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House of Lords

Arthur J S Hall & Co (a firm) *v* Simons

Barratt *v* Woolf Seddon (a firm)

Harris *v* Scholfield Roberts & Hill (a firm)

1998 Nov 9, 10, 11, 12, 13; Dec 14
2000 March 27, 28, 29, 30; 2000 July 20

Lord Bingham of Cornhill CJ, Morritt and Walker LJJ, Lord Steyn, Lord Browne-Wilkinson, Lord Hoffmann, Lord Hope of Craighead, Lord Hutton, Lord Hobhouse of Woodborough and Lord Millett

Solicitor — Negligence — Immunity from suit — Claims for negligence against solicitors advising on or negotiating settlements — Solicitors claiming immunity from suit — Whether solicitors and advocates enjoying immunity — Whether risk of collateral attack on court orders

In the first case plaintiff solicitors had acted for the defendant in protracted litigation concerning a building dispute. On the eve of the trial the defendant had been advised by counsel to compromise the proceedings on terms negotiated by counsel and the plaintiffs and subsequently embodied in a consent order. In proceedings brought by the plaintiffs for recovery of their fees the defendant counterclaimed alleging their negligence, in particular, in failing to advise properly as to the liability of other parties and as to timeous settlement.

In the second case the plaintiff retained the defendants to advise and act for him in matrimonial ancillary relief proceedings. Following agreement, based on the wife's valuation of the former matrimonial home, that she would receive a guaranteed sum from the proceeds of its sale, the defendants prepared and lodged with the court a minute of order which was approved and made by consent. When sale of the property was achieved at a reduced figure the plaintiff applied successfully for the consent order to be set aside and the sum payable to the wife was varied. The plaintiff claimed damages for negligence, in particular, by the defendants' failure to provide proper advice on valuation and division of the proceeds of sale and by their lodging the minute of order which recorded an inaccurate valuation.

In the third case the plaintiff instructed the defendants to advise her in matrimonial ancillary relief proceedings. Prior to any application for relief counsel, instructed by the defendants, advised on the appropriate level of periodical payments and on the possibility of contributions from the husband's cohabitee. On the trial date different counsel, also instructed by the defendants, advised her to settle at a lower level of relief on the incorrect basis that the husband's relationship had ceased. She accepted the compromise which was approved by the court and embodied in a consent order. On discovering the husband's marriage to the cohabitee she sought to appeal against the consent order and also commenced proceedings for negligence against the defendants alleging that they had failed to instruct competent counsel and properly to investigate the situation relating to the cohabitee.

In each case the judge at first instance concluded that the solicitors enjoyed an advocate's immunity from suit and struck out the client's claims against them as an abuse of process of the court. The Court of Appeal, having heard the cases together, ruled that in none of the cases were the solicitors immune from suit and restored the clients' claims.

On appeals by the solicitors—

Held, (1) that in the light of changes in the law of negligence, the functioning of the legal profession, the administration of justice and public perceptions reconsideration of the issue of advocates' immunity from suit was appropriate; that

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none of the reasons said to justify the immunity, viz the "cab rank" rule, the analogy with the immunities of witnesses and others involved in legal proceedings, the duty of the advocate to the court and the public policy against relitigating a decision of a court of competent jurisdiction, had sufficient weight to sustain the immunity in relation to civil proceedings; that the principles of res judicata, issue estoppel and abuse of process were sufficient to prevent any action being maintained which would be unfair or bring the administration of justice into disrepute; that the obstacle of proving that a better standard of advocacy would have produced a different outcome and the ability of the court to strike out unsustainable claims under CPR r 24.2 would restrict the ability of clients to bring unmeritorious and vexatious claims against advocates should the immunity be removed; and that, accordingly, 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 (post pp 678H–679C, 681E–G, 682B–G, 683F–G, 684A–D, 688D–E, F–H, 690B–D, 690G–692C, H–693E, H–694A, E–G, 696G–697A, 698A–F, 699B–C, 703D–F, 704A–C, F–705A, 706G–707B, 709F–710B, 712A–B, 713D–E, 714D–715A, 724D–725B, 726G–H, 727B–C, 728A–E, 729G–H, 735C–D, 736H–737D, 744A–B, 745C–D, 749H–750A, 752B).

(2) (Lord Hope of Craighead and Lord Hobhouse of Woodborough dissenting) that, since a collateral challenge in civil proceedings to a criminal conviction was prima facie an abuse of process and ordinarily such an action would be struck out, an advocate's immunity from suit was not required to prevent collateral attacks on criminal decisions (post, pp 679C–E, F–680C, 683F, 684F–685D, 706A–D, 727A–B, 730A–B, 752B).

(3) (Lord Hope of Craighead, Lord Hutton and Lord Hobhouse of Woodborough dissenting) that none of the other factors said to justify the immunity had sufficient weight to warrant its retention in relation to criminal proceedings; 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 representatives at a criminal trial; and that, accordingly, the public interest no longer required that advocates enjoy immunity from suit for negligence in the conduct of criminal actions (post, pp 683F, 684D–F, 685C–E, 695G–696F, 703D–F, 704A–C, 706E–G, 707B–C, 752B, 753E).

Hunter v Chief Constable of the West Midlands Police [1982] AC 529, HL(E) applied.

Rondel v Worsley [1969] 1 AC 191, HL(E) not followed.

Saif Ali v Sydney Mitchell & Co [1980] AC 198 considered.

(4) Dismissing the appeals, that the clients' claims did not invoke the advocate's immunity from suit and involved nothing which would be unfair to their solicitors or liable to bring the administration of justice into disrepute; and that, accordingly, the claims would be allowed to proceed (post, pp 684A, 685E, 705B–E, 707D–E, 709B–E, 726G–H, 735B, 752A–B, 753E).

Decision of the Court of Appeal, post p 623H et seq; [1999] 3 WLR 873 affirmed.

The following cases are referred to in their Lordships' opinions:

Acton v Graham Pearce & Co [1997] 3 All ER 909
Anderson v HM Advocate 1996 SC 29
Arenson v Arenson [1977] AC 405; [1975] 3 WLR 815; [1975] 3 All ER 901, HL(E)
Arnold v National Westminster Bank plc [1991] 2 AC 93; [1991] 2 WLR 1177; [1991] 3 All ER 41, HL(E)
Ashingdane v United Kingdom (1985) 7 EHRR 528
Ashmore v British Coal Corpn [1990] 2 QB 338; [1990] 2 WLR 1437; [1990] 2 All ER 981, CA
Atwell v Michael Perry & Co [1998] 4 All ER 65
Batchelor v Pattison and Mackersy (1876) 3 R 914
Bateman v Owen White [1996] PNLR 1, CA
Boland v Yates Property Corpn Pty Ltd (1999) 74 ALJR 209
Bradshaw v Joseph (1995) 666 A2d 1175
Browne v Robb (1990) 583 A2d 949

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A *Coyazo v State of New Mexico* (1995) 897 P2d 234
Crooks v Haddow 2000 GWD 10–367
Crooks v Lawford Kidd & Co 1999 GWD 14–651
Demarco v Ungaro (1979) 95 DLR (3d) 385
Elguzouli-Daf v Comr of Police of the Metropolis [1995] QB 335; [1995] 2 WLR 173; [1995] 1 All ER 833, CA
Fayed v United Kingdom (1994) 18 EHRR 393
B *Ferri v Ackerman* (1979) 444 US 193
Fletamentos Maritimos SA v Effjohn International BV (unreported) 10 December 1997; Court of Appeal (Civil Division) Transcript No 2115 of 1997, CA
Garrant v Moskal [1985] 2 WWR 80; [1985] 6 WWR 31
Giannarelli v Wraith (1988) 165 CLR 543
Golder v United Kingdom (1975) 1 EHRR 524
Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465; [1963] 3 WLR 101; [1963] 2 All ER 575, HL(E)
C *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145; [1994] 3 WLR 761; [1994] 3 All ER 506, HL(E)
Hodge (M) & Sons Ltd v Monaghan (1985) 51 Nfld & PEIR 173
Hollington v F Hewthorn & Co Ltd [1943] KB 587; [1943] 2 All ER 35, CA
Hunter v Chief Constable of the West Midlands Police [1982] AC 529; [1981] 3 WLR 906; [1981] 3 All ER 727, HL(E)
D *Imbler v Pachtman* (1976) 424 US 409
Karpenko v Paroian, Courey, Cohen & Houston (1980) 30 OR (2d) 776
Kelley v Corston [1998] QB 686; [1998] 3 WLR 246; [1997] 4 All ER 466, CA
Kitchen v Royal Air Force Association [1958] 1 WLR 563; [1958] 2 All ER 241, CA
Ladd v Marshall [1954] 1 WLR 1489; [1954] 3 All ER 745, CA
Law Hospital NHS Trust v Lord Advocate 1996 SC 301
Lithgow v United Kingdom (1986) 8 EHRR 329
E *McC (A Minor), In re* [1985] AC 528; [1984] 3 WLR 1227; [1984] 3 All ER 908, HL(NI)
Mann v O'Neill (1997) 191 CLR 204
Marrinan v Vibart [1963] 1 QB 528; [1962] 3 WLR 912; [1962] 3 All ER 380, CA
Martin v Watson [1996] AC 74; [1995] 3 WLR 318; [1995] 3 All ER 559, HL(E)
Morgano v Smith (1994) 879 P2d 735
Munster v Lamb (1883) 11 QBD 588, CA
Osman v United Kingdom [1999] 1 FLR 193
F *Pelky v Hudson Bay Insurance Co* (1981) 35 OR (2d) 97
R v Clinton [1993] 1 WLR 1181; [1993] 2 All ER 998, CA
R v Secretary of State for the Home Department, Ex p Simms [2000] 2 AC 115; [1999] 3 WLR 328; [1999] 3 All ER 400, HL(E)
Rees v Sinclair [1974] 1 NZLR 180
Reese v Danforth (1979) 406 A2d 735
Reichel v Magrath (1889) 14 App Cas 665, HL(E)
G *Ridehalgh v Horsefield* [1994] Ch 205; [1994] 3 WLR 462; [1994] 3 All ER 848, CA
Rondel v Worsley [1967] 1 QB 443; [1966] 3 WLR 950; [1966] 3 All ER 657, CA; [1969] 1 AC 191; [1967] 3 WLR 1666; [1967] 3 All ER 993, HL(E)
Roy v Prior [1971] AC 470; [1970] 3 WLR 202; [1970] 2 All ER 729, HL(E)
Saif Ali v Sydney Mitchell & Co [1980] AC 198; [1978] 3 WLR 849; [1978] 3 All ER 1033, HL(E)
Smith v Linskills [1996] 1 WLR 763; [1996] 2 All ER 353, CA
H *Somasundaram v M Julius Melchior & Co* [1988] 1 WLR 1394; [1989] 1 All ER 129, CA
Southwark London Borough Council v Mills [2001] 1 AC 1; [1999] 3 WLR 939; [1999] 4 All ER 449, HL(E)
Spring v Constantino (1975) 362 A2d 871
Stanton v Callaghan [2000] QB 75; [1999] 2 WLR 745; [1998] 4 All ER 961, CA

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Sutcliffe v Thackrah [1974] AC 727; [1974] 2 WLR 295; [1974] 1 All ER 319, HL(E)
Swain v Hillman [2001] 1 All ER 91; The Times, 4 November 1999, CA
TA Picot (CI) Ltd v Michel [1995] 2 LRC 247
Taylor v Director of the Serious Fraud Office [1999] 2 AC 177; [1998] 3 WLR 1040; [1998] 4 All ER 801, HL(E)
Tinnelly & Sons Ltd v United Kingdom (1998) 27 EHRR 249
Walpole v Partridge & Wilson [1994] QB 106; [1993] 3 WLR 1093; [1994] 1 All ER 385, CA
Waring, In re (No 2) [1948] Ch 221; [1948] 1 All ER 257

The following additional cases were cited in argument:

Biggar v McLeod [1978] 2 NZLR 9
Dinch v Dinch [1987] 1 WLR 252; [1987] 1 All ER 818, HL(E)
Food Corpn of India v Antclizo Shipping Corpn [1988] 1 WLR 603; [1988] 2 All ER 513, HL(E)
Harris (formerly Manahan) v Manahan [1996] 4 All ER 454, CA
Jenkins v Livesey (formerly Jenkins) [1985] AC 424; [1985] 2 WLR 47; [1985] 1 All ER 106, HL(E)
Landall v Dennis Faulkner & Alsop [1994] 5 Med LR 268
McFarlane v Wilkinson [1996] 1 Lloyd's Rep 406
Pounds v Pounds [1994] 1 WLR 1535; [1994] 4 All ER 777, CA
Richards v Witherspoon [1999] PNLR 776, CA
Robinson v Robinson (Practice Note) [1982] 1 WLR 786; [1982] 2 All ER 699, CA
Smith v Linskills [1996] 1 WLR 763; [1996] 2 All ER 353, CA
Stubbings v United Kingdom (1996) 23 EHRR 213
T v T (Consent Order: Procedure to Set Aside) [1996] 2 FLR 640
Vernon v Bosley (No 2) [1999] QB 18; [1997] 3 WLR 683; [1997] 1 All ER 614, CA
Xydhias v Xydhias [1999] 2 All ER 386, CA

The following cases are referred to in the judgment of the Court of Appeal:

Acton v Graham Pearce & Co [1997] 3 All ER 909
Ashmore v British Coal Corpn [1990] 2 QB 338; [1990] 2 WLR 1437; [1990] 2 All ER 981, CA
Atwell v Michael Perry & Co [1998] 4 All ER 65
B v Miller & Co [1996] 2 FLR 23
Barder v Barder [1988] AC 20; [1987] 2 WLR 1350; [1987] 2 All ER 440, HL(E)
Bateman v Owen White [1996] PNLR 1, CA
Biggar v McLeod [1977] 1 NZLR 321; [1978] 2 NZLR 9
Boys v Chaplin [1968] 2 QB 1; [1968] 2 WLR 328; [1968] 1 All ER 283, CA
Chong Yeo & Partners v Guan Ming Hardware & Engineering Pte Ltd [1997] 2 SLR 729
Christy (Thomas) Ltd, In re [1994] 2 BCLC 527
Connolly-Martin v D The Times, 17 August 1998
Dean v Dean [1978] Fam 161; [1978] 3 WLR 288; [1978] 3 All ER 758
de Lasala v de Lasala [1980] AC 546; [1979] 3 WLR 390; [1979] 2 All ER 1146, PC
Dickinson v Jones Alexander & Co [1993] 2 FLR 521
Dinch v Dinch [1987] 1 WLR 252; [1987] 1 All ER 818, HL(E)
Donellan v Watson (1990) 21 NSWLR 335
Flashman v Bond Pearce (unreported) 17 July 1998, Buckley J
Giannarelli v Wraith (1988) 165 CLR 543
Green v Rozen [1955] 1 WLR 741; [1955] 2 All ER 797
Griffin v Kingsmill [1998] PIQR P24
Griffin v Kingsmill (No 2) (unreported) 20 February 1998, Buckley J
Griffiths v Dawson & Co [1993] 2 FLR 315
Harris (formerly Manahan) v Manahan [1996] 4 All ER 454, CA

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A *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529; [1981] 3 WLR 906; [1981] 3 All ER 727, HL(E)
Jenkins v Livesey (formerly Jenkins) [1984] FLR 452, CA; [1985] AC 424; [1985] 2 WLR 47; [1985] 1 All ER 106, HL(E)
Keefe v Marks (1989) 16 NSWLR 713
Keegan Alexander Tedcastle & Friedlander v Hurst [1997] DCR 481
Kelley v Corston [1998] QB 686; [1998] 3 WLR 246; [1997] 4 All ER 466, CA
B *Landall v Dennis Faulkner & Alsop* [1994] 5 Med LR 268
McFarlane v Wilkinson [1996] 1 Lloyd's Rep 406
Noel v Becker (Practice Note) [1971] 1 WLR 355; [1971] 2 All ER 1186, CA
North West Water Ltd v Binnie & Partners [1990] 3 All ER 547
Oliver v McKenna & Co (unreported) 30 November 1995, Laddie J
Palmer v Durnford Ford [1992] QB 483; [1992] 2 WLR 407; [1992] 2 All ER 122
Peacock v Peacock [1991] 1 FLR 324
C *Phosphate Sewage Co Ltd v Molleson* (1879) 4 App Cas 801, HL(Sc)
Pounds v Pounds [1994] 1 WLR 1535; [1994] 4 All ER 777, CA
Practice Direction (Family Division: Financial Statement) [1984] 1 WLR 674; [1984] 2 All ER 256
Practice Direction (Financial Provision: Consent Order) [1986] 1 WLR 381; [1986] 1 All ER 704
Practice Direction (Financial Provision: Consent Order) (No 2) [1990] 1 WLR 150
D *Rees v Sinclair* [1973] 1 NZLR 236; [1974] 1 NZLR 180
Richards v Witherspoon (unreported) 6 May 1998, Judge Pollard
Rondel v Worsley [1967] 1 QB 443; [1966] 3 WLR 950; [1966] 3 All ER 657, CA; [1969] 1 AC 191; [1967] 3 WLR 1666; [1967] 3 All ER 993, HL(E)
Saif Ali v Sydney Mitchell & Co [1978] QB 95; [1977] 3 WLR 421; [1977] 3 All ER 744, CA; [1980] AC 198; [1978] 3 WLR 849; [1978] 3 All ER 1033, HL(E)
Sinanan v Innes Pitassi & Co (unreported) 20 February 1991; Court of Appeal (Civil Division), Transcript No 125 of 1991, CA
E *Smith v Linskills* [1996] 1 WLR 763; [1996] 2 All ER 353, CA
Somasundaram v M Julius Melchior & Co [1988] 1 WLR 1394; [1989] 1 All ER 129, CA
TA Picot (CI) Ltd v Michel [1995] 2 LRC 247
Thompson v Howley [1977] 1 NZLR 16
Thwaite v Thwaite [1982] Fam 1; [1981] 3 WLR 96; [1981] 2 All ER 789, CA
Walpole v Partridge & Wilson [1994] QB 106; [1993] 3 WLR 1093; [1994] 1 All ER
F 385, CA
Wright Son & Pepper v Smith (unreported) 10 November 1994, Sir Peter Pain
Yates Property Corpn Pty Ltd v Boland (1997) 145 ALR 169

The following additional cases were cited in argument before the Court of Appeal:

Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd [1982] 2 Lloyd's
G Rep 132, CA
Hatch v Lewis (1861) 2 F & F 467
Hawkins v Harwood (1849) 4 Ex 503
Marsh v Marsh [1993] 1 WLR 744; [1993] 2 All ER 794, CA
Osman v United Kingdom [1999] 1 FLR 193
Practice Direction (Decrees and Orders: Agreed Terms) [1972] 1 WLR 1313: [1972] 3 All ER 704
H *Stanton v Callaghan* [2000] 1 QB 75; [1999] 2 WLR 745; [1998] 4 All ER 961, CA
Sutton v Sutton [1984] Ch 184; [1984] 2 WLR 146; [1984] 1 All ER 168
Swinfen v Lord Chelmsford (1860) 5 H & N 890
T v T (Consent Order: Procedure to Set Aside) [1996] 2 FLR 640
Taylor v Director of the Serious Fraud Office [1999] 2 AC 177; [1998] 3 WLR 1040; [1998] 4 All ER 801, HL(E)

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Tommey v Tommey [1983] Fam 15; [1982] 3 WLR 909; [1982] 3 All ER 385
X (Minors) v Bedfordshire County Council [1995] 2 AC 633; [1995] 3 WLR 152; [1995] 3 All ER 353, HL(E)
Young v Bristol Aeroplane Co Ltd [1944] KB 718; [1944] 2 All ER 293, CA

The following additional cases, although not cited in argument, were referred to in the skeleton arguments before the Court of Appeal:

A & M Records Inc v Darakdjian [1975] 1 WLR 1610; [1975] 3 All ER 983
Allied Maples Group Ltd v Simmons & Simmons [1995] 1 WLR 1602; [1995] 4 All ER 907, CA
American Cyanamid Co v Ethicon Ltd [1975] AC 396; [1975] 2 WLR 316; [1975] 1 All ER 504, HL(E)
Attorney General v Prince and Gardner [1998] 1 NZLR 262
B v B (Consent Order: Variation) [1995] 1 FLR 9, CA
Barrett v Barrett [1988] 2 FLR 516, CA
Benson v Benson (Deceased) [1996] 1 FLR 692
C v C (Financial Provision: Non-Disclosure) [1994] 2 FLR 272
Davy-Chiesman v Davy-Chiesman [1984] Fam 48; [1984] 2 WLR 291; [1984] 1 All ER 321, CA
Duxbury v Duxbury (Note) [1992] Fam 62; [1991] 3 WLR 639; [1990] 2 All ER 77, CA
Edgar v Edgar [1980] 1 WLR 1410; [1980] 3 All ER 887, CA
Ezekiel v Orakpo [1997] 1 WLR 340, CA
Fergusson v Lewis (1879) 14 LJ 700
Fletcher & Son v Jubb, Booth & Helliwell [1920] 1 KB 275, CA
Fray v Voules (1859) 1 E & E 839
G (A Minor) (Care Proceedings), In re [1994] 2 FLR 69
Godefroy v Dalton (1830) 6 Bing 460
Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465; [1963] 3 WLR 101; [1963] 2 All ER 575, HL(E)
Hope-Smith v Hope-Smith [1989] 2 FLR 56, CA
Hyman v Hyman [1929] AC 601, HL(E)
Kitchen v Royal Air Force Association [1958] 1 WLR 563; [1958] 2 All ER 241, CA
Locke v Camberwell Health Authority [1991] 2 MedLR 249, CA
Lowsley v Forbes (trading as LE Design Services) [1999] 1 AC 329; [1998] 3 WLR 501; [1998] 3 All ER 897, HL(E)
M v M (Financial Provision) [1987] 2 FLR 1
N v C (Property Adjustment Order: Surveyor's Negligence) [1998] 1 FLR 63, CA
Naylor v Preston Area Health Authority [1987] 1 WLR 958; [1987] 2 All ER 353, CA
Practice Direction (Family Proceedings: Financial Dispute Resolution) [1997] 1 WLR 1069; [1997] 3 All ER 768
Practice Statement (Commercial Cases: Alternative Dispute Resolution) [1994] 1 WLR 14; [1994] 1 All ER 34
Robinson v Robinson (Practice Note) [1982] 1 WLR 786; [1982] 2 All ER 699, CA
Tibbs v Dick [1998] 2 FLR 1118, CA

APPEALS

Arthur J S Hall & Co v Simons

By a summons dated 6 March 1992 the plaintiffs, Arthur J S Hall & Co, claimed the sum of £6,840 against the defendant, their former client Melvyn Simons, as fees due for professional services rendered to him in respect of proceedings arising out of a building dispute compromised on 19 August 1991 and embodied in a consent order on 20 August 1991 by Judge Franks,

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A sitting on official referees' business in the Stoke-on-Trent District Registry of the Queen's Bench Division. The defendant, by his amended defence and counterclaim, dated 23 April 1997, denied that the sums were due and claimed damages for negligence and breach of duty in conducting the litigation on his behalf, in particular, (1) by failing at an early stage of the dispute either to advise the defendant of the weaknesses of his case, or to B pursue his case to an effective trial; (2) by acting in breach of their retainer that the defendant would at least recover his own costs; and (3) by failing to understand the factual basis of particular aspects of the dispute, to obtain proper expert evidence, to advise on the liability of third parties or to investigate such parties' solvency. On 14 October 1997 Judge Mackay, sitting at Liverpool County Court, determined as a preliminary issue that the plaintiffs were immune from suit in respect of the settlement made on C 19 August 1991 and struck out the defendant's counterclaim.

By an amended notice of appeal the defendant appealed on the grounds, inter alia, that the judge (1) erred in law in finding that immunity from suit applied to the settlement concluded on 19 August 1991 and that acts of negligence committed prior to the settlement should attract immunity; and (2) failed to consider whether the plaintiffs should benefit from D immunity in the circumstances of the case. By an amended respondent's notice dated 12 November 1998 the plaintiffs asserted that the judge's order should be affirmed on the further ground that the defendant's counterclaim was an abusive collateral attack on the settlement embodied in the consent order.

The facts are stated in the judgment of the court.

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Barratt v Woolf Seddon

By a writ and statement of claim served on 20 December 1994 the plaintiff, David Barratt, commenced proceedings against the defendants, Woolf Seddon, his former solicitors, claiming damages for negligence in respect of their conduct of ancillary relief proceedings arising from the breakdown of his marriage and in particular in respect of their advice and F conduct relating to the order of District Judge Keyes, sitting at Watford County Court, on 5 September 1991 who had approved the minute of order lodged by the defendants, whereby the wife should receive one half share of the former matrimonial home valued at £320,000, and had directed that the minute should stand as the court's order made by consent. In particular the plaintiff claimed that the defendants had (1) failed to advise or to obtain G advice as to the valuation of the former matrimonial home; (2) failed to advise that any agreement or order providing for division of the proceeds of sale should be on a percentage basis; (3) failed to advise that the court would not necessarily make an order in the terms agreed between the parties; and (4) lodged with the court a minute of order which inaccurately recorded the valuation of the property. He claimed as damages, inter alia, (1) £18,536·96, being the costs and disbursements of his appeal against the consent order H and (2) £20,011·81, being the difference between the amount he received from the net proceeds of sale and that which he should have received on a percentage basis.

On 14 October 1997, on the defendants' application, Blofeld J struck out the plaintiff's claim under RSC Ord 18, r 19 as disclosing no reasonable

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cause of action and/or as being frivolous, vexatious and an abuse of the court's process. He refused the plaintiff's application for leave to appeal.

By a notice of appeal dated 2 February 1998 and with leave of Pill LJ the plaintiff appealed on the grounds, inter alia, that (1) the judge was wrong to conclude that negligent advice leading to the making in matrimonial proceedings of a consent order for ancillary relief attracted immunity since the conduct complained of was not such as to found a claim for immunity; and (2) the consent order had been set aside as inappropriate on the plaintiff's subsequent appeal. By an application dated 3 November 1998 the defendants sought leave to serve a respondent's notice out of time to assert that the judge's decision be affirmed on the additional ground that the conduct complained of by the plaintiff related to matters which had an intimate connection with the conduct of a future contested hearing of the wife's application for relief and its settlement and that accordingly the matters were immune from suit.

The facts are stated in the judgment of the court.

Cockbone v Atkinson Dacre & Slack

By summonses issued on 11 May and 30 June 1995 the plaintiff, Clive Cockbone, began proceedings against the defendants, Atkinson Dacre & Slack, claiming damages for (1) negligence in respect of their conduct of ancillary relief proceedings between himself and his former wife, and (2) for the use of undue pressure and blackmail in inducing him to settle and consent to the order made on 22 August 1991 made by District Judge Grills, sitting at Harrogate County Court, whereby he was to pay to his former wife the sum of £250,000 by instalments, the unpaid part being secured by a charge over his farm. The plaintiff alleged, in particular, that the defendants had failed to provide to the court (1) an accurate valuation of the matrimonial assets available for distribution; (2) a proper, or any, analysis of his business indebtedness; and (3) evidence of his inability to comply with the order and of the taxation consequences of such an order. He further alleged that the defendants had given him no explanation of the legal effect of a consent order nor of the terms of the settlement and that they had exerted undue pressure on him to obtain his agreement. By their amended defence dated 30 June 1997 the defendants denied the allegations and on 4 August 1997 applied to struck out the plaintiff's claim as frivolous, vexatious and an abuse of the court's process.

On 9 October 1997, the action having been transferred to the High Court, Judge McGonigal, sitting as a judge of the Queen's Bench Division, granted the defendants' further application to re-amend the defence to plead immunity from suit. By his order dated 30 October 1997 the judge dismissed the plaintiff's claim under RSC Ord 18, r 19 and under the inherent jurisdiction of the court.

By a notice of appeal dated 8 December 1997 the plaintiff appealed on the ground that the judge had wrongly concluded that the defendants were entitled to claim immunity. On 28 October 1998 the defendants applied for leave to serve a respondent's notice out of time to assert that the judge's order should be affirmed in addition on the ground that the plaintiff's action represented an abusive collateral attack on the consent order.

The facts are stated in the judgment of the court.

