TITLE: "**Doctors, Lawyers and Immunity From Suit: What's Fair for One Should be Fair for All?" for the Medico-Legal Society of Victoria**

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Introduction

Ladies and Gentlemen:

Most of you in the audience are either trained doctors or lawyers. Some of you even practise in both fields. It is with some regret however that I announce the outcome of the latest Morgan Gallup poll. One of these professions is held in very high esteem by the community. The other ranks alongside used car salesmen and politicians. No prizes for guessing which is which.

There are some sophisticated theories as to why lawyers fare so badly in the popularity stakes. The "dentist theory" says we encounter lawyers, like dentists, at unhappy and expensive times in our lives – and we transfer that pain into dislike and anger for the person who delivered the service.

Not a bad theory. But it can't be right. Dentists are not especially unpopular in Australia, even if most people do not particularly enjoy the experience of visiting one.

Personally, I like the "bartender theory".

As one US legal critic puts it, "many of us head for the bartender who mixes the stiffest drinks".[2] In other words, clients actively seek out lawyers who will get them what they want. For instance, (or so the theory goes) the revengeful spouse looks for the "take-no-prisoners" divorce lawyer. The creditor looks for the lawyer who will give their debtor the hardest time; and "the person nursing a dubious personal injury claim", looks for the lawyer who is "best at exaggerating".[3]

Judging from some recent media reports, lawyers may be even less popular than usual with some members of other professions at the moment. Doctors in particular. I refer to the High Court's recent decision to retain the lawyer's historical privilege of

[1] The author acknowledges the assistance of her Research Associate, Natalya Dingley, BA JD, in the preparation of the speech.
[2] Walter K. Olson, *Dentists, Bartenders, and Lawyer Unpopularity*, Remarks made at a Speech delivered at a (US) Federalist Society national convention in 1999.
[3] *Ibid.*

advocate's immunity in *D'Orta-Ekenaike v Victoria Legal Aid*.[4] It has had many professionals, in particular medical practitioners, raising the question: "why is that *I* can be sued and lawyers, for the most part, cannot be?"

It is an interesting question. Particularly when one recalls the fact that the law forced the medical profession to accept negligence liability quite a few decades ago now. Some disgruntled doctors have been heard to say: "How would lawyers like it if their professional actions were trawled over years later, and they were held liable for not ensuring their client understood every risk implicit in a particular case?"[5] The threat of litigation is reported to be a persistent worry, particularly in high risk litigation areas like obstetrics.

Justice Kirby, the only one of the seven Justices to dissent in *D'Orta-Ekenaike*, put the problem the problem in the following way:

> "I just have to tell you ... the rest of the community, including the rest of the professional community, regards this as the courts looking after their own."

This is doubtless not true from the standpoint of the High Court Justices. But that would be the perception.

So how and why are doctors not similarly protected from suit? And why are lawyers the last profession to have immunity from negligence claims?

The first question leads us to a brief explanation of the history of medical negligence and where it stands now, particularly in light of recent tort reforms. The second will be answered by focussing on *D'Orta-Ekenaike*, and what arguments led the court to affirm advocate's immunity.

Medical Negligence

The 1930's English decision, *Donoghue v Stevenson*,[6] was the case that boosted consumer rights; the first to establish that product providers owe consumers a duty of care. "Product providers" expanded to include service providers (according to Lord MacMillan in that case, "the categories of negligence are never closed").[7] The effect of *Donoghue* was such that by the 1950's, the courts in Australia and elsewhere in the common law world were seeing a flow of cases against hospitals and doctors.

Initially, the patients were rarely successful.

Lord Denning, a prominent English Judge, was able to explain why that was the case, giving voice to a widely held opinion amongst the judiciary and the community when he said:

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[4] *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 214 ALR 92.
[5] Michael Pelly, 'Time, Gentlemen, Please', *The Sydney Morning Herald*, 22/04/05.
[6] *Donoghue v Stevenson* [1932] AC 562.
[7] *Ibid.* at 619, following on from Asquith LJ in *Candler v Crane Christmas & Co* [1951] 2 KB 164.

