

## SHOULD ADVOCATES' IMMUNITY CONTINUE?

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*[Advocates are currently immune from actions in negligence for work that is performed in, or closely connected to, court proceedings. This immunity was recently abolished by the House of Lords. The immunity still exists in Australia, although its future is currently under consideration by the High Court. This article examines recent case law, which has confirmed the immunity in some jurisdictions and abolished it in others. The authors argue that there are sound reasons to retain the immunity. The main points made in support of this argument are: similar protection is extended to other participants in legal proceedings; abolition of the immunity could lead to conflict between an advocate's duty to the court and to the client; the immunity prevents or limits relitigation and collateral attack on court decisions; and other sanctions are available against negligent advocates. The final section considers whether a duty of care is an appropriate mechanism to regulate the behaviour of advocates.]*

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## I INTRODUCTION

In *Arthur J S Hall & Co (a firm) v Simons*<sup>1</sup> the House of Lords abolished the common law doctrine under which advocates are immune from liability in negligence for work performed in court. Their Lordships unanimously abolished the immunity in civil proceedings and — by a bare majority — in criminal proceedings.<sup>2</sup> The decision in *Arthur Hall* was not entirely surprising. The immunity has been the subject of frequent academic criticism,<sup>3</sup> and no longer exists in many common law jurisdictions.<sup>4</sup>

The year before *Arthur Hall* was delivered the High Court of Australia briefly considered the immunity in *Boland v Yates Property Corporation Pty Ltd*.<sup>5</sup> While the case was decided on other grounds, the views expressed by several judges suggested that the status of the immunity may be reconsidered. *Arthur Hall* may provide an impetus for the High Court to revisit the immunity, should an appropriate case arise. An opportunity to reconsider the status of the immunity in Australia may have finally presented itself in *D'Orta-Ekenaik v Victoria Legal Aid*, the application of special leave to appeal for which is currently under consideration by the High Court.<sup>6</sup>

A former judge of the Supreme Court of Victoria has suggested that the fate of the immunity should be decided by Parliament because ‘this avoids the percep-

<sup>1</sup> [2002] 1 AC 615 ('*Arthur Hall*').

<sup>2</sup> Lords Steyn, Browne-Wilkinson, Hoffman and Millett abolished the immunity in both civil and criminal proceedings. Lords Hope, Hutton and Hobhouse supported the abolition of the immunity in civil proceedings only.

<sup>3</sup> See, eg, Jonathan Hill, 'Litigation and Negligence: A Comparative Study' (1986) 6 *Oxford Journal of Legal Studies* 183; David Pannick, *Advocates* (1992) 197–206, cited in *Arthur Hall* [2002] 1 AC 615, 678 (Lord Steyn); Melissa Newman, 'The Case against Advocates' Immunity: A Comparative Study' (1995) 9 *Georgetown Journal of Legal Ethics* 267; Stanley Yeo, 'Dismantling Barristerial Immunity' (1998) 14 *Queensland University of Technology Law Journal* 12; Peter Cane, *Tort Law and Economic Interests* (2<sup>nd</sup> ed, 1996) 233–8; Francis Trindade and Peter Cane, *The Law of Torts in Australia* (3<sup>rd</sup> ed, 1999) 429; James Goudkamp, 'Is There a Future for Advocates' Immunity?' (2002) 10 *Tort Law Review* 188. An interesting recent contribution is Justice Stephen Charles, 'The Immunity of the Advocate' (2003) 23 *Australian Bar Review* 220. Justice Charles, a sitting member of the Victorian Court of Appeal, is mindful of the many difficulties associated with the abolition of the immunity but appears resigned that the law will change. His Honour suggests that any change be made by the legislature rather than the courts, largely so that the immunity can be preserved in appropriate instances: at 237. Aspects of legal professional liability are also discussed in Stephen Warne, 'Compromise of Litigation and Lawyers' Liability: Forensic Immunity, Litigation Estoppels, the Rule against Collateral Attack, Confidentiality and the Modified Duty of Care' (2002) 10 *Torts Law Journal* 167. Warne examines the possible immunity of solicitors for certain work performed out of court and suggests that the rule against collateral attack is emerging as a separate doctrine to justify forensic immunity.

<sup>4</sup> See, eg, *Demarco v Ungaro* (1979) 95 DLR (3d) 385; *Ferri v Ackerman*, 444 US 193 (1979).

<sup>5</sup> (1999) 167 ALR 575 ('*Boland*'). See below Part III for a discussion of this case.

<sup>6</sup> Transcript of Proceedings, *D'Orta-Ekenaik v Victoria Legal Aid* (High Court of Australia, Gleeson CJ and Hayne J, 3 October 2003); Transcript of Proceedings, *D'Orta-Ekenaik v Victoria Legal Aid* (High Court of Australia, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 20–21 April 2004). The initial application for special leave — heard on 3 October 2003 — was referred by Gleeson CJ and Hayne J to the Full Court. Gleeson CJ concluded that hearing by instructing the parties to prepare ‘to argue the matter as on an appeal.’ The Court heard extensive argument but reserved its ruling on the application for special leave and the substantive decision. The application arose from a proceeding in the County Court of Victoria that was ultimately stayed: *D'Orta-Ekenaik v Victoria Legal Aid* (Unreported, County Court of Victoria, Wodak J, 13 December 2002).

tion of self-interest which cannot help but arise when the matter is decided by the courts.<sup>7</sup> In our view, two arguments can be made against this suggestion. First, the immunity attaches to the work of advocates and must, therefore, be a special privilege created by lawyers for the benefit of lawyers. Any debate of the immunity is likely to raise well-rehearsed views about lawyers which will hamper any objective examination of matters affecting the legal profession. Indeed it could be argued that Parliament's view of lawyers is no more objective than that of the rest of the community.

Secondly, the immunity is often perceived by commentators and the media as an anachronism that is out of step with modern tort law.<sup>8</sup> The suggestion that any form of immunity is anomalous has influenced the debate on advocates' immunity by creating a presumption, often undetected, that the immunity ought to be abolished in the absence of compelling reasons to the contrary.

However, the wider issue regarding the role of immunities and duties in the law generally is beyond the scope of this article.<sup>9</sup> This article is confined to the more modest task of stating the case in support of advocates' immunity. Part II of this article analyses the modern cases that affirm advocates' immunity. Part III examines *Arthur Hall* and the status of the immunity in Australia. Parts IV and V explore the arguments that support the continued existence of the immunity and respond to the arguments that are commonly made in support of its abolition.

## II THE RECENT ORIGINS OF THE IMMUNITY

### A *What Is the Immunity?*

The doctrine of advocates' immunity renders advocates immune from civil claims in professional negligence for any act or omission which arises honestly in the conduct or management of a proceeding in court, and for any out-of-court act or omission that is intimately connected with in-court proceedings.<sup>10</sup> There are other aspects of the immunity which have not been disturbed by the decision in *Arthur Hall*. For example, advocates still enjoy immunity from civil proceedings in defamation or misrepresentation, as well as immunity from criminal proceedings in defamation or fraud arising from statements made by a party or

<sup>7</sup> George Hampel and Jonathan Clough, 'Abolishing the Advocate's Immunity from Suit: Reconsidering *Giannarelli v Wraith*' (2000) 24 *Melbourne University Law Review* 1016, 1026. The Hon George Hampel retired from the Supreme Court of Victoria in 2000.

<sup>8</sup> See, eg, Jan Wade, 'End to Ancient Lurk in Sight', *The Australian Financial Review* (Sydney), 28 July 2000, 32; Chris Merritt, 'Australia Lags behind Normal Practice', *The Australian Financial Review* (Sydney), 28 July 2000, 33; Darrin Farrant, 'A-G Seeks to Dump Barrister Immunity', *The Sunday Age* (Melbourne), 22 October 2000, 5; Ebru Yaman, 'Bid to Strip Barristers' Immunity', *The Australian* (Sydney), 23 October 2000; Editorial, 'Barristers Flip Their Wigs over Immunity', *The Australian* (Sydney), 19 April 2004. See also Belinda Baker and Desmond Manderson, 'Counsel's Immunity: The High Court's Decision in *Boland v Yates*' (2001) 1 *Macquarie Law Journal* 108, who refer to the immunity as 'antiquated': at 114.

<sup>9</sup> For a discussion of this issue with reference to several duties and immunities, including advocates' immunity, see Rosalind English, 'Forensic Immunity Post-Osman' (2001) 64 *Modern Law Review* 300.

<sup>10</sup> *Giannarelli v Wraith* (1988) 165 CLR 543 ('*Giannarelli*'). Such claims may be framed as a breach of a term of the contract of retainer to take care, or in tort, or both.

his or her lawyer in the ordinary course of court proceedings. This immunity also extends to statements made in an unverified pleading.<sup>11</sup>

#### B *The Rationale of the Immunity*

The origins of advocates' immunity have been described as an 'obscure' part of the 'gradual evolution of the duties and liabilities of those concerned in the legal process'.<sup>12</sup> The earliest cases on the immunity contain little, if any, analysis of its nature or purpose.<sup>13</sup> Most modern analysis of the immunity can be traced to three key decisions, each of which provides a considered analysis of the immunity. The first is *Rondel v Worsley*.<sup>14</sup> Rondel sued Worsley, his former advocate, for alleged negligence. The House of Lords unanimously held that the action could not proceed because advocates were immune from liability in negligence. Their Lordships relied upon several grounds of public policy — in particular, the problems that could arise if advocates were subject to conflicting duties to both the court and their client.<sup>15</sup> Their Lordships held that the very possibility that advocates could face liability as a consequence of the discharge of their duties in court might cause them to 'subordinate' any duties owed to the court to those owed to the client.<sup>16</sup>

A decade later the House of Lords reconsidered the immunity in *Saif Ali v Sydney Mitchell & Co*.<sup>17</sup> In this case, attention was confined largely to the scope of the immunity. The majority accepted that the special status of advocates provided a sufficient reason for the immunity.<sup>18</sup> Lord Diplock, however, did not. His Lordship noted that the work of advocates bore many similarities to that of

<sup>11</sup> *Jamieson v The Queen* (1993) 177 CLR 574, 581–3 (Deane and Dawson JJ), following *R v Skinner* (1772) Lofft 54; 98 ER 529; *Dawkins v Lord Rokeby* (1873) LR 8 QB 255. The proposition is, however, qualified by a number of exceptions related to substantive administration of justice offences such as perjury, contempt of court and perverting the course of justice: *Jamieson v The Queen* (1993) 177 CLR 574, 582.

<sup>12</sup> *Rondel v Worsley* [1969] 1 AC 191, 258 (Lord Pearce) ('Rondel').

<sup>13</sup> The evolution of the law and the scant reasoning in many of the cases is outlined by Lord Pearce in *Rondel* [1969] 1 AC 191, 258–60.

<sup>14</sup> *Ibid.*

<sup>15</sup> One longstanding basis for the immunity had been abolished only three years earlier. The immunity had traditionally been justified by the absence of a contract between advocates and their clients (since any contract was normally formed between advocates and instructing solicitors). It was long held that a duty of care could not extend to a situation in which no contractual relationship existed between the two parties. The foundation of this reasoning was removed by *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. The House of Lords held that a duty of care can arise when a person relies upon the skill of another person who applies his or her specialist skill to help that person, irrespective of whether there is a contract between the parties.

<sup>16</sup> *Rondel* [1969] 1 AC 191, 231 (Lord Reid), 251 (Lord Morris), 272–3 (Lord Pearce), 283 (Lord Upjohn), 293 (Lord Pearson).

<sup>17</sup> [1980] AC 198.

<sup>18</sup> Their Lordships did, however, express these views in differing terms: see *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, 213 (Lord Wilberforce, stating that 'barristers have a special status, just as a trial has a special character: some immunity is necessary in the public interest'), 229–30 (Lord Salmon, endorsing the reasons advanced in *Rondel* [1969] 1 AC 191), 223 (Lord Russell, stressing the 'public duty that rests on the Bar in particular to participate in and contribute to the orderly proper and expeditious trial of causes in our courts'), 235 (Lord Keith, emphasising a 'barrister's duty to the court and the due administration of justice ... when he directs his mind' to the many issues concerning the conduct of proceedings).

other professionals who were also required to make difficult decisions under great pressure,<sup>19</sup> and accepted that other classes of professional people, such as surgeons, had adjusted to the potential liability arising from the operation of a duty of care.<sup>20</sup> Lord Diplock concluded, however, that advocates' immunity was still warranted on two key policy grounds. First, the immunity afforded advocates the protection granted to all other participants in legal proceedings, such as witnesses, jurors, court officials and judges.<sup>21</sup> Secondly, the immunity prevented collateral challenge against judicial decisions by removing a potential avenue for disaffected parties to raise grievances that had been determined in an earlier proceeding.<sup>22</sup>

In *Giannarelli v Wraith*,<sup>23</sup> a majority of the High Court accepted that advocates were not subject to a common law duty of care in negligence for work performed in court.<sup>24</sup> The facts provide a useful illustration of the type of case in which advocates' immunity can arise. The Giannarellis were convicted of perjury for evidence given to a royal commission.<sup>25</sup> The High Court quashed the convictions on the ground that the Giannarellis' evidence to the commission was inadmissible at their subsequent trial.<sup>26</sup> The Giannarellis sued their legal advisers in negligence, alleging that their lawyers had negligently failed to advise them that their evidence to the commission was inadmissible at trial.<sup>27</sup> It was also alleged that the advisers had negligently failed to object to the admission of this evidence at the trial itself.

The immediate issue before the High Court was a narrow question of statutory interpretation. Section 10(2) of the *Legal Profession Practice Act 1958* (Vic) provided that:

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.<sup>28</sup>

A majority of the Court held that this provision was intended to render barristers subject to the same common law duty of care applicable to solicitors at the

<sup>19</sup> Ibid 220.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid 221–2.

<sup>22</sup> Ibid 222–3.

<sup>23</sup> (1988) 165 CLR 543.

<sup>24</sup> The majority consisted of Mason CJ, Wilson, Brennan and Dawson JJ.

<sup>25</sup> *R v Giannarelli* (Unreported, Supreme Court of Victoria, Kaye J, 22 June 1983).

<sup>26</sup> *Giannarelli v The Queen* (1983) 154 CLR 212.

<sup>27</sup> On appeal it was held that the evidence had been rendered inadmissible by the operation of s 6DD of the *Royal Commissions Act 1902* (Cth). Counsel advising the Giannarellis had considered this point but disagreed on whether it could succeed. After discussion, the point was not taken during the hearing. While the point ultimately succeeded on appeal, it was not at all clear that it would have done so at trial.

<sup>28</sup> The date mentioned in the provision is the day on which the *Legal Profession Practice Act 1891* (Vic) received Royal Assent. The *Legal Profession Practice Act 1958* (Vic) has since been repealed and has been replaced by the *Legal Practice Act 1996* (Vic).

time specified in the provision (23 November 1891).<sup>29</sup> The majority concluded that a solicitor acting as an advocate was, at that date, not liable in negligence for work performed in court, and that s 10 extended this protection to advocates.<sup>30</sup> The minority held that s 10 was not intended to determine the potential liability of barristers by reference to the equivalent liability of solicitors at a stated point in time, but rather to subject barristers to the same liability applicable to solicitors generally.<sup>31</sup>

The majority also accepted that the common law immunity extended to advocates for work that was performed either in court, or work performed out of court that was closely connected such in-court work. Mason CJ concluded that only two policy arguments provided any significant support for the immunity at common law. First, advocates occupy a special position: they owe a duty to both the court and their client. Mason CJ held that an advocate's duty to the court overrode their duty to the client and that this superior duty was clearly separate from any duty owed to the client. The Chief Justice drew support from the special role of the advocate. His Honour stated that

a barrister's duty to the court epitomizes the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice. ... The judge is in no position to rule in advance on what witnesses will be called, what evidence should be led, what questions should be asked in cross-examination. Decisions on matters such as these, which necessarily influence the course of a trial and its duration, are made by counsel, not by the judge. This is why our system of justice as administered by the courts has proceeded on the footing that, in general, the litigant will be represented by a lawyer who, not being a mere agent for the litigant, exercises an independent judgment in the interests of the court.<sup>32</sup>

In the view of Mason CJ, there was a real risk that the exposure of advocates to potential liability in negligence would adversely affect the administration of justice. His Honour suggested that the judgements of advocates would become influenced by the need to avoid liability.<sup>33</sup> In particular, advocates might feel compelled to pursue issues that would not be pursued in the absence of potential liability. The Chief Justice reasoned that such cautious or defensive decisions could make litigation 'more lengthy, more complex and more costly'.<sup>34</sup>

The second matter of policy identified by Mason CJ concerned the adverse consequences which would flow from relitigating issues in collateral proceedings for negligence. Such consequences include the risk of inconsistent decisions on the same matter, which is incompatible with the common law principle of

<sup>29</sup> Giannarelli (1988) 165 CLR 543, 560–1 (Mason CJ), 570–1 (Wilson J), 586–7 (Brennan J), 592–3 (Dawson J).

<sup>30</sup> Ibid.

<sup>31</sup> Ibid 587–8 (Deane J), 608–9 (Toohey J, with whom Gaudron J agreed).

<sup>32</sup> Ibid 556–7.