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Harris v Scholfield Roberts & Hill (a firm)

By a writ and an amended statement of claim re-served on 20 May 1998 the plaintiff, Dawn Fraser Harris, began proceedings against, inter alios, the defendants, Scholfield Roberts & Hill, claiming damages for negligence in respect of the conduct of her application for ancillary relief in matrimonial proceedings whereby under a consent order made on 22 November 1991 by Deputy District Judge Derbyshire, sitting at Barnstaple County Court, she received periodical payments at the rate of £5,500 per annum payable in monthly instalments for a total period of two years and her claim for a capital sum was dismissed. She alleged in particular that the defendants had failed (1) to brief counsel competent in the relevant field; (2) to inform themselves of counsel's advice on lifelong maintenance; (3) to investigate properly the position of the husband's cohabitee; and (4) to give correct advice on the possibility of setting aside such an order. On 22 January 1998 District Judge White, on the defendants' application, struck out her claim as vexatious and an abuse of the court's process. On 13 May 1998 Toulson J allowed the plaintiff's appeal and reinstated the action.

By a notice of appeal dated 15 June 1998 the defendants appealed on the grounds, inter alia, that the judge was wrong in law in that (1) the plaintiff's action amounted to an abuse of process and/or was contrary to public policy since it constituted a collateral attack on the consent order; (2) all the allegations related to conduct which was so intimately connected with the conduct of the cause in court as to render the defendants immune from suit; and (3) the claim should have been struck out as being bound to fail since the defendants had in all relevant respects acted on counsel's advice so as to break the chain of causation.

The facts are stated in the judgment of the court.

Rupert Jackson QC, *Norman Wright* and *Sian Mirchandani* for the plaintiffs in the first case.

Rupert Jackson QC and *Lord Meston* QC for the defendants in the second case.

Rupert Jackson QC and *Christopher Critchlow* for the defendants in the third case.

Rupert Jackson QC and *Jeffrey Bacon* for the defendants in the fourth case.

Andrew Edis QC for the defendant in the first case.

Martin Pointer QC and *Stephen Trowell* for the plaintiff in the second case.

Mr Cockbone appeared in person.

Peter Duckworth and *Nicholas Bowen* for the plaintiff in the fourth case.

Cur adv vult

14 December. **LORD BINGHAM OF CORNHILL CJ** handed down the following judgment of the court.

1 In these four appeals, listed and heard together, the following questions of law arise: to what extent and in what circumstances does a lawyer's immunity from suit in relation to the allegedly negligent conduct of a case in court protect him against claims for allegedly negligent acts and omissions which take place out of court? Does a lawyer, if not otherwise

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immune from a claim in negligence by a client, become so when the court approves a consent order in any proceedings, but particularly in matrimonial proceedings in relation to ancillary relief? Is it in such circumstances an abuse of the process of the court to claim damages against a lawyer for alleged negligence leading to the making of a consent order? In the course of argument it became clear that all these questions were closely interrelated.

This is the judgment of the court, to which all members have very substantially contributed.

Immunity

2 Our primary sources on lawyers' immunity are two relatively recent decisions of the House of Lords in *Rondel v Worsley* [1969] 1 AC 191 and *Saif Ali v Sydney Mitchell & Co* [1980] AC 198. These cases clearly establish four propositions.

(1) A lawyer acting as an advocate is immune from any claim for damages for negligence by a client arising out of almost anything done or omitted in the course of conducting a case in court. For convenience we refer to this as "forensic immunity".

(2) The rationale of forensic immunity is recognised to be public policy principally (a) to prevent the relitigation, otherwise than on appeal, of issues already concluded adversely to the plaintiff by court decision; (b) as part of the general immunity from civil liability which attaches to all persons who participate in proceedings before a court of justice; and (c) because an advocate owes a duty to the court as well as to his client and should not be inhibited, through apprehension of an action by his client, from performing his duty fearlessly and independently.

(3) Since forensic immunity derogates from the fundamental principle that a professional person is answerable to a client for any loss caused to the client by any want of the skill and care ordinarily to be expected from such a professional person, the scope of the immunity should be restricted to cases in which public policy grounds call for its recognition.

(4) While forensic immunity extends beyond the limits expressed in (1) above, it applies 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."

3 Proposition (1) is the ratio of *Rondel v Worsley* [1969] 1 AC 191, in which case counsel was only instructed by the plaintiff to conduct his defence at his criminal trial after the hearing had begun, and the plaintiff's allegations of negligence related directly to the manner in which counsel had, in court, conducted the defence. That forensic immunity should extend to advocates whether they were solicitors or barristers was held in *Rondel v Worsley*, at pp 232, 267, 284 and 294, and in the *Saif Ali* case [1980] AC 198, 215, 223, 224 and 227. It is now plain, from section 62 of the Courts and Legal Services Act 1990, that any person other than a barrister, lawfully doing work in respect of which a barrister lawfully doing the same work would be immune, enjoys the same immunity.

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A 4 Proposition (2) is derived from the speeches of the majority in the *Saif Ali* case, particularly at pp 212, 222, 227 and 230, where the public policy considerations relied on in *Rondel v Worsley* were discussed and refined.

5 Proposition (3) is based on *Rondel v Worsley* [1969] 1 AC 191, 227, 244, 247, 253–254, 284 and 289, and on the speeches of the majority in the *Saif Ali* case [1980] AC 198, 213, 214, 215, 218, 219, 224 and 230.

B 6 Proposition (4) is based on the speeches in the *Saif Ali* case, at pp 215, 224, 231 and 232, where the majority expressly adopted a passage in the judgment of McCarthy P in the New Zealand Court of Appeal in *Rees v Sinclair* [1974] 1 NZLR 180, 187, which included the words quoted. In *Rees v Sinclair,* as is evident from the report [1973] 1 NZLR 236, the defendant was a solicitor and barrister who had acted for the plaintiff in matrimonial proceedings and had refused to plead or advance allegations C against the plaintiff's wife for which he considered there to be no justification.

7 It may of course be that the House of Lords will hereafter choose to review and modify the rulings given in these two leading cases, and it is noteworthy that in the *Saif Ali* case [1980] AC 198 Lord Diplock, at p 223, expressed regret that counsel for the plaintiff had not made a more radical challenge to the authority of *Rondel v Worsley* [1969] 1 AC 191. We D understand further that the European Court of Human Rights may be called upon to consider the compatibility of the decision in *Rondel v Worsley* with the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969). But we must treat these cases as binding authority for the four propositions we have set out. Those propositions do not, however, answer the first question posed above, which E relates to the outer limits of forensic immunity, beyond the core immunity which protects an advocate against claims arising from the conduct of a cause in court. More particularly, the issue arises (in all four appeals) whether forensic immunity, on a fair application of McCarthy P's rule adopted by the House of Lords, affords immunity to a lawyer who advises that a case be compromised, where the advice is accepted and the case is settled. Is the advice to settle "so intimately connected with the conduct of F 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"? Or can it depend on the facts of a given case whether advice to settle is so intimately connected or not? And does it matter when and where the advice is given? Does it matter whether the lawyer is acting as an advocate or in the role which solicitors have traditionally filled when instructing counsel?

G 8 In *Rondel v Worsley* certain of their Lordships gave examples of activity which might, or might not, be covered by forensic immunity and, as Lord Wilberforce pointed out in the *Saif Ali* case [1980] AC 198, 213–214, there was some diversity in those opinions which the House in the *Saif Ali* case was concerned to narrow.

9 In the *Saif Ali* case the negligence alleged was failure to join (or advise the joinder of) the correct defendant to a running down claim before the H expiry of the limitation period, and the issue of immunity arose on a third party claim by the defendant solicitors against counsel. In the Court of Appeal Bridge LJ, applying the *Rees v Sinclair* test, thought the test should be construed narrowly but was still quite satisfied that the barrister was entitled to the benefit of forensic immunity: see [1978] QB 95. In the House of Lords

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[1980] AC 198, all three members of the majority (Lord Wilberforce, at p 216, Lord Diplock, at p 224, and Lord Salmon, at p 232) considered the claim to be well outside the scope of forensic immunity. In addition to adopting and relying on the ruling of McCarthy P already quoted, all three members of the majority gave guidance on the scope of forensic immunity. Referring to this ruling Lord Wilberforce said, at p 215:

> "I do not understand this formulation as suggesting an entirely new test, i e, a double test requiring (a) intimate connection with the conduct of the cause in court and (b) necessity in the interests of the administration of justice. The latter words state the justification for the test but the test lies in the former words. If these words involve a narrowing of the test as compared with the more general words 'conduct and management' I think that this is right and for that reason I suggest that the passage, if sensibly, and not pedantically, construed, provides a sound foundation for individual decisions by the courts, whether immunity exists in any given case. I should make four observations. First, I think that 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. At these proceedings decisions may often fall to be made of the same nature as decisions at the trial itself: it would be illogical and unfair if they were protected in the one case but not in the other. Secondly, a decision that a barrister's liability extends so far as I have suggested necessarily involves that it does not extend beyond that point. In principle, those who undertake to give skilled advice are under a duty to use reasonable care and skill. The immunity as regards litigation is an exception from this and applies only in the area to which it extends. Outside that area, the normal rule must apply. Thirdly, I would hold that the same immunity attaches to a solicitor acting as an advocate in court as attaches to a barrister. Fourthly, it is necessary to repeat that the rule of immunity is quite distinct from the question what defences may be available to a barrister when he is sued. It by no means follows that if an error takes place outside this immunity area, a liability in negligence arises."

10 On the application of McCarthy P's ruling Lord Diplock said, at p 224:

> "So for instance in the English system of a divided profession where the practice is for the barrister to advise on evidence at some stage before the trial his protection from liability for negligence in the conduct of the case at trial is not to be circumvented by charging him with negligence in having previously advised the course of conduct at the hearing that was subsequently carried out. It would not be wise to attempt a catalogue of before-trial work which would fall within this limited extension of the immunity of an advocate from liability for the way in which he conducts a case in court."

Lord Salmon said, at p 230:

> "I cannot, however, understand how any aspect of public policy could possibly confer immunity on a barrister in a case such as the present should he negligently fail to join the correct persons or to advise that they should be joined as defendants; or for that matter should he negligently

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A advise that the action must be discontinued. It seems plain to me that there could be no possibility of a conflict between his duty to advise his client with reasonable care and skill and his duty to the public and to the courts. I do not see how public policy can come into this picture . . . Once it is clear that the circumstances are such that no question of public policy is involved, the prospects of immunity for a barrister against being sued for negligently advising his client vanish into thin air, together with the B ghosts of all the excuses for such immunity which were thought to exist in the past."

11 With reference to observations which he had made in *Rondel v Worsley* [1967] 1 QB 443 in the Court of Appeal, Lord Salmon said [1980] AC 198, 231:

C "I may have put the case too high if I used words which might give the impression that counsel's immunity always extended to the drafting of pleadings and to advising on evidence. I should have said that the immunity might *sometimes* extend to drafting pleadings and advising on evidence. If in an advice on evidence counsel states that he will not call Y as a witness whom he believes his client wishes to call solely to prejudice his opponent, counsel is immune on grounds of public policy from being D sued in negligence by his client for advising that Y must not be called or for refusing to call him. In such a case the advice would be so closely connected with the conduct of the case in court that it should be covered by the same immunity. It would be absurd if counsel who is immune from an action in negligence for refusing in court to call a witness could be sued in negligence for advising out of court that the witness should not be E called. If he could be sued for giving such advice it would make a travesty of the general immunity from suit for anything said or done in court and it is well settled that any device to circumvent this immunity cannot succeed: see, e g, *Marrinan v Vibart* [1963] 1 QB 234; [1963] 1 QB 528."

Lord Salmon considered, at p 231, that it could only be

F "in the rarest of cases that the law confers any immunity upon a barrister against a claim for negligence in respect of any work he has done out of court; and this case is certainly not amongst them."

12 The majority in the *Saif Ali* case, particularly Lord Diplock and Lord Salmon, intended that forensic immunity in respect of work done out of court should be recognised restrictively, and only where a clear public policy G justification was shown. The only pre-trial work expressly accepted as attracting immunity was advice given by an advocate on the calling of evidence which, if given at trial, would attract immunity. We infer that the House would have accepted a pre-trial decision by an advocate that a certain claim or defence should not, on strategic or professional grounds, be advanced or pleaded as similarly protected. We do not think the majority would have favoured a comprehensive or definitional approach to the H question whether pre-trial work of a given kind should attract immunity, as is evident from the way in which Lord Diplock posed the question for decision in the appeal before the House, at p 219:

"What is needed is to identify those reasons based on public policy which were held to justify a barrister's immunity from liability for

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negligence for what he did in court during the trial of a criminal case and, having done so, to decide whether they suffice to justify a like immunity when advising a client, through his solicitor, as to who should be made a party to a proposed civil action and when settling pleadings in the action in conformity with that advice."

Thus, when any advocate claims to be immune in respect of any specific thing which he has done or omitted to do, it is necessary to test that claim by reference to that specific act or omission and to examine the public policy grounds which may be relied on to support the recognition of immunity in that instance.

13 Both Lord Wilberforce and Lord Diplock recognised that the undesirability of relitigating the same issue was a public policy ground of much reduced weight where the case in question had never come to trial. Lord Wilberforce said, at pp 214–215:

"Furthermore, if the principle is invoked that it is against public policy to allow issues previously tried (between the client and his adversary) to be relitigated between client and barrister, it may be relevant to ask why this principle should extend to a case in which by the barrister's (assumed) fault, the case never came to trial at all. These two considerations show that the area of immunity must be cautiously defined."

Lord Diplock said, at p 223:

"My Lords, it seems to me that to require a court of co-ordinate jurisdiction to try the question whether another court reached a wrong decision and, if so, to inquire into the causes of its doing so, is calculated to bring the administration of justice into disrepute. Parliament indeed itself stepped in to prevent a similar abuse of the system of justice by convicted criminals in bringing civil actions for libel against those who described them as having been guilty of the crimes of which they had been convicted: see Civil Evidence Act 1968, section 13. A consequence of the decision of this House in *Rondel v Worsley* [1969] 1 AC 191 was to prevent its happening in actions for negligence against barristers. A similar objection, it may be mentioned, would not apply in cases where an action has been dismissed or judgment entered without a contested hearing, and there is no possibility of restoring the action and proceeding to a trial. If the dismissal or the entry of judgment was a consequence of the negligence of the legal advisers of a party to the action, a claim in negligence against the legal advisers at fault does not involve any allegation that the order of the court which dismissed the action or entered judgment was wrong."

14 The minority in the House understood the decision of the majority to exclude advice on settlement from the scope of forensic immunity. Lord Russell of Killowen said, at p 234:

"I can find no justifiable line to be drawn at the door of the court, so that a claim in negligence will lie against a barrister for what he does or omits negligently short of the threshold though not if his negligent omission or commission is over the threshold. His immunity from claims of negligence should (granted that it is to exist at all) extend to areas which affect or may affect the course of conduct of litigation, in which

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areas are to be found the public duty and obligation of the barrister to participate in the administration of justice. And this should be so even if the result of the alleged negligence is that litigation does not in fact come about. A decision which shapes, or may shape, the course of a trial should be within the umbrella (or blanket) of freedom from claims whether it is arrived at before trial or during it. This must include advice on settlement: advice on evidence: advice on parties: to list only examples. A barrister is offered an opportunity in the course of a trial to add a party: he misunderstands the case and allegedly negligently declines the opportunity: as I understand *Rondel v Worsley* [1969] 1 AC 191 he is immune from the claim. Is there any reason for not holding him also immune from a claim for not originally adding that party? I think not."

Lord Keith of Kinkel was of the same mind, at p 235:

> "A barrister's duty to the court and the due administration of justice has to be kept firmly in view when he directs his mind to whether an action should be brought and against what parties, to whether an action should be settled or abandoned and to advising on evidence and on the discovery of documents. It is true that decisions on such matters normally are taken in situations offering more opportunity for reflection than is present in face of the court in the course of a trial. But that might well mean that the decision is less instinctively correct in the light of the barrister's duty to the court and more likely to be influenced by thoughts of the action which the client, in the absence of an immunity, might take. I am therefore of opinion that the grounds of this aspect of public interest extend beyond the actual conduct of a case in court and are applicable to all stages of a barrister's work in connection with litigation, whether pending or only in contemplation."

But this was a minority view, and the majority's disagreement with it gave rise to Lord Keith's dissent. As he observed, at p 237:

> "The suggested restriction of the immunity would presumably exclude from its scope all cases relating to contemplated litigation which did not actually reach the stage of a hearing in court, and all litigation settled, compromised or abandoned. In other cases the suggested restriction would, in my opinion, prove difficult to apply in practice and would almost inevitably require inquiry into the facts. It would seldom, if ever, be possible to decide the issue of immunity upon an application for striking out. So the objective of relieving the barrister of any apprehension of contentious litigation regarding the conduct of his cases would not be achieved."

He concluded that the negligence alleged against the barrister took place "in connection with his conduct of litigation" and that accordingly the barrister was immune from suit.

15 There is nothing in these cases to suggest that anyone is immune in relation to anything done (or omitted) out of court if he would not have been immune in relation to the same thing done (or omitted) in court. These authorities furthermore stress that the immunity is an advocate's immunity. Thus a solicitor or any other qualified advocate may be immune.

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Collateral challenge as an abuse of process

16 In so far as forensic immunity rested on the undesirability of re-litigating, between different parties, an issue already decided by a court of competent jurisdiction, the need for such immunity was eroded by the unanimous decision of the House of Lords in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529. In that case the plaintiff Hunter claimed damages against two chief constables whom he alleged to be vicariously responsible for physical assaults which he claimed had been inflicted upon him by police officers at or before the time of his oral admission of murder. At his criminal trial for murder the question whether Hunter had been the victim of such assaults by the police had been directly in issue in a protracted voire dire and in the judge's direction to the jury. In his ruling on the voire dire the judge, applying the criminal burden of proof, had been sure that Hunter had not been assaulted by the police as he claimed. The jury convicted Hunter and were taken thereby to have been similarly satisfied. Hunter appealed to the Criminal Division of the Court of Appeal against his conviction, but made no complaint about the judge's ruling on the voire dire. By his civil action Hunter was concerned not to recover damages (which he could have done, subject to argument on quantum, against the Home Office, which accepted liability) but to throw doubt on the soundness of his conviction. The chief constables applied to strike out the action, first on grounds of estoppel per rem judicatam and secondly as an abuse of process. The House found it unnecessary to hear argument on estoppel per rem judicatam (or issue estoppel) and concluded, without calling on the chief constables to argue, that the proceedings were an abuse of the process of the court.

17 At the outset of his leading speech, with which the other members of the House agreed, Lord Diplock explained the scope of the decision, at p 536:

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

He continued, at pp 541–542:

> "The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made . . . My Lords, collateral attack upon a final decision of a court of competent jurisdiction may take a variety of forms. It is not surprising

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A that no reported case is to be found in which the facts present a precise parallel with those of the instant case. But the principle applicable is, in my view, simply and clearly stated in those passages from the judgment of AL Smith LJ in *Stephenson v Garnett* [1898] 1 QB 677, 680–681 and the speech of Lord Halsbury LC in *Reichel v Magrath* (1889) 14 App Cas 665, 668 which are cited by Goff LJ in his judgment in the instant case. I need only repeat an extract from the passage which he cites from the B judgment of A L Smith LJ: 'the court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous and vexatious, yet it ought to do so when, as here, it has been shown that the identical question sought to be raised has been already decided by a competent court.' The passage from Lord Halsbury's speech deserves repetition here in full: . . . 'I think it would be a scandal to the C administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again.' "

18 The proper method of attacking the decisions of the judge and the jury at the criminal trial would have been by an appeal to the Criminal Division of the Court of Appeal: see [1982] AC 529, 541. A collateral D challenge to those decisions in a later civil action was likely to be an abuse of the process of the court unless the plaintiff had come into possession of fresh evidence which entirely changed the aspect of the case. This exception was derived from the speech of Lord Cairns LC in *Phosphate Sewage Co Ltd v Molleson* (1879) 4 App Cas 801, 814.

19 We would stress that Lord Diplock was dealing with one example of E abuse of process. We consider that the collateral challenge principle may apply in other situations, in which the court has made an order or entered judgment by consent, particularly where it has specifically approved the terms of the order. We review some examples below.

Disposal of proceedings without a full hearing.

F 20 The compromise of proceedings may involve any one of many different procedures; see, generally, *Foskett, The Law and Practice of Compromise*, 4th ed (1996); *Green v Rozen* [1955] 1 WLR 741. Adult parties of sound mind may ordinarily settle proceedings by an agreement made wholly out of court. This was not done in any of the four cases before us. They may for a variety of reasons choose to embody their agreement in a consent judgment of the court; this will not in the ordinary way call for any G exercise of judgment by the court: *Foskett, The Law and Practice of Compromise*, ch 16, pp 250–251, para 16–02; *Noel v Becker (Practice Note)* [1971] 1 WLR 355. This procedure was adopted in one of the cases before us. If they do choose to embody their out of court agreement in a court order, the parties may agree that their agreed obligations are scheduled to an order in Tomlin form.

H 21 By contrast, a claim by or on behalf of a person under disability may not be validly compromised without the approval of the court: RSC Ord 80, r 10. Obtaining the approval of the court in such cases is no mere formality: see *The Supreme Court Practice 1999*, vol 1, pp 1516–1517, paras 80/11/10–10A. A compromise made on behalf of unborn or unascertained persons similarly requires the approval of the court, and again the obtaining

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of approval is not a formality: see RSC Ord 15, r 13(4) and *The Supreme Court Practice 1999*, vol 1, p 261, para 15/13/10.

22 In the case of trustees and executors, an order of the court may be sought approving a sale, purchase, compromise or other transaction: see RSC Ord 85, r 2(3)(d). Under the Insolvency Act 1986 an administrator (section 14(3)) or a receiver or manager (section 35) or the trustee of a bankrupt's estate (section 303) may apply to the court for directions, and a liquidator may invite the court to determine a question or exercise certain powers; such applications may be made primarily for the protection of the applicant; in many such cases there will be no full contested hearing, but the court will make an order on the material laid before it. The same is true where the court is asked to appoint a receiver proposed by a creditor in reliance on an affidavit of fitness: *Halsbury's Laws of England*, 4th ed reissue, vol 7(2) (1996), p 1004, para 1349.

It is unnecessary to multiply examples. But there is one form of consent order, in relation to ancillary relief in matrimonial proceedings, which is particularly germane to three of the appeals before us.

Consent orders for ancillary relief

23 Sections 23, 24 and 24A of the Matrimonial Causes Act 1973 empower the court to make orders of various descriptions in connection with divorce proceedings. These include orders for the making of periodical payments and for the payment of lump sums. Section 25 of the 1973 Act imposes a duty on the court in deciding whether to exercise its powers under sections 23, 24 or 24A and, if so, in what manner, to have regard to all the circumstances of the case, first consideration being given to the welfare of any child of the family while a minor. Section 25(2) provides that as regards the exercise of some of these powers in relation to a party to the marriage the court shall in particular have regard to a number of listed matters, which include the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, and other matters such as the financial needs, obligations and responsibilities which each of the parties has or is likely to have, the standard of living enjoyed by the family before the breakdown of the marriage, the age of each party to the marriage and the duration of the marriage, any physical or mental disability to which either of the parties is subject, the contribution which each of the parties has made or is likely in the future to make to the welfare of the family, the conduct of each of the parties, if that is such that it would be inequitable to disregard it, and the value to each of the parties to the marriage of any benefit (such as a pension) which by reason of the dissolution or annulment of the marriage a party will lose the chance of acquiring.

24 Where parties to matrimonial proceedings were agreed on the financial arrangements to take effect between them but wished their agreement to be embodied in an order of the court, it seems that a practice grew up of submitting the agreed terms to the court in writing for approval and embodiment in a court order without any personal attendance. This practice was disapproved by the Court of Appeal in *Jenkins v Livesey (formerly Jenkins)* [1984] FLR 452, where the court indicated that in any ordinary circumstances an attendance before the registrar was necessary to enable answers to be given to any queries that he might have in the course of

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exercising his jurisdiction to approve the agreed terms. In *Practice Direction (Family Division Financial Statement)* [1984] 1 WLR 674, a direction was given on the material to be laid before the court when approval was sought under section 25 of the 1973 Act. The effect of the Court of Appeal ruling was, however, promptly modified by the enactment in July 1984 of a new section 33A of the 1973 Act, as inserted by section 7 of the Matrimonial and Family Proceedings Act 1984, which provided:

> "(1) Notwithstanding anything in the preceding provisions of this Part of this Act, on an application for a consent order for financial relief the court may, unless it has reason to think that there are other circumstances into which it ought to inquire, make an order in the terms agreed on the basis only of the prescribed information furnished with the application."

25 When *Jenkins v Livesey* reached the House of Lords it was made clear that for reasons of public policy it was not open to parties, whether represented by lawyers or not, to disregard or contract out of the terms of section 25 of the 1973 Act, and that nothing in section 33A or the *Practice Direction* of 1984 in any way modified the duty of the parties to make full and frank disclosure of all relevant matters before a consent order was made: see [1985] AC 424, 441, 444 and 445.

26 The Matrimonial Causes (Amendment) Rules 1984 (SI 1984/1511 (L15)) inserted a new rule 76A into the Matrimonial Causes Rules 1977 (SI 1977/344 (L6)): this provided that with every application for a consent order for financial relief there should be lodged a statement of information containing certain prescribed information. The terms of this new rule were varied by the Matrimonial Causes (Amendment No 2) Rules 1985 (SI 1985/1315 (L11), which required information to be given of some of the matters specified in section 25(2) of the 1973 Act, such as the age of each party and the duration of the marriage, and an estimate in summary form of the approximate amount or value of the capital resources and net income of each party, but did not require information of some other matters, such as the standard of living enjoyed by the family before the breakdown of the marriage and any physical or mental disability of either of the parties to the marriage. *Practice Direction (Financial Provision: Consent Order)* [1986] 1 WLR 381 set out a suggested form in which the information referred to in rule 76A might be conveniently set out. The form was brief and simple and, although calling for details of any other especially significant matters, provided little space for elaboration of the information required. The suggested form was modified somewhat by *Practice Direction (Financial Provision: Consent Order) (No 2)* [1990] 1 WLR 150, but the same comments apply. Rule 76A has now been superseded by rule 2.61 of the Family Proceedings Rules 1991 (SI 1991/1247 (L20)), which contain in Form M.1 a form of statement of information for a consent order: more space is now provided for inclusion of details, but the statement remains brief and simple.

27 It is clearly established that

> "Financial arrangements that are agreed upon between the parties for the purpose of receiving the approval and being made the subject of a consent order by the court, once they have been made the subject of the

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court order no longer depend upon the agreement of the parties as the source from which their legal effect is derived. Their legal effect is derived from the court order:" see *de Lasala v de Lasala* [1980] AC 546, 560; *Thwaite v Thwaite* [1982] Fam 1, 7; *Jenkins v Livesey* [1985] AC 424, 435.

A party who has consented to an order is not precluded from seeking to challenge or set aside the order where fraud or misrepresentation or non-disclosure or a fundamental change of circumstances has occurred: see *Barder v Barder* [1988] AC 20; *Harris (formerly Manahan) v Manahan* [1996] 4 All ER 454. But substantial grounds for a challenge must be shown. Hence the salutary warning given by Lord Oliver of Aylmerton in *Dinch v Dinch* [1987] 1 WLR 252, 255:

". . . I feel impelled once again to stress in the most emphatic terms that it is in all cases the imperative professional duty of those invested with the task of advising parties to these unfortunate disputes to consider with due care the impact which any terms that they agree on behalf of their clients have and are intended to have upon any outstanding application for ancillary relief and to ensure that such appropriate provision is inserted in any consent order made as will leave no room for any future doubt or misunderstanding or saddle the parties with the wasteful burden of wholly unnecessary costs. It is, of course, also the duty of any court called upon to make such a consent order to consider for itself, before the order is drawn up and entered, the jurisdiction which it is being called upon to exercise and to make clear what claims for ancillary relief are being finally disposed of. I would, however, like to emphasise that the primary duty in this regard must lie upon those concerned with the negotiation and drafting of the terms of the order and that any failure to fulfil such duty occurring hereafter cannot be excused simply by reference to some inadvertent lack of vigilance on the part of the court or its officers in passing the order in a form which the parties have approved."

28 Different judges have, unsurprisingly, described the function of the court in making a consent order under section 25 where the parties have agreed terms in somewhat different ways. Bush J was, in our view, right to describe the proper approach of the court in such circumstances as a broad rather than a particular one (see *Dean v Dean* [1978] Fam 161, 172), and we agree with Waite LJ in *Pounds v Pounds* [1994] 1 WLR 1535, 1540 that it is only if a broad appraisal of the parties' financial circumstances as disclosed to it in summary form puts the court on inquiry that the court should probe more deeply. It is doubtless true, as Ward LJ pointed out in *Harris (formerly Manahan) v Manahan* [1996] 4 All ER 454, 462 that judges rely on practitioners' help. It nonetheless remains true that

"The court has an overriding duty to survey the sufficiency of the proposed consideration and the overall fairness of the orders proposed:" *Peacock v Peacock* [1991] 1 FLR 324, 328, per Thorpe J.