> "In a professional man, an error of judgement is not negligent".[8]

and:

> "If (medical practitioners) are found to be liable… whenever anything untoward happens, it would do a great disservice to the profession itself…".[9]

Such a benevolent view towards the liability of doctors in negligence however did not last. The case that changed everything was the seminal 1957 English decision, *Bolam v Friern Hospital Committee*.[10] It was that case that established the standard of care owed by health providers and how it was to be determined.[11] MacNair J laid down the test, known as the *Bolam* principle or test in the following terms:

> "The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill, it is well-established that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art".[12]

In other words:

> "The *Bolam* principle may be formulated as a rule that a doctor is not negligent if he acts in accordance with a practice accepted at the time as proper by a responsible body of medical opinion even though other doctors adopt a different practice. In short, the law imposes a duty of care: but the standard of care is a matter of medical judgment."[13]

In Australia however, the *Bolam* principle was finally rejected by the High Court in 1992 in *Rogers v Whitaker*.[14] The decision in *Rogers* has led to some criticism, particularly amongst medical practitioners, that the departure from the test set down in *Bolam* has resulted in a standard of care which is now set too high.

But the Court resolved in *Rogers* that it was more appropriate for the courts – rather than the profession itself - to adjudicate on what is the appropriate standard of care after giving weight to "the paramount consideration that a person is entitled to make his [or her] own decisions about his [or her] life".[15] The nature of particular risks presented to patients and their foreseeability were determined to be matters not exclusively within the domain of medical knowledge or expertise.[16] The joint judgment[17] in *Rogers* noted:

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[8] *Whitehouse v Jordan & Anor.* (1980) 1 AII. E.R. 650 (CA), per Lord Denning MR. In 1981, however, the House of Lords disagreed with Lord Denning's view in the Court of Appeal. Lord Fraser of Tullybelton expressed the view that what Lord Denning had meant to say was that 'an error of judgement was not *necessarily* negligent'. See *Whitehouse v Jordan* [1981] 1 All ER 267 (HL) at 281.
[9] *Ibid.*
[10] *Bolam v Friern Hospital Committee* [1957] 1 W.L.R. 582.
[11] *Bolam v Friern Hospital Committee* [1957] 1 W.L.R. 582.
[12] *Ibid.* at 586-587.
[13] Per Lord Scarman in *Sidaway v. Governors of Bethlem Royal Hospital* [1985] AC 871 at 881.
[14] *Rogers v Whitaker* (1992) 175 C.L.R. 479.
[15] *F v R* (1983) 33 SASR at 193.
[16] *Ibid.*, per Gaudron J.
[17] Mason CJ, Brennan, Dawson, Toohey and McHugh JJ.

> "One consequence of the application of the *Bolam* principle to cases involving the provision of advice or information is that, even if a patient asks a direct question about the possible risks or complications, the making of that inquiry would logically be of little or no significance; medical opinion determines whether the risk should or should not be disclosed and the express desire of a particular patient for information or advice does not alter that opinion or the legal significance of that opinion."[18]

Gaudron J stated her opinion, which also seemed to be that of the rest of the Court's, that the *Bolam* principle "may have some utility as a rule-of-thumb in some jury cases", but that it served no other useful function.[19] For these reasons, there was no basis for any exception or 'therapeutic privilege' not based in medical emergency.

Following on from these changes to common law medical negligence, some large damages payouts in negligence law in the 1980's and 1990's prompted much anxiety amongst professional organisations. Medical practitioners became particularly concerned. It would not be quite correct however to say that plaintiffs' increased success rate overall and the recovery of larger damages claims were the direct result of the adherence to *Rogers* and the rejection of *Bolam* test. It would be more appropriate to describe it as a less protective judicial approach taken to medical professionals than previously.

The changes in medical negligence law over these two decades especially prompted concerns in the late 1990's that insurance premiums were becoming unaffordable, that insurance was simply unavailable or that medical practitioners practising in high risk areas were being forced to give up work.

The result was a clamour for reform. A Committee which produced the Ipp Report, was formed to investigate the perceived need for reform at a national level. The Ipp Report in part inquired into the application, effectiveness and operation of the common law principles of negligence (such as causation and duty of care). It also proposed new limitation periods and made suggestions for caps and thresholds on damages awards. In Victoria, these recommendations and more were implemented into the *Wrongs Act 1958*.

