

Actions for negligence against barristers in England and Australia

**The Hon Justice Susan Kiefel AC
High Court of Australia**

Until the decision of the House of Lords in *Arthur J S Hall & Co v Simons*¹, barristers in England and Wales had been protected from actions arising from their negligence in the conduct of litigation. In that case, the House of Lords revisited the immunity and found, by a majority, that it was no longer required. This marked a significant change of direction in public policy for the House of Lords. Just over thirty years earlier, in *Rondel v Worsley*², that court had confirmed that public policy required the maintenance of the immunity.

Prior to the decision in *Arthur J S Hall*, the High Court of Australia had followed *Rondel v Worsley*³. Its opportunity to confirm, or deny, the existence of the immunity came five years after *Arthur J S Hall*. In *D'Orta-Ekenaike v Victoria Legal Aid*⁴, the High Court held that the interests of the administration of justice required its retention.

A decision by the High Court of Australia not to follow the House of Lords was unremarkable. As the High Court itself pointed out⁵, it had decided as long ago as 1963⁶ that it would no longer follow decisions of the House of Lords at the expense of its own opinions.

More pertinently, it might have been expected that final appeal courts of countries sharing a common law tradition would not arrive at fundamentally different decisions on this question. The immunity, for a long time, had been founded on considerations of public policy, in respect of which differences of approach might have been thought unlikely. An assumption that England and Australia might have a common approach to a matter involving the courts, and the conduct of lawyers in them, might be thought to be warranted.

¹ [2002] 1 AC 615.

² [1969] 1 AC 191.

³ See, for example, *Giannarelli v Wraith* (1988) 165 CLR 543.

⁴ (2005) 223 CLR 1.

⁵ *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 24 [59].

⁶ *Parker v The Queen* (1963) 111 CLR 610 at 632.

Yet, in comparing the approaches of courts in different jurisdictions it is necessary to exercise caution about making assumptions. This must be so even if the jurisdictions have much in common. An analysis of the factors which influenced the Australian and English courts in their decisions as to the immunity reveals that the assumption regarding consistency of approaches is not well-founded. Some things had changed, and the courts were operating in somewhat different legal and constitutional contexts. Those distinct contexts are likely to affect the perception of each court as to the matters which are important to the public interest. Indeed, as Lord Reid expressly noted in *Rondel v Worsley*⁷, conditions may be different in other countries and so public policy may point in a different direction.

I shall refer to the immunity, in a shorthand way, as attaching to barristers. That description best reflects the necessity of a connection between the conduct said to be negligent and a specific case in court. However, it has been accepted, since *Rondel v Worsley*, that if the immunity exists, it should apply to persons having the role of an advocate in litigation, whether he or she be a barrister or a solicitor⁸.

The background to the decisions

Before turning to the decisions in *Arthur J S Hall* and *D'Orta-Ekenaike*, it is necessary to take account of the grounds which, historically, have been identified for the immunity, and the extent to which its scope came to be narrowed.

In 1860, in *Swinfen v Lord Chelmsford*⁹, the Court of Exchequer held that barristers had a broad immunity from actions for negligence. The principal basis then given for the immunity was that a barrister was considered merely to be retained by the client. There was no contract between barrister and client upon which the client could sue. A barrister could usually be regarded only as retained by a client because a barrister held an office which involved a duty to the court and to the administration of justice, not just to the client¹⁰.

The decision in *Hedley Byrne v Heller*¹¹, in 1963, undermined that basis for the immunity. It held that a person could be sued in tort for the negligent performance of his or her professional duties, even if there was no contract with the client. It followed that, if the common law was to maintain the immunity for barristers, it would have to be on a new basis, or its former basis would need to be further explained.

⁷ [1969] 1 AC 191 at 228.

⁸ *Rondel v Worsley* [1969] 1 AC 191 at 232, 267, 284-285.

⁹ (1860) 5 H & N 890 [157 ER 1436].

