IN THE SUPREME COURT OF NEW ZEALAND

SC 19/2005
[2006] NZSC 70

BETWEEN	CHAMBERLAINS Appellants
AND	SUN POI LAI Respondent

BETWEEN	CHAMBERLAINS Appellants
AND	HILDA LORRAINE LAI Respondent

Hearing: 18-20 October 2005

Court: Elias CJ, Gault, Keith, Tipping and Thomas JJ

Counsel: A C Challis for Chamberlains
P F A Woodhouse QC, P N Collins and D Webb for Sun Lai
R M Gapes and C Weaver for Hilda Lai
W M Wilson QC and C F Finlayson for New Zealand Law Society
J A Farmer QC, G M Coumbe and A Thorn for New Zealand Bar Association

Judgment: 11 September 2006

JUDGMENT OF THE COURT

A. The appeal is dismissed.

B. The appellants must pay the respondents $30,000 in costs together with disbursements, to be fixed if necessary by the Registrar.

REASONS

ELIAS CJ, GAULT AND KEITH JJ

(Given by Elias CJ)

[1] Access to the courts for vindication of legal right is part of the rule of law. Immunity from legal suit where there is otherwise a cause of action is exceptional. Immunity may be given by statute, as in New Zealand in respect of personal injuries where other, exclusive, redress is provided.[1] An immunity may attach to status, such as of diplomats or heads of state. All cases of immunity require justification in some public policy sufficient to outweigh the public policy in vindication of legal right.

[2] Public policy is not static. So, for example, the immunities of the Crown have been progressively rolled back in response to changing attitudes as to where the public interest lies.[2] And the wide immunity at common law for states and heads of state has been restricted and modified by modern legislation and judicial decisions,[3] often under the influence of developing international law.[4]

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1 Injury Prevention, Rehabilitation, and Compensation Act 2001, s 317(1).

2 Originally the Crown was immune from all legal proceedings: see Holdsworth *A History of English Law* (3 ed 1944), vol 9 at 8; De Smith, Woolf and Jowell *Judicial Review of Administrative Action* (1995) at [4-038]. In New Zealand, see the Crown Proceedings Act 1950.

3 State immunity in New Zealand continues to be a matter of common law. In the UK, the common law is now replaced by the State Immunity Act 1978. For modification by case law see, for example, *Playa Larga v I Congreso del Partido* [1983] 1 AC 244 (holding that the former absolute immunity was restricted where a state was engaged in trade); *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet (No 3)* [2000] 1 AC 147 (holding that immunity for acts of torture did not survive ratification of the International Convention against Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment 1984).

4 Such as the Vienna Convention on Diplomatic Relations 1961 (upon which the Diplomatic Privileges and Immunities Act 1968 (NZ) was based), general covenants such as the Convention against Torture (relied upon in *Pinochet*) and the Convention on Jurisdictional Immunities of States and their Property (considered in *Jones v Minister of the Interior of the Kingdom of Saudi Arabia* [2006] 2 WLR 1424 at [8] per Lord Bingham of Cornhill; [47] per Lord Hoffmann), and developing rules of customary international law.

[3] The present appeal raises the question whether public policy justifies retention of a limited common law immunity for legal practitioners from claims by their clients for professional negligence. In principle, all who undertake to give skilled advice are under a duty to use reasonable care and skill. An immunity which shields legal practitioners from liability for breach of that duty is anomalous. No other professional group is immune from liability for breach of duties of care they owe to those they advise, treat or represent.

[4] The existing immunity, which attaches to court representation and work "intimately connected" with it, was not clearly established as a matter of New Zealand law until the 1973 Court of Appeal decision in *Rees v Sinclair*.[5] *Rees v Sinclair* applied the 1967 decision of the House of Lords in *Rondel v Worsley*.[6] The immunity recognised in *Rondel v Worsley* was also adopted in the same form in Australia.[7] No such sweeping immunity is known in Canada[8] or in the United States federal jurisdiction.[9]

[5] *Rondel v Worsley* has been controversial.[10] Eleven years after it was decided, Lord Diplock in *Saif Ali v Sydney Mitchell & Co*[11] expressed regret that the argument in that case had not extended to:[12]

> …a more radical submission that the immunity of the advocate, whether barrister or solicitor, for liability for negligence even for what he says or does in court ought no longer to be upheld.

In 2000, the House of Lords held unanimously in *Arthur J S Hall v Simons*[13] that the immunity was no longer justified in relation to the negligent conduct of civil proceedings. And, by a majority, it held that no sufficient public policy

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5 [1974] 1 NZLR 180.
6 [1969] 1 AC 191.
7 *Giannarelli v Wraith* (1988) 165 CLR 543.
8 *Demarco v Ungaro* (1979) 95 DLR (3d) 385, a judgment of the High Court of Ontario which seems to have been treated as authoritative. See Linden *Canadian Tort Law* (7 ed 2001) 156-158.
9 *Ferri v Ackerman*, 444 US 193 (1979).
10 See, for example, Cane *Tort Law and Economic Interests* (2 ed 1996) 233-237; Hill "Litigation and Negligence: a Comparative Study" (1986) 6 OJLS 183 at 184-186.
11 [1980] AC 198.
12 At 223.
13 [2002] 1 AC 615.

considerations justified its retention in respect of the negligent conduct of criminal proceedings.[14] *Rondel v Worsley* is therefore no longer good law in England and Wales.[15] After the decision of the Court of Appeal in the present case adopting *Arthur J S Hall v Simons* had been delivered, the High Court of Australia by a majority of 6:1 has however affirmed the immunity as a matter of Australian law in *D'Orta-Ekenaike v Victoria Legal Aid.*[16]

[6] The appeal to this Court therefore raises an important point which has led to divergent results in comparable jurisdictions and upon which appellate courts have themselves been divided. The principal issue on the appeal is whether the public interest requires retention of immunity for barristers and solicitors in respect of their conduct of litigation and work closely related to it. A second issue concerns whether any change to the immunity must now be left to Parliament: it is argued that the immunity has been recognised by statute through s 61 of the Law Practitioners Act 1982; alternatively, it is suggested that removal of the immunity is not suitable for judicial determination because it entails departure from long-settled authority.

The appeal

[7] Mr and Mrs Lai have issued proceedings in the High Court in Auckland claiming damages against Chamberlains, a firm of solicitors, for professional negligence. The negligence alleged (which is pleaded in alternative claims based on contract, tort, and breach of fiduciary duty) was in acknowledgements made by Chamberlains to the High Court before the terms of a consent order were finalised. The consent order resolved civil litigation to which Mr and Mrs Lai were parties and in which they were represented by Chamberlains. Chamberlains, by its statement of defence, denies all breaches of duty alleged and raises general defences of lack of causation and contributory negligence. It also raises the further defence of immunity

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14 At 683 per Lord Steyn; 684-685 per Lord Browne-Wilkinson; 707 per Lord Hoffmann; 753 per Lord Millett; and, in respect of civil proceedings only, at 726 per Lord Hope; 735 per Lord Hutton; 750-752 per Lord Hobhouse.

15 In Scotland, the Inner House of the Court of Session in *Wright v Paton Farrell* [2006] SLT 269 expressed the view that immunity in respect of criminal proceedings remained capable of justification in Scotland notwithstanding the contrary view of the majority in *Arthur J S Hall v Simons*. No opinion was expressed with respect to civil proceedings.

16 (2005) 214 ALR 92.

to all causes of action. Chamberlains says the immunity arises because the actions claimed to be negligent were intimately connected with the conduct of the case in court.

[8] Mr and Mrs Lai applied to strike out the defence of immunity. The strike out was denied in the High Court by a Full Court on the basis that it was open to the trial judge to find that some of the advice said to be negligent was sufficiently connected with the hearing as to be covered by the immunity.[17] *Rees v Sinclair*, as a decision of the Court of Appeal, was binding on the High Court. But both Judges expressed reservations about earlier justifications for the immunity and about its scope. Salmon J thought that modern case management had undermined some of the reasons for the immunity. Laurenson J thought public policy no longer justified the immunity in civil cases, although he would have retained it for criminal and family cases. If unconstrained by authority, both Judges would have confined the immunity to conduct of litigation in court on the basis that the "intimate connection" test is unworkable.[18]

[9] On appeal, the Court of Appeal held by a 4:1 majority that there was no longer sufficient justification for retention of immunity for barristers in respect of negligence in civil litigation.[19] The Court left the issue of liability for negligence in the conduct of criminal proceedings to "another day".[20] The majority Judges declined to follow *Rees v Sinclair*, preferring the reasoning in *Arthur J S Hall v Simons*. Hammond J, with whose reasons McGrath, Glazebrook and O'Regan JJ expressed agreement in a short joint concurring opinion, was of the view that none of the arguments considered in *Rondel v Worsley* for the immunity remained persuasive. Anderson P dissented. He thought the immunity was "as necessary for the due administration of justice for the public benefit, and for the advancement of our other democratic protections, as it ever was…".[21] In addition, he took the view that it would be wrong to overrule a long-standing decision founded on

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17 *Lai v Chamberlains* [2003] 2 NZLR 374.
18 At [60]-[61] per Salmon J; [135] per Laurenson J.
19 [2005] 3 NZLR 291 (McGrath, Glazebrook, Hammond and O'Regan JJ; Anderson P dissenting).
20 At [191] per Hammond J.
21 At [108].

considerations of public policy and that the law in New Zealand should remain aligned with that in Australia.

[10] A second issue considered by the Court of Appeal was whether s 61 of the Law Practitioners Act 1982 constitutes legislative recognition of the immunity of law practitioners from suit, so that the immunity cannot now be removed by judicial decision. Section 61, which first appeared in similar terms in New Zealand legislation in 1861,[22] provides:

> **61 Status of barristers**
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> Subject to this Act, barristers of the Court shall have the powers, privileges, duties, and responsibilities that barristers have in England.

The precursors of s 61 did not in their terms apply to solicitor-advocates, and in *Rees v Sinclair* the Court expressly reserved the question whether solicitor-advocates were immune from liability for negligence in litigation.[23] The distinction between barristers and solicitor-advocates has ceased to have practical effect in the application of s 61 because s 43(3) of the Law Practitioners Act 1982 permits any solicitor to practice as a barrister and, in that capacity, the solicitor has "all the rights, powers, and privileges of a barrister".

[11] In the Court of Appeal in the present case, Anderson P took the view that the immunity from suit was a "privilege" of barristers within the meaning of s 61. Since at 1982 (the date of enactment of s 61) barristers in England were immune from liability for negligence in work intimately connected with litigation,[24] he considered that the immunity "is now vested in New Zealand barristers as a matter of statutory entitlement which a Court is not competent to remove".[25] In any event, Anderson P took the view that the immunity at common law should not be modified by court decision, because it would operate retrospectively. Any change should therefore be left to the legislature.

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22 Law Practitioners Act 1861.
23 At 186 per McCarthy P; 190 per MacArthur J.
24 As *Saif Ali* had held.
25 At [120].

[12] The Judges in the majority in the Court of Appeal considered that the immunity was not properly to be regarded as a "privilege" within the meaning of s 61. They also took the view that the "powers, privileges, duties, and responsibilities" of barristers could not be frozen at the date of the enactment of s 61 and that New Zealand courts could reconsider the immunity, at least "if it is changed in England".[26] The majority considered that there was no occasion to leave change to the common law immunity to legislative correction. They considered that the circumstances did not compel prospective declaration of the law (assuming such declaration could be made).

[13] In accordance with the view of the majority in the Court of Appeal, the defence of immunity was struck out. The firm appeals with leave. It is supported by the New Zealand Law Society and the New Zealand Bar Association as interveners. They advocate retention of the immunity as based on sound policy and contend that, in any event, it cannot now be overturned by judicial decision because the immunity has been legislatively recognised. Alternatively, they contend that if the immunity is not upheld, the decision of the Court should be prospective only, allowing the immunity to be maintained by the firm in the present proceedings.

Advocates' immunity at common law

[14] *Rees v Sinclair* accepted the policy justifications for the immunity developed in *Rondel v Worsley*. *Rondel v Worsley* expressed a new rationale for an old immunity in English law. The immunity had been of doubtful scope in New Zealand because of the different circumstances of New Zealand legal practice.[27]

[15] In England, barristers did not enter into contracts for their professional services. As a result, it was held in the 18th century that barristers could not sue for

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[26] At [172] per Hammond J, with whom McGrath, Glazebrook and O'Regan JJ agreed.

[27] The profession in New Zealand has never maintained a strict division between barristers and solicitors comparable to that in the United Kingdom. In New Zealand, since the Supreme Court Ordinance 1841, the practices of barristers and solicitors have been able to be combined. Similar divergence from the English model of legal practice meant that in Canada barristerial immunity did not become part of Canadian law: see *Demarco v Ungaro*.

their fees.[28] The immunity of barristers from civil liability was recognised a little later, whether initially as a result of the absence of contractual obligations between barrister and client is not clear.[29] It was however rationalised on that basis in some of the subsequent cases.[30]

[16] In New Zealand, the Supreme Court Ordinances of 1841[31] and 1844 and the subsequent Law Practitioners Acts of 1854 and 1858, in what were clearly intended as temporary expedients, permitted anyone enrolled as a barrister or solicitor to act in both capacities. There was no clear impediment to their entering into contracts with clients for professional litigation services and it seems they could sue for unpaid fees.[32] After the Law Practitioners Act 1861 and until enactment of the Law Practitioners Act 1982, barristers could practice as solicitors and those admitted as both could combine their practices as both. Most did so. Whether they could therefore also be sued for breach of contractual duties of care and skill in the performance of litigation services was uncertain until *Rees v Sinclair* adopted the immunity as restated in *Rondel v Worsley.* Although the determination that legal practitioners are immune from liability for negligence in respect of in-court work was not necessary for disposal of the appeal in *Rees v Sinclair* itself, it has been treated as authoritative in subsequent cases.[33]

[17] The reassessment in *Rondel v Worsley* of the immunity of barristers had been prompted by the recognition of liability in tort for negligent advice in *Hedley Byrne & Co v Heller & Partners*.[34] Unlike the wider earlier immunity which had attached in English law to all work undertaken by barristers, the modern immunity described in *Rondel v Worsley* was confined to advocacy in court. In this, *Rondel v Worsley* reduced the scope of the earlier barristerial immunity considerably. The immunity was grounded on the public interest in the administration of justice. It was thought

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28 *Thornhill v Evans* (1742) 2 Atk 330 at 332.

29 This explanation was described by Lord Diplock in *Saif Ali* at 216 as "facile". See, also, *Arthur J S Hall v Simons* at 676 per Lord Steyn.

30 For example, *Kennedy v Broun* (1863) 14 CBNS 677.

31 Later disallowed and replaced with the 1844 Ordinance.

32 The point was assumed by McCarthy P in *Rees v Sinclair* at 186. It was discussed in *Robinson and Morgan-Coakle v Behan* [1964] NZLR 650 (SC).

33 See, for example, *Biggar v McLeod* [1978] 2 NZLR 9 (CA); *Harley v McDonald* [1999] 3 NZLR 545 (CA).

34 [1964] AC 465 (HL).

to serve the public interest in four principal ways, discussed in *Rondel v Worsley* and in the subsequent cases:

- by preventing the fear of subsequent litigation from eroding the barrister's independent duties to the court (in case of conflict with the interests of the client) and from promoting defensive lawyering which is wasteful of time and resources;

- by avoiding effective re-litigation, otherwise than on appeal, of controversies already resolved by court decisions, unsettling public confidence in outcomes and prolonging litigation;

- by recognising that barristers, in application of the "cab-rank obligation", cannot pick and choose their clients to minimise risk of future recrimination and that it is in the interests of justice that barristers continue to agree to represent anyone who needs representation, however difficult the person or distasteful the cause;

- as an essential part of a wider scheme of immunity which applies to judges, jurors, and witnesses in court proceedings.

[18] The first of these reasons, based upon the advocate's independent duty to the court, was the principal reason relied upon in *Rondel v Worsley.* Lord Reid was of the view that this duty may often lead to conflict with the client's wishes or "with what the client thinks are his personal wishes".[35]

> Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce. And by so acting he may well incur the displeasure or worse of his client so that if the case is lost, his client would or might seek legal redress if that were open to him.

[19] The immunity recognised in *Rees v Sinclair* applied to both barristers and solicitors. *Rees v Sinclair* held that the immunity applied both to the conduct of

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35 At 227-228.

cases in court or preparation "intimately connected" with it.[36] In *Saif Ali* the immunity in England was extended to solicitor-advocates.[37] The House of Lords in the same case adopted the "intimate connection" extension suggested in *Rees v Sinclair*. In New Zealand, Woodhouse J in *Biggar v McLeod* considered that the connection could be more simply expressed as attaching to the conduct of litigation.

[20] In the cases which have followed, the grounds identified in *Rondel v Worsley* as justifying the immunity have been closely scrutinised and re-weighed. What is striking is the shifting emphasis both within courts and over the forty years since the immunity has been put on its modern footing. Such shifts do not suggest sound foundations.

[21] Thus in *Saif Ali* Lord Diplock doubted whether some of the policy considerations which had persuaded the House eleven years earlier in *Rondel v Worsley* remained compelling. He observed of the barrister's duty to the court:[38]

> To say of a barrister that he owes a duty to the court, or to justice as an abstraction, to act in a particular way in particular circumstances may seem to be no more than a pretentious way of saying that when a barrister is taking part in litigation he must observe the rules; and this is true of all who practise any profession.

Neither was Lord Diplock impressed by the reliance in *Rondel v Worsley* on the cab-rank obligation. He doubted its strength as a matter of practice, but in any event thought the risk of being pursued subsequently by an obstinate and cantankerous client unwilling to accept disappointment was not one that justified depriving all clients of any possibility of a remedy for negligence.[39] Lord Diplock considered only two grounds could justify the immunity: that it is part of the general immunity which attaches to all who participate in proceedings before a court; and the risk that court decisions would be challenged in collateral proceedings before other courts of co-ordinate jurisdiction (a consideration he thought applied only to decisions reached after a contested hearing). In the same case, Lord Wilberforce[40] and Lord Russell of

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36 The test suggested by McCarthy P at 187.
37 At 215 per Lord Wilberforce; 224 per Lord Diplock; 227 per Lord Salmon.
38 At 219.
39 At 221.
40 At 214.

Killowen[41] considered that the first of these reasons (the general immunity of participants in court) could not justify the immunity of counsel for negligent conduct of proceedings.

[22] In *Giannarelli*, the 1987 High Court of Australia decision which adopted *Rondel v Worsley*, Mason CJ[42] too thought that only two public policy justifications for the immunity warranted serious examination. But the first reason was one rejected by Lord Diplock: the barrister's duty to the court. The second was the damage that would be caused to the administration of justice if court decisions could be collaterally attacked in negligence suits against counsel. In the same case, Wilson J[43] relied also on the absolute privilege accorded to those who participate in court proceedings. Brennan J[44] considered the most significant reason for the immunity to be the chilling effect of civil proceedings upon counsel's primary duty to the court. Dawson J[45] thought the most cogent reason for the immunity was the privilege against civil liability for all participants in court proceedings (although he also thought the risk of collateral challenge important). Toohey J[46] did not find it necessary to consider the policy justification for the immunity. Deane J, who agreed with Toohey J and so did not find it necessary to determine the point, expressed the view that none of the policy considerations relied upon by the Judges in the majority were sufficient to:[47]

> …outweigh or even balance, the injustice and consequent public detriment involved in depriving a person, who is caught up in litigation and engages the professional services of a legal practitioner, of all redress under the common law for "in court" negligence, however gross and callous in its nature or devastating in its consequences.

Arthur J S Hall v Simons

[23] In *Arthur J S Hall v Simons* in 2000, the immunity was reassessed by the House of Lords and rejected as a matter of English law. It was generally accepted

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41 At 233.
42 At 555.
43 At 572-573.
44 At 579.
45 At 594-595.
46 At 609.
47 At 588.

that in civil proceedings the boundaries of what was or was not within the scope of the immunity on the "intimate connection" test had proved unworkable.[48] All seven Law Lords held that the immunity was no longer justified in relation to negligent conduct of civil proceedings. Lord Steyn, Lord Browne-Wilkinson, Lord Hoffmann and Lord Millett held also that no sufficient public policy considerations justified retention of the immunity in respect of the negligent conduct of criminal proceedings. Lord Hope, Lord Hutton and Lord Hobhouse would have retained the immunity for criminal proceedings largely because of the nature of criminal trial and appeal.[49] Most of the arguments previously used to justify the immunity were brushed aside without difficulty.

[24] None of the Law Lords considered that the cab-rank principle provided justification for the immunity.[50] Lord Steyn expressed doubts about its observance as a matter of practical importance in the administration of justice.[51] Lord Hoffmann thought that fear of litigation was not likely to be the principal reason why barristers would prefer to be free of acting for a client under the cab-rank rule: being "tiresome or disgusting" were more immediate reasons.[52] Lord Hope thought the significance of the rule in daily practice was "not great" and that there was no sound basis for thinking that removal of the immunity would have the effect of depriving anyone of representation.[53]

[25] The argument that consistency with the immunity of other participants in court proceedings was justification for the immunity of advocates was also dismissed briefly by the majority and in respect of civil proceedings by the minority.[54] Lord Hoffmann considered it a false analogy because judges and witnesses, unlike advocates, owe no duty to a party in respect of evidence given in court.[55] Lord Hope

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48 At 707 per Lord Hoffmann; 724 per Lord Hope; 729 per Lord Hutton; 745 per Lord Hobhouse.