But tort law reform was not motivated by just what was happening in the common law itself however. Tort reform also arose as a result of what has been described as a "cauldron of international and national turmoil".[20] Claims of a perceived insurance "crisis" were fuelled by the spectacular collapse of HIH (a major insurer and medical indemnity organisation), mass anxiety generated by the events of September 11 2001, and escalating premiums internationally. Of particular concern to health providers was the failure of this nation's largest medical protection organisation, UMP.[21] All this, combined with the claim that damages recovery had become too easy, led to the insurance industry mounting a robust campaign for change,

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[18] *Rogers v Whitaker*, *Op. Cit.*
[19] *Ibid.*
[20] Paul de Jersey, 'Recent Tort Law Reform: was it necessary and did it go too far?', Speech delivered at the LawAsia Downunder 2005 Conference, held at the Gold Coast Convention and Exhibition Centre on 23 March 2005.
[21] *Ibid.*

supported by the medical profession which contended that recovery in the area of medical negligence had likewise become too "flaccid".[22]

A series of decisions in the Australian courts have reflected these winds of legislative and attitudinal change. The cases which immediately spring to mind include the case of Alexia Harriton,[23] the disabled woman born deaf, blind and mentally disabled following a doctor's alleged failure to diagnose her mother's rubella infection during pregnancy; and, perhaps, the reversal of Eames J's judgment in the Victorian Court of Appeal in *Rolah McCabe v British American Tobacco Australia Services Limited*.[24]

However, it seems that we are in for another period of change, and that perhaps the pendulum is swinging back the other way. Even proponents of tort law reform several years ago are beginning to propound the notion that the perceived insurance 'crisis' was at the time perhaps, in retrospect, a little over-stated. At the recent LawAsia Conference, the Chief Justice of the Queensland Supreme Court acknowledged his own changed perspective on the issue of tort reform:

> "When those reforms were very fresh, I suggested on another occasion that they were an example "of the governmental system working well, with the parliament intervening to meet perceived public concern as to the level of recovery which to that point had been ordained by the courts"… Time having progressed, we are now in a better position to assess the social justification for what has occurred. The theory, that insurance premiums would reduce, has apparently not been borne out…. Ultimately, there seems to have been no substantial benefit, rather prejudice, to those to whom the courts had given reasonable accommodation by the application of the independent judicial wisdom borne of decades."[25]

The tort law reform issue is of course far from resolved. It is an extremely important one for all medical practitioners in Australia. We await further developments.

Advocate's Immunity

Whilst doctors wrangle with the problems accompanying the possibility of negligence suits, namely insurance, lawyers continue to sail along unaffected by tort law reform issues and by such attendant costs and concerns.

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[22] *Ibid.*

[23] In *Harriton (by her tutor) v Stephens; Waller (by his tutor) v James & Anor; Waller (by his tutor) v Hoolihan* [2004] NSWCA 93), the NSW Court of Appeal majority refused to expand existing categories of negligence to recognize claims for 'wrongful life' at a time where the Australian jurisdiction was in fact attempting to restrict liability (see particularly the judgment of Ipp JA). Forming the majority in *Harriton*, Spigelman CJ and Ipp JA determined that although the medical practitioner may owe a duty of care to an unborn child, this duty did not extend so far as to the provision to parents of information to decide on termination.

[24] See the article 'Destruction of documents before proceedings commence: what is a court to do?' by Camille Cameron and Jonathan Liberman (2003) 27 MULR 273. The article argues that the Court of Appeal's decision in *McCabe* was flawed and should not be followed by courts in other jurisdictions.

[25] Paul de Jersey, 'Recent Tort Law Reform: was it necessary and did it go too far?', Speech delivered at the LawAsia Downunder 2005 Conference, held at the Gold Coast Convention and Exhibition Centre on 23 March 2005.

So what makes lawyers so special? Kirby J similarly posed the question during argument in *D'Orta-Ekenaike*:

> "*Rogers v Whitaker* states the [relevant] principle for [medical] professional people. What is the special reason for an exception to that on the part of barristers? It would seem to me that if you are almost uniquely exempt there have to be very good reasons of principle".