¹⁰ *Swinfen v Lord Chelmsford* (1860) 5 H & N 890 at 920 [157 ER 1436 at 1448].

¹¹ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

As sometimes happens, the opportunity to rule on such an important question arose in a rather unmeritorious case, four years after *Hedley Byrne v Heller*. In *Rondel v Worsley* the client had no real defence to the charge of grievous bodily harm, of which he had been convicted. His claim that his barrister should have put further questions to witnesses was not compelling. Nevertheless, it raised a point of general and public importance.

In *Rondel v Worsley*, the House of Lords based the immunity squarely on grounds of public policy. It is not that policy grounds were altogether absent from earlier decisions; rather, they were overshadowed, because the nature of the relationship between barrister and client was considered to be determinative. *Swinfen v Lord Chelmsford* itself refers to the duty owed by barristers to the courts and to the administration of justice as relevant to the immunity¹².

Rondel v Worsley identified a number of public policy considerations. In the first place, the administration of justice was seen to require a barrister to carry out his duty to the court, fearlessly and independently. A duty to the client might create a sense of divided loyalty which would inhibit proper conduct.

The immunity was also considered to be necessary to the cab rank rule, by which a barrister is obliged to act for any person if their matter falls within the barrister's usual area of practice and the person is prepared to pay the appropriate fee. The main benefit of the rule is that it ensures that every person receives representation, regardless of their reputation and of how unattractive their case might be. It was feared that the rule might not be followed if barristers identified a person as likely to sue if the case were lost.

Another ground which was identified in *Rondel v Worsley*, and which would later divide the court in *Arthur J S Hall*, related to relitigation. In proceedings brought to establish negligence against a barrister, it would be necessary to prove that the outcome of the earlier case would have been different. This gives rise to the possibility of two conflicting judgments, a circumstance which, obviously, is highly undesirable. The problem would be especially acute in criminal cases.

Associated with the need to avoid relitigation was the absolute immunity provided by the common law to the parties, witnesses, members of juries and judges. This immunity, like that provided to barristers, is based upon what is necessary to the administration of justice.

Whilst *Rondel v Worsley* confirmed that the immunity should be maintained, it also defined some limits to it. *Rondel v Worsley* confined the immunity to acts done in the conduct of litigation. The later case of *Saif Ali v Sydney Mitchell & Co*¹³ stated the

¹² *Swinfen v Lord Chelmsford* (1860) 5 H & N 890 at 920 [157 ER 1436 at 1448].

¹³ [1980] AC 198.

limits of the immunity with further precision. In that case, the House of Lords adopted¹⁴ the statement in a New Zealand decision that protection under the immunity "exists only where the particular work is so intimately connected with the conduct of the cause in court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing."¹⁵

The decisions in *Rondel v Worsley* and in *Saif Ali* were endorsed by a majority of the High Court of Australia in 1988, in *Giannarelli v Wraith*¹⁶.

In England, the immunity continued to be maintained, and maintained within the same limits, until the decision in *Arthur J S Hall* in 2000. It was observed in that case that barristers had enjoyed the protection given by the immunity for some 200 years¹⁷. However, the true purpose of the immunity was not to protect barristers; it was to protect the administration of justice.

The House of Lords: *Arthur J S Hall*

A matter which appears to have been regarded as of some importance to the majority in the House of Lords was the perception of the public. Lord Hoffmann, in particular, said that the arguments for the immunity would need to be strong enough to convince fair-minded members of the public that the public interest, and not some collective self-interest of lawyers, requires the immunity¹⁸.

Interestingly though, as one of the members of the House of Lords in *Arthur J S Hall* pointed out¹⁹, after *Rondel v Worsley* the question whether the immunity was in the public interest was considered by a Royal Commission on Legal Services in 1979. Neither the report of that Commission nor the background papers to what became the *Courts and Legal Services Act* 1990 (UK) revealed that there was widespread dissatisfaction with the immunity among members of the public. Proposed amendments intended to abolish the immunity were withdrawn after debate.