<sup>33</sup> Ibid 557.

<sup>34</sup> Ibid.

avoiding such inconsistencies to maintain, rather than damage, public confidence in the administration of justice.<sup>35</sup>

Wilson J considered the four main policy reasons in support of the immunity advanced in *Rondel*,<sup>36</sup> three of which he considered very strong.<sup>37</sup> First, the abolition of advocates' immunity would impose on advocates a duty of care to clients that conflicted with their duty to the court.<sup>38</sup> Secondly, the type of relitigation that would result from suits against advocates for alleged negligence would be extremely complex and difficult to manage.<sup>39</sup> Thirdly, the removal of the immunity could seriously undermine public confidence in the administration of justice.<sup>40</sup> Wilson J also placed some reliance on the 'cab rank' rule — under which advocates are bound to accept briefs within their range of expertise if able to do so — although his Honour clearly felt this was a lesser consideration in support of the immunity.<sup>41</sup> In addition, his Honour considered the reluctance of the law to grant special immunities which, in the case of advocates' immunity, could be perceived as some form of 'connivance' between judges and barristers.<sup>42</sup> Wilson J concluded, however, that the potential adverse consequences that could flow from abolition of the immunity were a sufficient warrant for its retention.<sup>43</sup>

Brennan J agreed that many decisions made by advocates were taken for the benefit of the court and the administration of justice,<sup>44</sup> but made clear that he was particularly influenced by the value received by the courts from the work of the independent bar. Brennan J suggested that this important justification for the immunity would disappear if the standard of advocacy provided by barristers declined to a point such that courts did not receive appropriate assistance from the advocates. His Honour concluded that, until there was evidence of a clear decline in the standard of advocacy, the conduct of advocacy should be regulated by 'the publicity of court proceedings, judicial supervision, appeals, peer pressure and disciplinary procedures to prevent neglect'.<sup>45</sup> Brennan J also drew attention to the 'cab rank' rule. His Honour suggested that the rule was important to the administration of justice, because it helped to ensure that access to effective legal representation was dependent only on the availability of counsel, rather than the publicity that the case may attract or the 'munificence' of the client.<sup>46</sup> Brennan J stressed that his remarks on the 'cab rank' rule were obiter dicta, and that any decline in its observance should be corrected by the bar and

<sup>35</sup> Ibid 558.

<sup>36</sup> [1969] 1 AC 191.

<sup>37</sup> *Giannarelli* (1988) 165 CLR 543, 572.

<sup>38</sup> Ibid 572–3.

<sup>39</sup> Ibid 573–4.

<sup>40</sup> Ibid 576.

<sup>41</sup> Ibid 573.

<sup>42</sup> Ibid 575, citing *Rondel v Worsley* [1967] 1 QB 443, 468.

<sup>43</sup> Ibid 575–6.

<sup>44</sup> Ibid 579.

<sup>45</sup> Ibid 580.

<sup>46</sup> Ibid.

other professional associations.<sup>47</sup> It is unclear, therefore, whether his Honour thought that the 'cab rank' rule could be invoked directly to support the immunity.

Dawson J also stressed the importance of preventing relitigation,<sup>48</sup> but felt that the strongest argument in favour of the immunity was the need to protect *all* participants in legal proceedings from any liability for their words and conduct during proceedings. His Honour noted that witnesses, judges, jurors and advocates were immune from liability in defamation for statements made in court. This privilege was granted because the participants in legal proceedings would be unable to speak freely if they faced possible legal action. Dawson J considered that no coherent distinction could be drawn between an action in defamation and one in negligence, since the contemplation of *either* type of suit would act as a restraint on the advocate and the services that he or she provided to the administration of justice.<sup>49</sup>

The minority in *Giannarelli* gave scant regard to the arguments in support of the immunity. Deane J rejected the 'pragmatic considerations of public policy' that had been accepted in other cases.<sup>50</sup> His Honour also flatly rejected any suggestion that the policy reasons invoked in support of the immunity outweighed or could 'even balance the injustice' caused by depriving a person of redress at common law.<sup>51</sup> Toohey J, with whom Gaudron J agreed, considered that some of the policy justifications raised in support of the immunity might influence the nature of an advocate's duty of care. His Honour suggested that an advocate's duty to the court would be 'relevant' to any duty owed to a client, but added that this reasoning was not intended 'to suggest that there is anything irreconcilable between the duty of care owed to the client and that owed to the court'.<sup>52</sup>

### C *The Scope of the Immunity*

Most analysis of the immunity is directed to the policy arguments for and against its retention, rather than the immunity's precise scope. In our view, many of the arguments made in favour of its abolition are weakened by the relatively limited scope of the immunity.

As a preliminary point, it should be noted that the immunity extends to persons acting in the capacity of an advocate, rather than to barristers alone. Thus the immunity applies to solicitors when performing work that 'is of a kind which falls within the area of immunity'.<sup>53</sup> An analysis of advocates' immunity is, therefore, equally relevant to solicitors who act as advocates.<sup>54</sup>

<sup>47</sup> Ibid.

<sup>48</sup> Ibid 594–5.

<sup>49</sup> Ibid 595–6.

<sup>50</sup> Ibid 588.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid 610.

<sup>53</sup> *May v Mijatovic* (2002) 26 WAR 95, 120 (Hasluck J).

<sup>54</sup> Warne suggests that there may be a 'shadow immunity' for solicitors which extends to the decisions of solicitors made in conjunction with barristers: Warne, above n 3, 198–202. He argues that solicitors ought to be immune from liability in negligence for work that is done in

### 1 *What Is ‘Intimately Connected’ for the Purposes of the Immunity?*

The immunity applies both to the work of the advocate in court, and to work performed outside court where it 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.’<sup>55</sup>

Mason CJ provided the best explanation of the difficulties in identifying the scope of the immunity in *Giannarelli*.<sup>56</sup> His Honour accepted that it was difficult to determine where the appropriate dividing line should be drawn between work that was performed in or out of court (or was closely connected to such work), and work that did not hold a sufficient connection. However, Mason CJ refused to draw a dividing line at the doors of the courtroom, on the basis that such a literal approach would be ‘artificial in the extreme’.<sup>57</sup> His Honour observed that:

Preparation of a case out of court cannot be divorced from presentation in court. The two are inextricably interwoven so that the immunity must extend to work done out of court which leads to a decision affecting the conduct of the case in court. But to take the immunity any further would entail a risk of taking the protection beyond the boundaries of the public policy considerations which sustain the immunity.<sup>58</sup>

In our view, the rationale for the ‘intimately connected’ test is not widely understood in most discussions of the immunity.<sup>59</sup> In the passage quoted above, Mason CJ alludes to the connection between the *preparation* and presentation of a case. We believe that this reasoning correctly identifies the often inseparable connection between the planning and execution of a case. Any immunity for advocacy cannot be applied literally. Advocacy, or the presentation of a case, can never be fully separated from its preparation. A case cannot be properly conducted without careful planning and preparation, nor can the behaviour of an advocate be fully understood without knowledge of the steps taken to draft, rehearse and finalise a case outside of court.

conjunction with barristers because the advocates’ immunity would be circumvented if a joint party to protected work could be sued. This argument essentially adopts the ‘intimately connected’ test (see below Part II(C)(1)) because it suggests that other lawyers whose work is intimately connected to that of the advocate ought to receive the benefit of the immunity. In our view, this reasoning is forceful.

<sup>55</sup> *Rees v Sinclair* [1974] 1 NZLR 180, 187 (McCarthy P), cited in *Giannarelli* (1988) 165 CLR 543, 560 (Mason CJ).

<sup>56</sup> (1988) 165 CLR 543, 559–60. Wilson and Brennan JJ also adopted the ‘intimately connected’ test: at 571 (Wilson J), 579 (Brennan J). Dawson J discussed the test, but did not expressly endorse it, although his discussion of the test and other parts of his judgment strongly suggest that he supported it: at 596.

<sup>57</sup> *Ibid* 559.

<sup>58</sup> *Ibid* 559–60.

<sup>59</sup> Goudkamp suggests that the real difficulty is that courts have failed to explain the ‘intimately connected’ test, or to provide a comprehensive explanation of the factors that determine its scope: Goudkamp, above n 3, 190–1. We believe that our explanation of the connection between the preparation and presentation of a case overcomes this criticism.

Callinan J adopted similar reasoning in *Boland*.<sup>60</sup> His Honour did not accept that

simply because the work ... was done over a long period of time, that in some way divorced it from work done closer in time to the hearing even though the former answered the description of work intimately connected with the forthcoming trial.<sup>61</sup>

This view suggests that what is ‘intimately connected’ is a *strategic* rather than temporal connection, based on the relevance between work performed out of court and the conduct of the matter in court. One logical consequence of this approach is that, even if a matter does not ultimately proceed to a hearing, pre-trial work could fall within the scope of the immunity if it bears a sufficient degree of relevance to the *planned* conduct of matters in court.

Kirby J also considered the scope of the ‘intimately connected’ test in *Boland*,<sup>62</sup> but endorsed the approach of Priestley JA in *Keefe v Marks*.<sup>63</sup> In that case, a barrister was briefed to ‘advise and appear’ in a personal injury matter. He did not claim interest on behalf of the client in either the statement of claim or at trial. The client sued, alleging that the barrister was negligent in failing to consider whether a claim for interest should be made, or take the necessary steps to institute this claim.<sup>64</sup> Priestley JA held that the claim in negligence should succeed. His Honour accepted that an ‘intimately connected’ test would not apply to all pleadings because a pleading, like all other work, should be assessed to determine if it was truly a preliminary decision that affected the in-court conduct of a case. His Honour reasoned that the ‘intimately connected’ test was a relative one, which required an assessment of the degree of connection between the in-court and out-of-court work. Priestley JA also noted that other proponents of the ‘intimately connected’ test supported only one, very particular, form of connection. As his Honour explained,

the connection must be a positive one. McCarthy P’s formulation [in *Rees v Sinclair*] seems to involve an actual decision which may have a significant effect on the conduct of the case in court. Brennan J’s formulation [in *Giannarelli*] in terms refers to negligence by act or omission in court, but only to the ‘making’ of the relevant ‘decisions’ out of court.<sup>65</sup>

Priestley JA concluded in this case that there were no ‘decisions’ in this positive sense. The plaintiff’s claim was based on an alleged omission — the failure to consider whether a claim for interest should be made — rather than any positive act by counsel.<sup>66</sup>

<sup>60</sup> (1999) 167 ALR 575.

<sup>61</sup> *Ibid* 670–1.

<sup>62</sup> *Ibid* 611.

<sup>63</sup> (1989) 16 NSWLR 713.

<sup>64</sup> *Ibid* 718–9. A claim for interest was eventually included in the original proceeding. Due to its late inclusion the claim was only partially successful; at 715.

<sup>65</sup> *Ibid* 725. His Honour referred to *Rees v Sinclair* [1974] 1 NZLR 180, 187 (McCarthy P) and *Giannarelli* (1988) 165 CLR 543, 579 (Brennan J).

<sup>66</sup> *Keefe v Marks* (1989) 16 NSWLR 713, 725.

Gleeson CJ, with whom Meagher JA agreed, held that the plaintiff's claim must fail because the barrister's decision whether or not to plead a claim for interest, or perhaps even to consider such a claim, could not be divorced from in-court work. His Honour reasoned that the limitations of the 'intimately connected' test would be circumvented if a claim could be based on the earliest part of a continuing course of conduct that was the furthest removed from the hearing of the case. Gleeson CJ also suggested that the immunity should not 'be circumvented by drawing fine distinctions between the preparation and the conduct of the case'.<sup>67</sup>

In our view, the immunity is no better served by Gleeson CJ's use of fine distinctions to cast protection around a wide range of decisions.<sup>68</sup> Any attempt to characterise the failure to plead interest in a personal injury case or the making of a hurried amendment in court as a continuing course of conduct is not helpful. There are no clear means by which to determine whether, or why, a series of decisions may constitute a continuing course of conduct. Many decisions made by lawyers during the pre-trial conduct of a case relate to a handful of core issues. Not surprisingly, those issues will arise in court. If every matter concerning one of these core issues may be characterised as 'intimately connected' because it forms part of a continuing course of conduct, then the scope of the test extends not only to the preparation of all matters that arise in court, but also to the *failure to consider* matters that could have been raised in court.

The approach of Priestley JA provides a better means of deciding and limiting the scope of what is 'intimately connected'. While either acts or omissions may properly support a finding of negligence, the same cannot be said for conduct protected by advocates' immunity. The intimate connection is founded on the link between the preparatory decisions made out of court and the ultimate conduct of the case in court. On this view, the *decision* not to raise a matter can be intimately and properly connected to the conduct of a case in court. The same cannot be said of a *failure* to consider a point of law or fact. How can a matter be 'intimately connected' to the conduct of a case in court if it is apparently not even considered by counsel?<sup>69</sup> Whether the connection is intimate will fall to be determined by the test expounded by Mason CJ.<sup>70</sup>

<sup>67</sup> Ibid 720.

<sup>68</sup> One such distinction is the suggestion by Stanley Yeo. He suggests that the immunity could be confined 'to cover only work which had to be performed by a barrister without the opportunity for calm reflection': Yeo, above n 3, 18. It would be quite difficult to define 'calm reflection' within the context of litigation, and even more difficult to determine factual arguments on whether any particular matter *had* to be performed without calm reflection.

<sup>69</sup> An example can be taken from Giannarelli (1988) 165 CLR 543. Some of the counsel in that case considered whether the Giannarellis' evidence would be inadmissible in light of the *Royal Commissions Act 1902* (Cth), but decided that it would be admissible according to the prevailing interpretation of the law. On the basis of this advice, the point was not pursued at trial. The failure to raise it in the hearing was within the scope of the 'intimately connected' test because the merit of the point was considered during the planning of the presentation of the case: at 560 (Mason CJ). If, however, no counsel had even considered the issue, it could not fairly be said that the failure to object to the admissibility of the evidence was somehow 'intimately connected' to the conduct of the proceedings.

<sup>70</sup> See above nn 56–8 and accompanying text.

## 2 Are Certain Acts Not 'Intimately Connected' or Just 'Beyond the Pale'?

There is very little judicial consideration of acts that might be beyond the scope of the immunity. In one sense, this lacuna is not surprising. The practical effect of any immunity from liability is that cases in which it is pleaded rarely move to a detailed examination of the facts.

In *Del Borrello v Friedman & Lurie (a firm)*,<sup>71</sup> it was suggested that the immunity should not extend to gross negligence. Kennedy J did not consider the submission in detail because there was no evidence to support such an allegation, but noted that there was no precedent in support of this submission.<sup>72</sup> His Honour did, however, accept that the immunity did not extend to 'the conduct of counsel acting in bad faith or dishonestly'.<sup>73</sup>

In our view, the immunity ought to be limited in this manner. It is argued that advocates' immunity is similar in principle to the immunity granted to other participants in judicial proceedings.<sup>74</sup> While the immunity granted to judges, witnesses, court officials and jurors differs slightly according to the character of the function that each person performs, none of these participants are immune from liability for acting dishonestly or in bad faith.<sup>75</sup> If advocates' immunity is to be justified on the basis that a similar protection extends to other participants in court proceedings, as we believe it should, it ought to be subject to the same limitations that attach to those other immunities.<sup>76</sup>

## 3 Summary

Callinan J has suggested that the test of whether an act or conduct is 'intimately connected' to in-court work depends on a strategic rather than temporal assessment.<sup>77</sup> On this view, the 'intimately connected' test is purposive and extends the immunity to the extent that preparation of a matter is significantly related to its presentation and conduct in court. When viewed from this perspective, the 'intimately connected' test does no more than extend the immunity to the limited tasks that cannot sensibly be divorced from the core function of in-

<sup>71</sup> [2001] WASCA 348 (Unreported, Kennedy, Wallwork and Murray JJ, 6 November 2001) ('*Del Borrello*'). It should be noted that the plaintiff's subsequent application for special leave was refused by the High Court: Transcript of Proceedings, *Del Borrello v Friedman & Lurie (a firm)* (High Court of Australia, Gaudron, Gummow and Kirby JJ, 24 October 2002).

<sup>72</sup> *Del Borrello* [2001] WASCA 348 (Unreported, Kennedy, Wallwork and Murray JJ, 6 November 2001) [122].

<sup>73</sup> *Ibid* [122]–[123]. Wallwork and Murray JJ did not comment on this point.

<sup>74</sup> See below Part IV(A).

<sup>75</sup> For example, a witness is generally immune from any liability in tort for statements made during the course of giving evidence, but may face liability for perjury for knowingly giving false evidence: *Jamieson v The Queen* (1993) 177 CLR 574, 582 (Deane and Dawson JJ), 594 (Gaudron J); *Darker v Chief Constable of West Midlands Police* [2001] 1 AC 435, 460–1 (Lord Clyde) ('*Darker*'). *Darker* suggests that a witness may also incur civil liability in such circumstances. The position for judges is similar. A judge is immune from liability for actions made in the exercise of his or her judicial powers, but not if he or she acts knowingly without, or in excess of, jurisdiction: *Sirros v Moore* [1975] 1 QB 118; *Rajski v Powell* (1987) 11 NSWLR 522.