Before turning to the reasons of principle enunciated by the High Court for the retention of advocate's immunity, a recounting of the facts of that case may be desirable. The facts are as follows.

In 1996, Ryan D'Orta-Ekenaike was charged with the sexual assault of a woman. He indicated at his committal hearing that he would plead guilty, but at the time of trial, he pleaded not guilty. The prosecution relied upon the earlier plea as an admission. He was convicted and spent seven months in jail.

The conviction was however set aside on appeal, on the ground of a misdirection as to how the earlier admission could be used. At his retrial, the admission was not allowed and he was acquitted.

D'Orta-Ekenaike then sought to bring a claim against his lawyers on the basis that he pleaded guilty at the committal on their advice, that their advice was negligent, and that they exercised "undue influence" to cause him to plead guilty. He claimed damages as a result of both the conviction and imprisonment.

After the Victorian Court of Appeal upheld the historical immunity afforded to barristers and solicitors, D'Orta-Ekenaike sought leave to appeal to the High Court. The High Court heard the case over two days of argument last year, handing down judgment in favour of Victoria Legal Aid and D'Orta-Ekenaike's trial barrister on 10 March this year. And in an indication of what lay at stake for the profession, D'Orta-Ekenaike's barrister at trial engaged no less than five Counsel - including two QC's and one SC - to argue his case.

In legal terms, the decision has been widely reported as upholding *Giannarelli v Wraith*.[26] This is a completely understandable interpretation, especially given the initial question that, *inter alia*, the majority posed for itself to answer, namely, "should the Court reconsider its decisions in *Giannarelli v Wraith* that … 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". The question was also raised as to whether "the acts or omissions of a solicitor which, if committed by an advocate, would be immune from suit?".[27]

Nevertheless, as pointed out by Kirby J in the judgment, the analogies with *Giannarelli* are not without considerable complexity. One could argue that no clear ratio exists in *Giannarelli* other than 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".[28] It

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[26] *Giannarelli v Wraith* (1988) 165 CLR 543.
[27] *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 214 ALR 92 at [1].
[28] *Ibid*. [270] [original emphasis]. See also *Boland v Yates Property Corporation Pty Limited* (1999) 74 ALJR 209, 240-1 (Kirby J).

is possible that in *D'Orta-Ekenaike* the High Court has done more than simply uphold advocates' immunity – it may in fact have expanded it.

Central to the majority's reasoning was its view that the "unique and essential function of the judicial branch is the quelling of controversies",[29] and that therein lay the "central justification for the advocate's immunity".[30] The catchcry of their Honours was "finality".[31] Controversies, once quelled, should rarely be reopened.[32] In their Honours' view, finality would be undermined by the "inevitable" relitigation of controversies that would accompany claims of negligence brought against advocates for their conduct of litigation.[33]

Their Honours also drew parallels with the immunities offered to witnesses and judges;[34] although they did not emphasise the significantly different nature of the relationship that a client has with his or her advocate, as opposed to that which they enjoy with other players in the judicial process.[35]

The seminal decision of the House of Lords, in *Arthur JS Hall v Simons*,[36] which recently abandoned the immunity in England and Wales, received little analysis in the majority judgment. Indeed, the majority appeared almost to disregard it on the basis of its being a reaction to the *Human Rights Act 1998* (UK) and the obligations imposed by Article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* ('the *Convention*').[37] The majority of the High Court appears to have formed this view although only two out of seven of their Lordships in *Arthur Hall* mentioned the *Convention*,[38] and despite the fact that "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".[39] Furthermore, the High Court's decision runs contrary to the decision delivered by the New Zealand Court of Appeal just two days earlier in *Sun Poi Lai v Chamberlains*, where four of the five judges held that the immunity should be abolished in civil cases.[40]