49 Lord Hobhouse considered that the question had not been sufficiently addressed on the appeal to enable a definitive answer to be given.

50 See 678-679 per Lord Steyn; 696 per Lord Hoffmann; 714 per Lord Hope; 740 per Lord Hobhouse. Lord Browne-Wilkinson and Lord Millett expressed their agreement with Lord Steyn and Lord Hoffmann.

51 At 678.

52 At 696.

53 At 714.

54 As to the analogy with witnesses see 679 per Lord Steyn; 697-698 per Lord Hoffmann; 714 per Lord Hope; 740-741 per Lord Hobhouse.

55 The position of an expert witness may need reassessment (as Lord Steyn noted at 679). See [54] below.

thought the argument a make-weight. On the other hand, Lord Hobhouse[56] and Lord Hutton,[57] dissenting as to criminal proceedings, considered that the liability to which defence counsel in criminal proceedings might be exposed would be unfair if all other participants were immune. They thought the immunity was necessary to protect the performance of an important public duty, essential to the administration of justice.

[26] The Law Lords in the minority as to criminal proceedings considered that the risk of liability in negligence would erode the exercise of independent judgment by advocates in criminal proceedings. But Lord Steyn and Lord Hoffmann (with whom Lord Browne-Wilkinson and Lord Millett expressed agreement) took the view that the advocate's duty to the court would not be affected by removal of the immunity. Both thought it significant that there was no indication that duties to the court have been undermined in jurisdictions where advocates do not have immunity.[58] Lord Steyn, Lord Browne-Wilkinson and Lord Hoffmann thought it was necessary to keep the risk of litigation in context: the courts differentiate between errors of judgment and negligence; it will be difficult to convince a court that better advocacy would have resulted in a more favourable outcome in the first proceedings; and the argument that unfounded actions might impact negatively on the conduct of advocates was dismissed by Lord Steyn as "a most flimsy foundation, unsupported by empirical evidence".[59] Lord Hoffmann emphasised that the duty to the court is backed up by court and professional disciplinary powers. Observing the rules could never put the advocate at risk of liability in negligence:[60]

> It cannot possibly be negligent to act in accordance with one's duty to the court and it is hard to imagine anyone who would plead such conduct as a cause of action.

[27] The key issues in *Arthur J S Hall v Simons* were whether the principles of finality in litigation would be undermined if advocates are not immune from actions for negligence and whether the nature of the criminal justice system requires retention of the immunity in respect of those proceedings. All Law Lords in *Arthur*

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56 At 741.
57 At 731.
58 At 681 per Lord Steyn; 695 per Lord Hoffmann.
59 At 682 per Lord Steyn; 684 per Lord Browne-Wilkinson; 687 per Lord Hoffmann.
60 At 692-693.

J S Hall v Simons were agreed that the immunity of advocates was not necessary to protect finality in civil litigation. Re-litigation in respect of civil proceedings was held to be adequately deterred by the rules of res judicata and issue estoppel and by the power of the court to prevent abuse of its process.[61] Lord Steyn, Lord Hoffmann, Lord Browne-Wilkinson and Lord Millett took the view that the power of the court to prevent abuse of process, as developed in *Hunter v Chief Constable of the West Midlands Police*[62] in relation to collateral challenge to criminal convictions, was sufficient protection for the public interest in finality of criminal process also.

[28] In *Hunter*, it was held that an action against the police for assault was an abuse of process because it amounted to a collateral attack on the plaintiffs' earlier convictions, against which they had appealed unsuccessfully. The convictions and the decision on appeal had entailed rejection of the plaintiffs' claims that confessions had been obtained as a result of the assaults. The proceedings were an abuse notwithstanding the fact that the parties to the proceedings were not the same, as required for res judicata or issue estoppel.

[29] The *Hunter* principle that it may be abuse of process to impugn an earlier decision has been applied to claims for professional negligence against solicitors in civil proceedings, in cases where the immunity was not in issue.[63] In *Arthur J S Hall v Simons*, however, the Law Lords saw little scope for abuse of process on the principle applied in *Hunter* in relation to claims for negligent conduct of civil proceedings. Lord Steyn thought it would ordinarily be unnecessary to rely on the *Hunter* principle where the negligence is claimed in respect of the conduct of civil proceedings because "[t]he principles of res judicata, issue estoppel and abuse of process as understood in private law should be adequate to cope with this risk".[64] Lord Browne-Wilkinson expressed some doubt about the application of the *Hunter* principle to civil judgments (noting that the rules of res judicata and issue estoppel

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61 At 680 per Lord Steyn, in apparent reference to such cases as *Henderson v Henderson* (1843) 3 Hare 100; 67 ER 313, discussed below at [59] and [71-72].

62 [1982] AC 529.

63 *Somasundaram v M Julius Melchior & Co* [1988] 1 WLR 1394 (CA); *Walpole v Partridge & Wilson* [1994] QB 106 (CA); *Smith v Linskills* [1996] 1 WLR 763 (CA); *Acton v Graham Pearce & Co* [1997] 3 All ER 909 (HC).

64 At 680.

are more restrictive).[65] Lord Hoffmann thought a negligence action in respect of the conduct of civil proceedings would seldom bring the administration of justice into disrepute:[66]

> Whether the original decision was right or wrong is usually a matter of concern only to the parties, and has no wider implications.

There could be exceptions where collateral challenge might be unfair to someone else. Lord Hoffmann gave as an illustration the impact upon the successful party in an earlier defamation proceeding.

[30] Criminal cases were different. Lord Hoffmann suggested that criminal convictions are in the nature of in rem determinations and pointed to the fact that the scope for re-examination of convictions on appeal is much wider than in civil cases.[67] Convictions based on guilty pleas were, he thought, no different. Lord Hoffmann suggested that there could be exceptions where collateral challenge would not amount to an abuse of process, such as a failure to advise on an appeal on a point of law.[68] Lord Steyn regarded collateral challenge to a subsisting conviction as "the paradigm of an abusive challenge". But while *Hunter* did not provide an inflexible rule, he thought it would be "prima facie an abuse to initiate a collateral civil challenge to a criminal conviction":[69]

> Ordinarily therefore a collateral civil challenge to a criminal conviction will be struck out as an abuse of process.

[31] Because the *Hunter* principle was sufficient protection for collateral challenge to criminal convictions and in unusual cases where such challenge to civil determinations would amount to abuse, Lord Hoffmann considered that re-litigation was no reason to give lawyers immunity against all actions for negligence in the conduct of litigation. Such response was disproportionate. The other Law Lords in the majority on this point agreed.[70] Lord Millett in addition expressed the view that

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65 At 685.

66 At 706. This approach is consistent with that more fully developed by Lord Hobhouse, as discussed at [35] below.

67 This too is a point made by Lord Hobhouse at 746-767, referred to at [36] below.

68 At 706, citing *Walpole v Partridge & Wilson*.

69 At 679.

70 At 679 per Lord Steyn; 685 per Lord Browne-Wilkinson.

an immunity for advocates according to whether they were conducting civil or criminal proceedings was indefensible.[71]

[32] The Law Lords in the minority thought that collateral challenge to a subsisting conviction was only part of the problem in removal of the immunity from negligence in the conduct of criminal proceedings. Lord Hope and Lord Hutton agreed that the problem of collateral challenge was sufficiently answered by the power to prevent abuse of process.[72] But they considered that *Hunter* was insufficient answer to the damage that would be caused to the administration of justice in criminal proceedings if immunity were not retained. They were concerned with the nature of criminal process and the appropriateness of advocate liability for negligence within it. On this view, the *Hunter* principle does not address the right question.

[33] Lord Hope pointed out that the *Hunter* principle, though apt to meet the case of collateral challenge to a subsisting conviction, provided an incomplete pattern of protection to serve the public interest in the field of criminal justice:[73]

> There are various events which may arise in the course of a criminal trial, such as things done or not done which may cause delay or continued detention in custody, which may operate to the client's disadvantage irrespective of the question whether he is in the end of the day acquitted or convicted or, if he is convicted, the conviction is set aside. Then there is the problem about what happens if the conviction is set aside on appeal. The appeal may have been taken on grounds other than that the advocate was negligent because the high standard which is needed to set aside a conviction on that ground cannot be satisfied. But once the conviction has been set aside the way will be clear for allegations which would not satisfy that standard to be made because the client's action can no longer be dismissed or struck out as an abuse of process. It should not be forgotten that the setting aside of the conviction does not of itself mean that the client no longer has a claim in damages: see *Acton v Graham Pearce Co* [1997] 3 All ER 909. He may have been detained in custody, or lost his job or suffered in other ways for which he may wish to be compensated.

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71 At 752.

72 Lord Hutton (at 730) expressly agreed with Lord Hoffman that *Hunter* was adequate to deal with the risk of abusive collateral challenge to subsisting convictions. See, also, Lord Hope at 722.

73 At 722-723.

Lord Hope thought the pattern of protection provided by the immunity was inadequately replaced by the abuse of process response, because of "the risk that the removal of the immunity would in some cases lead to a defensive approach by advocates"[74] and the risk they would be exposed to harassment at the instance of "clients who may be devious, vindictive, and unscrupulous".[75] Nor did he think such liability was necessary to provide an appropriate response to someone who complains of poor representation. On "the other side of the balance" were: the special mechanisms developed in criminal procedure to prevent miscarriages of justice; the availability of compensation for miscarriages of justice (under the Criminal Justice Act 1988 (UK) or through ex gratia payment); and professional disciplinary mechanisms for misconduct which can be activated by the client or the trial judge.[76]

[34] Lord Hutton agreed that preventing collateral challenge was only part of the benefit for the administration of criminal justice secured by the immunity. He considered that the removal of the immunity would be detrimental to the public interest even in cases where the conviction had been set aside or where the client did not complain about wrongful conviction. The public interest was not so much based on the risk that the advocate would not do his duty because of divided loyalties but on the view that:[77]

> …it is not right that a person performing an important public duty by taking part in a trial should be vexed by an unmeritorious action and that such an action should be summarily struck out.

[35] Lord Hobhouse was of the view that abuse of process and the immunity are distinct and separate: "[t]hey do not serve the same purpose".[78] He considered that the public interest to be protected was not the risk of inconsistent decisions (which the law "tolerates", at least where there is no additional element of vexation),[79] but

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74 At 724.
75 At 720.
76 At 720-721.
77 At 731.
78 At 743.
79 Explaining (at 751) that development of the *Hunter* principle into a rule that a claim for negligence cannot be brought in respect of a conviction unless the conviction is first set aside would be "an anomalous judge-made bar to a negligence action which does not at present exist".

the working of the criminal justice system. Lord Hobhouse emphasised that civil process provides "a system of relative justice".[80] Its character is that one party seeks a remedy for infringement of rights. The public interest is not in the outcome, but in the provision of a system for resolving civil disputes and enforcing civil rights, which is "a necessary part of a society governed by the rule of law not by superior force". If something goes wrong in litigation, the court must consider whether putting it right will cause injustice to the other party. If the error is caused by the party's lawyer, excluding the potential for liability will "make it more difficult to do justice between the plaintiff and the defendant not less difficult". The appeal process is not apt to provide the remedy for lawyer negligence. That is illustrated by the rules which strictly control the admission of new evidence on appeal. Preserving the rights of clients against their lawyers "assists the doing of justice between plaintiff and defendant in civil litigation".[81] The economic remedy was therefore the right remedy.

[36] Lord Hobhouse considered the criminal process to be "of a fundamentally different character to the civil process":[82]

> The legitimate interest of the citizen charged with a criminal offence is that he should have a fair trial and only be convicted if his guilt has been proved. It is not an economic interest. His interest like his potential liability under the criminal law stems from his membership of the society to which he belongs – his citizenship. If the charge against him has not been proved, he should be acquitted. If he has been wrongly convicted, his appeal against conviction should be allowed. If he has been wrongly or excessively sentenced, his punishment should be remitted or reduced. His only remedy lies within the criminal justice system. This is appropriate. The civil courts do not have any part to play in such matters. The relevance of what the advocate does during the criminal trial is to the issues at that trial, not the remoter economic consequences of the outcome of that trial.
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> Any involvement of the citizen in the criminal justice system may have adverse consequences. There are adverse consequences for witnesses which they in the public interest have to accept. There are certainly adverse consequences for those suspected of or charged with criminal offences. They may be held in custody. They normally have to attend their trial. They may be arrested and subjected to interviews or searches or tests which would otherwise be an infringement of their civil liberties. They may be acquitted after a long and traumatic trial. They may be convicted but have their

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80 At 744.
81 At 745.
82 At 747-748.

> conviction overturned on appeal. Thus they will to a greater or lesser extent suffer disadvantage and loss including loss of liberty and reputation.
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> Provided that the relevant persons have acted in good faith, the citizen has to accept this as part of the price he pays for living in the community and enjoying the protection of the criminal law. A defendant who is detained in custody but acquitted at his trial receives no compensation for his loss of liberty or for having had serious allegations made against him. The same applies if he is convicted and sentenced at his trial but has his conviction quashed on appeal. He too receives no compensation. Those who have paid for their own defence have no assurance that they will necessarily be awarded costs.

[37] After pointing out that a wrong conviction may arise for any of a wide number of reasons, Lord Hobhouse referred to the system of criminal compensation in the United Kingdom, under legislation which "strikes a balance between those encounters with the criminal justice system which the state should compensate and those which it should not". The policy is not "indiscriminate compensation for erroneous convictions". In those circumstances:[83]

> To provide a tort based liability to pay compensation in respect of the role of only one of the participants in the criminal justice system would not only destroy this balance but also produce a capricious distribution of compensation between ultimately acquitted defendants.

Not only would this create a lottery from the client's point of view, it would have serious impact upon the administration of justice:

> From the point of view of the administration of justice it would expose the professional advocate to a risk of litigation which would handicap him in performing his duty under the criminal justice system and disinterestedly assisting, particularly at the appellate level, in the correction of errors and remedying miscarriages of justice. To argue for a higher need for a supposed redistributive justice to enable the defendant to recover civil damages from his advocate, begs the question where the greater justice lies in relation to criminal litigation as well as the question whether such a need is indeed higher than the need to facilitate as far as possible the rectification of miscarriages of justice within the criminal justice system.

Lord Hobhouse, like Lord Hope and Lord Hutton, would therefore have retained the immunity in respect of the conduct of criminal proceedings.

[38] The differences between the majority and the minority positions in relation to criminal proceedings turn on the appropriateness of the immunity as an adequate

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[83] At 749.

response to the need for finality and the proper administration of criminal justice. The majority, too, considered that criminal proceedings are different from civil proceedings. The differences in the nature of criminal proceedings, expressed in similar terms by Lord Hoffmann and Lord Hobhouse, are why the majority considered it would be ordinarily an abuse of process to claim damages for negligence in criminal proceedings if the claim entailed collateral challenge to a subsisting conviction. The majority and minority disagreed on retention of the immunity because the minority believed that preventing collateral challenge to a subsisting conviction was not sufficient protection for the criminal justice system.

D'Orta-Ekenaike v Victoria Legal Aid

[39] Unlike *Arthur J S Hall v Simons, D'Orta-Ekenaike* was a criminal case. The High Court of Australia was presented directly with the issue on which the House of Lords had divided. Moreover, the case raised in stark form the matters which in *Arthur J S Hall v Simons* had exercised Lord Hobhouse in particular. D'Orta-Ekenaike's conviction had been overturned on appeal. There was thus no collateral challenge to a subsisting conviction. Indeed, the negligence alleged in the civil proceedings had not been a ground of appeal. D'Orta-Ekenaike complained that he had been pressured by his legal aid lawyer into pleading guilty to a charge of rape. His plea was later vacated and he was convicted at a trial at which the Judge allowed evidence of the earlier guilty plea to be led and then gave an inadequate direction on the use to which it could be put. The Judge's failure to give an adequate direction was the basis upon which the conviction was set aside. At the new trial (at which the evidence of the earlier plea was not admitted), D'Orta-Ekenaike was acquitted. He issued proceedings claiming damages for deprivation of liberty during the period of his imprisonment between conviction and appeal, for his resulting mental condition, for loss of income, and for the costs associated with the appeal and re-trial. The High Court had to consider whether *Giannarelli* was correct in two respects. First,

as to the conclusion that s 10(2) of the Legal Profession Practice Act 1958 (Vic) did not impose on barristers liability in negligence.[84] Secondly, as to the conclusion that at common law advocates are immune from liability for negligence in respect of the conduct of litigation in court or in work intimately connected with it.

[40] The principal majority opinion was a joint one by Gleeson CJ, Gummow, Hayne and Heydon JJ. They upheld the immunity, recognised in *Giannarelli*, as justified for two reasons: as a necessary protection for "the judicial system as a part of the government structure"; and because the immunity is an essential part of "a series of rules …designed to achieve finality in the quelling of disputes by the exercise of judicial power".[85]

[41] The joint majority opinion expressly disavowed any reliance on most of the justifications for the immunity considered in *Rondel v Worsley* and the cases which followed it, including *Giannarelli*. They were "at most" of marginal relevance to whether the immunity was sound.[86] The potential for conflict between the advocate's duties to the court and the duties to the client was based on the wrong assumption that there was any such conflict: the duty to the court was paramount and the question was not whether an advocate owes the client a duty of care, but whether there is an immunity from suit. The cab-rank principle was irrelevant to the solicitor-advocate and, although "highly desirable",[87] was insufficient basis for the immunity. Reference to the difficulty of the advocate's task was "distracting and irrelevant".[88] Although "not irrelevant", the chilling effect of the threat of civil suit was "not of determinative significance in deciding whether there is an immunity from suit".[89]

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84 Section 10(2) makes barristers in Victoria liable to their clients for negligence "to the same extent as a solicitor was on [23 November 1891] liable to his client for negligence as a solicitor". The majority in *Giannarelli* were of the view that in considering the immunity the correct comparison was with solicitors as advocates, and that as at 1891 they were immune from liability for in-court work. It is not necessary to consider this aspect of *D'Orta-Ekenaike* further for the purposes of the present appeal.

85 At [25].

86 At [25].

87 At [27].

88 At [28].

89 At [29].

[42] Gleeson CJ, Gummow, Hayne and Heydon JJ emphasised that the immunity was not based on any "special status" for advocates. Nor did it even 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".[90]

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

[43] The justification based on finality was considered to have as much force today as when *Giannarelli* was decided. No legislative changes prompted reconsideration. Nor did the Judges who joined the majority opinion consider that the different approach taken in England in *Arthur J S Hall v Simons* or in Canada and the United States compelled reconsideration in Australia. They considered that the House of Lords had been influenced by art 6 of the European Convention and by judicial perception of social and other changes in the United Kingdom which could not be readily transposed to Australia. In Canada and the United States prosecutors and judges were immune from suit. In looking to the United States it was necessary to take into account the doctrine of collateral estoppel as developed there and the fact that findings in appeal cases as to lawyer error may be binding in subsequent malpractice suits. The principles of finality therefore found "different expression in different jurisdictions".[91]

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90 At [44]-[45]. Therefore not agreeing with the views expressed by Lord Hutton, referred to at [34] above.

91 At [64].

[44] Gleeson CJ, Gummow, Hayne and Heydon JJ pointed out the different circumstances in which a claim for the professional negligence of an advocate can be made. Such a claim can arise where the client maintains that an earlier final decision was wrong, but no correction can be obtained in the proceedings themselves (perhaps because crucial evidence not called was available at the hearing and so is not admitted on appeal). It can arise where the challenge is to an "intermediate consequence" not able to be fully remedied in the original proceedings (as where a conviction is set aside on appeal but in the meantime the client has been in prison).[92] Or it can arise where the client is put to unnecessary expense. None of these consequences could be wholly cured within the original litigation. "And yet the judicial system has arrived at the result it did":[93]

> The consequences that have befallen the client are consequences flowing from what, by hypothesis, is a *lawful* result. So, to take the present case, the imprisonment of which the applicant seeks to complain is *lawful* imprisonment. In a case where the client would say the wrong final result is reached, the result in fact reached is, by hypothesis, one that was *lawfully* reached. Whether the lawful infliction of adverse consequences (such, for example, as imprisonment) can constitute a form of damage is a question that may be noted but need not be answered.

[45] The Judges who joined the joint majority opinion considered that there was no satisfactory basis to draw a distinction between claims which would amount to abuse of process and those which would not. They rejected the distinction drawn in *Arthur J S Hall v Simons* between civil and criminal proceedings: the line between the two was difficult to draw; and civil judgments were as worthy of respect as those reached on the trial of offences. Where a final result is challenged in a suit for negligence against counsel conducting the earlier proceedings, they considered it of significance that the client will always have been a party to the earlier proceedings. They were of the view that the principle of finality required that the final result in the earlier proceedings should be incontrovertible, at least by a party.