<sup>76</sup> An advocate who acts in bad faith or dishonestly in a manner relevant to his or her professional duties would, rightly in our view, also face harsh sanction from both the court and the Bar. See below Part IV(G) for a consideration of the potential sanctions that may apply to advocates.

<sup>77</sup> *Boland* (1999) 167 ALR 575, 670–1.

court work. In our view, if the test is strategic and purposive, and does not cover a failure by an advocate to consider a point of law or fact, the immunity has a limited and reasonable scope.

### III ARTHUR HALL AND BEYOND

#### A Arthur Hall

*Arthur Hall*<sup>78</sup> provided a surprising vehicle for the reconsideration of advocates' immunity. The case concerned three instances, joined for appeal purposes, of alleged negligence by solicitors.<sup>79</sup> In each case, the solicitors had acted as advocates and relied on the immunity as a complete defence. The claims were struck out at first instance, but were reinstated by the Court of Appeal. The Court held that the solicitors in each case were not acting as advocates and therefore could not invoke the immunity.<sup>80</sup> The Court of Appeal also dismissed two of the three cases on other grounds.

The applications proceeded to the House of Lords on the issue of advocates' immunity.<sup>81</sup> Their Lordships unanimously abolished the immunity for civil proceedings, holding that none of the various policy reasons provided in support of the immunity could justify its continued operation. Accepting that any immunity ought not be regarded as fixed or immutable,<sup>82</sup> the House of Lords noted that two significant changes had occurred since it had last endorsed the immunity on policy grounds.<sup>83</sup> First, the law of negligence had changed dramatically. Lord Hutton noted that the nature and extent of liability in negligence to

<sup>78</sup> [2002] 1 AC 615.

<sup>79</sup> One case involved an attempt by the solicitors to recover fees for services provided in a building dispute that was settled nine years before the decision of the House of Lords. The other claims arose from separate divorce proceedings.

<sup>80</sup> *Arthur J S Hall & Co (a firm) v Simons* [1999] 3 WLR 873. The reasons differed in each of the three actions. In the first action, *Arthur J S Hall & Co (a firm) v Simons*, a firm sued for its fees from a building dispute that settled the day before trial. The client counterclaimed, alleging that the solicitors gave negligent advice on the potential liability of other parties and the most appropriate time to settle. The trial judge made a preliminary ruling that the solicitors were immune from suit for their conduct of the settlement, and struck out the client's counterclaim in consequence of this ruling: at 878. On appeal the Court held that the solicitors were not acting as advocates when performing the allegedly negligent actions and, even if they were, their actions would not have been subject to immunity: at 908. The second action, *Barratt v Woolf Seddon (a firm)*, concerned a failure to include the correct value of an asset in a form filed in a family law dispute, which caused the client to maintain further proceedings. The Court decided this action on a similar basis: at 911. In the action of *Harris v Scholfield Roberts & Hill (a firm)*, another family law matter, the Court held that the solicitors were not acting as advocates during an alleged failure to instruct competent counsel and investigate factual aspects of the opponent's living arrangements: at 902–1.

<sup>81</sup> In each case the solicitors appealed, essentially on the ground that their allegedly negligent conduct fell within the scope of the immunity. Lord Hope also dismissed the solicitors' appeals on the basis that none of the claims actually involved conduct that fell within the scope of the immunity: *Arthur Hall* [2002] 1 AC 615, 709, 726.

<sup>82</sup> For example, Lord Steyn concluded that 'in today's world' the leading case of *Rondel* [1969] 1 AC 191 'no longer correctly reflects public policy': *ibid* 683.

<sup>83</sup> The House of Lords last endorsed the immunity in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, where it discussed and refined the policy considerations relied on in *Rondel* [1969] 1 AC 191.

which professional persons are subject had changed considerably.<sup>84</sup> On this view, the immunity could be reconsidered and abolished in light of wider social and legal changes. Secondly, the operation of the legal profession and the administration of justice had changed significantly. For example, courts could now monitor and effectively sanction negligent advocacy by making wasted costs orders against legal practitioners.<sup>85</sup> In addition, English law had developed and refined mechanisms to control relitigation more effectively.<sup>86</sup>

The majority also held that the immunity should be abolished in criminal proceedings if the conviction had been set aside because none of the policy justifications for the immunity provided a sufficient reason for its retention.<sup>87</sup> The majority was strongly influenced by the strict common law rules that preclude any form of collateral attack on the verdict of a criminal trial until it has been set aside.<sup>88</sup>

The minority held that the differences between civil and criminal proceedings were sufficient to retain the immunity for criminal proceedings.<sup>89</sup> Their Lordships noted that criminal proceedings were conducted on behalf of society as a whole and that wider social interests — which were not suited to resolution by civil proceedings — were at stake.<sup>90</sup> In addition, the criminal process provided other sufficient remedies to disaffected defendants.<sup>91</sup> We discuss some of the particular problems that the abolition of the immunity might raise for criminal proceedings below.<sup>92</sup>

#### B Post-Arthur Hall

*Arthur Hall* has been mentioned in several decisions of State Supreme Courts or Courts of Appeal.<sup>93</sup> In each instance, the relevant court has declined to

<sup>84</sup> *Arthur Hall* [2002] 1 AC 615, 728. Lord Hoffman, with whom Lord Browne-Wilkinson agreed, also alluded to this trend when he referred to 'great changes in the law of negligence': at 688. His Lordship concluded, however, that it would not be helpful to examine those changes in detail: at 688.

<sup>85</sup> See, eg, *ibid* 693–5 (Lord Hoffman). See below Part IV(F)(1) for a consideration of this issue.

<sup>86</sup> *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 ('Hunter'). This case was decided after *Rondel* [1969] 1 AC 191. See below Part IV(E) for a discussion of relitigation.

<sup>87</sup> *Arthur Hall* [2002] 1 AC 615, 679–80 (Lord Steyn), 685 (Lord Browne-Wilkinson), 705 (Lord Hoffmann). Lord Millett agreed with Lords Steyn and Hoffmann.

<sup>88</sup> The leading English case is *Hunter* [1982] AC 529. In that case the House of Lords effectively held that any civil claim that sought to challenge a conviction could be struck out as an abuse of process if the conviction had not been overturned. The strict manner in which this rule was explained suggests that a civil claim that impeaches a conviction in a collateral manner may only be maintained in the most exceptional circumstances.

<sup>89</sup> *Arthur Hall* [2002] 1 AC 615, 717–24 (Lord Hope), 730–5 (Lord Hutton), 745–50 (Lord Hobhouse).

<sup>90</sup> Lord Hobhouse gave the example of a defendant acquitted at trial, after spending a long period held in custody on remand, or an even longer period if acquitted after a second trial. His Lordship noted that such defendants had no civil remedy for the period of their detention. His Lordship suggested that hardships of this nature were an unfortunate but necessary part of the price paid by all citizens. On this view, the interest of a defendant in the criminal process is the right to vindication rather than liberty: *ibid* 747.

<sup>91</sup> *Ibid* 718–24 (Lord Hope), 730–5 (Lord Hutton), 745–52 (Lord Hobhouse).

<sup>92</sup> See below Part IV(H).

<sup>93</sup> See, eg, *O'Doherty v Birrell* [2001] 3 VR 147, 168 fn 26 (Winneke P, Phillips and Batt JJA); *Del Borrello* [2001] WASCA 348 (Unreported, Kennedy, Wallwork and Murray JJ, 6 November

provide any indication of the possible effect *Arthur Hall* might have on the law of Australia, no doubt because the reconsideration of *Giannarelli* is a matter for the High Court alone.<sup>94</sup> In *Boland*,<sup>95</sup> the High Court did not reconsider *Giannarelli*, largely because there was no negligence on the facts of the case at hand. Four members of the Court did, however, provide varying degrees of insight into their attitude to *Giannarelli*.<sup>96</sup>

Specifically, Gaudron J stated that she would have granted leave to reconsider *Giannarelli* had the immunity been relevant. Her Honour suggested that the lawyer-client relationship might not warrant immunity from suit, but it could affect the nature of the duty of care, if any, that a lawyer might owe to a client. Her Honour explained that

proximity — [or] more precisely, the nature of the relationship mandated by that notion — may exclude the existence of a duty of care on the part of legal practitioners with respect to work in court. Whatever the position, it is one that derives from the law of tort, not notions of ‘immunity from suit’.<sup>97</sup>

We will discuss this interesting suggestion below.<sup>98</sup>

A recent case which considered the immunity is the decision of the High Court of New Zealand in *Lai v Chamberlains*.<sup>99</sup> The Lais were joined as parties to a legal action against a company of which they were directors. In the course of the hearing, the trial judge indicated that judgment would be entered against the company. The trial judge asked whether the Lais would consent to judgment being entered against them. The hearing was adjourned while the Lais took advice from their solicitor. The Lais' solicitor advised that they could guarantee the judgment against their company. Judgment was then entered against the company. The company could not meet the judgment debt, so payment was sought from the Lais. The Lais sued their solicitor, on the ground that the advice on the guarantee of the debt was negligent.

2001); *Tahche v Abboud* [2002] VSC 42 (Unreported, Smith J, 1 March 2002); *May v Mijatovic* (2002) 26 WAR 95, 120 (Hasluck J); *Sovereign Motor Inns Pty Ltd v Howarth Asia Pacific Pty Ltd* [2003] NSWSC 1120 (Unreported, Master Harrison, 4 December 2003) [30].

<sup>94</sup> It remains to be seen whether the High Court might consider that *Giannarelli* was wrong or simply that it should not be followed. In *Arthur Hall*, the House of Lords pointedly declined to overrule *Rondel*, which affirmed the immunity: [2002] 1 AC 615, 682–3 (Lord Steyn). On the difficulties faced by courts of final jurisdiction in such cases, see Bruce Harris, ‘Final Appellate Courts Overruling Their Own “Wrong” Precedents: The Ongoing Search for Principle’ (2002) 118 *Law Quarterly Review* 408.

<sup>95</sup> (1999) 167 ALR 575.

<sup>96</sup> Gleeson CJ and Hayne J concluded that it was not necessary to consider the immunity: *ibid* 600 (Gleeson CJ), 624 (Hayne J). Gummow J indicated that he would not have granted leave to reconsider *Giannarelli*, but pointedly refrained from stating any view of the standing of the case: at 603. Callinan J also accepted that the case did not provide any reason to reconsider *Giannarelli*, but added that *Giannarelli* was ‘a recent decision ... based on sound policy and legal grounds’: at 670. Kirby undertook a detailed analysis of the immunity and suggested that *Giannarelli*, ‘so far as it expresses the immunity from suit enjoyed by legal practitioners in Australia, is confined in its holding and should not be expanded’: at 610. His Honour did not provide a clear indication of his views as to whether the immunity should be abolished, but did express support for the minority view of Priestley JA in *Keefe* (1989) 16 NSWLR 713, 725.

<sup>97</sup> *Boland* (1999) 167 ALR 575, 602–3.

<sup>98</sup> See below Part V.

<sup>99</sup> [2003] 2 NZLR 374.

The solicitor's firm applied to have the claims struck out on the basis that their advice was entirely protected by the immunity. The High Court, constituted by Salmon and Laurenson JJ, dismissed the application, holding that the evidence could support a finding that the advice was given after a sufficient period of time had lapsed since the hearing, such that it was not 'intimately connected' with the hearing. Consequently, the advice was not protected by the immunity.<sup>100</sup> Salmon and Laurenson JJ held that the immunity remained in force in New Zealand, but suggested that it should be modified to narrow its scope.<sup>101</sup>

Salmon J accepted that the Court was bound by the decision in *Rees v Sinclair*.<sup>102</sup> His Honour also frankly acknowledged that the future of the immunity was destined for the Court of Appeal of New Zealand and suggested that his reasoning was intended to assist any eventual decision of that court.<sup>103</sup> Salmon J accepted the force of many criticisms of the immunity but thought that there were two main reasons justifying its retention. First, the duties owed by an advocate to both the client and the court required advocates to maintain a strong level of independence.<sup>104</sup> Secondly, Salmon J held that the 'cab rank' rule supported the immunity. His Honour characterised it as an obligation that remained important to the operation of the legal system, particularly in the context of criminal proceedings.<sup>105</sup> Salmon J reasoned that it was 'essential that advocates should be prepared to act in a proper case for even the most difficult of litigants, free from concern that his or her decisions ... will form the basis of a claim for negligence'.<sup>106</sup>

Laurenson J also accepted that the immunity ought to be retained, but thought that it should be narrowed considerably. His Honour held the immunity should be abolished in civil proceedings as the policy concerns underpinning previous decisions had lost much of their force.<sup>107</sup> The main changes that his Honour identified were the decline of the oral tradition in litigation (other than in criminal proceedings), more effective case management, greater legal aid, the impact of the *Bill of Rights Act 1990* (NZ), and the growth in administrative and family law litigation.<sup>108</sup>

Laurenson J held that there was 'an overwhelming case to justify the retention of the immunity ... on grounds of public policy' in criminal and family law proceedings.<sup>109</sup> His Honour felt that the immunity was warranted for criminal

<sup>100</sup> *Ibid* 387 (Salmon J), 389 (Laurenson J).

<sup>101</sup> *Ibid* 386–7 (Salmon J), 396–402 (Laurenson J).

<sup>102</sup> [1974] 1 NZLR 180 (Court of Appeal).

<sup>103</sup> *Lai v Chamberlains* [2003] 2 NZLR 374, 376. The immunity was also considered in *Wright v Paton Farrell* (Unreported, Scottish Court of Sessions, 27 August 2002). In that case, the Court essentially held that the change of English law made by *Arthur Hall* did not effect a change to the law of Scotland. The Court held that the law of Scotland was stated by previous decisions that had accepted and applied the immunity. For a brief discussion of the case, see James Chalmers, 'Advocates' Immunity from Suit in Respect of Conduct in Court' (2002) 67 *Journal of Criminal Law* 401.

<sup>104</sup> *Lai v Chamberlains* [2003] 2 NZLR 374, 385.

<sup>105</sup> *Ibid* 386.

<sup>106</sup> *Ibid*.

<sup>107</sup> *Ibid* 396.

<sup>108</sup> *Ibid* 393–6.

<sup>109</sup> *Ibid* 396–7.

proceedings because clients in such proceedings ‘frequently seek to attach blame to their counsel.’<sup>110</sup> His Honour was also of the opinion that the immunity ought to be retained in family law proceedings because the desirability of finality in litigation was particularly strong when the rights of children were involved.<sup>111</sup>

Both judges suggested that the immunity ought to be modified in one respect — namely, that it should be limited to decisions made in the courtroom. Salmon J reasoned that decisions made in court were often made ‘solely out of the pressures of the trial process during a Court hearing’, but decisions made outside court did not possess this same quality.<sup>112</sup> Laurenson J suggested that limiting the immunity to decisions made in court might make the purpose of the immunity ‘more readily apparent to, and hence more acceptable by, the public.’<sup>113</sup> Whilst limiting advocates’ immunity to decisions made in court has some immediate practical appeal, we suggest that it provides a narrow focus on the scope and purpose of an advocate’s work.<sup>114</sup>

#### IV REASONS TO RETAIN THE IMMUNITY

We now turn to the main reasons that can be offered for the maintenance of the immunity. The following sections both examine the reasons in support of the immunity and respond to the arguments that are commonly made to support its abolition.

##### A *Immunity Extends to Other Participants in Judicial Proceedings*

Some commentators argue that advocates’ immunity is anomalous because it grants a special protection to advocates not available to other professionals.<sup>115</sup> In our view, the converse is true, since a similar immunity extends to other participants in legal proceedings.<sup>116</sup> There is clear authority that immunity from suit also extends to the actions performed and statements made by judges,<sup>117</sup> witnesses,<sup>118</sup> court staff<sup>119</sup> and jurors<sup>120</sup> in the course of judicial proceedings. A

<sup>110</sup> Ibid 400. His Honour also drew general support from the dissenting judgment of Lord Hobhouse in *Arthur Hall* on this point: *Arthur Hall* [2002] 1 AC 615, 747, 749.

<sup>111</sup> *Lai v Chamberlains* [2003] 2 NZLR 374, 400.

<sup>112</sup> Ibid 386.

<sup>113</sup> Ibid 401.

<sup>114</sup> See above Part II(C) regarding the ‘intimately connected’ test. It was explained that the test provides a strategic rather than temporal connection to the work of an advocate. On this view, the immunity should not be determined by superficial issues, such as where an advocate is at any point in time, but by the substantive issues, such as the character of the work in question.

<sup>115</sup> See, eg, Goudkamp, above n 3, 199; David Weisbrot, *Australian Lawyers* (1990) 211.

<sup>116</sup> *Contra* Goudkamp, who argues that no parallel can be drawn between advocates and other participants in legal proceedings because advocates owe a duty of care to their clients while all other participants do not: Goudkamp, above n 3, 197. In our view, this distinction focuses on the form of protection provided to the various participants in legal proceedings rather than the effect of that protection.

<sup>117</sup> See, eg, *Sirros v Moore* [1975] 1 QB 118; *Re McC (A Minor)* [1985] AC 528; *Yeldham v Rajski* (1989) 18 NSWLR 48; *Rawlinson v Rice* [1998] 1 NZLR 454. Judicial immunity operates in a remarkably similar manner throughout the common law world: Abimbola Olowofoyeku, ‘State Liability for the Exercise of Judicial Power’ [1998] *Public Law* 444.