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[29] *Ibid.* [43].
[30] *Ibid.* [45].
[31] *Ibid.* [34]-[36].
[32] *Ibid.* [34].
[33] *Ibid.* [43].
[34] Ibid [37]-[45].
[35] For example, the advocate is paid, ultimately (if indirectly) by the client. The advocate's duty of care to the client is also more pronounced: see, eg, *D'Orta-Ekenaike* [323] (Kirby J). Of course, it may be (and has been) argued that it is not whether a duty of care exists *per se* that is significant, but whether or not any actionable duty of care should exist. One argument essayed for retaining the immunity is that public policy grounds dictate that any duty of care owed should not be actionable: see, eg, *Sun Poi Lai v Chamberlains*, unreported, Court of Appeal of New Zealand, 8 March 2005, [44], [97] (Anderson P).
[36] [2002] 1 AC 615.
[37] *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 214 ALR 92 at [56]-[64]. See also [185] (McHugh J).
[38] *Arthur JS Hall v Simons* [2002] 1 AC 615, 734 (Lord Hutton), 753 (Lord Millett).
[39] *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 214 ALR 92 at [315] (Kirby J).
[40] In *Sun Poi Lai v Chamberlains*, Hammond J favoured the abolition of the immunity entirely, while McGrath, Glazebrook and O'Regan JJ wished to leave open the question of barristerial immunity in a criminal context. In *Arthur JS Hall v Simons* [2002] 1 AC 615, while all seven law lords favoured abolition of the immunity in the civil context, three of their Lordships (Lord Hope of Craighead at 723-4; Lord Hutton at 735; and Lord Hobhouse of Woodborough at 752) favoured its retention with respect to criminal proceedings. Anderson P dissented in *Sun*

It seems for this reason that, in light of the High Court's divergence from the sort of views now being expressed on this issue around the common law world, that Justice Kirby observed that the High Court of Australia is "out of step".[41] And not just with New Zealand and English law. His Honour noted that there is no such general immunity for advocates in the United States,[42] Canada,[43] the European Union,[44] Singapore,[45] India[46] or Malaysia.[47]

It is interesting to note from the transcript that Counsel representing Victoria Legal Aid – the side championing the retention of the immunity – relied upon many of the same arguments that the medical profession had once put up. Of much interest was the insurance premium blow-out argument, the "unquantifiable" standard of care argument and the "heat of the battle" argument.

The "heat of the battle" argument and the comparison to the situation of surgeons particularly seemed to dominate much of the debate. Counsel representing Victoria Legal Aid repeatedly observed that decisions must be made quickly in court, and without the attendant fear of litigation should they be wrong. The immunity, they said, was not there to help support the advocate. Rather, it was there to assist the administration of the courts, to allow a judge and jury to hear arguments from a barrister not fearful of suit.

With regard to this argument, Kirby J observed:

> "There is quite a bit of heat of battle in a surgeon's work, a brain surgeon's work and in flying a Boeing 747, but no one suggests that those professions could be immune from negligence."

His Honour later referred to the Court's ruling that an eye surgeon, Dr Rogers, was ordered to pay damages of $800,000 to a patient for failing to warn her that a cosmetic operation on her eye could result in total blindness:

> "If this Court held Dr Rogers liable for a… one in 14,000 chance and the doctor was held liable, why ought the barrister not to be held liable for what is said in the calm of his chambers, a different environment altogether… ?"

And when Counsel for Victoria Legal Aid suggested that "only egregious forms of error are regarded as actionable", Chief Justice Murray Gleeson responded:

> "Yes, tell that to the surgeons."

Poi Lai v Chamberlains, arguing that the immunity should be retained, but he did so on the basis that, in New Zealand, it was 'a matter of statutory entitlement which a Court is not competent to remove': [120].

[41] *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 214 ALR 92 at [47] (Kirby J).

[42] See for example *Ferri v Ackerman* 444 US 193 at 205 (1979).

[43] E.g. *Demarco v Ungaro* (1979) 95 DLR (3d) 385.

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

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

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

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

One of the least successful arguments put to the Court by Victoria Legal Aid was the cost of insurance argument. When Counsel urged their Honours to have regard to the "difficulties of obtaining insurance" these days and referred to the level of premiums for obstetrics, Kirby J interjected:

> "Many surgeons constantly complain about the cost of their insurance, but it has not so far been a reason for the common law to withdraw their liability in negligence."

His Honour also observed:

> "[T]he bottom line… is all these other professions have to get insurance or protection and lawyers and advocates are immune."

