THE BAR, IMMUNITY AND SAIF ALI

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A recent decision of the House of Lords that will be of particular interest to the legal profession in Australia is *Saif Ali* v. *Sydney Mitchell & Co. (a firm) and Others, P third party.*[1] The House held, by a majority of three to two, that the barrister's immunity from suit extended only to include those matters of pre-trial work, which are so intimately connected with the conduct of the case in court that they could be said to be preliminary decisions affecting the manner in which that cause was conducted when it came to a hearing.

Saif Ali has maintained that trend adopted in other recent cases[2] of extending liability for negligence in relationships where previously such relationships had not been found to give rise to a legal duty of care.[3] It fell to the House in the instant case to reconsider for the first time since *Rondel* v. *Worsley*[4] that much debated issue, the immunity of the Bar.

PAST CASE LAW

Although it would seem that English law had at one time permitted the client to recover against his barrister (or serjeant-at-law as he was then known[5]) it appears that this right of action disappeared at some time during the 16th Century.[6] It was well-established by the end of the 18th Century that barristers could not be found liable in respect of an action for negligence. In *Fell* v. *Brown, Esq.*,[7] for example, the plaintiff had brought an action against his barrister for "unskilfully and negligently"

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1 [1978] 3 All E.R. 1033.

2 E.g. *Pacific Acceptance Corporation Ltd* v. *Forsyth and Others* (1970) 92 W.N. (N.S.W.) 29 (auditors); *The Tojo Maru* [1971] 1 All E.R. 1110 (salvors); *Sutcliffe* v. *Thackrah* [1974] 1 All E.R. 859 (architects); *Arenson* v. *Casson Beckman Rutley & Co.* [1975] 3 All E.R. 901 (accountants); *Anns* v. *London Borough of Merton* [1977] 2 All E.R. 492 (building inspectors); *Richardson and Another* v. *Norris Smith Real Estate Ltd and Others* [1977] 1 N.Z.L.R. 152 (estate agents); *Elderkin* v. *Merrill Lynch, Royal Securities Ltd* (1978) 80 D.L.R. (3d) 313 (stockbrokers). See generally C. R. Symmons, "The Duty of Care in Negligence: Recently Expressed Policy Elements" (1971) 34 *Modern Law Review* 394 (Part 1) and 528 (Part 2).

3 See *Charlesworth on Negligence* R. A. Percy, (6th ed., 1977) (hereinafter *Charlesworth*) pp. 554-616.

4 [1969] 1 A.C. 191.

5 *Rondel* v. *Worsley* [1967] 1 Q.B. 443, 457-8 per Lawton J.

6 R. F. Roxburgh, "*Rondel* v. *Worsley*: The Historical Background" (1968) 84 *L.Q.R.* 178, 179.

7 (1791) Peake 131; 170 E.R. 104.

settling and signing a bill filed by the plaintiff in the Court of Chancery. It was argued on the plaintiff's behalf that

> "[i]f a counsel gives his opinion on any question, and happens to be mistaken, it cannot be said that he has been guilty of gross negligence; but if he is so inattentive to his duty as to blunder in the common course of business, he makes himself liable to an action, as would also a physician for such gross misconduct."[8]

Lord Kenyon C.J., was clearly unimpressed by counsel's argument for he intervened at the opening to state that the action could not be supported.[9] His Lordship is not reported to have elaborated upon the reasoning behind his objection, but it is stated at the end of the report that "His Lordship added that he believed this action was the first, and hoped it would be the last, of the kind."[10]

In *Perring* v. *Rebutter*,[11] a case that involved an action for negligence against a special pleader (which office was found to have a status akin to that of a barrister) it was stated that "[s]uch an action was certainly not maintainable against a barrister",[12] and the action discontinued.

It fell to the House of Lords three years later, in 1845, in *Purves* v. *Landell*,[13] a Scottish case, to consider the liability of a law agent for negligence. The House held that the action should fail for reasons that were best explained by Lord Campbell

> "I am sure I should have been sorry when I had the honour of practising at the Bar of England, if barristers had been liable to such a responsibility. Though I was tolerably cautious in giving opinions, I have no doubt that I have repeatedly given erroneous opinions; and I think it was Mr Justice Heath, who said that it was a very difficult thing for a gentleman at the Bar to be called upon to give his opinion, because it was calling upon him to conjecture what twelve other persons would say upon some point that had never before been determined. Well then, this may happen in all grades of the profession of the law. Against the barrister in England, and the advocate in Scotland, luckily no action can be maintained."[14]

It seems that it was not until the mid-19th Century that a rationale was sought upon which the barrister's immunity could be based.[15] In *Patience Swinfen* v. *Lord Chelmsford*,[16] in 1860, the plaintiff had brought an action against the Lord Chancellor of the day because of the manner in which he had allegedly conducted the plaintiff's case while he was at the Bar. Although it has been said that the "ratio decidendi of this case is confined to the authority of counsel to conduct and compromise a case as he sees

8 Ibid.
9 Ibid.
10 Ibid. 132; ibid. 105.
11 (1842) 2 M. and Rob. 429; 174 E.R. 340.
12 Ibid.
13 12 Cl. and Fin. 91; 8 E.R. 1332.
14 12 Cl. and Fin. 91, 102-3; 8 E.R. 1332, 1337.
15 *Rondel* v. *Worsley* [1967] 1 Q.B. 443, 462 per Lawton J.
16 (1860) 5 H. and N. 890; 157 E.R. 1436.

fit",[17] and further, that "the court never addressed its attention to the problem of negligence in the modern sense",[18] there are two points in the report of special interest in the context of *Saif Ali*. Firstly, it was held in *Swinfen* v. *Lord Chelmsford* that

> ". . . counsel is not subject to an action for calling or not calling a particular witness, or for putting or omitting to put a particular question, or for honestly taking a view of the case which may turn out to be quite erroneous. If he were so liable, counsel would perform their duties under the peril of an action by every disappointed and angry client."[19]

Secondly, note too some words expressed by Pollock C.B.