The same point was clearly made in *Pounds v Pounds* [1994] 1 WLR 1535, 1537–1538 by Waite LJ and by all three members of the Court of Appeal in

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A *Kelley v Corston* [1998] QB 686, per Judge LJ, at p 690, per Pill LJ, at p 710, and per Butler-Sloss LJ, at p 714.

Forensic immunity: the decided cases

29 Since the decision of the House of Lords in *Rondel v Worsley* [1969] 1 AC 191, a number of cases have been decided here and abroad in which
B lawyers have been held entitled to avail themselves of the protection afforded by forensic immunity:

(1) In *Biggar v McLeod* [1978] 2 NZLR 9 the defendant, a barrister and solicitor, had acted for the plaintiff in matrimonial proceedings which had been compromised with her agreement after the evidence in the case had been heard at a trial. She complained that the proceedings had been settled on terms other than those agreed with her, and issued proceedings against
C the defendant. At first instance the judge dismissed the plaintiff's action on the basis that the defendant had been immune from suit for negligence. The Court of Appeal agreed. Applying the *Rees v Sinclair* [1974] 1 NZLR 180, 187 test, the Court of Appeal held, at p 12, that the settlement of the proceedings during the trial was "part and parcel of the work of counsel in carrying forward the proceedings to a conclusion" and, at p 14, "part and
D parcel of the management of the trial". The case was only concerned with settlement during a trial. At this time the House of Lords had not yet heard the appeal in the *Saif Ali* case [1980] AC 198.

(2) In *Giannarelli v Wraith* (1988) 165 CLR 543, three men had been charged and convicted of perjury as a result of evidence which they had given to Commonwealth and Victorian Royal Commissions into employment matters. Appeals against conviction were ultimately successful on the
E ground that under a Commonwealth statute the evidence which they had given to the Royal Commissions was inadmissible against them in criminal proceedings. They sued three barristers who had represented them at the criminal trial, complaining of their failure to object to the inadmissible evidence, without which they would not have been convicted. By a bare majority, the High Court of Australia, at p 615, upheld the barristers' claim
F to immunity, regarding the failure to object to the reception of the evidence as "an incident of the conduct and management of the case in court".

(3) In *Keefe v Marks* (1989) 16 NSWLR 713 a personal injury plaintiff had recovered damages but had been denied interest, both at first instance and on appeal, because no such claim had been pleaded or made. He issued proceedings against his solicitor, complaining that his failure to recover interest was the result of the solicitor's negligence, and the solicitor
G compromised that claim. The solicitor then, however, issued proceedings against counsel, claiming an indemnity against the loss he had suffered, and counsel claimed the benefit of forensic immunity. The Court of Appeal of New South Wales, by a majority, held the claim of immunity to be a good one: it appeared that counsel had not been instructed to advise or to settle the statement of claim, but only to appear at the hearing; and it was held that
H preparation of a case out of court could not be divorced from presentation in court since the two activities were inextricably interwoven.

(4) In *Landall v Dennis Faulkner & Alsop* [1994] 5 Med LR 268, the plaintiff had compromised his road accident claim in reliance on advice given at the door of the court by a medical consultant (the third defendant), his counsel (the second defendant) and his solicitors (the first defendant).

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The hopeful prognosis upon which the settlement was based was not in the event borne out, and the plaintiff claimed damages against the three defendants for negligence. All claimed to be immune from suit. The consultant's claim was upheld, it would seem under the general privilege protecting those who give, or prepare to give, evidence in court, and also on application of the *Rees v Sinclair* test. Counsel's claim was upheld by analogy with the ruling in *Biggar v McLeod* [1978] 2 NZLR 9. The judge held [1994] 5 MedLR 268, 275, that any act or omission on the part of counsel between delivery of his brief at the end of November 1986 and the hearing in the middle of February 1987 was so intimately connected with the February hearing as to be subject to immunity. The claim against the solicitors was struck out as vexatious and an abuse of process, because no distinction was to be drawn between their position and that of counsel and to allow the matter to proceed against them would result in a blatant outflanking of counsel's immunity.

(5) The plaintiff in *Bateman v Owen White* [1996] PNLR 1 had been convicted at first instance but eventually acquitted on appeal. He sued the solicitors and counsel who had represented him at his trial, complaining that they had failed to object to inadmissible evidence. On application of the solicitors, counsel taking no active part, the judge struck out the plaintiff's claim on the ground that the solicitors were immune from suit in relation to the matters of which complaint was made. Leave to appeal against this decision was refused: it was held that "the substance of the matter, given the special nature of the objection to admissibility which was available in the present case, is the failure to raise that objection at the trial rather than the previous negligence which is also alleged". Accordingly, the complaint was held to relate to the conduct of the trial. No reference was made to any distinction between solicitors and barristers: see pp 6 to 7. The decision bears a close resemblance to that in *Giannarelli v Wraith,* 62 ALJR 611.

(6) The plaintiff in *McFarlane v Wilkinson* [1996] 1 Lloyd's Rep 406 had sued defendants in common law negligence. A preliminary issue was tried whether the defendants in that action owed him a duty of care. At first instance the judge held that they did. The Court of Appeal reversed that decision. Having lost that action, the plaintiff sued leading and junior counsel who had represented him in that case complaining that they had been negligent in failing to include in his action a claim for breach of statutory duty. This complaint related only to the period between the successful outcome at first instance and the unsuccessful outcome on appeal. It was held that this complaint fell squarely within the scope of forensic immunity as defined by the House of Lords in *Saif Ali* [1980] AC 198.

(7) The defendant in *Keegan Alexander Tedcastle & Friedlander v Hurst* [1997] DCR 481 complained that earlier proceedings had been unsuccessful as a result of inadequate research conducted by her advocate. The advocate claimed immunity, and the claim was upheld. The judge held, at p 484:

> "In my view the preparation of the case for the High Court and, in particular, the legal research incidental thereto was work undertaken by Mr Vickerman as a barrister. It was work which was so intimately connected with the conduct of the litigation that it comes within the scope of the protection."

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A (8) In *Yates Property Corporation Pty Ltd v Boland* (1997) 145 ALR 169 the plaintiff made complaints against a firm of solicitors and against counsel whom he had retained in earlier proceedings. In the course of a long judgment, all his complaints of negligence were dismissed. There was also, however, a claim for forensic immunity advanced on behalf of counsel: the judge found, at p 221, that all of the allegations of negligence made against them, realistically analysed, related either to work done in court or to work B done out of court which led to decisions affecting the conduct of the earlier proceedings. He accordingly found that they were entitled to immunity.

(9) *Kelley v Corston* [1998] QB 686 is a recent decision of the Court of Appeal to which much attention was devoted in argument. The defendant, a barrister, had been instructed to represent the plaintiff at a hearing of the plaintiff's claim for financial relief. A conference between the plaintiff and C counsel took place on the day before the hearing. On the day of the hearing both parties, and their representatives, attended at court and a compromise agreement was reached, embodied in a consent order by the deputy district judge. Thereafter the plaintiff issued proceedings against the barrister claiming damages for negligence in "negotiating and advising the plaintiff to accept a settlement of her claim for ancillary relief against her husband". The critical allegation made by the plaintiff, as understood by the Court of D Appeal, at p 690, was that the overall effect of the settlement had left the plaintiff unable to finance the repayments of the mortgage on the former matrimonial home after it had been transferred into her name. The barrister applied to strike out the claim on the basis that she was protected by forensic immunity. All three members of the Court of Appeal upheld the barrister's claim to forensic immunity, but on different grounds.

E Judge LJ, giving the first judgment, did not conclude that the barrister's conduct in settling the litigation was covered by immunity. He said, at p 701:

> "In my judgment the settlement of litigation is not normally encompassed within the principles on which the immunity of the advocate is based. None of the relevant authorities requires and there are no public policy considerations which justify a blanket immunity from F suit for negligent advice to a client which results in a settlement of his claim, whether the advice is given by counsel or a solicitor (whether advocate or not) and whether the settlement is reached before the hearing or at the door of the court."

To this general statement he acknowledged two exceptions: the first where a case was compromised after the trial had begun; and the second where a G settlement was subject to or required the approval of the court. In his judgment the barrister was entitled to claim immunity in that case because the settlement had required and received the approval of the court.

Pill LJ was of opinion, at p 710, that because the court had by giving its approval assumed responsibility for the merits of the consent order the advocate was immune from suit for his role in advising that the settlement be made. However, Pill LJ was unwilling to decide the appeal on that basis, H since this ground had never been pleaded or argued or relied on before the judge. He therefore went on to consider whether the advocate was immune on application of the *Rees v Sinclair* test, and concluded, at p 711, that she was on the basis that no sensible distinction could be drawn between a settlement made in the course of trial and one made at the door of the court

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before the trial began. He held, at p 712, that a settlement made at the door of the court in civil proceedings had a more intimate connection with a hearing about to begin than a plea of guilty in a criminal case.

Butler-Sloss LJ agreed with Pill LJ's conclusion. She held, at p 715, that a consent order made and approved under the 1973 Act had such an intimate connection with the conduct of the cause in court that it came within the *Rees v Sinclair* test. She also, however, as it would seem, hesitated to decide the appeal on this unpleaded ground, and so she too went on to consider whether forensic immunity extended to cover settlements made at the door of the court, although she thought her opinion on that matter might be strictly obiter. She concluded, at p 718, that there was no real distinction between coming to an agreement while waiting to start a case and making it after the case had begun. She said, at p 719:

> "For my part, I do not believe it is in the interests of the administration of justice that any distinction should be drawn between the point at which the advocates attend court and thereafter for immunity against suit to apply. It would also be a clear workable rule which was easy to apply."

(10) The second defendant in *Atwell v Michael Perry & Co* [1998] 4 All ER 65 was a barrister. He had acted for the plaintiff in county court proceedings brought against him by neighbours in a boundary dispute. In the proceedings the plaintiff had lost, and the second defendant had advised that there was no reasonable prospect of a successful appeal. The plaintiff had then sought advice from a different member of the Bar who had advised that the plaintiff had a very good prospect of success on appeal, and this advice was vindicated when the plaintiff did indeed succeed in the Court of Appeal. The plaintiff then claimed damages for negligence against the solicitors whom he had first instructed, as first defendants, and against the second defendant. His complaints of negligence, summarised, at p 72, alleged legal errors and oversights in the second defendant's assessment of the case and he also complained of the inaccurate advice that there were no grounds of appeal.

Sir Richard Scott V-C held, at p 79, that all the plaintiff's complaints related to decisions of counsel as to how he proposed to conduct the case, and as such were covered by forensic immunity; but, at p 80, he concluded that the second defendant's advice on the prospect of successfully appealing against the adverse decision was not similarly protected. Sir Richard Scott V-C concluded, however, that even that allegation did not raise a sustainable claim for damages in negligence: see pp 80–81. We understand that this decision is currently subject to appeal.

30 There have also been a series of cases in which forensic immunity, although claimed, has been denied:

(1) In *Somasundaram v M Julius Melchior & Co* [1988] 1 WLR 1394 a defendant who had pleaded guilty and been sentenced at a trial thereafter sued the solicitors who had acted for him at the criminal trial complaining that they had wrongly pressurised him into pleading guilty. It was argued for the solicitors that since counsel, if sued, would have been protected by forensic immunity from any claim based on his advice to plead guilty, the solicitors were entitled to a similar immunity. This claim the Court of Appeal rejected, holding, at p 1403, that forensic immunity only extended to those, whether barristers or solicitors, who were acting as advocates when

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doing the work giving rise to the complaint. The plaintiff's claim was, however, dismissed on other grounds (see post, p 897H below).

(2) In *Donellan v Watson* (1990) 21 NSWLR 335, forensic immunity was denied to a solicitor who consented to a compromise of an appeal on terms quite different from those he had agreed with his client. A somewhat similar decision had earlier been reached in New Zealand, without reference to forensic immunity, in *Thompson v Howley* [1977] 1 NZLR 16. These cases show that immunity does not necessarily attach to things done in court.

(3) The plaintiff in *Acton v Graham Pearce & Co* [1997] 3 All ER 909 had been convicted on criminal charges but the convictions had been quashed by the Court of Appeal following the reception of new evidence. He complained in these proceedings that the defendant solicitors, who had acted for him at the trial, had conducted his defence negligently with the result that he had been wrongly convicted. In these proceedings he complained that the solicitors had failed to take steps which reasonably competent solicitors would have taken, and the judge, at p 923, was satisfied that this complaint was made out. The judge, at p 924, could not accept that the solicitors' failures could be said to be in the nature of preliminary decisions affecting the way that the plaintiff's defence was to be conducted when the proceedings came to trial, and was accordingly satisfied that the failures were not within the scope of the forensic immunity established by *Rees v Sinclair*. The judge also held that there was no public policy objection to the plaintiff's claim since far from challenging the final subsisting decision of a court his claim was entirely consistent with his acquittal on appeal.

(4) In *Keegan Alexander Tedcastle & Friedlander v Hurst* [1997] DCR 481 it was held that a solicitor was not protected by immunity against claims based on his failure to give full and reasoned written advice on the risks of the litigation on which the defendant was embarking and its likely cost: see p 486.

(5) The plaintiff in *Griffin v Kingsmill* [1998] PIQR P24 was a minor who suffered very serious injuries in a road traffic accident. She sought damages from the driver of the car which had knocked her down, and her claim was settled and approved by the court under RSC Ord 80, r 11 before proceedings were begun. Under the settlement she received a sum very far below the value of the claim on a basis of full liability, and she thereafter sued as the first two defendants the solicitors who had previously represented her, and as the third defendant her counsel. All three defendants applied to strike out the plaintiff's claim against them on the ground that they were immune from suit in relation to the compromise of the plaintiff's claim. The deputy district judge refused to strike out, and his decision was affirmed on appeal by Timothy Walker J. He held, at pp 29–30:

> "(1) Striking out these claims would, in my judgment, involve not just an application, but an extension of the *obiter* reasoning of the Court of Appeal [in *Kelley v Corston* [1998] QB 686]. It necessarily involves the proposition that no matter how remote in time and space the advice to settle is from the court house door and the eventual court order, the advice to settle is immune just because of the court order. I am far from satisfied that such a result could have been intended. (2) Indeed, from the language of the judgments of the Court of Appeal . . . it seems to me more

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than arguable (which is all that matters for present purposes) that they did intend to confine the court order point to the specific facts before them. Such facts do not (obviously) exist here. (3) The extension of the principle in the manner indicated would lead to wholly random results. It would mean that the advice would be immune, depending upon the age of the client. Indeed, advice given to a 17 year old whose settlement was activated swiftly would be immune. Advice given to a 17 year old, the implementation of which was delayed beyond the next birthday, would not be immune. (4) Further, if the immunity arises solely from the court order (because essentially it is against public policy to inquire into whether the court discharged its duty to see that the settlement was a fair one) then, logically, I cannot see any reason why the immunity should not apply equally to the solicitors. It is plain beyond argument that the first defendant performed no advocacy function of any kind here, yet she would still be immune. For example, if a solicitor negligently failed to enclose a vital recent medical report when sending counsel instructions to advise on an infant's settlement, as a result of which the case was seriously under-valued, the solicitors, who had committed an elementary error which had nothing to do with the actual conduct of the case in court, would be immune."

(6) On the trial of a preliminary issue in the same case (unreported) 20 February 1998, Buckley J held that forensic immunity did not extend to cover counsel on the facts of the case, and that the first defendant was not protected by immunity in any event since she had not been acting as an advocate.

(7) In *Connolly-Martin v D* The Times, 17 August 1998, Sedley J refused to strike out on grounds of forensic immunity an action alleging that counsel had negligently and without the authority of his client given an undertaking binding on the client, an act done in court, and further alleging that counsel had negligently advised the client that she was bound by the undertaking, an act done out of court.

31 In *T A Picot (CI) Ltd v Michel* [1995] 2 LRC 247, where terms of compromise were embodied in a consent order, the Jersey Court of Appeal applied *Rondel v Worsley* [1969] 1 AC 191 and the *Saif Ali* case [1980] AC 198 in a restrictive way In *Chong Yeo & Partners v Guan Ming Hardware & Engineering Pte Ltd* [1997] 2 SLR 724, 729 it was held that forensic immunity did not protect an advocate or solicitor in Singapore save where the conduct of a criminal case was in question, and then the further action was barred not because of immunity but because the action was an abuse of the court process.

Collateral challenge as abuse of process: the decided cases

32 The *Hunter* principle (see [1982] AC 529) has been applied in a number of cases not involving claims against lawyers: see, for example, *North West Water Ltd v Binnie & Partners* [1990] 3 All ER 547; *Ashmore v British Coal Corpn* [1990] 2 QB 338; *In re Thomas Christy Ltd* [1994] 2 BCLC 527. It has also been applied in several cases brought against lawyers. In the *Somasundaram* case [1988] 1 WLR 1394, 1403, it was held that the plaintiff's claim against solicitors was an abuse of the process of the court since the action necessarily involved an attack on the conviction and

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A sentence imposed on the plaintiff by the Crown Court and upheld in the Court of Appeal. In *Oliver v McKenna & Co* (unreported) 30 November 1995, Laddie J held that a claim in negligence against solicitors, on the ground that they had negligently put forward and supported an unsuitable candidate for appointment as a receiver, was an abusive challenge to a judicial decision that the individual in question was a fit and proper person
B to be appointed. In *Smith v Linskills* [1996] 1 WLR 763 the Court of Appeal upheld the decision of a judge striking out a claim by a convicted criminal defendant against the solicitors who had represented him at his trial, holding that the action amounted to a collateral challenge to the conviction and was not justified under the fresh evidence rule laid down in the *Phosphate Sewage* case, 4 App Cas 801. In *Griffin v Kingsmill (No 2)*, 20 February 1998 the court held on a preliminary issue that the proceedings did involve a
C collateral challenge to the court's decision approving the infant settlement. Other unreported cases in which objections under this head have been upheld include *Sinanan v Innes Pitassi & Co* (unreported) 20 February 1991; Court of Appeal (Civil Division), Transcript No 125 of 1991, in which a claim in negligence was made against solicitors arising from their conduct of a defence to RSC Ord 14 proceedings; *Wright Son & Pepper v Smith*
D (unreported), 10 November 1994; *Richards v Witherspoon* (unreported) 6 May 1998 and *Flashman v Bond Pearce* (unreported), 17 July 1998.

33 In *B v Miller & Co* [1996] 2 FLR 23 the judge refused to strike out a claim for negligence against solicitors based on a consent order made in ancillary relief proceedings on the ground that such proceedings were not to be equated with a final order made at the conclusion of contested
E proceedings, but this decision was disapproved by all three members of the Court of Appeal in *Kelley v Corston* [1998] QB 686. In *Griffin v Kingsmill* [1998] PIQR P24, on the strike-out application, Timothy Walker J reached a similar conclusion, pointing out, at p 31, that the master who had approved the infant settlement had not been a court of trial, had not given a judgment on the merits of the case and had not given a judgment on any contested issue. The judge observed that if the collateral attack point were a good one
F it would have been an equally good one in *Kelley v Corston*; but it is plain from the report of that case that the *Hunter* argument was not relied on before the Court of Appeal.

34 In *Palmer v Durnford Ford* [1992] QB 483 haulage contractors, in reliance on the expert advice of an engineer, issued proceedings against the vendor and the repairer of a lorry. Shortly before trial the expert advised
G that he would have difficulty supporting the claim against the vendor. At the trial evidence was heard, but before the trial was completed the haulage contractors abandoned their claims and by consent judgment was given for both defendants with costs. The contractors then sued the solicitors and the expert who had acted for them at this trial. On the application of the expert, a district judge struck out the claim against him, holding that he was protected by the immunity of those participating in court proceedings. The
H contractors appealed. At the hearing of the appeal (by Mr Simon Tuckey, sitting a deputy judge of the High Court) the solicitors applied to strike out the claim against them as an abuse of the process of the court, relying on the judgment entered by consent. The expert also relied on that ground on appeal.

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The deputy judge allowed the contractors' appeal against the expert. Applying a test analogous to that in *Rees v Sinclair* [1974] 1 NZLR 180, he concluded that while the expert might be immune in relation to his evidence in court and the preparation of it, he might well not be immune in relation to his initial advice and his willingness to advise as an expert. The deputy judge did not find it possible, on the pleadings, to rule where immunity began and ended and so reinstated the claim. On the solicitors' summons, however, the deputy judge struck out those paragraphs of the contractors' pleading which, in his judgment, impugned the earlier consent judgment. He rejected the argument that this had not been a final decision because the court had not itself pronounced on the merits of the claims, holding that a final decision for the relevant purpose was one which would give rise to a plea of res judicata, leaving nothing to be judicially determined or ascertained thereafter.

35 The decision in *Palmer v Durnford Ford* [1992] QB 483 was considered by the Court of Appeal in *Walpole v Partridge & Wilson* [1994] QB 106. The plaintiff in that case had been convicted by magistrates and on appeal by the Crown Court. He had then consulted the defendant solicitors for the first time on the prospects of a further appeal, but complained in this action that the solicitors, despite favourable advice by counsel, had failed to pursue an appeal by way of case stated. It was accepted that he had a point arguable on appeal. On the application of the solicitors, a judge struck out the plaintiff's claim against the solicitors as an abuse, holding that it made a collateral attack on the subsisting decision of the Crown Court. The Court of Appeal took a different view, pointing out that the rule in *Hunter* [1982] AC 529 was not absolute and holding for a number of reasons that the action against the solicitors was not necessarily to be regarded as abusive. But the court questioned whether Mr Tuckey had been right to strike out the claim against the solicitors in the *Palmer* case. Ralph Gibson LJ, giving a judgment in which the other members of the court concurred, (1) agreed that as between the contractors and the repairers the consent judgment had been final as giving rise to a plea of res judicata; but (2) was not satisfied that that had been a decision against the contractors which they had had a full opportunity of contesting within the principle stated by Lord Diplock in the *Hunter* case; and (3) held that the *Hunter* principle did not prevent a plaintiff attacking a prior decision if he had sufficient fresh evidence; and (4) held, at pp 124–125:

> "If there is a sufficiently arguable case to show that the defendant solicitors, by their breach of duty, put the plaintiffs in the position of being unable properly to contest the first decision, so that the plaintiffs were reasonably compelled to submit to judgment on the issue, then, in my judgment, the plaintiffs' claim is not shown to be an abuse of the process of the court merely because it will, if it succeeds, require the court to assess the damages on the basis that the prior decision of the court would not have been made if the solicitors had not been in breach of duty."

Thus on this reasoning the *Hunter* principle may not be irrelevant where there has been an unapproved judgment by consent (although Lord Diplock in the passage from the *Saif Ali* case [1980] AC 198, 223, quoted ante, pp 885G–886A, would appear to have taken a different view); but the

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A principle in any event requires some modification where the claim is against solicitors on the ground that the solicitors' negligence obliged the client to accept less than would have been recoverable but for the solicitors' negligence; and good reason must be shown for reopening the matter. Plainly, however, the Court of Appeal did not intend to sanction a new and undesirable form of satellite litigation. It is very common for litigants, having compromised, to suffer post-settlement remorse. Only rarely will an B action against their legal advisers be otherwise than abusive.

36 It is of interest, if of little direct legal significance, that in *Dickinson v Jones Alexander & Co* [1993] 2 FLR 521 solicitors accused of negligence in conducting ancillary relief proceedings leading to a consent order admitted liability for negligence, so that the only issue was the quantum of damages which they should pay; and that in *Griffiths v Dawson & Co* [1993] 2 FLR C 315 solicitors were held liable and ordered to pay damages for negligence in the conduct of ancillary relief proceedings.

Discussion

37 It seems to us that in the light of the *Hunter* case [1982] AC 529 the first question to be asked on any application to strike out or dismiss a claim D for damages against lawyers based on their allegedly negligent conduct of earlier proceedings is whether the claim represents an abusive collateral challenge to an earlier decision of the court. If the claim does represent such a collateral challenge it should be dismissed or struck out unless, on the facts of the particular case, there are grounds for not following that course. This principle clearly applies to claims against lawyers whether they are acting as advocates or not. If the claim is dismissed or struck out on application of the E *Hunter* rule, there is no ground for holding the lawyer immune against such a claim on the ground that public policy requires the recognition of forensic immunity to prevent re-litigation of matters already finally decided by the court. If, on the other hand, it is not appropriate, on the facts of a given case, to strike out or dismiss the claim on application of the *Hunter* rule, forensic immunity should be recognised, if at all, only if some other clearly identified F public policy consideration requires it, for it is plain on high and binding authority that forensic immunity is to be accorded only when, and to the extent that, the public interest requires that it should.

38 As recognised by the Court of Appeal in the *Walpole* case [1994] QB 106, 116 and *Smith v Linskills* [1996] 1 WLR 763, 769, the House of Lords did not decide in the *Hunter* case that the initiation of later proceedings collaterally challenging an earlier judgment is necessarily an abuse of process G but that it may be. In considering whether, in any given case, later proceedings do constitute an abusive collateral challenge to an earlier subsisting judgment it is always necessary to consider with care (1) the nature and effect of the earlier judgment, (2) the nature and basis of the claim made in the later proceedings, and (3) any grounds relied on to justify the collateral challenge (if it is found to be such).

H 39 In considering (1), the nature and effect of the earlier judgment, it would in our view be fallacious to treat all judgments as of equal weight. We are satisfied that for reasons given in the *Hunter* case and *Smith v Linskills*, a collateral challenge in civil proceedings to a subsisting criminal conviction, particularly a conviction upheld or not challenged on appeal, and whether the defendant was convicted on his own admission or on the verdict of a

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court or jury, must always be the hardest to justify. Nothing short of fresh evidence satisfying the *Phosphate Sewage* test will ordinarily suffice. Little less is required to challenge the final decision of the court in civil proceedings when evidence has been received and judgment given. When, without a fully contested hearing, the court has given an interlocutory judgment, or approved a compromise under RSC Ord 80 or RSC Ord 15, r 13(4) or RSC Ord 85, or made a consent order for ancillary relief, such judgment or order is of lesser weight, and the conditions which must be met to justify a collateral challenge to such a judgment or order will be less stringent. The giving of such judgments and the making of such orders are not, however, to be ignored because the full *Hunter* test is not satisfied. They involve an exercise of judicial authority, embodied in an enforceable order of the court. They are not to be lightly disregarded. At the very least, it will be incumbent on a party seeking to mount a collateral challenge to such an order to explain why steps were not taken to set aside or challenge the judgment or order complained of in the original proceedings. If that threshold is crossed, the *Hunter* test must be adapted appropriately to the case in question, always bearing in mind that the fundamental issue is one of abuse. The initiation of proceedings against legal advisers which involves a collateral attack upon a consent judgment approved by the court in previous proceedings may, and ordinarily will, be an abuse of the process unless the plaintiff can properly allege a breach of duty which either (1) deprived the plaintiff of a reasonable opportunity of appreciating that better terms were available whether on settlement or at a contested hearing than the plaintiff obtained, or (2) placed the plaintiff in the position of having to accept a settlement significantly less advantageous or more disadvantageous than he should have had.

40 Although the question arises on the first appeal, we do not find it necessary to determine what, if any, weight attaches to a consent judgment not requiring or receiving the approval of the court. The question was first raised by the court when the argument was well advanced, and although Mr Jackson (for Arthur J S Hall & Co) adopted it, we did not hear full argument. We are conscious that Lord Diplock in the *Saif Ali* case [1980] AC 198 and Ralph Gibson LJ in the *Walpole* case [1994] QB 106 appear to have taken different views.

41 It is not open to us to question the existence of the core forensic immunity upheld in *Rondel v Worsley* [1969] 1 AC 191, nor to doubt the limited extension recognised in the *Saif Ali* case [1980] AC 198. It is, however, plain from the tenor of the majority speeches in the *Saif Ali* case that any extension beyond the core immunity must be rigorously scrutinised and clearly justified by considerations of public policy. While their Lordships made it plain that forensic immunity was available to solicitors as well as barristers, they could scarcely have made it plainer that such immunity was available only to those acting, in respect of any relevant act or omission, as advocates. Their speeches cannot be read as countenancing the grant of forensic immunity to those having the conduct or management of litigation otherwise than as advocates. Section 62 does not alter, and was enacted against the background of, that rule. Save where a claim relates to the acts or omissions of an advocate conducting a contested case in open court, forensic immunity is not to be recognised on the application of any blanket rule. It is always necessary to look with care at the specific

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A complaint of negligence made against the lawyer in the context of the particular case.

