IN THE COURT OF APPEAL OF NEW ZEALAND

CA17/03

BETWEEN	SUN POI LAI Appellant
AND	CHAMBERLAINS Respondent

CA15/03

AND BETWEEN	HILDA LORRAINE LAI Appellant
AND	CHAMBERLAINS Respondent

Hearing:	1 March 2004
Court:	Anderson P, McGrath, Glazebrook, Hammond and O'Regan JJ
Counsel:	P F A Woodhouse QC and J J Troup for Sun Lai (CA17/03) R M Gapes for Hilda Lai (CA15/03) A C Challis and G M Wishart for Chamberlains J A Farmer QC and G M Coumbe NZ Bar Association Intervener W M Wilson QC and C F Finlayson NZ Law Society Intervener
Judgment:	8 March 2005

JUDGMENT OF THE COURT

The appeals are allowed with costs reserved.

REASONS

	Para No.
Anderson P **(Dissenting)**	[1]
McGrath, Glazebrook and O'Regan JJ	[124]
Hammond J	[127]

ANDERSON P

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Introduction

[1] In New Zealand a lawyer could not, until now, be liable to a client for negligence in respect of acts or omissions in the conduct of a case in court or so intimately connected with such conduct that they can be fairly said to be a preliminary decision affecting it: *Rees v Sinclair* [1974] 1 NZLR 180 (CA). This principle, founded in the common law, is often called "barristerial immunity".

[2] The law is the same in Australia, as evidenced by *Giannarelli v Wraith* (1988) 165 CLR 543. Until July 2000, it had also been the law in England for well over a century. Then, in *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 the House of Lords decided that barristerial immunity should be erased. There was a minority view that it should be retained, but solely in respect of criminal cases.

[3] The present appeal raises the issue whether there should still be barristerial immunity in New Zealand or whether the New Zealand common law should follow the English decision to abolish.

[4] The matter came before the High Court as an application to strike out an affirmative defence of barristerial immunity. The Full Court, Salmon and Laurenson JJ, recognised that they were bound by this Court's decision in *Rees v Sinclair*. They nevertheless expressed their opinions for the benefit of this Court, anticipating an appeal. Salmon J was for retention of limited barristerial immunity in respect of all civil and criminal proceedings. Laurenson J favoured retention on a limited basis for family and criminal litigation. He would otherwise abolish the immunity.

[5] Neither Salmon J nor Laurenson J thought that immunity should remain for acts or omissions which do not occur in the courtroom. That is, each favoured abolition of the "intimate connection test". In the case of Salmon J, this was because the justification for immunity arose solely out of the pressures of the trial process during a Court hearing. He also agreed with the view expressed by Kirby J in *Boland v Yates* [1999] 167 ALR 575 (HCA) at [150] that the intimate connection test is impermissibly vague.

[6] Laurenson J favoured the more restrictive approach because this would obviate the difficulties of determining whether particular acts or omissions were covered or not; and also because the existence of the remaining core immunity would be more readily apparent to and accepted by the community. The immunity he considered should be retained was justified, in his opinion, on the grounds that the public interest required the observance of counsel's duty to the Court and the maintenance of a strong and independent bar. A distinction exists between the litigation of criminal and family matters, on the one hand, and general civil litigation on the other. The pressures on the criminal advocate are particularly acute; and the natures of both criminal and family litigation are such that proceedings would likely be prolonged, or relitigated.

[7] The essential arguments for and against retention, as identified in all the cases mentioned so far, are a perennial topic in learned articles and papers. Few new truths are revealed by the repetitive exegesis. The jurisprudence is informed as much by personal values and opinions as by logical analysis. There seems little if any empirical evidence.

[8] The trace of the common law has been from an absence of immunity through to its acceptance; subsequent rationalisation in terms of the absence of a contract between a barrister and a lay client; justification in *Rondel v Worsley* [1969] 1 AC 191, in terms of a policy of public interest, after *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 compelled a reconsideration of non-contractual duties of care; through to the remedial emphasis of their Lordships in *Arthur J S Hall & Co v Simons*.

[9] Before examining the arguments in greater detail I turn to the nature of the appellants' claims against the respondent. Mr and Mrs Lai were directors of a company, S and L Lai Ltd which was involved in the horticulture industry. In 1992 two plaintiffs brought proceedings in the High Court at Auckland against the Lais and their company. The causes of action against Mr and Mrs Lai allege that they, as directors of the company, were in breach of fiduciary duties owed to the plaintiffs in various respects.

[10] The proceedings were tried in the High Court at Auckland before Blanchard J in November 1995. After three days of trial, the question arose as to whether it was appropriate for Mr and Mrs Lai to consent to a judgment being entered against them personally in the event that the Court entered judgment against the company. In an interim judgment dated 20 November 1995, Blanchard J noted as follows:

> The plaintiffs also claim against the second defendants who are the directors of S & L Lai Limited alleging that they are in breach of a fiduciary duty owed to the plaintiffs (having knowingly assisted in any breaches by the first defendant) and in breach of the Fair Trading Act. However, this judgment is not concerned with the claims against the second defendants. Mr Hutcheson is taking instructions from his clients and has indicated that Mr and Mrs Lai are considering the possibility of giving the plaintiffs a written undertaking to make themselves personally responsible for any judgment against the first defendant. That would appear to be an academic exercise if the first defendant is solvent and would save the Court the need to hear what may be

> quite complicated arguments on the claims made against the second defendants and also the need to write a judgment dealing with difficult areas of the law.

[11] Three days earlier, on 17 November 1995, Mr I M Hutcheson, a barrister and solicitor employed by the respondent and instructed as counsel for Mr and Mrs Lai filed a memorandum in the following terms:

> 1. Counsel is making this memorandum in regard to the position of the second defendants in their personal capacity and specifically in relation to the suggestion from counsel for the plaintiffs that a guarantee, if provided by the second defendants, would avoid the need for the Court to consider and determine the legal issues in regard to the plaintiff's claim as against the second defendants.
>
> 2. Counsel has taken further instructions (as he indicated to the Court that he would) and can advise that the second defendants are willing to provide a guarantee to the effect that they will personally guarantee the payment by the first defendant of the amount of any judgment (if any) resulting in the within proceedings.
>
> 3. Counsel will confer with counsel for the plaintiffs to settle an appropriate form of document and will thereupon arrange for execution of that document.

[12] On or about 17 April 1996, according to the statements of claim, judgment in the proceedings was entered against the company for significant sums including costs. The appellants alleged that judgment in the proceedings was also entered against Mr and Mrs Lai personally for the same amounts "as a consequence of the advice given to the Court by Mr Hutcheson in his memorandum of 17 November 1995".

[13] The appellants allege that Blanchard J recorded in a minute dated 17 April 1996:

> The above judgments are against all defendants, the second defendants having indicated through the memorandum of their counsel of 17 November 1995 their commitment to stand behind their company, the first defendant. This has obviated any need for my judgment to deal separately with the claims against the second defendants.

[14] The appellants allege that Mr Hutcheson and therefore, vicariously, the respondent, are liable to them in various respects in filing, on their behalf, the memorandum which allegedly induced Blanchard J to give judgment against them as

well as their company. The causes of action are framed in contract, on the basis of a contract of retainer; negligence; and breach of fiduciary duty.

[15] The claim in equity alleges a breach of fiduciary duty in continuing to act for the Lai Company as well as Mr and Mrs Lai personally, which may or may not be a tenable proposition. The pleading then leaps to what is in reality, if not literally, an assertion of negligence in failing to give certain advice. The fact that the parties may be in a fiduciary relationship does not of course translate negligence into a breach of fiduciary duty, and I suspect the third cause of action is merely negligence in an equitable disguise.

[16] It is questionable whether it is reasonably contemplatable that a memorandum indicating a willingness "to provide a guarantee" to the effect that they will personally guarantee the payment by "the company" would give rise to a formal judgment of the High Court that they were liable in the proceedings. But in the context of proceedings for striking out, albeit in the inverted form of a strike-out application in respect of a specific defence, it is assumed to be so for the purposes of discussing the issue of barristerial immunity. Thus, the recurring debate about barristerial immunity comes before this Court on a possibly tenuous factual basis.

The impact of *Hedley Byrne*

[17] By at least the mid eighteenth century, the common law of England would not permit a barrister to sue for his fees: *Thornhill v Evans* (1742) 2 Atk 330, at 332. Barristerial immunity from suit, as a rule of the common law, appears to have been countenanced some time later, *Fell v Brown* (1791) Peake 131, and recognised later still, *Purves v Landell* (1845) 12 CL & S 91, at 93. The perception of barristerial immunity as a corollary of the notionally gratuitous nature of payments to counsel seems to have developed in the latter half of the nineteenth century: *Kennedy v Brown* (1863) 13 CBNS 677, at 727-728; *In re Le Brasseur and Oakley* [1896] 2 Ch 487, CA.

[18] In 1963 the House of Lords found, in *Hedley Byrne*, that there could be liability for negligence in respect of gratuitous advice. Although, as Lord Pearce

observed in *Rondel v Worsley*, gratuitous responsibility in negligence resulting in purely economic damage was not first conceived by *Hedley Byrne*, that case nevertheless broadened the common law's approach to the issue. When Mr Rondel issued a belated writ, in 1965, for professional negligence against counsel who had unsuccessfully defended him on a dock brief at the Old Bailey in 1959, the juridical basis for the barrister's plea of immunity came to be re-examined in another light. Both features of the gratuity/immunity correlation had independent origins founded in considerations of public policy and it is not surprising, therefore, that barristerial immunity survived *Hedley Byrne*.

[19] In *Rondel v Worsley* their Lordships, who included renowned jurists such as Lord Reid, found policy justifications for immunity in a number of respects. One arose from a barrister's duty to the Court as well as to the client. The nature and implications of the duality of duties is expressed by Lord Reid in *Rondel v Worsley* at 227-228 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 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 no 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.

[20] Lord Reid was plainly concerned that the possibility of being sued might undermine the confidence courts repose in counsel by affecting a barrister's judgment whether or how a certain step might be taken in the conduct of the case. He said at 228:

> I would not expect any counsel to be influenced by the possibility of an action being raised against him to such an extent that he would knowingly depart from his duty to the court or to his profession. But although the line between proper and improper conduct may be easy to state in general terms, it is by no means easy to draw in many borderline cases. At present it can be said with confidence in this country that where there is any doubt the vast

> majority of counsel put their public duty before the apparent interests of their clients. Otherwise there would not be that implicit trust between the Bench and the Bar which does so much to promote the smooth and speedy conduct of the administration of justice. There may be other countries where conditions are different and there public policy may point in a different direction. But here it would be a grave and dangerous step to make any change which would imperil in any way the confidence which every court rightly puts in all counsel who appear before it.