> ". . . provided an advocate acts honestly, with a view to the interests of his client, he is not responsible at all in an action. It seems admitted on all hands that he is not responsible for ignorance of law, or any mistake in fact, or for being less eloquent or less astute than he was expected to be. According to my view of the law a barrister, acting with perfect good faith and with a single view to the interests of his client, is not responsible for any mistake or indiscretion or an error in judgment of any sort. . . ."[20]

It was not until the "momentous decision"[21] of the House of Lords in *Hedley Byrne & Co. Ltd* v. *Heller & Partners Ltd*[22] in 1963 that it arose to question seriously the barrister's immunity for negligence. While the Law Lords left open the question whether such immunity should continue to exist in view of the relationship between barrister and client, *Hedley Byrne* did find that liability for negligence might exist in the absence of a contract for reward. This aspect of the case was of crucial importance for the Bar since it had been held on earlier occasions that this immunity existed because of the absence of any contractual relationship between counsel and client.[23] *Hedley Byrne*, said Lord Diplock in *Saif Ali*,

> "cast doubt on the facile explanation, which had been current for a hundred years, that a barrister's immunity from liability for economic loss sustained by a client in consequence of his incompetent advice or conduct was due to his incapacity as counsel to enter into a contractual relationship with his client."[24]

Hedley Byrne had, however, merely raised the question, and the issue remained unresolved until *Rondel* v. *Worsley* in 1967.

17 *Rondel* v. *Worsley* [1967] 1 Q.B. 443, 465 per Lawton J.
18 Ibid.
19 5 H. and N. 890, 921; 157 E.R. 1436, 1449.
20 5 H. and N. 890, 924; 157 E.R. 1436, 1450.
21 *Charlesworth* at 559.
22 [1964] A.C. 465 (H.L.). The impact of *Hedley Byrne* has been considered in many articles: see those given in *Charlesworth* at 559, footnote 45. The effect of the decision for the legal profession has been considered in: J. A. Franks, "Taking a Risk with Counsel" (1963) 107 *Solicitor's Journal* 622; J. R. Lingard, "Negligence and the Bar" (1964) 114 *New Law Journal* 202; D. N., "Negligence and the Bar" (1964) 114 *New Law Journal* 299.
23 E.g. *Kennedy* v. *Broun and Wife* (1863) 13 C.B. (N.S.) 677; 143 E.R. 268; *Robertson* v. *MacDonogh* (1880) 6 L.R. Ir. 433.
24 [1978] 3 All E.R. 1033, 1040. See also the judgment of Wilberforce L.J. [1978] 3 All E.R. 1033, 1036-7; Salmon L.J. ibid. 1051.

RONDEL v. *WORSLEY*

Rondel v. *Worsley*,[25] like *Hedley Byrne*, has received extensive coverage in legal journals, and it is not the intended purpose of the present writer to supplement that coverage at great length here.[26] The House of Lords' decision arose in this manner.[27] Norbert Fred Rondel had been convicted of causing grievous bodily harm to one Manning, and was sent down to serve 18 months' imprisonment in May 1959. Rondel had been defended for the latter stage of the trial by the barrister, Worsley, on a "dock-brief". Rondel served his sentence and, almost six years later, in February 1965, issued a writ claiming damages against his former counsel for professional negligence. This was struck out by Master Jordan and then again on appeal before Lawton J., sitting in the Queen's Bench Division of the High Court.[28] Rondel appealed unsuccessfully to the Court of Appeal,[29] but was granted leave to appeal to the House of Lords on the ground that the action involved important issues of public policy.

The House of Lords held,[30] dismissing the appeal, that a barrister was immune from an action for negligence at the suit of a client in respect of the conduct and management of a cause in court. This immunity extended also to include any preliminary work connected to the same, such as the drawing of pleadings. Thus, *Rondel* v. *Worsley* constituted "restatement of the traditional principle of barristers' immunity",[31] notwithstanding the earlier decision of the Law Lords in *Hedley Byrne.*

It seems that the decision of the Law Lords in *Rondel* v. *Worsley* had been founded upon principles of public policy. Immunity was justified on the ground that the barrister owes a duty to the Court in addition to that which is owed to the client, and that he should not be inhibited from

[25] [1969] 1 A.C. 191.