<sup>118</sup> See, eg, *Cabassi v Vila* (1940) 64 CLR 130; *R v Skinner* (1772) Lofft 54; 98 ER 529, as applied in *Munnings v Australian Government Solicitor* (1994) 118 ALR 385; *Mann v O'Neill* (1997)

similar immunity extends to quasi-judicial proceedings.<sup>121</sup> Although the immunity enjoyed by each is slightly different, the common theme is that the immunity granted to participants in legal proceedings is not for their personal benefit, but to protect the operation of the legal system. In *Rajski v Powell*, Kirby P explained that judicial immunity was granted

not to protect judges as individuals but to protect the interests of society ... and to ensure that justice may be administered by such judges in the courts, independently and on the basis of their unbiased opinion — not influenced by any apprehension of personal consequences.<sup>122</sup>

In *Boland*,<sup>123</sup> Kirby J suggested that similar considerations underpinned the extension of the immunity to other participants in legal proceedings. This included advocates, because ‘the advocate is, with judge, juror, witness and court official, an actor in the public functions of the state and not ... simply another professional person engaged in private practice for personal reward.’<sup>124</sup> The description of the participants in legal proceedings as actors is perhaps apt in more ways than one. For present purposes, it is simply relevant to note that advocates perform a public function during the conduct of legal proceedings. They are members of an ensemble cast.

In *Arthur Hall*,<sup>125</sup> Lord Hoffmann rejected the view that the immunity granted to other participants in judicial proceedings provided a sound reason for advocates’ immunity. His Lordship accepted that witness immunity was necessary to enable witnesses to speak freely during proceedings, but concluded that any attempt to invoke witness immunity in support of advocates’ immunity ‘involves generalising the policy of the witness immunity and expressing it ... as a “general immunity”’.<sup>126</sup> The absolute immunity granted to other participants in judicial proceedings had been extended to advocates, his Lordship reasoned, so they could also perform their duty effectively and without fear of the stress and tension that would result from the potential to incur liability.<sup>127</sup> Lord Hoffmann held that the true rationale of witness immunity was to provide limited freedom of expression to witnesses.<sup>128</sup> For this reason, the immunity protected witnesses from a suit based solely on their statements. By contrast, an action that was based on the testimony and the witness’ conduct out of court was permissible

<sup>191</sup> CLR 204. Not long after delivering judgment in *Arthur Hall*, the House of Lords affirmed witness immunity in *Darker* [2001] 1 AC 435. See also *Taylor v Director of Serious Fraud Office* [1999] 2 AC 177.

<sup>119</sup> *Harvey v Derrick* [1995] 1 NZLR 314.

<sup>120</sup> *R v Skinner* (1772) Lofft 54, 56; 98 ER 529, 530, as applied in *Munnings v Australian Government Solicitor* (1994) 118 ALR 385.

<sup>121</sup> *Hercules v Phease* [1994] 2 VR 411. The main difficulty in such cases is establishing whether the relevant function is sufficiently judicial in character to warrant protection. See Susan Kneebone, *Tort Liability of Public Authorities* (1998) 273–9.

<sup>122</sup> (1987) 11 NSWLR 522, 528.

<sup>123</sup> (1999) 167 ALR 575.

<sup>124</sup> *Ibid* 613.

<sup>125</sup> [2002] 1 AC 615.

<sup>126</sup> *Ibid* 697, citing *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, 222.

<sup>127</sup> *Arthur Hall* [2002] 1 AC 615, 697.

<sup>128</sup> *Ibid*.

because the testimony provided evidence of a wider course of impropriety which should not be protected.<sup>129</sup> In such a case the testimony of the witness is, ultimately, the fruit of a poisonous chain of conduct.

In our view, there are three reasons why this conclusion does not accurately reflect the purpose of the connection between witness immunity and advocates' immunity. First, advocates are not necessarily immune from an action that is based upon their statements and conduct both in *and* out of court. It appears that advocates may be liable for litigation conducted in bad faith,<sup>130</sup> and that statements and conduct occurring within and outside court may be led in evidence to support such a claim. Advocates who engage in such conduct can and should be liable in tort.<sup>131</sup> It would be churlish to remove an advocate's conduct in court from the scope of evidence that may be called in support of an action alleging bad faith on the part of an advocate. On this view, any immunity provided to advocates that draws from the witness analogy is subject to the same general limitations applicable to all other beneficiaries of witness immunity.<sup>132</sup>

The second and more important reason why witness immunity can provide a suitable analogy to support advocates' immunity is the wide nature of witness immunity. Witness immunity is the most limited of all immunities provided to participants in judicial proceedings, yet it is still very broad.<sup>133</sup> Witnesses are granted immunity for their evidence, even if the evidence is wrong or negligent.<sup>134</sup> A witness has no function other than to give evidence. Accordingly, immunity for the evidence given effectively covers all of the actions of a witness in judicial proceedings. Other participants do much more in judicial proceedings, and they receive a wider immunity for doing so. Jurors, for example, are immune from the consequences of any verdict that is subsequently quashed on appeal.<sup>135</sup> Judges are immune from the consequences of a decision or order made and issued, even one that is mistaken or grossly wrong, so long as the judge does not act knowingly beyond his or her jurisdiction.<sup>136</sup>

The common theme in such immunities is that participants are protected for actions done in good faith, even if wrong or negligent. In our view, advocates'

<sup>129</sup> Lord Hoffmann did not make this point clearly but, in our view, it is the best explanation of *Taylor v Director of Serious Fraud Office* [1999] 2 AC 177, 215, upon which his Lordship relied: *ibid* 697.

<sup>130</sup> *Del Borrello* [2001] WASCA 348 (Unreported, Kennedy, Wallwork and Murray JJ, 6 November 2001) [123] (Kennedy J).

<sup>131</sup> They may be joined as a party to the various torts that are based on some form of abuse of legal proceedings, such as the misuse of civil proceedings.

<sup>132</sup> In *Mann v O'Neill* (1997) 191 CLR 204, Kirby J noted that there was a lack of authority on the precise point at which witness immunity ended: at 260. Recently, the House of Lords confirmed that improper out-of-court conduct by a witness is not privileged, despite its apparent connection to the testimony of the witness: *Darker* [2001] 1 AC 435.

<sup>133</sup> On the scope of expert witness immunity, see Michael McSweeney, 'Immunity from Suit of Expert Witnesses' (2002) 22 *Australian Bar Review* 131, 136–42.

<sup>134</sup> *Munster v Lamb* (1883) 11 QBD 588.

<sup>135</sup> Our research has not uncovered a reported judicial decision where any such action has even been attempted.

<sup>136</sup> *Sirros v Moore* [1975] 1 QB 118. In *Arthur Hall* [2002] 1 AC 615, Lord Hutton affirmed that 'the clearly established immunity of a judge' for any action in negligence extended to both civil and criminal proceedings. His Lordship noted that the judges of the European Court of Justice were expressly protected from civil liability: at 731.

immunity grants an equivalent protection because it extends protection to the core functions of advocates in legal proceedings, including the conduct of a case in court and work performed that is intimately connected to in-court work.<sup>137</sup> For this reason, we believe that Lord Hoffman was not justified in suggesting that any attempt to invoke witness immunity involves an attempt to generalise the policy of witness immunity for a wider immunity, since that general immunity already exists. His Lordship was in fact seeking to support the creation of an exception to the general immunity that extends to participants in judicial proceedings by suggesting that witnesses provided the only analogous example. Had Lord Hoffmann acknowledged that he was creating an exception to a wide-ranging immunity, his Lordship may have developed positive arguments for the distinct treatment of advocates.

The third reason why witness immunity can provide a useful analogy for advocates' immunity is its similar operation.<sup>138</sup> The similarities were revealed in *Darker v Chief Constable of West Midlands*.<sup>139</sup> Darker sued several police officers, whom he alleged had engaged in a conspiracy to create false evidence and provide perjured testimony against him. The Chief Constable submitted that witness immunity precluded the use of the officers' testimony in Darker's claim. The House of Lords accepted that the immunity could normally protect careless or incorrect evidence, and the reports and preparation undertaken by witnesses.<sup>140</sup> However, their Lordships held that the immunity did not extend to testimony provided as part of a conspiracy to give false evidence.<sup>141</sup> This finding marked out a narrow exception to an otherwise wide immunity.

In our view, the House of Lords correctly distinguished between incorrect or negligent behaviour by a witness (which could not give rise to liability in tort), and the deliberate creation and presentation of false testimony (which could give rise to liability in tort). We believe that this clear distinction between wrong or negligent behaviour on the one hand, and deliberate or malicious misbehaviour

<sup>137</sup> Lord Hutton adopted similar reasoning in his support of maintaining the immunity for criminal proceedings. His Lordship reasoned that the work of advocates was very similar in principle to that of other participants in a criminal trial: *Arthur Hall* [2002] 1 AC 615, 733.

<sup>138</sup> Peter Cane seems to inadvertently concede this with his suggestion that the removal or narrowing of advocates' immunity might strengthen the case to remove the immunity of expert witnesses: Cane, above n 3, 237. This reasoning presupposes that the two immunities have a similar foundation.

<sup>139</sup> [2001] 1 AC 435.

<sup>140</sup> *Ibid* 447–8 (Lord Hope), 472 (Lord Hutton). Support for this view was drawn from *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177. Other members of the House of Lords in *Darker* did not directly suggest that the immunity might extend to careless or incorrect evidence, but they did accept that the immunity should only be precluded in cases where there is an allegation of the deliberate fabrication of facts: [2001] 1 AC 435, 461 (Lord Clyde). See also Lord Mackay, who generally endorsed the immunity, but held that it should not extend to the conduct of an officer who deliberately fabricates evidence with no intention of revealing that fabrication: at 452. We believe that the views of Lords Clyde and Mackay anticipate the extension of the immunity to cases in which evidence has been infected by careless or inadvertent error.

<sup>141</sup> *Darker* [2001] 1 AC 435, 449–50 (Lord Hope), 461 (Lord Clyde), 469 (Lord Hutton). See also Lord Cooke, who held that police witnesses should be entitled to the immunity that is normally extended to other witnesses, but not if there were allegations of a conspiracy to give false evidence: at 453.

on the other, provides the same boundary that should determine whether an advocate is or is not liable.

#### B *Misfeasance in Public Office*

The arguments in the previous section suggest that advocates' immunity is warranted because it provides an appropriate recognition of the role played by advocates in judicial proceedings, and places advocates in the same position as other participants. It is important to note that the special character of the duties and functions of advocates have been accepted to provide a good reason to limit advocates' liability for torts other than negligence. A notable exception is misfeasance in public office.

An action in misfeasance in public office enables a person to recover for loss or damage suffered by reason of the action of the holder of a public office, if the officer acted either maliciously or with the knowledge that his or her action was beyond their power and likely to cause harm to the plaintiff.<sup>142</sup> The recent case of *Cannon v Tahche*<sup>143</sup> suggests that the tort cannot be used by a defendant against his or her former prosecutors. Tahche had been convicted of rape, on two separate occasions, of the same victim. Subsequently, doubt arose over the soundness of the second conviction, and it was set aside.<sup>144</sup> The Director of Public Prosecutions ultimately entered a nolle prosequi in relation to the second conviction. Tahche commenced an action in malicious prosecution against the State of Victoria and several people associated with his prosecution, including a solicitor of the Office of Public Prosecutions and a barrister ('the prosecutors'). Tahche argued that the prosecutors had maliciously failed to disclose evidence that would have cast significant doubt on the evidence of the complainant. The Victorian Court of Appeal held that the prosecutors did not hold a 'public office' for the purposes of the tort of misfeasance in public office, and, even if they had, any duty of disclosure to which the prosecutors were subject was owed to the court rather than to the defendant.<sup>145</sup> On either view, Tahche had no cause of action against the prosecutors.

Importantly, the Court of Appeal held that any duty of disclosure to which prosecutors were subject was ethical in nature. Accordingly, any breach of the duty could be corrected by professional disciplinary proceedings against the practitioner and, where prosecution behaviour caused a miscarriage of justice, the trial could be set aside.<sup>146</sup>

The reasoning adopted by the Court of Appeal invoked reasons similar to those we raise in support of advocates' immunity. First, the Court suggested that any duty upon prosecuting advocates was owed to the court. This finding confirms

<sup>142</sup> The elements of the tort are explained in Rosalie Balkin and Jim Davis, *Law of Torts* (2<sup>nd</sup> ed, 1996) 726–30.

<sup>143</sup> [2002] 5 VR 317.

<sup>144</sup> *R v Tahche* (Unreported, Supreme Court of Victoria, Court of Appeal, Winneke P, Ormiston and Hayne JJA, 27 September 1995).

<sup>145</sup> *Cannon v Tahche* [2002] 5 VR 317, 347. At first instance, Smith J held that the prosecutors did hold a public office for the purposes of the tort: *Tahche v Abboud* [2002] VSC 42 (Unreported, Smith J, 1 March 2002) [101].

<sup>146</sup> *Cannon v Tahche* [2002] 5 VR 317, 340–1.

that the suggestion that an advocate may not owe a duty of care to a client or any other person (at least in respect of particular conduct in court, or out-of-court acts that are intimately connected with such conduct) is not unique to immunity in negligence. Secondly, the Court accepted that the duties of prosecutors should not be enforceable by an action in tort.<sup>147</sup> Thirdly, the Court of Appeal clearly accepted that the *potential* adverse effect of a duty that could be enforced in tort was a strong reason to rule against the existence of such a duty. It is important to note that the Court did not have the benefit of any empirical evidence on this issue and, therefore, decided the issue on principle.

### *C Abolishing the Immunity May Lead to Conflicting Duties*

All lawyers are officers of the court. As such, lawyers have a duty to assist the administration of justice. This duty gives rise to many specific obligations. For example, advocates owe a duty to the court to behave honestly, fairly and to present the law in a fair and accurate manner.<sup>148</sup> Supporters of advocates' immunity suggest that a duty of care to clients could conflict with the duty owed to the courts, sometimes dramatically, and that any such conflict should be avoided.<sup>149</sup> Two practical reasons can be provided in support of this argument. First, there is often no clear basis upon which advocates could decide whether a conflict existed and how it could be resolved.<sup>150</sup> Secondly, it is unwise and unfair to render any person subject to potentially conflicting duties.

In *Arthur Hall*, neither point was accepted to provide a substantial justification for the immunity.<sup>151</sup> Several of their Lordships suggested that the apparently narrow range of cases in which advocates' duties to the court and the client were in conflict would not give rise to liability if an advocate acted in good faith and in obedience to the duty owed to the court. The terms in which this point was explained are illuminating. Lord Hutton accepted that where a conflict of duty arose, an advocate was not bound by the wishes of the client. Accordingly, the 'mere fact' that an advocate had 'declined to do' what the client wished would not expose the advocate to any form of liability.<sup>152</sup> Lord Hobhouse reasoned that an advocate's duty to the court effectively imposed ethical constraints upon his or her behaviour. His Lordship concluded that the decisions made in good faith by 'any competent advocate' to discharge this duty to the court would be upheld

<sup>147</sup> The Court of Appeal stated this principle in very wide terms, holding that the duties of prosecutors could not be 'enforceable at the suit of the accused or anyone else by prerogative writ, judicial order or action for damages': *ibid* 347.

<sup>148</sup> See *Clyne v New South Wales Bar Association* (1960) 104 CLR 186, 200; *Copeland v Smith* [2000] 1 WLR 1371, 1375–6 (Brooke LJ).

<sup>149</sup> See Charles, above n 3, 231–2; Trindade and Cane, above n 3, 428.

<sup>150</sup> Justice Charles states that the problem of divided loyalties is 'very much a matter of intuition': Charles, above n 3, 231. In our view, this correctly highlights the subjective, and often subtle, nature of this issue. The interpretation and application of lawyers' duties often involve instinct and experience, which often are not capable of easy application. These difficulties are increased when more than one duty is involved, and further increased when those duties conflict.

<sup>151</sup> *Arthur Hall* [2002] 1 AC 615, 681 (Lord Steyn), 689–95 (Lord Hoffman), 715–7, 725–6 (Lord Hope), 738–9 (Lord Hobhouse).