[21] In Their Lordship's view the removal of barristerial immunity would, contrary to the public interest, prolong litigation in two ways. It would make a retrial or virtual retrial of the original action inevitable and would lead to prolixity in the conduct of cases. Again Lord Reid's speech puts in the matter with succinct erudition, at 228-229:

> And there is another factor which I fear might operate in a much greater number of cases. Every counsel in practice knows that daily he is faced with the question whether in his client's interest he should raise a new issue, put another witness in the box, or ask further questions of the witness whom he is examining or cross-examining. That is seldom an easy question but I think that most experienced counsel would agree that the golden rule is – when in doubt stop. Far more cases have been lost by going on too long than by stopping too soon. But the client does not know that. To him brevity may indicate incompetence or negligence and sometimes stopping too soon is an error of judgment. 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.

[22] Their Lordships saw another justification for retaining immunity in a barrister's ethical obligation, subject to assurance of a proper fee, to undertake litigation on behalf of a client. This obligation is often referred to as "the cab rank principle". The barrister does not have liberty of choice and is in this respect unique amongst professional persons. That ethical rule is itself founded in public policy, exemplified by the words of Erskine when he accepted a brief to defend Tom Paine. They were cited by Lord Upjohn in *Rondel v Worsley* at 281:

> From the moment when any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the courts where he daily sits to practise, from that moment the liberties of England are at an end.

[23] In 1973 the justification for barristerial immunity in New Zealand was examined by this Court in *Rees v Sinclair* [1974] 1 NZLR 180. Mr J B Sinclair, then a barrister and solicitor, later to be elevated to the High Court bench, was sued by his former client in respect of the conduct of matrimonial litigation. The negligence suit was heard in the High Court by Mahon J, *Rees v Sinclair* [1973] 1 NZLR 236. The High Court held that s 13 of the Law Practitioners Act 1955 conferred on a New Zealand barrister the same immunity from action by his client as was conferred upon barristers in England. That section provided:

> Barristers of the Court shall have all the powers, privileges, duties, and responsibilities that barristers have in England.

[24] Mahon J held at 239:

> …in my opinion the word "privileges" must, of necessity, include the traditional immunity from civil process enjoyed by barristers in England in relation to the carrying out of their professional duties. The common law of England has for centuries conferred on Judges, parties, counsel and witnesses absolute privilege in respect of anything done or said during the hearing of a cause (*Rondel v Worsley* (supra) and 3 *Halsbury's Laws of England* (3rd ed) 29) and I cannot doubt that the word "privileges" is used in the section to embrace not only the immunity from action for defamation but the concurrent immunity of counsel against proceeding for negligence or breach of duty arising out of the conduct or management of a case.

[25] When the matter was taken on appeal to this Court it was heard by McCarthy P, McArthur and Beattie JJ. Turning to s 13 Law Practitioners Act 1955, McCarthy P said at 186:

> Now the immunity from suits for negligence which barristers possess in England could be argued to be a privilege. "A privilege describes some advantage to an individual or group of individuals, a right enjoyed by a few as opposed to a right enjoyed by all". *Le Strange v Pettefar* (1939) 161 LT 300, 301, per Luxmore LJ. So it may be that by virtue of this provision alone, a barrister in New Zealand is entitled to this same immunity, at least one who is practising as a barrister only. But I do not wish to dispose of the issue in this way. I prefer to consider the question solely in the light of the public interest.

[26] McCarthy P considered that immunity should be retained for four of the public policy reasons discussed in *Rondel v Worsley*. McArthur J was persuaded by two of the principal reasons that immunity should inure. Beattie J did not give reasons but concurred in the result.

[27] The justifications for retention were these:

1. The administration of justice requires that a barrister should be immune from an action for negligence so that he may perform his tasks fearlessly and independently in the interests of his client, but subject to his overriding duty to the court, which may conflict with the interest of his client.

2. Actions for negligence against barristers would make the retrial of the original action inevitable and so prolong litigation contrary to the public interest.

3. Public policy necessitates that in litigation a barrister should be immune because he is bound to undertake litigation on behalf of any client who pays his fee.

4. Unless a barrister was immune he could not be expected to prune his case of irrelevancies and cases would be prolonged contrary to the public interest.

[28] The extent of the immunity is as set out in the first paragraph of this judgment.

[29] In 1978 the House of Lords re-examined the issue in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198. A formidable committee of the Lords, led by Lord Wilberforce and Lord Diplock, confirmed immunity in terms which adopted part of the explication of McCarthy P.

[30] A decade later the High Court of Australia in *Giannarelli v Wraith* confirmed its acceptance of the principles endorsed in *Rondel v Worsley* and *Rees v Sinclair*. Twelve years later the House of Lords delivered its decision in *Arthur J S Hall*, unanimously rejecting barristerial immunity in civil litigation and rejecting it by a majority in criminal proceedings.

[31] I shall turn shortly to a more detailed examination of their Lordships' speeches but wish to refer at this stage to an underlying perception in the debate

about immunity that where there is a wrong there should be a remedy. As a philosophical principle or value the expression has its attractions but it is not inevitably applicable to issues of the common law if by "wrong" is meant "loss or damage." This is because damage alone has not always founded a cause of action, as the ancient maxim *dammun absque injuria* demonstrates. But if by "wrong" is meant an actionable consequence, the maxim begs the question in a case such as the present. Further, in determining whether there should be a remedy for a wrong, options should not be confined to the narrow issue of a right of action for damages. Remedies for damaging conduct may, for example, include criminal and disciplinary processes and rights of appeal. Not all of life's vicissitudes aptly require the common law to levy monetary compensation.

The speeches in *Arthur J S Hall & Co*

[32] Lord Steyn delivered the first speech. He examined the cab rank argument for immunity and took the view that although it is a valuable professional rule, its impact on the administration of justice in England is not great. He considered that in reality 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. His Lordship felt that it was unlikely that the rule often obliges barristers to undertake work which they would not otherwise accept. When it does, and vexatious claims result, it would usually be possible, in his Lordship's opinion, to dispose of such claims summarily.

[33] I would respectfully respond to those comments by observing that barrister's clerks, in the English sense, are unknown in the New Zealand profession. Further, the suggestion that an unwanted brief might be avoided by the device of inappropriately raising fees hardly reflects the New Zealand situation where litigation is conducted on legal aid, in respect of which there is no scope for a barrister to amplify fees, even for a legitimate purpose.

[34] Next, Lord Steyn examined the argument of the analogy of immunities enjoyed by others who participate in the proceedings of a court, such as witnesses, deponents and the judiciary. 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. Lord Steyn concurred with observations made by Mr David Pannick QC, in his well known work *Advocates* (1992) at 197-206, that such public policy had little, if anything, to do with the policy of immunity from actions for negligent acts. He accorded virtually no weight to the analogous immunities argument.

[35] The third factor examined by Lord Steyn was the public policy against relitigating a decision of a court of competent jurisdiction. In his view that could not support an immunity extending to cases where there was no verdict by the jury or decision by the court. Lord Steyn noted that defendants convicted after a full and fair trial who have failed to appeal successfully will, from time to time, attempt to challenge their convictions by suing advocates who appeared for them. In his view this was the paradigm of an abusive challenge. Ordinarily, a collateral civil challenge to a criminal conviction would be struck out as an abuse of process. On the other hand, the situation is different if the convicted person should succeed in having the conviction set aside on any ground. In that case an action against a barrister in negligence would no longer be barred by the particular public policy which requires a defendant seeking to challenge a conviction to do so directly by appealing. In relation to collateral challenges in civil decisions, the principles of *res judicata*, issue estoppel and abuse of process as understood in private law should, in his Lordship's view, be adequate to cope with the risk of relitigation.

[36] Lord Steyn considered the critical factor in the debate to be the overriding duty of a barrister to the court and that it is essential that nothing should be done which might undermine that duty. The question was, in his view, whether the immunity is needed to ensure that barristers will respect their duty to the court. On that issue, comparative experience was enlightening. In the European Union, advocates have no immunity. In the United States prosecutors have an immunity and in a few states immunity is extended to public defenders. But otherwise lawyers have no immunity from suits of negligence by their clients. So also in Canada where an advocate has no immunity from an action in negligence. Lord Steyn considered the Canadian situation to be empirically tested evidence and most relevant. In his view, it tended to demonstrate that it is unnecessarily pessimistic to fear that actions

in negligence against barristers would undermine the public interest served by the advocate's duty.

[37] On the other hand, there would be benefits to be gained from ending immunity. First, it would end an anomalous exception to what his Lordship termed "the basic premise that there should be a remedy for a wrong". Second, one of the functions of tort law is to set external standards of behaviour for the benefit of the public and an exposure of isolated acts of incompetence at the bar would strengthen rather than weaken the legal system. Third, public confidence in the legal system is not enhanced by the existence of the immunity. He pointed out that in England barristers may now advertise, may enter into contracts for legal services with their professional clients and are obliged to carry insurance. His Lordship considered that it would tend to erode confidence in the legal system if advocates, alone amongst professional people, were immune from liability for negligence.

[38] Lord Browne-Wilkinson expressed the view that given the changes in society and in the law that had taken place since *Rondel v Worsley*, it was appropriate to review the public policy rationale for barristerial immunity. In his view, the propriety of maintaining such immunity depends upon the balance between the normal right of an individual to be compensated for a legal wrong to him and the advantages which accrue to the public interest from such an immunity. In relation to claims for immunity in civil proceedings, the balance no longer showed sufficient public benefit to justify maintenance of the immunity.

[39] In relation to criminal matters, Lord Browne-Wilkinson considered that the law already provided a solution to the prospect of vexatious proceedings, in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529. In his Lordship's view, an action claiming that an advocate has been negligent in criminal proceedings will ordinarily be struck out as an abuse of process so long as the criminal conviction stands. Only if the conviction has been set aside would such an action be normally maintainable.

[40] Lord Hoffman subjected the immunity rule to perhaps the most intensive scrutiny of all of their Lordships. He favoured abolition of the rule and declared his

point of departure to be that, in general, English law provides a remedy in damages for a person who has suffered injury as a result of professional negligence. (That proposition is not, of course, exactly the same in New Zealand where compensatory damages may not be obtained for any negligence, professional or otherwise, occasioning bodily injury.)

[41] His Lordship expressed the opinion, at 691, that one "should not exaggerate the bogey of vexatious claims". Every other profession has to put up with them, he said, and "A practitioner who is properly insured can usually expect such claims to be handled by solicitors instructed by the underwriters." Then there was the procedure of summary dismissal which should, in his view, reduce the incidence of vexatious claims. So also would the fact that pursuant to the Access to Justice Act 1999 which established the Legal Services Commission, it would not be easy to obtain legal representation for negligence actions against advocates.