[26] P.V.B., Note (1968) 84, 145; M. A. Catzman, "Negligence-Counsel-Whether Action for Negligence Lies Against Counsel in Conduct of Action—Considerations of Public Policy—Application of Recent Decision of House of Lords to Canadian Law" (1968) 46 *Canadian Bar Review* 505; Editorial, "No Moaning of the Bar" (1967) 117 *New L.J.* 1255; R. Hall, "Negligence and the Advocate" (1966) 116 *N.L.J.* 367; R. W. Harding, "*Rondel* v. *Worsley*" (1968) 8 *University of Western Australia Law Review* 242; P. C. Heerey, "Looking over the Advocate's Shoulder: An Australian View of *Rondel* v. *Worsley*" (1968) 42 *A.L.J.* 3; G. S. Hill, "Liability of an Advocate and Solicitor for Negligence in the Course of his Professional Duties" (1968) 2 *Malayan L.J.* xvi; J. A. Jolowicz, "The Immunity of the Legal Profession" (1968) 26 *Cambridge L.J.* 23; Note, "Barrister's Liability" (1968) 42 *A.L.J.* 2; P. M. North, "From *Hedley Byrne* to *Rondel* v. *Worsley*" (1968) 118 *N.L.J.* 137 and 148; P. M. North, "*Rondel* v. *Worsley* and Criminal Proceedings" [1968] *Crim. L.R.* 183; R. A., "The Barrister, the Client and the Court" (1968) 1 *Auckland Uni. L.R.* 82; R. F. Roxburgh, "*Rondel* v. *Worsley*: Immunity of the Bar" (1968) 84 *L.Q.R.* 513; H. W. Wilkinson, "Public Policy and the Immunity of Advocates" (1968) 31 *M.L.R.* 329.

[27] The facts are more fully stated in the judgment of Lord Denning M.R. in the Court of Appeal: [1967] 1 Q.B. 443, 493 et seq.

[28] [1967] 1 Q.B. 443. Rondel had applied for leave to appeal at the time of his conviction on the ground, inter alia, that counsel had conducted the case negligently, but this application had been refused.

[29] Ibid.

[30] [1969] 1 A.C. 191.

[31] [1978] 3 All E.R. 1033, 1036 per Wilberforce L.J.

carrying out the former duty for fear of an action by his client.[32] Immunity was justified also on the ground that it was undesirable that client and counsel might "relitigate" what had been contested between client (and counsel) and his opponent.[33] There the matter rested until November 1978, when it fell to the House of Lords to consider *Saif Ali* v. *Sydney Mitchell & Co.*[34]

SAIF ALI v. *SYDNEY MITCHELL & CO.*

The Facts

The plaintiff, Mr Saif Ali, was travelling on 26 March 1966 as a passenger in a van driven by a friend, Mr Akram. The van collided with a motor car. Mr Ali and Mr Akram were seriously injured and unable to work for many months. The motor car had been driven by a Mrs Sugden, who had been transporting her children to school when the accident had occurred. Mrs Sugden had borrowed the motor car from her husband, who was the owner.

Subsequently, on the instructions of solicitors, a barrister settled proceedings and drafted a pleading on behalf of Mr Ali and Mr Akram against Mr Sugden, on the ground that as his wife had been using the car to drive their children to school that he was responsible for her negligence. Mrs Sugden was not herself sued.[35]

It appeared initially as if Mr Sugden would not deny responsibility, but then his insurers took charge and decided to contest the suit on two grounds: (i) that Mrs Sugden's agency for her husband might be disputed; and (ii) that a case of contributory negligence might be raised against Mr Akram. Counsel was duly informed and instructed to consider amendment of the pleading. By this time, the three year period of limitation (which had commenced on the date of the accident) was coming to a close. When the barrister, on 1 April 1969, communicated in writing his advice that no amendment was necessary, that period had ended five days earlier. Thus, it was no longer open to the plaintiff to recover against either Mr Akram or Mrs Sugden.

Mr Sugden had initially, on 16 October 1969, denied his wife's agency. Then, he admitted it by subsequent amendment in June 1971. Still later, in July 1972, Mr Sugden changed his mind once again and obtained the unconditional consent of Mr Ali's solicitors to deny that agency. Proceedings against Mr Sugden were then dropped (apparently on the advice of

[32] [1969] 1 A.C. 191, 228-31 per Reid L.J.; ibid. 247-8 per Morris L.J.; ibid. 270-3 per Pearce L.J.; ibid. 282-4 per Upjohn L.J.; ibid. 293 per Pearson L.J. who stated that he agreed with his "noble and learned friends" on what they had said on the aspects of public policy and that he had nothing useful to add.

[33] [1969] 1 A.C. 191, 230 per Reid L.J.; ibid. 249-51 per Morris L.J.

[34] [1978] 3 All E.R. 1033.

[35] Ibid. 1036 per Wilberforce L.J.

leading counsel[36]). Mr Ali, who originally had had an "impregnable claim for damages, found after five years that he had nobody he could sue".[37]

Mr Ali commenced proceedings in 1974 against his solicitors, Sydney Mitchell & Co.,[38] claiming damages for professional negligence arising out of their conduct of his claim for damages for personal injuries, which had been sustained as a result of the road accident eight years before. The solicitors served a third party notice on the barrister on 29 May 1975, in which they claimed to be indemnified by him against Mr Ali's claim against themselves; that

> "at all material times and in all material matters the appellants had instructed him and he had accepted instructions as counsel for the plaintiff and that in the matters in respect of which complaint was made in the plaintiff's claim against them they had acted on his advice."[39]

Mr Assistant Registrar Cowan ordered, on 12 November 1975, that the third party notice should stand as a statement of claim on the barrister. This was struck out by Mr District Registrar Barrington-Ward as disclosing no reasonable cause of action (26 July 1976), and restored by Kerr J. (24 February 1977). The barrister appealed to the Court of Appeal and succeeded in having the third party proceedings dismissed.[40]

The Decision

Two points should be emphasised at the outset. Firstly, it was assumed for the purpose of the appeal that the allegations against the barrister were proven fact: that is, that the barrister had been negligent; that such negligence had caused damage; that the solicitors were therefore entitled to indemnity or contribution from the barrister.[41] Having made this

[36] Ibid.