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92 At [68].
93 At [70].

[46] Nor did the joint majority think it appropriate to make an exception for "intermediate" results. The grounds on which an intermediate result is set aside on appeal may be unrelated or at best only indirectly related to the alleged negligence (since the question on appeal is not counsel error but miscarriage of justice). They thought the lack of connection made the principle that for every wrong there must be a remedy "too attenuated to be of any relevant application".[94] They concluded that intermediate results should not be treated differently from final results.

[47] The third type of consequence considered was a claim for wasted costs. Since it would usually involve a direct or indirect challenge to the outcome on which the disposition of costs depended, the joint majority concluded that no such claim should be permitted:[95]

> …lest a dispute about wasted costs become the vehicle for a dispute about the outcome of the litigation in which it is said that the costs were wasted.

[48] McHugh J agreed with the views of Gleeson CJ, Gummow, Hayne and Heydon JJ as to the adverse consequences for the administration of justice if advocates did not have immunity. He agreed that many of the former justifications for the immunity were no longer sound. They included the potential for conflicting duties and the strains of the conduct of court proceedings. He considered that the immunity arose because advocates owe no actionable duty of care in respect of their conduct in court or in respect of conduct intimately connected with in-court conduct. The immunity for advocates was part of a wider exception on public policy grounds from the general rule that reasonable foresight of harm will give rise to a duty of care. Comparable limitations of liability attach to police officers in respect of negligent conduct of investigation of crimes and apprehension of criminals and to service personnel engaged in active operations. The immunity of advocates similarly rests on reasons of public policy:[96]

> The common law takes the view that the harm that is likely to be done to the administration of justice by permitting such actions is greater than the harm done to individuals by refusing them such causes of action.

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94 At [82].
95 At [83].
96 At [102].

[49] McHugh J thought that in *Arthur J S Hall v Simons* the House of Lords had underestimated the importance of maintaining confidence in the administration of justice in respect of civil proceedings and had overestimated the court's ability to limit re-litigation in a negligence trial. He considered that Australian law as to strike out and abuse of process differed from English law. He took the view that advocacy in the courts is a "unique profession":[97]

> Advocates play an indispensable part in the administration of justice.

Their duty to the court precluded reasoning by analogy from the liability of other professions. McHugh J thought two other "conclusive" factors were the difficulties of proving that, but for the advocate's negligence, a different result would have ensued and "the undermining of public confidence that would flow from inconsistent verdicts".[98] He considered that in criminal cases the prospect of re-litigation is "especially invidious".[99] But whether a claim arises out of civil or criminal litigation, "it can only be guesswork as to whether the negligence made any difference to the result":[100]

> That is because the opinion of a third party – a judge or a jury – is interposed between the negligence and the injury.

Since judges and jurors cannot give evidence of their reasoning, the "unreality of determining the causation issue in most cases" as well as the "undermining of public confidence by collateral attacks on final decisions of courts" were for McHugh J the "persuasive public policy bases that justify the immunity of advocates from suit".[101] Relevant too was the immunity of other participants in legal proceedings which:[102]

> …rests on the necessity that those who participate in the administration of justice should not be hampered in the discharge of their …role by the need to consider whether their conduct might be actionable.

[50] Kirby J dissented. He considered that the immunity was:[103]

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97 At [104].
98 At [113].
99 At [162].
100 At [164].
101 At [190].
102 At [192].
103 At [240].

> …a wholly exceptional exemption from the ordinary liability that other professional and non-professional persons face before the courts of Australia for conduct arguably much less blameworthy, in circumstances of equivalent care and attention, involving errors seemingly less culpable and perilous, if the complaints are believed.

He considered that the case could be disposed of on the basis that *Giannarelli* was authority for immunity only in respect of in-court negligence, and should not be extended to the out-of-court conduct in issue in the claim being considered. If *Giannarelli* stood for a wider legal rule, Kirby J favoured reconsideration of it on the basis that a wider immunity in application of the Victorian legislation was historically incorrect. Kirby J also considered the "more fundamental question" of whether the immunity exists today as a matter of common law.[104] He concluded that there is an "overwhelming case" against maintaining the immunity, agreeing with *Arthur J S Hall v Simons* that none of the justifications for the immunity which have formerly been put forward remain compelling.[105] The boundary of the immunity is, he considered, "ultimately indefinable".[106] Immunity is "an over-wide protection".[107] To address collateral attack, vexatious litigation and the need for finality it would, he thought, "not be beyond the capacity of Australian law to define proportionate protections as has been done in other jurisdictions".[108] In any case, a claim of legal professional negligence "is necessarily different, in fact and in law, from the issue that has been earlier litigated and determined".[109]

[51] Callinan J concurred with the majority. He considered that the role of the advocate differed from other professions because "[t]here are few absolute truths in the law and litigation".[110] Advocates should not be singled out for liability when witnesses, jurors and judges are not. The reasons for retaining the immunity he considered to include: the advocate's duty to the court; the "risk, expense and

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104 At [310]. A matter that would only have arisen in the case if it was accepted that the Victorian legislation imposed equality on barristers and solicitors as at 1891, leaving the common law to evolve.

105 At [312].

106 At [325].

107 At [330].

108 At [332].

109 At [333].

110 At [369].

vexation" of collateral proceedings;[111] difficulties in drawing the line between non-negligent and negligent errors of judgment (because litigation is not susceptible to scientific laws and measurements); the difficulties of examining cause and effect because of the "inscrutability of juries" and the independence of judges;[112] the impact upon the "valuable" cab-rank rule;[113] the fact that Parliament has not seen fit to abolish the immunity; and the necessity of the immunity to the "orderly functioning of the system of justice in this country".[114]

Reconsideration of the immunity

[52] The immunity cannot be retained in its present form. The test of "intimate connection" (which has as its touchstone the in-court conduct of litigation) has been uncertain in application and arbitrary in effect.[115] The difficulties in setting the boundaries are illustrated by the present case, where the High Court took the view that it was unclear whether concessions which led to a consent order were within the scope of the immunity. Such difficulties themselves prompt reassessment. In addition, rejection in New Zealand of the former justifications based on the nature of the role of the advocate would make reassessment inevitable because it would shift the proper scope of the immunity. If finality in judicial determination is its justification, immunity would not be warranted unless a court decision is questioned.[116] Yet the immunity recognised by *Rees v Sinclair* is not limited to cases of collateral challenge. It would need to be recast if, consistently with the approach in *D'Orta-Ekenaike*, its justification is founded upon the protection of judicial determinations. The first question in considering whether the immunity can be retained in its present form is therefore whether there is sufficient justification for it other than to achieve finality.

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111 At [370].
112 At [373].
113 At [377].
114 At [380].
115 The conclusion in *Arthur J S Hall v Simons* at 729 per Lord Hutton; 745 per Lord Hobhouse; 707 per Lord Hoffmann; 724 per Lord Hope. See, also, Kirby J in *Boland v Yates Property Corporation Pty Ltd & Another* (1999) 167 ALR 575 at 613.
116 Professor Cane has queried in this respect the actual decision in *D'Orta-Ekenaike* to strike out the claim even though the conviction had been set aside on appeal and therefore no subsisting court decision was in issue: "The New Face of Advocates' Immunity" (2005) 13 TLJ 93.

[53] No jurisdiction now countenances immunity on the basis of the special role of the advocate. We agree with the reasons given by the House of Lords and five of the Judges in the High Court of Australia for the conclusion that no adequate reason for the immunity exists in the nature of the advocate's role. It would be tedious to re-express those views at any length. The reasons can be shortly stated here.

[54] The advocate's duties to the court can never conflict with the duty to the client because they are the rules by which litigation must be conducted. Other professions have similar ethical obligations. The duties are supported by the disciplinary powers of the court and the legal profession. They are unlikely to wilt if the immunity is removed. There is no indication that the standard of observance of the duty to the court has been eroded in jurisdictions without immunity for advocates. The cab-rank principle is an important ethical obligation imposed on legal practitioners, but its practical importance in the administration of justice in New Zealand should not be exaggerated. The obligation to provide services to all is an ethic shared with other professions, which enjoy no immunity. The absolute privilege which precludes defamation liability is limited to what is said in court and is directed to a different policy: the candour of participants in court proceedings. The immunities of other participants in court proceedings are not analogous because witnesses and the judge do not assume duties of care to a party. (It is unnecessary to express any view on the liability of the professional witness for negligence in the preparation of reports which may form the foundation of evidence; witness immunity may well not extend so far.) The case of the advocate who assumes the conduct of litigation on behalf of a client to whom he owes duties of care (often as a matter of contractual undertaking) is entirely different.

[55] Although immunity of legal practitioners from liability for negligence has been retained in Australia, the basis of the immunity is fundamentally changed by *D'Orta-Ekenaike*. Former justifications for the common law immunity have focussed on the role of the advocate in the conduct of litigation. The principal majority opinion bases immunity not on the special position of the advocate (a justification it explicitly rejects), but entirely on the public interest in the integrity of the judicial system. In turn the integrity of the system is expressed to rest on the finality of outcomes arrived at judicially. It requires respect for subsisting judicial

determinations and avoidance of the vexation of re-litigation. On this view, judgments must be protected from the collateral attack entailed in a claim that, but for the negligence of the advocate, the client would have benefited from a different outcome. Someone party to earlier proceedings cannot be allowed to assert that a different result would have been obtained if the conduct of the earlier case had not been negligent. This justification, as already indicated, narrows the scope of the immunity considerably. Previously, it attached to all conduct in proceedings and intimately connected with court proceedings. The new rationale would require immunity only where the adverse outcome for the client is a subsisting decision of a court. Moreover, although the joint majority decision acknowledged that there are qualifications to the general principle of finality,[117] it did not explore the qualifications at any length.

[56] The House of Lords in *Arthur J S Hall v Simons* was fully alive to the need to protect important values in the legal system from being undermined by re-litigation and collateral challenge to subsisting court determinations. All Law Lords thought the courts have sufficient powers to protect the principles of finality in respect of civil proceedings under the established doctrines of res judicata and under the wide inherent powers to prevent abuse of process. All except Lord Hobhouse agreed that collateral challenges to subsisting criminal convictions were appropriately met by the power to prevent abuse of process under the principle developed in *Hunter*. The difference between the majority and Lord Hope and Lord Hutton was not on the point of finality. Lord Hope and Lord Hutton agreed that the public interest in finality in subsisting criminal convictions could be sufficiently protected by the power to control abuse of process. They considered, however, that it was not the only value in the criminal justice system requiring protection. Liability of advocates, in their view, was destructive of additional values even where the conviction had been set aside or where it was not in issue (as in a claim based on negligently causing delay). They considered that the impact of the criminal justice system was a cost of being a member of society. The liability of advocates for the adverse outcomes lawfully imposed would be unfair and contrary to the public policy in

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[117] Principally, appeals and the rules to set aside a judgment procured by fraud. And there is no impediment to bringing a claim in tort arising out of conduct which also constitutes a crime against a defendant who has been acquitted.

correction of error only through the criminal justice system itself. These considerations were also important to the majority Judges in *D'Orta-Ekenaike.*

[57] There are two different considerations in play here. The first is concerned with the principles of finality in the legal system. They are directly addressed by substantive doctrines of law and by rules of procedure which are ancillary to the exercise of substantive jurisdiction. It is only if these methods are inadequate that immunity for advocates could be justified on the basis of the need for finality. The second consideration is concerned with identifying responsibility for adverse consequences of the criminal justice system. If there are public policy reasons against the recognition of liability for certain losses, the direct way to address them is through the elements of the cause of action, rather than through blanket immunity for a particular occupation. The immunity for legal practitioners and its justification on the basis of their status has masked these different considerations.

Does the need to promote finality in litigation provide justification for the immunity?

[58] In general, a decision of a court can be challenged only by appeal to a superior court. The principles of finality familiar to our law are rules of public policy based on considerations of fairness to litigants and the need to bring litigation to an end.[118] They give rise to the substantive rules governing the pleas of autrefois acquit and autrefois convict which prevent those acquitted or convicted of crimes being re-tried. They are behind the substantive rules of res judicata which govern cause of action and issue estoppel. Those rules prevent a party to a final judgment challenging the decision in other proceedings between the parties or their privies.[119]

[59] The principles of finality also underlie one application of the broad inherent procedural power to strike proceedings out as an abuse of process. The circumstances in which courts have held proceedings to be an abuse of process include those falling under the doctrine of double jeopardy, where subsequent

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[118] They are expressed in the Latin maxims "nemo debet bis vexari pro una et eadem causa" (no one should be troubled twice by one and the same action) and "interest rei publicae ut sit finis litium" (the public interest requires litigation of an issue to end).

[119] *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 at 933 per Lord Guest.

proceedings for different charges seek a verdict which would in substance be inconsistent with an earlier verdict of acquittal.[120] Proceedings have also been held to amount to abuse of process where defendants are harassed with issues that should have been raised in previous litigation, an approach usually traced to that taken by Sir James Wigram V-C in *Henderson v Henderson*.[121] Although cause of action and issue estoppel apply only to proceedings between the same parties, the courts have been prepared to find abuse of process in cases entailing collateral challenge by a party to an earlier determination in fresh proceedings with a different party.

[60] So in *Reichel v Magrath*[122] the defendant vicar in proceedings brought by his successor had his defence (setting up his entitlement to the benefice) struck out as an abuse of process because it had already been determined against him in an earlier action he had taken against the Bishop and patrons of the benefice. In the United States, the same purpose is served by the doctrine of collateral estoppel.[123] It prevents re-litigation of an issue of fact or law necessary to an earlier court decision at the instance of a party to the earlier litigation.[124] Mutuality of parties is not required for collateral estoppel.[125] This doctrine and the related doctrine of res judicata:[126]

> …relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.

[61] There is no general rule of law that the opinion of a court expressed in a judgment cannot be questioned in different proceedings, outside the circumstances of autrefois acquit/convict or cause of action and issue estoppel. Collateral challenge will not therefore always be an abuse. The circumstances in which proceedings may

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120 The summary of the doctrine by Lord Hailsham in *R v Humphrys* [1977] AC 1 at 41 was accepted as a correct statement of New Zealand law by the Court of Appeal in *R v Roberts* (1992) 10 CRNZ 172 at 174. See, also, s 26(2) of the New Zealand Bill of Rights Act 1990.

121 (1843) 3 Hare 100; 67 ER 313.

122 (1889) 14 App Cas 665.

123 The existence of which was treated by Gleeson CJ, Gummow, Hayne and Heydon JJ in *D'Orta-Ekenaike* at [63]-[64] as an example of the different expression of principles of finality in different jurisdictions.

124 *Montana v United States,* 440 US 147 (1979) at 153; *Allen v McCurry,* 449 US 90 (1980) at 94.

125 *Allen v McCurry* at 94-95.

126 *Allen v McCurry* at 94.

amount to an abuse of process are varied. Lord Diplock in *Hunter* referred to the power to strike out for abuse of process as:[127]

> …the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.

[62] The development of the inherent power to prevent further litigation where it would amount to abuse in civil proceedings was reviewed by Lord Bingham in *Johnson v Gore Wood & Co.*[128] There, the power was invoked to overcome the technical objection to res judicata that previous litigation was resolved by settlement, not court determination. Lord Bingham considered that what constitutes abuse is a "broad, merits-based judgment",[129] incapable of capture in hard and fast rules of determination and not limited to further litigation between the same parties or their privies. Lord Millett in the same case thought it "primarily an ancillary and salutary principle" which prevents res judicata and issue estoppel being "deliberately or inadvertently circumvented".[130]

[63] In New Zealand abuse of process has been recognised as an independent duty of the court to prevent abuse, not limited to fixed categories.[131] In *New Zealand Social Credit Political League Inc v O'Brien*[132] a claim was struck out as abuse of process even though the defendant was not a party to the previous litigation brought by the plaintiff. His conduct had been in issue in the earlier proceedings and the claim for "malicious civil proceedings"[133] was "no more than the first defamation suit in a different garb":[134]

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127 At 536.
128 [2002] 2 AC 1.
129 At 31.
130 At 59.
131 *Reid v New Zealand Trotting Conference* [1984] 1 NZLR 8 (CA).
132 [1984] 1 NZLR 84 (CA).
133 The legal basis for which the Court of Appeal did not need to consider because of the view it took.
134 At 95 per Somers J.

> Estoppel per rem judicatam, issue estoppel, and abuse of process in at least one of its manifestations, may be seen as exemplifying similar concepts – that a matter once determined may not be again litigated, that a matter which could and should have been raised in proceedings which have been determined should not be allowed to be raised subsequently, and that a collateral attack upon a final decision in other proceedings will not be permitted. The dual objects are finality of litigation and fair use of curial procedures.

[64] In *Hunter* the power to prevent abuse was exercised directly to prevent the administration of justice being brought into disrepute by collateral challenge to criminal convictions which had not been set aside on appeal. The inevitable result of a successful action against the police for assault in that case would have been to undermine the convictions because the voluntariness of confessions said to have been extracted through the assaults had been critical to the convictions and the dismissal of the appeal against them.

[65] In *Hunter* and in *Arthur J S Hall v Simons* collateral challenge to a subsisting criminal conviction was treated as the paradigm of abuse of process. Although allowing that collateral challenge to civil proceedings might in some circumstances amount to abuse of process on the basis of the *Hunter* principle, the Law Lords thought it unlikely to amount to abuse in the general run of cases. Some additional element of vexation or unfairness to the parties to the original litigation (as in the case where it entailed suggesting that a failed defamation claim should have succeeded) was required to invoke the *Hunter* principle, in addition to the power to prevent abuse of process "as understood in private law".[135] Lord Hoffmann, Lord Hope and Lord Hobhouse dealt most fully with the reasons for a distinction between subsisting criminal convictions and subsisting civil determinations in considering abuse of process. They turn on the nature of criminal process and the enhanced opportunity for appeal it provides.[136]

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[135] At 680 per Lord Steyn, in apparent reference to the authorities derived from *Henderson v Henderson*.

[136] Referred to at 706 per Lord Hoffmann; 717-718 per Lord Hope; 745-749 per Lord Hobhouse.

[66] We agree with the view that a collateral challenge to a subsisting conviction will usually be an abuse of process.[137] There may be exceptions however. It would be unwise to be too definite. If appeal is precluded by statute or it would be unreasonable to require an appeal to be pursued (as in the case of minor offending where a sentence has been served) and there is no element of public vexation in the claim proceeding in the circumstances of the case, the public interest may lie in permitting it to proceed. Remedies in public law against the state, considered for example in *Maharaj v Attorney-General of Trinidad and Tobago (No 2)*,[138] illustrate that remedies for error in criminal proceedings are sometimes appropriately obtained outside the criminal justice system itself.[139] Such cases are exceptional. In general, criminal proceedings do not attempt relative justice between the parties but safe convictions on which society can rely. The closer appeal scrutiny reflects the emphasis on objectively correct result. Additional evidence is more readily admitted than in civil appeals. The appeal must be allowed if the conviction is unsafe. It is almost inconceivable that inadequate representation sufficient for advocate liability for wrong result would not also have led to a miscarriage of justice sufficient for successful appeal.[140] Appeal is the method of correction provided by the system. Until set aside on appeal, a conviction is in the nature of a judgment in rem, as Lord Hoffmann suggested. Society is in general entitled to treat conviction as establishing guilt against the person convicted unless the conviction is set aside on appeal.[141] Inconsistent court determinations on the question of guilt would be destructive of confidence in the criminal justice system. For that reason it will

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137 Cf the view taken by the Court of Appeal for Ontario in *Wernikowski v Kirkland, Murphy & Ain* (2000) 181 DLR (4th) 625 at [45]-[46] that abuse may require some additional element.

138 [1979] AC 385, applied in *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667 (CA).

139 Cf the views expressed by Lord Hobhouse quoted at [36] above and the joint majority opinion in *D'Orta-Ekenaike* quoted at [44] above, that any damage suffered as a result of the criminal justice system is part of the price of citizenship.

140 As Lord Hobhouse in *Arthur J S Hall v Simons* pointed out at 746. On the New Zealand approach to miscarriage of justice occasioned by counsel error, see *Sungsuwan v R* [2006] 1 NZLR 730 (SC). The extent to which, if at all, a finding as to the reasonableness of counsel's conduct on an appeal on miscarriage of justice binds a court hearing a subsequent negligence action cannot be addressed here, and is a matter of some controversy in the United States: see, for example, *Alberici v Tinari*, 542 A 2d 127 (SC Penn, 1988); cf *Kerkman v Varnum*, *Riddering*, *Schmidt and Howlett*, 519 NW 2d 862 (1994) (SC Mich, 1994).

141 Although for the purposes of civil proceedings a conviction is usually evidence only of the commission of an offence: see s 23 of the Evidence Amendment Act (No 2) 1980.

usually be abuse of process to bring proceedings which amount to collateral challenge to a subsisting conviction.