42 The *Saif Ali* case indicates that there are certain forms of advice (such as decisions made on strategic or professional grounds on whether witnesses should or should not be called, or whether claims or defences should or should not be pleaded) which would be covered by forensic immunity if made in court in the course of a trial and are likely to be B similarly protected if made out of court before a trial. We cannot, however, accept that a similar immunity should attach to allegedly negligent decisions made out of court on, for example, the legal strength or weakness of a claim, or the legal admissibility of evidence, or the approximate value of a claim. It may very well be, of course, that the lawyer will succeed in rebutting any accusation of negligence; but the question whether the lawyer is negligent is C quite distinct from the question whether he is immune.

43 If our foregoing analysis is correct, it must follow that there can be no general rule that counsel is, or is not, immune from liability in settling a case or, as it should more properly be put, in advising his client that the case should be settled. Nor, in our view, can it safely be said that such advice given at the door of the court on the day of the hearing, or even during the hearing, is necessarily immune, and advice given at any earlier stage is not: D all must depend on the advice given, the reason for it and the complaint made about it. Advice based on the advocate's assessment of the strength of the evidence, or the likelihood of a finding of contributory negligence may be one thing; advice based on a palpable error of law or deficient research may be quite another. Whatever the advice in question, and whenever and wherever the same is given, the basic question must always be whether E public policy requires the recognition of immunity in the case in question. Any doubt must be resolved against the grant of forensic immunity, since such immunity derogates from what we have described as a fundamental principle and the law should be slow to grant its own practitioners a protection denied to members of other professions.

44 We consider that the views which we have expressed above are, with two possible exceptions, consistent with, and indeed foreshadowed by, all F authority binding upon us. The first possible exception is *Kelley v Corston* [1998] QB 686. That is a very difficult case to follow and apply because (1) the ratio of the majority is somewhat elusive (the more so since Butler-Sloss LJ expressed agreement with the conclusions of Pill LJ but not with his reasoning); (2) some doubt is cast on what appears to be the ratio of Butler-Sloss LJ's judgment by her suggestion, at p 716, that the views she went on to G express might be said to be strictly obiter; (3) two members of the court were, it seems, unwilling to rest their judgments on the only point on which all three members of the court were apparently agreed; (4) the *Hunter* principle was not relied on, although it would seem to have provided the appropriate basis on which to consider the significance of the court's approval of the agreed terms of settlement (see Judge LJ, at p 695; the other members of the court made no reference to the *Hunter* case [1982] AC 529); H (5) it is not easy to reconcile the apparent reliance of Pill and Butler-Sloss LJJ on the fact that settlement was agreed at court when the parties gathered for the hearing with the acceptance by counsel for the plaintiff [1998] QB 686, 691, that no distinction could be drawn between the advice given by the barrister at court on the morning of the trial and the advice which she had

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given the day before. It is difficult to derive any clear principle from the case, a difficulty which we share with first instance judges who have attempted to apply it. It does not in any event govern these appeals, which all concern solicitors only.

45 The second possible exception is *Bateman v Owen White* [1996] 1 PNLR 1. We would not hold that solicitors were entitled to claim forensic immunity when they had not at the relevant time been acting as advocates. Since this was an interlocutory decision of two Lords Justices refusing leave to appeal, the strict doctrine of stare decisis does not apply to it: see *Boys v Chaplin* [1968] 2 QB 1.

46 It follows from our discussion of principle above that we have reservations about the correctness of the reasoning of certain English first instance decisions we have mentioned above, notably *Landall v Dennis Faulkner & Alsop* [1994] 5 Med LR 268, *McFarlane v Wilkinson* [1996] 1 Lloyd's Rep 406 and Timothy Walker J in *Griffin v Kingsmill* [1998] PIQR P24 (in regard to forensic immunity). Since the decisions of Sir Richard Scott V-C in *Atwell v Michael Perry & Co* [1998] 4 All ER 65 and of Buckley J in *Griffin v Kingsmill (No 2)*, 20 February 1998 are the subject of pending appeals not now before us we forbear to comment on them.

47 In *Kelley v Corston* [1998] QB 686 Judge LJ, at p 702, disapproved of *B v Miller & Co* [1996] 2 FLR 23 because he held that an ancillary relief agreement approved by the court and embodied in an order rendered those who advised the agreement immune from suit. Pill LJ, at p 710, took the same view. So, at p 715, did Butler-Sloss LJ. We respectfully agree that the judge in *B v Miller & Co* was wrong to discount as he did the court's approval of the settlement under section 33A of the 1973 Act. It is however noteworthy that in *B v Miller & Co*, in contrast with *Kelley v Corston*, the defendants' resistance was based on abuse of process and not forensic immunity, the claim was against solicitors and not against a barrister, and the court approving the ancillary relief agreement was not (it seems) provided with the minimum information required by rule 76A. The client's main complaint was that the solicitors had negligently failed to obtain an up to date valuation of the former matrimonial home, as a result of which she had allegedly received a much smaller sum than she should have received. Even if the judge in *B v Miller & Co* had given appropriate weight to the court's approval of the ancillary relief settlement, he might very well have been entitled, in our judgment, to allow the client's claim to proceed.

48 While we recognise the dangers of attempting to summarise the effect of a long and necessarily complex judgment, and we regret the repetition involved, we think it may be helpful if we draw together the main features of the law as we now understand it to be in cases where (1) a plaintiff in a later action seeks relief against legal advisers who acted for the plaintiff in an earlier action which ended in a considered decision of the court or an approved settlement and (2) the plaintiff's claim in the later action is based on negligence allegedly leading to an outcome less favourable than, but for the negligence, the plaintiff would and should have achieved and (3) the legal advisers sued in the later action apply to restrain further prosecution of the proceedings:

(1) The first question to be asked is whether the plaintiff's claim represents an abusive collateral challenge to the earlier judgment of the

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court. If it does the claim will ordinarily be dismissed or struck out unless there are grounds for not following that course.

(2) In deciding whether, in any given case, the later proceedings constitute an abusive collateral challenge to the earlier judgment of the court it is always necessary to consider (a) the nature and effect of the earlier judgment, (b) the nature and basis of the claim made in the later proceedings, and (c) any grounds relied on to justify the collateral challenge (if it is found to be such).

(3) In considering the nature and effect of the earlier judgment, even greater weight will be accorded to a criminal conviction than to the final judgment in a contested civil trial, and greater weight will be accorded to the judgment in a contested civil trial than to an interlocutory judgment or order or a consent order approved by the court. It can never, however, be appropriate to explore the extent to which an individual judge considered and appraised the merits of a proposed settlement in any particular case.

(4) Where the later proceedings do constitute a collateral attack upon a consent judgment approved by the court in previous proceedings they may, and ordinarily will, be an abuse of the process unless the plaintiff can properly allege a breach of duty which either (a) deprived the plaintiff of a reasonable opportunity of appreciating that better terms were available whether on settlement or at a contested hearing than the plaintiff obtained or (b) placed the plaintiff in the position of having to accept a settlement significantly less advantageous or more disadvantageous than he should have had.

(5) A plaintiff seeking to mount a collateral challenge to an earlier judgment or order will be required to explain why steps were not taken to set aside or challenge the judgment or order complained of in the original proceedings. The court will be reluctant to sanction the initiation of satellite proceedings against legal advisers, and will never do so without substantial grounds. It will never be enough that the plaintiff is suffering from post-settlement remorse.

(6) Pending reconsideration of *Rondel v Worsley* [1969] 1 AC 191 and the *Saif Ali* case [1980] AC 198 by the House of Lords, the ratio of those cases is binding on lower courts. Any extension of the core forensic immunity beyond the limit recognised in those cases must be rigorously scrutinised and clearly justified by considerations of public policy. Where later proceedings are objectionable as an abusive collateral challenge to an earlier judgment of the court that fact cannot, on its own, afford a public policy ground for granting forensic immunity.

(7) Forensic immunity (as distinct from the protection accorded to those who, in any capacity, participate in legal proceedings in court) is enjoyed only by those who, whatever their professional qualification, are in respect of any relevant act or omission acting as advocates.

(8) There can be no general rule that a lawyer is or is not immune from liability in advising a client to settle a case, and immunity does not depend on when or where such advice is given. All depends on the advice given, the reason for it and the complaint made about it. We now turn to the four appeals.

Arthur J S Hall & Co v Simons

49 Melvyn Keith Simons ("Mr Simons") is a building contractor. In 1985 and 1986 he carried out work to Church House, Madeley, Cheshire at

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the request of the owner, Mr Roderick Fox ("the owner"). A dispute arose between Mr Simons and the owner which led to proceedings ("the Stoke proceedings") in which the former claimed sums alleged to be due pursuant to the building contract and the latter claimed damages for what he claimed to be faulty work. Arthur J S Hall & Co ("the solicitors") acted for Mr Simons in connection with the Stoke proceedings and instructed counsel on his behalf. On 19 August 1991, the day before the trial was due to start, the owner and Mr Simons settled the proceedings between them. On the following day Judge Franks, sitting on official referee's business at Manchester, gave effect to the settlement by a consent order.

50 On 6 March 1992 the solicitors instituted proceedings in the Crewe County Court against Mr Simons for the recovery of their fees for acting for Mr Simons in and about the Stoke proceedings. Mr Simons defended the claim by alleging that the solicitors had been negligent in their conduct of the Stoke proceedings. The trial of these proceedings came before Judge Mackay, sitting at the Liverpool County Court, on 13 October 1997. Counsel for the solicitors sought and obtained leave to re-amend his reply and defence to counterclaim so as to assert that the amended defence and counterclaim did not disclose a reasonable cause of action in that "each and every act or omission of [the solicitors] relied upon is covered by the immunity from suit arising out of the conduct of the management of the cause".

51 Judge Mackay decided to determine this question as a preliminary issue. He resolved it in favour of the solicitors and, on 14 October 1997, gave judgment for the solicitors for the amount of their claim, namely £10,499·54. This is an appeal of Mr Simons from that determination and judgment. He seeks an order that there be a new trial. He claims that the judge was wrong in law to conclude that immunity could attach to the allegations of negligence made by Mr Simons against the solicitors. To explain what those allegations were and to provide the background to our conclusions it is necessary to describe the underlying disputes between Mr Simons and the owner in greater detail.

52 To carry out the works of renovation to his property at Madeley the owner engaged the services of an architect, the David Evans Practice ("the architect"), as well as those of Mr Simons. The timber treatment works were carried out by ALD Dampcoursing Ltd ("ALD"). The works were completed in the summer 1986 and the owner paid the sums due to Mr Simons except for £5,250 which, it was agreed, should be retained by the owner. On 7 May 1987 there was a meeting at the property attended by the owner, the architect and Mr Simons. Mr Simons contends that at this meeting the owner requested the completion of three snagging items and a thirty year timber treatment guarantee. He claims that it was agreed between the three of them that on completion of the snagging items and production of the guarantee the owner would pay to Mr Simons £4,550 in full and final settlement of his claim for £5,250. Mr Simons alleges that although he duly completed the snagging items and produced timber treatment guarantees from both ALD and Sovereign Chemicals Ltd (by whom ALD had been approved) the owner refused to pay him £4,550 or any part of it.

53 On 1 June 1988 Mr Simons instituted proceedings in the Stoke County Court for the recovery of £4,550 from the owner. On 16 August

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A 1988 Mr Simons retained the solicitors to act on his behalf in connection with the disputes with the owner. On 2 September 1988 the owner commenced proceedings against Mr Simons and the architect. The two actions were consolidated on 29 November 1988. Thus the claims in the Stoke proceedings comprised a claim by the owner against Mr Simons and the architect for damages for sundry alleged breaches of contract and acts of negligence, quantified in the sum of £16,620, and, as well as their defences, B counterclaims by Mr Simons for £4,550 and the architect for £1,226. In addition the architect sought contribution from Mr Simons and Mr Simons instituted third party proceedings against ALD seeking an indemnity against any liability for defective timber treatment work.

54 In due course the Stoke proceedings were fixed to be heard on 20 August 1991. In June and July 1991 the solicitors had a number of C conferences with counsel instructed by them on behalf of Mr Simons. By a letter dated 10 July 1991 the solicitors reported to Mr Simons the views of counsel that he regarded the problem whether Mr Simons or the architect was responsible for the allegedly defective timber treatment work of ALD as "knotty". The solicitors also reported the views of counsel that a lot would depend on whether the judge held that there had been a concluded agreement in May 1987 in respect of which counsel wished to see D Mr Simons. The solicitors informed Mr Simons that the architect's solicitors had been in touch with them suggesting a settlement whereby the architect would be responsible for half the owner's claim in respect of timber treatment and discussed the merits of that proposal. On 14 July 1991 Mr Charles Fox, the partner in the solicitors with whom Mr Simons dealt, recorded in an attendance note that he had pointed out to Mr Simons that E the weakest part of his defence was in respect of the timber treatment. In early August 1991 there were further exchanges between the solicitors and Mr Simons and the solicitors for the owner and the architect.

55 The crucial meeting took place on 19 August 1991. In the morning Mr Simons had a lengthy conference with counsel instructed on his behalf by the solicitors. It was also attended by his expert witnesses and by Mr Charles F Fox. They considered the conduct of the trial, due to commence the following day, and the evidence to be led in the course of it in some detail. At 2.30 p m the owner and the architect's solicitors also attended, though by this time Mr Charles Fox had left, leaving his assistant to hold the fort. The note prepared by the assistant clearly records the progress of the negotiations and the agreement ultimately reached. The owner reduced his claim to £15,000 and his costs, the architect increased his contribution from G 50% to £14,000 and 75% of the owner's costs and Mr Simons dropped his counterclaim and agreed to pay to the owner £1,000 and 25% of the owner's costs but on terms that he was free to pursue his third party claim against ALD. The note records counsel's consistent and strong advice to Mr Simons to settle and Mr Simon's reluctance to do so because "he could not see the point in the matter going on over five years [if] it was going to be settled eventually".

H 56 On 20 August 1991 Judge Franks made an order by consent to give effect to the compromise reached the previous day. The order did not require and did not receive the approval of the judge as to its terms. A week later, on 27 August 1991, judgment was entered by Judge Franks in the third party proceedings against ALD for £4,550, the amount of Mr Simons'

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original counterclaim against the owner, £2,990 interest thereon and the further sum of £1,000 paid by Mr Simons to the owner. In addition the judge awarded Mr Simons an indemnity against his costs of the main action and against his liability for 25% of the owner's costs thereof. The judgment obtained by Mr Simons against ALD proved to be valueless and he recovered nothing in respect of it.

57 As we have indicated already the solicitors instituted these proceedings for recovery of their fees of £6,840 on 6 March 1992. By his amended defence and counterclaim Mr Simons denied his indebtedness and counterclaimed for damages for negligence and breach of contract. His claims may be summarised as follows: (a) the solicitors had failed to advise him that his defence based on the agreement with the owner reached in May 1987 was weak and should be compromised; (b) the solicitors were in breach of the express term of their retainer alleged by Mr Simons that he would at least recover his own costs; (c) the solicitors had failed to inform Mr Simons at any time before 19 August 1991 that he should settle the owner's claim on the terms that he was ultimately forced to accept; (d) the solicitors had failed to understand the guarantee provided by Sovereign, to obtain proper expert evidence in time or at all, to advise on the liability of ALD or to investigate its solvency. The essence of Mr Simons' complaint is that either the solicitors should have advised him in the beginning to settle or they should have properly prepared for trial so that he could fight the case with unimpaired prospects of success. The relief sought was damages for the loss of the opportunity to recover £4,550 under his counterclaim against the owner and in respect of the liability to pay £1,000 and 25% of his costs to the owner pursuant to the consent order.

58 In their amended reply and defence to counterclaim served on May 1997 the solicitors raised a number of defences on the merits but did not claim any immunity. The action came on for trial before Judge Mackay on 13 October 1997. At the outset counsel for the solicitors sought leave to re-amend so as to claim immunity in the form to which we have already referred. This was not opposed. The judge agreed to determine, as a preliminary issue, the question of law as to the availability of any such immunity. In his judgment given on 14 October 1997 he recorded that it was agreed that he should "try the question of immunity as a preliminary issue". He then broke that question down into three questions, namely (a) "does the immunity from suit apply to the settlement of 19 August, the settlement which occurred the day before the trial took place, or more appropriately, was listed to take place?" (b) can Simons, the builder, evade immunity by alleging antecedent acts of negligence?" (c) "if so, does that apply to any antecedent act of negligence or only those not included in the ambit of the settlement?" The judge also recorded that counsel for Mr Simons had not argued the second or third questions but had "left the other two questions to be decided by this court, but to, as it were, hold his fire with regard to such questions".

59 In his judgment Judge Mackay explained the background to the preliminary issue and considered the decision of this court in *Kelley v Corston* [1998] QB 686. In respect of the first of the questions to which he had referred he said:

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A "There can be no doubt that a settlement of the case at court would attract immunity. The question I have to decide is: did the settlement of 19 and not 20 August 1991 attract this immunity? . . . It seems to me if all the parties gather as if for a trial when a trial is imminent and settle the case they are not to be distinguished from the same group actually appearing and settling the case on the very day of that trial . . . Therefore, I answer the question does immunity from suit apply to the settlement of 19 August 1991 with the answer, 'Yes'."

He answered the second question in the negative. He said:

"The purpose of a settlement is to reach a conclusion which may be adverse to the interests of one party or adverse to the interests of all the parties. It may well be that that melting pot includes all sorts of issues, some of which are connected closely with the evidence which the parties may wish to bring. Others are not connected closely with that evidence, but are very important to the parties. It is impossible to distinguish one from the other . . . a settlement is very closely connected with the trial of the issues because in my view it is a form of trial in itself. Because all the issues are gone through perhaps in a short period, perhaps not overtly between the parties, but they are gone through often enough in great detail . . . therefore I say that the builder cannot evade this immunity by alleging antecedent acts of negligence".

In respect of the third question he considered that the only antecedent acts which were not so immune were those "not referable to the matters contained in the settlement". He concluded:

"I consider that the settlement of a claim is effectively the same as the result of a claim tried at law, provided that settlement was closely connected with and contained the same personnel and materials as would have been the case if the settlement had been concluded either at the door of the court or after the beginning of the trial and I would not extend the immunity as enunciated by the Court of Appeal to settlements of cases other than those."

60 It will be apparent from our conclusions on the principles applicable to cases such as these that we are unable to agree with the judge's conclusions. First, the order of Judge Franks made on 20 August 1991 was a consent order which did not require the approval of the court as to the merits or fairness of its terms. Even if it be assumed that such an order may attract the *Hunter* principle so that a collateral attack on it is capable of amounting to an abuse of the process, a point we have left open, we are clear that no such abuse could be involved in this case. The alleged acts of negligence which we have summarised in paragraph 57, sub-paragraphs (a), (b) and (c) (see ante p 906) do not amount to an attack on the consent order. In so far as the acts of negligence summarised in sub-paragraph (d) are concerned, if proved, they will show that had the solicitors properly performed their duty a better settlement might have been achieved. For the reasons discussed earlier we do not consider that in those circumstances the claim against the solicitors could constitute an abuse of the process of the court on the *Hunter* principle.

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61 Second, even if the settlement reached on 19 August 1991 were capable of being sufficiently closely connected with the conduct of the cause in court so as to come within the *Rees v Sinclair* principle the consequential immunity is available to the advocate only. No complaint has been made against counsel instructed by the solicitors on behalf of Mr Simons. It is beyond doubt that the acts and omissions of which Mr Simons complains were done or not done, as the case may be, otherwise than as advocates.

62 Third, even if in the relevant respects the solicitors had been acting as advocates none of the allegations we have summarised in paragraph 57 above could have come within the *Rees v Sinclair* principle. Even the complaint, summarised in sub-paragraph (d), that the solicitors failed to obtain proper expert evidence in time or at all does not involve a decision by the solicitors from the consequences of which public policy requires that immunity should be afforded.

63 Counsel for the solicitors drew our attention to the fact that the damage claimed by Mr Simons was the consequence of having entered into the settlement on 19 August 1991. He submitted that if the acts and omissions of the solicitors leading to that settlement were immune then there was nothing left in the claim to be pursued at a trial. In that event, he claimed, there was no point in analysing the pleadings to see which act or omission did not come within the *Rees v Sinclair* principle for there was no viable claim for damages consequential on that act or omission alone. It is unnecessary for us to consider that submission further for we have concluded that no act or omission of the solicitors could be immune. It follows that the action must proceed to trial so that the facts may be found and any consequential liability ascertained.

64 For all these reason we allow the appeal of Mr Simons, set aside the order of Judge Mackay made on 14 October 1997 and direct a new trial of the action and counterclaim.

Barratt v Woolf Seddon

65 In this case Mr Barratt (the husband) sued Woolf Seddon, his former solicitors for negligence in respect of advice given in relation to, and their conduct of, his former wife's claim for ancillary relief which ultimately led to an order by consent.

66 This is an appeal from the decision of Blofeld J dated 14 October 1997 by which he acceded to an application by the solicitors to strike out the statement of claim of the husband. By the application dated 22 September 1997 the solicitors applied to amend their defence to allege

> "that the terms agreed between [the husband and his wife] were approved by the court in accordance with the duty of the court to consider the terms of settlement to be incorporated into a consent order in matrimonial ancillary relief proceedings. Following such consideration and approval by the court the said terms were incorporated into such an order. Accordingly [the solicitors] are entitled to, and claim immunity from suit in respect of the matters alleged in this action."

They, in addition, made an application that "the writ and the statement of claim herein be struck out pursuant to RSC Ord 18, r 19 as disclosing no reasonable cause of action and/or as being frivolous, vexatious and an abuse of the process of the court". It is not absolutely clear whether the judge's

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A decision was based simply on immunity, or whether it was based also on the ground that the action was a collateral attack within the *Hunter* principle, but it matters not because the appeal has been conducted on the basis that consideration must be given to both possibilities. In either case one must take the facts essentially from the statement of claim, and assume them to be facts that can be established at a trial.

B 67 The allegations the husband makes so far as material are as follows. On or about 8 November 1990 he retained the solicitors to advise him in connection with his matrimonial affairs, and to advise him and act for him in any proceedings arising from the breakdown of his marriage. The wife commenced proceedings in the Watford County Court, and, in addition to petitioning for divorce, requested the court to grant her ancillary relief. The only asset of significant value which was capable of being realised was their C jointly held matrimonial home. The wife, through her solicitors, put forward to the solicitors a value for the home of £320,000, but the husband told his solicitors that he was not happy with the valuation and wanted two valuations obtained. He further informed them of financial problems he was having in his business affairs. There were negotiations direct between husband and wife as well as between solicitors. The wife then gave notice on D 7 March 1991 that she intended to proceed with her application for ancillary relief. Direct negotiations continued following which on 7 May 1991, in a letter, the solicitors proposed to the wife's solicitors that she should receive a guaranteed sum of £160,000, that sum being put forward on the basis of a value for the home of £320,000. On 5 June 1991, after direct dialogue, the husband and wife agreed that the home should be sold and that the wife should receive £163,000 out of the net proceeds, the balance going to the E husband. That agreement was recorded in letters as between the solicitors of 14 and 24 June 1991.

68 On 1 July 1991 the home was placed on the market with an asking price of £339,000. During July the only offer received was one for £306,000 and the husband informed his solicitors of his concern about the agreement that he had reached. He informed them of his worries as to whether even the F £320,000 could be achieved and as to the difficulties he would have in affording the settlement terms.

69 The husband asserts that the advice he received at this stage was understood by him to be (1) that there was a concluded agreement between him and his wife, and (2) that the wife could enforce the agreement if he failed to sign the documents embodying the same, and that a refusal to sign would simply lead to extra costs being incurred.

G 70 The husband reiterated his concerns to his solicitors, including by this stage his ill health, but still the husband was advised that he was bound by the agreement. The husband then went into hospital for a period.

In the meanwhile, on 5 September 1991, on the basis of an agreed minute of order filed together with Forms 76A from both the husband and the wife each asserting the approximate value of the home at £320,000, and in the husband's case the form being signed by the solicitors on his behalf, an order H was made by District Judge Keyes which "by consent" provided that the minute of order should stand as the order of the court. The minute recited "upon hearing the solicitors" for the husband and the wife, and provided, so far as material, for the sale of the home with the wife to receive £163,000 out of the net proceeds.

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During 1992 the husband's financial position worsened and the home did not sell, albeit the price was reduced .

71 It seems (albeit from his statement and not the statement of claim) the husband consulted other solicitors in June 1992, and on 4 September 1992 an application was made to appeal the order of District Judge Keyes out of time. That application came before Judge Stockdale on 1 December 1992. The application was compromised. The consent order was set aside and the new order provided for sale of the home, and for the wife to receive £137,000.

The home was ultimately sold in August 1993 for £249,000.

72 The husband claims as damages (a) £18,536·96 being the costs and disbursements in pursuing the appeal; and (b) £20,011·81 being his calculation of the difference between what he ultimately received from the proceeds of the home and what he says he should have received if he had been properly advised in relation to the ancillary proceedings by the solicitors. The particulars of negligence can be summarised: (1) failing at any stage to obtain or advise the obtaining of a valuation of the home; (2) failing to advise that any agreement or order providing for the division of proceeds of sale of the matrimonial home should provide for parties to receive percentage interests, rather than for the wife to receive a guaranteed sum; (3) failing to advise that the court would not necessarily be obliged to make an order in the terms of the settlement reached between husband and wife; (4) lodging at the court a Form 76A recording inaccurately the value of the home at £320,000.

73 Blofeld J approached this case on the basis that *B v Miller & Co* [1996] 2 FLR 23 had been held to be wrongly decided. He then compared the allegations with those made in *B v Miller & Co* and found that there were great similarities. He accordingly struck out the claim.

For the reasons already indicated he was wrong to take the view that *B v Miller & Co* had been so comprehensively overruled. What is more Blofeld J seems to have thought that the position of a solicitor and the position of an advocate were precisely the same and approached the case from that standpoint. For reasons already discussed we disagree with that approach.

74 We would approach the case in accordance with the principles expressed in the earlier part of this judgment by asking first whether the action was an abuse of process within the collateral attack principle. Our view is that it cannot be so described. Certainly it can be said to be a collateral attack on District Judge Keyes' order, but if the allegations are made out (and the allegations are credible allegations), the solicitors were responsible for the fact that the plaintiff did not have a proper opportunity of appreciating that very much better terms were available, either on a settlement basis or on a contested hearing basis. They had not obtained a valuation of the matrimonial home; they had not advised that percentage interests would be likely to be ordered if requested; they advised that the agreement reached between husband and wife was final; and they put in a value of £320,000 in the Form 76A when the only offer so far received had been well below that figure, and they had no other valuation. Furthermore, ultimately the husband did, despite the consent order, achieve much better terms on appeal. There may be an argument as to whether if he had pursued that appeal more speedily he might not have achieved the very terms that should have been available before District Judge Keyes, but it is difficult to

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A see why there would not remain a credible case that by the failure to provide a reasonable opportunity to appreciate that very much better terms were available prior to the hearing before District Judge Keyes, the plaintiff has been put to the expense of conducting an appeal.

In our view the case should not have been struck out for abuse of process on the collateral attack principle.

B 75 If the case should not have been struck out as an abuse of process, have the solicitors shown that they are entitled to immunity for the acts of negligence alleged?

The solicitors were not in our view acting as advocates in relation to any alleged act of negligence, and furthermore the conduct said to be negligent was not in any area where the solicitor could say that he was acting where public policy, the rationale for immunity, had any impact. Even the failure

C to put in the correct value in a form to be presented to the court does not seem to us to fall within the area for which immunity was designed for advocates and should not therefore be held to exist for solicitors.

76 Even if the view expressed in relation to filling in Form 76A were thought to be too narrow, it does not follow that the claim must be struck out. The other acts of negligence alleged are very arguably as causative if not more causative of the plaintiff's loss and do not attract immunity on their

D own, and they should not do so simply because ultimately the case was settled and a court order made. They would not attract immunity if a full trial had taken place and the failure had caused the action to fail, and they should not do so simply because a settlement was ultimately reached. The reason they do not attract immunity is primarily because they are not the activities normally carried out by an advocate. But, in any event, they are

E not intimately connected to the conduct of the cause in a sense that would attract immunity for an advocate if carried out by him or her.

We would allow the appeal.

Cockbone v Atkinson Dacre & Slack

77 The marriage between Mr Clive Cockbone ("the husband") and his

F wife, Mrs Patricia Cockbone ("the wife"), was dissolved by a decree absolute pronounced on 25 September 1989, leaving outstanding the wife's claim for ancillary relief. In connection with that claim, on 20 June 1991, the husband retained Atkinson Dacre & Slack ("the solicitors") to act for him.