The position of other jurisdictions with respect to the immunity was also considered in *Arthur J S Hall*. Lord Hoffmann summarised the observations of a Canadian judge that Canada appeared to have got on perfectly well without the

¹⁴ *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 at 215, 224, 232.

¹⁵ *Rees v Sinclair* [1974] 1 NZLR 180 a 187.

¹⁶ (1988) 165 CLR 543.

¹⁷ *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 at 676.

¹⁸ *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 at 689.

¹⁹ *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 at 712-713 per Lord Hope of Craighead.

immunity for over 100 years²⁰. Lord Steyn, who wrote the other leading judgment, considered the Canadian experience to be most relevant²¹, a view with which Lord Hope of Craighead disagreed. Lord Hope considered Australian and New Zealand jurisprudence to be more closely aligned to that of the United Kingdom²². At that time, the immunity was retained in both jurisdictions. Although reference was made to there being no advocates' immunity in European countries²³, this does not appear to have been particularly influential. It was generally acknowledged that differences in the role of advocates, and of judges, in civilian countries made true comparisons difficult.

There is a strong sense in the judgments in *Arthur J S Hall* that times had changed. It was pointed out that there had been significant changes to the law of negligence, the legal profession, the administration of justice and public perceptions²⁴. Most of the grounds which had been stated in *Rondel v Worsley* were not now regarded as providing a serious justification for the immunity. In this respect, the High Court of Australia, later, would not disagree²⁵.

What divided the court in *Arthur J S Hall* was the effect that abolition of the immunity would have on the criminal justice system and public confidence in it. Fundamentally, relitigation would amount to a collateral attack on a conviction, but to a different standard of proof. Even if a conviction had been set aside, there would be difficulties. Lord Hope was also of the view that the abolition of the immunity was bound to have effects on the performance of advocates in criminal trials²⁶.

The majority that considered the immunity should be entirely abolished nonetheless accepted the concerns arising from relitigating criminal trials as real. Lord Hoffmann pointed to the circumstance which might arise where a person is convicted, yet in the later negligence action a judge finds he had a chance of acquittal, but for the negligent act²⁷. The solution accepted by the majority lay in decisions respecting abuse of process²⁸. It had been held²⁹ that the court can strike out as an

²⁰ *Arthur J S Hall & Co v Simons* [2002] AC 615 at 695.

²¹ *Arthur J S Hall & Co v Simons* [2002] AC 615 at 681.

²² *Arthur J S Hall & Co v Simons* [2002] AC 615 at 722.

²³ *Arthur J S Hall & Co v Simons* [2002] AC 615 at 680-681, 695, 721-722.

²⁴ *Arthur J S Hall & Co v Simons* [2002] AC 615 at 688; see also at 682-683, 691-692, 728, 737-738.

²⁵ *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 15 [25]-[27], 101 [323], 102-103 [327].

²⁶ *Arthur J S Hall & Co v Simons* [2002] AC 615 at 723-724.

²⁷ *Arthur J S Hall & Co v Simons* [2002] AC 615 at 687.

²⁸ *Arthur J S Hall & Co v Simons* [2002] AC 615 at 679-680, 685, 703, 705-707, 753.

abuse of process the second action if relitigation would be manifestly unfair to the defendant or would bring the administration of justice into disrepute. Prima facie it is an abuse of process to initiate a collateral civil challenge to a criminal conviction. That leaves criminal cases where the verdict has been set aside to be dealt with on different grounds. And it leaves relitigation of civil actions to be dealt with in accordance with the principles of *res judicata* and issue estoppel.

Could the departure from earlier views about the risks to the administration of justice generally, and to the criminal justice system in particular, be explained by what had occurred in the 30 years since *Rondel v Worsley*? A factor which may have been influential in *Arthur J S Hall* was something that was about to occur.

