IN THE SUPREME COURT OF NEW ZEALAND SC 19/2005

BETWEEN **CHAMBERLAINS**

Appellant

AND **SUN POI LAI**

First Respondent

AND **HILDA LORRAINE LAI**

Second Respondent

AND **NEW ZEALAND LAW SOCIETY**

First Intervener

AND **NEW ZEALAND BAR ASSOCIATION**

Second Intervener

Hearing 18, 19 and 20 October 2005

Coram Elias CJ
Gault J
Keith J
Tipping J
Thomas J

Counsel A C Challis for Appellant
P A Woodhouse QC, P N Collins and D Webb for First Respondent
R Gapes and C Weaver for Second Respondent
W M Wilson QC and C F Finlayson for First Intervener
J A Farmer QC, G M Coumbe and A Thorn for Second Intervener

CIVIL APPEAL

10.01 am

Challis May it please the Court, Miss Challis for the Appellants.

Elias CJ Thank you Miss Challis.

Woodhouse May it please the Court, I appear with Mr Collins and Mr Webb for the respondent Sun Poi Lai. It's pronounced Lay.

Elias CJ Yes, thank you Mr Woodhouse.

Gapes May it please the Court, I appear with Miss Weaver for Mrs Lai, Hilda Lorraine Lai.

Elias CJ Thank you Mr Gapes.

Farmer If the Court pleases, I appear with my learned friends Ms Coumbe and Ms Thorn for the New Zealand Bar Association as Intervener.

Elias CJ Thank you Mr Farmer.

Wilson May it please Your Honours, I appear with my learned friend Mr Finlayson for the N**Z** Law Society as intervener.

Elias CJ Yes, thank you. Now have counsel determined the order? Ms Challis, are we hearing from you first?

Challis No Your Honour. I understood that we had reached agreement and it had been indicated in the submissions that the Bar Association would go first, and the Law Society with me bringing up the rear and then Mr Woodhouse and presumably Mr Gapes following.

Elias CJ Alright, that's fine. Yes Mr Farmer.

Farmer Yes if Your Honours please, I am proposing to address policy issues that are relevant to this case. Then my learned junior Ms Coumbe will deal with three topics. One is the juridical basis of the immunity. Secondly are Bill of Rights issues. And thirdly the effect of international conventions, if any. The s.61 issue is dealt with in our written submissions but my learned friend Mr Wilson will address that, among other matters. So we'll leave that matter aside.

So turning if I may to the policy issues. There are really five preliminary points that I would like to make first. The first is that the immunity as formulated by the House of Lords in **Rondel** (**Rondel v Worsley** [1969] 1 AC 191) and in all subsequent case law is justified if at all on public policy grounds that support the proper administration of justice. The immunity is not justifiable on any perceived need to benefit barristers or to place them in a privileged position any more than judicial immunity is intended to benefit judges. Such benefits are merely an incidental consequence of the immunity. And although it's not in any Casebook that you've been given, Your Honours will recall I'm sure a short affirmation of that point that was made in **Narkla v McCarthy** and I'll just provide the reference. [1978] 1 NZLR 291

where at 294 Justice Woodhouse in referring to the judicial immunity said, that immunity is in no sense a private right which might be regarded as having been conferred upon a judge and which he then might be said to enjoy. He continued, he is merely the repository of a public right which is designed to ensure that the administration of justice will be untrammelled by the collateral attacks of disappointed or disaffected litigants. The second preliminary point.

Thomas J Could I have the page reference again?

Farmer 294.

Thomas J Thank you.

Farmer [1978] 1 NZLR 291 at 294 Your Honour. The second preliminary point that I would make is that judges have always been in a better position to assess the policy grounds than academic or media commentators. There is considerable reliance placed on, in my learned friend Mr Woodhouse's submission, the latter. And that too is a matter that's referred to in particular by Justice Kirby in his dissenting judgment in **D'Orta** (**D'Orta-Ekinaike v Victoria Legal Aid and another** (2005) 214 ALR 92). In our submission judges are best placed from their experience in the Courts to assess first of all the policy grounds which are based in essence on the need for finality in and respect for judgments of the Court and secondly are best placed to assess the issues relating to the conduct of litigation and the part played by counsel.

And then finally under this head, in our submission judges are best placed to assess the weight or the weighing process that needs to take place, weighing the interests of the private litigant on the one hand to have a claim for damages against her former counsel ventilated in the Courts against the public policy grounds that are relevant in this area.

The third preliminary point that we would make Your Honours is that the.

Elias CJ Sorry, are you saying that this is a private right verses a public policy or are these two public policy?

Farmer It is a private right but there is a public policy in having private rights ventilated in the Courts.

Elias CJ Yes, yes.

Farmer So that it's a question of how you, what weight you put to the public policy aspect of the right to have grievances ventilated in the Courts. And I'm not arguing, wouldn't be seen to argue that there isn't a public policy element in it.

The third preliminary point Your Honours is that the.

Gault J Before you move to that, are you going to say anything more about why you say judges are better placed than others to weigh these competing values or arguments?

Farmer Your Honour, not a lot. There have been suggestions, particularly, probably the judgment of Justice Kirby again in the **D'Orta** case, to the lack of what he called, I think, extrinsic evidence as to the consequences that might flow if the immunity were abolished. By the very nature of it, it's really very difficult to lead such evidence. For example on the impact that it might have on defensive advocacy. How is that established? By empirical evidence, the answer is it can't really be. It really is a matter for the judges from their own experience of the Courts to make that assessment.

Justice Kirby also in the **D'Orta** case makes the observation that in Canada and in the USA where there is no immunity, except in very limited circumstances in the US in the case of public prosecutors, his observation is that there is no evidence that the absence of immunity has opened the floodgates and led to a vast amount of litigation against lawyers. Our submission on that would be that that's not a matter that's really established either by Justice Kirby or anyone else either way. And I suppose the second observation we would make is that it perhaps begs the question any how. It's not just a matter of whether there will be a vast amount of litigation against lawyers, but it's more a question of, a more subtle question, of what the impact of the immunity or the absence of the immunity will have on the administration of justice and on the conduct of cases in Court. And as I say, that's a matter that's very hard to do other than form a view about, based on your own experience in the Courts, a lifetime of experience in the Courts.

Elias CJ Well then you're not contrasting, as I thought you were, whether judges are in a better position to assess the public interest than academics. You're saying judges are in a position to make a judgment in the absence of empirical information.

Farmer They are. And just as academics will make their own judgment, I'm saying that judges are far better placed than academics to make that judgment because judges have first hand experience of the Courts and of trials; academics don't.

Tipping J Mr Farmer, might not the contrast be rather not between judges and academics and the media, but between judges and Parliament?

Gault J I think that was my point really Mr Farmer. You've listed three aspects in which the judges are well placed to assess the importance of finality and to assess the impact on practical operation of the Courts but the third one was in weighing the public policy factors. It does

seem to me that it's something we need to consider. Not so much from the academics and the media but the Government, Parliament.

Farmer Well there is this, perhaps my response to that Your Honour would be, and I don't disagree with what you say, but my response would be this. That there is an important distinction that needs to be drawn between the policy assessments that were made by judges when the immunity was developed and perhaps, and finding its modern form in **Rondel v Worsley** in 1967, but then adopted and to some extent incrementally modified in subsequent House of Lords and other Court decisions. But to come to a view now that all of that has radically changed because of alleged changed conditions in society or even in the way in which legal practice and litigation is conducted, to come to the view that it's all radically changed is perhaps a matter that would be best suited for Parliament to determine rather than for the Courts.

And one of the vices as it were, or the vice of the House of Lords decision in **Hall v Simons** (**Arthur J S Hall and Co v Simons** [2002] 1 AC 6156) is that there was a radical change made to the law allegedly on changes in conditions in contemporary views of the law of negligence and in changes in the way in which the legal profession operated and the way in which litigation was conducted. And that is, we would submit, a task that the House of Lords undertook that was more appropriately fitted at that point, at that point, to Parliament if that sort of radical change were to be made.

Gault J We have a Bill before Parliament now which doesn't really address this but it's a more appropriate vehicle for addressing it?

Farmer Yes the Bill before Parliament, that's so, the Bill before Parliament now has effectively done nothing more than to preserve the status quo. The status quo.

Gault J Whatever that might be.

Farmer Whatever that might be. But the Bill at the time it was introduced of course, the status quo was not the law as now formulated by the Court of Appeal in this case.

Keith J You don't think that the change in wording of the Bill makes any difference?

Farmer No.

Keith J No, right.

Farmer I think that's a matter more my learned friend will deal with but we would submit it doesn't.

Tipping J Mr Farmer, there seems to have been a view in the House of Lords that because the judges had as it were created this immunity, that may not be entirely correct.

Farmer Yes.

Tipping J But on that premise, the judges were the most suitable people to decide whether, and if so, to abolish it.

Farmer That was, yes, that.

Tipping J Now that doesn't seem to me, with great respect, necessarily to follow.

Farmer That's Lord Hoffman's view of life.

Tipping J Yeah, well.

Farmer He that giveth can taketh away. And the point I was trying to make in a laboured way a short moment ago was that there is a fundamental difference between death and life. And the life of the immunity was developed, albeit that the juridical or the policy basis of it shifted, it was developed over a very lengthy period of time and the existence of the policy, of the immunity, was never doubted. But now, by one sudden act, Lord Hoffman and his colleagues took it away so to speak. And now my submission really was that that sort of radical abolition of a common law doctrine is more appropriately one to be made by Parliament. Particularly when it is supposedly based on changed conditions in society and in the legal profession.

Thomas J I'm sorry, I'm not quite clear on your answer. If Parliament were to review the matter and abolish the immunity, it would be on public policy grounds?

Farmer As determined by Parliament.

Thomas J And it seems to me that it's, that you really have just conceded that notwithstanding that, the judges are best placed to consider those policy grounds. I can't make the jump from that to Parliament's prerogative to do it simply because it's radical.

Farmer Can I make Your Honour, it's really my next third point. I think I can answer it if I perhaps read my next third point.

Thomas J Okay.

Farmer The third point, and it I hope encapsulates what I've just been endeavouring to say, the highest Courts of England, Scotland, Australia and New Zealand all made policy assessments over, as I said, a lengthy period of time in favour of the immunity. The modern, model statement of those policy grounds certainly is to be found in **Rondel v**

Worsley but followed, followed consistently thereafter with minor divergences of view, by the House of Lords again itself, particularly in **Saif Ali** (**Saif Ali v Sydney Mitchell & Co (A Firm)** [1980] AC 198 (HL)), by the High Court of Australia now on three occasions and by the Courts of this country until the recent Court of Appeal decision. So that in our submission, any radical reversal of that assessment by the Courts is only justified if at all by some radical change in the nature of litigation or conditions under which litigation is practised.

And in that respect it's worth pointing out immediately that the House of Lords in **Hall v Simons** did not hold that **Rondel v Worsley** had been wrongly decided. Far from it. Lord Hoffman in particular affirmed that it was, that there was no challenge to the correctness of that decision. Rather, what the House of Lords in **Hall v Simons** said was that a different view of policy should be taken because of the changes that have occurred in first the law of negligence, second the function of the legal profession, thirdly the changes to the Rules of Court which enabled unsustainable claims against barristers to be struck out and fourthly what was called public perceptions - the view that the public wouldn't like the idea that barristers were immune whereas perhaps others were not.

And so Your Honour, my point there is that if that sort of policy change is to be made because the facts have changed, that is to say the facts of the way in which a particular litigation is conducted, the administration of justice, the way justice is administered and so forth, then one would expect the changes to be very radical in nature to justify a radical change in the policy. And that sort of radical change is not as it were typical of the way in which the common law operates. And the common law has traditionally left radical change to be made by Parliament.

Now that's not to say that important changes don't occur from time to time in the common law. And I wouldn't seek to argue to the contrary. But on the face of it, prima facie, the sort of radical change that has occurred in **Hall v Simons** is one that one would have expected to be made by Parliament, if at all.

Elias CJ Can you just encapsulate for me what you say the radical change is? Because there's no doubt that the concept of abuse of process was thought by the Law Lords to have a fairly wide ambit. So what is so radical about the position that is reached in the UK?

Farmer The radical change is the abolition of immunity. That's the radical change.

Elias CJ Following from the provision?

Farmer From the existence of an immunity. The changes that justify that radical change were the four that I've listed. Changes to the Rules of

Court really come down to the question of whether, in particular whether a defendant has a greater ability through summary judgment procedures to have vexatious or unmeritorious claims dismissed. And the submission that we would make, and I will make and seek to develop it, is that the changes in the Rules of Court are not of such a magnitude as to justify the conclusion that unmeritorious claims against barristers, the effect of which may be to lead to the administration of justice being brought into disrepute, that those changes in the rules will not in fact, are not of such a magnitude to assure that kind of result.

Gault J Is your principal argument that the House of Lords in **Hall** got the assessment wrong? Or is it that the sort of assessment that should be made here is different?

Farmer We would say that the House of Lords, and history since has proved this to be correct, placed far too much reliance on the summary judgment procedure as being a satisfactory means to deal with the adverse policy issues of allowing relitigation or allowing actions against counsel to be taken. And in that respect, that's a view that's been expressed in the Australian High Court and it's a view that in our submission is borne out by reference to subsequent English case law that I'll take you to in due course.

Keith J How do you square that Mr Farmer with your second preliminary point that judges are in the best position to assess these things?

Farmer I'm saying that the judge has got it wrong on that issue in the House of Lords.

Keith J Mm.

Farmer And that subsequent experience in England has established that. So that.

Keith J So some judges are in a better position to assess than others?

Farmer Judges, like anyone else, make mistakes.

Tipping J You mean judges as a class as opposed to individual judges?

Farmer Absolutely, absolutely.

Keith J Well that's, going back to my brother Gault's point, it's got to be squared doesn't it with your proposition which you develop at the end of your submission about Parliament doing it, Parliament being in a better position because it can assess these matters on a broader basis.

Farmer My point there Your Honour was that the judges, if what we were talking about was simply the immunity being developed one way or the other, for example.

Keith J Right.

Farmer The intimate connection test.

Keith J Yes, yes.

Farmer How does that work in practice? Is it too wide a protection than is required or not?

Keith J Right.

Farmer That's the sort of development you would expect the judges to make.

Keith J Right.

Farmer But the abolition of the immunity altogether, and I'm sorry to keep using the word radical.

Keith J Mm, mm.

Farmer Because it may cause offence to one or two members of the Court possibly, but it is a radical change to abolish something.

Keith J Yes, yes.

Farmer To kill it. So my fourth point is really one to try and define the issues for this hearing. And in our submission they really come down to this. Whether or not first of all the changed conditions that were identified by the House of Lords in **Hall v Simons** are equally applicable in New Zealand. And in the Australian High Court decision in **D'Orta** the Judges were at pains to point out that they were not, that what was described in England was not necessarily true of Australia.

And secondly, if so, even if they are equally applicable in New Zealand, whether the same assessment should be made so as to abolish the immunity or whether the contrary assessment made by the High Court of Australia in **D'Orta** is more appropriate. And the case for the Bar Association, and this is my fifth preliminary point, is that the assessment of conditions, whether changed or not, made by the High Court of Australia, should be preferred to that made by the House of Lords. Both because conditions in Australia and New Zealand are more comparable and, but much more importantly than that, because the needs of the administration of justice and in particular the finality, desirability for finality in respect of judgments and secondly the causation problems, are the same today as they were in 1967. Nothing has changed to that extent that in our submission would require a

different assessment to be made of those policy grounds as formulated and applied by the House of Lords in **Rondel**.

The second submission for the Bar Association is that the powers of the Court to strike out unsustainable claims are not a satisfactory means of protecting the public interest in the proper administration of justice. It is submitted that there are major problems in striking out negligence claims or in fact in obtaining summary judgment by a defendant in negligence claims in which factual allegations both as to the conduct, as to causation, as to loss, necessarily require full investigation by the Court.

And it's, we would submit, and I'll take you to it in due course, but we would submit it's noteworthy that the House of Lords earlier this year in the case of **Moy v Pettmann Smith** (**Moy v Pettmann Smith (a firm)** [2005] UKHL 7) which was a negligence action against a barrister and that that was a case which went to trial. There was no attempt even to strike it out. It was obviously recognised by all concerned that the issues relating to the conduct of the barrister, relating to causation in particular, were of such complexity that neither a strike out application nor a summary judgment application were at all appropriate. And even, and I'll refer to another case which is not a case against a barrister but a case against a police constable, the **Darker** case (**Darker v Chief Constable of the West Midlands Police** [2001] 1 AC 435 (HL)) where an attempt was made to strike out the claim on the grounds that it was vexatious having regard to policy considerations. And the House of Lords ultimately held that it should not be struck out, the claim should be allowed to proceed.

So with those preliminary points, which I hope perhaps give the full picture of what I'm wanting to address in more detail, I'd like next to.

Tipping J Just before you do Mr Farmer. I'm a little unsure as to the ranking of your submissions as between Parliament and the Courts. Is your client's preferred option to leave it to the Parliament or that the Courts should decide this?

Farmer Our position Your Honour, as best I can state it, is that we would say that this Court should reaffirm the immunity as it's been formulated since **Rondel** in 1967. And that it can properly take that because it is simply reaffirming what is already there.

Tipping J I realise the two as it were lead to the same result, to allow the appeal.

Farmer Yes.

Tipping J But from the point of view of the reasoning process, is it

Farmer It's a matter for, whether the existing law, and by the existing law I'm not referring to the Court of Appeal's decision.

Tipping J No, no.

Farmer I'm referring to everything that was previously understood to be the law. If it's a matter of changing the existing law by abolishing the common law immunity, then it is our submission that is a task for Parliament. If it is a matter of reaffirming the existing law by reference, certainly by reference to what the House of Lords has said, but also by reference to the reaffirmation by the High Court of Australia for example of the **Rondel** position, then it's our submission that this Court is ideally placed to make that assessment. I mean there must be an assessment made today one way or the other of course.

Elias CJ What about a modification? An approach which puts the immunity on a different basis or reassesses the proper policy for it?

Farmer It might be said I suppose in **Rondel** that that's what the House of Lords did. Except that clearly enough in **Rondel** the analogy or the position of other actors in the judicial process including judges, witnesses, jurors, was considered by the House of Lords there to be highly relevant. And so at the heart of those immunities was the need for finality and also the need for those actors in the judicial process to participate in it without fear. And to that extent, and they are policy grounds that go right back and I'll give you a reference shortly to the time of Cooke at the end of the 16th, beginning of the 17th century. And so all that perhaps happened in **Rondel** was that there was an alignment of those policy considerations that applied to the immunities that support the judicial process as between barristers on the one hand and the other actors, judges etc on the other. And so what was discarded at that time in reality was the sort of, something of a digression that had been taking place in the 19th century which was the view that a justification, and it was only perhaps one but it was an important one, a justification for the immunity for barristers was that they could not sue for their fees. Now of course there was no contractual relationship and therefore if they couldn't sue for their fees they couldn't be sued for the services they performed. That justification could no longer be sustained once the decision had been given in **Hedley Byrne** because of course that cut through the contractual cocoon that otherwise, cut through the clear distinction that had always been drawn between contract and tort. So the answer to Your Honour's question is that there has been a shift in 1967 in the policy grounds. But it is just a shift. And so.

Elias CJ But it changes the scope of the immunity doesn't it? Because if you shift the policy, then the immunity must be no more than is necessary to give effect to that policy.

Farmer If the emphasis is on the administration of justice, then yes the immunity, the scope of the immunity becomes very important and it will be just what is necessary to support and protect the administration

of justice that was justified. Whereas if the policy justification had been one of the nature of the relationship between barrister and client, then perhaps a broader immunity might have been justified. So we certainly accept that as from 1967, if not earlier, the scope of the immunity for barristers had been at least clarified and possibly narrowed.

Elias CJ And so you'd allow us a similar creep will you?

Farmer Well I'm not encouraging you to make any creep. But clearly one of the matters that the Courts have looked at very closely in recent times is the scope of the intimate connection aspect of the immunity.

Elias CJ Yes.

Farmer And our submission on that is simply that the view taken by Justice Anderson or President Anderson in the Court of Appeal, was the correct one. Namely that that's the sort of issue that's probably best worked out through experience. And that we'd also in that respect endorse comments made both by the House of Lords in **Saif Ali** and by the High Court of Australia in **Giannarelli** (**Giannarelli v Wraith** (1988) 165 CLR 543 (High Court of A)) to the effect that the justification for the intimate connection test is that if you don't have it, you then get some rather arbitrary distinctions having to be drawn between what is the decision in Court and what is the decision out of Court.

Gault J You get the same if you do have it, I would have thought.

Farmer Yes you do. Yes there's always going to be a grey, blurred area.

Gault J The difficulties are really brought out in the Court of Appeal judgment in **Hall** where they wrestled with the three fact situations of intimate connection and it shows just how really difficult it is.

Farmer Mm. I think possibly the intimate connection, those who place great importance on the pressures on counsel in Court in a trial will have much less sympathy for the intimate connection test. I think one of the phrases that's used in the cases is the relative calm of chambers. Taking decisions, strategy decisions in the relative calm of chambers. Those who, however, say that the real justification for an immunity is not the pressure on counsel in Court so much as is much more the broader policy considerations, will then necessarily focus or allow for the fact that it is difficult to draw a distinction between decisions that are made in Court and the decisions that are made as to what to do in Court which may be made in chambers. And so the question of intimate connection is a justifiable extension as it were and one that, to the extent that there are difficulties in its application, are best worked out on a case by case basis. And that was the view that the President took in the present case.

Tipping J Mr Farmer, are you going to deal or is Mr Wilson going to deal with the question of retrospectively? Because that.

Farmer My learned friend Mr Wilson.

Tipping J Right, well I'll leave it. Because that could be said to be a matter that would tend to support leaving it to Parliament.

Farmer Yes, absolutely. And that my learned friend's going to deal with.

Tipping J Right.

Elias CJ I'm still trying to get a handle on when you say the Courts would be acting so radically that matters must be left to Parliament if you are acknowledging that the Courts will look very closely at the policy underpinning the immunity and that may have an effect on the immunity. Do you say that if the Courts for example were to abandon the intimate connection approach, that would be so radical that it would be a shift that would have to be left to Parliament?

Farmer No, I don't say that.

Elias CJ No, so that's why I asked you initially what do you say is really radical in what happened in **Hall**. Because on one view there is a substantial area of immunity preserved through the abuse of process approach if the policy is finality in litigation or not to permit collateral challenge. What I would like you to do is to identify for me the policy considerations your client says are fundamental and upon which a shift should not be undertaken by the Courts.

Farmer Your Honour I would not with respect agree that **Hall v Simons** has preserved at all any aspect of the immunity. **Hall v Simons** has done away with the immunity completely. It has allowed actions to be brought. What it has said, what the House of Lords in that case comforted themselves by saying, well if these are really unmeritorious claims and if it looks as if there's going to be collateral attack on the judgment of the Court, well then that will become evident and it can be the subject of a summary judgment or strike out application. But at the end of the day, any such application must be determined according to the law and the law is that barristers have no immunity. And so it will be a relatively limited class of case, probably primarily in the criminal area, where it could be said that there is truly a collateral attack being made, for example on a conviction. And even in that area, again there has been, there have been deficiencies in the ability of the Courts to completely prevent collateral attack. And I think in particular of the fact that it was found necessary for Parliament to enact legislation in the UK and elsewhere preventing people who are convicted of crimes suing for defamation people who had said they were murderers or they were robbers or whatever. So that.

Keith J That legislation didn't prevent the action, it merely said didn't it, that the Convention was evidence.

Farmer Which effectively prevents it.

Keith J Well does it? It certainly doesn't stop it. It would then give rise to the kind of issues that abuse of process might, mightn't it? What are the prospects?

Farmer Well there's nothing, my point Your Honour is that there's nothing equivalent to that that would prevent for example an action for negligence against a barrister and which would prevent the barrister raising as a defence, as he or she assuredly would, that if there were, or the particular conduct complained of, for example the failure to ask a witness a question, or failure to call a particular witness to give evidence, the failure to take a particular legal point, none of those things were causative of the result of the case. And so it is inevitable that in that sort of situation there is a form of collateral attack but not one which could be dealt with by way of summary process.

Elias CJ Well that's why I couldn't understand why you said that it was different for criminal cases. Because if it's a necessary part of the cause of action that a different outcome would have been achieved through the litigation, then you've got collateral attack.

Farmer Your Honour I didn't mean to say it was different.

Elias CJ I see.

Farmer What I said was that it's more apparent in criminal cases. But it occurs also in, I mean in the example I've just given. And of course it's necessary for the plaintiff to show that a different result would have been achieved. Because otherwise there is no loss that flows. And the point was made, I think by Justice McHugh in the **D'Orta**, case that in this area of causation, and I'm going to come to this, but in this area of causation, the real problem is that interposed between the conduct that's complained of and the loss that's occurred, losing the case, is the opinion of a third party, namely the judge. And that necessarily then has to be examined in terms for that link to be made.

Gault J It's one of the difficulties it seems that it may depend what you focus on. And there's been a lot of focus on unmeritorious claims, nuisance claims and on collateral attack. But what about a meritorious claim that does not involve collateral attack? Should there be immunity from that?

Elias CJ Mm.

Farmer I think my first response to that Your Honour would be to say it's difficult to envisage a claim which doesn't necessarily involve an examination of the judgment which the plaintiff was able to obtain in his or her favour.

Elias CJ A case that's been overturned on appeal but there's been loss because of the costs of appeal and the wasted time in the first instance hearing.

Farmer Yes but then the other matter that needs to be examined is also the whole way in which the case was conducted in Court. And the causative issues as to what would have happened if, just necessarily involve a relitigating of the case. And even if at the end of the day the judgment is accepted as being correct, perhaps in the instance Your Honour the Chief Justice has given, there is necessarily an investigation made, a relitigation of the case. And it's that relitigation of the case which the Courts in favour of the immunity have said is not in the public interest.

Perhaps if I could deal with these issues. We're getting perhaps into the area of policy.

Gault J Mm, mm.

Farmer That I would like to develop if I could. Because.

Gault J I understand. I don't want to interfere with your flow. But it does seem to follow from what you have said that you consider there are really no cases that do not involve relitigation. And you'll have to do some work.

Farmer Relitigation in one sense or another.

Gault J You'll have to do some work on me with that one.

Farmer Yeah, I mean Your Honour is correct that it is possible to think of cases where the validity of the judgment given can be accepted as a given. And I think the example Your Honour the Chief Justice gives of an appeal. And in fact the **D'Orta** case is perhaps one of those where there was originally a conviction and then it was overturned on appeal. But in the meantime the plaintiff had gone to jail for a period and that was the loss.

Tipping J Isn't the present case one of those? That this doesn't involve relitigating? It was a consent that was given to the entry of judgment. And you're not attacking any decision of the Court. The judge simply said, right if you consent, well I'll enter judgment, thank you very much.

Farmer But in fact if that consent had not been given then we're in the realm of speculation as to what the result would have been because in this case.

Elias CJ But it's not collateral attack.

Tipping J But that's a different point - the difficulty of proof. But here we're not. These plaintiffs, if I can call them that, are not seeking to relitigate any decision of a Court. They're simply saying they were induced to consent to judgment in circumstances when any competent counsel would have given them contrary advice. Isn't that the position in essence?

Farmer It still leaves open, this is perhaps, I'm trying to keep myself to areas of principle and I know these matters will be dealt with by my learned friend Miss Challis, but it still leaves open the question which the learned judge in this case, Justice Blanchard was I think happy to avoid if a consent could be given, which is why he raised it, leaves open the question as to what would have been the position in terms of breaches of fiduciary duty and the like.

Tipping J Loss of a chance, loss of a chance of avoiding the judgment.

Farmer Well then the loss of a chance is itself a problematic matter too.

Tipping J I know it's problematic.

Elias CJ But.

Tipping J But could you call it a. Sorry.

Elias CJ Well that's why I've invited you to identify the policy things that are absolutely fundamental. Because they identify, and collateral attack is one and I think we've been exploring that. But what other problems are fundamental so that if the Court recast the basis for the immunity and narrowed it, it would be bringing about a radical change which should be left to Parliament.

Farmer Well I've, in terms of recasting the immunity, the only modification of the immunity that's ever been really traversed is the question of the intimate connection test. Your Honour put to me earlier that effectively the House of Lords didn't abolish the immunity but modified it by simply saying that the abuse of process Rules of Court provided adequate means of dealing with the policy concerns.

Elias CJ Well the policy concern about collateral challenge.

Farmer That's right, that's right.

Elias CJ In particular.

Farmer And my submission to you is that that is not adequate, and that's the submission that we'll develop. But I think really I'm at the point

where I need to now examine with you just what these policy matters are and how they've been formulated by the Courts and in particular by the High Court of Australia.

Elias CJ Yes I think Justice Thomas probably had a question.

Thomas J Oh it was just about, I had difficulty seeing this case, this present case, as being a case which could properly be described as involving a collateral attack. But it's been overtaken by other discussion.

Farmer I think it's fair to say, I mean the learned President in this present case himself, while in his dissenting judgment upholding the immunity, raised the question as to whether the facts of this case really do give rise to a proper case of barristerial immunity. But we're not I think today really exploring that issue. Because for better or for worse we're all here today, and this matter has gone right through the Court system, we're here today to determine the issue of principle. And that's certainly all I'm concerned with on behalf of the Bar Association as an intervener.

Tipping J Just one final point Mr Farmer, you I take it would see it as an abolition if the immunity as such were removed?

Farmer Yes.

Tipping J But replaced by an expanded abuse of process protection.

Farmer Yes I do because the expanded abuse of process protection, what is that? That is simply an assessment as to whether the existing Rules of Court provide an adequate vehicle for dealing with the policy concerns. And our submission is that they don't. Because we're essentially dealing with negligence cases. Cases involving delegations of fact as well as law and cases leading in particular, giving rise to the most complex causation issues which again are issues of fact.

Tipping J But if your abuse of process doctrine was to the effect say that you could not bring such an action unless you had set aside the judgment that was central if you like to the cause of action, that would give very considerable protection against this whole business of relitigating, collateral attack and so forth. The present abuse of process rules are embryonic, particularly in the civil arena.

Farmer Mm.

Tipping J And I take your point that you would object and say it should be left to Parliament.

Farmer That sounds like a legislative solution Your Honour.

Tipping J Yes, yes, yes, quite.

Farmer Yes, yes.

Tipping J It may well be able to be turned round exactly like that. And I'm not expressing a view. But it's something as fundamental as that if you like as a quid pro quo to the abolition of the immunity might have to be left for Parliament's ingenuity.

Farmer Absolutely.

Tipping J I don't know but that really seems to me at the heart of what you're being asked.

Farmer Yes. And my response is that that may well be a reasonable compromise.

Tipping J The common law developments of the doctrine of abuse of process are problematical because there's no way this Court could properly lay down some sort of broad canvas.

Farmer No.

Tipping J Ahead of a case in which the issue expressly arose. And there would need to be, if you were taking away the protection granted by the present barristers' immunity, there would need to be some abuse of process quid pro quo to do the job, or part of the job that barristers' immunity does at the moment. That seems to me to be at the heart of the argument both substantively and for leaving it to Parliament.

Farmer Yes, yes. And in a sense Your Honour the real issue in this case is, was the House of Lords right to say that the Rules of Court were an adequate means of dealing with the problems.

Tipping J Well the Rules of Court per se do no more than talk about abuse of process. The real issue is what you mean by abuse of process. And I agree the summary judgment comfort if you like hasn't got a close equivalent in New Zealand.

Farmer Well we do have defendant summary judgment processes.

Tipping J Well yes.

Farmer But as the learned President said in the present case by reference to case law, case history to date in this country, there's no reason to think that the summary judgment procedure will be adequate to deal with cases of the complexity that we're talking about here.

Tipping J But isn't the point that the summary judgment procedure is no good unless you have a properly developed abuse of process jurisdiction?

Farmer Yes.

Tipping J Because it's only on abuse of process that you're likely to be able to knock these things out summarily.

Farmer That's right, that's right. I mean it's.

Gault J Is the immunity there to get rid of vexatious claims or is it there to protect against even meritorious claims?

Farmer It's both, it's both, it's both. And the point is made in one of the judgments that there will be cases that might well, because regarded as meritorious, but they will still give rise to exactly the same concerns about the need for finality in the judicial process. I wonder if I could move into that because I think that's really at the heart of this whole argument.

Elias CJ I would just like to flag that I hope somebody is going to address whether the collateral challenge issue, the need for finality doesn't really call for a recognition of a privilege which protects against a judgment being attacked collaterally. So that if it's a necessary part of the cause of action, there is a privilege against attacking it. But that's really why I'm asking you, and you're about to develop the other policy issues, whether that is, because I understand from your written argument that you would still see, quite apart from the collateral challenge issue, a need for an immunity for barristers. Because what really I'm putting to you as a privilege is really a privilege for the Court processes rather than for barristers.

Farmer Yes, I mean I think, let me put it this way. The finality concept is not just restricted to collateral attack on judgments. The policy of finality is one that says that there is a need to bring an end to disputes that give rise to the litigation. And to allow litigation upon litigation, which is the way it was put by Lord Morris I think in **Rondel**, is to as it were, albeit between different parties because now you have a barrister as a party, but because it does involve necessarily to a greater or lesser extent raking over the same ground that was dealt with in the first case, then you don't have finality. And so what that leads to is, it may lead to inconsistent decisions, but even if it doesn't, what it will necessarily lead to is, through that traversal of the earlier case, it necessarily leads to a lack of respect for the judicial process which society is entitled to accept as being one that has some finality to it. And that point is put very well by Lord Morris in **Rondel** and I was going to give you that reference. And also by the Majority in the High Court of Australia in the **D'Orta** case. And that's the point I really want to perhaps try and develop now if I could explore with you this concept of finality. And I hope Your Honour that may at least indirectly respond to the point you've put to me.

Now the policy issues that we have identified as being those that perhaps best justify the immunity are four in number. And these are in our written submissions. There is the need for finality in litigation and respect for the judicial process, which is an aspect of that. There is secondly the fact that the immunities attach to all participants in the judicial process and these two are related because they're focusing on the integrity of the judicial process. The third, which also is interrelated, is the advocate's overriding duty to the Court, which we say enhances the administration of justice. And including in that the reduction in defensive advocacy. And the fourth is the cab rank rule which we also say enhances the administration of justice and therefore goes to support, perhaps not entirely on its own, perhaps it needs these other matters as well, the immunity. So in our written submissions, they are chapters 2, 3, 4 and 5.

Now they all, in one way or another, do, as I say, focus on the integrity of the judicial process. And of course what we are focusing on is the role of the advocate in that process. But the advocate is not the only actor in the process, the others being judges, the judge, jurors and witnesses. In the present case, and I put this forward just as a preliminary statement of principle, in the present case the learned President said, at paragraph 105 of his judgment, you'll find his judgment in the Case on Appeal Tab 14, at page 140, and what he said there was, what is to my mind crucial however is the maintenance of the apparent independence of the Court process itself by obviating any basis for suggestion that a judge or a witness or counsel might have been influenced by the possibility of being sued by one of the litigants. In my opinion a compelling justification for the immunity of the judiciary, witnesses and counsel is that not only must they in fact be beyond the risk of the improper influence of fear or favour, they must manifestly be seen to be free of that risk. Now he's there dealing not with the finality point but dealing with the fearlessness point if I can put it that way. But what he is emphasising as the primary policy ground, is the need for the maintenance of the apparent, as I say seen, independence of the Court process.

And that sort of, that focus on the judicial process and its integrity was really a central theme in the judgment of the Majority in the High Court of Australia in **D'Orta**, if I could take Your Honours to that, which is Volume 1 of our Casebook, Tab 1. And when I refer to the Majority judgment, of course there were, that's the judgment of Chief Justice Gleeson together with Justices Gummo, Hane and Hayden. But supporting that judgment of course are the judgments of Justices McHugh and Callinan. But the joint judgment, if that's a better way perhaps of describing it, of those first four Judges, which was in Volume 1 Tab 1, described or referred to what they called the unique and essential function of the judicial branch of Government as being what they called the quelling of controversies through the judicial process by the application of, the ascertainment of facts and the application of the law. So if you go to paragraph 31.

Thomas J Paragraph?

Farmer 31. There's a reference first of all to **Giannarelli** and comments made in that case by Chief Justice Mason and then about half way through the paragraph Their Honours say: of the various factors advanced to justify the immunity, the adverse consequences for the administration of justice which would flow from the relitigation in collateral proceedings for negligence of issues determined in the principal proceedings was held, and they're referring there back to Chief Justice Mason's judgment, to be determinative. The significance of the reference to the administration of justice is of fundamental importance to the proper understanding of the immunity and its foundation.

Farmer And then they continued in paragraph 32. To adopt the language found in the cases considering chapter 3 of the Constitution, the central concern of the exercise of judicial power is the quelling of controversies. Judicial power is exercised as an element of the government of society and its aims are wider than, and more important than, the concerns of the particular parties to the controversy in question, be they private persons, corporation, polities or the community as personified in the Crown etc. No doubt the immediate parties to a controversy are very interested in the way in which it is resolved. But the community at large has a vital interest in the final quelling of that controversy. And that is why the reference to the judicial branch of Government is more than a mere collocation of words designed to instil respect for the judiciary. It reflects a fundamental observation about the way in which society is governed.

And they then went on further down, you'll see there's a section, paragraph 34 under the heading "finality" to develop their perception of what was meant by finality. And if I can just read that. 34 - A central and pervading tenet of the judicial system is that controversies once resolved are not to be reopened except in a few narrowly defined circumstances. That tenet finds reflection in the restriction upon the reopening of final orders after entry and in the rules concerning the bringing of an action to set aside a final judgment on the ground that it was procured by fraud. The tenet also finds reflection in the doctrines of res judicata and issue estoppel. And there's a development of that point.

And the paragraph ends, it is a tenet that underpins the extension of principles or a preclusion to some circumstances where the issues raised in the later proceedings could have been raised in the earlier proceedings. That's the so-called Anshone (?) estoppel, **Port of Melbourne Authority** case where the need for finality even extends to preventing the relitigation of issues that could have been raised but weren't.

Then Their Honours continue. 35 - The principal qualification to the general principle that controversies once quelled may not be reopened is provided by the appellate system. But even there the importance of finality pervades the law. And there's a reference to the limitations on further evidence and so forth.

And the paragraph ends with a reference to **Coultons** case. It is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial. 36 – The rules based on the need for finality of judicial determination are not confined to rules like those mentioned above. Those are rules which operate between the parties to a proceeding that has been determined. Other rules of law which affect persons other than the parties to the original proceeding also find their justification in considerations of a need for finality in judicial decisions. And some of those rules are rules of immunity from suit.

So that leads then to look at the justification for the various immunities from suit. And we're talking here about witness immunities, judicial immunity and counsels' immunity. And how those immunities support this general policy of finality, the quelling of controversies in the interests of maintaining the integrity of the judicial process. So in that, in the paragraphs that follow, the point is first of all made in paragraph 37 that by its very nature, because it is, every case is a contest between two parties and one of them loses, there is a very high probability that the party who loses may well consider the result of the case to be wrong or even unjust. And Their Honours say, seldom will a party have contested litigation without believing or at least hoping that it would be resolved in that party's favour. If that party does not succeed, an explanation for failure may be sought in what are perceived to be the failures of others, the judge, the witnesses, advocates, anyone other than the party whose case has been rejected. And that's, if I may say so Your Honours, that's a unique aspect or feature of what we're looking at here. That you have a class of potential claimant, which is a very large class, it's actually 50% of the total, group of litigants who by definition will be disappointed and by definition may well seek to attribute blame or fault to others other than themselves.

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

Then they set out in paragraph 39 some of the history of that in relation to witnesses. Why a disappointed litigant could not sue those who'd given evidence in the case. And in fact, and this is relevant perhaps to the intimate connection issue, pointing out that the witness immunity extends, if you look three-quarters of the way through the paragraph, to

preparatory steps taken by a witness. So even where the witness doesn't ultimately give evidence, but a brief of evidence for example has been prepared, the immunity extends.

Thomas J What's your attitude Mr Farmer on the question that's raised in the cases, that the other parties don't owe a duty of care to the claimant? Now I notice in Justice Kirby's judgment in the **D'Orta** case that he does suggest that a witness may well, he wouldn't be amiss he says to considering whether or not a witness owes a duty. For the rest, all the other judges have made that distinction, all the other judges that have addressed the point have made that distinction.

Farmer And in particular of course there's a real question surrounding expert witnesses. Because an expert witness, although has duties to the Court.

Thomas J Right.

Farmer The duty to be objective. The duty to tell the truth, although that's not quite the same thing, it's a duty to give an honest opinion really, and.

Thomas J Well leaving aside the question that Justice Kirby raised, that it may well be that on further consideration a witness does owe a duty to the party. But leaving that aside, the essential feature is that there is a duty owed to the party by the advocate who's received instructions and assumed the responsibility of due care.

Farmer Yes. That raises in a sense the question of there may be a duty owed but the policy of common law in looking at the negligence of any prospective defendant in any area, there is always, there are certain issues to be addressed. Proximity, foreseeability, and then the policy ground as to whether or not the Courts will impose a liability for negligence on that particular party. Now that's an issue that my learned Junior is going to address and I'd be quite happy, if Your Honour would be, to leave that to her.

Thomas J I'm quite happy to do that. There is a distinction. One could not say that the judge owes a duty to either party.

Farmer No but the point is made I think somewhere here that of course, in terms of proximity and foreseeability, hardly anyone can be more proximate than the judge to the litigant. And so it's foreseeable that if the judge is negligent or careless, there will be a loss or a wrong, an injury suffered by the litigant. But the policy of the common law intrudes to say, no, we will not allow you to sue the judge. But the position of the expert witness is a difficult one for those who want to rely on the duty of care as a distinguishing feature. Because the expert witness also can be said to have duties of care, apart from the duties to the Court, have duties of care as well. And the answer that's given by my learned friend I note in his submissions is that the Rules of Court now provide that the, I mean make very plain that the fundamental duty

of the expert witness is to the Court. And that is true but it's hard to say that there's not also some kind of comparable duty of care by the witness to the person retaining and paying him or her.

And it's of course noteworthy that there is no, there has been no attack, there has been no questioning in England of the expert, the immunity that attaches to the expert witness notwithstanding the judgments given in **Hall v Simons**.

Judicial immunity, going back to the joint judgment in **D'Orta**, is dealt with in paragraph 40 and the paragraph beginning, the development of judicial immunity was more complex. And it's certainly the case that if you go right back and look at it, that there was a distinction drawn between Courts of record and inferior Courts that didn't have records. And what was essential was that the integrity of the record was preserved. But allied to that was the underlying policy of finality. And there's a reference in paragraph 40 of the judgment, you'll see there's a statement three lines down, that the history of judicial immunity has been traced by Holdsworth. And if you look at the footnote, I don't suggest you do, I'll just tell you what's there, in the footnote it's not Holdsworth's History of English Law but rather a separate paper that Professor Holdsworth gave which was published in the 1924 Journal of the Society of Public Teachers of Law at page 17. And I'm sorry, we haven't included this in the Casebook but I would just tell you that at page 19 he refers to cases, very early cases, and in particular one **Floyd v Barker** in 1608 in Cookes Reports in which the learned Judge justified what was effectively judicial immunity in relation to Courts that kept, that were Courts of record. Justified it by the fact that if, that unless there was a rule that prevented people suing the judges, there would, and I quote, never be an end of causes but controversies will be infinite. The judges are to make an account to God and the King only. Otherwise those who are the most sincere would not be free from continual calumniations. And what Prof. Holdsworth says is that clearly that was the basis that then came to provide the immunity in modern law, namely a need to have an end to causes and a need to prevent controversies becoming infinite.

So going back to the joint judgment at the end of that paragraph 40, Their Honours said, what is important to notice for present purposes is not the history of the development of the immunity but that both judicial immunity and the immunity of witnesses were and are ultimately, although not solely, founded in considerations of the finality of judgments.

Now our submission then is, and this is the matter that is then addressed by Their Honours at paragraph 43 and following, is that those considerations that justify the immunities of judges and witnesses, and one can add jurors, those justifications which are based on the need for finality in order to protect the integrity of the judicial process, equally apply to suits against advocates. And so in paragraph

43 under the heading the judicial process as an aspect of Government conclusions.

(Beeping sound)

Elias CJ Sorry, we're beeping up here.

Tipping J I've probably inadvertently pushed or done something naughty.

Elias CJ Something technological. Well we might take the morning adjournment now and sort out the beeping, unless you wanted to finish off anything there Mr Farmer.

Farmer No, I'm happy to.

Elias CJ Come back to it. Alright, thank you.

Court adjourns 11.21 am
Court resumes 11.45 am

Elias CJ Thank you. Yes Mr Farmer.

Farmer Where I got to Your Honours was still looking at the joint judgment in **D'Orta** and, having taken you through the passages in the judgment which showed the relevance and the link between judicial and witness immunity to the policy of finality, Their Honours then went on to apply what they had said in that respect to advocates. And you'll find that at the beginning of paragraph 43 under the heading, the judicial process as an aspect of Government – conclusions.

Perhaps just above that at 42 there was a reference to Lord Mansfield in **Skinner's** case where he had said that neither party, witness, counsel, jury or judge can be put to answer civilly or criminally for words spoken in office. And then there's a reference to **Man v O'Neil** where it was said there were two related considerations. The first being to assist the full and free access to independent Courts for the impartial quelling of controversies without fear of the consequences. And the second one, the one we've been focusing on, the avoidance of the relitigation by discontented parties of decided cases after the entry of final judgment other than by appellate processes.

So under the heading, judicial process as an aspect of Government, at 43 Their Honours said the unique and essential function of the judicial branch is the quelling of controversies by the ascertainment of facts and the application of the law. Once a controversy has been quelled it is not to be relitigated. Yet relitigation of the controversy would be an inevitable and essential step in demonstrating that an advocate's negligence in the conduct of litigation has caused damage to the client. There's just no escape from it.

Gault J Well I think that's too broad myself.

Farmer As Your Honour pleases.

Thomas J It's very absolute in its terms, isn't it Mr Farmer? Are you going to take that absolute stance?

Farmer Absolutely.

Thomas J Well now we know where we are.

Farmer 44, the question is not, as may be supposed, and that's a reference to Lord Steyn in **Hall**, whether some special status should be accorded to advocates above that presently occupied by members of other professions. Comparisons made with other professions appear sometimes to proceed from an unstated premise that the law of negligence has been applied or misapplied too harshly against members of other professions. Particularly in relation to factual findings about breach of duty. But that was not a matter argued in this Court and should in any event be put to one side. Nor does the question depend upon characterising the role which the advocate, a private practitioner, plays in the administration of justice as the performance of a public or governmental function. Rather, the central justification for the advocate's immunity is the principle that controversies once resolved are not to be reopened except in a few narrowly defined circumstances.

Thomas J Can I just interrupt there?

Farmer Yes.

Thomas J Because I had this marked. The Majority are talking about controversies once resolved so presumably they've been through the appeal process.

Farmer Yes.

Thomas J What then are the few narrowly defined circumstances?

Farmer They're the ones that they referred to back in paragraph 35, there's reference first of all to the appeals.

