

ADVOCATES' IMMUNITY FROM CIVIL SUIT

OPTIONS PAPER

BACKGROUND

**Historical Development of the Immunity**

1. When advocates' immunity first arose for judicial consideration, the essence of the court's *ratio decidendi* was the absence of a contract between barrister and client in relation to litigation: *Swinfen v Lord Chelmsford* (1860) 5 H & N 890; 157 ER 1463. The judgment of the Court of Exchequer was to some extent mindful of the same policy considerations that are said to support the immunity today (in particular, the notion that if counsel were liable for suit, they would perform their duties 'under the peril of an action by every disappointed and angry client'<sup>1</sup>). However, it was not until 1969 that the first fully articulated statement of public policy reasons was given: *Rondel v Worsley* [1969] 1 AC 191. Policy grounds in support of the immunity were said to be:
  - 'The administration of justice requires that advocates should be able to carry out their duty to the court fearlessly and independently of the demands of the client;
  - The undesirability of re-litigating the earlier case in the context of a collateral attack being made upon it, leading also to the prolonging of litigation;
  - All those directly involved in the hearing should be able to speak freely in court without the fear of being sued for their actions or comments; and
  - Barristers are obliged to accept any client, however difficult, who seeks their services.'<sup>2</sup>
2. Although *Rondel* might be said to have further entrenched the immunity, it also commenced its refinement, given that it limited the immunity to the advocate's conduct and management of a cause in court and the preliminary work connected with such work (i.e. the drawing of pleadings). In addition, the House of Lords noted that the public policy grounds were not immutable.
3. *Rees v Sinclair* [1974] 1 NZLR 180 gave more precision to the expression 'conduct and management' by confining the immunity to before-trial work which is 'so intimately connected with the conduct of the cause in court that it can be fairly said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing' [at 87].

<sup>1</sup> *Swinfen v Lord Chelmsford* (1860) 5 H & N 890; per Pollock CB, at 921

<sup>2</sup> The Hon Justice Stephen Charles, 'The Immunity of the Advocate', (2003) 23(3) *Aust Bar Rev* 220-238

4. The scope of the immunity was further refined in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, in which the House of Lords reiterated that the barrister's immunity was not confined to in-court work, but also extended to some pre-trial work. This case stressed, however, that the protection should not be given any wider application than was absolutely necessary in the interests of the administration of justice, and that each piece of pre-trial work had to be tested against the 'intimately connected' test.
5. These developments were adopted in Australia in *Giannarelli v Wraith* (1988) 165 CLR 543 and subsequently in *Boland v Yates Property Corporation Ltd* (1999) 167 ALR 575.
6. In *Giannarelli*, the High Court, by majority, applied *Rondel* and *Saif Ali*, holding that at common law a barrister cannot be sued by his client for negligence in the conduct of a case in court or in work out of court which leads to a decision affecting the conduct of the case in court. However, it should be noted that in the recent decision of *D'Orta-Ekenaike* (see paragraph 8 below), Kirby J questioned whether this was in fact the majority position, given that *Giannarelli* concerned the liability of barristers for their conduct in court (and not out of court conduct), and that Brennan J based his judgment on reasoning that was not adopted by any of the other judges in the majority in that case.
7. In 2000, the House of Lords again looked at the public policy basis for the immunity, finding that the context had changed so much since *Rondel* that the immunity could no longer be justified. In *Arthur J S Hall & Co v Simons* [2000] 3 All ER 673, the House of Lords unanimously decided that the public interest in the administration of justice no longer required that advocates enjoy immunity from suit for alleged negligence in the conduct of civil proceedings. None of the grounds previously referred to in the English case law were found to justify a continuation of the immunity. The only disagreement amongst members of the House of Lords related to whether the immunity should, for public policy reasons, continue in relation to criminal trials. A majority of four to three favoured its removal for criminal cases as well as civil proceedings, reasoning that once a conviction had been set aside there could be no public policy objections to an action in negligence by a client against his legal representative at a criminal trial.
8. On 10 March 2005 the High Court considered the place of advocates' immunity in Australia and, by a majority of six to one, decided that the immunity should be retained: *D'Orta-Ekenaike v Victoria Legal Aid & Anor* [2005] HCA 12. Despite the fact that the immunity was upheld by the High Court, almost all of the public policy grounds relied upon in earlier decisions were regarded as not being determinative of the question of whether the immunity should be retained. Aside from Callinan J<sup>3</sup>, the majority judges in *D'Orta-Ekenaike* found that the only

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<sup>3</sup> Callinan J agreed with the view previously articulated by Mason J in *Giannarelli*, that advocates are subject to a 'special and unique difficulty, dealing as [they] do with matters not subject to scientific laws and measurement, in drawing a line between non-negligent errors of judgment and negligent errors of judgment in particular situations'. Advocates were said to be different from other professions, such as teachers, psychologists and psychiatrists, as unlike advocates, these professions do not require

public policy ground sufficient to warrant the continued existence of the immunity was the need to ensure the finality of judgments. The High Court's concern about the finality of judgments and its role in supporting the administration of justice is discussed in more detail throughout this Options Paper.

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their practitioners to 'attempt to see into the minds, and anticipate the thinking, reactions and opinions of other human beings' (at 370).

## PROJECT OVERVIEW

### Why now?

9. The recent decision of *D’Orta-Ekenaike* has prompted renewed interest in the position under Australian law in relation to advocates’ immunity.
10. Comparisons with other common law jurisdictions have led to calls for a review of the Australian law. Following the recent decisions to abolish the immunity in the United Kingdom and New Zealand, and bearing in mind the absence of an immunity in numerous other common law jurisdictions (including Canada and the United States of America), the Australian position now diverges from other comparable jurisdictions. (The immunity is also unknown in the countries of the European Union.) The High Court’s decision has therefore been said to leave Australia ‘out of step’ with other comparable jurisdictions (see **Appendix 1** for details of how the common law has developed in key jurisdictions and how this compares to the position in Australia).
11. In abolishing the immunity in the United Kingdom and New Zealand, the courts stated that public policy considerations had changed so as to require a reconsideration of the immunity. The High Court of Australia, on the other hand, held in *D’Orta-Ekenaike* that public policy considerations require the retention of the immunity in this country.

### Approach in the Paper

12. This paper examines as a starting point two polar approaches which could be taken to respond to the recent common law developments. At one end of the spectrum of available options, the question of the immunity could be left to the courts (such that the common law immunity is retained unless and until the courts decide to abolish it). At the opposite extreme, the legislature could step in to abolish the immunity in its entirety.
13. It becomes apparent in considering the retention and abolition options that their underlying rationales are fundamentally different. The decisions in which it has been found necessary to retain an immunity are most concerned with the perceived threat to the administration of justice posed by the removal of the immunity. On the other hand, in those cases in which the immunity has been abolished, the focus is on the litigants who are affected by their advocate’s conduct, and the principle that for every wrong there should be a remedy.
14. Judges called upon to assess the needs of public policy in a particular case are constrained by the facts of the case before them, the peculiarities of the judicial system within which they operate, and the limited scope of the decision they may give – whether, in all the circumstances, public policy requires that an immunity should or should not apply in the circumstances.

15. Legislatures, on the other hand, have a wider range of options available to them. This paper seeks to set out a series of options for consideration, ranging from leaving the question of advocates' immunity to the courts, through to the option of abolishing the immunity as it currently stands.
16. Between the extreme points on the spectrum, a range of reforms is identified and discussed, as a basis for seeking further feedback and ultimately determining which option is preferred. It is hoped that the issues identified in this Options Paper will ensure that, whatever approach is ultimately preferred, the decision will take account of the competing interests and concerns. For example, if it is decided to retain the immunity, it will be important that the concerns of individual litigants are not overlooked. Conversely, a decision to abolish the immunity should not ignore implications for the administration of justice.
17. In addition to these possible reforms to advocates' immunity, alternative mechanisms could be made available to address the consequences of negligent advocacy. Civil claims against negligent advocates seek to remedy the loss caused to the particular client<sup>4</sup>. But it may be that the justice system itself is damaged if negligent advocacy results in miscarriages of justice, such that avenues should be considered to enable this wider 'public' wrong to be remedied as well.

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<sup>4</sup> In this regard, it is worth noting for completeness that removal of advocates' immunity would certainly expose practitioners to proceedings in negligence. However, other causes of action may also be available, such as: liability for negligent misstatement (*Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465); actions based on contract; other statutory claims, such as under s. 52 of the *Trade Practices Act* or its state counterparts; and other claims such as breach of fiduciary duty (see Swanton & McDonald (2000) 74 ALJ 135, 139). For the purposes of this paper, the discussion assumes that civil proceedings are in negligence.

## **OPTION 1: LEAVE THE IMMUNITY TO THE COMMON LAW**

18. The first option to consider involves doing the least: leave the question of advocates' immunity to the courts, and consequently leave the recent decision of the High Court in *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12 to govern the position in Australia until such time as the High Court re-considers the matter.

### **What did *D'Orta-Ekenaike* decide?**

19. In March of this year, by a majority of six to one, the High Court declined to reopen *Giannarelli v Wraith*, which was said to stand for the proposition that "at common law an advocate cannot be sued by his or her client for negligence in the conduct of a case in court, or in work out of court which leads to a decision affecting the conduct of a case in court" [at 1, per Gleeson CJ, Gummow, Hayne and Heydon JJ]. In other words, an advocate cannot be liable in negligence for work done in court, and work done out of court which is intimately connected with the conduct of a case in court.
20. However, in contrast to *Giannarelli*, which concerned the liability of barristers for their conduct in court, *D'Orta-Ekenaike* concerned the civil liability of a barrister and his instructing solicitor for the performance of their respective professional duties outside court. The Court made clear that the immunity should apply both to barristers and solicitors, and should apply to work outside the court provided the 'intimately connected' test was met.

### ***Reasoning of the majority in D'Orta-Ekenaike***

21. The majority decision of Gleeson CJ, Gummow, Hayne and Heydon JJ noted that *Giannarelli* had principal regard to two matters:
- The place of the judicial system as part of the government structure; and
  - The place that an immunity from suit has in a series of rules all of which are designed to achieve finality in the quelling of disputes by the exercise of judicial power [at 25].
22. According to the majority, in assessing the public policy considerations, the chief consideration requiring that the immunity be retained is the nature of the judicial process and the role the advocate plays in it. They said that "a central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances" [at 34]. As such, the importance of finality 'pervades the law', and is evident in terms of restraints on the nature and availability of appeals, and rules about points which may be taken on appeal and about what evidence may be called. In addition, the immunity for witnesses and judicial immunity are ultimately, though not solely, founded on considerations of the finality of judgments.
23. So, it was held, once a controversy has been quelled, it is not to be relitigated. To re-open controversies would undermine confidence in the administration of justice and would be unfairly skewed; "yet relitigation of the controversy would

be an inevitable and essential step in demonstrating that an advocate's negligence in the conduct of litigation had caused damage to the client" [at 43].

24. The majority was clear that other factors which have traditionally been put forward as a basis for the immunity were, at most, of marginal relevance to whether an immunity should be held to exist [at 25]. Those factors included:
  - the connection between the immunity and a barrister's inability to sue for fees;
  - the possible conflict between duties owed by an advocate to the court and the client; and
  - the desirability of maintaining the cab rank rule.
25. Further, the majority also put aside the consideration of the difficulty of the advocate's task as both distracting and irrelevant [at 28]. The threat of civil suit against advocates, and the associated possibility that trials may consequently be prolonged, were also considered "not to be of determinative significance" [at 29] and did not provide support in principle for the existence of the immunity. Later in their judgment, the majority added that the question was not whether some special status should be given to advocates, nor was it useful to characterise the role of the advocate as the performance of a public or governmental function.
26. A detailed discussion of these traditional public policy grounds, together with a discussion of why they were no longer regarded as determinative by the High Court and the House of Lords, is at **Appendix 2**.

#### *Justice Kirby's dissenting judgment*

27. Justice Kirby gave the only dissenting judgment, which is discussed in more detail under Option 2 ('Abolish the Immunity'). Kirby J held that the grounds put forward by the majority were not sufficient to retain the immunity. In particular, in relation to the principle of finality and the majority's concern for the administration of justice, Kirby J observed that numerous legal systems flourish without the supposedly indispensable immunity (Canada, for example, and more recently England).

### **Practical considerations**

#### *A matter for the courts or the legislature?*

28. With some minor qualifications, the significant developments in relation to advocates' immunity have been developments of the common law. The common law of England and Wales, Australia and New Zealand has, at least until recently, developed consistently, if not at a consistent rate. In each case, the question of the nature and existence of any immunity has been left to the courts. Indeed, the New Zealand Parliament has recently made clear that it will leave the question as a matter for the courts (see clause 104 of the Lawyers and Conveyancers Bill).

29. As the issues relate to the administration of justice, it has been argued that the courts are best placed to assess public policy considerations to ensure the interests of the justice system are protected. For example, in *Hall* Lord Hobhouse of Woodborough said “In this area the judges have a legitimate competence to declare what is the likely impact of one rule of law or another upon the administration of justice”.
30. Indeed, the majority of the High Court referred to the public interest in ensuring that the judicial branch of government is able to discharge its function effectively [at 42]. They said:

To adopt the language found in the cases considering Chapter III of the Constitution, the central concern of the exercise of judicial power is the quelling of controversies. Judicial power is exercised as an element of the government of society and its aims are wider than, and more important than, the concerns of the particular parties to the controversy in question... No doubt the immediate parties to a controversy are very interested in the way in which it is resolved. But the community at large has a vital interest in the final quelling of that controversy. And that is why reference to the “judicial branch of government” is more than a mere collocation of words designed to instil respect for the judiciary. It reflects a fundamental observation about the way in which this society is governed.” [at 32]

31. When viewed together with the High Court’s views on the significance of the immunity for the finality of judgments, these comments by the majority perhaps support a reading that the Court regards the issue of advocates’ immunity as a matter properly left to the judicial branch of government. Indeed, if this is correct, it might be argued further that reforms to the immunity by the legislature could undermine the independence of the courts.
32. Perhaps, as argued in a submission to SCAG by The Victorian Bar,<sup>5</sup> the executive and legislative branches of government should pay close regard to the judgments of the six members of the High Court in *D’Orta-Ekenaike*. The High Court is the head of the judicial arm of government, with primary responsibility for the judicial system, and arguably it is therefore uniquely equipped above all others to determine the desirability or not of advocates’ immunity. Consequently, the Bar emphasises, if the High Court holds that the immunity is justified on the basis that it protects finality, and holds finality to be ‘fundamental’ to the judicial system, its views should be accorded great weight.
33. On the other hand, the courts’ analyses of practical consequences flowing from changes to the operation of the immunity have been described by some commentators as ‘intuitive’, rather than empirically based<sup>6</sup>. It does seem likely that examination of the immunity from a legislative point of view will allow for a more detailed consideration of the practical implications of the various options, a wider view of the overseas experience, and if necessary a more coordinated

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<sup>5</sup> Dated 27 May 2005. This submission is endorsed by the Law Council of Australia (which supports the retention of advocates’ immunity) and the NSW Bar Association, and has also been provided to the Australian Bar Association. The Victorian Legal Practitioners Liability Committee also endorses the Victorian Bar’s submission.

<sup>6</sup> The Hon George Hampel & Jonathon Clough, *Giannarelli v Wraith; Abolishing the Advocate’s Immunity from Suit*, *MULR*, [2000] Vol 24

approach to ancillary measures, for example, to support the administration of justice if the immunity is ultimately removed.

34. In this regard, the question arises whether the abolition of the immunity would be (as per Kirby J in *Boland*) “a change, potentially with such significant retrospective operation on the civil liabilities of many persons . . . such that it should only be introduced by a legislature”. Concerns have arisen in New Zealand about the retrospective impact of the Court of Appeal’s decision in *Lai v Chamberlains* [2005] NZCA 37 (8 March 2005). In that case, Anderson P (in his dissenting judgment) expressed the opinion that it was inappropriate for a court rather than parliament to modify or extinguish the immunity because of the retrospectivity of a court decision. The cause of action in *Lai* was more than six years old. Consequently, the argument went, if a court were to remove the immunity, counsel in every case for at least the past six years could potentially be sued. The majority declined to rule on this question but it remains to be seen whether concern about the possible retrospective implications of the decision becomes a live issue.
35. Finally, on the question of the role of the legislature, it should also be noted that the majority in *D’Orta-Ekenaike* looked to statutory changes since *Giannarelli v Wraith* to assess whether that earlier decision should be reconsidered. They observed that:
- The provision of the Victorian legislation preserving the common law immunity had not been changed in the interim (in spite of recommendations of the Law Reform Commission of Victoria<sup>7</sup>);
  - There is statutory recognition in Victoria of the duties owed by legal practitioners to their clients and the court, and there are mechanisms under the Victorian legislation providing for limited compensation payments to clients;
  - Despite close attention to the law of negligence in the ‘tort law reform’, no changes had been made to the immunity; and
  - Finally, nothing in the legislative steps since *Giannarelli* suggested that the Court should now reconsider that case.