[42] Lord Hoffman then turned to the "divided loyalty argument" that is, those issues discussed in *Rondel v Worsley* and reproduced at [17] of these reasons for judgment. In Lord Hoffman's view there were incentives for compliance with an advocate's duty to the court in the honest, conscientious qualities of advocates, a wish to enjoy a good reputation amongst one's peers and the judiciary, and the disciplinary powers of Judges and professional bodies. To the extent that divided loyalty might lead unconsciously to prolixity, Lord Hoffman thought that judicial disapproval would be a curb and new Civil Procedure Rules and jurisdiction to make wasted costs orders would impose restraint. Lord Hoffman also drew on the Canadian experience for support for abolition and dismissed the cab rank argument as being without any real substance.

[43] Nor was the witness immunity analogy persuasive to Lord Hoffman's mind. Witnesses were not subject to a duty of care and nor were Judges. The advocate is the only person involved in the trial process who is liable to be sued for negligence because he is the only person who has undertaken a duty of care to his client.

[44] In my respectful view, the argument in this regard might seem somewhat circular. The issue is not whether there is a duty of care but whether there should be

an actionable duty of care. There is no actionable duty of care imposed on witnesses and the judiciary because there is a public benefit in immunity. The elemental issue in the present debate is whether there is such a public benefit in barristerial immunity as to require carelessness to be not actionable.

[45] Lord Hoffman did not consider that evidential difficulties in fairly retrying issues which were before the court on an earlier occasion as a justification for a general immunity for lawyers. Nor did he see merit in an argument that there would be difficulty in determining how a Judge who actually heard a case might have reacted, subjectively, if a different argument or different evidence had been presented. He considered the assumption would have to be that a Judge would behave judicially.

[46] Lord Hoffman considered the most substantial argument was that it may be contrary to the public interest for a court to retry a case which has been decided by another court. But actions for negligence against lawyers are not the only cases which give rise to a possibility of the same issue being tried twice. Therefore, before examining the strength of the collateral challenge argument as a reason for maintaining immunity, he thought it necessary to consider how the law deals with collateral challenge in general. The question ultimately was whether relitigation of an issue previously decided would be manifestly unfair to a party or would bring the administration of justice into disrepute. In his Lordship's view not all litigation of the same issue would be manifestly unfair to a party or bring the administration of justice into disrepute. When relitigation is, for one or other of those reasons, an abuse, the court has power to strike it out.

[47] Lord Hoffman summed up the arguments at 704 in these terms:

> My Lords, I have now considered all the arguments relied upon in *Rondel v Worsley* [1969] 1 AC 191. In the conditions of today, they no longer carry the degree of conviction which would in my opinion be necessary to sustain the immunity. The empirical evidence to support the divided loyalty and cab rank arguments is lacking; the witness analogy is based upon mistaken reasoning and the collateral attack argument deals with a real problem in the wrong way. I do not say that *Rondel v Worsley* [1969] 1 AC 191 was wrongly decided at the time. The world was different then. But, as Lord Reid said then, public policy is not immutable and Your Lordships must consider the arguments afresh.

[48] Lord Hope of Craighead also undertook a quite extensive examination of the conflicting arguments and expressed the opinion that immunity should be discontinued in civil cases but retained in criminal cases. In relation to criminal matters he drew on his experience as Lord Justice General, the senior Judge in Scotland with duties and responsibilities in regard to the administration of the criminal justice system. He started with the proposition that removal of the immunity would be bound to have *some* effect on the performance of the function of advocates; that there would be a risk in some cases of a defensive approach. He was unable to agree that it would be in the public interest for immunity to be removed in criminal cases.

[49] Lord Hutton also considered that immunity should be retained in criminal cases. The public interest in the pursuit of the legitimate aim of advancing the administration of justice, and in protecting from vexation and harassment those who perform the public duty of defending accused persons, so that a criminal court will come to a just decision, required the immunity to remain. Lord Hutton concluded his speech at 735 in these terms:

> Therefore I am of opinion that the public interest requires that the immunity of an advocate in respect of his conduct of a criminal case in court and in respect of pre-trial work intimately connected with the conduct of the case in court should continue, notwithstanding the difficulty of drawing a clear line in respect of pre-trial work.

[50] Lord Hobhouse of Woodborough also examined the major arguments about abuse of process, conflict of duty and the duty to act if instructed. He considered a telling argument against recognising immunity for advocates in civil proceedings was the difficulty in defining the boundaries of what constitutes advocacy and would therefore qualify for the immunity. He thought this problem was not capable of satisfactory solution. But in respect of criminal process the salient features existed to serve the public interest, not to serve any private interest. He remarked in his speech that the reason why the question of immunity arises is because of the argument that a defendant who has been the victim of a miscarriage of justice should have a remedy and that on any view, the primary remedy must be the criminal appeal. Therefore the primary inquiry must be how the abrogation of the immunity would affect the effectiveness of the Court of Appeal in rectifying such miscarriages. Pursuant to the

statutory scheme for compensation, when a person has been convicted of a criminal offence and has subsequently had their conviction reversed on appeal, or has been pardoned, the Secretary of State is required to pay compensation for the miscarriage of justice. In Lord Hobhouse of Woodborough's view, a right to recover full damages on the grounds that a cause of conviction was counsel's negligence would bypass the limitations and safeguards built into the statutory scheme. This would produce a capricious distribution of compensation between ultimately acquitted defendants.

[51] Lord Hobhouse of Woodborough considered that in terms of the administration of justice, the removal of immunity would expose the professional advocate to a risk of litigation which would handicap him in performing his duty under the criminal justice system and disinterestedly assisting, particularly at the appellate level, in the correction of errors and remedying miscarriages of justice. He would retain immunity in criminal cases.

[52] Lord Millet was of the view that a line should not be drawn between civil and criminal cases but that immunity should be abolished for all types of proceedings.

Appellants' submissions

[53] The extensive and learned submissions by counsel for the appellants, advanced substantially by Mr Woodhouse and adopted by Mr Gapes, developed two elemental themes. First, that there is no principled basis for a Court to strike down the contractual obligation of an advocate to exercise care and skill; immunity is an unprincipled status because one side of a bargain is struck down – the client has obligations in respect of fees but the advocate is relieved of responsibility. Second, that there are other solutions to the problems sought to be met by what he described as "the blunt instrument of immunity".

[54] Counsel submitted that immunity is an exception to fundamental principles and New Zealand values, in particular access to the courts to remedy a wrong; equality before the law with its corollary that like cases should be treated alike; public respect for courts and confidence in the administration of justice; and that

there should be no public benefit at private expense. In counsel's submission the exception from remedy by immunity ought to cast the onus relating to retention or abolition on those who seek to uphold immunity. A further indication that those seeking retention should be required to justify is, in counsel's submission, that *Rees v Sinclair* was wrongly decided and did not represent an expression of the common law but a departure from it.

[55] The submissions carefully examine the jurisprudential antecedence of *Rees v Sinclair* but, with all respect to counsel's research and analysis, I am of the view that where a legal principle has been developed as a matter of policy rather that precedent, and has been applied for several decades, it has established its own pedigree by acceptance and usage. It was applied by this Court in *Biggar v McLeod* [1978] 2 NZLR 9, recognised by a Full Bench of this Court in *Harley v McDonald* [1999] 3 NZLR 545 at [23], and has been accepted as declaratory of the law and its justification for 30 years.

[56] Counsel further argued that the authority of *Rees v Sinclair* is weakened for a number of other reasons. The judicial observations on immunity were merely *obiter* and made by only two of the three Judges of this Court. Further, he submitted, there was no assistance from even a small number of earlier cases, no extrinsic evidence on which to found a basis for exception, no consideration of alternatives to immunity if there were problems from advocates being sued, and there was inadequate weighing of the opposing interests and values. In addition, there has been considerable academic and other criticism of the principle since *Rondel v Worsley.*

[57] Counsel for the appellants submitted that since *Rees v Sinclair* there have been significant changes in New Zealand society. For example, there has been an increased recognition of, and protection for, consumer rights and interests. Counsel listed 19 Acts passed since *Rees v Sinclair* was decided.

> (1) The Motor Vehicle Dealers Act 1975 (2) The Unsolicited Goods and Services Act 1975 (3) The Real Estate Agents Act 1976 (4) The Optometrists and Dispensing Opticians Act 1976 (5) The Nurses Act 1977 (6) The Contractual Mistakes Act 1977 (7) The Contractual Remedies Act 1979 (8) The Credit Contracts Act 1981 (9) The Contracts (Privity) Act 1982 (10) The Law Practitioners Act 1982 (11) The Fair Trading Act 1986 (12) The Commerce Act 1976 (13) The Disputes Tribunal Act 1988 (14)

> The Building Act 1991 (15) The Consumer Guarantees Act 1993 (16) The Health and Disability Commissioner Act 1994 (17) The Medical Practitioners Act 1995 (18) The Investment Advisors (Disclosure) Act 1996 (19) The Credit (Repossession) Act 1997.

[58] In addition, a Consumer Affairs Unit was set up as part of the Department of Trade and Industry in 1985 and in 1988 the Consumers Institute became an independent body. There have also been significant developments in the law of negligence as summarised in the judgment of Cooke P in *South Pacific Manufacturing v NZ Security Consultants* [1992] 2 NZLR 282, at 293-299. Counsel pointed also to the New Zealand Bill of Rights Act 1990 as an important statutory affirmation of the rights of individuals in relation to the State and State institutions. There was also reference to the effective reduction of Crown immunity resulting from the corporatisation and privatisation of former Crown entities.

[59] Counsel argued that a result of these statutory and common law developments has been an improved climate of private and public accountability in respect of community values and the provision of goods and services. Indicative of the evolution of values and standards is the general policy statement in the Lawyer's and Conveyance's Bill, introduced to the House of Representatives in July 2003, and expressed in these terms:

> The purposes of the Bill are the maintenance of public confidence and the provision of legal services and conveyancing, the protection of consumers of those services, and more competitive and flexible professional environment, and the encouragement of a more responsible regulatory regime. The Bill repeals the Law Practitioners Act 1982. The Act no longer meets the needs of the legal profession or consumers and inhibits professional responsiveness to changing market needs.

[60] Counsel noted that as a general rule barristers sole now carry professional indemnity insurance through a scheme organised by the New Zealand Bar Association. This is relevant both to the issue of a changed context and the question whether barristers may be consciously or unconsciously affected in their duties to the Court by the possibility of being sued by their client. Figures for 2003 indicate that of the 490 members of the New Zealand Bar Association, 406 had insurance. No figures have been supplied in relation to the New Zealand Criminal Bar Association and of course there may be many practitioners who are members of neither of those organisations.

[61] Another significant change since *Rees v Sinclair* is the development of the New Zealand rules of Court and of case management systems which reduce or may reduce the risk of vexatious claims against a defendant, including counsel. I venture however that the increasing incidence of vexatious and querulous litigation, a phenomenon of which Judges are very aware, significantly reduces the weight of the submission. The New Zealand experience leads me away from the optimistic expectations of their Lordships in *Hall* that the reform of court rules and developments such as *Hunter* will adequately counter the prospect of collateral attack or other vexatious litigation.