Thomas J Yes.

Farmer But then also the rules on appeals, rules about what points may be taken on appeals, further evidence, and then just above that somewhere I think is, yes, the beginning of 34, restrictions upon the reopening of final orders after entry, rules concerning the bringing of an action to set aside a final judgment on the ground that it was procured by fraud. I think that's what the reference is to.

Thomas J Yes. So really the absolute nature of the statement at the top of the page is to some extent eroded by these exceptions.

Farmer Well, unless.

Thomas J They can't really state it absolutely any more.

Farmer Well, except, we're perhaps just jousting here Your Honour with respect, but controversies once resolved. So that would allow for appeals.

Thomas J Yes.

Farmer They're not resolved until you've had the appeal process exhausted.

Thomas J Yes.

Farmer And there's I suppose, yes, I mean what they're saying is that even application to set aside a judgment, to recall a judgment, all those, there are those provisions but they're all extremely restricted. So to that extent there is less perhaps degree of absolution or absoluteness than I've indicated.

Still at 45, second sentence, this is a fundamental and pervading tenet of the judicial system reflecting the role played by the judicial process in the government of society. If an exception to that tenet were to be created by abolishing that immunity, a peculiar type of relitigation would arise. There would be relitigation of a controversy already determined as a result of what had happened during or in preparation for the hearing that had been designed to quell that controversy. Moreover it would be relitigation of a skewed and limited kind. No argument was advanced to this Court urging the abolition of judicial or witness immunity. If those immunities remain, it follows that the relitigation could not and would not examine the contribution of judge or witness to the events complained of, only the contribution of the advocate. An exception to the rule against the reopening of controversies would exist. But one of an inefficient and anomalous kind. Now there is another possibility.

Tipping J Just before you go on Mr Farmer, isn't there also another point there that Their Honours haven't expressly mentioned, that the inefficiency and anomaly would be added to by the fact that in some cases at least the successful party in the earlier litigation might well have a proper interest in intervening to protect the finding that had been made in that earlier litigation?

Farmer Yes.

Tipping J Because if it's money only, it probably won't matter too much. But if it's anything other than money it would be very odd to find that in

other proceedings that suddenly you've been told, actually if the advocate on the other side had done his job properly you would have been found guilty of fraud. Or your defamation proceeding might have turned out differently.

Farmer Yes, yes. There is a reference in one of the cases and I'm sorry, I just can't remember where it is, to the possibility that if the action against the barrister were successful, so that it became clear that the earlier judgment was wrong for whatever reason, that that might trigger the possibility of an application then being made by somebody, presumably the party who was successful, if for some reason they couldn't recover their loss totally against the barrister, then going back to the original Court and applying for a rehearing. Now that may be a little fanciful, it may not.

Tipping J Well it introduces yet another difficulty.

Farmer It does.

Tipping J That might have to be addressed if you're going to allow people.

Farmer Yes. And of course there is this, the way Lord Morris put it in **Rondel**, litigation upon litigation upon litigation. There's also the possibility that if the client failed in the action against the barrister, he may then say, well the reason I failed is because my second barrister.

Tipping J Mm.

Farmer Didn't do his job properly and then you have a further action.

Tipping J Well I see that as a bit, it's theoretically possible but for me the greater problem is the interests of the successful party in the first litigation.

Farmer Yes.

Tipping J And that's really very difficult stuff.

Farmer Yes.

Tipping J Should they be entitled to intervene? Presumably so if it was, you know, in their interests to do so. It's a very difficult point.

Farmer We've been talking so far Your Honour about civil cases.

Tipping J Yes.

Farmer Again there is a reference by a judge, and I'm sorry I can't recall but I may do so, in the criminal area. If a client were convicted and then were to, I mean there is the whole issue of collateral challenge, but if by one means or another the client were able to establish liability

against the barrister for negligence, which established in a sense that he'd been wrongly convicted, is there the two possibilities, well is there the possibility first of all that he may then go back to seek to have his conviction set aside? And the other possibility may be the one Your Honour's raised, is given that this action is on foot, would the Crown seek to intervene to protect the integrity of the Convention?

Tipping J What about the victim?

Farmer Or the victim.

Tipping J Whose word has been accepted by the jury, shall we say, but then it's said that if the barrister had done his job properly, or her, then the thing would have been different.

Farmer Yes.

Tipping J I mean it has endless fish-hooks in it.

Farmer It does, it does. It does. One point in that paragraph 45 that I would like to just go back to is at the foot of the page, the reference to if the immunities remain, that is to say judicial and witness immunity, the relitigation could not and would not examine the contribution of judge or witness. That really, that statement may not be totally correct. It's clearly a reference, it would seem to be a reference, to the fact that Judges and witnesses are not compellable, judges and witnesses are not compellable in any subsequent action. In other words the plaintiff, the client, could not seek to subpoena the judge or subpoena a witness in order to give evidence as to what, or a juror for that matter, as to what they may or may not have thought or done if for example the case had been conducted in a different way, if some further witness had been called or whatever. But of course while that's correct, it doesn't stop an argument being presented to the Court that no loss has been suffered. Because even if this further witness had been called or even if counsel had done or not done whatever it was claimed about by the former client, the result would have been no different and it doesn't prevent the client arguing, as the client necessarily has to argue, that the result would have been different. He would not have lost the case. So necessarily there is going to be a tension focused on the position of the judge and on the position of other participants in the earlier hearing.

But the other main point made about that, paragraph 45, which we would submit is an important paragraph in the judgment, is that there is, allowing the controversy to be reopened does lead to anomalies and we would submit it leads to potential injustice.

Now the only other, in this joint judgment, the only other paragraph I'd refer you to is paragraph 84 which is still on this point, where under the heading no relitigation, they simply say that to remove the advocate's immunity would make a significant inroad upon what we've earlier

described as a fundamental and pervading tenet of the justice system. That inroad should not be created. They then say, well we're not doing that to protect the lawyers. The legal principle which underpins the Court's conclusion is fundamental. Of course there's always a risk that determination of a legal controversy is imperfect and it may be imperfect because of what a party's advocate does or does not do. The law aims at providing the best and safest system of determination that's compatible with human fallibility. But underpinning the system is the need for certainty and finality of decision. The immunity of advocates is a necessary consequence of that need.

Now along the same theme really, Justice McHugh, who gave a separate judgment but concurring, at paragraph 143 also has a heading, public confidence in the administration of justice. And here he is, this is in the context of his dealing with the earlier judgments in **Giannarelli** by the High Court of Australia. And he said at 143, Their Honours in that case placed importance on the damage to the administration of justice that would be caused by the collateral challenge to proceedings where a suit of negligence concerns conduct in the course of litigation. That damage is two-fold. In order to establish causation, a plaintiff must show at least that, but for the advocate's conduct, a different result would have obtained in the proceedings. Causation could rarely be demonstrated without a full reconsideration of the issues litigated in the primary proceedings, including a rehearsal of the evidence. In this parallel proceeding the opponent from the principal proceeding would not be a party. Now that's Your Honour Justice Tipping's point.

Tipping J Yes.

Farmer Collateral proceedings are thus not the same as a retrial. The advocate is left in a peculiarly vulnerable position. The conduct amounting to negligence must be established in the context of the actual trial in which matters of impression, demeanour of witnesses, judge and jury take on importance and are hard to assess objectively at a later stage. And then in 144 he said, Their Honours in **Giannarelli** also saw retention of public confidence in the finality of curial resolution of disputes as important for the administration of justice.

Thomas J Those sort of factors that have just been mentioned really just tend to confirm that there's an inherent difficulty in establishing liability. I mean all the questions of impression, demeanour of witnesses and so on. It means that an advocate really does start with an advantage, even where negligent, it's going to be very difficult to recapture those sort of things.

Farmer It's a point I think that's made in **Hall v Simons** that the, that oh well, let's not worry too much because it's always going to be hard to show negligence. Particularly where necessarily counsel have to make, exercise judgment on matters that are difficult.

Thomas J Mm.

Farmer But with respect that's not a satisfactory answer, that people, that plaintiffs are more likely to lose than win. It doesn't deal with the issue of the fact that there will be cases that will be brought. And even if the plaintiffs lose, there will be a relitigation of the earlier proceeding and is that in the public interest, that's the question.

Keith J Compared with some negligence contexts though Mr Farmer, there is the structure and the record and so on of the trial isn't there?

Farmer Yes.

Keith J Which may go either way in terms of plaintiff or defendant.

Farmer Yes but that doesn't help very much in terms of the omissions of counsel.

Keith J No, no.

Farmer The failure to ask another question. The failure to, typically what happens is the client says, I want you to run this point or that point or I want you to run, ask this question or that question of the witness.

Keith J Mm, mm. But those omissions can be measured against the actual record of what actually happened and so there is a better factual basis than there would be in some negligence situations where there's not a record, where there's just a series of discussions between a client and an accountant or a surgeon or whoever it might be.

Farmer Yes that's true but it still leaves open the question of would the result have been different.

Keith J Oh sure.

Tipping J I wonder whether Justice McHugh might just have overstated that. Surely the issue would be, might the result have been different? Because these are likely to be loss of a chance cases aren't they, rather than. I mean this just adds to the whole complexity. Are we to have this difficult issue as to, if you get over the probability threshold you're 100 percent in?

Farmer Yes.

Tipping J And if you're only 49 percent you're completely out.

Farmer My learned friend says loss of a chance is I think his answer to this.

Tipping J Yes. But it just shows that there's yet another, well loss of chance cases are difficult in any event.

Farmer Absolutely yes. They are very difficult. But it's worth bearing in mind too that what we're dealing with here as potential plaintiffs are people who are not necessarily totally rational. They are disappointed litigants. Many of them will be querulous, many of them will be difficult people.

Tipping J I think your case, if I may say so, is better not focused solely on the irrational. We have to contemplate that there may be some rational people who think their counsel has done a poor job.

Farmer Yes. That's a fair point with respect. And the learned President focused on the irrational and the querulous and expressed great concerns about the increase in vexatious litigation.

Tipping J I mean it's not possible to sit in the Court day after day for 20 years without having some sympathy for the rational.

Farmer And perhaps some distaste for the irrational.

Tipping J Maybe.

Thomas J Mr Farmer, apropos these paragraphs that you're now referring to, in the appeal in criminal cases where there's been an allegation of incompetence on the part of defence counsel.

Farmer Yes.

Thomas J One never got the feeling, and certainly I didn't personally get the feeling, that one was relitigating or redeciding the issue. The allegation of incompetence did seem to stand out as something that could be assessed in the overall context of the trial. I just wonder whether this isn't perhaps tending to be something of an overstatement of the difficulties that would be encountered.

Farmer Yes, the question of incompetence of counsel in the context of criminal appeals is actually dealt with.

Thomas J Yes.

Farmer In these judgments and.

Tipping J There is the decision of this Court very recently which tends to bring the focus in this sort of case away from the question of competence. So I think that has to be borne in mind. You know the **Sungsuwan** decision? Maybe perhaps that's something that needs to be given some thought.

Farmer Yes. I think that perhaps the primary point that I make is of course with the appeal in a criminal case, the Court has to decide, was the incompetence of counsel such as to give rise to, I'm not quite sure what the exact test is, a real danger that the Convention may have been wrongly entered. Now if the conclusion is that that is so, then you simply have a reversal or a quashing of the Convention and a retrial. So it's just the ordinary appeal process at work. That's different from the situation that we've been addressing here which is where you have a final judgment and then there's a second proceeding in which there is a relitigation of that earlier case and necessarily some kind of assessment having to be made as to whether that earlier judgment was wrong or would have been different, at least would have been different, if something else had happened or not happened as the case may be. And it's that possibility.

Gault J Could that situation arise in say a medical context where a surgeon is dealt with in a disciplinary process and then subsequently sued for negligence?

Farmer That was an issue as I remember that exercised the House of Lords I think in a case called **Spackman** in the 1940's where there had been a finding of medical malpractice. And then there was a civil action brought. And the issue was, what was the standing of that earlier judgment? And I think the view of the Courts then was that it had no standing, it was simply the opinion of the disciplinary tribunal. So it wasn't even admissible as evidence.

Gault J Mm.

Farmer And so the civil action was dealt with just on its merits without reference to what had happened earlier. Now that position was later changed by statute in the UK. So I don't think it's quite comparable because what we're dealing with here are the decisions of Courts rather than the decisions of.

Gault J Oh well these discipline matters get into the Courts of course.

Farmer Sorry?

Gault J These discipline matters in other disciplines get into the Courts.

Farmer Yes but I'm not sure that they have, we don't have the, they're not part of the judicial process in the sense that they are binding decisions of the High Court or whoever.

Gault J Well those of us who sat in the Privy Council were faced endlessly with medical and dental disciplinary appeals.

Farmer But that's because in the UK and in other jurisdictions since, they have given those decisions statutory recognition. I'm fairly confident in

saying that. I remember it's something I looked at many years ago. So it's not a common law position.

Keith J Well that's that legislation you mentioned earlier isn't it, reversing, what was it, **Hollington v Hewthorn**?

Farmer That was the defamation point. No it's not the same.

Keith J Well it's wider than that, it's any criminal conviction can be evidence in civil proceedings.

Farmer Yes, yes, it may be the same legislation. I'm not sure.

Keith J I don't know, I just can't remember any about medical.

Farmer The case I'm thinking of was House of Lords called **Spackman v The General Medical Council** of whatever.

Keith J Mm, yes. And the standard argument used to be that's hearsay or opinion of somebody else.

Farmer Yes, yes.

Keith J It's not relevant, not admissible as you say.

Farmer Yes, yes. If I could just, I haven't quite finished paragraph 144 of His Honour's judgment. He refers at the beginning then to the retention of public confidence in the finality of curial resolution of disputes. He then says a successful claim of negligence against a practitioner depends on demonstrating that at least one outcome of the principal litigation was wrong. In circumstances where that result has not been first obtained by successful appeal, the possibility of inconsistent outcomes arises. A successful party in collateral proceedings might use that outcome as a ground for seeking leave to appeal the principal proceedings out of time. Now this is the point that I just discussed with Your Honour Justice Tipping. Inconsistent outcomes in criminal matters are an even greater concern for confidence in the administration of justice. The opportunity for a quasi rehearing through collateral proceedings would be an incentive to a disappointed litigant to sue his or her advocate. And he then refers to what Justice Dawson said in **Giannarelli**. And this is a passage that's in a much wider part of Justice Dawson's judgment that deals with this whole issue. Nothing could be more calculated to destroy confidence in the processes of the Courts or be more inimical to the policy that there be an end to litigation. If the decision of a Court is wrong, the appeal process is the means by which it should be corrected. To allow the Courts to be used to undermine its authority in other proceedings is clearly not in the public interest.

And, I won't take you to it but just if you might want to make a note. To the same effect of what's just been said, there's paragraph 373 of Justice Callinan's judgment.

Now the other aspect of Justice McHugh's judgment that is perhaps worth focusing on is the part that advocates play in the judicial process. And in particular the fact that they, that there is a fundamental difference between what an advocate does and the part that he plays in the Courtroom as one of the actors in the judicial process on the one hand and other professionals, including surgeons and airline pilots and accountants and so forth. And those differences really, at the end of the day, well they sound first of all in the nature of the duties of counsel, of the advocate, including obviously primarily the duty to the Court, and then they also sound in the causation problems that arise.

And just perhaps dealing with causation first of all. The way that Justice McHugh dealt with that is in paragraph 164 of his judgment where he said, whether a claim for damages for an advocate's negligence arises out of criminal or civil litigation, the issue of causation distinguishes the claim from every other action for negligence. That is because the opinion of a third party, a judge or a jury, is interposed between the negligence and the injury. Where physical injury is involved, a tribunal of fact, assisted by expert opinion, can determine, usually with confidence, whether the negligence caused the injury to the plaintiff. It's the matter of objective probability. Where economic loss is involved, the tribunal of fact can also usually find with some confidence … negligence caused the plaintiff's loss. In each case, except where a warning or advice is involved, the opinion of a third party is not interposed between the negligence and the injury as it is in the case of an advocate's negligence. And in the warning or advice cases, the issue of causation is usually a simple one. It depends upon whether the plaintiff is believed as to what he or she would have done if proper advice or a warning had been given. But where loss is claimed to be the result of an advocate's in-court negligence, the decisive factor in the causation issue is the opinion of the tribunal of fact at the original trial. There can only be guesswork as to whether the negligence made any difference to that result. No doubt there may be cases where the negligence is so gross that in an action for damages the tribunal of fact can find that it must have affected the result of the earlier proceedings. Such cases are likely to be rare. Even where a judge has tried the original case and given reasons, it will often be difficult to know whether the failure to ask a question or put an argument or the putting of a question or argument affected the judge's conclusion.

Now he also said, going back to.

Thomas J I repeat again Mr Farmer, that it's considerations like that, isn't it, that probably explain why there have been so few additional claims against

barristers in England since **Hall**. These are the inherent difficulties that any plaintiff is going to face suing an advocate.

Farmer There are inherent difficulties that any plaintiff is going to face suing an advocate. That is absolutely correct Your Honour. But when an advocate is sued, then it does open up this whole area, or this whole question of, it necessarily leads to the reconsideration, the relitigation of what has already been decided. And that is just inescapable. Then the question is, even if it's just one well-publicised case, does that undermine public confidence in the judicial process and the integrity of the system?

Thomas J Well what about the OJ Simpson sort of situation where there is a civil case following a criminal case? Does that bring the administration of justice into disrepute?

Farmer I think that sort of case is obviously explicable and would even be readily understandable by at least informed members of the public on the basis that there are different standards of proof and therefore in that sense different results may be the outcome. That the criminal charge is obviously dealt with on a reasonable doubt basis and then the balance of probabilities for a civil. And I think, as I say, even non-lawyers but reasonably well informed non-lawyers would understand that distinction.

Thomas J Well it exists every time there is a claim against an advocate for negligence in respect of a criminal case.

Farmer Um, yes, that's.

Thomas J The different standards of proof will apply.

Farmer That's right. But that's not.

Thomas J Well then does it not, if the public understand, and as you said, non-lawyers even understand that there is that distinction, does that not mean that there won't be this adverse effect on the administration of justice?

Farmer Your Honour, when the barrister is sued for his negligence in the conduct of a criminal case, whether or not the barrister is negligent is determined on a civil standard of proof. But the causation question, which is, would the client have been convicted if there hadn't been that negligence, that necessarily requires a consideration of the result of the criminal case on the normal reasonable doubt standard. So I don't know with respect that there is that.

Elias CJ No, they're not going to be complaining about an acquittal.

Farmer Sorry?

Elias CJ He's not going to be complaining about an acquittal.

Farmer You say he's not complaining about acquittal?

Elias CJ No, the plaintiff won't be suing his advocate.

Farmer No, no.

Elias CJ If he's acquitted.

Farmer No, he'll be saying.

Tipping J Even the most irrational.

Farmer Well strangely enough, of course in the **D'Orta** case in a sense he was. Because he'd been convicted as I remember it but then on appeal the Convention had been quashed but he'd spent some time in jail.

Tipping J Isn't the point not so much the differing onus of proof but in the OJ Simpson case the issue is identical whereas in the negligence case following a criminal trial the issue is quite different. The issue is, did he kill her or whatever it is, both in the criminal trial and in the civil trial. But in the negligence against barrister, the issue is not was he wrongly convicted but the issue is, was the barrister negligent? Okay, issues of wrongful conviction, I don't see there really being a parallel at all.

Farmer Well no, but was, but then to answer the next question, do you suffer loss if the barrister was negligent? Did the client suffer loss? And that requires you to decide or consider whether or not the Convention would or would not have occurred.

Tipping J I agree but the contrast isn't nearly as stark.

Keith J It's a relitigation point.

Thomas J The point is different. We're talking here about the effect on the administration of justice. And in the OJ Simpson sort of situation it's probably greater because the issue is in fact exactly the same.

Tipping J It's a worse perception.

Thomas J It's a worse perception and if that worse perception doesn't react adversely on the administration of justice, then that would have some significance for the present situation.

Farmer Well Your Honour, who is to say that even in that case it hasn't reacted adversely on the administration of justice?

Thomas J Well that's a legitimate answer, I agree. Yes.

Farmer Yes.

Tipping J I think it doesn't react adversely because most people can see that there's a different standard of proof on that same issue.

Farmer And most people thought that he was guilty anyway, so.

Tipping J Yes.

Thomas J Knew, knew, not thought.

Farmer So no-one's too upset.

Gault J But it wasn't necessarily … between criminal and civil. In fact it was two criminal cases under different jurisdictions wasn't it? One State and one Federal.

Elias CJ No, no.

Farmer No, one was a civil claim.

Thomas J There were civil proceedings.

Elias CJ Yes, the family sued.

Keith J But you could have that. I mean there are possibilities aren't there of the same issue arising in Sydney and Auckland being litigated in both places and neither deferring to the other.

Farmer Well I think in our submissions we've referred to such a case which I was involved in as counsel on both sides of the Tasman.

Keith J Mm, mm.

Farmer But there ultimately, I just can't remember what happened, I think our Commercial Court, and this did defer to, but probably not based on any principle of law, just as a matter of common sense, that the other case was further down the track and that's.

Keith J I was thinking of something you had a real interest, the Air New Zealand merger with two conflicting results. I know from tribunals.

Farmer Yes, and different processes and so on that were followed.

Keith J Mm.

Thomas J The situation which Justice Gault adverted to does arise in the United States as between a State jurisdiction and Federal. In the State

jurisdiction the accused may be acquitted but then charged in the Federal jurisdiction with a breach of fundamental rights or human rights on a rights-oriented charge. But on the same factual issue.

Keith J And that's happened hasn't it with some case in the south recently? From the '60s.

Elias CJ Mm.

Farmer And perhaps that's the reason why in this area we wouldn't necessarily see the United States legal system as being one that we would aspire to emulate. Which is the view that Justice Kirby took.

Thomas J Well perhaps one can just simply say that the first decision probably does more damage to the reputation of justice than trying it again.

Keith J There they had to get over the previous conviction, I mean the previous acquittal. But they were able to by saying it's a prosecution under a different statute.

Farmer Yes. And it could only be, one would imagine in a federal system where that sort of result could follow.

Keith J Mm, mm.

Farmer Certainly, because in the civil jurisdiction then the kind of Anshone estoppel type point deals with that by saying if you could have brought these particular causes of action in your case but you didn't, based on the same facts, then we're not going to allow you to do it by a second action.

Keith J Right, right.

Gault J So how do you compare Mr Farmer the public perception of the system of justice, which on the one hand avoids inconsistent inquiries and on the other denies justice to somebody who claims they have been the subject of a serious injustice?

Farmer Are you referring Your Honour specifically to the client here who's wanting to sue the barrister?

Gault J Yeah, yeah, this is a client that wishes to bring a claim against a barrister for negligence which is, let us say, a meritorious claim.

Farmer Yes.

Gault J And the door is closed. There must be a public perception of that just as there is a public perception of having relitigation.

Farmer That's right and that's the assessment that the Courts have to make as to which policy they will give greater weight to.

Gault J Well how can we do that?

Farmer Well the House of Lords did it in **Rondel v Worsley**.

Gault J How could they do that?

Tipping J Didn't trouble Lord Hoffman.

Farmer Pardon?

Tipping J Didn't trouble Lord Hoffman.

Farmer No it didn't trouble Lord Hoffman. But he purported to do it on the basis of so-called changed conditions. But in any event, the assessment was made Your Honour. That's all I can say to that. I mean it's a question, it's a value judgement that the Courts have to make.

Keith J Another kind of relitigation case, I don't know whether it's helpful or not, is the **Maharaj** type case which was at the foundation of the **Baigent** judgment, you know the compensation for breach of the Bill of Rights. Sorry I haven't gone back to it. But **Maharaj** was the barrister in Trinidad and Tobago and he was convicted of contempt of Court and the order for damages for breach of his natural justice rights in this case against the State, against the Court I suppose, was upheld by the Privy Council. And that's, as I say, I haven't gone back to see whether he succeeded on appeal or it may well have been he didn't have any right of appeal, I don't know. But that was a case where the same issue arose again and there've been one or two cases like that in New Zealand. There's a case called **Upton** where something went wrong in the District Court and someone was sent to prison. He did actually successfully appeal, but after he'd served his term. And he got compensation against the state.

Farmer Um.

Keith J Now maybe in that case the.

Farmer As an ex gratia payment or as a.

Keith J No, no in proceedings that got to the Court of Appeal. For breach of the Bill of Rights.

Farmer Yes, yes.

Keith J Breach of his rights to be heard.

Farmer Right okay. So that's a statutory cause of action.

Keith J Well the Court of Appeal read it and found it in the Bill of Rights back in.

Farmer Because there's another case I've just forgotten the name of where justice, again things went wrong in the District Court.

Keith J Right.

Farmer And Justice Hammond said that, well that's very unfortunate.

Keith J Yes, mm.

Farmer And I recommend you go to the Government and ask for an ex gratia payment.

Keith J Yes, yes. No but in the **Upton** case it is actually an award against the State for the error made. And it could have been made by the, could have been helped by the lawyer. It wasn't actually a lawyer in the case.

Farmer Well my assumption, I don't know the case, my assumption would be that the Court must have found the right as implied under the Bill of Rights Act.

Keith J Yes, yes, that's right.

Elias CJ Pre-removal of immunity in the District Court?

Keith J Yes.

Elias CJ Yes. Well … may have had.

Keith J Well no I think the claim, that kind of Bill of Rights claim is seen as being available against the State. It's not a proceeding against the judge. And the **Maharaj** one for instance I'm pretty sure was in the High Court there or the Supreme Court.

Tipping J The … of the judge might reinforce in some eyes the need for a remedy against the State.

Keith J Yes.

Tipping J If they've suffered a grievous wrong by some conduct of a judge.

Keith J And both of those cases it's the State that is paying. It's the State that is the litigant.

Farmer Mm, mm.

Gault J Even in **Baigent** there was an immunity provision.

Keith J Yes, mm.

Gault J Which was held not to apply in favour of the State as opposed to the act.

Keith J Mm, mm.

Farmer As opposed to the actor, yes.

Gault J Mm.

Elias CJ Where does that lead? That the State would be liable for all barristers' negligence because of the immunity.

Farmer I thought we were talking about judicial negligence Your Honour.

Elias CJ It's not an attractive argument.

Keith J I think the two cases I mentioned, both cases are about judges making a mistake.

Farmer Yes, that's what I thought. I was much more comfortable with that example.

Keith J And the Law Commission actually recommended that the possibility of suing in that case should be taken away in their report on **Baigent's** case. That was after I'd left the Law Commission. But no action's been taken on that. And the reason that the Law Commission gave was your reason of, you know, preventing relitigation.

Farmer Yes.

Keith J Back in that report.

Thomas J Allied to the question of relitigation, but not a question of relitigation but relevant to the public's perception of inconsistent findings, must be the fact that judges of the High Court can differ with one another and do. And that isn't thought to bring the administration of justice into disrepute.

Farmer Um.

Tipping J Not always.

Farmer Yes, I mean the, but although Your Honour's really talking I think about the appeal Court.

Thomas J The public perception, because much of this might come back to public perception, is a phrase used by Justice Gault. And just how significant is it in the public mind that from time to time the Court reach different outcomes in respect of the same issues?

Farmer I think Your Honour's talking really about the appellate process and where you have a number of judges looking at the same issue at the same time. What we've been looking at here is something quite different. Which is a trial has taken place and a judge and jury have given a determination and then subsequently there's effectively a retrial and different arguments, different issues, different evidence and so forth and so you get a different outcome. And that's quite a different.

Thomas J Well you can in the High Court get inconsistent findings, inconsistent findings as to the law.

Farmer In the same case? Well Your Honour's thinking of full Court, two judges?

Thomas J No, no, no. One Judge in the High Court can decide X.

Farmer The law.

Thomas J Yep, is the law. And another judge in another case, exactly the same issue, can decide the law is Y.

Farmer Yes, that happens.

Thomas J He or she will do so with respect but there will be a different decision.

Farmer But with respect they are different cases and that's just the nature.

Thomas J Yes but we're focusing on the public's perception of inconsistency.

Farmer Yes.

Thomas J And I'm just questioning you whether or not the public don't have a broader and more robust appreciation of the fact that there will be inconsistency in the administration of justice.

Farmer There is that inconsistency but the appellate process exists to cure it and to resolve it. And what we're talking about here is litigation on a particular set of facts and then being a relitigation of that same situation. With respect, I see that as different qualitatively.

Thomas J Yeah, I see your point.

Farmer Now just if I can finish with Justice McHugh, or almost finish with him. He does, and I've been talking about how his analysis of the position of advocates in relation to these general policy considerations,

he at paragraph 139, he looks at another aspect of the advocate's role. And this is really the prolixity or defensive advocacy point he's getting into here. I'll deal with it now just while we've got his judgment in front of us. He said in 139, the Majority, that's the Majority again in **Giannarelli**, relied on the primacy of the obligation of an advocate to the Court taking on particular significance in the conduct of litigation which had the potential to conflict with the interests of the client. The advocate must make decisions about the extent of cross-examination, the witnesses to be called, points to be taken, submissions and objections to be made. An advocate concerned about the exposure to liability for negligence to the client might, in making such decisions, relegate the interests of efficient conduct of litigation to second place in favour of the exclusion of any possible avenue of success for the client, however hopeless. Prolixity in litigation is contrary to the public interest and the resolution of disputes without delay.

Now that prolixity point was dealt with rather summarily by Justice Hammond in the present case because he said, well there's prolixity already anyway, so what's different? But with respect, although that may well be true, the real question here is whether the abolition of the immunity may in fact just simply serve to aggravate that problem. And it is a problem. We all know that. It's a problem that the Courts have tried to grapple with, that the rule makers have tried to grapple with, that the Bar Association constantly seeks to provide assistance in respect of. But it's fairly plain, we would submit, that it must be the case that it is going to be much more difficult for all but the most senior of counsel, to in fact take the hard judgemental decisions about what points to run, what points to argue, what witnesses to call and if there's any question of a client in fact wishing to have a no stone unturned approach to the case, then it is simply going to be the case that most counsel, if they are vulnerable to suit, are going to be far less inclined to endeavour to ensure that the litigation is run as efficiently as possible.

And that point is made by a number. It's dealt with actually also in the Majority, or the joint judgment in a somewhat, they don't give it quite the same emphasis that I'm giving it or that Justice McHugh gives it. And that's at paragraph 29 where they say, further, although not irrelevant, we would consider the chilling effect of the threat of civil suit with a consequent tendency to the prolongation of trials as not of determinative significance in deciding whether there is an immunity from suit. That is not to say however that the significance or magnitude of such effects should be underestimated. But while they are considerations that do not detract from the importance of the immunity, we do not consider that they provide support in principle for its existence.

So they're sort of saying, well of itself this is not an issue that would justify the immunity but it really coincidentally or happily does mean

that if there is an immunity, then that is going to be conducive to making the judicial process more efficient than it otherwise would be.

Now I mentioned already more than once Lord Morris in **Rondel v Worsley** and I wonder if I could just take you to that. It's Tab 6 of Volume 1 of the Casebook. And one point perhaps to note about **Rondel v Worsley** generally, and it just may be a little invidious to make this comment, but one can't help but be struck, at least if one grew up during this era or practised during this era, of the enormous standing of the House of Lords in this case. Lord Reid, Lord Morris, Lord Pearce, Lord Upjohn and Lord Pearson. And if one adds to that **Saif Ali** a few years later, and you add Lord Wilberforce and Lord Diplock and so forth, that these were as it were giants of the 20th century, I hope I'm not putting this too strongly.

Thomas J Well I hold Lord Bingham, Lord Steyn, Lord Brown-Wilkinson, Lord Hoff and Lord Hope in also high esteem.

Farmer Yes, and that's why I said it's invidious. I'm not in fact necessarily seeking to draw comparisons but I just do make the point that these were certainly not lightweight judges. These were heavyweight judges. And I'm not saying that the ones you mentioned.

Tipping J Well don't go any further. We don't want any sort of analysis here.

Farmer I'm not saying the ones you mentioned are lightweight judges, I'm certainly not saying that. I wouldn't presume to say that. Now Lord Morris, at page 249, and I won't read you the whole of this passage but it's really between 249 and 251, it does repay a reading of the whole of those pages but I won't do so. Beginning at 249, letter A. He gives some examples of the sort of case or cases that could give rise to the issues that we're dealing with. And the consequences of that. First of all in criminal cases and then in civil cases and then at the top of page 250 dealing with civil cases he says at line 2: If in the civil action the suggestion was made that had there been further evidence called or further questions put in the criminal case, there might have been a disagreement rather than a conviction, this only serves to demonstrate how difficult it would be for a Court to decide on a balance of probabilities what the jury in the criminal case would have done had there been different material before them. That actually touches on a point we discussed earlier.

And then he says, a trial upon a trial would raise speculation upon speculation. Then on the next page, 251, letter A he says: Many of these considerations have parallel validity in regard to complaints of lack of care and skill in a civil action. It is true that the Courts must not avoid reaching decisions merely because there are difficulties involved in reaching them. It may not be impossible in certain circumstances for one civil Court to decide that an earlier case in a civil Court, one for example tried by a judge alone, would have had a

different result had some different course been pursued. Though in most cases there would be likely to be various difficulties in the way of reaching such a conclusion. But it would in my view be undesirable in the interests of fair and efficient administration of justice to tolerate a system under which as a sort of by-product after the trial of an action and after any appeal or appeals, there were litigation upon litigation with the possibility of a recurring chain-like course of litigation. And then he goes on to say the quality of an advocate's work would suffer if, when deciding best how to conduct the case he felt that, and particularly if there was a divergence from any expressed views of the client's, if the advocate felt pressured by the prospect of liability.

A few lines down he said it would be a retrograde development if an advocate were under pressure unwarrantably to subordinate his duty to the Court to his duty to the client. While of course any refusal to depart at the behest of the client from accepted standards of propriety and honest advocacy would not be held to be negligence, yet if non-success in an action might be blamed upon the advocate he will often be induced as a matter of caution to embark on a line of questions or to call a witness or witnesses though his own personal unfettered judgment would have led him to consider such a course to be unwise.

And I think I'll come to it. I'll just, I think it may have been, I'm not sure actually who it was but I'll come to it. There was the suggestion also that really the conduct of advocacy doesn't, shouldn't really be based on always taking a cautious approach. Because to take the cautious approach does lead you very quickly into calling another witness; asking some more questions; running another point. And so what the Courts are entitled to expect from counsel is that they will take hard judgemental decisions about what to argue, what witness to call etc. And that perhaps again contrasts the advocate with other forms of professionals giving advice where perhaps they can more readily give conservative advice, particularly if there's some concern about potential liability.

I wanted next Your Honours to take you to this House of Lords case that I referred to earlier where a barrister was sued earlier this year or the judgment was given earlier this year, **Moy v Pettmann Smith**. Because it's a very good illustration in our submission of all the sorts of problems, causation problems in particular, that we're talking about and it gives the lie, or perhaps that's not the best way to put it, it exposes the unreality of reliance on the strike out and other similar procedures as a means of dealing with actions against barristers. Because this was a case that went to trial. There was no suggestion of a strike out application being made. Went to trial. Went from there to the Court of Appeal. Went from there to the House of Lords. Now it's in our Casebook but it's there in a form that's a sort of the unreported form and I see that my learned friends have put it in their Casebook as reported in the Weekly Law Reports and so I'll take you to that if I could. It's Tab 1.

Tipping J Of whose Casebook?

Farmer The respondents' Casebook. It's a joint Casebook of both respondents.

Tipping J Thank you.

Farmer And the facts of the case are, as I say, interesting. Just as an illustration of the sorts of negligence actions that we are contemplating. But there also are one or two observations by the Law Lords that we would say bear very strongly on what we are looking at here. By reference to the headnote you'll see that the facts, and I'll state them as briefly as I can, were that the claimant had injured his leg playing football and then he was operated on and the hospital was negligent. And as a result of that he suffered some continuing disability. He instructed solicitors to sue the medical health authority and counsel were retained. On advice, the solicitors wrote to a surgeon to get a report with a view to it being ultimately obviously put into evidence. The surgeon simply didn't reply. So there was the first misadventure that occurred, the surgeon didn't reply. And the second misadventure was that the solicitors didn't follow up and were clearly negligent in failing to push the surgeon to give a report in a timely way. And then the third misadventure was that the case got into the grips of the English case management system when a fixture was being allocated.

Tipping J You couldn't resist that.

Farmer No I couldn't. And there are some interesting observations.

Thomas J Why not put it this way, that it had the benefit of the English case management system?

Farmer No well Lord Carswell didn't think it was a benefit and I'll come to that. And nor did Justice Callahan in the **D'Orta** case which I'll also mention. So I mean the point being that actually the case management system, although designed to facilitate and help, as the way it was put by Justice Callahan in the **D'Orta** case, was it actually can, doesn't necessarily always, but can in fact increase the burdens on counsel and make things more difficult. And indeed, particularly where things are being condensed from a time point of view, can give rise to exactly the same problems that arose in this case. Because what next happened was that there was a judicial conference as we would call it. And a timetable order made that medical reports were to be filed by a certain date. And to give it some teeth, the direction was that if the reports weren't disclosed by that date, they wouldn't be admissible at trial except with leave. And we've seen some of that in our Courts now too. The claimant's solicitors, still without a report from the busy surgeon, didn't seek an extension of time. And so when the report was eventually received, they were out of time and an application was made

for leave to adduce it pursuant to the direction that had first been given. There had been a trial date already set and the judge refused leave to put in the report late. There was an appeal and the appeal judge said no, you're too late. And so the matter went ahead towards trial date. There was a payment made into Court by the medical health authority. Counsel then had the difficult issue to face as to what advice to give the client, that is to say, to accept the offer of the payment that had been made or to go to trial. Now the chances at trial on her assessment were far better if the trial judge were to accept the evidence into, accept the report into evidence at trial. But of course it was unknown to counsel, to her, as to whether the trial judge would allow the report in at trial and ultimately her advice to the client was not to accept the offer on the basis that it was as it were worth having a go and getting the report into evidence at trial because if it was received, then it would increase the damages very considerably.

What then happened was that the medical health authority reduced the offer and then when they got to the trial door, saw the judge. In preliminary discussion about the evidence, the judge indicated he was not going to receive it into evidence. The client then at that point accepted the offer, the reduced offer, that had been made and then subsequently sued the solicitors for negligence, the measure of loss being the difference between what he accepted by way of the reduced offer and what he would have got had the case proceeded with everything having been done properly along the way and with the medical report being received into evidence. The solicitors joined the barrister and ultimately the case went to trial. The barrister was at first instance held not to have been negligent. The Court of Appeal reversed that. Said they thought that the barrister was negligent and in particular ought to have explained rather more fully to the client the difficulties of obtaining leave at trial to have the surgeon's report admitted.

But on further appeal to the House of Lords the House of Lords reversed the Court of Appeal and said, and I'll read to you now from the headnote, the ruling. It's on page 582. Held, allowing the appeal, the difficulties faced by an advocate in advising on the acceptance or rejection of a settlement could be considerable. Especially if such advice had to be given at the door of the Court. That such advice could not be reasoned with comprehensive precision and the advocate could not be expected to give the client details of all the factors that might affect the course of action to be adopted. That moreover it was undesirable that potential liability in negligence should compel advocates to adopt a defensive attitude or to abdicate responsibility for their decisions and advocates were entitled to concentrate on giving clear and readily understood advice about the course of action that they recommended. And that counsel had been faced with a very difficult situation, not of her making, or that of the claimant, and the Court of Appeal should not have interfered with the judge's decision that she had not been negligent.

Now that case, I'll just take you to Lord Carswell in a moment. That case could be seen as just an example of how difficult it is to establish negligence against a client, against a barrister. But it's also, first of all, it's relevant to what we're talking about here in two other respects. First, what I've just read you is indicating the same sort of policy concerns the Court is having here that they had in the earlier litigation, going right back when barristers' immunity has been debated, that the undesirability from a policy point of view of allowing defensive advocacy of inducing counsel not to take responsibility for hard decisions that have to be taken.

And then the second point that it's helpful on is this question of causation because here was a case, just from the facts as I've outlined them to you, where there were a whole series of misadventures of events, including hard decisions, what one might call harsh decisions, given by judges on directions hearings that had contributed to the ultimate picture that finally developed and which counsel had to deal with. So in terms of trying to pinpoint blame as it were for all of the loss, for the loss that the client ultimately suffered, it was clearly not an easy matter to just simply say, well it was all the barrister's fault where you clearly had solicitors at fault, when you clearly had judges giving decisions that perhaps were not the right decisions. And that was a point that Lord Carswell made.

The relevant parts of his judgment are paragraphs 59 through to 61. And I'm just going to read you one little passage. But just so you get the scheme of it. 59 he actually interestingly begins by referring to **Hall v Simons**, to the fact that there was a ruling that there was no immunity. But then he went on to say at letter B on page 599, paragraph 59, he said that that interest, that's the public interest in there being no immunity, does require that the application of principle should not stifle advocates' independence of mind and action in the manner in which they conduct litigation and advise their clients. And he went on to refer to passages cited by Lord Salmon in **Saif Ali**, the problems and the difficulties counsel face and so forth.

And then at the foot of the page, three lines up, he said, since the decision of **Arthur Hall v Simons**, advocates have been liable to their clients for negligence in the same way as other professional persons. It would not be in the interests of those clients if they were compelled by the effect of over prescriptive decisions to adopt a practice of defensive advocacy in the conduct of litigation or advising clients about the course to be taken. I would endorse the view expressed by Lord Justice Brooke to which I've already referred that it would be unfortunate if they felt that they had to hedge their opinions about with qualifications. It would be equally unfortunate if another effect of the same syndrome were to be an abdication of responsibility for decisions relating to the conduct of litigation and a reluctance to give clients the advice which they require in their own bests interests. Nor do I

consider that to give clients a catalogue of every factor which might affect the course of action to be adopted would be a productive discharge of advocates' duty to give them proper advice. Miss Perry was faced on the morning of the trial on 6 April 1998 with a very difficult situation. Not of her own making or that of the claimant. The decisions of the Deputy District Judge and Circuit Judge appear to have been largely driven by listing necessities and the need for enforcing a greater degree of efficiency and promptness on the part of practitioners. In the process, the imperative of doing justice to the parties was subordinated. And Miss Perry may not unreasonably have felt the trial judge would pay rather more regard to that imperative and be receptive to her application to be allowed to adduce the vital further evidence of Professor Salay.

Thomas J Mr Farmer, doesn't the case really simply indicate that the abolition of the immunity doesn't mean that the considerations that were behind disappear from the law?

Farmer But I think.

Thomas J They're still there to be considered by the Courts.

Farmer Absolutely Your Honour. But equally though there's a recognition there, a concern being expressed there, that the effect of the abolition of the immunity may well exacerbate those matters. And that seems to be at least implicit in what Lord Carswell is saying.

Elias CJ Well isn't it demonstrating that you don't need an immunity?

Farmer Well you don't, the cost, Your Honour if you take that view, the cost of saying that is that you put parties and counsel through this form of litigation that ultimately ends up anyway with the barrister not being found negligent. So I mean if you take the view that it's going to be almost impossible to establish negligence on the part of a barrister.

Elias CJ We should protect them by maintaining the immunity?

Farmer It's not that you're protecting the barrister, it's protecting.

Elias CJ No, no I mean the litigants.

Farmer Well no it's a matter of, well what you're in fact, let me say it again. The point I'm simply making Your Honour here is that there is at least implicit in what Lord Carswell is saying that there is a real concern that the immunity may well lead to these sorts of results on the part of counsel.

Elias CJ But couldn't you put forward exactly the same arguments for surgeons - that these are complex decisions people are called upon to make. There are risks. They have to assess those. This, it seems to me, is an

argument almost directly, this case is almost directly against you as an argument because it demonstrates how these matters are worked out in actual controversies without the need for anything as crude as a blanket immunity for one type of professional.

From Well the position of the surgeon we would submit is fundamentally different. And Justice Callahan really deals with that. And I was actually going to go on to deal with that next. And it may be that that's perhaps, if I do that and then come back and deal with Your Honour's point. Because Your Honour's putting to me the proposition that it's too crude an instrument. Another way of saying that is the way that one of the Law Lords put it in **Hall v Simons,** that why does it matter because barristers can insure themselves anyway against liability and so let's by all means just simply allow litigation to go ahead against barristers because they won't be out of pocket, they'll be covered by insurance. All of that, none of that addresses the very issues that we've been talking about so far, which is that the problems of causation and so on, not only are they complex but they necessarily do lead to this kind of inquiry into what went wrong. And the inquiry into what went wrong necessarily involves examining the performance not only of counsel but of the judges in the earlier case. And that's in a sense a, I mean if we're talking about judicial immunity, if the justification for it or one of the justifications for it is public confidence in the judiciary, then in fact this sort of approach is not going to do anything to support that.

Elias CJ What was the aspect of the, the aspect that was questioning what a judge had done was the prediction as to the success of the application for admission of the report is it?

Farmer That was counsel's.

Elias CJ Yes.

Farmer That was counsel's assessment. What has been said here by the House of Lords is that the judges were too harsh in their earlier rulings. Now that's all been dealt with not by way of appeals in the case itself. It's all been dealt with by a second case in which the previous litigation has been reviewed and judgments made about the performance of all the actors including the judges, not just the counsel, including the judges.

Elias CJ But the disagreement of the House of Lords with the Court of Appeal was in terms of the suit for negligence.

Farmer That's to the Court of Appeal in this case.

Elias CJ Yes.

Farmer Yes. But my point Your Honour is that what necessarily had to be reviewed was the whole of the litigation that occurred before to find

out what went wrong and then to assess the barrister's conduct in the light of what the others did, including the judges, in fact three judges. The judges who made the initial directions, refused leave to appeal, leave to file out of time, and then the trial judge.

Gault J You said that the perception of the justice system was damaged by that process in this case?

Farmer Your Honour this, I mean one doesn't know whether the *Times* wrote an editorial about this case after it came out. But it is an illustration of the fact that it is inevitable, this is the point I'm making, that it is inevitable in the second case, the case against the barrister, that there will be reviewed all the things that went wrong and that includes an examination of the performance of the judges in the earlier case. And then the question is not then, well does it matter if a judge at a judicial conference got things wrong. The question is, do we want to have a system where the performance of judges in the earlier case inevitably must be put under the microscope. And does that, is that conducive to.

Elias CJ What was the, I'm sorry, I may not have followed the facts sufficiently, but what was the aspect of the conduct of the judge in the earlier case that was under review? Was it simply not acceding to the application for admission of the report?

From Well there were two judges, three judges involved. There was the first, initially the direction that was made, the timetable. Leave that aside. Secondly there was a refusal of the judge to allow leave to file the report after the timetable, out of time.

Elias CJ Yes.

Farmer The third was the rejection of the appeal against that decision. And then the fourth was the refusal of the trial judge to receive the report into evidence at trial. Or the indication that he would not receive it. So that, and the Court necessarily had to take account and had to form an assessment of the performance of those judges in determining whether or not the barrister was culpable in relation to the advice that she ultimately gave. And that's where Lord Carswell, I read you the part, Miss Perry was faced on the morning of the trial with a very difficult situation not of her own making. Now there were others involved too at fault. There was the original surgeon, the surgeon who failed to respond. There were the solicitors who failed to follow up in time.

