remain immune from suit in the future and, if so, whether the immunity will be significantly pruned to provide protection in respect of in-court acts and/or [*7] omissions only, depends on the decision of the court in the latter case, which is anticipated to be delivered shortly.

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n10 Ibid, at CLR 436.

n11 Ibid, at CLR 559-60.

n12 See the judgments of the majority in *Giannarelli*.

n13 Transcript of Proceedings, *D'Orta-Ekenaike v Victorian Legal Aid and Ian Denis McIvor* (HC, Gaudron CJ, McHugh, Kirby, Gummow, Hayne, Callinan and Heydon JJ, 20-21 April 2004) (*D'Orta*).

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Against these Australian High Court cases, it is interesting to note that in the United Kingdom, the House of Lords in *Arthur J S Hall & Co (a firm) v Simons* n14 recently abolished the immunity and the case of *Lai v Chamberlain* n15 in New Zealand followed the Court of Appeal and upheld the immunity. Although these cases are not binding on the Australian High Court, they will be persuasive authorities, given the common cultural milieu between these countries and Australia.

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n14 [2002] 1 AC 615; [2000] 3 All ER 673 (*Arthur Hall*).

n15 [2003] 2 NZLR 374 (*Lai*).

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In Australia, the immunity was not raised until the High Court case of *Giannarelli* in 1988. Accordingly most, if not all, of the case law on this issue prior to the case of *Giannarelli*, has been decided and debated by other common law jurisdictions, such as the United Kingdom. It is important to consider these cases, as they provide a proper context to the judgments in *Giannarelli*.

The development of the immunity principle

Historically, the immunity was linked to the barrister's inability to sue for his professional fees and the absence of any contract between a barrister and his client. n16 The cases of *Kennedy v Broun* n17 and *Le Brasseur v Oakley* n18 are frequently quoted in support of this proposition.

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n16 In *Giannarelli*, at CLR 592, Dawson J stated, that 'it was the absence of contract or the absence of any right to sue for his fees which was generally regarded as the basis of a barrister's immunity from liability for professional negligence'. Mason CJ stated, at 555, that '[h]istorically, [the immunity] has been linked to the barrister's inability to sue for his professional fees'.

n17 (1863) 143 ER 268 (*Kennedy*).

n18 [1896] 2 Ch 487 (*Oakley*). In this case, it was firmly held that the court could not and should not lend its assistance to barristers to recover their fees, as a barrister's services were regarded as being gratuitous.

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The case of *Kennedy* concerned a barrister who unsuccessfully attempted to issue proceedings against the client regarding a failure by the client to pay his fees in relation to an appearance brief at the Court of Chancery. Erle CJ (with whom Willams, Byles and Keating JJ agreed) stated '[t]hat a promise . . . to pay money to counsel for his advocacy . . . has no binding effect; and . . . the parties are mutually incapable of making any contract of hiring and service concerning advocacy in litigation'. n19 Further, that '[t]he incapacity of the advocate in litigation to make a contract for hiring affects the integrity and dignity of advocates, and so is in close relation with the highest of human interests, viz, the administration of justice'. n20 This case was applied in the Court of Appeal in *Oakley*.

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n19 Ibid, at 287.

n20 *Rondel v Worsley* [1969] 1 AC 191 at 239 per Lord Reid; [1967] 3 All ER 993, quoting Lord Earl CJ in *Kennedy v Broun*.

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However, this basis for maintaining the immunity was undermined [*10] in the case of *Hedley Byrne & Co Ltd v Heller & Partners*, n21 where the House of Lords held that liability for negligence could exist in the absence of any contract, provided there was reliance. Lord Diplock in *Saif Ali v Sydney Mitchell & Co (a firm)* stated that the effect of the case 'cast doubt on the facile explanation which had been current for a hundred years that a barrister's immunity from liability for economic loss . . . in consequence of his incompetent advice or conduct was due to his incapacity . . . to enter into a legal relationship with his client'. n22 In *Giannarelli*, Mason CJ stated that 'in *Rondel v Worsely*, the House of Lords squarely rejected the suggestion that the barrister's immunity to sue for his fees could support his immunity in negligence' n23 and relied on the principles in *Hedley* to support this view. n24

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n21 [1964] AC 465; [1963] 2 All ER 575 (*Hedley*).

n22 [1980] AC 198 at 216 per Lord Diplock; [1978] 3 All ER 1033 (*Saif Ali*).

n23 (1988) 165 CLR 543 at 555; 81 ALR 417.

n24 In *Giannarelli*, Mason CJ stated, at 555, that 'the negligent performance of a service, even if it be undertaken without consideration, gives rise to li-

ability in negligence, if the person for whose benefit the service is performed relies upon that service'.

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In the context of an expanding scope of liability for negligence, it was not surprising that a challenge would be made to the continuing existence of the immunity. The first case in which a direct challenge to the immunity was made was in *Rondel v Worsley*. n25

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n25 [1969] 1 AC 191; [1967] 3 All ER 993.

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The case of *Rondel* concerned a barrister who defended a client charged and convicted of various assault charges. The client made an unsuccessful application for leave to appeal the decision. The client subsequently initiated proceedings against the barrister, alleging the barrister had been negligent in the conduct of the case. The matter went to the House of Lords, which unanimously held that a barrister was immune from an action in negligence at a suit of a client in respect of his conduct and management of a case in court on grounds of public policy. n26 The main grounds of public policy that were discussed can be summarised as follows:

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n26 Ibid.

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1. A barrister owes a duty to the court, which is an overriding duty to that owed to his or her client, to carry out his or her duty fearlessly and independently of the demands of the client;

2. An action of negligence against a barrister would undesirably necessitate a re-trial or re-litigation of a case by a judge or jury, which would prolong litigation.

3. A barrister is obliged to accept any client, whether difficult or undesirable, who seeks their services.

4. The privilege against civil liability extends beyond the parties and their representatives to witnesses, the court officials and the judge himself.

Rondel is recognised as having comprehensively articulated the *basis* for the immunity on public policy grounds, as opposed to the absence of a contract. Notwithstanding, it is important to acknowledge that there were references to public policy in cases concerning the immunity prior to *Rondel*, such as the case of *Swinfen v Lord Chelmsford*. n27 However, these cases identified the unique or special role of a barrister compared to other professions, rather than the immunity being crucial for the proper administration of justice.

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n27 (1860) 5 H & N 890.

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However, in *Rondel* their Lordships failed to clearly set out the scope of the immunity, as the nature of the work that would fall within a barrister's 'conduct and management of a cause in court' was not defined. Accordingly, after *Rondel*, the New Zealand Court of Appeal in the case of *Rees* and the House of Lords in *Saif Ali* concentrated on the scope of the immunity question. The effect of these cases was to expand the immunity to include some preliminary work prior

to the courtroom yet which was 'intimately connected' with the barristers work in court.

In the context of these cases, *Giannarelli* was decided by the High Court of Australia. Most of the discussion in *Giannarelli* applied the views of their Lordships in *Rondel*.

Giannarelli v Wraith (1988) HCA

In ***Giannarelli***, the Giannarellis were convicted of perjury under s 314 of the Crimes Act 1958 (Vic) in respect of evidence given by them to the Commonwealth and Victorian Royal Commission into the Federated Ship Painters' & Dockers' Union. At first instance, Marks J of the Supreme Court of Victoria found in favour of the Giannarellis. However, the Full Court of the Supreme Court quickly overturned [*14] this decision. n28 However, a further appeal to the High Court of Australia was successful and the convictions were quashed on the grounds that s 6DD of the Royal Commission Act (1902) (Cth) rendered the Giannarellis' evidence to the commission inadmissible for the subsequent trial. n29 The Giannarellis subsequently initiated proceedings against their legal advisors, alleging that their legal advisors had been negligent in failing to advise them that the evidence given by them was inadmissible at trial and failed to object to the evidence on this ground at the trial itself.

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n28 ***Wraith v Giannarelli*** [1988] VR 713.

n29 (1988) 165 CLR 543; 81 ALR 417.

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The High Court dismissed the appeal and held that the immunity was supported by public policy, which in essence echoed the policy arguments discussed by their Lordships in *Rondel*. However, it is important to note that, as distinct from the English cases discussed above, the appeal in *Giannarelli* was also decided in a statutory context based on the proper construction [*15] of s 10(2) of the Legal Practice Act 1958 (Vic).

The majority (Mason CJ, Brennan, Wilson and Dawson JJ) held that s 10(2) did not impose any liability on a barrister for negligence. They also held that at common law, a barrister is not subject to any duty of care in negligence. While all of the majority judgments based their reasons on public policy, Mason CJ, Wilson and Brennan JJ concentrated on counsel's duty to the court and the effect on the administration of justice if the courts were not able to rely on the assistance of the advocacy profession. Dawson J appeared to emphasise the policy in avoiding 'collateral attacks' on decisions of a court and the privilege that the law affords to all those involved in judicial proceedings.

Conversely, the minority (Toohey J, with whom Deane and Gaudron JJ agreed) disagreed with the majority and found that s 10(2) did identify a duty of care being owed by a barrister to a client. Deane J, in a powerful dissenting judgment, disagreed with the majority and held that none of the public policy considerations in favour of the immunity justified its continued existence.

The Australian High Court was given a further opportunity in *Boland v* [*16] *Yates Property Corporation*, n30 to reconsider *Giannarelli*. The case of *Boland* involved a consideration of whether Yates' solicitors and counsel had been negligent in presenting the Yates' compensation claim in respect of certain land. As the court unanimously held that the legal advisors were not negligent in relation to the manner that the case had been prepared and conducted, most of the judgments did not reassess *Giannarelli*. Gleeson CJ, commenting on a submission that *Giannarelli* should be reconsidered, stated that 'because the issue does not arise, it is inappropriate to deal further with that submission'. n31

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n30 (1999) 167 ALR 575 (*Boland*).

n31 Ibid, at 600.

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After *Boland*, with the benefit of the judgments in *Rondel*, *Giannarelli* and Kirby J in *Boland*, the case of *Arthur Hall* decisively changed the law that had existed in the United Kingdom since *Rondel* and abolished the barristers' immunity from suit.

Arthur Hall [2002] HOL

This case concerned three instances, [*17] joined for appeal purposes, of alleged negligence by solicitors, who had in each case, acted as advocates. The advocates relied on *Rondel* and argued they had immunity as a complete defence. The claims were struck out at first instance but were reinstated by the Court of Appeal. The applications proceeded to the House of Lords on the issue of advocates' immunity.

