

GIANNARELLI v WRAITH*

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

I INTRODUCTION

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

II HISTORY AND SCOPE OF THE IMMUNITY

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

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

¹ (1988) 165 CLR 543.

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

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

⁴ [1969] 1 AC 191.

⁵ [1980] AC 198.

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

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

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

III *GIANNARELLI V WRAITH*

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

Marks J, at first instance, held that the respondents were not immune from suit by virtue of s 10(2) of the *Legal Profession Practice Act 1958* (Vic).¹² The respondents' appeal to the Full Court¹³ was allowed and the appellants then appealed to the High Court. The appellants' submissions before the High Court were that s 10(2) imposed liability on the respondents for negligence or alternatively that the respondents were subject to a common law duty of care. A majority of the Court¹⁴ dismissed the appeal and held that an advocate is not liable for negligence in respect of in-court work. Nor, according to the majority, did s 10(2) have the effect of imposing a common law duty of care.

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

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

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

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

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

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

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

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

¹⁴ Mason CJ, Wilson, Brennan and Dawson JJ.

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

- (2) Every barrister shall be liable for negligence as a barrister to the client on whose behalf he has been employed to the same extent as a solicitor was on the twenty-third day of November One thousand eight hundred and ninety-one¹⁶ liable to his client for negligence as a solicitor.

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

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

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

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

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

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

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

¹⁹ *Ibid* 603 (Toohy J), 587 (Deane J).

²⁰ *Ibid* 604.

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

²² *Ibid* 588.

IV THE CASE FOR CHANGE

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

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

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

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

²³ *Boland* (1999) 167 ALR 575, 617 (Kirby J).

²⁴ [2000] 3 All ER 673.

²⁵ *Arthur JS Hall & Co v Simons* [1999] 3 WLR 873.

²⁶ [1969] 1 AC 191.

²⁷ (1999) 167 ALR 575.

²⁸ *Ibid* 613.

²⁹ *Ibid* 612.

³⁰ *Ibid* 600 (Gleeson CJ), 603 (Gummow J), 624 (Hayne J).

³¹ *Ibid* 602-3.

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

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

V THE RATIONALES FOR THE IMMUNITY

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

A *The Special Role of the Advocate*

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

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

³² *Ibid* 670.

³³ *Giannarelli* (1988) 165 CLR 543, 555 (Mason CJ).

³⁴ *Ibid* 556 (Mason CJ).

³⁵ *Hall* [2000] 3 All ER 673, 690 (Lord Hoffmann).

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

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

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

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

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

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

³⁶ Ibid 691 (Lord Hoffmann); *Giannarelli* (1988) 165 CLR 543, 594 (Dawson J); *Boland* (1999) 167 ALR 575, 611 (Kirby J).

³⁷ *Giannarelli* (1988) 165 CLR 543, 594.

³⁸ Ibid 573 (Wilson J); *Hall* [2000] 3 All ER 673, 680 (Lord Steyn), 697 (Lord Hoffmann), 713-14 (Lord Hope), 738 (Lord Hobhouse).

³⁹ *Hall* [2000] 3 All ER 673, 680 (Lord Steyn).

⁴⁰ *Giannarelli* (1988) 165 CLR 543, 580 (Brennan J).

⁴¹ *Hall* [2000] 3 All ER 673, 693-4 (Lord Hoffmann).

⁴² Ibid 684 (Lord Steyn).

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

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

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

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

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

As for the protection of existing principles,

⁴³ *Giannarelli* (1988) 165 CLR 543, 557 (Mason CJ), 594 (Dawson J).

⁴⁴ *Ibid* 557 (Mason CJ), 573 (Wilson J), 579 (Brennan J).

⁴⁵ *Hall* [2000] 3 All ER 673, 717 (Lord Hope).

⁴⁶ *Ibid* 683 (Lord Steyn).

⁴⁷ *Ibid*.

⁴⁸ *Giannarelli* (1988) 165 CLR 543, 574 (Wilson J); *Hall* [2000] 3 All ER 673, 699 (Lord Hoffmann).

⁴⁹ *Hall* [2000] 3 All ER 673, 691–3 (Lord Hoffmann), 736 (Lord Hobhouse).