<sup>152</sup> *Ibid* 726.

by a subsequent court.<sup>153</sup> Lord Hoffmann attempted to assuage potential fears when he bluntly asserted that '[i]t cannot possibly be negligent to act in accordance with one's duty to the court and it is hard to imagine anyone who would plead such conduct as a cause of action.'<sup>154</sup> Note that Lord Hoffmann did not suggest that a cause of action of this nature could *never* be pleaded. In *Giannarelli*, by contrast, Wilson J accepted that an advocate 'could never be in breach of any duty to the client by fulfilling the paramount duty' to the court.<sup>155</sup>

In our view, the suggestion that an advocate could not, or would not, be liable in negligence for actions taken in discharging any duty to the court is an attempt to minimise the potential consequences of the abolition of the immunity. Perhaps the suggestion also provides comfort to opponents of the immunity, because it implies that any conflict between the duties owed by an advocate to the court and the client may be easily identified and resolved.<sup>156</sup>

There are several reasons to doubt this assumption. First, it is not clear how a conflict between duties may be identified. Even courts have admitted this difficulty. In *Giannarelli*, for example, Wilson J acknowledged that 'counsel's duty to the court is often easier to state than to apply in specific situations.'<sup>157</sup> Secondly, it is not clear who may decide how a conflict should be resolved. While the conflict will involve the advocate, it also involves the court. Can the advocate seek the view of the court? If so, when? Should the advocate seek the view of the court whenever a conflict arises, or wait to seek the view of the court during the course of any subsequent litigation commenced by the client? If it is not always clear when an advocate is discharging his or her duty to the court, it will often not be easy to determine when allegedly negligent behaviour falls within the scope of behaviour upon which a claim of negligence can be based.<sup>158</sup>

These problems are due in some part to the wide-ranging scope of an advocate's duty to the court. The duty to behave honestly, fairly and to present the law in a fair manner flows largely from the character of adversarial proceedings.

<sup>159</sup> It is widely accepted that because adversarial proceedings rely on the use of oral argument, it is necessary that 'judges rely heavily upon advocates appearing before them for a fair presentation of the facts and adequate instruc-

<sup>153</sup> *Ibid* 739.

<sup>154</sup> *Ibid* 692–3.

<sup>155</sup> (1988) 165 CLR 543, 572.

<sup>156</sup> This assumption seems to underpin the reasoning of many critics of the immunity. For example, Cane rejects the suggestion that conflicting duties might present a problem because 'the mere doing of one's duty to the court to the detriment of one's client could never be called negligent': Cane, above n 3, 235. This assertion clearly accepts that there may be conflicts, but Cane provides no way to identify or resolve such conflicts.

<sup>157</sup> (1988) 165 CLR 543, 572. Justice Charles comments: 'As to the argument that advocates could not be found negligent for merely carrying out their duty to the court, this may be easier, with respect, for a judge to assert than for an advocate to accept': Charles, above n 3, 232.

<sup>158</sup> Justice Charles expresses similar doubts. He argues that the difficult nature of many decisions that an advocate must take means that it is difficult to accept that some decisions can never be the subject of an action in negligence: Charles, above n 3, 232.

<sup>159</sup> See David Ipp, 'Lawyers' Duties to the Court' (1998) 114 *Law Quarterly Review* 63, 68–71. The relationship between the duties of candour and fairness and the adversarial system is due in large part to the great reliance that judges place on those who appear before them to inform the court about the law.

tion in the law.<sup>160</sup> The professional conduct rules governing advocates impose similar obligations additional to those imposed by the court. They may be invoked by way of a complaint made by a client, the court or another advocate.<sup>161</sup>

The duty to the court may oblige an advocate to behave apparently to the detriment of his or her client. For example, an advocate who presents the law fairly must include case law that is inconvenient, perhaps even fatal, to the client's case. Similarly, an advocate who is pressed by the court may abandon an unlikely ground of argument, or concede a strong point made by an opponent. In many instances an advocate will make a spontaneous, unilateral, tactical decision, for the perceived benefit of the case. For example, counsel who is asked by a judge whether a line of argument is *really* worth pursuing may decide that the point should be abandoned. Advocates are of course influenced by the manner in which the question is posed,<sup>162</sup> but they often have to decide whether to pursue or abandon particular arguments during a hearing in a unilateral manner.

It may not always be possible for an advocate to explain these decisions to a client. In some instances, the client may not understand the technical legal reasons for such a decision.<sup>163</sup> Although an advocate might *theoretically* be able to explain many decisions, often neither the opportunity nor the time are available.<sup>164</sup> Indeed, legal practitioners who charge fees according to the time devoted to work would most likely be criticised for providing unnecessary or excessive services. Even if an advocate could explain all of his or her decisions to a client, this has the potential to invite argument and second-guessing of their professional judgement and strategy. While an advocate who carefully recorded such exchanges could almost certainly preserve sufficient evidence of the client's involvement in technical decisions about the conduct of proceedings, we believe this would occur at the expense of the effective conduct of legal proceedings.

<sup>160</sup> Arthur Hall [2002] 1 AC 615, 692 (Lord Hoffmann). This principle is adopted in the rules of all Bar Associations and Law Societies in Australia and the Australian Bar Association *Model Rules* (2002). See Gino dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand* (2<sup>nd</sup> ed, 2001) 443–75.

<sup>161</sup> In many jurisdictions, any person may complain about the conduct of a legal practitioner. See, eg, *Legal Practice Act 1996* (Vic) s 138(1) which entitles '[a]ny person' to complain about the conduct of a practitioner or a firm.

<sup>162</sup> Every experienced participant in, or observer of, court proceedings has witnessed exchanges in which a judge has heard carefully prepared submissions on a particular point and turned to the advocate and asked: 'Counsel ... are you *sure* you want to pursue that point?' A judge who believes that a point is hopeless can normally indicate this view with a tone of voice and raised eyebrows that would leave no doubt as to the view of the court. A judge's demeanour often indicates that he or she does not want the court's time wasted, and counsel takes the point without complaint. Transcript can never capture such moments.

<sup>163</sup> Justice Charles notes that there are many matters that an advocate must determine which cannot be easily explained because they involve intuitive decisions, such as whether the evidence of a witness appears to have been accepted or how a jury may perceive a point: Charles, above n 3, 232.

<sup>164</sup> We do not intend to suggest that lawyers cannot, or should not, provide explanations for their decisions. However there are instances during the conduct of proceedings where this is not possible.

Some of the problems that can arise from such conflicts were explained in *Grimwade v Victoria*.<sup>165</sup> Grimwade was acquitted of several corporate law offences after lengthy proceedings (including an appeal). He sued his former prosecutors in several causes of action, including negligence. A dispute arose as to whether the prosecutors could, or should, owe a duty of care to an accused person. Harper J concluded that no such duty should be imposed because it would conflict with the duty owed by a prosecutor to the state (on whose behalf prosecutions were conducted) and the court. Harper J explained that:

The law should be meticulously careful to avoid the imposition of conflicting yet inescapable duties on the same person. Nobody should be damned if they do and damned if they do not. Indeed, whenever possible, the law should avoid placing the citizen in a situation in which regard must be had to two competing and legitimate interests, with penalties being imposed if one is favoured above the other.<sup>166</sup>

In our view, the unfairness that can flow from the inherent tension between conflicting duties is an equally appropriate description of the tension between an advocate's duty to the court and to the client. Many of the judgments in *Arthur Hall* were based on the premise that a conflict would rarely arise, or that when it did, would probably not give rise to liability on the part of an advocate.<sup>167</sup> However, these views did not grapple with the fundamental unfairness that two competing duties would present to advocates, or how advocates and the courts would work to resolve these conflicts in a manner that was satisfactory to a client. In our view, this basic unfairness should not be imposed before it is fully considered.

It is worth noting that Harper J declined to hold that a prosecutor should be subject to a duty of care towards an accused, even though a duty would not necessarily be inconsistent with their existing duties.<sup>168</sup> While a prosecutor must press the Crown case as far as possible, this cannot be done in a manner that infringes the accused person's right to a fair trial. Why then, would a duty of care towards an accused person introduce so many difficulties? Harper J accepted that there were many instances in which conflicting duties appeared to coexist comfortably. His Honour gave examples in which one person was granted power over another, and might be required to act contrary to the wishes of that other person whilst also owing them a duty of care, such as prison officials and prisoners, and medical practitioners and mentally ill patients.<sup>169</sup> Harper J did not accept that such examples were analogous to the function of prosecutors because

in these cases the person in authority has defined, and therefore limited, duties attaching to the office or calling through which the power is derived; and the duties are placed in a hierarchical structure, so that when they are in conflict, choices between them are relatively easy to make. More to the point, the duties

<sup>165</sup> (1997) 90 A Crim R 526.

<sup>166</sup> Ibid 545.

<sup>167</sup> See, eg, *Arthur Hall* [2002] 1 AC 615, 681 (Lord Steyn), 693 (Lord Hoffman).

<sup>168</sup> *Grimwade v Victoria* (1997) 90 A Crim R 526, 545–6.

<sup>169</sup> Ibid 545.

attaching to the position do not require those upon whom they are imposed to act in ways which do, or which might, adversely impact upon the very interests which the duty of care is (or, if it existed, would be) designed to protect.<sup>170</sup>

In one sense, the problems identified by Harper J might not arise in the context of advocates' duties, since courts have declared that the advocate's duty to the court clearly prevails over the duty to the client. The far more difficult problem which Harper J identifies is the contradictory nature of the authority and duty of an advocate. His Honour correctly notes that an advocate's duty to the court can adversely impact on the interests of a client. The duty to draw all relevant judicial authorities to the attention of the court, for example, may cause an advocate to highlight a precedent that has a serious adverse effect on the client's case. The corresponding nature of other conflicting duties, such as that which exists between a psychiatrist and their patient, do not carry the same potential of harm to the person to whom the duty is owed. While Harper J was concerned with the position of prosecutors, we believe that the same issues apply to all advocates.

#### D *The 'Cab Rank' Rule*

While we have discussed the potential conflict that may arise between an advocate's duty to the court and to the client, another important consideration is that an independent bar may also impose certain obligations upon its members. One of the most important is the 'cab rank' principle, under which a barrister must accept a brief that is within their field of expertise and does not conflict with any of their existing commitments.<sup>171</sup> This obligation does not apply to solicitors.<sup>172</sup> In *Giannarelli*,<sup>173</sup> Brennan J explained that the 'cab rank' rule provided an important means of ensuring equality of access to the law. His Honour stated that:

its observance is essential to the availability of justice according to the law. It is difficult enough to ensure that justice according to law is generally available; it is unacceptable that the privileges of legal representation should be available only according to the predilections of counsel or only on the payment of extravagant fees. If access to legal representation before the courts were dependent on counsel's predilections as to the acceptability of the cause or the munificence of the client, it would be difficult to bring unpopular causes to court and the profession would become the puppet of the powerful. If the cab-rank rule be in decline — and I do not know that it is — it would be the duty of the lead-

<sup>170</sup> Ibid 545–6.

<sup>171</sup> The rule is embodied in the Australian Bar Association, *Advocacy Rules* (2002) r 85 and the rules of individual bar associations: see, eg, Victorian Bar, *Rules of Conduct* (2004) rr 86–92. Barristers are bound to decline briefs that may give rise to some form of conflict with the spirit of independence and disinterestedness that the 'cab rank' rules seek to foster. An example is where counsel has advised or settled pleadings for another party: Victorian Bar, *Rules of Conduct* (2004) r 92(h).

<sup>172</sup> Cane suggests that a similar obligation extends to doctors employed by the English National Health System: Cane, above n 3, 236. Cf Australian Medical Association, *Code of Ethics* (2004), which does not contain an obligation that appears directly equivalent to the 'cab rank' rule.

<sup>173</sup> (1988) 165 CLR 543.

ers of the Bar and of the professional associations to ensure its restoration in full vigour.<sup>174</sup>

In *Arthur Hall*, it was suggested that the ‘cab rank’ rule did not provide a good reason to support advocates’ immunity. Lords Steyn and Hope accepted that the principle was a useful professional rule, but doubted that it had any significant impact on the administration of justice.<sup>175</sup> In particular, Lord Steyn suggested that the rule had lost much of its value since solicitors were now able to appear as advocates, although his Lordship did praise the tradition of the bar in supporting the principle.<sup>176</sup> His Lordship also rejected any suggestion that barristers would refuse to appear on behalf of difficult clients if the immunity was abolished, because advocacy in such circumstances was ‘a public duty which advocates perform without regard to such private considerations as personal gain or personal inconvenience’.<sup>177</sup>

In our view, the manner in which Lords Steyn and Hope considered the ‘cab rank’ rule raised more issues than it resolved. Much of the difficulty comes from the inherent tension in their attempts to both praise and cast aside the rule. If the rule has no significant influence, as their Lordships suggested, it is not clear why they felt compelled to laud its continued operation. More specifically, Lord Steyn’s suggestion that advocates would continue to observe the ‘cab rank’ rule for reasons of honour and public duty creates further difficulties. If the ‘cab rank’ rule can be explained as a ‘public duty’ to be discharged in the interests of justice and fairness, surely those who discharge it are (like other participants in judicial proceedings) performing a function for the benefit of the administration of justice? This reasoning strengthens the claim that advocates’ immunity can draw support from an analogy with witness immunity.<sup>178</sup>

The suggestion that the ‘cab rank’ rule is a public duty raises another difficulty. In our view, it is unfair for judicial authorities to abolish advocates’ immunity while also insisting that a public duty in the form of the ‘cab rank’ rule should remain, and be obeyed by advocates for reasons of public interest. To suggest that a barrister can use informal means to evade a potentially difficult client, who may pursue the barrister in negligence if the brief is not satisfactorily resolved, implies that there are difficult clients who may exploit the abolition of the immunity despite Lord Steyn’s own assertion to the contrary.<sup>179</sup> It also implies that barristers ought to observe the ‘cab rank’ rule in form rather than substance.<sup>180</sup> His Lordship inadvertently acknowledged these problems when he suggested that ‘[i]n 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.’<sup>181</sup>

<sup>174</sup> *Ibid* 580.

<sup>175</sup> [2002] 1 AC 615, 678–9 (Lord Steyn), 714 (Lord Hope).

<sup>176</sup> *Ibid* 714.

<sup>177</sup> *Ibid*.

<sup>178</sup> See above Part IV(A).

<sup>179</sup> *Arthur Hall* [2002] 1 AC 615, 679, citing Cane, above n 3, 236.

<sup>180</sup> Justice Charles has similarly commented that the criticisms of the ‘cab rank’ rule made by Lord Steyn and various academic commentators greatly undervalue, or even misrepresent, the rule as it applies in Australia: Charles, above n 3, 229.

<sup>181</sup> *Arthur Hall* [2002] 1 AC 615, 678. Cane makes the same suggestion: Cane, above n 3, 236.

In our view, this is a poor suggestion resulting from a failure to confront a difficult issue.

The 'cab rank' system remains an important aspect of the fair administration of justice in common law systems that adopt the adversarial system because it enhances access to justice. Judicial officers who suggest that the rule exerts little or no influence over the behaviour of barristers do so without the benefit of evidence from the bar. They also fail to confront the inevitable problems that would arise if the 'cab rank' rule fell into decline. One consequence of the approach taken by Lord Steyn is that, if advocates' immunity is abolished, barristers can and should veto clients on the basis of whether they may be expected to sue. With respect, his Lordship ought to have provided guidance on how the legal system is to deal with clients who are turned away. To take that course would undermine the legal profession, the administration of justice and public confidence in both the legal profession and the justice system.

#### *E The Immunity Limits Relitigation and Collateral Attack*

Relitigation can seriously erode public confidence in the legal system, because it is wasteful and undermines the original decision. The need to prevent relitigation, or collateral attack, was seen as an important justification in earlier decisions concerning advocates' immunity. In *Giannarelli*, for example, Mason CJ concluded that abolition of the immunity 'would unquestionably encourage litigation by unsuccessful litigants anxious to demonstrate that, but for the negligence of counsel they would have obtained a more favourable outcome'.<sup>182</sup>

In *Arthur Hall*, the House of Lords concluded that the possibility of relitigation was either not significant or could not support the immunity.<sup>183</sup> We will respond to each of the points made in support of this conclusion with a counterargument. First, however, it is worth noting that the reasoning of the House of Lords on the possible impact of collateral challenge was strongly influenced by procedural changes in England and Wales which, in the view of the House of Lords, made it more likely that proceedings that involved a collateral attack could be dismissed at a relatively early stage.<sup>184</sup> Equivalent procedural changes have not occurred in Australia. It follows that the dangers of collateral challenge in Australia cannot be dismissed with the same ease as was done in *Arthur Hall*.

The House of Lords argued that the possibility of relitigation did not extend to cases that did not have a final verdict or judgment.<sup>185</sup> It is true that any attempt to reargue a case that was subject to a final decision or order presents a particularly unacceptable challenge to the authority of the courts and the need for finality in litigation.<sup>186</sup> Another problem is that the duplication resulting from relitigation is

<sup>182</sup> (1988) 165 CLR 543, 558. See also 573–4 (Wilson J), 594–5 (Dawson J).

<sup>183</sup> The issue was considered in detail by Lord Hoffmann: [2002] 1 AC 615, 698–704.

<sup>184</sup> This is due to amendments to the *Civil Procedure (Amendment) Rules 1999* (UK), amending the *Civil Procedure Rules 1998* (UK). The content of the amendments is not relevant to our analysis.

<sup>185</sup> *Arthur Hall* [2002] 1 AC 615, 679 (Lord Steyn).

<sup>186</sup> *Ibid* 679 (Lord Steyn), 699–703 (Lord Hoffman), 715 (Lord Hope), 740–2 (Lord Hobhouse) A very different view was taken by the Ontario Court of Appeal in *Wernikowski v Kirkland, Murphy & Ain* (2000) 181 DLR (4<sup>th</sup>) 625. The Court held that any damage to the court system that might flow from relitigation was outweighed by the values fostered by allowing cases to pro-

wasteful, and imposes a particularly unfair burden on parties who have already endured the difficulty of a legal proceeding.<sup>187</sup> However, in our view, both problems can arise also in cases that have not been the subject of a verdict or final decision. The inherent waste of relitigation does not arise from the fact that earlier proceedings were concluded, but because the parties undertook preparation in the course of reaching a final determination. In most instances the work involved, and the issues raised, in a proceeding will not vary according to whether the matter is the subject of a verdict or final order after full presentation and argument, or is resolved prior to judgment.