Their Lordships unanimously abolished the barristers' immunity from suit for negligence in the course of civil proceedings. By a majority of 4:3, they also held that it should be abolished in criminal cases, provided the defendant's conviction was overturned. Their Lordships were strongly influenced by the Hunter principle in holding that the immunity should be abolished.

Arthur Hall represents the current law in the United Kingdom. In Australia, the profession waits with baited breath for the decision in *D'Orta*, which will determine the fate of the immunity in this country.

D'Orta [2004]

The case of *D'Orta* concerns a strike out application by a plaintiff, who alleges that his barrister and solicitor negligently advised him to enter a plea of guilty to a rape charge, prior to a committal hearing. Wodak [*18] J of the County Court concluded that the advice given in the conference 'involved a continuing course of conduct and was integral to what would occur at the committal'. n32 His Honour struck out the claim against both defendants. The Court of Appeal refused leave to appeal the decision. n33 It was appealed to the High Court and awaits judgment.

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n32 (Unreported, Vic CC, Wokak J, 13 December 2002) at [42].

n33 (Unreported, Vic CA, Winneke P and Buchanan JA, 14 March 2003, BC200308659).

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Although it difficult to predict the outcome in *D'Orta*, it is important to highlight that the court was split in *Giannarelli* and two of the minority judges based their decisions on the interpretation of the Victorian statute rather than the common law. Further, there can be no doubt that the decision in *Arthur Hall* will be influential to the court's decision. The court will need to decide whether the policy considerations can any longer legitimately justify the retention of the immunity.

Policy arguments and the immunity

The [*19] purpose of court proceedings is to 'do justice according to the law'. n34 Brennan J in *Giannarelli*, expressed the view that this is 'the foundation of a civilized society'. n35 The Australian adversarial system of justice is premised on parties with inconsistent interests being cast as adversaries and the judge being an impartial arbitrator between them. The role of a barrister or solicitor acting as an advocate is to represent an adversary but as Brennan J warns, 'counsel's duty is to assist the court in the doing of justice according to law'. n36 Lord Eldon in *Ex parte Lloyd* n37 stated:

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n34 *Giannarelli* (1988) 165 CLR 543 at 578 per Brennan J; 81 ALR 417.

n35 Ibid.

n36 Ibid.

n37 Reported as a note in *Ex parte Elsee* (1830) Mont 69 at 70.

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[Counsel] lends his exertions to all, himself to none. The result of the cause is to him a matter of indifference. It is for the court to decide. It is for him to argue. He is, however he may be represented by those who understand not his true situation, merely an officer [*20] assisting in the administration of justice. n38

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n38 Ibid, at 72.

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The barrister's duty to the court and the importance of a barrister being manifestly independent is often cited as the most powerful argument in favour of maintaining the immunity. This article concentrates on the arguments concerning a barrister's duty to the court, the privilege granted to those in court proceedings and the re-litigation argument. Countervailing arguments including the author's own views are expressed throughout.

Counsel's duty to the court

It is true to say that counsel is in a unique position in the judicial process, in so far as he has 'an overriding duty to the court, to the standards of his profession and to the public, which may mean and often does lead to a conflict with his client's wishes and with what the client thinks are his personal interests'. n39 A barrister must not mislead the court or allow the judge to take what he or she knows to be a bad point in the client's favour. Barristers owe a duty to the court to conduct [*21] their cases with complete candour and integrity. They also owe a duty to conduct their cases efficiently. They must cite all relevant law whether for or against their client's case. They must not make imputations of dishonesty, unless they have been given the information to support them. They should not waste the court's time on irrelevances, even if the client considers them important. The duties of an advocate to the court are overriding and an advocate could not be held liable for breach of a duty to his or her client arising from a discharge of his or her duties to the court.

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n39 *Rondel* [1969] 1 AC 191 at 227 per Lord Reid; [1967] 3 All ER 993.

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Proponents of the immunity argue that 'the independence of counsel is of great and essential value to the integrity, the efficacy, the elucidation of truth and the dispatch of business in the administration of justice' n40 and that it would cause 'irreparable injury to justice' n41 to 'compel [a barrister] to take cases, yet at the same time . . . remove his independence [*22] and immunity'. n42 The concern is that if counsel can be sued for negligence, then he or she may be tempted to prefer the interests of clients over the superior duty to the court, which would 'hamper the administration of justice'. n43 Mason CJ in *Giannarelli* argued that it was nothing but a 'pious hope' n44 to say that counsel would not be affected by civil liability if the immunity was abolished. Law Council President Bob Gotterson also argues that 'discharging the overriding

duty to the court would be complicated by considerations of self exposure to civil liability'. n45

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n40 Ibid, at 276.

n41 Ibid.

n42 Ibid.

n43 Ibid, at 204 per Lord Upjohn.

n44 (1998) 165 CLR 543 at 557; 81 ALR 417.

n45 Gibbs, above n 3, at 1.

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The concern is threefold: Firstly, that there would be a diminution of the assistance which a barrister can and should provide to the court. Secondly, that it would increase delays in the legal system generally. Finally, that mindful of the importance of appearing conscientious and competent, 'it is [*23] not at all improbable that the possibility of being sued for negligence would . . . lead some counsel to undue prolixity, which would not only be harmful to the client but against the public interest in prolonging trials'. n46 It is suggested that counsel may opt for protective tactics out of caution, such as putting unnecessary arguments to the court, calling unnecessary witnesses, and ask further questions than their 'unimpaired' judgment would tell them was required. However, Lord Hoffman explained in *Arthur Hall*, that the fear that counsel would take every possible point when otherwise he or she might have been willing to shorten the proceedings is a recognised problem with or without the immunity in place. n47

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n46 *Rondel* [1969] 1 AC 191 at 229 per Lord Reid; [1967] 3 All ER 993.

n47 [2002] 1 AC 615 at 665; [2000] 3 All ER 673.

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It is not disputed that each of these anticipated ramifications are undesirable and against the public interest. However, it must be remembered that:

An error in making a 'close call' [*24] would not be negligence, and nor would it be negligence for an advocate to err in favour of his or her duty to the court. The circumstances and pressures under which advocates have to make decisions can all be taken into account in deciding what constitutes a breach of duty. n48

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n48 Law Reform Commission of Victoria, 1992, Report No 48, *Access to the Law: Accountability of the Legal Profession*, Law Reform Commission of Victoria, Melbourne, p 47.

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The concerns lose much of their potency, as the standard of care that a barrister must exhibit to fulfil his or her duty of care would protect barristers from the peril of an action by every disappointed and angry client.

Some commentators, such as Stanley Yeo, Professor of Law, have argued for a test similar to the *Bolam* principle in the United Kingdom in *Bolam v Friern Barnet Hospital Management Committee* n49 which is applied in the medical negligence

area. n50 The suggested expression for the proposed standard of care is as follows:

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n49 [1957] 2 All ER 118.

n50 S Yeo, 'Dismantling Barristerial Immunity' (1998) 14 *Queensland University of Technology L Jnl* 12 at 14-15.

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A barrister is not negligent if he or she acts in accordance with a practice accepted at the time as permissible by a responsible body of barristerial opinion even though other barristers may adopt a different practice. The law imposes a duty of care but the standard of care is a matter of barristerial judgment. n51

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n51 Ibid.

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This is not a radical transformation of the law in this area. Indeed, the case law in Australia demonstrates that this standard or similar test is currently being used to decide cases where the courts have held the immunity does not apply. For example, the case of *Hodgins v Cantrill* n52 concerned a victim of a motor vehicle collision who had sought the advice of counsel on the question of the damages that he would be awarded if the matter was litigated. The client accepted the advice and settled the matter. The client subsequently sued his counsel alleging that his counsel was negligent, as he failed to properly advise the client on the extent of damages that would be recoverable. Having established [*26] that the immunity did not protect the barrister, the court heard from four barristers, who all concluded that the settlement figure was not a reasonable expectation of the outcome. The barrister was held liable for negligence.

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n52 (1997) 26 MVR 481.

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If the courts are already applying these principles, then there is little reason why they cannot continue to do so if the immunity is abolished. To uphold the immunity on the grounds that 'inevitably some counsel would be more inclined to act as mere agents of their clients to the detriment of the interests of the court and of the administration of justice generally' n53 is only mere conjecture. Further, in the author's view, it is not a consequence that is likely to emerge by holding barristers responsible for their actions. This is because it is not the fear of negligence that drives a barrister to perform his or her duties to the best of his or her abilities but rather, as barristers and solicitors are 'always keen to win a case and incidentally, to give satisfaction [*27] to their clients as far as this is compatible with their duty to the court . . . this is as inevitable a part of their human makeup as is the ambition of every judge to decide his cases right'. n54 It stems from the inherent pride and satisfaction that most professional persons possess in the performance of their services. It is doubtful whether abolition of the immunity will therefore significantly affect a barrister's conduct to the point where he or she would be vulnerable to a client's wishes. Mr Moshinsky submitted to the High Court in *D'Orta*:

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n53 *Giannarelli* (1988) 165 CLR 543 at 557; 81 ALR 417.

n54 *Rondel* [1969] 1 AC 191 at 272 per Lord Pearce; [1967] 3 All ER 993.

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barristers want to do well, they are competing for work and they do not want to be known as barristers who drag cases out. n55

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n55 Transcript of Proceedings, *D'Orta-Ekenaike v Victorian Legal Aid and Ian Denis McIvor* (HC, Mr Moshinsky, 20 April 2004) at [1575]-[1580].

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It is also because a barrister knows that if he or she is successful in his or her client's case or performs the tasks required of him or her to the satisfaction of his or her client then he or she is likely to get repeated work. This is the reality of the situation. Indeed, the standard of care may provide an increased incentive for barristers to uphold their duty to the court, for fear that their peers will judge them if they fail to do so. The Honourable Justice Hampel and Jonathan Clough consider that 'the imposition of a duty of care may have the effect of improving standards at the bar'. n56 They state that 'whilst standards at the Bar are generally high, in some respects there is room for improvement'. n57

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n56 The Hon G Hampel and J Clough, '***Giannarelli** v **Wraith**; Abolishing the Advocate's Immunity from Suit: Reconsidering **Giannarelli** v **Wraith***' (2000) 24 *MULR* 1016 at 1017.

n57 Ibid.