Gault J That was just context wasn't it? That was just narrative against which it became necessary to determine whether the advocate, in making the recommendation she did, in the light of all of that, was negligent.

Farmer That's true, she inherited that.

Gault J It wasn't a review of it in the sense of, was it right or was it wrong.

Elias CJ Mm.

Gault J It was simply stating the context in which the negligence was required to be considered.

Farmer Well Your Honour it's clear though that the Court, the House of Lords, in judging the barrister, has taken account of the fact that others created the problem. And the others who created the problem included the judges.

Tipping J I think the only alarming thing about this case is the view of the Court of Appeal.

Thomas J You could say too Mr Farmer that in a sense the administration of justice has been strengthened by the emphatic indication from Their Lordships that the exigencies and efficiency of the case management system are not to overrule considerations of justice.

Farmer That is true Your Honour. That needs to be said and needs to be said as often as possible. But it doesn't need to be, it can be said in all sorts of situations.

Elias CJ It was a bonus.

Thomas J Even irrelevant situations to your liking.

Elias CJ Well I think we'll take the lunch adjournment now and resume at 2.15 thank you.

Farmer As Your Honour pleases.

Court adjourns 1.05 pm
Court resumes 2.18 pm

Elias CJ Yes Mr Farmer.

Farmer As Your Honours please. I had just wanted to give you the reference to what Justice Callinan said in the **D'Orta** case on the effect of case management. I'm not harping on this topic for its own sake but you will see that my learned friend for the first respondent relies on case management as one of the changed conditions that not only justifies the removal of the immunity but also facilitates dealing with the problems, the policy problems and concerns adequately through the abuse of process and summary judgment procedures. The point made by Justice Callinan which is at paragraph 375 was really that case management first of all is not something new. It is really one of the reforms or one of the matters, it's certainly said by my learned friend in his submissions that it's one of the innovations that justifies a different approach to these matters. As Justice Callinan pointed out in

paragraph 375, it's not novel. He said that in a number of the States of Australia there has been special and expeditious procedures in commercial cases in force for many years following really the lead set in the UK by the establishment of the Commercial Court in 1895. And of course we ourselves have had a commercial list in this country for a considerable period as well.

The next point His Honour made towards the end of the paragraph is he said that not only is case management therefore a process which has been available and used for many years, but it is also hardly a process which has significantly reduced the burden upon advocates, in some ways it has increased it. And that's because, as he pointed out, it's designed to expedite litigation. Decisions still have to be made quickly and under pressure. The oral tradition has not been abandoned. In this case in the High Court Justice Laurenson thought that in civil cases especially there'd been a substantial movement away from the oral tradition towards written submissions and the like. That was at least part of the basis for his view that the immunity should be abandoned now in the case of civil cases but not, he said, in the case of criminal cases.

What Justice Callinan here said was, well that tradition has not been abandoned. The provision in advance of long written proofs or affidavits of evidence in chief which in all probability have been settled by the lawyers for the parties, can made cross examination more difficult and indeed its effectiveness critical to the outcome of the case. Too vigorous a form of case management may be productive of a higher risk of judicial error and the need therefore for even finer judgment on the part of advocates.

Thomas J I suppose what one can say is that to the extent that it is said that the abandonment of immunity would result in prolixity in pleadings and so on, that case management could counter that. There must be a tendency to cut out irrelevant causes of action that counsel might on this other argument say is necessary.

Farmer That is one of the goals of case management certainly Your Honour, is to seek to identify issues more precisely.

Thomas J Yes.

Farmer And therefore to that extent to reduce prolixity.

Thomas J Yes.

Farmer That is a positive aspect of case management that one can generally agree with. How it happens in practice may be different. My learned friend refers to the written briefs of evidence as being a reform of that requires a reconsideration of the immunity. Justice Callinan's point quite clearly here is that the written brief procedure, if anything, has

made or created an even more difficult set of issues for counsel in terms of cross examination on them and the like.

Without reading it to you, would Your Honours also note finally from Justice Callinan's judgment that he does deal with the various matters we've been talking about - causation, desirability of finality of litigation - in paragraphs 373 and 374. And also in paragraph 380 where he expressly aligns himself with the views in the joint judgment of the Chief Justice and the other judges.

The only other case that I wanted to take you to briefly which deals with these broad policy grounds of finality etc is in Volume 2 of our Casebook that's the **Darker** case, **Darker v Chief Constable of West Midlands** which is Tab 9 in Volume 2. And that was a case where policemen were being sued in tort for conspiracy to injure and other related torts. And I mentioned this briefly earlier. The Judge at first instance struck out the statement of claim on the grounds that the defendants were covered by an immunity. And the Court of Appeal upheld that decision. But the House of Lords reversed that and allowed the appeal and said that the matter should go to trial. And in particular on the issue of whether or not the immunity or the effect of the ruling was that the immunity did not extend to things that policemen did during the investigative process as opposed to what they did as part of the judicial process as witnesses.

And Lord Clyde, at page 457, dealt with the question of immunity for witnesses. And identified by reference to an earlier judgment of Lord Wilberforce in a case called **Roy v Prior**, this is page 457 letter E, to the policy grounds for the immunity of witnesses. And they, as described by Lord Wilberforce, they were twofold. One to enable, to ensure that witnesses would give their evidence fearlessly and secondly to avoid a multiplicity of actions in which the value or the truth of their evidence would be tried over again.

Elias CJ Mr Farmer, what are you taking from this case of relevance to these proceedings?

Farmer I'm just pointing out Your Honour that the basis of immunity, whether it be the immunity of a witness or a judge, and we would say of counsel, the basis of that immunity is as described here. And the submission that we then make is that this is equally applicable to counsel because if the Courts are concerned for example about relitigation arising out of witnesses being sued, so too they should be equally concerned about relitigation arising out of counsel being sued. So I'm just completing the references and as I said, I'm not going to dwell on it.

Thomas J There is a disparity though between the principle and the finding. The finding here is that the public policy doesn't require the immunity to be extended to the investigative process.

Farmer That's right, that's a policeman going out and.

Thomas J Well if the concern is relitigation, one would think that that would be the criteria. And irrespective of whether the flaw on the part of the police was in the investigative process or at trial, the question would be, is it going to result in the issue being relitigated? That would seem to be a logical extension of this principle. But it's not what the Lords have applied.

Farmer Well the, what was complained about as constituting the conspiracy by the policemen related to a much earlier period of time, that is to say when they were conducting the investigation.

Thomas J Well it may be on the facts. It may be that on the facts it doesn't. But one would think that if relitigation is the basic concern, then irrespective of where it falls in the spectrum of investigation through to trial, that would be the criteria - is it going to result in the relitigation of the issue?

Farmer Well this, maybe this is an example of the need for the Courts having to draw a cut-off point at some stage. And in fact it's interesting that at the top of page 457 His Lordship actually refers to President McCarthy's intimate connection.

Thomas J Yes well they all do.

Farmer Proposition in **Rees v Sinclair**. But again you see here is an example of the Courts taking what's been said about barristers' immunity and applying it to the subject of witness immunity and vice versa. You get a, because, for good reason, because the issues are the same. The issues are the same. And so what is said in our submission, I haven't read you the rest of the passage and I won't, but just at the top of page 458, the policy of law favouring termination to litigation etc, to allow a proceeding would enable a collateral attack, all of that comment is as I say equally applicable. It's found in the judgments of the High Court of Australia in the **D'Orta** case. There's no distinction in our submission between the position of witnesses and the position of counsel in that respect. And equally, and along the same lines, and I won't read it but just give you the reference, going back to the judgment of Lord Hope in the same case at page 446. He also refers to Lord Wilberforce's concern about multiplicity of actions in the case of witnesses. That's at the foot of page 446. But then goes on to say interestingly, on page 447, that the immunity for witnesses does extend back prior to the time when they're actually giving evidence in Court. The real issue is how far back do you go? So if you look on 447, he says, beginning at letter D, it is clear that if that objective is to be achieved, that's the policy objectives, it would not be satisfactory to confine the immunity to evidence given by witnesses while they're actually in the witness box. Witnesses seldom enter the witness box

without having been interviewed beforehand etc. And then down at the foot of that passage, that paragraph, letter G, the protection of the immunity is available even if the trial does not take place. And he refers to **Stanton v Callahan** which was the case of the expert witness who gave a report that was never actually finally put into evidence in Court but nevertheless the immunity was held to apply.

So I just wanted to give you those references and now finally, well almost finally, what I wanted to move onto was the third and fourth, and I'm going to deal with them together, the third and fourth policy grounds that are in our submissions which is the advocate's duty to the Court. And the cab rank rule. And in a sense they can be considered together. There is some relationship, some clear relationship between them. And there is, in Justice McHugh's judgment, what we would say is a fairly compelling description of the importance of advocates in the judicial system. And in particular he makes two points, one is that advocacy is a unique profession. It can be distinguished from other professions. And I'll show you what he says about that in a moment. And the second major point is that the independence of the bar and in particular the way in which it performs its role in presenting cases to the Court, investigating and preparing and then presenting cases to the Court, what he says, in large part secures the independence of the judiciary. Because the judiciary don't have to do that task. They can rely on counsel to do it and rely on it to do it in accordance with proper duties of counsel owed to the Court and so forth. And all of that to the extent that it thereby enables the judge to perform the task of judging in a way that is apparently impartial, allowing the case to unfold, to have evidence presented and so forth and then to take a determination on the basis of that evidence goes to give public confidence in the administration of justice. So what he says about that begins at paragraph 104.

Elias CJ Mr Farmer, I wouldn't have thought you needed to convince us of that proposition. The question is just, is it eroded by the **Hall** decision?

Farmer Well yes, I mean I think that that's. We, our submissions have really been directed to establishing the importance of the immunity in terms of maintaining the administration of justice. And allied to that is the fact that there is a bundle of immunities here. There's not just, we're talking all the time about barristers' immunity, but all the actors in the judicial process have a part to play, and interrelated part to play. Witnesses give evidence. Counsel present and lead that evidence and present arguments. Judges and juries decide cases. They are all the actors in the whole judicial process. They all have their part to play. And what Justice McHugh is saying here is that judges are best able to play their part if counsel play their part properly. And in particular carry out their duties to the Court. And maintain their independence. And that enables the judiciary to maintain its independence. And so if you then, by breaking down one of those bundle of immunities, the barristers' immunity, if that affects the way in which counsel perform

their duties, if that impacts also on the way in which, the degree to which judgments of the Court are finally accepted as being final, if it triggers relitigation, all of those things ultimately go to undermine the judicial process. That I think is his thesis.

Elias CJ Yes well I think we've understood that to be your argument from your written submissions.

Farmer Okay.

Elias CJ I'm just querying really whether you want to take us to those general statements.

Farmer Well I'm not going to read them but can I just summarise them by saying that what His Honour is saying in paragraphs 104 through to 108 is he is distinguishing advocacy from other professions. That's 104. In 105 he's pointing out the interrelationship between the bar and bench. And he's saying that without, if counsel were not performing their duties the bench, the judges, will necessarily have to themselves take over the proper performance of that function. And an obvious example of that is when one of the parties comes to the Court unrepresented. And this is a matter that has increasingly exercised Courts around the world, that the unrepresented litigant not only takes up a lot of time in the Court etc but necessarily makes the judge's task extremely difficult because to the extent that the judge is forced to perform the role of investigator to make sure that the unskilled, unrepresented litigant's case is properly put and presented. And it's.

Keith J But he must be saying that unless there is an immunity they're not going to carry out this function and that's going far too far Mr Farmer isn't it?

Farmer It is going too far but he is saying, to the extent that the bar doesn't perform its function properly.

Keith J Mm sure.

Farmer It perhaps links into the next and the last policy ground which was the cab rank point. Because clearly there is a concern that if, and Justice Anderson, President Anderson, expresses real concern about the effect that the abolition of the immunity may have on the cab rank principle and therefore on the degree to which unrepresented litigants may be appearing in the Courts. It's interesting that that's a trend that's already started to occur I understand in Canada where something, the figure I heard was from the visiting Canadian Supreme Court Judge that we had at our Bar Conference, was that 25 to 30 percent of parties now appearing in the Canadian Supreme Court are unrepresented and that this is having a real impact first of all on the efficiency of the way the Court system operates, but secondly.

Elias CJ Well we had an unrepresented litigant in this Court and he was most economical with his argument.

Farmer I'm not saying they're all.

Elias CJ He lost I might say, but it was a Majority decision.

Farmer Some of them can be quite skilful, Mr Erwood for example who spends his, has become a very accomplished, very knowledgeable rather than accomplished, about the law and about the High Court Rules in particular. That's not to say however that the sorts of concerns that I'm referring to aren't important. Well I won't take that point any further.

It has to be said, on this question of the duty of the Court or duty to the Court I'm sorry. There is some difference of view as to how significant that is as a factor in justifying the immunity. The Majority of the judges in the joint judgment in the **D'Orta** case in fact disregarded them, regarded them as not being, disregarded that factor, the duty to the Court, as being of great significance. But of course many other judges have placed considerable emphasis on it. And that's true also of the cab rank rule. The cab rank rule, some judges have disregarded as being of great significance in terms of justifying the immunity. I don't think that anyone doubts the utility of the cab rank rule. But other judges have taken a much more robust view of the rule and have said that it does serve to go to help support and justify the immunity.

On the duty to the Court, the references I would give you there, and I'm not going to read them, I'll just give you the references. In **Giannarelli** in the judgment of Chief Justice Mason at pages 556 and 557 where the learned Chief Justice described what the duty was or what the duty involved. And that in effect they required, among other things, the counsel to help facilitate the speedy and efficient administration of justice. And that went to the need that proper judgment be exercised in terms for example of the number of witnesses that would be called, the number of arguments that would be advanced and so forth. And His Honour's conclusion was that there was a real risk, to use his words, that if counsel were exposed to liability and negligence, the existence of that potential liability would influence the exercise of independent judgment by making counsel more mindful of the need to avoid any possibility of liability to his client.

He also dealt with the question of insurance. He said that although insurance might alleviate that concern, it certainly wouldn't eliminate it and that insurance wasn't to be seen as the panacea and the solution to those concerns they would have.

Justice McHugh at paragraph 113, Justice Callinan at paragraph 379 both thought this was to be, this was an important factor. And in the High Court in this case Justice Salmon, paragraphs 53 to 55, equally

thought it was an important factor that in his view justifying or substantially justified the immunity.

Interestingly, even in **Hall v Simons** itself, and I've set it out, actually it's in our written submissions if you have those handy, we've dealt with this whole topic, the advocate's overriding duty to the Court. It's at section 4 or chapter 4 from pages 13 through to 17. And on page 15, paragraph 4.6(b), Lord Hope said in the passage that's there set out, he said I consider that the risk is as real today as it was in 1967 in this country and as it was in 1988 in Australia, that if advocates in criminal cases were to be exposed to the risk of being held liable in negligence, the existence of that risk would influence the exercise by them of their independent judgment in order to avoid the possibility of being sued. The temptation in order to avoid that possibility would be to pursue every conceivable point, good or bad, in examination, cross examination and on argument in meticulous detail to ensure that no argument was left untouched and no stone was left uncovered. The exercise of independent judgment would be subordinated to the instincts of the litigant and person who insists on pursuing every point and putting every question without any regard to the interests of the Court and then to the interests of the administration of justice generally. Now he was talking there about criminal cases. We've made the submission immediately after that quote that there was no credible distinction between the position of counsel in civil cases and in criminal cases in this regard.

Gault J Mr Farmer it seems to me, perhaps you can dispel this, that underlying this particular line of argument must be a concern that advocates who feel they might be sued for adhering to the proper standards of their profession and adhering to their duties to the Court. Now how realistic is that?

Farmer Your Honour I think it's probably necessary to distinguish between different duties to the Court. If the duty to the Court is the duty such as not to suppress documentary evidence, the duty to bring to the Court's attention relevant authorities and the like, it's inconceivable that many counsel if any would as it were deliberately or even perhaps subconsciously quell or suppress the performance of that duty because of a concern of being sued. And of course if they were sued, there would be an immediate defence, namely that carrying out the duty to the Court cannot constitute negligence.

The difficult area is the one that Lord Hope has just referred to which is what I might call the "taking every point", the defensive advocacy. Because there, while that's part of the duty to the Court, duty of counsel to the Court to assist and facilitate the efficient conduct of the case and not to indulge in prolixity, that's rather more problematic in terms of providing an answer to a client who says, I wanted you to call this particular witness or I wanted you to run this particular argument. And you didn't. You exercised a judgment that those matters would

just simply amount to inefficiency and unnecessarily, without benefit prolong the conduct of the case. Now there, there's no clear cut answer. And so there really the Court has got to rely more on counsel exercising proper judgment. Not being unduly cautious and always exercising that judgment in a way that puts them beyond criticism of any kind by the client or otherwise. And so that's what Lord Hope has identified here Your Honour that probably constitutes the real problem area.

Gault J That's not so much duties to the Court in the cab rank point. That's just.

Farmer It's not the cab rank point, I agree.

Gault J It is the vexatious claim point.

Farmer It is one of the stated duties of counsel not to be prolix. But my point is that that's much more problematic in terms of establishing a defence to a claim by a client who says, I wanted counsel to run this point. Whether they said so in advance or whether just with the benefit of hindsight, they're saying, counsel didn't run this point, counsel didn't call this witness.

Gault J Well we're pretty familiar with that sort of complaint in criminal cases. We see it week after week after week.

Farmer Yes, yes.

Gault J And it just doesn't run. Exercise of judgment is exercise of judgment and that's measured against the standard of reasonably competent counsel. End of story. And you get complaint after complaint but that's the other problem isn't it of irritating, harassment? It's not so much duty.

Farmer And of course there it's not so bad for counsel because it's just the client arguing that in support of his appeal. But what we're talking about here is counsel being sued subsequently. But in any event Your Honour, Lord Hope for better or for worse was convinced by the point but thought it only applied in criminal cases. Our submission is that there is no proper basis for distinguishing between criminal and civil cases. That what he says there, if it's true in relation to criminal, well it is equally true in relation to civil cases.

The other, actually also interestingly, more recently the House of Lords, Lord Hobhouse in the House of Lords has dealt with this point. If you look at Volume 2 of the Casebook, Tab 18. No, I'm sorry, this is more, no I'll come back to this. This is to do with the cab rank rule. I'll come back to that in a moment.

One case I will refer you to though, it's not quite on point, but there's a decision in 2002 in the Equity Division of the New South Wales Supreme Court in which the relationship between policies or the relationship between the duties of counsel, the duties of lawyers on the one hand and changes in public policy on the other was considered. And effectively the Court said that the Court should be very slow to acknowledge or apply or recognise a change in public policy if the effect of that might be to erode standards, and in particular ethical obligations of lawyers. Now this case is not in the Casebook but I'll hand it up if I could. It's a case called **Smits v Roach**. And it was concerned, my learned friends have got copies of this case, it was concerned with changes that had been made by statute in the law relating to maintenance and champity. And in particular those changes had rendered maintenance and champity as no longer being either crimes or civil wrongs. But expressly under that statute, the statute was interpreted by the Court as expressly leaving intact the common law rule that a legal practitioner cannot recover costs or disbursements from a client in respect of an arrangement which was in nature champitous. And at page 187.

Elias CJ It seems a mile away from what we're considering Mr Farmer.

Farmer It is but except Your Honour the point that I'm making is that the recognition of the impact of policy change on lawyers' duties and what is said on page 187 paragraphs 250 to 252 was that the Courts should be concerned not to, I'll just read 252. The Court should not lend itself to the possible further erosions of ethical obligations by acknowledging a change in public policy in relation to the enforceability of champitous arrangements without the clearest indication by Parliament that it has occurred. In my opinion to do so would be likely to seriously erode the confidence which this Court must have in the professional integrity of those who appear before it. An ultimate consequence would be to erode the confidence which the public has in the judicial system to resolve disputes.

Now as far as the cab rank rule is concerned, Lord Steyn in **Hall** disregarded that as a matter of relevance. That was referred to by Justice Callinan at paragraphs 376 to 377. He pointed out that Lord Steyn certainly did acknowledge the rule as being a valuable professional rule. But Lord Steyn in **Hall** had then dismissed its relevance to the immunity debate on the grounds that the rule, as applied currently in England, had not been given as much, had not been honoured to the extent that it ideally should have been. And because of the system of barristers' clerks where clerks were rather minded to reject the unwanted brief. And Justice Callinan's response to that in paragraph 377 was to say, well that's not as it were a practice that applies so to speak in Australia. And he said he didn't doubt that the removal of the immunity would intrude upon and diminish the utility of the valuable cab rank rule. And related to that the tradition and

practice in Australia of undertaking work on a pro bono basis on behalf of poor persons.

Thomas J These points aren't arguments in themselves so much are they? It's a balancing exercise that we're about.

Farmer Yes.

Thomas J What Lord Steyn is saying is, when it comes to the cab rank principle, I recognise it and I give it validity. But as against the weight that you might want me to put upon it, no for this reason.

Farmer Yes.

Thomas J So it's a way of reducing the weight of that factor. It's not an absolute point in itself.

Farmer No, no I absolutely agree Your Honour. It's not an absolute point but our submission would be that greater weight should be given to it than perhaps Lord Steyn was willing to give it. Certainly in the present case first of all Justice Salmon gave it weight. Paragraph 56 of his judgment which is Tab 10 in the Case on Appeal said that the obligation of an advocate to accept any brief in the area in which he professes to practice which is offered to him at a proper professional fee commensurate with the length and difficulty of the case is still in my view of importance to the administration of justice. The principle remains of importance, particularly in the area of criminal litigation and it is essential that advocates should be prepared to act in a proper case for even the most difficult of litigants, free from the concern that his or her decisions in Court will form the basis of a claim for negligence. In the absence of that comfort, such people might find it difficult to obtain representation to the detriment of the ability of the Courts to do justice in the particular case. In this regard every judge knows how much more difficult it is to ascertain the merits of the case presented by a litigant in person.

And the learned President in the present case put the matter even more strongly at paragraph 106 which is Tab 14 in the Case on Appeal. And I will read this. He'd just said in 105 that what in his mind was crucial was the maintenance of the apparent independence of the Court process itself by obviating any basis for suggestion that a judge or a witness or counsel might have been influenced by the possibility of being sued by one of the litigants. He said, in my opinion a compelling justification for the immunity of the judiciary, witnesses and counsel is that not only must they in fact be beyond the risk of the improper influence of fear or favour, they must manifestly be seen to be free of that risk.

And then having said that, he turns specifically to the cab rank principle. And he said in 106, the cab rank principle has

conventionally been advanced in support of immunity. It is a professional obligation to facilitate the administration of justice. It is not overstating the obligation to call it one of the foundation stones of a free and democratic society. The right to consult and instruct a lawyer affirmed by s.24 of the Bill of Rights Act could not be honoured if lawyers had an entitlement to withhold their services on an arbitrary basis. Immunity is neither a reward for nor a corollary of that obligation to act but I think there is a real risk that the principle may in due course become undermined by abolition of immunity. The cab rank rule protects minorities, the unpopular, the despised, the outcasts, as well as the simply querulous. Although the courageous traditions of the bar may prevail for a generation or so, fundamental protections of a free and democratic society must last immeasurably longer. I am troubled by the tendency to reduce ethical standards to commercial concepts as it seems to me some aspects of the debate do. In a decade or two it may the thought that if one would be likely to suffer loss or inconvenience through taking a particular brief, one should not have to accept it. I believe there is an unacceptable risk that the cab rank rule should be eroded by removal of barristerial immunity. This also indicates a public benefit in retention.

Tipping J You were reading then from the President's judgment?

Farmer Yes.

Tipping J In the Court below at paragraph?

Farmer 106 Your Honour.

Elias CJ 106. Mr Farmer, all of this is set out very fully in your written submissions which we have of course read. I'm just mindful of the time that is passing. And wonder whether you could perhaps confine yourself to additional or points in reply or anything that you particularly want to stress.

Farmer I've got one more reference.

Elias CJ Yes.

Farmer If I can give you that because I mentioned it earlier and it deals with this point. And it's important because it shows that even in the House of Lords, what the House of Lords said in **Hall v Simons** is not itself as it were set in stone. Because in different context, and I've given you one or two references already, since then the Law Lords are necessarily having to revisit some of these policy issues and some of these concerns are coming to the surface yet again. And the case I wanted to mention was **Metcalf v Mardel** which is Volume 2, Tab 18. What Lord Hobhouse said in that case was somewhat reminiscent of what I've just read to you from the learned President's judgment. That is to

say there is a sort of what actually Lord Hobhouse calls a constitutional aspect to this cab rank principle.

This case was a wasted costs case which bears some analogies obviously to what we're dealing with here. And on page 141 of the judgment paragraphs 51 and 52, under the heading "Constitutional Aspect" His Lordship referred to the role of the advocate in the system of justice. And I won't read that to you. But it's the sort of stuff that I've been talking about.

And it ends, the paragraph, by referring to the role of the independent professional advocate being central, particularly in the adversary procedures that we follow. 52 he said, it follows that the willingness of professional advocates to represent litigants should not be undermined either by creating conflicts of interest or by exposing the advocates to pressures which will tend to defer them from representing certain clients or from doing so effectively. In England the professional rule a barrister must be prepared to represent any client within his field of practice and competence and the principles of professional independence underwrite in a manner too often taken for granted this constitutional safeguard. Unpopular, seemingly unmeritorious litigants must be capable of being represented without the advocate being penalised or harassed whether by the executive, the judiciary or by anyone else. Similar situations must be avoided where the advocate's conduct of a case is influenced not by his duty to his client but by concerns about his own self-interest.

As I say, these issues are not, they've not gone away. Even in England.

Elias CJ No but if the Courts are assiduous to ensure that counsel are not deterred from representing unappealing litigants, why is an immunity necessary?

Farmer That leads into the final topic I'm going to deal with which is, do you need the immunity or is the strike out summary judgment process enough. Because that's the stark choice. And the view taken obviously by the House of Lords in **Hall** was that it was sufficient. And in the present case, that's argued also by the respondents. And indeed, in my learned friend Mr Woodhouse's written submissions, he says in the section headed "Rules of Court" page 35, in paragraph 156 in particular, he says that since **Rees v Sinclair** was decided there'd been a number of reforms, procedural reforms which he says bear, this is at the end of 154, on the arguments in favour of immunity separate duties, defensive advocacy and finality. And the reforms that he refers to are case management, exchange of prepared briefs, written synopses of argument, judicial settlement conferences, ADR, commercial lists, summary judgment and wasted costs orders.

And he goes on to say in 157 about half way down that paragraph, that the finality concern in particular which we put so much emphasis on as did the Australian High Court, he says has also been reduced by the changed rules. He says this is because in the negligence action against the advocate, early intervention in the litigation by a judge and the ability of the judge and defendant to get an early indication of the real issues and strength of a claim, will assist in early identification of those cases which are an abuse or vexatious or which may truly involve an attack on an earlier decision of a nature which if successful would be seriously contrary to the interests of the administration of justice. He says that's the way to deal with it.

Now that's not a view, again, that the learned President in the present case has expressed or would have expressed agreement with. I'll give you the reference as to what he said effectively on that. First of all he refers to what was clearly the same argument run in the Court below. In paragraph 61, changes since **Rees v Sinclair** in rules, Court case management, and says at the top of page 130 of the Case on Appeal, I venture however that the increasing incidence of vexatious and querulous litigation a phenomenon of which judges are very aware, significantly reduces the weight of the submission. The New Zealand experience leads me away from the optimistic expectations of Their Lordships in **Hall** that the reform of Court rules and the developments such as **Hunter** will adequately counter the prospect of collateral attack or other vexatious litigation.

And that's the same view that was taken by the Australian High Court. And then the statements to similar effect are at paragraph 98 which begins, in my respectful view the vexation of defending actions is one that is underrated in **Hall**. And he ends that paragraph by saying, however effective the UK Rules of Court might be in achieving summary dismissal, the position would not appear to be as peremptory in New Zealand. The right to justice affirmed by s.27 of the Bill of Rights Act binds the Court.

And he then went on to refer to the High Court Rules relating to summary judgment. Pointed out that the case law to date, in particular the **Westpac Kemblar** case didn't allow of the ready entry of summary judgment.

There were obviously the well known limitations on strike outs which he then also dealt with. And it's perhaps worth pointing out too, one particular feature of our summary judgment, defendant's summary judgment rule, and that is that the Court will only enter summary judgment for the defendant where all the causes of action that the plaintiff brings, there is no real prospect of their success. Whereas the English rule allows.

Elias CJ Is that right?

Tipping J Mm, yes.

Keith J We discussed it in **Kemblar**.

Elias CJ Oh, **Kemblar**.

Farmer I'll give you the reference and I think it's Your Honour's own judgment.

Elias CJ Yes.

Farmer And I must say, having had some experience of late with trying to get summary judgment for defendants, it's not easy.

Tipping J Well it's not supposed to be easy.

Farmer No, quite.

Tipping J I mean that's the point.

Farmer Exactly. And so that's Rule 136(2), the Court may give judgment against the plaintiff when the defendant satisfies the Court that none of the causes of action can succeed. That's worded pretty rigidly. The wording in the English rule is, no real prospect of succeeding on the claim or an issue. So issues can be as it were dealt with by that process but not here. And the Australian, I have the Australian rules but there's probably no point in going to those. But the point is that certainly in the **D'Orta** case the Court there also took the view that whatever the position might be in England, one could not be so sanguine about the use of that remedy as a means of dealing with these issues in Australia.

Tipping J I've always thought Mr Farmer that the real difficulty with this confidence in summary judgment or abuse was that the simple and fairly well-known way of getting round it in most cases is over-pleading. And while our rules remain in their present form, that danger is not addressed.

Farmer Mm.

Tipping J Whether it's capable of being addressed I honestly don't know.

Farmer No. The ingenuity of lawyers should not be underestimated.

Tipping J Well one hopes.

Thomas J … the Court.

Tipping J But the whole point is that everyone's entitled to their day in Court and unless you've got some pretty bright line rule, or filter, it's going to be very difficult to stop these cases.

Farmer That's so Your Honour. And that was the concern that ultimately the learned President in the present case came to. That allied to that was the increase in what he described as vexatious litigation. And he did not think clearly that these rules were any protection against that.

Gault J That was not historically a policy support for the rule of immunity was it, that barristers need protection from unmeritorious claims?

Farmer Well they need, the immunity gave them protection.

Gault J I understand.

Farmer How these rules came in was because the House of Lords of course said, well if you're really worried about unmeritorious claims, then we'll deal with it under the rules. And that leaves meritorious claims and they should be allowed.

Gault J Yes but I was just thinking about the origins of this rule, the immunity.

Farmer Yes.

Gault J I didn't understand it as underpinned by a need to protect barristers from unmeritorious claims.

Farmer No, no, I think that's fair Your Honour. Because the concerns were about relitigation.

Gault J Yes.

Farmer Meritorious or unmeritorious.

Gault J Yes.

Farmer But the way the House.

Gault J So that President Anderson was just really finding a new foundation for it.

Farmer Well with respect Your Honour, I think what he's doing is he's addressing the way the House of Lords approached it which was to say - it was really the House of Lords that introduced it by saying, we think that the problem with the immunity is that there will be some meritorious claims that should be allowed. And if you're worried about unmeritorious claims, then we'll deal with them under the Rules. And what both the High Court of Australia and President Anderson, their reaction to that is to say, no, it's not true to say that the Rules.

Gault J So it's an argument to keep the immunity for a reason that it was not established for.

Farmer It's a response to the solution that the House of Lords came up with. That's all it is.

Tipping J Mr Farmer, at the very most basic level, is it perhaps possible to look at this issue in this way, that as a matter of policy should the legitimate claims of the few, one hopes the few, be sacrificed in the wider interests of the judicial system? In the end it's something a bit like that isn't it, is the policy choice that somebody has to make?

Farmer That's right. That's right.

Tipping J And as a second point, while I've interrupted, would you accept that really this case is about essentially the need to protect the judicial system? How far and by what jurisprudential method, are the real issues.

Farmer That's so Your Honour. And the House of Lords said, you don't really need to protect it because it'll be protected under the Rules of Court. And the response that we give, or that adopting what's been said in those cases, is that it does not provide adequate protection of the judicial process.

I think that's Your Honour all I wanted to say about that. And the only other two points very briefly, just to refer to them really. On the subject of the so-called changed conditions of legal practice. And I said to you what they were as outlined in **Hall v Simons**. They were changes in the law of negligence, changes in the conditions of legal practice in England and in particular statements to the effect that there's more commercialisation now at the bar and barristers advertise and all the rest of it. The third factor was public perceptions and the fourth factor was the reforms of the civil procedure rules that we've just been talking about. And that topic was dealt with at some length and I'll just give you the references again in Justice Callinan's judgment in **D'Orta**, paragraphs 361 to 365.

And in essence he effectively, his conclusion in 365 was that I do not think that any societal and related changes actual or assumed. And he was somewhat critical for example of some assumptions that had been made by the House of Lords about the impact of insurance, professional indemnity insurance which has become compulsory in the UK but is not compulsory here. He says, I do not think any societal and related changes, actual or assumed, of themselves justify the dismantling of an advocate's immunity. And he then goes on in paragraphs 366 and following and really ends up taking, as I say, a different view from that which was taken in the House of Lords.

Thomas J But I suppose it's realistic to say that the House of Lords are going to be reluctant to overrule an earlier case unless they have to.

Farmer Yes.

Thomas J And that this is a method by which they rationalise their change of heart on the policy issue by saying there have been changes. It's a format argument really isn't it? It's no more than that.

Farmer They certainly, Lord Hopman certainly was at pains to point out that he was not saying that **Rondel v Worsley** was wrongly decided.

Thomas J I know. I know but that's what a Court will do. That's what the House of Lords will do.

Farmer Yes.

Thomas J But there's no question about it. They have taken a different approach on the basic issues of policy.

Farmer Yes, yes. But at the end of the day the question here perhaps is, is the conduct of litigation in the practice of the law so different today from what it was from 1967 through 'til 1988, just to pick a date which was the date that **Giannarelli** was decided. Is it so different? We still do the reforms, case management or whatever they may be.

Thomas J Mm.

Farmer Have they really changed the basic conduct of litigation? The nature of the judicial process? Have they impacted on the policy considerations to an extent that would justify the abolition of the immunity? And our submission would be that they haven't.

The final matter is the intimate connection test. And we adopt what the learned President said at paragraph 107 of his judgment. In **Giannarelli** the High Court of Australia had adopted what was said by President McCarthy in **Rees v Sinclair** and the justification for not limiting the immunity to the decisions that were made within the four walls of the Court. But allowing the immunity to extend to the strategic decisions that impacted on what was done in Court. And to that extent, that's perhaps comparable with the witness immunity, which I gave you the references, where the preparation of the evidence is also protected as well as the actual evidence itself as given on the day.

Thomas J Well that comes back to that point I made in the witness immunity case. If the concern is relitigation, then the scope of the immunity should be as wide as will achieve that purpose.

Farmer Yes.

Thomas J And it really doesn't matter where it occurs. And the intimate connection test may turn out to be a very artificial one. In that there will be cases that would require relitigation outside that test.

Farmer Yes.

Thomas J And it seems to me that it hasn't been logically followed through.

Farmer It's just that why I took issue with Your Honour was that there is, the policeman, there is a clear cut-off, well a reasonably clear cut-off point between the policeman as an investigator and the policeman as the witness. And that's what the House of Lords was doing in the **Darker** case. They were saying, we're not going to extend the immunity into that different function, totally different function that the police perform.

What President Anderson said at paragraph 107 was that he felt that yes, there will be hard cases or borderline cases, but that's not necessarily any different from how legal and equitable rules and principles are applied all the time, that the Courts hear the facts, they decide on the facts whether the principle applies and then, to the extent that there's a ruling given, that provides a greater degree of clarification of what the principle was in the first place. And his view was that this was in a sense no different.

Now if the Court pleases, I'm sorry it's taken so long, but those, that covers what I was dealing with and, unless there's anything further you would like to ask, I'll hand over to my learned Junior.

Elias CJ Yes, we've decided that we'll sit till 5 and we'll take an afternoon adjournment and it's probably convenient if we take it now. Are Counsel happy with that course?

Farmer As Your Honour pleases.

Court adjourns 3.24 pm
Court resumes 3.41 pm

Elias CJ Thank you. Yes Miss Coumbe.

Coumbe Your Honours I'm returning to the written submission from page 24 onwards but the issues I cover will go beyond that. Topics that my submissions will cover, the main topics are these. First of all, although it's termed a ground for distinguishing **Hall**, the first part of my argument will relate to addressing the respondent's submission that the immunity is really nothing more than a blanket immunity that amounts to an exclusionary rule and infringes the right of access to the Courts, whether that derives from common law principles, fundamental common law principles or from the Bill of Rights. And they've referred to s.27, or from Article 14 of the International Covenant which

of course is termed in the same wording as Article 6 of the European Convention.

So there are two aspects that I'll cover in relation to that. One is how the immunity should be categorised. And secondly, what do we mean by access to justice in this context and why is the immunity not an infringement of that principle?

Then I will go on to address an argument that is that the immunity really should not be just seen as an anomaly, as a kind of lone exception to a principle that there should always be a remedy.

I'll touch briefly on why we might want to, New Zealand might want to align itself with Australia.

And finally will deal with the question of whether this matter should be left to the legislature and touch on the question of whether a prospective decision or a decision having limited prospective and some retrospective effect is at all appropriate and how that might impact on whether this should be left to the legislature.

If you'll bear with me I am going to have to go through to sort of lay the groundwork - some of the background to the approach to issues relating to Article 6 of the Convention and **Hall**. And although that may initially seem a little removed from the situation here in New Zealand, you'll see how I use that really to lead into s.27 in the Bill of Rights.

Tipping J Is that for the purpose of demonstrating that we have a different landscape from that which influenced Their Lordships in England?

Coumbe Not really, it is more for the purpose of demonstrating that the immunity, even if you took the view that s. 27 did relate to access to the Courts, that the immunity is not an infringement of that. It is not the kind of blanket exclusionary rule, or is not to be seen in that way, the blanket exclusionary procedural rule that the respondents have categorised it as.

Elias CJ The immunity is not an infringement of access to the Courts?

Coumbe The principle of access to the Courts as the respondents have suggested.

Elias CJ Yes.

Coumbe Whether that's based on common law or in terms of the Bill of Rights.

Keith J This is on the basis that the immunity or whatever it is goes to the substantive rights rather than?

Coumbe Yes it's a principle of, it's a fundamental principle of substantive law. It's not a merely procedural rule. And I will also be developing an argument that it is in any event properly categorised not as some kind of blanket immunity but really is in essence no different to other situations where for reasons of public policy the Courts have decided not to recognise a duty of care. And I'll refer you to various cases. There are certainly a number of cases that talk about that approach in general terms of negligence. But there are also some authorities that are not referred to in the written submissions where the Courts have approached the immunity, barristers' immunity and categorised it in that way.

Tipping J So the second aspect to some extent depends on the first aspect of your argument.

Coumbe They are to some extent interlinked.

Tipping J Yes, yes.

Coumbe Yes, so we're dealing with them together.

Tipping J I understand yes, thank you.

Coumbe So in **Hall**, certainly some of Their Lordships were influenced by and referred to the fact that Article 6 of the European Convention was then poised to become part of UK domestic law because of course the Human Rights Act was about to come into force. The important point is not so much that Article 6 of the Convention was about to become part of domestic law but the way in which Article 6 was viewed as operating at that time.

Hall was decided very much in the shadow of the decision in **Osman** (**Osman v United Kingdom** [1998] ECHR 101) which started life as a proceeding in the UK domestic Courts where a family brought a proceeding in negligence against the police. Their son had been subject to obsessive attentions from a former school teacher at his school and the police had had complaints made about this. The teacher attacked the family, killed the father and seriously wounded the son and so the family brought an action in negligence against the police. And they relied in bringing that, or rather the UK Courts struck out that claim relying on an earlier decision in **Hill v Chief Constable of West Yorkshire** which was a case involving what was then described as police immunity.

Now the police of course are not immune in terms of everything they do. But the Court in **Hill** had found that as a matter of policy, applying what was then the governing test in Anns, the two-stage test, was there sufficient proximity? If there was, on policy grounds should they uphold a duty of care or not? They found, and drawing an analogy

with barristers' immunity which they said had involved the same two-stage approach, that the police did not owe a duty of care in terms of the way they conducted their investigation. And that decision in **Hill** formed the basis of the strike out of the claim in **Osman**. So then the claim was appealed to the European Court, who decided that, that immunity exempting police from liability was some kind of blanket immunity. It was an exclusionary rule and it was a breach of the right of access to justice under Article 6.

Now Article 6 doesn't in terms refer to a right of access to justice but the Court has taken the view, and this is still the view of the European Court, that necessarily by implication there must be a right of access to justice under that provision. Otherwise how can your civil rights and obligations be determined?. So the immunity was categorised as a crude blanket immunity that infringed Article 6.

And I'm going to hand up some further materials. One is a decision, the **East Berkshire** decision which, although it went on to the House of Lords, I'm giving you the Court of Appeal decision. The reasoning in that decision was not tampered with in the House of Lords. And I'm also handing up a further article by English about the decline and fall of the **Osman** decision. And finally I'm giving you a copy of **Barrett v London Borough of Enfield** which was a decision of the House of Lords which was decided not long after **Osman** and was seriously critical of it.

Tipping J Well the problem with **Osman** was that they had had a fair and public hearing. It was just that they thought they should have had an even wider. That was the European approach was it? They didn't really understand how English law went about it.

Coumbe No, they misunderstood the domestic law in the UK.

Tipping J Yes.

Coumbe Domestic law of negligence. And if you look at the decision I've just given you, which is **Barrett v Enfield London Borough Council**, if you go to page 85 where Lord Browne-Wilkinson is highly critical of **Osman** and talks about.

Elias CJ Is it 585?

Coumbe Page 85.

Elias CJ 585 perhaps is it?

Coumbe Now in my decision, what is your law report that you have?

Gault J Appeal Cases.

Coumbe Oh.

Keith J Well on 558 he says that he finds the decision extremely difficult to understand. And isn't the real point in all of this that in **Z,** whenever that was, some years later, the European Court did make the distinction that you're making between a blanket immunity and?

Coumbe Yes I was leading into that. Lord Browne-Wilkinson in this case talked about the fact that the immunity was sometimes incorrectly used. In the context of a holding that it's not fair, just and reasonable in terms of the ordinary law of negligence.

Keith J Yes, yes.

Coumbe To find a particular class of defendants liable either generally or in relation to a particular type of activity. And he was highly critical of **Osman** there and considered it was wrongly decided. Subsequently the European Court in **Z** did reconsider **Osman** and that was a case, this was quite a horrible case involving young children who had been badly mistreated by their parents and the local authorities had failed to adequately step in. And the claim was brought on their behalf in negligence. **Z** is in the Casebook. And the Article 6 discussion begins on page 134. The Government argued that Article 6 wasn't even engaged because there were no civil rights and obligations to determine because of the limits on tort liability in that case. In the alternative they said that there had been a fair hearing in terms of Article 6 because in the context of the strike out application the question whether there should be a duty of care had been considered, albeit rejected. And the third argument mounted by the Government was that in any event, even if there were an infringement of Article 6, on the face of it the restrictions on liability were in pursuit of a legitimate aim and they were proportionate in terms of the Convention. Analysing the approach the Court acknowledged that there was a right of access to justice implicit in Article 6. That Article 6 had been engaged in this case. That the right was not absolute, it is subject to legitimate restrictions and the kinds of restrictions the Court mentioned in that case were on the one hand physical or procedural restrictions such as statutory limitations, security for costs orders and so on. On the other hand they referred to an earlier case in **Ashingdame** where there had been some statutory obstacles placed in the way of the claim.

They noted that in this case the applicants had not been prevented from in fact bringing their claim before the Courts. They went on to say that the finding that ultimately there was no duty of care was not a blanket immunity. It was simply a finding that there was no liability on the basis of the ordinary law of negligence in the UK. At that stage **Kaparo**(?) by then was the governing test. The three stage inquiry. Foreseeability, proximity and then was there a ground on policy reasons to negate liability. And they said that really **Osman** had gone

too far and had not adequately, the Court there had not adequately appreciated the nature of the assessment of liability in the local Courts.

Thomas J I'm sorry I haven't got quite clear in my mind the relevance of the point you're making or where you're heading to with this argument.

Coumbe Where I'm heading to is that it's been argued by the respondents that the immunity is a kind of a blanket immunity which amounts to essentially a procedural obstacle to bringing a case before the Courts. And therefore is a breach of a right of access to the Courts in terms of the common law and, as they suggest, under s.27 of the Bill of Rights. It was recognised in **Osman** that this is not a finding that there is no liability on policy grounds and the law of negligence is not a blanket immunity amounting to a procedural rule. Rather it is just a substantive determination in terms of local law that having properly weighed and balanced policy considerations, liability should not be recognised.

Thomas J Yes but there's a difference between a finding that there is no duty of care and a finding that irrespective of whether or not there is a duty of care, a party cannot be sued.

Keith J Well you're saying it's the first, there's a finding of no duty of care and in **Z.**

Coumbe Yes I'm saying that this case is on all fours with the kind of immunity that we're looking at here.

Keith J Well isn't it better to say non-liability? Isn't that what you're saying?

Coumbe Yes.

Keith J That you're just not liable.

Coumbe It is more properly analysed and described as a situation where there is no liability, there is no actionable duty of care. And that is a substantive matter, it's not a procedural matter that bars access to the Courts. The Courts determine whether there is a duty of care by analysing policy factors in terms of, well the New Zealand test of course as recently restated in the **Carter Holt**.

Thomas J The President in the Court below uses that phrase and draws that distinction, no actionable duty of care.

Coumbe Yes, mm.

Thomas J But if there is a duty of care, but it is not actionable, then that surely is an immunity?

Keith J Isn't it better to just say there is no duty of care? Isn't that what the European Court finally does say in paragraph 100 I think of **Z**?

Coumbe You could just say there is no duty of care.

Keith J Mm.

Coumbe At all.

Keith J Because the word actionable's got to be taken as read doesn't it? I thought it wasn't helpful for the President to put the adjective in.

Coumbe Well the way the President approached it. and I think the way that Justice McHugh also approached it in **D'Orta**, was to say well there is a duty in the sense of a professional duty but there is no legal duty of care. And that was also the approach of Chief Justice Mason in **Giannarelli** where he analysed it in terms of there being no duty of care.

Tipping J This is all very semantic isn't it? The bottom line is that at the moment, subject to the Court of Appeal, there's no liability. And whether you call it an immunity, not duty of care or anything else, surely doesn't get to the substance of the matter – whether there should be liability. I must say I'm getting a bit mystified as to why we have to go into all these intricacies.

Coumbe Well the reason.

Tipping J You're heading off an argument that hasn't yet been presented and to which you may not be required to reply.