During argument, lively debate was sparked by the notion of the standard of care and how it could apply and possibly measured in the situation of an advocate sued for negligence. McHugh J said: "It is a question of standard of care, is it not, and how you judge it, which makes the barrister's position different?"

His Honour observed that the common law had always regarded statements as different to physical acts in this regard. "After all", said McHugh J, "there are only so many ways, one would have thought, that you can remove an appendix or perform some other operation". To which Kirby J replied: "I imagine similar problems arise when operating on an aorta". Callinan J however rejected this suggestion, stating: "No, you are dealing with certain laws, scientific laws in relation to human tissues. *Measurable* matters."

The argument that perhaps won the day however appeared to be the fear of re-litigation, or "finality" of litigation point emphasised by their Honours in the judgment. In relation to this point during argument, the Court noted the recent decision of the New Zealand Court of Appeal to retain the immunity in criminal cases (though not in civil), and the particular difficulties presented by the possibility of recalling victims and witnesses to testify at an advocate's negligence trial.

Despite the momentousness of the decision before them and the gravity of proceedings, there were some light-hearted moments between the Judges.

At one point, Callinan J said that he could think of only three other professions, namely, psychiatry, psychology and perhaps teaching "where persuasion of the mind and seeing into the mind and attempting to anticipate how the mind might react [were] requirements".

At which point Kirby J chimed in: "The church, too."

Callinan J: "Well, you are not likely to suffer any damages [for that]."

Kirby J: "Not in this life [anyway]."

Whereupon McHugh J, silent for some minutes, was heard to comment:

"What about eternal damnation?"

The transcript of proceedings over two days in the High Court is fascinating reading for doctors and lawyers alike. I urge you to have a look at it if you have the time.

Conclusion

Outspoken critics of *D'Orta-Ekenaike* have since noted that the law forced the medical profession to do away with self-regulatory measures as well as the (lower) standard of care laid down in the *Bolam* test. They declare that in that case, self-regulation should also not be the order of the day for barristers and solicitors. "What's fair for one should be fair for all" they say.[48]

Others point to the fact that the trend in the common law world is running against immunity, with recent tort law reforms in England, New Zealand, Canada and the United States all extending liability and reducing immunities. Presently in some parts of the US, judges are now even being held liable for errors revealing incompetency. Critics of the decision in *D'Orta-Ekenaike* moreover warn that Australia now stands almost entirely alone on this issue, raising concerns relevant to globalisation and the need for further legal integration, not isolation.

In any event, it has been suggested that the politicians may now take the matter out of the courts' hands by specifically legislating to abolish, or at least narrow, the advocates' immunity.[49] Since the decision was handed down in *D'Orta-Ekenaike*, at least one media report suggests that the Attorney-Generals have met to discuss possible changes in the law.[50] According to that source, barristers may keep their immunity in court, however, may lose it where they give advice to clients outside of it. This proposal has seemingly won the endorsement of the New South Wales Bar Association. But the report also indicates that other State governments may be pushing for barristers to face the risk of being sued for negligent advice across the board.[51]

We shall have to wait and see what happens.

As it now stands, the law itself may have a different view of the medical and legal professions when it comes to immunity from negligence suits. The community also continues to perceive the two professions in a completely different way. But where we remain united is that both professions retain a strong tradition of upholding dearly held values. We have ethics. We face the challenge of commercial forces supplanting our ideals. But for the most part, our professions are dedicated to working for people, to obtain the best result we can for them. The professions at times combine to work together for the good of society and that is a fact which cannot be forgotten.

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[48] Comments made by Dr Hugh Carmalt, Chairman of the NSW Royal Australian College of Surgeons. As quoted by Michael Pelly, 'Time, Gentlemen, Please', *The Sydney Morning Herald*, 22/04/05.

[49] See, eg, Marcus Priest, 'Bad advice: barristers in the dock', *The Australian Financial Review* (Melbourne), 22 March 2005, 1.

[50] *Ibid.*

[51] *Ibid.*

As a great Australian judge once said, the law marches with medicine, but it is “in the rear and limping a little” - where it should be - keeping an eye on things.[52]

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[52] *Mount Isa Mines Ltd v Pusey* [1970] HCA 60, per Windeyer J.