At the time *Arthur J S Hall* was decided, the coming into force of the *Human Rights Act* 1998 (UK) was imminent. That Act enshrined in English law Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), which guarantees to the individual a right of access to the courts for the determination of his or her civil rights. Article 6 was then understood as securing the right of a person to have *any* claim relating to civil rights and obligations brought before a court³⁰. As Lord Hope observed³¹, an immunity from suit, such as the barristers' immunity, is a derogation from this fundamental right.

Although Lord Hoffmann said Article 6 did not arise for consideration in *Arthur J S Hall*³², other members of the House of Lords referred to it as a matter of considerable importance³³. It may also be observed that the starting point in Lord Hoffmann's reasons was not so far removed from notions of rights. It was that English law recognises professional negligence as actionable by all persons³⁴. This was not the view which had been expressed in *Rondel v Worsley*, which acknowledged the loss to a few individuals of the benefit of an action, but held it to be outweighed by the public interest in the administration of justice³⁵.

²⁹ *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529.

³⁰ *Osman v United Kingdom* (1998) 29 EHRR 245 at 312 [136].

³¹ *Arthur J S Hall & Co v Simons* [2002] AC 615 at 710.

³² [2002] AC 615 at 707.

³³ *Arthur J S Hall & Co v Simons* [2002] AC 615 at 718 per Lord Hope, 734-735 per Lord Hutton, 753 per Lord Millett.

³⁴ *Arthur J S Hall & Co v Simons* [2002] AC 615 at 688.

³⁵ See, for example, *Rondel v Worsley* [1969] 1 AC 191 at 228 per Lord Reid.

The High Court of Australia – *D’Orta-Ekenaike*

Article 6 may have provided the prism through which the immunity was viewed in *Arthur J S Hall*. Attention was therefore focussed upon an individual's right of action. It could not feature in the reasoning of the High Court of Australia in *D’Orta-Ekenaike*. Australia has no national Bill of Rights or the equivalent of the *Human Rights Act*³⁶. However, the administration of justice by the courts has a constitutional and governmental dimension, and the immunity was approached from this perspective.

As mentioned previously, the High Court was prepared to acknowledge that many of the bases previously said to justify the immunity could not be said themselves to provide a sufficient basis for it. As highly desirable as the cab rank rule is, it could not support the immunity³⁷. The immunity could not be said to be based upon a possible conflict of duties, for there could be none. A barrister's duty to the court is always paramount³⁸.

The two related considerations the High Court identified as sufficient to justify the maintenance of the immunity were (1) the nature of the judicial process as part of government; and (2) the place that the immunity, in common with some other rules, has in achieving finality in litigation.

It was said that judicial power is exercised by the courts as an element of the government of society. Its aims are therefore wider, and more important, than the concerns of particular parties to the controversy in question. The community at large has a vital interest in the finality of litigation³⁹.

The High Court pointed to the adverse consequences which would flow from relitigation, in collateral proceedings for negligence, of issues which had been determined. A central tenet of the judicial system is that controversies, once resolved, are not to be reopened except in very few, narrowly defined, circumstances. That tenet is reflected in rules concerning entry of final judgments and the rare circumstances in which they may be set aside; in doctrines such as *res judicata* and *issue estoppel*; in restraints on when further evidence may be admitted on appeal; and in the rule of immunity from suit applying to parties, witnesses, counsel, judges and members of juries⁴⁰. The purpose of rules such as these is the avoidance of relitigation.

³⁶ Human rights legislation exists in one Australian State and one Territory: see *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic).

³⁷ *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 15 [27], 102-103 [327]; cf at 119 [377].

³⁸ *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 15 [26].

³⁹ *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 16 [32].

⁴⁰ *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 17-18 [34]-[38].

