HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

RYAN D'ORTA-EKENAIKE APPLICANT

AND

VICTORIA LEGAL AID & ANOR RESPONDENTS

D'Orta-Ekenaike v Victoria Legal Aid [2005] HCA 12
10 March 2005
M61/2003

ORDER

1. Special leave to appeal granted.

2. Appeal treated as instituted and heard instanter and dismissed with costs.

On appeal from the Supreme Court of Victoria

Representation:

N A Moshinsky QC with V Ruta for the applicant (instructed by BTE Flynn Murone & Co)

D F Jackson QC with D Masel for the first respondent (instructed by Monahan + Rowell)

N J Young QC with D F Hore-Lacy SC, B G Walmsley SC, G A Devries and G M Hughan for the second respondent (instructed by Beckwith Cleverdon Rees)

CATCHWORDS

D'Orta-Ekenaike v Victoria Legal Aid

Legal practitioners – Negligence – Immunity from suit – Applicant sought legal assistance from first respondent, a statutory corporation deemed to be a firm of solicitors, in defence of criminal prosecution – First respondent retained second respondent, a barrister, to appear for applicant at committal proceedings – Applicant pleaded guilty at committal proceedings but subsequently pleaded not guilty and stood trial – Evidence of guilty plea led at first trial – Applicant convicted but verdict quashed on appeal and new trial ordered – Applicant acquitted on retrial – Respondents alleged to have been negligent in advising applicant to plead guilty at committal – Advice allegedly tendered at a conference two days prior to committal proceeding and at a further conference on day of committal proceeding – Whether advocate's immunity available to respondents – Whether advocate's immunity applied in respect of advice allegedly given in conference.

Legal practitioners – Immunity from suit – *Legal Profession Practice Act* 1958 (Vic) – Barristers liable for negligence to same extent as solicitor as at 1891 – Extent of solicitor's liability for negligence in 1891.

Courts – Judicial process – Judicial process as an aspect of government – Nature of the judicial process – The need for finality of judicial determination – Whether advocate's immunity necessary to ensure finality of judicial process.

Courts – Abuse of process – Whether rules about abuse of process provide sufficient satisfaction of the finality principle – Nature of client's complaint – Whether distinction exists between civil and criminal proceedings – Whether distinction to be drawn between challenging the final outcome of litigation and challenging an intermediate outcome.

High Court – Whether *Giannarelli v Wraith* (1988) 165 CLR 543 should be reconsidered – Relevance of statutory changes since *Giannarelli v Wraith* – Relevance of developments in common law in England and Wales – Relevance of experience in other jurisdictions.

Courts – Practice and procedure – Summary determination of action without trial – Whether claim revealed an arguable cause of action.

Legal Profession Practice Act 1958 (Vic), s 10.
Legal Practice Act 1996 (Vic), s 442.

1 GLEESON CJ, GUMMOW, HAYNE AND HEYDON JJ. There are two principal issues in this matter. First, should the Court reconsider its decisions in *Giannarelli v Wraith*[1] that:

(a) at common law an advocate cannot be sued by his or her client for negligence in the conduct of a case in court, or in work out of court which leads to a decision affecting the conduct of a case in court; and

(b) in 1891 (the date at which the extent of the liability of a barrister was fixed by the *Legal Profession Practice Act* 1958 (Vic) ("the LPPA")) an advocate was immune from suit for allegedly negligent acts or omissions committed in court in the conduct of civil or criminal litigation, or committed out of court but leading to a decision affecting the conduct of a case in court?

Secondly, does the immunity apply to the acts or omissions of a solicitor which, if committed by an advocate, would be immune from suit?

2 The issues arise in an application for special leave referred for argument, as on appeal, before the whole Court. The application for special leave is brought by a client (the applicant) whose action for negligence against the respondents was summarily terminated on the basis that his statement of claim disclosed no arguable cause of action.

3 Special leave should be granted but the appeal dismissed with costs. *Giannarelli* should not be reopened. The immunity applies to the particular acts or omissions alleged to have been committed by the second respondent and by an employee of the first respondent.

The facts alleged by the applicant

4 In February 1996, the applicant was charged with rape. He sought legal assistance from Victoria Legal Aid ("VLA"), a body corporate established by s 3 of the *Legal Aid Act* 1978 (Vic). VLA retained the second respondent (Mr McIvor) as the applicant's barrister to appear for the applicant in the Magistrates' Court at the committal proceeding to be held under the *Magistrates' Court Act* 1989 (Vic)[2].

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1 (1988) 165 CLR 543.

2 s 56.

5 At the committal proceeding, the applicant, although not bound to enter a plea, entered a plea of guilty. He was committed for trial in the County Court of Victoria.

6 In February 1997, the applicant was presented for trial. On arraignment he entered a plea of not guilty and stood trial. His guilty plea at the committal proceeding was led in evidence. He was convicted and sentenced to three years' imprisonment.

7 The applicant appealed against his conviction to the Court of Appeal of Victoria. That Court (Winneke P, Brooking JA, Vincent AJA) set aside the verdict, quashed the conviction and directed a new trial[3] on the ground that, although evidence of the applicant's guilty plea at committal had been properly admitted in evidence[4], the trial judge had failed to give sufficient directions about the use that might be made of the plea[5].

8 On the applicant's retrial, evidence of his guilty plea at committal was not admitted. He was acquitted.

9 In 2001, the applicant commenced an action against VLA and the barrister, Mr McIvor, in the County Court. The applicant alleged that he had retained VLA as his solicitor to act on his behalf in defending the charge of rape. (The statement of claim does not allege any consideration for this retainer but that may be ignored. It will be assumed that the applicant alleged that there was a contract of retainer.) He alleged that VLA and the barrister each owed him duties to exercise reasonable skill, care and diligence in acting for him. The pleading is at least consistent with the applicant alleging that the duties were either contractual or duties of care imposed by law, or both.

10 The applicant alleged that the person having the carriage of the matter at VLA (Ms Robyn Greensill) and the barrister, separately or together, advised him that:

(a) he "did not have any defence to the charge";

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3 *R v D'Orta-Ekenaike* [1998] 2 VR 140.

4 [1998] 2 VR 140 at 146.

5 [1998] 2 VR 140 at 147.

(b) if he entered a guilty plea at committal "he would receive a suspended sentence"; and

(c) if he did not plead guilty at committal but contested the charge at trial and was found guilty, "he would receive a custodial penalty".

This advice was said to have been tendered at a conference in the barrister's chambers held two days before the date appointed for the committal proceeding and again at a further conference at the Magistrates' Court on the day of, but before the commencement of, the committal proceeding. The applicant alleged that "undue pressure and influence" was exerted upon him at this second conference, by both Ms Greensill "on behalf of the VLA" and by Mr McIvor and that, as a result, he entered a guilty plea.

11 He alleges that, by reason of the breaches of duty by VLA and the barrister, he suffered, and continues to suffer, loss and damage. The particulars given of that loss and damage are loss of liberty during the period of his imprisonment between conviction at his first trial and subsequent quashing of that conviction, loss of income during that period and beyond (because of his psychological condition), psychotic illness, and the costs and expenses of the appeal, the retrial and the civil proceeding.

The steps in the action against the respondents

12 Both respondents filed defences to the applicant's statement of claim in which each put in issue many of the allegations made. It is, however, not necessary to examine those issues. Both respondents applied for orders terminating the proceedings summarily. The primary judge (Judge Wodak) ordered that the proceeding be forever stayed. His Honour held that the advice allegedly given at each conference, both by Ms Greensill and Mr McIvor, "was so intimately connected with the conduct of the trial as to come within the immunity defence principle". He further held that this defence was available both to VLA and to the barrister and that the applicant's proceeding was, therefore, doomed to fail.

13 The applicant sought leave to appeal to the Court of Appeal of Victoria. That Court (Winneke P and Buchanan JA) concluded that it was not shown that the decision of Judge Wodak was wrong, or attended by sufficient doubt to warrant a grant of leave, and accordingly refused leave to appeal. It is from that order that the applicant seeks special leave to appeal.

Statutory regulation of the Victorian legal profession

14 At the time *Giannarelli* was decided, and at the time of the events giving rise to the applicant's proceeding against VLA and Mr McIvor, the Victorian legal profession was regulated by the LPPA. The LPPA, although amended from time to time, was, in important respects, a consolidating statute enacted at the time of the 1958 consolidation of Victorian legislation. Indeed, in one critical respect, the LPPA was the re-enactment of legislation first passed in 1891 and subsequently re-enacted in the successive consolidations of 1915, 1928 and 1958.

15 Section 10 of the LPPA provided that:

> "(1) Every barrister shall be entitled to maintain an action for and recover from the solicitor or client respectively by whom he has been employed his fees costs and charges for any professional work done by him.
>
> (2) Every barrister shall be liable for negligence as a barrister to the client on whose behalf he has been employed to the same extent as a solicitor was on the twenty-third day of November One thousand eight hundred and ninety-one liable to his client for negligence as a solicitor."

That section had its origin in s 5 of the *Legal Profession Practice Act* 1891 (Vic) ("the 1891 Act"). Section 5 of the 1891 Act provided:

> "Every barrister shall in future be entitled to maintain an action for and recover from the solicitor or client respectively by whom he has been employed his fees costs and charges for any professional work done by him. And every barrister shall in future be liable for negligence as a barrister to the client on whose behalf he has been employed to the same extent as a solicitor is now liable to his client for negligence as a solicitor."

The 1891 Act was assented to on 23 November 1891 but came into operation on 1 January 1892[6]. It provided that those previously admitted as barristers were, by the 1891 Act, admitted as solicitors and were to be entitled to practise as solicitors[7] and, conversely, that those previously admitted as solicitors were

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6 s 1.

7 s 3.

admitted as barristers and were to be entitled to practise as such[8]. After the passing of the 1891 Act, no person was to be admitted to practise as a barrister or a solicitor solely but should be admitted by the Supreme Court both as a barrister and a solicitor[9].

16 When the 1891 Act was consolidated and re-enacted in 1915, as the *Legal Profession Practice Act* 1915, reference to the date of assent of the 1891 Act was substituted for the words "is now liable". Thus, as consolidated, s 10 of the *Legal Profession Practice Act* 1915 provided:

> "Every barrister shall be entitled to maintain an action for and recover from the solicitor or client respectively by whom he has been employed his fees costs and charges for any professional work done by him. And every barrister shall in future be liable for negligence as a barrister to the client on whose behalf he has been employed to the same extent as a solicitor was on the twenty-third day of November One thousand eight hundred and ninety-one liable to his client for negligence as a solicitor."

Although subsequently divided into two sub-sections, the section was re-enacted substantially in its 1915 form in 1928 and again in 1958.

17 Despite the evident legislative intention in the 1891 Act that the legal profession in Victoria should be fused, the amalgamation of the two branches has never been complete. Since the Victorian Bar was first established in 1884, there have always been practitioners in Victoria who, in accordance with voluntary arrangements undertaken on their signing the Roll of Counsel maintained by the Victorian Bar, have chosen to practise solely as barristers. Subject to some exceptions, those practitioners have agreed to act in litigious matters only on the instructions of a solicitor, and have agreed that each is duty bound to accept a brief in the courts in which he or she professes to practise, if offered a proper professional fee to do so, unless there are special circumstances to justify refusing to accept the particular brief[10]. That latter rule (usually referred to as the

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8 s 4.

9 s 10.

10 Gowans, *The Victorian Bar: Professional Conduct, Practice and Etiquette*, (1979) at 66, referring to the minutes of the meeting of the Bar Council of 3 November 1930.

"cabrank rule") is now set out in the Australian Bar Association Model Rules[11] and Rules of Conduct of The Victorian Bar Inc[12].

18 In addition, however, at all times since the 1891 Act, there have been practitioners in Victoria who, although not members of the Victorian Bar, have had extensive practices as advocates on the direct instructions of lay clients, both in courts of summary jurisdiction and in the superior courts. Thus while the profession in Victoria has for the most part been divided between those practising solely as barristers and those practising solely as solicitors, the division has not been absolute and it is a division that has come about as a result of voluntary arrangements undertaken by those who, together, have constituted the Victorian Bar.

19 These matters are of more than historical importance. First, their appreciation is necessary to a proper understanding of the 1891 Act and its legislative progeny which, at the relevant times, was s 10(2) of the LPPA. Secondly, they direct attention away from any consideration of special privileges or disabilities thought to attach to the profession of barrister, as that profession has been, or may now be, understood and organised in England and Wales, or in States where the legal profession is divided along lines similar to those in England and Wales.

20 This second point is emphasised when it is recognised that the legal professions in States other than Victoria have been organised and regulated differently. It is not necessary to describe, in any detail, either the present or the past organisation or regulation of the legal professions in those other States. In some, at various times, there has been only a small group of advocates who have practised solely or principally as barristers. In those States there have been many cases where a barrister, whose principal place of practice has been based in another State, but who has been admitted to practise in the first State, has advised about, or appeared in, litigation in the courts of that first State. Often enough, interstate counsel have appeared with one or more local practitioners as junior counsel. In such cases, the junior was often a partner or employee solicitor of the firm of instructing solicitors and a practitioner who often appeared in the superior courts of the State.

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11 Rules 85-92.

12 Rules 86-90, 92 and 113.

21 What these considerations, and the other historical matters described above, reveal is that attention must be directed to the nature of the role which an advocate (whether barrister, solicitor or both barrister and solicitor) plays in the judicial system.

The decision in *Giannarelli*

22 As indicated earlier, there are two aspects of the Court's decision in *Giannarelli* which are important in the present matter. First, there was a question about the proper construction of s 10(2) of the LPPA; secondly, there was a question about the common law immunity from suit of participants in the judicial process.

23 A majority of the Court concluded[13] that s 10(2) of the LPPA did not subject a barrister to a common law duty of care in negligence. As Wilson J, with whose reasons in this respect Mason CJ agreed, pointed out[14], s 10(2) of the LPPA was a "fixed-time" provision[15]; it required consideration of the extent to which, in 1891, a solicitor would have been liable to a client for negligence. The Court in *Giannarelli* divided over whether the relevant liability to be considered was confined to the liability of a solicitor as *advocate* or extended to the liability of a solicitor "in the exercise of his functions as a solicitor"[16]. The majority preferred the view that the comparison required by s 10(2), when considering whether an advocate was liable for negligence committed in court or in work intimately associated with work in court, was with the liability that a solicitor-advocate would have had to a client in 1891 in such circumstances.

24 For our own part, we prefer the construction, adopted by the majority in *Giannarelli*, that neither s 5 of the 1891 Act nor s 10(2) of the LPPA led to the result that, although in 1891 a solicitor-advocate would have been immune from suit for in-court negligence, either the 1891 Act or its subsequent re-enactments made a barrister liable to suit for such negligence. So to read the relevant provisions of either the 1891 Act or the LPPA would give little or no effect to the words "liable ... *to the same extent*". But in the end, chief significance must be

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13 (1988) 165 CLR 543 at 561 per Mason CJ, 570 per Wilson J, 587 per Brennan J, 590 per Dawson J.

14 (1988) 165 CLR 543 at 567.

15 Bennion, *Statutory Interpretation*, 4th ed (2002) at 762.

16 (1988) 165 CLR 543 at 604 per Toohey J.

attached to the fact that a disputed question of construction was finally resolved in *Giannarelli*. This Court should not depart from that decision without powerful reasons to do so. A mere preference for one construction over the other would not suffice.

25 The second aspect of the decision in *Giannarelli* which is now important is the conclusion reached about the common law. The conclusion that, at common law, an advocate cannot be sued by his or her client for negligence in the conduct of a case, or in work out of court which is intimately connected with the conduct of a case in court, was consistent with the earlier decisions of the House of Lords in *Rondel v Worsley*[17] and *Saif Ali v Sydney Mitchell & Co*[18]. No doubt because the arguments advanced in *Giannarelli* were framed against the background of those two English decisions, a number of matters were considered in the reasons in *Giannarelli* that have application, or at least greater application, in a divided legal profession where only barristers have a right of audience in superior courts. And because the particular claims made in *Giannarelli* against the barristers who were sued were framed or treated as claims in negligence, not claims for breach of contract, much of the discussion in the reasons in *Giannarelli* is directed at the tort of negligence. But, as these reasons will seek to demonstrate, the decision in *Giannarelli* must be understood having principal regard to two matters:

(a) the place of the judicial system as a part of the governmental structure; and

(b) the place that an immunity from suit has in a series of rules all of which are designed to achieve finality in the quelling of disputes by the exercise of judicial power.

Although reference is made in *Giannarelli* to matters such as:

(a) the supposed connection between a barrister's immunity and an inability to sue the client for professional fees[19];

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17 [1969] 1 AC 191.

18 [1980] AC 198.

19 (1988) 165 CLR 543 at 555 per Mason CJ; *In re Le Brasseur and Oakley* [1896] 2 Ch 487 at 494; *Robertson v Macdonogh* (1880) 6 LR Ir 433 at 438; cf *Rondel v Worsley* [1969] 1 AC 191 at 260-264.

(b) the potential competition between the duties which an advocate owes to the court and a duty of care to the client[20]; and

(c) the desirability of maintaining the cabrank rule[21];

each was, and should be, put aside as being, at most, of marginal relevance to whether an immunity should be held to exist. The first of these matters, even if it were well founded (and it is not), would be irrelevant to the liability of a solicitor-advocate and there is no sound basis for distinguishing between advocates according to whether the advocate does or does not have a contract with the client.

26 The second matter assumes, wrongly, that the duties might conflict. They do not; the duty to the court is paramount. But, more than that, the question of conflicting duties assumes that the only kind of case to be considered is one framed as a claim in negligence. That is not so. The question is whether there is an immunity from suit, not whether an advocate owes the client a duty of care.

27 The third consideration, the cabrank principle, is also irrelevant to the solicitor-advocate. Highly desirable as the maintenance of the cabrank rule is in ensuring that the unpopular client or cause is represented in court, it does not provide a sufficient basis to justify the existence of the common law immunity.

28 Likewise, it is as well to mention at this point a further consideration that must be put aside as irrelevant. It may readily be accepted that advocates must make some decisions in court very quickly and without pausing to articulate the reasons which warrant the choice made. But so too do many others have to make equally difficult decisions. Reference to the difficulty of the advocate's task is distracting and irrelevant.

29 Further, although not irrelevant, we would consider the "chilling" effect of the threat of civil suit[22], with a consequent tendency to the prolongation of

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20 (1988) 165 CLR 543 at 556 per Mason CJ, 572-573 per Wilson J; cf *Rondel v Worsley* [1969] 1 AC 191 at 231, 251, 272-273, 282.

21 (1988) 165 CLR 543 at 572-573 per Wilson J; *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 at 221.

22 (1988) 165 CLR 543 at 579 per Brennan J.

trials[23], as not of determinative significance in deciding whether there is an immunity from suit. That is not to say, however, that the significance, or magnitude, of such effects should be underestimated. But while they are considerations that do not detract from the importance of the immunity, we do not consider that they provide support in principle for its existence.

30 Chief attention must be given to the nature of the judicial process and the role that the advocate plays in it.

The judicial process as an aspect of government

31 In *Giannarelli*, Mason CJ said[24] that "the barrister's immunity, if it is to be sustained, must rest on considerations of public policy". His Honour explained[25] that the term "immunity" was used in a sense which assumed that rights and duties might otherwise exist at common law, but the immunity is sustained on considerations of public policy and "the injury to the public interest that would arise in the absence of immunity"[26]. Of the various factors advanced to justify the immunity, "the adverse consequences *for the administration of justice* which would flow from the re-litigation in collateral proceedings for negligence of issues determined in the principal proceedings" (emphasis added)[27] was held to be determinative[28]. The significance of the reference to the administration of justice is of fundamental importance to the proper understanding of the immunity and its foundation.

32 To adopt the language found in the cases considering Ch III of the Constitution, the central concern of the exercise of judicial power is the quelling of controversies. Judicial power is exercised as an element of the government of society and its aims are wider than, and more important than, the concerns of the particular parties to the controversy in question, be they private persons,

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23 (1988) 165 CLR 543 at 557 per Mason CJ, 594 per Dawson J.

24 (1988) 165 CLR 543 at 555.

25 (1988) 165 CLR 543 at 554-555.

26 *Gibbons v Duffell* (1932) 47 CLR 520 at 529 per Starke J.

27 (1988) 165 CLR 543 at 555.

28 See also (1988) 165 CLR 543 at 574 per Wilson J, 579 per Brennan J, 595-596 per Dawson J.

corporations, polities, or the community as personified in the Crown or represented by a Director of Public Prosecutions. No doubt the immediate parties to a controversy are very interested in the way in which it is resolved. But the community at large has a vital interest in the final quelling of that controversy. And that is why reference to the "judicial branch of government" is more than a mere collocation of words designed to instil respect for the judiciary. It reflects a fundamental observation about the way in which this society is governed.

33 As s 71 of the Constitution says, what is "vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction" is the judicial power *of the Commonwealth*, that is, the judicial power of the national polity. No matter whether the judicial branch of government is separated from the other branches of government (as it is and must be at the federal level[29] but, at least generally, is not at the State level[30]) it is, in Quick and Garran's words[31], "the third great department of government".

Finality

34 A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances. That tenet finds reflection in the restriction upon the reopening of final orders after entry[32] and in the rules concerning the bringing of an action to set aside a final judgment on the ground that it was procured by fraud[33]. The tenet also finds reflection in the doctrines of res judicata and issue estoppel. Those doctrines prevent a party to a proceeding raising, in a new proceeding against a party to the original proceeding, a cause of action or issue that was

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29 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 267-268 per Dixon CJ, McTiernan, Fullagar and Kitto JJ.

30 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

31 Quick and Garran, *The Annotated Constitution of the Australian Commonwealth*, (1901) at 719.

32 *DJL v Central Authority* (2000) 201 CLR 226.

33 *DJL v Central Authority* (2000) 201 CLR 226 at 244-245 [35]-[38].

finally decided in the original proceeding[34]. It is a tenet that underpins the extension of principles of preclusion to some circumstances where the issues raised in the later proceeding could have been raised in an earlier proceeding[35].

35 The principal qualification to the general principle that controversies, once quelled, may not be reopened is provided by the appellate system. But even there, the importance of finality pervades the law. Restraints on the nature[36] and availability of appeals, rules about what points may be taken on appeal[37] and rules about when further evidence may be called in an appeal (in particular, the so-called "fresh evidence rule"[38]) are all rules based on the need for finality. As was said in the joint reasons in *Coulton v Holcombe*[39]: "[i]t is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial".

36 The rules based on the need for finality of judicial determination are not confined to rules like those mentioned above. Those are rules which operate between the parties to a proceeding that has been determined. Other rules of law, which affect persons other than the parties to the original proceeding, also find their justification in considerations of the need for finality in judicial decisions. And some of those rules are rules of immunity from suit.

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34 See, for example, *Hoysted v Federal Commissioner of Taxation* (1925) 37 CLR 290; [1926] AC 155; *Blair v Curran* (1939) 62 CLR 464; *Jackson v Goldsmith* (1950) 81 CLR 446; *Administration of Papua and New Guinea v Daera Guba* (1973) 130 CLR 353.

35 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.

36 *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73.

37 *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418; *O'Brien v Komesaroff* (1982) 150 CLR 310; *Coulton v Holcombe* (1986) 162 CLR 1.

38 *Orr v Holmes* (1948) 76 CLR 632; *Ratten v The Queen* (1974) 131 CLR 510 at 516-517 per Barwick CJ; *Gallagher v The Queen* (1986) 160 CLR 392; *Mickelberg v The Queen* (1989) 167 CLR 259.

39 (1986) 162 CLR 1 at 7.

Other immunities from suit

37 Parties who fail in litigation, whatever its subject, may well consider the result of that litigation to be wrong, even unjust. Seldom will a party have contested litigation without believing, or at least hoping, that it will be resolved in that party's favour. If that party does not succeed, an explanation for failure may be sought in what are perceived to be the failures of others – the judge, the witnesses, advocates – anyone other than the party whose case has been rejected.

38 This is no new phenomenon. It is a problem with which the common law has had to grapple for centuries. Its response has been the development of immunities from suit for witnesses, judges and advocates. The origin of these rules can be traced to decisions of the 16th and 17th centuries[40].

39 From as early as the 16th century, a disappointed litigant could not sue those who had given evidence in the case. That is, the disappointed litigant could not seek to demonstrate that witnesses had given, or parties had suborned, perjured evidence[41] or that witnesses or parties had conspired together[42] to injure that litigant. Nor could the disappointed litigant seek to demonstrate that what was said by the witnesses had defamed that litigant[43]. All such actions were precluded or answered by an absolute privilege. It mattered not how the action was framed. And it mattered not whether the disappointed litigant alleged that the witness had acted deliberately or maliciously. No action lay, or now lies, against a witness for what is said or done in court[44]. It does not matter whether

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40 As to witnesses, see, for example, *Jerom and Knight's Case* (1588) 1 Leo 107 [74 ER 99]; *Damport v Sympson* (1596) Cro Eliz 520 [78 ER 769]; *Harding v Bodman* (1617) Hut 11 [123 ER 1064]; *Eyres v Sedgewicke* (1620) Cro Jac 601 [79 ER 513]. As to judges, see, for example, *Windham v Clere* (1589) Cro Eliz 130 [78 ER 387]; *Floyd v Barker* (1607) 12 Co Rep 23 [77 ER 1305]; *Metcalfe v Hodgson* (1633) Hut 120 [123 ER 1143]; *Nichols v Walker* (1635) Cro Car 394 [79 ER 944].

41 See, for example, *Revis v Smith* (1856) 18 CB 126 at 140, 141, 144 [139 ER 1314 at 1319-1321]; *Collins v Cave* (1859) 4 H & N 225 at 229, 230, 235 [157 ER 824 at 826-828]; *Henderson v Broomhead* (1859) 4 H & N 569 [157 ER 964].

42 *Cabassi v Vila* (1940) 64 CLR 130.

43 *Munster v Lamb* (1883) 11 QBD 588; *Gibbons v Duffell* (1932) 47 CLR 520 at 525.

44 *Cabassi v Vila* (1940) 64 CLR 130.

what is done is alleged to have been done negligently or even done deliberately and maliciously with the intention that it harm the person who would complain of it. The witness is immune from suit and the immunity extends to preparatory steps[45]. That the immunity must be pleaded as a defence makes it nonetheless an immunity from suit. As the whole Court said in *Lange v Australian Broadcasting Corporation*[46]:

> "The result [of the defence] is to confer upon defendants, who choose to plead and establish an appropriate defence, an immunity to action brought against them." (footnote omitted)

40 The development of judicial immunity was more complex. It was bound up with the development of the law relating to excess of jurisdiction, and thus with the development of the principles governing when a judicial decision was open to collateral attack. Its history has been traced by Holdsworth[47]. It is not necessary to examine that history in any detail, beyond noticing that the decisions of courts of record were conclusive, but those of inferior courts were open to collateral attack alleging excess of jurisdiction. Hence, while action might lie at common law for acts done in an inferior court in excess of jurisdiction, the decisions of supreme courts were final. And there was an immunity from suit for any judicial act done within jurisdiction[48]. What is important to notice for present purposes is not the history of development of this immunity, but that both judicial immunity and the immunity of witnesses were, and are, ultimately, although not solely, founded in considerations of the finality of judgments.

41 Statements can be found in the cases that the immunity of witnesses serves to encourage "freedom of expression" or "freedom of speech" so that the court will have full information about the issues in the case[49]. Statements also can be found[50] that place the immunity of those who participate in court proceedings on

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45 *Watson v M'Ewan* [1905] AC 480; *Gibbons v Duffell* (1932) 47 CLR 520 at 525.

46 (1997) 189 CLR 520 at 565.

47 Holdsworth, "Immunity for Judicial Acts", (1924) *Journal of the Society of Public Teachers of Law* 17.

48 *Sirros v Moore* [1975] QB 118; *Rajski v Powell* (1987) 11 NSWLR 522.

49 *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 at 679 per Lord Steyn, 697 per Lord Hoffmann.

50 For example, *Munster v Lamb* (1883) 11 QBD 588 at 607 per Fry LJ.

the desirability of avoiding baseless actions being brought against those who were merely discharging their duty, but these considerations are advanced in answer to another kind of argument. As Fry LJ said in *Munster v Lamb*[51]:

> "Why is it that a judge who disgraces his office, and speaks from the bench words of defamation, falsely and maliciously, and without reasonable or probable cause, is not liable to an action? Is not such conduct of the worst description, and does it not produce great injury to the person affected by it? Why should a witness be able to avail himself of his position in the box and to make without fear of civil consequences a false statement, which in many cases is perjured, and which is malicious and affects the character of another?"

The answer proffered (that it is more necessary to prevent the baseless action than provide for the kind of case described) may well suffice to meet the point. But the deeper consideration that lies beneath the principle is that determining whether the complaint made is baseless or not requires relitigation of the matter out of which the complaint arises.

42 In *R v Skinner*[52], Lord Mansfield said that "neither party, witness, counsel, jury, or Judge, can be put to answer, civilly or criminally, for words spoken in office". Of that immunity it has been said in *Mann v O'Neill*[53] that it responds to two related considerations, "to assist full and free access to independent courts for the impartial quelling of controversies, without fear of the consequences" and "the avoidance of the re-agitation by discontented parties of decided cases after the entry of final judgment" other than by appellate processes. That view of the matter reflects the consideration that what is at stake is the public interest in "the effective performance" of its function by the judicial branch of government[54].

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51 (1883) 11 QBD 588 at 607.

52 (1772) Lofft 54 at 56 [98 ER 529 at 530].

53 (1997) 191 CLR 204 at 239 per Gummow J.

54 cf *Gibbons v Duffell* (1932) 47 CLR 520 at 528 per Gavan Duffy CJ, Rich and Dixon JJ.

The judicial process as an aspect of government – conclusions

43 The "unique and essential function" of the judicial branch is the quelling of controversies by the ascertainment of the facts and the application of the law[55]. Once a controversy has been quelled, it is not to be relitigated. Yet relitigation of the controversy would be an inevitable and essential step in demonstrating that an advocate's negligence in the conduct of litigation had caused damage to the client.

44 The question is not, as may be supposed[56], whether some special status should be accorded to advocates above that presently occupied by members of other professions. Comparisons made with other professions appear sometimes to proceed from an unstated premise that the law of negligence has been applied, or misapplied, too harshly against members of other professions, particularly in relation to factual findings about breach of duty, but that was not a matter argued in this Court and should, in any event, be put to one side. Nor does the question depend upon characterising the role which the advocate (a private practitioner) plays in the administration of justice as the performance of a public or governmental function.

45 Rather, the central justification for the advocate's immunity is the principle that controversies, once resolved, are not to be reopened except in a few narrowly defined circumstances. This is a fundamental and pervading tenet of the judicial system, reflecting the role played by the judicial process in the government of society. If an exception to that tenet were to be created by abolishing that immunity, a peculiar type of relitigation would arise. There would be relitigation of a controversy (already determined) as a result of what had happened during, or in preparation for, the hearing that had been designed to quell that controversy. Moreover, it would be relitigation of a skewed and limited kind. No argument was advanced to this Court urging the abolition of judicial or witness immunity. If those immunities remain, it follows that the relitigation could not and would not examine the contribution of judge or witness to the events complained of, only the contribution of the advocate. An exception to the rule against the reopening of controversies would exist, but one of an inefficient and anomalous kind.

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55 *Fencott v Muller* (1983) 152 CLR 570 at 608 per Mason, Murphy, Brennan and Deane JJ.

56 cf *Arthur J S Hall v Simons* [2002] 1 AC 615 at 680 per Lord Steyn.

46 A justification based on finality has as much force today as it did when *Giannarelli* was decided. Given this, what changes have occurred since the decision in *Giannarelli* which would necessitate a reconsideration of that decision?

47 Three matters will be considered. First, there have been some changes to statutes that must be noticed. Secondly, there has been the decision of the House of Lords in *Arthur J S Hall & Co v Simons*[57] that the public interest in the administration of justice in England and Wales no longer required that advocates enjoy immunity from suit for alleged negligence in the conduct of civil or criminal proceedings. Thirdly, it will be necessary to say something shortly about the experience in other jurisdictions.

Statutory changes since *Giannarelli*

48 The LPPA was repealed by the *Legal Practice Act* 1996 (Vic) ("the Practice Act"). The relevant provisions of the Practice Act came into operation on 1 January 1997. Section 442 of the Practice Act provided that "[n]othing in this Act abrogates any immunity from liability for negligence enjoyed by legal practitioners before the commencement of this section".

49 That section had its origins in a report of the Law Reform Commission of Victoria[58] in which the Commission devoted a chapter to discussing the advocate's immunity. That discussion proceeded from the premise[59] that "neither barristers nor solicitors are liable for losses arising from negligent 'in-court' advocacy work". The Commission recommended[60] that this immunity be removed by legislation. It was said[61] that:

> "The legislation should provide that actions arising out of alleged negligence in the course of criminal proceedings cannot be commenced

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57 [2002] 1 AC 615.

58 Report No 48, *Access to the Law: Accountability of the Legal Profession*, July 1992.

59 Report No 48, par 50 at 23.

60 Report No 48 at 40.

61 Report No 48 at 40.

until the conviction or sentence in the criminal proceeding has been set aside or varied on an appeal or on a petition for mercy."

50 As s 442 of the Practice Act shows, the Commission's recommendation was not adopted. Instead, the Explanatory Memorandum for the Practice Bill said that what was to become s 442 of the Practice Act "*preserves* the common law immunity for advocates in respect of work in a court or tribunal or work intimately connected with it" (emphasis added). Thus, although s 442 speaks of "any" immunity not being abrogated, it is clear from the course of events described that it was enacted on the assumption that it would preserve an existing immunity.

51 It is necessary to notice some other provisions of the Practice Act. Section 64 sets out what are called the "general principles of professional conduct". They include that a legal practitioner should, in the service of a client, act honestly and fairly in the client's best interests and with all due skill and diligence. They also include the principle that a legal practitioner should, in the service of a client, act so as not to engage in, or assist, conduct that is calculated to defeat the ends of justice or is otherwise in breach of the law. There is, therefore, statutory recognition of obligations which all legal practitioners, including advocates, owe to their clients and to the court.

52 These general principles are reflected in "Practice rules"[62] made by recognised professional associations ("RPAs") to regulate the professional conduct of legal practitioners to whose disciplinary supervision the practitioners are assigned. Part 5 of the Practice Act[63] provides for the resolution of disputes between clients and legal practitioners and for the disciplinary arrangements governing practitioners. One form of dispute with which these provisions deal[64] is a claim that a person has suffered pecuniary losses as a result of an act or omission by a legal practitioner in the provision of legal services to the person (other than loss in respect of which a claim lies against the Fidelity Fund established under the Practice Act). One form of disposition of such a complaint is an order[65] by the Legal Profession Tribunal established under the Practice Act that the legal practitioner pay to the client a specified sum as compensation not

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62 *Legal Practice Act* 1996 (Vic), s 72.