⁵⁰ Peter Heerey, 'Looking over the Advocate's Shoulder: An Australian View of *Rondel v Worsley*' (1968) 42 *Australian Law Journal* 3, 8.

⁵¹ *Giannarelli* (1988) 165 CLR 543, 573 (Wilson J) (emphasis in original), see also 557 (Mason CJ). See also *Hall* [2000] 3 All ER 673, 737 (Lord Hobhouse).

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

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

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

B *Relitigation of Collateral Matters*

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

⁵² *Giannarelli* (1988) 165 CLR 543, 558-9 (Mason CJ).

⁵³ *Ibid* 595.

⁵⁴ *Ibid* 557-8 (Mason CJ), 573 (Wilson J); *Hall* [2000] 3 All ER 673, 739 (Lord Hobhouse), 714 (Lord Hope).

⁵⁵ *Giannarelli* (1988) 165 CLR 543, 596 (Dawson J).

⁵⁶ *Hall* [2000] 3 All ER 673, 680 (Lord Steyn); *Giannarelli* (1988) 165 CLR 543, 607-8 (Toohey J).

⁵⁷ *Hall* [2000] 3 All ER 673, 697-9 (Lord Hoffmann).

⁵⁸ *Giannarelli* (1988) 165 CLR 543, 558 (Mason CJ), 574 (Wilson J).

⁵⁹ *Ibid* 595 (Dawson J).

⁶⁰ *Ibid*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VI OTHER JURISDICTIONS

While the immunity existed until very recently in the United Kingdom, and continues to exist in New Zealand,⁷² it does not exist in either Canada,⁷³ the United States⁷⁴ or countries in the European Union.⁷⁵ One would expect that Canada, in particular, would provide valuable empirical evidence as to whether the fears related to the abolition of the immunity are soundly based or, as some found, 'unnecessarily pessimistic'.⁷⁶ Given that the nature of the public policy arguments is such that 'one is bound to a considerable extent to rely on intuitive judgments',⁷⁷ it is surprising that this point has been cursorily dismissed by some judges on the basis that the legal profession is differently structured in those jurisdictions.⁷⁸

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

⁷¹ Ibid 748 (Lord Hobhouse).

⁷² *Rees v Sinclair* [1974] 1 NZLR 180.

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

⁷⁴ *Ferri v Ackerman*, 444 US 193 (1979).

⁷⁵ *Hall* [2000] 3 All ER 673, 682–3 (Lord Steyn).

⁷⁶ Ibid 683 (Lord Steyn), see also 695–6 (Lord Hoffmann). See also *Boland* (1999) 167 ALR 575, 614–15 (Kirby J).

⁷⁷ *Hall* [2000] 3 All ER 673, 680 (Lord Steyn).

⁷⁸ Ibid 721 (Lord Hope); *Giannarelli* (1988) 165 CLR 543, 555 (Mason CJ), 577–8 (Wilson J), 596 (Dawson J).

⁷⁹ *Courts and Legal Services Act 1990* (UK) c 41, s 4. Prior to 1990 barristers were not subject to such orders.

⁸⁰ *Hall* [2000] 3 All ER 673, 695.

VII A MATTER FOR PARLIAMENT?

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

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

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

VIII CONCLUSION

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

⁸¹ Law Reform Commission of Victoria, *Access to the Law: Accountability of the Legal Profession*, Discussion Paper No 24 (1991) 22-3.

⁸² Hulls, above n 3.

⁸³ *Hall* [2000] 3 All ER 673, 735-6 (Lord Hobhouse).

⁸⁴ *Ibid* 704 (Lord Hoffmann).

⁸⁵ *Boland* (1999) 167 ALR 575, 607 (Kirby J).

⁸⁶ *Giannarelli* (1988) 165 CLR 543, 576 (Wilson J).

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

THE HON GEORGE HAMPEL* AND JONATHAN CLOUGH†

* QC; LLB (Melb); Professor of Advocacy and Trial Practice, Faculty of Law, Monash University; former Justice of the Supreme Court of Victoria.

† BSc, LLB (Hons) (Monash), LLM (Cantab); Senior Lecturer, Faculty of Law, Monash University.