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Although there is a concern that it may be difficult for one to 'draw the line between an alleged breach of duty where [*29] none in fact had been committed . . . a mere error of judgment . . . and *negligentia* or indeed *crassa negligentia*', n58 who better to judge the conduct of the barrister in question than a panel of barristers themselves? The standard of care judged by a barrister's own peers resolves this concern.

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n58 *Rondel* [1969] 1 AC 191 at 283 per Lord UpJohn; [1967] 3 All ER 993.

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It is easy to see how the immunity is viewed by many as simply a shield for barristers to protect themselves against the risk of being sued. This is because the arguments supporting the immunity are predicated only on the basis of what *might* happen if the immunity is forgone. Wilson J in *Giannarelli*, noted that it was the *threat* of litigation, not the likelihood of defeating the litigation that was material in considering the impact abolition of the immunity would have on counsel's duty to the court. n59 Mason CJ in *Giannarelli* stated that the fact that it 'would create a real risk of adverse consequences' n60 was sufficient [*30] to maintain the immunity.

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n59 (1988) 165 CLR 543 at 563; 81 ALR 417.

n60 Ibid, at 557.

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The truth is that it is impossible to know whether abolition of the immunity will have any affect at all in Australia, until the immunity is abrogated. The Victorian Law Reform Commission Report No 48 states that 'no one actually knows how the threat of being sued for non-negligent conduct would influence the judgment of advocates'. n61 At present, there is no empirical evidence to indicate whether or not counsel would become less fearless and independent, or more prolix in the presentation and management of their cases. Indeed, in *Demarco v Ungaro*, n62 Krever J placed reliance on the absence of empirical evidence supporting the case for an immunity to uphold abolition of the immunity in Canada. The Victorian Law Reform Commission noted that in Canada, where there has been no immunity doctrine for a hundred years, actions against lawyers 'had not attained a serious proportion'. n63 In *D'Orta*, counsel referred to the absence [*31] of empirical data to argue that there is no sensible basis for maintaining the immunity. n64 The tolerance of the immunity, which is premised on mere speculation, is difficult to justify.

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n61 Law Reform Commission of Victoria, *Access to the Law: Accountability of the Legal Profession*, Report No 48, 1992, p 47.

n62 (1979) 95 DLR (3d) 385 (*Demarco*).

n63 Law Reform Commission of Victoria, *Access to the Law: Accountability of the Legal Profession*, Discussion Paper, 24 July 1991, pp 21-2.

n64 Transcript of Proceedings, *D'Orta-Ekenaike v Victorian Legal Aid and Ian Denis McIvor* (HC, Mr Moshinsky, 20 April 2004) at [520]-[525].

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In addition, under the adversarial system, opposing counsel and the judge are able to control inefficient and irrelevant lines of questioning and witnesses. One has to wonder how readily a client would take it upon themselves to sue a barrister, particularly in the face of a solicitor's caution that 'great deference will be given by the courts to an advocate's judgment of how a trial [*32] should have been run', n65 not to mention the heavy cost to clients in pursuing any such action.

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n65 Law Reform Commission of Victoria, above n 60, p 47.

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It must be remembered that to deny a litigant a remedy for negligence on the part of counsel is to sanction a continuing exception in favour of counsel, as against his or her client, from the expanding law of negligence. Equality before the law is one of the fundamental principles of the adversarial system of justice, which assists the system in achieving just outcomes. The principle of equality before the law is one of the reasons that surgeons, architects, engineers and other professionals, including solicitors (not acting as advocates) are accountable for their professional services. Proponents of the immunity agree that equality is a fundamental constituent of our legal system. However, they argue that the immunity is a justifiable exception to the rule, as it protects the administration of justice, which is in the public interest. This is a curious argument, given [*33] that society, for whose benefit the immunity is said to protect, is critical of its existence and sceptical of the legal profession itself in developing the immunity. Mr Brett Dawson, president of the Australian Justice and Reform Inc (Qld) and committee member of the FLAC Inc of NSW states:

[The immunity] was invented by judges whose only reason for creating it was to give themselves and their barristerial brethren a protection that no useful members of the community enjoy. n66

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n66 B Dawson, 'Barristerial Immunity: Are we being well served?' (2002) *New South Wales Bar Association*, < http://flac.htmlplanet.com/reports/letterBD2.htm > (accessed 15 November 2004).

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Further, Wilson J in *Giannarelli* said that the community considered the immunity as 'barristers, with the connivance of the judges, [having] built for themselves an ivory tower and have lived in it ever since at the expense of their clients'. n67 Indeed, in *D'Orta*, Justice Michael Kirby said:

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n67 (1988) 165 CLR 543 at 575; 81 ALR 417, quoting the decision at first instance in *Rondel v Worsley* [1967] 1 QB 443 at 468.

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I just have to tell you . . . the rest of the community, including the rest of the professional community, regards this as the courts looking after their own. n68

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n68 Transcript of Proceedings, *D'Orta-Ekenaike v Victorian Legal Aid and Ian Denis McIvor* (HC, Kirby J, 20 April 2004) at [3585]-[3590].

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Finally, in an extract from *Hansard* in the Legislative Council on 24 October 2000, the Honourable Ian Gilfillan quoted Mr Rob Hulls, Victorian Attorney-General who said that '[p]utting barristers into a special category does have the potential to undermine the confidence in the legal system'. n69

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n69 Extract from *Hansard*, Legislative Council, < http://sa.democrats.org.au/parlt/ spring2000/1024_a.htm > (accessed 15 November 2004).

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The re-litigation argument

Under the adversarial system of justice, the appropriate method of correcting an incorrect [*35] decision of a court reached after a contested hearing is by an appeal against the judgment to a superior court. A further public policy consideration advanced to support the immunity concerns the adverse consequences for the administration of justice which it is said would flow from the relitigation in collateral proceedings for negligence of issues determined in the principal proceedings. The argument is that for a client to successfully sue a barrister for negligence, it necessitates a different court rehearing the substantive elements of the case, which undermines the finality of litigation. Further, it may cast doubt on the primary decision of another court, which would affect the public confidence in the legal system. It is argued that the problem is particularly acute in the criminal law context, as public confidence in the administration of justice is likely to be 'shaken if a judge in a civil case were to hold that a person whose conviction has been upheld on appeal would not have been convicted but for his advocate's negligence'. n70 Further, it is undesir-

able that a civil action is treated as an avenue of appeal, outside the system, which parliament has enacted for appeals [*36] in criminal cases.

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n70 *Arthur Hall* [2002] 1 AC 615 at 715 per Lord Hope of Craighead; [2000] 3 All ER 673.

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(a) Public confidence in the legal system

In *Giannarelli*, Mason CJ considered this policy consideration crucial for the maintenance of the immunity. He stated that:

If the plaintiff were to succeed the resolution of this issue by a different court, and on materials which might well be different from those presented in the initial litigation . . . it would undermine the status of the initial decision . . . It would be destructive of public confidence in the administration of justice. n71

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n71 (1988) 165 CLR 543 at 558 per Mason CJ; 81 ALR 417.

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Dawson J focused his concern on the fact that it would involve 'not only . . . relitigation of issues already decided, but the relitigation would be before a different Tribunal after a lapse of time upon [*37] evidence which would not necessarily be the same'. n72

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n72 Ibid, at CLR 594.

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It cannot be disputed that there is tremendous value in providing support for upholding public confidence in our legal system. Yet, in situations where the original decision is wrong and a plaintiff is left without a remedy, it is difficult to see how the public confidence in the legal system is being encouraged. One commentator argued that the most repugnant aspect of this argument is that 'whilst it maybe impugns the original judgment, mental gymnastics are required for the public to understand why the original decision remains correct in the eyes of the law'. n73

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n73 M Oldham, 'The Advocates' Common Law Immunity' (1996) 3 *Deakin L Rev* 55 at 60.

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Dawson J in *Giannarelli* stated that to relitigate an original matter would be 'bad enough in a civil case' but 'intolerable' [*38] in a criminal case. n74 How so? While it is not disputed that the courts would face difficulty in relitigating such matters, n75 surely the injustice in a wrongly convicted person being deprived of his freedom, not to mention the stigma of a conviction on his reputation would outweigh the policy argument requiring the original decision to stand unfettered?! Deane J in *Giannarelli* did not consider that:

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n74 (1988) 165 CLR 543 at 594-5; 81 ALR 417.

n75 In particular, that it would be difficult to properly apply the standard of proof in the relitigation of a criminal case in a civil action against a barrister, and the courts would be faced with evidentiary problems and problems regarding causation.

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the considerations of public policy . . . outweigh or even balance the injustice or consequent public detriment involved in depriving a person . . . of all redress under the common law for in court negligence, however gross and callous in its nature or devastating in its consequences. n76

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n76 (1988) 165 CLR 543 at 588; 81 ALR 417.

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It provides little comfort to those victims of the injustice of the legal system who have exhausted all rights of appeal, yet none the less suffered an injustice. n77 The Victorian Law Reform Commission points out that a failure to provide any remedy may lead to 'far more harm to public respect for the law' than having a matter relitigated. n78 Although a successful action by a wrongfully convicted person against their barrister will not restore their freedom, at least it provides them with a form of redress for the wrong committed. However, an obvious dilemma for the court will be how to compensate a person who is found to serve a sentence as a result of their advocate's negligence.

In *Rondel*, Lord Reid acknowledged that 'it would be absurd to say that there are no members of the bar who might at some time fall short of a reasonable standard of skill and care'. n79 It is in these clear cases that it is argued that a client should be awarded a remedy. Not in every case. It is true that when a case is concluded, it can often happen that in retrospect, there are cogitations as to whether, if a particular question had been asked or not asked, or an additional witness had been [*40] called, the result of the case may have been different. However, not all of these cases will involve any negligence on the part of counsel. If the immunity is abolished, this question, it is submitted, should be properly addressed by the standard of care, judged by a barrister's peers.

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n77 Lindy Chamberlain, whose unsuccessful appeal to the High Court of Australia is reported at *Chamberlain v R* (1983) 153 CLR 514; 46 ALR 608. Later events showed her to be innocent of a murder conviction and she was subsequently pardoned.

n78 Law Reform Commission of Victoria, above n 62, p 22.

n79 [1969] 1 AC 191 at 230; [1967] 3 All ER 993.