63 ss 122-172.

64 s 122(1)(b).

65 s 133(1)(a).

exceeding $15,000. Section 133(2) of the Practice Act provides that the making of a compensation order does not affect the right of a client to recover damages for pecuniary loss but the order must be taken into account by a court making an award of damages. Thus the Practice Act provides for the making of some, limited, orders against a practitioner to compensate a client for loss occasioned by an act or omission of the practitioner.

53 Some other legislative events must be noticed. Since 1999, State legislatures have given close attention to what has been called "tort law reform". In particular, close attention has been paid to the law of negligence, and a number of statutes have been passed since 2000 which have dealt with that general subject[66]. In none of that legislation has there been any reference to the immunities from suit of advocates, witnesses or judges.

54 Nothing in any of the legislative steps taken since *Giannarelli* suggests that the Court should now reconsider the decision reached in that case. On the contrary, the enactment of s 442 of the Practice Act suggests that the Court should not do so. One State legislature, directly confronted with a recommendation that the law should be changed to the form for which the applicant now contends, chose not to do so. That legislature expressly preserved the state of the law as it was determined in *Giannarelli*, supplementing that with a limited right to compensation in cases (among others) where a practitioner had failed to act with due skill and care.

55 This notwithstanding, the applicant contends that the House of Lords' decision in *Arthur J S Hall v Simons* shows why the common law in Australia should be restated.

Arthur J S Hall v Simons

56 The House of Lords has restated the common law about advocates' immunity, at least for England and Wales. (Perhaps there may remain some question[67] whether the law in Scotland still accords with what was decided in *Rondel v Worsley* and *Saif Ali v Sydney Mitchell & Co* but that question need not

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66 See, for example, *Civil Liability Act* 2002 (NSW), *Wrongs and Other Acts (Public Liability Insurance Reform) Act* 2002 (Vic), *Wrongs and Limitation of Actions Acts (Insurance Reform) Act* 2003 (Vic), *Wrongs and Other Acts (Law of Negligence) Act* 2003 (Vic).

67 *Anderson v HM Advocate* 1996 JC 29; *Wright v Paton Farrell* 2002 SCLR 1039.

be examined.) The House was divided in opinion in some aspects of the decision. All of their Lordships concluded[68] that reconsideration of advocates' immunity was appropriate in the light of changes in the law of negligence, the functioning of the legal profession, the administration of justice, and public perceptions. But, as Lord Millett pointed out[69], much also turned on the then imminent coming into operation of the *Human Rights Act* 1998 (UK) and the consequent application of Art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

57 Three members of the House[70] would have retained the immunity in relation to criminal proceedings. A majority of the House, however, concluded[71] that since a collateral challenge in civil proceedings to a criminal conviction was prima facie an abuse of process, and ordinarily such an action would be struck out, an immunity from suit was not required to prevent collateral attacks on criminal decisions.

58 The conclusion about collateral challenges and abuse of process was critical to the outcome in *Arthur J S Hall v Simons*. It will be necessary to consider that topic. Before doing so, however, it is as well to make two other points of basic importance.

59 First, this Court decided, as long ago as 1963[72], that it would no longer "follow decisions of the House of Lords, at the expense of our own opinions and cases decided here". The separate development of the common law in Australia over the last 40 years, coupled with the considerable, and now profound, changes in the constitutional and other arrangements to which the United Kingdom is party, such as the various European and other international instruments to which it is, but Australia is not, a party, can only reinforce that view.

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68 [2002] 1 AC 615 at 678 per Lord Steyn, 684 per Lord Browne-Wilkinson, 688 per Lord Hoffmann, 709-710 per Lord Hope of Craighead, 728 per Lord Hutton, 736-737 per Lord Hobhouse of Woodborough, 752-753 per Lord Millett.

69 [2002] 1 AC 615 at 753. See also at 734-735 per Lord Hutton.

70 [2002] 1 AC 615 at 723-724 per Lord Hope of Craighead, 735 per Lord Hutton, 752 per Lord Hobhouse of Woodborough.

71 [2002] 1 AC 615 at 679-680 per Lord Steyn, 684-685 per Lord Browne-Wilkinson, 706 per Lord Hoffmann, 727, 730 per Lord Hutton, 753 per Lord Millett.

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

60 Secondly, and no less fundamentally, where a decision of the House of Lords is based, as is its decision in *Arthur J S Hall v Simons*, upon the judicial perception of social and other changes said to affect the administration of justice in England and Wales (or the United Kingdom more generally) there can be no automatic transposition of the arguments found persuasive there to the Australian judicial system. Especially is that so when the decision may well be thought to have been significantly affected by the European considerations to which Lord Millett referred. In addition, of course, account must be taken not only of the fact that the legal profession is organised differently in the several States and Territories of Australia, but also of the fact that in none of those States or Territories is the profession organised in precisely the same way as it is in England and Wales. Further, although in the end we do not think this determinative, the rules to which reference is made in *Arthur J S Hall v Simons* about abuse of process and summary termination of civil proceedings may differ in some respects from those that apply in some Australian jurisdictions.

Experience in other jurisdictions

61 Care must also be exercised in dealing with the applicant's contention that advocates' immunity has not been thought to be a necessary part of the law of other jurisdictions – in particular, Canada, New Zealand or the several jurisdictions in the United States of America. In Canada, a single judge of the Ontario High Court of Justice, Krever J, held[73] in 1979 that an advocate was not immune from suit. It appears that this decision has not since been challenged in Canada. In New Zealand, the High Court held[74] that it was bound by earlier authority to hold that there is an advocates' immunity. On appeal, the Court of Appeal of New Zealand reversed that decision[75]. Whether there will be an appeal to the Supreme Court of New Zealand is not yet known. In the United States of America, it is said that there is no advocates' immunity.

62 But in each of these jurisdictions it is necessary to look beyond the bare statement that there is, or is not, an advocates' immunity. For example, in both

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73 *Demarco v Ungaro* (1979) 95 DLR (3d) 385.

74 *Lai v Chamberlains* [2003] 2 NZLR 374.

75 *Lai v Chamberlains* unreported, Court of Appeal of New Zealand, 8 March 2005.

Canada[76] and the United States[77] a prosecutor is immune from suit[78]. And in the United States absolute immunity for judges is the rule[79] despite the criticism that sometimes is directed at the rule[80]. Whether a public defender is immune[81] may remain a matter of controversy.

63 A description of the position in the United States would be incomplete, however, if no account was taken of the operation of the doctrine of collateral estoppel[82]. In particular, it would be necessary to take account of principles like that described in the *Restatement Third of The Law Governing Lawyers*[83] as being that a judgment, in a post-conviction proceeding in a criminal matter (as, for example, an appeal) about whether the lawyer was negligent, may be binding in a subsequent malpractice action against the lawyer even though the lawyer sued was not a party to that litigation[84]. And the application of such principles is not confined to criminal matters[85].

64 Principles of finality find different expression in different jurisdictions. The particular step taken by the House of Lords in *Arthur J S Hall v Simons* can be understood as influenced, if not required, by Art 6 of the European Convention to which Lord Millett referred. Article 6 was then understood (in the

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76 *Nelles v Ontario* [1989] 2 SCR 170.

77 *Gregoire v Biddle* 177 F 2d 579 (2nd Cir 1949) cert den 339 US 949 (1950); *Imbler v Pachtman* 424 US 409 (1976).

78 cf in the United Kingdom *Elguzouli-Daf v Commissioner of Police* [1995] QB 335.

79 *Stump v Sparkman* 435 US 349 (1978).

80 See Shaman, "Judicial Immunity from Civil and Criminal Liability", (1990) 27 *San Diego Law Review* 1.

81 *Black v Bayer* 672 F 2d 309 (3rd Cir 1982); cf *Ferri v Ackerman* 444 US 193 (1979).

82 *Ashe v Swenson* 397 US 436 (1970); *Allen v McCurry* 449 US 90 (1980).

83 §53 Comment d at 392.

84 See, for example, *McCord v Bailey* 636 F 2d 606 (DC Cir 1980).

85 Mallen and Smith, *Legal Malpractice*, 3rd ed (1989), vol 2, §17.13, at 50-55.

light of *Osman v United Kingdom*[86]) as securing the right to have *any* claim relating to civil rights and obligations brought before a court or tribunal. The immediate question in this case, however, is how, in Australia, the principle for which the applicant now contends is to be accommodated with the general principle that controversies, once quelled, should not be reopened. No competition with a general right of the kind considered in *Osman v United Kingdom* need be resolved.

Rules about abuse of process and finality

65 As foreshadowed in what is written above, particular attention must be directed to whether rules about abuse of process provide a sufficient satisfaction of the principle that controversies, quelled by the application of judicial power, are generally not to be reopened. That requires identification of the nature of the complaint made by a disappointed client who seeks to sue an advocate; next, identification of the premise from which the applicant's argument proceeds; and then, consideration of whether a distinction can or should be drawn between "civil" and "criminal" proceedings, or between challenges to "final" or "intermediate" results. First, what is the nature of the complaint that is made?

The nature of the client's complaint

66 In every case the complaint must be that a consequence has befallen the client which has not been, and cannot be, sufficiently corrected within the litigation in which the client was engaged. That consequence may take a number of forms. For the moment, it will suffice to identify what may appear to be the three chief consequences: (a) a wrong final result; (b) a wrong intermediate result; and (c) wasted costs.

67 A client may wish to say that the conduct of the advocate was a cause of the client losing the case because, for example, a point was not taken, or a witness was not called, or evidence was not led. The client may have no appeal, or no remedy on appeal, as, for example, would generally be the case if the evidence not called was available at trial.

68 A client may wish to say, as the applicant does in this case, that the conduct of the advocate (or here, the advocate and VLA) was a cause of the client suffering an intermediate consequence (conviction at the first trial and imprisonment) which was not wholly remedied on appeal. (The conviction was

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86 (1998) 29 EHRR 245.

set aside but the client was incarcerated for a time and complains of that and what is said to have been caused by it.)

69 A client may wish to say that the conduct of the advocate was a cause of the client incurring unnecessary expense. That may be because a costs order was made against the client or because unnecessary costs were incurred in taking a step in the litigation.

70 What unites these different kinds of consequence is that none of them has been, or could be, wholly remedied within the original litigation. The final order has not been, and cannot be, overturned on appeal. The intermediate consequence cannot be repaired or expunged on appeal. The costs order cannot be set aside; the costs incurred cannot be recovered from an opposite party. And in every one of these cases, the client would say that, but for the advocate's conduct, there would have been a different result. In particular, leaving cases of wasted costs aside, the client wishes to assert that, if the case had been prepared and presented properly, a different final, or intermediate, result would have been reached. And yet the judicial system has arrived at the result it did. The consequences that have befallen the client are consequences flowing from what, by hypothesis, is a *lawful* result. So, to take the present case, the imprisonment of which the applicant seeks to complain is *lawful* imprisonment. In a case where the client would say the wrong final result is reached, the result in fact reached is, by hypothesis, one that was *lawfully* reached. Whether the lawful infliction of adverse consequences (such, for example, as imprisonment) can constitute a form of damage is a question that may be noted but need not be answered.

The premise for the applicant's argument

71 The premise for the contention that a client should have an action against a negligent advocate whose negligence caused loss to the client is that there should be no wrong without remedy. If full effect is given to that premise, the client who is defamed in proceedings should have a remedy, at least if the defamation was published otherwise than without malice and in the intended performance of an advocate's or a judge's duty. But the absolute privilege accorded to all participants in the court process *and* the privilege given to those who publish fair and accurate reports of what is said in court are not challenged. Nor is there any challenge to the immunity of witnesses from suit whether for negligence or intentional torts. Yet it is said that there should be a remedy for the advocate's negligence.

72 If that is right, the paradigm case in which there should be a remedy is where the advocate's negligence is a cause of the client losing the litigation. That

is, there should be a remedy for cases in which the client seeks to challenge the *final* result. There are two consequences that follow from recognising that this is the paradigm case.

73 First, the tension between the principle of finality and allowing litigation seeking damages in cases where, in order to succeed, it will be necessary to impugn the final result of earlier litigation, is evident. Secondly, recognising that to permit a challenge to the final result is inconsistent with the need for finality shifts attention to whether there are to be *exceptional* cases in which that may be permitted. In *Arthur J S Hall v Simons*, all members of the House accepted that there are circumstances in which the result reached in earlier litigation should not be reopened. Those circumstances were to be identified by using rules about abuse of process. And in the present case, the applicant submitted that it was enough to show that he would not seek to impugn the *final* result of the litigation in which he had been engaged.

Abuse of process

74 Questions of abuse of process can be relevant to the present issue only if it is accepted that there are, or may be, circumstances in which the result reached in earlier litigation should not be impugned. The circumstances in which proceedings might be classified as an abuse of process have been described in various ways. In *Hunter v Chief Constable of the West Midlands Police*[87], to which extensive reference was made in the speeches in *Arthur J S Hall v Simons*, Lord Diplock spoke[88] of abuse of process as a misuse of a court's procedure which would "be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people". In *Rogers v The Queen*[89], Mason CJ observed of Lord Diplock's speech that, with what had been said in this Court[90], it indicated:

> "that there are two aspects to abuse of process: first, the aspect of vexation, oppression and unfairness to the other party to the litigation and, secondly, the fact that the matter complained of will bring the administration of justice into disrepute".

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87 [1982] AC 529.

88 [1982] AC 529 at 536.

89 (1994) 181 CLR 251 at 256.

90 *Williams v Spautz* (1992) 174 CLR 509; *Walton v Gardiner* (1993) 177 CLR 378.

75 But in the present case it is necessary to focus attention more closely upon what it is about the circumstances that might make prosecution of the case "manifestly unfair" or might "bring the administration of justice into disrepute among right-thinking people". When it is recognised that the particular circumstance which is said to engage consideration of questions of abuse of process is that the proceeding against the advocate requires challenging the result arrived at in earlier proceedings, the question then becomes how can a distinction be drawn between results that can be attacked, and those that cannot. Two different bases of distinction must be examined. First, can a distinction be drawn, as it was in *Arthur J S Hall v Simons*, between civil and criminal proceedings? Secondly, can a distinction be drawn between challenging the final outcome of litigation and challenging some intermediate outcome?

An exception for criminal cases?

76 The difficulties of dividing the litigious world into two classes, one marked "civil" and the other marked "criminal", were identified in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd*[91]. Those difficulties are reason enough to reject a principle founded in drawing such a distinction.

77 In addition, however, there is no sufficient reason to distinguish between a conviction and a verdict of acquittal. As Deane and Gaudron JJ pointed out in *Rogers*[92], principles of finality find reflection not only in doctrines of preclusion intended to protect the position of an individual (the doctrines of res judicata, issue estoppel, and so-called "Anshun estoppel") but also in the *public* need "for decisions of the courts, unless set aside or quashed, to be accepted as incontrovertibly correct"[93]. It is this public need which must underpin the proposition that a conviction cannot be challenged in subsequent proceedings. But if that is right (and it is) neither should an acquittal be open to challenge. Then the question comes down to whether some useful distinction can be drawn between civil and criminal cases. For the reasons given in *Labrador Liquor*, none can.

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91 (2003) 216 CLR 161.

92 (1994) 181 CLR 251 at 273-274.

93 (1994) 181 CLR 251 at 273. See also *Pearce v The Queen* (1998) 194 CLR 610 at 625-626 [53]-[55] per Gummow J.

78 Nor is it right to see the administration of the civil law as giving rise to judgments worthy of less respect than those reached on the trial of indictable or other offences. No doubt account must be taken of the different standards of proof. Account must also be taken of the fact that there are cases in which issues tried in civil litigation include issues that have been, or could be, the subject of criminal prosecution. The civil action for assault, the personal representative's proceedings to determine whether the beneficiary named in a will is barred from taking because the beneficiary feloniously killed the deceased, are but two obvious examples of such suits. But in none of those actions was the person who would seek to challenge the outcome reached in some earlier (criminal) proceeding a party to that earlier proceeding.

79 In cases where a client sues an advocate, the client will always have been a party to the proceeding the result in which is challenged. If effect is to be given to the principle that decisions of the courts, unless set aside or quashed, are to be accepted as incontrovertibly correct, it must be applied at least to the parties to the proceeding in which the decision is given. The final outcome of the proceeding, whether "civil" or "criminal" or a hybrid proceeding, must be incontrovertible by the parties to it.

80 If that is right, it follows that no remedy is to be provided if its provision depends upon demonstrating that a different *final* result should have been reached in the earlier litigation. Cases such as the present, in which the challenge made is to an intermediate result, can then be seen to be exceptional. The contention would be that, even if a client cannot say that a different *final* outcome should have been reached, the client may nonetheless complain about an intermediate result.

An exception for challenges to intermediate outcomes?

81 The existence of cases in which there would be an intermediate result of which complaint could be made would depend upon that intermediate result having been set aside on appeal. Here it is important to recognise that, just as was the case in the present matter, the grounds on which an intermediate result is set aside may be unrelated to what is now alleged to have been the advocate's negligent conduct. In this case, the conviction at the first trial was quashed for want of proper direction about how the plea of guilty at committal might be used, not because the guilty plea was improvidently entered.

82 Incompetence of counsel is not a separate ground of appeal. As was pointed out in *TKWJ v The Queen*[94], the relevant question on appeal in a criminal matter will be whether there was a miscarriage of justice. In general, then, if an intermediate result is set aside, it will be for reasons unconnected or, at best, only indirectly connected, with the client's contention that the advocate was negligent. It follows, therefore, that the class of cases in which an intermediate result would be open to challenge not only would be exceptional, in the sense of standing apart from challenges to final decisions, but also would be a class of case whose membership would depend upon the application of criteria unconnected with what, for present purposes, is the central focus of debate, namely the alleged negligence of the advocate. By this stage of the argument, in which attention is directed solely to exceptional cases, the proposition that for every wrong there should be a remedy has become too attenuated to be of any relevant application. Especially is that so when the very existence of the relevant exceptional case depends for the most part upon considerations that are irrelevant to the wrong that is to be remedied. If final results cannot be challenged, intermediate results should not be treated differently.

83 There remains for separate consideration the last of the three kinds of consequence identified earlier as consequences of which a client may wish to complain: wasted costs. Again, at first sight it might be thought that seeking to recover wasted costs would not cut across any principle of finality. But it is necessary to recall that the general rule is that costs follow the event. To challenge the costs order, therefore, will often (even, usually) involve a direct or indirect challenge to the outcome on which the disposition of costs depended. For the reasons given earlier, that should not be permitted lest a dispute about wasted costs become the vehicle for a dispute about the outcome of the litigation in which it is said that the costs were wasted.

No relitigation

84 To remove the advocate's immunity would make a significant inroad upon what we have earlier described as a fundamental and pervading tenet of the judicial system. That inroad should not be created. There may be those who will seek to characterise the result at which the Court arrives in this matter as a case of lawyers looking after their own, whether because of personal inclination and sympathy, or for other base motives. But the legal principle which underpins the Court's conclusion is fundamental. Of course, there is always a risk that the

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94 (2002) 212 CLR 124 at 132-133 [23]-[25] per Gaudron J, 157 [102]-[103] per Hayne J.

determination of a legal controversy is imperfect. And it may be imperfect because of what a party's advocate does or does not do. The law aims at providing the best and safest system of determination that is compatible with human fallibility[95]. But underpinning the system is the need for certainty and finality of decision. The immunity of advocates is a necessary consequence of that need.

Redrawing the line

85 No sufficient reason is proffered for reconsidering the Court's decision, in *Giannarelli*, that an advocate is immune from suit whether for negligence or otherwise in the conduct of a case in court. Should the boundary of the operation of the immunity be redrawn?

86 Again, we consider that no sufficient reason is proffered for doing so. In particular, there is no reason to depart from the test described in *Giannarelli* as work done in court or "work done out of court which leads to a decision affecting the conduct of the case in court"[96] or, as the latter class of case was described in the Explanatory Memorandum for the Bill that became the Practice Act, "work intimately connected with" work in a court. (We do not consider the two statements of the test differ in any significant way.)

87 As Mason CJ demonstrated in *Giannarelli*[97], "it would be artificial in the extreme to draw the line at the courtroom door". And no other geographical line can be drawn that would not encounter the same difficulties. The criterion adopted in *Giannarelli* accords with the purpose of the immunity. It describes the acts or omissions to which immunity attaches by reference to the conduct of the case. And it is the conduct of the case that generates the result which should not be impugned.

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95 *R v Carroll* (2002) 213 CLR 635 at 643 [22] per Gleeson CJ and Hayne J; *The Ampthill Peerage* [1977] AC 547 at 569 per Lord Wilberforce; *Erinford Properties Ltd v Cheshire County Council* [1974] Ch 261 at 268 per Megarry J.

96 (1988) 165 CLR 543 at 560 per Mason CJ.

97 (1988) 165 CLR 543 at 559.

Applying *Giannarelli* to this case

88 The advice which it is alleged that Mr McIvor, the barrister, and Ms Greensill, the employee of VLA, gave the applicant was advice about whether to enter a plea at committal. A committal proceeding is an administrative function conducted by a judicial officer[98]. The relationship between committal proceedings and trial is such that they are part of the controversy which the trial ultimately determines[99]. Entry of a plea was not required, but if entered, it could be used in evidence at a subsequent trial. Mr McIvor's tendering this advice to the applicant was work which an advocate did out of court but it was work which led to a decision which affected the conduct of the case at the subsequent trial. For these reasons, apart from the operation of s 10(2) of the LPPA, the advocate would have had an immunity from suit at common law.

VLA

89 VLA cannot be said to stand in any different position from the advocate. At the time of the events giving rise to this matter, the *Legal Aid Act* 1978 provided[100] that "VLA or an officer of VLA when ... performing any of the functions of ... a solicitor" was bound to observe the same rules and standards of professional conduct and ethics as those that a private practitioner was required to observe. For the purposes of the application of that provision in respect of a member of staff of VLA, VLA was deemed[101] to be a firm of solicitors and the members of staff of VLA were deemed[102] to be employed by that firm. That is, at least to the extent of identifying the professional obligations imposed upon VLA and its officers, VLA was equated by the *Legal Aid Act* with a private firm of solicitors.

90 The advice which Ms Greensill is alleged to have given (either separately from or in conjunction with Mr McIvor) is alleged to have been given at the same

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98 *Ammann v Wegener* (1972) 129 CLR 415 at 435-436 per Gibbs J; *Grassby v The Queen* (1989) 168 CLR 1.

99 *R v Murphy* (1985) 158 CLR 596 at 614 per Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ.

100 s 16(1).

101 s 16(2)(a).

102 s 16(2)(b).

time and for the same purpose as the advice Mr McIvor gave. No relevant distinction could be drawn between the junior of two counsel retained to appear for an accused tendering advice of the kind of which the applicant complains and the instructing solicitor tendering that advice. Neither junior counsel nor the instructing solicitor may have addressed the court in any subsequent court appearance. The duties which each owes the client are identical. The content of the advice is identical. It cannot be said that the advice of one is more closely related to the court proceedings than the other, let alone one being intrinsically superior to or more effective than the other (if such a distinction were possible or relevant). What this example reveals is that the considerations of finality which require maintenance of the advocate's immunity require that the immunity extend to the advice allegedly given by Ms Greensill on behalf of VLA.

91 Because the immunity now in question is rooted in the considerations described earlier, where a legal practitioner (whether acting as advocate, or as solicitor instructing an advocate) gives advice which leads to a decision (here the client's decision to enter a guilty plea at committal) which affects the conduct of a case in court, the practitioner cannot be sued for negligence on that account.

Conclusion and orders

92 For these reasons, special leave to appeal should be granted, the appeal treated as instituted and heard instanter, but dismissed with costs.

93 McHUGH J. The issue in this special leave application is whether a barrister and a solicitor practising in Victoria may be sued for damages in a civil action for conduct that induced the applicant to enter a plea of guilty to a charge of rape at a committal hearing. The applicant asks this Court to reconsider its decision in *Giannarelli v Wraith*[103] where the Court held that what has been called the advocates' immunity from suit prevents the bringing of a civil action for conduct occurring during, or intimately connected with, the trial of a civil or criminal cause. The applicant contends that this Court should now declare that the immunity is no longer part of the common law of Australia and that an advocate can be sued for negligent conduct in respect of the trial of a civil or criminal action. Alternatively, the applicant contends that the immunity upheld in *Giannarelli* does not extend to the conduct of the respondents of which he complains. He says that the immunity is anomalous and protects legal practitioners from action for damages for negligent conduct that in other professions and occupations would be actionable.

94 In my opinion, this Court should not overturn its decision in *Giannarelli*. The present action is based on the same statutory provision as was in issue in *Giannarelli*. That statute has now been repealed. If leave to appeal was granted, a decision in this case could only affect a small number of – maybe no other – actions. For that reason, the case is not one that should be the subject of the grant of special leave to appeal. Ordinarily, the proper course would be to dismiss the application. But other members of the Court have dealt extensively with the liability of advocates for conduct intimately connected with the hearing of litigation. Moreover, since *Giannarelli* was decided the House of Lords in *Arthur J S Hall & Co v Simons*[104] has declared that under English common law advocates are no longer immune from actions for negligence. In those circumstances, I do not dissent from the grant of special leave in this case. However, in my opinion the appeal must be dismissed because, under the common law of Australia, advocates are not liable to be sued in damages for negligent conduct that is intimately connected with the hearing of a civil or criminal cause. Nor were they liable for such conduct in 1891[105].

95 Although the inability to sue advocates for their in-court conduct is traditionally described as an immunity, that description is just another name for the conclusion that, as a matter of legal policy, advocates do not owe an *actionable* duty of care in respect of their conduct in court. Similarly, they owe no actionable duty of care in respect of out-of-court conduct that is intimately

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103 (1988) 165 CLR 543.

104 [2002] 1 AC 615.

105 *Legal Profession Practice Act* 1891 (Vic).

connected with in-court conduct. They do, however, owe actionable duties of care in respect of conduct that is not intimately connected with in-court advocacy. But in respect of their in-court conduct, they are in the same position as many other persons who owe no actionable duty of care in respect of their activities or the exercise of their professions even though the negligent performance of those activities or professions will cause damage to others. So far as the law of negligence is concerned, it does not matter whether the lack of remedy against the advocate arises because the advocate does not owe a duty of care enforceable by an action for damages or has what is described as an immunity from suit.

96 In *Brodie v Singleton Shire Council* Justices Gaudron and Gummow and I said of the concept of an immunity[106]:

> "The term 'immunity' may be used in a related sense to identify a liability or remedy which, in England, did not arise or was not available against the Executive Government, identified as 'the Crown'; hence the common law principle of immunity of the Crown from actions in tort and what is now known as the 'public interest immunity' against discovery of documents. …
>
> The term 'immunity' also is used in various areas of the law to indicate an immunity to action in respect of rights and duties which otherwise exist in the law. One example is the common law immunity of the Crown to actions for breaches of its contracts; the common law accepted that a contract had been made and a legal wrong committed. The immunity of the barrister, upheld in *Giannarelli v Wraith*, assumes, as Mason CJ explained, an obligation to exercise reasonable care and skill but sustains the immunity on considerations of public policy. Again, the common law rule which confers a 'qualified immunity' from liability in respect of straying animals is an 'exception to the ordinary principles of negligence' and, where it operates, 'negates the existence of a duty of care'. In recent decisions of the House of Lords respecting the liability in negligence of public authorities, the terms 'immunity' and 'non-justiciable' have been used, apparently interchangeably, and in the sense of negation of the existence of a duty of care." (footnotes omitted)

97 This discussion indicates that the immunity afforded advocates in Australia involves a recognition of the existence of obligations of due care and skill owed to clients, but for policy reasons denies a duty of care that gives rise to a cause of action in damages. That analysis accords with judicial statements that the immunity exists not to protect advocates from the consequences of their

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106 (2001) 206 CLR 512 at 555-556 [93]-[94].

misconduct but solely for the enhancement of the administration of justice and public confidence in it[107]. That analysis also explains the dividing line between the well-recognised exposure to liability for work not connected with the conduct of a matter in court and work covered by the immunity. It is the interjection of policy arising from the difficulties of proving that a different result would have ensued but for the carelessness of the advocate and the legal principle of finality that prevents an actionable duty of care arising.

98 However, although advocates have an immunity from action, in reality their position is no different from many other persons who owe no *actionable* duty of care in respect of their activities or the exercise of their professions. Thus, absent a contract, auditors owe no general duty of care to investors even though they can reasonably foresee that negligent auditing or reporting may cause damage to those investors[108]. Journalists and authors do not owe a legally enforceable duty to take reasonable care not to injure a person's reputation or financial position by publishing careless statements. Journalistic codes impose duties of care and ethics on journalists in respect of their writings but a journalist owes no generally enforceable duty of care even in cases where his or her carelessness causes immense harm to an individual. Unless a statement is defamatory as well as careless, the journalist or author incurs no liability. Even if the statement is defamatory and careless, it may not be actionable. The common law and statute provide many defences for statements that are defamatory and careless.

99 But it is not merely auditors, accountants, journalists and authors who are immune from liability for negligent statements causing damage to individuals. Absent a contractual or fiduciary relationship, any person who makes a negligent statement causing damage owes no actionable duty of care to other persons unless the statement was made in circumstances meeting the conditions formulated by this Court in *San Sebastian Pty Ltd v The Minister*[109] and other cases. Thus, a planning authority owes no duty of care to a developer who suffers loss by relying on representations contained in a scheme to redevelop a suburban area unless the authority assumed responsibility for, or intended to induce the developer to rely on, the representations[110]. A developer owes no duty of care to the subsequent purchaser of a commercial building even though the

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107 *Giannarelli v Wraith* (1988) 165 CLR 543 at 576 per Wilson J; *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 at 750 per Lord Hobhouse of Woodborough.

108 *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241.

109 (1986) 162 CLR 340.

110 *San Sebastian Pty Ltd v The Minister* (1986) 162 CLR 340.

developer knows or ought reasonably to foresee that negligent construction of the building will cause loss or damage to the subsequent purchaser[111]. Similarly, a municipal council owes no duty to a subsequent purchaser of a house to take reasonable care to ensure that the foundations of a dwelling-house are not defective before approving the construction of the house[112]. Nor does a housing authority owe a duty to a subsequent purchaser of a house to see that an extension to the house was not defective even if the authority granted the money that enabled the extension to be carried out under a statutory power[113]. No duty is owed even though the purchaser has bought the house with the aid of mortgage moneys provided by the authority. Similarly, a Commissioner for Companies who registers deposit-taking companies owes no duty to depositors to take care that the financial affairs of the registered companies are conducted properly[114]. Medical practitioners and social workers employed by the State to examine children for evidence of sexual abuse owe no duty of care to persons suspected of being guilty of the sexual abuse[115]. Persons who institute prosecutions owe no actionable duty to the defendant to take reasonable care in launching the prosecution. A prosecutor can be sued for the damage to the liberty and reputation of the defendant only when the prosecutor acted maliciously and without reasonable and probable cause[116]. Moreover, the action is not in negligence but for the tort of malicious prosecution. Judges and witnesses owe no actionable duty of care not to make careless statements that may cause loss of liberty, reputation or money. Neither a judge[117] nor a witness[118] nor counsel[119] can be sued even for false and defamatory statements made maliciously in the course of judicial proceedings. A witness's immunity from suit extends even to

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111 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 78 ALJR 628; 205 ALR 522.

112 *Sutherland Shire Council v Heyman* (1985) 157 CLR 424.

113 *Curran v Northern Ireland Co-Ownership Housing Association Ltd* [1987] AC 718.

114 *Yuen Kun Yeu v Attorney-General of Hong Kong* [1988] AC 175.

115 *Sullivan v Moody* (2001) 207 CLR 562.

116 *Davis v Gell* (1924) 35 CLR 275; *Sharp v Biggs* (1932) 48 CLR 81; *Commonwealth Life Assurance Society Ltd v Smith* (1938) 59 CLR 527.

117 *Sirros v Moore* [1975] QB 118; *Rajski v Powell* (1987) 11 NSWLR 522.

118 *Cabassi v Vila* (1940) 64 CLR 130.

119 *Munster v Lamb* (1883) 11 QBD 588.

out-of-court conduct that is intimately connected with the giving of evidence in court[120].

100 In all these cases, the policy of the law is that no action should lie for the negligent or careless conduct of the defendant even though the defendant knew or ought to have known that his or her conduct might cause damage to the plaintiff. Except for the purpose of classification, it does not matter whether the lack of legal liability stems from characterising it as an immunity or as an absence of a duty of care. Whichever classification is used, the result is the same: the negligent person is not liable to the injured person.

101 What is significant about the above cases is that the damage suffered by the plaintiff is not physical damage but economic damage or damage to liberty or reputation. Ordinarily, people owe a duty of care to other persons when they know or ought reasonably to foresee that their conduct may cause physical damage to those persons or their property. Reasonable foreseeability of physical harm is generally enough to impose a duty of care on a person who knows or ought reasonably foresee that physical harm is a likely result of his or her conduct. Liability will arise when the duty is breached and where there is a causal relationship between the breach and the harm. But even reasonable foresight of harm is not always sufficient to give rise to a duty of care. Thus, police officers owe no duty to a member of the public to take reasonable care in investigating a crime so as to be able to apprehend a criminal before he commits a further crime by injuring that member of the public[121]. It is not sufficient to found a duty of care that the police officer ought to know that, if his or her careless investigation fails to apprehend the criminal, a member of a particular class of persons may suffer physical harm[122]. Nor do service personnel engaged in active operations owe a duty of care to avoid loss or damage to private citizens[123]. Their immunity is not confined "to the presence of the enemy or to occasions when contact with the enemy has been established"[124]. It covers "attack and resistance, advance and retreat, pursuit and avoidance, reconnaissance and engagement"[125]. Nor does the duty that the landlord of a shopping centre owes as an occupier of land extend to conducting its operations

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120 *Watson v M'Ewan* [1905] AC 480.

121 *Hill v Chief Constable of West Yorkshire* [1989] AC 53.

122 *Hill v Chief Constable of West Yorkshire* [1989] AC 53 at 62.

123 *Shaw Savill and Albion Co Ltd v The Commonwealth* (1940) 66 CLR 344.

124 *Shaw Savill and Albion Co Ltd v The Commonwealth* (1940) 66 CLR 344 at 361.