The claim was settled at the Harrogate County Court on 22 August 1991 on terms that the husband should pay £250,000 to the wife by instalments, the unpaid part being secured on his farm in the meantime. An order to that

G effect was made, pursuant to section 33A of the Matrimonial Causes Act 1973, by District Judge Grills on the same day. On 10 April 1992 the husband, appearing in person, was refused leave to appeal from that order. In May and June 1995 the husband started proceedings in the Leeds County Court against, amongst others, the solicitors claiming damages for negligent handling of his case, and for the use of undue pressure and blackmail inducing him to enter into the settlement and to consent to the order. On

H 30 October 1997 Judge McGonigal, sitting as a judge of the Queen's Bench Division, struck out the husband's claim against the solicitors on the grounds that they were immune from suit in respect of their actions and advice leading to the settlement on 22 August 1991. This is an appeal of the husband from that order.

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78 The husband is a farmer. He farms land at Warsill, Ripley, near Harrogate, North Yorkshire, part of which was farmed by his father before him. He and the wife were married in August 1958. They had five children. The wife left the farm in February 1988. The husband contends that he settled the claims of the wife at the time she left by a payment of £10,500 to their daughter, Carol, and of £9,500 to the wife. The wife did not agree and issued an application for ancillary relief within the divorce proceedings commenced by her on 29 February 1988. The husband continued to live at the farm and to farm it with two of the sons of the marriage, Christopher and David. He claimed, but the wife disputed, that there was a partnership agreement between him and those two sons, made on 1 February 1988, whereby he held the farming assets on trust for the partnership in which the three of them shared the profits equally. It was because of the interests claimed by the sons that they were made parties to the ancillary relief claim.

79 On 19 June 1991 the wife served an up to date affidavit of means on the husband. This included a valuation of the farm and of the live and dead stock as at July 1990 prepared on her behalf by Stephenson & Sons ("Stephensons"). They valued the farm, live and dead stock and milk quota in the sum of £917,500 and suggested that the wife might be allocated two blocks of land at Dow Gill valued at £130,000. The following day the husband instructed the solicitors to act for him in connection with the ancillary relief application. He made it plain to Mr Walker, the partner responsible, that he did not accept the values put on the farming assets by Stephensons. The solicitors informed the solicitors for the wife of their involvement and were told by them that the ancillary relief proceedings were fixed for hearing over two days commencing on 22 August 1991.

80 The solicitors' application on the husband's behalf for legal aid, submitted on 21 June 1991, was granted on 1 July 1991 though, the solicitors contend, they were not so informed until 10 July 1991. The solicitors sought and obtained further documents from the husband on 15 and 18 July 1991 and from the Harrogate County Court on 7 August. On the latter date the legal aid certificate was issued and the solicitors gave notice that they were acting for the husband.

81 On 13 August 1991 the solicitors wrote to the husband indicating that they had been to the Harrogate County Court to obtain some of the documents they required but impressing on him the need for him to provide them with hard evidence of the payments totalling £20,000 to his daughter and the wife on which he relied in defence of the wife's claim. The husband duly attended on the solicitors, as requested, on 15 August 1991. He again made it plain that he disputed the Stephensons valuation of the farm and live and dead stock in the sum of £917,500 as at July 1990. He instructed the solicitors to apply for an adjournment of the hearing fixed for 22 August so that a valuation might be obtained on his behalf. The solicitors duly applied for the adjournment on 16 August but it was refused on 20 August.

82 In the meantime, on 15 August 1991, the solicitors contacted a valuer, Mr Atkinson ("the valuer") previously instructed by the husband. On Wednesday 21 August 1991 the valuer went to the farm and made an inventory and valuation. There was no time to put them in proper typed form but the valuer communicated the results to the solicitors that evening. The valuer also communicated with Mr Stephenson, and agreed to meet him at court the following day.

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A 83 Counsel had been contacted by the solicitors on 13 August but he was only formally briefed on 20 August following the unsuccessful application for an adjournment. The brief, for the husband alone, recorded that the husband disputed the Stephensons valuation and that the valuer would be attending at court. In a confidential note enclosed with the brief the solicitors added:

B "Cockbone is a typical farmer. He lives in cloud cuckoo land and will say whatever comes into his head at that particular moment. He persists in these arguments that the farm makes no money (which might be the case since it is clearly so badly managed), but nevertheless he has a large milk quota which should be profitable and a significant area of land, even if some is rough. Also that equipment is leased, as if this makes any C difference, and finally that the partnership agreement means that only one third or less can be taken into account. It is quite possible unless you stand your ground that you will be the subject of verbal bullying by Mr Cockbone. The most robust stance with him is absolutely vital. The inadequacy and superficiality of these instructions is greatly regretted, but please be assured that it is only with very great effort and urgent expenditure of much time that we have got this far. Please conduct the D case simply to the best of your ability with the information at your disposal. We are well aware it is less than adequate."

84 On 22 August 1991 the husband and the two sons, as interveners, attended the Harrogate County Court with the solicitors, counsel instructed by them on his behalf and the valuer. Also present were the solicitors and E counsel for the wife and Mr Stephenson. The valuer and Mr Stephenson agreed the value of the farm and live and dead stock in the sum of £914,700 (land £568,000, live and dead stock £175,700 and milk quota £171,000). Counsel for the husband and the wife then negotiated a settlement of the wife's claim. As recorded in an affidavit of the husband sworn on 29 February 1996 the solicitors, counsel and the valuer then met the husband in the waiting room at the court and told him that £250,000 was the best F settlement they could negotiate.

85 What followed is graphically described by the husband in the same affidavit. He deposed:

"We"—sc the husband and sons—"signed the order or they would come round with sale notices and sell the farm over our head. How do G you get on with Judge Grills if he does not like the look of you he can take a big swing against you. Don't be a bloody fool, you will be in the driving seat. Case is costing £20,000 a day. It was heated and nasty. There was no discussion with us of how they came to the figure of £250,000 or what other option there was such as going in front of District Judge Grills for a full hearing where he would make a decision . . . The pressure was too much for us and with me nearly going to prison for not paying H maintenance I had already paid and could not afford, we signed the order. We did not know we was giving Mrs Cockbone first legal charge on my property or how I was supposed to pay this huge amount of money and keep our living. I did not go in front of the judge. I was so upset I went straight home."

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86 As we have indicated the district judge made an order to give effect to the settlement. It included a recital to the effect that the husband would consent to the sale of any part of the farm so that the proceeds of sale might be applied in complying with the order. The sum of £250,000 was to be paid by the husband in three instalments, £10,000 within 28 days, £110,000 on or before 22 February 1992 and £130,000 on or before 22 July 1992.

87 As indicated in his statement quoted in paragraph 85 above the husband was thoroughly discontented with the outcome. There followed a number of applications by the husband and his sons to set aside or appeal against the consent order, but they all failed. Some or all of them were based on and supported by advice from counsel obtained in November 1991 and July 1992 and valuations of the farm, live and dead stock and milk quota as at 22 August 1991 obtained by the husband from Dacre Son, & Hartley, Savills and Cluttons in January and February 1993.

88 The husband commenced these proceedings against the solicitors when acting in person. The first plaint issued on 11 May 1995 sought damages for negligent handling of the ancillary relief proceedings and for undue pressure put upon the husband to sign the consent order. The second issued on 30 June 1995 sought damages for the use of blackmail in order to induce the husband to sign the consent order. The nature of the claim may be clearly seen from the particulars given by the husband on 4 June 1995 which, so far as material, state:

> "Negligent handling
>
> "Mr Walker of Atkinson Dacre and Slack was given Mrs P A Cockbone's valuation on 19 June 1991. He failed to have before the court on 22 August 1991 the following on my behalf:
>
> "1. An accurate valuation of the matrimonial assets then available for distribution.
>
> "2. A proper (or any) analysis of the indebtedness of my farming business.
>
> "3. Evidence of the tax implications of the consent order (nor were the tax consequences of the order considered).
>
> "4. Any evidence as to how I would be able to comply with the terms of the consent order.
>
> "There was no explanation of the legal ramifications of signing a consent order nor of the fact that Mrs P A Cockbone was given legal charge and the right to sell the property to get the money.
>
> "Mr Walker did not apply to the court for an adjournment until 20 August 1991."
>
> "Undue pressure
>
> "Undue pressure in the court office was applied to force us to sign the consent order by saying 'If you don't sign the consent order they will come round and put sale notices up and sell the farm over your head. How do you get on with Judge Grills? If he does not like you he will take big swings against you. This case is costing £20,000 a day, don't be a bloody fool you will be in the driving seat.' This was blackmail."

89 The husband contends that the valuations and financial statements were inaccurate in that the assets were overvalued, liabilities of the farming business were omitted and the tax and costs of the sales needed in order to comply with the order ignored. He asserts that if these defects had been

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A rectified then it would have been seen that his net assets did not exceed £189,500. In that event, he contends, the order in favour of the wife would have been for substantially less and capable of being satisfied by a transfer to her of the two blocks of land, valued at £130,000, referred to by Stephensons in their valuation made in July 1990. The husband contends, as alleged in the particulars,

B

> "If the case on 22 August 1991 had been conducted and executed properly there would have been no need to try to get the consent order overturned."

All these allegations were denied by the solicitors in their amended defence served in April 1997.

C 90 On 4 August 1997 (the trial of the action having been fixed for 4 November 1997), following the decision of the Court of Appeal in *Kelley v Corston* [1998] QB 686 the solicitors applied to strike out the proceedings against them on the grounds that they were frivolous and vexatious and otherwise an abuse of the process of the court. At the commencement of the hearing before Judge McGonigal on 9 October 1997 he granted the application of the solicitors to re-amend their defence. By their re-

D amendment the solicitors claim, relying so far as necessary on section 62 of the Courts and Legal Services Act 1990, that (1) the settlement was negotiated by counsel instructed by them on behalf of the husband at the door of the court and was therefore so intimately connected with the proceedings that counsel was immune from suit in respect of it; (2) the solicitors having so instructed counsel properly relied on his advice in respect

E of the settlement so as themselves to be immune; (3) the consent order giving effect to the settlement had been approved by the court as required by section 33A of the Matrimonial Causes Act 1973 so that by reason of such judicial intervention the solicitors were immune.

91 In his reserved judgment delivered on 30 October 1997 Judge McGonigal considered the decision of this court in *Kelley v Corston*. He concluded that counsel would have been immune from suit if sued by the

F husband in respect of his advice regarding the settlement. He then analysed the decision of Holland J in *Landall v Dennis Faulkner & Alsop* [1994] Med LR 268, referred to the speeches of Lord Wilberforce and Lord Diplock in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, 214 and 222, and the terms of section 62 of the Courts and Legal Services Act 1990. After observing that it was clear from the affidavit of the husband that the advice

G as to the settlement came from both counsel and the solicitors he said:

> "In *Kelley v Corston* the Court of Appeal held that a barrister advising a client regarding a consent order under the Matrimonial Causes Act 1973 is immune from suit. Accordingly, pursuant to section 62, a solicitor advising a client regarding such an order is also immune."

H 92 The judge then dismissed the allegations of blackmail and undue pressure exerted on the husband to induce him to settle. As to those allegations he said:

> "I am satisfied that [the husband] is using these words as hyperbole. The pressure he alleges consisted of such things as warning him that the

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court could order a sale of the farm to provide capital for [the wife] or that continuance of the litigation would be very expensive." A

He concluded, therefore, that the solicitors were immune from suit in respect of any claims brought by the husband in respect of their actions and advice on 22 August 1991 relating to the consent order.

93 Judge McGonigal then dealt with the complaints against the solicitors in respect of their acts and omissions before 22 August 1991. He B analysed them as being (a) the failure of the solicitors to obtain a valuation of the matrimonial assets in sufficient time before the hearing fixed for 22 August 1991 so as to enable them and counsel to advise the husband as to the appropriate level of payment at which to settle; (b) the failure of the solicitors to apply for an adjournment, so that such a valuation might be produced, until 16 August 1991; (c) the failure of the solicitors to advise the C husband at any time as to the principles on which the court acts in determining the level of ancillary relief and the likely basis for a settlement or order; (d) the failure of the solicitors properly to instruct counsel in time for him to give independent consideration to the issues and advice to the husband; (e) the failure of the solicitors to advise the husband as to the implications of any settlement or order with regard to the realisation of sufficient money and the tax consequences of doing so. D

94 In that context he considered the speeches of Lord Wilberforce, Lord Diplock and Lord Salmon in *Saif Ali v Sydney Mitchell & Co* [1980] AC 191, 213, 222 and 227, the test propounded in *Rees v Sinclair* [1974] 1 NZLR 180 and section 62 of the Courts and Legal Services Act 1990. He concluded that any decision as to what pre-trial work attracted immunity should be tested by the reasons for the immunity, namely E

"(a) that all who participate in proceedings before a court should be immune from suit in /respect of what they do and say or omit to do or say; (b) that the integrity of public justice should be maintained by discouraging collateral attacks on a decision of one court by relitigation of the same issue before another court or by the need to prevent the immunity of participants in court proceedings being outflanked." F

He considered that each of the complaints, as analysed by him, was immune for one or both of the reasons for the immunity to which he had referred. However he also decided that if he were wrong about immunity he would not strike out the husband's claims for they were not so obviously unfounded as to justify their summary dismissal before trial.

95 On 23 October 1998 the solicitors applied for leave to serve a G respondent's notice out of time. They ask this court to uphold the decision of the judge on the further grounds that the consent order made on 22 August 1991 involved judicial intervention in the form of the court's approval, that the claim of the husband involved a collateral attack on such order and because the judge should have concluded from all the papers before him that the claim of the husband was bound to fail and should be struck out under H the inherent jurisdiction of the court as an abuse of the process of the court. This application was opposed by the husband. We consider that the solicitors should have the extension of time they sought. The questions of immunity were all questions of law which had been fully argued by counsel for parties in the same interest as the husband in one or more of the other

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A appeals. Plainly such issues should be considered in the case of this appeal also. With regard to the claim that the decision of the judge should be upheld because the husband's claim was hopeless we do not think that the husband would sustain any prejudice or disadvantage if the solicitors are allowed to rely on that contention. He did not suggest that he had relied in any way on the absence of a respondent's notice in his preparation for the B hearing of the appeal. Thus the questions which arise on this appeal are whether the claims against the solicitors must fail because (1) the solicitors are immune from such suit (2) the claims are precluded by the *Hunter* principle and/or (3) they are wholly without merit.

96 Before us the husband appeared in person. In advance of the hearing he had sworn an affidavit on 14 May 1998 and submitted two skeleton arguments on 5 October and 1 November 1998 extending in all to 18 typed C pages. During the hearing he read to us from a manuscript with which he provided us with copies. From these documents it is clear that he contests each and every one of the judge's findings against him. In addition, though suffering from the disadvantages of extreme deafness, the gravamen of his complaint was clear enough. He objected strongly to the patronising and dismissive tone of the confidential note from the solicitors to counsel. But he D relied on it as showing clearly that the solicitors had not properly prepared for the trial. He contended that, though instructed on 20 June 1991, they had done much too little and much too late to prepare for the hearing in circumstances when they knew of the date for which it had been fixed and of his profound disagreement with the Stephenson valuation. He submits that in these circumstances the solicitors cannot escape liability by relying on the E opinion of counsel when they knew that counsel had not been properly instructed by them. He contends that what happened on 22 August was not due to any judicial intervention but was the consequence of the almost total lack of preparation for the hearing.

97 In accordance with our conclusions as to the general principles to be applied we do not share the judge's conclusion that the solicitors are entitled to the immunity attaching to an advocate. The solicitors did not act as F advocates in relation to any of the matters of which the husband complains. Nor in failing to prepare adequately for the hearing did they rely on counsel's advice. Accordingly the immunity, if any, must be found in the proper application of the *Hunter* principle. That principle is available because the order required the intervention of the court because of the provisions of section 33A of the Matrimonial Causes Act 1973.

G 98 There is no doubt that all the acts and omissions of the solicitors of which the husband complains are relied on for the proposition that but for those acts or omissions the order of the court would have been for a substantially lower sum. But it does not follow from such consequence that immunity must attach to the act or omission in question. The *Hunter* principle does not preclude relitigation in cases where there is fresh evidence which casts an entirely new light on the case. In our view this exception is H capable of applying in this case; whether it does will depend on the facts as found at the trial. For that reason also we would not accept the contention advanced by the solicitors that the whole of the husband's claim is so lacking in merit as to be liable to be struck out under the inherent jurisdiction of the court.

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99 It is elementary that in any contested application for ancillary relief it is necessary to have full and proper valuations and financial information. The solicitors knew from the outset that the husband contested the figures on which the wife relied. No doubt they had problems obtaining the documents and clear instructions from the husband but it has not been explained to our satisfaction why there was not sufficient time to obtain all that was required between 10 July 1991, when the solicitors knew that legal aid had been granted, and 22 August when the hearing took place. The valuations subsequently obtained by the husband indicate that the court might well have accepted substantially lower values than those attributed to the farming assets by Stephensons. It is not at all clear to us that the liabilities of the business were fully taken into account nor that the liabilities for tax and the costs of sale which would arise from the sales necessary to enable the husband to comply with an order for so large an amount as £250,000 were ever considered.

100 It is an integral part of the husband's claim that undue pressure was put upon him and his sons to agree to the settlement because due to the lack of preparation by the solicitors the case could not be fought with any prospect of success. Though the judge may have been right about the hyperbole associated with the claim we do not think that the allegation of undue pressure should be struck out. By contrast it is clear to us that the allegation of blackmail is without any foundation at all. Indeed it appears to us that the husband was using the word in a wholly different sense to that which would be understood by a lawyer. As this allegation either adds nothing to the allegation of undue pressure or is without any factual foundation but is, in either event, liable to be misunderstood we agree with the judge that it should be struck out.

101 For these reasons we allow the appeal in this case also and, with the exception of the allegation of blackmail, which is to remain struck out, discharge the order of Judge McGonigal. This action should now proceed to trial without further delay.

Harris v Scholfield Roberts & Hill

102 This is an action brought by Mrs Harris ("the wife") against two firms of solicitors. As against the first firm ("the first solicitors") she alleges negligence in relation to the conduct of her application for ancillary relief which resulted in a consent order being made by Deputy District Judge Derbyshire on 22 November 1991 at the Barnstaple County Court. As against the second firm ("the second solicitors") she alleges negligence in relation to the conduct of an appeal from that order which was struck out for want of prosecution.

On 22 January 1998 District Judge White struck out the wife's claim against the first solicitors on the ground that it was vexatious and an abuse of the process of the court, but on 13 May 1998 Toulson J allowed the wife's appeal and reinstated the action against that firm. No application was made by the second solicitors to strike out the claim against them.

103 This is the first solicitors' appeal from the decision of Toulson J, the grounds of the appeal being that (1) the wife's claim against the first solicitors constituted a collateral attack on the decision of Deputy District Judge Derbyshire, and was an abuse on that basis; (2) that in the alternative the role of the first solicitors was indistinguishable from that of counsel and

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A that the first solicitors were entitled to immunity; and (3) that in any event the first solicitors and Mrs Harris acted on the basis of counsel's advice and thus the chain of causation was broken. This latter point was not pursued.

104 Once again the facts must be taken essentially from the statement of claim and the presumption must be that the facts would be established if there was a trial.

B On 8 November 1991, the first solicitors on behalf of the wife obtained counsel's advice in relation to her claim for ancillary relief. On the basis that the husband was earning £40,000, and that the wife was on income support (she being a self-employed psychotherapist/lecturer whose earnings were equalled by her business expenditure), he advised that the wife was entitled to periodical payments for herself, unlimited in time, of £8,120 per annum. The counsel also advised that since the husband was apparently cohabiting C with a female colleague at work, the solicitors should obtain discovery of the financial position of that colleague by way of voluntary disclosure or a witness summons.

105 The same counsel was briefed for the hearing of the wife's ancillary relief hearing on 22 November 1991. Shortly before that date he became unavailable, and the solicitors had to brief different counsel at short notice. D Outside the court this counsel advised that the wife should consent to an order that she should be provided with "periodical payments at the rate of £5,500 per annum payable in equal monthly instalments on 24th each month commencing 24 December 1991 and ceasing 24 November 1993 that is, a total of £11,000". The order further provided that the parties' capital claims should be dismissed. The husband, prior to the order being made, had represented that his relationship with his colleague had broken down, E and that thus her financial position was irrelevant. That was untrue in that in fact the husband had married the colleague on 30 July 1991.

Once the wife discovered that the husband had deceived her and the court she went to the second solicitors. They commenced an appeal against the consent order, and much later commenced a further application to set aside the consent order. Both the appeal and the application to set aside were F dismissed for want of prosecution on 24 November 1994.

106 The allegations of negligence against the first solicitors can be summarised as follows: (1) failure to brief counsel competent in the relevant field; (2) failure to inform themselves of counsel's advice on lifelong maintenance and/or the authorities that told against termination of maintenance; (3) failure to take account of the wife's instructions; (4) failure to investigate properly the position of the colleague; (5) incorrect advice that G it was easy to overturn a consent order if the husband turned out to be lying.

107 Toulson J held first, that the action was not an abuse of process on the collateral attack principle, and second, that public policy did not seem to him to require the solicitors to be held immune for the acts of negligence alleged. His approach is not far removed from that suggested as appropriate in this judgment. He suggested that the approach of Judge LJ (supported obiter by Pill and Butler Sloss LJJ) in *Kelley v Corston* [1998] QB 686 H justifying immunity came close to applying the collateral attack principle under another guise. He also made the point that whereas full hearings carry with them all the normal rights of appeal, consent orders have the feature that there may be only very limited rights of appeal, and thus it would be ironic if the collateral attack principle applied with the same rigour to such

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orders when the action was alleging negligence against the lawyers who advised the entry into the consent order. He distinguished the factual situation in *Kelley v Corston* from the facts of the case before him on the basis that there was no suggestion that the court that made the order in *Kelley v Corston* had not been properly informed, and he held that the action was not an abuse of process on the collateral attack principle.

108 On immunity he reviewed certain of the authorities and concluded that the authorities were based on the view of the court as to where public policy lay, and he took the view that if the allegations made against the solicitors were true then public policy did not require the plaintiff to be left without a remedy.

109 In accordance with the principles discussed earlier in this judgment, we start with the question whether this action is an abuse of process on the collateral attack principle. In our view it clearly is not, because the alleged breaches of duty (which it has to be said are credible allegations), if established, prevented the plaintiff having a reasonable opportunity of appreciating that there were very much better terms available either on settlement or on a full hearing. It can properly be alleged that if they had briefed competent counsel, taken account of relevant authorities and investigated the colleague's position, an entirely different and more advantageous settlement would have been likely.

The fact that the order as obtained was appealable because of the dishonesty of the husband and then not pursued by the second solicitors may be a factor to be considered in relation to causation, but it was not (as recorded by Toulson J's judgment), a point taken as being decisive of the appeal on its own.

In our view the judge was right to conclude that the action was not an abuse of process on the collateral attack principle.

110 Are the solicitors immune? The solicitors in this case were not acting in any way as advocates. That disposes of any suggestion that there might be immunity. But in any event if it could be contemplated that a barrister as advocate might lawfully have performed any of the actions for which the solicitors are criticised, it does not seem to us that there would be immunity for the barrister. Even if we had felt constrained by *Kelley v Corston* to hold that counsel were immune in so far as he was advising on settlement at the door of the court, we would not have been prepared to hold that acts done, or more accurately not done, prior to the settlement negotiations starting and which would lead to an inadequate settlement being concluded would be immune unless those *acts* could be said to be protected for public policy reasons i e by the rationale for which immunity can be justified. An example of such an act would be an insistence that certain witnesses should not be called as part of the advice leading to settlement, but none of the acts alleged can be supported by any public policy rationale.

In our view the judge was right on this issue also and this appeal should be dismissed.

111 In summary, therefore, we allow the appeal in *Arthur J S Hall & Co v Simons, Barratt v Woolf Seddon* and *Cockbone v Atkinson Dacre & Slack*, with the minor or consequential orders we have indicated and dismiss the appeal in *Harris v Scholfield Roberts & Hill*. Before parting with these appeals we should like to add our appreciation for the assistance we have

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A obtained from all counsel involved. We also commend the practice of grouping for a single hearing a number of appeals raising the same general point of law in different factual circumstances. It saves time and helps the court to appreciate the ramifications of its decision.

Orders accordingly.
Leave to appeal refused.

B

19 May 1999. The Appeal Committee of the House of Lords (Lord Slynn of Hadley, Lord Hutton and Lord Hobhouse of Woodborough) allowed petitions by the plaintiffs in the first case and the defendants in the second, third and fourth cases for leave to appeal.

C *Solicitors: Weightmans, Liverpool; Reynolds Porter Chamberlain; Wansbroughs Willey Hargrave, Leeds; Bond Pearce, Exeter; Hill Dickinson, Liverpool; Cooper Whiteman; Stephens & Scown, Exeter.*

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The plaintiff in the first case and the defendants in the second and fourth cases appealed. The Bar Council was given leave to intervene.

D The facts are stated in the opinions of Lord Steyn, Lord Hoffmann and Lord Hope of Craighead.

Jonathan Sumption QC, Jeffrey Bacon and *Sian Mirchandani* for the solicitors. Almost uniquely among professionals, lawyers have divided loyalties: they have a duty to the court and as well as to their clients; they are

E not obliged to win at all costs; they contribute to the workings of justice and have to act honestly and responsibly. In *Rondel v Worsley* [1969] 1 AC 191 it was held that a barrister was immune in respect of his conduct of a case in court. Although there were differences in approach in the speeches there were three main policy considerations which weighed with the court: (i) the value of immunity as reinforcing the advocate's paramount duty to the court; (ii) the desirability of preventing relitigation of the same issues; (iii) the

F supposed unfairness of imposing liability on barristers, who cannot choose their clients because of the cab rank rule.

That decision is not out of date. The reasoning is still valid today. The relitigation issue is not the sole or main justification for the immunity. The main concern is the barrister's duty to the court. If advocates are exposed to the threat of themselves being sued by an unsuccessful client with a grievance

G the result is likely to be that advocates take every possible point when presenting a case. The professional man is motivated by a concern not to be sued as much as by a concern not to be successfully sued: see *Munster v Lamb* (1883) 11 QBD 588. Any change to the rule on immunity will lead, over time, to more points, even bad points, being raised in litigation generally.

There is no justification for departing from the present rule. The pressure

H on the objectivity and detachment of those participating in court proceedings is greater than it was and the case against the relitigation of disputes stronger for three reasons. (i) Britain is a more litigious society than it used to be. (ii) Solicitors have wider rights of advocacy and are more inclined to exercise them. A solicitor is more vulnerable to pressure from a litigious client than a barrister is. The solicitor has direct contact with the

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client throughout the proceedings. The client's business is more likely to be a significant part of the solicitor's practice. He also has partners to think about. (iii) The new rules of civil procedure are dependent on the independent judgment of practitioners if they are to work well. For example, the selective basis for the disclosure of documents puts a premium on the independent judgment of a litigant's advisers as to what in fairness to their opponent should be disclosed.

In *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 the court had to consider the scope of the immunity as it applied to conduct out of court. The majority decided on the "intimate connection" test. The essential justification for the extension of the immunity to acts or omissions out of court which were intimately connected to the conduct of the case in court is that without such an extension the rule would call for distinctions which were at best artificial and at worst impossible. The minority would have gone further and granted immunity for all out of court work connected with litigation. It is true that other professions are exposed to professional negligence claims but not in circumstances where they owe a primary duty to someone other than their client.

The immunity and the English authorities which recognise it have been adopted by other common law jurisdictions. In particular, they have been adopted by the High Court of Australia, in a careful judgment which restated the policy underlying the immunity in much the same terms as the English case law: *Giannarelli v Wraith* (1988) 165 CLR 543. The approach of the Court of Appeal in New Zealand in *Rees v Sinclair* [1974] 1 NZLR 180, 187 is a correct statement of the law and was adopted in the *Saif Ali* case [1980] AC 198. In no Commonwealth jurisdiction has the immunity been rejected, except Canada, where it was rejected in 1863. After the decision in *Rondel v Worsley* [1969] 1 AC 191 an attempt was made to reintroduce the immunity which failed: see *Demarco v Ungaro* (1979) 95 DLR (3d) 385. There has been in modern times no trace of immunity for advocates in the United States of America, where counsel have an overriding duty to their clients. They are under a duty to act in good faith but are not under a general duty to the court. State prosecutors cannot be sued as they are under a duty to look at both sides of a case: see *Speiser, Krause and Gans, The American Law of Tort* (1985), pp 199–205. The procedure in the United States, as in the European civil law system, is significantly different from England: proceedings are more often conducted in writing rather than exclusively by oral hearing.

If the House changes the law now it will be departing from a rule which has stood the test of time and is applied by all the jurisdictions which are closest to England. Any change would operate retrospectively. Since immunity is conferred with a view to influencing the conduct of practitioners by reinforcing their independence from their clients it would be wrong to abrogate it retrospectively.