[67] Gleeson CJ, Gummow, Hayne and Heydon JJ in *D'Orta-Ekenaike* thought that the only relevance of the power to prevent abuse of process would be if there were circumstances in which it would *not* be an abuse to impugn an earlier court decision. They thought there were no such circumstances because any collateral challenge would offend against the integrity of the judicial system. In coming to that conclusion, they rejected exceptions based on distinctions between civil and criminal cases as "unstable" [142] and those based on challenges to intermediate outcomes as too attenuated.

[68] This amounts to a view that collateral challenge to a judgment in the course of a claim for professional negligence against an advocate is always an abuse of process and therefore is properly protected by a blanket immunity. We are not able to accept that it represents New Zealand law. The intimate connection limitation means that the immunity has never precluded all claims against advocates where it is said that, but for the negligence, there would have been a different outcome. Lord Diplock in *Saif Ali* referred to the failure to join a party at an early stage as falling outside the immunity. And claims based on missed time limits for appeal have not been prevented by the immunity.[143] Moreover, the restriction of cause of action and issue estoppel to parties and their privies would be misconceived if there were a more fundamental principle that judicial determinations can never be questioned in different proceedings by a party to the original litigation. The inherent power ensures that such challenge can be restrained if in context it would amount to an abuse. If it does not, there is no basis for immunity for an advocate for negligence in the conduct of the earlier litigation.

[69] A distinction for the purposes of immunity between advocates conducting criminal proceedings and advocates conducting civil proceedings would be invidious

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142 The view expressed in *Chief Executive Officer of Customs v Labrador Liquor Wholesale Pty Ltd* (2003) 216 CLR 161 at [114] and relied upon in the joint majority opinion at [76].

143 *Walpole v Partridge & Wilson*.

for the reasons given in *Arthur J S Hall v Simons* by Lord Millett. And the incongruity would be exacerbated by the difficulties of classification of proceedings as civil or criminal.[144] For those reasons, we do not agree with the Court of Appeal that the immunity in respect of criminal proceedings can be left to be dealt with on another occasion. But it is not invidious to apply the power to prevent abuse of process in a context that takes into account the nature of the judicial determination. It is not inevitable that collateral challenge to a subsisting conviction will be an abuse of process although such challenge will generally be an abuse. Many collateral challenges to subsisting civil judgments will not amount to abuse of process even where the doctrine of res judicata does not apply, at least where appeal rights have been exercised.

[70] Few cases in England before *Arthur J S Hall v Simons* seem to have applied the *Hunter* approach to earlier civil determinations, although in *Somasundaram v M Julius Melchior & Co*[145] the Court of Appeal treated the principle as applicable to earlier civil proceedings. In New Zealand, *Hunter* was applied by the Court of Appeal in respect of earlier disciplinary proceedings in *Reid v New Zealand Trotting Conference*[146] and in respect of earlier civil proceedings in *New Zealand Social Credit Political League v O'Brien*.[147] In *Arthur J S Hall v Simons* Lord Hoffmann considered that it would "seldom" be possible to say that a collateral challenge to an earlier civil determination was an abuse of process because "[w]hether the original decision was right or wrong is usually a matter of concern only to the parties and has no wider implications".[148] He acknowledged exceptions however.

[71] Professional disciplinary proceedings, defamation proceedings, and other civil proceedings (including family law proceedings) which determine matters of

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144 *D'Orta-Ekenaike* at [76] per the joint majority opinion; *Arthur J S Hall v Simons* at 752 per Lord Millett.

145 [1988] 1 WLR 1394.

146 [1984] 1 NZLR 8 (CA).

147 Where *Hunter* was cited as authority for the general power to prevent abuse. *New Zealand Social Credit Political League Inc v O'Brien* itself was closer to the abuse recognised in *Henderson v Henderson* and *Johnson v Gore Wood & Co*.

148 At 706.

status may well provide examples where the administration of justice could be brought into disrepute by subsequent collateral challenge. So might a deliberate choice not to pursue an appeal in circumstances where it would redress the disadvantage claimed. A categorical approach would be wrong. On the other hand, the restrictions upon res judicata should not be swept away by an expansive approach that collateral challenges to civil proceedings are always abusive. Whether proceedings are abusive can be assessed as appropriate against the principles of finality developed in *Henderson v Henderson* to protect litigants from vexation or against the principles developed in *Hunter* to protect public confidence in the administration of justice. For the reasons most fully explained in *Arthur J S Hall v Simons* by Lord Hobhouse, the different systems of error correction provided for civil and criminal proceedings mean that it may often not be an abuse of process to impugn a result in earlier civil proceedings. But civil proceedings which seek a conclusion that a subsisting criminal conviction is wrong will usually be an abuse of process.

[72] The substantive doctrines which prevent litigation and the power to strike out proceedings for abuse of process under the principles in *Henderson v Henderson* and *Hunter* are sufficient and appropriate protection for the public interest in judicial process. No immunity for advocates is necessary to protect these values. It is a disproportionate response.

Is avoiding abusive collateral challenge sufficient protection of the integrity of the justice system?

[73] Where there is no question of abusive collateral challenge, a claim against a lawyer for negligence in the conduct of civil litigation does not run counter to any public interest in the justice system. Indeed, as Lord Hobhouse pointed out, it may make it easier to do justice between the plaintiff and defendant in the original proceedings. The outcome in the original proceedings is conclusive as to the rights of the parties on the cases put forward by them. Appeal may not provide a remedy for negligence in the way the case was conducted because to allow it to do so (for example by admitting further evidence or argument) will often be unfair to the other

litigant. Any loss suffered by one party as a result of negligence in representation can be properly addressed by claim against the advocate without vexing the other party further and without distorting the system of civil justice. It is the appropriate response in a system in which litigation is conducted by the parties. There may be difficulties in proof of negligence and causation of loss, but those difficulties are present in litigation against other professionals where no question of immunity arises. And they arise under the present law in respect of advocates for out-of-court negligence. An economic remedy from the advocate in breach of duty of care is the right remedy. No public interest is served by an immunity which shields some advocates on the basis that their conduct was intimately connected with conduct in court but exposes others because their negligence was in missing a time limit, failing to join a party, or failing to identify the right cause of action.

[74] The criminal justice system on the other hand is not a system of party-delineated justice. It imposes sanctions in the name of society as a whole. It provides for correction of error through enhanced appeal opportunities, in a manner not available to civil litigants. Those acquitted at trial or discharged after appeal have to accept lawful deprivation of liberty in the meantime as part of the system. They usually have no entitlement to compensation, except in those cases where an ex gratia payment is made by the state or where there is a public law claim against the state outside the criminal justice system.[149] If advocates are not immune, there may be little to inhibit irresponsible claims from clients that their delayed release or their deprivation of liberty was caused by the advocate. Others who may have shared responsibility for error – prosecutors, judge, jury – will not be available for contribution because they are immune from any liability. These were the reasons that prompted Lord Hobhouse to say that the liability of advocates would create a lottery and a capricious distribution of compensation between ultimately acquitted defendants. They led the minority in *Arthur J S Hall v Simons* to conclude that the interest of the plaintiff in obtaining civil compensation from a negligent advocate was subject to the higher need to require all rectification of miscarriages of justice to be sought within the criminal justice system itself. Similar considerations led the

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[149] For example, for breach of the New Zealand Bill of Rights Act 1990 on the basis recognised in *Baigent's Case.*

joint majority in *D'Orta-Ekenaike* to emphasise that the consequences for the client are lawfully imposed consequences.

[75] These arguments have force. We accept that the impact of advocate liability upon the criminal justice system is not exhausted by prevention of collateral attack upon subsisting convictions. There remain difficult questions about liability which have not yet been addressed in our law because the immunity has made their consideration unnecessary. Although McHugh J in *D'Orta-Ekenaike* suggested that the correct legal analysis is that advocates owe no actionable duty of care (a contention also urged on us by the New Zealand Bar Association as intervener), that analysis is not consistent with the authorities. Nor does it answer a claim in contract, which is equally prevented by the present immunity, as Mr Farmer acknowledged in argument. The better view is that advocates who undertake skilled advice and representation owe duties of care to their clients as a matter of general principle (often in both contract and tort). If they do not come within the intimate connection test they are liable for breach. The immunity does not affect the duty but provides a shield against liability. That does not mean however that questions of liability do not remain. They have not been addressed because the existence of the immunity has precluded their consideration. Following the lifting of the immunity, it may well be necessary to consider whether reasons of legal policy impact upon liability for the negligent conduct of criminal proceedings. The extent to which the public interest requires redress to be obtained only or principally within the remedies provided by the criminal justice system itself will have to be considered. It will be necessary to consider too whether there are any limits to liability. These inquiries are hinted at in *D'Orta-Ekenaike* in the joint majority decision when it notes, as a question that "need not be answered":[150]

> …[w]hether the lawful infliction of adverse consequences (such, for example, as imprisonment) can constitute a form of damage…

[76] Immunity provides comprehensive protection for the advocate without addressing these legal policy issues distinctly. It prevents equally claims by the

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150 At [70].

client for unnecessary costs (in respect of which it is difficult to discern a public interest in protecting the negligent advocate) and claims for compensation for time spent in prison (where liability may be highly questionable). As Lord Hoffmann put it, it is "burning down the house to roast the pig".[151] If there are policy reasons against liability for some losses arising out of the criminal justice process, it is right that they be addressed on the basis of principle, rather than by blanket immunity. Similarly difficult questions of liability arise in respect of other occupational groups, including some participants in the criminal justice system, without the need for such immunity.[152]

The risk of unmeritorious claims

[77] Except in the case of abusive collateral challenge, peremptory relief by strike out cannot provide a summary solution for all claims which lack merit.[153] But all who undertake skilled advice and who owe duties of care are in that boat. The risk does not warrant a special immunity for legal practitioners. It would be wrong to assume that advocates are more at risk of baseless claims from vindictive or unscrupulous clients than other professions or callings. Moreover, negligence is more than error of judgment. Lord Salmon in *Saif Ali* indicated why establishing negligence will not be easy:[154]

> Lawyers are often faced with finely balanced problems. Diametrically opposite views may and not infrequently are taken by barristers and indeed by judges, each of whom has exercised reasonable, and sometimes far more than reasonable, care and competence. The fact that one of them turns out to be wrong certainly does not mean that he has been negligent.

[78] *Moy v Pettman Smith*[155] illustrates the point. There, the House of Lords was careful to recognise that the standard of care to be expected of any professional who

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151 *Arthur J S Hall v Simons* at 703.

152 See, for example, *Brooks v Commissioner of Police of the Metropolis* [2005] 1 WLR 1495 (HL); cf *Phelps v Hillingdon London Borough Council* [2001] 2 AC 619 (HL).

153 Before a court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed: *R Lucas & Son (Nelson Mail) Ltd v O'Brien* [1978] 2 NZLR 289 at 294-295 (CA); *Takaro Properties Ltd (in rec) v Rowling* [1978] 2 NZLR 314 at 316-317 (CA); *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 at 267 (CA).

154 At 231.

155 [2005] 1 WLR 581.

works in an environment where judgment calls have to be made under time constraints and in difficult circumstances must not be set at a level which is unrealistic and must be assessed in context.[156] The application of liability "should not stifle advocates' independence of mind and action in the manner in which they conduct litigation and advise their clients".[157] Nor should the standard of care imposed be such as to force advocates into defensive lawyering which is contrary to the public interest in the fair and efficient operation of the criminal justice system. And establishing that negligence is causative of loss will not be easy in circumstances where the direct cause of loss is the imposition of an independent judgment.

[79] The risk of unmeritorious claims provides no sufficient basis for a special immunity for legal practitioners not available to other callings. As Gleeson CJ, Gummow, Hayne and Heydon JJ made clear, the immunity cannot be justified by any special status for a private legal practitioner. Public confidence in the administration of justice is more likely to be eroded by such preferential treatment. The public interest in maintaining the integrity of the criminal justice system is rightly addressed not by immunity but by attention to the legal elements of liability.

There is no justification for the immunity

[80] In summary, the immunity must now be reconsidered. The test of connection with litigation is uncertain. The former principal justifications for the immunity no longer persuade, if they ever did. Although consistency with Australian law may have been a more important consideration if the matter had been evenly balanced, we consider that the answer as a matter of New Zealand law is clear-cut. The ends of finality in litigation are adequately addressed by res judicata and issue estoppel, the pleas of autrefois acquit/convict, and the power of the court to strike out proceedings which are an abuse of process in application of the *Henderson v Henderson* principle. The power to prevent abuse of process in application of the *Hunter* principle will sufficiently prevent collateral challenge to subsisting criminal

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156 At 587 per Lord Hope; 589 per Baroness Hale; 599 per Lord Carswell. Lord Nicholls and Lord Brown agreed with the reasons of the other Law Lords.

157 At 599 per Lord Carswell.

convictions and collateral challenge to civil judgments where the integrity of legal process would be undermined by such challenge. Immunity for advocates is not therefore required to meet the public interest in finality of proceedings or the integrity of the judicial process. Other public interests in the integrity of the criminal justice system may not be exhausted by prevention of abusive collateral challenge alone, but are more appropriately addressed in application of the principles governing liability. Immunity is the wrong response. No compelling public policy requires retention of an anomalous immunity for one occupational group. And, as Lord Salmon said in *Saif Ali*:[158]

> Once it is clear that the circumstances are such that no question of public policy is involved, the prospects of immunity for a barrister against being sued for negligently advising his client vanish into thin air, together with the ghosts of all the excuses for such immunity which were thought to exist in the past.

Does s 61 of the Law Practitioners Act 1982 enact the immunity in the form it took in England in 1982?

[81] Section 61 of the Law Practitioners Act 1982 carries on the language of a provision first contained in s 10 of the Law Practitioners Act 1861 and subsequently re-enacted in successive statutes. In considering the meaning of s 61 and its predecessors, we do not think it necessary to consider the extent to which there may be differences between "privileges" and "immunities" in other contexts. We accept that the term "privilege" as used in successive Law Practitioners Acts is apt to cover any immunities which attached to barristers in England. It is unlikely that the phrase "powers, privileges, duties, and responsibilities" was used in a technical sense.

[82] The Law Practitioners Act 1861 was the first statute in New Zealand to provide more than a rudimentary system to regulate the enrolment of barristers and solicitors.[159] Section 10 of the Law Practitioners Act 1861 provided:

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158 At 230.

159 Before that, the Supreme Court Ordinance 1841, the Supreme Court Ordinance 1844, and the Law Practitioners Acts of 1854 and 1858 had provided for enrolment of barristers admitted in Great Britain and Ireland, solicitors admitted in the courts of Westminster, Dublin, or Edinburgh, and those who had served clerkships or had established themselves in practice before December 1841 (the date of setting up of the Supreme Court).

> In New Zealand, Barristers of the Supreme Court shall have all the powers privileges duties and responsibilities that Barristers have in England.

Section 10 was re-enacted in s 12 of the Law Practitioners Act 1882, s 11 of the Law Practitioners Act 1908, s 7 of the Law Practitioners Act 1931 and s 13 of the Law Practitioners Act 1955, before its enactment as s 61 of the Law Practitioners Act 1982.

[83] Before 1861, only barristers admitted in Great Britain or Ireland were eligible to enrol with the Supreme Court of New Zealand.[160] The Law Practitioners Act 1861, enacted after representative government was established in 1852, made provision for New Zealand qualification and admission. That was the background against which s 10 of the Act identified that New Zealand barristers admitted under the 1861 Act had the same powers, privileges, duties, and responsibilities as barristers in England. The reference to those attributes effectively defined what a New Zealand barrister was. Such statutory reference to English law was common in the setting up of the New Zealand legal system, as it was elsewhere in the British Empire.[161]

[84] Until the restrictions contained in the early Ordinances of 1841 and 1844 had been replaced by the power to admit locally qualified barristers, there was no need for a definition of "barristers". All eligible for enrolment in New Zealand were barristers in Great Britain or Ireland. The New Zealand Supreme Court, set up in 1841, had the jurisdiction of the superior courts at Westminster, whose practice set the powers, privileges, duties, and responsibilities of English barristers at common law and supervised their observance. English law had been applied in New Zealand from 1840 under the doctrine of the common law, described by Blackstone, that it attached to a settled British colony, as far as applicable to the circumstances of the colony.[162] Before the English Laws Act 1858 there had been some controversy about whether English statutes enacted after 1788 (the date of establishment of the colony of New South Wales, to which New Zealand was initially attached) were in

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160 Supreme Court Ordinances of 1841 and 1844.

161 See Roberts-Wray *Commonwealth and Colonial Law* (1966) 11.

162 Roberts-Wray at 539; Jeremy Finn "Development of the Law in New Zealand" in Spiller et al *A New Zealand Legal History* (2 ed 2001) 75. Whether New Zealand was a settled or a ceded colony is a matter that need not be considered here.

force in New Zealand. The English Laws Act 1858 settled the matter of date by fixing it as the date of the Proclamation by Governor Gipps of New South Wales of the extension of his jurisdiction to such of the territories of New Zealand as might be acquired in sovereignty by Lieutenant-Governor Hobson.[163] The 1858 Act provided:[164]

> The laws of England as existing on the fourteenth day of January, one thousand eight hundred and forty, shall, so far as applicable to the circumstances of the said Colony of New Zealand, be deemed and taken to have been in force therein on and after that day and shall continue to be therein applied in the administration of justice accordingly.

[85] What powers, privileges, duties, and responsibilities English barristers in New Zealand had were therefore described by the common law and rules of practice of the superior courts of England, received into New Zealand law as at the 14th day of January 1840 and from then New Zealand law subject to the jurisdiction of the Supreme Court of New Zealand. The 1861 legislation prescribed the application of English common law and practice to New Zealand-admitted barristers. The effect was to apply to them the common law and practice which already attached to English barristers enrolled with the Supreme Court.

[86] Although what Bennion refers to as "archival drafting" can "freeze" the body of law in the form it was in on the date of incorporation or as at a date specified,[165] that was not the purpose of s 10 of the Law Practitioners Act 1861 any more than it was the purpose of the English Laws Application Act 1858 to freeze at 1840 the development of the general common law received into New Zealand. Such provisions are rules of reception which do not preclude either the development of local statutes or the evolution of New Zealand common law through decisions of the local courts. They are starting points from which the new legal order can evolve from the snapshot of English law at the date nominated.

[87] Section 1 of the English Laws Act 1858 was consolidated by the English Laws Application Act 1908 and, as to the common law only, by s 5 of the Imperial

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163 Why this date was selected, rather than the date of the Treaty of Waitangi or the dates of the Hobson Proclamations, is not clear.

164 Section 1.

165 Bennion *Statutory Interpretation* (4 ed 2002) 649.

Laws Application Act 1988. The consolidating provisions carry on the common law of England only so far as it was part of the law of New Zealand immediately before the commencement of each Act.

[88] Section 61 is the latest consolidation of s 10 of the Law Practitioners Act 1861. It has been re-enacted in the same terms in 1882, 1908, 1931 and 1955. Although the Acts which have followed the Law Practitioners Act 1861 have been expressed to be both amending and consolidating Acts, this provision has remained constant. We are of the view that s 61, like its equivalents in the Acts of 1882, 1908, 1931, and 1955, is properly to be regarded as a straight consolidation which does not change the pre-existing law.[166] Although Professor Burrows has rightly suggested caution in making an assumption that a consolidation does not effect a change in law (pointing out that most New Zealand statutes which consolidate also amend),[167] we consider that s 61 is properly construed as having been constant in meaning since 1861 in the sense that from its 1840 base in New Zealand, Parliament and the courts were left free to develop the law.

[89] It is not necessary for the purposes of this case to decide whether the "powers privileges duties and responsibilities that Barristers have in England" would, on the enactment of s 10 in 1861, have been described by English law and practice in 1861 or by English law and practice in 1840. We think the better view is that the date of reception of the law defining barristers is the date of reception of the general law of which it is part at 1840, leaving the New Zealand courts free to pick up further developments in England after that date (if thought to be appropriate to New Zealand conditions), in development of New Zealand law. But, whether the date of reception was 1861 or 1840, the English law at reception in either case has been long since overtaken by New Zealand law, both statutory and common law.

[90] Any other interpretation would lead to absurd results. It would mean that the New Zealand law as to the powers, privileges, duties, and responsibilities of barristers changed to shadow the then current English law in 1882, 1908, 1931, 1955 and 1982. If the law was frozen during the currency of each Act at the form in

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166 Bennion at 515.

167 Burrows *Statute Law in New Zealand* (3 ed 2003) 330-331.

which it was in England at the date of commencement, New Zealand law would be left lagging while the common law evolved in England. If properly regarded as not frozen, any New Zealand common law development which departed from English authority (as *Rees v Sinclair* did in the "intimate connection" extension to the immunity) would have shot back into line with the English common law as at the date of commencement of each new statute. Such fixed synchrony is wholly inconsistent with the reception and development of the common law of New Zealand from its English roots.[168] Nor is it the way s 61 and its predecessors have been viewed. In *Rees v Sinclair* the Court of Appeal, in considering s 13 of the Law Practitioners Act 1955, did not suggest that the "powers, privileges, duties, and responsibilities that barristers have in England" turned on the state of the immunity in England in 1955. It clearly felt free to develop New Zealand common law from its English origins. Similarly, the "responsibilities" of barristers have continued to evolve in New Zealand through changes to court practice and professional codes of conduct, without reference to the position of barristers in England.