125 *Shaw Savill and Albion Co Ltd v The Commonwealth* (1940) 66 CLR 344 at 362.

so that persons leaving the centre are protected from physical attacks by third parties[126].

102 In these exceptions to the general rule that reasonable foresight of physical harm will give rise to a duty of care, the law negates liability for reasons of policy. In the case of police officers, one reason for excluding the duty is that a "great deal of police time, trouble and expense might be expected to have to be put into the preparation of the defence to the action"[127]. This would result in "a significant diversion of police manpower and attention from their most important function, that of the suppression of crime"[128]. Consequently, a police officer is not liable for the harm suffered by a victim of crime unless, at the very least, that person was subject to a "special risk" of harm different from other members of the public[129]. In the case of service personnel, the policy of the common law is "to concede to the armed forces complete legal freedom of action in the field, that is to say in the course of active operations against the enemy, so that the application of private law by the ordinary courts may end where the active use of arms begins"[130]. In the case of the supermarket landlord, the common law refuses to impose a duty because, "[i]f people were under a legal duty to prevent foreseeable harm to others, the burden imposed would be intolerable"[131]. Similarly, public policy is the reason that the common law does not give a cause of action to a person who suffers harm as the result of an advocate's negligent in-court conduct or conduct intimately connected with the hearing of a case. The common law takes the view that the harm that is likely to be done to the administration of justice by permitting such actions is greater than the harm done to individuals by refusing them such causes of action.

103 Where the harm suffered by a person is economic loss or injury to reputation or liberty, the common law is always reluctant to impose a duty of care on the harm-causing person even where it was reasonably foreseeable that harm of that kind might ensue. Because that is so, a trader is under no duty to take reasonable care to avoid loss or injury to its commercial rivals while lawfully pursuing its trade even though its object is to take away the custom or

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126 *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254.

127 *Hill v Chief Constable of West Yorkshire* [1989] AC 53 at 63.

128 *Hill v Chief Constable of West Yorkshire* [1989] AC 53 at 63.

129 *Hill v Chief Constable of West Yorkshire* [1989] AC 53 at 62.

130 *Shaw Savill and Albion Co Ltd v The Commonwealth* (1940) 66 CLR 344 at 362.

131 *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 266 per Gleeson CJ.

market share of its rivals. Reasonable foresight of harm is never decisive in determining whether a person owes a duty to take care to avoid economic loss or injury to reputation or liberty. Indeed, until 1964 it could fairly be said that, in the absence of a contract or fiduciary duty, no action for such losses would arise in any case[132]. Before the law will impose a duty of care in respect of these kinds of harm, it considers other factors and will not impose a duty of care unless public policy requires it. Those factors include the nature of the defendant's activities and the object that the defendant is seeking to achieve. The common law evaluates all the competing interests in the case before determining, as a matter of policy, that the defendant should be restrained in carrying out its activities by the obligation to take reasonable care for the plaintiff's economic, liberty or reputation interests.

104 In the case of in-court advocacy, the common law of Australia has long held that, although it is reasonably foreseeable that an advocate's carelessness will cause harm to the advocate's client, other factors negate the existence of an enforceable duty of care. The common law regards them as so important that advocates cannot be sued for damages for carelessness in conducting litigation. Advocacy in the courts is a unique profession. Advocates play an indispensable part in the administration of justice. No valid analogy can be drawn between the exercise of the calling of advocacy in the common law context and the exercise of other professions. The lack of validity in analogies with other professions and callings is reinforced by the significant differences in the proof of issues in negligence claims against other professions and callings and the proof of those issues if advocates could be sued for their courtroom conduct.

105 In Australia, advocacy in the courts is principally carried out by those admitted as, or practising exclusively as, barristers. In Australia, the barrister[133], like the solicitor, is an officer of the court[134], as indispensable to the administration of justice as the judge. Without an independent Bar, investigating and arguing the legal rights and duties of members of the public in the courts and assisting in the administration of justice, the cost of administering justice would increase dramatically. Government functionaries, or perhaps the judges themselves, would have to take on the role of the advocates. They would have to engage in many out-of-court activities that are now carried out by members of

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

133 For the purpose of this judgment, I will refer to legal practitioners in their role as advocates as barristers whether they are admitted as solicitors, barristers and solicitors or barristers.

134 This is not the case in England where the Inns of Court control and regulate the admission and conduct of barristers.

the Bar. That would include investigating, researching and presenting claims and defences in the great majority of cases. As experience has shown, few persons, untrained in law, have the ability to adequately present or defend a legal cause of action. The independence of the Bar in large part therefore secures the independence of the judiciary. It seems highly unlikely that public confidence in the administration of justice could be maintained at its present level if the administration of justice in all its aspects was a government monopoly.

106 Hence, there is an undeniable public interest in the maintenance of an independent Bar that, within the limits imposed by the adversarial system of justice, assists in achieving an efficient and economical system of justice. For close on two centuries, eminent judges have acknowledged the indispensable part that the Bar plays in the administration of justice. More than 160 years ago, Mr Baron Alderson pointed out that "[t]he institution of barristers is principally to assist the Court in the dispensing of justice"[135]. In *Ziems v The Prothonotary of the Supreme Court of NSW*[136], Dixon CJ pointed out that "the Bar is a body exercising a unique but indispensable function in the administration of justice". In the same case, Kitto J said[137]:

> "It has been said before, and in this case the Chief Justice of the Supreme Court has said again, that the Bar is no ordinary profession or occupation. These are not empty words, nor is it their purpose to express or encourage professional pretensions. They should be understood as a reminder that a barrister is more than his client's confidant, adviser and advocate, and must therefore possess more than honesty, learning and forensic ability. He is, by virtue of a long tradition, in a relationship of intimate collaboration with the judges, as well as with his fellow-members of the Bar, in the high task of endeavouring to make successful the service of the law to the community. That is a delicate relationship, and it carries exceptional privileges and exceptional obligations. If a barrister is found to be, for any reason, an unsuitable person to share in the enjoyment of those privileges and in the effective discharge of those responsibilities, he is not a fit and proper person to remain at the Bar."

107 This special relationship with the judges is the reason, for example, why advocates who neglect to file income tax returns or pay taxes may be struck off the role of practitioners. Such failures may indicate that a person is not a fit and proper person to discharge the duties owed by an advocate to the court and to lay

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135 *Moscatti v Lawson* (1835) 1 M & Rob 454 at 455 [174 ER 156 at 156].

136 (1957) 97 CLR 279 at 286.

137 (1957) 97 CLR 279 at 298.

clients. There can be few other professions, if any, where such failures bring a professional career to an end.

108 The practices and the professional conduct of barristers have changed in many respects since Mr Baron Alderson's observation. When he was a member of the Court of Exchequer Chamber, the Inns of Court would have held that a barrister who advertised legal services, sued for fees or entered into contractual relationships with lay clients concerning representation in court was guilty of unacceptable and unprofessional conduct. Not now. In most common law jurisdictions today, advocates can do each of these things. But despite these changes in the professional practices of barristers, the role of the barrister is as singular today as it has been at any time in the last 200 years. The barrister's role remains indispensable to the common law system of justice.

109 No doubt care needs to be taken when using expressions such as "exercising a unique but indispensable function in the administration of justice"[138]. That expression is not synonymous with assisting the court in every possible way to arrive at the best legal decision possible on the facts of the case. This is a consequence of the adversarial system of justice, a consequence that is reinforced by the doctrine of legal professional privilege which exists for the benefit of the client and not for the benefit of his or her legal adviser and prevents the barrister from disclosing legally privileged information.

110 Under the adversarial system of justice, a barrister has no obligation to the court to assist an opponent to prove a cause of action or defence. A barrister is under no obligation to tell an opponent or a witness anything that may assist the opponent's cause[139]. Nor does a barrister owe a duty to the court to assist the opponent to plead the facts in a way best calculated to obtain a just result according to law. As long as the barrister does not mislead the court, he or she is entitled to make the opponent prove that person's case even though the barrister knows that the facts alleged by the opponent are true. Indeed, as four Justices of this Court pointed out in *Tuckiar v The King*[140], in a criminal trial counsel is entitled to put rational arguments, based on the evidence, against a verdict of guilty even when counsel is aware of facts that point to the client's guilt. Their Honours said[141]:

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138 (1957) 97 CLR 279 at 286.

139 *In re G Mayor Cooke* (1889) 5 TLR 407.

140 (1934) 52 CLR 335.

141 *Tuckiar v The King* (1934) 52 CLR 335 at 346.

> "Whether he be in fact guilty or not, a prisoner is, in point of law, entitled to acquittal from any charge which the evidence fails to establish that he committed, and it is not incumbent on his counsel by abandoning his defence to deprive him of the benefit of such rational arguments as fairly arise on the proofs submitted."

111 The adversarial system of justice has its critics, many of whom claim that it hampers rather than helps the achievement of justice. But when all the consequences of the adversarial system are taken into account, the fact remains that the administration of justice, as now known, would be greatly impaired without the assistance of an independent Bar. Despite being in a relationship of confidence with a lay client, the first duty of the barrister is not to the client but to the court in which the barrister appears. The duty to the instructing solicitor or the lay client is secondary. Where the respective duties conflict, the duty to the court is paramount. That duty to the court imposes obligations on the barrister with which the barrister must comply even though to do so is contrary to the interests or wishes of the client. Thus, the barrister can do nothing that would obstruct the administration of justice by:

- deceiving the court;
- withholding information or documents that are required to be disclosed or produced under the rules concerned with discovery, interrogatories and subpoenas;
- abusing the process of the court by preparing or arguing unmeritorious applications;
- wasting the court's time by prolix or irrelevant arguments;
- coaching clients or their witnesses as to the evidence they should give;
- using dishonest or unfair means or tactics to hinder an opponent in the conduct of his or her case.

112 Moreover, the advocate owes a duty to the court to inform it of legal authorities that "bear one way or the other upon matters under debate"[142]. The duty applies "quite irrespective of whether or not the particular authority assists the party which is so aware of it"[143].

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142 *Glebe Sugar Refining Co Ltd v Greenock Harbour Trustees* [1921] SC (HL) 72 at 74.

143 *Glebe Sugar Refining Co Ltd v Greenock Harbour Trustees* [1921] SC (HL) 72 at 74.

113 Thus, in many situations arising in the conduct of litigation, the common law requires an advocate to act contrary to the interests of his or her client. I doubt if there is any other profession where *the common law* requires a member of another profession to act contrary to the interests of that person's client. In some professions and callings, statutes now impose specific obligations on members to disclose information against the interests of the client. But advocacy is probably unique in imposing common law obligations on a professional person to act contrary to the interests of a lay client. This factor alone is probably sufficient to preclude reasoning by analogy from the liability of other professions and occupations for negligent conduct. But however that may be, two other factors show conclusively that it is in the public interest to give advocates an immunity from liability for in-court conduct and conduct intimately connected with in-court conduct. They are the difficulties of proof concerned with showing that, but for the advocate's carelessness, a different result would have ensued and the undermining of public confidence that would flow from inconsistent verdicts. It will be necessary at a later stage of this judgment to return to those matters.

Statement of the case

114 In 1996, the applicant was charged with raping a female. In February 1997, he was convicted of that charge by a jury. He was sentenced to three years imprisonment. At his trial, the Crown tendered as evidence against him the guilty plea that the applicant had made at the committal hearing. Later, the Court of Appeal of the Supreme Court of Victoria quashed the applicant's conviction and ordered a retrial on the ground that the trial judge's directions in respect of the plea of guilty were inadequate[144]. In 1998 at the retrial a jury acquitted the applicant of rape. At the retrial, the presiding judge rejected the tender of the applicant's plea of guilty at the committal hearing.

115 In 2001, the applicant commenced an action for damages in the County Court of Victoria against Victoria Legal Aid, his solicitor, and Ian McIvor, a barrister. He alleges that, by reason of Victoria Legal Aid's breach of its retainer and McIvor's breach of the duty that as a barrister he owed to the applicant, the applicant has suffered and continues to suffer injury, loss and damage. The particulars included loss of liberty, a psychotic illness, loss of income and the costs and expenses of the appeal and retrial.

116 After defences were filed, Victoria Legal Aid and McIvor applied for an order permanently staying the proceedings. Rule 23.01 of the County Court Rules of Procedure in Civil Proceedings (Vic) provides for the making of a permanent stay order where a proceeding does not disclose a cause of action, is

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144 *R v D'Orta-Ekenaike* [1998] 2 VR 140.

scandalous, frivolous or vexatious or is an abuse of process. Judge Wodak, who heard the application, made an order permanently staying the proceedings. He granted the stay because the decision of this Court in *Giannarelli v Wraith*[145] showed that the applicant's claim did not disclose a cause of action. That was because *Giannarelli* held that advocates were immune from action for damages for negligently conducting cases in court or making decisions out of court that were intimately connected with conducting cases in court. The Court of Appeal of the Supreme Court of Victoria confirmed Judge Wodak's order.

117 The applicant now seeks special leave to appeal against the order of the Court of Appeal dismissing his appeal against his Honour's order.

Statement of facts

118 As a result of the procedure in the County Court, the application for special leave to appeal has to be dealt with on the facts alleged in the Statement of Claim. The respondent solicitor has contested the construction of some allegations of fact in the Statement of Claim. The respondent barrister has submitted that the approach to be taken to an application for stay under the County Court Rules involves construing ambiguities in the Statement of Claim against the applicant. The County Court and Court of Appeal did not identify any ambiguities in the pleadings requiring resolution for the purpose of determining the stay application. Judge Wodak assumed for those purposes that the applicant could establish negligence in the manner claimed. The parties accepted that the facts alleged in the Statement of Claim were the basis for this Court's consideration.

119 The material facts alleged in the Statement of Claim are as follows. In February 1996, the applicant retained Victoria Legal Aid as his solicitor to defend the charge of rape. It briefed McIvor to appear for him at the committal proceedings. The applicant had two meetings with McIvor and an employee of Victoria Legal Aid at which he told them that he was not guilty of the charge. He also told them of the circumstances of the alleged offence, circumstances that disclosed a possible defence of consent. Nevertheless, they advised him to plead guilty to the charge on the ground that he had no defence and that an early plea of guilty would most likely result in a suspended sentence. They advised him that, if he defended the charge, he ran the risk that a gaol term would be imposed. They exerted undue pressure and influence on him to plead guilty at committal. As a result, at the committal he pleaded guilty.

120 Upon these facts, the applicant claims that the respondents breached the duty of care that they owed him. He claims damages for the costs of the appeal

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145 (1988) 165 CLR 543.

and the second trial, for his incarceration, lost income and illnesses following the events described, all of which he says were caused by the negligence of the respondents but for which he would not have entered a guilty plea at committal. The applicant's particulars of negligence allege a failure to exercise due care in considering the possible defence available to him, a failure to warn him that a plea of guilty at committal may be admitted as evidence if a trial was held and the exertion of pressure to plead guilty.

The statutory regime

121 The liability of the second respondent, the barrister, is potentially affected by the provisions of the *Legal Profession Practice Act* 1958 (Vic) ("the 1958 Act"). The relevant provision for this application is s 10(2) which, at the time of the events, provided:

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

122 The history of the provision was traced in *Giannarelli v Wraith* where there was no disagreement about its past, only what implications flowed from its history. Section 10(2) first appeared as s 5 of the *Legal Profession Practice Act* 1891 (Vic). In that context the provision read:

> "… every barrister shall *in future* be liable for negligence as a barrister to the client on whose behalf he has been employed to the same extent as a solicitor is *now* liable to his client for negligence as a solicitor." (emphasis added)

123 When the provision was re-enacted in 1915, 1928 and then 1958, the italicised words were removed and the date of coming into force of the 1891 Act was inserted.

124 The 1958 Act was repealed effective from 1 January 1997 by s 452 of the *Legal Practice Act* 1996 (Vic) ("the 1996 Act"). In s 442 of the 1996 Act, any effect of that Act on legal practitioners' liability pre-1997 is expressly excluded. The 1996 Act clearly operates prospectively[146]. The 1958 Act continues to apply to the conduct of the respondents and governs any liability they may have incurred.

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146 See also *Interpretation of Legislation Act* 1984 (Vic), s 14(2).

125 The same provision governed the conduct of the practitioners in *Giannarelli*. It is convenient to consider what understanding of the provision, and of the immunity, prevailed on that occasion.

What did *Giannarelli v Wraith* decide?

126 *Giannarelli* involved a claim in negligence by two brothers who had been convicted of perjury on the basis of testimony they gave to a Royal Commission. This Court quashed their convictions after failed appeals in the Court of Criminal Appeal. They sued the barristers who appeared for them at the committal, trial and appeal to the Court of Criminal Appeal and the instructing solicitor from the committal and trial. Their convictions were quashed on a ground raised for the first time in the High Court proceedings – that s 6DD of the *Royal Commissions Act* 1902 (Cth) rendered the testimony from the Royal Commission inadmissible in the perjury trial. The brothers claimed that their barristers were negligent in failing to raise that objection earlier.

127 By majority, this Court held that the barristers were immune from the claim of negligence.

Statutory interpretation

128 In *Giannarelli*, no one interpretation of s 10(2) commanded majority acceptance. All Justices agreed on two matters. Before the 1891 Act, a barrister could not sue for his fees because he had no contract with his client and because of the public policy understanding of the basis on which a barrister offered his services. And, before 1891, a barrister could not be sued for the negligent performance of his professional services. One effect of the 1891 Act was to provide for a single admission as both solicitor and barrister and to make all persons who were barristers at that date, solicitors also, and vice versa.

129 Mason CJ, Wilson and Dawson JJ held that s 10(2) in the form it appeared in the 1891 Act had the purpose of placing barristers and solicitors on the same footing in terms of liability for negligence. Accordingly, the issue for those Justices in *Giannarelli* was: as at 23 November 1891, would a solicitor have been immune from a suit of negligence for the conduct alleged against the defendant barristers?

130 The fourth member of the majority in the result was Brennan J who held that s 10(2) did not apply to the appeal in *Giannarelli*. His Honour construed the provision in its original context and concluded that it was intended to apply only to those barristers who, by operation of the 1891 Act, became entitled to practise as solicitors. Those admitted after the commencement of the 1891 Act would be entitled to sue for their fees and would be liable in negligence by virtue of their admission as both barrister and solicitor. For Brennan J, the only issue was

whether the respondent barristers had an immunity at common law at the time of the appeal.

131 Toohey J, with whom Deane and Gaudron JJ agreed, held that, in s 10(2), the words "to the same extent as" had the effect of "imposing a statutory liability upon a barrister for negligence in relation to his activities as a barrister"[147]. A barrister's liability was measured by that of a solicitor in negligence as a solicitor. Both owed a duty of care to their clients for work undertaken in their respective professional capacities from 23 November 1891 which, if breached, could result in liability in negligence. The effect of the Act was thus to remove the immunity of barristers from liability for negligent conduct as barristers. His Honour noted[148]:

> "It does not follow from this construction that the duty is not capable of development or that the categories of negligence for which a barrister is liable are forever fixed as at 23 November 1891."

Toohey J held that subsequent common law authority on the advocates' immunity did not affect the respondents' position.

132 The first difficulty facing this Court is the absence of an authoritative construction of the provision which governs the second respondent in this case. Three Justices held that the provision applied to direct attention to the immunity at common law in 1891, three that it applied to abrogate the immunity and one that it did not apply to any barrister admitted after 1891. The minority construction of Deane, Toohey and Gaudron JJ should be excluded from consideration on the basis that it does not accord with the result in *Giannarelli*. The applicant's submission that there is no meaningful difference in the approach to the statutory provision between the majority and minority in *Giannarelli* cannot be supported.

133 The difference in reasoning among the majority Justices means that *Giannarelli* has no *ratio decidendi*. But this does not mean that it has no precedential authority or does not have binding force in this case. I discussed this kind of situation in *Re Tyler; Ex parte Foley*[149]:

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147 (1988) 165 CLR 543 at 603.

148 (1988) 165 CLR 543 at 609.

149 (1994) 181 CLR 18 at 37-38.

"The divergent reasoning of the majority judges in *Re Tracey; Ex parte Ryan*[150] and *Re Nolan; Ex parte Young*[151] means that neither of those cases has a ratio decidendi. But that does not mean that the doctrine of stare decisis has no relevance or that the decisions in those cases have no authority as precedents. Because it is impossible to extract a ratio decidendi from either of the two cases, each decision is authority only for what it decided[152]. But what is meant by saying that a case, whose ratio decidendi cannot be discerned, is authority for what it decided? It cannot mean that a court bound by that decision is bound only by the precise facts of the case. Stare decisis and res judicata are different concepts.

In my opinion, the true rule is that a court, bound by a previous decision whose ratio decidendi is not discernible, is bound to apply that decision when the circumstances of the instant case 'are not reasonably distinguishable from those which gave rise to the decision'[153]. In *Great Western Railway Co v Owners of SS Mostyn ('The Mostyn')*[154], Viscount Dunedin, after concluding that no binding ratio decidendi could be extracted from the House's decision in *River Wear Commissioners v Adamson*[155] said[156]:

> 'Now, the judgment is binding. What, therefore, I think is our duty on this occasion is to consider the statute for ourselves in the light of the opinions, diverging as they are, and to give an interpretation; but that interpretation must necessarily be one which would not, if it applied to the facts of *Wear v Adamson*, lead to a different result.'"

134 Applying that reasoning to the present case, this Court cannot determine the liability of the respondents in a way that is inconsistent with the decision in *Giannarelli*. The facts of this application arise under the same statutory

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150 (1989) 166 CLR 518.

151 (1991) 172 CLR 460.

152 *Dickinson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 188; *Philip Morris Ltd v Commissioner of Business Franchises (Vict)* (1989) 167 CLR 399 at 496.

153 *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446 at 479 per Lord Reid.

154 [1928] AC 57.

155 (1877) 2 App Cas 743.

156 *The Mostyn* [1928] AC 57 at 74.

provision as applied in *Giannarelli*. On an application arising under the 1958 Act, and relevantly indistinguishable from *Giannarelli*, that is, falling within the scope of the immunity described in that case, the Court cannot deliver a result inconsistent with *Giannarelli* unless the Court overrules that case.

135 As I have indicated, the liability of a solicitor in respect of in-court negligence at common law in 1891 was relevant to the reasoning of Mason CJ and Wilson and Dawson JJ and the liability of both solicitors and barristers in 1988 was relevant to the reasoning of Brennan J. However, Brennan J also considered the state of the law in 1891, in the alternative to his construction of the 1958 Act, and held that it was the same as in 1988. Even the Justices who relied on a fixed time interpretation of the provision took account of subsequent articulations of the immunity and did not rely exclusively on the state of the authorities in 1891. Wilson J explained this approach on one aspect of the immunity, saying[157]:

> "… I find the reasoning [in later cases] persuasive, and see no difficulty in accepting [them] as strong evidence of the law of England as it was in 1891 with respect to the immunity of solicitors from liability for in-court negligence as advocates."[158]

136 Dawson J positively concluded that the later authorities "did not alter the extent of the liability" but merely re-expressed its basis as lying in public policy and not in the absence of contract between the barrister and client, developments in negligence having removed that possibility[159].

137 Toohey J considered, in the alternative to *his* construction, the question of solicitors' liability for in-court negligence in 1891 and dissented on the authorities[160]. Deane J, as well as agreeing with Toohey J, indicated his dissent, as a matter of policy, from the majority view that the common law immunity extended to the conduct of the respondents[161].

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157 *Giannarelli v Wraith* (1988) 165 CLR 543 at 570. Mason CJ agreed with Wilson J's approach to the provision at 561.

158 See also the concluding words of his Honour's judgment: (1988) 165 CLR 543 at 578.

159 (1988) 165 CLR 543 at 593.

160 (1988) 165 CLR 543 at 604-606.

161 (1988) 165 CLR 543 at 588.

138 In concluding that the common law affords advocates an immunity for in-court negligence, the majority held that the basis for the immunity lay in public policy considerations[162]. Their Honours identified three matters as relevant.

(i) The role of the advocate

139 The majority relied on the primacy of the obligation of an advocate to the Court, taking on particular significance in the conduct of litigation, which had the potential to conflict with the interests of the client[163]. The advocate must make decisions about the extent of cross-examination, the witnesses to be called, points to be taken, submissions and objections to be made. An advocate, concerned about the exposure to liability for negligence to the client, might, in making such decisions, relegate the interests of efficient conduct of litigation to second place in favour of the exclusion of any possible avenue of success for the client, however hopeless. Prolixity in litigation is contrary to the public interest in the resolution of disputes without delay.

140 An advocate must also, on occasion, act contrary to her or his client's interests, even instructions, and refuse to allege fraud or other disgraceful conduct without good cause, to mislead the court or to fail to disclose authority contrary to the client's position. The burden of meeting allegations of negligence, even assuming that courts would not visit liability on a practitioner for upholding their obligation to the court, would influence the discharge of that obligation. One difficulty is that unsuccessful litigants whose principal action was without much substance are those most likely to bring a later, equally unsubstantiated, claim against their representative.

(ii) Other immunities

141 Connected with the issue of an advocate's duty to the court, in the majority's view, was the consistency of the immunity for an advocate with immunities afforded to other participants in litigation[164]. The rationale for the immunity of judges, jurors and witnesses from suit for what they say in court is the protection of free speaking in court proceedings, the better to achieve the

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162 (1988) 165 CLR 543 at 555 per Mason CJ, 569 per Wilson J, 579 per Brennan J, 593-594 per Dawson J.

163 (1988) 165 CLR 543 at 555 per Mason CJ, 572-573 per Wilson J, 579 per Brennan J, 594 per Dawson J.

164 (1988) 165 CLR 543 at 557 per Mason CJ, 569-570 per Wilson J, 579 per Brennan J, 595 per Dawson J.

disclosure of truth in the administration of justice. The majority Justices relied on what Brett MR had said in *Munster v Lamb*[165]:

> "If upon the grounds of public policy and free administration of the law the privilege be extended to judges and witnesses, although they speak maliciously and without reasonable or probable cause, is it not for the benefit of the administration of the law that counsel also should have an entirely free mind? Of the three classes – judge, witness, and counsel – it seems to me that a counsel has a special need to have his mind clear from all anxiety."

142 Also related to the role of an advocate in the administration of justice is the preservation of the cab rank principle. Legal practitioners are, according to this principle, required to accept work presented to them in a field in which they hold themselves out as practising as long as a reasonable fee is offered. The removal of the immunity is said to threaten the principle because it will make practitioners reluctant to accept a brief from a difficult or unmeritorious client for fear that a vexatious claim in negligence will ensue. Brennan J commented on the importance of the continued observance of the cab rank rule to the administration of justice[166] but none of the Justices gave it particular weight in considering the immunity at common law[167].

(iii) Public confidence in the administration of justice

143 Their Honours placed importance on the damage to the administration of justice that would be caused by the collateral challenge to proceedings where a suit of negligence concerns conduct in the course of litigation. That damage is two-fold. In order to establish causation, a plaintiff must show at least that, but for the advocate's conduct, a different result would have obtained in the proceedings. Causation could rarely be demonstrated without a full reconsideration of the issues litigated in the primary proceedings, including a rehearsal of the evidence. In this parallel proceeding, the opponent from the principal proceeding would not be a party. Collateral proceedings are thus not the same as a retrial. The advocate is left in a peculiarly vulnerable position. The conduct amounting to negligence must be established in the context of the actual trial, in which matters of impression, demeanour of witnesses, judge and the jury, take on importance and are hard to assess objectively at a later stage.

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165 (1883) 11 QBD 588 at 603.

166 (1988) 165 CLR 543 at 580.

167 (1988) 165 CLR 543 at 573 per Wilson J, 594 per Dawson J (Mason CJ did not refer to it).

144 Their Honours also saw retention of public confidence in the finality of curial resolution of disputes[168] as important for the administration of justice. A successful claim of negligence against a practitioner depends on demonstrating that at least one outcome of the principal litigation was wrong. In circumstances where that result has not been first obtained by successful appeal, the possibility of inconsistent outcomes arises. A successful party in collateral proceedings might use that outcome as a ground for seeking leave to appeal the principal proceedings out of time. Inconsistent outcomes in criminal matters are an even greater concern for confidence in the administration of justice. The opportunity for a quasi-rehearing through collateral proceedings would be an incentive to a disappointed litigant to sue his or her advocate. Dawson J said on this issue[169]:

> "Nothing could be more calculated to destroy confidence in the processes of the courts or be more inimical to the policy that there be an end to litigation. If the decision of a court is wrong, the appeal process is the means by which it should be corrected. To allow the courts to be used to undermine its authority in other proceedings is clearly not in the public interest."

Dealing with issues of timing

145 The relevant date for determining whether there is an immunity at common law precluding a suit against the respondents takes on importance in this case because it is an application for special leave to appeal and the statutory provision governing the matter has been repealed. Since the decision in *Giannarelli*, the House of Lords has abolished the immunity of advocates in both civil and criminal proceedings, preferring to rely on the broad power in English courts to strike out claims on abuse of process grounds[170]. A significant factor in that decision was the changing nature of advocacy and legal practice.

146 If the immunity applied to the present case is one falling to be determined according to the *current* state of the common law, this Court might wish to re-express the immunity of advocates in a modern context and grant special leave to appeal. That path would involve no criticism of the decision in *Giannarelli*. However, if the matter is determined on the state of the law in 1891, this Court must be satisfied of manifest error in the decision of the Court in *Giannarelli* before it could grant leave. A grant of leave cannot be influenced by subsequent developments of fact or law, except insofar as those developments may be said to

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168 (1988) 165 CLR 543 at 558 per Mason CJ (with whom Brennan J agreed at 579), 573-574 per Wilson J, 594-595 per Dawson J.

169 (1988) 165 CLR 543 at 595.

170 *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 at 691-692 per Lord Hoffmann.

throw light on the law of 1891 (in the manner described by Wilson J). The applicant has not sought to demonstrate patent error in *Giannarelli*, however; rather he submits that the retention of the immunity can "no longer" be justified.

147 A major difficulty in granting leave to re-open this authority is that there is no majority holding in *Giannarelli* as to the relevant date for determining the second respondent's liability – 1891 or the common law applicable in 1996? The 1958 Act has been repealed, so that the present basis of advocates' immunity in Victoria now lies in common law alone. It is not the most efficient way for this Court to conduct its business by granting leave in a case that might turn on a repealed statute that might affect few, if any, cases apart from this one.

148 The two intervening events – the House of Lords decision and the repeal of the time-based statutory provision – when considered with the unsatisfactory state of *Giannarelli* on the issue of whether the common law should be considered according to the statutory date or the present time, therefore, tell against granting special leave to appeal in this case. Neither party has suggested that any equivalent statutory provision applies in any other jurisdiction. Nor can I find a jurisdiction in which this issue is presently regulated by statute. This case can only raise a matter of national significance insofar as it deals with the present common law position. Because of its statutory basis, this application is not a good vehicle for considering the modern state of the common law in respect of advocates' immunity.

149 However, in an application for special leave, this Court will consider whether a miscarriage of justice is demonstrated on the facts of the particular case. Again, difficulties arise because the permanent stay order on the applicant's claim leaves this Court to assess the matter as if negligence were established. Ordinarily the Court would not grant leave where crucial facts remain contested. In this case, it is quite possible that, whatever the law, the claim will fail on the facts. However, other members of the Court would grant special leave to appeal and they have examined the substance of the law. In those circumstances, it would not be satisfactory to reject the application on no other basis than that it is an unsatisfactory vehicle to deal with the issue of the advocate's immunity.

Does the immunity extend to the present conduct?

150 The first issue for the Court is whether the immunity recognised in *Giannarelli* extends to the conduct the subject of this Statement of Claim. If not, then it would be unnecessary for this Court to reconsider the immunity. The applicant submits, in the alternative to reconsidering *Giannarelli*, that the immunity for advocates does not cover the negligent application of pressure in relation to a committal plea.

The extent of the immunity

151 In *Giannarelli*, the majority adopted the extent of the immunity described by McCarthy P in the New Zealand Court of Appeal[171]. In *Rees v Sinclair* his Honour said[172]:

> "… the protection 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."

The passage had also been adopted by the House of Lords in *Saif Ali v Sydney Mitchell & Co*[173] as the appropriate test.

Giving meaning to "intimately connected"

152 A decision about a plea of guilty cannot be described other than as intimately connected with the conduct of a criminal cause. It is a decision made preliminary to the hearing of a charge which affects the conduct of the accused's matter before the court. In adopting the "intimately connected" test, Lord Wilberforce said[174]:

> "... I think that the formulation takes proper account, as it should, of the fact that many trials, civil and criminal, take place only after interlocutory or pre-trial proceedings. At these proceedings decisions may often fall to be made of the same nature as decisions at the trial itself: it would be illogical and unfair if they were protected in the one case but not in the other."

153 The connection of a plea of guilty at committal with the conduct of a criminal matter is intimately connected with the hearing of that matter because the timing of the plea affects the sentence imposed, in particular, whether the plea was entered at the first reasonable opportunity[175]. The applicant's attempt to

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171 (1988) 165 CLR 543 at 560 per Mason CJ, 571 per Wilson J, 579 per Brennan J, 596 per Dawson J.

172 [1974] 1 NZLR 180 at 187.

173 [1980] AC 198 at 215 per Lord Wilberforce, 224 per Lord Diplock, 232 per Lord Salmon.

174 *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 at 215.

175 *Cameron v The Queen* (2002) 209 CLR 339 at 345-346 [19]-[25] per Gaudron, Gummow and Callinan JJ.

distinguish his case from *Giannarelli* on the basis that a committal is an administrative and not judicial proceeding cannot be accepted. Further, *Giannarelli* itself concerned the liability of, among others, the barristers from the committal proceedings.

154 Work that courts have held was intimately connected with the conduct of a cause includes:

- Failing to raise a matter pertinent to the opposition of a maintenance application[176];
- Failing to plead or claim interest in an action for damages[177];
- Issuing a notice to admit and making admissions[178];
- Failing to plead a statutory prohibition on the admissibility of crucial evidence[179];
- Negligently advising a settlement[180].

155 In *Keefe v Marks*, Gleeson CJ referred to other examples of out-of-court work that would be intimately connected with the conduct of the cause[181]:

> "interviewing the plaintiff and any other potential witnesses, giving advice and making decisions about what witnesses to call and not to call, working up any necessary legal arguments, giving consideration to the adequacy of the pleadings and, if appropriate, causing any necessary steps to be undertaken to have the pleadings amended."

156 By contrast, a failure to advise the availability of possible actions against third parties[182], failure to advise commencing proceedings in a particular

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176 *Rees v Sinclair* [1974] 1 NZLR 180 at 187.