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It has been argued that it may become positively invidious to decide the manner that the judge would have decided the case if different evidence had been called (which was later available), as some judges are more receptive than others to certain points. Lord Morris of Borth-y-Gest in *Rondel* stated that 'in some cases, it might only be those who judicially determined the first case . . [*41] . who could supply the answer'. n80 Is this an acceptable reason to deny a potential plaintiff proper relief? Is it not, quite simply, irrelevant to have regard to a judge's idiosyncrasies? Surely, it must be assumed that any judge behaved judicially. Notwithstanding, in *D'Orta*, McHugh J stated that:

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n80 Ibid, at AC 248.

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in a court of law, much depends on one's impression of the court. A judge would have to be blind to think that members of the Bar do not think that they have a better chance of getting special leave from some members of the court than from others. n81

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n81 Transcript of Proceedings, *D'Orta-Ekenaike v Victorian Legal Aid and Ian Denis McIvor* (HC, McHugh J, 20 April 2004) at [1065].

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The allowance and support for an appeal process is an acknowledgement that decisions of courts of law can be wrong. After all, it is the appeal process [*42] that permits miscarriages of justice to be remedied and litigants to be afforded remedies they would otherwise not be entitled to attain. If the conviction of an accused person can be quashed by a superior court and in a civil context, decisions of a lower court can be altered on appeal, the notion of relitigation is not entirely foreign to our courts at all. The case of *Re Knowles* n82 exemplifies this point further, where the Victorian Full Supreme Court set aside a criminal conviction of an accused person where justice had miscarried at the trial resulting from counsel's alleged negligence. n83 However, those in favour of the immunity assert that the fact that an Appeal Court had refused to set aside a judgment or to quash a conviction amounts to *prima facie* evidence that counsel had not been negligent or, if they had, that there had been no miscarriage of justice.

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n82 [1984] VR 751.

n83 Interestingly, this case was identified by Wilson J in *Giannarelli*. However, Wilson J distinguished it, at 574-5, on the basis that it did not bear the same 'concatenation of policy factors as inhere in the resent problem'.

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(b) Finality in litigation

In *Arthur Hall*, Lord Hope of Craighead stated that 'it is . . . undesirable that the same issue should be litigated time and again . . . there is a strong public interest in the finality of litigation'. n84 For this reason, the latin maxims of *nemo debet bis vexari pro una et eadem causa* (a person should not be troubled twice for the same reason) and *interest rei publicae ut finis sit litium* (which is concerned with the interests of the State) have been developed to prevent relitigation when the parties are the same. For example, the first maxim has developed rules such as *res judicata* and *issue estoppel*. The second maxim can be used to justify the extension of the rules of issue estoppel, in cases where although the parties are not the same, the circumstances are such as to bring the case within the spirit of the rules. n85

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n84 [2002] 1 AC 615 at 715; [2000] 3 All ER 673.

n85 Ibid, at AC 616.

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It is argued that the above doctrines of *res judicata* and *issue estoppel* [*44] in addition to the courts inherent power to strike out claims as an abuse of process are able to adequately control the risks posed by the relitigation of

matters. Perhaps the most leading case on the application of the court's power to dismiss proceedings on the ground that it would otherwise represent an abuse of process is the case of *Hunter*.

Hunter [1982] HOL

This case concerned the trial of six men convicted of an IRA bombing in Birmingham in 1974. The defendants claimed that the police had beaten them to extract confessions. The trial judge held a *voir dire* and decided that the prosecution had proved beyond reasonable doubt that they had not been beaten. They were convicted. They applied for leave to appeal but it was refused. The accused commenced proceedings against the policemen for assault, alleging the same beating as had been alleged at the criminal trial. The House of Lords held that it was an abuse of process of the court to attempt to relitigate the same issue and that the actions should be struck out.

This case shows that, superimposed upon the rules of issue estoppel, the courts have a power to strike out attempts to relitigate issues between different [*45] parties as an abuse of process of the court, provided it can be justified on public policy grounds and justice requires it. In *Hunter*, Lord Diplock stated that the case concerned:

the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which . . . would . . . be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. n86

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n86 [1982] AC 529 at 536; [1981] 3 All ER 727.

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In most cases involving the relitigation of a criminal proceeding, for a plaintiff to be successful, he or she must show that the original decision was incorrect. If it was not, then it would not be possible to show that the negligence was causative of any loss. However, a challenge to a conviction alleging negligence against an advocate is the paradigm of an abusive challenge and would be struck out as such. Lord Hoffman identified this in *Arthur Hall* when he stated that:

If a client could sue his lawyer [*46] for negligence in conducting his litigation, he would have to prove not only that the lawyer had been negligent but also that his negligence had an adverse effect on the outcome. This would usually mean proving that he would have won the case he lost. But this gives rise to the possibility of apparently conflicting judgments which could bring the administration of justice into disrepute. n87

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n87 [2002] 1 AC 615 at 687; [2000] 3 All ER 673.

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Accordingly, this indicates that not all relitigation of the same issue will be manifestly unfair to a party or bring the administration of justice into disrepute. When relitigation is for one or other of these reasons of abuse, the court has power to strike it out. In *Arthur Hall*, Lord Hoffman felt that 'this makes it very difficult to use the possibility of relitigation as a reason for giving lawyers immunity against all actions for negligence in the conduct of litigations . . . It is burning down the house to roast the pig.' n88 However, the writer concedes that by the same [*47] argument, the Hunter principle is likely to produce effectively the same situation as if the advocate were in fact immune from suit, at least in criminal cases.

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n88 Ibid, at AC 702.

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Privilege of court officials

It is a well-established rule that a witness is absolutely immune from liability in the course of judicial proceedings, however false and malicious they may be. n89 The same is said for judges, advocates, or parties in respect of words used by them in the course of judicial proceedings, or for juries in respect of their verdicts. Much significance is also placed on the privilege afforded to others in judicial proceedings to support barristerial immunity. Lord Diplock in *Saif Ali* expressed the analogy of the witness immunity to the negligence of barristers as a 'general immunity from civil liability, which attaches to all persons in respect of their participation in proceedings before a court of justice'. n90 The rationale is that 'great mischief would result if those engaged in the administration of justice [*48] were not at liberty to speak freely'. n91 It is said to ensure that trials are conducted 'without the avoidable stress and tensions of alarm and fear in those who have a role to play in them'. n92 Dawson J in *Giannarelli* stated that:

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n89 *Giannarelli* (1988) 165 CLR 543 per Mason CJ; 81 ALR 417, quoting Starke J in *Cabassi v Vila* (1940) 64 CLR 130 at 146.

n90 [1980] AC 198 at 222; [1978] 3 All ER 1033.

n91 *Giannarelli* (1988) 165 CLR 543 at 557 per Mason CJ; 81 ALR 417.

n92 *Arthur Hall* [2002] 1 AC 615 at 697; [2000] 3 All ER 673.

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fundamental to the administration of justice is the opportunity which the law affords to all those who are participants in proceedings in a court to speak and act freely, within the rules laid down, unimpeded by the prospect of civil process as a consequence of them having done so. n93

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n93 (1988) 165 CLR 543 at 595; 81 ALR 417.

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This is a circular and ironic argument: On the one hand, it is argued that barristers have a 'special' role in the administration of justice and that therefore an exception should be made for them, compared to others, including other professionals. On the other hand, barristers are asserting their entitlement to immunity, on the basis that if it were taken away, they would be the only ones in the judicial process that would be excluded from the privilege. Lord Pearce in *Rondel* put the question as follows:

The five essential ingredients of the judicial process at the trial are the parties, the witness, the judge, the juror and the advocate . . . Should he alone of the five be liable to his client in damages? n94

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n94 [1969] 1 AC 191 at 270; [1967] 3 All ER 993.

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It is clear that this argument is tenuous as a barrister's role in the judicial process is quite distinct. Unlike a barrister, a judge owes no actionable

duty of care to any party. A judge is the arbitrator of law and/or facts, depending on the case. Further, [*50] the nature of a barrister's work involves decision making which may affect the outcome of a case. Accordingly, it is a barrister's skill and the performance of his or her services for which the client pays that may cause him or her to be sued for negligence.

If a judge and/or jury decides a matter incorrectly, his or her decision although not actionable, is appealable. The judge has a public duty to administer justice in accordance with his or her oath. n95 In addition, no party pays a judge and/or jury. The public, of which both adversaries are members, pays them. Further, a witness owes no duty of care to anyone in respect of evidence which the witness proposes to give in court. His or her only duty is to tell the truth. Accordingly, there seems to be little analogy that can be drawn between a barrister and a witness or judge or jury having protection from suit. The reason that a barrister is the only person in the court process who should be able to be sued for negligence, is because he or she is the only one of all the parties involved in the judicial process who have an obligation to comport themselves according to a proper standard in litigation, who may be sued by the person [*51] who suffers loss if he or she fails to do so.

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n95 *Arthur Hall* [2002] 1 AC 615 at 698 per Lord Hoffman; [2000] 3 All ER 673.

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Other arguments

(a) The cab-rank principle

The cab-rank principle requires an advocate to accept a client who desires their services within their field of practice and can pay their fee. The obligation stands regardless of whether the client is the type of client to engage in a vexatious negligence claim against a barrister. n96 Accordingly, the cab-rank principle is also used to justify the immunity, as the concern is that if a barrister is obliged to accept any client, he or she would be unfairly exposed to vexatious actions by clients 'whom any sensible lawyer with freedom of action would have refused to act for'. n97

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n96 Oldham, above n 72, at 62 quoting C G Veljanoski and C J Whelan, 'Professional Negligence and the Quality of Legal Services -- An Economic Perspective' (1983) 46 *Melbourne L Rev* 700 at 712.

n97 S Brookes, 'Time to Abolish Lawyers' Immunity from Suit' (1999) 24 *Alt L Jnl* 175 at 176.

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In practice, however, it is fair to say that barristers have a degree of freedom in selecting their clients. In *Arthur Hall*, Lord Steyn stated that:

In real life, a barrister has a clerk whose enthusiasm for the unwanted brief may not be great, and he is free to raise the fee within limits. It is not likely that the rule often obliges barristers to undertake work which they would not otherwise accept. n98

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n98 [2002] 1 AC 615 at 678; [2000] 3 All ER 673.

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Further, barristers often specialise in practices and they are permitted to decline briefs which do not fall within their specialty. The cab-rank principle

was not accorded significant weight in the decision of *Giannarelli*. In *Arthur Hall*, Lord Steyn decisively rejected the principle as a justification for the immunity. He remarked that 'it is a very high price to pay for protection from what must, in practice, be the very small risk of being subjected to vexatious litigation'. n99 It is submitted that therefore, the cab-rank argument has little, if any weight [*53] at all.