[91] The language of s 61 does not compel absurdity if it is construed, as we think it must be, only as a consolidation of the application of English law and practice by which s 10 of the 1861 Act defined the incidents of barristerial status. The initial reference, as was the case with the general reception of English law, was not a straitjacket but a start from which New Zealand law could grow and a limitation on the direct applicability of English law after the date of reception. Thereafter, English law (except that made by Imperial statute before adoption of the Statute of Westminster) applied in New Zealand only after adoption by New Zealand statute or if followed by decisions of the New Zealand courts.[169] Section 61, like the consolidations of the English Laws Act 1858 in 1908 and 1988, is properly regarded as an example of the re-enactment of spent legislation.[170] The law and practice of England was received in 1840 and defined the nature of barristers under the 1861

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168 See *Corbett v Social Security Commission* [1962] NZLR 878 (CA), *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA); cf *Smith v Wellington Woollen Manufacturing Co* [1956] NZLR 491 (CA). See, also, *South Pacific Manufacturing v New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282 (CA).

169 See, as to the decisions of the courts, Roberts-Wray at 565.

170 As described by Burrows at 332-333.

Act. But since then it has evolved according to New Zealand law and the practice of its courts.

[92] Nor can we agree that s 61 constitutes legislative endorsement of the immunity, making any reconsideration exclusively a matter for Parliament. The authoritative reception through legislation of English rules relating to barristers was as necessary in the circumstances of a new legal order in New Zealand as the authoritative reception of the wider common law as at 1840. The content of the common law, in both cases, was left to identification by the courts except where modified by Parliament. It did not change its character so as to permit no development except by legislation. No legislative modification has been made to the common law immunity. It remains common law. And on its reception into the New Zealand legal system it became the responsibility of the courts.

Should reconsideration of the immunity nevertheless be left to Parliament?

[93] Although s 61 does not prevent reconsideration of the common law immunity, there remains the question whether its abandonment would be such a radical change that it is best left to Parliament. The New Zealand Law Society and the New Zealand Bar Association urged that solution. They pointed out that Parliament is best placed to consider wider policy implications and legislates prospectively, so that existing expectations are not disturbed. Similar arguments were advanced to the House of Lords in *Arthur J S Hall v Simons* and rejected. We too are of the view that it is appropriate for the courts of New Zealand to reconsider the immunity.

[94] The immunity was a creation of the common law. Its reception into New Zealand law did not alter its character. Authoritative acknowledgement of the immunity in New Zealand law is comparatively recent. It rests entirely on legal policy, not wider considerations of social justice. The higher level social interests are in access to the courts and the rule of law, both of which Parliament has recently

affirmed in legislation.[171] The more immediate legal policy justifications for immunity turn on the needs of the administration of justice and the adequacy of court processes, which the courts are well placed to assess.[172] Moreover, a legislative solution to the intractable problem of setting the boundaries of the immunity would be as elusive as judicial solutions have proved to be. The immunity developed in *Rees v Sinclair* is the wrong solution. Since the former justifications for the immunity are no longer convincing (if they ever were), it would be abdication of responsibility not to address what is an anomaly created by the courts.

[95] It is not necessary to consider whether courts have the power to make a change of this nature prospective only.[173] There is no occasion to do so here. We have been given no information to suggest that the removal of the immunity would overset expectations to such an extent that it should apply on a prospective basis only. A recent review undertaken in Australia by the Standing Committee of Attorneys-General suggests little evidence of a flood of claims or adverse increase in insurance premiums in England since *Arthur J S Hall v Simons* was decided.[174] We have been given no material suggesting hardship which would justify an extraordinary approach to reconsideration of the law. The limits to the immunity in the "intimate connection" test and the uncertainty of its scope mean that legal practitioners have ordered their practices in the knowledge that they may be liable for breach of their duties of care to clients. Doubts about the justification for the immunity have always existed and have grown in recent years. They are strengthened by legislative and international affirmation of the importance of access to the courts in maintenance of the rule of law. No basis for departing from the normal consequence of concluding that an earlier authority should no longer be followed has been made out.

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171 See the New Zealand Bill of Rights Act 1990, ss 23-25; Supreme Court Act 2003, s 3.

172 As Lord Hobhouse in *Arthur J S Hall v Simons* noted at 737.

173 See *In re Spectrum Plus Ltd (in liq)* [2005] 2 AC 680 (HL). In *Arthur J S Hall v Simons*, Lord Hope suggested that immunity should only be abolished prospectively. The other Law Lords did not address this issue.

174 *Advocates' Immunity from Civil Suit: Options Paper* (August 2005) at [74].

Disposal

[96] The decision of the Court of Appeal must be affirmed and the appeal dismissed with the effect that the defence of immunity is struck out. The appellants must pay the costs of the respondents, fixed at $30,000 together with disbursements.

TIPPING J

Introduction

[97] The issue in this appeal is whether the Court of Appeal was right in its decision to abolish the longstanding common law rule that barristers have immunity from suit in relation to claims for negligence deriving from work they do in court and work intimately connected therewith. I agree with the other members of this Court that the Court of Appeal was correct in its decision to abolish barristerial immunity. Because of the importance of the question and certain downstream issues, I am delivering reasons of my own.

[98] In medieval times, barristers, as we now know them, were liable for negligence and, so it seems, were able to take action to recover their fees.[175] During the 16th century there was a revival of interest in many facets of life in ancient Greece and Rome. Included in this renaissance was the study of Roman law. It was a well established tenet of Roman law that advocates had no contractual right to sue for their fees. In that respect they had no contract with their clients and what they received for their services was in the nature of an honorarium.[176]

[99] The importation of this Roman law approach into the English common law resulted in the medieval view being overtaken by the view that as there was no

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[175] See Lawton J at first instance in *Rondel v Worsley* [1967] 1 QB 443 at 458 and Roxburgh "*Rondel v Worsley*: The Historical Background" (1968) 84 LQR 178. The basis for this early liability seems to have been an analogue with those exercising common callings. One sometimes therefore sees barristers linked, for example, with farriers.

[176] See *Atkinson v Pengelly* [1995] 3 NZLR 104 at 110.

contract between barrister and lay client, or between barrister and instructing solicitor for that matter, there was no basis for any action for breach of any duty to take care. Until the 20th century there was no recognised general cause of action for negligence, outside contract, in relation to services rendered by a professional person. The absence of any contractual basis for a claim against a barrister, and the corresponding inability of a barrister to sue for outstanding fees, was generally seen as the basis upon which barristers' so-called immunity was based.

[100] When, in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*,[177] the House of Lords allowed claims to be brought in tort for negligent statements and advice, without the need for any contractual relationship between the parties, the traditional underpinning of barristers' immunity could no longer be supported. It was not long before the immunity was reviewed in *Rondel v Worsley*.[178] The House of Lords decided that the immunity was still justified on public policy grounds which required it to be limited to in-court work. Ten years later the scope of the immunity was expanded by the House of Lords, in *Saif Ali v Sydney Mitchell & Co*,[179] to incorporate work intimately connected with in-court work.

[101] By means of these two decisions, the House of Lords introduced not only a fundamental change in the previously understood rationale for the immunity but also a significant narrowing of its scope. Whereas the "no contract" underpinning resulted in barristers not being liable for any work they might do, the public policy underpinning confined the immunity to in-court work and work intimately connected therewith. These developments were achieved by judicial amendment to what was a judicially created common law rule, and they were achieved without any apparent concern at the retrospective effect of what was being done or any serious concern that a change of this kind should be effected, if at all, only by Parliament. New Zealand followed suit in *Rees v Sinclair*.[180] Indeed it was our Court of Appeal in that case which initiated the problematic "intimate connection" extension.

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177 [1964] AC 465.
178 [1969] 1 AC 191, affirming [1967] 1 QB 443 (CA).
179 [1980] AC 198.
180 [1974] 1 NZLR 180.

[102] Then, 35 years after *Rondel v Worsley*, the House of Lords decided, in *Arthur J S Hall & Co v Simons*,[181] that public policy considerations no longer justified the immunity and it should therefore be abolished altogether. Again it was not thought necessary or appropriate to leave the matter to Parliament. Of the seven Judges who sat in *Hall* only Lord Hope considered the retrospectivity issue. Because the individual cases in *Hall* turned on an issue other than the existence of barristers' immunity, Lord Hope expressed the view that the House's ruling, as regards the abolition of the immunity, should have only prospective effect. None of their Lordships found it necessary to dwell for long on whether the longstanding nature of the immunity or any other factor made it desirable to leave it to Parliament to decide whether to abolish the immunity.

[103] In *D'Orta-Ekenaike v Victoria Legal Aid*[182] the High Court of Australia, by a majority of 6:1, decided to maintain the immunity, contrary to the view of the House of Lords in *Hall*. In a decision delivered just before that of the High Court of Australia, our Court of Appeal decided, by a majority of 4:1, to follow the English lead and abolish the immunity in New Zealand, at least in civil cases.[183]

[104] It is in these circumstances that the matter falls to be addressed in this Court, there having been an appeal by Chamberlains, the firm of barristers and solicitors involved in the present case. The New Zealand Law Society and the Bar Association were given leave to intervene in support of the firm, and Mr and Mrs Lai, the respondents, have sought to uphold the decision made by the Court of Appeal.

Section 61 of the Law Practitioners Act 1982

[105] The first question which must be addressed is whether s 61 of the Law Practitioners Act applies to barristers' immunity and, if so, with what effect. The section provides:

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181 [2002] 1 AC 615.
182 (2005) 214 ALR 92.
183 *Lai v Chamberlains* [2005] 3 NZLR 291.

61 Status of barristers

> Subject to this Act, barristers of the Court shall have all the powers, privileges, duties, and responsibilities that barristers have in England.

[106] The New Zealand Law Society argued that barristers' immunity came within the phrase "powers, privileges, duties, and responsibilities". Hence Parliament had legislatively conferred on New Zealand barristers the immunity from suit which barristers in England enjoyed in 1982 when the Law Practitioners Act was passed. The Law Society also contended that as Parliament had conferred the immunity, only Parliament could remove it. The section should therefore be construed on the footing that the abolition of the immunity by the House of Lords in *Hall* did not affect its continued legislative existence in New Zealand. Chamberlains and the Bar Association associated themselves with the Law Society's argument on this aspect of the case.

[107] The Lais argued that the majority in the Court of Appeal had been correct in taking the view that barristers' immunity did not come within the terms of s 61. They also argued that even if the immunity did come within s 61, the section did not prevent the courts from abolishing the immunity; not because they were bound to follow *Hall* but because it was, in any event, open to them and appropriate to do so. The first inquiry is therefore whether barristers' immunity does fall within s 61. On this point I agree with the Law Society's submissions and with the view of Anderson P in the Court of Appeal. I respectfully disagree with the conclusion reached by the majority in the Court of Appeal.

[108] I note at the outset that, at first instance in *Rees v Sinclair*, Mahon J had no doubt that the word "privileges" in s 61 included barristers' immunity. He said:[184]

> [I]n 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 (*Rondel v Worsley* (supra) and 3 *Halsbury's Laws of England* (3rd ed) 29) and I cannot doubt that the word "privileges" is used in the section to embrace not only the immunity from action for defamation but

[184] [1973] 1 NZLR 236 at 239 (SC). The Court of Appeal did not directly address the point.

> the concurrent immunity of counsel against proceeding for negligence or breach of duty arising out of the conduct or management of a case.

[109] The question is one of statutory interpretation. The meaning of s 61 has to be ascertained from its text in the light of its purpose.[185] With respect to Hammond J's approach which distinguished sharply between a privilege and an immunity, I do not consider any refined jurisprudential analysis of the phrase "powers, privileges, duties, and responsibilities" or of any of the individual words in that phrase is required. It is unlikely that Parliament meant the phrase and its individual components to be construed in that way. If that were so, the absence of the word "rights" and the use of the general word "responsibilities" would be surprising.

[110] The composite phrase came into our statute law in 1861 as s 10 of the Law Practitioners Act of that year and was carried forward in all subsequent cognate legislation. It may not be a coincidence that the year before, in the famous early case on barristers' immunity of *Swinfen v Lord Chelmsford*,[186] Pollock CB had used the second part of the phrase twice in his judgment. He referred to that case as raising questions as to the "duties and responsibilities" of the members of the Bar. It is clear from the context that his Lordship was not using the phrase in any technical or precise sense. There is no reason to suppose that the New Zealand legislature was using the expanded phrase in any technical or precise sense either, both when it put it on the statute book in 1861 and when it re-enacted it down the years.[187]

[111] Both in lay terms and in more technical legal terms an immunity can properly be regarded as a privilege. Two short references will suffice to exemplify this point. The Oxford English Dictionary[188] has, as its primary modern definition of the word "privilege", the following:

> A right, advantage or immunity granted to or enjoyed by a person or a body or class of persons, beyond the common advantages of others; an exemption in a particular case from certain burdens or liabilities.

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185 Section 5(1) of the Interpretation Act 1999.
186 (1860) 5 H & N 890 at 917; 157 ER 1436 at 1448.
187 See fn 196 below.
188 *OED Online* (2 ed 1989) http://dictionary.oed.com (updated to 8 August 2006).

Black's Law Dictionary[189] describes a privilege as:

> A special legal right, exemption, or immunity granted to a person or class of persons; an exception to a duty. A privilege grants someone the legal freedom to do or not to do a given act. It immunizes conduct that, under ordinary circumstances, would subject the actor to liability.

[112] It is significant that a Judge as exact with his terminology as Somers J referred to barristers' immunity as a privilege in *New Zealand Social Credit Political League Inc v O'Brien*.[190] He said:

> Barristers and solicitors have a duty to their client, to the Court and to the public. To enable them to perform it they have certain privileges. One is against suit in respect of the conduct of a case in Court and in respect of work so intimately connected thereto that it warrants the like protection.

[113] Textually, therefore, the concept of barristers' immunity, whether in the strict sense of an inability to be sued, or in the more general sense of the absence of a duty of care and hence of a cause of action, is well able to be regarded as a privilege. The longstanding rule that barristers could not be sued for negligence was, in every sense, a private law ("privus lex (leg-)") which is the etymological connotation of the word "privilege".[191] Interestingly too the etymology of the word "immunity" shows that it is derived from a concept akin to privilege.[192] In medieval legal Latin the word "immunitas" meant a privileged place or sanctuary. And the Shorter Oxford Dictionary[193] defines the word "immunity" in general terms as a privilege.

[114] Parliament's purpose in enacting s 61 and its predecessors strongly suggests that no technical, limited or Hohfeldian meaning should attach to the word "privilege", or to the connotations of the whole phrase of which that word is a part.

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189 (8 ed 2004).

190 [1984] 1 NZLR 84 at 96 (CA).

191 A private law in this sense ("privilegium" in Roman law) was a law limited to a particular group of persons.

192 With respect to Hammond J at his [169], the etymological root of the word "immunity" is not the noun "manus" (hand) but the adjective "munis" (meaning eligible or liable for some form of service, duty or charge). "Immunis" meant free or exempt from such service, duty or charge. It did not have any connotation of a staying of the hand: see Lewis and Short *A Latin Dictionary* (1969) 895 and 1176-1177.

193 (5 ed 2002).

It would be strange if, in a measure such as s 61 and its predecessors, Parliament meant to invest New Zealand barristers with all the incidents pertaining to the status or office of barristers in England except for their immunity from suit. No reason was advanced why Parliament might have wished to exclude immunity from suit from its obvious wish to equate New Zealand barristers in all respects with English barristers.

[115] For the purposes of defamation, barristers, as with other participants in the judicial process, enjoy absolute privilege in respect of what they say in court. This use of the word "privilege" is firmly embedded in the terminology of defamation law. In a sense this privilege is an immunity from suit. As Mahon J implied in *Rees v Sinclair*, it is difficult to see how Parliament, by its use of the word "privileges" in s 61, could have intended to distinguish between the tort of defamation and the tort of negligence. It is unpersuasive to suggest that by its use of the word "privileges" Parliament was intending to endorse the absolute privilege enjoyed by barristers in respect of defamation but not to endorse their traditional immunity from suit in relation to negligence.

[116] I do not consider that the reference in s 127 of the Law Practitioners Act to immunities as well as privileges in the context of proceedings before the Disciplinary Tribunal gives any reliable guide to the proper interpretation of s 61. The context of s 127 is narrower and more focused than the generality of application intended for s 61. I am of the view that both the text of s 61 and its purpose clearly suggest that barristers' immunity was meant to come within the compass of the section. Hence Parliament must be taken to have legislatively affirmed in the series of statutes culminating in the Law Practitioners Act 1982 that New Zealand barristers were to have the same immunity from suit as English barristers had.

[117] That brings me to the more difficult question. It concerns what effect this legislative recognition of barristers' immunity has on the ability of the New Zealand courts to abolish the immunity, or to amend it, if to do so is appropriate in the light of current circumstances.

[118] The ultimate question is whether s 61 and its predecessors prohibited common law developments in this area of the law. This case, at its various stages, has involved discussion about the time at which the effect of s 61 is to be gauged insofar as it connects the status of barristers in New Zealand to that of barristers in England. Should the section be construed as having an effect fixed as at the date of its enactment, or rather, should the effect be ascertained at the date the section falls to be interpreted?

[119] Although the latter was referred to in argument as the "ambulatory" approach, it is a different notion from that underpinning s 6 of the Interpretation Act 1999 which provides that an enactment applies to circumstances as they arise.[194] The difficulty with this so-called "ambulatory" interpretation of s 61 is that New Zealand law would thereby inevitably have been tied to English law. This approach to s 61 would mean that whatever changes were made to the powers, privileges, duties, and responsibilities of barristers in England would automatically apply in New Zealand. The only escape would be express Parliamentary disallowance of the change. That would be a most unlikely state of affairs for the New Zealand Parliament to have established.

[120] When it is also appreciated that s 61 is made subject to the Act as a whole, it becomes even more difficult to hold that our Parliament meant to make our law in relation to barristers subject automatically to any change made in England. The fact that s 61 is made subject to the rest of the Act means, among other things, that the section is subject to the professional rules of conduct relating to barristers as may from time to time be made by the New Zealand Law Society pursuant to its power to make rules affecting the conduct of practitioners.[195] Thus s 61 is subject to the indigenous rule-making powers of the New Zealand Law Society. This feature heightens the unlikelihood of Parliament having given a blank cheque to the English Parliament, English judges and any relevant English professional body, as regards the professional and legal position of barristers in New Zealand.

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194 Unless in terms of s 4(1)(b) the context of the enactment requires a different interpretation.

195 Section 17(2)(d) of the Law Practitioners Act 1982 empowers the Society to make rules: "[r]egulating in respect of any matters the professional practice, conduct, and discipline of practitioners". This provision would be rendered ineffective unless the words "subject to this Act" in s 61 are read as meaning subject to what is prescribed or permitted by the Act.

[121] A fixed date interpretation is potentially more tenable in view of the escape from what would otherwise be a frozen landscape provided by the words "subject to this Act". Those words give some capacity for change. But it is still unlikely that Parliament was demonstrating a continuing intention to preclude any common law development in relation to barristers. The phrase "subject to this Act" lets in changes made by professional rules but does not expressly provide for judicial changes in relation to any aspect of the subject which could not be altered by professional rules. It is hardly likely that Parliament meant s 61 to be subject to contrary professional rules, but at the same time wished to continue to preclude any judicial development as regards barristers who are, of course, officers of the court.

[122] What then was Parliament's purpose when enacting s 61? It is relevant here to recall that the text of s 61 has featured in successive enactments dealing with the legal profession.[196] There has been no material change in the wording of those provisions down the years. In view of the difficulties with both the "fixed date" and the "always speaking" or ambulatory approaches, and in the light of what, in any event, I regard as the essential purpose of s 61 and its predecessors, I would construe s 61 as simply bringing in and affirming the various professional and legal rules relating to English barristers as a starting or reference point, on the basis that it would be possible for the appropriate New Zealand institutions to add to, subtract from, amend, or abolish them as local conditions might warrant.

[123] Parliament gave a clear signal that it was leaving room for change by making s 61 and each of its predecessors subject to the rest of the Act. It was thereby allowing such changes as were effected or permitted by dint of any relevant provision elsewhere in those Acts. This statutory avenue for departure from the starting or reference point does not expressly provide for common law departures as opposed to departures within the competence of the Law Society. But that does not support the view that Parliament was implicitly saying there was to be no common law departure. That, in any event, seems an inherently unlikely thing for Parliament to have done in an environment in which the courts had historically been responsible

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[196] See s 10 of the Law Practitioners Act 1861; s 12 of the Law Practitioners Act 1882; s 11 of the Law Practitioners Act 1908; s 7 of the Law Practitioners Act 1931; and s 13 of the Law Practitioners Act 1955.

for controlling and developing most matters pertaining to the powers, privileges, duties, and responsibilities of barristers.