[37] Ibid.

[38] The defendants in the action and the appellants before the House of Lords were Sydney Mitchell & Co. (sued as a firm); A. W. Smith & Co. (sued as a firm); and Christopher John Smith, a solicitor, who is described as having been "at all material times . . . a partner in or principal of the second appellants and . . . currently a partner in the first appellants with whom the second appellants had amalgamated on 1st January 1970" [1978] 3 All E.R. 1033, 1035.

[39] Ibid.

[40] [1977] 3 All E.R. 744 (Lord Denning M.R., Lawton and Bridge L.JJ.). Note that leave to appeal to the House of Lords had been refused by the Court of Appeal, but that leave was granted by the House because of the importance of the issues raised in the case. See: M. A. Catzman, "Negligence—Barrister—Immunity from Action for Negligence at the Suit of his Client—Extent of Immunity" (1978) 56 *Canadian Bar Review* 116; A. C. Hutchinson, "The Barrister's Immunity" (1978) 128 *N.L.J.* 144.

[41] The negligence alleged in the amended third party notice comprised: (i) delaying until after the expiry of the limitation period to advise whether the proceedings should be resettled in view of the non-admission by Mr Sugden that Mrs Sugden was driving as his agent and the possible negligence of Mr Akram; (ii) failing to advise until a late stage that there might be a conflict of interest between the plaintiff and Mr Akram; (iii) failing to advise the plaintiff that he should take proceedings against Mr Sugden and/or Mrs Sugden and/or Mr Akram and advising that proceedings should be issued against Mr Sugden only. Per Wilberforce L.J. [1978] 3 All E.R. 1033, 1036.

assumption, the House examined whether a claim for negligence could succeed against the barrister.

It should also be noted that *Rondel* v. *Worsley* had been concerned with the immunity of a barrister from an action for professional negligence in respect of acts or omissions *during* the course of *criminal* proceedings against his client. The question that fell to be answered in *Saif Ali* was whether that immunity should extend to protect the barrister with regard to *pre-trial* acts or omissions in connection with *civil* proceedings brought against him by a client.

The decision of the majority (Wilberforce, Diplock and Salmon L.JJ.) in *Saif Ali* confirmed the ruling of the House in *Rondel* v. *Worsley*. The House did not re-open the decision in the earlier case, but was more concerned with defining the limits of the immunity that should exist, an exercise which Lord Wilberforce described as "a fringe decision rather than a new pattern".[42] The judgments of the Law Lords in *Rondel* v. *Worsley* were found by the majority in *Saif Ali* to have failed to define precisely the exact limits of immunity.[43] The Law Lords did extract, however, general principle, which as Lord Wilberforce observed, did

> "show a consensus that what the immunity covers is not only litigation in court but some things which occur at an earlier stage, broadly classified as related to conduct and management of litigation."[44]

Such a test as it stood was clearly inadequate. Lord Wilberforce advocated "something more precise . . . if immunity in respect of acts out of court is to be properly related to the immunity for acts in court".[45] The criterion adopted by the majority of the House was one based upon language of McCarthy P., in *Rees* v. *Sinclair*,[46] a case before the New Zealand Court of Appeal. The President stated

> "Each piece of before-trial work should, however, be tested against the one rule; that the protection exists only where the particular work is so intimately connected with the conduct of the cause in Court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing. The protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice. . . ."[47]

It was held, applying this criterion to the facts in *Saif Ali*, that there had not been "intimate connection" between the advice given and the conduct of the case in court. "It was not even remotely connected with counsel's duty to the court or with public policy."[48]

[42] [1978] 3 All E.R. 1033, 1037.
[43] Ibid. 1037-8 per Wilberforce L.J.; 1041 per Diplock L.J.; 1050 per Salmon L.J.
[44] Ibid 1038.
[45] Ibid. 1039.
[46] [1974] 1 N.Z.L.R. 180.
[47] Ibid. 187. Quoted in the House of Lords: [1978] 3 All E.R. 1033, 1039 per Wilberforce L.J.; ibid. 1046 per Diplock L.J.; ibid. 1052 per Salmon L.J.