***The test for ‘intimately connected’***

36. The Australian formulation of advocates’ immunity extends the immunity beyond the court room to cover work that is ‘intimately connected’ with work done in court. This mirrors the development of the immunity in other common law jurisdictions, starting with *Rondel v Worsley*, which limited the immunity to the advocate’s conduct and management of a cause in court and the preliminary work connected with that work such as the drawing of pleadings.
37. Greater specificity was provided by McCarthy P in *Rees v Sinclair* [at 187]:

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<sup>7</sup> Report No.48 of the Law Reform Commission of Victoria, *Access to the Law: Accountability of the Legal Profession*, 1992

I cannot narrow the protection to what is done in court. It must be wider than that and includes some pre-trial work. 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, and that is why I would not be prepared to include anything which does not come within the test I have stated.

38. In *Gianarelli* (subsequently endorsed in *D'Orta-Ekenaike*) Mason CJ framed the argument thus:

Is the immunity to end at the courtroom door so that the protection does not extend to preparatory activities such as the drawing and settling of pleadings and the giving of advice on evidence? To limit the immunity in this way would be to confine it to conduct and management of the case in the courtroom, thereby protecting the advocate in respect of his tactical handling of the proceedings. However, it would be artificial in the extreme to draw the line at the courtroom door. Preparation of a case out of court cannot be divorced from presentation in court. The two are inextricably interwoven so that the immunity must extend to work done out of court which leads to a decision affecting the conduct of the case in court. But to take the immunity any further would entail a risk of taking the protection beyond the boundaries of the public policy considerations which sustain the immunity.

39. Mason CJ adopted the approach taken by McCarthy P in *Rees v. Sinclair*, 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".

40. Their Honours in the joint judgment in *D'Orta-Ekenaike* agreed with this approach, stating that it 'accords with the purpose of the immunity' because it describes the acts or omissions to which immunity attaches by reference to the conduct of the case. Similarly, as noted by Lord Wilberforce in *Saif Ali*, the formulation 'takes proper account, as it should, of the fact that many trials, civil and criminal, take place only after interlocutory or pre-trial proceedings' and as such it would be 'illogical and unfair' if decisions were protected only in the case of in-court work.

41. On the other hand, this test has been criticised as ambiguous and potentially too generous. For example, in *D'Orta-Ekenaike* Kirby J said that if a broad view of 'intimately connected' is applied, there is "virtually nothing in the practice of advocates that is not shielded by the immunity" [at 326].

42. In *D'Orta-Ekenaike*, McHugh J provided examples of conduct that have been held to fall within this definition, including:

- Failing to raise a matter pertinent to the opposition of a maintenance application: *Rees v Sinclair* [1974] 1 NZLR 180 at 187;
- Failing to plead or claim interest in an action for damages: *Keefe v Marks* (1989) 16 NSWLR 713 at 718;
- Issuing a notice to admit and making admissions: *Munnings v Australian Government Solicitor* (1994) 68 ALJR 169 at 172 per Dawson J; 118 ALR 385 at 390;

- Failing to plead a statutory prohibition on the admissibility of crucial evidence: *Giannarelli v Wraith* (1988) 165 CLR 543; and
  - Negligently advising a settlement: *Biggar v McLeod* [1978] 2 NZLR 9.
43. On any view, the ‘intimately connected’ test is open to different interpretations, potentially leading to difficulties in determining exactly what preliminary or preparatory steps will be covered by the immunity. An expanding interpretation of this test will increasingly limit the availability of negligence actions against advocates. For example, an expansive interpretation of the ‘intimately connected’ test could preclude a claim of negligence against a solicitor in circumstances which would ordinarily be subject to scrutiny. If the ultimate decision is to retain the immunity, it may nevertheless be appropriate consider its scope, and in particular whether legislative limits should be placed on the ‘intimate connection’ test. This is discussed below at paragraphs 122-126.

***Criminal and civil matters – a different approach?***

44. If the view is taken that the immunity should no longer apply to civil matters, but that the criminal justice system faces special risks if the immunity is removed, one option would be to retain the common law position in respect of criminal matters, while abolishing (or modifying in some other way) the immunity in respect of civil proceedings. This is discussed in more detail in Option 3 at paragraphs 110-115.

***Rights of individual litigants who are precluded from seeking compensation from a negligent advocate***

45. Perhaps the key issue for consideration if it is decided to leave the question of advocates’ immunity to the common law is whether any alternative mechanisms could be put in place to address in some way the position of litigants who have experienced a miscarriage of justice as the result of negligent conduct by their legal representative in circumstances covered by the immunity.
46. One such example may be providing for a right of appeal based on the advocate’s negligence, where that negligence has resulted in a miscarriage of justice. A restricted ground of appeal already exists at common law in relation to criminal proceedings where the advocate’s “flagrant incompetence” has resulted in a miscarriage of justice. The question is whether that appeal ground should be expanded in some way, perhaps to encompass less “flagrant” negligent conduct, or perhaps to apply also to civil proceedings. The issues arising in relation to appeal rights are discussed at paragraphs 131-151.

## **OPTION 2: Abolish the immunity**

47. At the other end of the spectrum of possible reforms is to abolish the common law immunity in its entirety. This would enable clients to bring proceedings against advocates for all negligent work, including work that is performed in court and work that is intimately connected with court work; and would apply equally to criminal and civil proceedings.

### **Reasoning of Kirby J in *D'Orta-Ekenaike***

48. The most recent Australian exposition of the rationale for abolishing the immunity was provided by Kirby J's dissenting judgment in *D'Orta-Ekenaike*. In essence, Kirby J's view was that immunities are, and should be, exceptional. The general principle of tort law is that a party who is wronged by the negligence of another, in situations where a duty of care is owed, is entitled to seek a remedy for foreseeable damage caused by that negligence. Consequently, a clear basis should be articulated for any derogation from this general principle.
49. Like his colleagues in the majority, Justice Kirby discounted a range of other factors which have been traditional justifications for the immunity (see **Appendix 2** for a discussion of these traditional grounds).
50. In response to the chief public policy consideration put forward by the majority ('the principle of finality'), Kirby J observed that numerous comparable legal systems flourish without the supposedly indispensable immunity (Canada, for example, and England). While His Honour found that the issues of collateral attack did not arise on the facts of *D'Orta-Ekenaike*, he said that if those issues did present themselves "it would not be beyond the capacity of Australian law to define proportionate protections as has been done in other jurisdictions" [at 332].

### **Advantages of abolition**

#### ***Provides a means to seek a remedy for a wrong***

51. Perhaps Lord Steyn's words in *Hall* best describe the aim of abolishing the immunity: to "bring to an end an anomalous exception to the basic premise that there should be a remedy for a wrong". Abolishing the immunity would acknowledge that the interests of clients of negligent advocates should be given significant weight in balancing the various interests. On this view, finality in judicial outcomes, while an important principle for the justice system, is not of overriding importance and should not be achieved at the expense of providing a remedy to individual litigants.
52. This approach would mirror the recent change in the United Kingdom in the decision of *Hall* and would also reflect the decision of *Lai* in New Zealand

(although the New Zealand decision related only to civil proceedings, and is subject to appeal).

53. The House of Lords in the *Hall* decision recognised that the social and economic environment had changed since *Rondel v Worsley*, and that public policy considerations had progressed accordingly. The decision recognised that we now live in a consumerist society, where consumers of legal services expect a remedy for a wrong if those services are deficient (Lord Steyn).

***Provides consistency with human rights obligations***

54. In *D’Orta-Ekenaike*, Justice Kirby reasoned that Australia’s commitment to international human rights instruments which require equality before (and accountability to) the law are significant in the development of the common law in Australia, just as such considerations were influential (but not decisive) in *Hall* [at 316]. His Honour said that immunity from liability at law is a “derogation from the rule of law and fundamental rights”.

***Brings advocates into line with other professionals***

55. Extending the availability of a remedy in tort to an advocate’s client (in respect of the advocate’s work in court and that which is intimately connected with court work) would place the client in a position similar to that of clients of almost any other type of service provider. No immunity is available to other occupational groups, and this has been one ground on which the immunity has been criticised. For example, professionals such as surgeons must also make instantaneous and difficult decisions under pressure, yet no immunity applies to them. Those who argue in favour of removing the immunity often assume that judges and lawyers have created a refuge for barristers from the usual risks faced by professionals. However, the major decisions all make clear that the immunity exists to protect the interests of the administration of justice, not the interests of lawyers. Indeed, the majority of the High Court clearly rejected the difficulty of the advocate’s task as a basis for maintaining the immunity.
56. While other occupational groups do not have a comparable immunity, it is worth noting that it is not always possible to sue a professional if that person’s actions cause harm. This depends on whether a duty of care is owed and has been breached, which in turn is based on policy considerations. For example, it has been held that a medical practitioner, psychiatrist, social worker and the Department of Community Welfare owed no duty of care to the father of a child whom they examined in relation to allegations of child abuse against the father<sup>8</sup>.
57. One distinction between advocates and this scenario is that in all circumstances other than those covered by advocates’ immunity, the lawyer-client relationship, by its nature, gives rise to a duty of care and an exposure to liability for negligence.

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<sup>8</sup> *Hillman v Black* (1996) 67 SASR 490; *Sullivan v Moody* (2001) 183 ALR 404

58. On the other hand, the Victorian Bar argues that the immunity of advocates from suit should be compared to other branches of government, rather than other professions. In particular, the Bar argues that “just as the public interest in the administration of law affords immunity to those involved in the judicial process, so the executive arm of government has crown privilege and immunity, and the legislative arm of government has parliamentary privilege and absolute immunity”. However, according to the Bar, the immunity takes account of the fact that the advocate is a private practitioner, and does not depend on characterising the advocate’s role as a public or governmental function.

## **Risks of abolition**

### *A threat to the finality of judgments? Re-litigation and collateral attack*

59. As outlined in Option 1, the majority of the High Court in *D’Orta-Ekenaike* regarded abolition of the long-standing immunity as likely to undermine the finality of judgments, by allowing for parties to effectively re-litigate matters via proceedings against their lawyers in negligence. **Appendix 3** sets out a more detailed discussion of the problem of re-litigation and collateral attack.
60. Every court that has considered abolishing the immunity has grappled with this issue. In the most recent decisions in England and New Zealand, the courts were satisfied that the problem could be overcome.
61. In England, for example, it was noted by Lord Hoffman in *Hall* that actions for negligence against lawyers are not the only cases which give rise to a possibility of the same issue being tried twice. His Lordship explained that the law has to deal with the problem in numerous other contexts, and as such it has given rise to the doctrines of *double jeopardy*, *issue estoppel*, and *res judicata*. In cases in which re-litigation of an issue previously decided would be ‘manifestly unfair’ to a party or would bring the administration of justice into disrepute, it was stressed by all members of the House of Lords that courts can now rely on rules of civil procedure to strike out unmeritorious claims (see **Appendix 4** for details of the specific rules referred to in *Hall*). Similarly in New Zealand, Hammond J referred to the procedure for abuse of process as an answer to unmeritorious collateral attacks. In contrast, McHugh J concluded that the House of Lords had “underestimated the importance of maintaining confidence in the administration of justice, even in the civil sphere, and overestimated the court’s capacity to limit the re-litigation or rehearing aspects of a negligence trial” [at 191].
62. The English discussion envisages two clear types of re-litigation. The first is without merit and designed to impugn the original judgment. It would be essential, if the immunity was abolished, that such “collateral attacks” could be disposed of summarily. The second type of re-litigation is a claim of substance, such that it may be appropriate for the court to hear and determine the claim. To fail to allow for a hearing (and, if appropriate, a remedy) in those circumstances may do greater harm to the system of justice than the risk to the finality of judgments.

63. If unmeritorious collateral attacks are guarded against, the question remains whether re-litigation is against the public interest even where a claim of negligence has substance. In other words, can it be said that finality is so important a value that litigants should lose their substantive rights on its account?
64. A further question that arises, based on the view that the risks to the administration of justice arising from re-litigation are greater in the case of criminal proceedings, is whether a different approach is warranted for criminal and civil proceedings. The majority of the High Court took that view that no distinction should be made on this basis. However, the minority in *Hall* and the Victorian Law Reform Commission<sup>9</sup> set out arguments for a different approach to criminal and civil proceedings. This is discussed further at **Appendix 3**. It is worth noting for completeness that some argue that family law proceedings should be treated similarly to criminal proceedings, due to the tendency of those matters to be prolonged or re-litigated<sup>10</sup>.
65. If it is proposed to abolish advocates' immunity, but to address the problems of re-litigation, the question arises how this problem can be overcome. Summary disposition for matters that are an abuse of process may be one option, but other options may also need to be considered, in one or both of the civil and criminal jurisdictions, such as the requirement that the initial verdict must have been successfully appealed before a negligence action may be brought. This is discussed further at paragraphs 152-159.

#### *A change to the framework of the administration of justice*

66. The Victorian Bar has argued that abolishing advocates' immunity would lead to a change in the framework of the administration of justice, such that advocates would need to adjust their conduct of cases within the new framework. The Bar has indicated that removal of the "exceptional privilege"<sup>11</sup> of advocates' immunity would consequently need to be balanced by adjustment to the "exceptional obligations" of barristers. Those include the obligation to exercise independent judgment (independent from the interests of the client) and the cab-rank rule. Further, it is argued, abolition may also have consequences for access to justice if those providing free legal representation are faced with the possibility of negligence proceedings.

#### **Effect of abolition – Experience in overseas jurisdictions**

67. It is essential to consider the possible practical implications if the abolition option is pursued. While some data has been obtained from the United Kingdom in relation to the experience following the *Hall* decision, it is probably too soon to assess the implications of the recent *Lai* decision in New Zealand, which is being appealed. No information has been received to date in relation to the position in Canada, where advocates' immunity does not apply.

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<sup>9</sup> Above at 7.

<sup>10</sup> See, for example, the submission of the Victorian Bar.

<sup>11</sup> McHugh J referred to statements of Kitto J in *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 at 298

### *Re-litigation and collateral attack*

68. Some information has been received from the United Kingdom in relation to abuse of process or collateral attack following the *Hall* decision. The Bar Mutual Management Company, on behalf of the Bar Mutual Indemnity Fund (BMIF) (the insurer for all barristers in England and Wales in private practice) has indicated that it is not aware of any collateral attack or abuse of process problems having arisen as a result of *Hall*. The Bar Council of the United Kingdom takes the same view.
69. Despite the evidence to date, BMIF raises the theoretical potential for a problem involving two apparently inconsistent decisions, even where the original decision is overturned on appeal prior to any claim for negligence. This is said by the BMIF to be a possibility in relation to proceedings that are currently on foot. For example, a conviction may be overturned because the appellate court finds that defence advocates were flagrantly incompetent. The client, whose conviction has now been overturned based on his or her advocate's negligence, then brings a negligence claim. Neither the defence advocates nor the adjudicating court are then bound by the appeal findings in relation to the defence advocate's conduct, with the risk that there may be irreconcilable and conflicting judgments on the quality of the defence advocate's conduct. In other words, the appeal decision could be that the defence advocate was flagrantly incompetent, while the negligence finding may be that the advocate did not breach the requisite standard of care.
70. It may be that the possibility of inconsistent decisions of this nature would not cause undue concern, particularly given that so few such matters are likely to arise. However, if the abolition option is preferred, further consideration could be given to how this problem might be avoided in the Australian context.
71. Another potentially problematic scenario arose in *Luke v Kingsley Smith & Co (A Firm)* [2003] EWHC 1559 (QB). In that case, negligence was alleged by L against law firm A in respect of its handling of a claim for damages. L's claim had subsequently been settled by law firm B after L had sacked law firm A. Law firm A issued a claim against law firm B and its barrister, seeking contribution. Law firm B and the barrister issued applications for summary judgments under the Civil Procedure Rules. It is these rules that were said in *Hall* to protect barristers against 'unmeritorious claims'.
72. In this case, however, the applications for summary judgment failed, suggesting that law firms (or barristers) which act on behalf of a client who has terminated his or her previous legal representation on the basis of the first law firm's mishandling of the case might be exposed to a claim by the first law firm. It is worthwhile noting, however, that the negligence claim ultimately failed on the issue of causation: *Luke v Wansbroughs (A Firm)* [2003] AWHC 3151 (QB).