Furthermore, relitigation can also undermine the authority of the legal system even though a case was not subject to a final decision or verdict. Most cases that are not subject to a final judicial decision or jury verdict are discontinued voluntarily, or settled on agreed terms. Some cases may be struck out for want of prosecution. In each instance, a case has been concluded by a legitimate means, often involving the consent of the parties or the failure of one party to adequately pursue its case. In our view, the moral imperative against relitigation is even stronger when the earlier proceedings are halted by the voluntary conduct of the party who seeks to reactivate substantially the same point in later proceedings. An attempt to reargue a decision that was decided against one's will, as arguably occurs when a case is resolved by a jury verdict or a judicial decision, can be understood as a natural instinct to continue a dispute that one believes was not resolved correctly. The same empathy cannot extend to cases that are settled or discontinued by reason of a party's own conduct. Neither the administration of justice nor public confidence in the courts is enhanced by a rule that permits actions for the purposes of re-examining such matters.<sup>188</sup>

The House of Lords also held that evidentiary difficulties arising in relitigation did not present a sufficient reason to decline jurisdiction to hear such claims. Lord Hoffmann suggested that many cases would be resolved quickly due to a lack of evidence, and that this problem would be exacerbated by the passage of time between the original and subsequent litigation. His Honour reasoned that such evidentiary problems would cause many cases to be struck out.<sup>189</sup> We will discuss the practical problems that may arise in actions against advocates below. At present it is sufficient to suggest that evidentiary problems may still exist even if the case is not struck out for lack of evidence. It is probable that the

ceed. Those values included accountability, fairness and professional competence: at 638–9, citing *Demarco v Ungaro* (1979) 95 DLR (3d) 385 (Krever J).

<sup>187</sup> *Arthur Hall* [2002] 1 AC 615, 701–3 (Lord Hoffman, Lords Browne-Wilkinson and Millett agreeing).

<sup>188</sup> For this reason, we do not accept the argument of Cane, who asserts that it is anomalous and unfair that the policy against relitigation can be invoked to prevent an action against a decision that has not been the subject of a decision in the formal sense: Cane, above n 3, 236. We acknowledge that, strictly speaking, it is possible in some circumstances to relitigate proceedings that have been settled — for example where a practitioner has settled a matter without authority from the client. This is normally done by a separate action that seeks to undo the judgment and the settlement that lies behind it. Fraud by an opposing party is also a common reason to relitigate a settled proceeding. We would suggest that the reversal of such cases does not represent relitigation because the original proceeding was not discontinued by the voluntary and informed conduct of the party.

<sup>189</sup> *Arthur Hall* [2002] 1 AC 615, 699.

nature of litigation would provide a sufficiently detailed documentary record to survive for some time. Tapes of proceedings, for example, are normally stored for at least a decade even if they are not transcribed. Evidentiary difficulties are more likely to arise from the differing interpretations placed on such material. In our view, it is unlikely that such claims could be struck out as easily as implied by Lord Hoffman. This is particularly so because in most Australian jurisdictions, the test for deciding whether a case should be struck out is more onerous than that in the United Kingdom, requiring the plaintiff's claim to be hopeless and bound to fail.<sup>190</sup> As every practitioner knows, claims which may well fail at trial are often sustainable at an interlocutory level by the construction of finely balanced arguments, and it is difficult to accept that such claims could be struck out easily.

Lord Hoffmann accorded greater weight to the general danger that relitigation presented to the *credibility* of the legal system. His Honour noted that the legal system strongly discouraged relitigation by any means other than appeal.<sup>191</sup> More particularly, the inherent power of courts enables them to strike out a case that constitutes relitigation if it would be unfair to one party to allow the case to proceed, or the case would amount to nothing more than a collateral challenge upon the final decision of another court.<sup>192</sup> However, this rule does not prohibit relitigation, but merely indicates the instances in which the inherent power of the court may be used to halt relitigation.<sup>193</sup> Lord Hobhouse noted that the leading case of *Hunter v Chief Constable of the West Midlands Police*<sup>194</sup> concerned an action by a disaffected defendant against the police rather than his lawyers.<sup>195</sup> His Lordship suggested that the matter could have proceeded in the form of an action in negligence against the defendant's lawyers, even if to impugn an earlier verdict.<sup>196</sup> There is one misconception arising from this explanation of *Hunter* that should firstly be clarified. It would not have been appropriate for Hunter to sue his legal advisers since his complaint concerned misconduct on the part of the police; however it may have been appropriate for Hunter to consider joining the prosecution lawyers in any subsequent legal proceedings.<sup>197</sup> While Hunter's claim against the police was rejected as an abuse of process, his allegations were later proved to be completely correct.<sup>198</sup>

<sup>190</sup> See, eg, *Dey v Victorian Railway Commissioners* (1949) 78 CLR 62, 90–1 (Dixon J); *Wentworth v Rogers [No 5]* (1986) 6 NSWLR 534; *David v Commonwealth* (1986) 68 ALR 18.

<sup>191</sup> *Arthur Hall* [2002] 1 AC 615, 701.

<sup>192</sup> Ibid 702–3, citing *Hunter* [1982] AC 529.

<sup>193</sup> Ibid 703, citing *Walpole v Partridge & Wilson* [1994] QB 106.

<sup>194</sup> [1982] AC 529.

<sup>195</sup> Hunter was one of the 'Birmingham Six', all of whom were convicted of an IRA bombing. The convictions of all defendants were later quashed after evidence of significant police misconduct was uncovered: *McIlkenny v R* [1992] 2 All ER 417.

<sup>196</sup> *Arthur Hall* [2002] 1 AC 615, 742–3, 750–2.

<sup>197</sup> In Hunter's case, he might have joined the prosecution lawyers, on the basis that the somewhat implausible nature of some of the police evidence should have concerned the prosecution lawyers. Any such claim would have faced great difficulty as there was no evidence to suggest that the prosecution lawyers were aware of the irregularities that arose in the collection of evidence or behaved improperly during trial.

<sup>198</sup> We do not intend to comment on the prosecution lawyers who acted in Hunter's trial, but rather the wider problem in England that arose during the 1970s and 1980s from the systematic crea-

We believe that any consideration of whether the legal system includes sufficient mechanisms to detect and strike out relitigation at an early stage raises many difficult issues. Lord Hoffmann conceded this much when he accepted that the abolition of advocates' immunity would lead to more cases that clarified the limits of the abuse of process doctrine established in *Hunter*.<sup>199</sup> His Lordship also accepted that it was difficult to derive clear guidance from the abuse of process doctrine to guide the speedy resolution of other cases, because power to strike out relitigation cases as an abuse of process was 'peculiarly a matter of judicial application to the facts of each case'.<sup>200</sup> Lord Hoffman did, however, provide some guidance on the issue. The question whether a claim involving collateral review of an earlier case amounted to an abuse of process would not depend on the weight given to the judgment of the court. It would normally be very difficult to prove that a different result could have been achieved for reasons alleged in a new claim. A more likely claim would be one alleging that a better result could have been achieved if better advice had been given. Lord Hoffmann concluded that such cases did not involve an attack on the judicial process, and ought to be allowed to proceed if the plaintiff had a real prospect of success.<sup>201</sup>

Lord Hoffmann's explanation of the principles governing the exercise of the power to strike out cases that raise relitigation issues does not dispel the particular form of relitigation that could arise with the abolition of advocates' immunity. As Mason CJ noted, some clients would be likely to say that, while another advocate may not have been able to change the result of a case, a better advocate could have achieved a more favourable outcome.<sup>202</sup> Perhaps an award of damages would have been higher, or the non-parole period of a sentence would have been somewhat shorter. This last point highlights a significant problem with the issue of collateral attack cases. Virtually all judicial and academic discussion of relitigation assumes that a plaintiff would seek to indirectly reopen a previously argued case, with a view to questioning the original result.<sup>203</sup> In our view, this conception of relitigation is unduly narrow, since in many instances a client may be equally aggrieved about the terms of a decision as the decision itself.

Cases that have not been through a hearing would also present more difficult evidentiary problems, because there would be significantly less evidence available in a convenient form to the parties. In particular, such cases would lack a transcript of proceedings, information contained in the examination and cross-

tion of false evidence by police, exacerbated by an uncritical acceptance of such evidence by prosecutors, courts and jurors. The House of Lords has belatedly acknowledged the systemic nature of this problem: see, eg, *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115.

<sup>199</sup> [1982] AC 529.

<sup>200</sup> *Arthur Hall* [2002] 1 AC 615, 705.

<sup>201</sup> *Ibid* 705–6.

<sup>202</sup> *Giannarelli* (1988) 165 CLR 543, 558.

<sup>203</sup> See, eg, Goudkamp, above n 3, 195–6; Charles, above n 3, 235–7. In *Arthur Hall* [2002] 1 AC 615, Lord Hoffman gave the example of a defendant who might sue his lawyer for negligence and gain an award of damages, whilst remaining in prison: at 687. One exception is Cane, who believes that the collateral challenge argument is only relevant to cases in which there was no settlement. He does not discuss in any detail the differences or difficulties that such cases might present: Cane, above n 3, 236–7.

examination of witnesses, oral arguments, and comments by a presiding judge. In the absence of such material it is difficult to accept that claims of negligence could be struck out easily, or at an early stage, if the claimant alleged that the deficiencies in evidence were due to the decision of an advocate to refrain from collecting or analysing evidence.<sup>204</sup>

#### F Other Sanctions Apply to Advocates

##### 1 Sanctions from the Profession and Professional Regulatory Bodies

Advocates are, like all other legal practitioners, subject to a regime of professional regulation. Disciplinary bodies may penalise, strike off, suspend, reprimand or fine a practitioner.<sup>205</sup> All legal practitioners are amenable to the jurisdiction of statutory regulatory bodies.<sup>206</sup> In most cases they are also amenable to regulation by either a Bar Association or a Law Society. It is well-settled that professional disciplinary schemes are intended to operate in the public interest, by protecting the public from misconduct by legal practitioners.<sup>207</sup> Disciplinary schemes also serve to maintain appropriate standards of professional behaviour among lawyers by imposing sanctions upon inappropriate conduct and providing guidance to other practitioners.<sup>208</sup> Furthermore, practitioners are normally prosecuted for disciplinary offences of a general nature, such as unprofessional conduct or professional misconduct. A range of conduct may warrant disciplinary proceedings, including the general duty of a legal practitioner to be reasonably competent in the practice of law.<sup>209</sup>

##### 2 Sanctions from the Court

The Supreme Courts of each state and territory possess an inherent jurisdiction over the legal practitioners who are admitted in their particular jurisdiction.<sup>210</sup>

<sup>204</sup> We exclude potential actions over cases that have been settled but are subsequently subject to dispute, as described previously: see above n 188. In such cases, any evidentiary disputes would not be over the evidence presented in the substantive case but rather evidence of the acts alleged to have led to the inappropriate conclusion of the case, such as evidence that a settlement was made without authority of the client or that it was tainted by fraud.

<sup>205</sup> The disciplinary proceedings of professional legal bodies and statutory legal regulators that apply to all Australian jurisdictions, and the differing considerations for each of the various penalties are explained in dal Pont, above n 160, 587–622.

<sup>206</sup> The jurisdiction of the various legal regulatory bodies of Australia is explained in *ibid* 597–638.

<sup>207</sup> See, eg, *Weaver v Law Society of New South Wales* (1979) 142 CLR 201, 207 (Mason J); *A-G (NT) v Legal Practitioner* (1981) 10 NTR 7, 21 (Forster CJ, Muirhead and Gallop JJ); *Smith v New South Wales Bar Association* (1992) 176 CLR 256, 270 (Deane J).

<sup>208</sup> See, eg, *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279, 286 (Dixon CJ); *A-G (NT) v Legal Practitioner* (1981) 10 NTR 7, 21 (Forster CJ, Muirhead and Gallop JJ).

<sup>209</sup> The description of this widely neglected principle is taken from dal Pont: above n 160, 77–81. dal Pont notes that the main difficulty with a duty of professional competence is that competence lies in the eye of the beholder. It could also be added that what makes this external assessment so difficult is that the beholder is often a layperson who is attempting to assess another person's professional conduct and judgement.

<sup>210</sup> See, eg, *Weaver v Law Society of New South Wales* (1979) 142 CLR 201, 207 (Mason J); *Wentworth v Law Society of New South Wales* (1992) 176 CLR 239, 250–2 (Deane, Dawson Toohey and Gaudron JJ). In *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)* (1998) 156 ALR 169 ('White Industries'), Goldberg J explained that the Federal Court also possessed this jurisdiction, even though it did not maintain a roll of practitioners or have jurisdiction to strike

This jurisdiction enables courts to impose a range of sanctions upon a practitioner, such as reprimanding them, suspending them or striking them off the roll.<sup>211</sup> These sanctions are commonly viewed as powers of last resort, particularly when legal practitioners may also be subject to statutory disciplinary proceedings.<sup>212</sup> Those proceedings do not, however, detract from the general power of courts to impose sanctions against a practitioner who has breached a duty owed to the court. It may in fact be more appropriate that the court remedy the breach of any duty owed to it by a practitioner, rather than refer the matter to a statutory disciplinary tribunal, in order to remove the potential difficulties that could arise if a judicial officer acted as the complainant before a statutory tribunal.<sup>213</sup>

One potential means by which a court may enforce appropriate standards of advocacy is the award of costs against practitioners. Orders of this nature may counteract a problem that could arise whether or not advocates' immunity exists. In *Arthur Hall*, counsel for the defendants submitted that removal of the immunity would lead to 'defensive lawyering', so that an advocate might make every possible point when he or she might otherwise be willing to concede some weaker points.<sup>214</sup> Lord Hoffmann rejected this argument, largely because courts had developed an appropriate range of remedies to prevent the apparently small amount of defensive lawyering that already occurred.<sup>215</sup> In particular, English courts are expressly empowered to make wasted costs orders against legal practitioners.<sup>216</sup> In *Ridehalgh v Horsefield*,<sup>217</sup> the first English case in which a

off practitioners, as the jurisdiction was based on the Court's general power to enforce duties owed by practitioners to the Court: at 229.

<sup>211</sup> Which remedy is suitable depends on the extent of the inappropriate or unprofessional conduct or misconduct. On these differing standards, see *Re Nelson and the Legal Practitioners Act 1970* (1991) 106 ACTR 1, 25 (Higgins and Foster JJ) (reprimand); *Re a Practitioner* (1984) 36 SASR 590, 593 (King CJ) (suspension); *Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279, 298–300 (Kitto J) (striking off); *Re Maraj (A Legal Practitioner)* (1995) 15 WAR 12, 25 (Malcolm CJ) (striking off). Courts may also penalise practitioners for contempt, although this power is not limited to legal practitioners. On the principles governing contempt, see *A-G (UK) v Times Newspapers Ltd* [1974] AC 273, 309 (Lord Diplock) and *Australian Meat Industry Employees Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98, 106–9 (Gibbs CJ, Mason and Deane JJ).

<sup>212</sup> These procedures are contained in: *Legal Practitioners Act 1893* (WA); *Queensland Law Society Act 1952* (Qld); *Legal Practitioners Act 1970* (ACT); *Legal Practitioners Act 1974* (NT); *Legal Practitioners Act 1981* (SA); *Legal Profession Act 1987* (NSW); *Legal Profession Act 1993* (Tas); *Legal Practice Act 1996* (Vic).

<sup>213</sup> Those difficulties mainly relate to the potential embarrassment that a judge would face in acting as a complainant before a statutory tribunal. For example, if the judge was required to provide evidence or lead submissions about the conduct of the practitioner in question, he or she might be required to express an opinion on decided cases, or perhaps also the competence of the practitioner compared to others. Any public expression of views by a judge on the competence of a practitioner could be invoked as a reason for the judge to stand aside from future proceedings concerning the practitioner, on the ground that the views expressed could give rise to a reasonable apprehension of bias on the part of the judge. The very decision of a judge to prefer disciplinary proceedings could be seen to give rise to such an apprehension. It could also be suggested that a judge who prefers disciplinary charges which are not found to be proved could face questions about his or her own judgment.

<sup>214</sup> [2002] 1 AC 615, 693.

<sup>215</sup> *Ibid.*

<sup>216</sup> *Supreme Court Act 1981* (UK) c 54, s 51. This power was introduced in 1990 as part of more general reforms effected in the *Courts and Legal Services Act 1990* (UK) c 41, s 4.