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n99 P Cane, *Tort Law and Economic Interests*, 2nd ed, Clarendon Press, Oxford, 1996, p 236, quoting from *Arthur Hall* [2002] 1 AC 615 at 679; [2000] 3 All ER 673.

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(b) Other professionals

Another argument supporting the abolition of the immunity is the fact that other professionals, including architects, engineers, and solicitors (not acting as advocates) n100 are accountable for their professional services. This has stirred some annoyance amongst the members of the medical profession in particular, who assert that '[i]t is not fair that an injured member of the public should be denied compensation from their lawyer, when they can receive compensation from their doctor'. n101 Such an anomaly merely fuels antagonistic feelings toward the legal system by community members. Like doctors, barristers should be held accountable for their services.

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n100 The position of the solicitor advocate is beyond the scope of this article. See *Giannarelli*, generally for a discussion on this area.

n101 Brookes, above n 96, at 176.

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No member of the medical profession or indeed any other profession is immune from being sued for professional negligence. Medical practitioners may be found negligent if a plaintiff can successfully prove on the balance of probabilities that they were owed a duty of care, that the required standard of care was not met and that the breach of the duty was causative of the plaintiff's loss or damage, which was reasonably foreseeable. Yet arguably, most of the policy arguments used to support barrister's immunity are equally applicable to the medical profession.

In *Arthur Hall*, it was acknowledged that 'doctors are in a similar position to lawyers in that they too are under a higher ethical duty and are not necessarily able to choose their clients'. n102 A doctor working in an emergency ward does not have the benefit of deciding which patient he or she will assist. In some instances, it is not inconceivable that a doctor would be required to perform a task beyond his or her skill and experience, being simply the only duty doctor available on that day. How does this differ from the cab rank principle? Further, medical practitioners, like barristers, may be likely to adopt overcautious [*55] practices for fear of being sued. Doctors may feel obliged to undertake additional procedures, and take more time to explain risks than was otherwise necessary, consult with the patient more frequently than otherwise required and arrange unnecessary diagnostic tests to be safe. n103

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n102 [2002] 1 AC 615 at 672 per Lord Bingham of Cornhill; [2000] 3 All ER 673.

n103 Brookes, above n 96, at 178.

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However, perhaps the most compelling argument is that not unlike a barrister, who has a duty to the court and to his or her client which may at times be inconsistent, a medical practitioner is also faced with conflicts of his or her duties. For example, a doctor is unable to perform active euthanasia, despite the patient's request. The doctor must surrender to his or her higher duty to abide by the law. Controversial areas such as abortion, surrogacy and IVF are other areas where a doctor is faced with competing interests. If a doctor chooses the interests of the client above the interests of the law in these cases, would this [*56] not impact on the administration of justice? Yet the courts do not consider doctors within the category of persons in need of protection from negligence in such circumstances. The point to be made is that if barristers receive immunity, then it may be difficult for other professionals in the community to understand why barristers *alone* should enjoy the protection, if the policy reasons supporting the immunity are equally applicable to other professionals.

There has been much commentary in the medical area concerning doctors being unable to have protection from suit. Doctors now 'want to be exempted from liability through thresholds and caps on liability under the much vaunted reforms of the tort law'. n104 What will happen to the injured citizen? The president of the Law Institute of Victoria, Bill O'Shea argues:

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n104 B O'Shea, 'Doctors Invaluable, but not outside the law' (2003) 144 *Lawyers Weekly* 11 at 11.

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Let's hope that we don't get into a situation in this country where victims of doctors' negligence [*57] are regarded as second class citizens left to bear by themselves the cost of injuries they have sustained due to the negligence of their treating doctor. n105

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n105 Ibid.

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While the author agrees with the content of the argument, it is ironic that it is made by a member of the very profession that grants immunity to a barrister. Professional people are paid on the basis that they perform a service and if they are negligent in relation to that service, they should be held liable. No exception should be made for barristers.

Scope of the immunity

Surprisingly, most of the commentary and analysis of the immunity has concentrated on the policy reasons supporting and opposing the immunity, rather than its scope. The present test is that if the work of the barrister can be said to be 'so intimately connected with the conduct of the case in court that it can be fairly said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing' n106 then a barrister is protected from suit. The author [*58] does not consider the immunity should be maintained. However, if the result of *D'Orta* is that the immunity is maintained, then it is hoped at the very least, that the immunity is better defined and substantially restricted to the barrister's conduct in the courtroom.

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n106 *Rees* [1974] 1 NZLR 180 at 187 per McCarthy P and upheld by Mason CJ in *Giannarelli*.

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The scope of the immunity was considered in *Rondel*. However, the court was divided on how far the immunity extended. n107 In *Saif Ali*, four members of the House of Lords endorsed the dictum of McCarthy in *Rees* and held that the immunity included some 'pre-trial work' provided it was intimately connected with the cause in court. n108 Lord Russell of Killowen in *Saif Ali* stated that the protection 'must include advice on settlement, advice on evidence, advice on parties' n109 as some examples.

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n107 [1969] 1 AC 191; [1967] 3 All ER 993. Lord Pearson limited himself to the expression of a doubt as to whether the immunity extended to 'pure paper work' which he explained as drafting and advisory work unconnected with litigation. Conversely, Lord Morris of Borth-y-Gest said the immunity was confined to the actual conduct of a case in court. Between the two extremes Lord Reid expressed the view that the immunity would extend to drawing pleadings or conducting subsequent stages in a case, as it applies to counsel's conduct during the trial.

n108 [1980] AC 198 at 206; [1978] 3 All ER 1033.

n109 Ibid, at AC 234.

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Mason CJ in *Giannarelli* argued that 'the preparation of case out of court cannot be divorced from the presentation of a case in court' n110 and that 'it would be artificial in the extreme to draw the line at the courtroom door'. n111 However, there can be no dispute that a dividing line needs to be drawn, whether artificial or 'architectural' n112 in nature, so that one can properly identify the conduct which is given protection. Mason CJ himself acknowledged this in the same paragraph of his judgment where he discussed the intimate connection test and said that '. . . to take the immunity any further would entail a risk of taking the protection beyond the boundaries of . . . public policy . . . which sustain the immunity'. n113 The author considers that limiting the protection to the barrister's conduct in the courtroom at least clarifies the conduct that will fall within the immunity and prevents the expansion of the doctrine to conduct that is clearly meant to be the subject of our tort law, for which the community should have a remedy.

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n110 (1988) 165 CLR 543 at 560; 81 ALR 417.

n111 Ibid, at CLR 559.

n112 Using the words of Gleeson CJ in the appeal in *D'Orta* at [2045].

n113 (1988) 165 CLR 543 at 560; 81 ALR 417.

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The present test of 'intimate connection' is, in the author's view, a vague, unhelpful test that is difficult to apply in any satisfactory manner. The result has been an unnecessary expansion of conduct to include acts and omissions of barristers outside the courtroom which do not reflect the policy reasons for its alleged required existence.

The kinds of decisions which a barrister is obliged to make in advising a client regarding the proper defendants to a proposed proceeding and the manner in which to plead the cause(s) of action against those defendants is usually made with reflection. Yet arguably, if an incorrect decision is made, a client would be without a remedy, as the conduct could reasonably be considered to be conduct 'intimately connected' with the presentation of the case in court and

thereby attract protection from suit. Similarly, a decision regarding the reliability of a witness which leads to a decision about whether or not to call that witness at trial, would appear to presently fall within the immunity, as it would be said to be 'intimately connected' with the cause in court.

However, given that these considerations would normally be completed with reflection [*61] in the barrister's private chambers, how is the barrister placed into conflict, when he or she is not before a judge and does not put the administration of justice into danger? Further, how can it be said that the barrister is like a witness or judge, when at this stage the barrister is sitting 'in the comparative calm of the office or chambers?' n114 where there is no threat to him or her being able to act freely? The policy reasons simply do not support the immunity beyond the courtroom.

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n114 *Boland* (1999) 167 ALR 575 at 613.

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In addition, what about the situation where an advocate's:

appalling misjudgement about an elementary evidentiary or legal principle, made well before trial and under no particular pressure, that leads, quite unjustifiably to the abandonment (on the advocate's misconceived advice) of the client's most promising cause of action or defence? n115

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n115 G Hancock and A Baron, 'Practitioner Immunity following *Boland v Yates*' (2000) 74 *Law Institute Jnl* 52 at 53.

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It is difficult to see how the courts can justifiably extend the immunity and deprive a plaintiff of a remedy in these cases. As Kirby J (in dissent) stated in *Boland*, the protection should be limited to in-court proceedings 'where the advocate is brought to immediate account before the judicial power which is invoked' n116 and where 'difficult and usually instantaneous decisions must be made that may necessitate subordination of the wishes of the client to the duty of the court'. n117

Although it is conceded that a barrister is able to be sued for advice work unrelated to litigation, as Kirby J warns us in *Boland*, 'the "intimate connection" test . . . is capable of being expanded to include a large proportion, perhaps most, of the advice work . . . and this demonstrates its potential reach'. n118 The case law demonstrates that there have been divergences in judicial opinion as to the application of the 'intimate connection' test. For example, in the case of *Keefe v Marks*, n119 a barrister failed to plead a claim for interest in a personal injury case under the rules of the court and failed to advise the client of the potential for such a claim. The Court of Appeal [*63] divided on the question of whether the barrister's omissions were protected by the immunity. In addition, it appears that after *Arthur Hall*, the House of Lords has considered whether expert witnesses should be immune from suit in respect of work done outside the courtroom. n120 The court unanimously held that the expert should be given the immunity, for the same reasons that underpin the advocates' immunity. n121

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n116 (1999) 167 ALR 575 at 613.

n117 Ibid.

n118 (1999) 167 ALR 575 at 613.

n119 (1989) 16 NSWLR 713.

n120 *Darker v Chief Constable of The West Midlands Police* [2001] 1 AC 435; [2000] 4 All ER 193.

n121 Ibid.

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This shows that further expansion of the immunity may fuel an expansion of immunities granted to others, which ultimately limits the redress available to an individual. If the immunity is restricted to the courtroom, it would be more readily apparent to the community and hence more acceptable to the public. However, an expansion of the immunity will be perceived as a further injustice to the individual. [*64]

Comparative analysis

While the immunity existed for a long time in the United Kingdom until the case of *Arthur Hall*, and continues to exist in New Zealand, n122 it does not exist in Canada, the United States n123 or countries in the European Union. n124 It is true that some of these countries have differently constituted legal systems, which may limit the relevance of the cases in Australia. None the less, they are still important to consider as some of the reasoning can be applied in the Australian context.