### ***Defensive Lawyering***

73. The Bar Council of the United Kingdom has indicated that the abolition of the immunity has not given rise to longer trials as a result of defensive lawyering.

### ***Flood of Claims***

74. BMIF has indicated that the abolition of the immunity in *Hall* has not provoked a flood of insurance claims in which negligent advocacy or courtroom corridor advice is alleged, nor a surge in claims in general over the past five years. While there was an increase in insurance notifications during the policy year during which *Hall* was decided (2000/2001), subsequent years have seen the number of notifications return to approximately the same levels as prior to the *Hall* decision. The number of notifications during the 2004/2005 policy year was the lowest for over ten years. In addition, the BMIF indicates that there “has been no appreciable increase in the incidence of allegations concerning conduct that would previously have attracted an immunity defence”.
75. The Bar Council of the United Kingdom has also advised that there is no serious evidence of increased action against barristers or of increased insurance premiums as a consequence of the *Hall* decision.
76. This is consistent with Kirby J’s view in *D’Orta-Ekenaike* that concerns about a flood of claims were unlikely to be borne out by experience, having regard to the experience in the United States and Canada. In his view, a number of factors would restrict unmeritorious claims, including: the general unavailability of legal aid in Australia to support negligence claims against lawyers; the availability of summary relief against vexatious claims; and rules against abuse of process by relitigation. His Honour also referred to the “empathy and understanding of judges for co-professionals in unmeritorious cases”.

### ***Effect on Premiums***

77. BMIF has also indicated that the abolition of the immunity in England and Wales has not resulted in an increase in insurance premiums. There has been some increase in premiums, but this has been caused by factors unrelated to new exposure to suit for negligence. BMIF calculates premiums by reference to fee income and the areas of practice in which the practitioner’s income has been earned. Any ratings increases have been due to the overall claims experience of the various areas of practice, not by reference to *Hall*. Further, the rating for the area of practice that might be thought most likely to be affected by the abolition of the immunity (namely Criminal) has remained unchanged. Consequently, on the question of legal costs, a subject on which BMIF is not able to comment generally, it is able to say that any increase in legal costs following the *Hall* decision is not due to barristers having to pay more for their professional indemnity insurance.
78. In New Zealand, no data is yet available following the *Lai* decision in March 2005, although members of the profession have expressed concern about the possible impact on insurance premiums.

79. In Victoria, the Legal Practitioners Liability Committee has indicated that premiums would be unlikely to increase unless there was a demonstrated impact on claims as a result of any abolition or modification of the immunity. However, commercial insurers are likely to take a different approach. For example, during the policy year 2004-2005, prior to the High Court's decision in *D'Orta-Ekenaike*, the insurer to the Victorian Bar (at that time a commercial insurer) increased premiums in anticipation that the High Court may abolish the common law immunity. While it is understood that the additional premium was refunded when the High Court's view was known, this state of affairs does indicate that practitioners seeking insurance may face at least a short term increase in premiums from commercial insurers if the immunity is abolished (or, presumably, restricted), until claims patterns are established.

### *Disposing of unmeritorious claims*

80. A number of the judgments in *Hall* referred to the increased powers in the English Civil Procedure Rules (CPR) allowing for summary disposal of unmeritorious claims. The overriding objective of the CPR is to enable the court to deal with cases justly. The court must further this overriding objective by actively managing cases, including (amongst other things) deciding promptly which issues need full investigation and trial, and accordingly disposing summarily of the others<sup>12</sup>. Part 24 of the CPR allows a defendant to apply for summary dismissal of proceedings (or parts thereof) brought against him or her if the claimant has no real prospect of succeeding on the claim. This is a less onerous test than the 'frivolous or vexatious' standard applied in traditional strikeout applications. According to the Woolf Report<sup>13</sup> which was the basis for the new CPR, one of the key means of improving case management is for the court to exercise its power of summary dismissal on a wider basis than in the past.

81. The BMIF has indicated that its experience is that "where we have applied to strike out or to dismiss summarily claims previously covered by advocate immunity on the basis that the proceedings are hopeless and bound to fail, we have had a similar success rate to when it was possible to deploy an immunity defence. This is because many claims in which negligent conduct in court is being alleged are wholly without merit and are being advanced by the vexatious and/or disgruntled."

82. **Appendix 4** sets out the relevant rules in England, New Zealand and the Australian jurisdictions.

### **Practical considerations**

83. A decision to abolish the immunity would reflect a view that negligent conduct by a litigant's advocate should give rise to a right on the part of the litigant to seek compensation from the advocate. Based on the English experience, it would

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<sup>12</sup> Rule 1.1-1.4 of the Civil Procedure Rules

<sup>13</sup> Lord Woolf, *Access to Justice Final Report*, 1996

appear that there is only a small risk that abolishing advocates' immunity may create difficulties for the administration of justice, for example if it results in increased negligence claims against advocates (with potential consequences for court workloads), if the finality of judgments is compromised, or if insurance premiums increase.

84. The considerations discussed below illustrate that, even if the existing immunity is abolished, the practical difficulties of proving negligence by an advocate are likely to limit the number of clients who pursue such claims, much less the number of negligence actions that succeed (see paragraphs 96-106).
85. One approach would be simply to leave the system to find its own equilibrium over time, as courts address negligence claims on their merits. There is some evidence that this approach would not lead to floods of litigation, if the Australian experience reflects that of England following the *Hall* decision.
86. However, it seems likely that certain features of the English justice system, such as the Civil Procedure Rules, have assisted in limiting the number of claims. The question, then, is whether in the Australian states and territories similar features exist to support the justice system, or whether those mechanisms would need to be enhanced.

### ***Civil Procedure Rules***

87. The first issue to consider is whether existing civil procedure rules in each Australian jurisdiction are adequate, bearing in mind the reliance placed on the Civil Procedure Rules (CPR) by the House of Lords in *Hall* (see **Appendix 4** for a comparison of the civil procedure rules in the United Kingdom, New Zealand and the Australian jurisdictions). The submission of the Victorian Bar argues that Australian law does not provide for the striking out of claims against advocates as an abuse of process or based on issue estoppel to the extent relied on by the House of Lords in *Hall*. In the Bar's submission, the English CPR allowing for dismissal where the claimant has no real prospect of succeeding on the claim and the decision in *Hunter v Chief Constable* are at odds with Australian law (citing McHugh J in *D'Orta-Ekenaike* at 202).
88. It would be necessary to ensure that rules of civil procedure or the court's inherent powers clearly provide for the courts to dismiss any proceeding that amounts to a collateral attack and in addition any other re-litigation that may bring the administration of justice into disrepute. It may also be desirable to ensure that the grounds on which proceedings may be struck out are wider than the traditional 'abuse of process' ground. In this regard, the Victorian Bar makes the point that the current position under Australian law should not be changed in an attempt simply to replicate the English law:

"The sound principles on which the general law in relation to abuse of process, issue estoppel and the threshold for summary judgment in Australian law is based should not be abandoned so as to achieve, by different means affecting all cases, only part of what is now achieved by the sharply focussed immunity limited to advocates' involvement in the judicial process."

89. A practical impediment to the adoption of uniform court rules in this area is that each jurisdiction will have different court rules and may also vest responsibility for those rules in different bodies. In South Australia and Victoria, for example, the courts are responsible for their own rules. Obtaining and maintaining a uniform approach may prove a difficult task.

#### ***Doctrines of issue estoppel and res judicata***

90. The doctrines of *issue estoppel* and *res judicata* prevent a party to a proceeding from raising, in a new proceeding against a party to the original proceeding, a cause of action or issue that was finally decided in the original proceeding. The High Court cited these principles as examples of principles designed to ensure that judgments are final and that “controversies, once resolved, are not to be reopened except in a few narrowly defined circumstances”.
91. Lord Steyn, on the other hand, referred to the principles of *res judicata*, *issue estoppel* and abuse of process as mechanisms that should assist in coping with the risk of collateral challenge (see *Hall* at p.5).

#### ***Personal Costs Orders***

92. The existence of wasted costs orders was a factor relied upon by the House of Lords as an indicator that the administration of justice would not be jeopardised if the immunity was removed. The House of Lords reasoned that the exposure of barristers to these personal costs orders had not resulted in longer trials due to defensive advocacy, and that this suggested that the duties owed by barristers to the court were sufficient to protect the justice system from lawyers taking every point considered necessary by the client.
93. Following from this, the Bar Council of the United Kingdom has indicated that there is no formal research following *Hall* to show any evidence of changes to advocates’ behaviour as a result of *Hall*.
94. Personal costs orders are presently available in various Australian jurisdictions. In Victoria, Order 63A, Rule 23 of the Supreme Court Rules empowers the judge to make an order for costs against a party’s legal representatives, either acting as an advocate or non-advocate.
95. If the reasoning of the House of Lords is applied, the fact that advocates are already exposed to personal costs orders indicates that their conduct is already scrutinised to some degree, and that this has not had untoward implications for the conduct of trials or the length of proceedings. However, some jurisdictions have observed that costs orders can be misused by practitioners to inappropriately threaten the other side with personal costs orders for bringing an unmeritorious action.

#### ***Standard of Care***

96. As the cases have suggested, the courts will presumably be slow to conclude that a decision made by an advocate in the conduct of a case was negligence rather

than a mere error of judgment. A recent English decision is instructive in this regard. In *Moy v Pettmann Smith* [2005] UKHL 7, the House of Lords indicated that the standard of care required is that the advocate's conduct must be "within the range of that to be expected of a reasonably competent counsel of the appellant's seniority and purported experience" (Lord Carswell at 62).

97. *Moy* also provides some guidance as to how negligence claims against advocates might be assessed if the impugned conduct is the failure to inform the client of all the relevant considerations or reasons forming the basis of advice provided. The House of Lords found that it was not incumbent on the barrister in that case to spell out all her reasoning in the recommendation she made to the client. Lord Carswell noted that courts should be slow to hold advocates to blame if they concentrated on giving clear and readily understood advice to their clients about the course of action they recommend; and by the same token, advocates should not be obliged to give clients a catalogue of every factor which might affect the course of action to be adopted.
98. Legislation in each state and territory of Australia sets out the standard of care in relation to negligence by a professional. For example, the *Civil Liability Act 2002* (NSW) sets out the standard of care at section 50<sup>14</sup>:
- (1) A person practising a profession (a professional) does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.
  - (2) However, peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.
  - (3) The fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.
  - (4) Peer professional opinion does not have to be universally accepted to be considered widely accepted.
99. Applying this standard to the facts in *Moy* would seem likely to result in the same outcome as the English test. It is noted, however, that it appears that the Australian statutory standard of care may be higher than the *Moy v Pettmann Smith* test set out above.

### ***Causation and assessing the loss***

100. In addition to proving that the advocate has failed to reach the appropriate standard of care, the client will need to prove causation and foreseeable loss arising from the advocate's conduct, and the court hearing the matter will need to be satisfied that the case is made out on the available evidence.
101. A client who alleges that his or her former advocate has caused loss as a result of negligent conduct in court (or conduct that is intimately connected with court work) must prove that the advocate's negligence caused the client to lose the case. However, there may be numerous other intervening acts which occur between the

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<sup>14</sup> See also *Wrongs Act 1958* (Vic) s.59

advocate's conduct and the ultimate outcome of the case. For example, the judge's decision to admit or exclude certain evidence may have affected the outcome, or the evidence given by a witness may not have been as expected. Indeed, judges may take a more interventionist approach precisely to compensate for the deficiencies of counsel.

102. Another 'obstacle of proof' lies in speculation as to what happened in the jury room. The key witnesses who may be able to shed light on whether the advocate's negligence did give rise to the loss are not able to be compelled to give evidence in subsequent proceedings. As McHugh J indicated in *D'Orta-Ekenaike*, decisions made about the conduct of a case based on what it will be possible to persuade a judge or jury to think are open to reasonable differences of professional opinion, and influenced by factors not demonstrable by evidence because of their particularity to each case, and because those to be persuaded are non-compellable witnesses. As such, he said, 'claims of negligence in respect of advocacy are generally either unanswerable or unwinnable because of the obstacles of proof' [at 194]. Another issue is that legal practitioners cannot divulge matters covered by professional privilege.
103. The Victorian Bar has expressed its view that the immunity should be retained, given (amongst other things) the difficulty of establishing causation where other participants in the proceedings cannot be compelled to give evidence. Without evidence from the jury (that the conduct of the advocate caused the harm to the client's cause), it is claimed, it would be impossible to prove, and would simply be an exercise that piles 'speculation upon speculation'.<sup>15</sup> Furthermore, the Victorian Bar indicated that the immunity of other judicial participants should not and cannot be removed; and yet, without their availability advocates will be unable to properly defend their actions or join as parties other participants who contributed to the plaintiff's loss, with the result that such re-litigation will be distorted, inequitable and inconsistent. In the words of the majority in *D'Orta-Ekenaike*, the re-litigation would be "of a skewed and limited kind".
104. Moreover, this demonstrates that providing a litigant with the ability to challenge their advocate's conduct in court may also open a new realm of jurisprudence about when the result of a case can be attributed to the advocate, and when it can more properly be attributed to the other side's counsel, the judge, the jury or other factors. If it could be shown that the judge is equally at fault, the question would arise whether it would be anomalous for the advocate to face liability while the judge remains immune from suit.
105. If causation can be established, the next question is how the loss will be assessed. The litigant has lost the chance of a more favourable outcome in the earlier trial. The value of this chance will be very difficult to assess, because it will be extremely difficult to determine how likely that chance was. Another issue that may need to be considered is how damages should be assessed in relation to a wrong conviction (or sanction) arising from the advocate's negligence. Conversely, the possibility cannot be excluded that a defendant who

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<sup>15</sup> *Giannarelli v Wraith* (1988) 165 CLR 543, 574 (per Wilson J, quoting from Lord Morris in *Rondel v Worsley*).

is in fact guilty of an offence but who has lost a chance of acquittal due to their advocate's negligence may be entitled to compensation.

106. Having regard to these issues of causation, it could be argued that abolition of advocates' immunity may have less impact than is anticipated - not because the implications for the administration of justice are insignificant, but because it will be difficult for an advocate's client to establish negligence, due to the difficulties in demonstrating both causation and the associated loss alleged to flow from the advocate's conduct.

### ***Contracting out of liability***

107. In some cases the relationship between an advocate and a client may be contractual, raising a further question if the immunity is removed whether advocates may then seek to contract out of liability to their clients. In Victoria lawyers are prohibited from contracting out of liability, unless this is permitted by other legislation such as the professional standards scheme<sup>16</sup>. In jurisdictions where there is no such prohibition on contracting out, it would seem likely that advocates may seek to avoid or limit liability for negligence by contract. It will be preferable if jurisdictions take a uniform approach to this issue.

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<sup>16</sup> For example, s.7.2.11(2) of the Victorian *Legal Profession Act 2005*.

### **OPTION 3: MODIFY THE OPERATION OF THE COMMON LAW IMMUNITY**

108. Various options for modification of the current operation of advocates' immunity have been identified. These options reflect the competing interests of individual litigants and the justice system: the desire to provide litigants with an avenue for redress where they have suffered loss due to their advocate's conduct, tempered by concern to ensure that the administration of justice is not undermined.
109. Officers have considered whether the immunity could be retained in limited circumstances, either based on the nature of the proceedings or the nature of the work being performed by the advocate, to ensure that the client is provided a means of seeking redress unless the risks to the justice system are regarded as so significant that they should take precedence over individual rights. The options are:
- (i) Confining the immunity to criminal proceedings;
  - (ii) Restricting the immunity to work done in court;
  - (iii) Restricting the immunity to 'the presentation and testing of evidence' and the 'advancement and answering of argument' rather than 'work done in court';
  - (iv) Clarifying through statute the limits of the common law immunity in terms of what is meant by 'work done out of court which is intimately connected with the conduct of a case in court'; and
  - (v) Preserving an immunity for prosecutors and possibly public defenders.