177 *Keefe v Marks* (1989) 16 NSWLR 713 at 718.

178 *Munnings v Australian Government Solicitor* (1994) 68 ALJR 169 at 172 per Dawson J; 118 ALR 385 at 390.

179 *Giannarelli v Wraith* (1988) 165 CLR 543.

180 *Biggar v McLeod* [1978] 2 NZLR 9.

181 (1989) 16 NSWLR 713 at 718.

182 *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 at 216, 224, 232.

jurisdiction[183] and the negligent compromise of appeal proceedings leading to the loss of benefits gained at first instance[184] have been held not to fall within the immunity. Of course many other categories of conduct are well recognised as falling outside the immunity, especially the giving of advice not for the purpose of litigation[185].

157 The applicant sought to distinguish this case from *Giannarelli* on the basis that it involves a failure to warn in the *Rogers v Whitaker*[186] sense. That submission must be rejected. The issue is whether the relevant connection with the conduct of the litigation exists, not the form of the negligence. An integral part of the advocate's role is the giving of advice on the basis of which the client will give instructions that direct the course of proceedings. The advice is critical to and often determinative of the client's decision. There is no relevant distinction between instructions given on negligent advice and the negligent carrying out of instructions if both are intimately connected with the conduct of litigation.

158 The Court of Appeal for England and Wales has had occasion to decide a very similar case to the present one. In *Somasundaram v Melchior & Co*[187], the plaintiff had been convicted of unlawful and malicious wounding after pleading guilty. His conviction was confirmed on appeal. He had instructed his solicitor that he could not remember picking up the knife with which his wife was stabbed and he intended to plead not guilty. Subsequently he changed his story and recalled picking up the knife and striking her on the head with it. At a meeting with counsel and the solicitor, counsel advised the plaintiff that he had no defence to the charge if he persisted with the second account and the plaintiff decided to plead guilty.

159 As in the present case, the plaintiff in *Somasundaram* claimed that the solicitors had pressured him into pleading guilty. The defendant firm of solicitors was also acting for the plaintiff in matrimonial proceedings. The plaintiff claimed the solicitors had influenced his decision with threats of the potential consequences for those proceedings if there was a trial in the criminal matter. The Court of Appeal upheld the striking out of the proceedings against the firm on the basis that the claim had no chance of success and was frivolous

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183 *Macrae v Stevens* [1996] Aust Tort Reports ¶81-405.

184 *Donellan v Watson* (1990) 21 NSWLR 335.

185 For example *Heydon v NRMA Ltd* (2000) 51 NSWLR 1.

186 (1992) 175 CLR 479.

187 [1988] 1 WLR 1394; [1989] 1 All ER 129.

and vexatious. The Court went on, however, to address the defendant's alternative defences – first, that it was an abuse of process to impugn a decision of a competent court and second, the immunity of advocates. The Court held that it was an abuse of process to attempt to impugn a conviction by a competent court[188]. As for the character of work such as advice on a plea in criminal proceedings, the Court said[189]:

> "Both counsel submit, rightly in our judgment, that advice as to a plea is something which 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 the cause is to be conducted when it comes to a hearing … Indeed it is difficult to think of any decision more closely so connected." (footnotes omitted)

160 Their Lordships thought that the advocates' immunity would have protected the barrister but not the solicitor (who was not acting as an advocate) from a claim in negligence[190].

161 Not every aspect of legal practice that is intimately connected with the conduct of litigation, and so covered by the immunity, is supported by all of the public policy bases for the immunity. Some aspects, particularly those germinating out of court, are based more on the public policy of preventing re-litigation or collateral proceedings than in the duty of an advocate to the court or the peculiarities of the adversarial profession. It is difficult to see what constraints a barrister or solicitor is under when advising a client whether to plead guilty. An accused is entitled to put the prosecution to proof. Benefits that may attend an early plea of guilty are for the client to weigh up in his or her interests. Immunising advocates from actions based on their negligent exaggeration of the sentencing benefits of a guilty plea, exertion of pressure to plead guilty or failure to advise on the risks attending a plea of guilty serves no public interest connected with the advocate's obligations to the court. However, there may be a public policy purpose in protecting an advocate from vexatious claims arising from mere errors of judgment inherent in predicting a sentencing outcome. If liability were to attach to underestimation of a sentence, practitioners might give higher estimates in their advice and depress the number of guilty pleas entered.

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188 [1988] 1 WLR 1394 at 1403; [1989] 1 All ER 129 at 136; relying on *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, discussed below.

189 [1988] 1 WLR 1394 at 1403; [1989] 1 All ER 129 at 136.

190 [1988] 1 WLR 1394 at 1403-1404; [1989] 1 All ER 129 at 136-137.

162 Immunity for advice concerning pleas of guilty does, however, serve the important public interests of avoiding re-litigation of issues and maintaining confidence in the administration of criminal justice insofar as that confidence rests on finality of outcome. In criminal cases, the prospect of re-litigation is especially invidious. Whether or not the conviction has been overturned, the plaintiff must prove that, but for the advocate's negligence, an acquittal would have followed. But, except where an acquittal was required as a matter of law, that issue in most cases is simply impossible of proof. Take the present case as an example. Juries give no reasons, and it is against public policy for jurors to be called to give evidence as to their reasoning process. For all a civil court, trying an action for negligence, would know, the plea of guilty may have been entirely discounted by the jury at the first trial of the applicant. The advocates' alleged negligence may have had no material bearing on the result. Why should a plaintiff get damages for negligence that cannot be proved to have affected the result?

163 Those who claim that, if an advocate's negligence can be a ground for overturning a criminal conviction, it should be a ground for a civil action for damages fail to note the differences between a criminal appeal and a civil action for damages concerning an advocate's negligence. In a criminal appeal, once the court finds that the advocate's negligence constituted an irregularity that might have affected the result, the onus is on the Crown to prove that the irregularity could not possibly have affected the result. Unless the Crown has discharged that onus – which is always difficult – the conviction will be quashed. In the civil proceeding, the accused bears the onus of proving that the advocate's negligence resulted in his or her conviction, a burden that can only be discharged by guesswork.

164 Whether a claim for damages for an advocate's negligence arises out of criminal or civil litigation, the issue of causation distinguishes the claim from every other action for negligence. That is because the opinion of a third party – a judge or a jury – is interposed between the negligence and the injury. Where physical injury is involved, the tribunal of fact, assisted by expert opinion where necessary, can determine – usually with confidence – whether the negligence caused the injury to the plaintiff. It is a matter of objective probability. Where economic loss is involved, the tribunal of fact can also usually find with some confidence that the defendant's negligence caused the plaintiff's loss. In each case, except where a warning or advice is involved, the opinion of a third party is not interposed between the negligence and the injury, as it is in the case of an advocate's negligence. And in the warning or advice cases, the issue of causation is usually a simple one. It depends upon whether the plaintiff is believed as to what he or she would have done if proper advice or a warning had been given. But where loss is claimed to be the result of an advocate's in-court negligence, the decisive factor in the causation issue is the opinion of the tribunal of fact at the original trial. It can only be guesswork as to whether the negligence made any difference to that result. No doubt there may be cases where the negligence

is so gross that, in an action for damages, the tribunal of fact can find that it must have affected the result of the earlier proceedings. Such cases are likely to be rare. Even where a judge has tried the original case and given reasons, it will often be difficult to know whether the failure to ask a question or put an argument or the putting of a question or argument affected the judge's conclusion.

165 In their joint judgment, Gleeson CJ, Gummow, Hayne and Heydon JJ set out in detail the reasons why adverse consequences for the administration of justice would also be likely to result from the re-litigation in negligence proceedings of issues already decided in a civil or criminal cause. I agree with what their Honours have written on this fundamental issue.

166 There is, of course, a greater public interest in maintaining confidence in the administration of criminal rather than civil justice. So, it is possible to sue a practitioner for the negligent settlement of proceedings or for the negligent loss or abandonment of a cause of action. Such claims lead to the litigation of a primary claim even if that claim can no longer be pursued. These results flow even though there is a public interest in the finality achieved through the statutes of limitations and the promotion of out-of-court dispute settlement. But where a trial has taken place, as the judgment of Gleeson CJ, Gummow, Hayne and Heydon JJ demonstrates, public confidence in the administration of justice is likely to be impaired by the re-litigation in a negligence action of issues already judicially determined.

167 The preservation of finality is a compelling reason why it is not appropriate to construct "allegations of damage in a manner which attempts to relate the harm suffered as a consequence of a barrister's alleged negligence to that aspect of his conduct furthest removed from physically standing up and speaking in Court"[191]. If a decision affects the conduct of a case in court, it can be viewed both as a course of conduct lasting from the decision until and including the last opportunity to change that course during the hearing, and as a potential, although unprovable, causative factor in a result. The context in which the decision is made, either physical or temporal, is thus of no relevance. The notion of the "calm of chambers" serves only to identify one factor supporting the restriction of the immunity, in respect of conduct not taking place during court proceedings. It does not follow that a decision, made out of court, and maintained in court, is outside the rationales for the immunity.

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191 *Keefe v Marks* (1989) 16 NSWLR 713 at 719 per Gleeson CJ. His Honour reiterated those remarks in the decision of this Court in *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209 at 228-229 [97]; 167 ALR 575 at 601; and they were endorsed by Callinan J (1999) 74 ALJR 209 at 280 [361]; 167 ALR 575 at 670; Kirby J *contra* (1999) 74 ALJR 209 at 236 [128]; 167 ALR 575 at 610.

168 Accordingly, the immunity should extend to any work, which, if the subject of a claim of negligence, would require the impugning of a final decision of a court or the re-litigation of matters already finally determined by a court. On that basis, no distinction should be drawn between the role of a solicitor and a barrister in the context of advising a client regarding the entering of a plea in criminal proceedings. If the immunity were applicable to the barrister and not the solicitor in the present case, it would not serve the public policy purpose of preventing the rehearing of the applicant's charge.

169 In his judgment[192] in this case, Kirby J relies on a number of cases for the proposition that solicitors were "not immune from proceedings in negligence in respect of conduct *out of court* (or indeed *in court*, a matter not here in issue)". But, with great respect to his Honour, at its highest one of the cases cited appears to assume that under Scots law a procurator could be sued for damages for failing to examine witnesses properly. But none of the other cases supports the proposition for which his Honour cites them.

170 Kirby J cites[193] *Hill v Finney*[194] to support his proposition. But nothing said by the Queen's Bench in that case supports the proposition. The notes attached to the Report, which were made by the reporter of the case, purport to discuss the law; whether accurately or not is another matter. In any event, the notes make it clear that there was no distinction between the liability of the solicitor and the liability of counsel. The notes state[195]:

> "It seems clear that an attorney is no more liable than a counsel for honestly advising his client that, on the facts, his suit or defence cannot be sustained."

171 A more unsatisfactory case than *Hill* could hardly be found. It is simply a report of a *nisi prius* trial before Cockburn CJ. The jury brought in findings that would have entitled the defendant to a verdict as a matter of law. The foreman then said "he believed his brethren had agreed to their findings on the supposition that they would be enabled to award damages"[196]. The jury then asked to retire. On their return, they said "we return a simple verdict for the plaintiff – Damages,

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192 Reasons of Kirby J at [283], [284], [295], [300].

193 Reasons of Kirby J at [283], [284].

194 (1865) 4 F & F 616 [176 ER 716].

195 (1865) 4 F & F 616 at 625 n(a) [176 ER 716 at 720].

196 (1865) 4 F & F 616 at 653 [176 ER 716 at 734].

one farthing"[197]. In answer to a question from the Lord Chief Justice, the jury said that they now found that the defendant had given the alleged advice, to which Cockburn CJ replied[198]:

> "Why, that is inconsistent with your former finding! You think that the plaintiff is entitled to a verdict, but not to damages; that he has lost his defence through the defendant's fault, but that he has suffered no loss! However, that is your verdict."

The reporter comments that it was clear that the Lord Chief Justice would have favoured a motion for a new trial or a verdict for the defendant but the defendant was satisfied, and did not move[199].

172 Nor do the cases cited by Kirby J "confirm the foregoing historical analysis"[200]. *Stokes v Trumper*[201] simply decided that where a "solicitor has by his *crassa negligentia* in the conduct of [a] suit caused the suit to be lost, he cannot recover any portion of his bill" including disbursements[202]. The case says nothing about whether the client could have recovered damages from the solicitor for loss suffered. *Re Spencer*[203] decided that a solicitor who put an erroneous allegation into a petition that resulted in a wrongful payment of funds held in court was "primarily liable for the costs and expenses" of the matter. *Ritchie v Macrosty*[204] was, according to the headnote, an action for damages "brought by a client against an agent (a country procurator), [alleging] gross negligence and want of skill, or mismanagement from improper motives", whereby a cause entrusted to him had been lost. The procurator denied the allegations that they showed a cause of action. The parties could not agree as to the terms of the issue to be tried. Consequently, the Lord Justice-Clerk commented[205]:

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197 (1865) 4 F & F 616 at 655 [176 ER 716 at 734].

198 (1865) 4 F & F 616 at 655 [176 ER 716 at 734].

199 (1865) 4 F & F 616 at 655 [176 ER 716 at 734].

200 Reasons of Kirby J at [297] fn 412.

201 (1855) 2 K & J 232 [69 ER 766].

202 (1855) 2 K & J 232 at 247 [69 ER 766 at 772].

203 (1870) 39 LJ Ch 841 at 843.

204 (1854) 16 Dunlop 554.

205 (1854) 16 Dunlop 554 at 558.

> "I think it would be going too far to hold at present that there is no relevancy; and it strikes me that the best way of disposing of this case is, to remit to the Sheriff of the county to report as to the conduct of his own procurator."

173 Assuming that the procurator was an attorney, the case is hardly authority for the proposition that under the common law of England in 1891 a solicitor did not have the same immunity as a barrister in respect of in-court conduct.

174 Since I wrote the above, Kirby J has added further references in support of the contention that a solicitor could have been sued for negligence under the common law as it existed in 1891. With great respect, however, none of the references to which his Honour refers establish the proposition that a solicitor in the same position as the first respondent in this case could have been sued for negligence at common law. They do no more than establish that in many situations a solicitor could be sued at common law for negligence in respect of out-of-court conduct. But, as I have already pointed out, so can barristers.

175 The strongest reference in support of his Honour's contention is the statement contained in the work by Archer M White[206]. In that statement White says, "[w]hen acting as advocate for his client, he is liable for breach of contract." White cites two cases for this proposition. However, neither of them support the proposition that in 1894 a solicitor could be sued for negligence for in-court conduct or conduct intimately connected with the conduct of a case in court. The cases to which White refers are reported only as summary notes in issues of *The Law Journal* in 1879 and 1885. The first of them is *Fergusson v Lewis*[207] where the plaintiff had retained the defendant, a solicitor, to defend him on a charge of "permitting a horse belonging to the company to be taken out in an unfit condition". The defendant was found to breach his retainer because he "did not attend the Court, though at his request the case was put off for an hour and a half, and the plaintiff was convicted and fined". It is hardly surprising that the jury found for the plaintiff. Any barrister today who failed to turn up to court would equally be liable. The second case is *Clarke v Couchman*[208] where the plaintiff sued the defendant, a solicitor, for "costs alleged to have been incurred by the defendants' negligence in getting up a case heard at the same Court". The note of the case states:

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206 White, *A Treatise on the Constitution and Government of Solicitors: Their Rights and Duties*, (1894) at 175.

207 (1879) 14 *The Law Journal* 700.

208 (1885) 20 *The Law Journal* 318.

> "The allegation of negligence was that whereas Mr Charles Couchman undertook the case, he, at the last moment, and without any intimation to the plaintiff, handed it over to Mr Thursfield, another member of the firm, through whose want of familiarity with the facts the plaintiff was non-suited."

The plaintiff recovered judgment. Again it is hardly surprising that the solicitor was held guilty of negligence. Any barrister who was guilty of such conduct would also be liable in damages for the loss caused to the plaintiff. What is perhaps significant is that the plaintiff sued Couchman and not Thursfield who had acted as the advocate for the firm and who obviously did not conduct the case in accordance with the appropriate standard of competence.

176 It is hardly surprising that there is no recorded case as at 1891 holding that a solicitor could be sued for negligence in respect of the conduct of a case in court or conduct intimately connected with his or her conduct of the case in court. In 1891, the right of solicitors to appear as advocates was subject to significant limitations. In England solicitors had no right of audience before the High Court of Justice until the enactment of the *Courts and Legal Services Act* (1990) UK. They had however been given the right to appear as advocates in the County Courts in 1845 and in Courts of Petty Sessions in 1848. In 1857 they were given the right to act in Probate and Divorce Courts and in 1859 the right to act in the Court of Admiralty[209].

177 Similarly in New South Wales, solicitors did not obtain the right of appearance before the Supreme Court of New South Wales until the enactment of the *Legal Practitioners Act* 1892 (NSW) which stated in s 2:

> "From and after the passing of this Act every Attorney shall be competent to appear, and shall have the right of audience, in all Courts in New South Wales in all matters and proceedings in which he acts as Attorney, Solicitor, or Proctor."

Prior to the enactment of that legislation a Rule of Court "made in 1834 or 1835 [gave] an exclusive right of audience in the Supreme Court to barristers."[210]

178 In Victoria, the position was similar. Until the enactment of the *Legal Profession Practice Act* 1891 (Vic) only a barrister could appear in the Supreme

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209 Holdsworth, *A History of English Law*, (1965), vol 15 at 228.

210 Teece, *The Law and Conduct of the Legal Profession in New South Wales*, (1963) at 12. See also *R v Stephen* (1880) 1 NSWLR 244.

Court[211]. However, solicitors had the right to appear in a County Court under the *County Court Act* 1852 (Vic).

179 If in 1891 the English courts had had to determine whether a solicitor could be guilty of negligence in respect of the in-court conduct of a case or because of a matter intimately connected with such conduct, I think it is highly likely that, notwithstanding the existence of a contract between the solicitor and the client, the English courts would have held that the solicitor-advocate was not liable. In *Mackay v Ford*[212], the Court of Exchequer Chamber held that an attorney acting as advocate could not be sued for defamation for words uttered by him in defence of his client in criminal proceedings before magistrates. During argument, Chief Baron Pollock interjected[213]: "[a]n attorney when acting as an advocate has the same privilege as counsel." That comment suggests that, if the point had arisen, the English courts would have held that solicitors acting as advocates had the same privileges and immunities as barristers. And if the English courts had so held, so would the courts of Victoria.

180 In my opinion, the applicant's claim cannot succeed unless the immunity of advocates is reconsidered by this Court, either as to its extent or as to its existence.

Changes in legal practice

181 The House of Lords, in *Arthur J S Hall*[214], identified a number of developments in legal practice said to justify a reconsideration and, ultimately, abolition of the immunity for advocates. The applicant does not suggest that this Court should merely follow the decision of the House of Lords, but presses the factors considered by their Lordships as grounds for this Court to reconsider the immunity in Australia after taking into account those and other factors.

182 The House rejected each of the bases previously relied on to support the advocates' immunity. The cab rank rule was considered of minimal effect in preserving access to justice and the immunity too high a price to pay in the administration of justice for the benefits it offered[215].

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211 Dean, *A Multitude of Counsellors*, (1968) at 86.

212 (1860) 5 H&N 792 [157 ER 1397].

213 (1860) 5 H&N 792 at 794 [157 ER 1397 at 1397].

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

215 *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 at 678-679 per Lord Steyn, 696-697 per Lord Hoffmann, 714 per Lord Hope of Craighead, 739-740 per Lord Hobhouse of Woodborough.

183 The need for consistency with immunity of other participants in court proceedings was rejected because the position of advocates was distinguishable[216]. The House held that, because they owed a duty of care as professionals to their paying clients, advocates were not comparable to judges or witnesses except, possibly, expert witnesses who ought also to be deprived of their immunity. The immunity from suit for defamation did not require an immunity from suit for negligence as well. By contrast, the House held that the advocate's duty to the court was not distinguishable from potentially conflicting duties arising in other professions, for example ethical obligations of doctors[217]. Those professions were also subject to numerous, even vexatious, claims. The threat of vexatious claims was not likely to affect the performance of an advocate's obligations to the court more than the countervailing possibilities of damage to reputation, wasted costs orders and measures by disciplinary bodies or the court[218].

184 The House also rejected the possibility of re-litigation or collateral proceedings[219]. It did so on the basis that attempts to impugn final decisions of competent courts could be struck out as an abuse of process under the rules of court or employing the authority of *Hunter v Chief Constable of the West Midlands Police*[220].

185 The decision of their Lordships expressly relied on change[221] and the experience of comparable jurisdictions, including other European Community nations, Canada and the United States, all of whom had abolished or never had

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216 *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 at 679 per Lord Steyn, 697-698 per Lord Hoffmann, 714-715 per Lord Hope of Craighead.

217 *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 at 680 per Lord Steyn, 690 per Lord Hoffmann, 728 per Lord Hutton.

218 *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 at 692-693 per Lord Hoffmann.

219 *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 at 679 per Lord Steyn, 685 per Lord Browne-Wilkinson, 691, 705-707 per Lord Hoffmann, 715 per Lord Hope of Craighead.

220 [1982] AC 529.

221 *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 at 682 per Lord Steyn, 684 per Lord Browne-Wilkinson, 688, 691, 704 per Lord Hoffmann, 728 per Lord Hutton, 737 per Lord Hobhouse of Woodborough.

the immunity[222]. The House took into account the commercialisation of legal practice including advertising, the use of contract and insurance. Their Lordships also considered a rise in the public expectation of professional liability.

186 These matters rendered the immunity of advocates anomalous and unable to be supported by the public policy considerations previously embraced[223]. Their Lordships rejected fears of over-litigation in light of the difficulty of establishing breach and causation in such negligence actions[224]. The House valued instead the role of tort as a promoter of standards of performance in the legal profession and the maintenance of public confidence in the legal system by the removal of a self-serving immunity. Lord Steyn concluded[225]:

> "[O]n the information now available and developments since *Rondel v Worsley*[226] I am satisfied that in today's world that decision no longer correctly reflects public policy."

The public policy basis for the immunity endures

187 Their Lordships' reasons show that some factors formerly relied on to support the immunity can no longer be accepted. For example, a number of the features of legal practice said to distinguish advocates from other professions are no longer persuasive. The potentially conflicting duties of doctors to their patients' wishes, ethical obligations including confidentiality and the preservation of life, have not protected them from suit. Recently, the New South Wales Court of Appeal held that a doctor was negligent in failing to obtain the consent of two patients, a couple, who came to him to be tested for sexually transmittable diseases, to the mutual disclosure of the results, and was liable for the later infection of one of them by the other with HIV[227]. The doctor was obliged, in the exercise of reasonable care, to request permission for what would otherwise be both a criminal offence and a breach of statutory duty. Many other examples, especially those involving the absence of consent to treatment in life-threatening situations, may be enumerated.

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222 *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 at 680-681 per Lord Steyn, 695 per Lord Hoffmann.

223 *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 at 684 per Lord Browne Wilkinson.

224 *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 at 753 per Lord Millett.

225 *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 at 683.

226 [1969] 1 AC 191.

227 *Harvey v PD* (2004) 59 NSWLR 639.

188 The idea of pressure, haste and quick judgment involving unknown quantities in a courtroom is also not distinguishable from the kind of strain under which a surgeon might operate. Mr Jackson QC, for the first respondent, referred to the special position of advocates because they face an opponent, whereas in medical practice, all involved seek the health of the patient. I do not think that distinction is persuasive. The disease or condition to be treated might well be viewed as having a similar role in medical practice. Indeed in some cases, a patient may be the doctor's worst enemy in improving the patient's health.

189 The invidious dissection of a professional's conduct by lawyers and judges with the benefit of hindsight and time for reflection is also not a burden that would attach only to advocates in the absence of immunity. Competing demands, matters of fine judgment with heavy potential consequences, unexpected outcomes and new information at a crucial moment, for example, are all features of defences to claims of negligence in medical practice. The *Bolam* test[228] of professional liability, which has now been adopted in most Australian jurisdictions by statute[229], is intended to preclude judges and legal practitioners imposing their own views as to what is negligent practice in many professions. This is particularly so in the case of medical practice where lawyers cannot be expected to appreciate the true reality of participation in that profession. If lawyers and judges had such insight, arguably the common law might have adopted immunities, or higher thresholds of negligence in other professions.

190 In my view, however, the factors considered in *Arthur J S Hall* do not require this Court to abolish the immunity of advocates. The unreality of determining the causation issue in most cases and the undermining of public confidence by collateral attacks on final decisions of courts are the persuasive public policy bases that justify the immunity of advocates from suit. The truly distinguishing feature of legal practice is that it results in enforceable judgments. Those judgments may be called into question on appeal, including by attacks on the quality of legal representation provided. However, it is inimical to the legal process and the administration of justice, that matters be re-litigated for a collateral purpose or that judgments be fundamentally called into question in ways which cannot result in their amendment. And without abandoning the rule

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228 *Bolam v Friern Barnet Hospital Management Committee* [1957] 1 WLR 582; [1957] 2 All ER 118.

229 *Civil Liability Act* 2002 (NSW), Pt 1A, Div 6; *Wrongs Act* 1958 (Vic), s 59; *Civil Liability Act* 2003 (Q), Ch 2, Pt 1, Div 5; *Civil Liability Act* 1936 (SA), s 41; *Civil Liability Act* 2002 (Tas), s 22. See the discussion of this reform in Spigelman, "Negligence and insurance premiums: Recent changes in Australian law", (2003) 11 *Torts Law Journal* 291 at 300-303.

that judges and jurors cannot be called to give evidence to explain their decisions, it can only be guesswork in many – probably most – cases whether the advocate's negligence affected the result.

191 In *Arthur J S Hall*, the Law Lords who did not favour the abolition of the immunity in criminal cases emphasised the problem of collateral attacks on final judgments in criminal cases[230]. They recognised that existing authority was insufficient to strike out all actions calling into question a conviction. In my view, however, their Lordships underestimated the importance of maintaining confidence in the administration of justice even in the civil sphere, and overestimated the court's capacity to limit the re-litigation or rehearing aspects of a negligence trial.

192 Collateral attack and re-litigation are not the only bases for maintaining the advocates' immunity. The immunity of other participants in legal proceedings – the judge, jurors and witnesses – rests on the necessity that those who participate in the administration of justice should not be hampered in the discharge of their duties by fear of litigation concerning what they say and do. The administration of justice demands fearless and independent advocates who are not hampered in the discharge of their role by the need to consider whether their conduct might be actionable. The advocates' immunity from a suit for defamation in part rests on this basis.

193 Another factor supporting the immunity of advocates is, as I have indicated, that neither the judicial officer nor members of the jury can testify. Moreover, other legal practitioners cannot divulge matters covered by professional privilege. So, the immunity arises not only from the extent to which an advocate is analogous to other participants in a court proceeding but also because the courts wish to retain the immunity of those participants and cannot equitably do so while exposing the advocate to suit.

194 Although many aspects of legal practice are not distinguishable from other professions in terms of justifying an immunity from negligence, the causation issue is. The task of the advocate is to persuade another person in a system underpinned by the principle that the vigorous presentation of opposing views is the best method for obtaining the correct result. Although this is a matter that could be considered in the assessment of breach, decisions made about the conduct of a case based on what it will be possible to persuade a judge or jury to think are open to reasonable differences of professional opinion and influenced by factors not demonstrable by evidence because of their particularity to each case and because those to be persuaded are non-compellable witnesses. Claims

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230 *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 at 722-725 per Lord Hope of Craighead, 751-752 per Lord Hobhouse of Woodborough.

of negligence in respect of advocacy are generally either unanswerable or unwinnable because of the obstacles of proof.

195 Those in favour of the abolition of the immunity tend to emphasise the unwinnable character of such claims as a brake on the floodgates of litigation. But a case like the present demonstrates that where there has been a successful retrial, the defence of the claim may be difficult, even though the onus of proof remains on the plaintiff.

196 Moreover, there is evidence that, in the Australian context, even the difficulty of proving an allegation of deficient representation has not dissuaded many persons from making such claims the basis for an appeal. The leading authority on the issue of allowing an appeal on the ground of incompetent counsel is *R v Birks*[231], a decision of the New South Wales Court of Criminal Appeal. Gleeson CJ described the law as "well settled" that neither counsel's incompetence nor acting contrary to instructions "will, of itself, attract appellate intervention"[232]. His Honour sought to identify a single rationale for the occasions when a court would intervene, that intervention being always "extremely cautious"[233]. His Honour held that there would be no appellate intervention unless a miscarriage of justice was shown, a matter that would be assessed in the context of the operation of the criminal justice system. A person would ordinarily be bound by the way his or her case was conducted by counsel so that decisions made without, or contrary to instructions, errors of judgment or even negligence would not usually suffice. However, where "flagrant incompetence" of counsel or some other cause resulted in a miscarriage of justice, an appellate court would intervene[234]. The decision in *Birks* makes clear that there may be a combination of events, including the incompetence of counsel, which together amount to a miscarriage of justice.

197 Appellate courts in Australian jurisdictions regularly hear appeals alleging the incompetence of counsel. The matters are overwhelmingly of a criminal character and almost always dismissed. The particulars of incompetence generally involve issues concerning admissions or failure to adduce or failure to object to certain evidence[235]. Wrongly advising the accused not to give evidence

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231 (1990) 19 NSWLR 677.

232 (1990) 19 NSWLR 677 at 684 per Gleeson CJ.

233 (1990) 19 NSWLR 677 at 684 per Gleeson CJ.

234 (1990) 19 NSWLR 677 at 685 per Gleeson CJ.

235 For example, *Hart v The Queen* (2003) 27 WAR 441; *R v Cerullo* [2003] NSWCCA 201; *R v TJF* (2001) 120 A Crim R 209; *R v Gust* [1999] NSWCCA 265; *Arrowsmith v The Queen* (1994) 55 FCR 130.

is a common complaint[236]. Cross-examination is the other main area of challenge – the failure to pursue inconsistencies, the failure to put certain questions[237]. More unusual examples include intoxication, advising the client to plead not guilty and raising character during examination-in-chief without properly checking the accused's antecedents[238].

198 On many occasions appellate courts have reiterated the caution with which such allegations are approached. The Victorian Court of Appeal said[239]:

> "No doubt there will be many decisions made by counsel which, in retrospect, might appear to have been ill advised. However the mere fact that such decisions have been made and appear in retrospect to have been unwise will not, of itself, lead a court of criminal appeal to quash a conviction, for the simple reason that the making of those decisions is part and parcel of the process of a fair trial … A court of criminal appeal is poorly equipped to review decisions made by counsel during the course of a criminal trial, many of which have to be made on the spur of the moment or in circumstances with which an appellate court cannot hope to be familiar. Usually there must be something akin to flagrant incompetence of counsel before it will be moved to intervene …".

199 However, notwithstanding the rarity of success, claims of this kind continue to be made. The Queensland Court of Appeal has made these observations[240]:

> "It is becoming more common, particularly when an appellant is not legally represented, for counsel who represented the appellant at trial to be criticised for the way the trial was conducted, with allegations of bad advice, disregard of instructions, and failure to ask necessary questions or call necessary witnesses …

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236 For example, *R v Nudd* [2004] QCA 154; compare *R v McConnell* [2000] QCA 463; *R v Szabo* [2001] 2 Qd R 214.

237 For example, *R v Shalala* [2003] NSWCCA 330; *R v Martin* [2000] NSWCCA 332; *R v Lawson* [2000] NSWCCA 214.

238 Including *R v Falzon* (2000) 33 MVR 128; *Olivero v The Queen* (1993) 61 SASR 354.

239 *R v Miletic* [1997] 1 VR 593 at 598-599.

240 *R v Green* [1997] 1 Qd R 584 at 586 per Fitzgerald P and Thomas J.

> While these complaints are easy to make, considerable time and effort is often necessary to determine whether they have any substance, even when they are baseless. This presents a major problem in an overloaded court system in which the number of cases to be heard, especially criminal cases, is increasing and trials are growing longer, with a corresponding increase in the appellate workload and, because of the cost of legal representation and perhaps other reasons, more appellants are representing themselves. Almost invariably, the absence of competent legal representation adds to the burden on the Court, which is anxious to ensure that the unrepresented party receives appropriate assistance …
>
> The mere fact that valid criticisms can be made of counsel's conduct of the trial does not mean that there has been a miscarriage of justice or that an appeal against conviction should be allowed." (footnotes omitted)

200 In appropriate cases, an appellate court will intervene. So in *R v Falzon*[241], the New South Wales Court of Criminal Appeal allowed an appeal against sentence where counsel had advised the accused to plead not guilty, in circumstances where there was clearly no basis for defending the charge. The Court recognised that an earlier plea would have entitled the accused to a discount on sentence and made an allowance for that in re-sentencing. And in *R v Kyriacou*[242] the South Australian Court of Criminal Appeal allowed an appeal against conviction where the incompetence of counsel had led to a failure to put key aspects of the defence to the main Crown witness and counsel's misleading advice had led to the accused not testifying. The Court held that the accused had lost a very real prospect of a verdict of not guilty.

201 The problem of collateral attack on final decisions and re-litigation is unable to be cured by the exercise of the courts' powers to strike out proceedings. There is no issue estoppel in the negligence action between the advocate and the client, because the advocate was not a party to the principal proceedings[243]. Each Supreme Court in Australia has an inherent jurisdiction to protect its own processes from abuse and a provision in the rules of court to the same effect[244].

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241 (2000) 33 MVR 128.

242 (2000) 210 LSJS 296.

243 *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 at 743 per Lord Hobhouse of Woodborough.

244 Supreme Court Rules (NSW), Pt 13 r 5, Pt 15 r 26; Supreme Court (General Civil Procedure) Rules (Vic), r 23.01; Supreme Court Rules (SA), rr 3.01, 46.18; Uniform Civil Procedure Rules (Q), r 293; Rules of the Supreme Court (WA),

(Footnote continues on next page)

Lower courts have equivalent rules[245]. Although a claim involving negligence in prior proceedings may be recognised as contrary to the public interest, it does not amount to an abuse of process. Unless the damages claimed are not for a cognisable loss, the claim will have a proper purpose of compensation[246]. And if the matter has been finally concluded by a competent court, there can be no suggestion that the proceedings seek to influence that outcome. Without investigating the merits of the matter, it will be difficult to demonstrate, on a strike-out application, that the proceeding is inherently vexatious. An improper purpose or a vexatious claim will be even harder to demonstrate if the result of the principal proceedings has been in the plaintiff's favour on appeal. And yet the public interest in avoiding re-litigation and protecting finality will remain. It is important to remember that the proceedings may be commenced at any time within the limitation period, while an appeal must, except where leave is obtained, be filed within a few weeks of the judgment.