If the immunity subsists the issue arises as to how far it extends to acts or omissions out of court but connected to the conduct of the case in court. Any test which relies on mere physical or temporal proximity to the court is unhelpful. Three criteria should apply. (1) The act or omission must be a preliminary decision as to how a case is going to be conducted in the face of the court, e g, the drafting of pleadings. (2) As with pleadings, a decision made in court to drop a pleaded point or not call a witness is no different

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A from a decision taken earlier not to plead the point or summon the witness in the first place. Solicitors are in the same position as counsel when making such decisions except that they do so at an earlier stage. (3) The act or omission must concern a matter in which the advocate owes a wider duty rather than an exclusive duty to his client. The whole reasoning in *Rondel v Worsley* [1969] 1 AC 191 is aimed at defining a class of act which gives rise to divided loyalties.

B In *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, 213–215, 224, 230–232 the House gave some guidance on the point. In practice, the courts have developed the law pragmatically and with an eye to the policy purpose of the immunity. Thus, it has been held in England that the immunity attaches to advice on a plea at a criminal trial (see *Somasundaram v M Julius Melchior & Co* [1988] 1 WLR 1394), advice on whether to require the attendance of C particular witnesses (see *Bateman v Owen White* [1996] 1 PNLR 1), advice on the pleadings shortly before an appeal (see *McFarlane v Wilkinson* [1996] 1 Lloyd's Rep 406) and to a practitioner's pre-trial consideration of the evidence and his pre-trial analysis of the law (see *Atwell v Michael Perry & Co* [1998] 4 All ER 65). On the other hand advice given at the inception of the proceedings about the correct party to sue is not within the immunity D (see *Saif Ali v Sydney Mitchell & Co* [1980] AC 198), nor is a negligent failure to obtain evidence the relevance of which is plain (see *Acton v Graham Pearce & Co* [1997] 3 All ER 909).

In both England (see *Landall v Dennis Faulkner & Alsop* [1994] 5 Med LR 268 and *Kelley v Corston* [1998] QB 686) and New Zealand (see *Biggar v McLeod* [1978] 2 NZLR 9) it has been held that the immunity extends to advice on a settlement at the door of the court or in the course of the trial. E That is correct. Advice on settlement given in these circumstances will normally reflect the practitioner's judgment as to the way in which the case is being, or will be, put in court. It would be unsatisfactory for the immunity to attach in cases where the practitioner's forensic assessment led him to fight the case to judgment, but not in cases where his assessment caused his client to anticipate or discount that judgment by settling with his opponent. On the other hand, it is implicit in the fact that a lawyer may be liable to his F client for failing to warn him at an early stage about the right party to sue or the risks attaching to the litigation that advice on settlement which is more remote from the hearing and does not reflect judgments on how to conduct the case in court may not be protected.

Solicitors have always enjoyed rights of advocacy before certain tribunals and a solicitor advocate has the same immunity as counsel. When a solicitor G instructs counsel to appear as the advocate, but himself does part or all of the preparatory work for the hearing which counsel would commonly do, and in respect of which counsel would be immune, the solicitor should also be immune even though he does not appear as the advocate at the hearing. The roles of solicitor and junior counsel to a silk are often very similar yet junior counsel has immunity as an advocate. Immunity should attach to the acts, not the status, of the person performing them. The policy of immunity was H developed at a time when most non-advocates left all final decisions about the conduct of litigation to the advocate. The relationship between counsel and solicitors has changed and decisions now tend to be taken jointly. The matter is, however, concluded by section 62 of the Courts and Legal Services Act 1990 which, although not determinative of whether any immunity

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should exist, provides that the same immunity is conferred on a solicitor who provides "any legal services in relation to any proceedings" as he would have "if he were a barrister lawfully providing those services". It is not limited to advocacy or advocates. The section heading refers to advocates, but only because it is referring to the extension of the immunity of barrister advocates to solicitors. The heading is not in any event part of the text considered by Parliament and is relevant only to resolve ambiguities. Section 62 is not ambiguous.

It is an abuse of process for a person to bring a civil action by way of collateral attack on a final decision of the court in a criminal or civil case: see *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529; *Ashmore v British Coal Corpn* [1990] 2 QB 338 and *Smith v Linskills* [1996] 1 WLR 763. In both contexts the principle is subject to an exception for cases where new evidence is produced. An action for damages based on the negligence of a lawyer in the conduct of proceedings which resulted in a judgment will normally involve collateral attacks on that judgment. The effect of such litigation is to question the correctness of the original court's decision (by a means other than an appeal) and to undermine the integrity of the administration of justice: see *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, 223 per Lord Diplock.

A consent order by way of settlement will not normally engage the rule as there is no judicial decision on the merits. The position is different where what was settled was a claim for ancillary relief in matrimonial proceedings. A decision by the court to give effect to a settlement of such a claim agreed by the parties is a decision on the merits because the court has a statutory obligation under sections 23 to 25 of the Matrimonial Causes Act 1973 to exercise an independent judgment of its own: see *Pounds v Pounds* [1994] 1 WLR 1535; *Jenkins v Livesey (formerly Jenkins)* [1985] AC 424 and *Harris (formerly Manahan) v Manahan* [1996] 4 All ER 454. When a settlement between husband and wife is approved by the court and embodied in a matrimonial consent order there is a judicial decision on the appropriateness of those terms. The approach of the Court of Appeal, at paragraphs 39 and 48, is wrong. The proposed hierarchy of decisions is illogical, and it is unsatisfactory to decide a case on counsel's account of how much consideration the judge gave to a consent order. The only way to distinguish between one kind of consent order and another is to consider the duty on the judge in the specific circumstances. The Court of Appeal did not take sufficiently seriously the judge's function in matrimonial proceedings. The reasoning in *Kelley v Corston* [1998] QB 686, 718–719 is compelling and should be followed.

If the existence of the immunity or the rule against collateral attacks on judicial decisions gives rise to a violation of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, that is a significant policy consideration against it. The immunity of legal practitioners in respect of the conduct of court proceedings is probably to be regarded as an immunity properly so-called. It has always been expressed as such, and it applies even to claims for breach of contract where the existence of the duty seems beyond dispute. There is, however, no violation of article 6.

The jurisprudence of the European Court of Human Rights accepts limitations on the right of access to a court for overriding reasons of public

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A policy. The right may be limited by law, provided (i) that the limits are not such as to impair the essence of the right, (ii) that they are for a legitimate purpose, and (iii) that the means employed are proportionate to that purpose: see *Ashingdane v United Kingdom* (1985) 7 EHRR 528. Examples of the immunities which the court has held to be acceptable under article 6 can be found in *Fayed v United Kingdom* (1994) 18 EHRR 393 and
B *Stubbings v United Kingdom* (1996) 23 EHRR 213. They leave a broad margin of appreciation to states. The immunity of legal practitioners in respect of the conduct of court proceedings is neither arbitrary nor disproportionate. In *Osman v United Kingdom* [1999] 1 FLR 193 the court appears to have either misunderstood or been misinformed about English law. Even on a striking out application there will be a hearing to determine what the policy requires in the particular case. That is all that
C article 6 requires. The decision about what the policy is or should be is for the domestic courts.

[Submissions were made on the facts. Reference was made to *Robinson v Robinson (Practice Note)* [1982] 1 WLR 786; *T v T (Consent Order: Procedure to Set Aside)* [1996] 2 FLR 640 and *Xydhias v Xydhias* [1999] 2 All ER 386.]

D *Peter Scott QC, Clare Montgomery QC, David Perry* and *Mark Simpson* for the Bar Council. Immunity for advocates in criminal and family proceedings is particularly important as those are areas which are emotionally charged for clients and solicitors and where counsel most needs to be in a position to take decisions. But typically litigation of all types is disappointing or unsuccessful for one side or the other; it is tempting to seek
E to blame the advocate. It is not in the public interest to create reasons for re-trials designed to show that the original verdict was wrong. That is properly the function of the appellate process.

The immunity is that of the advocate and relates solely to his functions. Out of court immunity is covered by the same legal test as in court immunity. Witness immunity provides a useful analogy. The immunity is
F similar to the immunity for experts: see *Stanton v Callaghan* [2000] QB 75. Settlements are important to the legal process and a lack of immunity would be damaging in that context. Such settlements are often reached close to judgment being given and, not infrequently, after prompting by the judge.

Time has not rendered the propositions on which *Rondel v Worsley* [1969] 1 AC 191 was based wrong still unarguable. Sections 27 and 28 of
G the Courts and Legal Services Act did not franchise a new type of advocate.

The cab rank rule, contained in the Code of Conduct of the Bar of England and Wales, is an important rule, the advantages of which can legitimately be taken into account: see [1969] 1 AC 191, 274–276, 281, 292. Although it does not apply to solicitor advocates, the fact that there are certain advocates who do not accept the burden does not undermine the need for immunity for those who do. It is in the public interest that a
H barrister who is available to accept instructions in the matter is bound to provide his services to a client, however unattractive the client or his case may be, provided only that the client can pay his fee or is legally aided and the case is within the barrister's usual sphere of practice. To remove the immunity would undermine the rule and compliance with it.

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The Bar has been subjected to a much lower level of criticism than solicitors: see the Annual Report of the Complaints Commissioner 1999. Within the area of immunity a barrister can still be disciplined but the complainant cannot be awarded compensation. See also the comments of Thorpe LJ in *Vernon v Bosley (No 2)* [1999] QB 18, 64.

If the House were to overrule *Rondel v Worsley* [1969] 1 AC 191 it would be trespassing on territory on which Parliament has enacted legislation on the assumption that the immunity exists : see section 22 of the Courts and Legal Services Act 1999; Hansard (HL Debates), 5 February 1990, cols *570–578*); Hansard (HC Debates), 7 June 1990, cols *325–340*; the Supply of Services (Exclusion of Implied Terms) Order 1982 (SI 1982/1771) see also the final report of the Royal Commission on Legal Services 1979, para 24. On the approach of the House to overruling its previous decisions, see *Food Corpn of India v Antclizo Shipping Corpn* [1988] 1 WLR 603. Any judicial decision that the immunity no longer applies must have retrospective effect regarding actions for negligence which can be brought against advocates. Legislation does not have such an effect, except in those cases where it expressly or by necessary implication so provides. There are compelling and obvious reasons for this.

There is no justification for the suggestion that the application of the principle in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 should be changed.

Montgomery QC following. Article 6 of the Convention is not engaged because there is no arguable substantive law to which it can attach. Although normally referred to as an immunity, the reason for the inability of a claimant to sue his advocate in relation to certain of his acts is that the advocate owes no duty of care in relation to those acts. *Osman v United Kingdom* [1999] 1 FLR 193 does not require consideration. If the Convention is engaged the approach of the solicitors is correct: see *Fayed v United Kingdom* 18 EHRR 393.

The approach of the courts in the United States of America can be seen in *Ferri v Ackerman* (1979) 444 US 193. Even there the immunity of prosecuting counsel remains. If the immunity of prosecutors cannot be abolished it should follow that the immunity of defence counsel acting under legal Aid cannot be abolished. Criminal practitioners will suffer most if the immunity is to go.

The fact that there is no civil law concept of immunity does not tell against it. Under the civil law system most of the focus on establishing the facts rests on the judge. There is nothing curious about giving English advocates immunity when doing a similar job. The civil law advocate is under a duty not to mislead the court but has no further duty, such as to draw adverse authorities to the attention of the court.

For the approach in South Africa see *Joubert and Faris, The Law of South Africa*, vol 14 (1999, first reissue), p 292, para 289 and *Morris, Technique in Litigation*, 4th ed (1993), p 60. For the Australian approach see *Boland v Yates Property Corpn Pty Ltd* (1999) 74 ALJR 209.

Andrew Edis QC, Peter Duckworth, Nicholas Bowen and *David Balcombe* for the clients. The same policy justifies both forensic immunity and abuse of process is the same: they are required, if at all, to avoid trials involving claims which relitigate issues that have already been decided.

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A There are therefore two rules of law where only one is needed. If the court can deal with undesirable relitigation as an abuse of process, and if that is the true public policy which underpins forensic immunity, then it follows that forensic immunity cannot be justified at all, since there is no unmet public policy requirement which could justify it. Abuse of process is a better method of dealing with the relitigation problem than immunity because it enables a case by case approach which permits the court to do justice in a B way that blanket immunity prevents.

The immunity should be abolished by judicial decision now. Alternatively that task should be left to Parliament, with full guidance in the speeches of the House indicating the view that it ought to be abolished. If immunity survives at all (temporarily or permanently), there should be no extension. It should be reduced to its smallest possible extent, if necessary C with test of its scope remodelled for coherence.

If it is justified in respect of work done in court in civil proceedings, then there is a limited extension to out of court work in civil proceedings. The scope of that extension must be limited to things done or not done which actually affected the presentation (not the preparation) of the case in court. There is a distinction between assembling the legal and factual material for the trial and presenting that material. This is a consequence of its being D "advocates' immunity". This distinction is impossible to apply which is a further argument for abolishing the immunity.

There is no relevant parallel between witness immunity and forensic immunity. A witness owes a duty to tell the truth to the court. Breach of the duty has penal sanctions. A paid witness, e g, an expert, has duties to his client but they are all subject to the overriding duty to the court to tell the E truth. His duties to his client cannot affect what he says in the witness box. In the box he owes no duty to his client. As to the extent of an expert's immunity, see *Stanton v Callaghan* [2000] QB 75. An advocate has duties to his client which are qualified by other duties to the court and to his profession. However, he always owes a common law duty of care to his client wherever and whatever he does within the scope of his instructions.

The approach of the House in *Rondel v Worsley* [1969] 1 AC 191 and *Saif* F *Ali v Sydney Mitchell & Co* [1980] AC 198 can be regarded as a step by step approach to the limitation of the immunity. It is now time for the House to take the next step. The passage of time has rendered unarguable many of the propositions which were taken seriously in *Rondel v Worsley* [1969] 1 AC 191. Sections 27 and 28 of the Courts and Legal Services Act 1990 have enfranchised a new type of advocate and litigator. Section 61 abolished the G old rule that a barrister could not make a contract for his services. There is now direct access to the bar. Consumer protection legislation has advanced considerably (see section 2(2) of the Unfair Contract Terms Act 1977 and section 13 of the Supply of Goods and Services Act 1982) and public policy regarding the supply of legal services should take a lead from the trend of consumer protection in the wider market place. Those are sufficient changes in the environment in which legal services are provided to justify a H reconsideration of the existence of immunity. The comments in *T A Picot (CI) Ltd v Michel* [1995] 2 LRC 247 are of interest.

The approach of Lord Diplock in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 to most of the grounds relied on as justifying the immunity is correct. Counsel's duty to his client is to use all proper skill and care to advance his

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interests, subject to an overriding duty to the court. The two are not in conflict. They may lead to opposite courses of action, in which case duty to the court must prevail. The consequence is that where counsel acts adversely to his client's wishes or interests, he will not be liable in negligence where he acted reasonably and in compliance with his duty to the court. No lawyer is ever obliged by duty to act negligently.

There is no empirical evidence to support most of the assumptions which underpin the immunity. Lack of immunity will not lead to fewer settlements, quite the opposite. A client under time pressure might be more willing to settle if he knows he can sue his lawyer for bad advice. The cab rank rule is of no relevance to the issue.

Doctors are in a similar position to lawyers in that they too are under a higher ethical duty and are not necessarily able to choose their clients. A doctor in accident and emergency may have to deal with drunken and abusive patients. Yet doctors enjoy no immunity from being sued for negligence. It is unacceptable for the legal profession to object to having to face the possibility of disgruntled clients bringing vexatious or weak claims against it.

How wide the power to strike out a case as a collateral attack on a judicial decision extends is dependent on an assessment of the extent of the evil of relitigation: see *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529. For example, it is hard to say that an omission is intimately connected with events in court. Various approaches can be seen in *Walpole v Partridge & Wilson* [1994] QB 106, *Richards v Witherspoon* [1999] PNLR 776 and the decision of the Court of Appeal, at paragraph 48. There is a greater need to protect against collateral attack when there is a high level of judicial involvement in coming to a decision. The lower down the scale of judicial involvement one goes the less the need to protect against collateral attack. That is the widest acceptable application of the rule. The issue is one of public policy rather than fairness or logic. The distinction between preparation of a case and presentation in court provides a definitive line The principle should be developed to cover all relitigation which is an abuse of the court but not apply to prevent non-abusive relitigation. It should extend to all criminal cases and civil cases where appropriate.

Barrister and solicitor advocates are under duties to their clients under, respectively, the Code of Conduct of the Bar of England and Wales and the Solicitors' Practice Rules 1990 and the Law Society's Code for Advocacy 1993. See also *Dinch v Dinch* [1987] 1 WLR 252, 255 and *Vernon v Bosley (No 2)* [1999] QB 18. Professional discipline is a sanction which is intended to ensure compliance with the rules. In addition, advocates can be subject to a wasted costs order: see *Ridehalgh v Horsefield* [1994] Ch 205. Fears of defensive advocacy if the immunity is removed are not justified. It is better that professionals work too hard than that they do not work hard enough.

If the immunity is to remain its scope should be clearly defined and limited. The immunity sought by the solicitors, to cover people who are not acting as advocates at the relevant time, would amount to the grant of a new immunity where none has been granted in the past and which is not justified by any evidence that it is necessary. It is said to follow logically from the existing immunity of advocates but logic is not relevant to public policy. It is really an argument based on fairness: if the advocate is immune, it would be

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A unfair to the solicitor with him if he were not immune as well. Fairness to the solicitor is not a relevant consideration.

There has never been any authority in the House of Lords for an immunity where there was no final hearing: The law is found in the *Saif Ali* case [1980] AC 198 and in its adoption and explanation of the *Rees v Sinclair* [1974] 1 NZLR 180 test. The solicitors are seeking an extension of the rule in *Kelley v Corston* [1998] QB 686 which was itself an extension of B the rule in the *Saif Ali* case [1980] AC 198. The ratio in *Kelley v Corston* [1998] QB 686, by which connection with a hearing by time and place to determine whether acts or omissions attract immunity, is contrary to *Rees v Sinclair* [1974] 1 NZLR 180.

Although article 6 does not cover the right of access to the court, that right is inherently part of the right to a fair trial: see *Golder v United* C *Kingdom* (1975) 1 EHRR 524. The right of access is not absolute and in imposing limitations the contracting states enjoy a margin of appreciation to take account of national requirements: see *Ashingdane v United Kingdom* 7 EHRR 528. An action against an advocate brought either in contract or in tort requires the determination of substantive, as opposed to potential, civil rights and obligations recognised under domestic law. Article 6 is, therefore, D applicable and any procedural rule which has as its effect the prevention or restriction of access to a trial is potentially incompatible therewith. A blanket immunity, as opposed to an exclusionary rule depending on the features of a particular case, is incompatible with the right to a fair trial under article 6. If the United Kingdom is to meet its obligations under the Convention forensic immunity should be abolished altogether. If it survives at all, its application must be determined on a case by case basis: see E *Ashingdane v United Kingdom* 7 EHRR 528; *Stubbings v United Kingdom* 23 EHRR 213 and *Fayed v United Kingdom* 18 EHRR 393. *Osman v United Kingdom* [1999] 1 FLR 193 is not relevant.

[Submissions were made on the facts.]

Duckworth following. At the time at which the cause of action arose in both the *Barrett* and *Harris* cases (1991) there was no easy way of appealing F consent orders. The effect of rule 8(1) of the Family Procedure Rules 1991, which disapplied CCR Ord 37, r 6, was a cause of confusion and uncertainty among the legal profession: see *T v T (Consent Order: Procedure to Set Aside)* [1996] 2 FLR 640 and *Harris (formerly Manahan) v Manahan* [1996] 4 All ER 454. Both in principle and in practice, when asked to approve a consent order, the degree of scrutiny given by a district judge was G strictly limited: see *Pounds v Pounds* [1994] 1 WLR 1535 and *Harris (formerly Manahan) v Manahan* [1996] 4 All ER 454. The state of the law in 1991 was such that a district judge would not have felt it either desirable or necessary to peer into the finances of a couple appearing before him with a draft consent order.

Even since *Kelley v Corston* [1998] QB 686 (in which neither *Pounds v Pounds* [1994] 1 WLR 1535 nor *Harris (formerly Manahan) v Manahan* H [1996] 4 All ER 454 were cited) it has been a rarity for approval to be withheld. A district judge is aware that if he disturbs a delicate negotiation the parties may be plunged afresh into litigation at the time when their resources are stretched to the limit. It necessarily follows that court approval is no guarantees of the correctness or appropriateness of a consent

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order. The court has exercised its mind to a limited degree, but only on the basis of the facts as presented by the lawyers; those facts include, prominently, the wish of both parties to settle. The principle of finality in matrimonial cases has nothing to do with suing one's lawyer.

Sumption QC in reply. *Rondel v Worsley* [1969] 1 AC 191 is a modern decision of the House, which has stood for more than three decades. It has been regularly applied by the lower courts. It has been adopted in the common law of other Commonwealth countries, including those whose legal systems are close to our own. It deals with an issue of substantial public importance, potentially affecting many practitioners and litigants. It was considered by a Royal Commission in 1979 and by Parliament in 1990. Proposals to abrogate it were rejected on both occasions. Its existence is assumed in sections 22 and 62 of the Courts and Legal Services Act 1990. It was left undisturbed when Parliament revisited the regulation of the legal profession in 1999. It is the basis on which legal professional risks have been rated for insurance purposes and on which a substantial number of outstanding claims are being handled. Such a decision ought not to be overruled by the House simply because the Committee would have taken a different view about the requirements of public policy in 1967. It should be overruled only if (i) it is necessary to overrule it in order to decide the appeals, and (ii) it is clear that circumstances have changed in such a way as make its original rationale irrelevant or wrong in modern conditions.

Circumstances have not changed in any respect which would justify the judicial abrogation of the immunity rule now. The only suggested change of any significance which is said to militate in favour of its abrogation is the increased public support for consumer rights. The "consumerist" case against the immunity has always been accepted. It is not new. The real question is how it is to be balanced against the perceived threat to practitioners' independence from their own clients which would or might arise if their professional instincts were gradually modified by the kind of defensive practises which have become common in other professions more exposed to litigation. This is inevitably a matter of experienced intuition on the part of judges. The experienced judges sitting in *Rondel v Worsley* considered it to be a real danger in 1967. No one has pointed to anything which has made it less real now.

The immunity is justifiable under article 6 for reasons that are well established in the jurisprudence of the Strasbourg Court. It is plainly not a "blanket" immunity, for it is neither comprehensive nor indiscriminate, but limited to specific functions. Moreover, the client's right receives some protection from the court's jurisdiction to make wasted costs orders, the disciplinary procedures of the professions and, in the case of solicitors, from the compensation scheme relating to inadequate professional service created by section 37A of and Schedule 1A to the Solicitors Act 1974.

Even if the immunity of legal practitioners were fairly to be described as a "blanket" immunity, it would not be contrary to article 6. The Strasbourg Court has upheld immunities which were total in respect of the particular complaint that the applicant desired to make and allowed of no alternative remedy, as it did in the leading case of *Ashingdane v United Kingdom* (1985) 7 EHRR 528.

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A It is argued that *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 should be limited so that it will apply to collateral attacks on some judgments but not others. The distinction suggested by the Court of Appeal depends on a hierarchy of judicial decisions ranged according to the degree of judicial input. However, it is unacceptable in principle for a judicial decision to be challenged collaterally according to the degree of attention which the particular judge paid to his decision in the particular B case. In the first place, it is impossible to define the threshold at which the degree of judicial attention is sufficient to engage the rule. Secondly, this kind of argument is proper, if at all, only on an appeal.

The alternative is to assess the degree of judicial input according to the type of decision. But on that footing it can be assessed only on the assumption that the judges are performing the duty which Parliament has C laid on them. In dealing with consent orders in matrimonial cases, it is clear that the court's duty is to conduct an independent assessment so as to perform its duties under section 25 of the Matrimonial Causes Act 1973: see *Xydhias v Xydhias* [1999] 2 All ER 386, 395. It cannot be open to the clients to argue that *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 should be applied in a different way on the ground that D judges do not in practice take those responsibilities seriously.

The cab-rank rule, however important, is of limited relevance to the immunity. The solicitors' profession, although it has no cab-rank rule, does have a more limited rule which is likely to meet the same mischief in a high proportion of cases: see para 2.4.2 of The Law Society's Code for Advocacy 1993.

E Their Lordships took time for consideration

20 July **LORD STEYN** My Lords, there are three appeals before the House from orders of the Court of Appeal in a building case and in two cases involving family proceedings. Clients raised claims in negligence against firms of solicitors. In response the solicitors relied on the immunity of advocates from suits in negligence. In all three cases judges at first instance F ruled that the claims against the solicitors were unsustainable. The circumstances of these cases and the disposals are set out in the judgment of the Court of Appeal, ante, p 623H, given by Lord Bingham of Cornhill CJ. In effect the Court of Appeal ruled in all three cases presently before the House that the claims were wrongly struck out. The solicitors now appeal. The results of the appeals are of great importance to the parties. But C transcending the importance of the specific issues arising on the appeals there are two fundamental general questions, namely: (1) ought the current immunity of an advocate in respect of and relating to conduct of legal proceedings as enunciated by the House in *Rondel v Worsley* [1969] 1 AC 191, and explained in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, to be maintained in England? (2) What is or ought to be the proper scope in England of the general principle barring a collateral attack in a civil action H on the decision of a criminal court as enunciated in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529? The position in Scotland was not the subject matter of argument on these appeals.

These questions before the House affect both branches of the legal profession. Your Lordships have had the benefit of careful arguments from

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three sides. First, by counsel for the appellant solicitors who were supported by the Solicitors Indemnity Fund. Secondly, by counsel for the Bar Council who was given leave to intervene and played a particularly helpful part in the appeal. Thirdly, by counsel for the individual litigants who put forward the contrary argument. Having studied the detailed written arguments and heard the oral arguments of counsel for the appellants, the interveners, and the respondents, your Lordships are now in as good a position to form a judgment on the principal issues as is achievable.

It is necessary to explain the scheme of my opinion. There is a direct link between the two general questions. How the law deals with the problem of relitigation of matters already decided, as identified in the *Hunter* case, is an important aspect of any reconsideration of the immunity of advocates. It will be necessary to examine the two issues together. Secondly, although the cases before the House involve actions against solicitors and not against barristers, the reality is that the immunity of barristers is of longer standing and underpinned to some extent by arguments not available to solicitors. It will therefore be convenient first to concentrate by and large on the position in regard to barristers and then to consider whether the conclusions arrived at also apply to solicitors.

The existing immunity of barristers

For more than two centuries barristers have enjoyed an immunity from actions in negligence. The reasons for this immunity were various. It included the dignity of the Bar, the "cab rank" principle, the assumption that barristers may not sue for their fees, the undesirability of relitigating cases decided or settled, and the duty of a barrister to the court: Roxburgh, "Rondel v Worsley: The Historical Background" (1968) 84 LQR 178; and Roxburgh, "Rondel v Worsley: Immunity of the Bar" (1968) 84 LQR 513. In 1967 when the House decided *Rondel v Worsley* the dignity of the Bar was no longer regarded as a reason which justified conferring an immunity on advocates whilst withholding it from all other professional men. In *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 the rule was established that irrespective of contract, if someone possessed of a special skill undertakes to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise: at pp 502–503. The fact that the barrister did not enter into a contract with his solicitor or client ceased to be a ground of justification for the immunity. Nevertheless, in a unanimous decision the House in *Rondel v Worsley* [1969] 1 AC 191 upheld the ancient immunity on considerations of "public policy [which are] not immutable:" at p 227B, per Lord Reid. It is worth recalling that in that case the appellant had obtained the services of the respondent to defend him on a dock brief, and alleged that the respondent had been negligent in the conduct of his defence. It is undoubtedly right, as counsel for the solicitors submitted and nobody disputed, that the principal ground of the decision is the overriding duty of a barrister to the court. The House thought that the existence of liability in negligence, and indeed the very possibility of making assertions of liability against a barrister, might tend to undermine the willingness of barristers to carry out their duties to the court. Lord Morris of Borth-y-Gest encapsulated the core idea by saying, at p 251D: "It would be a retrograde development if an advocate were under pressure unwarrantably to subordinate his duty to the court to his duty to the client." Other members of

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A the Appellate Committee expressed similar views: see p 231E, per Lord Reid; pp 272B–273F, per Lord Pearce; pp 283E–283G, per Lord Upjohn; and p 293E, per Lord Pearson. This factor is the pivot on which in 1967 the existence of the immunity hinged. But for it the case would probably have been decided differently. There were however supporting reasons. Perhaps the most important of these was the undesirability of relitigating issues already decided: see p 230B–F, per Lord Reid and pp 249A–250B, per Lord B Morris of Borth-y-Gest. Another factor to which some weight was attached was the "cab rank" rule, which imposed (and still imposes) upon barristers, but not solicitors, the obligation to accept instructions from anyone who wishes to engage their services in an area of the law in which they practised. In the year after *Rondel v Worsley* was decided Sir Ronald Roxburgh (formerly Roxburgh J) said that "the pressures for putting barristers on the C same footing as other professional men . . . are already strong, and may grow stronger": 84 LQR 513, 527.