#### **Confine the immunity to criminal proceedings**

110. Justifications for allowing clients to make negligence claims in respect of civil advocacy but not criminal advocacy are based on the view that the risks to the administration of justice are greater in the case of criminal proceedings. This issue is discussed in **Appendix 3**.

#### ***Arguments in favour of retaining for criminal proceedings only***

111. The primary argument for retaining the immunity for criminal proceedings, even if it is abolished in respect of civil proceedings, is the possibility that a subsequent civil suit could give rise to conflicting judgments if a negligence finding is made while the criminal conviction still stands. This undermines the principle of finality and has a potentially damaging effect on the public's faith in the criminal judicial process.
112. In addition, the minority judges in *Hall* favoured retaining the immunity only for criminal proceedings based on the view that the risk of vexatious collateral attack would be greater in respect of claims relating to criminal proceedings. Lord Hope of Craighead argued that removal of the immunity from advocates in criminal cases would 'expose them to a significant risk of being harassed by the

threat of litigation at the instance of clients who may well be devious, vindictive and unscrupulous, but for whom they have felt bound to act in order that they may receive a fair trial.' He found that it would not be in the public interest to allow advocates to be harassed in this way, just as it is not in the public interest to allow disgruntled litigants to make claims against judges.

***The counter arguments: why a distinction should not be made between civil and criminal proceedings***

113. In *D'Orta-Ekenaike*, Kirby J rejected an exception for criminal proceedings only, and agreed with the majority in *Hall*, arguing that the immunity should be abolished for both criminal and civil proceedings. His Honour referred to the words of Lord Millett in *Hall*:

[T]o make the existence of the immunity depend on whether the proceedings in question are civil or criminal would be to draw the line in the wrong place ...

[E]ven if the immunity were retained only in criminal cases tried on indictment, in which the liberty of the subject is at stake ... it is difficult to believe that the distinction would commend itself to the public. It would mean that a party would have a remedy if the incompetence of his counsel deprived him of compensation for (say) breach of contract or unfair dismissal, but not if it led to his imprisonment for a crime he did not commit and the consequent and uncompensated loss of his job. I think that the public would at best regard such a result as incomprehensible and at worst greet it with derision.

114. In respect of the possibility of conflicting judgments, provisions enabling summary dismissal of unmeritorious claims or collateral attacks should ensure that claims against advocates could not be made unless a criminal verdict has been overturned on appeal. If the original judgment has been overturned, there can be no public policy objection to an action for negligence against the legal advisers, as arguably there can be no conflict of judgments.
115. Another problem that will arise if the immunity is confined to criminal proceedings is that it is not always apparent into which category a matter falls. For example, should a professional disciplinary matter be characterised as criminal or civil? And what of matters that comprise both civil and criminal elements?

**Restrict the immunity to work done in court**

116. Under this option, advocates' immunity would be confined by removing from its scope any conduct outside of court, even that which is 'intimately connected' with the conduct of a case such that it could be fairly said to be a preliminary decision affecting the way a cause is to be conducted when it comes to hearing.
117. If it is assumed that there are good public policy grounds for immunising advocates for their in-court work, can a distinction can be made about the nature of work done out of court such that the immunity should stop at the courtroom door? Perhaps the reference to work done 'in court' should not be taken to refer to the precise location of the work, but rather the activity in which the advocate is

engaged. But that makes it no less difficult to sever the activity from the preliminary or supporting work that makes the activity possible.

118. This approach has been rejected in the Australian decisions in favour of the ‘intimate connection’ test, due to the artificiality of drawing the line at the courtroom door, and the fact that work done out of court is inextricably interwoven with the conduct of the case in court<sup>17</sup>. The better approach, according to the High Court, is to describe the acts or omissions to which the immunity attaches by reference to the conduct of the case.

119. Indeed, tactical decisions as to how to proceed with a case may well be made outside of the court room, and it is often these kinds of decisions that attract a claim of negligence (for example, in *D’Orta-Ekenaike*, the barrister’s impugned conduct was the advice to the applicant client to plead guilty at committal).

**Restricting the immunity to ‘the presentation and testing of evidence’ and the ‘advancement and answering of argument’ rather than ‘work done in court’**

120. This option seems to cover ‘in-court’ work only. As such, it is not clear how it differs from the above option. Perhaps ‘the presentation and testing of evidence’ or ‘the advancement and answering of argument’ are narrower than ‘work done in court’, but it may be necessary to define these terms if this option is preferred. For example, perhaps this modification would exclude from the scope of the immunity counsel’s advice (such as advice on an offer of settlement as a result of evidence that emerges while the trial is in progress). It may also exclude advice given before and even in preparation for trial (since this advice is not directly the presentation of evidence but is advice about the presentation of evidence), as well as procedural matters such as a failure to seek a costs order.

121. If the immunity is currently so wide as to cover almost anything done by an advocate (as suggested by Kirby J – see paragraph 122), this option may provide a means of excluding some of the more egregious errors from the immunity, while preserving the immunity of the court process. However, without clear statutory definition, it is difficult to judge whether this option would, in practice, be more certain in its scope than the present ‘intimately connected’ test.

**Clarify through statute the limits of the common law immunity in terms of what is meant by ‘work done out of court which is intimately connected with the conduct of a case in court’.**

122. The ‘intimate connection’ test is discussed above at paragraphs 36-43. It extends the advocates’ immunity to work that is “so intimately connected with the conduct of the cause in court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing”<sup>18</sup>. However, as Kirby J said in *D’Orta-Ekenaike*, if a broad view is taken of

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<sup>17</sup> See, for example, Mason CJ in *Giannarelli v Wraith* (discussed at paragraphs 38 and 39 above).

<sup>18</sup> *Rees v. Sinclair* (1974) 1 NZLR 180

“intimately connected”, there is virtually nothing in the practice of advocates that is not shielded by the immunity [at 326].

123. The test articulated by Mason J in *Giannarelli* and endorsed in *D’Orta-Ekenaike* has attracted criticism for being ambiguous and potentially too generous. This option would clarify and confine the test, to provide for consistency in the way the test is applied by the courts.
124. The major difficulty with this option is that it is very difficult to contemplate a legislative definition or formula that would be workable to achieve the same outcome as the common law test. One approach would be to provide for a legislative definition in accordance with the common law formulation (i.e. as ‘work that can fairly be said to be a preliminary decision affecting the way the cause is to be conducted when it comes to a hearing.’), but this could be criticised because it adds nothing to the current position. Indeed, it may over time limit the courts’ ability to develop the law relating to work done out of court and may ultimately inhibit the courts from reconsidering the existence of the immunity based on public policy considerations.
125. Alternatively, it would be possible to list examples of the types of preliminary decisions that qualify for the immunity. For example, in *D’Orta-Ekenaike*, Gleeson CJ, Gummow, Hayne and Heydon JJ noted that work that courts have held to be ‘intimately connected with the conduct of a cause’ have included:
  - Failing to raise a matter pertinent to the opposition of a maintenance application;
  - Failing to plead or claim interest in an action for damages;
  - Issuing a notice to admit and making admissions;
  - Failing to plead a statutory prohibition on the admissibility of crucial evidence;
  - Negligently advising a settlement;
  - Interviewing the plaintiff and any other potential witnesses;
  - Giving advice and making decisions about what witnesses to call and not to call, working up any necessary legal arguments; and
  - Giving consideration to the adequacy of the pleadings and, if appropriate, causing any necessary steps to be undertaken to have the pleadings amended.
126. Constructing a legislative provision based on listing the types of work that should be covered by the immunity is likely to face numerous obstacles. If an exhaustive list is preferred it is likely to be difficult to identify every situation that should fall within the definition, particularly if the legislation is required to be uniform. On the other hand, an illustrative legislative provision may simply lead to greater confusion.

### **Preserve immunity for prosecutors and public defenders**

127. An approach resembling the position in a number of states of the United States of America is to preserve an immunity for criminal prosecutors, and possibly extend this to public defenders.

128. If the basis for removing the immunity is to provide a means of redress to the clients of negligent advocates, retaining the immunity for prosecutors would seem unnecessary, since the prosecutor's 'client' is the State or Territory. Other mechanisms could no doubt be used to sanction negligent prosecutors, without undermining the general policy position in relation to advocates' immunity. It would not be appropriate for advocates' immunity to be extended to possible causes of action the defendant may have against the prosecutor (for example, acting in bad faith, malfeasance or misconduct).
129. Similarly, preserving an immunity for public defenders (but not private practitioners working in the same field) would create an anomaly, denying a means of redress to litigants whose legal representation is funded by legal aid but allowing privately funded criminal defendants to pursue negligence claims against their advocates. If it is decided to preclude claims against this discrete category of practitioners, alternative options may be available that do not undermine the general policy associated with providing to defendants a right to bring proceedings against negligent counsel. If this option is preferred, officers could explore the feasibility of alternative mechanisms such as an indemnity fund for these kinds of claims.

## ANCILLARY MECHANISMS TO SUPPORT THE JUSTICE SYSTEM

130. The approaches described above all relate directly to the existence or operation of the immunity for advocates. In addition, numerous mechanisms which are available generally in judicial proceedings could be used in conjunction with particular options to balance the competing interests of individual litigants and the needs of the administration of justice. These judicial mechanisms are central features of the justice system, such as rights of appeal, costs orders and disciplinary regimes.

### **A ground of appeal where an advocate's conduct leads to miscarriage of justice**

131. The justice system already acknowledges that there is a range of circumstances in which a party to proceedings should be able to challenge the outcome, notwithstanding the importance of the finality of judgments for the administration of justice. The primary mechanism for such a challenge is the right of appeal.

132. Appeals are available on limited grounds, depending on the nature of the original proceedings and the tribunal of fact.

#### *Existing ground of appeal*

133. In Australian courts the outcome of a criminal proceeding may presently be appealed on the ground that the incompetence of counsel has led to a miscarriage of justice. Similarly in New Zealand, the incompetence of counsel is a ground of appeal in criminal matters if the incompetence has given rise to an unsatisfactory conviction<sup>19</sup>.

134. This is a restrictive ground of appeal which applies only in respect of criminal proceedings, and appellate courts will be cautious about intervening. According to the leading authority<sup>20</sup>, the ground of appeal turns on a miscarriage of justice, whether due to the 'flagrant incompetence' of counsel or some other cause. Gleeson CJ of the New South Wales Court of Appeal indicated, however, that it is "impossible, and undesirable, to attempt to define such cases [of miscarriage of justice] with precision. When they arise they will attract appellate intervention."

135. The following key principles also emerge from the leading Australian authority:<sup>21</sup>

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<sup>19</sup> In *Lai v Chamberlains* Hammond J referred to this ground of appeal, noting that although these hearings raise their own kinds of difficulties, they have proved to be by no means insuperable, and are not such as ought to deflect the proper course of the ultimate justice of the case.

<sup>20</sup> Gleeson CJ in *R v Birks* (1990) 19 NSWLR 677

<sup>21</sup> Other principles in consideration of this ground of appeal can be found in the following cases: *R v Paddon* [1999] 2 Qd R 387; *R v P S* [2001] NSWCCA 224; *R v Green* [1997] 1 Qd R 584; *R v Miletic* [1997] 1 VR 593; *R v Lane* [1965] QWN 33.

- An appellate court would intervene only if there had been such a defect of judgment or neglect of duty that the court is left with a view that justice has miscarried;
- The appellate court has a power and a duty to intervene in the case of a miscarriage of justice, but what amounts to a miscarriage of justice is something that must be considered in the light of the way in which the system of criminal justice operates;
- The ground will not be made out unless incompetence or misconduct has deprived an accused of a significant possibility of acquittal; and
- As a general rule an accused person is bound by the way the trial is conducted by counsel, regardless of whether that was in accordance with the wishes of the client, and it is not a ground for setting aside a conviction that decisions made by counsel were made without, or contrary to, instructions, or involve errors of judgment or even negligence: See Gleeson CJ in *R v Birks* (1990) 19 NSWLR 677.

136. It is clear, therefore, that a defendant must demonstrate that his or her advocate's conduct did not involve only an error of judgment. Even negligence may not suffice, unless the negligence is regarded by the appeal court as so serious that the advocate's performance was 'flagrantly incompetent'.

#### *Advantages of appeals*

137. The benefit of allowing an appeal from a decision arising from proceedings in which the advocate was negligent is that it provides the litigant an opportunity to obtain the right result. In contrast, a claim of negligence provides a basis for compensating the litigant for the poor result that has come about due to the advocate's negligent conduct - in other words it 'shifts the loss' (in this case, from the defendant to his or her advocate) but does not, of itself, rectify the result. This advantage is particularly apparent in circumstances where the loss is of a nature that cannot easily be assessed in financial terms (for example, a wrong criminal conviction).

138. As the earlier discussion illustrates, the benefits of enabling clients to sue their advocates in negligence may in practice be largely illusory, due to the difficulties of causation in making out a negligence claim (see paragraphs 100-106). The difficulties associated with causation will not arise in the same way in an appeal, because the issue in an appeal would be whether there has been a miscarriage of justice. The question in a negligence action would be whether the advocate's negligence caused the verdict.

139. Another possible benefit of the appeal process would be that a formal (or informal) process could be put in place requiring the relevant body to consider disciplinary action where an appeal is successful based on the advocate's 'flagrant incompetence'.

#### *Difficulties of the existing ground of appeal*

140. The existing ground of appeal based on the advocate's 'flagrant incompetence' would appear to require that the advocate has been more than negligent; that the

conduct has been so grossly negligent as to be 'flagrantly incompetent'. However, while the courts have made clear that they will be slow to intervene on such an appeal, the primary issue is not the advocate's conduct but rather whether a miscarriage of justice has occurred as a result of that conduct.

141. A miscarriage of justice arising from an advocate's 'flagrant incompetence' provides the basis for an appeal in extremely limited circumstances. It is not available at all in respect of civil proceedings. No doubt this reflects the special nature of the criminal justice system and the implications of a finding of guilt for a defendant. On the other hand, in *D'Orta-Ekenaike* the High Court held that no distinction should be made based on whether the proceedings in question were civil or criminal in considering the risks of re-litigation. The majority asserted that it was wrong to imply that the administration of the civil law should give rise to judgments worthy of less respect than those reached on the trial of indictable or other offences [at 77–78]. If the option of providing for an appeal is to be considered further, it will be necessary to consider whether these two approaches can be reconciled.

***Extending the ground of appeal to civil matters***

142. Would it be possible to extend this ground of appeal to civil proceedings and, if so, what difficulties are likely to arise?
143. The key issue to consider in relation to civil proceedings is the potential unfairness to other litigants if one party is able to pursue an appeal based on their own advocate's performance. This concern does not arise in criminal proceedings, where the other 'party' is the public prosecutor. The implications for such 'innocent' litigants would include the cost of further proceedings and the lengthening of the court process. Costs orders may also be useful, and these are discussed further below at paragraphs 160-164. However, while the threat of costs orders provides a filter to discourage unmeritorious appeals, it is questionable whether the costs mechanism would be adequate to compensate an 'innocent' litigant who must endure the appeal process (and possibly a retrial) due to the negligence of the other party's counsel, particularly if the original finding is overturned on appeal (such that costs are unlikely to be awarded in the 'innocent' litigant's favour). The difficulty of recovering costs is another factor that suggests that costs orders would not be sufficient on their own.

***Expanding the ground of appeal: negligence or failure of duty rather than 'flagrant incompetence'***

144. The critical component of the existing ground of appeal (in respect of criminal matters) is that the conduct of the advocate must have been so damaging to the client's case that it has resulted in a miscarriage of justice. The courts have indicated that they will be cautious to intervene in criminal cases on this ground, and it is consistent with this approach that they have required that the advocate's conduct must depart significantly from the standard of care required. Presumably the same approach would be taken if this ground of appeal was extended to civil matters.

