

THE IRISH POSITION¹

*“Life is inherently uncertain, and I have always thought that in litigation there is nothing like a healthy dose of uncertainty to promote a reasonable settlement ... in the academic world ... we thrive on uncertainty. The role of academics ... is to inject doubt where none existed before!”*²

The official position in Ireland relating to advocates’ immunity is that we actually don’t have one! There appears to be no decision in this country in which the matter has been comprehensively addressed as an issue in proceedings.³ Vague judicial guidance on the issue was given by Costello P in *HMW v Ireland*⁴ when he reiterated the views of Lord Reid in *Rondel v Worsley* in the following obiter passage:

Lord Reid pointed out that every counsel has a duty to his client to act fearlessly in his interests but that as an officer of the court concerned in the administration of justice he has an overriding duty to that court, to the standards of his profession and to the public. A barrister must not mislead the court, nor cast aspersions on the other party for which there was no basis in the information in his possession, must not withhold authorities or documents which may tell against his client but which the law or the standards of his profession require him to produce. Because the barrister is required to put his public duty before the apparent interest of his client the public interest requires that on the grounds of public policy the barristers’ immunity from suit be maintained.

Keane thought that the constitutional right of access to the courts strengthened the policy considerations behind the immunity, and went so far as to state that “it can be fairly confidently assumed that the decision in *Rondel*’s case will be followed [in Ireland].”⁵

In 1971 the matter was the subject of a report by the Committee on Court Practice and Procedure⁶:

The present legal position as to the liability of a barrister for professional negligence seems to be that he is immune from actions for negligence in advocacy in court. With regard to advising and preliminary work in connection with litigation the position is doubtful but the better opinion seems to be that he cannot

¹ See generally: McMahon and Binchy *Law of Torts* 3rd edn; Quill *Torts in Ireland* 2nd edn; Dunlop ‘Lawyers’ Negligence’ (1971) 65 *Gazette of Incorporated Law Society of Ireland* 71; Keane ‘Note: Negligence of Barristers’ (1967) 2 *Ir Jur* 102; Ryan and Ryan ‘A Bar to Recovery? Barristers, Public Policy, and Immunity from Suit’ (2005) 10 *Bar Review* 209.

² Goode *Commercial Law in the Next Millennium* 1998.

³ *Robertson v MacDonagh* (1880) 6 *LR IR* 433 where a client suing in contract for the non-performance by a barrister of his duties as an advocate, “admitted that in an ordinary case arising between client and counsel ... a client [could not] sue his counsel for the non-performance of his duties as an advocate, or for negligence in the performance of such duties.” 436 – 437. See McMahon and Binchy p 400.

⁴ [1997] 2 *IR* 142, 158-159, which concerned a public policy immunity for the Attorney General.

⁵ Keane ‘Note: Negligence of Barristers’ (1967) 2 *Ir Jur* 102, 103.

⁶ Fourteenth Interim Report, *Liability of Barristers and Solicitors for Professional Negligence* (Prl 2348 1971).

be made liable. In non-litigious work the position is also doubtful but since the decision in *Rondel v Worsley* the better opinion seems to be that he is liable.

The last decade has seen a massive reform of the public policy immunity for barristers across the common law world. The time has now come for the Irish courts to pick a side in this contentious debate and to settle the question conclusively. The questions are: which side are we going to choose and what will be the implications of that choice?

Fennelly J:

Immunity from suit, where it has been held to exist, normally proceeds from overriding considerations of public interest. Foreign sovereign States have been held to be immune from the jurisdiction of our courts (*McElhinney v Williams* [1996] ILRM 276). Witnesses in legal proceedings are absolutely immune from suit in respect of the evidence they give (see discussion in *McMullen v McGinley*, Supreme Court unreported, 15th March 2005 per Fennelly J). The immunity of judges is based on public policy considerations (See *Morris P in Desmond v Riordan* [2000] 1 I.R. 505). **Formerly, barristers enjoyed complete immunity from suit by their clients in respect of their conduct of proceedings.** All of these are or were examples of general immunity granted a priori on grounds of public policy. The immunity is available even where all the elements of a tort are otherwise established.

Seems to suggest that the modern Irish Supreme Court does not believe that the immunity exists anymore.