[62] Counsel submitted that the purpose of immunity, as distinguished from its rationale, is to prevent actions against practitioners for advocacy work but this purpose must, in practice, often be undermined by the uncertain scope of the test of "intimate connection". This means that cases will often have to go to trial to determine on all the facts whether the conduct complained of is or is not intimately connected. In consequence, things sought to be avoided by immunity are not avoided and in counsel's submission that by itself is an important reason for abolishing the rule. I would think, however, that if there were substance in the reasoning the concern could be met by abolishing the intimate connection test rather than the immunity rule entirely.

[63] As to the "separate duties" argument in support of retention, counsel submitted that the importance of the barrister's ultimate duty to the court should not cloud an inquiry as to whether immunity is plainly justifiable on a separate duties basis. In counsel's submission the objective of counsel's duty was one of the means of seeking to ensure that the court does not make wrong decisions. But, he argued, the trial process and the rules of court would reduce to a rarity a wrong decision by a court in consequence of counsel's unconscious breach of duty. The adversarial system, case management and other procedural reforms and the divergent interests in typical litigation would, in counsel's submission, meet the risk.

[64] Counsel submitted that relevant evidence demonstrates that absence of immunity does not produce material problems in respect of an advocate's duties to the court but we have no empirical evidence one way or the other on that issue. But

in my view, the fact that there is no barristerial immunity in Canada and some European countries, and of course now England, is not evidence of the absence of risk but of acceptance of it.

[65] Counsel recognised that in *Rees v Sinclair*, immunity was upheld on the separate duties argument out of concern that standards might slip, but he submitted this is a low threshold against certainty of harm to some litigants negligently represented and is a threshold which in modern conditions is unacceptably inadequate. The risk of poor standards of advocacy, lapses of duty to the court, prolixity and otherwise defensive advocacy are, in counsel's submission, more appropriately regulated by means other than barristerial immunity. Alternatives include wasted costs orders against counsel, authority for which in New Zealand is *Harley v McDonald* [2002] 1 NZLR 1; continuing education and peer review; case management techniques; and the uplifting of awareness of professional standards of competence. Further, advocates know that it is not negligent to meet a duty to the court where such conflicts with a duty to the client.

[66] Turning to the cab rank rule, which Salmon J considered of continuing importance, particularly in the area of criminal litigation, as a justification for retention of immunity and which Laurenson J also considered to be a reason why immunity should remain in criminal proceedings, counsel submitted there was no connection between the perceived problem and the solution. The perceived problem was that some practitioners might shirk their duty under the rule to avoid the risk of being sued vexatiously by a known querulous litigant. But in counsel's submission, although some may not comply with the rule, most lawyers would with the result that legal representation would be obtained. The solution is to enforce that rule rather than avoid the risk of non-compliance at the expense of litigants who are not vexatious and have in fact suffered loss through negligence on the part of their counsel. There is an anomaly, submitted counsel, in the fact that all practitioners are bound by the cab rank rule but immunity does not extend to all work that practitioners do. This means that immunity cannot be justified on the basis of a trade-off for unavoidable obligation to a client.

[67] As to the existence of other immunities, such as those enjoyed by Judges and witnesses, counsel submitted that this argument is demolished by the speeches in *Hall* and that, in any event, *Rees v Sinclair* did not identify such a justification for immunity.

[68] The pressures of advocacy was a principal reason for Laurenson J's conclusion that immunity should remain for criminal and family law advocates, limited to immunity for acts and omissions in the court room. Counsel acknowledged there can be considerable pressure in the conduct of a case and that a client's ability to sue may add to the pressure for some advocates. But in counsel's submission the added pressure is not of itself a justification for immunity. What had to be demonstrated as a justification was a connection between the fact of pressure and an adverse consequence for the administration of justice, rather than an adverse consequence for the advocate. But working under pressure which might lead to mistakes is not unique to the advocate. He could have added that a decision made in the pressure of trial, perceivable in hindsight to have been wrong, will not necessarily amount to negligence. In relation to criminal appeals based on counsel error this Court has made it plain in countless cases that mere error is not enough to carry the appeal; there must be demonstrated radical error on the part of counsel.

[69] Counsel submitted that there are difficulties in applying the rule because the limits of immunity are imprecise and difficult to apply in practice. He noted that both Salmon J and Laurenson J would abolish the "intimate connection" aspect of the immunity rule. The difficulties of application can produce seemingly anomalous or inconsistent results and thereby undermine public confidence in the administration of justice.

[70] Finally, counsel examined the question of immunity in terms of breaches of statutory duty and breaches of fiduciary duty. In his submission both appellants had actions against the respondents for alleged breach of fiduciary duty, a matter on which I expressed some reservation earlier in this judgment, but which nevertheless provides a focus in argument on the difficulties apprehended by counsel. If there is no immunity for breach of fiduciary duty then immunity in contract in tort would be anomalous. On the other hand, however, extension of immunity to breaches of

fiduciary duty, an issue which has not been discussed in any case known to counsel, which may sometimes import actual dishonesty, public confidence in the administration of justice would be undermined.

[71] Other difficulties arise in relation to breaches of statutory obligations such as, for example, s 9 Fair Trading Act 1986. In counsel's submission it is not competent for the courts to extend a common law immunity to a statutory obligation.

[72] In terms of relief on the interlocutory application appealed against, counsel submits that if this Court should hold that immunity does not exist in relation to at least a fiduciary duty cause of action, the respondent's defence should be struck out in relation to it.

Respondents' submissions

[73] For the respondents, Ms Challis adopted the arguments advanced by counsel for the Interveners, but emphasised the following points. The public interest in administration of justice should take precedence over the public interest in ensuring remedies for wrongs. Since immunity currently exists the onus is on the appellants to demonstrate that it should no longer be sustained. It is not sufficient for the appellants to say that *Rees v Sinclair* was wrongly decided; they must satisfy this Court it should now be over-ruled.

[74] Counsel further submitted that *Hall* was concerned with English conditions and a more appropriate analogy for New Zealand is Australia. Generally illustrative of different conditions in England is the entitlement of English barristers to enter into contracts for legal services, and the obligation of English barristers to carry professional indemnity insurance.

[75] Ms Challis urged that if immunity were to be abolished or modified, that should not have retrospective effect. This, amongst other reasons such as *stare decisis*, made it inappropriate for the Courts rather than Parliament to contemplate abolition of immunity.

NZ Bar Association submissions

[76] For the New Zealand Bar Association Mr Farmer submitted that there was a heavy burden of justification on those who assert that immunity should be abolished, given that there has been no call for reform of the principle from the profession or the wider public.

[77] The House of Lords in *Hall* was, said Mr Farmer, unduly dismissive of the public policy factors that have traditionally justified immunity. Of those factors the following remain very persuasive: a general immunity from civil liability attaches to all participants in courtroom proceedings and there was no justification for holding only advocates liable; the advocate's duty to the court could be affected through even unconscious anxiety about litigation at the suit of a client, thereby imperilling the advocates independence and the implicit trust and confidence which must exist between Bench and Bar; the cab rank rule might be subverted by removal of immunity; there would be re-litigation, including by way of collateral attack, and this would undermine public confidence in the judicial system.

[78] Counsel also noted the context and influences on the *Hall* decision which are distinguishable from the New Zealand situation. These include the incorporation into United Kingdom domestic law of the European Convention for the Protection of Human Rights and Fundamental Freedoms; the additional powers in the new Civil Procedure Rules (UK) to dispose summarily of ill-conceived claims, including such as may relate to advocates; and other barriers to the bringing of vexatious claims such as the Access to Justice Act 1999.

[79] As to social policy considerations indicating that there should be a remedy for every wrong, counsel submitted that the appellants' arguments were too simplistic. They disregarded that there has been no erosion of the immunities protecting the participants in the judicial process. These immunities are mandated by the paramountcy of public interest in the administration of justice. Consumer legislation does not undermine the immunity. Indeed s 40(3) Consumer Guarantees Act 1993 expressly preserves:

> Any rule of law conferring immunity from suit on a barrister or solicitor for work done in the course of, or in connection with, proceedings before any Court or Tribunal.

[80] Further, accountability does not necessarily equate to an award of damages. Provision for accountability can be found, for example, in the profession's disciplinary regime, costs revision processes and liability to pay costs awards.

[81] It was significant, in counsel's submission, that immunity is still very much a part of the law of Australia, the High Court having declined to reconsider the doctrine in *Boland v Yates Property Corporation Pty Ltd* (1999) 167 ALR 575.

[82] Finally, counsel submitted, "any significant reform of such an entrenched and fundamental principle of the common law on public policy grounds should preferably be left to the Legislature."

NZ Law Society submissions

[83] The New Zealand Law Society supported the submissions advanced for the New Zealand Bar Association and added that the immunity extends not just to barristers but to solicitor advocates. There is no real issue about that. *Rees v Sinclair* was decided at a time when practitioners as barristers sole comprised a handful of silks and scarcely more juniors. Mr Sinclair himself practised as a barrister and solicitor.

[84] Counsel submitted that the question whether *Rees v Sinclair* was wrongly decided is not relevant, the real issue being whether public policy considerations in New Zealand support continuation of immunity.

[85] Emphasis was placed by counsel on the seniority and experience of the High Court bench in this case, both as practitioners and Judges. Neither favoured the total abolition of immunity.

[86] Fundamental to an appreciation of the issue before the Court is that immunity from suit is not accorded for private advantage but public benefit, whether it is the

immunity of diplomats, foreign sovereigns, or participants in the processes of the Court. Those which apply to the Court, extending to Judges, jurors, witnesses and advocates, reflect the unique character of such proceedings.

[87] Counsel submitted that the duty of an advocate to the Court is as important a consideration today as when *Rees v Sinclair* was decided. Situations will arise where that duty may be compromised even unconsciously by a conflicting duty to the client.

[88] The inevitability of vexatious litigation was a matter of significant concern to the Law Society. The confidence expressed by their Lordships in *Hall* could not be reflected in New Zealand with its different provisions for legal assistance to litigants. As counsel for the NZ Bar Association pointed out, there were significant differences between the UK Access to Future Act 1999 and the NZ Legal Services Act 2000. The distinction is summarised by counsel, in my view reasonably correctly, in this way:

> The English legislation is … primarily concerned with restricting access to public monies for legal proceedings and ensuring that those who obtain access to public funding have a reasonable case. This is to be compared with the scheme of the Legal Services Act 2000, the purpose of which is to promote access to justice by, inter alia, providing a legal aid scheme that assists people who do not have sufficient means to pay for legal services to nonetheless have access to them.

[89] The inevitability of collateral attack was emphasised by counsel. The House of Lords itself divided on this issue as it bore on the finality of criminal proceedings. Counsel submitted that the *Hunter* principle was not an adequate answer. This is because of the reluctance of New Zealand Courts peremptorily to strike out claims and by the inevitability of delay before obtaining finality of litigation on a strike out application.