145. It may be possible to relax this test, in respect of either or both criminal and civil proceedings, such that lesser departures from the required standard of care could also provide a basis for an appeal. Rather than 'flagrant incompetence', the test could be whether the advocate was 'negligent' or whether the advocate failed to satisfy the duty owed to the client. It may be questionable what this would achieve if the approach of the courts in practice is to assess whether a miscarriage of justice has occurred as the result of the advocate's conduct, however characterised. In addition, if the appeal is based on the advocate's negligence, this is likely to raise the practical difficulties discussed above in relation to negligence proceedings, in particular the difficulties of causation.
146. Certainly it may be necessary to expand the ground of appeal if a successful appeal is made a prerequisite to bringing a personal claim against the negligent advocate (whether in negligence or otherwise). If the ground for bringing an appeal is restricted too severely, this will effectively preclude negligence proceedings against advocates, even if such actions are theoretically available as a result of the abolition of the immunity. The option of making an appeal a prerequisite to negligence proceedings is discussed in more detail at paragraphs 152-156.
147. The critical component should be that the advocate's negligence, however defined for the purposes of the ground of appeal, has been so damaging to the clients' case that it has resulted in a miscarriage of justice.

***Combining an appeal with a claim against the advocate***

148. A variation to this appeal model would be to combine an appeal on the grounds described above with a right to make a claim against counsel if incompetence is found. A detailed proposal along these lines was put by Bret Walker SC, former President of the NSW Bar Association, in a letter to the NSW Attorney-General dated 16 March 2005.
149. Bret Walker proposed that a client should be able to recover 'wasted costs' (plus interest) from the advocate if the client succeeds on appeal in overturning a trial outcome on the ground that a substantial miscarriage of justice has occurred by reason of the litigator's incompetence or other failure to exercise in good faith his or her functions as an officer of the court. In order to avoid the problems of conflicting judgments, a criminal accused who succeeds in obtaining a new trial on appeal should be able to recover in a claim against a litigator only if the accused is actually re-tried and is acquitted. In addition, in respect of criminal matters, a client should be able to recover from his or her litigator any net income lost due to time spent in custody. In respect of civil and criminal matters, a party should be able to recover costs from the other side when there has been professional misconduct.

### *Appeals – practical considerations*

150. On a more practical level it would need to be determined precisely how such appeals should be run. Different approaches may be suitable in different forums. On the other hand, it may be desirable for uniform rules and procedure to be agreed between all jurisdictions. Officers will need to consider this matter further in consultation with local judicial bodies if an appeal model is preferred.
151. It is worth noting finally that there may be a range of tribunals in which rights of appeal are presently limited, such that creating a new ground of appeal based on the incompetence or negligence of counsel may significantly expand the available bases for challenging decisions. For example, in the Victorian Civil and Administrative Tribunal (VCAT), a matter may presently be appealed only on a question of law. How would a new ground of appeal, if extended to civil matters, apply in this tribunal? Further, if this new ground of appeal is made available, is it likely to lead to a flood of appeals, if only because it is the only feasible ground on which a decision might be challenged? Conversely, could a new ground of appeal based on the incompetence of counsel be confined, so that it applies only in identified courts and tribunals?

### **Successful appeal as pre-requisite to claim for damages**

152. The key issue arising from a decision to abolish the current immunity is to ensure that the finality of judgments is not undermined by parties effectively re-litigating matters via proceedings against their advocates. The practical concern is that such re-litigation may lead to two apparently inconsistent verdicts, thereby placing the administration of justice in disrepute (see **Appendix 3** for a discussion of the risks of re-litigation).
153. One means of avoiding the possibility of conflicting judgments would be to require that, before negligence proceedings may be commenced, the original verdict must have been overturned. The question is whether creating such a statutory hurdle to negligence proceedings is necessary or desirable.
154. In practice, 'collateral attacks' which are designed to impugn the original judgment could be disposed of summarily as an abuse of process. Indeed, judges may go further and determine in a particular case that it would be an abuse of process (or otherwise contrary to the rules of procedure) to bring a negligence claim against the advocate unless the earlier decision has first been overturned.
155. On the other hand, in some cases re-litigation may involve a claim of substance, such that it would be appropriate for the court to hear and determine the claim. As the House of Lords said in *Hall*, "not all re-litigation of the same issue will be manifestly unfair to a party or bring the administration of justice into disrepute". In those cases, to preclude a hearing (and possibly a remedy) may cause greater harm to the system of justice than the risk of conflicting judgments.
156. Of course, allowing for such re-litigation without requiring that the original verdict is first overturned places greater reliance on the rules of civil procedure as

a mechanism to enable judges to dismiss claims that would be manifestly unfair to a party or bring the administration of justice into disrepute. Existing civil procedure rules would need to be considered carefully to ensure they are adequate for this purpose.

### ***Practical issues***

157. A number of difficulties are associated with requiring that the initial verdict be overturned. Most importantly, this approach relies on the existence of an avenue of appeal from the decision in relation to which the advocate is alleged to have been negligent. As described above, the ground of appeal available in respect of criminal proceedings based on an advocate's 'flagrant incompetence' currently has no counterpart in respect of civil proceedings. If this approach is preferred, further consideration would need to be given to extending the ground of appeal to civil proceedings.
158. Secondly, the original litigation would be extended by the appeals process, potentially creating issues for court workloads and increasing the costs of litigation for both parties. Another potential difficulty is that if the order on appeal is that the matter be reheard, there may be circumstances in which this is not workable (for example, due to the death of key witnesses). In those circumstances, given that the rehearing cannot proceed, the appellant would be denied a right to sue in negligence.
159. One final matter to consider if this approach is adopted is that allowance may need to be made for the case of a defendant who has not had a verdict overturned, but who has had a sentence reduced on the basis that the original sentence imposed was too harsh, and that this resulted from the advocate's negligence.

### **Costs mechanisms**

160. Costs orders could be used in conjunction with the grounds of appeal described above as a means of compensating parties (and advocates) for the costs of appeals made on the ground of the advocate's negligence. This is a well established means of restoring the position of parties who have been successful in litigation, and also provides a means of discouraging unfounded legal proceedings.
161. Two situations would need to be considered. In the first case, the client successfully appeals the original decision on the ground that his or her advocate was negligent. Both the client and the respondent to the appeal should then be compensated for the costs of the appeal. The advocate whose negligence led to the miscarriage of justice that formed the basis for the appeal would then pay the costs of both parties to the appeal. Difficulties may arise if the advocate is not a party to the proceeding, and consideration would need to be given to how they could be overcome<sup>22</sup>.

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<sup>22</sup> In South Australia, statutory provisions presently enable courts to award costs against non-parties. See s.37 *Magistrates Court Act*, s.42 *District Court Act* and s.40 *Supreme Court Act*.

162. In the second case, the client's appeal against the original decision is not successful - either the advocate is not found to have been negligent or no miscarriage of justice has flowed from the negligent conduct. In that case, the appellant should pay the costs of the other party and possibly also the advocate (if the advocate is a party to the proceeding).
163. This approach provides a useful means of inhibiting unreasonable conduct, both by the advocate (who faces costs consequences if he or she is negligent) and by the appellant (who faces costs consequences if the ground of appeal is not made out). In addition, the 'innocent' respondent to the appeal is protected from the costs of the appeal process.
164. There are circumstances in which this approach would not provide a remedy for negligent conduct, however. If the advocate is found to have been negligent but is not found to have contributed to a miscarriage of justice, the client is not only left without a remedy for the negligence, but must also pay the advocate's costs.

### **Disciplinary mechanisms**

165. Disciplinary mechanisms which exist in all states and territories have a significant role to play in regulating the conduct of legal practitioners. These form part of the national model law for the regulation of the legal profession, with the result that certain aspects of the disciplinary systems (such as the definitions of unsatisfactory professional conduct and professional misconduct) are now uniform. Most other aspects of the disciplinary regimes are a matter for individual jurisdictions.
166. Significantly, negligence would not give rise to disciplinary action in many cases. Consequently the disciplinary regime would not provide an alternative for the usual civil processes.
167. A disciplinary sanction has a direct impact on the advocate whose conduct has been called into question, whether by a fine, suspension or even disqualification from practice. However, except in some limited cases, disciplinary regimes do not provide for the payment of compensation to an aggrieved client (although this is a matter for individual jurisdictions to determine under the national model law).
168. If this avenue is to be considered further, some preliminary questions would need to be considered, including whether individual jurisdictions would wish to expand the power of disciplinary tribunals to order compensation. Even if greater scope is provided for compensation orders, it is unlikely that aggrieved clients of negligent advocates would have the same access to redress if confined to the disciplinary regime.
169. While disciplinary mechanisms would not appear to be an adequate alternative to other avenues (such as enabling clients to bring civil proceedings against negligent advocates or providing for a ground of appeal based on an advocate's negligence), they could be used in conjunction with these other avenues to provide additional sanctions for negligent advocacy.

ADVOCATES' IMMUNITY FROM CIVIL SUIT

APPENDIX 1

DEVELOPMENT OF THE COMMON LAW

A. THE POSITION IN AUSTRALIA

1. In the recent decision of *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12, the High Court (in a majority decision) confirmed the position in *Giannarelli v Wraith* (1988) 165 CLR 543. This was said to stand for the proposition that an advocate cannot be liable in negligence for work done in court, and work done out of court which is intimately connected with the conduct of a case in court.
2. However, in contrast to *Giannarelli*, which concerned the liability of barristers for their conduct in court, *D'Orta-Ekenaike* concerned the civil liability of a barrister and his instructing solicitor for the allegedly negligent performance of their respective professional duties *outside* court.
3. According to the High Court, the chief public policy consideration supporting retention of the immunity was the nature of the judicial process, and the role that the advocate plays in it. In the joint judgment by Gleeson CJ, Gummow, Hayne and Heydon JJ, their Honours explained that a central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances. As such, the importance of finality 'pervades the law', and is evident in terms of restraints on the nature and availability of appeals, and rules about points which may be taken on appeal and about what evidence may be called. If an exception to that tenet were to be created by abolishing the immunity, a 'peculiar type of re-litigation' would arise as an essential step in demonstrating that an advocate's negligence in the conduct of litigation had caused damage to a client.
4. Other public policy grounds which had been relied on in previous decisions, both in Australia and in other common law jurisdictions, were found by the majority not to be determinative in assessing whether advocates' immunity should be maintained.
5. In a dissenting judgement, Kirby J firstly questioned the precedential value of *Giannarelli v Wraith*. His Honour argued that as that case only concerned the liability of barristers for their conduct in court, it does not stand for any binding legal rule relating to the liability of solicitors and their out of court conduct. Kirby J therefore argued that there was no legal obstacle to the High Court deciding the extent of advocates' out-of-court liability.

6. Kirby J then went on to consider some of the public policy considerations for abolishing the immunity. His Honour commented that an immunity from liability at law is a derogation from the rule of law and fundamental rights, and that the 'special solicitude of the law for its own practitioners ... has been contrasted with the accountability of demanded of other professions'. His Honour further reasoned that Australia's commitment to international human rights instruments which require equality before (and accountability to) the law are significant in the development of the common law in Australia, just as such considerations were influential in the House of Lords decision to abolish the immunity<sup>23</sup>.
7. Justice Kirby also referred to the changing status of barristers (they can no longer be considered 'gentlemen' of an elevated status in contemporary society); and professional and global considerations (such as the nature of the modern provision of legal services) in arguing that the immunity could no longer be justified.
8. In response to the chief public policy consideration put forward by the majority ('the principle of finality'), Kirby J observed that numerous legal systems flourish without the supposedly indispensable immunity (Canada, for example, and England and Wales). His Honour also indicated that to leave abolition of the immunity to Parliament would be to 'abdicate' the Court's responsibility. Regard was also had to the fact that retention of the immunity would place Australia out of step with the rest of the common law world.

## **B. THE POSITION IN OTHER KEY COMMON LAW JURISDICTIONS**

### ***England and Wales***

9. In July 2000, the House of Lords in *Arthur JS Hall v Simons* [2000] 3 All ER 673 (*Hall*) abolished for England and Wales the common law immunity of advocates from civil suit for negligence in relation to court activities. The House of Lords unanimously decided in favour of its removal for civil cases, and by a majority of four to three in favour of its removal for criminal proceedings.
10. The House of Lords found that public attitudes and circumstances had changed and that there was no longer a justification for advocates to be immune from civil suit in relation to their court-related activities. For example, the practice of law has become more commercialised, advocates may advertise legal services, and there is an obligation to carry professional indemnity insurance. The Court found that removing the immunity would bring to an end an anomalous exception to the basic premise that there should be a remedy for a wrong, while also improving standards of advocacy and public confidence in the legal system.
11. Lord Hutton noted, for example, that where a person relies on a member of a profession to give him advice or otherwise to exercise his professional skills on his behalf, the professional man should carry out his professional task with reasonable care. If the advocate fails to do so, and in consequence the person who engages him suffers loss, the client should be able to redress that situation in a manner that is just and fair.

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<sup>23</sup> *Arthur JS Hall v Simons* [2000] 3 All ER 673

12. The Law Lords rebutted the arguments in favour of retaining the immunity as follows:

➤ *Collateral attack*

In respect of the possibility that abolishing the immunity could give rise to vexatious collateral attacks (i.e. proceedings designed to impugn the result in an earlier proceeding), these could be precluded by developments in the English civil justice system, which were designed to reduce the incidence of vexatious claims (for example, summary dismissal under the Civil Procedure Rules 1999). Applicants now no longer have to show that a claim is 'frivolous and vexatious' but rather that 'the claimant has no real prospect of succeeding on the claim' (see Appendix 2, rules 3.4(2)(a) and 24.2).

Lord Hoffman argued that while the ability to strike out an action as an abuse of the procedure of the court is a longstanding remedy, it should not exist as a substitute for the immunity, because challenging a previous decision does not necessarily constitute an abuse of process.

His Lordship also observed that the policy concerning re-litigation is concerned with both the interests of the individual (giving rise to the concept of double jeopardy) and the interests of the public (giving rise to the doctrines of *autrefois acquit*, *res judicata* and *issue estoppel*). However, these powers (and those conferred by the Civil Procedure Rules) are used only in cases in which justice and public policy demand it. As such, Lord Hoffman argued that the power to strike out an action should only be exercised 'in cases in which re-litigation of an issue previously decided would be 'manifestly unfair' to a party or would bring the administration of justice into disrepute'.

➤ *Divided loyalty*

In relation to the argument that an advocate, faced with liability for negligence, may place the duty to the client above the duty to the court was discounted. Lord Hoffman noted that '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'.

Lord Hobhouse of Woodborough added that competent advocates are well able to cope with conflicts between a duty to the court and to the client, and should be confident that, where they adopt a particular view of their duty to the court in good faith, that judgment will be upheld by the court.

➤ *The cab rank rule*

In relation to the argument that the risk of a vexatious negligence claim may lead some barristers to avoid the obligations of the cab rank principle, Lord Hoffman argued that 'there may be many reasons why a barrister, free to choose, would prefer not to act for a client, such as the fact that he is particularly tiresome or disgusting, but I doubt whether fear of a vexatious action is a prominent consideration'. His Lordship went on to reason that in any case, vexatious actions are a hazard of professional people, and ways of dealing with them are improving. Further if the prospect of vexatious claims

serves to improve the strike-out procedures even more, then ‘so much the better for everyone’.

➤ *The witness analogy*

In terms of the so-called analogy between judicial witnesses (and their immunity) and barristers, it was argued that there is in fact no comparison, as a witness owes no duty of care to anyone in respect of the evidence he gives to the court; his or her only duty is to tell the truth. Similarly, judges have only a public duty to administer justice. In comparison, advocates are the only court room participants who owe a duty of care to their clients.

*Should the immunity be retained for criminal proceedings?*

13. Three members of the House of Lords (Lord Hobhouse of Woodborough, Lord Hope of Craighead, and Lord Hutton) advanced several reasons for retaining the immunity for criminal proceedings only:

- The public interest requires a different result when consideration is given to the immunity of counsel who defend persons charged with criminal convictions, as many defendants in criminal cases are ‘highly unscrupulous and disreputable persons’ and would therefore be more prone to vexatious actions against their counsel if they knew it was open to them to do so. Thus the same consideration should be given to counsel as is given to judges in respect of harassment by vexatious litigants/defendants.
- Even though the criminal process is formally adversarial, it is of a fundamentally different character to the civil process. Its purpose and function are different. It is to enforce the criminal law – a ‘directly social function’. As put by Lord Hobhouse of Woodborough:

‘Criminal trials do not exist to protect private interests but the public interest in the enforcement of the criminal law... Those who take part in the trial do so as a public duty whether in exchange for remuneration or the payment of expenses. The proceedings are conducted in public under judicial control. The position of the advocates is the same as that of the other participants. The prosecuting advocate has a duty to see that the prosecution case is, on behalf of the Crown, presented effectively and fairly. That of the defending advocate is to see that the defendant has a fair trial, that the prosecution case is properly probed and tested both in fact and in law and that his factual and legal defences are properly placed before the court supported by the available evidence and arguments... The advocate is performing a public function in the public interest. It is his public duty to protect the interests of his client. The criminal justice system depends upon his doing so skilfully and independently.’