[124] This approach is supported by what must have been Parliament's purpose when enacting s 5 of the Imperial Laws Application Act 1988 which reads:

> **5 Application of common law of England**
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> 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, shall continue to be part of the laws of New Zealand.

[125] Parliament's reference to the common law of England is analogous to its reference to the powers, privileges, duties, and responsibilities of English barristers. It cannot be supposed that by enacting s 5 our Parliament intended either to freeze the common law as at 1988 or automatically to bring into New Zealand law all common law developments in England. The only reasonable view is that s 5 was designed to make applicable in New Zealand, on its enactment, the English common law as hitherto adopted by our courts, but with the clear implication that the New Zealand courts could build on or change it as best suited New Zealand's legal system. The same applies with s 61 and its predecessors. In short, the sections have the effect of receiving the relevant English law into New Zealand but with no implication that future English changes necessarily apply in New Zealand or that the New Zealand courts cannot develop, amend, or abandon the received law as may best suit New Zealand circumstances.

[126] I am therefore of the view that s 61[197] does not prevent the courts from abolishing or amending the common law rule which gives barristers immunity from suit in particular circumstances, if to do so would otherwise be an appropriate development of the common law.

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[197] The corresponding section in the Lawyers and Conveyancers Act 2006 is s 117 which provides that, subject to the Act, barristers of the High Court have all the powers, privileges, duties and responsibilities that barristers have "at law". This is a rather strange provision because if a barrister has a certain privilege at law, he or she must have it irrespective of s 117. But that aside, the abolition of barristers' immunity will mean that they do not have such immunity at law. The new section (which is not yet in force) is thus consistent with the view I have expressed about s 61.

Should the issue be left to Parliament?

[127] I propose to address next the question whether the substantive issue should in any event be left to Parliament. While the Court is not bound to do so, those favouring the retention of the immunity suggested, as a fallback position, that the Court should follow that course. I have already made passing reference to this aspect. My view is that in this case the Court should not pass the ultimate responsibility over to Parliament. Neither the House of Lords nor the High Court of Australia thought that this would be appropriate, albeit the High Court was of course intending to retain the immunity. Kirby J, in dissent, did not consider the courts should defer to Parliament. Nor did our Court of Appeal.

[128] The immunity is a creature of the common law. The issues arising are well within the institutional competence of the courts. As will emerge later in these reasons, a key issue is whether the doctrine of abuse of process is a better way of addressing matters which have hitherto been covered by barristerial immunity. Nothing could be more central to the role of the courts than addressing how best to delimit and control abuse of their processes and to define the duties and responsibilities of their officers. I am therefore satisfied that it is a proper function of the courts to abolish barristers' immunity if they consider that is the appropriate course to take.

The retrospective/prospective issue

[129] As I consider the Court of Appeal came to the correct conclusion, for the reasons given by the Chief Justice and those which I will briefly set out below, I will move now to discuss whether barristers' immunity should be abolished only with prospective effect, as the appellant firm contended. This inquiry has two parts: whether this Court can give decisions having only prospective effect; and, if so, whether this is an appropriate case in which to adopt that course.

[130] The traditional (declaratory) theory involved the proposition that in deciding what the law was the courts were deciding what it had always been. At the very least

they were deciding what it was at the time the events giving rise to the litigation took place. Hence the courts could not, or at least should not, state that at the time of the relevant events the law was X but from the date of judgment onwards it was to be Y.

[131] A further facet of the traditional view was that the role of the courts was to declare the law applicable to the facts of the case and it was for Parliament to change that law for the future. The courts' backward-looking role was essentially different from Parliament's role, supported as the latter role was by the strong presumption against retrospectivity. The theory was that the courts should have no scruples about their decisions having retrospective effect because the law, as later declared, already existed at the time the relevant events occurred.

[132] That general approach to retrospectivity worked and works well in most circumstances. But it comes under some tension if, although the law at the time of the events was understood to be X, a court, usually a final appellate court, now declares it to be Y. The court may say that the previous understanding was wrong; or, more problematically, may say that the previous understanding was right, but the law as previously understood should be changed. This, effectively, is the situation in the present case. In 1995, when the relevant events occurred, everyone would have said that under New Zealand law as it then stood barristers were immune from suits for negligence in relation to protected conduct. But now, some 11 years later, the courts are saying that the law should change and the immunity should be abolished, albeit with the doctrine of abuse of process being available to cover some of the ground earlier covered by barristers' immunity. The essential question is whether this change should operate only for the future.

[133] One argument which must immediately be confronted is that in the light of the retrospectivity issue this Court should have decided to leave any change to Parliament which could, and almost certainly would, have introduced the change, if any change was to be made at all, with prospective effect only. This is a point of some force and seems to me to be the strongest argument in favour of deference to Parliament. I have rejected that suggestion because I am of the view that it is best in the end to face up squarely to the retrospective dimension, which is an issue

legitimately within the province of the common law, rather than to avoid it by leaving the whole problem to Parliament.

[134] There is now a growing body of academic and judicial literature on the subject of what is generally called prospective overruling.[198] That is convenient shorthand but I consider that the subject is better understood when described as limiting the retrospective effect of judicial decisions. The House of Lords recently examined the subject in *In re Spectrum Plus Ltd (in liq)*.[199] Professor Philip Joseph has done the same in an article in the New Zealand Law Review.[200] Professor Joseph makes a number of forceful points in favour of the courts having an ability to overrule prospectively. I agree with him that there are difficulties with purely prospective overruling. An intermediate position between a fully prospective and a fully retrospective approach is likely to achieve the best reconciliation of all the competing issues. The pure version of prospective overruling applies the old law to the case in hand and to all other cases the facts of which pre-date the giving of judgment. The new law applies to all cases the facts of which occur after the overruling judgment is delivered. The pure approach therefore denies to the victor what would otherwise have been the fruits of victory. By contrast the partial version has the new law applying to the parties and perhaps to others who have already commenced proceedings, but not otherwise retrospectively.

[135] A proper approach to this topic requires an appreciation of the realities of the role of the courts in our judicial system. Judges make law. They always have done: hence the expression "judge-made law". The total body of law under which we live comprises law made by Parliament and law made by the judges. Parliament changes the law from time to time and so do the judges. It is inappropriate in a modern world to deny that judges can and do change the law. There is nothing constitutionally improper in their doing so. The expression judicial legislation is sometimes used pejoratively in this context, but that usage fails to understand that a large part of our

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198 As well as the sources which I will specifically mention, there are useful recent discussions by Dame Mary Arden in a note "Prospective Overruling" (2004) 120 LQR 7; Sampford *Retrospectivity and the Rule of Law* (2006) ch 5; and by the Hong Kong Court of Appeal in *HKSAR v Hung Chin Wa* [2006] HKCA 30.

199 [2005] 2 AC 680; cf *Kleinwort Benson v Lincoln City Council* [1999] 2 AC 349 at 377-379 per Lord Goff.

200 "Constitutional Law" [2006] NZ L Rev 123 at 138-149.

law always has been and still is created by judges. In some circumstances that creation involves change; and whether there is change is often a matter of degree. The present issue concerns whether and how judicial changes to the law can be managed so as to avoid or at least mitigate, when necessary, the difficulties which arise from the retrospective effect of such changes.

[136] We are changing the law in the present case. Hitherto barristers have had immunity from suit for protected work. Henceforth they will not have any such immunity. We are not declaring that in reality barristers have never had immunity; nor are we simply correcting a mistaken view of the law. Blackstone might have put it that way but we cannot. We are changing the law because of a change in perceptions over time of what public and legal policy require. If anyone had asked a properly qualified lawyer in 1995 whether barristers had immunity from suit in defined circumstances, the answer could only have been in the affirmative.

[137] Parliamentary changes to the law are almost always solely prospective in effect. By contrast, it is standard common law doctrine that if the courts make a change, it has retrospective effect both specifically and generally. Something which Parliament does only very rarely is a standard feature of a judicial change in the law. This is a significant contrast, the more so in the light of the need, often emphasised in the human rights arena, for the law to be predictable and sufficiently clear to enable people to order their affairs with confidence.

[138] It is apparent from the general survey conducted by Lord Nicholls in *Spectrum* that prospective overruling, whether pure or partial, has not obtained currency in Australia or Canada. Indeed in *Ha*'s case[201] the High Court of Australia set its face firmly against any such notion. Like Professor Joseph, I am not persuaded that it is either necessary or appropriate to close the door entirely on the notion of prospective overruling.

[139] Both our system of precedent and how we should handle the consequences of overruling earlier decisions are governed by the common law. There is no good reason why this aspect of the common law should be regarded as set in stone and

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[201] *Ha v State of New South Wales* (1997) 189 CLR 465 at 503-504.

uniquely incapable of modification and development. Nor do I consider that this Court should be deterred by allegations of excess of judicial power. The remedies which the courts give are almost uniformly of common law or equitable origin, albeit in some cases they have been amended or overlaid by statute. The ultimate task of any court is to do justice according to law in a manner which combines adherence to principle with an appropriate degree of pragmatism.

[140] While I do not consider successful parties should usually be denied the fruits of their argument that the law should be changed, I do consider there may sometimes be cases where it would be wrong to extend the effect of a change to others who have legitimately ordered their affairs in reliance on the law being as earlier established. The retrospectivity issue will often be relevant to the earlier subject of whether the courts should leave a change to Parliament. The law must have the means to accommodate cases where, for whatever reason, it is not appropriate to do so, but where it would be unfair to citizens generally, or societally disruptive, to change the law with fully retrospective effect.

[141] In the United States, prospective overruling gained considerable currency in the middle of the last century but seems to have fallen into decline more recently.[202] In *Spectrum* the House of Lords cautiously left the door open for the exceptional case, with Lord Steyn[203] and Lord Scott[204] doubting whether it would ever be appropriate to adopt prospective overruling in cases which involved a changed interpretation of a statute. I cannot myself see why it is necessary or appropriate to make any distinction between statute and common law. As with decisions on the common law, statutory interpretation establishes what the law is. The subsequent overruling of an earlier decision changes the law as much in the one case as the other, even if that change comes about through a realisation that the earlier decision was simply wrong.

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202 Representative of the earlier view are: *Great Northern Railway Co v Sunburst Oil and Refining Co*, 287 US 358 (1932); *Linkletter v Walker,* 381 US 618 (1965); *Chevron Oil Co v Huson*, 404 US 97 (1971). The more recent approach is demonstrated by: *Griffith v Kentucky*, 479 US 314 (1987); *James B Beam Distilling Co v Georgia*, 501 US 529 (1991); *Harper v Virginia Department of Taxation*, 509 US 86 (1993).

203 At 700.

204 At 726.

[142] I do not propose to lengthen these reasons by a more detailed survey of the literature, or by simply rehearsing, beyond what is already implicit, the pros and cons of the various arguments which have been put forward on this topic. I will simply move to outline five signposts which may be found helpful as we move forward. I do so from the standpoint that in some, no doubt rare, circumstances, this Court should be able to limit the retrospective effect of a decision which can fairly be said to change the law.

[143] That, effectively, is my first point. Decisions should continue to speak retrospectively for all purposes unless they can clearly be said to change the law. The second point, correlative to the first, is that the decision being overruled must have been of a kind which could fairly be regarded as settling the law on the point. This means that the technique of limiting the retrospective effect of a decision is likely to be appropriate primarily in this Court. In *Spectrum* the earlier decision had been made in the High Court and had been the subject of some controversy. Their Lordships felt that although the decision had stood for quite a long time, it could not fairly be regarded as having settled the law.

[144] The third point is that the earlier decision should generally be of a kind that reliance is likely to have been placed upon it in the ordering of the affairs of citizens or society generally. This reliance must be such that it would cause serious injustice to individuals, or would clearly not be in the best interests of society as a whole, for the law to be altered retrospectively. The more the earlier decision is of this kind the stronger the argument is likely to be for some limitation of retrospective effect. The fourth point is that as well as considering the harm that may be done if a decision has retrospective effect the court should also consider, and if necessary balance against the former harm, any harm that might be done to individuals or society if the decision did not have retrospective effect. For example, in *Spectrum*, had the decision of the House of Lords not operated retrospectively, preferential creditors in current liquidations would not have enjoyed the position which Parliament had intended for them.

[145] My fifth point, already foreshadowed, is that any limitation of retrospective effect should not usually affect the parties to the case in hand. The party who

succeeds in getting the law changed should be entitled to the benefit of that success. The position of others who might already have litigation pending which involves the point in issue is difficult and I would not wish to forecast what view should be taken in their case. To exclude them might seem arbitrary and inconsistent, as Lord Nicholls suggested in *Spectrum*; but equally such cases may also involve parties who have justifiably relied on the earlier law. Exempting the immediate parties from any general non-retrospective operation is itself somewhat arbitrary, but that small degree of arbitrariness must be accepted in the interests of the law as a whole. To do otherwise, as Lord Nicholls said, would stultify the common law method by making a successful challenge to the existing law of no benefit to the successful litigant.

[146] Finally, I wish to make it clear that by subscribing to a carefully controlled ability for this Court to limit the retrospective effect of judgments which change the law, I am not suggesting any looser approach to the circumstances in which it may be appropriate to depart from earlier decisions.

[147] On the basis of those signposts and such others as may emerge in the light of experience, I consider this Court, if otherwise satisfied that it is appropriate to do so, may rule that the change in the law which it proposes to introduce should, save for the immediate parties, apply only to events occurring after the date of the judgment which effects the change.

[148] Before leaving the general aspects of this subject, I refer to an interesting suggestion made by Richard Tur of Oriel College, Oxford in his article "Time and Law"[205] written following the decision of the House of Lords in *Hall*. The author explores the possibility that a "weaker" form of prospective overruling may sometimes be appropriate. Rather than overruling an earlier decision, the court may simply not follow it. The rationale is that the earlier decision was correct at the time it was made and subsequently but, by reason of changed circumstances, is no longer correct and should thus not be followed, rather than that it should be overruled as erroneous from the beginning. This idea does not solve all problems but may

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[205] (2002) 22 OJLS 463.

provide another conceptual basis for addressing the difficult temporal issues which arise when a court decides that an existing rule should be changed.

Retrospectivity – this case

[149] There cannot be any doubt that in 1995, when the relevant events occurred, the law in New Zealand was generally viewed as settled by the decision of the Court of Appeal in *Rees v Sinclair*. Although that was not a decision of the Privy Council, it was wholly consistent with authority at the highest level in England. Any thought that the Privy Council might depart from *Rees v Sinclair* could only have been viewed at that time as speculative.

[150] Although the events in the present case occurred well before *Hall*, it could be said that from the time *Hall*'s case was decided by the House of Lords, the clouds were gathering, as Lord Nicholls put it in *Spectrum*, and New Zealand's law was thereby rendered uncertain. But even if the relevant events had happened after *Hall*, the view New Zealand courts might take was by no means self-evident. The fact that we are differing from Australia makes it clear, albeit in hindsight, that the solution to be favoured in this part of the world was by no means obviously the same as that favoured in England; a fortiori in the criminal area where the House of Lords was divided.

[151] I do not consider it would be appropriate to introduce further difficulty and complexity into this field by suggesting that the overruling court, if otherwise minded to limit the retrospectivity of its decision, should be obliged to consider fixing a time earlier than that of its decision as the time from which the new law should operate. That earlier time could only be based on when, in the court's view, change was sufficiently in the air or on the cards that people should have ceased to rely on the existing law. Such an approach, as well as introducing further complexity and difficulty, would also ignore the fact that, until the law is changed, everyone is, prima facie at least, entitled, if not obliged, to order their affairs in accordance with it.

[152] The crucial point for present purposes concerns the extent to which and the way in which barristers may have relied on the immunity in ordering their affairs. The Court has no evidence on this issue. There could hardly be any persuasive suggestion that barristers' standards of work were influenced by their immunity. The only sensible aspect of reliance which might arise concerns insurance arrangements. But, again, we have no evidence to assist us.

[153] It is unclear whether standard insurance policies taken out by barristers during the relevant period will have covered all legal liability or only specific aspects of work. If they covered the barrister in the first way, then any legal liability now attaching by dint of the abolition of the immunity would be covered by the policy. The detriment would be to the underwriters in not collecting a premium coincident with the expanded risk. If standard policies covering barristers included non-protected areas of work and excluded protected areas, then retrospective operation of the present decision might result in barristers being without cover in relation to work for which it was then thought they had no need for cover.

[154] The difficulty of establishing at the margins what out-of-court work was covered by the immunity, and what was not, adds further potential uncertainty to this whole picture. The onus of establishing that there are grounds to limit the ordinary retrospective effect of a decision of this Court should be on whoever seeks to do so. While there is some potential for a degree of hardship for barristers in having the effect of this judgment fully retrospective, I find myself unpersuaded that the extent and likely incidence of such hardship justifies the exceptional course of limiting the retrospective effect of the Court's decision. In short, I do not consider it has been shown that the level of potential injustice arising from full retrospectivity is such that we should alter that normal consequence.

Abolition of the immunity

[155] I agree with what the Chief Justice has written on this, the central aspect of the case. I simply summarise what has led me to that view. The principal reason why the Court of Appeal was correct to hold that barristers should no longer have any immunity from suit is that the law creating the immunity had its focus in the

wrong place. This was so both as a matter of substance and of description. The only persuasive purpose of barristers' immunity lay in the indirect role the immunity played in protecting the processes of the court. Its value lay there, rather than in its direct role of protecting barristers from liability for negligence. As I am satisfied that the indirect benefits to the judicial system provided by barristers' immunity can and should be captured more directly, there is no sufficient reason why barristers should be protected from suits for negligence. It is better to address the need to protect the judicial system in a direct way rather than indirectly through the overreaching vehicle of barristers' immunity.

[156] By reason of the nature of their work, barristers may well be vulnerable to vexatious or frivolous claims. But that cannot of itself be a reason for protecting them from valid claims as well. The key question for me has been to identify the circumstances in which and the means by which the legal system should be protected from the unacceptable side effects of claims against barristers. Those side effects should in my view be addressed by means which do not preclude all claims, irrespective of their merit and irrespective of whether and the degree to which their prosecution would harm the judicial system.

[157] Nor am I persuaded that barristers should have the automatic and absolute protection that other participants in the judicial system enjoy. Judges, jurors and witnesses are obvious examples. Their duties, and their need for protection in the interest of doing justice in the particular case, cannot be equated with the position of barristers. The duties of barristers to the court and to their clients are not inconsistent with each other. They are complementary. The duties of barristers to their clients and allegations of breach thereof must always be assessed in the light of their duties to the court. There can be no valid suggestion of a breach of duty to a client if the conduct of the barrister has been in accordance with a duty to the court or a reasonable perception of what that duty is.

[158] The ethical duty which rests on practitioners to act irrespective of personal preference (usually referred to as the cab-rank principle) remains important.[206]

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[206] New Zealand Law Society *Rules of Professional Conduct for Barristers and Solicitors* (7 ed 2006), r 1.02.

Nevertheless, I cannot see any cause for concern that vulnerability to civil action will inhibit barristers who would not otherwise have been inhibited from accepting a brief on behalf of an unpopular client or cause.

[159] These various considerations and those referred to by the Chief Justice have led me to the view that both substantively and descriptively it is better to achieve the ultimate objective of protecting the judicial system in necessary cases by means of a developed doctrine of abuse of process.[207] The abolition of barristers' immunity will also make it necessary to determine the extent to which claims against barristers for certain types of loss or in certain types of situation should be allowed as a matter of public policy. In this way focused and principled solutions can be found which will serve the interests of justice better than the blunt instrument of barristers' immunity.

[160] I should briefly indicate why I am not persuaded by the conclusion reached by the majority of the High Court of Australia in *D'Orta-Ekenaike*. The striking feature of that decision is that the policy bases upon which the Court relied in upholding barristers' immunity were significantly different from those which persuaded the House of Lords to do the same in *Rondel v Worsley* and from those which had led the High Court to follow suit in *Giannarelli v Wraith*.[208] The various earlier underpinnings were largely discounted in favour of a single principle that controversies, once resolved, should not be re-opened except in a few narrowly defined circumstances. This was said to be a fundamental and pervading tenet of the judicial system reflecting the role played by the judicial process in the government of society. The second part of the High Court's reasoning was based on the premise that it was difficult, if not impossible, to formulate a satisfactory basis for deciding when collateral challenges to subsisting convictions or civil determinations would not amount to an abuse of process.

[161] The Australian view involves a strong implication that such collateral challenges would always be abusive as a threat to the integrity of the judicial system.

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[207] This approach has the persuasive support of Professor Stephen Todd of the University of Canterbury: see Todd et al *The Law of Torts in New Zealand* (4 ed 2005) at [6.7.03].

[208] (1988) 165 CLR 543.

As will appear, I share that view in relation to criminal convictions, but not in relation to civil determinations. But a conclusion that collateral challenges should never be permitted because they are always abusive does not support the maintenance of the over-inclusive rule of barristerial immunity. Even then the interests of justice would be better served by the doctrine of abuse of process rather than by having barristers immune from suit. Having the focus on the immunity of barristers conceals the true purpose of the law, which is to prevent its processes from being misused. The key issue is therefore when collateral challenge should be regarded as an abuse.