Coumbe That is true, I am heading off an argument that is in the respondent's submissions. And essentially our position is that there is no liability, there is no duty. And whether it's termed an immunity or a lack of a duty of care, that is a substantive principle of law, it's not just a procedural matter. And in terms of whether that infringes our Bill of Rights. We don't of course have an exact equivalent of Article 6 of the European Convention. Section 25 enacts in part what is in that but just in relation to criminal process. Section 27 involves a right of observance of natural justice by any tribunal. The Courts so far in New Zealand have interpreted that as having a procedural content only. Not having a substantive content. Natural justice of course has a very well accepted and established meaning. It's a right to a fair hearing and a fair process.

Tipping J It would be nonsense to say we must recognise a duty of care in this particular fact situation because natural justice requires us to. That would be meaningless.

Coumbe Well I entirely agree. Perhaps I can move through this argument more quickly. It is addressing.

Tipping J I mean in the end that would just be a recipe for sloppy thought.

Coumbe So in dealing with the respondent's argument then, my submission is that this is a determination of a substantive principle of law, it doesn't infringe s.27 which is concerned with procedural issues. It has been suggested by the respondents that a recent decision of this Court in **Discount Brands** somehow extended s.27 into more substantive issues. But that was dealing with.

Tipping J Who's the culprit for that extension?

Coumbe Pardon?

Tipping J Who is the culprit for that extension of **Discount Brands**?

Coumbe It wasn't extended. That case did involve.

Tipping J Well who is the alleged culprit? Who is said to have.

Keith J That's me.

Tipping J Is it you?

Keith J Mr Woodhouse quotes it.

Coumbe But in fact that case was dealing of course with a procedural issue of a failure to notify, not a substantive matter.

Keith J Presumably the argument that's being made here that picks up on **Z** is that if, in terms of both the Covenant provision and s.27, if you have rights and obligations and interests protected or recognised by law, the s.27 language, and if there is an immunity that says even although you've got rights, you can't sue because of some blanket immunity argument, you've got an argument haven't you of the kind that succeeded in **Osman**. But you're saying it's not, there are no rights here. Because there is no liability on your side. And so it's not a matter of a blanket immunity of the **Osman** type. I mean that's the essence isn't it?

Coumbe Yes and furthermore, it's not a case of denying access to the Courts. Because both in **Z** and subsequent decisions in the UK, they have said, well even if a case is brought and it's struck out at the outset on the basis, on grounds of precedent, there is no duty of care in the particular situation, that is not a denial of access to the Courts.

Keith J Yes, sure. So the real issue here is whether the lack of liability or whatever it is.

Coumbe Is properly justified.

Keith J On your side is a properly justified, substantive argument in terms of negligence doctrine.

Coumbe Yes you come back to, is it properly justified? And that basically brings you back to the policy grounds that we've been canvassing.

Keith J Yes, mm. And so it's **Kaparo** and all that.

Coumbe Yes, yes. Another case where it was.

Thomas J That has to be surely strained. Is there a duty of care on the advocate's solicitor up to the point where what he advises, he or she advises, is intimately connected with the trial and then the duty of care just drops away. It just can't be right.

Coumbe That is how it has been analysed. In for example a decision of the Privy Council, it's not in the Casebook but it's **Ewan Cum Yu v Attorney-General of Hong Kong**. Lord Justice Keith, in referring specifically to barristers' immunity, the rule in **Rondel v Worsley**, referred to the **Anns** test which was the two-stage test very similar to our test. Which was recently restated in I think the **Rolls Royce v Carter Holt** decision of the Court of Appeal earlier this year. That you approach, he saw **Rondel v Worsley** as very much being a case which was an example of an analysis where there was sufficient proximity in terms of the first limb. He goes on to say that the second stage of that test is one which will rarely have to be applied. It can arise only in a limited category of cases where, notwithstanding that a case of negligence is made out on the proximity basis, public policy requires that there should be no liability. One of the rare cases where that has been held to be so was **Rondel v Worsley**, dealing with the liability of barrister for negligence in the conduct of proceedings in Court. So he squarely analysed.

Tipping J Could we have the citation for that please?

Coumbe Yes, it is [1988] 1 AC 175.

Gault J That's not an immunity at all.

Coumbe Well it doesn't have to be called an immunity. It is simply another example.

Gault J It's not really in the nature of an immunity is it?

Keith J Mm.

Coumbe It's just another example of the situation where in the law of negligence the essential ingredients to establishing a duty of care are not made out. Proximity, I readily acknowledge that proximity is made out in the case of a barrister and their client. But on policy grounds the Courts have declined to impose a duty of care.

Gault J When somebody is not sufficiently proximate to be held to owe a duty of care, you don't say they have an immunity.

Thomas J No.

Coumbe No and recently in the **Burns** case in the House of Lords they came back to look again at the **Hill** principle. And **Hill** of course, which referred to the immunity. And Lord Keith in that case also referred back to what he'd said in the **Ewan Cum Yu** case. They described it as an immunity in **Hill** but in **Burns** more recently the Court has said well, you know, the barristers' immunity has been abolished but they weren't using immunity in any specific sense there but, you know, in the light of you know **Z** and the discrediting of **Osman**, we should now really be framing this in terms of just a lack of duty of care and not really calling it an immunity.

Tipping J Well it's interesting that in the argument in **Rondel v Worsley** counsel for the appellant, I think it was Bob Cooper, described it as a privilege.

Coumbe Well I think I'll leave that aspect for Mr Wilson.

Tipping J Oh yes. The terminology is slippery. It's the substance that matters.

Coumbe Mm.

Thomas J You're just moving the policy issues to the duty of care framework from how we have discussed them with Mr Farmer this morning?

Coumbe That's right, it is.

Thomas J You're saying the same policy considerations negate the first limb?

Keith J Yes.

Thomas J Of the negligence test.

Coumbe Yes and that will lead into my next argument that it is not to be seen as some kind of anomaly to a situation where otherwise there is always liability in the law of negligence.

Tipping J But I don't see there as being anything anomalous in a barrister's duty of care, or the case for a duty of care being negated in relation to certain aspects of a barrister's work and not in relation to other aspects. Because the policy issues may be different.

Coumbe Yes, that's certainly exactly the argument that I'm advancing. That although there is a duty and it's enforceable in relation to many other aspects of a barrister's work, in that limited sphere of the Courtroom or work intimately connected with that, a duty of care is not recognised on policy grounds. And there's nothing particularly odd or surprising about that given the many other cases where exactly the same sort of approach has been taken in the law of negligence to other types of professionals in certain, either generally or in relation to certain aspects of their work.

Tipping J For me, if I may interpose and perhaps, I hope I won't do this again, or too often, the real issue is whether or not the policy underpinning for the lack of duty of care would be better reflected in an abuse of process doctrine than in that policy. That the abuse of process doctrine would be closely focused on the primary rationale for the policy exclusion of liability, to use a neutral term, namely relitigation and finality. That seems to me to be a much more productive line of discussion than whether the European Courts have given us a good or a bad steer. Because the English Judges took the view, rightly or wrongly, that abuse of process would largely cope with major aspects of the rationale for the policy of exclusion of the duty. So, I can signal from my point of view, that seems to me to be a very important issue and I would for myself be much benefited by focus on that than the sort of what you might call the more esoteric jurisprudential aspects or the influence of the European setup. Because I'm not wholly persuaded that the English Judges were right that abuse of process does sufficiently cope with the finality and other issues. I'm not expecting you to answer this off the cuff. But I just think sooner or later what for me is a crucial point in this case has to be addressed.

Coumbe I can pursue the argument that the immunity is not an anomaly and could go back to that in the context of, should this be left to the legislature or what is the appropriate way of dealing with this.

Tipping J Well that would be helpful.

Coumbe This next argument is on page 29 of the submission. The points there are that a large part of the respondent's case and a large part of the general opposition to advocates' immunity is that it is seen as being somehow anomalous, somehow an exception to this principle that there should be a remedy for every wrong. And I've made the point on page 30 that, and again I've already covered this in some detail, that it's rather circular to speak of there even being a wrong because the effect of what we call the immunity is just a negated duty of care, whether that arises in contract or tort. That there are many other instances other than advocates' immunity where a countervailing public interest denies a remedy.

And I've referred to a long list of provisions in footnote 96 where Parliament has expressly conferred a similar immunity on persons exercising public functions. Mostly those are public tribunals such as the Commerce Commission, the Securities Commission and so on. I've referred to various articles by Justice Ipp which are in our Casebook where he talks about many other circumstances where a duty of care has been negated and Justice McHugh in **D'Orta-Ekinaike** also lists, over many pages, a number of similar instances.

There are a number of statutes in New Zealand that confer immunities on counsel and witnesses in the context of proceedings before statutory tribunals. And I have listed those on page 31.

There has been no, we've still got all of the immunities relating to other participants in the judicial process. So there has been no erosion of those.

I make the point on page 32 that accountability doesn't equate to a right of action in damages. There are other remedies available for negligence on the part of an advocate such as disciplinary powers, the Court's inherent jurisdiction to punish for contempt. The Court also has an inherent jurisdiction to remove counsel from a case if there is an egregious sort of failure to perform adequately. Revision of bills of costs. And that applies to both the bills of costs of barristers and solicitors. The making of wasted costs orders. Rights of appeal and even criminal processes.

I suggested that the expansionist era that we once had in the law of torts where it did seem to certainly favour plaintiffs, has perhaps lost its momentum. And there I have annexed various articles of Justice Spigelman and Justice Ipp from Australia.

Thomas J Well that is so in Australia. I mean they have the problem of personal injury litigation.

Coumbe Yes.

Thomas J It's been so for a long time.

Coumbe Yes and they have had a statutory, a major of course statutory restriction on the law of negligence. But those statutory, and the Civil Liability Act. That goes beyond personal injury cases though, the width of that.

Keith J The High Court of Australia a few years ago though, to the surprise of many, imposed liability didn't they for nonfeasance on roading authorities?

Coumbe Oh that's right. That was the.

Keith J The **Brody** case.

Coumbe The **Brody** case, yes.

Keith J So that's one. Yes but as my brother Thomas was indicating, it's a bit hard to know how much to get from Australia isn't it? It does have a different jurisdiction to us.

Coumbe I'm not suggesting there's an absolute trend but there are certainly a number of reasonably significant cases that have come out of the Court of Appeal where.

Thomas J I think you could say the same in the UK.

Coumbe Mm.

Thomas J Plaintiffs are not as popular there or in Australia as they might be here.

Coumbe So the fact that there is no duty of care imposed on barristers or solicitor advocates in a limited sphere of their overall work, is not anomalous. It's not really that out of step with many other decisions in these areas. The **Attorney-General v Carter**, **Ship Surveyor**, although actually there was neither proximity nor were there relevant policy factors in that case. In the recent **Rolls Royce v Carter Holt** decision in the Court of Appeal it was held that a subcontractor did not owe a duty of care to the owner to actually carry out his contract. There are many other examples of situations where for policy reasons, a duty of care has been negated.

Thomas J It's not easy though to think of situations where someone has assumed a responsibility to exercise care and skill and no duty exists.

Coumbe Well I think most of the cases where proximity has been recognised, such as **South Pacific Manufacturing**, where there is sufficient proximity and proximity is based, as I understand it, on a recognition that the particular person who has been injured through your actions, that that was not entirely unforeseeable. I don't see it as really being that different. Proximity is established but there are compelling or persuasive policy reasons for not following through and imposing a duty of care.

Elias CJ What's been put to you is that this is a case where the barrister has assumed an obligation to exercise care and skill. Are there any cases that you can bring to our attention where in those circumstances public policy negates liability?

Coumbe Well when you say has assumed responsibility, again I think that in a case like **South Pacific Manufacturing** where the private investigator undertook the responsibility of investigating in relation to the cause of the fire and there was proximity in terms of the loss caused to the

plaintiff is a similar case. I think, again I just come back to my argument that where proximity is established, and a lot of the UK cases such as the **Z** itself, the local authorities, you know and their employees had really in some respects you could say assumed a responsibility to the children whose welfare they were monitoring. They visited them over a period of many many years. There was constant contact and yet there was a complete failure to fulfil those obligations. The Court, the European Court and the domestic Courts before it found that there was a sufficient relationship of proximity there but again, well for policy reasons, a duty of care was negated.

Tipping J Assumption of responsibility, as the discussion in **Attorney-General v Carter** might show, is a relatively sophisticated concept. And it is I think a little dangerous to move on a sine que non basis from an assumption of responsibility to a duty of care. It might sound very attractive in theory.

Coumbe Mm.

Tipping J But there's a lot of writing and discussion on this which, for New Zealand purposes anyway, so far has culminated in the **Carter** judgment.

Coumbe Mm.

Tipping J But I'm sure there's plenty more to go in this area. But I think it's never been a sine que non simply because you can say a responsibility has been assumed that there is per se a duty of care.

Coumbe Yes, I think the policy considerations still need to be analysed as they have been in the case of barristers' immunity.

Tipping J And if we were going to go down this road we'd need to go into a fairly extensive journey into this aspect of the law of torts.

Coumbe So anyway, to sum up. The argument is that barristers' immunity can't, shouldn't be viewed as some kind of exception to a general principle there should always be a remedy for a wrong. Because, as the discussion demonstrates, that is certainly not always the case. And in many respects it is no different from any other case where negligence liability has been negated on policy grounds.

The next argument relates to whether or should New Zealand and Australia remain in alignment. There I would, and this is from page 36 on, there I would certainly acknowledge of course that this Court must undertake its own assessment of the policy considerations. But having done so, there are arguments why it may be a good thing to align ourselves with Australia. There is of course the longstanding policy of greater harmonisation of laws. There are strong links between the two jurisdictions in terms of professional practice under the Trans Tasman

Mutual Recognition Act. Trade practice legislation here and perhaps companies' legislation have come increasingly into alignment.

I've referred on page 36 to a case where a decision or proceedings had elements on both sides of the Tasman. And certainly the learned President in the Court of Appeal thought that there was merit in aligning ourselves with Australia. Or at least that that position should be seen as persuasive.

The respondents have argued, well you know, what about all the other aspects of for example the law or torts where there is no alignment. And gave the example of **Rilens v Fletcher** or that rule having been absorbed into the law of negligence in the **Bernie** case in Australia. In response to that I note that Professor Todd in his book *Law of Torts* notes that the Court in **Bernie** did nevertheless say that the rule under **Riles v Fletcher** should now be subject to a non-delegable duty of care and did leave open the door.

Tipping J You're going again into the intricate mysteries of this area of the law of torts. Do we really have to engage ourselves with delegable duties and independent contractors and so on?

Coumbe No we don't need to do that. It's just simply to say, well look, there are other areas where perhaps the law is not completely in alignment. The example given by the respondents is not a particularly good one because the differences are not that great. But in any event, it doesn't have the same elements as advocates' immunity where you have common links in terms of professional practice on both sides of the Tasman.

Gault J I'm given to understand that some of the State legislatures are having a look at some sort of statutory intervention in respect of the **D'Orta** case. Should that occur, should we just change too?

Coumbe I'm not suggesting this Court, certainly not suggesting that Your Honours should simply follow the High Court of Australia per se. And our argument has very much been presented on the basis that the policy considerations justifying the continuation of the immunity do warrant that. But there are some, I just pointed out some advantages in the continued consistency between the two jurisdictions.

Turning to my final argument which is, should any significant reform of the immunity be left to Parliament? My learned friend Mr Farmer made the point earlier today that whereas the fact that it is judge-made, the immunity, and over a long period of time with an evolving basis or justification for the immunity shifting from the absence of a contract into more policy considerations does not in itself follow that, well judges made it, judges can remove it. And Your Honour Justice Tipping also made that point this morning.

There are a number of practical reasons why it would be desirable for this issue to be left to Parliament. First of all a far wider range of consultation could be undertaken than is available to the Courts. In terms of how the Law Commission functions, research is undertaken, discussion papers are published, responses are evaluated, final reports are issued, a draft Bill. And then there is the Select Committee process. And the Court just cannot engage in community input or involvement to that extent.

There is an ability, if it's left to Parliament, for some kind of, if a compromise solution is seen as desirable. And the one that has been discussed today is the question of whether there should in fact be more teeth attached to the abuse of process argument or grounds for protecting the administration of justice if the immunity were to be abolished. That could certainly be the subject more readily of a legislative process than a judicial process. Although no doubt it would not be popular, any review of any of the other immunities could be undertaken in conjunction with that process.

Then there is the question of, or the fact that abolition of the immunity would have retrospective effect under normal principles of law. And the learned President in the Court below did note that at the moment he did not consider that in New Zealand a prospective ruling could be made. There is a recent decision of the House of Lords that was decided in June this year, **National Westminster Bank v Spectrum**, where there was, the door was opened in terms of the possibility of prospective rulings in exceptional cases. The Court did not do that in terms of other jurisdictions, for example in the US the position there was unsettled, in Ireland it wasn't recognised, in Canada it wasn't recognised. It was in terms of the jurisprudence coming out of Luxembourg and Strasbourg in terms of international covenants.

Keith J Did they actually say it wasn't recognised, sorry, in Canada, that it was not?

Coumbe They said in the judgment that so far Canada had been resistant to that.

Keith J Well that's wrong isn't it? I mean there are decisions in the constitutional area which are future looking. Ages ago the **Manitoba** case and so on where the Manitoba legislature was supposed to pass bi-lingual statutes and hadn't and they were given some years to get it right. Otherwise there would have been chaos.

Coumbe Then the statement by Lord, certainly Lord Nichols did say that that was not the position in Canada. So to the extent, that may simply not be correct.

Keith J No.

Gault J When you look at the circumstances of the **Natwest v Spectrum** case where there were literally thousands in existence of bank documents that were going to be affected by this decision. And the case for dealing with it prospectively only was so strong. That would be a much stronger case than this, yet they didn't think it was even close.

Coumbe That's right, they thought that you know, we're dealing with sophisticated commercial people who can adjust their, you know, they didn't feel there was a need to protect anyone by making a prospective ruling. And nor did they want to shut the claimants in that particular case out by making a prospective ruling which might not benefit them. They looked at the possibility, or at least Lord Nichols mentioned the possibility that if prospective rulings were going to be permitted, well you know where might be a situation where you could have a what he called a kind of selective prospective order. But I think quite rightly expressed the view that that might be seen as somewhat discriminatory or arbitrary. He was thinking of a situation where an order might be prospective but retrospective just in relation to the particular litigants so that they got the benefit of all their efforts in bringing the matter before the Court. But our submission is that that would be an unsatisfactory outcome.

Gault J What would bring this particular type of case into the area of exceptional case that the House of Lords contemplated might possibly justify only prospective effect?

Coumbe I'm not sure that, it's not really our argument that this is such an exceptional case that there should be either a selective prospective or completely prospective order made. Rather it's our case that the Court should be careful about adopting or following the House of Lords on this point. And that really it is better to leave the matter to Parliament to determine whether there should be, if there is just to be prospective overruling, to leave that Parliament.

Gault J Yes thank you.

Tipping J I have to say that this retrospective point seems to me to be quite troublesome. Justice Hammond, with whom the other Judges in the Majority agreed, dealt with it very peremptorily in paragraph 208 when he really said that the so-called problem was more apparent than real. I would have thought it was a problem that was exceptionally real for the solicitors in this case.

Coumbe Well if it's prospective, they're going to miss out.

Tipping J Well exactly. It's fundamental to the.

Coumbe So in some ways it might be in the Bar Association's interests to argue for a prospective declaration but our submission really is that that is not

an appropriate thing for the Court to do and that it should be left to Parliament. The entire thing should be left to Parliament.

Tipping J If the immunity is abolished then the solicitors in this case will find, what is it, 13 years after the event facts which at the time they would have had every reason to think could not lead to any action for negligence will have landed them with a liability. Now we spend a lot of time looking at the question of the fairness and appropriateness of retrospective legislation in the criminal field.

Coumbe Mm.

Tipping J And there's much thumping of the desk about human rights and so on. But I wonder whether we aren't sort of underplaying this issue a little bit in the civil field. It's one thing to be locked up retrospectively but it's not wholly different in principle to be told you're liable for X thousand million dollars retrospectively. Now I just signal that that seems to me to be an area that might deserve some further thought.

Coumbe Well our argument is that that is a ground, further ground for saying it should be left to Parliament.

Tipping J Quite.

Coumbe Because the normal effect or the effect of if you were to decide that the immunity should go, the effect of your decision, unless you were going to adopt what the House of Lords has said and decide this was a very exceptional case or that you should introduce the whole notion of prospective overruling into New Zealand law, that does create a lot of unfairness in terms of the way people have been ordering their affairs since **Rees v Sinclair**.

Tipping J Presumably one's insurance cover.

Coumbe Yes.

Tipping J As just a single dimension of the issue would have been struck on the premise of there being immunity.

Coumbe So our argument is that is a powerful reason really for leaving it to Parliament. And that the suggestion by the respondents that some kind of selective prospective that would encompass their case but leave everything else untouched is a little arbitrary and discriminatory for us to want to advocate that as a sound approach.

Justice Kirby, who has never been a great proponent of the immunity, nevertheless in the **Boland** case, **Boland v Yates Property** (**Boland v Yates Property Corp Pty Ltd** (1999) 167 ALR 575 (High Court of A)) noted the adverse consequences of the retrospective operation should the immunity be abolished. And the learned President said in

this case at paragraph 121, the present causes of action extend back more than six years, and of course it would go back further than that if there were to be retrospective overruling. And if the Court were to remove immunity, counsel in every case, whether at first instance or on appeal for at least the past six years, would be potentially liable to a proceeding, vexatious or otherwise. And he talks about the fact that fixing of fees, arrangements for indemnity insurance and so on would have all been undertaken on a false basis. And he expresses the view that there really isn't any room for a prospective overruling. And we would certainly adopt that as part of our submission.

Thomas J Isn't that the sort of issue that some value might be got from the experience in the UK following **Hall v Simons**? One would have thought that if the retrospective point was of great significance that it would have made some impact in the UK following that decision.

Coumbe Well are we really in a position to assess what impact, what the impact has been? I don't know that we are. And I would still.

Thomas J Well one would think that after what, four or five years, if there were cases in the past that could be brought against counsel, they would have been brought in that time. That doesn't seem to be the case.

Keith J And we do have those figures don't we which show the number of claims that have been made over that time.

Coumbe I don't know that we would necessarily accept the reliability of that information that's been annexed to the respondents' submissions.

Keith J No I'm not talking about that. I'm talking about the paper by Mark Lomas of Littleton Chambers (Mark Lomas QC *Recent Developments in Barristers' Negligence – Part 1 – An Overview & The Impact of* ***Hall v Simons***" Paper presented to the Professional Negligence Bar Association, UK, 14.5.03). Well there is a question I suppose about the authority of them. But one thing that they show, 10 years before **Hall's** case, was that the total notifications were 472, the poor advocacy notifications were 19. So that's what, 5 percent or so. And that figure has gone up to slightly over 10 percent in more recent years. So there hasn't been a massive proportionate increase in poor advocacy notifications. So I mean there is that five years or so of experience isn't there?

Coumbe Yes we're not arguing for a prospective overruling. But the argument is that really it should be left to the legislature and those sort of considerations can certainly be taken into account in that context.

Keith J Those figures also raise a question about the impact of **Rondel v Worsley**. If the proportions were similar back in 1967, then barristers were losing an immunity were they in respect of all their non-court connected activities? Which was, I don't know, on the basis of more

recent figures, was 70, 80 and 90 percent of the notifications. I don't know what the figures were then. But it's not a surprising proportion is it, when you think of the range of barristers' work.

Tipping J I've always been brought up on the view that where the parties could reasonably be regarded as having ordered their affairs, on the strength of a long established rule, the Courts should be extremely hesitant in altering that rule retrospectively. It's fine for the future because people can then order their affairs according to the new rule. But the idea that you could be told X years after the event that your settled expectation is now … strikes me with respect as being quite problematic.

Coumbe Yes well that does happen of course when a longstanding principle is overruled. But I certainly would agree that it is.

Tipping J This is not against you, it's for you.

Coumbe Yes I agree, there are strong arguments I agree, that that should not happen. And we would take the view that it isn't appropriate for the Courts to overrule such a longstanding principle as **Rondel v Worsley** that has been adopted for such a long time in New Zealand. And that the recent suggestions in the House of Lords about ways and means in which prospective rulings can be made is just not really an adequate answer.

Thomas J But another way of putting it would be to say that it's a factor to be taken into account always of course. But as Lord Reid said, public policy is not immutable. If the Court is going to have any ability to revise public policy from time to time as it changes and as needs change, it would seem inevitable that there will be retrospective decisions.

Coumbe Yes that, and.

Thomas J I mean it becomes a factor. If that outweighs the other factors that are involved in pointing the other way, well then you give way to it. But I don't see it as an absolute point again.

Coumbe No I'm not suggesting it's an absolute. It is.

Thomas J No, it's a factor.

Coumbe It is a factor to be taken into account and it adds weight to the argument that this should be left to the legislature.

Thomas J To the legislature, yes.

Tipping J On this, you've skipped, and perhaps deliberately, the heading "Lawyers and Conveyancers Bill". What, if anything, do you suggest the Court should take out of a Bill that's now lapsed?

Coumbe I'm not really, frankly I'm happy for you not to take much out of that at all. I just noted in passing that it didn't contain at any stage a provision taking away the immunity as such.

Tipping J Well it contains what is potentially a glorious circularity when it says that barristers shall have all the privileges etc that barristers have at law. Well of course they have their privileges and so on that they have at law. It hardly needs a blinding statement by the Parliament to say it. But you're not really placing any great reliance on a sort of tentative signal from Parliament?

Coumbe Well this may be, and I could argue, it is arguable that this is an amendment specifically designed to deal to the arguments that are being made by various commentators to the effect that the effect of s.61 is that the immunity fell down in New Zealand at the same time that it was abolished in the UK.

Are there any other questions?

Thomas J There's a point I want to raise. And I want to raise it, you may want to just consider it or it may not be worthy of consideration but I didn't find it in the submission of the respondents. It may be that I overlooked it. It relates to the legislature's reversal of **Daniels v Thomson**. Now in **Daniels v Thomas**, the reference if you want to make a note is [1998] 3 NZLR 22. Now in that case the Court decided that if a criminal conviction or acquittal had occurred, there could be no subsequent claim for exemplary damages. And in the case of dealing with the acquittal the Court referred to the undesirability of allowing the same issues to be relitigated and to the principle of finality. That's at page 51. Now the legislature shortly thereafter reversed that effect in s.396 of the Accident Insurance Act of 1998. Now it seemed to me, and I'm frightened that I'm overlooking something here, that the legislature has contemplated necessarily that those claims which will be brought under the amendment, that can now be brought, will be relitigating issues that have been decided before. And the question that you might like to consider was whether or not this Court might not be justified in looking at that situation as an indication of parliamentary policy.

Coumbe Your Honour, I'm not familiar with that decision and would like to have an opportunity to perhaps look at that before responding on that question.

Thomas J Sure. Well your Senior might want to take it up in reply or something, I don't know. There may be nothing to it. But on the face of it looks as though the legislature have said, we're not worried about the relitigation of these issues. And they expressly negate each of the grounds of the Court of Appeal's decision. So they've effectively said, well we're not concerned about relitigation of the same issues. The

finality principle doesn't persuade us that these matters should not be relitigated in claims for exemplary damages.

Now there may be a flaw to this because I don't have the advantage of a Judge's clerk any more Ms Coumbe. But if there is, I'd like to know what it is.

Coumbe Yes, I would like to read the decision to be aware of whether there is any other possible aspect of that.

Elias CJ Thank you Ms Coumbe. Yes Mr Wilson, we would like you to get under way this evening.

4.42 pm

Wilson If Your Honours please. For the Law Society we support and adopt the submissions that Your Honours have heard from my learned friends Mr Farmer and Ms Coumbe. And I will attempt to avoid duplicating those submissions with one exception which I immediately acknowledge. And that is my first submission, which is to emphasise three aspects of the work of a barrister which in my submission cumulatively make the work of the barrister unique among professional responsibilities. And contrary to the observation of His Honour Justice Hammond in the Court below at paragraph 150 of his judgment when he said, then too I am not at all sure that it is accurate to say that the litigation specialist is in anything like a unique position.

Your Honours the three characteristics of Court work to which I refer are firstly, in litigation almost always there is a loser, as well as a winner. And losers in litigation in my submission frequently believe that they should have succeeded and would have succeeded if their counsel had conducted the trial differently.

Thomas J Well there may be rare cases where that's precisely right. The loser would have succeeded if counsel had been competent.

Wilson Yes indeed, yes. I acknowledge that Your Honour. I'm not saying that counsel are always competent.

Thomas J No.

Wilson But the point I'm making is that there is almost always a loser and the loser frequently believes they should have won. The second characteristic of litigation to which I refer is that the barrister must at times act contrary to the client's interests and the classic example of that Your Honours is in my submission the well-established obligation of counsel to refer to the Court an authority which is relevant but which is against the case being advanced.

Elias CJ Well I just don't know that you can say that that's contrary to the client's interests. Because after all if it didn't pop up in counsel's submission it may well pop up more conveniently either as a result of the judge's own investigations or on appeal which would be even more expensive.

Wilson I agree with that. But certainly from the perception of clients, and at the risk of giving evidence myself, it's very difficult for even the most sophisticated of clients to understand why their own counsel has referred the Court to an authority which is against them, even when that argument follows the argument for the other side where the authority has not been raised.

Gault J There can't be any liability for doing that.

Wilson I'm not suggesting that Your Honour. I'm not suggesting liability but I do refer to it as the second of the three characteristics of litigation. And the third.

Thomas J Which point to uniqueness, is that what you're saying, uniqueness of the barrister's position?

Wilson I'm saying that cumulatively these three points establish uniqueness.

Keith J Not separately.

Wilson Not separately. Although some may separately but I don't put the argument that way.

Keith J Don't think so.

Wilson No. And the third point in my submission is that advocacy is an art and not a science. There is frequently no right or wrong answer in advance to the question of whether a witness should be called, a question should be asked or a point should be taken. And that makes it very easy for an unsuccessful litigant to assert in hindsight that their counsel made the wrong decision. Those are the three matters which in my submission cumulatively do make trial work unique among professional responsibilities.

Thomas J Well I suppose other professions might on reflection come forward with some features which make them unique in their own sense. The surgeon claiming that I have to deal with life and death.

Wilson Yes, yes.

Thomas J That's a unique feature of surgery perhaps.

Wilson Yes, yes.

Thomas J You have to tie this into a wider argument don't you?

Wilson Yes and I'm proposing to do so Your Honour. And those unique aspects cumulatively make counsel very vulnerable to allegations, however well founded or otherwise, that they have not conducted a trial in a manner that best served the interests of their client. And that in turn, absent immunity, makes the barrister very vulnerable to the threat or actuality of claim from the unsuccessful client.

Your Honours I go on to submit that it is no answer to that point that if the immunity were removed the Court would be conscious of the difficulties faced by counsel when claims were brought by the client against counsel. And I immediately accept that the Courts would be well aware of the pressures on counsel. And would give full weight to those in the resolution of claims by clients. But the point I wish to make Your Honours is that the very making of the claim, however unfounded, will be damaging to the barrister because of the inevitable stress which results to the barrister through the making of the claim and the likely impact on professional indemnity premium.

Indeed Your Honours, I go on to submit that one of the unfortunate ironies of this type of situation is that it's the unfounded or marginal claim which must go to trial to be determined which is likely to have adverse reputational consequences for the barrister of a kind which do not result from an obviously well-founded claim. And as I said to Your Honour Justice Thomas, I acknowledge there will be some, absent immunity, which if made is likely to be settled out of Court.

Tipping J You distinguish barristers from other professionals on this very basis, that they are so much more vulnerable?

Wilson Yes indeed Your Honour.

Tipping J To that sort of claim.

Wilson Indeed Your Honour. And that's why I went through those and make those introductory submissions.

Tipping J Quite, yes.

Wilson Particularly the winner and the loser.

Tipping J Yep, yes I understand. I just thought I'd want to make sure I'd made the link.

Wilson And I'm grateful to Your Honour. And while one would immediately acknowledge that particularly surgeons are literally dealing in life and death situations, fortunately in the great majority of operations there is no loser, there's only the winner, the patient who benefits from the successful operation.

Thomas J Or the patient who has no further interest in the world at all.

Wilson Indeed.

Tipping J What relevance if any would the fact that the Accident Compensation regime would preclude a very considerable amount of litigation against them doctors have in this sphere Mr Wilson, if any?

Wilson Well indeed. In my submission it's not really relevant to my argument.

Tipping J No.

Wilson But even if there were otherwise an analogy to be drawn.

Tipping J Yes.

Wilson With the medical and associated professions, the effect of Accident Compensation is to remove the practical.

Tipping J But they don't, by dint of that, have the same vulnerability as barristers. That is where it might possibly fit in because they're not, in almost all cases, liable to common law action.

Wilson Indeed and certainly they face the potential of disciplinary action but so do barristers.

Elias CJ Well they face claims under the Health and Disability Commissioner Act.

Wilson The same way that barristers potentially face action under the Law Practitioners.

Elias CJ No, it's a bit more intrusive. Well it's not directed simply, it's directed at compensation.

Keith J It's hard to imagine a manslaughter prosecution against a barrister arising out of their practise.

Tipping J We've all been tempted.

Wilson Yes, quite. Including judges I suspect. Your Honours the three issues that I do propose to address in a little detail, because they haven't been addressed fully by my friends, are firstly s.61. Secondly the question of the trans-Tasman relationship. And thirdly the question of retrospectively that's already been touched on in the course of the day.

But there's one other short point that I could conveniently deal with in a few minutes prior to five o'clock. And that is, as counsel for the New

Zealand Law Society, to deal briefly with the argument advanced for Mr Lai at page 32 and 33 of the written submissions on his behalf where my friends seek to draw some support from some of the Rules of Professional Conduct of the New Zealand Law Society. And in my submission, on analysis, those rules don't help my friend's argument at all. If I can deal with the two that seem to be particularly relevant.

At paragraph 139 they refer to Rule 1.12. A practitioner must accept legal responsibility for his or her actions. And go on to provide for some qualification to that. And then my friend submitted at paragraph 140, advocate's immunity justified on any ground is in direct conflict with this latter rule. I assume that's Rule 1.12 they're referring to. But in my submission there's no conflict there at all. The effect of the immunity, if it's upheld, is that there is no legal responsibility on the part of the barrister for his or her actions. And therefore no conflict with Rule 1.12.

The other point I make, over the page 33, paragraph 141, relying on Rule 8.01 where it is correctly stated there, the Rule notes that in the interests of the administration of justice the overriding duty of a practitioner acting in litigation is to the Court or the tribunal concerned. Subject to this, the practitioner has a duty to act in the best interests of the client. And as to that I make two points. First, the emphasis on the overriding obligation of the practitioner to the Court or tribunal and I've referred to that already. Secondly, I make the submission that the duty to act in the best interests of the client does not equate to a right of the client to sue the practitioner for an alleged breach of that duty. That's all I wish to say on that.

Gault J Could I just ask you about one point that's been going through my mind Mr Wilson?

Wilson Indeed Sir.

Gault J And you don't need to deal with it tonight. And that is the somewhat artificial line that seems to me between the situation of solicitors and the situation of advocates when it would seem that you get into intimate closeness to litigation by degrees. And somewhere in there there's a line where the immunity doesn't apply to solicitors who might be giving precisely the same advice as, when matters have moved a little further, the barrister might give and enjoy immunity. And that just seems to be a little anomalous.

Wilson I can make two responses Your Honour. Firstly I don't suggest there's a bright line division here. But the intimate connection test seems to have worked satisfactorily in practice. And I would submit Sir that the application of that test is at least likely to mean that whether the practitioner concerned is a barrister sole or a barrister and solicitor, the immunity will cut in at the same point. In other words, neither the solicitor advocate nor the barrister will on any view of the immunity be

able to invoke its protection at the earlier stage before the point is reached of the intimate connection with the litigation. But in saying that, Your Honour Justice Gault, I don't derogate at all from my acknowledgement that there's no bright line there. Is that the convenient time for us to?

Elias CJ Yes that's a convenient time. We'll take the take the adjournment now thank you. Thank you counsel.

Court adjourns 5.00 pm

Wednesday 19 October 2005

Court resumes 10.00

Elias CJ Yes Mr Wilson.

Wilson If Your Honours please, turning to s.61, my argument here is in three parts. First the contention that the immunity is a privilege for the purposes of s.61. And obviously if I were to be unsuccessful in persuading Your Honours that it were, that is an end of the s.61 wider issue.

Tipping J Does it have to be literally a privilege or does it have to be simply within the compendious phrase?

Wilson The latter.

Tipping J The latter. Yes.

Wilson I just need to summarise.

Tipping J Oh sorry, sorry.

Wilson Within s.61. If, however, Your Honours are persuaded that the immunity does come within s.61, the issue then arises as to whether the section in its effect is ambulatory or fixed in time. And if, on that issue, Your Honours were to find that the section were fixed in time, that in my submission would really resolve the point because clearly as at 1982 the immunity was in existence in England. If, however, you were to conclude that the section is ambulatory in its effect, some consequential issues then arise as to what is the practical effect and I'll deal with those.

Elias CJ Is that who can amble?

Wilson Indeed.

Elias CJ Yes.

Wilson Who can amble and whether one can amble for some purposes but not for others.

Elias CJ Yes.

Thomas J What's the effective time, we're looking at 1982 are we?

Wilson Indeed, the enactment of the '82 Act. So Your Honours going back to the first of those issues, is the immunity within the section. We've addressed this issue in our written submissions from paragraph 3.3 through to paragraph 3.14. I certainly don't intend to read the submissions but there we give references both to dictionary definitions in terms of the general dictionaries and also legal dictionaries which support the proposition that an immunity is a form of privilege.

As on a number of issues in the Court below, there was a division of view here between the President and Justice Hammond delivering in effect the Majority judgment. The President, at paragraph 116 of the judgment, had this to say. It may be arguable in terms of abstract jurisprudence such as Professor W N Hofield's classical analysis discussed by Justice Hammond, that barristerial immunity is not a privilege. More to the point however is whether the legislature contemplated the immunity as a privilege when it referred in s.61 of the 1982 Act to the powers, privileges, duties and responsibilities that barristers have in England. Not what jurisprudentialists might think but what Parliament means is the real issue. And with respect, that is a correct conclusion Your Honours. This is not a question of Hofieldian analysis, but one of statutory interpretation.

In contrast Justice Hammond, at paragraph 171 of the judgment, had this to say. The answer to the President's concern that the existing forensic immunity or privilege is locked in by the existing legislation is that the term must today surely be construed in a rights-conscious way. That is in a way which does not inappropriately restrict access to the Courts. And it would surely come as a distinct surprise to the New Zealand Parliament to find that public access to justice is trumped by a term which now has a changed meaning in the UK but not in New Zealand.

Your Honours I make three points in relation to that paragraph. First is that, with respect, His Honour seems to be very close to saying that the words of the section must yield to the principle of access to the Courts. In my submission that cannot be the position.

Keith J Why do you say that Mr Wilson? It's a common enough proposition isn't it, that if there's some question about the scope of a provision that might lock somebody out of the Courts, they should be able to, the Courts will read down ouster clauses, … clauses.

Wilson If there's a genuine ambiguity.

Keith J Well there is this dispute isn't there about what the word privilege means and what the character of the interest in this case is.

Wilson In my submission, for the reasons I'll be developing, when properly understood in context the meaning is clear.

Keith J Okay.

Wilson And I certainly don't quarrel with the proposition if it's limited to a means of resolving what would otherwise be an ambiguity. But as to the point made in the second sentence, the supposed response of the New Zealand Parliament, in my submission the point goes the other way. Namely it would indeed surprise the Parliament of this country to be told that the law as enacted by it had been materially changed by a change made to the law of England by an English Court 20 years later.

Thomas J Isn't that the ambulatory point though? You're not dealing with that yet are you?

Wilson No, I'm not dealing with that at all.

Keith J And does he go that far in that sentence? That now has a changed meaning there but it's locked in here? The old meaning's locked in here?

Wilson Well in the first line of the next paragraph Your Honour, as I went on, even if the statutory provision does apply, it is surely ambulatory.

Keith J Yes, mm.

Wilson And I took that as an indication that the previous paragraph was not addressing the ambulatory point, which I'll certainly come to Your Honour Justice Thomas.

Gault J Is there a corresponding statutory provision in England?

Wilson Not that I'm aware of.

Gault J He says it's changed there.

Tipping J It's not the term that's changed. The language is a little awkward.

Wilson Yes indeed. It's rather that there's been a change to the common law of England as made by the House of Lords.

Gault J Yes.

Wilson The third and short point I make is that of course, and we're coming back to this point, our Parliament is free to change our statute law in any event.

To go back to the question of whether the immunity does come within the section, it is important in my submission to recall the point that we make at paragraph 3.14 of the written submissions where we set out an extract from the judgment of Justice Mahon in **Rees v Sinclair** in the then Supreme Court, this follows in 1973. In my opinion the word privileges must of necessity include the traditional immunity from civil process enjoyed by barristers in England in relation to the carrying out of their professional duties. The common law of England has for centuries conferred on judges, parties, counsel and witnesses absolute privilege in respect of anything done or said during the hearing of a cause, he gives the references. And I cannot doubt that the word privileges is used in the section to embrace not only the immunity from action for defamation but the concurrent immunity of counsel against proceeding for negligence or breach of duty arising out of the conduct or management of a case.

Tipping J It would be very odd if they, in defamation it is always known as the privilege. It would be very odd if Parliament had intended to preserve that privilege but not the cognate immunity.

Wilson Indeed.

Tipping J That attaches to negligence suits. The terminology here is very interchangeable. One only has to read the judgments in **Rondel v Worsley** to.

Wilson Yes and, as I think Your Honour observed during the argument yesterday, it is very much a semantic argument whether one's talking about privileges or immunities. And I've got a further authority I'll just refer you to shortly, a Canadian authority that I believe may assist on the point. But just before leaving the judgment of Justice Mahon, it is of some significance in my submission that, and President Justice McCarthy left the point open in the Court of Appeal, but given that Justice Mahon had that to say, in 1982 the corresponding section was re-enacted in materially identical form. And while I accept immediately that what I think is sometimes referred to as the principle of legislative endorsement can't be given too much weight in statutory interpretation, it is of some significance that notwithstanding this judgment, the Parliament, our Parliament re-enacted the corresponding provision in the same form in 1982.

Gault J It goes back for more than a century before that.

Wilson Indeed, it does.

Gault J In exactly the same terms.

Wilson It does, it does.

Gault J Exactly the same context.

Wilson It does.

Gault J Is it at all relevant to consider what Parliament might have meant in 1861 or whenever it came in?

Wilson It's certainly relevant. I can't really.

Gault J You see, it's rather an intellectual argument to say, oh well they were endorsing **Rees v Sinclair** in 1982 when they just really rubber stamped the same formula that they had in at least four previous enactments.

Wilson Indeed, indeed.

Keith J And way back it would have had wider protection, would have conferred wider protection presumably wouldn't it? Before **Rondel v Worsley** narrowed it to administration of justice?

Wilson Yes, yes quite. But on any view of the law in 1982, it certainly covered the immunity from suit for what's done in Court. Which is the relevant point, in my submission.

Your Honours the Canadian authority to which I referred is a judgment called **Harrison v Carswell** which I've asked Finlayson just to hand up copies of that. Judgment of the Supreme Court of Canada. And the only reason is that it's a case involving the right to picket within a shopping centre. And I simply refer you to it because at the foot of page 6 of the report, what was the Minority of the Court, but nothing turns on that for this purpose, cited and relied on a principle as expressed in *Prosser and the Law of Torts* as follows. It's at the foot of page 6 Your Honours.

Privilege, and hopefully this may assist on the semantic issue, privilege is the modern term applied to those considerations which avoid liability where it might otherwise follow. So that's the broad sense of privilege. Indeed as the passage goes on, in its broader sense it is applied to any immunity which prevents the existence of a tort. But in its more common usage it signifies that the defendant has acted to further an interest of such social importance that it is entitled to protection even at the expense of damage to the plaintiff. He is allowed freedom of action because his own interests or those of the public require it and social policy will best be served by permitting it. The boundaries of the privilege are marked out by current ideas of what will most effectively promote the general welfare. So the distinction's drawn between privilege in the wider sense and in a more narrow sense.

And that indeed is further illustrated by the authority upon which my friends for Mrs Lai refer in their written submissions, namely the judgment of the Privy Council in the **Auckland District Law Society** case (**B v Auckland District Law Society** [2003] 2 AC 736 (Privy Council)). My friends first at paragraph 15 of their submission rely on **B v ADLS** as supporting their submission that the immunity does not come within s.61 because s.127 of the same Act refers to both privileges and immunities. And my friends again rely on that point at paragraph 26.3 of their submissions.

But in my submission Your Honours, when one goes to that authority that's to be found in the Bar Association Casebook under Tab 27, it supports the argument I'm addressing to the Court that the immunity falls within the concept of privilege. The relevant passage is to be found at 760 of the report.

Elias CJ Sorry, which Tab?

Wilson It's under Tab 27 Your Honour.

Elias CJ 27.

Wilson Paragraph 63 of the judgment of the Privy Council. Where the Board had this to say: Their Lordships agree that s.127 applies to the hearing and not at the investigative stage. But they do not agree that it is anything to do with the privilege now under consideration. That was a litigation privilege issue. They observe that the section is concerned only with the privileges and immunities of witnesses and counsel, that's in disciplinary proceedings, and that it provides that they are to have the same immunities and privileges as if the proceedings, meaning the proceedings before a disciplinary tribunal, were proceedings in a Court of law. The question immediately arises, what immunities and privileges are enjoyed by witnesses qua witnesses and counsel qua counsel in proceedings in a Court of law which they would not enjoy in proceedings before a tribunal? The answer is absolute privilege in defamation and immunity from suit in respect of anything they may say in the course of the proceeding. Then they draw the contrast with legal professional privilege.

The point I make Your Honours is that litigation privilege, I'm sorry defamation privilege, absolute privilege in defamation and immunity from suit in respect of anything said in the course of the proceedings, are very much two sides of the same coin. It just emphasises that we're really talking about very much the same thing here. It's very largely a semantic point, to come back to Justice Tipping's point.

Tipping J Strictly, it should be anything they may say and do.

Keith J Well are they addressing your issue though? I thought they were just there concerned with defamation.

Wilson Yes Sir. They are concerned with defamation.

Keith J Or not to?

Tipping J Yes.

Wilson But whereas my friends, for some reason that escapes me, submit that this supports their contention, I say it supports my argument that immunity and privilege are really coextensive in the defamation context. Or in the broader context of privilege, immunity is a subset of privilege. And that supports the argument that the immunity comes within s.61.

Tipping J I think s.127 has some importance without prejudice to, I'm not trying to take sides on the argument Mr Wilson. But if one contrasts it, you could take out of it this studied distinction between privileges and immunities, you could.

Wilson Yes.

Tipping J But from the point of view of what s.61 is really driving at, it would be extremely odd that counsel before the disciplinary tribunal should have wider privileges if you like or insulation than they do under s.61.

Wilson Indeed. In terms of appearing in Court.

Tipping J Yes. I mean and that would be the consequence of taking a studied distinction between privileges and immunities it seemed to me, subject to further argument.