All of this indicates that a private cause of action in tort would compromise counsel’s ability to perform his or her public function and would derogate from the criminal law’s ‘directly social purpose’.

- A defendant who has been the victim of a miscarriage of justice should have a remedy, but that primary remedy must be the Court of Appeal.

### **Scotland**

14. As noted in the joint judgment in *D'Orta-Ekenaike*, there is some doubt as to whether the immunity would still apply in Scotland. A Scottish (Outer) Court of Session decision (Scotland's supreme civil court) indicates that in Scotland the immunity does still apply: *Wright v. Paton Farrell & Ors* [2002] Scot CS 341 (27 August 2002), although the matter remains to be considered by the Inner Court (which is in essence the appeal court).
15. In *Wright*, T G Coutts QC, sitting as a Temporary Judge, stated that the decision in *Hall*, which was concerned with English Civil law and English procedure, is not binding in Scotland. In addition, the decision in *Hall* was subsequent to the trial in *Wright*; and expressly did not overrule *Rondel v. Worsley* [1969] 1 A.C. 191, merely holding that since public policy considerations had changed in England, *Rondel* no longer applied. Coutts QC went on to state that in the Scottish Outer House, a judge is still bound by the leading case of *Batchelor v Pattison & Mackersy* (1876) 3 R. 914 in which the immunity was upheld.
16. Coutts QC also ventured various reasons why the public policy considerations in *Hall* were irrelevant in Scotland. For example:
  - 'the availability of protection against the evils described by Lord Hope apply only in English law; and specifically, the English application of the "cab rank rule"';
  - 'the way in which vexatious claims can be controlled and disposed of (see section 12 of Lord Hoffman's speech) has no parallel in Scotland';
  - 'wasted costs orders cannot be made north of the Tweed'; and
  - 're-litigation is rightly perceived to be a clear danger in Scotland, especially with the increasing advent of party litigants'.

### **Canada**

17. In Canada there never has been immunity from suit in negligence for barristers. However, in *Demarco v. Ungaro* (1979) 95 D.L.R. (3d) 385, the Supreme Court of Ontario considered whether the policy considerations that the English courts at the time felt warranted the continued existence of the immunity (in respect of the conduct of litigation) had any relevance to the Canadian jurisdiction, and whether such an immunity should be established in Canada.
18. In particular, the English case of *Rondel v. Worsley* [1969] 1 A.C. 191 was considered. This (arguably) stood for the proposition that 'a barrister is immune from an action for negligence at the suit of a client in respect of his conduct and management of a cause in court and the preliminary work connected therewith, such as the drawing of pleadings'. Whilst the so-called 'public interest' was a significant consideration in *Rondel*, Krever J concluded that the public interest in Ontario did not require that courts recognise the immunity of a lawyer from action for negligence at the suit of his client by reason of the conduct of a case in court. Foreshadowing the words of Kirby J in *D'Orta-Ekenaike*, Krever J noted:

It has not been, is not now, and should not be, public policy in Ontario to confer exclusively on lawyers engaged in court work an immunity possessed by no other professional person. Public policy and the public interest do not exist in a vacuum. They must be examined against the background of a host of sociological facts of the society concerned.

19. Further, Krever J found it difficult to believe that a decision made by a lawyer in the conduct of a case would be held to be negligence as opposed to a mere error of judgment. But in his view, in those cases where an error is so egregious that a Court would conclude it to be negligence, the client in question should not be deprived of recourse. To do so would not be consistent with the public interest.
20. In terms of the issue of conflict of duty to the court and to clients, Krever J observed that there is no empirical evidence that the risk is so serious that an aggrieved client should be rendered remediless.
21. In terms of the danger of re-litigation, Krever J stated that it is not:

... a contingency that does not already exist in our law and [is] inherently involved in the concept of *res judicata* in the recognition that a party in an action in personam is only precluded from litigating the same matter against a person who was a party to the earlier action. .... Better that [a matter be retried over again] than that the client should be without recourse.

22. In terms of the cab-rank rule, Krever J concurred with Lord Diplock in *Saif Ali v Signey Mitchell & Co (a firm) et al* [1978] 3 W.L.R 849, who was also not persuaded of the validity of the ground, and stated at pp.861-2:

True it is that [a barrister] may be obliged to accept instructions on behalf of an obstinate and cantankerous client who is more likely than more rational beings to bring proceedings for negligence against his counsel if disappointed in the result of his litigation; but the existence of this risk does not, in my view, justify depriving all clients of any possibility of a remedy for negligence of counsel, however elementary and obvious the mistake he has made may be. There are other and more specific means of disposing summarily of vexatious actions.

23. Subsequent to this case, in *Hall*, Lord Hope of Craighead noted that in Canada ‘there is no evidence that its absence has given rise to difficulty, perhaps because it was made clear that the court would be slow to conclude that a decision made by a lawyer in the conduct of the case was negligence rather than a mere error of judgment’.
24. Similarly, in *Lai v Chamberlains* [2005] NZCA 37 (8 March 2005) (in which the immunity was abolished in New Zealand) reference is made to the fact that in Canada (and the United States) an attorney’s conduct must be shown to have been so manifestly erroneous that the act or omission was one which no prudent advocate would have entertained.

### ***New Zealand***

25. Prior to *Lai v Chamberlains* [2005] NZCA 37 (8 March 2005) a lawyer in New Zealand could not be liable to a client for negligence in respect of acts or omissions in the conduct of a case in court or so intimately connected with such conduct that they can be fairly said to be a preliminary decision affecting it: *Rees v Sinclair* [1974] 1 NZLR 180 (CA).
26. In *Lai v Chamberlains* the main issue before the Court of Appeal was whether the common law in New Zealand should follow the English decision to abolish the immunity (*Hall*).

*Section 61 of the Law Practitioners' Act 1982*

27. Section 61 of the NZ *Law Practitioners' Act 1982* provides that NZ barristers 'shall have all the powers, privileges, duties and responsibilities that barristers have in England'. This meant that, given that the immunity was abolished in England in 2000, arguably it was also abolished in NZ.
28. At the time of *Rees v Sinclair*, s.13 of the *Law Practitioners Act 1952* applied (which contained an identical provision to s61). In the initial proceedings in *Rees v Sinclair*, Mahon J held that the immunity was a 'privilege' and that s.13 therefore applied, and its effect was to incorporate English law on the barristerial immunity into New Zealand law. However, on appeal, the immunity was confirmed, but for different reasons. Although the Court of Appeal acknowledged that s.13 might operate to confer the immunity automatically, it based its decision solely on public policy considerations pertaining in New Zealand. Given that the case was therefore decided on public policy grounds, some commentators argued that there was in fact no definitive answer as to the existence of the immunity in New Zealand following the date of *Hall*<sup>24</sup>.
29. When the issue was reviewed in *Lai v Chamberlains*, the majority of judges decided in favour of removing the immunity on policy grounds. Anderson P dissented, stating that s61 of the NZ *Law Practitioners' Act 1982* actually conferred a present immunity on barristers, as that was the law in England at the time the section was drafted and it was the intention of the legislature that it should continue as such in perpetuity or until amended by Parliament.

*Public policy reasons*

30. The arguments for maintaining the immunity were rebutted as follows:
- *The relationship of counsel to the court*  
There are many other professions that have duties to third parties (for example, doctors have a duty with respect to medical ethics) and this does not confer on them an immunity from suit. There is also no compelling empirical evidence to support the assertion that the imposition of liability for negligence is likely to cause advocates to ignore their duties to the court; quite the contrary.
  - *The immunities other persons have in court proceedings*  
Hammond J argued that it is not discriminatory to remove the immunity from barristers alone, given that the other kinds of immunities have their own distinct and eminently supportable justifications – which do not apply to barristers. The judiciary, for instance, has to be able to deal fearlessly and in an unimpeded manner with whatever it is that the case is about. Witness immunity is given because witnesses are required to give their evidence without fear.
  - *Counsel is under a particular disability (the cab-rank principle)*

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<sup>24</sup> See for example Wyatt & Simpson, 'Litigators' Immunity', *The New Zealand Law Journal*, April 2002

The court found that barristers are not alone in being a profession that cannot refuse to take on clients; for example, in commercial life there are a number of examples, such as doctors and the 'humble innkeeper'. The proper way to view the cab-rank principle is that it is one of the circumstances to consider in a given case in determining whether a lawyer has acted reasonably and prudently.

➤ *The consequence of a no-immunity rule on the primary litigation (defensive practice)*

Hammond J noted that already counsel are endeavouring to make every single post 'a winning post', regardless of its strength, and so even if they were to feel compelled to act defensively, very little would change.

➤ *The consequences of a no-immunity rule for re-litigation (collateral attack)*

Concerns about re-litigation are already relevant in New Zealand, and are being addressed within the New Zealand legal system. For instance, to some extent the legal aid system filters out unmeritorious claims, as does the doctrine of abuse of process. To the extent that any further adaptations are required in existing legal processes in relation to the disappearance of advocate's immunity, they were expected to develop incrementally and through the common law.

31. Whilst the majority found that the arguments in *Hall* compelling, as *Lai v Chamberlains* concerned liability in a civil case, it was considered preferable to leave the question of immunity in criminal cases to be argued at a later date, so that the particular policy issues which arise in that context could be fully argued.
32. The standard for negligence was said to be what the reasonably competent practitioner would do having regard to the standards normally and reasonably adopted by his profession: *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384 (in which a lawyer's liability in negligence was assessed).
33. Finally, it should be noted that leave was granted on 13 June 2005 to appeal *Lai v Chamberlains* but the appeal has not yet been heard.

***United States***

34. Very limited immunity exists in the United States. In this regard it is necessary to distinguish between prosecuting and defence attorneys and between the position in federal law and that in each State. Judges and prosecuting attorneys are protected by immunity in relation to their conduct of legal proceedings. In *Imbler v. Pachtman* (1976) 424 US 409 the Supreme Court held that a state prosecutor had absolute immunity for the initiation and pursuit of a criminal prosecution, including the presentation of the State's case at a trial. Defence attorneys, on the other hand, do not have the judicial immunity which protects prosecutors and grand jurors, as defence attorneys owe nothing more than a general duty to the public and are required to serve the undivided interests of clients.
35. However, each State has the right to determine for itself the extent and scope of any immunity, acting on the basis of empirical data available to that State: *Ferri v. Ackermann* (1979) 444 US 193. In some states an immunity exists for the benefit

of public defenders in criminal cases, in view of the disruption and costs which would flow from the burden of defending civil claims. Connecticut (*Spring v. Constantino* (1975) 362 A.2d 871) and Pennsylvania (*Reese v. Danforth* (1979) 406 A.2d 735) have not adopted such an immunity, but a more recent trend in other states has been to uphold legislation granting immunity to public defenders: for example, Nevada (*Morgano v. Smith* (1994) 879 P.2d 735); Delaware (*Browne v. Robb* (1990) 583 A.2d 949); Vermont (*Bradshaw v. Joseph* (1995) 666 A.2d 1175); and New Mexico (*Coyazo v. State of New Mexico* (1995) 897 P.2d 234).



**ADVOCATES' IMMUNITY FROM CIVIL SUIT**

**APPENDIX 2**

**TRADITIONAL BASES FOR MAINTAINING THE IMMUNITY, NOW  
DISCOUNTED BY THE HIGH COURT**

*The 'special status' of lawyers performing advocacy*

1. In *D'Orta*, Callinan J claimed that consideration must be given to 'the special and unique difficulty, dealing as advocates do, with matters not subject to scientific laws and measurement'. His Honour went on to explain that:

Any advocate who is experienced in trial work before both judges and jurors knows only too well that many decisions have to be made, often on a second by second basis, as to what should be said or asked, and how it should be said or asked. And that which has been said or asked may look quite different, either much better or worse than it seemed at the time, after all the evidence has been led, the submissions made, and the judgment or verdict given. Few other professions, teaching, psychology and psychiatry are perhaps some, require their practitioners to attempt to see into the minds, and anticipate the thinking, reactions, and opinions of other human beings, as does the profession of advocacy.

2. On the other hand, their Honours in the joint judgment in *D'Orta* discounted the argument that the immunity should be retained because of 'some special status' being accorded to advocates; and, as has been noted, based their reasons on maintaining the immunity on the importance of finality. Similarly, McHugh J argued that the immunity should be retained, but not on the basis of the 'special status' of advocacy work. His Honour explained:

The idea of pressure, haste and quick judgment involving unknown quantities in a courtroom is also not distinguishable from the kind of strain under which a surgeon might operate... The invidious dissection of a professional's conduct by lawyers and judges with the benefit of hindsight and time for reflection is also not a burden that would attach only to advocates in the absence of immunity. Competing demands, matters of fine judgment with heavy potential consequences, unexpected outcomes and new information at a crucial moment, for example, are all features of defences to claims of negligence in medical practice

3. In *Hall*, the House of Lords also gave little credence to the argument that lawyers were operating under a peculiar difficulty and should therefore not be subject to claims of negligence. Lord Hoffman referred to the argument that 'a person performing an important public duty by taking part in a trial should not be vexed by an unmeritorious action' as 'the vexation argument'. Of it his Lordship said that taken by itself:

it has no validity, as it is true that the conduct of litigation is a difficult art and that one of the reasons why it sometimes requires delicate judgment is the advocate's duty to the court. But there are many professional activities which require delicate judgment and advocacy is not the only one which may involve a divided loyalty.

4. Whilst some of the arguments about the onerous nature of advocates' work are no doubt true (that they do perform under great pressure, and they must decisions on a second by second basis, etc) – any claim of negligence will be assessed bearing in mind these factors and as such to remove the immunity would not be to open advocates to unfair claims of negligence. As with all negligence claims against professionals, a claim of negligence against a advocate will be assessed on the basis of whether the impugned conduct was a 'reasonable' course of action under the circumstances. As stated by Lord Diplock in *Saif Ali v. Sydney Smith Mitchell & Co.* [1980] A.C. 198, at p. 220C-E:

No matter what profession it may be, the common law does not impose on those who practise it any liability for damage resulting from what in the result turn out to have been errors of judgment, unless the error was such as no reasonably well-informed and competent member of that profession could have made. So too the common law makes allowance for the difficulties in the circumstances in which professional judgments have to be made and acted upon.

5. Similarly, the principle articulated in *Bolam v Friern Hospital Management Commitee* (1957) 1 WLR 582 has also been enshrined in legislation in most Australian jurisdictions (for example, s.59 of the *Wrongs Act 1958* (Vic) – 'standard of care for professionals'); that is – a [professional] is not negligent if he or she acts in accordance with a practice accepted at the time as proper by a responsible body of members of that profession, even though some other members of that profession might adopt a different practice. This means if there is general peer support for some impugned conduct, unless that conduct is deemed 'unreasonable' by the court, it cannot be characterised as 'negligence'.
6. As such, although there might be a 'special and unique difficulty' in performing advocacy, a advocate would have to depart radically from the kind of conduct that is 'normal' or 'reasonable' under those circumstances to be found negligent.

#### ***Implications for standards of advocacy***

7. It is sometimes claimed that fear of vexatious actions will distract advocates in their duties and cause them to practise defensively. However, numerous judges have found this is not a strong basis for retaining the immunity. As pointed out in *Hall* by Lord Hoffman:

[v]exatious actions are an occupational hazard of professional men and we are improving our ways of dealing with them. If the prospect of their being brought against lawyers serves as an incentive to improve those procedures even more, so much the better for everyone.

8. It was also pointed out in *Hall*, that since 'wasted costs orders' could be made against advocates, this has not caused a decline in standards of advocacy in the United Kingdom, and by analogy, one might assume that the possibility that another kind of disciplinary action could be taken against advocates would also not cause a decline in standards of advocacy.
9. If anything, it seems likely that the knowledge that they must act in accordance with a duty of care will make advocates perform their advocacy to a higher standard, which would benefit not only their clients but the judicial system generally. As put in a 1992 Report of the Victorian Law Reform Commission ('VLRC'), not only does liability in negligence provide a mechanism for loss shifting, but also, 'liability for professional negligence has an important bearing

on economic efficiency in the market place'.<sup>25</sup> In other words, liability for professional negligence has a deterrent and regulatory effect which will improve standards of advocacy.