Eleven years later in *Saif Ali v Sydney Smith Mitchell & Co* [1980] AC 198 the House revisited this topic. On this occasion the immunity established in *Rondel v Worsley* was not challenged and was not directly in issue. The existence of the debate on the merits of the immunity was not reopened. The terrain of the debate centred on the scope of the immunity. Except for Lord D Diplock, the members of the House accepted the rationale of *Rondel v Worsley*, which Lord Wilberforce said, at p 213C, was that "barristers . . . have a special status, just as a trial has a special character: some immunity is necessary in the public interest, even if, in some rare cases, an individual may suffer loss." About a barrister's overriding duty to the court Lord Diplock observed, at p 220:

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> "The fact that application of the rules that a barrister must observe may in particular cases call for the exercise of finely balanced judgments upon matters about which different members of the profession might take different views, does not in my view provide sufficient reason for granting absolute immunity from liability at common law. No matter what profession it may be, the common law does not impose on those who F 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. The salvor and the surgeon, like the barrister, may be called upon to make immediate decisions which, if in the result G they turn out to have been wrong, may have disastrous consequences. Yet neither salvors nor surgeons are immune from liability for negligent conduct of a salvage or surgical operation; nor does it seem that the absence of absolute immunity from negligence has disabled members of professions other than the law from giving their best services to those to whom they are rendered."

H Lord Diplock did, however, think that the immunity could be justified on two other grounds. The first is the analogy of the general immunity from civil liability which attaches to all persons in respect of the participation in proceedings before a court of justice, namely judges, court officials, witnesses, parties, counsel and solicitors alike: p 222A–C: The second was

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the public interest in not permitting decisions to be challenged by collateral proceedings: pp 222D–223D. There matters rested for a time.

The next development was the introduction by statute of a power enabling the court to make wasted costs orders against legal practitioners: see section 51 of the Supreme Court Act 1981 as substituted by section 4 of the Courts and Legal Services Act 1990. Not surprisingly barristers are occasionally guilty of wholly unjustifiable conduct which occasions a waste of expenditure. The Bar argued that because of the immunity of barristers no such orders ought in principle to be made against barristers. The Court of Appeal ruled to the contrary: *Ridehalgh v Horsefield* [1994] Ch 205. And that decision was accepted by the Bar. It operates satisfactorily. It has not been detrimental to the functioning of the court system or indeed the interests of the Bar.

As Roxburgh predicted in 1968 the pressure for a re-examination of *Rondel v Worsley* mounted. There has been considerable academic criticism of the immunity. In a detailed and balanced discussion Peter Cane (*Case, Tort Law and Economic Interests,* 2nd ed (1996), pp 233–238) found that, even taken together, the justifications adduced for the immunity do not support it strongly: see also similar effect Jonathan Hill, "Litigation and Negligence: A Comparative Study" (1986) 6 Oxford Journal of Legal Studies 183, 184–186. In an area where one is bound to a considerable extent to rely on intuitive judgments, the criticism of the immunity by two outstanding practising barristers is significant. In *Advocates* (1992), pp 197–206, Mr David Pannick examined the case for and against the immunity in detail. While accepting that there is some substance in some of the arguments for an immunity, he found that on balance the immunity is not justified. He added, at p 206: "This issue will not go away. English law will, in the future, have more to say on this topic." Recently, Sir Sydney Kentridge QC expressed the view, making use of his experience as an advocate in South Africa and in England, that the "gloomy speculations" on which the immunity of barristers in England is based are wide off the mark: see *Tortious Liability of Statutory Bodies*, edited by B S Markesinis (1999), Foreword, p ix. But even more important are the observations in the present case by Lord Bingham of Cornhill CJ, Morritt LJ and Waller LJ. They clearly considered that, while the principle against collateral challenge as enunciated in the *Hunter* case ought to be maintained, nevertheless there was a substantial case for the sceptical re-examination of the immunity of barristers.

It is now possible to take stock of the arguments for and against the immunity. I will examine the relevant matters in turn. First, there is the ethical "cab rank" principle. It provides that barristers may not pick and choose their clients. It binds barristers but not solicitor advocates. It cannot therefore account for the immunity of solicitor advocates. It is a matter of judgment what weight should be placed on the "cab rank" rule as a justification for the immunity. It is a valuable professional rule. But 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"

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A 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 vexations litigation (which is, anyway, unlikely to get very far)": *Cane, Tort Law and Economic Interests*, p 236. Secondly, there is the analogy of the immunities enjoyed by those who participate in court proceedings: compare however Cane's observation about the strength of the case for removing the B immunity from paid expert witnesses: at p 237. Those immunities are founded on the public policy which seeks to encourage freedom of speech in court so that the court will have full information about the issues in the case. For these reasons they prevent legal actions based on what is said in court. As Pannick has pointed out this has little, if anything, to do with the alleged legal policy which requires immunity from actions for negligent acts: ibid, C at p 202. If the latter immunity has merit it must rest on other grounds. Whilst this factor seemed at first to have some attractiveness, it has on analysis no or virtually no weight at all.

The third factor is the public policy against relitigating a decision of a court of competent jurisdiction. This factor cannot support an immunity extending to cases where there was no verdict by the jury or decision by the court. It cannot arguably justify the immunity in its present width. The D major question arises in regard to criminal trials which have resulted in a verdict by a jury or a decision by the court. Prosecuting counsel owes no duty of care to a defendant: *Elguzouli-Daf v Comr of Police of the Metropolis* [1995] QB 335. The position of defence counsel must however be considered. Unless debarred from doing so, defendants convicted after a full and fair trial who failed to appeal successfully will from time to time E attempt to challenge their convictions by suing advocates who appeared for them. This is the paradigm of an abusive challenge. It is a principal focus of the principle in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529. Public policy requires a defendant who seeks to challenge his conviction to do so directly by seeking to appeal his conviction. In this regard the creation of the Criminal Cases Review Commission was a notable F step forward. Recently in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 127–128, there was uncontroverted evidence before the House that the Commission is seriously under-resourced and under-funded. Incoming cases apparently have to wait two years before they are assigned to a case worker. This is a depressing picture. The answer is that the functioning of the Commission must be improved. But I have no doubt that the principle underlying the *Hunter* case must be maintained as a G matter of high public policy. In the *Hunter* case the House did not, however, "lay down an inflexible rule to be applied willy-nilly to all cases which might arguably be said to be within it": *Smith v Linskills* [1996] 1 WLR 763, 769, per Sir Thomas Bingham MR. It is, however, prima facie an abuse to initiate a collateral civil challenge to a criminal conviction. Ordinarily therefore a collateral civil challenge to a criminal conviction will be struck out as an abuse of process. On the other hand, if the convicted person has succeeded H in having his conviction set aside on any ground, an action against a barrister in negligence will no longer be barred by the particular public policy identified in the *Hunter* case. But, in such a case the civil action in negligence against the barrister may nevertheless be struck out as unsustainable under the new flexible CPR rr 3.4(2)(a) and 24.2. If the *Hunter* case is interpreted

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and applied in this way, the principal force of the fear of oblique challenges to criminal convictions disappears. Relying on my experience of the criminal justice system as a presiding judge on the Northern Circuit and as a member of the Court of Appeal (Criminal Division), I do not share intuitive judgments that the public policy against relitigation still requires the immunity to be maintained in criminal cases. That leaves collateral challenges to civil decisions. The principles of res judicata, issue estoppel and abuse of process as understood in private law should be adequate to cope with this risk. It would not ordinarily be necessary to rely on the *Hunter* principle in the civil context but I would accept that the policy underlying it should still stand guard against unforeseen gaps. In my judgment a barrister's immunity is not needed to deal with collateral attacks on criminal and civil decisions. The public interest is satisfactorily protected by independent principles and powers of the court.

The critical factor is, however, the duty of a barrister to the court. It also applies to every person who exercises rights of audience before any court, or who exercises rights to conduct litigation before a court: see sections 27(2A) and 28(2A) of the Courts and Legal Services Act 1990 as inserted by section 42 of the Access to Justice Act 1999. It is essential that nothing should be done which might undermine the overriding duty of an advocate to the court. The question is however whether the immunity is needed to ensure that barristers will respect their duty to the court. The view of the House in 1967 was that assertions of negligence would tend to erode this duty. In the world of today there are substantial grounds for questioning this ground of public policy. In 1967 the House considered that for reasons of public policy barristers must be accorded a special status. Nowadays a comparison with other professionals is important. Thus doctors have duties not only to their patients but also to an ethical code. Doctors are sometimes faced with a tension between these duties. Concrete examples of such conflicting duties are given by *Ian Kennedy, Treat Me Right; Essays in Medical Law and Ethics* (1988). A topical instance is the case where an Aids infected patient asks a consultant not to reveal his condition to the patient's wife, general practitioner and other healthcare officials. Such decisions may easily be as difficult as those facing barristers. And nobody argues that doctors should have an immunity from suits in negligence.

Comparative experience may throw some light on the question whether in the public interest such an immunity of advocates is truly necessary. In 1967 no comparative material was placed before the House. Lord Reid did, however, mention other countries where public policy points in a different direction: [1969] 1 AC 191, 228E. In the present case we have had the benefit of a substantial comparative review. The High Court of Australia followed *Rondel v Worsley*: *Gianarelli v Wraith* (1988) 165 CLR 543; see also *Boland v Yates Property Corpn Pty Ltd* (1999) 74 ALJR 209. In New Zealand the Court of Appeal has taken a similar course: *Rees v Sinclair* [1974] 1 NZLR 180. It is a matter of significance that the High Court of Australia and the Court of Appeal of New Zealand came to the conclusion that a barristers immunity from actions in negligence is required by public policy considerations in those countries. On the other hand, in countries in the European Union advocates have no immunity. It is true that there is a difference in that the control of a civilian judge over the proceedings is

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A greater than is customarily exercised by a judge in England: see *Ralph Graef, Judicial Activism in Civil Proceedings* (1996), passim. But with the advent of the Woolf reforms this difference is reduced to some extent in civil cases: see CPR Pt 1, r 1.1 (the overriding objective). On the other hand, I accept that in the field of criminal procedure the role of a judge in England is far more passive than in European Union countries: see *Van Den Wyngaert, Criminal Procedure Systems in the European Community* (1993), passim. B I am also willing to accept that, although an advocate in a civilian system owes a duty to the court, it is less extensive than in England. For example, in Germany there is apparently no duty to refer the court to adverse authorities as in England. Despite these differences the fact that the absence of an immunity has apparently caused no practical difficulties in other countries in the European Union is of some significance: *Tortious Liability of Statutory* C *Bodies*, edited by B S Markesinis (1999), p 80. In the United States prosecutors have an immunity. In a few states the immunity is extended to public defenders. But otherwise lawyers have no immunity from suits of negligence by their clients: *Ferri v Ackermann* (1979) 444 US 193. While the differences between the legal system of the USA and our own must be taken into account, the United States position cannot be altogether ignored. In D Canada an advocate had no immunity from an action in negligence before *Rondel v Worsley* was decided. In 1979 the question was re-examined in great detail as a result of the decision of the House of Lords in *Rondel v Worsley*: see *Demarco v Ungaro* (1979) 95 DLR (3d) 385. In Canada trial lawyers owe a duty to the court. After a detailed and careful review the court found there was no evidence that the work of Canadian courts was hampered in any way by counsel's fear of civil liability. The *Demarco* case E has been consistently followed by Canadian courts: see *Karpenko v Paroian, Courey, Cohen & Houston* (1980) 30 OR (2d) 776; *Pelky v Hudson Bay Insurance Co* (1981) 35 OR (2d) 97; *Garrant v Moskal* [1985] 2 WWR 80, affirmed [1985] 6 WWR 31; *M Hodge & Sons Ltd v Monaghan* (1985) 51 Nfld & PEIR 173. I regard the Canadian empirically tested experience as the most relevant. It tends to demonstrate that the fears that the possibility F of actions in negligence against barristers would tend to undermine the public interest are unnecessarily pessimistic.

There would be benefits to be gained from the ending of immunity. First, and most importantly, it will bring to an end an anomalous exception to the basic premise that there should be a remedy for a wrong. There is no reason to fear a flood of negligence suits against barristers. The mere doing of his duty to the court by the advocate to the detriment of his client could never be G 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. In this context the observations of Sir Thomas Bingham MR in *Ridehalgh v Horsefield* [1994] H Ch 205 are instructive. Dealing with the circumstances in which a wasted costs order against a barrister might be appropriate he observed, at p 236:

> "Any judge who is invited to make or contemplates making an order arising out of an advocate's conduct of court proceedings must make full allowance for the fact that an advocate in court, like a commander in

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battle, often has to make decisions quickly and under pressure, in the fog of war and ignorant of developments on the other side of the hill. Mistakes will inevitably be made, things done which the outcome shows to have been unwise. But advocacy is more an art than a science. It cannot be conducted according to formulae. Individuals differ in their style and approach. It is only when, with all allowances made, an advocate's conduct of court proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order against him."

For broadly similar reasons it will not be easy to establish negligence against a barrister. The courts can be trusted to differentiate between errors of judgment and true negligence. 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. The new Civil Procedure Rules 1999, have made it easier to dispose summarily of such claims: rules 3.4(2)(a) and 24.2. The only argument that remains is that the fear of unfounded actions might have a negative effect on the conduct of advocates. This is a most flimsy foundation, unsupported by empirical evidence, for the immunity. Secondly, it must be borne in mind that one of the functions of tort law is to set external standards of behaviour for the benefit of the public. And it would be right to say that while standards at the Bar are generally high, in some respects there is room for improvement. An exposure of isolated acts of incompetence at the Bar will strengthen rather than weaken the legal system. Thirdly, and most importantly, public confidence in the legal system is not enhanced by the existence of the immunity. The appearance is created that the law singles out its own for protection no matter how flagrant the breach of the barrister. The world has changed since 1967. The practice of law has become more commercialised: barristers may now advertise. They may now enter into contracts for legal services with their professional clients. They are now obliged to carry insurance. On the other hand, today we live in a consumerist society in which people have a much greater awareness of their rights. If they have suffered a wrong as a result of the provision of negligent professional services, they expect to have the right to claim redress. It tends to erode confidence in the legal system if advocates, alone among professional men, are immune from liability for negligence. It is also noteworthy that there is no obligation on the barrister (or for that matter the solicitor advocate) to inform a client at the inception of the relationship that he is not liable in negligence, and in practice the client is never so informed. Given that the resort to litigation is often one of the most important decisions in the life of the client, it has to be said that this is not a satisfactory position. Moreover, conduct covered by the immunity is beyond the remit of the Legal Services Ombudsman: section 22(7)(b) of the Courts and Legal Services Act 1990. In combination these factors reinforce the already strong case for ending the immunity.

My Lords, one is intensely aware that *Rondel v Worsley* [1969] 1 AC 191 was a carefully reasoned and unanimous decision of the House. On the other hand, it is now clear that when the balance is struck between competing factors it is no longer in the public interest that the immunity in favour of barristers should remain. I am far from saying that *Rondel v*

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A *Worsley* was wrongly decided. But on the information now available and developments since *Rondel v Worsley* I am satisfied that in today's world that decision no longer correctly reflects public policy. The basis of the immunity of barristers has gone. And exactly the same reasoning applies to solicitor advocates. There are differences between the two branches of the profession but not of a character to differentiate materially between them in respect of the issue before the House. I would treat them in the same way.

B That brings me to the argument that the ending of the immunity, if it is to be undertaken, is a matter for Parliament. This argument is founded on section 62 of the Courts and Legal Services Act 1990. It reads:

> "(1) A person—(a) who is not a barrister; but (b) who lawfully provides any legal services in relation to any proceedings, shall have the same immunity from liability for negligence in respect of his acts or
C omissions as he would have if he were a barrister lawfully providing those services. (2) No act or omission on the part of any barrister or other person which is accorded immunity from liability for negligence shall give rise to an action for breach of any contract relating to the provision by him of the legal services in question."

D The background to this provision is, of course, the judicially created immunity of barristers, which in 1967 was held by the House to be founded on public policy. And it will be recollected that Lord Reid observed that public policy is not immutable. Against this background the meaning of section 62 is clear. It provides that solicitor advocates will have the same immunity as barristers have. In other words, the immunity of solicitors will follow the fortunes of the immunity of barristers, or track it. Section 62 did
E not either expressly or by implication give parliamentary endorsement to the immunity of barristers. In these circumstances the argument that it is beyond the power of the House of Lords, which created the immunity spelt out in *Rondel v Worsley*, to reverse that decision in changed circumstances involving a different balance of policy considerations is not right. Should the House as a matter of discretion leave it to Parliament? This issue is more finely balanced. It would certainly be the easy route for the House to say "let
F us leave it to Parliament". On balance my view is that it would be an abdication of our responsibilities with the unfortunate consequence of plunging both branches of the legal profession in England into a state of uncertainty over a prolonged period. That would be a disservice to the public interest. On the other hand, if the decision is made to end the immunity now, both branches of the profession will know where they stand.
G They ought to find it relatively easy to amend their rules where necessary and to adjust their already existing insurance arrangements in so far as that may be necessary.

My Lords, the cards are now heavily stacked against maintaining the immunity of advocates. I would rule that there is no longer any such immunity in criminal and civil cases. In doing so I am quite confident that the legal profession does not need the immunity.

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The Hunter case

So far as the *Hunter* case involves a separate question before the House I would refer to my discussion of this topic under the heading of immunity of barristers.

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The disposal of the appeals

Given the conclusion that the immunity no longer exists, it follows that the appeals must fail. I would dismiss the three appeals.

LORD BROWNE-WILKINSON My Lords, I have had the advantage of reading the speeches of my noble and learned friends, Lord Steyn and Lord Hoffmann. I agree with them and for the reasons they give, I would dismiss these appeals. However, since the point at issue is important and your Lordships' views are not unanimous, I will state shortly my views on the point on which your Lordships are divided.

Let me initially consider the points on which your Lordships are all agreed. First that, given the changes in society and in the law that have taken place since the decision in *Rondel v Worsley* [1969] 1 AC 191, it is appropriate to review the public policy decision that advocates enjoy immunity from liability for the negligent conduct of a case in court. Second, that the propriety of maintaining such immunity depends upon the balance between, on the one hand, the normal right of an individual to be compensated for a legal wrong done to him and, on the other, the advantages which accrue to the public interest from such immunity. Third, that in relation to claims for immunity for an advocate in civil proceedings, such balance no longer shows sufficient public benefit as to justify the maintenance of the immunity of the advocate.

The point on which your Lordships are divided is whether the same rules should apply whether the negligence alleged against the advocate relates to his conduct of a civil action or to a criminal prosecution. Are there, as some of your Lordships think, special reasons which require the immunity of the advocate in a criminal trial to be maintained? Of the four main grounds relied upon as justifying the immunity, only one seems to me to be capable of justifying the immunity, namely that to allow an action for negligence against the advocate for his conduct in earlier litigation is necessarily going to involve the risk that different conclusions on issues decided in the first case will be reached in the later case. In the context of civil proceedings (i e where the advocate is sought to be made liable for his conduct of a civil action) although such conflicting decisions are undesirable, they are far from unknown. But in the context of criminal proceedings (i e when the advocate's negligence occurred in the course of a criminal trial) the decision is far more difficult. In the overwhelming majority of cases, the action in negligence will not be capable of succeeding unless the verdict of guilty in the original trial is held to have been incorrect; if the complainant was in any event guilty of the alleged crime, the negligence of his advocate, even if proved, would not have been shown to be causative of any loss. Therefore, if there is to be a successful action for negligence in criminal matters, so long as the plaintiff's criminal conviction stands there will be two conflicting decisions of the court, one (reached by judge and jury on the criminal burden of proof) saying that he is guilty, the other (reached by a judge alone on balance of probability) that he is not guilty. My Lords, I would find such conflicting decisions quite unacceptable. If a man has been found guilty of a crime in a criminal trial, for all the purposes of society he is guilty unless and until his conviction is set aside on appeal. Therefore, if the removal of the advocate's immunity in criminal cases would produce these conflicting

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decisions, I would have no doubt that the public interest demanded that the advocate's immunity be preserved.

But in my judgment the law has already provided a solution where later proceedings are brought which directly or indirectly challenge the correctness of a criminal conviction. *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 establishes that the court can strike out as an abuse of process the second action in which the plaintiff seeks to re-litigate issues decided against him in earlier proceedings if such re-litigation would be manifestly unfair to the defendant or would bring the administration of justice into disrepute. In view of the more restrictive rules of res judicata and issue estoppel it is not clear to me how far the *Hunter* case goes where the challenge is to an earlier decision in a civil case. But in my judgment where the later civil action must, in order to succeed, establish that a subsisting conviction is wrong, in the overwhelming majority of cases to permit the action to continue would bring the administration of justice into disrepute. Save in truly exceptional circumstances, the only permissible challenge to a criminal conviction is by way of appeal.

It follows that, in the ordinary case, an action claiming that an advocate has been negligent in criminal proceedings will be struck out as an abuse of process so long as the criminal conviction stands. Only if the conviction has been set aside will such an action be normally maintainable. In these circumstances there is no need to preserve an advocate's immunity for his conduct of a criminal case since, in my judgment, the number of cases in which negligence actions are brought after a conviction is quashed is likely to be small and actions in which the conviction has not been quashed will be struck out as an abuse of process.

For these reasons, and the much fuller reasons given by Lord Steyn and Lord Hoffmann, I would dismiss these appeals.

LORD HOFFMANN My Lords,

1. The facts

In these appeals three clients are suing their solicitors for negligence. In the first, Mr Simons says that his solicitors negligently allowed him to become involved in lengthy and expensive litigation when they should have advised him to settle. In the second, Mr Barratt says that his solicitors negligently advised him to settle his divorced wife's claim for a share of the matrimonial home on disadvantageous terms. In the third, Mrs Harris has a similar complaint about the terms upon which her solicitors advised her to settle her claim for maintenance against her ex-husband. None of these allegations has been investigated. The solicitors may or may not have a complete answer to them. But they say that, even if they were negligent, they cannot be sued. They claim immunity under a modern version of an ancient rule of common law which prevented barristers from being sued for negligence.

2. The immunity rule

The old rule for barristers survived until 1967. The way in which it was usually explained was that barristers, unlike solicitors, had no contract with their clients. They could not sue for their fees. And in the absence of a

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contract there could be no liability. But that reason was undermined when the House of Lords decided in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 that, even without a contract, a person who negligently performed professional or other duties which he had undertaken could be sued in tort. So the whole question was re-examined by the House in *Rondel v Worsley* [1969] 1 AC 191. What emerged was a different rule of immunity, in some respects wider and in others narrower, not based upon any technicalities but upon what the House perceived as the public interest in the administration of justice.

The new rule was narrower because, although their Lordships were not unanimous about its precise limits, they agreed that it should in general terms be confined to acts concerned with the conduct of litigation. None of them thought that it could apply to non-contentious work. Barristers had previously been immune from liability for anything. On the other hand, the new rule was wider in that it also applied to solicitors.

Most of the speeches in *Rondel v Worsley* [1969] 1 AC 191 were devoted to explaining why the new immunity was necessary. The old cases had not relied solely upon the technicalities of contract. The rule was also said to be an expression of public policy. But Lord Reid said, at p 227B–C, that public policy was "not immutable" and that because "doubts appear to have arisen in many quarters whether that rule is justifiable in present day conditions in this country" it was proper to "re-examine the whole matter". The grounds upon which their Lordships considered that public policy required a modified immunity may be summarised under four heads: divided loyalty, the cab rank, the witness analogy and collateral challenge.

3. *Divided loyalty*

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. So, it was said, the possibility of a claim for negligence might inhibit the lawyer from acting in accordance with his overriding duty to the court. That would be prejudicial to the administration of justice.

4. *The cab rank*

It is a valuable professional ethic of the English Bar that a barrister may not refuse to act for a client on the ground that he disapproves of him or his case. Every barrister not otherwise engaged is available for hire by any client willing and able to pay the appropriate fee. This rule protects barristers against being criticised for giving their services to a client with a bad reputation and enables unpopular causes to obtain representation in court. It was said that barristers would be less inclined to honour this professional obligation if they suspected that the client was the sort of person who would, if he lost his case, turn on his barrister and sue for negligence. This

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consideration was said to apply with particular force to the criminal bar, where the unsuccessful client, like Mr Rondel, was likely to have leisure to ponder the way his trial had been conducted and access to legal aid if he could persuade another lawyer that he had an arguable case.

5. The witness analogy

No one can be sued in defamation for anything said in court. The rule confers an absolute immunity which protects witnesses, lawyers and the judge. The administration of justice requires that participants in court proceedings should be able to speak freely without being inhibited by the fear of being sued, even unsuccessfully, for what they say. The immunity has also been extended to statements made out of court in the course of preparing evidence to be given in court. So it is said that a similar immunity against proceedings for negligence is necessary to enable advocates to conduct the litigation properly.

6. Collateral challenge

If a client could sue his lawyer for negligence in conducting his litigation, he would have to prove not only that the lawyer had been negligent but also that his negligence had an adverse effect upon the outcome. This would usually mean proving that he would have won a case which he lost. But this gives rise to the possibility of apparently conflicting judgments which could bring the administration of justice into disrepute. A client is convicted and sent to prison. His appeal is dismissed. In prison, he sues his lawyer for negligence. The lawyer's defence is that he was not negligent but that, in any case, the client has suffered no injustice because whatever the lawyer did would not have secured an acquittal. In seeking to establish the latter point, the lawyer may or may not be able to re-assemble the witnesses who gave evidence for the prosecution. The question of whether the client should have been acquitted is then tried on evidence which is bound in some respects to be different, before a different tribunal and in the absence of the prosecution. The civil court finds, on a balance of probability, that the lawyer was negligent and that if he had conducted the defence with reasonable skill, the client would have been acquitted. Or perhaps that he would have had a 50% chance of being acquitted. Damages are awarded. But what happens then? Does the client remain in prison, despite the fact that a judge has said there was an even chance that he would have been acquitted? Should he be released, notwithstanding that the prosecution has had no opportunity to say that his conviction was correct? Should it be referred back to the Court of Appeal and what happens if the Court of Appeal, on the material before it, takes a different view from the civil judge? The public would not understand what was happening. So it was said that to allow clients to sue for negligence would allow a "collateral challenge" to a previous decision of another court. Even though the parties were different, this would be contrary to the public interest.

7. The scope of the immunity

Eleven years later, after *Rondel v Worsley* [1969] 1 AC 191, the House of Lords in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 had to consider the limits of the immunity. There was no challenge to the decision itself or the

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core immunity for the conduct of litigation in court. The question was the extent to which that immunity cast its shadow upon acts done out of court. In the particular case, it was a barrister's failure to advise joining additional parties before the limitation period had expired. The test for the out of court immunity adopted by the majority of the House was whether the work was so "intimately connected" with the conduct of the case in court as to amount to a decision as to how it would be conducted at the hearing. By this test, the barrister's conduct fell outside the immunity.

Although the immunity itself was not under challenge in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, Lord Diplock considered that the need to delimit its scope required a reconsideration of its rationale. He was unimpressed by the divided loyalty argument which had been in the forefront of the reasoning in *Rondel v Worsley* [1969] 1 AC 191. He thought no better of the cab rank rule. But he considered that the analogy with witness immunity and the collateral challenge argument were sufficient to justify a limited immunity.

8. A reconsideration

In the cases now under appeal, the Court of Appeal was of course bound by *Rondel v Worsley* [1969] 1 AC 191 and *Saif Ali v Sydney Mitchell & Co* [1980] AC 198. It decided that in all three cases the alleged negligence of the solicitors was not within the scope of the immunity as extended to out of court work. Their advice was not intimately connected with the way in which the case, if it had not settled, would have been conducted in court. But before your Lordships, the respondent clients have made a root and branch attack on the immunity. They say that it should be altogether abolished. Over 30 years have passed since *Rondel v Worsley* [1969] 1 AC 191; public policy, as Lord Reid said at the time, is not immutable, and there have been great changes in the law of negligence, the functioning of the legal profession, the administration of justice and public perceptions. They say that it is once again time to re-examine the whole matter. My Lords, I agree. In reconsidering these questions, I have been greatly assisted by a wealth of writing on the subject by judges, practitioners and academics, in the United Kingdom and overseas. I hope that I will not be thought ungrateful if do not encumber this speech with citations. The question of what the public interest now requires depends upon the strength of the arguments rather than the weight of authority.