Wilson Indeed Your Honour. And more generally, given that s.61 is directed at, putting aside the ambulatory point, at conferring upon New Zealand barristers the same benefits, to try and use a neutral term, of practice as barristers in England and at that time there were clearly the immunity in England if immunity were not intended to be encompassed within s.61. And whereas of course I accept my friend's point that s.127 refers to immunity, and for the sort of reason that Your Honour Justice Tipping's just put to me, that doesn't really help them. But if I can summarise my argument this way. In s.127 and in many other statutory contexts, the legislation refers to privilege and immunity, that is just making explicit what is implicit in s.61, namely it covers the immunity. Your Honours that leads me to the.

Tipping J Well just before you move off this. It's the fact isn't it that you've set out s.61 somewhere in your submissions Mr Wilson.

Wilson Yes at 3.3 I think it was Sir.

Tipping J 3.2

Wilson Sorry, 3.5, sorry 3.3.

Tipping J 3.3. If one was going to get Hofieldian, one might draw something out of the fact that the word rights does not appear in s.61.

Wilson Indeed.

Tipping J It's obviously not intended to be a definitional analysis it seems to me. I mean otherwise, I mean if you're going to take inference from the fact that immunities is not there, well you'd have to equally take rights of audience.

Wilson Rights. Indeed.

Tipping J Well, you know, presumably they didn't mean that. Well that's just bizarre.

Wilson Yes, the right of audience is scarcely a power, duty or responsibility so if it's anything it's going to be a privilege.

Tipping J Well I mean it just doesn't seem to me to be drafted with that degree of Hofieldian precision that other minds might have seen.

Wilson With respect Sir, it underlines that the President's approach, that to treat this as an exercise of statutory interpretation rather than an exercise in Hofieldian analysis, is the correct one.

Thomas J Well I have to agree it doesn't appeal to me at all because one could in fact come up with quite a different analysis. It's too abstract.

Wilson Indeed Sir.

Thomas J For my purposes at present anyway. But I wonder whether it isn't necessary to look at the section in broader terms and ask what is the sense of the section? Just what is the scope? Take for example, I mean I understand why you focus on the word privilege, but take the word responsibilities in this section.

Wilson Yes.

Thomas J It's that aspect of your submission which would make the privilege, duty or responsibility or power a statutory entitlement or direction until changed by Parliament that I think is your difficulty.

Wilson This is the ambulatory point Sir.

Thomas J No, no it's not the ambulatory point. So it's still the question of construction. I mean take the word responsibilities and say, well can that really be construed as a direction by Parliament that it will endure until such time as Parliament changes it. Does that mean that the Law Society couldn't add to the responsibilities of the barristers?

Wilson Certainly not in any material way.

Thomas J Could it detract from the responsibilities of barristers?

Wilson No it couldn't.

Thomas J And the duties, it's an ethical, the cab rank principle is an ethical duty.

Wilson Yes.

Thomas J Does it now have statutory force until such time as it's repealed by Parliament?

Wilson Yes because the cab rank principle was in force or applied to English barristers in 1982, that must follow.

Keith J And the intervention rule?

Wilson Yes, well with respect Your Honour, that's a particularly good example in the ambulatory context that I'll be coming to. And it may have been overlooked in the discussions, as Your Honour Justice Thomas will recall, the intervention rule going back a long way now, with the Bar Association as to whether it was open, indeed open given the section to amend the rule.

Thomas J Well this would put the argument, your interpretation if accepted would put the argument beyond contest.

Wilson Indeed.

Elias CJ Well it is subject to the Act.

Thomas J Mm.

Elias CJ And presumably the Act gives the Law Society powers to move the responsibilities.

Tipping J Yes I think that's important, subject to this Act.

Wilson Yes indeed, indeed. I'm sorry I'd overlooked that. That is an important point.

Tipping J Mm.

Wilson So a more accurate answer on my part to Your Honour Justice Thomas would have been that any change would have had to be empowered by the Act.

Thomas J By the Act.

Wilson By the Act.

Tipping J Well not necessarily quite that. It doesn't matter for your present purposes.

Wilson No.

Tipping J So perhaps we won't go down there.

Wilson We've got enough issues.

Tipping J But one has to ask oneself in the broadest sense, what was Parliament saying here? And it appears to be saying that, subject to anything else in the Act, this is to be the general set-up for barristers.

Wilson Well precisely Sir. And could I invite Your Honours just to test the point this way? Just assume shortly after the enactment of the 1982 legislation it had been suggested that New Zealand barristers had all the responsibilities of English barristers but did not have the benefit of the immunity rule at that time available to English barristers because it was outside the wording of s.61. In my submission that argument could scarcely have run. Your Honours to move to the ambulatory point.

Elias CJ Before you do, is this all you're going to say about immunities and privileges? Because I have a few loose threads.

Wilson Yes.

Elias CJ You're not returning to that again?

Wilson No, no.

Elias CJ You said that immunity is a subset of privilege?

Wilson Yes.

Elias CJ Well accepting the point that's been put to you by Justice Tipping that these concepts seem to be used interchangeably, I wonder whether, however, that's entirely right. Because I would have thought that immunity is a consequence of privilege in most cases where privilege operates.

Wilson Indeed Your Honour, and defamation being the classic example.

Elias CJ Yes, yes. On the other hand I think we do use immunity distinctly, not entirely distinctly, but we do have it in a different sense as well. And I wondered whether, it was just occurring to me that privilege generally attaches to occasions and to use, it seems to me, whereas we do have immunities which are consequential upon status. So diplomatic immunity for example strikes me as a pure immunity. What I'm really wondering is whether here we're not in a situation where what barristers really have, what the underlying policy is, is a privilege attached to the occasion around litigation as parliamentarians are privileged in Parliament. But as **Jennings v Buchanan** illustrated, that doesn't attach to their status as parliamentarians. In which case the way the immunity is being put as attached to barristerial practise generally may be much too wide, or to the profession of barristers may be much too wide. I just wondered whether you wanted to make any comment on that?

Wilson Yes indeed Your Honour. And in my submission the point that you've put to me really reflects that passage from Prosser in the Canadian case that I mentioned earlier where Prosser, as I understand the extract, is drawing a distinction between a wider and a narrower meaning of privilege.

Elias CJ Yes.

Wilson And to relate to the question you just put to me, talking about the privileged occasion is the narrower meaning. But privilege also has the wider meaning, as stated at the commencement of that extract, namely considerations which avoid liability that might otherwise follow. Which would come within, I apprehend, say the parliamentary or diplomatic situations Your Honour put to me.

Keith J That's not right is it Mr Wilson? The diplomat is different because the diplomat has only immunity. The diplomats are bound by the law, they have to comply with the law.

Wilson Yes.

Keith J But they can't be prosecuted or sued unless the immunity is waived. And that's made quite clear in our Diplomatic Immunities and Privileges Act.

Wilson Yes.

Keith J There's a very clear distinction drawn there between things called privileges and things called immunities. And in fact there's a provision in the Crimes Act that says that New Zealand diplomats who have had the benefit of immunity overseas can be prosecuted here for the offence. So there is, I think it partly goes back to the discussion I was

having yesterday with Ms Coumbe I think. Isn't what is in issue here, what you're claiming here, really a privilege in essence? It's not simply an immunity. It's not simply a blanket, going back to the **Z** and **Osman** language.

Wilson Yes, indeed, it is, yes.

Keith J It's a denial of liability.

Wilson It is.

Keith J As we were discussing, it's almost better not even to get to the word privilege but simply to say.

Wilson Denial of liability.

Keith J There is no liability in terms of standard tort analysis. Whereas the diplomat driving down the road now is bound by the law of negligence. There's just the bar against suing but that's a bar that can be lifted.

Wilson Yes.

Keith J And there can be, the liability can be invoked. And it arose. Early in ACC, the **Donserlaar** case succeeds because no proceeding can be brought because of the ACC legislation, but there is still a liability. And so it was still possible to say, on the basis of that liability there could be proceedings brought for punitive damages. So I think there is a distinction that can be very useful in those cases.

Wilson Yes.

Keith J Where an immunity exists alone without there being any privilege. Without there being any denial of liability. Now the two Donserlaar brothers were liable to one another. They just couldn't recover damages from one another for beating one another up simply for the immediate costs and so on but they could get exemplary damages, or one of them could.

Wilson In my submission Your Honour, the point you put to me is again consistent with the opening sentence of the passage from Prosser. Privilege is the modern term applied to those considerations which avoid liability where it might otherwise follow.

Keith J Yes, yes, avoid liability. Not avoid suit.

Wilson Avoid liability.

Keith J That's a lesser thing.

Wilson Yes indeed. And that's why, that really I accept is a better way of putting the point.

Keith J And a fortiori of course, there can't be a suit because you're not liable.

Wilson Correct.

Keith J Whereas in the case of a diplomat, there can't be a suit because you're immune.

Wilson You're immune.

Keith J Not because you're not liable.

Wilson Yes indeed, indeed Your Honour.

Elias CJ Mm, yes thank you. I've found that helpful.

Thomas J Could I just come back to this point though? It troubles me to think that it can be said that Parliament intended, subject to the Act, that barristers should be fixed with the powers, privileges, duties and responsibilities they have in England until such time as Parliament chooses to review those powers, privileges, however minor they might be and so on. There are provisions like this, are there not, which are used simply to introduce what is the position in the UK at the present time into New Zealand. But not necessarily with the object of fixing them with sort of parliamentary sanction.

Wilson With respect Sir, it's difficult to avoid the conclusion that Parliament in 1982 wasn't giving legislative sanction to New Zealand barristers having the powers, privileges, duties and responsibilities, all of them, that barristers in England have. Otherwise why say this?

Elias CJ But isn't it simply a rule of reception? We've had lots of those in our legislative history.

Wilson Yes.

Elias CJ Receiving the common law at a particular time. Most of the common law came on board in 1840 and we've still got the very odd provision in the Interpretation Act which I think Mr Woodhouse refers to.

Wilson Yes.

Elias CJ But is it more than that? Is it more than a.

Thomas J Yes that puts it.

Elias CJ Is it more than a provision of reception?

Wilson Well it's in mandatory terms. Shall have.

Thomas J Well it's got to be mandatory to bring the powers, privileges, duties and responsibilities to this side of the world and import them. But to vest Parliament with the intention to preclude the common law in respect of powers, privileges, duties and responsibilities seems to be a pretty big jump to me.

Wilson Of course it's not as if, and the point's been made to me already this morning, it was being introduced for the first time in such a provision in 1982.

Thomas J 1861.

Wilson Yes. And as the successive Law Practitioners Acts followed, presumably, it's well known the Law Society was very much involved in the preparation of the legislation. And the parliamentarians were happy to continue that progression.

Tipping J I'm not very familiar with this doctrine of reception. If it was that, and that only, would it have been necessary to keep saying it?

Wilson Well indeed Your Honour it's.

Tipping J I don't know.

Wilson Indeed it's difficult to see why it's necessary at all if it's simply intended to recognise that New Zealand barristers at common law have the corresponding features of practise as their counterparts in England. Why do you have to say that because there's nothing else in the Act that takes it away, those rights.

Elias CJ We did have, I think Jim Cameron's referred to our slavish following of English legislation at this time. There may be some, I think he refers to some other examples.

Tipping J What legislation would we have been slavishly following?

Wilson Well particularly when we already had legislation with such a term. And in my submission, as a matter of inference it's more likely that Parliament was following the corresponding provision in the existing Law Practitioners Act rather than copying an English provision in 1982.

Gault J That seems from that, that it was a statutory endorsement of any changes that might have occurred between the re-enactment of the provision.

Wilson Indeed.

Elias CJ Yes.

Gault J In other words, we'll take whatever England has.

Wilson Yes.

Elias CJ Yes.

Tipping J We're happy with it so far.

Wilson Yes.

Elias CJ Yes.

Tipping J But that doesn't find us.

Keith J So **Rondel v Worsley** didn't arrive until 1982? I mean that wasn't the view that was taken in **Rees v Sinclair**. Was that the view that was taken?

Wilson Well I think in **Rees v Sinclair** the President, Justice McCarthy, indicated that he wouldn't necessarily have relied on s.61 but in fact didn't do so where Justice Mahon had relied on it squarely.

Keith J But that's the '55 Act.

Wilson The previous Act, yes the previous Act.

Tipping J The '55 Act.

Wilson But this was 1973, **Rees v Sinclair**.

Keith J So in 1973 he's willing to take account of a decision subsequent to 1955.

Wilson Yes.

Keith J In interpreting the '55 Act.

Wilson Yes.

Keith J So we've got a 1982 Act with a subsequent decision.

Wilson Well that, my submission is, really does come more directly into the ambulatory question.

Keith J Mm.

Elias CJ Well Parliament ambulated by this re-enactment, scooping up the common law between the enactments. I'm not quite sure what sort of

lack of confidence that indicates in the New Zealand judiciary to keep the common law refreshed. But the current legislation of course abandons that. So, on the view that I'm putting to you, the English common law is received at the date of the current legislation but in the Bill, it will have changed according to law.

Wilson Indeed.

Elias CJ In the intervening period.

Wilson Yes indeed, precisely. And just to anticipate a point I was coming to later, in response I think to a question that Your Honour Justice Keith raised yesterday, I would certainly suggest that if new legislation were to be enacted, including clause 104 as it was included in the Bill, which has now lapsed and I'll come back later to the technical aspects there, that would represent a very material change from s.61. Because of the lack of reference to England. And indeed, to anticipate a question Your Honours may well put to me, well what then would the purpose be of a clause 104 provision? I'd find it difficult to suggest anything beyond confirming the common law.

Tipping J As at the date of operation?

Wilson As at the date of operation.

Thomas J But I think you can accept that there has to be a realistic appreciation of the notion that Parliament hasn't endorsed anything. Probably what happened is the law draftsman just carried the provision forward from one Act to the other.

Wilson Yes I think it wasn't actually the law draftsman who drafted the Act.

Keith J It was the retired Chief Law Draftsman wasn't it?

Wilson Yes, yes.

Tipping J Yes but we can't avoid the fact that Parliament, for whatever reason, has basically said, as at 1982 … the ambulatory point.

Wilson Yes, yes.

Tipping J That we shall have the same regime as in England.

Wilson Well indeed.

Tipping J It's unavoidable.

Wilson It would seem clear in my submission, yes.

Keith J And going to the Chief Justice's point about reception provisions though. The current one was put into the Imperial Laws Application Act in 1988 I think. And it says, the law of England, so far as it was part of the laws of New Zealand immediately before the commencement of this Act, shall continue to be part of the laws of New Zealand. And fortunately I don't think we've ever had an argument that that means that we can't have regard to anything that has been done by English Courts since 1988 because the law, the English law received got stuck as at 1988. And I don't think it means either that we're not allowed to look at other jurisdictions.

Wilson Yes.

Elias CJ And it doesn't mean that Parliament having entered the field, the New Zealand Courts can't develop New Zealand common law.

Keith J Mm. So I mean that's plainly a provision that doesn't freeze things as at 1988.

Wilson Quite. Whereas we have here a much more specific provision, in my submission.

Keith J The current one?

Elias CJ Why do you say it's more specific?

Wilson Because it is directed specifically to the position of barristers.

Elias CJ Yes but it's specific in terms of subject.

Wilson Yes.

Elias CJ But is it different in terms of effect?

Wilson I haven't looked at that question.

Elias CJ No. Thank you.

Wilson May I move to the ambulatory point? And I preface my submission here, while emphasising I'm not raising any formal objection, but I do feel obliged to note that this argument was raised by the respondents in their written submissions in the Court of Appeal but was abandoned by them at the commencement of the hearing. And I simply raise it in case Your Honours wish to consider the issue of whether it's appropriate for parties to raise in this Court arguments which they'd raised and abandoned in the Court below. But having said that I proceed on the assumption that Your Honours will be prepared to consider the issue. And I address it in these terms.

First Your Honours, to come back I'm afraid again to the wording of s.61. In my submission again the plain wording of the section is directed to the position in 1982. And by way of hypothetical contrast, does not include for example words such as that barristers shall from time to time have in England. Had that been the case, there obviously would have been a strong basis for the ambulatory argument.

The next point I make is that to give the section an ambulatory construction would in my submission be to use, and this is the point made in the submission of my friends for the Bar Association, to use a phrase used by some members of the board in **Harley v McDonald**. But not, I hasten to add Your Honour the Chief Justice, I don't suggest that you'd use this term yourself, but having been present at that hearing, some members of the Board certainly referred to the ambulatory argument as the New Zealand legislature handing a blank cheque to the legislature in Courts of England to change the conditions of practice of New Zealand barristers. And that would indeed be a surprising situation.

Your Honours, to take a specific example outside the area of immunity, privilege. And indeed a point that was raised already by the Court with me this morning, the intervention rule. There have, as I understand the position in recent years, been very significant changes to the intervention rule in England. For example allowing barristers to accept retainers from lay clients without to my knowledge it ever having been suggested that those changes to practice in England thereby also applied in New Zealand.

And again, in this part of the case, it is in my submission instructive to compare the competing statements of the President in the Court below and Justice Hammond. The President at paragraph 114 of his judgment, having noted that the appellants in that Court had abandoned the ambulatory argument, understandably in my submission given the abandonment dealt with the point shortly by simply saying in short that s.61, this is their argument, was not declaratory of the incidence of status and existence at the time the section was enacted. But is a delegation to a foreign community of the power to impose or change the incidence of barristerial status within New Zealand to conform to their own circumstances. In my view the proposition is so manifestly untenable that the abandonment of the argument is hardly surprising.

Justice Hammond addressed this issue at paragraph 172 of his judgment as follows. Even if the statutory provision does apply, it is surely ambulatory and not frozen in time. That is, it encompasses the immunities of barristers in England at any relevant time or at least that New Zealand Courts can change the rule if it is changed in England. And I do, with respect to His Honour, note that that's the third time the word surely has appeared in those two paragraphs. In paragraph 171 twice and then at paragraph 172. And it was really the only

justification His Honour puts forward for his conclusion that the section is ambulatory, namely surely it must be ambulatory.

Tipping J It's a very odd case where one member of the Court says an argument is untenable and all the others say that the proposition is untenable is self-evident.

Wilson Well it's particularly odd where the argument was abandoned by the party to whose benefit it may have run.

Tipping J They just simply literally abandoned it did they?

Wilson Yes.

Keith J What about the second one.

Tipping J How could the Majority find for it. I suppose they could technically.

Wilson I cannot answer that.

Elias CJ It's a very odd sequence there.

Gault J It's just a question of statutory interpretation. The fact that somebody's abandoned something doesn't mean the Court doesn't have to decide what it means.

Wilson Well the Court's perfectly entitled to take the point, even if the party concerned doesn't went to run it but it does have the consequence that the Court's not going to have the opposing argument.

Tipping J Yeah, I was just going to say. Were you given notice that the Court was thinking of adopting an abandoned argument.

Wilson Not to my recollection. I'll check with my friends. There was certainly no indication at the hearing that I can recall. I'll get the notes to you.

Having said that, I'm happy to deal with the point but the only justification in my submission that I can really try and meet in paragraph 172 is that it's ambulatory because surely it must be ambulatory. And that's a somewhat difficult argument to meet.

Elias CJ Well surely it must be.

Wilson Surely it must, yes indeed. Even harder to meet.

Tipping J I think that's a challenge from the chief Justice.

Gault J It was taken for granted in **Rees v Sinclair**.

Tipping J Mm.

Keith J And in **Rees v Sinclair** they picked up on the last half sentence of Justice Hammond's approach.

Wilson Yes and that's a point that I was going to come to. This really is the third part of my argument here but it's convenient to deal with it now.

Elias CJ But aren't we dealing with different things. In 114 the President is dealing with the idea that our law just adapts according to changes in English law. It's not really to say that it's not able to change is it?

Tipping J There's a difference here between automatic adjustatement.

Wilson Yes.

Tipping J And discretionary adjustatement.

Wilson Well quite.

Elias CJ Yes.

Wilson And I'll deal with that now because it's the point I was going to come to. In my submission while one can perhaps understand an argument, I'm still not clear what it is, as to why the section should be ambulatory in terms of automatic adjustment, it's very difficult to construe the section as enabling discretionary adjustatement.

Keith J But isn't that what happened in **Rees v Sinclair**.

Wilson Yes it is, it is. Coming back to the wording, the point … taken there, but I certainly take the point that looking at the wording of the section, it's either ambulatory or not. And if it's ambulatory, it's ambulatory for all purposes, not just some purposes.

Keith J Well unless you take the line that the Court of Appeal took in Rees and Sinclair that what is open to the Court is to look at changing policy. And the changing balance of policy. And they picked up some but not all didn't they of the **Rondel v Worsley** arguments.

Wilson Yes.

Keith J Which are arguments that happened after 1955.

Wilson After then.

Keith J I mean certainly the Court of Appeal saw itself as free to assess those policies.

Wilson Yes.

Keith J In the way that the House of Lords had seen itself free to assess the competing public policies.

Wilson In my submission, it's difficult to reconcile that with the wording of the section.

Gault J Well the section purports to invoke the position in England and in England the House of Lords said these are the policy factors for this territory. The policy factors for other territories will be for them.

Wilson Yes.

Gault J So that was the law of England.

Wilson Yes.

Elias CJ Unless you construe it as a rule of reception.

Wilson Yes.

Elias CJ That English law at this date is received.

Wilson Yes.

Elias CJ It's common law and we adjust it according to New Zealand common law. Otherwise your argument, if everything is going to be frozen, your argument would mean that there could be no evolution of the common law, the general common law, in New Zealand.

Wilson In terms of the position of barristers?

Elias CJ In terms of the imperial laws application act.

Wilson As I say I haven't looked at that so I can't deal with that.

Thomas J Mr Wilson I would use the ambulatory argument again as perhaps providing an indication as to the meaning of the section, to come back to its interpretation. I mean the reference to the barristers of the Court, that means barristers of the Court of New Zealand.

Wilson Yes.

Thomas J The Court of course once exercised complete jurisdiction. Barristers of the Court of New Zealand and if it's ambulatory and legislature has intended that the Courts in England will be able to dictate what the common law is in respect of barristers here.

Wilson Yes.

Thomas J Now that, I suggest, to me anyway, is rather repugnant. But it points to the concept the section broadly looked at does not indicate Parliament's intent to freeze the common law or the development of the common law.

Wilson Of New Zealand?

Thomas J Of New Zealand, by New Zealand Courts. So if the argument about the ambulatory nature of the section is as repugnant as you say, it may have a bearing on the interpretation of the section.

Wilson I can't deny that's a possibility.

Thomas J Yes.

Tipping J Well that's the one point that strikes me as being difficult Mr Wilson. The idea that this is ambulatory I find very difficult. But I equally find difficult the idea that it sort of freezes things at a date. Can you help me?

Wilson Well there are two.

Tipping J Which is the, what's the way out of that.

Wilson The way out of it in my submission Sir is two-fold. First, as has been pointed out to me already this morning, the introductory words, subject to this Act and the possibility of making some change within the parameters of the Act. And secondly the possibility of amendment to the Act as indeed, as I've covered already, was foreshadowed by clause 104. And again, members of the Court would have better knowledge and recollection than I of the mode of practice in 1982. I don't know if there are any, I accept of course that there were many barristers and solicitors of the Court, not so many barristers I think at that point who would have been subject to perhaps the more, the more English type mode of practise, I don't know.

Tipping J Is the definition of barrister for the purposes of '82 Act someone holding a practising certificate solely as a barrister.

Wilson Yes. Yes. Not a barrister and solicitor, that's my recollection, yes.

Tipping J Yes I think that's right.

Wilson So it is a very specialist group. I think I'm right in saying, in 1982.

Gault J I was one of them and there were quite a few.

Wilson Yes.

Tipping J Wd that mean that the position was different for someone like me who was a barrister and solicitor but happened to appear in the Court from time to time. I might have a different impact, this section wouldn't impact on me. It would only impact on my brother Gault.

Wilson I think so but I'd like to check that point. It's some time since I looked at the definition.

Tipping J That introduces a further twist in the tale because that is a bizarre consequence.

Wilson Yes, yes. I'm sorry, it's been drawn to my attention, the interpretation in s.2, barrister means a person enrolled as a barrister and solicitor and practising as a barrister, whether or not he also practises as a solicitor. So Your Honour would have been within the definition.

Tipping J Right, yeah well that. Thank you, that gets rid of that.

Wilson I'm grateful to my friends. And certainly it removes any basis for any suggestion there was only a small group because there were obviously many barristers and solicitors practising as barristers. I readily acknowledge that.

Thomas J And I suppose that definition goes back to 1861 as well.

Wilson I suspect it does Your Honour. With all the twists and turns on the way in terms of different modes of practice.

Tipping J But what I need help with Mr Wilson and maybe nothing more can be said on the point, is the idea of Parliament, subject to the Act admittedly, but intending that there should be no common law development in relation to barristers. That's what your argument must amount to mustn't it.

Wilson Yes it is. Indeed obviously in the context of the present appeal it has to be.

Tipping J Yes.

Wilson Well perhaps not. Perhaps I could seek to summarise the position this way in the light of the questions and observations that Your Honours have put to me. There would seem to have to be the three possible interpretations, again that Your Honours have put to me. First, the argument I was putting, that absolutely frozen in 1982. Second, fully ambulatory in the sense that any changes in England, whether at common law or statute, would.

Tipping J Mandatorily.

Wilson Would mandatorily apply to New Zealand barristers. And the third possibility that Your Honours have put to me, that the section conferred on barristers in 1982 the position in England at that time whether statutory or common law in base, but left open to the Courts of this country to develop as a matter of New Zealand common law changes.

Thomas J You have to widen that just … privilege. It's the whole gamut, powers, privileges, duties and responsibilities.

Wilson Yes indeed, absolutely. And all I can say is it's difficult to reconcile the second or third of those interpretations with the words of the section.

Elias CJ Well that's why I think you need to look at parallel provisions. And Justice Keith has put to you the imperial laws application Act provision. And I think, is it Mr Woodhouse has referred to the English Laws Act. Oh it was you Mr Gapes was it.

Gapes Yes Your Honour.

Elias CJ Because what would your argument be in relation to those provisions. The imperial laws application act simply says that after the commencement of this Act the common law of England, including the principles and rules of equity, so far as it was part of the laws of New Zealand immediately before the commencement of this Act.

Wilson Yes.

Elias CJ Shall continue to be part of the laws of New Zealand.

Wilson Yes, mm.

Elias CJ Now that can't freeze the law.

Wilson No, because.

Elias CJ At that date.

Wilson Quite, but with respect Your Honour, the words insofar as it's part of the laws of New Zealand.

Elias CJ Yes but the English laws act wasn't in those terms.

Wilson The one you've put to me.

Elias CJ Yes, yes.

Wilson There is a distinguishing point there in my submission.

Elias CJ Yes.

Wilson In that if s.61 had had a reference to being part of the law of New Zealand it'd be a very different situation.

Elias CJ Well would it because you'd say, on your argument, it's frozen at that time.

Wilson No, but I'd find it much more difficult to run the argument.

Elias CJ And the English laws application act Mr Gapes, what page was that in your submissions.

Gapes Page 8 paragraph 32 ma'am. That's the submissions for H L Lai.

Elias CJ The laws of England as existing on the 14th day of January 1840.

Wilson Well that's a very different situation in my submission given the relationship between New Zealand and England there.

Elias CJ But hang on, and shall continue to be there and applied in the administration of justice accordingly.

Wilson Yes, yes.

Elias CJ On your argument if that is not simply a date of reception, it freezes things, there could have been no development of the common law.

Wilson No.

Elias CJ From 1840.

Wilson Yeah, well quite, indeed and I wouldn't suggest that.

Elias CJ No.

Wilson There is, what is of far greater significance in my submission is the point I've just sought to make a minute ago, the contrast to the 1988 Act and the reference to being part of the laws of New Zealand.

Gault J That's just defining what laws are involved.

Elias CJ Yes.

Wilson Yes.

Gault J And then once you've defined what laws are involved, they are to continue to be part of the laws of New Zealand.

Wilson Yes. Without any.

Gault J Cannot be changed.

Wilson Yes, without any necessary restriction in my submission, on their development.

Gault J Well that's what's being put to you isn't it.

Wilson Yes and I'm saying, I understand the point that's being put to me, but in my submission a general, particularly the reference to being part of the laws of New Zealand, of itself contemplates the continuing development of the laws of New Zealand.

Tipping J Does it mean that if it's an English statute, the New Zealand Parliament can change it which is obvious.

Wilson Yes.

Tipping J And if it's a rule of common law, New Zealand common law can change it.

Wilson Can change it, yes. There's scarcely any argument about that.

Tipping J Yes, well if that is so, is there not a distinct parallel with what Parliament was endeavouring to achieve by s.61.

Wilson There is a broad comparison but there is a distinction in my submission.

Tipping J And that distinction is?

Wilson That s.61 was directed specifically to the position of barristers and specifically in terms of the reference to the law of England as at 1982 with no implicit recognition of the possibility of development.

Elias CJ Right. I would have thought your better argument would be that Parliament, having recognised these privileges, and provided for their reception as at that date, and identifying through this mechanism what the law was, although the Courts can develop it, there's a question as to the extent to which there can be the sort of radical change that Mr Farmer was talking about yesterday. But to say that we're actually locked to the position in 1982 seems to me as far fetched as saying that the New Zealand common law is locked into the position at 1840.

Wilson Your Honour you haven't heard the other argument from me yet. But I can assure you this isn't a situation where I'm picking an argument up simply because it's raised by the Court. But I was proposing to come to it at the end of my submissions.

Elias CJ Alright.

Wilson In the context of the question of whether a change should be made by this Court or left to Parliament.

Elias CJ Yes thank you.

Wilson And I accept it's an easier argument in terms of what might be termed.

Tipping J Well here you're saying we can't change it.

Wilson Yes, you can't.

Tipping J There you're saying we shouldn't change it.

Wilson Later I'm saying you shouldn't even if you can.

Elias CJ Yes, thank you.

Wilson And I've tried to distinguish the two arguments by running the alternative arguments at different points in my submissions.

So Your Honours, I'm sorry it's taken a while, but that's my argument on s.61. And I can deal more, or I may not be able to, but I can deal reasonably quickly with the next topic, that of the trans-Tasman relationship and then I'll be going on to retrospectively which is an argument of some complexity and that really leads me into my closing submission that I've just foreshadowed, namely reform should be left to Parliament.

Your Honours as to the trans-Tasman relationship, the Law Society, we do put considerable weight on this but it's an argument that I can develop briefly and of course it's a matter for Your Honours to assess. And can I introduce this part of the submission by putting to you that, at the risk of stating the obvious, we now have a situation where the highest Court of this country faces a clear choice between the approach taken in recent years by the highest Court of England and a different approach to the same issue taken even more recently by the highest Court of Australia. That's the stark position.

And let me make absolutely clear Your Honours, I don't suggest in any way that it's not open to this Court to choose to go either way or indeed to go down some other route. Nor am I submitting that, I'll just be speaking hypothetically, if Your Honours were to prefer the House of Lords approach, that considerations of trans-Tasman harmony should persuade you to take a different approach and following the High Court approach. But what I am suggesting is that in weighing up the competing arguments you should give weight to the, and such weight as obviously you think appropriate, to the advantage of achieving harmony with Australia. And the essential points are covered in the written submissions, the general trend towards harmonisation,

including the reciprocal provisions for admission as barristers and solicitors, but what's perhaps more relevant in my submission is a point we make at paragraph 4.4 of our written submissions, namely the provisions governing the taking of evidence as between Australia and New Zealand and any other country, which demonstrated a more, or illustrated at a more practical level the advantage of having the same position on immunity.

Now I'll ask Mr Finlayson just to hand up so I can, or you may have it already, just some brief extract from the evidence amendment act of 1994 with which Your Honours may or may not be familiar.

Your Honours these are the provisions as supplemented by the High Court Rules 502A through to 502J which provide for the taking of evidence in Australia and the making of submissions from Australia in New Zealand proceedings and the converse. From s.19 on of the provisions providing for a New Zealand Court receiving evidence and submissions by video link and telephone conference from Australia. And s.23 confers on Australian counsel the right to take part in the taking of evidence or the receipt of submissions by a New Zealand Court from Australia. So one could well have a situation there of opposing, one being Australian counsel, one New Zealand counsel.

And from s.24 on the legislation deals with the converse position of an Australian, of giving authority to an Australian Court to take evidence and receive submissions by video link or telephone conference in New Zealand. I invite Your Honours to note in particular subsection 2 of s.28. That a person appearing as a barrister, a solicitor both as in relation to the taking of the evidence or the making of submissions, all the privileges and immunities of counsel in the High Court, and that of course is the High Court of New Zealand and I immediately acknowledge the reference to both privileges and immunities of counsel.

And again the position could well be that in evidence or submissions being received in New Zealand from an Australian Court that you could have both Australian and New Zealand counsel involved. And I simply make the submission that where in the same proceedings you have counsel from the different jurisdictions involved, it's undesirable that different considerations of immunity should apply. And if it were to be suggested by Your Honours, well isn't that a fairly theoretical issue, my response would be that as is demonstrated very clearly by the submissions of the various Australian barristers' organisations to the High Court in **D'Orta**, by the judgments of that Court and by subsequent writings and other developments in Australia, certainly on the other side of the Tasman the nature of the immunity is seen as very relevant to the way in which litigation is conducted.

Keith J There are examples I think Mr Wilson are there of this kind of thing being done without statutory support.

Wilson Yes.

Keith J As between England and here where, depending on what happens to the law here, there could be a similar dislocation.

Wilson Well there's been, certainly not infrequently, evidence is taken here, is taken overseas, from overseas, you know, for the purpose, and taking of depositions and so on.

Keith J Yes.

Wilson But I'm not aware of any corresponding statutory provisions.

Keith J No, no, well that's my point.

Wilson Yes.

Keith J I mean it can happen without a statute.

Wilson Oh it can happen without statute.

Keith J And there may well be different protections in the jurisdictions involved.

Wilson Yes, certainly.

Keith J I can think of one case that Mr Finlayson was in for instance where there was an expert witness in the UK. Now Mr Justice Walker.

Wilson Yes indeed. I'm not aware of that case. But I've been involved in a number of situations where the taking of evidence overseas. I haven't myself been involved in any cases where counsel from other jurisdictions have appeared. It may have occurred but in the significant number of cases that I've been involved in the taking of evidence overseas, there have only been New Zealand counsel involved.

Keith J Okay, right.

Wilson But I can only speak from my own experience.

Keith J Mm, sure.

Wilson Yes, yes Mr Finlayson tells me that now Mr Justice Walker's evidence was actually called by New Zealand counsel in that case.

Keith J Right, okay.

Wilson By video link, just the usual thing. So that's as far as I wish to take the trans-Tasman question. So can I move to now to the question of

retrospectively. And I introduce this part of the argument by submitting that if the immunity were to be abolished retrospectively, injustice would be likely to follow. And deal again with the final context, with the competing positions of, not the competing positions, the competing observations of the judges in the Court below.

First Justice Hammond and indeed this paragraph I think was referred to by Your Honour Justice Tipping yesterday at paragraph 208 of the judgment. He had this to say. There remains the issue of whether this Court should indicate whether this development in the law is to be retro or prospective. I think that problem to be more apparent than real. And like Their Lordships in **Hall**, I prefer not to pronounce upon it at this time. I think this Court can and should allow these appeals. I admit to some difficulty in following what His Honour says. He certainly seems to have pronounced that in his view the problem was more apparent than real. That suggests it wasn't really an issue and left it on that basis.

And contrast the President in a paragraph which my learned friend Ms Coumbe read to the Court yesterday, paragraph 121. And I won't read it again. It set out what he, the President, though could be the elements of prejudice which would result from retro removal of the immunity. Could I add Your Honours, another albeit related area of concern for counsel. And this is difficult in a situation like this to avoid being influenced by one's own experience. I'll try and generalise the point. In my submission it's by no means unusual for barristers prior to a trial to discuss with their client in general terms the witnesses to be called, the lines of cross examination to be taken against witnesses for the other party or parties, and the legal arguments to be run. And certainly prior to the removal of the immunity counsel were free at trial to depart from a course of action that had been previously discussed and even agreed with the client if counsel thought it appropriate to do so.

And in my submission it would be a cause for concern of counsel if, in a situation where hindsight had shown it was an unwise decision to depart from the plan agreed with a client prior to the trial, there were a risk of being sued.

And I come back to my point in my opening submissions yesterday. I accept immediately that the Court would be very sympathetic to the demands of an advocate and the importance of flexibility in the running of a case. It would still be undesirable to be at risk of suit in that situation. And indeed looking to the future, in that situation where one were minded during a trial to depart from an approach, be it in terms of calling witnesses, cross examination, or running legal arguments in respect of which instructions had previously been obtained, the only prudent course would be to either stick with the original plan even though that might prolong the hearing and turn out to be an unwise course or to seek an adjournment to obtain further instructions.

Tipping J I'm not quite sure how this fits with the retrospectively argument. It seems to be a point of a general plea rather than a plea.

Wilson Well no Sir. In terms of what's happened for. Looking to the future. If the immunity were to be removed, we as counsel would know where we stood. And we'd take that into account in terms of getting instructions including instructions to depart from what had been agreed if thought appropriate or if necessary seeking further instructions, that sort of thing.

Tipping J This is really an argument that the goal posts shouldn't be shifted.

Wilson Yes indeed.

Tipping J To something that's already happened.

Wilson Exactly. The goal posts can be shifted for next week's game.

Tipping J Yes.

Wilson But you know, not for what's happened.

Tipping J Not for last week's game.

Wilson Not for last week's game. That's the context Sir.

Tipping J Yes.

Wilson It's retrospectively. And I take it no further.

Tipping J This is a point that bears on your discretionary argument really does it.

Wilson Yes it does.

Tipping J I mean if we can't do it well nothing else matters.

Wilson Yes indeed.

Tipping J If we can do it, we shouldn't do it because we can't adequately cope with these retro problems.

Wilson Well indeed. Indeed. And obviously if the Court were minded not to make any change well then no question of retrospectively arises. But on the hypothesis that this Court were to reach the conclusion that the immunity should be removed or reformulated or reconsidered. And it's leading up to the argument I'm making that it should be left to Parliament.

Just to lead in from there, if I invite Your Honours just to accept for the moment the thesis that prejudice would result from retrospective

removal of the immunity. In my submission there are only two possible ways of avoiding that prejudice. First by the Court making any change prospective only or secondly by leaving change to Parliament.

And as was mentioned briefly in argument yesterday, as it happens the House of Lords at the end of June this year did deliver its judgments in the Spectrum case and because of the importance of this issue, I do see just to take a few minutes to take Your Honours through that judgment and again, the copy is available there from the weekly law reports.

Keith J We've been given it by Mr Woodhouse too.

Wilson Oh you have it already. And again, it's the weekly law reports may I enquire.

Keith J Yes.

Wilson Was it, thank you, that simplifies it. And I apprehend from the argument yesterday that at least some of Your Honours have the opportunity to consider this.

Keith J Am I the only one who got it then.

Wilson Well shall be hand it up to be safe.

Thomas J Is this the one that's come up this morning.

Keith J Supplementary Casebook, 16, 21.

Elias CJ Oh yes, here it is.

Wilson It's the latest edition of the, or the latest volume of the Casebook.

Elias CJ Yes, it's an ambulatory case book.

Tipping J Oh this is Daniels and Thomson.

Elias CJ Daniels and Thomson.

Tipping J This is what sparked all this off.

Wilson Yes I did observe to my friends this morning they displayed remarkable foresight in identifying Daniels and Thomson as a, they just didn't happen to copy it 'til last night.

Thomas J But Spectrum is under Tab 17.

Wilson I'm obliged to Your Honour. And again it was a position where as the headnote makes clear, the House of Lords sat as a bench of seven. And

had to consider a very significant possible change to the law relating to floating charges and their conversion to fixed charges. And Their Lordships all concluded that even though the relevant law had been in force for some considerable time, it should be changed. And then as part of their consideration of the issues, Their Lordships then went on to consider whether given that a change should be made, whether that change should be prospective only.

Could I invite Your Honours to turn first to paragraph 22, part of the speech of Lord Nichols. And I do say, in fairness to my learned friend Ms Coumbe, to point out that while I accept of course the observations of Your Honour justice Keith that there had been in the constitutional context in Canada some reference to prospective action.

Keith J More than a reference. Real action.

Wilson Yes indeed and actual decisions.

Keith J Yes, yes.

Wilson Lord Nichols did say at the commencement of paragraph 22 in Canada, the prospective overruling has not found favour. So my learned friend was right in terms of quoting Lord Nichols.

Keith J Yes.

Wilson But more to the point in the present case, from paragraph 39 on, Lord Nichols expressed his conclusion as to the possibility of prospective overruling as follows. The objections in principle and difficulties in practice mentioned above have substance. Particularly in regard to the traditional interpretation of statutes. These objections are compelling pointers to what should be the normal reach of the judicial process. But even in respect of statute law they do not lead the conclusion that prospective overruling can never be justified as a proper exercise of judicial power. In this country the established practises of judicial precedent arise from the common law. Constitutionally they just have the power to modify this practice. He goes on in paragraph 40 and 41, if I can summarise, to recognise the possibility of prospective overruling but making clear that that would be a very exceptional course.

And at paragraph 43, His Lordship was able to state very firmly that the present case, in his view, was miles away from the exceptional category in which a … prospective overruling would be legitimate.

Tipping J This of course was a case where the rule was established only at first instance.

Wilson Yes it was.

Tipping J And it involved a matter of statutory interpretation.

Wilson Yes indeed.

Tipping J So this case is really quite, our present case is significantly different in that respect I suppose.

Wilson Yes it's significantly different. Having said that, I certainly couldn't with respect quarrel with the observation Your Honour just Gault made yesterday that although it was a first instance decision, on the evidence it established a practice that had been followed generally in England and there were I think literally thousands of bank security documents that had been entered into in reliance upon it. And that demonstrates of itself in my submission the very, even on the most liberal approach to the possibility of prospective overruling, what an exceptional step it is to take.

Tipping J Well I notice Lord Nichols in his final paragraph says there's no reason to suppose this decision lulled them into a false sense of security.

Wilson False sense of security, yes.

Tipping J Well His Lordship must have a very agile mind if he was of the view in a sense that these people weren't led to think that this was the law. It's a question of how much people have been lulled into ordering their affairs in the light of barristerial immunity I suppose. I mean that's just a phrase I've picked out. But.

Wilson Yes, again.

Gault J Well have barristers have been comfortable being negligent, have they?

Wilson Not so much comfortable being negligent but comfortable, to come back to my example, departing from a course of action that had been agreed without getting instructions from the client.

Elias CJ In this case I see from the cases cited that **Rondel v Worsley** is cited.

Wilson Yes indeed.

Elias CJ Is that.

Wilson Lord Hope had something to say on that very point.

Elias CJ On the prospective.

Wilson Yes, in the context of barristers' immunity. Which, but I'm just proposing to just go through the speeches in sequence if I may.

Elias CJ Oh I see, yes thank you, I'm sorry.

Wilson No, not at all. But Lord Steyn at paragraph 45, expressed the view that in regard to prospective overruling, he said the good sense of not saying never as explained by Lord Nichols, on the other hand like Lord Scott, at present I find it difficult to see how it could be possible to permit prospective overruling in a dispute about the interpretation of a statute. And that is a point of distinction.

Thomas J Where are you at the moment Mr Wilson.

Wilson I'm at paragraph 44 and 45. The very brief concurring speech of Lord Steyn.

Thomas J Right.

Elias CJ Yes, do you have a clock there do you.

Wilson Yes I have a clock that says 11.35 though.

Elias CJ Would it suit you to take the adjournment now.

Wilson Well I'm entirely, this would be convenient, it'll take me some time to finish going through the speeches.

Elias CJ I should mention that today we have to rise at 10 to 1 but we can resume again at 2.15 and we propose to go through 'til 5 again, taking an afternoon adjournment at 3.30.

Wilson Yes. If it would assist Your Honours, I wouldn't be more than another half, well subject to that well known expression injury time, I wouldn't expect to be more than another half hour.

Elias CJ Yes, mauling time. Right. Thank you.

Court adjourns 11.29 am

Chamberlains Part 7

Court resumes

Court adjourns 11.29 am
Court resumes 11.48 am

Elias CJ Thank you, yes Mr Wilson.

Wilson Your Honours just to continue the review of Spectrum. At paragraph 65, having concluded at paragraph 64 that the previous decision should be overruled, Lord Hope went on to consider whether the overruling should be prospective only. Stated at paragraph 65, changes in the law

do not occur in a vacuum. Much is likely to depend on whether the change affects situations before the change occurs or whether it affects only situations that come altered. On the whole legislation affects the future only and not the past. Though awareness of what is to come may well influence the way people conduct their affairs before its commencement. The reverse is true of judicial decisions. His Lordship then went on to review the authorities.

Thomas J What paragraph was that again please.

Wilson That Sir was in paragraph 65.

Thomas J Thank you.

Wilson And His Lordship then went on to review the authorities on proposing overruling including at paragraph 67, a judgment of the High Court of Australia. And then at paragraph 71 reached this conclusion. The question then is whether it can ever be consistent with the exercise of its judicial power for the house to declare that a decision which it takes which changes the law is not to affect things or things done in the past but only events or things done in the future. While I recognise the force of Lord Goff's argument to the contrary in Cline mort Benson, I think that it would be unwise to say that the power to do this can never be available in any circumstances.

And then to pick up the question of Your Honour the chief justice. In paragraph 72 His Lordship went on to discuss this question in the context of **Hall** as follows. The question whether such a declaration will ever be consistent with the exercise of the judicial power must in the end depend on the issue that the House is being called upon to decide. In **Hall** for example, I said that I was of opinion that the decision in that case which changed the law about the immunity from suit of the advocate should take effect only from the date when the House delivered its judgment. That was a highly unusual case. In the Court of Appeal it was held that the solicitors had not acted as their client's advocate and their conduct was not so intimately connected with the conduct of the case in Court as to attract the immunity. I said at the outset of my speech that the grounds which the Court of Appeal had given for its decision were entirely sound, sufficient and satisfactory. That it was unnecessary for the disposal of the appeal to examine the fundamental question whether the core forensic immunity which the House had recognised in **Rondel v Worsley** could be justified on grounds of public policy. The opportunity had been taken of arranging for the case to be heard by 7 Law Lords so that it could be considered whether the rule that was established by that case could still be said to be justified. The focus of attention was shifted quite deliberately for this issue. The House was no longer interested in the question whether the Court of Appeal had been right to say that the solicitors' conduct was such as not to attract the core immunity. So I did not regard it as necessary for the disposal of the appeal to say that

any changes regarding the immunity should operate retrospectively. On the contrary, as I said, I consider it to be a legitimate exercise of Your Lordships judicial function to declare prospectively whether or not the immunity which is judge made, is to be available in the future and if so, in what circumstances.

And His Lordship went on in a passage in my submission of particular relevance. I continue to think that this approach to the exercise of the judicial power in that case was legitimate. There was no need in order to do justice between the parties to the disputes for the decision in **Hall** to be applied retrospectively. Advocates had arranged their affairs since the decision in **Rondel v Worsley** on the basis that in their conduct of cases in Court the core immunity was available. Recognising the importance that is to be attached to legal certainty, there was much to be said for the view that in their case a decision to remove the immunity should operate prospectively only and not retrospectively. Now Your Honours I think I'm.