The minority (Lord Russell of Killowen and Lord Keith of Kinkel) were clearly of the view that the barrister's immunity should be retained. Russell and Keith L.JJ., adopted a particularly narrow interpretation of *Rondel* v. *Worsley*. Lord Diplock, in contrast, had been at pains to point out that since the practice statement of 1966,[49] all propositions of law laid down in previous appeals before the House had been seen as persuasive only.[50]

Lord Russell stated that he could

> "find no justifiable line to be drawn at the door of the Court, so that a claim in negligence will lie against a barrister for what he does or omits negligently short of the threshold though not if his negligent omission or commission is over the threshold."[51]

Lord Keith expressed the opinion that at least four of the Law Lords in *Rondel* v. *Worsley* had not limited the scope of the immunity to work done actually in court in the conduct of a cause.[52] Lord Keith believed himself that "its application extends further than the actual conduct of a case in court"[53] and was "applicable to all stages of a barrister's work in connection with litigation, whether pending or only in contemplation".[54] His Lordship explained that he understood the principal holding in *Rondel* v. *Worsley* to have been that

> "immunity should apply in all situations where there is the possibility of conflict between the barrister's duty to the court and to the proper administration of justice and the personal interests of his client."[55]

In Lord Keith's view, that possibility existed in relation to *all* aspects of a barrister's work in connection with litigation. Thus, considerations of public policy, and the merit inherent in having one clear rule, demanded that immunity should extend to all of a barrister's work connected with litigation.[56] The minority concluded, on the basis of the facts assumed in *Saif Ali*, that since the negligence alleged against the barrister had occurred in connection with his conduct of litigation, it was protected by immunity.

DESIRABILITY OF IMMUNITY FOR BARRISTERS

The decision in *Saif Ali* has been criticised. It has been claimed in a note

48 Ibid. 1052 per Salmon L.J. Note that it was held further by the majority that a solicitor acting as an advocate in court enjoys the same immunity as a barrister: ibid. 1039 per Wilberforce L.J.; ibid. 1046 per Diplock L.J.; ibid. 1048 per Salmon L.J.
49 Note [1966] 3 All E.R. 77; [1966] 1 W.L.R. 1234.
50 [1978] 3 All E.R. 1033, 1040-1.
51 Ibid. 1053.
52 Ibid. 1054.
53 Ibid.
54 Ibid. 1055.
55 Ibid.
56 Ibid. 1056.

published in the *Australian Law Journal*[57] that the House of Lords has failed to attribute sufficient attention to the practical consequences of the ruling. It is alleged that in narrowing the area of barristers' immunity from claims for pre-trial negligence, inadequate regard appears to have been paid to the problems that have been engendered. There may be some merit to this criticism. It may also be the case that

> ". . . the difficulties involved are of greater complexity and on a more abstract level than those governing the question of proving lapses in skill or care by medical practitioners, architects, or accountants."[58]

On the other hand, however, the fact that difficulties might arise in applying the newly developed principle is not a sufficient reason to forego progressive development in this area of law. It is apparent also that courts have demonstrated competence in coping with problems of delineation and that these are not insurmountable.[59]

It may also be stated in repudiation of this criticism that the *Saif Ali* ruling displays an awareness of the requirement to balance the issues of public policy, which support retention of barristers' immunity, and the very real claim of an injured litigant, who has suffered because of the negligent act or omission of a member of the Bar. The advocate does, after all, make available his services to the public at not inconsiderable expense and it would seem only consistent with any concept of fairness that the latter should not have to forego compensation beyond that which may be necessary because of public policy factors.

It is claimed also in criticism, of *Saif Ali* that

> "[o]ne predictable consequence of the decision in Britain, and in Australia, if the High Court here should adopt the majority view of the House of Lords, is that pleadings will become more lengthy and prolix, and interlocutory proceedings more numerous."[60]

It is charged that the decision will cause counsel to "tend to be ultra cautious" and offer advice "irrespective of the objective grounds or necessity for doing so, rather than risking a subsequent action for damages for negligence by a dissatisfied client".[61]

The present writer suggests that these criticisms may be premature for, as it was pointed out in *Saif Ali*,[62] establishing that counsel has made an error during the conduct of pre-trial litigation is not the same thing as having proved that counsel had been negligent. Counsel is required only to exercise the care and foresight of a reasonable barrister. Further, and perhaps the critical point in favour of the *Saif Ali* ruling, is that profes-

[57] Current Topics, "The House of Lords and the Reduced Immunity of Barristers from Claims for Pre-Trial Negligence" (1979) 53 *A.L.J.* 1.
[58] Ibid. 2.
[59] Infra notes 64-90 and accompanying text.
[60] Current Topics, supra note 57 at 2.
[61] Ibid.
[62] [1978] 3 All E.R. 1033, 1043 per Lord Diplock.

sional indemnity insurance is available. An editorial published in a United Kingdom—based practitioners' journal has asked the following question

> "[i]n these days, when negligence insurance is increasingly recognised as a necessary part of every well turned out lawyer's professional equipment, who is immunity from suit likely, in the last analysis, to protect except insurance companies?"[63]

IMPLICATIONS FOR THE VICTORIAN PRACTITIONER OF THE DECISION IN *SAIF ALI*

The decision of the Law Lords in *Saif Ali* governs, of course, the position in England where the profession is divided. The question of whether the solicitor-advocate will be liable for negligence in respect of his activities (or omissions) while conducting proceedings in Victoria, where the legal profession is fused, de jure but not de facto, is not so clearly settled. The situation is governed by s. 10(2) *Legal Profession Practice Act* 1958. This states

> "Every barrister shall be liable for negligence as a barrister to the client on whose behalf he has been employed to the same extent as a solicitor was on . . . [23 November, 1891] . . . liable to his client for negligence as a solicitor."