Abuse of process - background

[162] That leads me to examine how the doctrine of abuse of process may be applied as a sufficient substitute for barristers' immunity and as a sufficient safeguard against what would otherwise be the undesirable consequences of its abolition. I will start with the decisions of the Court of Appeal and the House of Lords in *Hunter*'s case.[209] Several prisoners who had been convicted of murder commenced civil proceedings against police officers for assault. At their murder trial the Judge had expressed himself as satisfied beyond reasonable doubt that no such assaults as alleged in the subsequent civil proceedings had taken place. He did so in the course of a ruling that statements made by the then accused to the police were admissible. The jury found the accused guilty and their convictions were upheld on appeal. By taking civil proceedings for assault the plaintiffs were necessarily challenging the Judge's ruling at their criminal trial and the jury's implicit acceptance that their statements were not vitiated by violence.

[163] In the High Court Cantley J declined to strike out the civil proceedings as an abuse. The Court of Appeal reversed his decision, albeit the three Judges did not adopt the same reasoning. There were differences between them as to whether the case was governed by res judicata or issue estoppel because the parties were not the

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[209] Reported in the Court of Appeal as *McIlkenny v Chief Constable of the West Midlands & Another* [1980] 1 QB 283 (Lord Denning MR, Goff LJ and Sir George Baker) and in the House of Lords as *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529.

same in the civil proceedings as they had been in the criminal proceedings. The Court of Appeal's unanimous ultimate conclusion was that it was not appropriate to allow the plaintiffs to mount a collateral challenge to the trial Judge's ruling and indirectly to the resulting convictions. Goff LJ put the matter squarely on the basis of abuse of process.[210] He relied on the judgment of A L Smith LJ in *Stephenson v Garnett*[211] in which his Lordship had regarded it as appropriate to strike out a claim when "the identical question sought to be raised has been already decided [against the intending plaintiff] by a competent Court". Collins LJ had expressly stated in that case[212] that if "the very same question raised in the action" had been earlier decided against the plaintiff, his claim was an abuse of process.

[164] Goff LJ remarked of the case in hand that "the substance" of the matter was the very question which the trial Judge had determined in the criminal proceedings. His Lordship invoked the observation of Lord Halsbury LC in *Reichel v Magrath*[213] that it would be a scandal to the administration of justice if, when the same question had been disposed of by one case, the litigant were to be permitted, by changing the form of the proceedings, to set up the same case again. Goff LJ added the further point that the issue had earlier been tried on the criminal standard of proof and the plaintiffs were now seeking to say that on the balance of probabilities something was "likely which has already been held certainly not so".[214]

[165] The leading speech in the House of Lords was delivered by Lord Diplock, with whom all the other members of the Appellate Committee agreed.[215] Lord Diplock, who expressly approved Goff LJ's approach in the Court of Appeal, commenced by saying:[216]

> My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The

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210 At 330 ff.
211 [1898] 1 QB 677 at 680-681.
212 At 682.
213 (1889) 14 App Cas 665 at 668.
214 At 332.
215 Lord Russell, Lord Keith, Lord Roskill and Lord Brandon.
216 At 536.

> circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.

[166] His Lordship's observation that the doctrine of abuse of process should not be limited to fixed categories has, in my view, subsequently been pressed beyond its proper and intended scope. Lord Diplock was not suggesting that categorisation per se was inappropriate, only that the scope of the doctrine should not be limited to fixed categories. His Lordship's words should not be taken as suggesting that like cases should not be treated alike. Later in his speech Lord Diplock said:[217]

> The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a *final* decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.

I have highlighted the need for the earlier decision to be final because that is an important ingredient of the rule.

[167] Lord Diplock's words, even when read in the light of his admonition against fixed categories, do not suggest that he thought it might be appropriate in some circumstances to allow a collateral civil challenge to a criminal conviction.

[168] Six years later *Hunter*'s case was applied by the English Court of Appeal in *Somasundaram v M Julius Melchior & Co*.[218] That case involved exactly the kind of claim which abolition of barristers' immunity would otherwise make possible had the defendant been a barrister not a solicitor. The plaintiff had been advised by a solicitor to plead guilty to a charge of malicious wounding. He was convicted on his plea and sentenced to two years imprisonment. The Court of Appeal refused his application for leave to appeal against conviction but reduced the sentence to 18 months. The plaintiff brought proceedings for damages against his solicitor alleging negligence in the advice to plead guilty. He further necessarily contended

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[217] At 541 (emphasis added).
[218] [1988] 1 WLR 1394.

that a plea of not guilty would probably have led to an acquittal. The solicitor applied to strike out the proceedings as an abuse. That application was granted by a Master whose decision was upheld by the High Court. The Court of Appeal dismissed a further appeal and in so doing cited the extracts from the speech of Lord Diplock in *Hunter* to which I have already referred. In so doing the Court emphasised that the appropriate, indeed the only, way convictions may be attacked is by appeal, citing words of Lord Diplock to that effect in *Saif Ali*,[219] and anticipating comments made, particularly by Lord Hobhouse, in *Hall*'s case.

[169] Their Lordships also cited from the speeches of Lord Reid and Lord Morris in *Rondel v Worsley*, in which they had suggested respectively that a collateral attack on a criminal conviction in a civil court was something "one would not contemplate with equanimity"[220] and was a "procedure that ought not to be permitted".[221] The *Somasundaram* Court then cited a lengthy further passage from the speech of Lord Morris,[222] the concluding part of which it is appropriate to reproduce here:

> The procedure regulating criminal trials and the machinery for appeals in criminal cases is part of the structure of the law. Much of it is statutory. In practice the judges who preside at criminal trials do what they can to ensure that the case of an accused person, whether he is represented or whether he is not, is fairly and adequately presented. If there is an appeal there are rules which regulate the approach of the appeal court and which apply to such matters as to whether evidence will be heard on appeal or whether a new trial will be ordered. In practice it is unlikely that, owing to some want of care, counsel would refrain from calling at the trial a witness who was thought to be dependable and whose testimony would certainly secure an acquittal. It is to be remembered also that an accused person is at liberty to give evidence on his own behalf. A system which is devised so as to provide adequate and reasonable safeguards against the conviction of innocent persons and to provide for appeals must nevertheless aim at some measure of finality. If the system is found not to be adequate then it can be altered and modified: it can be kept continually under review. I cannot think, however, that it would be in the public interest to permit a sort of unseemly excrescence upon the legal system whereby someone who has been convicted and has, without success, exhausted all the procedures for appeal open to him should seek to establish his innocence (and to get damages) by asserting that he would not have been convicted at all but for the fact that his advocate failed to exercise due care and skill.
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> 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 courts must not avoid

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219 At 222.
220 At 230.
221 At 249.
222 At 248-251.

> 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 the 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 on litigation with the possibility of a recurring chain-like course of litigation.

[170] With respect, I find these observations highly persuasive, particularly in relation to collateral civil attacks on subsisting convictions. As I shall later discuss, there is a need for some flexibility when the earlier decision is itself of a civil kind, but the general thrust of what Lord Morris said, albeit in support of barristers' immunity, is equally apt as support for the doctrine of abuse of process.

[171] The next development in England came in *Smith v Linskills*.[223] In that case the plaintiff had been convicted of aggravated burglary following a plea of not guilty. His appeal to the Court of Appeal was dismissed. He brought proceedings against his solicitors for negligence on the basis that their lack of skill and care in the preparation of his defence had led to the conviction. The proceedings were struck out by the District Judge. On appeal Potter J upheld that decision. The Court of Appeal dismissed the ensuing further appeal. The plaintiff wished to rely on evidence not called at his criminal trial in support of the contention that his defence had not been properly prepared and that, if it had been, he would have been acquitted. The case is significant for this observation in the judgment of the Court delivered by Sir Thomas Bingham MR:[224]

> It was not, as we understand, the intention of the House in the *Hunter* case to lay down an inflexible rule to be applied willy-nilly to all cases which might arguably be said to fall within it. Lord Diplock was at pains to emphasise the need for flexibility and the exercise of judgment. Ralph Gibson L.J. was, in our opinion, correct when he said in *Walpole v. Partridge & Wilson* [1994] Q.B. 106, at p. 116:
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> > "The decision of their Lordships in *Hunter*'s case, however, was, in my judgment, not that the initiation of such proceedings is necessarily an abuse of process but that it may be. The question whether it is so clearly an abuse of process that the court must, or may, strike out the proceedings before trial must be answered

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223 [1996] 1 WLR 763 (CA).
224 At 769.

> having regard to the evidence before the court on the application to strike out. There are, in short, and at least, exceptions to the principle."
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> It is none the less noteworthy that in *McIlkenny v. Chief Constable of the West Midlands* [1980] Q.B. 283, 333A, Goff L.J., whose judgment was unreservedly approved by the House of Lords, expressed the opinion that relitigation of an issue which had previously been the subject of final decision "must prima facie be an abuse of the privilege of the court to allow the matter to be litigated all over again." In the present case Mr. Nicol has, rightly in our judgment, devoted his argument to seeking to show that certain ingredients of Lord Diplock's rule are not present here.

[172] Goff LJ's use of the concept of a prima facie abuse, as noted in the foregoing citation, needs to be approached with some care. The context was a statement by his Lordship of the point he had reached before considering the arguments raised by the plaintiffs in support of their contention that the later civil proceedings were not an abuse. I am by no means sure, from a reading of Goff LJ's judgment as a whole, that his Lordship intended that the approach he was taking should ultimately have only prima facie application.

[173] I say that primarily because later in his judgment[225] Goff LJ cited, as having much force, the statement of Lord Diplock in *Saif Ali*[226] that to require a court of co-ordinate jurisdiction to try the question whether another court had reached a wrong decision and, if so, to inquire into the causes of its doing so, was calculated to bring the administration of justice into disrepute. Furthermore, the way Lord Diplock expressed himself in *Hunter* does not suggest he understood Goff LJ as ultimately espousing only a prima facie rule.

[174] I should mention here that *Walpole*'s case[227] involved a claim against solicitors for negligence in not bringing an appeal on a point of law against a client's conviction. The leading judgment of Ralph Gibson LJ ranged quite widely over the submissions which had been made and contained the passage cited by Sir Thomas Bingham MR as recorded above. Some aspects of this judgment raise problems, as

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225 At 337.
226 At 223.
227 *Walpole v Partridge & Wilson* [1994] QB 106 (CA).

noted by Hugh Evans in a perceptive article entitled "*Hall v Simons* and Abuse of Process".[228]

[175] One basis for the conclusion reached in *Walpole*, that the proceedings were not an abuse, was that the determination implicitly being challenged was not final or should not be regarded as final. It had become final only because of the negligence alleged against the solicitors and in those circumstances it would be inappropriate to regard the proceedings against the solicitors as an abuse. Viewed in this light *Walpole*'s case might be said not to engage the *Hunter* rule at all. But such an approach raises as many difficulties as it purports to answer. Like Mr Evans I doubt whether *Walpole*'s case, despite Lord Hoffmann's approbation of it in *Hall*, can be reconciled with the approach of their Lordships in that case. In practical terms the problem is likely to be dealt with by the granting of an extension of time to appeal. That would be likely if the point of the proposed appeal had the merit it would need to support a negligence claim.

[176] A little later in its *Linskills* judgment the Court of Appeal said:[229]

> It is plain from *Hunter's* case [1982] A.C. 529, 545A, that the existence at the commencement of the civil action of "fresh evidence" obtained since the criminal trial may justify making an exception to the general rule of public policy that the use of civil actions to initiate collateral attacks on final decisions against the intending plaintiff by criminal courts of competent jurisdiction should be treated as an abuse of the process of the court. It is also plain that the test to be met by such evidence is a strict one, stricter than the ordinary Court of Appeal test for receiving new evidence (that the evidence "would probably have an important influence on the result of the case, though it need not be decisive:" *Ladd v. Marshall* [1954] 1 W.L.R. 1489, 1491). The new evidence must be such as "entirely changes the aspect of the case:" *Phosphate Sewage Co. Ltd. v. Molleson* (1879) 4 App.Cas. 801, 814; *Hunter's* case [1982] A.C. 529, 545E. Mr. Nicol relied on this exception to the general rule, putting his argument in two ways.

[177] I am not satisfied that this so-called exception to the rule is, or at least should be, an exception where the collateral challenge is to a subsisting conviction as opposed to a subsisting civil judgment. I will develop my reasoning below.

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228 (2001) 17 PN 218.
229 At 771.

[178] I will refer to only one more English case before coming to the way abuse of process was viewed in *Hall*'s case.[230] The House of Lords examined the matter again in *Johnson v Gore Wood & Co*.[231] Proceedings between a company and its solicitors were compromised during trial. The plaintiff, who was the controlling shareholder of the company, commenced further proceedings against the solicitors claiming he had suffered personal losses separate from those of the company. At the pre-trial stage of the company's claim there had been discussions in which the possibility of achieving a composite settlement of both the company's claim and the plaintiff's claim arose. It was therefore apparent to all concerned that the plaintiff was asserting he had suffered personal loss. He did not, however, seek to be joined as an additional plaintiff in the company's claim. The House of Lords held that his subsequent claim was not an abuse.

[179] The case did not involve any collateral challenge to a final criminal or civil determination. The context in which the House emphasised the need to address the question of abuse of process on a broad-based factual basis was different. Their Lordships held the case was not sufficiently covered by the rule in *Henderson v Henderson*[232] to justify the order striking out the plaintiff's claim which had been made by the Court of Appeal in reliance on that rule. *Johnson*'s case, although valuable for its general discussion, does not take the collateral challenge issue any further.

[180] That brings me to the discussion of this topic in the speeches in *Hall*'s case. The Chief Justice has substantially covered this ground so I will confine my remarks to selected aspects. Lord Steyn observed[233] that a suit against a barrister alleging that his negligence caused a conviction, without having had the conviction set aside on appeal, was "the paradigm of an abusive challenge". He went on to say that "prima facie" such challenge was an abuse and "ordinarily" such proceedings would

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230 The main New Zealand cases on abuse of process are *Reid v New Zealand Trotting Conference* [1984] 1 NZLR 8 (CA) and *New Zealand Social Credit Political League Inc v O'Brien*. Neither of these cases, although consistent in a broad way with the English cases, touched on the crucial point with which I am concerned, namely whether there should be an absolute or some lesser rule against collateral civil challenge to a subsisting criminal conviction.

231 [2002] 2 AC 1.

232 (1843) 3 Hare 100; 67 ER 313. Briefly the rule is that a litigant cannot bring a second claim to ventilate an issue which could and should have been raised in the first claim.

233 At 679.

be struck out as an abuse. His Lordship did not indicate what circumstances might be sufficiently exceptional to avoid the operation of his prima facie approach. Speaking of collateral challenges to earlier civil decisions, Lord Steyn expressed the view[234] that abuse of process would be available to deal with "unforeseen gaps" beyond res judicata and issue estoppel. He did not further elaborate.

[181] Lord Browne-Wilkinson said[235] he would find an attack on an extant criminal conviction in civil proceedings "quite unacceptable". He reserved from the application of this approach "quite exceptional circumstances", without indicating what they might be. Lord Hoffmann's view[236] was that a collateral challenge to a criminal conviction would ordinarily but not necessarily be an abuse. In saying this he adopted as appropriate the statement to that effect by Ralph Gibson LJ in *Walpole*'s case,[237] cited by the Court of Appeal in *Linskills*. In contrast Lord Hoffmann considered that a collateral challenge to an earlier civil decision would "seldom" be abusive.

[182] In coming to these views Lord Hoffmann relied quite heavily on Lord Diplock's admonition in *Hunter* against categorisation. I have already foreshadowed my view on this point. Lord Diplock was warning against confining manifestations of abuse of process to fixed categories. He was not saying that when a particular category was being addressed the consequences of the abuse demonstrated by that category should be regarded as variable or discretionary. If the same vice is inherent in all manifestations of the abuse involved in that category flexibility of outcome is apt to involve inconsistency and to do more harm than good.

[183] Lord Hope pointed[238] to the anomaly of an award of damages for the consequences of a conviction which still stood. I agree and consider that it would be very difficult, if not impossible, to explain to the general public how this situation could arise. If the civil court thinks the barrister's negligence has probably resulted in an unsafe conviction, society could hardly tolerate its continuing existence. Far

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234 At 780.
235 At 684.
236 At 706.
237 At 116.
238 At 715.

better that it be a mandatory precondition to an action against a barrister that the conviction first be set aside.

[184] Lord Hope also gave a persuasive description of the principal reason supporting an embargo against abusive collateral attack when he said:[239]

> It is generally recognised that it is undesirable that collateral attacks of this kind should be permitted. The problem is that doubt will be cast on the soundness of the original decision, which may have been affirmed on appeal, if the later decision is in conflict with it. The problem is particularly acute in the field of criminal justice, as public confidence in the administration of justice is likely to be shaken if a judge in a civil case were to hold that a person whose conviction has been upheld on appeal would not have been convicted but for his advocate's negligence. He would have a remedy in damages but no remedy against the conviction. It is undesirable that a civil action should be treated as an avenue of appeal outside the system which Parliament has laid down for appeals in criminal cases.

[185] Lord Hutton's views on this question were the same as those of Lord Hoffmann. Lord Hobhouse did not consider the *Hunter* doctrine apt to deal with criminal cases but nevertheless made some helpful comments about abuse of process. In relation to the criminal arena he said:[240]

> Any decision reached at the trial is subject to appeal. The appeal is the process provided by the legal system for the rectifying of errors or mishaps which have occurred during the trial. The appeal process itself represents a working out of the policy of the law for qualifying the finality of the trial and incorporates appropriate safeguards. It is upon the appeal process more than upon the trial process that any system of civil fault-based remedies against advocates would encroach. The place for criticising the outcome of the trial and remedying any miscarriage of justice should in principle be the appeal court, not another trial where the advocate is the defendant.

[186] Lord Hobhouse also pertinently observed[241] that it was hard to imagine a criminal case where criticism of counsel could be sufficiently substantial to justify a civil claim but would not give a sufficient ground of appeal. His Lordship contrasted the position where the previous decision was of a civil kind by saying:[242]

> The court …has essentially to make a decision between two conflicting parties and determining their respective rights inter se. It is primarily the provision by the state of a service similar to the provision of arbitration

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239 At 715.
240 At 740.
241 At 746.
242 At 744.

> services. The public interest does not normally come into it save in so far as the provision of a system of civil dispute resolution and the enforcement of civil rights is a necessary part of a society governed by the rule of law not by superior force.

[187] With respect, I consider this rather downplays the need for protection from collateral challenge in the civil arena, but his Lordship's general comparison between criminal and civil cases is valuable.

[188] Lord Millett expressed the view[243] that the client should not be allowed to challenge the correctness of the conviction unless and until it is set aside. With respect, that way of expressing the matter is somewhat illogical. If the conviction has been set aside there is no continuing need to challenge it. But I am sure Lord Millett was intending to say that a claim for damages against a barrister could not be made if it challenged the correctness of a subsisting conviction.

Abuse of process - conclusions

[189] So far as criminal cases are concerned, the speeches in *Hall* provide support for an embargo against collateral challenge to subsisting convictions of varying degrees of strictness. The approaches range from saying that the embargo applies in ordinary circumstances; to saying that it applies prima facie; that it applies other than in truly exceptional cases; and that it applies in all cases. My view is that there should be a total embargo on collateral challenges to subsisting convictions. If fresh evidence is not sufficient to secure a new trial on appeal, I cannot see how it could be held to justify a claim for negligence on the basis that it would probably have led to an acquittal.[244] If the fresh evidence comes to light after the appeal, it could hardly be negligent not to have called it at the trial and, if the evidence is compelling enough, it would justify relief by way of a Governor-General's reference under s 406 of the Crimes Act 1961. All other species of negligence which might be alleged will concern preparation for trial or the conduct of the defence at the trial.

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243 At 753.

244 The same position does not necessarily obtain in civil cases. This is one reason why a distinction between civil and criminal cases is necessary.

[190] The decision of this Court in *Sungsuwan v R*[245] makes it clear that the conduct of counsel, whether negligent or not, can afford grounds for setting aside a conviction if the Court of Appeal is of the view that there is a real risk that the verdict of the jury is unsafe. If that cannot be shown on appeal, counsel's conduct could hardly later be found on the balance of probabilities to have led to an unsafe verdict. Real risk is a significantly lower standard to meet than more probable than not.

[191] Once it is accepted that it is ordinarily, or prima facie, or almost always an abuse to challenge a criminal conviction in civil proceedings, it can only be inherent judicial caution – the never say never principle – which causes one to step back from an absolute rule. After quite extensive reading I have not come across any persuasive example of circumstances in which it should be permissible to challenge a subsisting conviction in civil proceedings against counsel. While I agree with Lord Steyn that a civil challenge to a subsisting conviction is the paradigm of an abuse of process, I have difficulty with his conclusion that this paradigm of abuse is only prima facie abusive. If this is the epitome of abuse, how can it ever not be an abuse? How can you get damages on the basis that a conviction is unsafe or erroneous while that conviction remains in existence? A conviction must be regarded as valid unless and until set aside.