Elias CJ In most cases of course it will be necessary if you're to do justice between the parties to apply it with retrospective effect.

Wilson Yes indeed.

Keith J And it may or may not be here, we don't know do we.

Wilson Yes, I.

Tipping J Well the facts of it this case could be said to not attract the immunity anyway.

Keith J Mm.

Wilson Well appearing for the Law Society I don't want to get drawn into the role of any particular sols.

Tipping J No, but.

Wilson But my friend Ms Challis I think may have something to say about that in this case.

Tipping J Yes, well of course Lord Hope was influenced significantly wasn't he by the fact that the Court of Appeal had got it right on the facts so it didn't matter in that case.

Wilson Yes, yes exactly. And it wasn't necessary to be retrospective in order to do justice between the parties as he was saying there.

Tipping J Mm.

Keith J Then there's the profound first sentence of 74 isn't there.

Wilson Indeed. Yes.

Elias CJ With the emphasis on wholly exceptional cases Lord Nichols put it too.

Wilson Yes. Your Honours I think I'm correct in saying that the only reference in Spectrum to the particular issue of barristers' immunity was that passage from there.

Gault J Right. What was the overall view on the head count as to this prospective overruling in that case.

Wilson 7 nil, on.

Gault J In spectrum did they all say that.

Wilson Yes, they, if I could summarise it this way. Their Lordships differed slightly as to the degree of circumstances in which prospective overruling could ever be appropriate but they were unanimous in finding that it would not be appropriate on the facts of that particular case.

Gault J Yes.

Wilson To change prospectively only.

Tipping J I can't remember Mr Wilson, did others of Their Lordships in **Hall** say anything on the subject of the prospective/retrospective as Lord Hope did.

Wilson Certainly not to my recollection Sir.

Tipping J I couldn't recall it off the cuff, no.

Wilson I can't recall it.

Thomas J Was this prospective/retro point the reason that sat 7?

Keith J Yes, mm.

Thomas J Or was there some other issue.

Wilson Yes.

Thomas J This was the issue that.

Wilson Why they sat 7.

Elias CJ No it'll be the substantive issue.

Gault J It was whether or not C B Gorman should be overruled. That was why they sat 7.

Thomas J Sat 7 yes.

Wilson Oh yes. And decided the, yes. I don't think there's been a number of strong indications that it was going to be overruled in other cases. And I can just give Your Honours briefly the references to the versions of the other members of the House. At paragraph 126 Lord Scott reached this conclusion. Lord Nichols has reviewed indepth the jurisprudential pros and cons of a proposition overruling and has concluded that even where interpretation and application of the statute is the issue, the door should be kept open for the possibility of such a ruling in an exceptional case. I would respectfully agree with his comment about the wisdom of never say never approach but find myself unable to visualise circumstances in which it was be proper for a Court having reached a conclusion as to the correct meaning of a statute to decline to apply to the case in hand the statute thus construed.

Then I can just give brief references.

Thomas J Well one can understand that of course because it's like saying that it has a different commencement date from the date on which it's been given in the statute.

Wilson Indeed. And that's the practical effect of it. And I can give brief references to the other speeches. At paragraph 161 Lord Walker. The topic of overruling long standing decisions which have been relied on by commercial lenders and on the further topic of proposition overruling, I am in full and respectful agreement with the opinions of my noble and learned friends Lord Nichols of Birkenhead and Lord Hope. I would allow this appeal and hold without any sort of temporal restriction that the C B Gorman case was wrongly decided on the issue of construction.

And the immediately following paragraph. Baroness Hale at the last sentence on the page. In connection from my noble and learned friend Lord Nichols of Birkenhead and also Lord Hope, I would not wish to rule out the possibility that this House might one day consider that the only just result was to declare that its decision should have prospective effect only including the possibility that this could arise in a dispute about the interpretation of a statute.

And finally Lord Brown at the end of paragraph 165, whilst I would not rule out the possibility that this house may one day think it is right to declare the law with prospective effect only, I'm quite clear that this is not the case for such an order.

So Your Honours in summary, I mean it's readily accepted, it's got to be a very exceptional situation before any common law Court will

change the law prospectively only and in particular, and indeed as is clear from Lord Hope's discussion of **Hall**, it would be particularly unlikely for a Court to contemplate that where prospective effect would have an impact as between the parties to the litigation. The parties have come to the Court and the party who's persuaded the Court that there should be a change, that the law should be changed and therefore should have the benefit of that change to their position.

So for that reason I'd certainly find it difficult to advance an argument that prospective overruling would be appropriate here.

Your Honours that leaves me with three topics all related to the question of whether the issue of removal or change to the immunity should be left to Parliament. The first of those points is to refer Your Honours to a paper which appears in the respondents' Casebook under Tab 7. It's an options paper prepared in I think august this year for the Standing Committee of Attorneys General of Australia.

Elias CJ Sorry what Tab is it?

Wilson Under Tab 7 Your Honour of the respondents' Casebook the respondents' first Casebook perhaps I should say now.

Elias CJ Yes.

Wilson The pre-Daniels Casebook. And I don't intend to take Your Honours through it in detail but I simply refer to it for the purpose of seeking to demonstrate that the possible options are not limited to those at the ends of the spectrum, namely retention of the immunity in its present form or complete abolition of it. Rather there are a number of other possibilities at various points on the spectrum between those extremes. And I'll just give Your Honours the relevant headings. First from page 6 of the paper. Option 1. Leave the immunity to the common law. Consequently leaving the decision of the High Court in **D'Orta** to govern the position until such time as the High Court reconsiders the matter.

Then from page 12, the other extreme. Abolish the immunity. That's discussed in detail in the following pages including the possible changes to Court rules. And then option 3 from page 24, various options for modifying the operation of the common law immunity. The first following the sub-heading prior to paragraph 110, confining the immunity to criminal proceedings. Over the page above paragraph 116, restricting the immunity to work done in Court. Following page, page 26.

Thomas J Are we back to my point though, I can't understand how the Courts and the experts such as compiled this paper don't tie the test into the harm. If the harm is relitigation, then the test should be, in this case, is this going to result in a collateral attack on the decision below.

Wilson Yes.

Thomas J And once you accept that, once you accept the relitigation as the real harm, these tests - in Court only, or intimate connection and so on, sound rather artificial.

Wilson Sir. In terms of some of the options they're coming to in a minute, I think go some way to.

Thomas J Okay.

Wilson Addressing that point. Restricting the immunity to work done in Court, page 26. Restrict the immunity to the presentation of testing in evidence and the advancement and answering of argument rather than work done in Court. Further down page 26. Clarify through statute the limits of the common law immunity in terms of what is meant by work done out of Court which is intimately connected with the conduct of a case in Court. Then on page 27, preserve immunity for prosecutors and public defenders. And then from page 29, what's referred to as ancillary mechanisms to support the justice system. And why they've done that rather than call it a further option. But the authors then discuss a possible ground of appeal where an advocate's conduct leads to miscarriage of justice. And to summarise of course, to come back to the question of Your Honour Justice Thomas, if it's done by way of appeal, by definition there is no question of a collateral.

Thomas J Right.

Wilson Judgment there. And page 31, extending the ground of appeal to civil matters. Further down that page, expanding.

Elias CJ Some of these options are incredibly unattractive - combining an appeal with a claim against the advocate.

Wilson I'm not seeking to support any of them.

Elias CJ No, no.

Wilson I'm just drawing to Your Honours attention.

Elias CJ It may be an argument for the judges fixing this.

Wilson Yes. Well this of course is the Australian context.

Elias CJ Oh but I think we tag along don't we.

Tipping J They're putting up everything they can think of I suspect.

Wilson Yes. Expanding the ground of appeal, negligence or failure of duty rather than flagrant incompetence of counsel. And then from page 32, combining appeal with a claim against the advocate. And that's as they say in paragraph 148, a variation to this appeal model would be to combine an appeal on the grounds described above with the right to make a claim against counsel if incompetence is to be found. And it's a reference there to a proposal that seems to have, seems to be referred to in a number of quarters across the Tasman emanating from Mr Walker QC, former President of the NSW Bar Association as to, as I said, the combining of an appeal with a claim against the advocate. And setting out quite detailed, as I said in paragraph 148, detailed proposals there.

Thomas J Even wasted costs applications aren't heart at the same time as an appeal.

Wilson No, no. So you've certainly got sequential hearings. But, again, with collateral judgments. Then following page 73, successful appeal is a prerequisite to claim for damages which again is another, again obviously makes some time issues, but the successful appeal does, as I said before in answer to Your Honour, is one way of avoiding the collateral challenge issue. And then on page 34, costs mechanisms. Page 35 disciplinary mechanisms.

Elias CJ So this is, because of course hardly got any status this, this is really in support of a submission what, that there are a number of different options which.

Wilson Yes.

Elias CJ Which a legislative solution could look at.

Wilson Absolutely.

Thomas J But Mr Farmer said that we're best qualified to look at these matters.

Elias CJ And looking at this, I think he might be right.

Wilson Mr Farmer said you're certainly better to continue the indemnity. Just two further points. The first of which is just more a technical point in relation to the current status of clause 104 and the Bill to which my friends have made reference. And Your Honours, with the advantage of Junior counsel, who's becoming very familiar with relevant provisions in the Constitution Act and Standing Orders which are relevant though to the present proceedings, could I just hand those up simply as we seek to make clear to Your Honours what the current position is with the legislation. Do you have them there?

Elias CJ It depends, in brief it depends on whether the Government puts it forward again.

Wilson Absolutely. But in brief Your Honour a I understand it, it was a change in the Constitution Act earlier this year.

Elias CJ Yes.

Wilson Whereas previously, and I'm probably not using the right technical terms, there could a resolution of the outgoing Parliament holding over some legislation.

Elias CJ Yes.

Thomas J Yes, mm.

Wilson Now it's the other way round.

Elias CJ Yes.

Wilson And the new Parliament has to pass the appropriate resolution to reinstate the litigation.

Elias CJ Yes.

Wilson And that's provided for in the Standing Orders, Standing Order 79 reinstatement of business there too.

Thomas J Mm.

Wilson So I simply make the submission that there can be no, given, as we obviously all know, we now have a new Government, there can be no certainty as to whether the Bill as a whole in clause 104 will continue in the form in which they were before the last House, the last Parliament. So Your Honours that brings me to the conclusion of the submissions for the Law Society.

And could I summarise our position in these ways, this way. Namely that if this Court were to conclude that the immunity should be reviewed, or consideration need be given to its removal, the appropriate course to take would be for this Court to maintain the status quo by allowing the appeal on the basis that the immunity should be reconsidered by Parliament an that course in my submission has four advantages.

First, and this comes back to s.61 in terms of what should be done rather than what can be done. It gives weight to the presence of s.61 and in particular recognises that it is preferable for this Court not to act in a radical way in terms of changing the privileges conferred by s.61 even if it's open to this Court to do so.

Secondly, it avoids any issue of retrospectively.

Thirdly, it provides an appropriate mechanism to enable a range of options which may or may not be those in the Attorney General's paper to be considered.

And fourthly, at least in a broad way at the present point in time, it achieves harmony in the approach being taken on both sides of the Tasman sea.

Thomas J Well that depends on what line Parliament takes.

Wilson Yes, but it enables Parliament to.

Thomas J To just make the decision.

Wilson To make the decision and to take into account what if anything is being done by the Australian Parliament, I think it'd be the State Parliaments too there. Certainly the Australian Parliament. It would give our Parliament that opportunity, I put it no higher than that.

And Your Honours those are the submission for the New Zealand Law Society.

12.10 pm

Elias CJ Yes thank you Mr Wilson. Miss Challis.

Challis Just as a preliminary point, the appellants in the proceedings adopt the submissions of the New Zealand Bar Association and New Zealand Law Society in their entirety and I don't propose to go into the issues at all which they have raised and discussed with Your Honours. There are four points I wish to raise. And one of those which is topical and has been discussed this morning are whether in fact the immunity in this case or whether there should have been immunity in this case in the facts of the case. That has always been an issue which the appellants have been live to and the suggestion that has always been made is that the trial should have taken place. This is relevant to the costs submission in some respects by the respondents in this Court. If there had been a determination as to whether or not the immunity was applicable on the facts, then we may not have been here on that issue. And I accept that it is a case which is arguable whether the immunity would apply. But it was only one defence which was open to the solicitors in this case.

So as it relates to the costs issue which my learned friend Mr Woodhouse makes in his written submission I just address that briefly. He has said in those submissions that the respondents should not be responsible for costs at all in this Court and I just note my objection to that statement. Costs should fall where they usually would as with any other appeal, to the successful party.

The second point I make is on the facts of this case, will this be a collateral attack on a judgment. And the answer to that is yes it will be. Yesterday I think His Honour Justice Tipping mentioned that Mr and Mrs Lai had consented to judgment being entered against them and counsel had filed a memo to that effect. In actual fact the memo referred to the willingness of Mr and Mrs Lai to provide a guarantee and then there was correspondence between the plaintiffs and defendants in that proceeding as to whether or not, or the form of the guarantee that was going to be provided. So that was still the subject of discussion. And we don't know what form that guarantee would have taken.

Tipping J Ws I wrong in thinking that a judgment was entered.

Challis It was but what happened was a notice of appeal was filed against the judgment. And that was an issue which was live on appeal.

Tipping J But it wasn't a judgment on the merits was it.

Challis No it wasn't.

Tipping J Because the Judge.

Challis But the judgment said that Mr and Mrs Lai had consented to the judgment effectively being entered against them and that was not the case. So there was an issue about the judgment and a notice of appeal filed.

Elias CJ You mean there was an issue as to consent.

Challis Yes, that's what.

Tipping J Well what you're saying, calling a spade a spade, is that your clients didn't consent to the judgment.

Challis Well that's an issue for the substantive proceeding as to the arguments of negligence against the solicitor. Because what we say and will say at trial, and we're sort of still to get there, is that there was no consent to the judgment. There was an indication of a willingness to guarantee but the judge took an extra step and entered judgment when that is not what Mr and Mrs Lai agreed. So the judge's findings.

Tipping J You didn't apply to recall the judgment on the basis of a misunderstanding or anything like that.

Challis Perhaps that's what should have been done but instead a notice of appeal was filed and for whatever reason, the appeal process was not pursued. So this judgment will be attacked collaterally in these proceedings.

Tipping J It's not a case where it could be said to be inconsistent results because rightly or wrongly the judge thought there was consent.

Challis That's right but we say that was a wrong conclusion to draw from the memo.

Tipping J Yes I understand that.

Challis Yes.

Tipping J Right.

Challis So my point simply is this will result in a collateral attack. There was a proper appeal process but for whatever reason, that was not pursued. And Mr and Mrs Lai had obtained separate representation at the time, shortly after the notice of appeal was filed and that sol chose not to pursue the appeal for whatever reason.

Tipping J I'm sorry to pursue this but in the end, the judgment is extant. It is a judgment of the Court. It may have been capable of attack in a variety of ways but for present purposes it is an extant live judgment.

Challis Yes but for the purposes of causation issues and in this case for the claim of negligence, the solicitors will raise the argument that the cause of the loss, the cause of the judgment was not anything the sol did because he filed a memo saying that Mr and Mrs Lai would give or consider making or giving a guarantee but then the judge went and. So the cause of the loss was in fact the judge entering the judgment contrary to what the sol had indicated in his memo. So it's back to the causation arguments. And so that is a live issue.

Elias CJ Is there any substantiation of that in the material we've got.

Challis I don't believe so. The basis of the appeal has always been, it was an application for strike out obviously of this defence.

Elias CJ Yes.

Challis And so it's always proceeded on the assumption I suppose like any strike out, but ours is back to front, that immunity would apply were it still available at law. So the appeal has always proceeded on the basis that the facts do justify it effectively and so the issue is only one whether or not there are policy reasons or whatever that the immunity should no longer apply in New Zealand. So that has never been an issue that has needed to be a matter of evidence or the like before any Court on the appeal. And Justice Heath in his preliminary judgment, the first judgment, where it was applied, Mr and Mrs Lai applied to move it directly to the Court of Appeal, and justice heath indicated that

the facts may not justify it and perhaps we should leave it there and have it determined first. But that wasn't done.

And another short point I just wish to make in respect of the retrospectively argument was in Spectrum, it was the two, definitely the two issues of whether or not to overrule the existing judgment and the prospectivity which was considered by the Court to be of major importance. So that was perhaps in answer to Your Honour Justice Tipping's query about whether or not prospectivity was one of the reasons for the 7 law Lords. And I understand that was one of two reasons.

Tipping J Oh, in spectrum.

Challis Yes.

Tipping J Yes, yes. But in this particular case, in the Court of Appeal, I presume your interests ran the argument that if you're going to do it, don't do it against us.

Challis That's right. In Hall and Simons, only Lord Hope mentioned the prospective argument. None of the other law Lords did and in answer also to your question Sir. And of course it was Lord Hope in spectrum that referred to the immunity issue and certainly from my reading of his judgment he was in favour still of having prospectivity on a barristerial immunity if that had been, you know, abolished, he was still in favour of that. Of course again it didn't need to be determined because the immunity didn't apply in Hall and Simons factually.

But here we have the situation where this barrister conducted the case as he did, and we were going on the assumption that the immunity is right on the facts. So this barrister acted as he did knowing that he was immune for conduct in Court or intimately connected with the Court process. So to take the immunity away is effectively to enable him to have acted on a false premise effectively at the time, which is the point President Anderson made in the Court of Appeal.

And again, counsel for Mr Lai mentions in his submissions that if this Court needs to determine the prosp/retro issue, that he says this Court could find selectively that this case should not be prosp but perhaps all other should be. But I cannot see the justification for that. And he deals with that in s.7 of his submissions.

If it's to be prosp it needs to prosp from the date of the judgments for all cases. Not just for this one or.

Gault J What is your submission? mr wilson didn't go so far as to say this Court should determine it can and then make it prosp only. He simply used this as an argument for perhaps leaving it to Parliament. What is

your submission. Are you saying we should grapple with the point of whether it should be prosp and make it prosp only if we get that far?

Challis My primary submission is the same as the Bar Association, that this is a matter for Parliament.

Gault J Alright, thank you.

Challis But if it gets that far I am taking the step and saying that if it is, that this Court can as a result of spectrum make a prosp ruling and that it should do so for the reasons advanced by Lord Hope.

The final issue which I just wish to raise, I don't know the extent to which my learned friends are going to be referring to Daniels and Thomson. But I obtained overnight the parliamentary debate about this particular issue. And thought it might be useful for this Court to have that available to it.

Put simply, this was a supplementary order paper that introduced this provision into the accident insurance Act in 1998. The hon derek quigley had introduced it, principally as a result of the discussion by Your Honour Justice Thomas, the dissenting decision in Daniels and Thomson. But the concern of the member of Parliament was that he saw a gross injustice in denying to victims of sexual abuse and rape in particular to sue the offenders for exemplary damages. That was the evil that he saw had occurred as a result of daniels and thomson which he wanted to correct. And he also saw that as reversing some of the bias which he thought had tilted too strongly in favour of the offenders.

So there is no discussion in any of the debate which you have before you about relitigation and that type of thing. It just simply wasn't considered. So in answer.

Thomas J But it was the effect of the amndmt.

Challis It was the effect.

Thomas J We've got that far.

Challis Yes, yes but I understand Your Honour Justice Thomas to have raised the issue yesterday on the basis that could this be Parliament's answer to they aren't concerned about relitigation. And my response to that is no.

Thomas J No, I think the point can be stated quite low, in a modest way really. It's just incongruous that this Court might be overly concerned about relitigation when Parliament has not been so concerned in that particular situation.

Challis Yes. And clearly they weren't concerned but it was never something that even entered their mind. Had it been drawn to their attention or been an issue specifically identified, then maybe we could draw something from it. But in my submission we can't in this case because as I said, it was a unique position and it was.

Thomas J I don't know that the process works quite that way. There would have been quite a bit of work done.

Challis Certainly.

Thomas J By officials and certainly there is an indication in the transcript that they were aware of individual judgments.

Challis Yes.

Thomas J In the Court. So that.

Challis And they made certain distinctions between.

Thomas J They would know what had been said in the judgment.

Challis Yes.

Thomas J Certainly the officials would have, about finality.

Challis Certainly they were. And there was mentn of the judgment and Your Honour's findings in relation to certain issues. So they were aware of the judgment. They just didn't.

Thomas J Yes.

Challis Certainly there's nothing apparent in that.

Keith J That runs along with the other provisions that mr farmer mentioned yesterday which, in the evidence Act, I think it's 1980, which contemplate as well don't they that sometimes there will have been criminal proceedings and then subsequently civil proceedings in which the criminal result may well be questiond.

Challis Yes. And there was distinctions made between the criminal and civil Courts in the debate that is before you.

Keith J Yes.

Tipping J Sorry, if someone has been convicted of rape and they are then sued for exemplary damages as this process envisages doesn't it.

Challis Yes.

Tipping J Yes. Could they possibly argue that they were not guilty of rape. I thought that was.

Keith J It's possible. I mean it's possible under that.

Tipping J It's theoretically possible.

Keith J Mm, mm.

Challis Yes. It is theoretically possible.

Tipping J But it's a very, mm.

Challis That's right. Normally the conduct, I mean to get exemplary damages obviously flagrant disregard etc.

Tipping J Mm. But the.

Challis And if they're convicted.

Tipping J But the analogy between that and the sort of relitigation that would become involved when you're saying that my barrister was negligent and if he hadn't been I would have won, I suppose is there but it's not exactly sharp.

Challis No, no.

Thomas J The issue of finality and relitigation was raised where there was an acquittal.

Tipping J Quite.

Thomas J That wasn't touched upon in the, where there'd been a conviction.

Tipping J A conviction, no.

Challis No, that's right.

Tipping J Yes well I supose, the general tenor of this debate seems to be, well let's give more weight to the position of victims and never mind the problem of the rapist or the putative rapist.

Challis That's exactly right. Yes. They basically said the law seems to have tilted too far in favour of offenders.

Tipping J That seems to be the flavour of all this stuff.

Challis Exactly. Exactly. I just thought it useful since His Honour Justice Thomas raised the issue.

Keith J This is also a very interesting political time in Parliament.

Challis Yes.

Keith J Where Act was holding up the Government.

Challis Those were the only additional matters I wished to draw to the Court's attention.

Elias CJ Thank you Miss Challis.

Challis Thank you Your Honour.

12.27 pm

Elias CJ Yes mr wdhs.

Wdhs May it pls Your Honours.

Elias CJ Ms wdhs as I indicated we'll stop at 10 to 1.

Wdhs Yes thank you Your Honour. If you could indicate to me when we've.

Elias CJ I will. I'll give you a signal.

Wdhs Just to provide a broad indication as to how I'm proposg to proceed. I will refer to the summary in our written submission very briefly to indicate the areas that will be touched on by me and by both of my learned friends in oral submissions. The heart of my submissions is concerned with the question of finality of judgments as what seems to be the critical remaing reason for blanket immunity. And the associated imptnt question as to whether abuse of process as it has been developed is a more suitable means of dealing with the problms that undoubted will arise on occasions if barristers can be sued. That's the essence of what I am wanting to say.

Lkg at the summary commencg at paragraph 5, paragraphs 5, 6, 7 and 8 of that summary deal with matters that my learned friend mr Webb will make oral submissions to Your Honours on. At paragraph 5 of the summary what we respectfully submit is the startg point and, perhaps not the most apposite expressn, but the bedrock against which so much of this needs to be tested, what is submitted to be the fundaml principles of New Zealand law, the rights of access to and equality before the law. And they do have, with respect, real importance although sometimes when these matters are stated in a sort of broad and abstract way they can tend to sort of float off into the atmosphere a little bit. But they have real purpose and real bit and they have been reaffirmed recently in New Zealand. And my learned friend mr Webb will deal with that. With what is an aspect intimately connectd with that, and that is the juristic nature of immunity because it is necessary

in our submission to give consideration to that in order to determine the extent to which, or indeed whether at all, immunity as it applies to advocates is contrary to the general fundamental principle of access to and equality before the law.

And at paragraph 7 there are two other imptnt values which immunity tends to be in conflict with. They are noted briefly in that summary. The importance of public respect for Courts and confidence in the administration of justice and of course that's the other side of the coin of this whole argument about the administration of justice and how it is sought to be preserved by immunity. The other side of that in respect of the administration of justice is the perception that it is, the public perception to the extent that the public concerns itself with these, the informed members of the public, that it is unsatisfactory and it is unjust that a client with a meritorious claim, and those are the ones that we've got to focus on, is deprived of the opportunity to have the matter determined on the merits.

So that's an equally imptnt aspect of the administration of justice in our submission to what as a shorthand provision we call the finality objective. And I don't want to understate that. There are elements of principle in that as well.

The other aspect is that the consequence of immunity is that the public benefit is provided at private expense. And at paragraph 8, the final aspect of mr webb's.

Thomas J That's pretty much the case with all litigation isn't it. That where there is a policy issue that is involved, the public interest or benefit will be provided at public expense if it goes against the litigant.

Wdhs I'm sorry Your Honour I'm not quite.

Thomas J Well I think that statement is probably fairly common to all litigation where there is a public element or public interest involved. I'd avoid a situation where the expense will fall on the individual litigationt.

Gault J Not just in litigation. It's in any law that restricts a private right in the public interest.

Wdhs Quite and the submission is made that it's not unique in this situation. But it is a factor.

Gault J Okay.

Wdhs The remaining aspect to be dealt with by my learned friend mr webb is noted at paragraph 8. The immunity rule is unsettled as to content as it is to doctrinal basis. And that has a relevance perhaps in two respects at least. With respect, there is a need up to a point to demystify the immunity matter which has been, certainly in some respects, aspects of

it elevated to a rather refined level. The essential point of the submission is to demystify it.

The other aspect of it is to put into context what this Court will be doing if in fact the decision of the Court of Appeal is upheld. The submission is made, and it's developed, I will develop it to an extent later, in response to the submissions of my learned friend mr farmer that what the Court of Appeal does and what the respondents in this case are wanting to uphold, is a radical change in the common law. The submission will be made that it isn't. And that in fact **Rondel** might be seen more as having been a radical change at the time.

Paragraph 9 of the summary brings me to the aspect of the case that I am proposing to deal with orally to the greatest extent and there are one or two other aspects I'll touch on. I've already indicated, and that is what in our submission we see as the heart of the whole argument. I've already outlined what that is, the finality matter and whether abuse of process is adequate.

I'll touch on some other aspects but I was intending only to touch on some that are summarised at paragraphs 10 and 11. This question as to whethr there is evidence or at least some information that is reasonably reliable and provides a guide as to what might happen if there is no immunity. And perhaps it's appropriate for me to deal with this at this point. There is a question as to whether some of the material we've put before Your Honours should not have been put before Your Honours without leave. We received, and I should indicate this in pragmatic terms, notice by fax from the solicitors for the appellant on Monday that there's a potential objectn by them to some of this material because leave was not sought and it constitutes evidence.

Elias CJ Well they haven't made that objectn to us Mr Wdhs but it's fair to say that there are some doubts that we have as to the reliance we can place on material of that sort.

Wdhs Yes thank you Your Honour. Strictly and on a literal reading of whatever the rule is, rule 40, in relation to the admsn of the, it may be seen as evidence. It's put forward as information. But it is not evidence as one would normally be trying to grapple with on an appeal, trying to put it in after the event which has a direct bearing on the issues between the parties. But information, I can't say in the public realm, but information of a broadly publicly available nature. Certainly some of it is available to members of the Bar Association who are here as interveners. Other parts of the information being the letter from the director of BMIF, associated with the Bar Council in England and in fact information which really just confirms directly what is contained in that report for the attorneys general in Australia which is already before you perhaps by way of commentary. Now I cannot ask the Court to give weight to this information as if it is evidence proved in

the normal way and accepted by the Court. I do ask the Court to have regard to it for what it is worth.

Elias CJ Well you're putting it forward as sort of … brief contextual material and I'm flagging with you mr wdhs that on its own face it doesn't seem really to take us very far. I suppose what is in your favour is that we haven't been given material suggesting that the sky has fallen in other jurisdictions.

Wdhs Yes, yes. The only other point, and I don't place significant reliance on it, is that it is in the same vein as some statements that have been made in the submissions for the Bar Association relating to the collapse of HIH and.

Elias CJ The effect on the cab rank principle and.

Wdhs Matters of that nature and the numbers of unrepresented people before the SC of Canada and I don't want to overplay this.

Elias CJ No.

Tipping J Well it may be useful, it may not. But I frankly haven't looked at it so I didn't know that it was properly before us and I haven't. I've read the attorney general stuff but I frankly haven't read the other stuff because I didn't really feel very comfortable doing so. So if you want me to be influenced by any of it, you're going to have to go to it. But I don't suggest that it's likely to be very helpful frankly.

Wdhs Yes, some of it really just touches on this question of insurance. And nothing much more can be said in relation to insurance than what will be apparent to Your Honours anyway. It's available. And it's available to barristers and it's been available in New Zealand for a very long time. And they can order their affairs accordgly and it's a matter of dealing with some of the points that are raised in favour of immunity in relation to vexatious litigants.

Gault J Well I'd have been much happier if it had been in affidavit form. I think it could have been quite helpful. But to just put in letters at this level, I think I think is presentg the Court with real difficulty.

Wdhs Yes, well I'm fully conscious of that Your Honour. I can indicate if I may that the contact from mr simpson of BMIF was made by him to my learned friend mr gapes indicating that.

Gault J Are you giving us some more evid?

Wdhs Well yes perhaps I should take it no further.

Tipping J Well it may help you mr wdhs if I were to indicate that I think this case turns largely, if not entirely, on whether the necessary protection

against collateral challenge etc is best handled through barristers' immunity or abuse of process.

Wdhs Well that of course is my.

Tipping J And all the rest of it is just as it were surrounding material.

Wdhs Matters to be considered. Well with respect Sir that of course is the point I made.

Tipping J Yes and I was delighted to hear it put that way.

Wdhs Yes. I won't. I've raised the matter.

Elias CJ I think you can move on mr wdhs.

Wdhs Yes. I will deal with that aspect that Your Honour Justice Tipping just mentioned. There is two or three other, I will deal briefly with some aspects of this question of change. My learned friend Mr Collins will deal with the matters that are summarised in paragraph 12, the most imptnt of which seems to be, or the more important of the two, seems to be this question of retrospvy. There's also the comity with Australia point but perhaps not one to be pursued at great length.

Elias CJ Could you just hold on there. (Judges confer) Mr wdhs if you've prepared on this basis, I think the Court could probably hear from three counsel but it's very unusual and we would normally expect the argument to be presented by two counsel at the most. But however, let's proceed and see where we get to.

Wdhs Yes I do understand Your Honour. I'll be taking the burden of what seems to be the main argument and some of these other matters I do submit with respect can be dealt with fairly concisely.

Elias CJ Yes. Well I think they will have to be because of the time constraints that we're now under. However, yes carry on mr wdhs.

Wdhs Yes Your Honour. Well I'll most immediately to deal with the question of finality. And just restating it. The heart of the argument in our submission about immunity today concerns the finality objective and whether this more approprly dealt with by the modern doctrine of abuse of process. The first point that is made orally in this respect is that this does not concern a conflict of equal principles or objectives. There is a potential conflict of course between the fundamental rights of access to the Courts and equality before the law and the objective of finality in litigation and what's associated with that. But these matters in our submission are not of equal weight. And the reason for that submission I expect is fairly apparent now from the matters that have been traversed in summary and contained much more fully in the written submission. Turning to the question of finality.

Tipping J Where do we find this in your written material mr wdhs or is this something you're developing more orally than in writg.

Wdhs The.

Tipping J Is it s.3.

Wdhs There's two parts to it. The first part is found in s.1, commencing at page 4 Your Honour.

Tipping J Thank you.

Wdhs The rights of access to and equality before the law.

Tipping J Well Magna Carta's not a bad start I suppose.

Wdhs No.

Tipping J If only chronologically.

Wdhs Yes chronologically I've made an error. The footnote refers to magna carta in 1215 but in fact the version of magna carta that's been adopted in New Zealand is one reaffirmed I think by Henry II a bit later.

Keith J Mm, mm.

Wdhs But there's only 50 years in it or something of that nature. But the fundamental rights or principles.

Elias CJ I thought it was Edward III.

Keith J That's the Statute of Westminster.

Elias CJ Oh sorry. Yes.

Wdhs Have I got the wrong King.

Keith J No, no.

Elias CJ No, no the author of the imperial laws application act.

Wdhs 1297.

Keith J 1297 sounds right.

Wdhs Edward I.

Elias CJ Yes.

Gault J Well the next is page 16 is it if I could move on. Not being interested in the Kings of England.

Wdhs The start Sir yes is at page 4 in respect of the principles which we submit are not absolute but paramount. And it's against those which all these other things need to be tested. The other aspect is the principle of finality, the objective of finality. Which is discussed, yes Your Honour, from page 14 of the written submission under the heading, review of the reasons for immunity with the bulk of this section dealing with the whole finality principle and the adequacy in our submission of the abuse of process doctrine to deal with the problems which will arise. Now the point that I'm seeking to make succinctly I hope is that it is not, and this should also be made in the light of the approach of the High Court of Australia in the d'orta case where it is submitted the Majority judgment of the four judges in the joint judgment in particular in our submission elevates the principle of finality to a, not to an absolute, although there are statements in that judgment which express it that way, but to a principle that should only have exceptions in the rarest of cases where there are compelling needs for that to occur and in our submission that turns the principles on their head.

It is the fundamountl principles which we deal with in the written submission in s.2 which are the startg point and that is recognised or the way in which the matter is put certainly, with firmness in all of the judgments I believe in **Hall v Simons**, and indeed in the judgments in **Rondel**l and Worsley.

Tipping J Are you saying that the narrowness of the hc's approach to the exceptions from the principle of finality do not suffntly reflect the weight that should be given to the fundmtl principles.

Wdhs Yes Sir. And in fact there is a statement in d'orta which might indicate that the Court there was not attaching any real significance to the normal right of access to the Courts of a party who has suffered a legal wrong any great weight at all.

Elias CJ But it question-begging? Because no-ones, I'm just struggling to see that the principle of access to the Courts is engaged here. Because the question is whether there is any right to be given effect to. After all people have had access to the Courts here on the strike out application. It's been held that there's no cause of action. Where's the impediment to access to justice.

Wdhs That's the matter to be taken up in the consideration in the juristic nature of the immunity. It is not, and that is why in our submission this question does have some importance. It is not a case of the Court saying, in the case of work by advocates in Court or intimately connected with the Court, there is no duty of care. Our submission is that there is a duty of care and numbers of judgments acknowledge

that. But there is immunity from suit in respect of the duty of care, the legal duty of care that exists.

Keith J So you're saying it's an **Osman** type case where there's.

Wdhs It's of the type that **Osman** thought they were dealing with.

Keith J Yeah, mm, so it's a blanket immunity.

Wdhs Yes.

Keith J The King or the barrister or whoever it is just can't be sued.

Wdhs Yes.

Tipping J The real question is, and I'm not trying to knock the jurisprudential argument but the real question is whether you should deprive someone who is meritorious if you like, forget all this juristic terminology, of a remedy because of a higher public intrest. Isn't that the real nub of the matter. If you've got a meritorious plaintiff, prima facie that plaintiff should have a remedy.

Wdhs Yes Sir.

Tipping J The issue is whether there's a higher interest in protecting Court processes, finality and so on.

Wdhs Yes Sir.

Tipping J That means you've got to say, sorry to that person in the interests of the wider public good.

Wdhs Yes, yes.

Tipping J Isn't it. I mean it's easy to state in those terms. But isn't that really at the core of this.

Wdhs That is the nub of it Your Honour.

Tipping J Yes.

Wdhs But there is, and again it could end up being to an extent a semantic argument but it is important in our submission to retain focus on the relative importnce of the interests one is seeking to deal with.

Tipping J Of course. I'm not, please don't think I'm knocking that. I'm just saying that one can get perhaps a little, one's vision can become a little narrowed if one gets too technical about sort of whether it's a cause of action with an immunity or no cause of action at all and so on and so forth. But I think we've reached the.

Elias CJ I think we've reached the time where we'll take the lunch adjournment and we'll resume at 2.15 pm.

Wdhs Your Honours.

Elias CJ Thank you Mr Woodhouse.

Court adjourns 12.51 pm.
Court resumes 2.18 pm

Elias CJ Thank you. Yes Mr Woodhouse.

Wdhs Your Honours. I turn to make some points. Connected points, but I'll make them under headings, the broad subject perhaps being the relative importance of finality. And under the heading in my note here, exceptions to finality. And bearing in mind that as we see it and respectfully submit correctly, there are two elements to it. One is the desirability of avoidg relitigation. And secondly and in our submission more importantly the desirability of avoiding conflictg decisions of Courts.

There are, and it's been noted in the argument so far and noted at paragraph 59 of our written submission, numbers of exceptions in relation to the avoidance of relitigation taking that in its broadest sense, and the most common and obvious being an appeal. But there are numbers of examples. Secondly there are numbers of exceptions that arise in different ways to the more fundamental and important objective of avoidg conflictg decisions or decisions which are not directly and technically in the legal sense in pure conflict but one differs in important material respects from another. And again that, from the examples that we give at paragraph 59, occurs on an appeal when an appeal is allowed. And of course it can occur on successive appeals where, and the obvious sorts of ways where that can occur where there decision in New Zealand of the Court of Appeal which allows an appeal from the High Court is then reversed again and there's a series of, not in a strict legal sense, conflictg decisions but there are, and I'll come to the real importance of this in relation to the administration of justice and that's what it all relates to. And public perception. That's what all this is driving towards.

In the course of argument there was reference to the fact that there can be conflictg decisions within Courts of the same jurisdiction and in New Zealand most commonly obviously within the High Court. And of course there are conflicts or differences in the decisions of those Courts where there are more than one judge such as on the Court of Appeal or on this Court.

The point of bringing these examples up and no doubt there are others, is that the public in our submission readily understands and accepts

these sorts of things which from the point of view of public confidence in the administration of justice are not significantly different from what may happen if an advocate is sued and the result of the decision in that case in some way casts or indicates that the result in an earlier case might have been different. And of course technically in most situations where there is a broadly direct challenge to the decision in the earlier case as a necessary part of the action against the advocate, in a strict legal sense it's simply saying that the public it is submitted, is well able to understand that in the first case the judge got it right on the basis of what was put to the judge. This case concerns what went wrong in terms of the handling by the advocate.

In the course of argument reference was made to the OJ Simpson case and the possibility of a civil action following an acquittal in a criminal case. And as I apprhended the discussion at that point, an acknowledgmt that the public is able to understand that although in a broad sense there is a conflict, it's one that can be accommodated within the administration of justice in this sense because of the different burdens of proof. And as I say, with respect, the critical thing here, and in our submission sometimes lost sight of in this debate as it moves into more refined areas of seemingly paramount principles of finality, the ultimate concern is with the administration of justice and the public perception of what is occurring.

Tipping J Wasn't there a judge, I'm trying to think who it was, who said finality is good but justice is better.

Elias CJ Atkin.

Tipping J Atkin was it?

Elias CJ Finality is a good thing, but justice is a better.

Wdhs Well I could never have put it as well or as precisely as that. But it's the essence of it. And in fact it's how to, the best means of achieving justice in a given case.

And I leap at this point beyond what I was going to deal with, to the abuse of process doctrine, and the way it has developed and this is an important aspect in terms of change, the way it has developed since **Rondel v Worsley**. It is a far more sophisticated means and does address the interests of justice in the individual case than blanket immunity which, to deal with the bad also prevents the good from proceeding.

Thomas J Could I just go back to that point about the public perception. That's the key to it isn't it, the public perception. Because I imagine that we wouldn't be too concerned about collateral challenges but the for the fact that the public might perceived this to be adverse to the

administration of justice. So that it's the public's perception which is the dominant concern?

Wdhs In our submission Your Honour yes.

Thomas J Yes.

Wdhs It's a matter of public policy.

Thomas J Yes.

Wdhs The rule is founded on public policy. Policy for the public. And in this case in respect of the administration of justice.

Elias CJ Well it's not entirely public perception is it because it's about the subversion of the institutnl safeguards provided by appeal, rehearing, those sort of ways of directly confronting a decision that is erroneous. So there's an institutnl value as well.

Wdhs I accept that Your Honour. There is a need to avoid an undermining of the way in which the institutn operates.

Tipping J And could there not also in some cases be an interest in the successful party in the now challenged decision.

Wdhs Yes Your Honour. And it's a point that I was going to come to and I'll deal with now. And a point I accept with respect as being a point of importance. The submission in its essence that is made in that regard is that abuse of process doctrine is well equipped, well able to address that sort of problem in the interests of justice. And I do repeat myself, a far more sophisticated way to deal with each case as it arises. I think Your Honour Justice Tipping mentioned the possibility of the original action being a civil case alleging fraud which fails. And the plaintiff brings an action against the advocate. And as part of the claim, needs to demonstrate that had things been dealt with differently fraud would have been established. That may very well be. And one has to look at each case on a case by case basis. But prima facie that may very well be a case, well that very well be a case where prima facie the Court would proceed on the basis that the abuse of process rule should be applied to prevent the second action from proceeding. And here that can be seen as being justified in the interests of justice looking at the interests of justice for the defendant in the original case.

Keith J I wondered about adminstrv law cases well mr wdhs which I notice Justice Laurenson deals with separately. If there's actually a decision of the status kind that is made in an administrv law case.

Wdhs Yes well decisions of the status kind in an earlier civil case.

Keith J Or in a family case too.

Wdhs Yes, yes, and they may very well be.

Keith J Mm.

Wdhs The point, thinking of the point I was about to make, is that that probably would be the way in which the Court would approach it, on that prima facie basis. There may very well, however, be cases where there should be an exception and it's noted in some of the cases referred to in the written submission, including those involving apparent collateral attack on decisions in criminal cases, that sometimes the interests of justice may warrant an exception. But they may very well be exceptional cases. And it's perhaps unproductive to try and speculate about examples. And of course that's not the way the common law tends to deal with these things in trying to anticipate what may occur. But then immediately doing what I've said is unwise, in an earlier civil action for fraud, it may be that the material put before the Court in the subsequent application, seeking to proceed with the action against the advocate, demonstrates beyond any reasonable doubt that fraud occurred and perhaps that material and the reason why the definitiondnt succeeded in the first case was further fraudulent action on the part of that defendant although of course that would be a separate reason for setting aside the earlier judgment. But I am speculatg.

Tipping J I'm inclined to think, without getting too dogmatic about it that it prima facie, to use your term Mr wdhs would be problematical to allow someone to collaterally challenge either a civil or a criminal judgment or verdict without having impeached it by the Conventionl means. I mean there may well be exceptions as you say. But it seems to me that if there's any strength in the policy at all, one would need at least some presumptive approach.

Wdhs Yes.

Tipping J If you're going to leave it to sort of, oh well, look at the ceiling, look at the floor, let's see whether this is an abuse suit, no-one's going to know where they stand.

Wdhs Yes Sir, well with respect I acknowledge and I, using the word prima facie, there would be a presumption.

Tipping J Well I was only bldg on.

Wdhs There would be a presumption.

Tipping J Because in England they've basically said haven't they that you can't attack a criminal conviction collaterally. You've got to have succeeded on an appeal.

Wdhs Yes. And perhaps the particular focus in **Hall v Simons** being on the criminal situation because of the divergence in the opinions of Their Lordships and that need for the original conviction to have been first set aside, was noted.

Tipping J Well for myself.

Wdhs And as Your Honour says, that may very well be the need in respect of civil cases.

Tipping J Yes.

Whds Which involve a status determination of the sort that we have dealing with. But the whole, the essence of the submission remains the same. Abuse of process is a sophisticated doctrine able to to deal with this whilst preservg what is prima facie the lawful and we submit fundamental right of those indivs with a meritorious claim to proceed with it, where these other conflictg interests are not at risk.

Tipping J I think you might have some published work of Professor stephen rodd in your favour in relation to this submission Mr Wdhs. Are you aware of what I'm referring to.

Wdhs Yes Sir, there's his article in the.

Tipping J Is it the N**Z** law journal or, no.

Wdhs No, it was in the Torts.

Tipping J Torts Review.

Wdhs Tort review.

Tipping J Yes. I think it also appears in the most recent editn of his textbook.

Wdhs It's in the fourth ed which didn't make it into our Casebook. And I think in the chapter that deals with this in Torts in NZ, it's possibly a slightly fuller discussion than occurs in what appears in Tab 8.

Tipping J Yes.

Wdhs In our Casebook. As I recall it the discussion in the law of torts perhaps deals more fully with the cases; the appraisal which appears under Tab 8 perhaps is much the same in the textbook.

Tipping J Well he makes the point doesn't he that this technique is more rationally aligned with the mischief that one is endeavouring to prevent.

Wdhs Yes Sir. Yes. And that is the essence of our submission in other words. The debate since **Rondel v Worsley** has ranged far and wide when looking at reasons for immunity. Of course the whole foundatn of the submission we are now making is that the sevl other reasons that have been advanced from time to time have by and large, if not entirely, fallen by the wayside as having any weight or any sufficient weight to warrant immunity. And it allows the focus then to be upon, well the focus is much more focused on the sorts of issues that arise in respect of what we compendiously call finality. And of course what the submission I have just made is in fact supported by is the approach of the joint judgment, in the joint judgment in the d'orta case where finality and aspects of it is said by the judges of the High Court of Australia in that judgment to be the only significant but the determinative reason for retaing immunity with other matters regarded in earlier decades as having particular importance such as the duty of counsel to the Court and Their Honours opinion in **D'Orta**, having no real validity as an argument at all.

And the citation from the **Saif Ali** case, there is a citation from the **Saif Ali** case from Lord diplock in relation to the duties of the counsel to the Court as a reason where His Lordship was very dismissive of that. Perhaps I won't waste your time now in trying to find it. But trying to summarise what His Lordship said is that the argument is perhaps just a pretentious way of saying that a barrister or an advocate should obey the rules. And it is looking at it from that perspective and I'm now well off the point of finality.

An odd argument for a professional person, in this case a barrister, to advance. Anyway, the essential point being that these other arguments have entirely or effectively fallen by the wayside and the focus now can be upon the best way of dealing with the harm that in some cases undoubtedly might flow if an advocate can be sued by the client.

Thomas J Well it's not only the matters relevant to the issue of finality. I recollect that yesterday Mr Farmer referred to a case, **Moy** I think it was, where the Court was under the general rubric of considerg whether or not an action should proceed, able to take into account all the difficulties that counsel face and the problems that are peculiar, or perceived to be peculiar to counsel.

Wdhs Yes in assessing the standard of care that should apply in the event of an action being brought.

Thomas J Mm.

Wdhs Stepping, just going back slightly in the submissions I was making, Your Honour the chief justice referred to the integrity of the system in response to a submission I was making about public perception. And the public reaction. And I agreed with Your Honour's comments in that regard. Both aspects need to be taken into account. The note I had

made here, just developing this point, that flowed from the fact that there are lots of exceptions to relitigation and numbers of exceptions in a broad sense to the desirability of avoidg conflictg judgments, what this also in our submission, what this also points to is the robust nature of the justice system in its abstract sense. That way I sought to put it here is that the justice system is not a wilting violet. It's well able in our total system of Government, to deal with glitches, to deal with imperfectns. The submission is made in the written submission at paragraph 73 dealing with a particular possibilty but applicable more broadly and if I may read this. Perhaps if immunity goes there may be some claims which do impinge on the due administration of justice to some extent but which fall short of being an abuse of process or vexatious or within some other recognised category warrantg strike out or stay.