<sup>217</sup> [1994] Ch 205. This case was recently approved by the House of Lords in *Medcalf v Mardell* [2003] 1 AC 120.

court considered making an order against an advocate, the Bar Council of England submitted that advocates' immunity would be undermined if this power could be exercised against barristers. The Court of Appeal flatly rejected the submission. In *Arthur Hall*, the House of Lords noted that the decision had apparently 'not been detrimental to the functioning of the court system or indeed the interests of the Bar.'<sup>218</sup>

Remedies of this nature are available in all Australian jurisdictions. The inherent jurisdiction of courts over both legal practitioner and legal proceedings enables courts to order an award of costs against a legal practitioner if the lawyer has incurred the costs improperly, without reasonable cause, by reason of undue delay, or by some other form of default.<sup>219</sup> Three recent decisions concerning the power to award costs against legal practitioners suggest that this jurisdiction enables courts to regulate the standard of advocacy and punish negligent advocacy.

In *White Industries (Qld) Pty Ltd v Flower & Hart (a firm)*,<sup>220</sup> Goldberg J concluded that orders against legal practitioners could be made for several reasons, including cases where the practitioner was guilty of 'a serious dereliction of duty or serious misconduct in promoting the cause of and the proper administration of justice'.<sup>221</sup> After reviewing the relevant law, his Honour held that this test could be satisfied if a practitioner failed to give reasonable or proper attention to the relevant facts or law.<sup>222</sup> On this view, an award of costs can provide a de facto means of regulating the conduct of legal practitioners, because it enables courts to provide some compensation to the client where the conduct of a legal practitioner falls significantly below the standard which both the court and the client have a right to expect.

In *Harley v McDonald*,<sup>223</sup> the Privy Council overturned an award of costs made against a firm of solicitors after the trial judge found that the case was hopeless and should not have been maintained.<sup>224</sup> Three aspects of the reasoning

<sup>218</sup> [2002] 1 AC 615, 678 (Lord Steyn).

<sup>219</sup> For a survey of the statute and judicial law of all Australian jurisdictions see dal Pont, above n 160, 374–9. A particular instance is r 63.23 of the *Supreme Court (General Civil Procedure) Rules 1996* (Vic).

<sup>220</sup> (1998) 156 ALR 169; aff'd (1999) 87 FCR 134.

<sup>221</sup> *White Industries* (1998) 156 ALR 169, 239.

<sup>222</sup> Ibid. *White Industries* involved an allegation that solicitors had commenced and continued an action knowing that the action had no prospect of success. Goldberg J held that where such conduct was unreasonable, the jurisdiction to award costs against a practitioner would be enlivened.

<sup>223</sup> [2001] 2 AC 678.

<sup>224</sup> Harley invested money with a firm of solicitors. Upon the liquidation of the firm, he successfully sued but was not paid because the partners were declared bankrupt. Harley then sued the firm's professional insurers and later joined the New Zealand Law Society as defendants. The trial judge dismissed the claim against the insurers, but found for Harley against the Law Society. The judge held that the proceedings against the insurers were utterly hopeless and should not have been maintained. He held that his remarks to this effect during an interlocutory ruling should have alerted Harley's legal advisers to consider carefully whether to maintain the proceeding: *McDonald v FAI (NZ) General Insurance Co Ltd* [1999] 1 NZLR 583, 587 (Giles J). The trial judge ordered Harley's barrister and solicitor to pay a significant part of Harley's costs on the basis that they had been guilty of negligence and dereliction of their duty to the court in pursuing such a hopeless case: at 594–5. This order was upheld by the Court of Appeal of New Zealand: *Harley v McDonald* [1999] 3 NZLR 545.

of the Privy Council are relevant to advocates' immunity. First, the Privy Council held that any policy considerations that might be invoked to support advocates' immunity did not operate to prevent a court from awarding costs against an advocate in an appropriate case,<sup>225</sup> because any possible immunity from liability was related to the advocate's duty to the client, while the potential liability for an award of costs arose from an advocate's duty to the court.

Secondly, the advocate's duty to the court gave rise to a further important finding that the power of the court to make an order of costs against a practitioner arose from the inherent jurisdiction of the court, and was one that should be exercised in the public interest. The Privy Council explained that the jurisdiction

rests upon the principle that, as officers of the court, [practitioners] owe a duty to the court, while the court for its part has a duty to ensure that its officers achieve and maintain an appropriate professional level of competence and do not abuse the court's process. The court's duty is founded in the public interest that the procedures of the court to which litigants and others are subjected are conducted by its officers as economically and efficiently as possible.<sup>226</sup>

In our view, this passage acknowledges that the jurisdiction of superior courts to supervise the duties owed by practitioners casts a corresponding duty upon courts to enforce those duties. The Privy Council held that this jurisdiction should be exercised in cases where a practitioner has been guilty of a serious dereliction of duty to the court<sup>227</sup> — for example, commencing or maintaining a proceeding that a reasonably competent practitioner ought to have known had no prospect of success. More particularly, the Privy Council reasoned that an order of costs against a practitioner was a sanction imposed by the court, and should be crafted in a manner that enabled the court to provide some form of compensation for the litigant who suffered by reason of the practitioner's behaviour.

<sup>228</sup> While any order would be expressed in compensatory terms, it would also serve a punitive purpose to the practitioner.<sup>229</sup>

Thirdly, it is important to note that the standard of behaviour that the Privy Council would qualify as a 'serious dereliction' for the purposes of an award of costs was not unlike that which the House of Lords thought would support a finding of negligence against a practitioner in *Arthur Hall*.<sup>230</sup> The Privy Council accepted that a simple mistake, oversight or error of judgement would not be

<sup>225</sup> *Harley v McDonald* [2001] 2 AC 678, 701. The Privy Council pointedly declined to consider whether *Arthur Hall* had the effect of removing the immunity in New Zealand. Their Lordships stated that they 'would wish to have the advantage of judgments of the courts in New Zealand before expressing any opinion' on this point: at 701.

<sup>226</sup> *Ibid* 701–2. While the case involved the role of solicitors as officers of the court and their potential liability to an award of costs, the Privy Council expressly held that the same reasoning applied to barristers: at 702. Although the Privy Council was examining the position of practitioners before the High Court of New Zealand, in our view its remarks are of general application to any superior court. Justice David Ipp also seems to favour the view that the jurisdiction of courts to enforce duties owed to it by lawyers does not distinguish between barristers and solicitors: Justice David Ipp, 'Lawyers' Duties to the Court' (1988) 114 *Law Quarterly Review* 63, 66–7. In our view, the award of costs against lawyers is but one example.

<sup>227</sup> *Harley v McDonald* [2001] 2 AC 678, 702–3.

<sup>228</sup> *Ibid* 703.

<sup>229</sup> *Ibid*, citing *Myers v Elman* [1940] AC 282, 319 (Lord Wright).

<sup>230</sup> [2002] 1 AC 615.

sufficient.<sup>231</sup> While the Privy Council pointedly declined to adopt a precise standard of behaviour, it accepted that a serious dereliction of duty or gross negligence would clearly be sufficient, and that lesser behaviour might also suffice.<sup>232</sup> As the Privy Council explained, '[t]he essential point is that it is not errors of judgment that attract the exercise of the jurisdiction, but errors of a duty owed to the court.'<sup>233</sup>

The Victorian Court of Appeal adopted similar reasoning in *Etna v Arif*.<sup>234</sup> In that case, the Court held that an award of costs against a legal practitioner was within the Court's disciplinary jurisdiction, even though the main function of the order was to compensate the litigant.<sup>235</sup> The Court also held that the power to award costs was supplementary to the general jurisdiction that courts held over legal practitioners which is expressly preserved by s 172 of the *Legal Practice Act 1996* (Vic).<sup>236</sup> The Court of Appeal concluded that the relevant Victorian rule enabled the court to award costs where a legal practitioner had been guilty of gross negligence or unprofessional conduct, rather than 'ordinary' or 'mere' negligence.<sup>237</sup> While this finding was based largely on the history and language of the rule in question, the Court was also influenced by the view that the jurisdiction to award costs for disciplinary purposes should reflect the same high standard required for other sanctions imposed for disciplinary reasons.<sup>238</sup>

The relevant rule has since been amended to enable an award to be made against a practitioner who fails 'to act with the competence reasonably to be expected of ordinary members of the profession'.<sup>239</sup> This amendment clearly removes the high standard of negligence required by *Etna*,<sup>240</sup> and, in our view, restores the ability of courts to correct professional negligence by practitioners. The reasoning in *Etna* complicated the determination of awards of costs against

<sup>231</sup> *Harley v McDonald* [2001] 2 AC 678, 704.

<sup>232</sup> *Ibid* 705.

<sup>233</sup> *Ibid* 706. The Privy Council explained elsewhere that there was no rule that 'mere' negligence could not support an adverse award of costs, and that such conduct 'must be put in its proper context': at 705, citing *Myers v Elman* [1940] AC 282, 319 (Lord Wright). See also *Steindl Nominees Pty Ltd v Laghaifar* [2003] 1 Qd R 683.

<sup>234</sup> [1999] 2 VR 353 ('*Etna*'). The alleged negligence comprised the solicitor's failure to examine several key attachments to an affidavit. The trial judge held that had the solicitors read the documents, they would have realised that key assertions in the affidavit were untenable. The Court of Appeal held that this did not constitute gross negligence, essentially because the affidavit was required to be filed urgently, and there was clearly insufficient time to read the documents: at 386 (Batt JA).

<sup>235</sup> *Ibid* 379 (Batt JA). The power is contained in *Supreme Court (General Civil Procedure) Rules 1996* (Vic) r 63.23(1).

<sup>236</sup> *Ibid* 385 (Batt JA). The regulatory statutes of other jurisdictions contain similar provisions to generally preserve the jurisdiction of the Supreme Court. See, eg, *Legal Practitioners Act 1893* (WA) s 31H; *Legal Profession Act 1987* (NSW) s 171M.

<sup>237</sup> *Etna* [1999] 2 VR 353, 383 (Batt JA).

<sup>238</sup> *Ibid* 383–6 (Batt JA).

<sup>239</sup> *Ibid* 395. The amendment was effected by the *Supreme Court (Chapter 1 Amendment No 12) Rules 2000* (Vic) s 4.

<sup>240</sup> *Guss v Geelong Building Society (in liq)* [2001] VSC 299 (Unreported, Ashley J, 20 February 2001) [13].

lawyers in an unnecessary and undesirable manner, and should not be adopted by other courts.<sup>241</sup>

The jurisdiction to make an award of costs against a practitioner is only one aspect of the supervisory jurisdiction that courts may exercise over legal practitioners; however it does provide aggrieved clients with a remedy containing many benefits that are absent in a separate action for negligence. First, a client is not required to institute an entirely separate proceeding for an application for costs, as this can be made at the conclusion of an existing proceeding. Secondly, such applications are heard by the judge who presided over the case in which the practitioner is alleged to have acted in a manner that warrants an award of costs, thereby removing the need to reargue most points of fact. Thirdly, the expeditious manner in which judges normally dispose of costs applications ensures that clients who have a grievance about the behaviour of their advocate are subjected to as little further litigation as possible.

There are, of course, many practical problems associated with the wasted costs jurisdiction. The most obvious, which we mention without any easy solution, is how this jurisdiction may be exercised when the party who might benefit from such an order is still represented by the ‘guilty’ practitioner. Since the court normally only exercises this jurisdiction when it sees incompetence leading to unnecessary costs, it is difficult, if not impossible, for a party to make an application for costs without forcing the immediate withdrawal of his or her lawyers. The disruption caused to a case by such a withdrawal, albeit that of an incompetent lawyer, strongly discourages parties from invoking the jurisdiction at the earliest possible time. In our view, however, such problems are outweighed by the benefits of the wasted costs jurisdiction which suggest that it provides a particularly useful means of granting redress for negligent and inappropriate conduct by legal practitioners.<sup>242</sup>

#### *G How Could an Action in Negligence Be Determined?*

Almost all of the discussion about the difficulties associated with claims in negligence against advocates mention, in passing, the potential evidentiary difficulties that would arise in such cases.<sup>243</sup> Several of the judgments in *Giannarelli* and *Arthur Hall* refer to particular problems that could arise in legal proceedings against advocates, such as the difficulty in gathering evidence or establishing a clear understanding of negligence in the context of advocacy.<sup>244</sup> In *Arthur Hall*, no member of the House of Lords concluded that the potential practical problems in negligence claims against advocates were sufficient to

<sup>241</sup> But see *Steindl Nominees Pty Ltd v Laghaifar* [2003] 1 Qd R 683, where it was suggested that, in view of the serious implications involved in any award of costs against an advocate, the claim must be clearly proved and the advocate was entitled to the benefit of any doubt that might be present on the facts: at 692–3 (Williams JA, Philippides J agreeing).

<sup>242</sup> Justice Charles takes a quite different view. He suggests that an order for wasted costs ‘adds only a further conflicting tension to the advocate’s already divided loyalty’: Charles, above n 3, 222.

<sup>243</sup> See, eg, the grounds for which Lord Steyn concluded it would not be easy to establish a claim of negligence against a barrister: *Arthur Hall* [2002] 1 AC 615, 681–2.

<sup>244</sup> See, eg, *Arthur Hall* [2002] 1 AC 615, 698–9 (Lord Hoffmann).

warrant caution in the abolition of the immunity, although the issue was not considered in detail.

Several important issues regarding the determination of claims against advocates remain to be settled. The most contentious is the evidence that may be called by each party. As a matter of principle, parties should be able to rely upon all relevant evidence. In a negligence action against an advocate, this rule would naturally enable the parties to call the advocates who appeared in the earlier case, most documentary evidence<sup>245</sup> and the transcript of proceedings. But such evidence will provide only a partial insight into the conduct of the earlier proceeding. There must also be an assessment of the judgement exercised by an advocate and the effect of the decisions made by the advocate. In other words, a subsequent court must appraise an advocate's performance, the wisdom of the advocate's decision and the context within which those decisions were made.<sup>246</sup> Such evidence raises a difficult issue for judges. The judge who presided over the earlier proceedings would certainly have been well placed, and perhaps uniquely placed, to assess the judgement of the participants. In addition, judges may also draw upon their experience as former practitioners of high standing.<sup>247</sup>

We believe there are sound reasons of principle why judges should be competent, and perhaps even compellable, witnesses in such cases. The problems for judges are of both principle and practice. The theoretical problem lies in the difficulty of judges suggesting that advocates be treated like all other professionals, largely because working within the judicial system does not itself provide any reason for special treatment, while declining to apply this principle to themselves. This is ultimately a moral problem, which must be faced by judges. If judges support the abolition of the immunity partly on the basis that advocates should be treated like other professional people, it would be anomalous if they did so while also supporting a testimonial immunity for themselves. This approach would also run counter to many clear judicial statements to the contrary.<sup>248</sup>

There are several practical considerations that can be used to counter the inevitable suggestions that it would be inappropriate to call judicial officers as witnesses.<sup>249</sup> First, there is no possibility that a judge would face any civil

<sup>245</sup> Material held by the other party to the original proceeding would be likely to include documents subject to legal professional privilege, though the other party may waive privilege.

<sup>246</sup> This appears to be the best explanation of Lord Steyn's suggestion that 'it will not be easy to establish negligence against a barrister. The courts can be trusted to differentiate between errors of judgment and true negligence': *Arthur Hall* [2002] 1 AC 615, 682.

<sup>247</sup> This would also be the case if the test favoured by Yeo was adopted: Yeo, above n 3. Yeo suggests that advocates could be subject to a standard of care determined by reference to 'a practice accepted ... as permissible by a responsible body of barristerial opinion even though other barristers may adopt a different practice': at 14. The experience and standing of judges would be relevant to the evidence required to administer such a standard of care.

<sup>248</sup> See, eg, *Darker* [2001] 1 AC 435, 457 (Lord Clyde).

<sup>249</sup> Justice Charles simply argues that it would be contrary to public policy to allow judges to be called as witnesses: Charles, above n 3, 236. In our view, this assertion would have to be reconsidered by the High Court if it chose to abolish advocates' immunity. If the High Court accepts that public policy provides a sound reason why judges cannot be called, we argue that the Court would be compelled to provide clear reasons for this.

liability.<sup>250</sup> Accordingly, it could not be suggested that the fear of providing evidence in a subsequent civil proceeding against could inhibit a judge from discharging his or her judicial duties. Secondly, a judge could provide a uniquely informed opinion about the earlier proceeding and the standard of advocacy. Justice requires that parties should be able to rely on the best evidence available,<sup>251</sup> and this principle should extend to evidence from presiding judicial officers.<sup>252</sup> Thirdly, a judge would breach no confidence by providing his or her opinion on proceedings that were conducted in public, since he or she would simply be commenting on matters that had occurred in the public domain. Fourthly, the evidence of a judge could expedite cases involving negligent advocacy. The uniquely informed position of a judge could clarify issues between the parties and before the subsequent court, which would save considerable time and resources. In addition, it cannot realistically be suggested that judges would be intimidated or adversely affected by any requirement to give evidence, or lack the knowledge and ability to provide useful evidence or withstand the rigours of providing evidence. A person who presides over legal proceedings should be able to withstand the pressures of legal proceedings better than most.<sup>253</sup>

The final consideration is perhaps the most awkward for judges. In *Arthur Hall*, several of their Lordships drew upon their own experience or personal impressions to draw conclusions on how cases involving allegations of negligent advocacy might proceed.<sup>254</sup> While it is no longer controversial to suggest that judges draw from their experience and personal views in the formation of judicial law, such reliance raises a special problem when judges are dealing with potential litigation involving advocates. It is very difficult to accept that judges can rely upon their own expertise to reject the practical problems that might arise in litigation due to the abolition of advocates' immunity without also accepting that judges should be available to apply that same expertise to cases over which they have presided.