[192] I have not been able to think of a situation in which the interests of justice in allowing a challenge would outweigh the considerations served by the rule. The danger of allowing potential exceptions is that room is left for argument about whether the case is exceptional. To some extent the purpose of the rule is thereby undermined. Overall I consider it better in the interests of certainty and simplicity for there to be an absolute rule. The remote possibility that such a rule might defeat a case which should not have been caught by it is a very small price to pay for the forensic and other advantages of certainty. While the trend in many areas of law has been away from fixed rules in favour of flexibility, there are still cases which, on a balance of all the competing issues, justify a firm clear rule. This, in my view, is one of them.

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[245] [2006] 1 NZLR 730.

[193] The position is different in cases involving a collateral challenge to an earlier civil determination. They are of many and varied kinds. The best starting point is a rule which makes it prima facie an abuse to bring civil proceedings against a lawyer claiming that the outcome of earlier civil proceedings would have been better if the lawyer had not been negligent. I have already mentioned the difficulties that might arise in defamation proceedings. Proceedings for the modern equivalent of a custody order are another example. If a mother fails in her application, she could hardly be allowed to claim damages from her lawyer on the basis that the case was negligently handled and would otherwise have succeeded. Any finding that this was probably so would be tantamount to a finding that the child should actually be with the mother not the father. It is difficult to see how that conflict could be allowed to arise from collateral proceedings to which the father was not a party. How too would the interests of the child be safeguarded?

[194] I accept that it may not be an abuse for a client in proceedings involving a sum of money to sue his lawyer saying that had the lawyer not been negligent monetary relief would have been granted or the sum awarded would have been higher. On the face of it, nothing would be at stake for the successful litigant in the earlier proceedings. He or she would simply learn that they had been lucky; the negligence of their opponent's lawyer has resulted in their having to pay less than would otherwise have been the case, or nothing at all. I do not think sensible members of the public would have much difficulty in understanding what was happening, nor do I think that in these simple circumstances it could fairly be said that to allow the collateral claim would bring the administration of justice into disrepute or be unfair to the successful party in the earlier case.

[195] In *Hall* Lord Hoffmann made the distinction[246] between earlier judgments which had an "in rem" connotation and those which did not. That is a helpful distinction but I am not convinced it leads to his Lordship's conclusion that in the civil arena collateral challenge will seldom be abusive. Even a claim for a money sum may involve pejorative allegations against the party said to be liable. A

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[246] At 702.

negligence claim may well have reputational consequences. The plaintiff client may fail when suing a professional person and then say in a suit against his lawyer that had the case been properly handled the professional person would or should have been found negligent. The second case could hardly be fairly tried without the professional person being involved and defending themselves a second time. That would be quite unacceptable.

[196] It is not far-fetched to suggest that similar situations may arise in other kinds of civil claims for a money sum. It would be awkward and unsatisfactory to expect the defendant lawyer in the second proceedings to have to take the part of the professional or other defendant against whom he or she had been engaged in the first proceedings. This type of potential problem would be even stronger if the earlier failed proceedings had involved allegations of fraud or other dishonesty or even breach of fiduciary duty.

[197] My conclusion in the civil arena is that the desirable outcome is to have a general prohibitory rule from which exceptions will be appropriate. I would therefore hold that it is prima facie an abuse to commence civil proceedings collaterally challenging the final outcome of an earlier civil case. The onus should be on the plaintiff in the second proceedings to demonstrate:

(a) that the bringing of those proceedings is not unfair to any party in the first proceedings;

(b) that the consequences of success in the second proceedings will not cause an undesirable clash of determinations; and

(c) that the bringing of the second proceedings will not otherwise bring the administration of justice into disrepute.

[198] I will close by saying something about cases, both criminal and civil, in which a claim against a barrister is made after the setting aside of an earlier conviction or civil judgment. In the civil arena the barrister will be vulnerable to

liability for the expenses incurred in the setting aside exercise, any other financial losses caused by the negligence, and perhaps something in the nature of general damages. I would reserve the last matter for consideration as and when necessary.

[199] It should be emphasised that claims of this kind may well be difficult to establish. Causation is likely to pose substantial problems and, on the issue of negligence, realistic standards will have to be applied and the risks of applying the wisdom of hindsight will, as always, need to be guarded against.[247] In any subsequent civil suit between client and barrister issues can also be anticipated in relation to the relevance and weight of the judgment which has set aside the conviction or order.

[200] The problems are likely to be more substantial in the criminal arena. Significant policy issues can be forecast. Should the law of torts award damages for negligence when the loss derives from a lawful period of imprisonment? Should the law impose on barristers a duty of care when other participants in the system, albeit for different reasons, owe no such duty or are immune from any liability for a breach?[248]

[201] Contribution problems may be substantial. Seldom is a conviction likely to be set aside solely on the grounds of counsel's negligence. The Judge may have had some responsibility to guard the accused against certain types of negligence by counsel. While some of these points, and no doubt others, could be invoked in favour of retaining barristers' immunity, I consider they are better addressed as facets of legal policy in the context where they truly belong, rather than as support for a blanket immunity for barristers.

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247 The House of Lords appropriately recognised this point in *Moy v Pettman Smith* [2005] 1 WLR 581.

248 Some of the issues potentially arising are discussed, albeit with understandable lack of reference to barristers, by Heffey in an article entitled "Negligent Infliction of Imprisonment: Actionable 'Per Se' or 'Cum Damno'?" (1983) 14 MULR 53.

Conclusion

[202] For the reasons given I agree that the appeal should be dismissed with costs as proposed by the Chief Justice.

THOMAS J

Introduction

[203] I agree with the decision of this Court that the common law immunity for barristers must go. It is an anachronism that has survived well beyond its natural term. Henceforth, barristers, as with others who proffer skilled advice, will be liable for a breach of a duty to use reasonable care and skill in the service of their clients. It can be anticipated that, in the fullness of time, the contrary decision of the High Court of Australia in *D'Orta-Ekenaike v Victoria Legal Aid*[249] will be reversed by legislation or, possibly, a future Court.

[204] I also agree that s 61 of the Law Practitioners Act 1982 poses no difficulty in reaching this decision. The provision was clearly intended by Parliament to be a reception clause and, as is not uncommon, that clause has been reproduced unchanged through a number of re-enactments. What is, perhaps, somewhat puzzling is the fact arguments based on s 61 gained such momentum in the Courts below. From time to time, it seems, sight has been lost of the fact that the objective in interpreting s 61 is to ascertain the intention of Parliament; not to arrive at a judicially preferred interpretation of s 61 irrespective of the intention of Parliament.

[205] I do not doubt that this Court should have the power to rule that, in exceptional cases, its decision is to have prospective effect only. Lord Nicholls has

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[249] (2005) 214 ALR 92.

made a persuasive case for a final appellate court to possess such a power in *In re Spectrum Plus Ltd (in liq)*.[250] I endorse what he has said.[251] But I agree that there is nothing in this case so exceptional that the decision should have only prospective effect.

[206] Finally, I endorse the majority's stance in rejecting a categorical approach and holding that, while civil proceedings involving a collateral challenge to a subsisting conviction will usually be an abuse of process, there may be cases where this is not so.[252] Tipping J takes a different view. He seeks an absolute rule whereby a civil proceeding would invariably be regarded as an abuse of process if it involved a collateral challenge to a subsisting criminal conviction. As this is a point on which the Court has disagreed, I will add a few brief words of my own.

"…Never say never"

[207] In condemning formalism I have elsewhere briefly enumerated the characteristics which, to a greater or lesser extent, a judge who subscribes to that approach will exhibit. Among these characteristics is the fact that the judge will have little compunction about proclaiming absolute or near absolute rules. Notwithstanding the lesson of more than two centuries, it is assumed that the dynamic of the common law can be fettered. Treading this formalistic treadmill, the judge will manifest a distrust of judicial discretion and seek to control it with rigid rules or doctrine.[253] I am therefore pleased that the majority have rejected this approach and correspondingly disappointed that Tipping J has chosen to adopt it.

[208] Lord Nicholls has pointed out the undesirability of saying "never". Admittedly in a different context, the distinguished Law Lord said:[254]

> Rigidity in the operation of a legal system is a sign of weakness, not strength. It deprives a legal system of necessary elasticity. Far from

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250 [2005] 2 AC 680.
251 Especially at [39]-[42].
252 See [66] and [69] above.
253 *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (2005) 63.
254 *Spectrum* at [41].

> achieving a constitutionally exemplary result, it can produce a legal system unable to function effectively in changing times. "Never say never" is a wise judicial precept…

[209] I entirely agree. In the constant evolution of the common law it is a lesson which has been learned time out of mind. Yet, judges of a formalistic bent with comparable experience resist the lesson. Why is this? Surely it is a judicial conceit to think that the judges of today can foresee all the varied circumstances that may arise in the future and call for judicial resolution. The finite capacity of the human mind means that it is no more possible to predict the myriad of circumstances or combination of circumstances that will eventuate in human affairs than it is to predict the myriad of patterns that coalesce in a kaleidoscope.

[210] For this reason it is not possible to rule out the possibility that circumstances may arise where it is not an abuse of process to bring a claim in negligence against a barrister even though there is a subsisting conviction. Such circumstances will no doubt embrace the situation where the conviction subsists, or is alleged to subsist, because of the negligence or serial incompetence of the barrister. It may prove to be the case that the appellate process and other procedural safeguards have not been effective in avoiding the conviction. But it would be a mistake to try to predict the unpredictable. Rather, it is better to adopt the wise judicial precept advanced by Lord Nicholls and "never say never".

[211] The argument can, of course, be advanced that the possibility an absolute rule might defeat a case which should not be caught by it is a very small price to pay for the advantage of obtaining certainty. Indeed, describing the possibility as "remote", Tipping J makes this argument in those very words.[255] I will touch upon the question of certainty shortly. For the present it is important to appreciate what this argument means. A litigant who may have a meritorious claim in a proceeding which is not an abuse of process is denied access to the courts. He or she confronts what is effectively the defence of barristerial immunity arrived at by another and equally absolute route. This denial of access to the courts, and the denial of the right to justice which goes with that access, will accrue however gross the barrister's breach of his or her duty of care and however far removed the proceeding is from an

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[255] At [192] above.

abuse of process. The rigidity of an absolute rule solicits injustice; it is an invitation to deny to the individual the Justinian precept that "justice is the set and constant purpose to give every man his due".

[212] Driving the formalistic predisposition to stipulate absolute rules is the notion that flexibility will involve inconsistency and that an absolute rule will foster certainty. Indeed, Tipping J makes these arguments.[256] But the perception is incomplete and the promised level of certainty illusory. It is true that if one litigant is able to proceed in proceedings where there is a subsisting conviction and another in the same or similar situation is not there will be an inconsistency. But it will be an inconsistency in the administration of the law, not in the law itself, and an inconsistency which the appellate system is designed to correct. An unacceptable inconsistency in the law exists, however, if neither of two proceedings involves an abuse of process and only one of those proceedings can proceed because of a judicially imposed embargo on the category to which the other belongs.

[213] Similarly, the promise of certainty will fall short of expectations. A total ban on civil proceedings where there is a subsisting conviction, irrespective whether the proceeding amounts to an abuse of process or not, will not suppress litigation; it will simply change its nature. A litigant whose proceeding involves a collateral challenge to a subsisting conviction, but which is not, or arguably not, an abuse of process will contend that an exception should be made to the rule in the particular circumstances of the case. The common law, of course, owns many more exceptions to rules than it does rules. Indeed, at times the exceptions become so extensive that the exceptions become the rule.[257]

[214] This process is part of the dynamic of the common law and litigants and their lawyers will not be deterred from bringing what they perceive to be a meritorious claim or deeply felt grievance or injustice to the attention of the court simply because a rule has been stated too widely in the past. They will argue that the particular case is not covered by the principle underlying the prohibition. Further, litigants facing

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256 See [182] and [192] above.

257 Notable examples of cases in which a general rule has been effectively overwhelmed by exceptions are *Foss v Harbottle* (1843) 2 Hare 461; 67 ER 189 and *Addis v Gramophone Co Ltd* [1909] AC 488.

an absolute embargo may be prone to argue that the subsisting conviction is not final, or "should not be regarded as final".[258] In yet other circumstances it may be open to a party to assert that the validity of the subsisting conviction is not in issue, or directly in issue, and that the claim does not therefore deserve the opprobrium of a collateral challenge.

[215] Other arguments will arise from circumstances that cannot now be foreseen, and I would not presume to exhaust the ingenuity of counsel. Suffice it to say, that the promised level of certainty which it is claimed will follow from an absolute embargo will not eventuate. Indeed, it is possible that it could result in greater uncertainty than a system entrusting the judges with the responsibility to judge whether, in the circumstances of each particular case, the legal process is being abused. As Professor Atiyah has said: "it is sometimes suggested that it is actually easier to predict discretionary decisions than rule-bound decisions, which is only to say that it is often simpler and clearer to identify (and agree upon) the justice of a case than the law".[259] No one, of course, would deny that, along with justice and relevance to the times, the achievement of greater certainty in the law is a desirable objective. Rather, I am criticising the use of certainty as a mantra; the unquestioning, unthinking and unreasoned assumption that an absolute rule can be equated with certainty.

[216] Underlying the perception that it would be calamitous to allow a civil proceeding to proceed where there is an subsisting conviction, as evidenced by a number of observations of Tipping J,[260] is the belief that the public reaction would be extremely adverse and the administration of justice would be brought into disrepute if the validity of the conviction was undermined. But, again, this perception can be taken too far.

[217] Such a perception underestimates the robustness of public opinion in regard to the legal system and, indeed, could expose the judiciary to the charge of being a

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258 See [175] above.
259 P S Atiyah *Law and Modern Society* (1 ed 1983) 95.
260 See [183]-[184] above.

trifle precious. The public accepts that judges are not infallible, that the legal system is not perfect, and that miscarriages of justice do occur. It accepts that the validity of a subsisting conviction may be undermined when a witness is subsequently charged with perjury or the intimidation of a Crown witness. It accepts that apparently inconsistent decisions exist when a person is acquitted in criminal proceedings but is subsequently held liable on the same facts in a civil proceeding. It accepts that, in criminal proceedings where severance is directed, inconsistent decisions may eventuate and that an acquittal in one may cast doubt on the validity of the conviction in the other, or vice versa. Other illustrations could be given, along with the long running public sagas such as, for example, the Arthur Allan Thomas case, which indicate that public confidence in the administration of justice is not dependent on the pretence that the legal system is better than it actually is. The public is quite capable of adopting a realistic appreciation of the judicial system, and it is preferable that confidence in the legal system be based on that realistic appreciation.

[218] In this context, while it will be an important consideration and, at times, even a decisive consideration in determining an application to strike out a claim that the appellate process and possibly other procedural safeguards may not have been exhausted, the adverse reaction of the public to a civil proceeding involving a subsisting conviction should not be overstated. Furthermore, it is to be noted that such cases will be exceptional, and it must be assumed that the reason why the proceeding has been permitted to proceed will be spelt out and available in the public domain. Then, again, the plaintiff in the civil proceeding must ultimately succeed before any significant conclusion can be drawn adverse to the administration of justice. Finally, of course, any adverse reaction to a civil proceeding involving a challenge to a subsisting conviction must be offset against the possibility that the public will react negatively to an apparently meritorious proceeding being struck out on the basis of an absolute rule so that the plaintiff is effectively denied access to the courts and to the justice that is his or her due.

[219] I cannot accept Tipping J's interpretation of what Lord Diplock said in *Hunter*'s case,[261] that is, that the Law Lord was merely warning against confining manifestations of abuse of process to fixed categories, and that the learned Law Lord was not saying that when a particular category is being addressed the consequences of the abuse demonstrated by that category should be regarded as variable or discretionary.[262] What Lord Diplock said[263] is plain and clear. Having referred to the inherent power of the court to prevent the misuse of its procedure, he observed that the circumstances in which abuse of process can arise are very varied. The learned Law Lord then stated that it would be most unwise to say anything that might be taken as limiting to fixed categories the kind of circumstances in which the court has a duty (he expressly disavowed the word discretion) to exercise the "salutary power" to strike out a proceeding.

[220] I would respectfully reiterate that Lord Diplock has made his meaning plain and clear. He is condemning as most unwise the assertion of a fixed category or categories where the court must, as an absolute rule, strike out a proceeding as an abuse of process. Creating a category of case, that is, civil proceedings in which there is a collateral challenge to a subsisting conviction, where the court must, not may, exercise this salutary power is to do just that. Short of indulging in conspicuous sophistry it is impossible to explain away the clarity of Lord Diplock's ruling delivered on behalf of a unanimous Appellate Committee.

[221] The attempt to make Lord Diplock's words mean something other than what they plainly mean is, of course, part of a wider review of the relevant cases and dicta undertaken by Tipping J. His review contrasts sharply with the objective analysis of much the same cases undertaken by the Chief Justice. Cases and dicta are reinterpreted or selectively distinguished and dicta are reconstructed, explained away or diminished as incomplete. Gambits such as these, of course, have not gone

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261 *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529.

262 See [182] above. See also [166] above. It is difficult to see how it can be said that Lord Diplock was only suggesting that "the scope of the doctrine should not be limited to fixed categories" when the Law Lord was speaking of the circumstances in which the court has a *duty* to strike out the proceeding.

263 At 536.

unnoticed.[264] As I have already indicated, when Lord Diplock in *Hunter's* case said that it would be most unwise to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty to strike out a proceeding as an abuse of process, he meant just that; when Sir Thomas Bingham MR, as he then was, said in *Smith v Linskills*[265] that Lord Diplock had been "at pains to emphasise the need for flexibility and the exercise of judgment", he meant just that; when Goff LJ, as he then was, used the phrase "prima facie" in *McIlkenny v Chief Constable of the West Midlands & Another*,[266] he meant to say prima facie; and so on, and so on. It is a form of judicial torture to strive so hard to make cases and dicta say what they do not say.

[222] What then is the purpose of such an artificial exercise? Is it to show that the absolute rule for which Tipping J contends is founded in authority? That cannot be for there is clearly no precedent for such a rule. Is it an effort to demonstrate that there is no authority which would preclude the creation of such an absolute rule? Having regard to the chain of dicta supporting Lord Diplock's principle that purpose also faces difficulties and, in any event, establishing the absence of adverse authority does not mysteriously constitute supporting authority. Or is it an attempt to provide some sort of perceived conventional judicial respectability for a committed predisposition or preordained outcome?

[223] I am not saying it is not open to a judge to hold that, where a civil proceeding involves a collateral challenge to the validity of a subsisting conviction, the court is obliged to strike out the proceeding as an abuse of process, irrespective of the particular circumstances, if he or she is of that mind. But the route by which that outcome could properly be achieved would be to acknowledge that *Hunter's* case and much supporting dicta are to the contrary, and to then seek to establish that, as a matter of legal policy, it is not "most unwise" to create that category. An alternative route would be to accept the abolition of the defence of barristerial immunity except for civil proceedings where the validity of a subsisting conviction is being

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264 See, for example, *Jones v Secretary for State for Social Services* [1972] AC 944 at 966 per Lord Reid. See also Sir Anthony Mason, writing extra-judicially, "The Use and Abuse of Precedent" (1988) 4 Aust Bar Rev 93 at 100.

265 [1966] 1 WLR 763 at 769 (CA).

266 [1980] 1 QB 283 at 332-333 (CA).

challenged. In times when there is a widespread demand for greater transparency and honesty in judicial reasoning, the artifices inherent in exercises of this kind have no place in the Court's methodology.

Conclusion

[224] The long overdue abolition of barristerial immunity will open the way for claims to be made against barristers who have failed to exercise the requisite degree of care and skill in the performance of their duties. The requisite degree of care and skill will be determined realistically by the courts having regard to the facts of the case.[267] No one doubts that many claims will face formidable difficulties in, for example, establishing causation and the assessment of damages. But dealing with these difficulties is within the capacity of the courts. What is important is that meritorious claims which would have hitherto been blocked by the defence of barristerial immunity may now proceed. Unmeritorious claims can be stopped in their tracks as an abuse of process. Existing principles,[268] which apply to applications to strike out a proceeding as an abuse of process, will no doubt be augmented over time with the development of further principles to provide the legal system with the necessary responsive and proportionate protection.

[225] I reject, as does the majority, the isolation of any particular category for automatic disqualification. Rather, I prefer to leave the question whether there is an abuse of process in the particular circumstances of a claim to the good judgment of the courts. It will be, as Lord Bingham said, "a broad, merits-based judgment".[269] I trust the judgment, and the discretion, of the judges at first instance to determine the meritorious from the unmeritorious. But if they should err, they can be corrected on appeal.

[226] Overall, what has emerged as a result of the judgment of this Court eradicating an unjustifiable anachronism is a more flexible legal system with a greater capacity to deliver justice in the individual case.

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267 See *Moy v Pettman Smith* [2005] 1 WLR 581 (HL).
268 Together with the doctrines of res judicata and issue estoppel.
269 *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 31.

[227] I am pleased to join with the Chief Justice in dismissing the appeal on the basis as to costs which she suggests.

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