And this is the point that I was seeking to make. If that is so this is what our entire system of Government already accepts and accommodates. Our institutions of Government and our principles of law are not perceived as perfect or immutable. The public's confidence in the due administration of justice will not diminish because for example occasionally there is a successful and therefore meritorious claim against a lawyer which indicates that the decision in an earlier case might have been different if the lawyer had not been negligent. The legal system is surely robust, I used the word surely, approprly. The legal system is surely robust enough to survive things of this nature without any difficulty.

And that's concerned with the system.

Thomas J Well it has survived any number of knocks. Take the situation where as in the Thomas case, there were three or four hearings by Courts, ultimately one would have to say discredited. Too great an emphasis perhaps on the institutn. But no-one would pretend that today our system of justice isn't held in relatively high regard.

Wdhs Precisely Sir.

Thomas J And there are other examples one can give. It has to take a knock every now and again.

Wdhs Yes. And it's bound to just like the other institutions of Government. And I sought to continue the floral metaphor about wilting violets by also saying, in coming back to the point I'd originally made, that the public cannot look on the justice system, and it picks up what Your Honour's said, through rose tinted glasses. These things are accepted. Provided they're kept within reasonable check.

Under the heading, Parliament and finality we have picked up and now put into our supplementary Casebook, through diligent research, the decision in Daniels and Thomson together with s.396 of the, this is in

the respondent's supplementary Casebook, the Daniels and Thomson original decision of the Court of Appeal under Tab 16.

And then s.396 of the Accident Insurance Act 1998, being the amdmt that was made following that Court of Appeal decision under Tab 19. And the point of the reference, and with respect Sir picking up the point as we understand you were making, as an indication that Parliament does not see finality in Court decisions as being certainly anything like the paramount objective as it is said to be in our submission in the High Court of Australia decision in **D'Orta**. My learned friend ms challis referred to the parliamentary debate and to the extent that these things assist, and one of Your Honours referred to the way in which these matters come before the house in the first place and then of course they do go through the various processes and so on, with other matters no doubt addressed in Select Committee.

But in the House the hon derek quigley said, and this is at page 142 92 in the transcript from hansard that my learned friend handed up, page 14 202 at the foot of the page. And just notg before I read this that the minister there at least appears to have been alert to the matters that are of concern to us in respect of finality and different decisions of different cts: the court of appeal concluded in the particular limited field where the criminal law has intervened or is likely to intervene exemplary damages are not justified. I disagree with that very very strongly. And I disagree with it for a number of reasons. First and foremost I think that the forum of the criminal Court and the forum of the civil Court are quite different. And I think we ought to take that into account. In one jurisdiction the whole case is run by the crown. And in the other case, in the civil Court, the plaintiff can run his or her proceedings. I think also the status between these two Courts is quite different. And so on.

And in fact over the page, in the second heading in bold, hon derek quigley, given two more minutes. Reference had been made, research had been done on English and welsh Law Commission reports. I think this, I don't want to take this too far. It is indicative.

Thomas J Yes it's either indicative or if the people's representatives haven't even addressed the point of relitigation it must go to the question of perception. They haven't perceived it as being sufficiently important to direct their minds to it. So either way it seems to me it is of some value.

Wdhs Yes and what I've been endeavouring to show is that it seems likely from what is recorded is that the minds were directed to this issue.

Thomas J Mm.

Elias CJ Or they haven't perceived it at all in which case it can't be of much value.

Wdhs Well yes. Yes either way.

Thomas J Yeah, either way.

Wdhs But perhaps.

Gault J The debate did refer in more than one place to the somewhat related point of double jeopardy.

Thomas J Mm, mm.

Gault J And passed it aside.

Wdhs Yes Sir.

Tipping J Was the onus of there was a standard of proof. Did that feature in the debate.

Wdhs I can't answer that question Sir.

Tipping J No that's probably getting a little too refined.

Keith J Well Mr Quigley's statement picks it up.

Thomas J It does.

Wdhs Implicitly he's going that.

Thomas J Mm, they had some sort of a report in front of them I think. I'm not sure, no.

Elias CJ I must say I'm a bit lost in this relitigation myself.

Keith J Well I mean the broader point is, isn't it, that Parliament in this statute and in a number of others does contemplate that sometimes matters will be dealt with sequentially in different jurisdictions. And doesn't close it off. I mean that's the.

Wdhs And implicitly that there may be conflicting decisions of different Courts.

Keith J Mm sure.

Wdhs In this cse the criminal one and the civil Court which is assessing whether there's liability for exemplary damages.

Tipping J I must say Mr Wdhs I'm attracted to the proposition that I think in part derives from Lord bingham when he was master of the rolls, you refer to it in paragraph 63 of your written submission with a footnote to the

Smith v Linskills a firm, case where as I recall the approach of His Lordship with the concurrence of the other two members of the Court of Appeal was to basically have a startg poing tht it would be an abuse of process to collaterally attack but to say that it might have to give way in the face of the demands of justice.

Wdhs Yes Sir.

Tipping J I suppose I'm just playing the same tune really. But there's actually a very useful discussion of the whole issue in that judgment. You've footnoted it which is helpful but I've actually read it.

Thomas J What judgment was that please?

Tipping J Footnote 43 to Mr Wdhs's written submission at the bottom of page 16, Smith and Linskills. It was a claim against solicitors as I recall and it did involve this question of relitigation. But the way they solved it was by saying that in ordinary circumstances it would, as I recall, it would be an abuse but not always.

Wdhs Yes and I regret that I can't immediately put my finger on it but there's at least one or two cases where this exceptional course has been taken.

Tipping J Yes.

Keith J What's the correct reference for that.

Wdhs I suspect it's All ER Sir.

Keith J Yes.

Wdhs And I do apologise that some of the footnotes in this in the body of the text has errors.

There's a point we seek to make orally and I've given it the heading, the nature of relitigation and conflictg decisions. Which is perhaps not very informative. When considerg both relitigation and conflictg decisions, as an outcome of the removal of immunity, the nature of what occurs with each needs to be borne in mind. Firstly with relitigation it is not a reopening of the controversy in its entirety, being the controversy already settled in the earlier Court decision. At most there may be need, and perhaps often there will be need, for a fairly full traversal of the subject matter in the previous case.

Tipping J Won't it, most, not always, but mostly be a loss of a chance exercise. It's unlikely that you're going to be able to say that had counsel not been negligent we would definitely have won. I mean you might be able to but.

Wdhs Well there may be the odd case where one can say that.

Tipping J You could but.

Wdhs You could argue that but it's more likely to be that sort of argument Sir yes.

Tipping J Yes. And I suppose you could say, and this is just thinking aloud, that the loss of the chance of wining isn't so dramatically antithetical to the earlier judgment.

Wdhs Yes Sir.

Tipping J Than the proposition that we would have won.

Wdhs In this case, using it as an example, the argument will have to traverse what would have happened if the invitn from justice blanchard hadn't been accepted, however it came about, and the argument as to whether our clients as directors could be liable for the primary liabilities of the company had been avoided by the agreement to entry of judgment or however it precisely occurred on the facts. It will be necessary to consider whether if the whole issue had been run on its merits judgment would have been given against them. But that will be necessary. But in the circumstances of this particular case, and I was going to come to this particular case to try and in my submission, just bring this whole matter back down to earth and just look at this particular case, it doesn't raise, to do that does not in our submission raise matters antithetical in any material way to the matters that are of concern in respect of the administration of justice. And if one uses the abuse of process doctrine as a door keeper when each one of these, if the blanket immunity is removed, to determine whether the case can proceed, it's well able to look at, we're doing it now. Well able to make an assessment as to whether there is likely to be any materl harm of such gravity, and I emphasise that, of such gravity. There may be some potential problem, but it may not be of sufficient gravity in the interests of justice to prevent the matter from proceedings. In the intrests of justice the matter perhaps, well in this case, it will be submitted, should proceed.

The point being made was in relation to the relitigation question. The other aspect of finality is conflictg decisions. And the solitary, essentially solitary point that I wish to make in this context when considering the nature of the conflictg decision and how it arises, if it arises, and there is an apparent conflict or a degree of conflict and in most cases it won't be absolute in any event, it will have arisen on a meritorious claim against the advocate. And if one certainly considers this from the point of view of the public perception, the submission is made that it is unlikely that the public would consider that this gives rise to any material concern. And the submission on the other side of the coin is made, that it is more likely and it seems a reasonable submission to make, that in this sort of case where one is assuming the

claim is meritorious and would lead to judgment against the advocate, the public would at the very least be surprised that the matter wasn't able to proceed because of a blanket immunity designed in fact to prevent other types of claim, quite different, from proceeding.

That was bedded in reality. There's a heading, how to prevent finality harm. I don't think there's need for me to further address this orally. The answer of course to my own question or our question is by applying this far more sophisticated doctrine as it has developed in more recent years, of abuse of process. Far more sophisticated than the blunt instrument of complete immunity.

The point is made in this context that the question here is not whether abuse of process is as effective as immunity in removing all finality concerns. Abuse of process will not be as effective in removg every concern that might be considered. But that is not the question. The question is what is the most satisfactory means, having regard to the fundamental principle of access to and equality before the law. Or putting it more broadly, the overall interests of justice and the various factors that need to be considered in that context.

Abuse of process, it is submitted, as a legal tool, involves considerations which the Courts are very familiar with. It involves as by case consideration. And case by case consideration of what is best in the interests of justice, weighing it from the various matters that need to be weighed.

If blanked immunity is removed, and abuse of process is used as the means of dealing with problms, it may require refinemt over time as claims against advocates are dealt with but it is submitted, that cannot be a sound reason to retain blanket immunity if the Court is satisfied that broadly speaking the doctrine of abuse of process is sufficiently sophisticated and developed to be put into operation in this particular area now. And it's submitted that it is.

Gault J What was the case in New Zealand, it was the social credit man wasn't it, O'Brien? Social Credit.

Wdhs Mm.

Gault J That was an abuse of process case where it was held that it would have involved relitigation and then therefore it should be struck out. Did the Court attempt to formulate any principles in relation to relitigation.

Wdhs I regret I can't assist Your Honour in any material respect at the moment in respect of that decision.

Keith J It's in here somewhere isn't it.

Wdhs The further benefit, and this is a sept point and it's directed to the intimate connection test and it's the problems that can arise with it. The submission is made that abuse of process, the doctrine of abuse of process is a more sophisticated tool than the intimate connection test for deciding when claims can proceed or which claims can proceed and which cannot.

And responding now to the first, perhaps the first point made by my learned friend Mr Farmer in his opening comments. The submission is made that the consequence of the Majority decision of the Court of Appeal and what the respondents in this case are seeking to uphold is not a radical change. A decision which affirms the Court of Appeal and which follows **Hall v Simons** involves in the respondent's submission a modification of a rule of common law. It's a devlopmt to deal to the same end but it's a development from what we submit is a crude form of blanket immunity for actions in an uncertain range of advocates' work to what may be described as a sophistcd form of selective immunity which arises by application of the doctrine of abuse of process.

And on the question of radical change, to the extent that it really has relevance, and it's submitted that it's perhaps with respect an overstated consideration, but on the question of radical change it's submitted that what the House of Lords did in **Rondel v Worsley** may be seen as being substantially more radical in that there was a complete reformulation of the grounds for immunity on the basis of public policy. Coupled with that, and this bears on this question of retrospectivy, in one fell sweep retrospectively, the total immunity that barristers in England had for all of the work that they did of any nature, was removed and the immunity was confined on the precise decision of **Rondel v Worsley** essentially to in court work but leaving open, because there was no precise decision to the contrary effect, work related to Court work with the development that occurred in the test developed in **Rees v Sinclair** and adopted then in England in **Saif Ali**.

And of course on the retrospectivity point, which thank you Your Honours for leave to to do this, my learned Junior mr collins will dealt with. The House of Lords saw no difficulty in removing the immunity that did apply to all other work that barristers did.

The one final submission I make orally in respect of what now confronts the Court and tied in to an extent with this question of radical change. This case is the first time that this issue has come before New Zealand's final Court of Appeal for complete appraisal in the way that it is now before Your Honours. And that is not a matter of insignificance when considering whether in fact it is appropriate through this Court as opposed to by other means such as leaving it to Parliament, in considering whether to uphold the decision of the Majority of the Court of Appeal.

There is in fact one other point on this central submission and it's perhaps just putting things in different words. What blanket immunity implies is that the common law of New Zealand is incapable of preventing a case from proceeding which will harm the administration of justice other than by also preventing claims which plainly will not do that. And if the proposition is looked on in that light it might be said to be a somewhat startling proposition that our legal system today cannot deal with the problems that will undoubtedly arise by better means.

The written submission proceeds following finality to deal with other reasons in the past that have been relied on. I did not intend to traverse that. We've sought to deal with that fairly fully in our submissions. And of course dealt with fully in the relevant judgments of the House of Lords and the Court of Appeal in this case and of course in other judgments.

Perhaps, and this may be fairly apparent from the argument that's proceeded up to this point. Some of the arguments in our submission really don't seem to relate in any event, don't provide any foundatn for immunity. Numbers of them seem to relate in particular to the problem of vexatious litigants and that lawyers may or may not be more exposed to such than others. But that in our submission cannot be a basis for even considering or even a factor to bring into account in considering immunity. Vexatious litigants do arise in all sorts of fields. And are dealt with by other procedures.

Section 4 of the written submission is concerned with this question of evidence. And I wasn't intending to make any further submission on this materl that's before Your Honours. There is a reasonably expanded submission on what appears to be indicated with reasonable clarity from what has occurred in Canada. Or putting it another way, what hasn't occurred in Canada. The sky has not fallen. There are indications at least in a negative sense that nothing has been put before the Court to show that in the five years since **Hall v Simons** any material problems have arisen of the sort which the House of Lords was concerned about in **Rondel**l and Worsley.

And one other point to bear in mind there if I may draw it to Your Honours' attention is the fact that when the decision was made with retro effect, there would of course have been six years under the limitation period preceding that within which a claim for negligence may have been brought in England. So that at this point, in 2005, there's an accumulative potential of 11 years of claims that may have been brought against advocates and no indication is put before the Court to suggest that anything of material consequence has occurred.

Section 5 of the written submission has the heading, changed circumstances since Rees was decided. My learned friend Mr Gapes has drawn to my attention that there's a point made in our written

submission about the experience in Australia also in the period between the first instance decision in Gianneralli with the removal of immunity and the reinstatement on appeal in Victoria. And according to the footnote here with appeals and Boland and Yates, under Tab 12 of the Bar Association's Casebook, in the 27 months between May 1985 and August 1987 there was no evidence either of an increase in the number of claims for negligence against barristers, nor of the duration of criminal trials conducted by barristers. There'd been a review by the victorian law commissn.

Thomas J As you say, that's not just the two years, that's the two plus 6.

Wdhs Plus the 6 that would have been assuming it's the same limitation period.

Gault J What was the footnote number.

Wdhs I'm sorry Sir, it's footnote 163.

Gault J Thank you.

Wdhs In Boland and Yates, Tab 12 of the New Zealand Bar Association's Casebook at page 615.

Gault J Thank you.

Wdhs And this is noted, without any great elaboration, at paragraph 119 of our written submission. And in case in amongst all of this material it leads to confusion, there's a footnote referring to the, purported referring to the report of the law reform commissn of victoria as being in our Casebook, which should have appeared at Tab 6. But what in fact appears at Tab 6 is a submission from the victorian bar to the attorneys general, fervently urging them not to remove immunity.

Elias CJ Yes.

Wdhs The matters that I would just elaborate on briefly if I may in respect of changed circumstances are these. To the extent that it is necessary to point to changed circumstances, and we've submitted for reasons set out in the written submission that it's not necessary, for reasons mentioned I think by Lord Reid in **Rondel v Worsley**, these matters, matters of public policy require review from time to time and what is occurring, what we are asking Your Honours to do and we asked the Court of Appeal to do, is to review the whole matter in the light of modern perceptions. And perhaps of additional importance in New Zealand having regar to the way in which the matter has only ever been dealt with in one case, namely **Rees v Sinclair**, it wasn't addressed in Bigger and McLeod as an issue of principle, it's the first time the matter has come before the final Court of appeal in New Zealand and requires in our respectful submission, full reappraisal in all respects.

Not just in the lt, not just because there are changed circumstances. But there are changed circumstances. Numbers are noted. Those of importance in fact are dealt with in other parts of the submission. The first might be seen as the developmnt in more recent times and particularly since the **Hunter** decision in England of the abuse of process doctrine.

The second important development in our submission, and it's just noted in summary in the written submission at this point, but dealt with much more fully earlier, is the reaffirmation of the human rights, fundamental rights principles that in fact stem originally in the common law from magna carta. These are very ancient principles but they have received firm reaffirmation by Parliament recently in New Zealand. And they are important changes.

Thomas J There's one changed circumstances which various judges, including the judges in **Hall v Simons**, referred to about that and that's the commercialisation, they refer to it as the commercialisation of legal practice. Now I have seen this in my time where litigation was a poor relative, a public service by the large firms, to the point where it's become a profitable business. And at the bar of course, fees are charged which probably have no justification outside the fact that the market will stand them. Now there is very definitely a change there. But I have trouble linking it to the issue of an immunity.

Wdhs So do I Sir. It's not a factor that we're putting forward.

Thomas J Right, okay.

Wdhs It's not a factor that we've put forward.

Thomas J Well it's certainly put forward in **Hall v Simons** of course.

Wdhs Yes.

Thomas J It's just not explained, that's all.

Wdhs Yes. The one other change that I would touch on although it is dealt with in the submission, is the changes in the Court processes and particularly case management. And first of all to dispose of an argument which in our submission seems not to be relevant, it's not concerned, the submission is not made as an indication that vexatious claims are now more easily dealt with and more effectively dealt with by the Court. The point of the submission is that the case management considerations, and all claims against advocates will be civil claims or the ones we're concerned about, civil action generally for negligence, the case managemt system in our submission will facilitate the earlier identification of cases which may in fact put at risk the matters that have been identified in relation to the finality issue. And that is, I don't seek to overstate the relevance of this but it has importance in relation

to the most effective management of the problems, the potential problems that would arise from the removal of the blanket immunity.

Tipping J Are you really meaning here that there has been a rise in the ability to summarily dispose of unmeritorious or.

Wdhs Not to summarily dispose of them Sir. But more the system is at least designed, whether it always achieves this, to identify at a much earlier stage of a proceeding whether the particular claim that's been brought is one which has ramifications in relation to the matters of concern that we've been dealing with.

Tipping J With a view to getting them.

Wdhs Then with a view, yes, I'm sorry Sir, yes.

Tipping J Sorry I omitted the first step. Yes.

Wdhs Yes, yes

Tipping J But that's the essence of the point is it.

Wdhs Yes Sir.

Tipping J That the system is now more capable of accommodating early intervention.

Wdhs Yes Sir.

Tipping J In these sort of cases.

Wdhs Yes, certainly. With a view to.

Tipping J Whether by summary judgment or abuse of process or whatever.

Wdhs Yes.

Tipping J So the fears of hundreds having to run needn't be as great as they perhaps were earlier.

Wdhs Yes Sir. That's the point.

Tipping J Yes.

Wdhs And perhaps one further point although it is made in the written submission. Emphasis has been given in the submissions for the New Zealand Bar Association to difference between our rules and those in the UK in relation to the rules for strike out and summary judgment for defendants and so on. And undoubtedly there are differences and the point of emphasis is different. The submission we make is that that is

not, well it's certainly not a reason for retaining immunity. All that discloses is that the manner in which in New Zealand we prefer currently to go about assessing these matters is different from the way in which they choose to go about it in England. That's the only point of relevance. And it reflects the differences in policy that exist of course in each country.

Unless there are matters that Your Honours wish to put to me, those are the submissions that I was wanting to make orally on what does seem to us to be the central point.

Gault J Mr Woodhouse are there any cases dealing with the status of the immunity in respect of intentnl torts, malicious torts.

Wdhs The submission was made by us to the Court of Appeal and it hasn't been made to Your Honours, that there is certainly a question, it may be touched on in the written submission here, but it's certainly not developed, there is a question as to whether immunity does apply only to claims made that would otherwise be made in negligence or contractual.

Gault J I just had a quick look at that O'Brien case and that was a malicious prosecution claim. However, thank you.

Wdhs Well yes Sir. It perhaps points to the, there are certain, one of the Judges in **Rondel v Worsley**, and I regret that I can't take you immediately to this, made the observation that they were only dealing with claims in negligence. And that no doubt a claim founded on dishonesty, but I can't remember the precise way, of the advocate would not be prevented by immunity.

Gault J Well hard to see that immunity would be justified having regard to the purpose for it.

Tipping J Well under the old regime where there was the emphasis on contract, the formulations such as in the Earl of Chelmsford case and so on were very much to the effect that provided the lawyer acted in good faith.

Wdhs Yes, yes.

Tipping J Which would, of course there are some intentional torts where you could debate whether there was good faith or not. But it would be somewhat antithetical if we can use that word again, to allowing it to run in an intenl tort area.

Wdhs Yes Sir. Yes. Qutie.

Thomas J Do you know what the basis of the exception for prosecutors is in those jurisdictions where they don't have the immunity other than for

prosecutors. Who is the fear. Are they fearful that accused who have been acquitted will sue a prosecutor or what.

Wdhs The basis for it, well it may be for being prosecuted on conviction or acquittal, there may be an unwarranted response or even a warranted response in some cases, by the accused or the person who's been convicted. The immunities, certainly in the US, re statutory immunities. Not immunities developed at the common law.

Thomas J I suppose it has more to do, I don't know but I suppose it has more to do with persuading people to become prosecutors and thereby exempting them from any possibility of suit.

Wdhs I can't assist Your Honour I regret on the point.

Thomas J No.

Wdhs Thank you Your Honours.

Elias CJ Thank you mr wdhse. Now who's going to go next.

Wdhs Mr Webb.

3.22 pm

Elias CJ Mr Webb. Thank you Mr Webb.

Webb Your Honours I'm going to expand somewhat on the submissions starting from paragraph 15. It is the case for the Lais that the question here, as has been repeatedly stated, is whether or not the right of access to justice should give way to a more pressg need to protect the due administration of justice. So far the focus has been predominantly on the due administration of justice. And I propose to look at the question of the right to access and develop the strength of that right and also to touch on the manner in which that right should be balanced against the need for the due administration of justice.

I will then examine very briefly the rule itself and the purpose of that examination will be simply to emphasise that this is not some ancient rule which has great legal pedigree but really it's a rule that lies on a pretty shaky foundation and it is in fact right to be revisited by this Court.

To turn to the right to access to justice. It's my Sir and ma'am that this is, it's important to take this as a rational starting place. To date we've been talking largely about the processes of the Court. But the proper startg place for any analysis is to accept that the Lais have a right to bring their claim before the Courts. And then and only then to ask whether that right should be displaced. Certainly not the other way round.

I would submit that it's well estalbished that there's a fundamental right that the lais have access to the Courts. And starting, as Your Honours have noted, from magna carta and then found in the statutory affirmatn of those principles in s.27 of the New Zealand Bill of Rights Act. Although s.27 is a procedural section and there's no point taken with that, it does require, if natural justice is to be done to any litigant, that they have access to justice. You can't have natural justice without first having justice.

I also note that that piece of legislation was passed in recognition of New Zealand's obligation under the international covenant on civil and political rights. And the language of Article 14 of that should be taken into account.

Once we've established that there is that right to justice, and I think that can be taken, we then need to turn to wther this rule that is currently under examination is in fact a denial of that right. And I'm loath to engaged in the discussion about whether it's an immunity or a privilege. I think perhaps this discussion is best framed in terms of whether it's an exclusionary rule or not. That is to say, whether the rule denies the right to be heard or whether it is a rule which simply says that there is no duty owed.

Once we establish that point we can then, once we establish that it is an exclusionary rule, we can then use the rights of jurisprudence to ask whether the interests of justice demand that the right be overridden. And that's relatively well established. The question of whether the need for the administration of justice is demonstrably justified as being an appropriate dominating factor in a free and democratic society. That's of course s.4 of the New Zealand Bill of Rights Act. And I would emphasise that it needs to be demonstrably justified, not simply inferred from speculation on what the future consequences of the removal of the immunity might be.

And it is my submission that this Court needs to examine carefully the mattes put before it in respect of the position in Canada in particular and also in the US and in the UK. Because that is good, useful facts upon which to determine whether it is demonstrably justified that the existence of the immunity is a necessary doctrine to protect the administration of justice.

From paragraph 22 of the submissions and further on there are a number of statements and footnote 6 contains a compendium of statements identifying that the immunity is a rule which precludes a person from bringing a claim. The point.

Tipping J Isn't the reason for that that they have no cause of action. I mean this is like a dog chasing its tail in a way.

Webb I wasn't to say exactly that, but it is, but there is a degree of circularity there.

Tipping J Yes.

Webb But I would submit that that can be answered by simply noting two points. Firstly there is no tort, no tort analaysis being engaged in by this Court or any other Court that considers these questions. The principles of the law of negligence simply have not been addressed. And the reason they haven't been addressed is because they're in fact not relevant because this is an immunity. No-one is engaging in analysis about foreseeability and proximity or about the nature of the loss that has been suffered. Or even an economic analaysis that might inform us in these regards if we're engaging in a negligence analaysis.

The other point I would made in respect of identifying this as an exclusionary rule is that this is not, does not exclude only tort claims. The focus has always been on tort claims. But it is quite clear that contract claims will also be excluded. And wherever a practitioner is acting as a solicitor as well as a barrister, there will be a contractual nexis. And where there is a contract, there is very much a right to sue for damages caused by a contractual duty of care. But I don't think there can be any suggestion that this doctrine currently under examination doesn't also preclude a claim under the contract.

And I will make one further point in respect of this being an exclusionary rule. And that is that if we go back to **Rondel v Worsley**, where the Court adopted a Court based immunity as its foundn for this new immunity, that was the doctrine which prevented claims for slander in Munster and Lamb against counsel who said damaging words in Court. And once again that's yet another immunity. A classic immunity where whatever you might say and whatever duties you might have breached, the wronged party was precluded from taking any action.

Gault J I suppose if it is just simply a matter of no cause of action in tort, then it's not a privilege. You don't need a privilege. There's no cause of action.

Webb That's right Sir. That if we did simply take a wholly tort based analysis, the privilege problem would fall away. But I mean once again, I don't want to discuss whether it's a privilege or an immunity. Which is why I've adopted this language of an exclusionary rule.

Gault J On my account, I think there's a clear distinction between whether there's no cause of action and whether it's an immunity. I think it is the latter.

Webb Yeah.

Tipping J In a modern tort analaysis at least in New Zealand you would say that at the first step there's a prima facie duty of care but it is overtaken by policy considerations if you were going to uphold the whatever we're calling it wdnt you.

Webb Yes.

Tipping J And you'd end up with the view that there was no cause of action or there was no duty of care cognizable at law.

Webb I think we would end up with the point that there's no duty of care which the law recognises.

Tipping J Yes.

Webb Which is in fact what the English Courts did in **Osman** which is what of course the European Court of HR failed to recognise and later corrected in **Z.**

Tipping J Right.

Webb And it is our submission Sir that there's no harm done to our case by **Z** because it was, it's simply not helpful because they were situations, **Osman** in respect of police, **Z** in respect of local bodies in social welfare responsibilities, where the Courts engaged in a fully fledged and quite detailed analysis of the considerations that apply to whether or not a duty of care in negligence should exist. That hasn't been done in this case or in any of these barristerial immunity cases. So in terms of whether there is a denial of the right to have the matter heard and determined, according to the normal principles of the law of tort or the law of contract, that right hasn't been afforded the Lais in this case. And the very object of this doctrine is to preclude that matter being heard.

Thomas J I would have thought that most cases of negligence against the advocate would be on the basis of the **Hedley Burn** principle. That is advice will have been involved. There has been an assumption of responsibility to provide due care and skill. And the recipient has relied upon that or it's been perceived the recipient would reasonably rely on it. Those are the two legs of **Hedley Burn**.

Webb Yes.

Thomas J Now in Henderson and Merit the House of Lords held that if those ingredients were established one did not go on to discuss whether or not it might be fair and reasonable and so on in accordance with policy. In other words, the policy considerations were subsumed in the elements of the cause of action under **Hedley Burn**. Now that be the case, it seems to me that you're much closer to being able to say there

is a duty and the only way that this can be analysed is as an immunity and an exclusion from that duty.

Webb Yes. I agree entirely Sir. If the hedley burn cases are the only ones that come before the Court.

Thomas J There will be others I accept.

Webb It's conceivable that there are others that fit into different factual frameworks where there has been some error of judgment which has been criticised.

Thomas J Well you've only got to run your eye over the factual situations of the cases, numerous cases, to see that in most cases it's been a question of advice.

Webb Yes, especially those settlement cases which in fact form quite a large part of those that do crop up. So that is certainly the case if we take the Henderson and Merit Syndicates approach that if those two items are established and the policy considerations are subsumed in that, then simply to say you have no cause of action must be an immunity because there's no space for the wider considerations.

Thomas J There's no space. There's no space for the policy considerations to come in.

Webb Yes.

Elias CJ Mr Webb we'll take the afternoon adjournment now thank you.

Court adjourns 3.36 pm

Chamberlains v Lai Part 8
Wed 19 October 2005

Court resumes 3.53 pm

Elias CJ Yes mr webb.

Webb Thank you ma'am.

Elias CJ Mr Webb, where are you heading now because I think, did you have more to enlarge upon in terms of the juridical basis.

Webb Not greatly Your Honour. Really I simply wanted to establish the existence of the doctrine as an exclusionary rule.

Elias CJ Yes.

Webb And then move to the point that if it is an exclusionary rule as we submit, then the proper approach for the Court in considg this would be to weigh it in terms of the Bill of Rights approach which is really outlined in clause 4 of our submissions as very much our startg place.

Elias CJ Yes.

Webb And these really are foundnl matters. And it is our submission in light of the fact that it is an exclusionary rule, to be justified it needs to be shown that the administration of justice is of fundamental importnce. I think that goes without saying. But also it needs to be shown that the measure taken to protect the administration of justice actually has that effect. That there's a causative link between the immunity and the claimed consequence of the protection of justice. And it is our submission that this simply hsnt been shown. And because this in our submission.

Elias CJ Is this a proportlty argument.

Webb Well no, it's more fundamtl than proporty. It's simply, it's almost an evidentl point in the sense that anyone seeking to uphold an immunity must show that the steps taken protect the interest which is at stake. And the immunity it is submitted doesn't, or there's no clear and convictiong, and that's what it needs to be, demonstrable evidence before this Court that there is a link, a real link between the existence of the immunity and the continued proper administration of justice in the public perception.

Keith J Well it does prevent summary litigation doesn't it. And you're acceptg that summary litigation should be stopped in some way. But isn't your point the Chief Justice's one that in terms of proporty it goes too far. It's an overreach.

Webb Yes, and that's my point 4.4.

Tipping J It's … Hoffman's peak.

Keith J Yes, yes.

Webb Yes. Which is a strange metaphor from that particular law Lord.

Tipping J Well he's obviously a devotee of charles lamb I would think. If you can forgive the.

Webb That's exactly right Sir, that in terms of proporty and my learned Senior's argument has been on that basis, that it's a wildly disproportionate step to take to exclude countless legitimate claims to protect the administration of justice from a small number of truly problematic claims. Of course our key submission is that this is far better effected by a sophistcd abuse doctrine such as that found in

O'Brien although O'Brien v Social Credit Political League although that was, arguably the Canadians have taken that one step further in this exact context. And those authorities are mentnd in our submissions. And there are a number of Canadian authorities. Actually we have that case here, the social credit case if Your Honours would care to, I don't intend to discuss at length because that case isn't I would submit particularly helpful here. It is interestingly an example of the abuse doctrine being used to stop a civil claim from relitigating an earlier civil claim. Which is exactly.

Keith J So it is helpful here isn't it.

Webb Well in that regard it's helpful. It's an unusual case in the sense that it was a litigant suing opposing counsel in earlier litigation saying that their claim was ill founded and should never have been drafted. And in fact the case could have been disposed, and the Court noted that there was simply no duty owed by a counsel to the opposing litigant. But also it was struck out because its predominant purpose was the attack on the prior litigation. I would submit that the hunter principle is a little wider than that. And certainly the Canadians have taken a broader approach and said it's not necessary only that the attack be, sorry the claim be an attack, but even if it is properly motivated but has the effect of undermining the administration of justice in a serious way then the abuse doctrine will make that balance, undertake that balancing exercise and if necessary preclude an otherwise deserving plaintiff. But the great merits of that approach are that it only precludes the one plaintiff. It does not preclude all of the plaintiffs who might bring an action. Now that one plaintiff might have cause for personal umbrage. But in terms of the proporty point which is really what I was pointing to, the abuse doctrine as adopted in Canada as articulated in hunter is a finely tuned doctrine and I would submit that there is no case which slips through the abuse doctrine. Any case which the applicationts here raise as problematic is caught by a fully fledged abuse doctrine. And a doctrine of that nature which can be so tailored is a wholly legitimate response to the problems which this very broad brush immunity is allegedly aimed in a very inaccurate way.

Tipping J There is that, I think, quite well known passage in the judgment of mr justice somers at 95 line 12 where His Honour summarised the sort of symetry between reas judicata, estoppel and abuse of process and set out the, and perhaps some would say he put it a little but too strongly that a collateral attack upon a final decision in other proceedings will not be permitted. Maybe that's just a little too high. But it will not normally be permitted or something like that.

Webb Yes and I think Sir, and certainly the Canadians have taken the approach, that there is a heavy onus on any litigant bringing a collateral challenge to show that the merits of their collateral challenge outweigh the deep concerns any Court would have in revisiting a settled judgment of an earlier Court.

Tipping J Mm.

Webb And that kind of presumptn is one which would fit with this situation.

In my submission I traverse the Euro Court of human rights and I don't propose to go through that material but I submit that it is valuable. I would make one minor note, and that is that the **Z** and the UK case in the materials appears to be the wrong case and if Your Honours are proposing to read it, it appears to be a draft and the points, the points quoted in the appellant's submissions I think are not in that version. So that's just a really procedural point.

Movg to paragraph 36 of the submissions and just very briefly. I just want to touch on the imprtnce and this is really a difficult submission in some ways. The importance that whatever position this Court takes needs to take into account the perception of the public as to the administration of justice. And it is my submission that the appropriate measure is that of the right thinking and enlightened member of the public. And there's an extract there from demarco that identifies the importance of social facts and the fact that Justice Creaver there said he did not believe that the enlightened non-legally trained members of the community would agree with me but I would hold public intrest requires that litigation lawyers be immune from actions in negligence. And then if I may refer Your Honours to a passage in **Hall** v Simons, Lord Hoffman and that's at Tab 2 of the appellant's bundle. And right at the foot of page 688 Lord Hoffman identifies the public perception in considering whether such a justification still exists, your Lordships cannot ignore the fact that you are yrselves members of the legal profession. Members of other professions and the public in general are bound to view with some scepticism the claims of lawyers that the public interest requires them to have a special immunity from liability for negligence. If your Lordships are convinced that there are compelling arguments for such an immunity you should not of course be deterred from saying so by fear of unfounded accusations of collective self interest. But those arguments need to be strong enough to convince a fair minded member of the public. They cannot be based merely upon intuitions.

So there's two aspects to that statement. One is that the fair minded member of the public needs to be able to look at the justice system of the profession and the bench and be confident.

Thomas J Let's not get too carried away. It probably comes down to intuitn as to what a fair minded and enlightened member of the public would think.

Webb Well I, with respect Sir, I'm cautious of resting something of this importance on intuitions. And that's returning, because that was my second point, to return to the point that when we're considg whether a right to litigate should be removed from a citizen, we should rest that

removal on demonstrable evidence that the removal of the right is necessary to preserve an important public interest.

Elias CJ I don't think anyone would take issue with that. It occurs to me mr webb that these points are part of the general policy matters that we've had developed to us. I'm not quite sure what additional points you want us to take from them.

Webb Well that point about the public perception I think is one important one that needed emphasis. But if I may now, I'll simply move to the brief overview of the rule or the foundn of the rule. Because I think.

Elias CJ Sorry which rule.

Thomas J The immunity.

Webb This is my last submission ma'am at paragraph 40.

Elias CJ Yes.

Webb Which identifies the fact that the doctrine of immunity is not some ancient principle but in fact it is a doctrine whch has been searchg for a rational foundn since the Switten decision. And it is our submission that that rational foundn is the abuse doctrine.

Thomas J Where does this take you though. I mean if it were an ancient doctrine it might be easier to say, oh well it's well and truly out of date now.

Webb Well, my point is simply that it's never been settled. And in terms of whether this should be left to Parliament for example, the fact is that this rule has been played around with by Courts in the UK, in Australia and in New Zealand ever since it first existed.

Tipping J I thought the rule was clear enough, the doctrinal and other underpinnings. I mean it's only the intimate connection that's the problem from the point of view of its reach isn't it.

Webb Well even the rule. If you think about it, in 1967 the rule was that there was no contractual nexis, therefore no claim. The rule itself was radically reshaped in 1967.

Thomas J But again, you're losing me Mr Webb. With public policy one would expect the basis to change. That's the nature of policy. There are going to be changes. I would approbate that. I would say that's the law moving with the times.

Webb Yes.

Thomas J So what point is there in pointing out that there have been different policy bases from time to time. Great, good.

Webb Sir, yes, public policy was only really introduced in the **Rondel** case and we embrace the suggestion that it's a public policy based doctrine which needs to shift with social times. And that this Court should properly reshape this in light of both changing social times and the emergence of the abuse doctrine which provides a far more effective tool. And it really is just my submission in a nutshell, and I will keep it to a nutshell, is simply that the claims that this is an immunity based on and similar to immunities of other courtroom participants is a flawed approach, because it's simply not. The barrister or the advocate has a direct and intimate relationship with his or her client. And the sole basis of the immunity really in today's environment is the protection of the administration of justice. And that's what the House of Lords in **Hall** said and that's what the High Court of Australia said effectively in **D'Orta** although they went opposite ways on how that was to be articulated. In light of that our submission is that the doctrine of abuse presents an ideal new and rational foundn for the protecn of the interests of justice in the conduct of litigation by an advocate.

Your Honours those are the submissions I wish to make. And if I could now hand over to Mr Collins.

4.09 pm

Elias CJ Yes thank you Mr Webb. Yes thank you mr collins.

Collins Yes may it please the Court I'll be brief. I'm addressing two issues, the trans-Tasman alignment issue which is the subject of written submissions in paragraphs 169 to 176 of the submissions. The only point I wsh to make orally is High Court of Australia in the **D'Orta** decision which came out two days after the Court of Appeal decision in this case was aware of the Court of Appeal decision and took account of it in reaching its own decision. And at paragraph 61 of the **D'Orta** decision referred to it in the context and under the heading of experience in other jurisdictions. The absence of any reference to particular significance of the state of the law in this country is significant in my submission in relation to the point that the need for alignment with Australia is something that this Court should take into account as giving weight to the retention of the immunity. The overall submission.

Elias CJ Sorry, is that a submission that they don't. Is that what you were saying.

Clns I'm sorry Your Honour.

Elias CJ Sorry, I was just trying to work out, is that a submission that if the autralian Courts aren't concerned to be in line with us, we shadn't be concerned to be in line with them.

Clns Well not quite. It's simply that one would expect the partner jurisdiction to share that concern if it was a heightened concern that there be alignment with the other partner jurisdiction And I can't put it any higher than that. One would expect that if it was a matter of moment to the Australian Court, that it might have been referred to and the New Zealand situation may have had a separate or higher consideration whereas it was really lumped in with a variety of other jurisdictions that were being considered.

Tipping J Unfortly the timing issue's probably intervened in that respect do you think. I mean they came out with theirs two days, didn't they, after our Court of Appeal had delivered their judgment.

Clns Yes I accept, I mean it won't for example have been a topic of argument.

Thomas J May have been timing but I suspect, I think this Court probably doesn't rank much above the Court of Appeal in Tasmania.

Clns So the submission.

Elias CJ Thank you.

Tipping J You won't be invited back.

Thomas J I'm not giving up my day job, that's for sure.

Keith J It was the Court of Appeal.

Thomas J The Court of Appeal yes.

Clns Just to close off that submission, the point really that the interveners are making that a common approach from both countries is a significant matter which should be taken into account is, in the respondent's submission, not of any significant weight at all.

Turning to the retrospectivity issue. The point taken by my learned friend ms challis for the appellant is that the Court, if it is to reinstate or affirm the immunity, should do so on a purely prospective basis. Now the power of the Court to make retrospective rulings is a key constittnl power in the Court and it's referred to with some force in the speech of Lord nichols in the Spectrum case and I just went to turn to page 69 where His Lordship referred to, under the heading objectns in principle, the essence of the principle argument against prospective overruling, and here that term is used in the sense of pure prospective overruling that is for the future only, the essence of the principle argument against that is that in this country and in the UK prospecitve overruling is outside the constitutionl limits of the judicial function. It would amount to the judicial usurpation of the legislative function. Power to make rulings have only prospective effect it is said is not

inherent in the judicial role. A ruling having only prospective effect cannot be characterised as merely a less extensive form of overruling than overruling with both retrospective and prospective effect. And prospective overruling robs a ruling of its essential authenticity as a judicial act. Cts exist to decide the legal consequences of overruling. I'm sorry, a Court decision which takes a form of a pure prospective overruling does not decide in a dispute between the parties according to what the Court declares is the present state of the law.

Now ms challis is asking this Court to, if it is minded to affirm the immunity at all, to do so on a purely prospective basis. And in my submission that would cause a serious injustice to the plaintiff respondents, who would be in the position of having come all this way, having won in principle but being deprived of the fruits of the outcome. And there's simply no basis for that in the context of the rare exception which the House of Lords refers to in.

Keith J Well Lord Hope recognises that doesn't he in his comment.

Clns Yes.

Keith J That is picked up in here.

Clns And that in rare or extreme cases the Court might prospectively make a pure prospective ruling but there's nothing been placed before the Court in this case to show that the outcome of this case and the consequence of a retro ruling is anything other than in the relatively routine role and function of this Court.

The only other point I want to make about that is that a purely prospective ruling would also have the effect of creatg a significant fetter on the devlopmt of the common law where again a person in the position of the plaintiff respondents here is told that they can run their case and win on principle but be deprived of the fruits of it. And in my submission there's no sound basis for that at all in this case.

Keith J And unless their an institutional litigant like the interveners in this case in a sense, and they've got a long term interest.

Clns Mm.

Keith J But your clients are not in that position.

Clns That's right and they are not championing a cause.

Keith J No, no, no.

Clns So those are the only submissions I have on that point. And that's the case for the respondent Mr Lai.

4.18 pm.

Elias CJ Thank you mr collins. Yes Mr Gapes.

Gapes May it please the Court, at the heart of my submissions is the proposition that matters in New Zealand concerng barristers' immunity, whether we're talking about abolition or amendment or retention are matters that New Zealand Courts and especially this Court can, should and perhaps are required to deal with. The relevant law is not frozen. And it's not a matter where this Court should simply duck the issue and leave it for Parliament.

Elias CJ Mr Gapes, we are not troubled by s.61 of the Law Practitioners Act. So that may help you in addressing us.

Gapes Thank you Your Honour. As you'll tell, a large chunk of what I was going to talk about concerns s.61.

Elias CJ Yes, and your written submissions were extremely helpful on that point.

Gapes I was going to advance an alternative argument but I think I should call that a day.

Elias Cj What was your alternative argument.

Gapes Well it was really to develop what I understood Your Honour to be suggesting in terms of the principle by which s.61 effectively receives the English law into New Zealand but then there is also the common law and the ability of the Courts in New Zealand to take it beyond that.

Gault J I wdnt risk interfering with that Mr Gapes.

Gapes So if yre not troubled by s.61, from my perspective then I happy to.

Tipping J Well I make it clear. We're not troubled with it, perhaps ultimately I think. There may not be entire concurrence as to whether it applies but I think there is an ultimate concurrence that it doesn't restrain us.

Elias CJ So if you wanted to develop something that's not in your written submissions on that it would help us.

Gapes Well perhaps then I won't deal with what I've said already.

Elias CJ Yes.

Gapes And strictly just raise the new point which I hope is faithful to what's been said earlier. If s.61 does cover barristerial immunity, and there's a question then of course whether it fits within the term privileges or within the compedious term used in s.61. But assuming that to be case

then the argument would run that s.61 imports or receives the English law on the relevant subject into New Zealand.

Thomas J Have you anything to add in addn to what's been said from the bench on this point. You just have to adopt it because the point is again the appellants really isn't it.

Gapes Correct.

Thomas J It's for them to.

Gapes I really only had a few points that I thought would support it. But.

Tipping J Well I personally would like to hear it.

Elias CJ Yes I would too.

Gapes There are two alternatives. If the English law is imported then it could be either imported and fixed at a particular date which I think is an unattractive option but is a possibility. Alternatively it could be ambulatory which I think is the preferable alternative, but it could work either way.

Tipping J But isn't there a hybrid third, an intermediate position that it's not fixed and it's not wholly ambulatory, it's imported as a startg point but with the ability for both our Parliament and our Courts to develop, change, do whatever they like to it.

Gapes That I think was what Justice Hammond may have been driving that and what is very very briefly noted at the end of my submissions on s.61.

Keith J And it's also what the Court of Appeal did in the rees case isn't it, rees v sinclair.

Gapes Yes I'm not sure if they did it consciously in that sense.

Keith J No, no, but that's the way.

Tipping J That's the effect of what they did.

Gapes That was the effect of what they did and whether they did it because they regarded themselves, well they didn't regard themselves as bound to do that.

Keith J Well they didn't see themselves.

Gapes No.

Keith J As impeded by the section.

Gapes They didn't see themselves as bound. So I think that probably is a fair characterisation of the Court of Appeal.

Keith J Yes. And it really does run back into, I think you set it out don't you, the general reception provision, the imperial law applications point.

Gapes Mm. In fact the next mention I was going to make was just to say well the relevant common law of England continues to be the law of New Zealand because of the imperial laws application act of 1988.

Keith J Mm. But that doesn't mean that we're stuck with whatever it was then or whatever it's become now.

Gapes Quite.

Keith J It's up to us isn't it.

Gapes Quite, quite, quite. So it really gets to the point that s.61 doesn't prevent the New Zealand Courts developing the New Zealand common law.

Keith J Mm.

Gapes And even lookg in passing at the Supreme Court act, the act under which this Court is established, obviously contemplates that this Court will be looking at important issues and will be looking at them in the New Zealand context. Not that that's a necessary part of the argument but I think it's just a helpful part of the context. And beyond that I would simply say that there's nothing in s.61 to say that it excludes the common law. The common law is part of the law, the English common law up to 1988, is part of the New Zealand law. It continues to be part of the New Zealand law. The common law can't or shouldn't be excluded unless there's going to be something clear to say that it should be excluded. So that was really the just.