It would seem that there is some confusion as to the manner in which this sub-section is to be interpreted. There are two views. First, the view expressed by P. C. Heerey is that ". . . . s. 10(2) of the 1958 Act appears to be a re-enactment of a transitional provision and concerned only with persons who had been admitted as a barrister—i.e., before 1891".[64] Heerey has founded this conclusion upon his interpretation of two further sections of the 1958 Act, namely s. 3, which defines "barrister" to mean a "barrister of the Supreme Court", and s. 10 of the *Legal Profession Practice Act* 1891. This statute was concerned with the amalgamation of the legal profession within Victoria. Section 10, which was later re-enacted as s. 5(1) of the 1958 Act, provides that ". . . no person shall be admitted to practise [after 1891] as a barrister or solicitor solely, but every person admitted by the Supreme Court shall be admitted both as a barrister and solicitor".

Heerey's interpretation of s. 10(2) has been criticised as "rather dubious" by Julian Disney and his co-authors in their recent book entitled *Lawyers*.[65] They suggest as an alternative explanation, that ". . . solicitors are, and have been since before 1891, immune when acting as advocates; accordingly, barristers are also immune when acting as advocates".[66] It is explained in *Lawyers* that in 1891 (i.e., when s. 10(2) was originally

[63] Editorial, "Immunity-From *Rondel* to *Ali*" (1978) 128 *N.L.J.* 1081, 1082.
[64] Supra note 26, 8.
[65] J. Disney, J. Basten, P. Redmond, S. Ross, *Lawyers* (Sydney, Law Book Co., 1977) 605.
[66] Ibid.

enacted) it was intended that the provision in question should operate to abolish immunity for all Victorian legal practitioners and reduce distinctions between the offices of barrister and solicitor. It is suggested that Victorian barristers were given the right to sue for their fees as a corollary of this intention, and, perhaps, as a form of compensation offered in lieu of the traditional blanket immunity to which the Bar had formerly been entitled.[67] It is conceded in *Lawyers*, however, despite the existence of contrasting views, that both produce a similar result: i.e., solicitors are immune when acting as advocates, and barristers are also immune when acting as advocates.[68]

Interpretation of s. 10(2) of the 1958 Act has not fallen to be decided in the Victorian courts, and it would seem reasonable to suggest that the position is not entirely clear. There is, however, some authority in a mere handful of cases decided in other jurisdictions among the Commonwealth countries to the effect that a legal practitioner practising where the profession is fused will be liable for damages in an action for negligence occurring in the course of his duties *qua* solicitor, but not in the course of his duties *qua* advocate/barrister. It will be convenient to consider these cases under the separate headings of that place where the ruling was handed down.

South Australia

In *Feldman* v. *A Practitioner*,[69] the plaintiff had brought an action against a legal practitioner, who had represented him as both solicitor and counsel (before and during the hearing) in a case before the Supreme Court and in which he had been unsuccessful. Feldman alleged that the practitioner had been negligent in the conduct of these earlier proceedings in that he had failed to adduce evidence upon a particular topic. Bray C.J., sitting in the Supreme Court dismissed the suit on the ground that

> ". . . no action lies against a barrister in relation to his conduct of a case in court . . . (since) . . . a barrister is immune from an action for negligence at the suit of a client in respect of his conduct and management of the case in court and the preliminary work connected therewith."[70]

The Chief Justice relied, in reaching this decision, upon the authority of *Rondell* v. *Worsley*,[71] *Rees* v. *Sinclair*[72] and the English Court of Appeal decision in *Saif Ali*.[73]

67 Ibid.
68 Ibid.
69 (1978) 18 S.A.S.R. 238 (Sup. Ct., Bray C.J.).
70 Ibid. 238-9.
71 [1969] 1 A.C. 191 (H.L.).
72 [1974] 1 N.Z.L.R. 180 (C.A.); infra note 76.
73 [1977] 3 All E.R. 744. The decision of the Court of Appeal was, of course, reversed in the House of Lords ([1978] 3 All E.R. 1033), but it is submitted that immunity would still have protected the practitioner in *Feldman* since the allegedly negligent omission to adduce evidence in court would fall within the "intimately connected with proceedings" test adopted by the Law Lords.

In relation to the question of liability for negligence of the solicitor-advocate in a fused profession, Bray C.J., made the following statement

> ". . . of course, a solicitor-barrister remains liable to an action for negligence for what he does while acting as a solicitor. Clearly he cannot by assuming the dual role acquire an immunity that he would not have had if he had acted as solicitor alone and briefed other counsel. And when he performs both roles it will often be a question of some nicety whether any particular act, omission or decision emanated from the solicitor or from the barrister."[74]

While it was clear in the instant case that the defendant practitioner's decisions not to examine or re-examine the plaintiff, and not to call other evidence, were reached in the role of advocate (made therefore in his role of counsel rather than solicitor), the Court seemed fully aware of the difficulties that might arise in applying the distinction on future occasions.[75]

New Zealand

In *Rees* v. *Sinclair*,[76] the appellant, Rees, had brought an action for damages for negligence by the defendant legal practitioner while the latter had been acting on his behalf. The action was dismissed by the Court of Appeal, which then continued to consider the question of the validity of a claim against a lawyer in a fused profession on the ground of negligence in greater detail. The Court held that a barrister should be immune from an action for negligence; also that this immunity did extend to "pre-trial work"[77] and that which was described as the "true work of an advocate",[78] but it is of more immediate interest to examine the case in relation to the question of liability for negligence of the practitioner, who practices both as barrister and solicitor.