[90] The risk of defensive advocacy was also addressed by counsel, the risk of which being seen as an additional policy justification for immunity. This is consistent with the importance of the issue and the abundant literature discussing it.

Discussion

[91] There can be a tendency for arguments on issues whose difficulties stem not from innate complexity but fundamental conflicts to become unduly derivative and even interstitial. In this debate there may be a fundamental incompatibility between two sets of values. One is a system of remedial principles for recognised wrongs. The other is the system for the just administration of all the laws of New Zealand. Ultimately, incompatibility may be resolved by subordination of the values of one set to those of the other.

[92] Of course, if there were no incompatibility, each set of values would be applied. Much of the argument in support of abolition can be characterised as an analytical denial or depreciation of the existence or significance of incompatibility. Hence, for example, there is the argument that advocates would not be deflected from their duty to the court or the public by anxiety over being sued by a querulous client.

[93] Earlier in this judgment at [31] I raised a matter which was the subject of submissions by counsel and which I now return to. This is the question whether negligence by an advocate, the present subject of immunity, is properly to be regarded as irremediable. The answer is in the negative, it simply being irremediable by the payment of money. In the criminal law radical error by counsel is a recognised ground of appeal, the establishing of which almost invariably leads to a quashing of the conviction and a new trial. In both criminal and civil cases there are disciplinary remedies and costs revision procedures. So the dilemma is not provision of a remedy on the one hand and the maintenance of the administration of justice on the other, but rather the provision of an additional remedy, namely financial compensation on the one hand and the maintenance of the administration of justice on the other. This affects the weighting of the incompatible values, in my view, in favour of the latter.

[94] The difficulty which advocates of abolition immediately encounter is that the common law and the Legislature have acknowledged the crucial importance of civil immunity for those intimately connected with the judicial process. Until *Nakhala v*

McCarthy [1978] 1 NZLR 291, an action complaining of the judicial work of a superior court Judge was, as Woodhouse J remarked at 293, "probably unique in New Zealand". It must have been so since then because the case confirmed the common law privilege of immunity from civil suit which had long been recognised and applied in the United Kingdom. More recently, the Legislature has increased the immunity of District Court Judges and of Associate Judges of the High Court to the same level as High Court Judges themselves – s 119 District Courts Act 1947, amended 20 May 2004 by 2004 No 42, s 7; s 26Q Judicature Act 1908, amended 20 May 2004 by 2004 No 45, s 11.

[95] Witnesses in court proceedings have a similar immunity from civil suit, including in respect of statements made outside court for the purpose of being repeated as evidence. *Dentice v Valuers Registration Board* [1992] 1 NZLR 720, at 723-4; *Prince v Attorney General* [1996] 3 NZLR 733, at 741.

[96] The immunities exist for the public benefit. The rationale is explained by Fry LJ in *Munster v Lamb* (1883) 11 QBD 588, 607 in terms which must be no less apt in our contemporary, highly litigious society:

> The rule of law exists, not because the conduct of those persons ought 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.

[97] Earlier in my reasons, at [44], I focussed on the distinction between a duty of care and an actionable duty of care, the latter being examinable in terms of proximity and policy. There is in my view a sufficient proximity between a party to litigation on the one hand and Judges, witnesses and counsel on the other hand, to impose, subject to policy considerations, a duty of care. A Judge would know that an erroneous decision could cause loss to the affected party and the witness would be taken to know that a careless testimony could similarly cause loss. If the policy

reasons for not imposing a duty of care are compelling, they relate, as I have indicated, to the due administration of justice. In my view the position of an advocate is also one of proximity but countervailing policy.

[98] In my respectful view the vexation of defending actions is one that is underrated in *Hall*. An advocate cannot simply forward a writ on to an indemnifier and forget about it entirely. Moreover, in New Zealand in recent years, there has been a significant increase in vexatious litigation, often with a collateral purpose. The disposition of it at first instance and on appeal has involved significant time and inconvenience to the judiciary, and similarly for defendants/respondents who have also incurred considerable costs, personally or in respect of the Legal Services Agency. Such cases necessarily involve the hearing of argument and the delivery of reasoned judgments. However effective the United Kingdom Rules of Court might be in achieving summary dismissal, the position would not appear to be as peremptory in New Zealand. The right to justice affirmed by s 27 NZ Bill of Rights Act 1990 binds the courts.

[99] Although r 136(2) of the High Court Rules enables a defendant to apply for summary judgment against a plaintiff if the defendant satisfies the court that none of the causes of action in the plaintiff's statement of claim can succeed, this Court has held that except in clear cases, such as a claim upon a simple debt where it is reasonable to expect proof to be immediately available, it will not be appropriate to decide by summary procedure the sufficiency of the proof of the plaintiff's claim. *Westpac Banking Corp v M M Kembla New Zealand Ltd* [2001] 2 NZLR 298, at [63].

[100] In relation to the power to strike out, an application proceeds on the assumption that the facts pleaded in the statement of claim are true. As this Court pointed out in *Attorney General v Prince & Gardner* [1998] 1 NZLR 262, at 267:

> It is well settled that before the Court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed … The jurisdiction is one to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material…

[101] I do not doubt that if barristerial immunity were removed there would be a significant increase in vexatious claims by querulous, vainly hopeful, desperate or vengeful litigants.

[102] Conversely, I doubt that a change in the law would bring to light many sustainable claims for or essentially in the nature of negligence. This is because:

> (a) The nature of a trial is such that counsel often have to make difficult judgments in pressing circumstances, such that the possibility of a more beneficial course, perceived in hindsight, is unlikely to be regarded as evidence of negligence.
>
> (b) An advocate's honouring the duty to the Court at the expense of the client's personal interests or inclination could not be considered negligence.

[103] In my opinion, the civil immunity of all the significant participants in a Court process significantly facilitates the administration of justice by inhibiting vexatious litigation. Particularly in relation to finality in criminal matters, immunity supports the integrity of the judicial system. The fact that an appeal against conviction or sentence may have failed could not of itself be a barrier to a vexatious claim against trial counsel or counsel who appeared on the appeal. An obsessive or otherwise querulous person who had been convicted or sentenced could indirectly attack the integrity of the verdict or appellate judgment on the basis that these were a consequence of counsel's negligence.

[104] As to the likelihood of actual anxiety on the part of counsel over being sued by a disaffected client, I would give that less weight. Courage is an elementary virtue and expectation of counsel. Apart from that, there is nothing to suggest that counsel might have been or might be influenced in the discharge of their duty to the Court by concerns about complaints to law societies or risk of cost revision. But it is impossible to know the reality, only the theoretical risk. That risk must be reduced by immunity.

[105] What is to my mind crucial, however, is the maintenance of the apparent independence of the Court process itself by obviating any basis for suggestion that a Judge or a witness or counsel might have been influenced by the possibility of being sued by one of the litigants. In my opinion a compelling justification for the

immunity of the judiciary, witnesses and counsel is that not only must they in fact be beyond the risk of the improper influence of fear or favour, they must manifestly be seen to be free of that risk.

[106] The cab rank principle has conventionally been advanced in support of immunity. It is a professional obligation to facilitate the administration of justice. It is not overstating the obligation to call it one of the foundation stones of a free and democratic society. The right to consult and instruct a lawyer, affirmed by s 24 NZ Bill of Rights Act could not be honoured if lawyers had an entitlement to withhold their services on an arbitrary basis. Immunity is neither a reward for nor a corollary of that obligation to act, but I think there is a real risk that the principle may in due course become undermined by abolition of immunity. The cab rank rule protects minorities, the unpopular, the despised, the outcasts as well as the simply querulous. Although the courageous traditions of the bar may prevail for a generation or so, fundamental protections of a free and democratic society must last immeasurably longer. I am troubled by the tendency to reduce ethical standards to commercial concepts as, it seems to me, some aspects of the debate do. In a decade or two it may be thought that if one would be likely to suffer loss or inconvenience through taking a particular brief, one should not have to accept it. I believe there is an unacceptable risk that the cab rank rule would be eroded by removal of barristerial immunity. This also indicates a public benefit in retention.

[107] Turning to the question whether the immunity should in any event be circumscribed by abolishing the "intimate connection" aspects, I hold the view that apprehended difficulties in this regard are likely to be overrated. We were not cited examples of anomalous or marginal cases, and I think that few marginal cases are likely to be litigated. I do not doubt that if there were a reasonably arguable question whether certain acts or omissions fell within or outside the scope of immunity, underwriters would meet or compromise claims. The perceived difficulty is not a practical issue but an abstract one. It is just another example of legal or equitable principles which can only be articulated with a measure of generality and which fall to be applied to particular facts as they may arise. In a marginal case the conflicting policy arguments carry weight appropriate to the circumstances.

[108] In my opinion immunity is as necessary for the due administration of justice for the public benefit, and for the advancement of our other democratic protections, as it ever was, for the reasons I have explained. But in addition I think it would be wrong to overrule a decision of this Court which has stood for three decades and which has been founded on considerations of public policy. The doctrine of *stare decisis* compels this Court to uphold retention of immunity on the same terms as has existed. The case is not like *Attorney-General v Ngati Apa* [2003] 3 NZLR 643, which did not involve a re-alignment of policy but a correction of jurisprudential error.

[109] There is also weight in the argument that the New Zealand and Australian principles should remain in alignment given the economic relationship and reciprocal professional incidents of these two countries. The United Kingdom may look eastward, but the Pacific region is not in view.

The crux

[110] I come now to express an opinion which bypasses the policy arguments advanced by the parties and which in my view clearly determines that the appeals must fail. I did not go directly to the matter in deference to counsels' extensive and learned arguments and also because my views might be of assistance in another forum, judicial or legislative as the case may be. I am of the opinion that barristerial immunity is no longer just a common law principle but a matter of statutory conferment.

[111] Section 61 of the Law Practitioners Act 1982 provides as follows:

> **Status of barristers**
>
> Subject to this Act, barristers of the Court shall have the powers, privileges, duties, and responsibilities that barristers have in England.

[112] At the time s 61 was enacted barristerial immunity in England was in terms of *Saif Ali v Sydney Mitchell & Co*, decided by the House of Lords in 1978. The scope of immunity confirmed in that case was as described in *Rees v Sinclair* and paraphrased in [1] of this judgment. It is interesting to note that the Lawyers and

Conveyancers Bill anticipates the continuation of immunity in terms of *Rees v Sinclair.* Clause 104 replicates s 61 Law Practitioners Act 1982 except that it defines powers, privileges, duties and responsibilities in terms of those barristers here "at law" rather than "in England".

[113] The written submissions on behalf of the appellants invoked s 61 to support an argument that barristerial immunity had now been extinguished in New Zealand in consequence of its abolition by the House of Lords in *Hall*. That argument was addressed in written submissions for the respondent and the interveners but was not addressed orally because appellants' counsel abandoned the argument at the outset.