202 In *Arthur J S Hall*, the House of Lords[247] relied on new flexible Civil Procedure Rules[248] which permitted an action to be dismissed where "the claimant has no real prospect of succeeding on the claim". These new rules contrasted with the previous position where a defendant "had a very heavy burden to satisfy the court that it was 'frivolous and vexatious' and ought to be struck out"[249]. Their Lordships also relied on the authority of *Hunter v Chief Constable of the West Midlands Police*[250]. That decision appears to be at odds with the state of Australian authority and does not operate in cases where a result has been overturned on appeal[251]. The Lords who would have retained the

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O 67 r 5; Supreme Court Rules 2000 (Tas), r 259; Supreme Court Rules (NT), r 23.01; Supreme Court Rules (ACT), O 17 r 1.

245 For example the provision under which this strike-out application was brought, the County Court Rules of Procedure in Civil Proceedings (Vic), r 23.01.

246 *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 at 742 per Lord Hobhouse of Woodborough.

247 *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 at 682 per Lord Steyn, 691, 707 per Lord Hoffmann, 733 per Lord Hutton.

248 Civil Procedure Rules 1999 (UK), r 24.2.

249 *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 at 691 per Lord Hoffmann.

250 [1982] AC 529.

251 *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 at 685 per Lord Browne-Wilkinson, 702-703 per Lord Hoffmann.

immunity in criminal cases did not think even the broad rules of court and *Hunter* were enough to protect criminal advocates from the likelihood of vexatious claims[252].

203 Australian courts operate under what is now described as the "old rules" in the United Kingdom. This Court has said[253]:

> "The power to order summary judgment must be exercised with 'exceptional caution' and 'should never be exercised unless it is clear that there is no real question to be tried' ... Nowhere is that need for exceptional caution more important than in a case where the ultimate outcome turns upon the resolution of some disputed issue or issues of fact. In such a case, it is essential that 'great care … be exercised to ensure that under the guise of achieving expeditious finality a plaintiff is not improperly deprived of his opportunity for the trial of his case by the appointed tribunal'[254]." (some footnotes omitted)

204 An alternative might be to seek a permanent stay of proceedings on the basis that, having regard to the immunities of crucial witnesses and, for example, any delay between the principal proceedings and the claim of negligence, it would be impossible for the defendant advocate to receive a fair trial. However, this power too should be invoked only in very extreme circumstances, because it involves a refusal to exercise the court's jurisdiction[255].

The immunity should not be reconsidered

205 Despite the House of Lords' decision in *Arthur J S Hall* and the recent decision of the Court of Appeal of New Zealand in *Lai v Chamberlains*[256], I am not persuaded, for the reasons that I have given, that the common law of

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252 *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 at 722-724 per Lord Hope of Craighead, 733-734 per Lord Hutton, 742-743 per Lord Hobhouse of Woodborough.

253 *Webster v Lampard* (1993) 177 CLR 598 at 602-603 per Mason CJ, Deane and Dawson JJ.

254 *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 130. See also *Dey v Victorian Railways Commissioners* (1949) 78 CLR 62 at 91 per Dixon J.

255 *Jago v District Court (NSW)* (1989) 168 CLR 23; *Walton v Gardiner* (1993) 177 CLR 378.

256 Unreported, Court of Appeal of New Zealand, 8 March 2005.

Australia should abandon the immunity of advocates or hold that it does not apply to out-of-court advice concerning a plea of guilty. It covers the present case including the allegation that the advice to plead guilty constituted undue pressure and influence and the claim that the applicant has suffered mental illness as the result of his conviction and imprisonment.

206 Ordinarily, the proper order would be that the application for special leave to appeal should be dismissed. However, the decision of the House of Lords in *Arthur J S Hall* departing from the previous course of authority and coming after *Giannarelli* raised a question of great public interest. It raised the question as to whether the common law of Australia should also abolish the advocates' immunity in respect of in-court conduct or conduct intimately connected with in-court conduct. That question is sufficiently important to warrant the grant of special leave so that this Court can decide whether the immunity should or should not be retained.

207 Accordingly, there should be a grant of special leave but the appeal must be dismissed with costs.

208 KIRBY J. This case concerns the civil liability of a barrister, and of his instructing solicitor, for the performance of their respective professional duties outside court in a manner alleged to have been negligent. The client claims that, as a result of their negligence, he suffered, and continues to suffer, damage. To recover compensation for such damage, he commenced legal proceedings. However, those proceedings were permanently stayed on the basis that each of the lawyer defendants was entitled to the benefit of an absolute immunity from suit. It was held that no proceedings could be maintained at law, even assuming that the client could prove all of the allegations of negligence that he had pleaded against the defendants.

209 Having failed to obtain from the intermediate court leave to appeal, the client seeks special leave to appeal to this Court, the lifting of the stay order and the remittal of the proceedings for trial. The application was referred to a Full Court to be heard as on the return of an appeal. In my opinion, the client is entitled to succeed. The appeal should be allowed. The judgment below should be set aside. The case should go to trial.

Professional negligence, lawyers' immunity and change

210 *Liability of the professions*: Over the course of a century, this Court has heard countless cases in which negligence has been alleged against professional and other skilled persons. Thus, it has held to legal account architects[257], civil engineers[258], dental surgeons[259] and specialist physicians and surgeons[260], anaesthetists[261], electrical contractors[262], persons providing financial advice[263],

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257 *Voli v Inglewood Shire Council* (1963) 110 CLR 74 at 79-80, 84.

258 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 78 ALJR 628; 205 ALR 522. See also *Brickhill v Cooke* [1984] 3 NSWLR 396 at 398; *Investors in Industry Commercial Properties Ltd v South Bedfordshire District Council* [1986] QB 1034.

259 *Rosenberg v Percival* (2001) 205 CLR 434 at 453 [60], 465 [101], 499 [208].

260 *Rogers v Whitaker* (1992) 175 CLR 479; *Chappel v Hart* (1998) 195 CLR 232; *Naxakis v Western General Hospital* (1999) 197 CLR 269; *Cattanach v Melchior* (2003) 215 CLR 1.

261 *Paton v Parker* (1941) 65 CLR 187 at 195, 198.

262 *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313.

263 *Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1968) 122 CLR 556 at 566-573. See also, on appeal to the Privy Council: (1970) 122 CLR 628; [1971] AC 793.

police officers[264], builders[265], pilots[266], solicitors[267] (in respect of out-of-court advice) and teachers[268]. In individual cases, the professional person concerned has won or lost. But liability has been decided by the application of the general principles of the law of negligence as elaborated at the time of the decision. None of the defendants in any of the foregoing cases claimed, still less received, the benefit of an absolute immunity from liability[269]. So why are the lawyers in this case entitled to be treated in such a special, protective and unequal way? Is this truly the law of Australia, applicable to the case? If so, what is the justification?

211 *"The cards are now stacked"*: In earlier times, the law in Australia (as even earlier in England) recognised an immunity for barristers from liability for negligence. However, there is no such general immunity for advocates in, for example, the United States of America[270], Canada[271], the European Union[272], Singapore[273], India[274] or Malaysia[275]. An attempt in England to have the barristers' immunity at common law re-expressed was partly successful in

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264 *Howard v Jarvis* (1958) 98 CLR 177 at 183.

265 *Bryan v Maloney* (1995) 182 CLR 609.

266 *Oceanic Crest Shipping Co v Pilbara Harbour Services Pty Ltd* (1986) 160 CLR 626.

267 *Hawkins v Clayton* (1988) 164 CLR 539; *Hill v Van Erp* (1997) 188 CLR 159.

268 *Ramsay v Larsen* (1964) 111 CLR 16; *Geyer v Downs* (1977) 138 CLR 91; *The Commonwealth v Introvigne* (1982) 150 CLR 258.

269 See, however, the liability arising out of military operations: *Shaw Savill and Albion Co Ltd v The Commonwealth* (1940) 66 CLR 344.

270 See eg *Ferri v Ackerman* 444 US 193 at 205 (1979).

271 See eg *Demarco v Ungaro* (1979) 95 DLR (3d) 385.

272 See *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 at 680-681 per Lord Steyn.

273 *Chong Yeo & Partners v Guan Ming Hardware & Engineering Pte Ltd* [1997] 2 SLR 729 at 744 per Yong Pung How CJ.

274 *Kaur v Deol Bus Service Ltd* AIR 1989 P&H 183 at 185 per Sodhi J.

275 *Miranda v Khoo Yew Boon* [1968] 1 MLJ 161.

Rondel v Worsley[276] and *Saif Ali v Sydney Mitchell & Co*[277]. It was at that point in the evolution of common law doctrine that this Court delivered its decision in *Giannarelli v Wraith*[278].

212 In *Giannarelli*, this Court was closely divided. It affirmed the survival of a defined immunity for the barrister respondents. The immunity was such that, at common law, a barrister could not be sued by a client for negligence for conduct in court, or for conduct out of court that leads to a decision affecting the in-court conduct. Some members of the Court suggested that there was a similar immunity for a solicitor acting as an advocate in court. Some expressed even wider views concerning the scope of the immunity.

213 An attempt to reopen the existence, and ambit, of that immunity in Australia failed in *Boland v Yates Property Corporation Pty Ltd*[279]. This was because it was ultimately unnecessary for the decision in that case to determine the availability of the immunity claimed.

214 Then came the House of Lords' decision in *Arthur J S Hall & Co v Simons*[280]. Their Lordships unanimously concluded that the public interest, which had previously been held to sustain the advocates' immunity, could no longer do so in respect of a suit for alleged negligence in the conduct of *civil* proceedings. With three dissentients[281], a majority[282] went on to conclude that the immunity in relation to the conduct of *criminal* proceedings could likewise no longer be supported.

215 In the result, in England and Wales, whose law was the original source for the Australian law providing immunity for barristers, such immunity has now been abolished. In New Zealand, too, shortly before these reasons were published, the Court of Appeal abolished advocates' immunity as no longer

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276 [1969] 1 AC 191.

277 [1980] AC 198.

278 (1988) 165 CLR 543.

279 (1999) 74 ALJR 209; 167 ALR 575.

280 [2002] 1 AC 615.

281 Lord Hope of Craighead, Lord Hutton and Lord Hobhouse of Woodborough.

282 Lord Steyn, Lord Browne-Wilkinson, Lord Hoffmann and Lord Millett.

representing the law of that country[283]. As Lord Steyn observed in *Arthur J S Hall*[284], "the cards are now heavily stacked against maintaining the immunity of advocates".

216 If this Court not only upholds the immunity for barristers in respect of in-court decisions but expands it to protect out-of-court advice by barristers, and by an instructing solicitor with respect to that person's separate obligations to the client, it will, once again[285], be approaching basic legal doctrine in a way rejected virtually everywhere else. Such disparity in a matter of legal principle does not necessarily mean that this Court is wrong. But it certainly suggests the need for justification by reference to identified errors of so many other courts and legal systems or proof of such local divergencies as warrant Australian law taking its own peculiar direction.

217 *An inadmissible empathy*: Is an outcome, upholding a broad immunity from suit for Australian lawyers for in-court work (or out-of-court work intimately connected with in-court work), required by distinctions in the organisation or duties of the legal profession in this country? Or by some special vulnerability to suit of Australian lawyers? Or by some particular feature of local legislation or law[286]? Perhaps it is necessary because of a settled holding of this Court that should not be changed except by Parliament?

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283 *Lai v Chamberlains* unreported, Court of Appeal of New Zealand, 8 March 2005 per McGrath, Glazebrook, Hammond and O'Regan JJ, Anderson P diss. The Court did not decide the issue of a retention of immunity for criminal trials. In New Zealand, the question was not complicated by the statutory prescription applicable in Victoria. See also *Harley v McDonald* [2001] 2 AC 678.

284 [2002] 1 AC 615 at 683.

285 For example, in proposals to adopt the test in *Caparo Industries Plc v Dickman* [1990] 2 AC 605 at 617-618 per Lord Bridge of Harwich. See *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540 at 623-627 [231]-[238]; Kirby, "Harold Luntz: Doyen of the Australian Law of Torts", (2003) 27 *Melbourne University Law Review* 635 at 638. Or, in using international law to interpret the Constitution: *Al-Kateb v Godwin* (2004) 78 ALJR 1099 at 1134 [184]-[186]; 208 ALR 124 at 170-171. See also the test for disqualification for apparent bias for pecuniary interest: *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 384 [150], noted in "Reviews and Notices", (2002) 28 *Commonwealth Law Bulletin* 642 at 647.

286 Such as the *Legal Profession Practice Act* 1958 (Vic) ("the 1958 Act"), considered in *Giannarelli* (1988) 165 CLR 543.

218 It will be necessary to consider these questions. But this much is clear. The point that divides this Court, upon the issue argued in the present application, should not rest merely on the personal inclinations and sympathies of particular judges[287]. Nor should it depend on a transient lack of sympathy for plaintiffs' claims[288]. Nor can it draw legitimate support from what Professor Cane has called an "empathy heuristic"[289]. In the words of Lord Hoffmann, intuition and sympathetic understanding confined to lawyers, from whom ordinarily Australian judges are drawn, "will not do"[290]. Such a large, even, it is suggested, an expanded immunity from the legal liability that is imposed by judges on virtually everyone else in society in like relationships, requires the incontestable authority of a statutory exemption, the unarguable power of binding legal doctrine or the overwhelming force of arguments of principle and policy expressed in new ways because the old ones now persuade almost no other judiciary in the world.

219 There is no such statutory exemption applicable to this case. This Court's existing legal doctrine does not control the outcome of these proceedings. Even if it did, such doctrine would need to be reconsidered by this Court in the light of public policy perceived "in today's world"[291]. Authority, principle and policy require that this Court declare that the absolute immunity from suit, as invoked by the lawyers in this case, is not part of Australian law. The client is entitled to have his action tried on the merits.

The facts and applicable legislation

220 *The facts and legislation*: The facts in this case have not yet been found at trial. From the pleadings, it appears that Mr Ryan D'Orta-Ekenaike (the applicant) sued Victoria Legal Aid ("VLA"), a body corporate established by the *Legal Aid Act* 1978 (Vic). VLA is the first respondent to the applicant's

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287 See *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 78 ALJR 203 at 226 [127]; 203 ALR 143 at 175.

288 *Woolcock* (2004) 78 ALJR 628 at 656 [150]; 205 ALR 522 at 561; Luntz, "Torts Turnaround Downunder", (2001) 1 *Oxford University Commonwealth Law Journal* 95; Stapleton, "The golden thread at the heart of tort law: Protection of the vulnerable", (2003) 24 *Australian Bar Review* 135 at 142.

289 Cane, "Consequences in Judicial Reasoning", in Horder (ed), *Oxford Essays in Jurisprudence: Fourth Series*, (2000) 41 at 56, fn 35, referred to by Lord Hoffmann in *Arthur J S Hall* [2002] 1 AC 615 at 689.

290 *Arthur J S Hall* [2002] 1 AC 615 at 689.

291 *Arthur J S Hall* [2002] 1 AC 615 at 683 per Lord Steyn.

proceedings. It is the employer of Ms Robyn Greensill ("the solicitor"). She is a solicitor who, at the relevant time, advised the applicant in respect of criminal proceedings brought against him, charging him with rape.

221 By the *Legal Aid Act*, VLA and officers of VLA (such as the solicitor) are "subject to the same professional duties as those to which a private practitioner is subject by law or the custom of the legal profession in the practice of his profession"[292]. For the purposes of the application of this provision in respect of a member of the staff of VLA "who is practising as, or performing any of the functions of, a legal practitioner … in a court on behalf of any person"[293], VLA is deemed to be "a firm of solicitors lawfully practising in the State and retained by the person to act on his behalf"[294] and "the members of the staff of VLA shall be deemed to be employed by that firm"[295]. VLA is obliged to indemnify any officer against any liability incurred by him or her "in respect of any negligent act or omission by the officer in the course of the performance of his or duties [sic] or in good faith in the purported performance of his or her duties"[296]. The Act therefore contemplates, and provides for, VLA's liability in negligence for the acts or omissions of its employees.

222 Mr Ian McIvor is a barrister practising at the Melbourne Bar ("the barrister"). He is the second respondent to the applicant's proceedings. It is important to state that neither the barrister nor VLA has, at this stage, been found to have been negligent. Each has filed a defence contesting the applicant's claims. However, in advance of a hearing of the action, VLA and the barrister successfully invoked the asserted immunity from suit. They succeeded in obtaining summary relief from the County Court of Victoria (Judge Wodak). It is the consequent order, permanently staying the applicant's proceeding for negligence, that the applicant contests in this Court.

223 The general factual background to the case is stated in the reasons of Gleeson CJ, Gummow, Hayne and Heydon JJ ("the joint reasons")[297] and in the reasons of McHugh J[298]. There set out are the applicant's pleaded allegations

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292 *Legal Aid Act* 1978 (Vic), s 16(1)(b).

293 *Legal Aid Act* 1978 (Vic), s 16(2).

294 *Legal Aid Act* 1978 (Vic), s 16(2)(a).

295 *Legal Aid Act* 1978 (Vic), s 16(2)(b).

296 *Legal Aid Act* 1978 (Vic), s 16(4).

297 Joint reasons at [4]-[11].

298 Reasons of McHugh J at [114]-[120].

against VLA and the barrister, the fate of the proceedings in the Victorian courts, and the relevant provisions successively enacted by the Victorian Parliament since 1891 for the liability of members of the legal profession in that State.

224 *The constitutional setting*: Mention is made in the joint reasons of the constitutional arrangements governing the courts of Australia[299]. There is no specific provision in the Constitution for the entitlements and liabilities of the legal profession. Still less is there any mention there of an immunity to be enjoyed by members of the legal profession against client claims of negligence. No implication of immunity could be derived from the Constitution as necessarily inherent in the provisions for this country's courts as set out there. None was alleged.

225 Nor was any argument advanced that it was implicit in the constitutional design that persons, such as the applicant, are entitled to approach the courts, provided for in the Constitution, on a basis of full equality with other parties in a like position, claiming redress for negligence[300]. In light of the substantial arguments pressed in this application, I will disregard any such constitutional implications. Nevertheless, immunities from suit are rightly regarded in Australia as exceptional. Normally, the law of Australia, which the Constitution upholds, demands that all persons should be equal before the courts in rights and liabilities. Derogations from that rule need clear and convincing authority. Quelling controversies is indeed an important purpose of the Judicature established by the Constitution[301]. However, normally, "controversies" are "quelled" justly and by the application of law. If negligence can be proved, the controversy presented by such a claim is quelled by holding those negligent, who owed a duty of care and caused damage, liable for the result. It is not "quelled" by shutting the door of the courts to those who are damaged in that way.

226 *Approach to the application*: During argument, a question arose concerning the approach that it was proper to take to the claim by VLA and the barrister for peremptory relief against the applicant's proceedings. For the barrister, it was said that this Court's authority supported the proposition that the court, before which such relief was sought, looked with strictness at the pleadings propounded. It judged the motion for summary dismissal, or a

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299 Joint reasons at [32]-[33].

300 See *Leeth v The Commonwealth* (1992) 174 CLR 455 at 486 per Deane and Toohey JJ (diss), 502 per Gaudron J (diss); *Kruger v The Commonwealth* (1997) 190 CLR 1 at 112-113 per Gaudron J (diss); cf *Muir v The Queen* (2004) 78 ALJR 780 at 784-785 [23]-[28]; 206 ALR 189 at 194-195.

301 Joint reasons at [43].

permanent stay, by measuring the pleadings strictly according to their terms against the applicable legal standard.

227 Such an approach may be correct where the law in question is clear and settled[302]. However, the function of a court, asked to give peremptory relief that stops proceedings in their tracks, is not a mechanical one[303]. To prevent a party with an apparently serious claim from having a trial of that claim on its merits must not become an occasion to inflict injustice or prematurely to close the court's doors in that party's face.

228 Summary relief terminating an action, or ordering that it be permanently stayed, is only available where there is "no risk of injustice to the plaintiffs". Such orders are provided "only in plain and obvious cases". Otherwise, as Sir Thomas Bingham MR said in *E (A Minor) v Dorset County Council*[304], "where the legal viability of a cause of action is unclear (perhaps because the law is in a state of transition), or in any way sensitive to the facts, an order to strike out should not be made". In *Woolcock Street Investments Pty Ltd v CDG Pty Ltd*[305], I explained why the approach to such cases is one of restraint:

> "Only in a clear case will answers be given, and orders made, that have the effect of denying a party its ordinary civil right to a trial. This is especially so where, as in many actions for negligence, the factual details may help to throw light on the existence of a legal cause of action – specifically a duty of care owed by the defendant to the plaintiff."

229 Unfortunately, it has been a feature of many of the cases concerned with the existence, and scope, of the duty of care owed by lawyers to their clients (and of the immunity from suit claimed by such lawyers) that courts, determining the matter, have had to do so in proceedings such as the present. The issue has been disjoined from the evidence. Questions of law have been isolated[306]. Or the matter has been determined on pleadings without the benefit of a full consideration of the facts and findings based on a thorough appreciation of the evidence.

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302 *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 129-130.

303 See *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 155, 167-172.

304 [1995] 2 AC 633 at 694.

305 (2004) 78 ALJR 628 at 654 [138]; 205 ALR 522 at 558.

306 As in *Giannarelli* (1988) 165 CLR 543 at 597-598.

230 Where parties seek peremptory relief, as VLA and the barrister did in these proceedings, they cannot complain if an appellate court tests the provision of such relief against the plaintiff's case, viewed at its highest. Doing so is only fair. If a party is to be denied a trial on the merits, which is ordinarily any person's right, this should only happen where the facts and law combine to make the case a clear one, demanding that result and none other.

231 *The applicant's case at its highest*: As it happens, in the present case a public record of earlier proceedings involving the applicant is available. Without objection, parts of the record of the earlier criminal proceedings were received by this Court. In the way the proceedings unfolded, involving the applicant in two trials for rape, it became necessary, in the second trial, for the applicant to establish the basis upon which it would be unjust to permit the prosecution to prove that he had pleaded guilty to rape at his committal. Obviously, proof of that fact before the jury in the second trial would harm the applicant's defence. That is why he sought to exclude the evidence of his original plea.

232 The issue was decided in the second trial in the County Court of Victoria on a *voir dire* conducted by Judge Duckett. In the course of his ruling, explaining the reasons why evidence of the plea should be excluded, the judge recounted evidence that had been adduced before him, which he accepted[307].

233 The applicant gave evidence before Judge Duckett. He deposed to the circumstances of the plea. He said that, on six occasions, he had given a private solicitor, whom he initially retained, consistent instructions that he proposed to plead not guilty. The judge accepted that he had given the same instructions to the VLA solicitor when she took over responsibility for his defence. Her instructions to counsel at the time stated that "the accused is adamant"[308] that he is not guilty. However, the barrister expressed "a firm view" that the applicant had "no defence to this charge"[309]. The applicant was not comfortable with that advice.

234 At first, it appeared that the applicant's defence would be reserved to the trial, as was his right. However, on the day of the committal hearing, in an interview room at the Melbourne Magistrates' Court, a conference took place between the barrister, the VLA solicitor and the applicant. Judge Duckett explained[310]:

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307 Ruling of Judge Duckett, County Court of Victoria, 22 June 1998 ("Ruling") at 56.

308 Ruling at 56.

309 Ruling at 56.

310 Ruling at 57.

> "I was told that counsel said strongly that there was no defence to the charge and the accused said a number of times that he was not guilty.
>
> His Legal Aid solicitor said in evidence that she pressured him to plead guilty because, as she saw it, he would then get the reward of a shorter term of imprisonment or a benefit in terms of sentence as a result of such an early plea. She said that she was instrumental in the accused's failure to reserve his plea at committal.
>
> I also note that, whilst this conference was being held at the court, the prosecuting authorities interrupted twice … to try to get an early decision from the defence. It does appear that this was a highly charged situation in which the accused was asked to give his instructions."

235 The judge proceeded to describe the factual conflict concerning the existence or absence of consent on the part of the complainant, and the existence or absence of a belief on the part of the applicant that the complainant was consenting to sexual intercourse with him. The applicant believed that there had been consent to sexual intercourse with him, and that that was a reasonable belief "because of a measure of foreplay that took place between them before penetration"[311]. Judge Duckett went on[312]:

> "For counsel to say in these circumstances that there is no defence to this charge is patently not correct, and I assume that what counsel intended to say was that the defence that was open to the accused was a defence that will be difficult to establish."

236 During the discussions with the barrister and the VLA solicitor, the applicant telephoned his former private solicitor to seek her advice. Understandably, according to the judge, as she was no longer involved in the matter, she was unable to help him. Also understandably, the applicant was affected by what the VLA solicitor and the barrister told him before his plea was taken. Judge Duckett concluded[313]:

> "I am satisfied that the plea that was entered was as a result of considerable pressure applied by the accused's previous legal advisers and that it could well have been given in the mistaken belief that the accused

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311 Ruling at 57.

312 Ruling at 58.

313 Ruling at 58-59.

> had no defence in law to the charge of rape. In those circumstances … I rule that the evidence is not admissible."

237 Following the exclusion of the evidence of the plea of guilty to rape, the applicant was acquitted of the charge at his second trial. He then brought the present proceedings asserting negligence on the part of the solicitor and the barrister in telling him that he had no defence to the charge; in suggesting that he would receive a suspended sentence on a guilty plea entered at the committal; in telling him that he would receive a custodial penalty if he pleaded not guilty and was found guilty; and in failing to explain, adequately or at all, the risks involved in entering a guilty plea at committal, in the event that he later sought to change that plea and to restore the plea of not guilty that he had earlier asserted.

238 Again, in fairness to the barrister and the solicitor, it is important to point out that the abbreviated proceedings on the *voir dire* would not necessarily reflect what would emerge in a full trial of a negligence claim. However, two of the three parties (the applicant and the solicitor, but not the barrister) gave evidence before Judge Duckett. The issues sufficiently overlap to make the observations of the judge on the *voir dire* of relevance, certainly to understanding the applicant's claim against VLA in respect of the solicitor's alleged conduct. Attaching evidentiary flesh to the bare bones of the pleadings (foreclosed, so far, by the summary relief granted below) presents starkly the issue that now falls for decision.

239 That issue is stated by Deane J, in general terms, in his dissenting reasons in *Giannarelli*[314]. Is a legal practitioner immune from all redress for negligence "however gross and callous in its nature or devastating in its consequences"[315] simply because the practitioner is a professional person admitted as a barrister or solicitor who has performed functions in, or closely connected with, court proceedings? Is that person, as such, absolutely immune from suit although negligence can clearly be proved, wrong or inadequate professional advice established, and although it is shown (as was alleged in this case) that considerable pressure was applied to have the client accept that negligent advice?

240 Presented in this way, the issues in the present application transcend any negligent acts and omissions of the barrister and the solicitor in this case, assuming that they could be proved. What is involved is a wholly exceptional exemption from the ordinary liability that other professional and non-professional persons face before the courts of Australia for conduct arguably much less blameworthy, in circumstances of equivalent care and attention,

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314 (1988) 165 CLR 543 at 587-588.

315 *Giannarelli* (1988) 165 CLR 543 at 588.

involving errors seemingly less culpable and perilous, if the complaints are believed[316].

The issues

241 Upon my analysis, the following issues arise for decision:

(1) *Identifying the rule in Giannarelli*: Does any binding rule of law, established by this Court's decision in *Giannarelli*[317], govern the outcome of the present application?

(2) *Reconsideration of Giannarelli*: If so, or in any event, should the rule in *Giannarelli* be reconsidered and re-expressed in the light of the arguments presented in the present application?

(3) *The scope of lawyers' immunity*: If there is no binding rule of law to govern the outcome of the present application, or if any previous rule should now be re-expressed, is it reasonably arguable that the barrister or VLA (for the solicitor) is liable in negligence so that the applicant's action should be restored to the list and proceed to trial? Is there an immunity for lawyers at all, and if so, what is the scope and nature of that immunity?

(4) *Deference to Parliament*: To the extent that there is no binding rule applicable to the present application, or that any such rule should be reconsidered and re-expressed, should this Court leave any such reconsideration and re-expression to Parliament? Or should it proceed, as the House of Lords has recently done, to declare that the lawyers' immunity no longer applies either generally or in particular circumstances?

(5) *Outcome of the application*: In the light of the answers to the foregoing issues what orders should be made in respect of the application and the continuance of the applicant's proceedings against his former lawyers?

Identifying the rule in *Giannarelli*

242 It is critical first to identify the precise binding rule for which the decision in *Giannarelli* stands. It is especially important to ascertain that rule in this case because *Giannarelli* concerned the liability of barristers in the State of Victoria.

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316 eg the default found against Dr Rogers in *Rogers v Whitaker* (1992) 175 CLR 479 and against Dr Chappel in *Chappel v Hart* (1998) 195 CLR 232.

317 (1988) 165 CLR 543.

Although the Court was divided in *Giannarelli*, the decision is relatively recent. If the *ratio decidendi* of that decision is applicable to the present case, it is the duty of courts to give effect to it whilst it stands. So far as *stare decisis* is concerned, constitutional cases in this Court stand in a different position[318]. But in other matters of law, where the Court has ruled, unless an existing rule is altered, it is the duty of judges to apply it. The reluctance to change an existing rule is sometimes treated as enlarged where (as the barrister submitted was the position in this case) the principle stated in past authority concerns a disputed question of statutory construction in respect of which the applicable legislation was relevantly the same but has been amended since the events giving rise to the proceedings[319].

243 When a court is asked to reconsider a past decision[320], with a view to altering the legal rule which that decision establishes, this does not mean rewriting all of the reasons of the judges who participated. The nature of discursive reasoning in common law jurisdictions would make such a task inappropriate and needlessly burdensome. The binding rule of a decision is ascertained with a strictness of approach in some ways similar to that adopted in deriving the *res judicata* or an issue finally determined in a trial that cannot be reopened between the parties. What is involved is a process at once precise and careful. In the last mentioned cases, it requires identification of the "matter which it was necessary to decide and which was actually decided"[321]. Were it otherwise, a mass of *obiter dicta*, deployed rhetorically and argumentatively by judges in the course of explaining how a legal rule is arrived at, would take on the force of binding law. Such an approach would expand enormously the ambit of decisional authority. Fortunately, that is not the way the common law doctrine of precedent operates.

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318 *Queensland v The Commonwealth* (1977) 139 CLR 585 at 593-594; *Stevens v Head* (1993) 176 CLR 433 at 461-462; *Shaw* (2003) 78 ALJR 203 at 217 [76]; 203 ALR 143 at 161-162; *Coleman v Power* (2004) 78 ALJR 1166 at 1219 [289]; 209 ALR 182 at 255.

319 The facts of the present case are governed by the 1958 Act, s 10(2), considered in *Giannarelli* (1988) 165 CLR 543. Since the events giving rise to the applicant's action, that sub-section has been repealed and replaced by the *Legal Practice Act* 1996 (Vic), s 442. See joint reasons at [48].

320 See joint reasons at [1].

321 *Blair v Curran* (1939) 62 CLR 464 at 532 per Dixon J.

244 In *Garcia v National Australia Bank Ltd*[322], I explained the process that is involved. It is rudimentary[323]. However, it needs to be restated in this case:

> "It is fundamental to the ascertainment of the binding rule of a judicial decision that it should be derived from (1) the reasons of the judges agreeing in the order disposing of the proceedings; (2) upon a matter in issue in the proceedings; (3) upon which a decision is necessary to arrive at that order".

245 It follows that the opinions of judges who dissent from a court's orders are disregarded for this purpose, however valuable their reasons may otherwise be. Judicial remarks on subsidiary issues, not strictly necessary to the decision, are likewise discarded, however persuasive they appear. The governing rule is "at once majoritarian and precise"[324]. That rule and none other applies to the ascertainment of the *ratio decidendi* of *Giannarelli*.

246 In considering the barrister's submission that this Court should adhere to the rule established by *Giannarelli*, it is thus elementary that the content of that rule should be found with legal accuracy. In new circumstances, in a case with new and different facts, this Court may choose to expand a previously stated rule. In doing so, it may choose to use, for that purpose, *obiter dicta* appearing in the reasons of the judges in the majority (or those in the minority) in *Giannarelli*. But only the *ratio*, ascertained by the foregoing process, binds others affected until it is changed by Parliament or this Court. Judicial remarks falling outside the foregoing requirements might be persuasive. Obviously, they are entitled to attention and respect, especially if they appear in the reasons of judges who supported the order in the previous case and if they are consistent with such reasoning. But, as a matter of law, they are not binding. As McHugh J said recently in *Coleman v Power*[325], cases are "only authorities for what they decide". A case can have "no wider ratio decidendi than what was in issue in the case"[326].

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322 (1998) 194 CLR 395 at 417 [56].

323 *Dickenson's Arcade Pty Ltd v Tasmania* (1974) 130 CLR 177 at 188; *Federation Insurance Ltd v Wasson* (1987) 163 CLR 303 at 313-314; *Great Western Railway Co v Owners of SS Mostyn* [1928] AC 57 at 73-74. See MacAdam and Pyke, *Judicial Reasoning and the Doctrine of Precedent in Australia*, (1998), Ch 10.

324 *Garcia* (1998) 194 CLR 395 at 417 [56]; see *Johnson v The Queen* (2004) 78 ALJR 616 at 626 [40]; 205 ALR 346 at 359.

325 (2004) 78 ALJR 1166 at 1182 [79]; 209 ALR 182 at 203.

326 *Coleman* (2004) 78 ALJR 1166 at 1182 [79]; 209 ALR 182 at 203.

The rule in *Giannarelli*: the ratio on the statute

247 *The statutory argument*: In *Giannarelli*, the plaintiffs in the negligence action (the Giannarellis) initially invoked s 10(2) of the 1958 Act. That sub-section was adapted from the original enactment in the *Legal Profession Practice Act* 1891 (Vic) ("the 1891 Act"). The Giannarellis submitted that the sub-section imposed liability for negligence "upon legal practitioners in relation to their professional activities as barristers" and overcame "the assumed immunity of barristers from any such liability that existed as at the date of its original enactment"[327]. It was later to be remarked that one "might be forgiven for imagining that the purpose of the provision was to do away with the barrister's immunity from suit in negligence"[328]. However, the Giannarellis' arguments divided this Court.