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n122 *Lai* [2003] 2 NZLR 374.

n123 Although prosecutors do have immunity and in some states the immunity is extended to public defenders.

n124 *Arthur Hall* [2002] 1 AC 615 at 680-1 per Lord Steyn; [2000] 3 All ER 673.

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The decision of Krever J in *Demarco* has been cited and considered by the judges in most of the leading cases on the immunity issue including *Arthur Hall*, *Boland* and *Giannarelli*. In *Demarco*, Krever J made the point that in Canada, there has been no evidence of an avalanche [*65] of claims against barristers. n125 In *Arthur Hall*, Lord Steyn stated that the Canadian empirically tested evidence tended to demonstrate that 'the fears that the possibility of actions in negligence against barristers would tend to undermine the public interest are unnecessarily pessimistic'. n126 Krever J noted that 'there is no empirical evidence that the risk is so serious that an aggrieved client should be rendered remediless'. n127 Wilson J pointed out in *Giannarelli* that this case has received widespread acceptance from commentators in Canada. n128

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n125 (1979) 95 DLR (3d) 385 at [25].

n126 [2002] 1 AC 615 at 681; [2000] 3 All ER 673.

n127 Grant, above n 1, at 2 quoting from Krever J in *Demarco* (1979) 95 DLR (3d) 385 at [25].

n128 (1988) 165 CLR 543 at 578; 81 ALR 417.

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In New Zealand, in the case of *Lai*, although the immunity was upheld, it was restricted in scope. The court held that the scope of the immunity could not be extended beyond the courtroom where there is an absence of the same immediacy. [*66] n129 While Laurenson J considered that there is no justification for the retention of the immunity in the civil and administrative areas, he considered

it was so justified in the criminal and family law context. As discussed earlier in this article, the United Kingdom has abolished the immunity in *Arthur Hall*.

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n129 [2003] 2 NZLR 374 at 374.

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If other countries including the United Kingdom are able to survive with barristers being sued for their negligent acts and omissions, then the author considers that the Australian society will also cope with a change in the law. After all, the empirical evidence in other countries indicates that there is no real concern that abrogation of the immunity will cause more barristers to be sued or significantly affect the administration of justice, as is so dreadfully feared.

Consideration of the Hunter doctrine

The Hunter doctrine operates to strike out proceedings where there has been an abuse of the process of the court. Giles J in *State Bank of NSW Ltd v Alexander Stenhouse* [*67] *Ltd* n130 expressed the guiding considerations of the Hunter doctrine as being the 'oppression and unfairness to the other party to the litigation and concern for the integrity of the system of the administration of justice'. n131 The Hunter doctrine is arguably an appropriate substitute for the immunity and controls collateral attacks on court decisions. In light of the Hunter doctrine, on any application to strike out or dismiss a claim for damages against a barrister, based on their allegedly negligent conduct of earlier proceedings, the court is to determine whether the claim represents an abuse of process in light of the earlier decision of the court. If it does, it should be dismissed or struck out unless, on the facts of the particular case, there are grounds for not following that course.

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n130 (1997) Aust Torts Reports para 81-423 (*State Bank*).

n131 Ibid, at 64,089.

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The High Court of Australia accepted the Hunter doctrine in *Rogers v R* n132 which concerned a challenge to a criminal conviction. The accused [*68] had made various confessions regarding a number of armed robberies. At the trial on four charges of armed robbery, the accused challenged the admissibility of the confessions. The judge held the confessions inadmissible. Rogers was acquitted on two of the charges. He was found guilty on the remaining two charges based on other evidence. At a later stage, the Crown attempted to charge the accused regarding other armed robberies the accused had confessed to but with which he had not yet been charged. The majority of the court held that the Crown's case should be struck out, as it was considered an abuse of the process of the court unless the Crown had independent evidence that the accused had in fact committed those robberies.

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n132 (1994) 181 CLR 251; 123 ALR 417.

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The Hunter doctrine has also been applied in a civil context in Australia in cases such as *Re Thomas Christy Ltd (in liquidation)* n133 and the case of *Haines v Australian Broadcasting Corporation*. n134 Giles J in *State Bank* held that there may be [*69] an abuse of process where an insured seeks to relitigate an

issue against his insurer, which was previously decided in the proceedings brought against the insured in respect of indemnity. n135

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n133 (1994) 2 BCLC 527. This case concerned a claim for wrongful dismissal by a former director disqualified following a ruling of fitness for office was held to be an abuse of process.

n134 (1995) 43 NSWLR 404.

n135 (1997) Aust Torts Reports para 81,423 at 64,088.

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In *Arthur Hall*, Lord Steyn felt that 'a barrister's immunity is not needed to deal with collateral attacks on criminal and civil decisions' as '[t]he public interest is satisfactorily protected by independent principles and powers of the court'. n136 Lord Browne-Wilkinson agreed with Lord Steyn and said that it was not necessary to retain the immunity as 'the law has already provided a solution' n137 under the rule which prevents a collateral attack as applied in the case of *Hunter*. n138

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n136 [2002] 1 AC 615 at 679; [2000] 3 All ER 673.

n137 Ibid, at AC 686.

n138 Ibid.

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Accordingly, it appears that the immunity, at least to some extent, has been eroded by the Hunter principle. Indeed Lord Bingham CJ in *Arthur Hall* went so far as saying that in an application against a barrister based on alleged negligent conduct of earlier proceedings, the Hunter doctrine should be the first consideration. n139 The court would need to consider the nature and effect of the judgment, the basis of the negligence claim and any grounds to justify collateral challenge. n140 A claimant would need to explain the reason that steps were not taken to challenge the decision. n141

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n139 *Arthur Hall* [2002] 1 AC 615 at 643; [2000] 3 All ER 673.

n140 Ibid, at AC 643.

n141 Ibid.

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It is clear that the Hunter doctrine is able to prevent collateral attacks on decisions of the courts where it could be regarded as an abuse of process or improper purpose. Perhaps the court should focus instead on the application of the Hunter doctrine, rather than expanding the immunity doctrine to cover areas beyond its intended [*71] and justifiable scope.

Conclusion

The immunity has become a supernova of a doctrine, swollen far beyond its original size to the extent that it now potentially encompasses barristers involved in litigation in respect of a range of functions involved in the preparation of a case in court. The further it extends, the more difficult it becomes to define the boundaries of the doctrine and the less the public policy considerations validate its existence.

Any infringement of the general principle of equal treatment before the law must be carefully considered and justified on compelling grounds. In a context where other jurisdictions have abolished the immunity, with no significant ramifications for the administration of justice, and where most other professionals are held accountable for their services, the courts need to accept that it may be time for the immunity to go.

The community's expectation that every wrong should attract a remedy is the cornerstone of the immunity issue. There is a sense of injustice and great scepticism that advocacy is the only occupation that is exempt from the general rule. As Deane J stated in a powerful dissenting judgment in *Giannarelli*:

I do not [*72] consider that the considerations of public policy . . . outweigh or even balance the injustice and consequent public detriment involved in depriving a person, who is caught up in litigation and engages the professional services of a legal practitioner, of all redress under the common law for 'in-court' negligence, however gross and callous in its nature or devastating in its consequences. n142

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n142 (1988) 165 CLR 543 at 588; 81 ALR 417.

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The Hunter doctrine may be all that the law requires to guard against impermissible attacks on the decisions of the court. It is hoped that the High Court in *D'Orta* follows the decision of the House of Lords in *Arthur Hall* and ends the anomalous exception to the rule that for every wrong there should be a remedy. Only then can the community be satisfied that justice is being done.

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TITLE: [*1] Case Note: The new face of advocates' immunity

AUTHOR: Peter Cane n1

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n1 Law and Philosophy Program, Research School of Social Sciences, Australian National University. Thanks to the participants in the RSSS discussion group at which the ideas in this note were first floated; to the audience at a subsequent seminar at the University of New England; and to Jim Allan, Mark Lunney and Jane Stapleton for penetrating questions and helpful suggestions.

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ABSTRACT: The High Court has recently reaffirmed the immunity of advocates from negligence liability in respect of in-court work and associated out-of-court conduct. The joint-majority judgment rejected most of the traditional arguments in favour of immunity and based the decision on arguments about the nature of judicial power and the finality of court decisions. This note explores the implications of that move.

TEXT: Ryan D'Orta-Ekenaike was charged with rape. His solicitor and barrister advised him to plead guilty at his committal hearing, saying that since he had no defence, he would get [*2] a custodial sentence if he pleaded not guilty and was subsequently convicted, but only a suspended sentence if he pleaded guilty. He followed their advice and was committed for trial. At trial, he changed his plea to not guilty; but his earlier guilty plea was led in evidence and he was convicted and sentenced to three years' imprisonment. n2 Ryan successfully appealed against his conviction on the ground of misdirection by the judge concerning the use the jury might make of the evidence that he had pleaded guilty at the committal stage. On retrial, the evidence of the guilty plea was not admitted and Ryan was acquitted. He sued his barrister and solicitor in respect of the advice, alleging that he had suffered and continued to suffer financial and non-financial harm and loss as a result of breaches of duty by his advisers. The defendants claimed immunity from liability on the basis of the High Court's decision in ***Giannarelli*** *v* ***Wraith***. n3

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n2 Part of which he presumably served.

n3 (1988) 165 CLR 543; 81 ALR 417.

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The judge at first instance ordered that the claim 'be forever stayed' n4 and the Victorian Court of Appeal dismissed an appeal from this order. The High

Court in *D'Orta-Ekenaike v Victoria Legal Aid* n5 was faced with three main issues:

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n4 (2005) 214 ALR 92 at [12].

n5 Ibid.

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-- whether it should reconsider its decision in *Giannarelli*;

-- whether the immunity recognised in *Giannarelli* protected solicitor-advocates as well as barristers; and

-- whether the scope of the immunity recognised in *Giannarelli* -- extending to acts and omissions committed in the conduct of a case in court or in work done out of court which leads to a decision affecting the conduct of a case in court (hereafter 'protected work') -- should be reconsidered.