Counsel for the appellant, Rees, had submitted that the delineation between the roles of barrister and solicitor should be made so that immunity from liability in negligence should apply only to Court appearances.[79] This contention was rejected, although the Court of Appeal was cautious to avoid establishing any statement of boundaries, since it was acknowledged to be ". . . most difficult to draw in advance any statement of them which will satisfactorily dispose of all debatable areas. . . ."[80] The Court of Appeal was intent instead on formulating a principle within the

74 (1978) 18 S.A.S.R. 238, 239.
75 Ibid. 239-40 per Bray C.J.
76 [1973] 1 N.Z.L.R. 236; affd. [1974] 1 N.Z.L.R. 180 (C.A.). *Rees* v. *Sinclair* would appear to have been the first occasion on which it fell to a New Zealand Court to consider the question of liability for negligence in relation to a fused profession. *Watts and Cohen* v. *Willis* (1910) 29 N.Z.L.R. 58, 29 N.Z.L.R. 615 (C.A.), has been referred to in this context (e.g. *Heerey*, supra note 26 at 9), but the negligence in that case did not relate to conduct of litigation in Court: see *Rees* v. *Sinclair* [1974] 1 N.Z.L.R. 180, 188 per Macarthur J.
77 [1974] 1 N.Z.L.R. 180, 187 per McCarthy P.
78 Ibid. 190 per Macarthur J.
79 Ibid. 187 per McCarthy P.
80 Ibid.

bounds of which it would be permitted to assert immunity. That which was laid down was, of course, that adopted by the Law Lords and which formed the basis of their decision in *Saif Ali*.[81]

More recently, in *Biggar* v. *McLeod*,[82] the matter arose again in the Court of Appeal. The facts giving rise to the action might be described briefly as follows. The defendant, McLeod, a barrister and solicitor, had acted for the plaintiff in matrimonial proceedings. Mr McLeod had advised his client during the trial (at that stage after the oral evidence had been given) that the proceedings could be settled on terms. These he outlined and the client elected to accept. The Judge was duly informed that the parties had reached a settlement and by consent a formal order had been made to give it effect. Mrs Biggar apparently, at a later stage, changed her mind. She claimed that Mr McLeod had misinformed her as to the terms that had been agreed upon, and alternatively, that he had negligently permitted a settlement to be concluded on a basis that fell outside the terms indicated to his client.[83] Mr McLeod denied these allegations. He moved that the plaintiff's statement of claim be struck out and the action be dismissed on the basis of a barrister's immunity from suit for negligence. The motion was upheld at first instance and subsequently this decision to dismiss the action was affirmed by the Court of Appeal.

The critical question was ". . . whether the settlement of an action during its progress in Court can be regarded as work related to the conduct of the litigation".[84] In resolving this question, the Court of Appeal in *Biggar* v. *McLeod* applied the test expounded in *Rees* v. *Sinclair* by McCarthy P.[85] Mr Justice Woodhouse stated in this context

> ". . . I am satisfied that the issue raised is a very narrow one. It is whether the test outlined by McCarthy P. by reference to the conduct of an action in court, or as I prefer to consider it, the conduct of litigation, has been satisfied by work which in this instance was associated with the ending of an action by a settlement. . . . Once it is accepted that the immunity exists . . . and that it extends to the conduct of litigation, then the simple question is whether the step of ending current proceedings by a compromise rather than by obtaining the judgment in due course should properly be regarded as part and parcel of the work of counsel in carrying forward the proceedings to a conclusion. I am in no doubt that this must be so."[86]

[81] Supra note 47 and accompanying text. Commenting on the statements of principle enunciated by McCarthy P., Macarthur J. described it as ". . . the only practical test . . . to confine the immunity to the true work of an advocate . . ." [1974] 1 N.Z.L.R. 180, 190.

[82] [1977] 1 N.Z.L.R. 321; affd. [1978] 2 N.Z.L.R. 9 (C.A.). See J. F. Corkery, "Counsel Immunity From Suit" [1977] *N.Z.L.J.* 515; J. Hughes, "Counsel's Immunity" [1978] *N.Z.L.J.* 294.

[83] [1978] 2 N.Z.L.R. 9, 10 per Woodhouse J.

[84] Ibid. 11 per Woodhouse J.; 13 per Richardson J.

[85] Supra note 47 and accompanying text.

[86] [1978] 2 N.Z.L.R. 9, 12. See [1978] 2 N.Z.L.R. 9, 14 per Richardson J.

It is also to be noted that the Court emphasised that the question of whether immunity should apply in a given case should not be resolved by reference to "actual activity of counsel inside the courtroom", but in relation to public policy considerations.[87]

Canada

The Ontario Court of Appeal has recently commented upon the extent of a barrister's immunity for negligence in *Banks et al.* v. *Reid*.[88] In that case, the plaintiffs sued their legal adviser, a barrister and solicitor practising in the Province of Quebec, for damages allegedly caused by his negligence while acting on their behalf with respect to personal injuries received in an automobile accident. It was held that the defendant was liable for negligence since his omission had occurred while he was acting in the role of a solicitor-client relationship.[89]

The judgment of the Court of Appeal was delivered by Brooke J.A., who said in the context of immunity in a fused profession

> "If . . . (immunity should be afforded negligence) . . . at all in this jurisdiction, where practitioners are both barristers and solicitors, *Rondel* v. *Worsely* should be confined to issues between a barrister and his client in the discharge of the barrister's duties before a Court and is dependent upon consideration of the barrister's duty to the Court and duty to his client. Reid's (the legal practitioner's) negligence was his failure to

[87] Ibid. 11 per Woodhouse J. See [1978] 2 N.Z.L.R. 9, 13 per Richardson J., Woodhouse J. agreed with the comments of Bridge L.J. in *Saif Ali* at Court of Appeal level ([1977] 3 All E.R. 744, 749-50), which it was said reflected the position of the fused profession in New Zealand, subject to that which was said in *Rees* v. *Sinclair* [1974] 1 N.Z.L.R. 180 (C.A.) relating to the position of work carried out by a New Zealand barrister and solicitor that should be regarded as work done in his capacity as a solicitor: [1978] 2 N.Z.L.R. 9, 12.