248 Three judges upheld the submission. Toohey J did so by reference to the language of the section and its statutory history[329]. He also drew upon the purpose of the section in the context of the effort of the Parliament of Victoria in 1891 to abolish the division of the legal profession into barristers and solicitors and to assimilate the functions (and the liabilities) of each[330]. Toohey J's analysis is compelling. It represents an instance of the purposive construction of legislation that, since *Giannarelli* was decided, has gained increasing ascendancy in this Court[331]. Deane J[332] and Gaudron J[333] agreed with it. However, these were the three judges who dissented from the Court's orders in *Giannarelli*. In conformity with the rule for the ascertainment of the *ratio* of that decision, their reasoning must be disregarded.

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327 *Giannarelli* (1988) 165 CLR 543 at 544-545.

328 Law Reform Commission of Victoria, *Access to the law: accountability of the legal profession*, Report No 48, (1992) at 44 [3].

329 *Giannarelli* (1988) 165 CLR 543 at 597-603.

330 *Giannarelli* (1988) 165 CLR 543 at 599-601.

331 *Bropho v Western Australia* (1990) 171 CLR 1 at 20, approving *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 421-424 per McHugh JA. See also *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 112-113.

332 *Giannarelli* (1988) 165 CLR 543 at 587.

333 *Giannarelli* (1988) 165 CLR 543 at 610.

249 *Reasoning of the majority*: The judges in the majority in *Giannarelli*, whose concurrence in this Court's orders was decisive, were Mason CJ, Wilson, Brennan and Dawson JJ. But there were significant differences in the ways each of them reasoned.

250 As appears from the structure of his reasons, Mason CJ approached the case, basically, as one concerned with the common law immunity of the defendant barristers in the action brought by the plaintiffs[334]. A solicitor, Mr Shulkes, had originally been a defendant in the Giannarellis' claim. Subsequently, the claim against the solicitor was withdrawn[335]. In point of legal principle, therefore, the case was concerned, and only concerned, with the liability of barristers. It does not stand for any binding legal rule relating to the liability of solicitors. Anything said in *Giannarelli* with respect to the liability of solicitors was unnecessary to the decision formalised in this Court's orders. It represents *obiter dicta* that do not bind as a matter of precedential law.

251 Although the plaintiffs had put their claim based on the statute at the forefront of their argument, Mason CJ's treatment of the statutory issue appears in less than a page, at the end of his Honour's reasoning[336]. There, Mason CJ expresses agreement with the interpretation of the statutory provisions contained in the reasons of Wilson J[337]. The presentation of the Chief Justice's reasons suggests that this was a subsidiary, or supplementary, foundation for the opinion that he had reached on the basis of the applicable rule of the common law.

252 In his reasons, Wilson J, like Toohey J, placed the statutory argument at the forefront of his analysis[338]. He concluded that the statutory provision was a "fixed-time" provision[339]. Accordingly, to "determine whether it exposes a barrister to liability for in-court negligence it is necessary to ask whether, on 23 November 1891, a solicitor was liable to his client for in-court negligence in respect of his handling of a case as an advocate"[340].

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334 *Giannarelli* (1988) 165 CLR 543 at 554.

335 *Giannarelli* (1988) 165 CLR 543 at 544.

336 *Giannarelli* (1988) 165 CLR 543 at 560-561.

337 *Giannarelli* (1988) 165 CLR 543 at 561.

338 *Giannarelli* (1988) 165 CLR 543 at 563-571.

339 *Giannarelli* (1988) 165 CLR 543 at 567.

340 *Giannarelli* (1988) 165 CLR 543 at 567-568 per Wilson J.

253 Like Wilson J, Dawson J (also part of the majority) gave primacy to the statutory argument. Although Dawson J recognised that, at the time of its enactment, the 1891 Act was endeavouring to ensure that both solicitors and barristers "should in the future be treated equally"[341], he ultimately concluded (as Wilson J had done) that "whether barristers are immune in Victoria from liability for negligence in the conduct of their clients' cases in court" depends, under the Act, "upon the liability of solicitors in 1891"[342].

254 The result is that three judges in *Giannarelli* (Mason CJ, Wilson and Dawson JJ) rejected the interpretation of the 1958 Act preferred by the three judges in the minority (Toohey, Deane and Gaudron JJ). They rejected the approach of Toohey J that the statute simply identified the relevant duty of care owed by a barrister to his or her client in a way designed to equalise the liability of barristers with solicitors. This equal division of the Court in *Giannarelli* left the deciding vote to Brennan J.

255 *The decisive opinion of Brennan J*: Brennan J took a different approach again to the meaning of the 1958 Act. By reference to his analysis of the history and language of the 1891 Act, his Honour concluded that s 5 of that Act (which had introduced the right of barristers to sue for their fees and equalised the liability in negligence of barristers and solicitors) was in the nature of a *transitional* provision[343]. He concluded in this way by reference to the express imposition of liability on the barristers and solicitors mentioned in the 1891 Act, but only with respect to those "heretofore … admitted"[344]. To the submission that this view was difficult to reconcile with the later repeated re-enactment of the provision of the 1891 Act – eventually in the 1958 Act – Brennan J said that it was "perhaps … a tribute to the longevity of Victorian practitioners and the caution of the draftsman"[345]. His Honour's conclusion could not have been clearer[346]:

> "In my opinion, s 10(2) is not expressed to have any application to practitioners admitted as barristers and solicitors after 23 November 1891 and has never applied to such practitioners."

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341 *Giannarelli* (1988) 165 CLR 543 at 590.

342 *Giannarelli* (1988) 165 CLR 543 at 590.

343 *Giannarelli* (1988) 165 CLR 543 at 582-583.

344 *Giannarelli* (1988) 165 CLR 543 at 582.

345 *Giannarelli* (1988) 165 CLR 543 at 582.

346 *Giannarelli* (1988) 165 CLR 543 at 583.

256 It is true that Brennan J then considered what would follow if, contrary to his real opinion, s 10(2) of the 1958 Act were taken as applying generally to a barrister and solicitor of modern times. He observed that this had been an agreed construction before the Full Court of the Supreme Court of Victoria. He pointed to the great difficulty of ascertaining, with today's eyes, the liability of solicitors in 1891 and then applying that liability to today's legal practitioners[347]. He finally repeated his rejection of the Giannarellis' case, so far as it was based on s 10(2) of the 1958 Act. For Brennan J, that sub-section was "a vestigial provision applying only to barristers admitted prior to 23 November 1891 and probably only with respect to their practices as solicitors pursuant to s 3 of the 1891 Act or its later equivalents"[348].

257 *Conclusion: no clear ratio*: The reasoning of Brennan J in *Giannarelli* involves a view of the 1958 Act adopted by none of the other judges in the majority in that case. It deprives any resulting *ratio* of the case, concerning s 10(2) of the 1958 Act, of force as a binding principle of law governing later judges. There were three theories as to the meaning and purpose of the statutory amendment in 1891, carried forward to the 1958 Act. None of them secured the endorsement of a majority of this Court. It follows that the purpose and effect of s 10(2) of the 1958 Act are open to fresh determination in this case. Unhesitatingly, I would adopt the interpretation accepted by Toohey, Deane and Gaudron JJ in *Giannarelli*. I would do so for the reasons given by Toohey J.

258 In his reasons, McHugh J acknowledges the foregoing divergencies in the opinions of the judges who joined in the Court's orders in *Giannarelli*[349]. His Honour accepts that there is no *ratio decidendi* in *Giannarelli*[350], but holds that *Giannarelli* has precedential value in cases where the facts are not reasonably distinguishable[351]. I contest that the facts of this case are indistinguishable for precedential purposes. This case includes a solicitor (in *Giannarelli*, the solicitor dropped out). It concerns out-of-court advice by the barrister, whereas *Giannarelli* concerned a failure by the barristers to raise an objection in court.

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347 *Giannarelli* (1988) 165 CLR 543 at 584-585.

348 *Giannarelli* (1988) 165 CLR 543 at 587.

349 Reasons of McHugh J at [128]-[132].

350 cf *Shaw* (2003) 78 ALJR 203 at 212 [49]-[50] per McHugh J; 203 ALR 143 at 154-155.

351 Reasons of McHugh J at [133].

The rule in *Giannarelli*: solicitors' liability in 1891

259 *Giannarelli: what was decided*: Assuming, however, that the foregoing analysis is incorrect and that the closing, reluctant words of Brennan J's reasons in *Giannarelli*[352] amount to an ultimate endorsement of the construction of the 1891 Act favoured by Wilson J, obviously it is open to comment that the emerging legal principle is an extremely unstable one. It rests, in effect, not on what the fourth member of the majority in *Giannarelli* believed was the true construction of the 1958 Act but on a construction that was agreed by the parties before the Full Court[353], which that judge had earlier rejected by his analysis.

260 It follows that if, contrary to my opinion, this hypothetical and contingent endorsement of the "fixed-time" theory of s 10(2) of the 1958 Act should be accepted as providing a binding rule, decided by the majority in *Giannarelli*, its unsatisfactory foundation makes it necessary to define precisely what the Court decided and to examine whether that decision carries sufficient conviction and authority to apply to the different factual circumstances of the applicant's case. When that task is undertaken, additional weaknesses in the reasoning of the majority in *Giannarelli* become immediately apparent.

261 *Separated points of law*: In the reasons in *Giannarelli*, only Toohey J clearly identifies the legal points that were before this Court for decision in that case. He alone sets out[354] the three questions of law that arose for determination in the Full Court, and were separated for decision[355]. The appeal to this Court in *Giannarelli* (and the constitutional "matter" that had to be decided) was confined to a consideration of whether the Supreme Court had erred in the determination of those separated questions. By setting them out explicitly, Toohey J directed attention, correctly, to the limited points that were presented for decision. In ascertaining the legal questions decided in *Giannarelli*, for the purpose of defining the binding rule for which that decision stands, the proper starting point is the statement of the separated questions of law tendered for answer.

262 As appears from the reasons of Toohey J, those questions of law concerned the liability of the several barristers in respect of their successive conduct of the Giannarellis' defence at the committal proceeding, in their trial and in the Court of Criminal Appeal[356]. No reference whatever is made in the

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352 *Giannarelli* (1988) 165 CLR 543 at 587.

353 *Giannarelli* (1988) 165 CLR 543 at 583 per Brennan J.

354 *Giannarelli* (1988) 165 CLR 543 at 597-598.

355 See *Wraith v Giannarelli* [1988] VR 713 at 716-717.

356 *Giannarelli* (1988) 165 CLR 543 at 597-598.

separated questions to the liability in law of the solicitor, Mr Shulkes. By the time the questions were separated in the Full Court, he had dropped out of the proceedings[357]. This analysis confirms that there can be no rule of law in *Giannarelli*, governing the liability of a solicitor (whether under the 1958 Act or otherwise), that is binding on this Court or any other Australian court as a matter of *ratio decidendi*. The point did not fall for decision. As a matter of legal authority, it remains open.

263 On the other hand, the liability of the barristers who appeared for the Giannarellis when the legal point later revealed in this Court[358] was not noticed or taken, was certainly presented for decision in *Giannarelli*. Yet it was presented solely in terms of the three reserved questions of law. Those questions were expressed in identical language. Only the references to the successive barristers and hearings were changed. It is enough, therefore, to restate one of the questions, taken from the reasons of Toohey J[359]:

> "(a) As a matter of law is the first Appellant immune from all liability to the first, second and third respondents on the facts alleged against him in the Statement of Claim on the grounds that as a matter of public policy he is immune from all and any liability for negligence or breach of retainer arising out of any act or omission on his part *during his conduct of the said Respondents' defence at the committal hearing*?"

264 On the face of things, the separated questions of law, so expressed, confined the issue for decision in *Giannarelli* to the barristers' conduct "during" specified "hearings". They did not extend to conduct *outside* such "hearings". They did not do so whether that conduct was intimately connected, remotely connected or unconnected with the "hearing". Simply put, issues of barristerial liability out of court were not before this Court in *Giannarelli* upon the questions that defined the issues for decision.

265 *The causative defaults alleged*: Given the nature of the facts alleged against the barristers in the statement of claim, this explanation of the issues addressed in *Giannarelli* is unsurprising. Those facts asserted that the barristers had successively failed to advise the Giannarellis "that they had a good defence to the proceedings" and had failed "to object to certain inadmissible evidence tendered by the Crown"[360]. Examined closely, only the failure to object to the

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357 *Giannarelli* (1988) 165 CLR 543 at 554 per Mason CJ.

358 In *Giannarelli v The Queen* (1983) 154 CLR 212.

359 *Giannarelli* (1988) 165 CLR 543 at 597 (emphasis added).

360 (1988) 165 CLR 543 at 553 per Mason CJ.

admission of the evidence given by the Giannarellis before the Royal Commission *was causative* of their subsequent conviction of perjury, the imposition of criminal punishment and the incurring of costs in bringing the matter to this Court where the barristers' omission was eventually repaired[361].

266 The provision of "advice" to the Giannarellis by their barristers earlier might theoretically have led to successful no bill applications. But the *real* damage suffered by them, of which they complained in their negligence actions, was a result of the failure of their lawyers to detect and raise in the hearing the legal defence available under the *Royal Commissions Act* 1902 (Cth)[362]. That defence bites when evidence given before a Royal Commission is tendered against the witness in later civil or criminal proceedings. By that Act, such evidence is inadmissible.

267 Reading the separated questions of law in this light, it is clear that the legal issues for decision in *Giannarelli* were limited by an adverbial phrase of place, namely conduct by the barrister in question "during" the "hearing". The questions did not extend more broadly. They did not need to, having regard to the issue that was presented for decision by the evidence and the reserved questions.

268 It follows that anything said by this Court in *Giannarelli*, concerning the liability of a solicitor or the liability of barristers otherwise than during the hearing, represented *obiter dicta*. Such observations are not binding in the present case. They are entitled to careful attention. But they do not represent a binding rule of the common law of Australia.

269 The reasons of the judges in the majority in *Giannarelli* travelled far beyond the issue so defined. However, those reasons correctly and repeatedly returned to the liability/immunity of barristers for work "in court"[363]. Thus, at the opening of his reasons, Dawson J defined the issue for decision by the Court to be whether a barrister "is immune from liability for negligence in the conduct of his client's case *in court*"[364]. That was a correct statement of the issue raised by the separated questions of law and by the evidence in the case.

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361 (1988) 165 CLR 543 at 553 per Mason CJ.

362 s 6DD.

363 See eg *Giannarelli* (1988) 165 CLR 543 at 558-559 per Mason CJ, 572-573 per Wilson J, 579 per Brennan J.

364 *Giannarelli* (1988) 165 CLR 543 at 588 (emphasis added).

270 I have expressed the foregoing opinions before[365]. I have not changed my mind. In the present case, the applicant's pleader was careful to limit his claim for negligence to conduct outside the courtroom. This delineation was unconvincing to Mason CJ in *Giannarelli*[366]. Whilst his Honour's opinion in this respect is entitled to consideration, it is not binding. As a matter of law, *Giannarelli* is confined to holding that a Victorian barrister is immune from liability for negligence in the conduct of his or her client's case *in* court *during* a hearing.

271 *Conclusion: no legal obstacle*: Negligence in such conduct is not what the present applicant alleges, or has ever alleged, against the barrister, still less against the solicitor employed by VLA. It follows that there is no legal obstacle to this Court's deciding the extent of the out-of-court liability of those lawyers. Obviously, the decision on that liability will take into account the holding in *Giannarelli*. However, there are strong reasons of principle and policy why, at the least, that holding should not be extended beyond the courtroom door[367].

Legal professional liability by statute in 1891 and today

272 *How the question arises*: It is obvious that, if the 1958 Act makes relevant provision for the liability in negligence of legal practitioners in Victoria, its terms must (to that extent) be obeyed, whatever may be the common law of Australia on the subject. The starting point in resolving the present application is therefore the statute. No issue was raised as to its constitutional validity.

273 I have explained that, in *Giannarelli*[368], three theories were expressed as to the purpose and effect of the 1891 Act and its progeny. They could be described as the "equalising" theory[369], the "fixed-time" theory[370] and the "transitional provision" theory[371]. For the moment I will accept that ultimately Brennan J

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365 *Boland* (1999) 74 ALJR 209 at 240-241 [146]; 167 ALR 575 at 617.

366 *Giannarelli* (1988) 165 CLR 543 at 559-560.

367 *Boland* (1999) 74 ALJR 209 at 241-242 [150]; 167 ALR 575 at 618. See also *Lai* [2003] 2 NZLR 374 at 387 [62].

368 (1988) 165 CLR 543.

369 Held by Toohey J (with whom Deane and Gaudron JJ agreed). See above at [248].

370 Held by Wilson J (with whom Mason CJ agreed) and with Dawson J to like effect. See above at [252].

371 Held by Brennan J. See above at [255].

adopted the "fixed-time" theory on the basis of the parties' agreement[372]. As Toohey J for the dissentients also explored the consequences of the "fixed-time" approach[373], this Court should examine the liability of a solicitor in Victoria on 23 November 1891 for conduct of the kind alleged against VLA and the barrister in this case, in order to ascertain the extent of that liability (or immunity) upon the postulate that the "fixed-time" theory represents the binding *ratio* of *Giannarelli*.

274 Merely to state such a method of determining the contemporary liability of legal practitioners in Victoria more than a hundred years later casts a spell of unreality over the entire exercise. This suggests that it is unlikely that it is what the Parliament of Victoria intended when it enacted, consolidated and re-enacted the 1891 provisions. However, against the chance that *Giannarelli* establishes a rule that obliges this approach, I will indicate where it leads for out-of-court advice of the kind that the applicant pleads in this case both against the barrister and the solicitor. By reference to the liability of a solicitor in Victoria in 1891, is it reasonably arguable that, under the 1958 Act, contemporary Victorian lawyers are liable in negligence for the acts and defaults of which the applicant complains? Or may they successfully plead immunity from suit carried into the modern age by reference to a solicitor's liability in negligence in 1891?

275 *1891 liability: legal texts*: The law of negligence in Victoria in 1891 was significantly different from that in 1996, when the relevant acts and omissions pleaded by the applicant are alleged to have occurred. In 1891 the House of Lords had decided neither *Donoghue v Stevenson*[374] nor *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[375]. As Brennan J observed in *Giannarelli*, it is difficult enough for judges to find and express the present law of negligence. It is next to impossible for them to state precisely and with accuracy how an earlier generation would have viewed the law, perceiving its commands through the eyes of those living a century ago[376].

> "The judges of today are aliens to the society of a hundred years ago and, unless the relevant earlier period has produced an applicable precedent of binding authority, a judge could hardly be translated back to the earlier time and, ignoring the experience of the intervening years, declare

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372 See *Giannarelli* (1988) 165 CLR 543 at 587.

373 *Giannarelli* (1988) 165 CLR 543 at 599-609.

374 [1932] AC 562.

375 [1964] AC 465.

376 *Giannarelli* (1988) 165 CLR 543 at 585 per Brennan J.

common law principles different from what the judge now considers the common law to be."

276 Yet this is the theory of the "fixed-time provision" that the 1891 Act was said to impose. To assume that, by that Act, a solicitor's liability in 1891 is in some respects frozen in time by statute (as distinct from merely equalised with that of a barrister) is the course that we were invited to accept. I do so with great reluctance. Nevertheless, I will take this step in case it is what the *ratio* of *Giannarelli* obliges so far as the application of the statutory provisions is concerned. What, then, was the negligence liability/immunity of a Victorian solicitor in 1891?

277 In his text, *Principles of the Law of Negligence*[377], Thomas Beven, writing in 1889, said that in the "preliminary investigations required before instituting proceedings the solicitor's duty is specially to consider [*inter alia*] [w]hether there is any, and what, right of action". He went on to say that "[p]alpable negligence in any of these particulars, whether arising from want of acquaintance with law or from defective apprehension of the facts would constitute a cause of action against the solicitor". This was because it was "deemed essential that the client should have the benefit of his solicitor's advice and judgment in the conduct of the suit in the management of which the solicitor is also required to be reasonably competent".

278 In a text more particularly addressed to solicitors' liability, Arthur Poley in 1897[378] wrote that it was "the solicitor's duty to ascertain the facts for the purpose of advising his client as to his rights before he launches the litigation". By inference, the same would apply to advising a client as to a defence in criminal proceedings. The separate liability of a solicitor in connection with litigation was explained by Archer White. He stated that, when a solicitor "act[s] as advocate for his client, he is liable for breach of contract" and that "[a] solicitor before advising an action should satisfy himself that there is a proper cause"[379]. White also said that, in litigation, a solicitor "must in all cases warn his client of possible consequences" of adopting a particular course[380].

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377 (1889) at 794.

378 Poley, *A Treatise Upon the Law Affecting Solicitors of the Supreme Court*, (1897) at 190.

379 White, *A Treatise on the Constitution and Government of Solicitors: Their Rights and Duties*, (1894) at 175.

380 White, *A Treatise on the Constitution and Government of Solicitors: Their Rights and Duties*, (1894) at 177.

279 Whatever immunity was enjoyed by barristers in Victoria in the last decade of the nineteenth century, alike with England, and whether barristerial immunity rested on the notion that the function of a barrister involved an office[381], or was not the proper subject of contractual liability[382], or was protected by public policy[383], the situation of solicitors was clearly different. As White explained[384]: "[w]herever the relation of solicitor and client exists, whether the solicitor is paid for his services or not, he is liable for negligence to his client". And "negligence includes any act or omission which he may reasonably be expected to have been able to avoid"[385].

280 The standard of care owed by a solicitor in 1891 was expressed at that time in terms of liability for "*crassa negligentia*" or "gross negligence"[386]. However, such expressions meant "nothing more than the absence of the skill, diligence, and care which would be ordinarily expected in the case of a solicitor"[387]. It is plain that, in 1891, the texts on negligence and solicitors' liability were of the opinion that a solicitor could be expected to inform himself of all relevant facts and law so as to be in a position to offer advice as to the suitable course of litigation and the consequences of the choices open to the client. Because solicitors had contracts of retainer with their clients they could sue for fees. However, they could also be sued for negligent failure to conform to the foregoing standards.

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381 See eg *Swinfen v Lord Chelmsford* (1860) 5 H & N 890 at 921 [157 ER 1436 at 1449].

382 *Thornhill v Evans* (1742) 2 Atk 330 at 332 [26 ER 601 at 602]; *Turner v Philipps* (1792) Peake 166 [170 ER 116]. Physicians were treated as being in the same class: *Veitch v Russell* (1842) 3 QB 928 [114 ER 764]; *Rondel* [1969] 1 AC 191 at 237.

383 *Ex parte Lloyd* (5 November 1822), reported as a note in *Ex parte Elsee* (1830) Mont 69 at 72, cited in *Giannarelli* (1988) 165 CLR 543 at 578-579 per Brennan J.

384 White, *A Treatise on the Constitution and Government of Solicitors: Their Rights and Duties*, (1894) at 170 (footnote omitted).

385 White, *A Treatise on the Constitution and Government of Solicitors: Their Rights and Duties*, (1894) at 170.

386 Saunders, *A Treatise Upon the Law Applicable to Negligence*, (1871) at 156; Poley, *A Treatise Upon the Law Affecting Solicitors of the Supreme Court*, (1897) at 188; Beven, *Principles of the Law of Negligence*, (1889) at 788.

387 Poley, *A Treatise Upon the Law Affecting Solicitors of the Supreme Court*, (1897) at 188.

281 It follows that, if the 1891 Act (and its successors, including the 1958 Act) assimilated the liability of a Victorian barrister with the liability of a solicitor in 1891, there is little doubt that a solicitor at that time was liable in law for negligent acts and omissions in the provision of advice to a client out of court, such as the applicant alleges here.

282 *1891 liability: case law*: The foregoing statements in legal texts are sustained by reference to the case law of the late nineteenth century. It was not disputed in these proceedings (any more than it had been in *Giannarelli*) that the law in Victoria in 1891 was the same as that expressed in England at that time.

283 In *Hill v Finney*[388] (a decision not referred to in *Giannarelli*) the Queen's Bench in England observed that an attorney could be liable for negligently advising a client not to defend an action. In that case, the plaintiff had retained the attorney to represent him in an action commenced by the plaintiff's wife for judicial separation on the ground of cruelty. Counsel was not retained. The plaintiff (like the present applicant) considered that he had a good defence to his wife's action. However, he accepted his attorney's advice not to defend the action nor to adduce evidence in opposition. The plaintiff understood the attorney's advice to be that, if he consented to his wife's action, the separation would be pronounced without the wife's giving evidence of his alleged cruelty.

284 That proved not to be the case. The trial judge insisted upon the provision of evidence of cruelty. The plaintiff was unprepared to answer such evidence. In consequence of the resulting order, based on the proved cruelty, the plaintiff was dismissed from the Army. He suffered loss. He brought proceedings to recover damages from the attorney for the consequences of the allegedly negligent out-of-court advice. There was not the slightest suggestion by the Queen's Bench that, in 1865, the attorney was entitled to an immunity from the plaintiff's suit on the basis that the advice he had tendered to his client was "work done out of court which leads to a decision affecting the conduct of the case in court"[389] and thus immune from suit. On the contrary, the proceedings were consistent with the earlier statement of the law in England that "[a]ttorneys are responsible to their clients for negligence or unskilfulness; but no action lies against the counsel for his acts, if done bona fide for his client"[390].

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388 (1865) 4 F & F 616 [176 ER 716].

389 *Giannarelli* (1988) 165 CLR 543 at 560 per Mason CJ.

390 *Swinfen v Swinfen* (1857) 1 CB (NS) 364 at 403 [140 ER 150 at 166].

285 Numerous authorities may be found in the casebooks of the nineteenth century in which a solicitor was deprived of costs or held liable for negligent misapprehension of the law in advising a client as to the course that the client should take in court proceedings[391]. In an early decision of this Court, in *Charlick v Foley Brothers Ltd*[392], Isaacs J made it clear that the duty of a solicitor extended to explaining fully to a client the ramifications of pleading a defence based on the statute of frauds. Isaacs J said that no such defence should be filed "without [the solicitor] fully explaining it, and pointing out its full meaning and effect, and the probable consequences of the defence in case the event turns on a question of credibility"[393]. A failure to explain such consequences fully would have rendered a solicitor in 1891 liable to the client for any losses that ensued[394].

286 It is true that by the nineteenth century solicitors, like barristers, were accorded immunity from suit for any alleged defamation occurring during in-court conduct as an advocate[395]. However, such an immunity rested on a legal principle different from, and narrower than, the absolute professional immunity claimed in the present proceedings[396]. Apart from everything else, the immunity was concerned with in-court conduct. It is not relevant to the present case, where all of the alleged conversations took place, and the professional advice was given, out of court.

287 In 1891, forty years before *Donoghue v Stevenson*[397] was decided, negligence was not perceived as an independent, comprehensive tort. It was an element in the duty inherent in particular relationships that gave rise to a cause of action at common law. In the case of a solicitor, the relationship in question arose from the contractual obligation between the solicitor and client[398]. It was the perceived absence of such a contract between a lay client and a barrister that

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391 eg *Ibbotson v Shippey* (1879) 23 Sol Jo 388.

392 (1916) 21 CLR 249.

393 *Charlick* (1916) 21 CLR 249 at 251.

394 *Lee v Dixon* (1863) 3 F & F 744 [176 ER 341].

395 *Munster v Lamb* (1883) 11 QBD 588.

396 See *Giannarelli* (1988) 165 CLR 543 at 607, citing *Demarco* (1979) 95 DLR (3d) 385 at 407-408 per Krever J.

397 [1932] AC 562.

398 See *D'Orta-Ekenaike v Victoria Legal Aid* [2004] HCATrans 119 at 4821-4824 per McHugh J.

was one of the oft-propounded reasons for the inability of the client to sue the barrister and hence for the barrister's immunity from suit for negligence. However, the position of a solicitor in 1891 was quite different[399].

288 This view of a solicitor's liability as at 1891 is confirmed by the contemporary texts[400]. By providing as it did in the 1891 Act, that a barrister could recover fees from a "client"[401], the Victorian Parliament recognised a relationship then necessary to facilitate a general duty arising in tort between the barrister and client thereafter. In a sense, the 1891 Act anticipated by decades the steps that were later to occur in the common law in *Donoghue v Stevenson*[402] and *Hedley Byrne*[403]. Under the common law principles expressed in those cases, absent any immunity, breach of a duty of care on the part of legal practitioners, certainly in respect of out-of-court advice to a client, was available to ground liability in negligence. If the "fixed-time" theory of the 1891 Act is accepted, that step was taken in Victoria much earlier. Because in 1891 a *solicitor* was liable for negligence on his contract of retainer, so, thereafter, was a *barrister*. All that remained was the ascertainment of whether the alleged conduct by barristers amounted to out-of-court negligence. If it did, liability arose and the immunity did not apply.

289 *The "intimately connected" test*: There is no hint in the contemporary texts on the negligence liability of solicitors in the late nineteenth century, nor in the cases of that time, that the immunity earlier accorded to barristers was available to solicitors with respect to out-of-court work. On the contrary, there is very great doubt that, at that time, the general immunity belonging to barristers in respect of *in-court* activities as an advocate extended to solicitors. The sole immunity that was recognised in a solicitor's case related to immunity from suits for in-court defamation. I could find no decision that goes further.

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399 *Swinfen v Swinfen* (1857) 1 CB (NS) 364 at 403 [140 ER 150 at 166]; see these reasons at [307].

400 In 1889, it was explained that "an action for negligence against a solicitor" lay not in "contract but in tort; since its essence is not the non-performance of a contractual duty but the performance of a negligent act; and therefore damage has to be shewn. Further, damage must be shewn to have resulted from the negligent act": Beven, *Principles of the Law of Negligence*, (1889) at 790.

401 1891 Act, s 5.

402 [1932] AC 562.

403 [1964] AC 465.

290 It follows that the historical analysis of Toohey J in *Giannarelli* is to be preferred[404]. Because the present case concerns only *out-of-court* conduct, not *in-court* advocacy, it is unnecessary to reopen what I regard as an historical error on the part of the majority in *Giannarelli* in holding that a solicitor advocate in Victoria in 1891 was entitled, at that time, to all the immunities of a barrister in respect of *in-court* activities. But when it comes to *out-of-court* advising, there was in 1891 no general immunity for solicitors[405]. It should not now be invented by this Court. To do so would be contrary to historical facts proved by the contemporary records.

291 The passage that gave rise to the expansion of the immunity for out-of-court advice appears in the reasons of McCarthy P in *Rees v Sinclair*[406]. Not until that decision in 1973 was a separate rule propounded in respect of a barristers' immunity from action extending it to "pre-trial work … so intimately connected with the conduct of the cause in Court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing". It was that passage that was approved in England in *Saif Ali*[407].

292 The task before the New Zealand and English courts, in those decisions, was different from that which, in *Giannarelli*, the "fixed-time" hypothesis was held to impose on Australian courts in respect of a claim for immunity by legal practitioners in Victoria. There, the inquiry was not what the evolving standards of the common law permitted or obliged. Upon that subject, different views could be stated[408]. In the case of Victoria, however, upon the "fixed-time" hypothesis, the question was a statutory one. It involved an historical search for the liability of solicitors in 1891. Except by invoking a fiction that defies established historical fact (namely that the common law is always unchanged and unchanging[409]), it is impossible to pretend that any immunity from liability in negligence extended in November 1891 to solicitors for *out-of-court* advising

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404 *Giannarelli* (1988) 165 CLR 543 at 604-607.

405 See reasons of McHugh J at [174].

406 [1974] 1 NZLR 180 at 187.

407 [1980] AC 198 at 215 per Lord Wilberforce, 224 per Lord Diplock, 232 per Lord Salmon.

408 See eg *Keefe v Marks* (1989) 16 NSWLR 713 at 719 per Gleeson CJ, 729 per Meagher JA; cf 723 per Priestley JA (diss).

409 See *Giannarelli* (1988) 165 CLR 543 at 585 per Brennan J, citing *Atlas Tiles Ltd v Briers* (1978) 144 CLR 202 at 208.

whether connected or unconnected to an in-court appearance. That assertion defies the clear state of the common law in 1891.

293 If this Court is to adopt the "fixed-time" hypothesis, it must do so rigorously and accurately. It must ascertain and apply what the law said at the chosen time. It cannot pick and choose amongst the favourable and unfavourable developments happening thereafter, attributing only those that it likes to the law of 1891.

The rule in *Giannarelli*: resulting *ratio* and reconsideration

294 *The resulting rule in Giannarelli*: It follows from the foregoing analysis that any *ratio decidendi* of *Giannarelli* is confined to the immunity of barristers during the hearing of proceedings *in court*. No binding rule is established applicable to barristers for *out-of-court* advice. No binding rule at all is established for the liability of solicitors. All remarks on those subjects are *obiter dicta*. Moreover, they are *dicta* that rest on the flimsiest of foundations in a sharply divided decision, where the deciding opinion of Brennan J differed from all others and supported the Court's orders on a hypothesis which that judge himself had earlier rejected.

295 Assuming that a majority can be constructed in *Giannarelli* to fix the liability of barristers and solicitors in Victoria in 1996 by reference to the liability of solicitors in Victoria in November 1891, the contemporary cases and texts clearly show that, at that time, a solicitor was not immune from proceedings in negligence in respect of conduct *out of court* (or indeed *in court*, a matter not here in issue). The later holdings concerning the ambit of *barristers'* immunities in England[410] and New Zealand[411] have no immediate relevance to this case. This is because, on the postulate adopted, the only inquiry is about the liability of *solicitors* in Victoria in November 1891.

296 From this it follows that there is nothing in the *ratio decidendi* in *Giannarelli* that obliges the termination of the applicant's proceedings against VLA and the barrister. In the face of contrary developments in the law elsewhere, this Court should not expand the scope of the immunity for which *Giannarelli* stands. Confined to its essential reasoning, *Giannarelli* does not support the decisions of the Victorian courts in this case. To the extent that those courts thought otherwise, they erred. This Court should correct their orders.

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410 *Saif Ali* [1980] AC 198 at 215.

411 *Rees* [1974] 1 NZLR 180 at 187 (the holdings of which were recently held by the Court of Appeal "no longer [to] justify the retention of the immunity": *Lai* unreported, Court of Appeal of New Zealand, 8 March 2005 at [125]).

297 This answer to the first issue in these proceedings obviates any necessity to reopen the *ratio decidendi* of *Giannarelli*. If, however, contrary to my analysis, *Giannarelli* stands for a wider legal rule that would support the immunities severally claimed by VLA for the solicitor and by the barrister, I would certainly favour reconsideration of that rule. I would do so in the light of the arguments presented in this application. I would also favour reconsideration because, respectfully, I consider the analysis in *Giannarelli* of Deane, Toohey and Gaudron JJ to be correct. Their Honours' reasoning is to be preferred as a matter of statutory construction, purposive interpretation, historical analysis[412] and legal principle.