[114] The appellants' abandoned argument was, in effect, that s 61 was ambulatory in nature, that wherever there might be some change to the powers, privileges, duties and responsibilities of English barristers, s 61 would automatically effect a similar change in New Zealand. In short, that s 61 was not declaratory of the incidents of status in existence at the time the section was enacted, but is a delegation to a foreign community of the power to impose or change the incidents of barristerial status within New Zealand to conform to their own circumstances. In my view the proposition is so manifestly untenable that the abandonment of the argument is hardly surprising.

[115] In my opinion s 61 is an absolute answer in favour of the respondent. Mahon J in disposing of the plaintiff's claim in *Rees v Sinclair* was of the view that immunity is a legal privilege. On appeal, McCarthy P recognised that immunity could be argued to be a privilege - see [24] and [25] of this judgment.

[116] It may be arguable in terms of abstract jurisprudence such as Professor W N Hohfeld's classical analysis, discussed by Hammond J at [165], that barristerial immunity is not a privilege. More to the point however is whether the Legislature contemplated the immunity as a privilege when it referred, in s 61 Law Practitioners Act 1982, to "the powers, privileges, duties, and responsibilities that barristers have in England." Not what jurisprudentialists might think, but what Parliament meant, is the real issue.

[117] The phrase in issue had been included in every incarnation of the Law Practitioners' Act since 1882, long before the publication of Professor Hohfeld's writing in 1923. To my mind the Legislature's intention from the outset was to invest barristers in New Zealand with the compendious incidents of the status of a barrister which obtained in England at the time the section was enacted.

[118] By 1892 the barristerial immunity, albeit rationalised differently from the post *Rondel v Worsley* explication, was an established and significant incident of the barristerial status in England. It is inconceivable that from 1892 the Legislature did not intend New Zealand barristers to have that incident of status along with all the other, and sought to achieve such exclusion by not mentioning the word "immunities".

[119] Between the Law Practitioners Acts of 1955 and 1982 came the decisions in *Rondel v Worsley* (1967), *Rees v Sinclair* (1973) with its discussion of the term "privilege", and *Saif Ali v Sydney Mitchell & Co* (1978). Notwithstanding these cases the Legislature enacted s 61 of the Law Practitioners Act 1982 in the same terms as its 1955 predecessor. If it had not been the Legislature's intention to invest New Zealand barristers with barristerial immunity when defining the incidents of status, the 1982 Act provided a plain opportunity to express such an intention. Yet the phrase remained the same.

[120] I have no doubt that barristerial immunity in terms of *Rees v Sinclair* is now vested in New Zealand barristers as a matter of statutory entitlement which a Court is not competent to remove.

[121] Even if that were not so I would think it inappropriate for a Court rather than Parliament to modify or extinguish immunity because of the retrospective implications of a Court decision. The present causes of action extend back more than six years and if a Court were to remove immunity counsel in every case, whether at first instance or on appeal, for at least the past six years would be potentially liable to a proceeding, vexatious or otherwise. The acceptance of briefs which they might have been ethically entitled to decline, the fixing of fees, or the arrangements for professional indemnity insurance in a context of assumed

immunity, would all have been undertaken on a false basis. Courts are not the Legislature and cannot prevent retro-activity in the sense of purporting to affect previously arising causes of action which have not yet been the subject of litigation.

[122] For these reasons I would dismiss the appeals.

[123] However, in accordance with the opinion of the majority of the Court, the appeals are allowed with costs reserved.

McGRATH, GLAZEBROOK AND O'REGAN JJ
(GIVEN BY O'REGAN J)

[124] We agree with Hammond J that the appeal should be allowed and that costs should be reserved. In our view, the reasons given by Hammond J for the abolition of the immunity, and those set out in the judgments of the House of Lords in *Arthur J S Hall and Co v Simons* [2002] 1 AC 615 are compelling. We do not believe there is a present policy justification for barristerial immunity in civil cases. We prefer to leave the question of barristerial immunity in a criminal context to be argued in a case where the particular policy issues which arise in that context have been fully argued. Those issues are highlighted in the judgment of Laurenson J in this case and in the minority speeches in *Hall*.

[125] For the reasons given by Hammond J, we agree that it is appropriate that this Court make a determination on the issues in this case, despite our conclusion's divergence from the obiter comments in *Rees v Sinclair* [1974] 1 NZLR 180, which were applied in *Biggar v McLeod* [1978] 2 NZLR 9, and despite s 61 of the Law Practitioners Act 1982. We are not, however, as pointed out by Hammond J, overruling *Biggar v McLeod.* Our decision is that the policy factors set out in *Rees v Sinclair* and applied in *Biggar v McLeod* no longer justify the retention of the immunity. We are not to be taken as expressing a view on the circumstances in which it is appropriate for this court to depart from a prior decision, and in particular,

whether the advent of the Supreme Court should cause this court to take a more restrictive approach than has previously been the case.

[126] We have considered whether it is open and would be more appropriate in this case for the Court to express its views on the issues prospectively, rather than declaring that the immunity no longer applied at the time that the events founding the present proceedings took place. Assuming without deciding that the Court has jurisdiction to make such a declaration, we agree with Hammond J that the present circumstances do not compel a prospective statement of the law. Whenever the changes occurred that mean the immunity is no longer justified, they had clearly occurred at the time of the events at issue in this case.

HAMMOND J

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Introduction

[127] The President has assumed the burden of outlining the circumstances of this case, and the present state of the authorities on the central issue in the appeal: should a lawyer have immunity from suit if he or she is negligent in relation to the conduct of litigation in this country?

[128] The President has reached the view that such an immunity should be retained, in its present form. I find myself unable to share that view. In my view, the present immunity should go, at least in relation to civil cases, and this Court can and should now say so.

[129] Given the President's careful traverse of the existing law I am afforded the comparative luxury of being able to go directly, and in as straightforward a way as I can muster, to the heart of this important issue.

The present rule

[130] The present legal position in New Zealand is that, notwithstanding the fact that all other professional persons are liable to be sued for damages if loss is caused to his or her client by a lack of professional skill, a barrister sole or a person practising as a barrister and solicitor is not, if the matter complained of is sufficiently proximate in relation to litigation. And this no matter how egregious the particular breach of care may have been. I will call this rule "forensic immunity".

[131] It will be observed that the immunity, as it is commonly referred to, is restricted to what the lawyer does when acting as an advocate. This necessarily raises a distinction between what the public would think of as "court work" done as an advocate (which attracts the immunity); and other kinds of lawyers work (which does not).

[132] The immunity in its present form extends to all classes of court work, whether it be civil law (including what today is routinely referred to as administrative law or public law), or with respect to criminal cases. In criminal

cases a flagrant error by counsel is an established ground upon which the safety of a conviction may be challenged, but such an error would not sound in damages.

The case for and against the immunity: introduction

[133] As long ago now as 1791, Lord Kenyon CJ dismissed a claim for negligence brought against a barrister. His Lordship said he believed this action was the first, and he hoped it would be the last, of its kind (*Fell v Brown* (1791) Peake 131; 170 ER 104 at 105). His Lordship has proved to be quite wrong in suggesting that the issue should simply go away: as a matter of observable fact the existence of the immunity has proved to be contentious to this very day. And even if the immunity is to be done away with, it would be foolish to think that some aspects of the relationship between a client and his advocate in a litigation situation will not continue to be troublesome.

[134] That said, to my mind an eye must be kept firmly on the central point in this debate: what is it that requires that where there has been a breach of duty by an advocate, the client cannot sue for loss caused thereby?

The reasons for the immunity

[135] The answers to the question, "why such an immunity?" can conveniently be grouped under six subsets, as follows: (a) the relationship of counsel to the court; (b) the immunities other persons have in court proceedings; (c) the disabilities imposed on counsel by a duty to represent his or her client; (d) the consequences of a no-immunity rule on the primary litigation; (e) the consequences of a no-immunity rule in re-litigation; (f) the juristic character of the "immunity".

(a) The relationship of counsel to the court

[136] It is elementary that an advocate owes a duty to the court as well as to his client. That is a cornerstone of the litigation system throughout the common law world. But right from the time that challenges began to be mounted to the continued

existence of this immunity, appellate courts expressed concern that liability for negligence in the performance of the advocate's task might have the consequence of making a lawyer less willing to perform his or her duty to the court when it conflicted with the interests of his or her client.

[137] Perhaps the first point to be made here is that this problem is not unique to lawyers. Doctors, for instance, have distinct duties with respect to medical ethics but this does not confer immunity on them from negligence. Indeed the only profession where a third party interest or relationship is said to change the existence of a duty of care is in relation to advocates.

[138] Secondly, where an advocate distinctly fails in his or her professional standards - and in particular his or her duties to a court - there are disciplinary sanctions which may be resorted to by professional bodies, and, in extreme cases, by the court itself (through the contempt powers of a court).

[139] Thirdly, there is no compelling empirical evidence of which I am aware to support the assertion that the imposition of liability for negligence is likely to cause advocates to ignore their duties to the court. Quite the contrary. The immunity we are considering does not exist in Canada (*Demarco v Ungaro* (1979) 95 DLR (3d) 385), the United States of America (*Feric v Ackerman* 444 US 193 (1979), or France (Hill "Litigation and Negligence: A Comparative Study" (1986) 6 Oxford J Legal Studies 183).

[140] In Canada and the United States of America, the attorney's election to honour the public obligation must be shown to have been so manifestly erroneous that the act or omission was one which no prudent advocate would have entertained. The United States of America, and increasingly Canada, are what is sometimes characterised as "litigious" societies. Yet the sky has not fallen in those jurisdictions on account of the lack of forensic immunity; indeed it is difficult to discern even the formation of storm clouds. (If anything, in those jurisdictions it is the problem of serious medical incompetence, rather than legal incompetence, which has given rise to significant social concern because threat of suit has undoubtedly had some real impact on the provision of medical services).

(b) The immunities other persons have in court proceedings

[141] The law gives some broad immunities to all those who participate in court proceedings. To take a simple illustration, counsel cannot be sued (though they could be disciplined by a judge, or by professional conduct bodies) for outrageous, unfounded and defamatory statements about the opposing side, in court. A judge has an absolute immunity from suit. Why, therefore, should there not be counsel immunity?

[142] The answer to this "discrimination" concern, is that it is not discriminatory at all. These other kinds of immunities have their own distinct and eminently supportable justifications. The judiciary, for instance, has to be able to deal fearlessly and in an unimpeded manner with whatever it is that the case is about. And counsel is given a very large licence to speak in favour of his or her interests. But those sorts of things do not appear to me to have anything to do with the alleged public policy which requires immunity from legal action for negligent acts.