The High Court pointed out that, if the law were to permit relitigation of a matter which had been decided, a peculiar type of proceeding would occur. If immunities of other participants in proceedings continued, and no one suggested they should not, the relitigation could not examine the contribution the judge or witnesses made to the outcome. The focus would be entirely upon the contribution of the lawyer said to be negligent⁴¹. It was also observed that relitigation of this kind would be different from any other action for negligence because the opinion of a third party (be it judge or jury) is interposed between the alleged negligent act and the injury. This would create problems for proof of causation⁴².

Cases within the immunity

In Australia, the existence of the immunity has required the courts to determine when conduct falls within its scope and when it does not. In both England and Australia, the courts have had to determine the standard of care required of a lawyer and how that standard might be proved.

The immunity, as it applies in Australia, remains limited to advice or conduct which is intimately connected with litigation. A clear example of advice which is covered by the immunity is advice as to whether a person who is accused of a crime should plead guilty to it, as in *D'Orta-Ekenaike*. Conduct which takes place in the court and which would be covered by the immunity might include a failure to put a matter to a witness, or to take an objection to evidence. The connection with the litigation will be self-evident.

It is acts and omissions occurring out of court which more commonly raise questions as to whether they are protected. Conduct which has been said to have the requisite connection with litigation includes making decisions about which witnesses to call or not to call; working up legal arguments; considering the adequacy of pleadings; and causing steps to be taken to have pleadings amended⁴³. Examples of conduct held not to be protected by the immunity are: failing to advise about the availability of possible actions against third parties; failing to advise about the commencement of proceedings in a particular jurisdiction; and negligently compromising appeal proceedings, leading to the loss of benefits which had been gained at trial⁴⁴.

⁴¹ *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 21 [45].

⁴² *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 55 [164] per McHugh J.

⁴³ See *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 52 [155], quoting *Keefe v Marks* (1989) 16 NSWLR 713 at 718.

⁴⁴ *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at 52-53 [156].

The standard of conduct

The standard of conduct which is required of barristers is the same in English and in Australian courts. It is that of a reasonably competent barrister. That standard was confirmed by the House of Lords in 2005 in *Moy v Pettman Smith*⁴⁵, where a barrister advised against, what turned out to be, a more favourable settlement. The advice was given in the context of an application for the court's leave to adduce evidence that affected the value of the claim, necessitated by the solicitor's failure to disclose it in time. The offer made by the defendant was open until court commenced. However, the barrister considered there to be a better than even chance of obtaining leave and advised against acceptance. When it became clear that the judge was not minded to grant leave, the defendant reduced the offer, which the client was obliged to take.

It was held that the standard of care was that required of any skilled professional who had to make decisions and exercise judgments in difficult circumstances, under pressure of time⁴⁶. A mere error of judgment will not make a barrister liable. The barrister in question was not negligent.

The other question which arose in that case was what evidence was necessary to prove that the standard had been maintained. It had earlier been held, in *Bolam v Friern Hospital Management Committee*⁴⁷, that a doctor could not be negligent if he or she acted in accordance with a practice which has been accepted as proper by a responsible body of professional opinion. Evidence of that kind might have been led in *Moy v Pettman Smith*, but it was not. It was explained by Lord Hope⁴⁸ that judges, recalling their days in practice, no doubt feel confident that they can assess whether the relevant standard of care has been departed from without the need for evidence. His Lordship added a note of caution – that if the standard judges apply is that which they would set for themselves, there may be variance between judges, and findings about the standard will become arbitrary.

In practical terms, most courts in Australia could not now impose their views of professional standards. In most Australian jurisdictions, statutes dealing with civil liability for negligence apply the same standard set out in *Bolam v Friern Hospital Management Committee*⁴⁹.

⁴⁵ [2005] 1 WLR 581 at 589 [25], 601 [62].

⁴⁶ *Moy v Pettman Smith* [2005] 1 WLR 581 at 587 [18], 589 [25], quoting *Arthur J S Hall & Co v Simons* [2002] AC 615 at 737.

⁴⁷ [1957] 1 WLR 582 at 587.