298 *Response to historical criticism*: In his reasons[413], McHugh J criticises my analysis of some of the nineteenth century cases that I have cited in the foregoing part of these reasons. I do not accept his criticism.

299 It is distasteful, in resolving what is ultimately a significant contemporary legal question, to become embroiled in a dispute concerning the liability of solicitors, separately from barristers, in nineteenth century England and Victoria. To say the least, there is an air of unreality in such an endeavour. I have engaged in the task only because of the argument that the applicable Victorian legislation, and a legal rule established by this Court in *Giannarelli*, oblige a search for the content of solicitors' liability for negligence in 1891. I venture upon a response to McHugh J's criticism, protesting once again that neither premise for undertaking this task is good law.

300 It is true[414] that *Hill v Finney*[415] is in some ways an unsatisfactory case. The report of the directions of Cockburn CJ to the jury is spiced with comments of the reporter. However, the case is cited in nineteenth century texts as support for the proposition that "the solicitor may also be sued for any tort which he has committed independently of the contract of retainer against his client"[416]. In what is ultimately an inquiry about the understanding of the legal profession in 1891 as

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412 There are many other cases that confirm the foregoing historical analysis: eg *Stokes v Trumper* (1855) 2 K & J 232 [69 ER 766]; *Ritchie v Macrosty* (1854) 16 Dunlop 554; *Re Spencer* (1870) 39 LJ Ch 841.

413 Reasons of McHugh J at [169]-[175].

414 Reasons of McHugh J at [170]-[171].

415 (1865) 4 F & F 616 [176 ER 716].

416 See eg White, *A Treatise on the Constitution and Government of Solicitors: Their Rights and Duties*, (1894) at 179.

to the liability of barristers for negligent out-of-court conduct (and given Brennan J's observations in *Giannarelli*[417] as to the difficulty, one hundred years later, of stating with any precision the common law principles of 1891 as they then stood and were interpreted) such citation by the authors of contemporaneous legal texts is far from irrelevant. It is a sounder source of the law in 1891 than our contaminated examinations of the cases are likely to produce.

301 The report in *Hill* details a number of cases where actions for negligence were brought against attorneys. The reporter's notes appear to contradict, or at least to require modification of, the reporter's statement extracted by McHugh J in his reasons[418]. The reporter goes on to say that actions for negligence could be brought against attorneys for errors in practice[419]:

> "Now, no doubt an attorney is liable for an error of practice, if it is plain and obvious (as this, it was admitted, would have been) and led to an injurious result".

More to the point, the summing up of Cockburn CJ notes that the attorney's defence, as argued in the case, was not that there was immunity *in law*. Instead, it was that the defendant had denied giving the alleged advice *in fact* and said that the advice that he gave was honestly given and not accompanied by the alleged misrepresentation. The absence of a plea of immunity, or reference to such a legal defence, by so experienced a judge as Cockburn CJ, suggests that the immunity now asserted for the attorney, one hundred and forty years later, was not in the minds of the contemporary lawyers.

302 It is true that, closely analysed and confined to the matters essential for decision, the cases referred to in one of my footnotes[420], taken to task by McHugh J[421], do not resolve the point in issue here. But they were certainly

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417 (1988) 165 CLR 543 at 585; see these reasons at [275].

418 Reasons of McHugh J at [170].

419 *Hill* (1865) 4 F & F 616 at 634 fn (b) [176 ER 716 at 726]; see also earlier in the same footnote at 634 fn (b) [176 ER 716 at 725]:

> "[I]n an action against an attorney, not for direct breach of a positive contract to do a specific act, but for breach of a general duty arising out of the retainer to bring sufficient care and skill to the performance of the contract, the action is not on contract but in tort, and its essence is negligence, and the damage must be shown to have arisen thereupon."

420 In my reasons above, fn 412.

421 Reasons of McHugh J at [172]-[173].

understood by contemporary practitioners and text-writers to indicate that an attorney could be held liable for negligence for out-of-court acts and defaults, whereas a barrister (having no contract with the lay client) could not.

303 Thus in *Stokes v Trumper*[422], Sir William Page Wood VC[423] cited from *Purves v Landell*[424] to sustain his proposition that "where an attorney has shewn a 'want of reasonable skill', he is liable in an action for negligence"[425]. In *Purves*, Lord Campbell had said that "[a]gainst the barrister in England, … luckily, no action can be maintained. But against the attorney, the professional adviser, or the procurator, an action may be maintained." The stated juxtaposition could not be clearer.

304 As to the criticism of my citation of *Re Spencer*[426], it is correct to say that it concerned an attorney's liability for costs and expenses. But it was in that case that Giffard LJ wrote[427]:

> "If persons either make or adopt a statement, the contrary of which they ought to have known, by the exercise of reasonable care, to be the truth; and if they obtain from the Court, on the footing of that statement, an order which afterwards is found to be wrong, they are bound to indemnify the persons injured by that order from all consequences occasioned by it."

305 Finding renewed, but momentary, enthusiasm for this historical inquiry, I should mention some additional authorities that support my proposition concerning the liability of attorneys to clients for out-of-court negligence, according to the common law of England in the nineteenth century. Thus, in *Godefroy v Jay*[428], it was held that negligence was proved against the defendant, an attorney, who allowed judgment to go by default in an action in which the plaintiff had retained him for his defence. Although the case certainly contemplated court proceedings, and the negligent conduct that occurred was out

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422 (1855) 2 K & J 232 [69 ER 766].

423 Later Lord Hatherley.

424 (1845) 12 Cl & F 91 at 103 [8 ER 1332 at 1337].

425 (1855) 2 K & J 232 at 247 [69 ER 766 at 772].

426 (1870) 39 LJ Ch 841. See reasons of McHugh J at [172]-[173].

427 (1870) 39 LJ Ch 841 at 843.

428 (1831) 7 Bing 413 [131 ER 159]. See also *Filmer v Delber* (1811) 3 Taunt 486 [128 ER 192 at 193]; *Reece v Righy* (1821) 4 B & Ald 202 [106 ER 912].

of court, no plea of immunity was raised. Indeed, Alderson J considered the matter "a very plain case"[429] of liability.

306 In *Hart v Frame*[430], an attorney was employed to take proceedings for employers against apprentices for misconduct. He proceeded on a section of the applicable statute specifically relating to servants and not apprentices. He was held liable to repay the clients the damages and costs occasioned by his error. No legal immunity was suggested or found. In *Purves*[431] came the decision differentiating the "lucky" immunity of the barrister from the less fortunate liability of the attorney.

307 In *Swinfen v Swinfen*[432] the respective liabilities of an attorney and a barrister were contrasted. A compromise was entered into by the barrister on behalf of the client which was later formalised in an order of the court. The client refused to comply with the order, contending that the compromise had been made without her authority. When a motion was brought for contempt of court, the court refused and discharged the original order, holding that it had been made without the client's authority. Crowder J, like those who had gone before, distinguished clearly the respective liabilities of barristers and solicitors, as they then stood[433]:

> "Attorneys are responsible to their clients for negligence or unskilfulness; but no action lies against the counsel for his acts, if done bona fide for his client. In this respect, therefore, the counsel stands in a different position from the attorney".

308 In *Stanford v Roberts*[434], Kay J also drew a distinction between the immunity that he was prepared to attribute to counsel and the liability of solicitors for omitting from a deed of settlement a provision which counsel had recommended should be inserted in it. To similar effect was the decision of Stirling J in *In re Dangar's Trusts*[435]. In that case it was held that a solicitor was

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429 (1831) 7 Bing 413 at 422 [131 ER 159 at 163].

430 (1839) 6 Cl & F 193 at 210 [7 ER 670 at 676].

431 (1845) 12 Cl & F 91 at 103 [8 ER 1332 at 1337].

432 (1857) 1 CB (NS) 364 [140 ER 150].

433 (1857) 1 CB (NS) 364 at 403 [140 ER 150 at 166].

434 (1884) 26 Ch D 155 at 160.

435 (1889) 41 Ch D 178.

liable for his negligence in not seeing that all of the facts relating to a matter were brought before the court. Where the solicitor took "an active part"[436] in the court proceedings, Stirling J considered that "the current of authority is clear and decisive as to the liability of solicitors in cases of misfeasance … He is liable for the consequences of his neglect in not having informed the Court of the true state of the title of the fund".

309 These and other cases were plainly understood in contemporaneous legal texts to support the conclusion that I have expressed concerning the liability of solicitors for *out-of-court* negligence in 1891. The fact that several of the cases concerned professional conduct intimately associated with *in-court* activity merely reinforces my stated conclusion about the application of the Victorian legislation upon the identified assumptions.

Scope of any new forensic immunity

310 *Assumptions of the analysis*: In this area of discourse, it is not unusual for judges to express their views on the more fundamental question of whether, apart from the statutory provisions, the immunity exists today. The judges in the majority in *Giannarelli* did so[437]. In *Boland*[438], so did Gaudron J[439] and I[440]. So also did Callinan J to the opposite effect[441].

311 The state of the common law concerning any alleged immunity of legal practitioners, in respect of out-of-court advice to their clients, only arises in these proceedings if it is accepted that the 1958 Act does not yield a conclusive answer to the ascertainment of the liability in negligence of VLA and the barrister. In a sense, this would involve viewing the 1891 Act as imposing equality on the rights and liabilities of barristers and solicitors after that time and leaving it to the common law to develop in the normal way in respect of each of them[442]. That would be the way in which the existence, or absence, of a common law immunity

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436 (1889) 41 Ch D 178 at 196.

437 (1988) 165 CLR 543 at 554-560 per Mason CJ, 572-575 per Wilson J, 586-587 per Brennan J, 591-596 per Dawson J.

438 (1999) 74 ALJR 209; 167 ALR 575.

439 *Boland* (1999) 74 ALJR 209 at 230 [107]; 167 ALR 575 at 602-603.

440 *Boland* (1999) 74 ALJR 209 at 236-242 [128]-[151]; 167 ALR 575 at 610-619.

441 *Boland* (1999) 74 ALJR 209 at 280-281 [360]-[363]; 167 ALR 575 at 670-671.

442 *Giannarelli* (1988) 165 CLR 543 at 602-609 per Toohey J.

for lawyers would be decided in other Australian jurisdictions that have no provision similar to s 10(2) of the 1958 Act. In Victoria, at least until the most recent statutory changes, the position has been affected by the special statutory prescription derived ultimately from the 1891 Act.

312 *The immunity cannot be supported*: If, contrary to the above reasoning, the scope of a Victorian legal practitioner's immunity from suit is open to consideration as a matter of common law principle (as distinct from historical discovery) there is an overwhelming case against maintaining it.

313 In this conclusion I agree with the unanimous opinion of the House of Lords in *Arthur J S Hall*. As in England, this Court should declare that the supposed foundations for the immunity, when subjected to contemporary scrutiny, are found wanting. Neither the assertion of a special "office" nor the absence of a contract of retainer now suffices to sustain the immunity[443]. The supposed arguments of public policy, examined with today's eyes, are also insufficient[444]. Comparable legal systems within, and outside, the common law world operate perfectly well without the immunity. The English Bar, from which the Australian rule first derived, now does so. Because I agree in the reasoning of Lord Steyn and Lord Hoffmann in *Arthur J S Hall*[445], and because I have earlier foreshadowed my views[446], I can now state them briefly.

314 *The anomalous exception of immunity*: On the face of things, an immunity from liability at law is a derogation from the rule of law and fundamental rights[447]. The special solicitude of the law for its own practitioners has been noted by judges[448]. It has been contrasted with the high measure of accountability demanded of other professions[449]. Such an immunity diminishes

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443 *Swinfen v Lord Chelmsford* (1860) 5 H & N 890 at 920 [157 ER 1436 at 1448]; *Batchelor v Pattison and Mackersy* (1876) 3 R 914 at 918; *In re Le Brasseur and Oakley* [1896] 2 Ch 487 at 494 (CA).

444 *Arthur J S Hall* [2002] 1 AC 615.

445 [2002] 1 AC 615 at 675 per Lord Steyn, 685 per Lord Hoffmann.

446 *Boland* (1999) 74 ALJR 209 at 236-240 [128]-[142]; 167 ALR 575 at 610-616.

447 *Osman v United Kingdom* (1998) 29 EHRR 245 at 285 [110]-[111], 316-317 [150]-[154].

448 *Saif Ali* [1980] AC 198 at 218-220 per Lord Diplock, 228-229 per Lord Salmon.

449 See Masel, *Professional Negligence of Lawyers, Accountants, Bankers and Brokers*, 2nd ed (1989) at 192; Heerey, "Looking over The Advocate's Shoulder: An Australian View of Rondel v Worsley", (1968) 42 *Australian Law Journal* 3 at

(Footnote continues on next page)

justifiable loss distribution in a generally inelastic market[450]. Effectively, it reduces equality before the courts.

315 It is a mistake to portray the decision of the House of Lords in *Arthur J S Hall* as resting on the human rights provisions of local law or on the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the European Convention")[451]. Although that Convention was mentioned by some of their Lordships[452], most made no mention of it at all. Doubtless this was because the *Human Rights Act* 1998 (UK) was not in force as part of the domestic law of England at the time relevant to any of the proceedings before the House. The principles in the case fell to be examined outside the Convention paradigm[453].

316 In any case, the same principles that inform the European Convention are recognised in the International Covenant on Civil and Political Rights ("the ICCPR")[454]. Australia is a party to the latter. It is also a signatory to the First Optional Protocol to the ICCPR, designed to ensure compliance with the ICCPR's requirements[455]. Inevitably, those requirements (of equality before, and accountability to, the law) influence the contemporary expression of the common law of Australia[456].

7; Brookes, "Time to abolish lawyers' immunity from suit", (1999) 24 *Alternative Law Journal* 175 at 175. See also Williams, "Immunity in retreat?", (1999) 15 *Professional Negligence* 75; Yeo, "Dismantling Barristerial Immunity", (1998) 14 *Queensland University of Technology Law Journal* 12.

450 Law Reform Commission of Victoria, *Access to the law: accountability of the legal profession*, Report No 48, (1992) at 23 [51]. The Commission records (at 25-26 [56]) that abolition of the immunity was supported by the Law Institute of Victoria (representing solicitors) but opposed by the Bar Council and members of the judiciary.

451 Done at Rome on 4 November 1950. See Art 6 ("Right to a fair trial").

452 *Arthur J S Hall* [2002] 1 AC 615 at 734 per Lord Hutton, 753 per Lord Millett.

453 *Arthur J S Hall* [2002] 1 AC 615 at 707 per Lord Hoffmann.

454 Done at New York on 19 December 1966, [1980] *Australian Treaty Series* No 23, Art 14.

455 Done at New York on 19 December 1966, [1991] *Australian Treaty Series* No 39.

456 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42 per Brennan J.

317 Restrictions on rights to legal recovery in the nature of immunities have been held contrary to such universal provisions[457]. True, some immunities have been sustained[458]. However, the examination of each such claim is scrupulous. So must it be in the contemporary common law. The common law of Australia is no less suspicious of legal immunities than are the laws of other countries and the foregoing international conventions[459].

318 *The changing state of authority*: Successive justifications of the source of the barristers' immunity have collapsed under the force of changes in the law and social perceptions. The justification by reference to the inability of a barrister to sue for fees[460] is now completely unpersuasive. Those in other professions who perform work as advisers, including in an honorary capacity, are not exempt from legal liability[461]. In any event, in many places (including Victoria) statute has reversed the traditional rule about the recovery of fees[462]. And it never applied to solicitors.

319 The suggestion that the immunity attaches to the barrister as a "gentleman", a holder of an office who owes a duty to the court, his or her profession and the public[463], is unpersuasive in contemporary Australia[464], if it was ever so. Fundamentally, such views derive from a class-based notion of

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457 eg *Holy Monasteries v Greece* (1994) 20 EHRR 1; *Devlin v United Kingdom* (2001) 34 EHRR 1029.

458 *A v United Kingdom* (2002) 36 EHRR 917 (Parliamentary privilege). See Lester and Pannick (eds), *Human Rights Law and Practice*, 2nd ed (2004) at 214-219 [4.6.16]-[4.6.22].

459 *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 556-557 [97] per Gaudron, McHugh and Gummow JJ, 602-603 [234]-[235] of my own reasons, referring to *Roy v Prior* [1971] AC 470 at 480 per Lord Wilberforce.

460 *Le Brasseur* [1896] 2 Ch 487 at 494; *Robertson v Macdonogh* (1880) 6 LR Ir 433 at 438; *Rondel* [1967] 1 QB 443 at 513 per Danckwerts LJ; *Rondel* [1969] 1 AC 191 at 292-293 per Lord Pearson.

461 *Rondel* [1969] 1 AC 191 at 226-227, 244-245, 277-280, 288-289; *Giannarelli* (1988) 165 CLR 543 at 555.

462 1958 Act, s 10(1).

463 *Batchelor* (1876) 3 R 914 at 918 per Lord Inglis LP.

464 See *Arthur J S Hall* [2002] 1 AC 615 at 725-726 per Lord Hope of Craighead; *Rondel* [1969] 1 AC 191 at 241-246.

society that has no place in contemporary Australian law[465]. As Wilson J noted in *Giannarelli*[466], "[f]avouritism and inequality of treatment under the law are capable of breeding contempt for the law, particularly when it is perceived that those who are favoured are themselves lawyers".

320 That leaves only the supposed public policy arguments to uphold the claimed immunity. That basis was supported in England in *Rondel*[467] in 1967. It was maintained in *Saif Ali*[468] in 1978. However, by 2000[469], "public policy" was unanimously held insufficient in England to support the barristers' immunity in respect of civil litigation. By majority, it was also held insufficient in criminal cases. *Giannarelli* was delivered in an interval between the foregoing decisions. The postulate of barristerial immunity, based squarely on public policy grounds, is relatively recent. It was derived, in effect, from *Rondel*. The clear exclusion from the immunity of non-contentious chamber work is also relatively recent. In *Rondel*[470], Lord Reid foreshadowed the time that I believe has now arrived. His Lordship pointed to the fact that public policy is not immutable. What may have seemed justifiable on that ground in earlier times is unjustifiable today.

321 *Professional and global considerations*: The existence of an immunity for barristers first arose when the legal profession was significantly different from its current comportment in Australia. The Bar, like the judiciary, was much smaller. The organisation of contemporary legal practice in Australia has greatly altered. Increasingly, advocacy is performed by lawyers who do not practise exclusively as barristers. Often they practise in national, indeed international, firms. Australian lawyers increasingly deal with lawyers in other lands, virtually none of whom enjoy the immunity that lingers in Australia as an historical vestige. The welfare and liberty of clients depend upon the accuracy and sufficiency of legal advice. Whatever special problems arise, calling for instantaneous judgment *inside* the courtroom doors, they seem no more demanding than the

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465 See *In re May* (1858) 4 Jur NS 1169, where Sir Richard Kindersley VC observed that he would "never willingly derogate from the high position in which a barrister stands, and by which he is distinguished from an ordinary tradesman".

466 (1988) 165 CLR 543 at 575.

467 [1969] 1 AC 191.

468 [1980] AC 198.

469 *Arthur J S Hall* [2002] 1 AC 615.

470 [1969] 1 AC 191 at 227. See also *Arthur J S Hall* [2002] 1 AC 615 at 704 per Lord Hoffmann, 709 per Lord Hope of Craighead.

instantaneous decisions expected of a surgeon or of a pilot of a large passenger aircraft. Neither of the latter may claim an immunity from suit for negligence.

322 The features of the modern provision of legal services (illustrated in this case by the involvement of VLA) suggest a need to rethink the justifiability of an absolute immunity for advocates. Yet, far from being reconsidered, confined or abolished (as has occurred in England following *Arthur J S Hall*), the demand in this case was effectively to *expand* the immunity. It was to increase the rule in *Giannarelli* beyond in-court decisions during a hearing and to extend the immunity to a solicitor employed by a legal aid body, who would certainly not have enjoyed the traditional immunity formerly confined to barristers as a class. Others may not find this direction of Australian law, running against the global tide, anomalous and unjustifiable. I do.

323 *Special features and public policy*: The arguments in support of the immunity, based on the suggested role of the legal practitioner in private (or equivalent to private) practice in the governmental functions of administering justice, are as unconvincing to me as they were to all of their Lordships in the House of Lords. The supposed analogy to the immunity afforded to judges, jurors and prosecutors breaks down under a moment's examination. None of these persons owes any duty of care to a litigant. Lawyers, such as the barrister and the solicitor in this case, owe such a duty. Furthermore, the barrister's "divided loyalty" to client and court does not support the existence of the immunity, as it is difficult to see how negligence could be found where a barrister has simply complied with a duty to the court[471].

324 Similarly, the witness analogy is unconvincing. A witness and a lawyer must have immunity from defamation for what they say in court. However, I am far from convinced that a witness should enjoy an absolute immunity from suit in respect, say, of a report, prepared for a fee out of court on behalf of a party where that report contains negligent mistakes or omissions that cause reasonably foreseeable damage to that party[472]. It is unnecessary to decide that point here. But any immunity that exists must be defined as an exception to the general principle that a party who is wronged by the negligence of another owing that party a duty of care, should normally have a remedy for any foreseeable damage thereby occasioned.

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471 See *Arthur J S Hall* [2002] 1 AC 615 at 686, 692-693, 738-739; Cane, *Tort Law and Economic Interests*, 2nd ed (1996) at 235.

472 See Cane, *Tort Law and Economic Interests*, 2nd ed (1996) at 237, cited in *Arthur J S Hall* [2002] 1 AC 615 at 679 per Lord Steyn.

325 Subsuming the private legal practitioner into the category of public officials and extending an absolute immunity whatever the negligence or wrong-doing revealed, cannot be sustained by a functional analysis. Once the legal liability of barristers for some of the advice they give is upheld[473], the class exemption (which never extended to solicitors) is demolished. From that point, the law limps along with an unjustifiable exception to legal accountability based on empathy and tradition, not coherent legal principle. Its boundary is ultimately indefinable. This fact also suggests the instability of the immunity principle that is being asserted.

326 For those who take a broad view of work that is "intimately connected" with in-court decisions, there is virtually nothing in the practice of advocates that is not shielded by the immunity. Indeed, it allegedly extends to the instructing solicitor, although that person has his or her separate and independent duties to provide out-of-court advice to the client. The practice of retaining a second lawyer can only be justified if such distinct duties are accurately and separately discharged. Against the unhistorical and unprincipled extension of the immunity in the way now proposed in this case, I dissent.

327 *Fear of floods of litigation*: The usual alarms were sounded concerning the dangers of re-expressing the lawyers' immunity in this case. In response to them, I would answer as the House of Lords has done. None of the propounded fears is sufficient to sustain the anomalous immunity on public policy grounds. I agree with what the House of Lords said concerning the supposed danger to the "cab rank" rule[474]; the suggested dangers of collateral challenges to a previous decision of another court[475]; the propounded fear of vexation by disgruntled litigants[476]; and the danger postulated to the advocate's duty to the court[477] and of an unjustifiable increase in litigation. I would conclude, as their Lordships did, that none of these arguments, ultimately, supports an absolute immunity from suit, said to belong to lawyers, alone of all professional groups, for simply doing their job.

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473 *Arthur J S Hall* [2002] 1 AC 615 at 729 per Lord Hutton, 745 per Lord Hobhouse of Woodborough.

474 *Arthur J S Hall* [2002] 1 AC 615 at 678-679 per Lord Steyn, 696-697 per Lord Hoffmann.

475 *Arthur J S Hall* [2002] 1 AC 615 at 679-680 per Lord Steyn.

476 *Arthur J S Hall* [2002] 1 AC 615 at 690-692 per Lord Hoffmann.

477 *Arthur J S Hall* [2002] 1 AC 615 at 692-693 per Lord Hoffmann.

328 The fear of floods of litigation, brought by discontented litigants against barristers and their instructing solicitors, which cannot be properly repelled where unwarranted is likewise unsustained by experience. It does not happen in the United States, a most litigious country, where there has never been an immunity from suit for ordinary attorney advocates[478]. It does not happen in Canada, where the courts have rejected such a general immunity[479]. Instead, in that country, the courts have concentrated on developing special rules to recognise the practical problems that lawyers often face in conducting trials and giving legal advice. The general unavailability of legal aid in Australia to support negligence claims against lawyers; the availability of summary relief against vexatious claims[480]; and the rules against abuse of process by relitigation[481] (not to mention the empathy and understanding of judges for co-professionals in unmeritorious cases) make it completely unnecessary to retain an absolute immunity of the broad, even growing, ambit propounded in this case. I agree with the comment of Lord Hoffmann in *Arthur J S Hall*[482]:

> "[The immunity] is burning down the house to roast the pig; using a broad-spectrum remedy when a more specific remedy without side effects can handle the problem equally well."

329 Confirmation of this empirical assessment also comes from two specific sources. Between the time, in the *Giannarelli* litigation, that Marks J found the immunity unavailable to barristers in Victoria and the reversal of that decision by the Victorian Full Court, there was no objective evidence of any increase in the length of criminal trials in that State or evidence of a sudden rise in negligence claims against lawyers[483]. Moreover, in England, where the immunity has now been abolished, a flood of litigation has not occurred and has been declared

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478 *Ferri* 444 US 193 (1979). See *Arthur J S Hall* [2002] 1 AC 615 at 721 per Lord Hope of Craighead.

479 *Garrant v Moskal* [1985] 2 WWR 80 at 82, applying *Demarco* (1979) 95 DLR (3d) 385; cf Linden, *Canadian Tort Law*, 7th ed (2001) at 151.

480 *General Steel Industries* (1964) 112 CLR 125 at 129-130. See also *Arthur J S Hall* [2002] 1 AC 615 at 691-692.

481 *Arthur J S Hall* [2002] 1 AC 615 at 703-704 per Lord Hoffmann.

482 [2002] 1 AC 615 at 703.

483 Law Reform Commission of Victoria, *Access to the law: accountability of the legal profession*, Report No 48, (1992) at 35-36 [78].

"unlikely"[484]. Only a handful of cases involving alleged negligence on the part of barristers has reportedly reached court and "in only two of them was the barrister found liable"[485]. A commentator has concluded[486]:

> "The decision [in *Arthur J S Hall*] does not appear to have caused any great problems for the legal profession. Indeed, the reaction of some in the profession is that it is to be welcomed, if it helps to restore public confidence in the openness and accountability of the profession."

330 Even before *Arthur J S Hall* was decided, the English courts had no hesitation in providing relief against futile, frivolous, vexatious and abusive claims. So much is illustrated by the decision of the English Court of Appeal in *Somasundaram v M Julius Melchior & Co*[487], described in the reasons of McHugh J[488]. Where the law affords such measured relief from unwarranted claims, the maintenance of a general legal immunity represents an over-wide protection. It is one incapable of adjusting to the occasional claim which is warranted as a case of professional negligence, accountable to the courts as every other such case is.

331 *A criminal proceedings exception?*: In *Boland*[489], I acknowledged that a stronger argument existed for an exception from liability in respect of the conduct of criminal, when compared to civil, proceedings. This was noticed in the House of Lords by two of their Lordships who ultimately favoured such an exception[490]. A third member of the House of Lords also supported such an exception[491]. The question did not have to be decided in *Boland*, which in any event was a case involving civil proceedings. However, it has to be decided here.

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484 Seneviratne, "The rise and fall of advocates' immunity", (2001) *Legal Studies* 644 at 662.

485 Seneviratne, "The rise and fall of advocates' immunity", (2001) *Legal Studies* 644 at 662, fn 130.

486 Seneviratne, "The rise and fall of advocates' immunity", (2001) *Legal Studies* 644 at 662 (footnotes omitted).

487 [1988] 1 WLR 1394 (CA); [1989] 1 All ER 129.

488 Reasons of McHugh J at [158]-[160].

489 (1999) 74 ALJR 209 at 241 [148]; 167 ALR 575 at 617-618.

490 *Arthur J S Hall* [2002] 1 AC 615 at 716 per Lord Hope of Craighead, 730 per Lord Hutton.

491 *Arthur J S Hall* [2002] 1 AC 615 at 746-749 per Lord Hobhouse of Woodborough.

With respect, I now find preferable the views of the majority in the House of Lords. Lord Millett explained[492]:

> "[T]o make the existence of the immunity depend on whether the proceedings in question are civil or criminal would be to draw the line in the wrong place …
>
> [E]ven if the immunity were retained only in criminal cases tried on indictment, in which the liberty of the subject is at stake … it is difficult to believe that the distinction would commend itself to the public. It would mean that a party would have a remedy if the incompetence of his counsel deprived him of compensation for (say) breach of contract or unfair dismissal, but not if it led to his imprisonment for a crime he did not commit and the consequent and uncompensated loss of his job. I think that the public would at best regard such a result as incomprehensible and at worst greet it with derision."

332 There is no attempt in the present applicant's case to use his civil proceeding for an illegitimate collateral attack on a criminal conviction that has been sustained by legal process. His criminal conviction has been set aside. He has been acquitted. The applicant brings his action for compensation for advice that he alleges was inaccurate and inadequate which caused him to be imprisoned unnecessarily and otherwise to suffer damage. Moreover, the action is brought in respect of professional conduct that happened out of court. The issues of collateral attack do not therefore present themselves. If they did, it would not be beyond the capacity of Australian law to define proportionate protections as has been done in other jurisdictions.

333 *Removal of false issues*: Before leaving these points, I would add a number of comments on the reasons of the majority in this Court. First, as to the suggestion that the immunity of advocates is an essential consequence of the need for certainty and finality of court determinations of legal controversies[493], it is enough to say that virtually all legal systems of the world, including many that are at least as worthy of respect as our own, flourish without the supposed indispensable immunity. They either have never had it or have now abolished it. And in any case, the issue raised in a claim of legal professional negligence is necessarily different, in fact and in law, from the issue that has been earlier litigated and determined.

334 Secondly, the respondents' case is not improved by substituting an analysis expressed in terms of an absence of legal duty for that in terms of the

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492 *Arthur J S Hall* [2002] 1 AC 615 at 752.

493 See joint reasons at [34]-[36], [43]-[45].

existence of a legal immunity. So far, the applicable English and Australian law has usually been expressed in terms of an advocates' "immunity". Its operation does not become any more palatable by adopting the supposed new nomenclature[494]. In particular, this verbal device cannot avoid the traditional, and recently restated[495], distaste of our law for legal immunities. They are highly exceptional; and rightly so.

335 Thirdly, there is no analogy between the liability of legal advisers and that of journalists, property developers and other persons instanced by McHugh J[496]. There are few relationships that are closer, involving at once neighbourhood, proximity, reliance and vulnerability of the client, than that with legal advisers in connection with litigation. The supposed analogies mentioned by McHugh J are remote. In any event, the holdings of no liability in some such cases have been criticised[497] or were the subject of dissenting opinions[498].

336 Fourthly, the test of liability cannot be whether its "burden" is, in the opinion of some judges, "intolerable"[499]. Were that the test for liability in negligence, it would probably exempt neurosurgeons, air pilots and many others carrying heavy responsibilities for fleeting acts and omissions of carelessness. What is "intolerable" depends, in any event, on the eye of the beholder. Critics of the advocates' immunity have repeatedly suggested that its survival can be traced to considerations of professional and judicial empathy rather than to neutral legal principles and to reasoning by comparison with analogous advisory occupational groups.

337 Fifthly, there is no occasion in these proceedings for a dissertation on the merits and importance of independent advocates[500]. Who contests it? The independent Bar has not only been a vital contributor to the just and efficient

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494 Reasons of McHugh J at [95].

495 eg *Brodie* (2001) 206 CLR 512.

496 Reasons of McHugh J at [98]-[99].

497 Thus the denial of recovery in *Osman v Ferguson* [1993] 4 All ER 344 (CA) was criticised in the European Court of Human Rights in *Osman* (1998) 29 EHRR 245.

498 See eg *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 276-285 [65]-[87]; *Woolcock* (2004) 78 ALJR 628 at 656-661 [150]-[175]; 205 ALR 522 at 561-568.

499 *Modbury* (2000) 205 CLR 254 at 266 [28], cited in reasons of McHugh J at [102].

500 Reasons of McHugh J at [105]-[108].

operation of the trial process. It has contributed uniquely to the independence and high standing of the judiciary of our tradition[501]. But this is not the issue in the case. All that is involved is whether, by the application of statute or the development of the common law, Australian barristers and solicitors are entitled to an exceptional immunity which other socially useful, sometimes intensely demanding, advisory professions do not enjoy and which advocates have not enjoyed, or do not enjoy, in virtually every other country on earth.

338 With all respect, the appeal to the "undeniable public interest in the maintenance of the independent Bar"[502] introduces a false trail. Independent lawyers, including an independent and separate Bar, exist, and in some cases have long existed, in many other countries and, in particular, in most other countries of the common law. To suggest that the removal of the anomalous out-of-court immunity for lawyers in Australia would, uniquely, destroy that professional independence is to display a lack of confidence in the local legal profession that I simply cannot share. Australian barristers, and their instructing solicitors, are made of sterner stuff.

339 *A residual in-court immunity?*: The foregoing is sufficient to persuade me to the merits of the applicant's challenge to the immunity invoked by VLA and the barrister. However, a question remains whether *Giannarelli* should continue to state the law in respect of *in-court* negligence by advocates.

340 The logic of my reasoning suggests that, as the applicant submitted, *Giannarelli* should now be overruled. On the other hand, to arrive at orders in this case it is unnecessary to do this. *Giannarelli* indisputably concerned allegations of *in-court* negligence. The applicant's case here, as pleaded, involves allegations of *out-of-court* negligence. Because mine is a minority view, it is unnecessary for me to resolve this point. My inclination would be to leave *Giannarelli* standing until a case is presented where a challenge to its supposed *ratio* is necessary, as it is not here. Because the advice and "pressure" of which the applicant complains occurred otherwise than in the heat of an actual hearing of his committal, trial or appeal, the question of the legal rule for *in-court* negligence does not need to be redetermined. There are different arguments available on the point[503]. I would leave its resolution to the future.

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501 Kirby, *Judicial Activism: Authority, Principle and Policy in the Judicial Method*, (Hamlyn Lectures, 2003) (2004) at 17-20.

502 Reasons of McHugh J at [106].

503 See *Boland* (1999) 74 ALJR 209 at 241-242 [150]; 167 ALR 575 at 618.

Should any change be left to Parliament?

341 *The argument of the lawyers*: The fourth issue in this application assumes that the earlier issues have been decided in favour of the applicant. A question must then be answered whether, in such circumstances, the immunity being wholly or to some degree shown as anomalous, unjustifiable and unsustained by public policy, this Court should now abolish it to the necessary extent – or leave any change to be made by the legislatures of the nation, which have the ordinary responsibility for the regulation of the legal profession.