By a 6-1 majority (Kirby J dissenting) the court held -- partly reaffirming and partly extending the decision in *Giannarelli* -- that advocates, n6 whether solicitors or barristers, cannot be sued for negligence committed in the course of performing protected work. This comment [*4] will focus primarily on the joint-majority judgment of Gleeson CJ and Gummow, Hayne and Heydon JJ.

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n6 The judgments contain no definition of the word 'advocate'. It seems that it should be taken to mean something like 'a lawyer having the right of audience before the relevant court'.

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My main argument will be that the way the joint-majority supported their reassertion of the advocate's immunity has important implications for our understanding of the nature and scope of that immunity; and that the rationale they offered justifies neither the striking-out of Ryan's action against his lawyers nor the court's adherence to the definition of the scope of the immunity in terms of protected work.

1 The rationale for the immunity

Over the years, various arguments have been used to support advocates' immunity from negligence liability. They include the following:

-- A barrister cannot sue the client to recover agreed remuneration because the relationship between barrister and lay client is not contractual. The joint-majority [*5] considered this argument to be 'at most, of marginal relevance' because it cannot support the immunity of the solicitor-advocate. n7

-- The advocate owes a duty to the court (or 'to justice' as it is sometimes portentously put) which may conflict with the advocate's duty of care to the client. The joint-majority rejected this argument on the grounds (a) that the advocate's duty to the court is paramount, thus resolving any perceived conflict, and (b) that the argument cannot support immunity from liability (for defamation, for instance) that is not based on a duty of care to the client. n8

-- The desirability of maintaining the 'cab-rank' principle that a barrister must accept any brief he or she is free to handle. The joint-majority side-lined this argument because it cannot support the immunity of solicitor-advocates. n9

-- Advocates often have to make difficult tactical decisions in 'the heat of the courtroom', as it were. The joint-majority called this argument 'distracting and irrelevant'. n10

-- The fear of being sued could adversely affect the way advocates do their job, encouraging them to adopt 'defensive' tactics that might unduly prolong court proceedings. The joint-majority [*6] thought that this argument had some force, but that it did not 'provide support in principle' for the immunity. n11

It will be noted that these arguments focus on the role of advocate and on the advocate's relationships with the lay client and the court. By contrast, the 'finality argument', on which the joint-majority place almost the entire weight of justifying the immunity, focuses on the nature of the judicial function and the status of judicial decisions. This shift of focus is central (or so I will argue) to understanding the logic of the approach of the joint-majority.

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n7 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 214 ALR 92 at [25].

n8 Ibid, at [26].

n9 Ibid, at [27].

n10 Ibid, at [28].

n11 Ibid, at [29].

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The finality argument goes something like this:

-- The courts are a branch of government, the public function of which is the 'quelling of controversies', n12 that is, the 'final' resolution of legal disputes and claims.

-- The 'principle of finality' allows court decisions to be subject to appeal to a [*7] higher court; n13 but otherwise, 'except in a few narrowly defined circumstances', n14 it prohibits the re-opening of court decisions and the re-litigation of disputes and claims.

-- Allowing clients to sue advocates for negligence would derogate from and undermine the principle of finality by allowing issues decided by courts to be relitigated other than by way of appeal: 'relitigation of the controversy would be an inevitable and essential step in demonstrating that an advocate's negligence in the conduct of litigation had caused damage to the client.' n15

-- Moreover, such litigation would be 'inefficient' because the immunity of other participants in the judicial process -- judges and witnesses -- would prevent their 'contribution' to the outcome being 'examined'. n16

Put summarily, the finality argument seems to be that advocates' immunity is a corollary of a public interest in the finality of court decisions; which is, in turn, a corollary of the concept of judicial power and the role of the courts as a branch of government. Although the joint-majority say that 'attention must be directed to the nature of the role the advocate . . . plays in the judicial system', n17 in fact [*8] they seem to focus on the nature of the outcome of the judicial process (ie, 'final' decisions) rather than on the roles played by the various participants in that process.

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n12 Ibid, at [32].

n13 A final decision is, it seems, one that can be challenged only by appeal and not 'collaterally'. But note that in an opaque passage (at [81]-[82]) the joint-majority contrast 'final' decisions with 'intermediate' decisions (such as the conviction in this case). In the former sense, both the 'intermediate' conviction and the 'final' acquittal were 'final'. The court has recently considered the question of the finality of a decision in relation to issue estoppel: see *Kuligowski v Metrobus* (2004) 208 ALR 1.

n14 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 214 ALR 92 at [34], [45].

n15 Ibid, at [43].

n16 Ibid, at [45]. It is unclear what this means. It is certainly true that judges and witnesses cannot be sued for anything they do or say in court proceedings; but it does not follow that their words and actions cannot be examined for other purposes, such as determining the cause of a court's decision. For instance, in Ryan's appeal the judge's direction to the jury was examined and, implicitly at least, treated as a cause of his conviction. There is no obvious reason why such a course of action should be acceptable in appeal proceedings, but not in a negligence claim against an advocate (assuming, of course, that such claims are allowed at all).

n17 Ibid, at [21].

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I wish to make four comments on the finality principle, understood as a basis for advocates' immunity from liability for negligence.

1. It does not explain why D'Orta-Ekenaike's lawyers were granted immunity from being sued for negligence. The plaintiff's claim did not, either explicitly or implicitly, question any of the court decisions in his case. Indeed, his conviction had been overturned on appeal -- as allowed and required by the finality principle -- and the successful ground of appeal was not the conduct of the lawyers, n18 but misdirection by the judge. n19 If P had been allowed to sue his lawyers, causation would have been a difficult issue. Certainly, the lawyers' allegedly negligent conduct was part of the causal history of P's conviction; and it is at least arguable that on the balance of probabilities, P would not have been found guilty if he had not pleaded guilty. But the more immediate cause of the conviction was the conduct of the judge and jury in the first trial. It is possible that a court trying P's claim against his lawyers would have held the lawyers not causally responsible for P's loss.

McHugh J made much of the likely difficulty of proving causation [*10] in claims against advocates. n20 Surprisingly, he considered that it provided support for immunity rather than a reason why immunity was not needed to provide advocates with adequate protection from dissatisfied clients. This approach appears to be motivated by two concerns. One is that claims against advocates are likely to be weak, n21 or even 'vexatious', n22 and that litigants who sue their lawyers are unlikely to be dissuaded from doing so by the difficulty of making a successful claim. n23 The other concern is that despite the likely difficulty of proving causation in a claim against an advocate, 'a case like the present demonstrates that where there has been a successful retrial [sic], defence of the claim may be difficult, even though the onus of proof remains on the plaintiff'. n24 Neither concern provides an independent argument for advocates' immunity. On the contrary, they support immunity only if there are other good reasons to protect advocates from liability. This is shown by the fact that in the case of no other profession is the risk of being the target of weak claims or, conversely, of a strong claim, considered to be a good reason for immunity from being sued. Indeed, [*11] it is tempting to say that an argument that advocates need immunity because some claims against them will fail and others will succeed, confronts their clients with a vicious Catch-22.

Initially surprising, too, is McHugh J's view that the finality principle supports the prohibition of claims against advocates because such a claim could not lead to the amendment of a final decision cast into doubt by a holding of liability against the advocate. n25 On reflection, however, his concern here seems to be based not on the finality principle as such but on a risk that the simultaneous existence of inconsistent decisions might undermine public confidence in the administration of justice. Assuming for the moment that any such risk is sufficiently great to justify blanket immunity, it is not clear in what sense a holding by one court, that another court would have reached a different decision if an advocate had not been negligent, is inconsistent with the decision actually reached by that other court, given that (*ex hypothesi*) the first

court has held that: (1) the advocate was negligent, and (2) the decision of the other court would, on the balance of probabilities, have been different [*12] if the advocate had not been negligent. The better analysis is that the first court's holding is consistent with the other court's decision precisely because of the advocate's negligence.

However, even if this analysis is accepted, it may not remove a sense of unease at the prospect of a civil court, which has no power to overturn a criminal conviction, implicitly deciding that a convicted defendant ought to have been acquitted by a criminal court, especially if the defendant is left languishing in prison. It must be conceded that an appeal is preferable to litigation against legal advisers and that the law should discourage disappointed litigants from suing their lawyers without first taking all reasonable steps to engage the appeal process. There should also be some procedure for reconsidering criminal convictions in appropriate cases where the appellate route is closed. But none of this requires us to accept that advocates should be shielded from accountability for their negligence in order to engender and maintain public confidence in the justice system based on a false and dangerous belief that it is infallible or, at least, not susceptible to miscarriage as a result of [*13] the incompetence of counsel.

At all events, however strong the finality argument is thought to be, it is hard to see how it can justify prohibiting claims that do not challenge final decisions. This is because the finality argument (unlike other arguments for immunity) does not refer to the role of advocates or to their relationships with the court and their lay clients, but only to the nature of judicial decisions and power.

2. The finality principle only applies to disputes and claims that are resolved by a court order. Prior to the decision in *D'Orta-Ekenaike*, it had always been assumed that advocates' immunity applied to any protected conduct, because most of the arguments used to support the immunity made no distinction between claims resolved by court order and claims not so resolved. Since the joint-majority did not address this issue, it is not clear whether this narrowing of the scope of the immunity was intended or not. It may be an unintended consequence of the joint-majority's explicit rejection of arguments that could support a wider immunity.

3. In formulating the finality argument, the joint-majority refer to Ch III of the Australian Constitution as an embodiment [*14] of the concept of judicial power on which the finality principle is based. They note that Ch III has no equivalent in the constitutions of the States, but also that the role of State courts is essentially the same as that of Chapter III courts. n26 It is difficult to know how much to read into this reference to Ch III. On one view, it may be no more than an emphatic way of making the point that the public interest in the 'quelling of controversies' trumps the private interest of litigants in enforcing the duties of care that lawyers owe to their clients. n27

On the other hand, because the concept of judicial power plays such a central role in the reasoning of the joint-majority, perhaps the reference to Ch III has more significance. After all, in their view of things, advocates' immunity is a corollary of the finality of judicial decisions and the finality principle is a corollary of the concept of judicial power or, even more strongly, intrinsic to that concept. If this is right, it might be arguable that abolition of the immunity would be unconstitutional so far as protected work is concerned. Such a conclusion would be extremely ironical (and perhaps, therefore, should be [*15] rejected) because (as Michael Pelly has argued) n28 the joint-majority seem to have thrown down the gauntlet to legislatures n29 by implicitly challenging them to reverse the High Court's decision if they think it undesirable. But suppose (as seems likely at the time of writing) that one or more of the States pass legislation abolishing or limiting the immunity as established by the High Court in *D'Orta-Ekenaike*. Would such legislation be unconstitutional in its application to decisions, made in exercise of federal judicial power, on the basis that negligence liability of advocates for protected work would undermine an essential feature of judicial power as embodied in Ch III of the Constitution? Further, could the principle in *Kable v Director of Public Prosecutions*

(NSW) n30 be called in aid to support an argument that such legislation would be unconstitutional even in its application to decisions made in exercise of non-federal judicial power? Could it not be said that the power to entertain negligence claims against advocates that challenge the finality of judicial decisions is incompatible with the very concept of judicial power as understood by the joint-majority in [*16] *D'Orta-Ekenaike*?