Perhaps the most forceful argument to compel the appearance of judges was provided by the House of Lords itself. Only seven days after the *Arthur Hall* decision was delivered, the House of Lords unanimously affirmed that witnesses were generally immune from any civil liability based upon their testimony.<sup>255</sup> Lord Clyde explained that '[t]hose engaged in the judicial process should be

<sup>250</sup> On judicial immunity, see above Part IV(A).

<sup>251</sup> At this point we assume that the opinion of the judge could be admissible as a 'fact' that was relevant to a subsequent case. This point would depend on the many circumstances of each case.

<sup>252</sup> Importantly, this principle would not enable judges to be compelled to give evidence in cases in which they had no involvement. There is authority that a court will not compel an expert witness to give evidence against his or her will if the expert has no connection with the case: *Application of Forsyth; Re Cordova v Philips Roxane Laboratories Inc* (1984) 2 NSWLR 327, 335.

<sup>253</sup> There is also the additional problem of how the opinion and reasoning of a judge could be presented and considered by a subsequent judge and/or jury. We offer no solution to this problem, but note that it would involve considerable forensic difficulty.

<sup>254</sup> See, eg, *Arthur Hall* [2002] 1 AC 615, 680 (Lord Steyn).

<sup>255</sup> *Darker* [2001] 1 AC 435. The House of Lords held that an allegation that witnesses had fabricated evidence would not be protected because the fabrication, if true, was comprised of a conspiracy that was commenced well before any evidence was given. The House of Lords held that the immunity did not extend to protect evidence given in the course of that conspiracy.

under no restraint from saying what has to be said and doing what has to be done for the proper conduct of that process.<sup>256</sup> This rule surely cannot exclude judicial officers.

#### *H Considerations for Criminal Proceedings*

In *Arthur Hall*, the majority also held that the immunity should be abolished for criminal proceedings, essentially for the same reasons invoked to abolish the immunity for civil proceedings.<sup>257</sup> The majority assumed that any right of action would only be available once a conviction had been overturned. Their Lordships also affirmed existing law that prosecuting counsel owed no duty of care to an accused.<sup>258</sup> These findings essentially suggest that a defendant might be able to sue his or her advocate if a conviction was never valid, but never the prosecutor.

The minority concluded that criminal proceedings were sufficiently different from civil proceedings to warrant retention of the immunity in the criminal context.<sup>259</sup> Lord Hutton identified two public policy reasons why advocates involved in criminal proceedings should not face liability in negligence. First, an advocate should be protected so that he or she may not be influenced by the fear of litigation.<sup>260</sup> Secondly, it is inappropriate that any person performing a public duty such as advocacy in a criminal proceeding might be 'vexed by an unmeritorious action and that such an action should be summarily struck out.'<sup>261</sup> Lord Hutton drew a close parallel between the functions performed by judges and prosecutors in criminal proceedings.<sup>262</sup> His Lordship concluded that the need to protect advocates against vexatious litigation was markedly stronger in criminal proceedings, while the potential avenues to stymie such litigation might not be as effective as they would be in civil proceedings.<sup>263</sup>

In our view, granting defendants the right to sue their advocates once their conviction has been overturned provides an inadequate and ad hoc form of redress. This criticism arises from the various reasons why a conviction may be overturned. Inaccurate evidence may be reviewed and either corrected by public investigators, or successfully challenged by an accused person. Misconduct by investigating officials or prosecutors may be uncovered and established. Negligence by the advocate of an accused person may also be uncovered, although it is usually alleged in conjunction with another reason. The common theme is that

<sup>256</sup> Ibid 457. See also the similar statement by Rich ACJ in *Cabassi v Vila* (1940) 64 CLR 130, 139.

<sup>257</sup> Lord Steyn also drew on his own experience on the Northern Circuit and as the member of the Criminal Division of the Court of Appeal: [2002] 1 AC 615, 680.

<sup>258</sup> Ibid 679 (Lord Steyn), 747 (Lord Hobhouse). Lord Browne-Wilkinson agreed with Lord Steyn: at 684.

<sup>259</sup> Ibid 717–25 (Lord Hope), 730–5 (Lord Hutton), 745–52 (Lord Hobhouse). Lord Hutton also suggested that retaining the immunity for criminal proceedings would not breach the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953): at 734.

<sup>260</sup> *Arthur Hall* [2002] 1 AC 615, 731. Similar considerations exerted a strong influence over Laurenson J in *Lai v Chamberlains* [2003] 2 NZLR 374, 397–400.

<sup>261</sup> *Arthur Hall* [2002] 1 AC 615, 731.

<sup>262</sup> Ibid 732–3.

<sup>263</sup> His Lordship also concluded that maintenance of the immunity for criminal proceedings would not violate European law: *ibid* 734.

an accused person has been the victim of a grave injustice. The main problem is that the justice system itself has erred. The source of the error is less important than the need to quash an erroneous conviction or the need to compensate the defendant.

The suggestion of the majority of the House of Lords that the immunity for criminal proceedings be abolished only after a conviction had been overturned involves a very narrow conception of the circumstances in which an allegation of negligence may arise in a criminal trial. There are many circumstances where an allegation of negligence could be made against an advocate that is not related to the conviction itself. A defendant may not seek to overturn his or her conviction because the sentence has been served, or the procedure for a special appeal is simply too arduous. The latter is a particularly important factor if the defendant must endure this process before he or she can even commence an action in negligence. It is also possible that a defendant may accept the soundness of a conviction but still claim negligence. For example, a defendant could admit that he or she was guilty of homicide but argue that he or she should have been convicted of manslaughter rather than murder. A defendant could also concede that he or she was convicted of an appropriate crime, but received an unduly severe sentence by reason of the negligence of counsel. Such instances would provide an aggrieved defendant with a good reason to pursue legal action if the complaint was well-founded.

In each example it is *possible* for a defendant to have suffered significant damage as a result of negligent advocacy. There is no compelling reason to limit any right of action against advocates simply on the basis of whether a defendant's conviction remains. Lord Hoffmann accepted this point in relation to civil proceedings, when his Lordship acknowledged that claims which alleged that a better outcome could have been achieved but for the negligence of the advocate did not necessarily involve an attack on the judicial process and, therefore, could not be struck out as an abuse of process.<sup>264</sup> In our view, there is no justification to limit this reasoning to civil proceedings.

Negligence on the part of defence counsel is only one of several means by which a person may suffer damage, yet, according to the majority of the House of Lords, it is one of the few avenues for which a right of action is available, as prosecutorial and judicial negligence provide no right of action.<sup>265</sup> Past cases suggest that any legal action against the police is strenuously defended.<sup>266</sup> It is difficult to justify any finding of law that grants a defendant a right of action against only some of the potential sources of an incorrect conviction. It would be more appropriate to compensate *all* defendants on a no fault basis. This would be an important benefit to persons who were the victim of flawed proceedings. Any allegations of negligence or misconduct ought to be the subject of separate professional disciplinary proceedings.

<sup>264</sup> Ibid 705.

<sup>265</sup> See above Part IV(A).

<sup>266</sup> See, eg, the strong defence of the police mounted to proceedings commenced as a result of a raid on a nightclub, as discussed in Ian Freckleton, 'Suing the Police: The Moral of the Disappointing Morsel' (1996) 21 *Alternative Law Journal* 173.

## V IS A DUTY OF CARE APPROPRIATE?

In an illuminating passage in *Arthur Hall*, Lord Hoffmann explained that the immunities granted to judicial officers were of no relevance to advocates because:

The judge owes no duty of care to either of the parties. He has only a public duty to administer justice in accordance with his oath. The fact that the advocate is the only person involved in the trial process who is liable to be sued for negligence is because he is the only person who has undertaken a duty of care to his client.<sup>267</sup>

In our view, this passage does not correctly state the basis for the liability of advocates in negligence. Any possible liability exists as a result of its creation by judicial officers, as does the judicial immunity from liability. Duties of care are not undertaken, they are imposed.<sup>268</sup> Lord Hoffmann attempted to expand the scope of that immunity by asserting that judges also do not owe a duty of care to parties appearing before them. While the wisdom of that assertion, for which his Lordship offered no authority, lies beyond the scope of this article, it does emphasise how both the existence and character of any duty of care are dependent upon conscious judicial decisions to create and regulate a duty. It is, therefore, appropriate to ask whether a duty of care is an appropriate device by which the functions and duties of an advocate may be conceived and enforced.

Gaudron J hinted at this issue in *Boland*, when she suggested that the relationship between lawyers and their clients may affect the nature of any duty of care that a lawyer might owe to a client.<sup>269</sup> The issue may not, however, be so simple. In recent years the High Court has clearly struggled with the question of how to best articulate the elements of a duty of care.<sup>270</sup> The source of many of these recent problems can be traced to Lord Atkin's classic ruling in *Donoghue v Stevenson*,<sup>271</sup> which expounded a duty of care based largely on the 'neighbourhood principle' without precisely defining the elements of the duty of care. Lord Atkin's conception of 'neighbourhood' encompassed people who are 'closely and directly affected' by one person's actions.<sup>272</sup> This principle enabled his Lordship to move beyond the relatively simplistic notions which, until that time, had conceived a relationship between a plaintiff and defendant in terms of time and space, to embrace the connection of a causal nature.

Later courts have developed both structure and guidance to this concept of neighbourhood by use of the concept of 'proximity'. For a long period proximity was perceived by the High Court as a unifying principle that underpinned

<sup>267</sup> [2002] 1 AC 615, 698.

<sup>268</sup> We draw a distinction between the creation or imposition of a duty of care as a general legal principle, and the assumption of that duty by a person in a particular case.

<sup>269</sup> (1999) 167 ALR 575, 602–3. See above Part III(B).

<sup>270</sup> The lack of agreement in the Court was highlighted in *Perre v Apand Pty Ltd* (1999) 198 CLR 180. Evidence of the impending doctrinal fragmentation in the Court was apparent in preceding decisions: see, eg, *Hill v Van Erp* (1997) 188 CLR 159; *Pyrenees Shire Council v Day* (1998) 192 CLR 330. See also the more recent decision of *Cattanach v Melchior* (2003) 199 ALR 131.

<sup>271</sup> [1932] AC 562.

<sup>272</sup> *Ibid* 580.

neighbourhood. In recent years, however, the Court has strongly questioned the value of the proximity concept.<sup>273</sup> Unfortunately the Court has not developed a coherent doctrine to replace proximity.<sup>274</sup> McHugh J has conceded that the divergence of opinion within the Court is so great that 'the search for a unifying element may be a long one'.<sup>275</sup>

While these wider problems facing the High Court in tort law are beyond the scope of this article, two relevant points may be drawn from the current uncertainties. First, it is difficult to predict the doctrinal basis upon which the Court might abolish advocates' immunity. This point assumes that the Court would conceive the abolition of the immunity as involving the further step of the imposition of a duty of care upon advocates.<sup>276</sup> The most recent decisions of the Court suggest that it will not impose or extend a duty of care in the absence of a good reason to do so.<sup>277</sup> Secondly, the manner in which the Court may take account of policy considerations when approaching a new or novel duty of care remains unclear. More particularly, the Court's doctrinal shift away from the concept of proximity has not been replaced by a coherent means for the Court to take account of the policy considerations that underpin the recognition of new duties of care.<sup>278</sup>

The remarks of Gaudron J in *Boland* acknowledge one important aspect of the debate over proximity. Her Honour correctly notes that the doctrine itself does not determine whether a duty of care exists, but that it provides a necessary process of reasoning in which a court must examine the circumstances of a case before determining whether a duty of care may be imposed.<sup>279</sup> Her Honour's more intriguing suggestion is that the 'nature of the relationship' managed by proximity could operate to exclude the existence of a duty of care for work performed by advocates in court.<sup>280</sup> In our view, the relationship between advocate and client provides an important reason for courts to hesitate to impose a duty of care in this regard. It is useful to compare the work of an advocate with a surgeon. The apparent similarity between the two professions is often raised by those who seek to limit the liability of medical practitioners or complain about

<sup>273</sup> The most graphic example is *Sullivan v Moody* (2001) 207 CLR 562. The Court stated that proximity 'might be a convenient short-hand method of formulating the ultimate question in the case, but it provides no assistance in deciding how to answer the question': at 579.

<sup>274</sup> Recent disagreement in the High Court is explained in Harold Luntz, 'Torts Turnaround Downunder' (2001) 1 *Oxford University Commonwealth Law Journal* 95 and Christian Witting, 'The Three-Stage Test Abandoned in Australia — Or Not?' (2002) 118 *Law Quarterly Review* 214. See also Justice David Ipp, 'Policy and the Swing of the Negligence Pendulum' (2003) 77 *Australian Law Journal* 732. Justice Ipp argues that much of the recent change and uncertainty in negligence is due to difficulties that judges have in articulating the influence of matters of policy in a coherent manner.

<sup>275</sup> *Perre v Apand Pty Ltd* (1998) 198 CLR 180, 210.

<sup>276</sup> The current doctrinal problems in the High Court suggest that abolition of the immunity may not be difficult, but the development of a coherent basis for the imposition of a duty of care upon advocates would be.

<sup>277</sup> This is the conclusion drawn by Luntz: above n 274, 106. Luntz also suggests that recent decisions of the High Court show a discernible shift to a 'pro-defendant' stance: at 96–8.

<sup>278</sup> This seems to be the best explanation of the fragmented reasoning in *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254.

<sup>279</sup> [1999] 167 ALR 575, 602–3.

<sup>280</sup> *Ibid* 602.

the special treatment granted to lawyers by advocates' immunity.<sup>281</sup> In many ways the work of a surgeon and an advocate are very similar. Both must draw upon substantial professional experience to make decisions of tremendous importance, the effect of which will be felt entirely by another person. Both decide the most appropriate course of action, and both retain a professional and moral responsibility for their conduct. But the work of a surgeon differs in one crucial aspect. A surgeon *uses* a scalpel and, in doing so, performs the most important aspect of surgery. Whether this function is described as responsibility, authority or power, it is the very essence of the medical procedure. By contrast, an advocate retains no such responsibility. In any judicial proceeding, the equivalent power to *administer* justice is in the hands of the judge, sometimes with the assistance of a jury. While an advocate may provide submissions or examine and cross-examine witnesses, he or she will never hold the responsibility, authority or power to determine the proceeding before the court. This role remains the province of the judge and jury. The scalpel is never passed to the advocate.<sup>282</sup>

#### VI CONCLUSION

One common theme of the arguments made in support of the abolition of advocates' immunity is that they fail to take account of the peculiar position that advocates occupy in the legal process. Advocates are officers of the court. Ultimately, they are also servants of the court. In this capacity, they are subject to special duties, and where those duties conflict with any obligations owed to the client, an advocate is bound to accord priority to any duty owed to the court. For this reason the analogy between advocates' immunity and the immunities granted to other participants in legal proceedings is particularly attractive, because it places advocates under the same protective umbrella that applies to these other participants.

Furthermore, the immunity removes advocates from potential conflicts in the duties that he or she may owe to the court and the client. No other participant in legal proceedings faces potentially conflicting duties of this nature. The unique position that advocates occupy — as the connection between the court and the client — provides additional support for retaining advocates' immunity, as special care should be taken to avoid the imposition of a tortious duty of care to enforce one of these duties.

Many of the problems that could arise if a duty of care was imposed have the potential to affect parties other than advocates. The problem of relitigation,

<sup>281</sup> But see Yeo, above n 3. Yeo believes that advocates' immunity should be narrowed. He suggests that a limited, but continued, immunity for advocates could be justified partly because they exercise greater discretion and independent judgement than medical practitioners: at 18–21. Goudkamp also suggests that if the immunity is to be retained it should be narrowed so that it is limited more directly to conduct in court. He suggests that it would be unrealistic to limit the immunity to criminal proceedings: Goudkamp, above 3, 206.

<sup>282</sup> We accept that there are cases in which, according to this analogy, the advocate comes close to holding the scalpel (such as when a matter is settled on the advice of an advocate). In our view an advocate does not grasp the scalpel because a decision to settle is made ultimately by a client. An agreement between the parties or a consent judgment gains its authority from the agreement of the parties or the court or both, not the advocate.

which we have suggested may be far greater than courts have admitted, could create significant evidentiary and practical problems for courts and all parties to such litigation.

Much of the analysis in this article has focused on the arguments for and against advocates' immunity. This should not obscure what we believe is the relatively simple and forceful basis for the immunity. Advocates are subject to a range of obligations in the performance of their professional duties. It is appropriate that most of these duties are owed directly to the court, rather than to other parties such as clients, because advocates appear before and remain answerable to courts. The immunity grants advocates a relatively narrow protection, and operates to protect only those actions performed in good faith that are significantly related to the presentation and conduct of a matter in court. This conception of the immunity provides limited protection that is directly linked to the status of advocates as officers of the court. Our emphasis on advocates as officers of the court fortifies the view that the immunity can be justified in principle because it provides advocates with a similar form of protection that is granted to other participants in legal proceedings. Accordingly, we have not argued that advocates should receive special protection, but rather that they should not be denied the similar protection granted to others.