10. For example, the VLRC considered that a duty of care assessable by the courts would offer an external control on professional conduct. The imposition of a pecuniary penalty also provides lawyers with a strong incentive to self-regulate and exercise greater care. This would enhance the disciplinary mechanisms currently in place, which are limited in their scope and the nature of the sanctions available. As stated in the Report, 'the policy objectives of professional liability law – deterrence and compensation – promote economically efficient behaviour'; whereas, 'the professional bodies themselves only regulate professional misconduct – mere incompetence does not amount to this.'<sup>26</sup>

### *Divided loyalty*

11. In *Hall*, Lord Hoffman explained that:

Lawyers conducting litigation owe a divided loyalty. They have a duty to their clients, but they may not win by whatever means. They also owe a duty to the court and the administration of justice. They may not mislead the court or allow the judge to take what they know to be a bad point in their favour. They must cite all relevant law, whether for or against their case. They may not make imputations of dishonesty unless they have been given the information to support them. They should not waste time on irrelevancies even if the client thinks that they are important. Sometimes the performance of these duties to the court may annoy the client.

12. Thus it is often claimed that the possibility of a claim for negligence might inhibit the lawyer from acting in accordance with the paramount duty to the court. However, the House of Lords in *Hall* dismissed the 'divided loyalty' argument with persuasive reasoning. For example:

- Lord Steyn pointed out that many other professions, such as doctors, have a divided loyalties. Doctors have duties not only to their patients but also to an ethical code, and they are sometimes faced with a tension between these duties. However, we do not say that doctors should have an immunity merely because they are faced with such choices or that they have a difficult job.
- Lord Hoffman noted that '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'.
- Lord Hobhouse of Woodborough added that competent advocates are well able to cope with conflicts between a duty to the court and to the client, and should be confident that, where they adopt a particular view of their duty to the court in good faith, that judgment will be upheld by the court.

13. Similarly, in *D'Orta*, the joint judgment stressed that those duties do not conflict; rather, the duty to the court is paramount. Kirby J stated that 'the advocate's "divided loyalty" to client and court does not support the existence of the

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<sup>25</sup> C G Veljanovski and C J Whelan 'Professional Negligence and the Quality of Legal Services – An Economic Perspective' (1983) 46 *Mod LR* 700 in Report of the Victorian Law Reform Commission, *Access to the Law: Accountability of the Legal Profession*, 1992.

<sup>26</sup> *Ibid*, p.24

immunity, as it is difficult to see how negligence could be found where a advocate has simply complied with a duty to the court’.

### ***The cab rank rule***

14. The cab rank principle obliges barristers to accept any client, no matter how difficult their case may be or how vexatious they may seem, if that client seeks their services in courts in which the barrister holds him or herself out as practising, when properly instructed. In *Giannarelli v Waith*, Brennan J gave support to the rule as follows:

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

15. If it is accepted that the cab rank rule is so important a feature of our judicial system, claims that the removal of the immunity would endanger it warrant serious consideration.
16. In essence, the argument is that it would be unfair to remove the immunity from suit for barristers, as they are unable – in accordance with the cab rank rule – to refuse clients who might be potentially vexatious, or whose claims are bound to fail, and who might therefore be inclined to seek recourse against them. In response to this unfairness, some barristers may be reluctant to accept a brief from a difficult client for fear that a vexatious claim in negligence will ensue. This consideration is said to apply with particular force to the criminal bar, where the unsuccessful client would be more likely to sue their barrister, given that they would have leisure to ponder the way their trial had been conducted, and their possible access to legal aid (see Lord Hoffman in *Hall*).
17. In *Hall*, however, the importance of the cab rank rule was to some extent disputed. Lord Steyn acknowledged that it was a "valuable professional rule"; however his Lordship added that:

... its impact on the administration of justice in England is not great. In real life a barrister has a clerk whose enthusiasm for the unwanted brief may not be great, and he is free to raise the fee within limits. It is not likely that the rule often obliges barristers to undertake work which they would not otherwise accept. When it does occur, and vexatious claims result, it will usually be possible to dispose of such claims summarily. In any event, the "cab rank" rule cannot justify depriving all clients of a remedy for negligence causing them grievous financial loss. It is "a very high price to pay for protection from what must, in practice, be the very small risk of being subjected to vexatious litigation (which is, anyway, unlikely to get very far):"<sup>27</sup>

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<sup>27</sup> Lord Steyn, quoting Cane, Peter, *Tort Law and Economic Interests*, 2nd ed. (1996).

18. Lord Hoffman also dismissed the argument, stating that he did not believe the argument that a barrister would be unfairly exposed to vexatious claims through the imposition of the cab rank rule had any real substance. His Lordship argued that:

There may be many reasons why a barrister, free to choose, would prefer not to act for a client, such as the fact that he is particularly tiresome or disgusting, but I doubt whether fear of a vexatious action is a prominent consideration. In any case, for reasons which I have explained, I think that vexatious actions are an occupational hazard of professional men and that we are improving our ways of dealing with them. If the prospect of their being brought against lawyers serves as an incentive to improve those procedures even more, so much the better for everyone.

19. Similarly, Lord Hope of Craighead gave little credence to the argument, stating that its significance in daily practise is small, and that it provides no sound basis for thinking that removal of the immunity would have the effect of depriving those who were in need of the services of advocates in criminal cases of the prospect of obtaining their services.

20. Although the significance of the cab rank rule in the UK was said to be minimal, Callinan J found in *D'Orta* that the considerations referred to in *Hall* on the cab rank rule do not apply in Australia. For example, in reference to Lord Steyn's comments, his Honour noted that whilst it would be wrong for a barrister, or a barrister's clerk, to raise a barrister's fee as a device to avoid an unwanted brief, in only two of the States do barristers employ clerks, 'and even in those latter, the role of the clerk is increasingly administrative, and removed from the fixation of fees'. As such, his Honour argued that in this country, 'the removal of the immunity would intrude upon and diminish the utility of the valuable cab rank rule'. Related to this rule was said to be the undertaking of work on a *pro bono* basis on behalf of indigent parties; in respect of which the removal of the immunity would have 'a real capacity to deny the courts access to these services'.

21. On the other hand, the joint judgment in *D'Orta* stated that the cab rank principle 'is irrelevant' and does not provide 'a sufficient basis to justify the existence of the common law immunity' [at 27]. Instead, as noted above, the principal reason for maintaining the immunity was the importance of finality in the judicial process as an aspect of government.

### ***The witness analogy***

22. The witness analogy argument starts from the well-established rule that a witness is absolutely immune from liability for anything which he says in court: *R v Skinner* (1772) Lofft 52; as applied in *Munnings v Australian Government Solicitor* (1994) 18 ALR 385. So are:

- judges (*Sirros v Moore* [1975] 1 QB 118);
- court staff (*Harvey v Derrick* [1995] 1 NZLR 314);
- jurors (*R v Skinner* (1772) Lofft 52 as applied in *Munnings v Australian Government Solicitor* (1994) 18 ALR 385); and
- parties to a proceeding (they cannot be sued for libel, malicious falsehood or conspiring to give false evidence: *Marrinan v. Vibart* [1963] 1 Q.B. 528).

23. The policy of this rule is to encourage persons who take part in court proceedings to express themselves freely. The interests of justice require that they should not feel inhibited by the thought that they might be sued for something they say. As Kirby P put it in *Rajski v Powell* (1987) 11 NSWLR 522:

[judicial immunity is granted] not to protect judges as individuals but to protect the interests of society ... and to ensure that justice may be administered by such judges in the courts, independently and on the basis of their unbiased opinion – not influenced by any apprehension of personal consequences.

24. The application of the analogy to the negligence of lawyers involves generalising the policy of the witness immunity and expressing it, as Lord Diplock did in *Saif Ali v. Sydney Mitchell & Co.* [1980] A.C. 198, 222, as a ‘general immunity from civil liability which attaches to all persons in respect of their participation in proceedings before a court of justice.’ Similarly, it has been said that advocates should enjoy judicial immunity because as participants in legal proceedings, they too are ‘actors’ performing a public function; or ‘members of an ensemble cast’: Groves & Derham, ‘Should Advocates’ Immunity Continue?’, *MULR* (2004) 97.
25. The rationale for the immunity of advocates (as opposed to other participants) is said to be to ‘ensure that trials are conducted [by advocates] without avoidable stress and tensions of alarm and fear in those who have a part to play in them’: Lord Diplock in *Saif Ali v. Sydney Mitchell & Co* (supra).
26. In particular, it could be argued that amongst all these ‘actors’ advocates have most in common with witnesses. Compared to the other immunities (noted above) the immunity of witnesses is more narrow; and is recognised only in respect of their evidence given in court (even if it is wrong or negligent). Similarly, the immunity of advocates is said to extend protection only to the core functions of advocates in legal proceedings, including the conduct of a case in court, and work performed that is intimately connected to in-court work. By contrast, judges enjoy immunity from the consequences of a decision or order made and issued, even if it is grossly mistaken, so long as the judge does not act knowingly beyond his or her jurisdiction: *Sirros v Moore* [1975] 1 AB 118.
27. Note though, that advocates may be liable for litigation conducted in bad faith (*Del Borrello* [2001] WASCA 348) and that statements and conduct occurring within and outside court may be led in evidence in support of such a claim.
28. In *Hall*, however, Lord Browne-Wilkinson argued that to generalise the witness immunity such that it can be extended by analogy to advocates is ‘illegitimate and dangerous’. Upon analysis, he found that in fact there is no analogy between judicial immunity, the immunity of witnesses and advocates’ immunity, as each is underpinned by a different rationale. For example, the witness immunity is to encourage freedom of expression, and is based upon a perception that without it, witnesses would otherwise be less inclined to come forward and tell the truth, which would be inimical to the interests of justice. As such, Lord Browne-Wilkinson said that it is not sufficient to explain any immunity relating to court proceedings by saying that the people involved should be free from “avoidable stress and tensions”, for:

[t]hat merely suggests that everyone would find litigation more agreeable if no awkward consequences could follow from anything which the participants did. It is another version of the vexation argument, which I have already rejected. It is necessary to go further and explain why the public interest requires that a particular participant should be free from the stress created by the possibility that he might be sued. How would he otherwise behave differently in a way which was contrary to the public interest?

29. Further, Lord Brown-Wilkinson argued that unlike a lawyer, a witness owes no duty of care to anyone in respect of the evidence he gives to the court. His only duty is to tell the truth. As such, it was stated that there is no analogy with the position of a lawyer who owes a duty of care to his client. Similarly, no analogy was said to exist with the position of the judge:

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

30. In *Lai v Chamberlains* [2005] NZCA 37 Hammond J also argued that it is not discriminatory to remove the immunity from advocates alone, given that the other kinds of immunities have their own distinct and eminently supportable justifications, which do not apply to advocates.

31. In *D'Orta*, Kirby J also argued that the witness analogy is unconvincing, as, for example, even witnesses probably do not enjoy an absolute immunity from suit 'in respect, say, of a report, prepared for a fee out of court on behalf of a party where that report contains negligent mistakes or omissions that cause reasonably foreseeable damage to that party'. Further, his Honour argued that any immunity that exists must be defined as an exception to the general principle that a party who is wronged by the negligence of another owing that party a duty of care, should normally have a remedy for any foreseeable damage thereby occasioned. To derogate from this duty by subsuming the private legal practitioner 'into the category of public officials and extending an absolute immunity whatever the negligence or wrong-doing revealed' cannot be sustained by functional analysis or coherent legal principle.

### ***The floodgates argument***

32. Another concern is that advocates will face a flood of claims from disgruntled clients that may have no merit but will be difficult to defend. In turn, this will create a burden for the court system.
33. In *D'Orta*, McHugh J argued that whilst those in favour of the abolition of the immunity tend to emphasise the 'unwinnable' character of such claims as a brake on the floodgates of litigation, defending a claim of negligence may also be difficult, even though the onus of proof remains on the plaintiff. This was said to be demonstrated by analogy with claims of incompetence of counsel in respect of criminal proceedings, and the notion that there may be a combination of events, including the incompetence of counsel, which together amount to a miscarriage of justice.

34. However, it remains that claims of incompetence of counsel are ‘almost always dismissed’;<sup>28</sup> and arguably it would be very onerous to successfully establish negligence in the conduct of litigation. If Courts are extremely cautious about finding ‘incompetence of counsel’ as a ground of appeal in criminal matters, then the same might be assumed in respect of claims of negligence. For example, in *R v Miletic* [1997] 1 VR 593 at 598-599 the Victorian Court of Appeal said:

No doubt there will be many decisions made by counsel which, in retrospect, might appear to have been ill advised. However the mere fact that such decisions have been made and appear in retrospect to have been unwise will not, of itself, lead a court of criminal appeal to quash a conviction, for the simple reason that the making of those decisions is part and parcel of the process of a fair trial ... A court of criminal appeal is poorly equipped to review decisions made by counsel during the course of a criminal trial, many of which have to be made on the spur of the moment or in circumstances with which an appellate court cannot hope to be familiar. Usually there must be something akin to flagrant incompetence of counsel before it will be moved to intervene.

35. McHugh J argued that although many of these claims of incompetence of counsel fail, many are brought, and this was said to indicate that a similar ‘flood’ would ensue if advocates’ immunity were abolished. This in turn would present a ‘major problem in an overloaded court system’. The short answer to this is that if a claim is unmeritorious, it can be struck out. As noted in *Hall* by Lord Steyn:

There is no reason to fear a flood of negligence suits against barristers, as the mere doing of his duty to the court by the advocate to the detriment of his client could never be called negligent. Indeed if the advocate's conduct was bona fide dictated by his perception of his duty to the court there would be no possibility of the court holding him to be negligent. Moreover, when such claims are made courts will take into account the difficult decisions faced daily by barristers working in demanding situations to tight timetables.... The courts can be trusted to differentiate between errors of judgment and true negligence. In any event, a plaintiff who claims that poor advocacy resulted in an unfavourable outcome will face the very great obstacle of showing that a better standard of advocacy would have resulted in a more favourable outcome. Unmeritorious claims against barristers will be struck out.

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<sup>28</sup> As noted by McHugh J at 197 in *D’Orta*.

**ADVOCATES' IMMUNITY FROM CIVIL SUIT**

**APPENDIX 3**

**RELITIGATION AND COLLATERAL ATTACK**

*What is 're-litigation' and 'collateral attack'?*

36. If a client could sue a barrister, it is said that the same controversy would implicitly be reopened, and the decision as to the barrister's negligence may undermine the finality of the decision to which the barrister's negligence relates. This is because the judgment in the first proceeding would continue to stand after another proceeding (ie the negligence claim) had reached a different conclusion. In a report of the Victorian Law Reform Commission, the Victorian Bar stated it thus:

The vice of such collateral litigation is that, if successful, it will not affect the binding nature of the initial decision, but will nevertheless leave it impugned by another decision, possibly of the same court, possibly on different evidence and, in any event, on different issues. The public would be unlikely to retain confidence in the original decision of the court in such circumstances, let alone respect for the entire system of justice.

Furthermore, if the initial decision is successfully impugned, the result will have come about without the successful party to the initial litigation being a party to the subsequent negligence action although it is the decision in his or her claim which is sought to be impugned.<sup>29</sup>

37. In *Hall* Lord Hobhouse of Woodborough also took the view that not all negligence claims would be of concern. Rather, 'collateral attack' arises when a claim of negligence amounts to an abuse of process (i.e. there is nothing that could reasonably amount to negligence on the part of the barrister, but the claimant wishes to impugn the relevant judgment). As such, 'collateral attack' was said to be a 'distinct concept', and challenging a previous decision should not in itself necessarily connote an abuse of process. Thus Lord Hobhouse indicated that abolishing the immunity will only in some cases give rise to the problem of collateral attack, and when it does, those cases can be disposed of summarily.

38. However, assuming unmeritorious claims could be struck out as an abuse of process, a successful claim of negligence in respect of a civil or criminal matter could, arguably, still undermine the principle of finality. On this question, the House of Lords indicated that 'not all re-litigation of the same issue will be manifestly unfair to a party or bring the administration of justice in to disrepute' (Lord Hoffman, section 21).