Tipping J Well one member of the Court of Appeal in hosking and runting said that if Parliament wnted to stifle the developt of the common law they would have to do so with total clarity.

Gapes Yes well.

Tipping J And that is really your point isn't it.

Gapes That's my point although I perhaps would use clarity rather than total clarity.

Tipping J Well.

Gapes But it would be convenient to say total clarity.

Tipping J Yeah, well, that sort of concept.

Gapes Yes. To exclude the New Zealand Courts from developing the New Zealand common law on this would be contrary to the approach taken in rees and in my submission also to the approach indicated by the Privy Council in Harley. There's a paragraph reproduced in my submissions and I don't propose to go over it again because you will see that is there. But the Privy Council in Harley talked about the fact that they had lengthy submissions. The question of s.61 was dealt with in argument and you can see from the argument at pages 4, 5 and 8 of the case, these are the arguments of counsel being rehearsed in the report, s.61 was part of that argument raised both by counsel for mrs harley and also by I think it was amicus curiae for assisting the Court. But effective Mr McCoy who had been previously counsel for Mr McDonald. So s.61 was part of that argument. There was a barristers immunity foundation laid at least in the written submissions there. It was not a question of s.61 having not been in Their Lordships minds. It was there. And they came to the view that the question of whether the immunity rule can still be justified on public policy grounds in New Zealand is yet to be tested. So they were plainly not regarding the New Zealand situation as governed by some automatic interpretation of s.61.

I think that just backs up the approach taken in Rees.

Tipping J Mm.

Gapes And for what it's worth, and I don't attach a lot of weight to it, the lawyers and conveyancers Bill really does not signify any intentn on the part of Parliament to take over this kind of issue. If anything, they're saying, right well that's an issue for the Courts. Of course I rcognise immediately that that's only a bill. It may not even be adopted by the new Parliament. But there's no legislative intentn manifest there. If anything, the nod is in favour of this being a matter for the Courts.

So that was all I wanted to say in terms of the new argument on s.61. The other point I was dealing with was the question of whether any removal issue should be dealt with by the Courts or left to Parliament. I thought I might comment briefly on pages 39 and following of the submission made on behalf of the Bar Association. There were a couple of issues there that I thought in fairness I should raise. One is that there's a footnote to paragraph 15.1 referring to the views of justice stephen charles in an article which he wrote in 2003 and to the decision of Justice Kirby in Boland. And the proposition in the submnsn for the Bar Association is that Justice Kirby was expressing the view that any decision on abolition or restriction should be left to Parliament. But I think if you read the paragraph in question, and I'm referring also to the paragraph reference on the next page of those

submissions, it's on page 607 of the Casebook, I think you'll find that Justice Kirby is merely asking the question rather than giving the answer. I don't want to spend a lot of time on that but if I could just leave that with you. My interpretation of what he said is quite different from the Bar Association's.

The same point arises in relation to the paragraph at the very end of page 40 of the submissions where the submission by the Bar Association or on behalf of the Bar Association is made that similarly Justice Kirby in the Boland case signalled that he thought reform was a matter for the legislature. I don't believe that's what he's saying at all and even if it were, he's taken a very different view by the time you get to to **D'Orta**, if you look at paragraph 341 of that case.

Thomas J 341.

Gapes 341 of **D'Orta**. That's at the Bar Association's booklet, Tab 12.

Thomas J Right.

Gapes Sorry, the Boland case is at Tab 12, the **D'Orta** is at Tab 1.

Tipping J It doesn't sound like Justice Kirby to suggest that it should be left to Parliament.

Gapes No. We can look at the passage if it's of interest. I just didn't want to spend a lot of time.

Tipping J Well no, I don't want to detain you if you don't feel inclined.

Gapes I think it's a small point which I'm happy to leave. But it doesn't sound like Justice Kirby and I don't think its what he said and certainly don't think it's what he currently thinks because he's expressed a clearly different view later.

In relation to the quen of whether it should be left to Parliament, the other points I would made are the points made in **Hall** that it would produce prolonged uncertainty, it would be against the public interest therefore, and that's a point made by Lord Steyn. This is really a topic for judges to address, a Lord Hoffman said. And in a context such as this it would be inefficient and time consuming. It would be productive of delay, and of course it would be unjust to the plaintiffs in this action, the respondents before you. This is quintessentially an area where the judges have far more knowledge and expertise and ability in involvement than those in Parliament.

Tipping J Is it in support of your point that in essence what we're being asked to do in one sense could be said to be abolishing the rule, but in another sense it could be said that we're being asked to recategorise it or retain an essential element of it under an abuse of process doctrine and that's

not dissimilar to what the House of Lords did in **Rondel v Worsley** in that they recognised the rule but in a much narrower compass than it had earlier arisen. And in effect changed the underpinning of it.

Gapes There are of course a whole range of options available to you. And abolition at one end is one. You could also change it in a number of different ways. You could.

Tipping J But your argument, or the argument that's been presented by the other respondent is essentially that we should get rid of it as an immunity but recognise at least part of its effect through abuse of process. And I take it yre not differing from that.

Gapes No, absolutely not.

Tipping J No.

Gapes Although I was going to emphasise that of course abolition, just to clarify, that abolition's an option but if you just get rid of the intimate connection side of it then the plaintiffs would still be successful on this, or if you abolished it only in civil cases, then again the plaintiffs would succeed. But yes, I mean you can use a variety of terms for the various options that are available to you. And one of them would be to say well it's abolishing the rule but recasting it or saving it in another form.

Thomas J But isn't the point that being made that if it's a question of adjustg the means by which this mischief is dealt with, if hat's all that's involved, then it's not the radical step that the applicationts have been asserting, isn't that the point.

Gapes For myself, I don't see it as startg something new. I would say you're abolishing the old and you've got a abuse of process there, it's already there, it's well established, okay it may need some refinemt here and there, but what aspect of the law can you say is sort of ultimate perfect at every moment in time.

Keith J And it's still the 1967 rationale is my brother's point I think, that, you know, if the rationale is the proper administration of justice or preventing relitigation, that was the radical shift in 1967 and that is still there, it just has a different manifestn, that's the matters to be dealt down the other route.

Gapes That's right, there are other ways, particularly nowadays.

Keith J Mm, mm.

Gapes In which that underlying concern can be addressed and addressed perfectly adequly.

Keith J Mm.

Gapes The Bar Association referred to the decisions of President Anderson but I think the comments of Their Lordships in **Hall** at pages 683 and 704 to 705 really address those matters. And a combination of the hall decision and the decision of the Court of Appeal in this instance I think are a more than adequ answer to any of the points made by the President in the Court below.

Allied with the point I made about Harley earlier on in referring back to the same extract, I think you can see again from the same extract an answer to the leave it to Parliament submission. Because again it's plain that the Privy Council in Harley was contemplating not that the matter would be left to Parliament but that it would be addressed by the Courts. They contemplated that those public policy grounds would be tested in the New Zealand Courts and they would perhaps find their way to the Privy Council. And certainly befor the Privy Council wanted to deal with it, it wanted to hear from the Courts. The Privy Council was not saying this is an issue which needs to be referred to Parliament.

And while I'm looking at that extract, I wonder whether I could.

Thomas J Just remind me of the passage again.

Gapes It's on page 5 of my submissions Sir.

Thomas J Oh yes.

Gapes And the particular sentence is in bold text there.

Thomas J Mm, mm.

Gapes But the following sentence is important also in terms of the question of the leave to Parliament one. They weren't saying leave it to Parliament. They were saying, let's hear what the Courts have to say about this. And if I could also while I'm there just refer to the last two sentences in that passage. Because it bears on the argument earlier about whether there's a duty and an immunity which prevents the duty being actioned or whether there's no duty at all. And the Privy Council view, and admittedly it's dealt with fairly briefly, but they say in those last two sentences, in the one case meaning the immunity from suit case, the issue arises from the barrister's duty to his client. So they're not doubtg that there's an immunity but rather saying there's a duty and an issue about whether you can enforce it. And in the other, the wasted costs situation that arises from the duty to the Courts, and distinguishing those now, it is fair to say that that's dealt with very lightly in passing and it's possible that you could give it another construction. But it is an indication anyway that that was what was contemplated.

In my submission it would be a very sad abdicatn of this Court's role if the Court were simply leave this matter to Parliament. It's not the approach that's been taken by the senior Courts of other jurisdictions. The House of Lords has been happy to deal with it and deal with it comprehensively. Our New Zealand Court of Appeal in rees and more recently have looked at the doctrine and decided that it's a matter that the Courts can deal with. They have not decided to leave it to Parliament. And in Australia again in **D'Orta**, the Courts have decided that that is a matter for the Courts. Not a matter that has to be left to Parliament.

We in New Zealand now have a Supreme Court. A Court set up to deal at a Senior level with important issues. And to deal with them in the light of New Zealand conditions as is plain from the section at the beginning of the SC Act, I can't remember if it's s.2 or s.3. I've got it there if it's necessary. But it's probably more than familiar to you all.

To leave an issue such as this, a quintessentially Courts issue to Parliament would in my submission tend to emasculate this Court at a very early stage in its life and not be consistent with s.3 of the Act and the purpose of having this Court here to address issues in a New Zealand context.

Section 3(1) paragraph (a) items 2 and 3 talk about determination of important issues from other Court. And they talk about access to justice. And certainly from the point of view of the Lais, both of those are relevant in the current context because these are important issues not just for them but obviously much more widely and for there to be the kind of access to justice that the SC Act bears in mind, this matter needs to be dealt with by this Court rather than left for some parliamentary exercise somewhere down the track.

In terms of s.3(2) there's obviously no challenge here to the sovereignty of Parliament. That's not in my submission an issue. We are operating in an area of judge-made law. And the question of whether the sc will take the role on or at least take the opportunity which has been conferred on it by Parliament.

Keith J That subsection mentions the rule of law as well doesn't it for what it's worth.

Gapes I think that might be just slightly later. But the subsectn I was talking about was s.3 subsn (1) and it's paragraph (a) item 3 which talks about access to justice. And it's correct that s.3 subsn (2) which talks about sovereignty of Parliament also deals with the rule of law saying nothing in this Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament.

Keith J Yes.

Gapes And my submission really is that.

Elias CJ Not given.

Gapes There's no problem.

Keith J I don't think today.

Gapes It's not an issue. So in my submission, whether you abolish it altogether or whether you adjust the immunity, this is a matter which should be dealt with by the Courts. It is not a matter which should be left for Parliament. And whether you amend in any of those ways that have been discussed or whether you choose to abolish it, either way it's a matter which leads to the appeal effectively being refused.

I'm happy to address any further arguments.

Gault J Just thinking about the status of the proceeding itself Mr Gapes, if we were to dismiss the appeal I suppose but indicate that we thought that this was a matter approprly dealt with by abuse of process what should we then do. Should this go back to the High Court to determine whether in this case it should be struck out as abuse of process. Or what should we do.

Gapes I would submit that you would dismiss the appeal. You might make, I mean, abuse of process has never been argued as having any relevnce to this particular case.

Gault J No, well we couldn't make any finding about it in this case.

Gapes No, no. And no-one's suggested that it's an abuse of process. And hopefully no-one ever will.

Gault J So that if they want to assert the.

Gapes But if they want to.

Gault J That the immunity should be substituted with abuse of process which has such effect as to bar this claim, they would have to make another application, is that what you're saying.

Gapes I would imagine so if abuse of process, if someone wanted to apply to strike it out as an abuse of process, surely they would have to apply.

Gault J And we are dealing with an application to strike out aren't we.

Gapes We are dealing with an application by the plaintiffs to strike out a defence. So it's an application by the Lais, not an application against the Lais.

Gault J Mm.

Gapes So it's not possible, if it's a strike out application and if the appeal's refused, that doesn't prevent somebody at a later time bringing an abuse of process action of they think there's something in it.

Tipping J The present defence has been struck out by the Court of Appeal as untenable.

Gapes Correct.

Tipping J In law.

Gapes Correct, correct.

Tipping J Well if the other parties wish to come at it through the other door they would have to amend their defence and then there could be presumably, one would hope not, but I mean there'd be another attempt to strike out the repleading in that respect, if they repleaded it as abuse of process.

Gapes Well then you get into abuse upon abuse wouldn't you.

Keith J Yes.

Gapes Whether the new pleading of abuse is itself an abuse by circumventing the decision in another way. I haven't thought that through in all fairness.

Tipping J But from the point of view of my brother's question as to how we deal with it, there would be only one way wdnt there, and that would be to uphold the Court of Appeal's striking out of the present defence or that part of the present defence and.

Gapes Leave it at that.

Tipping J Leave it at that.

Gapes Correct. That's what I would think is the correct position. Because how can you deal with some application which hasn't ever been made?

Elias CJ I see the statement of claim, just thinking about the causation thing, the statement of claim simply seeks an inquiry as to damages.

Gapes It sounds familiar but I'd have to say it's some time since I looked at the detail of that.

Tipping J Well I think the trial judge might very well reject that and simply say it's got to be tried, assuming you know, that it would have to be tried

by a judge as part of a proceeding because you've got all sorts of inter-related issues. It's not just an inquiry into quantum. There's all sorts of issues interwoven with the question of damages.

Gapes Mm. There may be issues of that nature that need some refinemt.

Tipping J Yes.

Gapes I'd have to say it's been a long time since I've really looked at any of those issues. We've been more concerned with the major issues of principle.

Tipping J Quite. Well you got this body blow at an early stage didn't you. Well you decided that you wanted to apply a body blow to the other party.

Gapes Yes.

Tipping J And the attention has been thenceforth directed to that.

Gapes Yes. So I mean it's, I don't know, 18 mths or more since the Court of Appeal hearing and even longer since the High Court hearing and there's been quite a bit of time. So in fairness there hasn't been much time devoted to the trial aspect of it.

Tipping J Well as I see it, and correct me if I'm wrong, there is a very simple issue here as to whether that part of the statement of defence that is in issue should or should not be struck out.

Gapes Correct.

Tipping J That's the ultimate.

Gapes Yes.

Tipping J Technical issue.

Gapes Yes.

Elias CJ Well that's simply a pleading that as a further defence to all causes of action it is entitled to immunity from the plaintiffs' claim, that's it.

Tipping J Mm.

Gapes Yes. It just deals with the defence and then yes, there will be other issues to be dealt with subsequently.

Tipping J Mm.

Elias CJ Thank you Mr Gapes.

Gapes Thank you Your Honours.

4.48 pm

Elias CJ Now, where are we going in terms of replies. Ms Challis, did you intend to reply?

Challis No I didn't. I'm not sure about the interveners, but I didn't.

Elias CJ Alrt, so we'd start with you mr wilson.

Wilson It'd be very briefly on one issue Your Honour.

Elias CJ But do you want to be heard now. Is that convenient.

Wilson Yes if that's convenient, yes.

Elias CJ Excellent.

Wilson It'll only take 5 minutes.

Elias CJ Yes thank you.

Wilson Your Honours the only issue on which I do seek to reply is on the question of abuse of process. And as to that I make the following points. In my submission it's easy to speak as have my friends of abuse of process as a sophisticated or finely tuned doctrine which will protect against, which would protect against abusive claims if the immunity were removed. But in my submission it's essential to look at the position in practical terms. And I therefore invite Your Honours to assume a situation of the immunity having gone and I then conduct a trial in a competent way but without undertaking defensive advocacy by askg every question, calling every witness, taking every point. And my then client is unsuccessful. And then the former client then sues me alleging that I had conducted the trial in a negligent manner, and for the reasons I submitted late yesterday, it was very easy to make that allegation given the nature of advocacy, and that if I had not been negligent the outcome would or would probably have been different. And in that situation in my submission, realistically I would not be able to strike out the claim as an abuse of process, certainly in terms of the way that doctrine is formulated at present. The authorities make clear that with claims of negligence, whether in the context of an application to strike out under rule 186 or an application under rule 477 to dismiss as an abuse of process, and the tests are effectively the same under the two rules, very difficult if not impossible to strike out the application. And accordingly on this hypothetical situation, abuse of process as at present formulated, would not assist me and I would be forced to defend myself at a full trial. And Your Honours, so long as another cause of action were also pleaded, and it's easy to add one as for

example an allegation of breach of fiduciary duty however unfounded, defendants' summary judgment procedure would not avail me.

So in my submission Your Honours, the only way in practical terms of controlling abuse is to maintain the immunity or to rewrite the rules for abuse of process very substantially in a manner which is not at present readily apparent and which I'd suggest is unlikely to be seen as an appropriate task for this Court.

Those are the submissions in reply.

Elias CJ Yes thank you mr wilson.

Tipping J I just want to ask on that one question Mr Wilson. Any such hypothetical action against you would necessarily, wdnt it, call into question the correctness of the decision.

Wilson Yes, yes indeed. Yes necessarily.

Tipping J If there was a doctrine of abuse, that it was prima facie or presumptively abuse of process to do that, it wdnt completely cover the ground but it would substantially assist presumably.

Wilson It would indeed Your Honour. That's the sort, indeed I readily accept that but the detail of such a proposal, of such a change, would require very careful consideration.

Gault J Well they managed in O'Brien didn't they to have a look at it and decide while it was discretionary, in this case it was plainly just an attempt to relitigate and it should be struck out.

Wilson Yes on the facts of that case.

Gault J Yeah, but.

Tipping J But Mr Justice Somers in that passage I drew attention to.

Wilson Yes.

Tipping J Collateral attack upon a final decision in other proceedings will not be permitted. Now I'm not sure that goes, doesn't go just slightly too absolute but it's, if there was something close to that, that there had to be something truly exceptional to allow it.

Wilson Truly exceptional, that would obviously.

Tipping J That would at least cover.

Wilson Certainly would assist greatly.

Tipping J Assist, yes.

Wilson Yes indeed Your Honour. Your Honours.

Elias CJ Yes, thank you.

4.54 pm

Elias CJ Mr Farmer do you want to be heard tonight.

Farmer I think I'm going to be a little longer than 5 o'clock.

Elias CJ Yes. But would you prefer to be heard in the morning or.

Farmer I think I would prefer to be heard in the morning when we're all fresh.

Elias CJ Yes well if we started at 10, when do you think you would conclude.

Farmer 10.30.

Elias CJ Right. That's alright.

Farmer I think my learned friend said, subject to injury time.

Elias CJ No, good, thank you. Alrt we'll take the adjournment now thank you and resume at 10 tomorrow.

Court adjourns 4.55 pm

Thursday 20 October 2005

Court resumes 10.01 am

Collins May it please the Court, for one moment.

Elias CJ Yes Mr Collins.

Collins Mr Woodhouse has asked me to convey his apologies in circumstances where he's returned to akld for an important family matter. No discourtesy to the Court is intended.

Elias CJ No, that's fine. Snr counsel can of course come and go, thank you. Yes Mr fmr. I'm not sure what all that congratulations.

Farmer That was about the fact Your Honour, I accepted.

Thomas J Are you going to be coming or going.

Farmer Your Honours I have said to Mr Woodhouse, there was no need for him to do what has just been done because Senior counsel were free to come and go as they please. So it's very nice thank you to have the Court reaffirm that.

Elias CJ Right, thank you.

Farmer I think my learned friend wanted to say something.

Elias CJ Yes Mr Gapes.

Gapes Simply Your Honours to indicate there's the extract from Todd which was raised by Justice Tipping yesterday. I don't propose to.

Elias CJ I thought we had that in fact.

Gapes We had in the respondents' Casebook the article which he's written.

Elias CJ Yes.

Gapes But not the text.

Elias CJ Not the text, yes thank you.

Gapes And you'll see there's a lot of similarity but I don't want to say anything. I just wanted to provide it.

Elias CJ Yes thank you Mr Gapess. Yes Mr Farmer.

Farmer If the Court pleases. Finality is really the issue that needs to be addressed and in particular a question of whether the immunity on the one hand or abuse of process on the other is the appropriate means of dealing with the, what seems to be acknowledged, concern about the need for finality and the problms that arise and the harm that will be caused if relitigation is allowed.

Finality was certainly, as Your Honours have seen, viewed by the judges in the joint judgment in the **D'Orta** case as being the only substantive policy issue justifying the immunity although Their Honours also thought that the chilling effect, as they described it, of the threat of litigation with a consequence tendency to the prolongation of trials, was a matter that should not be underestimated. And you'll recall that in paragraph 29.

However, it should be just mentioned in passing that other judges have seen that that concern, the chillg effect concern, as a policy justification in itself for the immunity including in

particular Justice McHugh at paragraph 192. The Bar Association in its submissions has also put that forward as one of the justifications for the immunity.

In relation to the finality policy, Your Honours the point needs to be made that the policy does not distinguish between meritorious and non-meritorious claims. The focus is on the harm that relitigation whether meritorious or otherwise, will have on the administration of justice. And so in considering abuse of process as an alternative, it needs to be, that fact needs to be borne in mind because the focus in relation to abuse of process necessarily tends to be on the unmeritorious claim and whether or not that can be as it were weeded out at an early stage of the process. Second.

Elias CJ Do you say that if abuse of process were the rationale or the protection, there would be a tendency to let through all meritorious claims and to weed out those that are not meritorious.

Farmer What we say is that abuse of process will not achieve the goal of weedg out the unmeritorious claim.

Elias CJ I see, thank you.

Farmer But we say that in the discussion about abuse of process, sight should not be lost of the fact that the policy that the immunity, the policy of finality that supports the immunity is one that is focused as I say on the harm to the administration of justice and is one therefore applies irrespective of whether the claim is meritorious or otherwise.

Tipping J Mr Farmer if the doctrine of abuse of process was, I'll use the word sharpened, so as to have a clear prima facie rule that if there was an impeachment of finality or collateral attack or whatever, you couldn't proceed, if that was a necessary element in your claim, would that not cover substantially the problm that you've just been adverting to.

Farmer I was coming to that very point Your Honour. Because in our, and I'll perhaps foreshadow it by saying that as Lord hoffman pointed out in **Hall**, in the case certainly of a civil claim a civil judgment which is followed by a claim against the advocate, there is no attack in fact on the judgment of the Court. Rather what happens is that the client argues that but for the negligence of the advocate, a different result would have been achieved. So that's rather different from the sort of collateral attack on a criminal conviction that the **Hunter** case represented.

Tipping J Is it not of the essence of that sort of case that the client is arguing against the advocate that the rsult would or might have been different.

Farmer Absolutely, that is correct. He is arguing that. But my point is that it is accepted, and the client must accept, that on the evidence and on the way the case was run before the judge, the judge got it right. But what is said is that the judge would have come to a different conclusion and that must be said because of course otherwise loss can't be established, if the case had been run differently the judge would have or may well have, depending on whether one is requiring taking account of the possibility of a loss of opportunity claim, it's necessary to argu that. And so what that does is open up the problem that the High Court in the joint judgment was concerned about that there is no end, no finality to the dispute. The dispute in a different form continues, the controversy continues to be ventilated and litigated. With the possible result, if the client is correct, that a contrary judgment so to speak, is arrived at. But arrived at on in effect different evidence, different arguments and so forth. And the High Court indeed in **Rondel v Worsley**, Their Lordships were concerned about litigation upon litigation. Speculatn upon speculation to use the words of Lord morris I read to you earlier in the week.

Gault J There are the two problems, I suppose they're related. But there is also the potential for collateral attack. I mean really the subsequent proceeding against counsel is brought to try and how that the first decision was wrong. That might be vexatious but that's the O'Brien case. And it is often the criminal situation.

Farmer That's the **Hunter** case, yes that's the **Hunter** and O'Brien cases.

Gault J So there are both aspects to it.

Farmer That's exactly right Your Honour. But the question, what was considered by Their Lordships in **Hall** but not resolved, and I'll give you references in a moment, was the question of whether the true collateral attack case, the **Hunter** case, could somehow be applied in a way that deals specifically with the situation of a civil judgment where, as I've said, there is not so much a direct attack on the correctness of the judgment based on how the judge heard the case, but where what is said is that but for the negligence of the advocate, if the case had been run differently, a different result would have been achieved. And that is a different situation from the **Hunter** situation where in a civil claim, whether it be negligence or conspiracy to injure or whatever, as in **Hunter**, what is put directly in issue is the correctness of the earlier conviction.

Gault J It seems to me that the potential is also that the barrister defendant will try and meet the claim by saying irrespective of that, the result would have been the same.

Farmer Absolutely, yes.

Gault J And that's a collateral attack or could be on.

Farmer Using the term collateral attack in this broader sense.

Gault J Yeah, what the judge did.

Farmer Yes, yes.

Gault J The judge might have done that but should have done something else.

Farmer Should have done that.

Gault J And the result would have been the same.

Farmer And that's the sort of situation that was recognised in the joint judgment at paragraph 45 where Their Honours, referring to the relitigation that occurs, said it's relitigation of a skewed and limited kind and referred then to the fact that the, and this is also picked up by other judges in that case, that the judge and the witnesses can't be called to give evidence so that the inquiry is skewed but of course it's perfectly open to the barrister to argue that the judge got it wrong or that a witness lied or whatever and so then, so that the result as Your Honour says, well even without going that far, he can argue that if a further witness had been called, as the client argues, the result would have been the same.

Now that's obviously an inherently difficult inquiry to make. And it's difficult to make because of the reason the joint judgment gives, that you can't call the judge to say well, if there'd been this other witness, would you have decided it the same way. And that leads to what Lord morris called a speculation.

Now one of course might say to that, well that's all very well but all that shows is how unlikely it is that any of these claims are ever going to succeed. And then that takes you back, if one accepts that, well then that takes you back to the proposition that there will be litigation. It is not going to be able to be struck out. It will go to trial. The client probably will lose. And then what is the net result of all that? The relitigation. So whether the client loses or wins, relitigation occurs. If the client wins, well then you have the problem of inconsistent judgment. If the client loses,

you've nevertheless gone through that process at enormous cost to the system and harm being caused to the system and so the question is not whether the immunity is too blunt an instrument. The question is whether the immunity is the appropriate instrumt for imposing an efficient means of dealing with these policy concerns.

And as against that, the question is, does abuse of process provide a realistic way of equally dealing with the problem and preventing harm to the system by at least sortg out, and it can't protect it completely, but by at least sorting out the unmeritorious claims.

Tipping J Mr Farmer, the law Lords by implication, and there wasn't a great deal of discussion as I recall, of this point as to whether abuse of process was indeed a sufficient substitute, but they obviously thought so. You're saying that on closer analysis, it isn't.

Farmer I'll give you the references Your Honour. Because what. There was obviously in that case quite a considerable degree of discussion about the hunter case and in particular whether that might provide an adequ protection. So if I can just give you the tab, and I won't read all this to you, I'll just give you the references. The **Hall** case is in Tab 2 of Volume 1 of our Casebook. Both Lord Hobhouse and Lord Hope effectively expressed the view that the hunter case was really of no great assistance in dealing with the problem and references there are Lord Hope, page 722, beginning at letter H with the words, I am not persuaded that the principle in **Hunter** provides the protection which is needed to serve the public interests in the field of crml justice. And he goes on to develop that point. He doesn't seek, I should add too, he doesn't seek to apply **Hunter** to the position with civil cases. The way he deals with that of course is to say that he thinks that the policy, public policy considerations are different in civil cases from what they are in the crml area. But doesn't really seek to deal with the question of how in civil cases the finality concern might be protected.

Lord Hobhouse, page 742.

Gault J What was the page please.

Farmer 742, beginning at letter H again, discusses the case. Says at 743C that the collateral attack point, first of all says at the end of the previous paragraph at letter B, the immunity point and the abuse of process point are distinct and separate. They do not serve the same ppse. And then goes on to say, the collateral attack point is a species or subset of abuse of process. He refers to the law of estoppel, reas judicata and issue estoppel.

And then says at letter E, the case of **Hunter** is not apt or adequ to deal with cases brought by aggrieved clients against advocates alleged to have been negligent. So he clearly saw no potential as it were, for development of hunter because he didn't think it was presently adequ.

Then, even the judges, the law Lords who took a stronger view, position, against the immunity in both civil and crml cases, also had expressed reservations about hunter and recognised its limitations. So for example Lord Steyn at 679, beginning at letter G, said, in the **Hunter** case the House did not however lay down an inflexible rule to be applied willy nilly to all cases which might arguably be said to be within it. And that's a quote from Lord Sir Thomas Bingham as he was, Master of Rolls and Smith and Linskills which was a case that one of Your Honours referred to in argument. But then went on to say, it is however prima facie an abuse to initiate a collateral civil challenge to a criminal conviction. Ordinarily therefore a collateral civil challenge to a criminal conviction will be struck out as an abuse of process.

Thomas J Mr Farmer, it's in this, the collateral challenge to a criminal convcn that I find difficult. If we take a case where the advocate has committed some basic mistake and is truly negligent. May have failed to perceive the significance of a document and cross examination on it. And the point somehow or other is not taken in the appeal process which one would hope that it did in fact emerge. But it does come up in the proceedings taken in the civil Court. It seems repugnant that a conviction which may be unsafe even at that stage should have to stand where it is alleged and possibly quite clear that there has been a miscarriage of justice because of counsel's negligence. It seems draconian to say, right the Convention absolutely will stand, it is sacrosanct, when there is evidence somewhere that it shadn't stand.

Farmer Well that of course is at the heart of the evil of relitigation. And the need for finality of judgments. Right or wrong. I mean judgments, if they're wrong, they should be appealed of course. But once that process is ventilated or if it's not ventilated by choice, then the judgment stands as Your Honour says.

Thomas J The verdict stands.

Farmer Exactly Sir.

Tipping J It would be capable of being addressed by a governor general's reference.

Farmer Oh, yes.

Tipping J We had a situation like that in the Court of Appeal not, oh about 5 or 6 yrs ago when in the end the crown didn't oppose the.

Farmer Yes, yes. That's.

Tipping J I can't quite remember how it came out but.

Farmer That's an extra-judicial remedy.

Tipping J Yes, quite, but still, my brother's concern, it would ultimately be capable of being.

Farmer Yes.

Tipping J I don't know that that has much bearing on our present issue.

Farmer No.

Keith J Well it is another example of relitigation isn't it. Because that reference did involve a formal decision by the Court of Appeal to allow the Convention, allow the appeal and upset the Convention.

Farmer But it's still within the confines of the particular case.

Keith J Yes, yes.

Elias CJ It's appeal.

Tipping J It's essentially appeal.

Farmer It's a special form of appeal.

Keith J Mm.

Farmer Just going back to Lord Steyn, he moves from crml to civil. I'll just give you the reference, it's 680 letter B, where he says that leaves collateral challenges to civil decisions. The principles of reas judicata, issue estoppel and abuse of process as understood in private law should be adequ to cope with this risk. It would not ordinarily be necessary to rely on **Hunter**. The problem. That's of course similar to the statements made by justice somers in O'Brien in the passage that Your Honour said twice I think went too far.

Tipping J Well arguably. I was just a little anxious about the absoluteness of it.

Farmer Arguably. And with respect Your Honour was right to be anxious about it because in fact Lord Brown Wilkinson effectively I think

would have had the same anxiety because there's the obvs point, I mean there are restrictions clearly on the application of those principles to a subsequent case where the parties are different, where the barrister, although he was a participant in the earlier proceeding was not a party. And Lord brown wilkinson in **Hall**, and I'll give you the reference there, page 685 letter B, referred to what he called the more restrictive rules of reas judicata and issue estoppel and said in the light of those it is not clear to me how far the **Hunter** case goes where the challenge is to an earlier decision. So Their Honours, Their Lordships.

Tipping J Well wait a moment, His Lordship's referring there only to reas judicata and issue estoppel. Lord steyn was referring to those two plus abuse of process.

Farmer Absolutely, that's correct. That is correct. So at least with the estoppel, reas judicata points, there are severe limitations on them to deal with the situation in the civil case.

Tipping J Well no-one's suggesting that it could be dealt with by either of those doctrines. It clearly couldn't.

Farmer No. And the reason for that effectively is given by Lord Hoffman and this is the final reference I'll give you out of **Hall**, at page 705. Where at letter F he refers to the practical difficulties of proving that a case which was lost after a full hearing would have been won if it'd been conducted differently. But then, and then he referred to **Hunter**. And then at letter H he said in relation to civil cases that had been lost, he said, I can see no objectn on grounds of public interest to a claim that a civil case was lost because of the negligence of the advocate, merely because the case went to full trial. In such a case the plaintiff accepts that the decision is reas judicata and binding upon him. He claims, however, that if the right arguments had been used or evidence called it would have been decided differently. And that was the point I started out with in the submissions.

So that that takes you necessarily leads you very much into that situation described by the joint judges in the **D'Orta** case. That when you do say, well the case would have been decided differently, you are necessarily reopening the controversy and you are thereby putting into jeopardy the policy of finality and of the finality in terms of quelling the controversy, dealing with it once and for all.

Tipping J Mr From I'm sorry to keep interrupting. But in relation to what Lord hoffman has said here which you've helpfully referred to, I just wonder what if any effect should be given to the fact that His Lordship didn't actually seem to me to address the question of

the position of the successful party. If it's a purely money case, that's not too bad. But if it's a case involving reputation or status or anything. That, with respect, I think Lord hoffman hasn't quite covered the full ground.

Farmer No, with respect I agree with that. Yes, yes, I agree with what Your Honour says.

Tipping J Yes.

Farmer So, if I can just repeat this point. The finality policy is one that does express concern about any kind of relitigation, whether it's meritorious or not, occurring. And even the meritorious claim, if it goes ahead, is necessarily going to involve relitigation with the consequences that that has for the administration of justice. So that when one thinks about abuse of process as a sort of an alternative so to speak to the immunity, the immunity being the remedy as it were, the means by which that concern is met, when one thinks of abuse of process, abuse of process can only do at most, if at all, all it can do at most if at all is to stop unmeritorious claims from proceeding. So it doesn't address the situation of the meritorious claim which, yes, gives a remedy to the client but also along the way happens to cause the harm to the administration of justice that the policy was concerned about.

Gault J I don't follow, I'm sorry, can you help me Mr Farmer. Let us assume that there is a meritors claim and it appears that it will undoubtedly result wholly in relitigation. Would not that be an abuse of process.

Farmer Well if it is, then that is exactly the same effect as the immunity but.

Gault J I'm putting to you I think.

Farmer Yes but of course unlike the immunity, which prevents the thing ever getting off the ground, in that case it will get off the ground but it will be necessary for the defendant, the advocate to go through the process of applying to the Court, of having an argument to establish what Your Honour has just put to me, and then.

Gault J That's the nuisance value.

Farmer Well it's nuisance value. It's inefficient, it's costly, it's costly to the system as well as to the advocate. And of course it has the reputational effects. So that it's all of those things but in terms of, is this, is the abuse of process ground a better way of dealing with it, we would say it's grossly inefficient. Because maybe you do get to the same result but it's grossly inefficient. Because

Your Honour of course the meritorious claim, it's interesting we're asked here well what is a meritorious claim. It's something more than showing that the advocate was negligent. It's also a matter of showing that loss follows from that negligence. Otherwise there is no claim.

Gault J Yes well it seems that you could at least theoretically get a situation where allegations of negligence and loss could be established without there being a serious relitigation of what occurred in the previous Court proceeding. And in that event the abuse of process would sort that out and perhaps let it proceed. Whereas the immunity would not.

Farmer With respect Your Honour, with one possible exceptional category, it's hard to see or think of a case where necessarily, where there isn't necessarily a relitigation of the earlier case and a submission ultimately being made either by the plaintiff that the judgment would have been different, the result would have been different, or by the advocate defendant, that the result would have been the same. That's inevitable.

Gault J I don't want to get into the …. but I think I can conceive of such a case as for example a judgment reads that but for the concession of counsel, such and such would have been the result. Now you don't need to relitigate that if the concession was negligently given.

Farmer I don't think I've ever read such a judgment.

Gault J Well I think I have in effect.

Farmer Yes. Concessions of course are recorded in judgments. But there are always a variety of factual and legal issues that are traversed and then a result arrived at. And a concession may be an important step along the way of resolving all those things. But with respect it will always be open to the advocate to say, yes I made that concession but there were these other.

Gault J Even if I hadn't the result would have been the same.

Farmer That's right, that's right. Unless it was put quite as starkly as Your Honour has just said. And I say that that is, perhaps one can certainly imagine that might happen but it's not what one would normally expect.

Tipping J I suspect Mr Farmer that what lies at the heart of this is a suggestion that immunity is a sharp bright shield.

Farmer Yes.

Tipping J Abuse of process is apt to be so it is said a bit fuzzy. You don't quite know what reaction the Court's going to have in the individual case to whether this is arguably an abuse of process or so clearly an abuse of process that it should be struck out at the beginning. That I think is probably the, it's the inherent uncertainties if you like as to how the Court is going to react to an abuse of process argument as opposed to immunity. Is that really. This is why you're staying it's inefficient. Because frankly someone could start where it was clearly covered by immunity and you'd have to move to strike it out. But it would be much simpler and cleaner. That's really what you're saying isn't it.

Farmer Yes. But also I think I'm saying further Your Honour that because of the nature of the claim that is made against the advocate, namely negligence, that negligence claims are not attractive, not the right word, are not promising candidates for a striking out or even for a summary judgment application for the reason that they always involve issues of fact, issues of law which can be coped with in a summary way, but issues of fact, issues of causation in terms of the need to establish loss to establish the tort and so the minute there is on the affidavits that go to support the application to strike out a disputed matter of fact, that is the end of it.

Tipping J Oh it wdnt be the end of it on an abuse of process. The jurisdiction would have to be applied with some degree of robustness.

Farmer That's the problem Your Honour. Then that leads you to the problem first of all how does one, does one say that this is going to be a special category of case that will be dealt with more robustly and if so, how is the abuse of process principle formulated.

Tipping J Well that's my point, that there is at the moment inherent uncertainty around the scope.

Farmer So Parliament could do it of course. Parl may be able to come up with some formulatn. But it's difficult for me standg here today to address this point when I don't know exactly what Your Honour perhaps has in mind other than it would be something more robust and that's the problem.

Tipping J Well Lord Steyn referred to, didn't he, and so did Sir thomas bingham as then was, this sort of prima facie approach. I agree it's not as sharp a sword or a shield as immunity. And no-one could argue that. The question is whether, however it isn't a proper match for the malice or the mischief that we're concerned about.

Farmer Yes.

Tipping J It's shutting everybody out as opposed to shutting most of them out.

Farmer Well I suppose Your Honour too my point would be that even if one said we're going to be robust, there could be implications of that for other kinds of cases too, I mean can one have a special rule of robustness for abuse of process for this type of case without that spilling over right through the whole area.

Tipping J Well I think one could. I mean it's normally the difficulties with saying whether there definitely is or isn't a duty of care and that's where the negligence things tend to have to run.

Farmer But assuming that one does that, then it would be my submission that that is an extremely difficult exercise and that inevitably there will be cases, both meritorious and unmeritorious that will go through that will simply not be able to be closed off at that point.

Tipping J I understand the point.

Farmer And then you are into the sort of area of harm to the system.

Tipping J Yep I understand the point.

Farmer And it's that where the focus should be.

Thomas J Are you going to address Mr Woodhouse's point that you have tended to overstate the harm to the system. That the public can work out that the judgment at first instance would have been different but for the advocate's negligence.

Farmer That certainly wasn't the view of the High Court of Australia. So I just put myself.

Thomas J You rely on that Court.

Farmer Put myself behind them. And with great respect to my learned friend I feel more comfortable there than sitting inside …

Now just relevant to that Your Honour maybe, and I'm almost at the end I think of what I want to say, but in our written submissions at paragraph 2.4, you don't need to go to it.

Elias CJ 2 point?

Farmer Sorry, the Court of Appeal's judgment, recent judgment in Burns v National Bank of New Zealand. Now I'll hand up copies of that

if I could. Which is the spoliation of evidence case. And the issue was whether or not such a tort existed at common law in this country. And Your Honour justice keith was of course in that case. And ruling that there was no such tort, at paragraph 85 in the judgment of the Court given by justice glazebrook, paragraph 85 on page 321, prominent in the reasoning of the Court was the policy concerns of line 15. Policy reasons that favour non-recognition include that alternative remedies are available, that the fact of damages too speculative and that the tort is potentially inconsistent with the policy favouring final judgments. It's the plaintiff who has lost the primary law suit enabling a second separate suit by establishing that a piece of relevant evidence was destroyed or concealed. This creates the possibility of inconsistent results. This Court should be wary about adopting a new tort that could have the consequence of undermining the finality of adjudicatn and producing further litigation.

So there's again the focus on the harm. And the importance of the policy. So I just give you that reference. It was, as I say, in our written submissions but not referred to in oral argument here.

Your Honours there is one other, I mentioned earlier the possible exceptional category of case in answer to Your Honour Justice Gault trying to envisage different situations that might arise. And one of the situations that perhaps does need to be considered is the case that doesn't go to judgment. The civil case that doesn't go to judgment because settlement occurs durg the course of trial or on the door of the Court. Now at present that would be covered by the intimate connection extension of the immunity. But even in that, and so one might say, well perhaps there's a case where relitigation in a sense isn't occurring. But nevertheless the causation issues still arise. Because the argument will be that if the case had gone to judgment, if there had been a trial, the client would have recovered more than he or she got as a result of acceptg counsel's advice to settle on a particular basis. So once again the controversy is reopened, albeit that there's no second trial.

Elias CJ But there are cases Mr Farmer where lawyers have missed limitation periods and things like that where the same exercise has to be undertaken. The chances of succeedg have to be assessed.

Farmer Yes. That's of course not a situation where the immunity applies. If a solicitor is just negligent.

Elias CJ No.

Farmer In not filing a claim within time.

Elias CJ No but it's an exercise that's still undertaken.

Farmer Yes, yes.

Elias CJ Trying to speculate what the course of the litigation would have been.

Farmer Yes, that's right. And to an extent that's true of this example I'm just giving. But there is this difference. That it is again part of the policy of the law that settlements should be repsected. That once made, the settlement achieves finality.

Tipping J Say a client is, I'm reminded of the **Moy** case, wasn't it the **Moy** case.

Farmer Yes.

Tipping J Where it was found by the Court of Appeal to have fallen below but the House of Lords said no, no way.

Farmer Yes.

Tipping J It's a case she had clearly fallen below the standard of a reasonably competent barrister in advising that settlement in those circumstances. I can't see an action saying we would clearly have got more or endeavouring to prove they would have got more or the chance of getting more is going to bring justice into disrepute or affect a third party or undermine finality or anything like that.

Farmer Well that case, that example would still give rise of course to causation issues.

Tipping J Of course.

Farmer But I agree that's just a diffculty of proof sort of point.

Tipping J Exactly.

Farmer Yes but, accepting what Your Honour says for the purpose of discussion, not a concession.

Tipping J No, no.

Farmer Then that's a good argument against having an extension, an intimate connection extension because there you are truly dealing with a situation where the case doesn't go to trial because advice is given. And that's really what I was going to

say about my example which is much the same thing I think. That except for this, that where a settlement occurs effectively there is a policy as I say that says that settlements are good, they're good for the legal system, they must, because they achiev finality and in a way that happens to be very efficient because you don't have judges having to sit for days hearing a case, so there is a principle that settlements should be respected and should not be lightly set aside if there is a challenge to them. However, as I say, it certainly is the case that if in that instance there was a claim that the advocate had advised negligently on the settlemt, well then that would be perhaps an argument for saying that the intimate connection extension shadn't occur. But once you're into the trial situation, and once yre in the situation where a judgment is given, well then inevitably you do have relitigation occurring.

Thomas J The High Court in **D'Orta** really meet this point by framg the finality principle as being a principle of quelling controversy.

Farmer That's right.

Thomas J And so they would rank settlmts as being just as important as a judgment that is challenged.

Farmer They don't deal specifically with settlmts but I think it's consistent with the spirit of what they say that that is.

Thomas J Yeah.

Tipping J But the difference between an in-court settlmt or an out of Court settlmt as to how proximate the trial is, is a very unsatisfactory way of resolving whether there should be a right of action. It's an extraordinarily arbitrary, saying that it's a week before the trial, it's not intimately connected or if they've had an adjournment for a week to allow the parties to consider their position. I mean I'm influenced by a case I was familiar with in practice where someone had clearly been negligently advised in a personal injury case by a counsel who can't have had any experience in the field. And that person was unable to recover, you know, because of the so-called intimate connection test. It just seemed just completely wrong.

Farmer Well I mean yes one can take, this is, there are difficulties with it and it's fair to acknowledge that. I mean at one extreme you might the situation where a client is advised that he has no claim at all. And so he doesn't bring a claim.

Tipping J Indeed, exactly.

Farmer And that would not be covered by the immunity I don't think on any stretch of it. At the other extreme there would be the sort of thing that perhaps happened in this case where during the course of the trial counsel gives certain advise as a result of a matter being or issue being raised by the Judge. And then there's the example Your Honour gives of a week before the trial. So where do you draw the line. And the answer to that is probably the answer given by the learned President in the present case, well if you're going to have an intimate connection test, and he says actually two things in his judgment. At one point of his judgment he says, well this is an argument not for doing away with the immunity but it's an argument for not having the intimate connection extension of it.

Tipping J Yes.

Farmer But he also says later in his judgment that if, that the intimate connection issue is best sorted out on a case by case basis. And it can be. But I think this is an area of genuine debate.

Tipping J It is.

Farmer And I wouldn't pretend otherwise.

Tipping J No.

Gault J The Court of Appeal in the **Hall** case was really wrestling with cases of this.

Farmer Which case sorry Your Honour.

Gault J In the **Hall** case the Court of Appeal was wrestling with consent orders.

Farmer Yes.

Gault J Submitted to on advice.

Farmer Which is what we, this case is a variant of that. We have a consent order, or at least an order made by the judge purportedly by consent but where it's now said that there was no consent given. So that's a really difficult.

Tipping J That's another twist.

Farmer Another twist to it. Your Honours those were really the submissions I wanted to make in reply.

Thomas J Yes there was another point. You'll recollect that yesterday it was pointed out that a blanket immunity would cover cases

where the barrister or solicitor had a contract with the client. You're quite happy to see the immunity applied there?

Farmer Yes.

Thomas J It would override any contractual undertaking to exercise skill.

Farmer Policy considerations can apply in the law of contract as well and it would be the same policy consideration.

Elias CJ And intentnl torts.

Farmer That's more difficult and I don't think anyone has said that the immunity applies to intentional torts.

Gault J All the same policy considerations are there aren't they.

Elias CJ Yes.

Farmer They are but that may be a situation where there's a policy that people.

Elias CJ A higher policy trumps it.

Farmer That's right. The policy of for example counsel who is part of some conspiracy to injure has client by combining with someone to make sure the client lost the case. That sort of case. It's hard.

Tipping J The intentional inflictn of harm would be a lack of good faith.

Farmer Yes, yes.

Tipping J And the immunity's never been available where there's lack of good faith.

Farmer Even if the days when it was based on the inability to sue for fees.

Tipping J Exactly.

Farmer Yes.

Elias CJ Any further questions? No. Thank you Mr Farmer. And thank you all counsel. We've had excellent submissions and a most enjoyable hearing. Thank you. We'll reserve.

Court adjourns 10.49 am.