342 VLA and the barrister argued strongly that the latter was the proper course. I was reminded of my reasons in *Brodie v Singleton Shire Council*[504]. I there collected some of the arguments for and against judicial re-expression of the common law. Several of those arguments are applicable to this case. An important consideration that supports leaving the issue to Parliament is the necessarily prospective operation of any new rule that would expose to liability persons who may previously have assumed that they were immune from suit[505]. There is some suggestion in *Arthur J S Hall* that the re-expression of liability adopted in that case "should take effect only from the date [of] the judgment in this case"[506]. To the extent that that was a consideration for their Lordships (a matter that is uncertain from their reasons) it is a course that is unavailable in Australia where prospective overruling has been held to be inconsistent with the Constitution[507].

343 *Rejection of the arguments in England*: The argument that a re-expression of the law should be left to Parliament was strongly pressed upon the House of Lords in *Arthur J S Hall*[508]. Clearly, their Lordships were unimpressed with it. By their orders, they unanimously rejected the contention. Lord Hoffmann acknowledged the need for restraint by judges in entering areas of the law "which are properly matters for democratic decision"[509]. This was most relevant where a significant allocation of resources was involved, a matter which should be left to

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504 (2001) 206 CLR 512 at 591-604 [203]-[237].

505 *Brodie* (2001) 206 CLR 512 at 595-596 [215], referring to *Ha v New South Wales* (1997) 189 CLR 465 at 503-504.

506 [2002] 1 AC 615 at 726 per Lord Hope of Craighead.

507 *Ha* (1997) 189 CLR 465 at 503-504.

508 [2002] 1 AC 615 at 683 per Lord Steyn, 704-705 per Lord Hoffmann.

509 *Arthur J S Hall* [2002] 1 AC 615 at 704, referring to *Southwark London Borough Council v Mills* [2001] 1 AC 1 at 9-10.

Parliament. Lord Hoffmann expressed the view that the course of legislation followed in England indicated that Parliament had accepted that judges had re-expressed the law in *Rondel* and might do so again. His Lordship went on[510]:

> "I do not think that your Lordships would be intervening in matters which should be left to Parliament. The judges created the immunity and the judges should say that the grounds for maintaining it no longer exist. Cessante ratione legis, cessat lex ipsa."

344 Lord Steyn[511] accepted that the question was "finely balanced" and that it would be "the easy route" for their Lordships to abdicate their responsibilities, although doing so would occasion a state of continuing uncertainty over a prolonged period[512]. He said that to do so would be "a disservice to the public interest". I agree with those reasons.

345 *The judicial function and immunities*: To the above I would add a final consideration to which I gave weight in *Brodie*[513]. That was another case involving an anomalous, unjust and unclear immunity from legal liability:

> "There are undoubtedly some activities which, of their very nature, justify the provision of a legal immunity from suit. However, they are, and should be, closely confined. When challenged, they should be capable of being fully justified by more than an appeal to legal history and past legal authority. When examined, some immunities have been rejected as unsustainable[514]. Others have been questioned and elsewhere overruled[515] ... The survival of the immunity must be tested, not simply by the facts of the present cases but by any circumstance, however extreme and culpable, where [the protected party] claims an immunity from liability …

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510 *Arthur J S Hall* [2002] 1 AC 615 at 704-705. The Latin maxim means: "the rationale of a legal rule no longer being applicable, that rule itself no longer applies".

511 *Arthur J S Hall* [2002] 1 AC 615 at 683.

512 *Arthur J S Hall* [2002] 1 AC 615 at 683.

513 (2001) 206 CLR 512 at 603-604 [235]-[237].

514 eg the immunity of landlords: *Jones v Bartlett* (2000) 205 CLR 166 at 238-240 [245]-[251].

515 eg of advocates: *Boland* (1999) 74 ALJR 209 at 236 [129]; 167 ALR 575 at 611; *Arthur J S Hall* [2002] 1 AC 615.

> [I]n the present case, the offence to fundamental notions of equality of parties before the law, which the anomalous immunity invoked by the respondents occasions, reinforces my conclusion that such immunity can no longer rest on a rule made by the judges."

346 *Conclusion: out-of-court immunity abolished*: I reach the same conclusion in the present case. I question why an anomalous immunity is not only *preserved* in Australia but now actually *enlarged* by a binding legal rule that will include out-of-court advisings and extend to protect solicitors as well as barristers. With all respect to those of the contrary view, I regard such a decision as legally erroneous, unwarranted and unworthy.

347 In taking this step, this Court adopts a posture that has never represented the law in most of the world. It extends an approach that has increasingly been rejected or closely confined by the judges of other common law countries. I reject the notion that the accomplished advocates of Australia, and their instructing solicitors, are in greater need of a legal immunity than their counterparts elsewhere. Or that the administration of justice in Australia, almost uniquely, requires such an immunity in order to function. Or that the law extends to Australian legal practitioners an absolute immunity from suit as claimed. Once again, this Court is out of step with the rest of the legal world. It shores up privileges and immunities that others have never allowed, or have now abandoned, as unjustifiable and legally unnecessary.

Orders

348 Special leave to appeal should be granted. The appeal should be allowed. The decision of the Court of Appeal of the Supreme Court of Victoria should be set aside. In lieu thereof, it should be ordered that leave to appeal to that Court be granted and the appeal allowed. The orders of the County Court of Victoria should be set aside. The matter should be remitted to that Court for trial consistently with these reasons. The respondents should pay the applicant's costs in this Court, in the Court of Appeal and in the County Court.

CALLINAN J.

Issue

349 This application for special leave, which was argued as if it were an appeal, raises the question whether the Court should overrule its decision in *Giannarelli v Wraith*[516] by abolishing the immunity of advocates, and, in some cases, solicitors, from suit in relation to the conduct of legal proceedings.

Facts

350 There has as yet been no trial in this matter. The facts before this Court are confined therefore to the untested allegations in the statement of claim and what is recorded as having occurred in open court during the criminal trial and the appeal to the Court of Appeal of Victoria.

351 The applicant was charged with rape on 11 February 1996. He retained the first respondent as his solicitor. The second respondent was retained by the first respondent as the applicant's barrister. On the basis of emphatic advice given by the respondents, the applicant pleaded guilty to the charge at a committal hearing on 11 July 1996. At trial, the applicant changed his plea to not guilty. The prosecution then sought to lead evidence of his plea of guilty at the committal hearing. Objection was taken to the tender. The trial judge, Judge Lewis, in dismissing the objection said this[517]:

> "And further, as part of its case the Crown relies on the accused's plea of guilty at the Magistrates' Court as being an admission by him to every element of the offence, including that element relating to his state of mind."

352 In his summing up the trial judge said this of the plea of guilty at the committal[518]:

> "[The applicant has submitted] further, that you should disregard his plea of guilty at the Magistrates' Court. He pleaded guilty for the wrong reasons, if you like, for convenience, on advice from his legal advisers and the police. And, as the evidence in this trial demonstrates, says the accused's counsel, he has a perfectly good defence to the charge.

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516 (1988) 165 CLR 543.

517 See *R v D'orta-Ekenaike* [1998] 2 VR 140 at 147.

518 See *R v D'orta-Ekenaike* [1998] 2 VR 140 at 147.

> The Crown has not been able to prove beyond reasonable doubt that the accused man had the necessary guilty mind."

353 No exception was taken to this part of the summing up by the second respondent. The applicant was convicted and sentenced to a term of imprisonment of three years on 3 March 1997. On 24 July 1997, the Court of Appeal of Victoria (Winneke P, Brooking JA and Vincent AJA) quashed the applicant's conviction and sentence by reason of error in the trial judge's direction and ordered a re-trial. In so holding, Winneke P (with whom Brooking JA and Vincent AJA agreed) said[519]:

> "Those directions were, in my view, less than sufficient. In a case where the Crown was contending that the applicant's plea of guilty at the lower court was conclusive evidence of his guilt, including the challenged issue of his state of mind, it was the judge's obligation to give the jury directions, carrying with them the full authority of his office, as to how they should approach such a significant issue. Like in every other case where an alleged confession of guilt has been challenged, his Honour, in my view, was bound to instruct the jury in the circumstances that, before they could use the evidence of the guilty plea as conclusive evidence of the applicant's guilt, they had to be satisfied beyond reasonable doubt that such plea was, and was intended to be, a true acknowledgment of the applicant's guilt of the crime charged; and that if, having regard to the evidence, they concluded that it was possible that he had entered the plea not because of a belief in his guilt but because he believed he would receive a suspended or more lenient sentence, then they should discard the plea of guilty from their consideration.
>
> Because the evidence of the plea of guilty was such a potent piece of evidence operating adversely to the applicant, the failure to give such a direction, in my view, has exposed the applicant to a risk of a substantial miscarriage of justice, a risk which cannot be saved by the operation of the proviso to s 568(1) of the Crimes Act."

354 At the re-trial, the applicant pleaded not guilty. The prosecution again sought to lead evidence of the plea of guilty at the committal. The trial judge (Judge Duckett) rejected the tender. In doing so his Honour said:

> "I am satisfied that the plea that was entered was as a result of considerable pressure applied by the accused's previous legal advisers and that it could well have been given in the mistaken belief that the accused had no defence in law to the charge of rape. In those circumstances and in

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519 *R v D'orta-Ekenaike* [1998] 2 VR 140 at 147.

> the exercise of the discretion in the court, I rule that the evidence is not admissible."

On this occasion, the applicant was acquitted.

355 On 4 September 2001, the applicant sued the respondents in negligence in the County Court of Victoria. He claimed that the advice to plead guilty given by the respondents before the committal hearing was given negligently, and that the respondents imposed undue influence on him to plead guilty. The applicant claimed, and it can readily be accepted, that he suffered loss and damage as a result of his imprisonment.

356 The first and second respondents applied for a stay of the applicant's proceedings by summons. On 13 December 2002, Judge Wodak of the County Court of Victoria granted the application with costs and stayed the proceedings pursuant to r 23.01 of the County Court Rules of Procedure in Civil Proceedings 1999 (Vic), which provides that a proceeding may be stayed if it does not disclose a cause of action, is scandalous, frivolous or vexatious, or is an abuse of the process of the Court.

357 The applicant applied to the Victorian Court of Appeal for leave to appeal[520]. That Court (Winneke P and Buchanan JA) refused the application and ordered that the applicant pay the respondents' costs for the reason that the action was governed by the decision of this Court in *Giannarelli v Wraith* and was therefore bound to fail.

The application to this Court

358 It is necessary first to say something, but fortunately very little in view of the careful review of it and its history by Gleeson CJ, Gummow, Hayne and Heydon JJ, of the legislation bearing on this case, the *Legal Profession Practice Act* 1958 (Vic) ("the LPPA"). Section 10(2) of the LPPA is, as a fixed time provision, one of those rather rare enactments that denies the legal fiction that decisions restating the common law are merely declaratory of it both prospectively and retrospectively. As are Gleeson CJ, Gummow, Hayne and Heydon JJ, I am of the view that the construction of both s 5 of the *Legal Profession Practice Act* 1891 (Vic) and s 10(2) of the LPPA adopted by the majority in *Giannarelli v Wraith*[521] was correct, but in any event that there would

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520 *D'orta-Ekenaike v Victoria Legal Aid* unreported, Victorian Court of Appeal, 14 March 2003.

521 (1988) 165 CLR 543 at 561 per Mason CJ, 570 per Wilson J, 587 per Brennan J, 590 per Dawson J.

be insufficient reason for this Court currently to depart from it even if its correctness were in doubt.

359 I now turn to the common law regarding barristers' and solicitors' liability in negligence which was also considered by this Court in *Giannarelli v Wraith*. The applicant submits in this Court that the House of Lords correctly identified in *Arthur J S Hall & Co v Simons*[522], reasons, as valid for Australia as for the United Kingdom, why advocates should no longer enjoy immunity of any kind from suit. Before dealing with those submissions, I should restate the common law principle for which *Giannarelli v Wraith* relevantly stands. It is that neither a barrister nor a solicitor will be liable for work done in court, or work done out of court that is connected with work done in court.

360 In *Arthur J S Hall & Co v Simons*, the House of Lords discussed and effectively rejected the reasons which hitherto had long been regarded as necessitating the existence of the immunity. Their Lordships took the view that benefits would flow from the lifting of the immunity: it would bring an end to an anomalous exception to the basic principle that there should be a remedy for a wrong[523]. This assertion implies that advocates alone escape liability for negligent error. But this is not so. Journalists and publishers regularly negligently inflict harm upon persons about whom they write or speak. The law's tenderness for free speech however affords them a practical immunity, by way of a defence of qualified privilege, from suit in many cases. Auditors may not be successfully sued by financiers in respect of negligent auditing[524]. Many statutory bodies, including the Australian Crime Commission[525], the Australian Securities and Investments Commission[526], the Australian Competition Tribunal[527], the Crime and Misconduct Commission[528] in Queensland and the Independent Commission Against Corruption[529] in New South Wales enjoy a

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522 [2002] 1 AC 615.

523 [2002] 1 AC 615 at 682 per Lord Steyn.

524 *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241.

525 *Australian Crime Commission Act* 2002 (Cth), s 59B.

526 *Australian Securities and Investments Commission Act* 2001 (Cth), s 246.

527 *Trade Practices Act* 1974 (Cth), s 158.

528 *Crime and Misconduct Act* 2001 (Q), s 335 (although the protection from liability is not absolute and does not cover negligent acts and omissions).

529 *Independent Commission Against Corruption Act* 1988 (NSW), s 109.

statutory immunity despite their capacity to cause great harm to people and corporations by their negligence. In this country, military officers may not be sued for damages for negligently causing harm to servicepeople during active service[530]. Jurors and witnesses may not be sued in respect of any negligence by them in court. Judges and judicial officers may not be sued in negligence despite that negligent error by them is capable of causing very great harm indeed. Immunity of advocates is not therefore anomalous. For the advancement and preservation of a free and democratic society, numerous immunities exist and are justifiable. They exist for, and in, a broader public interest, even though the result may be the denial of a remedy for a wrong. This is so even though modern judicial tendency inclines against any extension of those categories of immunity[531].

361 Lord Steyn referred to, and thought as arguing against immunity, vast changes in legal practice. It has become more commercialised: barristers may now advertise. They may enter into contracts for legal services. They must carry insurance. Modern society is consumerist. People have a greater awareness of their rights. A barrister is not obliged to inform a client in advance of the existence of any immunity[532].

362 Let it be accepted for the sake of the argument, that the changes to which his Lordship referred may be occurring in varying degrees in this country although so far advertising by barristers is either proscribed or heavily restricted. In my respectful opinion, those sorts of changes do not however justify the dismantling of the immunity that is available to advocates. To treat an entitlement of barristers to advertise (if it were available to them) as giving rise to and justifying the removal of immunity would be, in my opinion, to compound the sort of harm which New South Wales has recently sought to cure[533]. A profession which undertakes its work in public, adversarially and competitively, in the presence of judges who supervise the whole proceedings, and may

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530 *Shaw Savill and Albion Co Ltd v The Commonwealth* (1940) 66 CLR 344 at 361 per Dixon J (with whom Rich ACJ and McTiernan J agreed); *Groves v The Commonwealth* (1982) 150 CLR 113 at 117 per Gibbs CJ, 126 per Stephen, Mason, Aickin and Wilson JJ.

531 *Cattanach v Melchior* (2003) 215 CLR 1 at 106 [295] per Callinan J; see also at 29 [59] per McHugh and Gummow JJ.

532 *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 at 682.

533 See reg 139 of the Legal Profession Regulation 2002 (NSW) inserted by Sched 1 to the Legal Profession Amendment (Personal Injury Advertising) Regulation 2003 (NSW) restricting advertising by barristers and solicitors of their willingness to or capacity to undertake claims for personal injury.

discipline its members, and whose engagement is generally by other professionals, has no need to, and should not, in my opinion, be obliged or encouraged to advertise. That it happens cannot displace the powerful reasons for the retention of the immunity to which I will refer. Even if it could, it would provide no basis for lifting the immunity of those barristers who choose not to advertise.

363 Whether barristers are compelled to, or would prudently, in any event, carry insurance is not in my view relevant. Insurance policies are written no doubt upon the basis of the current law, and that is that the immunity exists. Neither the House of Lords nor this Court had any evidence before it of the implications of increases in premiums that would follow from the abolition of the immunity. The law has traditionally, and in my opinion correctly, generally taken the view that the existence or otherwise of insurance should not affect the outcome of a case. And likewise its availability or otherwise should not influence the formulation of common law principle in respect of which many other factors have a more relevant and important role to play.

364 Let it also presently be accepted that people may have a greater awareness of their rights, and, because they form part of a consumerist society, are more ready now to pursue them than in the past. If that be so, people also no doubt are in a position to, and do exercise a greater degree of discernment and control over the conduct of their cases by their advocates in court. That many people may have embraced consumerism provides no more reason to enable them to pursue their advocates in negligence than that an increasingly large number of people may sell and purchase shares, would provide a reason for shareholders to sue the Australian Securities and Investments Commission in negligence.

365 It follows that I do not think that any societal and related changes, actual or assumed, of themselves justify the dismantling of an advocates' immunity. But the applicant also submits that the basis for the existence of the immunity in the first place is, and always has been, unsound. Among other things, the applicant again relies for this submission upon the analysis and rejection by Lord Hoffmann in *Arthur J S Hall & Co v Simons* of the arguments in favour of the immunity.

366 Before considering those arguments I would make these observations. Litigation in our common law system is adversarial. It involves the presentation of the facts and law in the best possible light for the party on whose behalf the presentation is made. Cross-examination requires of counsel careful preparation but it is still both a technical skill and an art. Decisions with respect to it have often to be made instantaneously, and, accordingly, in part at least, intuitively. It is frequently impossible to know whether a question in chief or cross-examination should have been asked, until after it has been answered. The material with which advocates have to deal in every case is human material, not the tangible human material of tissue, bone and blood, but of mind and memory.

Counsel can rarely be completely certain at the beginning, of the actual way in which the facts are going to fall out by the end of the trial. Every case requires the making of strategic and tactical decisions. A major aspect of the successful advocate's craft is persuasiveness. Persuasiveness is difficult to define and therefore difficult to teach. Its form may vary according to the nature of the case to which it is to be brought. Indeed, frankness requires that it be acknowledged that it may vary according not only to the court or tribunal in which it is to be practised, but also to the personal composition of that tribunal or court on the day. Despite what other professionals may claim, the practice of advocacy is unique in this and other respects. True it is that surgeons for example, have to make instantaneous judgments, and that the materials upon which they are working do not always respond predictably, but there are only a certain number of procedures or courses which may be taken, and provided a surgeon adopt a reasonable one or other of them, the surgeon will not be regarded as having been negligent. The days have long passed (some 2400 years or so) since medicine could be described as simply an art and not largely or entirely a science[534].

367 There is a further relevant consideration. Although the common law in general changes only incrementally, there have in recent times been changes of a radical and even sudden kind. Very recent examples are the decisions of this Court in *Brodie v Singleton Shire Council*[535] and *Lange v Australian Broadcasting Corporation*[536]. In the common law, precedential system in which Australian advocates work, the legal fiction to which I earlier referred, that what this Court decides has in effect always been the law, prevails. In consequence, there is a more than merely theoretical risk, that if an advocate may be sued, he or she could be sued for not having pursued in court, a new claim, for example, for non-feasance against a local authority, even before *Brodie* was decided by this Court. Take also the consequences of this case if the applicant's arguments were to succeed and *Giannarelli v Wraith* were accordingly to be overruled. Any advocate who had failed to pursue in court for a person in the same circumstances as this applicant, a claim for damages against the advocate acting for him at his committal, would arguably be liable in negligence for not anticipating the decision for which the applicant here contends. Even a failure to anticipate a small incremental change could be hazardous. All common lawyers are supposed to understand that the common law changes at least, incrementally. Potential liability for not making adventurous claims in pre-emption of possible

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534 Hippocrates said, "Life is short, and the Art long; the occasion fleeting; experience fallacious, and judgment difficult": quoted in *The Theory and Practice of Medicine*, (1964) at 292.

535 (2001) 206 CLR 512. See also the discussion in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 329-330 [336].

536 (1997) 189 CLR 520.

change could well produce an undesirable and expensive deluge of extravagant claims, with a corresponding impact upon the work of the courts.

368 It is not uncommon for this Court to speak with more than one voice. Of the 14 decisions reported in vol 211 of the Commonwealth Law Reports, there were two cases in which the Court divided 5 to 2, one case in which the decision was by a majority of 4 to 3, and no cases in which the Court delivered a joint unanimous judgment. The law and the outcome in any particular case are therefore frequently other than pellucid and predictable[537].

369 Furthermore, in-court error, so called, is not always exclusively the error of the advocate. Sometimes, the error is exclusively the error of the court. *Boland v Yates Property Corporation Pty Ltd*[538] is a case in point. It was exclusively judicial error there which gave rise to a whole train of expensive proceedings in negligence against a barrister and solicitors who were ultimately exonerated by this Court. The trigger for those proceedings was a misapprehension on the part of the Court of Appeal of New South Wales as to the true nature of "special value" in a valuation case[539], a misapprehension which was repeated by the Full Court of the Federal Court. This case itself took a quite different turn on the second trial, the judge there rejecting the tender of the plea which had been received in the first trial. Who was right; the first or the second trial judge? That opinions on these questions can reasonably differ highlights the problem. There are few absolute truths in the law and litigation. Why, it may be asked, should the advocate be singled out as liable when witnesses, jurors and judges are not?

370 The factors to which I have referred justify the existence of the immunity. The realities of them cannot however be divorced from other, even more compelling reasons for the existence and the continuation of the immunity. Three of these were stated very fully by Mason CJ in *Giannarelli v Wraith*[540] and need no repetition, other than by reference, by me: the advocate's overriding duty to an independent authority, the court; the risk, expense and vexation of collateral proceedings; and, the special and unique difficulty, dealing as

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537 *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209 at 272-273 [310]; 167 ALR 575 at 659.

538 (1999) 74 ALJR 209; 167 ALR 575.

539 *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209 at 254 [224]-[227], 261-262 [255]-[260], 270 [298], 273-274 [313]-[318], 275 [326], 275-276 [331]-[334], 276 [338], 279-280 [355]-[359]; 167 ALR 575 at 634-635, 644-646, 656, 660-665, 669-670.

540 (1988) 165 CLR 543 at 555-559.

advocates do, with matters not subject to scientific laws and measurement, in drawing a line between non-negligent errors of judgment and negligent errors of judgment in particular situations. To the last I would only add this. Any advocate who is experienced in trial work before both judges and jurors knows only too well that many decisions have to be made, often on a second by second basis, as to what should be said or asked, and how it should be said or asked. And that which has been said or asked may look quite different, either much better or worse than it seemed at the time, after all the evidence has been led, the submissions made, and the judgment or verdict given. Few other professions, teaching, psychology and psychiatry are perhaps some, require their practitioners to attempt to see into the minds, and anticipate the thinking, reactions, and opinions of other human beings, as does the profession of advocacy.

371 The truths to which I have referred are regrettably not fully understood, and, it must also be observed, are often not accurately represented. This in part at least, explains the suspicion that abounds in some sections of the public but which Lord Hoffmann in *Arthur J S Hall & Co v Simons* thought a further factor justifying the withdrawal of the immunity[541].

372 Because *Giannarelli v Wraith* is a recent decision of this Court, and in my opinion is, with respect, plainly right in its treatment of the common law as well as the relevant legislation, it is unnecessary for me to do more than touch upon some of the other reasons which compel the continuation of the immunity.

373 By contrast with the work of other professionals, the cause and effect of something done in the course of advocacy are difficult to explore fully and satisfactorily. This is so because of the overwhelming public importance in the isolation and consequential inscrutability of juries, the independence of judges, and the inability therefore of either a plaintiff client or a defendant advocate to call the judge, or the jurors to prove or disprove causation.

374 Risk of action does no doubt conduce to the defensive practice of a profession, in turn leading to delay and unnecessary expense. That this has not been thought sufficient reason to confer immunity upon other professionals does raise the question whether it should do so in relation to lawyers. Standing alone, it might not. But there are other, related considerations in the case of advocate lawyers. Principally they are the cost and the desirability of finality of litigation to which I give separate attention. The fact that decisions holding professionals liable in negligence may have produced unnecessarily defensive practices is to be regretted, but provides no sufficient basis to treat advocates in the same way as other professionals. The remedy, if one is warranted, for unnecessarily defensive

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541 [2002] 1 AC 615 at 689.

professional practice elsewhere, does not lie in the imposition of liability upon lawyers in respect of their conduct of litigation.

375 It has been suggested that the invention of case management and a gradual departure from conduct of litigation by the oral word exclusively have greatly relieved the burden upon the advocate: that much that had to be done previously, intuitively and initially instantaneously, can be, and is now to a substantial extent done in the calm and reflective atmosphere of chambers[542]. Case management is not however novel. In no fewer than three Australian jurisdictions, New South Wales, Queensland and Victoria, legislation enabling the adoption of special and expeditious procedures in commercial cases has been in force for many years[543]. Available judicial decree there even extended to dispensation with the rules of evidence[544] and compulsion of a party to make admissions with respect to any question of fact relevant to the action[545]. This Australian legislation generally had as its model the rules and practice of the Commercial Court established in the United Kingdom in 1895 as part of the Queen's Bench Division to expedite the resolution of commercial and mercantile disputes[546]. Not only therefore is case management a process which has been available and used for many years, but it is also hardly a process which has significantly reduced the burden upon advocates[547]. In some ways it has increased it. Case management is designed among other things to expedite litigation. Decisions still have to be made quickly and under pressure. The oral tradition has not been abandoned. The provision in advance, of long, written proofs or affidavits of evidence-in-chief which in all probability have been settled by the lawyers for the parties, can make cross-examination more difficult, and indeed its effectiveness, critical to the

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542 *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 at 724 per Lord Hope of Craighead.

543 *Supreme Court Act* 1970 (NSW), s 53 and Supreme Court Rules 1970 (NSW), Pt 14 r 1; Supreme Court (Miscellaneous Civil Proceedings) Rules 1998 (Vic), O 2; *Commercial Causes Act* 1910 (Q), s 3.

544 See for example, *Supreme Court Act* 1970 (NSW), s 82(1)(a) and Supreme Court Rules 1970 (NSW), Pt 14 r 2; Supreme Court (General Civil Procedure) Rules 1996 (Vic), r 40.05; *Commercial Causes Act* 1910 (Q), s 4(5)(b).

545 See for example, *Supreme Court Act* 1970 (NSW), s 82(1)(b); *Commercial Causes Act* 1910 (Q), s 4(5)(e).

546 *Halsbury's Laws of England*, 4th ed reissue, vol 37, par 1370. See also Scrutton, "The Work of the Commercial Courts", (1921) 1 *Cambridge Law Journal* 6.

547 No case was referred to which suggested that an advocate's immunity was less in a commercial cause.

outcome of the case[548]. Too vigorous a form of case management may be productive of a higher risk of judicial error and the need therefore for even finer judgment on the part of advocates[549].

376 In *Arthur J S Hall & Co v Simons*, Lord Steyn acknowledged that the "cab rank" rule requiring barristers to undertake cases in fields in which they practise for the fees they customarily charge was a "valuable professional rule"[550]. His Lordship however added this:

> "But its impact on the administration of justice in England is not great. In real life a barrister has a clerk whose enthusiasm for the unwanted brief may not be great, and he is free to raise the fee within limits. It is not likely that the rule often obliges barristers to undertake work which they would not otherwise accept."

377 It would be wrong for a barrister, or a barrister's clerk in Australia, and it is not the practice therefore in this country, to raise a barrister's fee as a device to avoid an unwanted brief. Furthermore, in only two of the States in which there is a functionally divided legal profession, do barristers employ clerks. And even in those latter, the role of the clerk is increasingly administrative, and removed from the fixation of fees. In this country, I do not doubt that the removal of the immunity would intrude upon and diminish the utility of the valuable cab rank rule. Related to the utility, and therefore the desirability of the retention of the cab rank rule, is the practice in Australia, particularly in this Court, of the undertaking of work on a pro bono basis on behalf of indigent parties. Legal aid funds are likely to continue to be scarce. In consequence, the Court's reliance upon the altruism of advocates in offering their services on a pro bono basis is unlikely to decrease. The removal of the immunity has a real capacity to deny the courts access to these services.

378 The immunity in varying forms has existed for more than 200 years. Its existence and justification have been much debated over the years. Legislatures

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548 The enthusiasm for case management is not universal. Among its critics is Professor Michael Zander QC who has written persuasively about a number of its defects (see "The Woolf Report: Forwards or Backwards for the New Lord Chancellor?", (1997) 16 *Civil Justice Quarterly* 208; "Does Case Management Work?", (1997) *New Zealand Law Journal* 151). It may be proper to regard it in its most radical or intrusive forms as still experimental.

549 *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 is an example of the correction by this Court of too rigid an approach to case management at first instance and in the Full Court of the Federal Court.

550 [2002] 1 AC 615 at 678.

have not moved to abolish it. In particular, the Victorian Parliament chose not to abolish or regulate the immunity. This is so notwithstanding that, after *Giannarelli v Wraith* was decided, itself a decision in a Victorian case, the Law Reform Commission of Victoria had recommended legislative removal of the immunity[551]. Instead, by s 442(1) of the *Legal Practice Act* 1996 (Vic), the legislature expressly legislated that nothing in that Act abrogates any immunity from liability for negligence enjoyed by legal practitioners before the commencement of the section. Far ranging changes reducing common law liability for negligence have recently been enacted[552], but this immunity has not been abrogated. Practices and legal principles which have evolved over long periods and under scrutiny from time to time are not lightly to be discarded: it would be presumptuous for current law makers to think or act differently.

379 There are other matters which require separate discussion. One is the duty that advocates owe to the court. It is a primary duty and transcends the duty owed to the client. That it transcends the latter does not mean that it is always easy for the advocate to distinguish between, and give preference to the primary duty in cases of doubt. The need for observance of the duty to the court as a primary duty requires that there be no ambiguity about what may flow from it, in particular, a claim, however misconceived, by the client against the advocate.

380 What I have said justifies the retention of the immunity. That I have not referred in detail to other justifications for it does not mean that they are not relevant and important. The risk of conflicting judgments, the need for freedom of expression and candour in court, the invidiousness of making comparisons between actual and notional reactions by judges and juries to arguments and counsel's conduct of a case, and the discouragement of relitigation all lead to the conclusion that in the public interest the immunity of advocates is necessary for the orderly functioning of the system of justice in this country. As to the last, I also agree with what Gleeson CJ, Gummow, Hayne and Heydon JJ have said at [34]-[36] of their Honours' reasons and would add only this. The law has always frowned upon prolonged litigation pursued to produce a different result from what has already been decided. What was said in relation to the doctrine of res judicata is relevant here[553]:

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551 *Access to the Law: Accountability of the Legal Profession*, Report No 48, (1992) at 50.

552 See for example, *Wrongs (Amendment) Act* 2000 (Vic), *Wrongs and Other Acts (Public Liability Insurance Reform) Act* 2002 (Vic), *Wrongs and Limitation of Actions Acts (Insurance Reform) Act* 2003 (Vic), *Wrongs and Other Acts (Law of Negligence) Act* 2003 (Vic).

553 *Jeter v Hewitt* 63 US 352 at 364 (1859) per Campbell J.

> "[T]he maintenance of public order, the repose of society, and the quiet of families, require that what has been definitely determined by competent tribunals shall be accepted as irrefragable legal truth."

381 The reasons which I have given for the retention of the immunity are reasons also for its operation upon work done out of court which leads to a decision affecting the conduct of a case in court. It will be apparent from my rejection of the reasons asserted for dismantling the immunity that I disagree with the very recent decision of the New Zealand Court of Appeal[554].

382 So far as the second respondent is concerned, the position is clear. For the reasons stated by Judge Wodak and by the Court of Appeal, the relevant work had a connexion, indeed an intimate connexion, with the conduct of the case in court. Advice as to a plea of guilty given shortly prior to a committal could not fairly be characterized otherwise. It went to the heart of the proceedings in court: it was fundamental to the conduct of them.

383 Should a distinction be drawn however between the first respondent as the instructing solicitor who joined in the advice alleged to have been given, and the second respondent as the advocate? Are the respective positions of the respondents different by reason of their different roles as barrister and solicitor?

384 In my opinion, the first respondent's submissions that the immunity of a solicitor who advises jointly with counsel cannot be considered in isolation from the immunity of counsel, should be accepted. A decision of the kind taken here, as with many decisions as to the conduct of the case, is taken after discussion and is usually taken jointly. What may have started as a tentative suggestion by one of the lawyers may well emerge as a firm joint decision, a separate author of which cannot reasonably be identified. A solicitor, instructing in litigation owes the same duties as the advocate to court and client. The reasons favouring immunity of advocates in work connected with the conduct of litigation accordingly require that the same immunity obtain for solicitors.

385 The existence of the immunity does not depend upon whether the proceedings are civil or criminal. Nor does anything turn on the fact that the advice here was given in relation to committal proceedings. As this Court said in *R v Murphy*[555]:

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554 *Lai v Chamberlains* unreported, Court of Appeal of New Zealand, 8 March 2005.

555 (1985) 158 CLR 596 at 616.

> "Even though they are properly to be regarded as non-judicial in character, committal proceedings themselves traditionally constitute the first step in the curial process, possibly culminating in the presentation of the indictment and trial by jury. They have the closest, if not an essential, connexion with an actual exercise of judicial power: see *Ammann v Wegener*[556]; *Barton v The Queen*[557]."

386 Only two other matters require mention. The first is that in his pleadings, the applicant asserts that "undue pressure" was imposed by the respondents. The Court of Appeal was correct in holding that this could not give rise to a cause of action. In any event, the particulars indicate that the allegation is effectively of emphatic, perhaps even very emphatic, advice. As to that, it may simply be said that advice that is not clear, is advice that may not be worth having.

387 The applicant sought to rely upon *Rogers v Whitaker*[558]. He contended that he was not, but should have been, warned that a plea of guilty at the committal could have adverse effects at trial if he sought to withdraw or change his plea. It must have been unmistakably clear to the applicant that the entering of a plea of guilty was ultimately his personal decision and that it would have for him the most serious of consequences. Anyone pleading guilty must have known that. In any event, an allegation of a "failure to advise", not materially different from the allegation made here, was rejected in *Giannarelli v Wraith*.

388 I would grant the application for special leave to appeal, treat the appeal as having been instituted and heard but dismiss it with costs.

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556 (1972) 129 CLR 415 at 437.

557 (1980) 147 CLR 75 at 99.

558 (1992) 175 CLR 479.