39. The English cases demonstrate two clear types of re-litigation. The first is without merit and designed to impugn the original judgment. It would be

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<sup>29</sup> Law Reform Commission of Victoria, *Access to the law: Accountability of the Legal Profession*, Report No.48, July 1992, p.27.

essential, if the immunity was abolished, that such “collateral attack” claims could be disposed of summarily. The second type of re-litigation would be a claim of substance, such that it may be appropriate for the court to hear and determine the claim. To fail to allow for a hearing and, if appropriate, a remedy in those circumstances may do greater harm to the system of justice than the risk to the finality of judgments.

40. The English law now reflects the view stated by Kreever J stated in *Demarco*: ‘better that [a matter be retried over again] than the client should be without recourse’. In other words, whilst the public interest in the finality of litigation is no doubt strong, so too is the public policy in favour of rights of compensation against those whose negligence causes harm to others.
41. The VLRC was also mindful of this point in its 1992 Report, in which it recommended that the immunity of advocates from liability for negligent ‘in-court’ work should be abolished:

To some extent the ‘finality’ argument is misleading since it tends to imply literal ‘re-litigation of an earlier decision; [when in fact] this is not the case at all. .... How persuasive one finds the finality argument really depends on the view one takes of which vice is more destructive of public confidence in the legal system. The first vice is that, on some relatively small number of occasions, one lawsuit will result in another lawsuit between a party and the barrister who represented that party in the first. The second vice is that litigants should be denied any right to sue their barristers, no matter how grossly incompetent.<sup>30</sup>

### ***Re-litigation: a particular concern for criminal proceedings?***

42. It is arguable that the risks to the administration of justice arising from re-litigation are greater in the case of criminal proceedings. This may be due to the way in which criminal proceedings operate (for example, some commentators consider that the courts have less control over proceedings, such that it is vital that advocates are able to exercise independent judgment); the more ‘public’ nature of criminal proceedings; the possible consequences of a finding of guilt in criminal proceedings; or the concern that the implications of re-litigation in relation to criminal proceedings are more severe.
43. In its 1992 Report<sup>31</sup>, the VLRC distinguished between civil and criminal proceedings in its consideration of this issue of re-litigation. While it found that special measures were required in relation to criminal proceedings (see below), the VLRC found that in respect of civil proceedings, a subsequent action in negligence is *not* actually an interference with the judgment in the original proceedings; rather, it is the fact that the original judgment stands that provides the basis for the plaintiff’s negligence action. Further, ‘the proceeding between the plaintiff and the defendant barrister is a matter of complete indifference to the other parties to the original proceeding’.<sup>32</sup> The Victorian Bar has responded to this argument, providing as an illustration a situation where the parties to the

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<sup>30</sup> Ibid, p.36

<sup>31</sup> Ibid, p.28

<sup>32</sup> VLRC Report, op cit, p.28

original proceeding may be very interested in the outcome of subsequent negligence claim<sup>33</sup>.

44. Collateral attack was said to be a problem *only* where the negligence claimed relates to advocacy in a criminal case. The VLRC stressed that in criminal proceedings, assurance is required against the conviction of innocent people. Obvious manifestations of this central concern were said to be the standard of proof, the requirement of a unanimous jury verdict; and the criminal appellate process. However, if a negligence action were to succeed against a barrister in respect of a criminal proceeding, the plaintiff would need to prove that but for the barrister's negligence, he or she would have been acquitted. And yet, this test would be determined on a civil standard of proof, and by judge alone.
45. Accordingly, the VLRC recommended that there should be a rule that plaintiffs cannot bring an action against an advocate for negligence in the course of criminal proceedings unless the plaintiff has succeeded in having the conviction (or sentence) set aside on appeal or in a petition of mercy.<sup>34</sup> This rule was said to provide a 'complete answer' to the problem of collateral attacks in criminal matters.
46. In *Hall* three members of the House of Lords dissented on whether the immunity should be abolished for criminal proceedings (arguing that it should not be), also noting some of the key differences between civil and criminal proceedings. The special public interest in criminal proceedings was stressed, as was the need to maintain public confidence in the ability of the judicial process to reach the correct verdict. It was said that even though the criminal process is formally adversarial, it is of a fundamentally different character to the civil process, and has a different purpose and function (a 'directly social' one). Lord Hobhouse of Woodborough stated:

Criminal trials do not exist to protect private interests but the public interest in the enforcement of the criminal law... Those who take part in the trial do so as a public duty whether in exchange for remuneration or the payment of expenses. The proceedings are conducted in public under judicial control. The position of the advocates is the same as that of the other participants. The prosecuting advocate has a duty to see that the prosecution case is, on behalf of the Crown, presented effectively and fairly. That of the defending advocate is to see that the defendant has a fair trial, that the prosecution case is properly probed and tested both in fact and in law and that his factual and legal defences are properly placed before the court supported by the available evidence and arguments... The advocate is performing a public function in the public interest. It is his public duty to protect the interests of his client. The criminal justice system depends upon his doing so skilfully and independently.

47. Thus the suggestion was that a private cause of action in tort would compromise counsel's ability to perform his or her public function, and re-litigation of a

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<sup>33</sup> For example, if a plaintiff successfully brings a defamation claim, but the defendant subsequently successfully proves negligence against his or her barrister in respect of the defamation trial, then the decision as to the barrister's negligence might suggest that the defendant was not in fact guilty of defamation. In other words, 'the reputation of the plaintiff in the defamation proceeding would again be in issue at the trial of the second suit against the barrister, and subject to being reported in the press', yet the plaintiff would have no part to play in those proceedings.

<sup>34</sup> *Ibid*, p.30

criminal matter on the basis of a private interest would derogate from the criminal law's 'directly social purpose'.

48. However, the majority in the House of Lords effectively agreed with the VLRC in relation to criminal matters. They held that an answer to these concerns about the nature of the criminal process and the danger of conflicting judgments is that a claim against a barrister in respect of negligence for criminal proceedings will be struck out as an abuse of process unless the conviction has first been quashed via an appeal process. As stated by Lord Hoffman:

It would ordinarily be an abuse of process for a civil court to be asked to decide that a subsisting conviction was wrong. This applies to a conviction on a plea of guilty as well as after a trial. The resulting conflict of judgments is likely to bring the administration of justice into disrepute.... I say it will ordinarily be an abuse because there are bound to be exceptional cases in which the issue can be tried without a risk that the conflict of judgments would bring the administration of justice into disrepute. ... [However] once the conviction has been set aside, there can be no public policy objection to an action for negligence against the legal advisers. There can be no conflict of judgments...

49. In *D'Orta*, the majority held the immunity was necessary in relation to both civil and criminal proceedings. In relation to the issue of 'collateral attack', the Court found that there is no useful distinction between civil and criminal proceedings [at 77]. In the joint judgment, their Honours asserted that it was wrong to imply that the administration of the civil law should give rise to judgments worthy of less respect than those reached on the trial of indictable or other offences, given that:

[i]n cases where a client sues an advocate, the client will always have been a party to the proceeding the result in which is challenged. If effect is to be given to the principle that decisions of the courts, unless set aside or quashed, are to be accepted as incontrovertibly correct, it must be applied at least to the parties to the proceeding in which the decision is given. The final outcome of the proceeding, whether "civil" or "criminal" or a hybrid proceeding, must be incontrovertible by the parties to it.

If that is right, it follows that no remedy is to be provided if its provision depends upon demonstrating that a different final result should have been reached in the earlier litigation. [at 79].

**ADVOCATES' IMMUNITY FROM CIVIL SUIT**

**APPENDIX 4**

**RULES OF CIVIL PROCEDURE**

**UNITED KINGDOM**

**Rules of Civil Procedure**

**24. Grounds for summary judgment**

24.2 The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –

(a) it considers that –

- (i) that claimant has no real prospect of succeeding on the claim or issue; or
- (ii) that defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial.

**3.4 Power to strike out a statement of case**

- (1) In this rule and rule 3.5, reference to a statement of case includes reference to part of a statement of case.
- (2) The court may strike out a statement of case if it appears to the court –
  - (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
  - (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
  - (c) that there has been a failure to comply with a rule, practice direction or court order.

## **NEW ZEALAND**

### **Summary judgment**

Rules 477 of the High Court Rules and 481 of the District Court Rules 1992 state:

Where in any proceeding it appears to the Court that in relation to the proceeding generally or in relation to any claim for relief in the proceeding-

- (a) no reasonable cause of action is disclosed; or
- (b) the proceeding is frivolous or vexatious; or
- (c) the proceeding is an abuse of process of the Court-

the Court may order that the proceeding be stayed or dismissed generally or in relation to any claim for relief in the proceeding.

### **Power to strike out**

Rules 186 of the High Court Rules and 209 of the District Court Rules enable the courts to strike out a pleading where that pleading:

- (a) discloses no reasonable cause of action or defence or other case appropriate to the nature of the pleading; or
- (b) is likely to cause prejudice, embarrassment or delay in the proceedings; or
- (c) is otherwise an abuse of the process of the Court.

## **VICTORIA & NORTHERN TERRITORY\***

### **Victorian Supreme Court –**

#### **General Rules of Procedure in Civil Proceedings**

##### **23.01 Stay or judgment in proceeding**

- (1) Where a proceeding generally or any claim in a proceeding—
- (a) does not disclose a cause of action;
  - (b) is scandalous, frivolous or vexatious; or
  - (c) is an abuse of the process of the Court—

the Court may stay the proceeding generally or in relation to any claim or give judgment in the proceeding generally or in relation to any claim.

- (2) Where the defence to any claim in a proceeding—
- (a) does not disclose an answer; or
  - (b) is scandalous, frivolous or vexatious—

the Court may give judgment in the proceeding generally or in relation to any claim.

- (3) In this Rule a claim in a proceeding includes a claim by counterclaim and a claim by third party notice, and a defence includes a defence to a counterclaim and a defence to a claim by third party notice.

##### **23.03 Summary judgment for defendant**

On application by a defendant who has filed an appearance the Court at any time may give judgment for that defendant against the plaintiff if the defendant has a good defence on the merits.

##### **23.02 Striking out pleading**

Where an indorsement of claim on a writ or originating motion or a pleading or any part of an indorsement of claim or pleading—

- (a) does not disclose a cause of action or defence;
- (b) is scandalous, frivolous or vexatious;
- (c) may prejudice, embarrass or delay the fair trial of the proceeding; or
- (d) is otherwise an abuse of the process of the Court—

the Court may order that the whole or part of the indorsement or pleading be struck out or amended.

*\* The NT rules closely mirror the Victorian Supreme Court Rules*

## **NEW SOUTH WALES**

### **Civil Procedure Act 2005**

#### **Uniform Civil Procedure Rules 2005**

##### **Rule 13.4 Frivolous and vexatious proceedings**

- (1) If in any proceedings it appears to the court that in relation to the proceedings generally or in relation to any claim for relief in the proceedings:
  - (a) the proceedings are frivolous or vexatious, or
  - (b) no reasonable cause of action is disclosed, or
  - (c) the proceedings are an abuse of the process of the court,

the court may order that the proceedings be dismissed generally or in relation to that claim.
- (2) The court may receive evidence on the hearing of an application for an order under subrule (1).

##### **Rule 14.28 Circumstances in which court may strike out pleadings**

- (1) The court may at any stage of the proceedings order that the whole or any part of a pleading be struck out if the pleading:
  - (a) discloses no reasonable cause of action or defence or other case appropriate to the nature of the pleading, or
  - (b) has a tendency to cause prejudice, embarrassment or delay in the proceedings, or
  - (c) is otherwise an abuse of the process of the court.
- (2) The court may receive evidence on the hearing of an application for an order under subrule (1).

##### **Rule 29.9 Dismissal of proceedings on defendant's application**

- (1) A defendant in proceedings in which the plaintiff is the beginning party may apply to the court for an order:
  - (a) for the dismissal of the proceedings, or
  - (b) for the dismissal of the proceedings to the extent to which they concern any cause of action relevant to the plaintiff's claim for relief against that defendant,

on the ground that, on the evidence given, a judgment for the plaintiff could not be supported.

- (2) Such an application may be made at any time after the conclusion of the evidence for the plaintiff in his or her case in chief.
- (3) The plaintiff may argue, or decline to argue, the question raised by the application.
- (4) The court may not make an order under this rule unless the plaintiff argues the question raised by the application and the defendant satisfies the court that, on the evidence given, a judgment for the plaintiff could not be supported.
- (5) If the plaintiff declines to argue the question raised by the application, or if the defendant fails to satisfy the court that, on the evidence given, a judgment for the plaintiff could not be supported, the defendant:
  - (a) may adduce evidence or further evidence, or
  - (b) may make an application under rule 29.10.
- (6) If fewer than all defendants apply to the court under subrule (1), the court must not deal with any such application before the conclusion of the evidence given for all parties.

**Rule 29.10 Judgment for want of evidence**

- (1) An opposite party may apply to the court to give judgment for the opposite party, either generally or on any claim for relief in the proceedings, on the ground that, on the evidence given, a judgment for the beginning party could not be supported.
- (2) Such an application may be made at any time after the conclusion of the evidence for the beginning party in his or her case in chief.
- (3) The court may not give judgment under this rule unless the opposite party satisfies the court that, on the evidence given, a judgment for the beginning party could not be supported.
- (4) If the opposite party fails to satisfy the court that, on the evidence given, a judgment for the beginning party could not be supported, the opposite party may not adduce evidence or further evidence in the proceedings generally or on the claim for relief concerned, as the case may be, except by leave of the court.
- (5) If not all opposite parties apply to the court under subrule (1), the court must not deal with any such application before the conclusion of the evidence given for all parties.

## **QUEENSLAND**

### **Uniform Civil Procedure Rules 1999**

#### **292 Summary judgment for plaintiff**

- (1) A plaintiff may, at any time after a defendant files a notice of intention to defend, apply to the court under this part for judgment against the defendant.
- (2) If the court is satisfied that-
  - (a) the defendant has no real prospect of successfully defending all or a part of the plaintiff's claim; and
  - (b) there is no need for a trial of the claim or the part of the claim;

the court may give judgment for the plaintiff against the defendant for all or the part of the plaintiff's claim and may make any other order the court considers appropriate.

#### **293 Summary judgment for defendant**

- (1) A defendant may, at any time after filing a notice of intention to defend, apply to the court under this part for judgment against a plaintiff.
- (2) If the court is satisfied-
  - (a) the plaintiff has no real prospect of succeeding on all or a part of the plaintiff's claim; and
  - (b) there is no need for a trial of the claim or the part of the claim;

the court may give judgment for the defendant against the plaintiff for all or the part of the plaintiff's claim and may make any other order the court considers appropriate.

#### **171 Striking out pleadings**

- (1) This rule applies if a pleading or part of a pleading—
  - (a) discloses no reasonable cause of action or defence; or
  - (b) has a tendency to prejudice or delay the fair trial of the proceeding; or
  - (c) is unnecessary or scandalous; or
  - (d) is frivolous or vexatious; or
  - (e) is otherwise an abuse of the process of the court.
- (2) The court, at any stage of the proceeding, may strike out all or part of the pleading and order the costs of the application to be paid by a party calculated on the indemnity basis.
- (3) On the hearing of an application under subrule (2), the court is not limited to receiving evidence about the pleading.

## **SOUTH AUSTRALIA**

### **Supreme Court Rules**

#### **Summary judgment**

##### **Rule 25.04(1)(c)**

For a defendant's application for summary judgment, the defendant must file an affidavit showing why the plaintiff's case

*cannot succeed, or cannot succeed in this Court, as the case may be, on any possible view of the facts or the law.*

If the Court is satisfied of that, it can give summary judgment or make any of various other orders, or treat the application as an application for directions.

This rule applies in both the Supreme Court and the District Court.

In the Magistrates Court, the rule is similar:

8. (1) *Where a party wishes to obtain –*

*(a) summary judgment in, or the disposal of the whole or part of, an action;*

*or*

*(b) immediate relief,*

*he or she may do so on application accompanied by an affidavit specifying –*

*(c) why the other party does not have a good action or defence on the merits on any possible view of the facts or law;*

*or*

*(d) why such relief should be granted.*

(2) *The Court may –*

*(a) enter judgment accordingly;*

*(b) grant the whole or part of the relief sought, and order that the action continue in relation to the part not disposed of;*

*(c) make an order for an early trial;*

*or*

*(d) make any other order.*