⁴⁸ *Moy v Pettman Smith* [2005] 1 WLR 581 at 587-588 [19].

⁴⁹ See, for example, *Civil Liability Act 2002* (NSW), s 50.

Other jurisdictions

A review of decisions concerning the immunity in other jurisdictions within this region shows there to be a diversity of views. The approach of courts to the question of its retention, like that of the English and Australian courts, may be influenced by local considerations.

The courts of New Zealand originally maintained the immunity. It will be recalled that it was a New Zealand decision concerning the scope of the immunity which was taken up by the House of Lords in *Saif Ali*. More recently, however, the Supreme Court of New Zealand has held that the immunity cannot be retained⁵⁰. In the view of the Court there was no general rule of law that the opinion of a court expressed in a judgment could not be questioned in different proceedings. Substantive doctrines such as *res judicata*, issue estoppel and *autrefois acquit and convict*, together with the power to strike out proceedings for abuse of process, were considered sufficient to protect the public interest in the judicial process⁵¹.

In Singapore, the Court of Appeal ruled some time ago⁵² that there is no special immunity for advocates. In India, it would appear that an immunity may remain operative⁵³, but there may be questions as to its scope⁵⁴. I understand the position in Hong Kong to be that the Court of Final Appeal has not expressed a view on the question whether the common law of Hong Kong should be developed along the same lines as in England⁵⁵.

So far as concerns Malaysia, my attention has been drawn to a decision of the Federal Court, in late 1967, in *Miranda v Khoo Yew Boon*⁵⁶. It was there said, by reference to the decision of the Court of Appeal in *Rondel v Worsley*⁵⁷, that because the roles of barrister and solicitor are combined in this jurisdiction, the immunity might

⁵⁰ *Lai v Chamberlains* [2007] 2 NZLR 7.

⁵¹ *Lai v Chamberlains* [2007] 2 NZLR 7 at 37 [61], 41 [72], 44 [80].

⁵² *Chong Yeo & Partners & Anor v Guan Ming Hardware & Engineering Pte Ltd* (1997) 2 SLR 729.

⁵³ Padia (ed), *Pollock & Mulla on Indian Contract and Specific Relief Acts*, 13th ed (2006), Ch 6.

⁵⁴ *Indian Medical Association v VP Shantha* [1995] Supp 5 SCR 110 at 128; *K Vishnu v National Consumer Disputes Redressal Commission* AIR 2000 Andhra Pradesh 518 at 527-528 [31]-[34].

⁵⁵ *HKSAR v Hung Chan Wa* (2006) 9 HKCFAR 614 at 634 [31]; *Halsbury's Laws of Hong Kong*, 2nd ed (2011) at [90.1080].

⁵⁶ [1968] 1 MLJ 161.

⁵⁷ [1966] 3 WLR 950.

not apply. However, the decision in *Miranda* was given less than a month after the House of Lord's decision in *Rondel v Worsley* and before it was reported. It does not appear that the Federal Court had regard to that decision. It will be recalled that the House of Lords said no distinction should be drawn between solicitors and barristers for the purposes of the immunity. What matters was the connection of their conduct to the litigation. The Federal Court does not appear to have considered the question since.

Conclusion

It has not been my purpose to suggest that one approach or the other to the retention of the immunity is correct; rather, I have sought to identify explanations for the different perspectives. Some members in the minority in *Arthur J S Hall* had suggested retention of the immunity only so far as concerned criminal proceedings. However, the approaches of each of the House of Lords and the High Court of Australia did not admit of a middle ground. Both proceeded from positions of high principle. There does not appear to have been a flood of litigation in England since the decision in *Arthur J S Hall*. Although consideration was given to abolition of the immunity in Australia, by statute, that has not occurred.

The theme of this Conference concerns the legal profession and law reform. If further consideration is to be given to the immunity, some assistance may be gained from the views of other courts; but they may not reflect all of the features present in the legal system of Malaysia.