[143] Mr Farmer stressed the immunity from suit of expert witnesses in court. Again, witness immunity is given in this instance because witnesses are required to give their evidence without fear, and liability may inhibit them in that regard. Whatever experts may think they are doing they have the same obligation as other witnesses to give truthful evidence (including honest and full opinions). They are not (unlike barristers) advocates for their clients' positions.

(c) Counsel is under a particular disability?

[144] The argument here runs that it would be unfair to make an advocate liable in negligence since he or she is obliged to accept instructions from anyone who wishes to engage their services for a proper professional fee, in an area of law in which they practise. In shorthand form, this is often referred to as the "cab-rank" principle.

[145] Real attention has to be paid, when addressing this concern, to the circumstances of the particular jurisdiction, and the distinctive structure of the legal profession in it.

[146] In New Zealand, according to the New Zealand Law Society website, there are currently about 9,053 lawyers in New Zealand, of which approximately 12 percent are in practice as barristers sole. On the basis of those figures, it would appear that there are approximately 1,086 members of the "separate" bar.

[147] The legal profession in New Zealand is governed by Rule 1.02 of the *Rules of Professional Conduct for Barristers and Solicitors of the New Zealand Law Society* (7th ed 2004), which provides as follows:

> A practitioner as a professional person must be available to the public and must not, without good cause, refuse to accept instructions for services within the practitioner's fields of practice from any particular client or prospective client.
>
> Commentary
>
> (1) It would be improper for a practitioner to accept instructions unless the matter could be handled promptly with due competence and without undue interference by the pressure of other work or other obligations. Instructions for work, which is outside the field of competence of a practitioner, should be either declined or, with the consent of the client, referred to another practitioner.
>
> (2) The complexities of modern legal practice mean that a practitioner is unlikely to be competent in all fields of practice. A practitioner should not hesitate to explain to a client or a prospective client that the client needs the services of a practitioner more experienced in the appropriate field or practice.
>
> (3) Where the commitments of a practitioner should not allow sufficient time to be devoted to the matter, those commitments would be good cause for refusing to act.
>
> (4) Any refusal to act must not be based on the race, colour, ethnic or national origins, sex or creed of the prospective client.
>
> (5) If a client is eligible for legal aid the practitioner has a duty to draw that fact to the client's attention.
>
> (6) A client should receive the same standard of service whether the client is legally aided or not.
>
> (7) Nothing in this rule or its commentaries shall prevent a practitioner from contracting for a general retainer by accepting a payment in return for which the practitioner remains available to receive instructions from the payer and agrees not to accept instructions that would conflict with that obligation. A barrister sole would need to make a retainer contract through an instructing solicitor.

[148] This rule represents a fair and balanced endeavour on the part of the New Zealand Law Society to evolve, for the substantial majority of legal practitioners in this country, rules which meet the present day circumstances of New Zealand society. Many barristers and solicitors in firms are devoted full time to litigation work, and, particularly outside the main centres, many practitioners turn their hand intermittently, or to a marked degree, to litigation of one character or another. Indeed the conduct of litigation in New Zealand would be sorely affected if the realities faced by a practitioner in a small and more remote rural town in New Zealand who diligently turns his or her hand to traffic cases, domestic disputes, petty crime and the like were not to be recognised. The needs of all New Zealanders are important here. That is, the setting of the relevant legal rules should not be viewed against only the concerns of specialist barristers serving specialist constituencies.

[149] The cab-rank argument may once have had more force in a jurisdiction with an enforced separate bar. That state of affairs has now gone, to a marked extent, even in the United Kingdom. And although I think it would be fair to say that Australia still has, particularly in the major litigation centres, strong and distinct separate bars, a significant amount of litigation work is done by lawyers with a "fused" role.

[150] Then too, I am not at all sure that it is accurate to say that the litigation specialist is in anything like a unique position. To take doctors again, such persons owe a duty to medical ethics as well to the interests of a patient. And in commercial life, there are a number of illustrations of persons who, in law, cannot refuse to take on clients. Historically, the liability of even the humble innkeeper turned on this point.

[151] The cab-rank rule, to the extent that it applies in a given jurisdiction, is not therefore a supporting reason for the existence of the immunity. The proper way to view the cab-rank principle is that it is one of the circumstances to consider in a given case in determining whether a lawyer has acted reasonably and prudently. As Louis Blom-Cooper suggested to the House of Lords in argument in *Rondel v Worsley*, "the peculiar characteristics of the professional work of a lawyer … are

relevant to the issue, what standard of duty of care does the law impose? But these characteristics do not constitute, either singularly or cumulatively, any denial of the existence of a duty to take care" ([1969] 1 AC 191 at 196C).

(d) The consequences of a no-immunity rule on the primary litigation

[152] The concern here can be shortly put. If an advocate knows that he or she is not immune from suit, there may be "over litigation", one feature of which is "prolixity". Or, as it is sometimes put, advocates will likely practise defensively.

[153] I have to say that, sadly, even with an immunity rule, litigation is today often sprawling and imprecise. It is somewhat surprising that more counsel do not appreciate the pleasure, relief even, with which a court receives a crisp and well-understood case from counsel. Too often the blunderbuss, rather than the rapier, is the weapon to which counsel resort.

[154] For myself, I doubt that much change would occur under a no-immunity rule, when counsel are already endeavouring to make every single post a winning post, regardless of its strength.

(e) The consequences of a no-immunity rule in re-litigation

[155] The argument here is simply that permitting an action for negligence against an advocate would have the undesirable consequence of requiring a reconsideration of the merits of much that transpired at the original trial. And that there are likely to be a number of difficulties, of a largely practical character, in a second "go around". For instance, witnesses might not now be available, important papers or exhibits may have been lost, and so on. Then too, it is said, as Lord Morris put it in *Rondel v Worsley,* it would be "a sort of unseemly excrescence" (above, at 250) upon a legal system if a man who was convicted of a criminal offence, and whose appeal was dismissed, could seek to reopen the issue by contending that, but for the incompetence of his counsel, he would have been acquitted (and that he ought to be compensated for the regrettable effect on his own life).

[156] There is some force in these concerns about re-litigation, which range from efficiency concerns and the concern over collateral attacks on judgments through to practical legal issues, such as limitation periods, causation, and damages. But the short answer is that those kinds of concerns are already with us, and they are being addressed now within the New Zealand legal system. For instance, to some extent our legal aid system filters out unmeritorious claims; and the doctrine of abuse of process (which rests heavily on the notion of finality of litigation) is a most useful vehicle. To the extent that any further adaptations are required in existing legal processes in relation to the disappearance of advocate's immunity I would expect those to take place on the sort of incremental basis which is the usual method of the common law.

[157] There is support for this view elsewhere in our law. Even leaving aside counsel incompetence appeals in criminal cases, for one reason or another, re-trials already have to be held on some occasions. Simple illustrations are the discovery, sometimes quite belatedly, of relevant "new" evidence; then too, trial judges may make errors which lead to a direction on appeal for a new trial; sometimes jury verdicts are found to be perverse, also leading to re-trials. These re-trials are not always straightforward, but they are able to be dealt with quite adequately.

[158] In the area of counsel incompetence, flagrantly incompetent advocacy which has given rise to an unsatisfactory or unsafe conviction is a well-established ground for a criminal appeal in New Zealand. This ground of appeal is unfortunately raised relatively commonly in this Court. The occasions on which an appeal to this ground succeeds are relatively rare, and the hearings raise their own kinds of difficulties. But those difficulties have proved to be by no means insuperable, and are not such as ought to deflect the proper course of the ultimate justice of the case.

(f) The juristic character of the "immunity"

[159] The proposition here is that the rule of forensic immunity either is, or is akin to, a statutory "privilege".

[160] If the immunity is of that character, that may have very distinct consequences. One is that there would not be any duty at all on the advocate (rather than a duty which is "blocked" or "stayed" by the immunity) to take care. Another, and this is asserted by the President, is that the "privilege" might then be within s 61 of the existing Law Practitioners Act 1982 (see the President's judgment at [111]), and consequently rests upon a statutory base which could not be altered by a court.

[161] The first kind of difficulty became acute in the United Kingdom as a result of *Osman v United Kingdom* (1998) 29 EHRR 245 (as to which see English, "Forensic Immunity Post-Osman" (2001) 64 Mod LR 300). However, for present purposes, the debate, and cases, following *Osman* are principally of interest as demonstrating "a wholesale retreat" (as English puts it) from public policy immunity generally, in face of the constraints of the European Convention on Human Rights.

[162] For present purposes however, what I wish to emphasise is that it is analytically wrong to endeavour to convert an "immunity" into a "privilege".

[163] Legal language in this area matters. The internationally distinguished New Zealand jurist, Sir John Salmond, pointed out many years ago that the terms "right" and "duty" were hopelessly overworked, and too often resorted to for relationships which were not in reality the same, thereby giving rise to confusion in legal argument. (See *Jurisprudence* 12ed ch.vii).

[164] Professor W N Hohfeld (*Fundamental Legal Conceptions as Applied in Judicial Reasoning* Ed. Cook 1923 ch2) endeavoured to analyse the problematic "right-duty" relationship into component parts, to encourage greater accuracy in language.

[165] Hohfeld's famous analysis is as follows:

Opposites	{right	privilege	power	immunity
	{no-right	duty	disability	liability
Correlatives	{right	privilege	power	immunity
	{duty	no-right	liability	disability

[166] A "privilege" is the opposite of a duty, and the correlative of a "no-right". An "immunity" is the correlative of disability ("no power") and the opposite of "liability". However the analysis of "privilege" is made more difficult than anywhere else in the table, because Hohfeld found it necessary to treat "liberty" and "privilege" as being synonymous. This although the usual distinction is that a "liberty" is primarily lawful for all, whereas "privilege" covers things that are *prima facie* unlawful but allowable in certain circumstances to a circumscribed number of persons.

[167] In the end, attempts to apply this sort of analysis to liberties or privileges, in particular, in actual cases have proved problematical, even at the highest level (see eg Lord Lindley's speech in *Quinn v Leathem* [1901] AC 495 at 534; and that of Lord Bowen in *Mogul Steamship Co v McGregor* (1889) 23 QBD 59).

[168] Analytically, the term "immunity" is much more easily dealt with. It means, in Hohfeld's scheme, a freedom on the part of one person against having a given legal relation altered by a given act or omission on the part of another person. Hence, a judge is "immune" from having to pay damages for defamation because of what she says in the course of a trial; the correlative is a disability; and immunity is the opposite of liability.

[169] To my mind therefore, in strictly analytical terms, the term "immunity" is a much better "fit" for the problem of advocates liability. But importantly, such an approach also accords better with the everyday use of language, which simply sees an immunity as a state of freedom from the operation of otherwise applicable legal rules. This is consistent with the root of the word ("manus" - hand) as meaning "a staying of the hand" (which would otherwise descend on the hapless advocate). Hence diplomatic immunity does not imply moral blamelessness: the diplomat may well have done a "wrong", but cannot be prosecuted. A child of tender years may have committed an appalling "offence", but by reason of tender years is "immune" from legal process.