4. The joint-majority accept that there are 'a few narrowly defined circumstances' in which 'controversies once resolved . . . [may be] reopened'. n31 The 'principal qualification' n32 to the finality principle is that judicial decisions may be reopened on appeal. Independently of appeal, an injunction may be awarded to restrain the enforcement of a judgment obtained by fraud. n33 The joint-majority also accept that a defendant who has been acquitted in a criminal trial may be sued in tort -- the O J Simpson phenomenon. n34 This course of action is acceptable, it seems, because although it involves questioning a final decision, the party challenging the decision will not have been a party to the proceedings in which that decision was given n35 -- but it is not clear why this makes a difference. n36

Since the finality principle is not absolute or without exception, the argument it provides in favour of advocates' immunity must be that the exception represented by advocates' negligence liability would undermine the principle to an unacceptable extent. In *Arthur J S Hall & Co v Simons* n37 three members of a seven-member House of Lords thought that the demands [*17] of finality would be adequately met by giving advocates immunity in relation to decisions in criminal cases only. The joint-majority in *D'Orta-Ekenaike* rejected this solution because of the difficulty, as they saw it, of distinguishing between civil and criminal cases. n38 The majority Law Lords in *Hall v Simons* thought that courts possessed sufficient power, even without advocates' immunity, to deal with unacceptable attempts on the part of litigants to question judicial decisions by suing their lawyers. In particular, reference was made to the principle in *Hunter v Chief Constable of the West Midlands Police* n39 to the effect that it is normally an abuse of court process for a criminal defendant to challenge his or her conviction in civil proceedings. The joint-majority in *D'Orta-Ekenaike* rejected this 'abuse of process' technique, apparently because they considered advocates' immunity to be, via the principle of finality, a corollary of the concept of judicial power. n40 An immunity so deeply rooted in the constitutional soil should not, it seems, be made hostage to the uncertainty and contingency of a fact-specific concept such as 'abuse of process'. n41

Most [*18] of the traditional arguments for advocates' immunity are pragmatic, n42 depending on an assessment of the likely negative impact of claims against advocates on the administration of justice. The traditional reading of the finality argument is also essentially pragmatic. n43 In *D'Orta-Ekenaike*, the joint-majority seem to raise the stakes by rejecting most of the traditional pragmatic arguments more-or-less outright and re-interpreting the finality principle as a corollary of basic constitutional principle and structure.

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n18 The joint-majority pointed out that incompetence of counsel is not 'a separate ground of appeal' (at [82]); although, according to McHugh J (at [197]), it is very commonly raised in criminal appeals.

n19 Ibid, at [7].

n20 Ibid, at [162]-[164], [194]-[195].

n21 Ibid, at [140].

n22 Ibid, at [202].

n23 Ibid, at [196]. I make no comment on the validity of this concern other than to note that supporters of advocates' immunity often assume that litigants who sue their lawyers are probably (what psychologists call) 'querulants', who suffer from what is coming to be recognised as a mental dysfunction.

n24 Ibid, at [195].

n25 Ibid, at [190].

n26 Ibid, at [32]-[33].

n27 McHugh J went to great lengths to argue that advocates do not owe an 'actionable' (at [95]) duty of care to their clients in relation to protected work. One motivation for this move may have been a desire to stress what he (and Callinan J) considered to be fundamental differences between the profession of advocate and other professions: according to McHugh J, 'advocacy in the courts is a unique profession' (at [104)]. See also Callinan J at [366]. Another motivation might have been to answer a point made by Kirby J. One argument in favour of advocates' immunity (at least for in-court work) is that judges, juries and witnesses also enjoy such immunity. Kirby J rebutted this argument with the point that of these groups, only advocates owe a duty of care to litigants (at [323]).

n28 M Pelly, 'A little backbone needed in legal immunity case', *Sydney Morning Herald*, 21 March 2005.

n29 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 214 ALR 92 at [48]-[54].

n30 (1996) 189 CLR 51; 138 ALR 577. For a clear brief account of this case see L Zines, *Cowen and Zines's Federal Jurisdiction in Australia*, 3rd ed, The Federation Press, Sydney, 2002, pp 242-6.

n31 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 214 ALR 92 at [34], [45].

n32 Ibid, at [35]. It is certainly not an exception to the principle and perhaps should properly be seen as part of its meaning (see above n 12).

n33 *DJL v Central Authority* (2000) 201 CLR 226; 170 ALR 659 at [35]-[38].

n34 See, generally, J Stapleton, 'Civil prosecutions -- Part 1: Double jeopardy and abuse of process' (1999) 7 *TLJ* 245; 'Civil prosecutions - Part 2: Civil claims for killing or rape' (2000) 8 *TLJ* 15.

n35 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 214 ALR 92 at [78]-[79].

n36 Nor does it seem to allow of the possibility of a tort action consequent on the failure of a private prosecution by the victim.

n37 [2002] 1 AC 615; [2000] 3 All ER 673.

n38 (2005) 214 ALR 92 at [76].

n39 [1982] AC 529; [1981] 3 All ER 727.

n40 (2005) 214 ALR 92 at [72]-[82], although the argument in this passage is rather difficult to follow.

n41 The joint-majority thought that procedural differences between Australia and England were not 'determinative' (at [60]). Contrast McHugh J at [202].

n42 Or perhaps, in more loaded terms, 'policy' arguments.

n43 This is the way it was understood by the House of Lords in *Hall v Simons* [2002] 1 AC 615; [2000] 3 All ER 673.

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2 Protected work

Having re-affirmed the existence of advocates' immunity, the remaining issue facing the joint-majority concerned its scope. They saw no good reason to revisit this aspect of *Giannarelli*, which accorded immunity to what I have called 'protected work' -- work done in court or work done out of court that leads to a decision affecting the conduct of the case in court. n44 The result of this unwillingness to reconsider the scope of the immunity is a lack of fit between the rationale for the immunity (the finality principle) and the formula specifying its scope. On the one hand, the finality principle would not seem to support im-

munity in respect of protected work in any case where a claim against an advocate would not challenge the finality of a judicial decision. For instance, a claim against an advocate for defamation in respect of a statement made in court might well not entail a challenge to the court's decision. It might be argued that the finality rationale supports only the immunity from negligence liability and that advocates' immunity from other causes of action must rest on different foundations. But it should be noted that the joint-majority, while not expressly [*20] rejecting the argument that immunity from defamation liability protects freedom of speech and guards against the chilling effect of fear of being sued, rested this immunity, too, on 'the deeper consideration' of finality and the undesirability of re-litigation. n45

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n44 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 214 ALR 92 at [85]-[86].

n45 Ibid, at [41].

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On the other hand, the finality principle might be applicable (in principle at least) to negligence claims not based on protected conduct. For instance, in *Saif Ali v Sydney Mitchell & Co* n46 it was held that failure, at an early stage of proceedings, to advise the joining of certain parties to an action, is conduct not protected by advocates' immunity. But one could imagine cases in which a negligence action in respect of such conduct might cast doubt on the correctness of a final judicial decision.

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n46 [1980] AC 198; [1978] 3 All ER 1033.

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In short, one would expect the scope of advocates' immunity to reflect its rationale. By putting so much weight on the finality argument while leaving the definition of protected work unchanged, the joint-majority have created an unstable dissonance between the rationale and the scope of the immunity.

3 The ***ratio* of the decision**

It might be argued n47 that however central to the joint-majority judgment the finality argument might be, it is not part of the *ratio* of the decision, which is simply that advocates are immune from negligence liability for protected work. In support of this line of thought, it might be added that although both McHugh and Callinan JJ in their separate concurring judgments accept the finality principle, their support for the immunity is more broadly based on some, at least, of the other arguments traditionally used to justify advocates' immunity. According to this line of reasoning, any lack of fit between the rationale for and the scope of the immunity, and between that rationale and the court's decision, would be of no importance because the discussion of and appeal to the finality principle by the joint-majority would be purely *obiter* [*22] .

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n47 I owe this line of thought to Leslie Zines.

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Tempting though this argument is, it rests on a very narrow understanding of the concept of the *ratio* of a decision. There is, of course, a distinction between the rule which a decision establishes and the reasons given for that rule. However, unlike legislative law-making, judicial law-making depends crucially for its legitimacy on the reasons and reasoning used to support it. Legislation is legitimised primarily by the processes by which it is made, whereas common

law is, ultimately, no more valid than the reasons that support it. Whatever qualifications to the latter proposition are required by the doctrines of precedent and *stare decisis* (which might be thought to validate decisions regardless of their substantive merit), they do not apply to the joint-majority judgment in *D'Orta-Ekenaike*. This is because the High Court is not, of course, bound by the decisions of any other court or by its own decisions and because the joint-majority explicitly embarked [*23] on a reconsideration n48 of the arguments for and against advocates' immunity and, hence, of the validity of the immunity itself.

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n48 Which McHugh J would have preferred not to undertake: (2005) 214 ALR 92 at [94].

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4 Conclusion

The conclusion must be, then, that by undermining most of the traditional foundations of the edifice of advocates' immunity and putting the full weight of the structure on the finality argument, the joint-majority have so destabilised it that *D'Orta-Ekenaike* is unlikely to be other than a temporary staging-post on the road to resolution of the important issues of principle it raises. More specifically, the joint-majority's approach presents us with a dilemma. On the one hand, if we take their reasoning seriously, we are forced to brand the dismissal of the appeal as a mistake. On the other hand, if we accept the outcome as correct (in the sense of 'justified'), we must reject most of the joint-majority's reasoning as mistaken and irrelevant. Neither conclusion is satisfactory and either leaves [*24] the law in a state of considerable confusion.