[88] (1978) 81 D.L.R. (3d) 730, reversing (1975) 53 D.L.R. (3d) 27. There are two other Canadian cases relating to this area. It was held in the earlier decision, *Leslie* v. *Ball* (1863) 22 U.C.Q.B. 512, C.A., that a lawyer in a fused profession, who acted as both solicitor (attorney) and barrister, did not escape liability for negligence for failing as a solicitor to give counsel proper instructions, albeit that he was himself in both roles. The judgment of Hagarty J., states ". . . that if the same gentleman act in both characters, he in no way evades or diminishes any liability properly attachable to him as such attorney. . . . [I]f a Canadian attorney, having full knowledge of certain material facts, or the existence of material evidence, uses his privilege of acting as counsel himself, and wholly omits urging such facts or calling such evidence, I think he cannot complain if he be treated exactly as if he had omitted properly to instruct counsel" (ibid. 515-6). Adam Wilson J., added, in dismissing the appeal, that ". . . there is no doubt that a counsel who is also the attorney in the cause is certainly liable for his neglect as counsel, in like manner and to the same extent as an attorney is" (ibid. 519). The second case is *Quevillon et al.* v. *Lamoureux* (1975) 52 D.L.R. (3d) 476, Quebec C.A. The headnote states: "Barristers and Solicitors—Negligence—Failure to Commence action within limitation period—Failure resulting from error in recording date of accident at time of receiving instructions to sue—Whether liable to client for damages client unable to recover from original tortfeasor." It was held that the legal practitioner was liable, but in this instance liability attached to his role *qua* solicitor. The report is very short and contains no discussion of the question of the barrister's immunity for negligence.

[89] (1978) 81 D.L.R. (3d) 730, 735 per Brooke J.A.

carry out duties of a different nature, being duties that were fundamental to the relationship between a solicitor and his client."[90]

England

The Privy Council has also commented on the immunity of a barrister in a jurisdiction where the legal profession is fused. In the *Queen* v. *Joseph Doutre*,[91] an appeal to the Judicial Committee of the Privy Council from a decision of the Supreme Court of Canada, the major issue was whether the barrister might sue and recover for fees, and not his immunity for negligence. However, in this context Lord Watson, delivering the judgment of the Board said

". . . their Lordships entertain serious doubt whether, in an English colony where the common law of England is in force, they could have any application to the case of a lawyer who is not a mere advocate or pleader, and who combines in his own person the various functions which are exercised by legal practitioners of every class in England, all of whom, the Bar alone excepted, can recover their fees by an action at law."[92]

Heerey has argued that this statement constitutes ". . . eminent authority that the law of England relating to a separate Bar does not necessarily apply where the profession is fused".[93] It is suggested that this interpretation of Lord Watson's statement was applied by that writer to support his stated contention that ". . . an Australian court should be slow to follow *Rondel* v. *Worsley*".[94] It would seem unlikely that the same statement should be employed in support of the argument that a Victorian court should hesitate to follow the decision in *Saif Ali*, especially in view of the comments of three Law Lords relating to the position of a solicitor acting as an advocate in a jurisdiction where the profession is fused. Lord Wilberforce stated that ". . . the same immunity attaches to a solicitor acting as an advocate in court as attaches to a barrister".[95] Similar statements were uttered by Lord Diplock[96] and Lord Salmon.[97] In contrast, in *Rondel* v. *Worsley*, none of the Law Lords directly referred to the position of the fused profession advocate, and anyway, any comment to the effect that a solicitor—advocate will be immune from actions for negligence has been described as obiter dicta.[98]

CONCLUSION

Finally, it may be said that it would seem probable that a Victorian Court

[90] Ibid.
[91] (1884) 9 App. Cas. 745 (P.C.).
[92] Ibid. 751-2.
[93] Heerey, supra note 26, 8.
[94] Ibid. 9.
[95] [1978] 3 All E.R. 1033, 1039.
[96] Ibid. 1046.
[97] Ibid. 1048.
[98] See Heerey, supra note 26, 8.

would, if the matter arose, attribute considerable weight to the House of Lords' decision in *Saif Ali*. This conclusion is supported by the analysis of the South Australian, New Zealand and Canadian cases reviewed. Thus, the solicitor—advocate will be liable for damages for negligence unless it can be shown that the particular act or omission that allegedly constituted the negligence is within the bounds of the test expounded in *Rees* v. *Sinclair* and adopted by the Law Lords in *Saif Ali*, therefore conferring immunity upon him. Similarly, a barrister will be afforded immunity from suit only in so far as matters are concerned which may said to be "intimately connected" with the conduct of the cause in court.