[170] Then too, there is this point: any attempt to say that an advocate has the "privilege" (or its legal synonym "liberty") to cause harm to a client is likely to give

rise to understandable moral outrage on the part of the citizenry. It may well have been considerations of that kind which led Sir Thadeus McCarthy in *Rees v Sinclair* [1973] 1 NZLR 236 from endeavouring to stand on this point (contrary to the present stance of Anderson P). McCarthy P preferred to deal with the issue of an "immunity" in public policy terms, rather than on an analytical or semantic approach.

[171] The answer to the President's concern that the existing forensic immunity (or "privilege") is "locked in" by the existing legislation is that the term must today surely be construed in a "rights conscious" way (that is, in a way which does not inappropriately restrict access to the courts). And it would surely come as a distinct surprise to the New Zealand Parliament to find that public access to justice is trumped by a term which now has a changed meaning in the United Kingdom, but not in New Zealand.

[172] Even if this statutory provision does apply, it is surely ambulatory, and not frozen in time. That is, it encompasses the immunities of barristers in England at any relevant time; or, at least that New Zealand courts can change the rule if it is changed in England.

[173] Finally, I note that English drafting practise has not continued to stand firmly on the use of the term "privilege". For instance, s 62 of the Courts and Legal Services Act 1990 (UK) provides that:

> A person who is not a barrister but lawfully provides legal services in relation to any proceeding shall have the same *immunity* from liability for negligence in respect of his acts or omission would have if he were a barrister lawfully performing those services (emphasis added).

The case for removing the immunity

[174] The case here can conveniently be dealt with under these heads: (a) the requirements of justice; (b) respect for the law; (c) the hortatory character of a no-immunity rule.

(a) The justice premise

[175] The argument here is entirely straightforward: it is quite wrong in principle that a victim of egregious professional incompetence should have no remedy for loss caused to him or her. This concern has today even greater concern, given the enactment of s 27 of the New Zealand Bill of Rights in 1990, which overtly supports a general right of access to our courts.

[176] Whatever source of law "access to New Zealand courts" is based on (and essentially it is a fundamental part of the rule of law) any "immunity" which restricts that access must surely be strictly justified as being proportionate to the necessity of the preservation and proper ordering of the justice system itself.

(b) Respect for the law

[177] This leads naturally enough to what I consider to be a reason of real importance. Whilst respect for the law has not, fortunately, fallen entirely on hard times, it has to be accepted that the measure of cynicism and distrust expressed by lay persons for lawyers has increased greatly in, say, the last quarter of a century. The proposition that the bar and the judiciary should continue to support an immunity of the present character can only, ultimately, further erode the critically important confidence of the citizens of this country in the legal profession.

[178] Then too, at the end of the day, the law of torts has a normative role of regulating conduct in our society. This body of law cannot itself be seen to absolve lawyers from negligently caused loss, and expect to be respected.

(c) The hortatory effect of a no-immunity rule

[179] From time to time it has been argued that the effect of a no-immunity rule would be to raise professional standards.

[180] I agree with those judges who have argued, by way of response, that in a litigation setting, there is already a distinct "spur to action": what advocate does not want to win for his or her client? Indeed, there may well be a greater problem with over-zealousness than under-zealousness in litigation today. In short, I do not see an instrumental reason for abolition, under this head.

[181] My reasons would be more symbolic and hortatory. That is, in principle the law should take its stand on "excellence" in matters legal and should not be seen to be supporting anything less than that, even though in reality excellence is not fully attainable. To put it another way, in the formulation of legal rules, the ideal should always be encouraged.

Weighing the respective cases

[182] It follows from the arguments that I have already set out that, in my view, whatever force there is in the case for the immunity - if we were starting afresh - is well outweighed by the case against immunity.

[183] In my view, Deane J (admittedly dissenting from the majority judgment of the Australian High Court in *Giannarelli v Wraith* (1988) 165 CLR 543) was entirely correct to say, and I cannot improve on his language, that "such force as there might be in the arguments for immunity certainly does not 'outweigh' or even balance the injustice and consequent public detriment involved in depriving a person, who is caught up in litigation and engages the professional services of a legal practitioner, of all redress under the common law for 'in court' negligence, however gross and callous in its nature or devastating in its consequences" (at 588).

The standard for negligence

[184] The standard principle for assessing a lawyer's liability in negligence (outside of the ambit of the present immunity) was concisely put by Oliver J, as he then was, in *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384, in these terms:

> The test is what the reasonably competent practitioner would do having regard to the standards normally adopted by his profession (at 403).

[185] If the immunity is to go, should this test be applied to litigation-related cases, as opposed to solicitors work?

[186] Given that there are two important objectives to be supported in this area - on the one hand, the rights of persons to resort to courts and have an identified wrong redressed; and on the other, minimising operational damage within a given legal system by vexatious and even mischievous claims - both objectives could perhaps be addressed by recognising that the standard of care which has to be established before there could be a claim should be that of "gross negligence".

[187] The question then is, should the "usual" standard apply, or should this higher test be applied? Applying the standard test would avoid invidious distinctions as to different classes of lawyers work, as well as the problem of defining the fuzzier edges of where litigation begins and ends. But the higher test for forensic work might also further assist in deflecting, at the outset, meritless or mischievous claims.

[188] I consider the virtues of simplicity in the law are very important here. The test articulated by Oliver J is easily capable of assimilation by lawyers and lay persons alike, and it refers to an objective yardstick. The qualification I would add is that a profession should never, in a tort liability case, be entitled to set the ultimate standard for itself. That is for the Court. Oliver J's test has to be read (and I think in practice is read) subject to the word "reasonably", so that the test should perhaps read "normally *and reasonably* adopted by his profession".

Should the immunity be abolished in its entirety?

[189] There is a significant issue as to whether forensic immunity should be abolished only for civil trials, or whether it should go altogether.

[190] In *Arthur J S Hall & Co v Simons* [2002] 1 AC 615, four Law Lords thought the immunity should go altogether; the other three took the view that defence

lawyers still need a core immunity in respect of their conduct of criminal proceedings.

[191] I consider there is considerable force in the views taken in the majority judgments in *Hall* on this issue. However, it is not, strictly speaking, necessary to deal with this point now, and we did not hear submissions from counsel, or for instance, the Crown and the Criminal Bar Association on this issue. It is therefore appropriate to leave this issue to another day, for such future consideration as it may require.

The institutional problem: reform by the courts or the legislature?

[192] There are two subsets to this problem. First, how far is it appropriate for this Court to depart from its own previous decisions? Second, if the present rules as to forensic immunity are to be changed, should this be done by appellate authority, and if so, in which Court; or, by Parliament?

[193] I do not find it necessary to traverse in detail the issue of *stare decisis* in the Court of Appeal in this jurisdiction.

[194] The history of this issue has recently been helpfully set out by Richard Scragg in "The New Zealand Court of Appeal and the Doctrine of Stare Decisis" (2003) 9 Canterbury Law Review 294.

[195] As long ago as *Re Rayner* [1948] NZLR 455 this Court was of the view that ordinarily it is bound by its own prior decisions, but it can overrule a prior decision where appropriate. There has since been a consistent reluctance in this Court to enumerate specific categories of "appropriateness".

[196] This issue arose again recently in *Jones v Sky City Auckland Limited* [2004] 1 NZLR 192. Keith J, for a Full Court said:

> While this court can of course reconsider and overrule its own earlier decisions and it has not stated precise rules to regulate that action, our approach is cautious [para 9].

[197] In my view therefore there is no impediment, on the existing authorities, to this Court reconsidering such views as it has already expressed on this question. But, in any event, this is not a true “reversal” situation; as in *Hall*, we are considering whether a rule should be changed.

[198] If I am wrong in this respect, to my mind there are nevertheless compelling reasons for this Court to express its views in this case.

[199] The rule - such as it was - against this Court revisiting its own prior holdings was doubtless influenced in part by the then structure of the New Zealand courts. In practise, appeals to the Judicial Committee of the Privy Council were relatively rare, and extremely rare in criminal law cases. For all practical purposes this Court was the last court of appeal in New Zealand.

[200] New Zealand now has its own final court of appeal - the Supreme Court of New Zealand - and that Court is a leave Court. The conditions under which leave may be obtained to appeal a decision of this Court to the Supreme Court are defined in the Supreme Court Act 2003.

[201] Leave decisions are issuing from that Court, and it remains to be seen what pattern (if any) grants of leave may take, or whether that Court will choose to enlarge upon the leave provisions by way of commentary.

[202] However, in most jurisdictions, final appellate courts have emphasised the primary role of intermediate appellate courts (such as this court) in regard to matters of litigation practice. A typical example is *Callery v Gray (Nos 1 and 2)* [2002] 3 All ER 417 (HL) where Lord Hoffman said, at para 17, “My Lords, the Court of Appeal is traditionally and rightly responsible for supervising the administration of civil procedure”.

[203] I would have thought that a final appellate court would find it useful to have the views of an immediate appellate court as to the way in which a given legal doctrine is working in practice, or is likely to work under a changed scenario. After all, this Court has the primary responsibility at this time for overseeing counsel

incompetence challenges in criminal trials. That would be one factor, and possibly an important consideration, for a final appellate court to weigh in determining where and how the rules are to be recast, if they are to be judicially recast at all.

[204] I turn then to the question: court or legislative change? I start with the obvious point that the immunity as it stands was judicially created. It is difficult to see therefore why it should not be judicially revisited. Then too, there are important aspects of common law rules, and for that matter the law of negligence, which have been revisited and altered from time to time by appellate courts. Conceptually, new areas of common law doctrine have been created or advanced by appellate courts ("restitution" is probably the most obvious development under this head in recent years).

[205] Secondly, the immunity rule is one which courts are well placed to assess: at heart the debate is whether the administration of justice would be brought into disrepute or disrepair by the threat of litigation against advocates. Judges are particularly well placed to measure how far vexatious claims are controllable, and how far abuse of the process of the court is likely to occur, if the immunity goes.

[206] Finally, there is always, and appropriately so, a concern as to whether further and wider submissions might affect the proper disposition of an issue such as forensic immunity. This is particularly so where empirical or "field" evidence could be brought to bear. However there appears to be little, if any, relevant evidence of a kind that could be called upon in this instance, at least in relation to civil cases.

[207] In my view, this Court can and should deal with the issue of the removal of forensic immunity in civil cases, now.

[208] There remains the issue of whether this Court should indicate whether this development in the law is to be retrospective or prospective. I think that "problem" to be more apparent than real, and like their Lordships in *Hall*, I prefer not to pronounce upon it at this time. I think this Court can, and should, allow these appeals.

Conclusion

[209] In the result, I would allow the appeals.

[210] Counsel have been put to much fuller consideration of the legal arguments than would be usual in this case. I would reserve the question of costs for memoranda by counsel.

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