9. The principle of equal treatment

My Lords, my point of departure is that in general English law provides a remedy in damages for a person who has suffered injury as a result of professional negligence. The landmark cases by which this principle was developed are *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, to which I have already referred, and *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145. It follows that any exception which denies such a remedy requires a sound justification. Otherwise your Lordships would fail to observe the fundamental principle of justice which requires that people should be treated equally and like cases treated alike.

In considering whether such a justification still exists, your Lordships cannot ignore the fact that you are yourselves members of the legal

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A profession. Members of other professions, and the public in general, are bound to view with some scepticism the claims of lawyers that the public interest requires them to have a special immunity from liability for negligence. If your Lordships are convinced that there are compelling arguments for such an immunity, you should not of course be deterred from saying so by fear of unfounded accusations of collective self-interest. But B those arguments need to be strong enough to convince a fair-minded member of the public. They cannot be based merely upon intuitions. This is a case in which what Professor Peter Cane has described as an "empathy heuristic" will not do. (See *Oxford Essays in Jurisprudence*, edited by Jeremy Horder, 4th series (2000), p 56, footnote 35.)

10. The divided loyalty argument analysed

C My Lords, there is apt to be a certain amount of confusion about the exact nature of the divided loyalty argument. There are two distinct versions in circulation but they are not always recognised to be different.

(a) Effect on behaviour of lawyers

The first argument is that the possibility of being sued for negligence D would actually inhibit the lawyer, consciously or unconsciously, from giving his duty to the court priority to his duty to his client, or, as Lord Diplock preferred to put it in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, 219 from observing the rules. This argument involves a prediction about the way in which the removal of the immunity would affect the way in which lawyers behave in court. It claims that their behaviour would change in a way which E was contrary to the public interest in the administration of justice. This was the argument advanced by Mr Sumption to your Lordships on behalf of the defendant solicitors. He said that if there was no immunity, lawyers would in marginal cases prefer the interests of their clients to the interests of justice. It is an argument which in view of the eminence of its proponents in *Rondel v Worsley* [1969] 1 AC 191 and elsewhere must be taken seriously I shall in due course return to it.

F

(b) A difficult art

The second version of the argument is that the divided loyalty is a special factor that makes the conduct of litigation a very difficult art It is easy to commit what appear in retrospect to have been errors of judgment. Even if there is no real danger that a court would hold such errors to have been G negligent, the advocate would be exposed to vexatious claims by difficult clients. The argument is pressed most strongly in connection with advocacy in criminal proceedings, where the clients are said to be more than usually likely to be vexatious. Your Lordships will observe that this version of the argument does not depend upon the proposition that lawyers will be deterred from observing the rules or their duty to the court. It is advanced as a good argument even if your Lordships think that there are no sufficient H grounds for the prediction which Mr Sumption invites you to make. It is rather an argument that the imposition of liability would be unfair. The efforts of lawyers in good faith to comply with their public duties should not leave them open to vexatious claims by dissatisfied clients. This is the argument which my noble and learned friend, Lord Hutton, calls the

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"second strand" of the divided loyalty argument. As he puts it, "it is not right that a person performing an important public duty by taking part in a [criminal] trial should be vexed by an unmeritorious action . . ." (post, p 731F–G). I shall deal with this argument, which I propose to call the "vexation argument," before returning to the one advanced by Mr Sumption.

11. The vexation argument

My Lords, I do not think that the vexation argument, taken by itself, has any validity. 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. The doctor, for example, owes a duty to the individual patient. But he also owes a duty to his other patients which may prevent him from giving one patient the treatment or resources he would ideally prefer. We do not say that they should have immunity merely because they do a difficult job in which it is easy to make a bona fide error of judgment. And although the criminal advocate is engaged in an activity of great public importance, I do not think it would be right to claim that he is in this respect unique among professional men. The fact is that the advocate, like other professional men, undertakes a duty to his client to conduct his case, subject to the rules and ethics of his profession, with proper skill and care. No other participant in the trial undertakes such a duty.

There is some overlap between the vexatious claims argument and the witness analogy, to which I shall come in due course. Essentially it depends upon the same reasoning as Fry LJ used in the famous passage in *Munster v Lamb* (1883) 11 QBD 588, 607 in defence of the absolute privilege of witnesses giving evidence in court:

> "It is not a desire to prevent actions from being brought in cases where they ought to be maintained that has led to the adoption of the present rule of law; but it is the fear that if the rule were otherwise, numerous actions would be brought against persons who were merely discharging their duty. It must always be borne in mind that it is not intended to protect malicious and untruthful persons, but that it is intended to protect persons acting bona fide, who under a different rule would be liable, not perhaps to verdicts and judgments against them, but to the vexation of defending actions."

But this argument depends upon the assumption that there is a powerful public interest which makes this degree of protection necessary. In the case of witnesses, it is the assumption that they would otherwise be less willing to come forward and tell the truth in court. In other words, that their behaviour would be affected in a particular way which was contrary to the interests of the administration of justice. It is not simply the general proposition that people doing their best in a difficult job should not be exposed to vexatious claims. This argument could apply to many people besides lawyers. So in my opinion it is only the first version of the divided loyalty argument which can have any prospect of success. The second is in principle misconceived.

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A *12. Vexatious claims in general*

Before returning to Mr Sumption's divided loyalty argument, I should say that in my opinion one should not exaggerate the bogey of vexatious claims. As I have said, every other profession has to put up with them. A practitioner who is properly insured can usually expect such claims to be handled by solicitors instructed by the underwriters. And there have been recent
B developments in the civil justice system designed to reduce the incidence of vexatious claims.

(a) Summary dismissal

The first is the new Civil Procedure Rules. Under the old rules, a defendant faced with what appeared to be a bad claim had a very heavy
C burden to satisfy the court that it was "frivolous and vexatious" and ought to be struck out. Now rule 24.2 provides that the court may give summary judgment in favour of a defendant if it considers that "the claimant has no real prospect of succeeding on the claim". The defendant may file written evidence in support of his application. In *Swain v Hillman* [2001] 1 All ER 91 (see The Times, 4 November 1999), Lord Woolf MR encouraged judges to make use of this "very salutary power . . . It saved expense; it achieved
D expedition; it avoided the court's resources being used up in cases where it would serve no purpose; and, generally, was in the interests of justice."

Of course the summary power has its limits. The court should not "conduct a mini-trial" when there are issues which should be considered at a full one. But it should enable the courts to deal summarily with truly vexatious proceedings. It should also be remembered that a lawyer
E defendant has the advantage that the power of summary dismissal is in the hands of lawyers. I do not suggest that they would be inclined to favour their own profession. The opposite is more likely to be the case. But they would understand what the case was about. They would be operating in their own field of expertise, not faced with the allegations of professional negligence in another discipline which they did not have the knowledge or
F experience to recognise as groundless. So in this respect lawyers faced with vexatious claims are in an advantageous position.

(b) Funding of litigation

The second important change has been made by the Access to Justice Act 1999, which came into force on 1 April 2000. Civil legal aid has been
G abolished and replaced by legal services funded by the Legal Services Commission as part of the Community Legal Service. The Act altogether excludes legal help in relation to "allegations of negligently caused injury, death or damage to property": see paragraph 1(a) of Schedule 2. Although an action for damages for loss caused by negligent advocacy or related services may not strictly fall within these categories, it is clear that it will not be easy to obtain legal representation for such actions. The Lord Chancellor
H has approved a Funding Code prepared by the Commission under section 8 of the Act which indicates that they would not come very high on the Community Legal Service's scale of priorities. Paragraph 5.7.1 of the code provides that if "the nature of the case is suitable for a [conditional fee agreement], and the client is likely to be able to avail himself or herself of a

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[conditional fee agreement], full representation will be refused". Actions for damages for the negligent conduct of litigation would seem, by analogy with paragraph 1(a) of Schedule 2, to be suitable for conditional fee agreements. Furthermore, under paragraph 5.7.3, full representation in a claim for damages will be refused unless certain cost benefit criteria are satisfied. For example, if the chances of success are good (60–80%), the likely damages must exceed the likely costs by a ratio of 2:1. If the prospects are less than 50%, representation will be refused.

It will therefore be much more difficult than it has been in the past to obtain legal help for negligence actions which have little prospect of success. The public funding of cases like *Rondel v Worsley* [1969] 1 AC 191, the very paradigm of a hopeless claim by a disgruntled criminal defendant, is unlikely to be repeated. The alternative will be a conditional fee agreement, which would require satisfying another lawyer that the claim had sufficient prospects to make it worth his while to take it on at his own risk as to costs. Once again, as a lawyer, he will be able to recognise a vexatious claim when he sees one.

13. Back to the divided loyalty argument

After this digression, I return to Mr Sumption's divided loyalty argument. I have no doubt that the advocate's duty to the court is extremely important in the English system of justice. The reasons are eloquently stated by their Lordships in *Rondel v Worsley* [1969] 1 AC 191 and I do not think that the passage of more than 30 years has diminished their force. The substantial orality of the English system of trial and appellate procedure means that the judges rely heavily upon the advocates appearing before them for a fair presentation of the facts and adequate instruction in the law. They trust the lawyers who appear before them; the lawyers trust each other to behave according to the rules, and that trust is seldom misplaced. The question is whether removing the immunity would have a significant adverse effect upon this state of affairs.

To assess the likelihood, I think that one should start by considering the incentives which advocates presently have to comply with their duty and those which might tempt them to ignore it. The first consideration is that most advocates are honest conscientious people who need no other incentive to comply with the ethics of their profession. Then there is the wish to enjoy a good reputation among one's peers and the judiciary. There can be few professions which operate in so bright a glare of publicity as that of the advocate. Everything is done in public before a discerning audience. Serious lapses seldom pass unnoticed. And in the background lie the disciplinary powers of the judges and the professional bodies. Whereas in 1967 it might have been said that the concept of the duty to the court was somewhat undefined and that much was left to the discretion of the advocate, who might interpret his obligations in the way which suited him best, today both branches of the profession are governed by detailed codes of conduct.

Looking at the other side of the coin, what pressures might induce the advocate to disregard his duty to the court in favour of pleasing the client? Perhaps the wish not to cause dissatisfaction which might make the client reluctant to pay. Or the wish to obtain more instructions from the same client. But among these pressures, I would not put high on the list the prospect of an action for negligence. It cannot possibly be negligent to act in

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A 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. So when the advocate decides that he ought to tell the judge about some authority which is contrary to his case, I do not think it would for a moment occur to him that he might be sued for negligence. I think it is of some significance that the situation in which the interests of the client and the duty to justice are most likely to come into conflict is in the preparation of the list of documents for
B discovery. The lawyer advising on discovery is obliged to insist that he disclose relevant documents adverse to his case which are not protected by privilege. But solicitors who undertake no advocacy usually perform this task and it has never been thought to be protected by immunity.

Mr Sumption did not really suggest that any conscious calculation would take place. What he said was that it would lead to defensive lawyering,
C rather as liability for professional negligence is said to lead to defensive medicine. The advocate would take every possible point when otherwise he might have been willing to shorten the proceedings by conceding that some were really non-starters. But prolixity is a recognised problem even with the immunity in place. Lawyers want to do as much as they honestly can for their client and occasionally more. The tendency to overkill is not inhibited by the system under which they are conventionally paid, which is reasonable
D remuneration for work reasonably done. So the problem has to be contained in other ways. The disapproval of the court is a traditional curb on prolixity. But it has not been enough. Other mechanisms have had to be put into place. The new Civil Procedure Rules have given judges a battery of powers to keep the resources expended on a case proportionate to the its value and importance.

E An important innovation for the purpose of restraining unnecessary expenditure on costs has been the extension in 1990 of the power of the court to make wasted costs orders. The implications of this jurisdiction are in my view so relevant to the present argument that the subject deserves a section of its own.

14. Wasted costs orders

F The judgment of the Court of Appeal in *Ridehalgh v Horsefield* [1994] Ch 205, 226–231 contains a history of the wasted costs jurisdiction. Briefly stated, the court had jurisdiction before 1990 to order solicitors to pay costs wasted by their clients or other parties by reason of their misconduct, default or serious negligence. The jurisdiction did not apply to barristers. But section 4 of the Courts and Legal Services Act 1990 conferred power to make
G rules under which the court could order any legal representative to pay costs wasted by any party as a result of "any improper, unreasonable or negligent act or omission" on their part. Rules to this effect came into force on 1 October 1991: RSC Ord 62, r 11. Sections 111 and 112 of the Act conferred similar powers on judges and magistrates in criminal proceedings.

For present purposes, the significance of this development is that it made advocates, both barristers and solicitors, liable for negligence in the conduct
H of litigation. It is true that it was a limited form of liability because it was restricted to the payment of wasted costs. It did not extend to any other loss which their negligence might have caused to their clients or other parties. But the costs of modern litigation can amount to a good deal of money. Furthermore, the possibility that the negligent conduct of litigation may lead

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to a wasted costs order being visited upon the advocate by summary process, before the very judge hearing the case, is likely to be more present to the mind of an advocate than the prospect of an action for negligence at some time in the future. If, therefore, the possibility of being held liable in negligence is calculated to have an adverse effect on the behaviour of advocates in court, one might expect this to have followed, at least in some degree, from the introduction of wasted costs orders.

Such was certainly the submission of counsel for both the Law Society and the Bar Council to the Court of Appeal in *Ridehalgh v Horsefield* [1994] Ch 205. The Courts and Legal Services Act 1990 had extended rights of audience in the superior courts to solicitors and section 62 recognised that they should in that capacity have whatever immunities were enjoyed by barristers:

> "(1) A person—(a) who is not a barrister; but (b) who lawfully provides any legal services in relation to any proceedings, shall have the same immunity from liability for negligence in respect of his acts or omissions as he would if he were a barrister lawfully providing those services."

The two professional bodies argued that any liability for wasted costs orders should be subject to the immunity recognised in section 62. Their counsel were not however agreed on how the divided loyalty of the advocate would be affected. Mr Matheson QC for the Law Society said, at p 213E, that it would "affect the willingness of legal representatives fearlessly to represent their clients' interests". Mr Rupert Jackson QC, for the Bar Council, advanced, at pp 217–218, the *Rondel v Worsley* [1969] 1 AC 191 argument that it would affect the ability of the barrister "to be able to perform his duty to the court fearlessly and independently". Either version of the argument would have made a sizeable hole in the new jurisdiction, particularly in its application to barristers in criminal proceedings. The Court of Appeal rejected it. Since then, many wasted costs orders have been made as a result of the negligent conduct of legal proceedings.

My Lords, I accept that the liability of a negligent advocate to a wasted costs order is not the same as a liability to pay general damages. But the experience of the wasted costs jurisdiction is the only empirical evidence we have available in this country to test the proposition that such liability will have an adverse effect upon the way advocates perform their duty to the court. There is no doubt that the jurisdiction has given rise to problems, particularly in exercising it with both fairness and economy. But I have found no suggestion that it has changed standards of advocacy for the worse. On the contrary. In *Fletamentos Maritimos SA v Effjohn International BV* (unreported) 10 December 1997; Court of Appeal (Civil Division) Transcript No 2115 of 1997, the Court of Appeal made a wasted costs order against a firm of solicitors who had instructed counsel to made a hopeless application for leave to appeal. Simon Brown LJ ended his judgment by saying:

> "Nothing in this judgment should, or I believe will, deflect legal representatives, on instructions, from vigorously pursuing and arguing the most difficult cases. An argument, however unpromising, is perfectly properly advanced (not least on an application for leave to appeal)

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A provided only and always that it is respectable and is not being pursued for reasons other than a genuine belief in the possibility of its success. If our order today were to discourage some of the more absurd arguments with which this court is sometimes plagued, I for one would not be regretful."

B *15. Overseas experience*

Mr Sumption, for the solicitors, and Mr Peter Scott, for the Bar Council, say that one cannot draw any useful conclusions from other legal systems in which no immunity exists. Legal cultures differ. The court procedures of Europe and the United States, for example, lack the predominantly oral character of litigation in the United Kingdom. In Australia and New Zealand, where procedures are most similar, *Rondel v Worsley* [1969] C 1 AC 191 is followed. In general I accept this, but I cannot refrain from drawing attention to the experience in Canada. It appears that in that country no immunity was claimed for lawyers before *Rondel v Worsley* [1969] 1 AC 191. Then, in *Demarco v Ungaro*, 95 DLR (3d) 385, a firm of barristers and solicitors at Niagara Falls, Ontario found themselves sued by a former client for negligence in the conduct of a case in which he had been D ordered to pay $6,000 and costs. They argued that as long as the immunity in England was based on the absence of a contract with a barrister, it could obviously have no application in Canada. Lawyers there contracted with their clients. But now that the House of Lords in *Rondel v Worsley* [1969] 1 AC 191 had reissued the immunity with a newly minted rationale, there was no reason why the arguments of public policy should not also pass E current in Canada. Krever J examined that case and *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, as well as the few Canadian cases on the subject and explained the differences between the Canadian and English legal professions. But I do not think it would be unfair to summarise the pith of the judgment on the divided loyalty argument as being that Canada had got on perfectly well without an immunity for over a hundred years and there was no reason to think that it needed to be introduced in order to F encourage lawyers to perform their duties to the court. He said, at p 406:

> "With respect to the duty of counsel to the court and the risk that, in the absence of immunity, counsel will be tempted to prefer the interest of the client to the duty to the court and will thereby prolong trials, it is my respectful view that there is no empirical evidence that the risk is so serious that an aggrieved client should be rendered remediless."

G Although a decision at first instance in Ontario, the careful and fully reasoned decision of Krever J appears to have been treated as settling the law in Canada. It has not since been challenged.

16. Divided loyalty and criminal proceedings

H My noble and learned friend, Lord Hope of Craighead, considers that although in civil proceedings the possibility that the removal of the immunity may have an adverse effect upon the conduct of advocates is not strong enough to justify its retention, there is a sufficiently strong likelihood that it will have this effect in criminal cases. Counsel will be tempted "to pursue every conceivable point, good or bad . . ." (post, p 717A). This must

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be an intuitive prediction, because there is in the nature of things no way of proving it now. I would not regard the current efflorescence of human rights points in Scottish criminal proceedings, notwithstanding the existence of the immunity, as any indication as to whether removal of the immunity would aggravate matters. This is an area in which cause and effect is not easy to establish. And of course, I acknowledge that my noble and learned friend's experience is far greater than mine. Indeed, it could hardly be less. But I am comforted by the fact that others with considerable experience of criminal proceedings do not have the same forebodings. In the end, I do not think that such intuitions are a sound basis upon which to proceed.

The argument for immunity in criminal proceedings depends heavily upon the image of litigants like Mr Rondel, occupying their prison time with devising vexatious proceedings against their counsel which are then launched at public expense. But it must be remembered, first, that the abuse of process doctrine, which I shall discuss later, is likely to eliminate almost all such plaintiffs who have not succeeded in having their convictions set aside; and secondly, for the reasons which I have explained, that vexatious actions are less likely to be publicly funded and more likely to be struck out than they were in 1967. My noble and learned friend, Lord Hutton, chooses his example carefully when he says that "few members of the public would have been critical of Mr Worsley being granted immunity": post, p 734A. I quite agree that the case against him should have been struck out. But that is because it was hopeless. It would be easy to imagine other facts in which the public would react very badly to a grant of immunity.

My noble and learned friend, Lord Hobhouse of Woodborough, has a rather narrower point. He places emphasis not so much upon the way the advocate may conduct the criminal trial but upon the appellate process. He says that the advocate may be less inclined to assist the Court of Appeal with a full explanation of what went wrong at the trial if he thinks that a successful appeal would open the way to an action against him for negligence. In most appeals, no such assistance will be required. All the material will be on the record. But I accept that there are some cases in which it may be necessary to inquire of the advocate as to matters such as the instructions he received or why some witnesses were not called. Again it seems to me that the prediction of a change in the behaviour of the advocates is based upon intuition and, even if the intuition is more soundly based, the class of cases involved is so narrow that it cannot justify a total immunity from actions for negligence in the conduct of all criminal cases.

17. The cab rank

This argument is that a barrister, who is obliged to accept any client, would be unfairly exposed to vexatious actions by clients whom any sensible lawyer with freedom of action would have refused to act for. It is, in the nature of things, intuitive, incapable of empirical verification, and I do not believe it has any real substance. The clients in question will presumably have already found solicitors to represent them without any professional compulsion. 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

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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. I should mention that Lord Diplock in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, 221 dismissed the cab rank argument for much the same reasons.

18. The witness analogy

This argument starts from the well-established rule that a witness is absolutely immune from liability for anything which he says in court. So is the judge, counsel and the parties. They cannot be sued for libel, malicious falsehood or conspiring to give false evidence: *Marrinan v Vibart* [1963] 1 QB 528. 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. And, as Fry LJ explained in the passage which I have already cited from *Munster v Lamb* 11 QBD 588, 607 this policy is regarded as so important that it requires not merely qualified privilege but absolute immunity.

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] AC 198, 222A, as a "general immunity from civil liability which attaches to all persons in respect of their participation in proceedings before a court of justice". Stated at this level of generality, it includes immunity for advocates from liability for anything that they may do. The rationale is said to be to "ensure that trials are conducted without avoidable stress and tensions of alarm and fear in those who have a part to play in them".

My Lords, with all respect to Lord Diplock, it seems to me that to generalise the witness immunity in this way is illegitimate and dangerous. In the High Court of Australia in *Mann v O'Neill* (1997) 191 CLR 204, 221, 912 McHugh J spoke of the perils of extending the witness immunity by analogy. There is, he said, a temptation:

> "to recognise the availability of the defence for new factual circumstances simply because they are closely analogous to an existing category (or cases within an existing category) without examining the case for recognition in light of the underlying rationale for the defence."

What is the rationale of the witness immunity? In *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177, 215C, I said that the policy of the immunity was "to encourage freedom of expression" and that was why it was limited to cases in which "the alleged statement constitutes the cause of action". My noble and learned friend, Lord Hope of Craighead, explained, at p 219H, that the immunity did not, for example, protect a witness against an action for malicious prosecution based on what he had said to the police because "it is the malicious abuse of process, not the making of the statement, which provides the cause of action". In other words, the immunity is based upon a perception that witnesses would otherwise be less inclined to come forward and tell the truth. They would behave differently in a way which was inimical to the interests of justice.

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It is not sufficient, therefore, to explain any immunity relating to court proceedings by saying that the people involved should be free from "avoidable stress and tensions". That 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?

If one asks the question in this way, as I think one must, then it becomes apparent that Lord Diplock was inconsistent in rejecting the divided loyalty argument and the cab rank argument but accepting the witness analogy. It involves, as Lord Diplock himself would have put it, a petitio principii. The witness rule depends upon the proposition that without it, witnesses would be more reluctant to assist the court. To establish the analogy, it is necessary to point to some similar effect on the behaviour of lawyers. But Lord Diplock rejected the only two candidates put forward for likely changes in behaviour and offered no others. The proposition that absence of immunity would have an effect contrary to the public interest was assumed without argument.

Mr Scott invited your Lordships to apply by analogy the decision of the Court of Appeal in *Stanton v Callaghan* [2000] QB 75, in which it was held that an expert witness could not be sued for agreeing to a joint experts' statement in terms which the client thought detrimental to his interests. He said that this was an example of a general immunity for acts done in the course of litigation. But that seems to me to fall squarely within the traditional witness immunity. The alleged cause of action was a statement of the evidence which the witness proposed to give to the court. 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. There seems to me no analogy with the position of a lawyer who owes a duty of care to his client.

Nor is there in my opinion any analogy 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.

19. Collateral attack

This argument also has a number of strands which need to be examined separately.

(a) Evidential difficulties

It may be very difficult to arrive at a conclusion about what would have happened in earlier proceedings if in some respect they had been conducted differently. In *Smith v Linskills* [1996] 1 WLR 763, 773 Sir Thomas Bingham MR spoke of:

> "The virtual impossibility of fairly retrying at a later date the issue which was before the court on the earlier occasion. The present case

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A exemplifies the problem. It is over 12 years since the crime was committed. Recollections (of the participants and the lawyers involved) must have faded. Witnesses have disappeared. Transcripts have been lost or destroyed. Hayes may, or may not, be available to testify. Evidence of events since the trial will be bound to intrude, as it already has. It is futile to suppose that the course of the Crown Court trial can be authentically re-created."

B

Of course this is true. But, in principle, evidential difficulties have never been regarded as a reason for declining jurisdiction. The plaintiff has to prove that the lawyer's negligence caused him loss. The burden of proof is upon him. His case may have become so weak with the passage of time that it has to be struck out. But that is no reason for giving lawyers immunity from suit even in cases in which there is no difficulty about proving that their C negligence caused loss to the plaintiff. This has to be done in cases which fall outside the immunity. For example, in *Kitchen v Royal Air Force Association* [1958] 1 WLR 563 a firm of solicitors were negligent in failing to issue a writ before the limitation period expired. Lloyd-Jacob J had to decide in 1957 what would have been the plaintiff's chances of success in an action which should have been brought before 1946 to establish that her D husband's death by electrocution in 1945 had been caused by the negligence of the West Kent Electricity Co when it installed a control box in 1940. The Court of Appeal upheld his estimate of the value of her claim.

(b) Invidious judgments

Then it is said that while it is difficult enough to decide what would have E happened at a trial which did not in fact take place (as in *Kitchen v Royal Air Force Association* [1958] 1 WLR 563), it may become positively invidious to decide how a judge who actually heard the case would have reacted if the advocate had advanced a different argument or called different evidence. Some judges are more receptive to certain kinds of points than others. I think that this is an imaginary problem. Whatever may have been the foibles of the judge who heard the case, it cannot be assumed that he would have F behaved irrationally. If he did, it would have been corrected on appeal. Obviously one has to take into account the findings that the judge made on the case as it was actually presented. For example, if he did not believe anything which the plaintiff said, it may be difficult to show that a different line of argument would have persuaded him to find in his favour. But I do not see how it is relevant for the purposes of the hypothetical exercise to G have regard to the judge's idiosyncrasies. It must be assumed that he would have behaved judicially.

(c) Conflicting judgments

The most substantial argument is that it may be contrary to the public interest for a court to retry a case which has been decided by another court. H In *Rondel v Worsley* [1969] 1 AC 191, 251 Lord Morris of Borth-y-Gest said that it would be:

> "undesirable in the interests of the fair and efficient administration of justice to tolerate a system under which, as a sort of by-product after the trial of an action and after any appeal or appeals, there were litigation

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upon litigation with the possibility of a recurring chain-like course of litigation." A

In *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, 222–223, Lord Diplock developed this point in a passage which should be quoted at length:

"Under the English system of administration of justice, the appropriate method of correcting a wrong decision of a court of justice reached after a contested hearing is by appeal against the judgment to a superior court. B This is not based solely on technical doctrines of res judicata but upon principles of public policy, which also discourage collateral attack on the correctness of a subsisting judgment of a court of trial upon a contested issue by re-trial of the same issue, either directly or indirectly in a court of co-ordinate jurisdiction. Yet a retrial of any issue decided against a barrister's client in favour of an adverse party in the action in respect of C which allegations of negligent conduct by the barrister are made would be an indirect consequence of entertaining such an action. The re-trial of the issue in the previous action, if it depended on oral evidence, would have to be undertaken de novo. This would involve calling anew after a lapse of time witnesses who had been called at the previous trial and eliciting their evidence before a different judge by questions in examination and cross- D examination that were not the same as those that had been put to them at the previous trial. The circumstances in which the barrister had made decisions as to the way in which he would conduct the previous trial, and the material on which those decisions were based, could not be reproduced in the re-trial; and the initial question in the action for negligence: whether it has been established that the decision adverse to the client reached by the court in the previous trial was wrong, would E become hopelessly entangled with the second question: whether it has been established that notwithstanding the differences in the circumstances in which the previous trial was conducted, it was the negligent act or omission of the barrister in the conduct of his client's case that caused the wrong decision by the court and not any other of those differences. My Lords, it seems to me that to require a court of co-ordinate jurisdiction to F try the question whether another court reached a wrong decision and, if so, to inquire into the causes of its doing so, is calculated to bring the administration of justice into disrepute."

It may be said that this passage is combining two arguments: the one based upon evidential difficulty, which is not, as I have said, a general reason for refusing to try a case, and the argument that conflicting decisions may G bring the administration of justice into disrepute. But I think that Lord Diplock is saying that the fallibility of any conclusion about whether the earlier case would have been decided differently reinforces the public interest rule about avoiding conflicting decisions. This is obviously an argument entitled to great respect.

But actions for negligence against lawyers are not the only cases which give rise to a possibility of the same issue being tried twice. The law has to H deal with the problem in numerous other contexts. So, before examining the strength of the collateral challenge argument as a reason for maintaining the immunity of lawyers, it is necessary to consider how the law deals with collateral challenge in general.

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20. Relitigation in general

The law discourages relitigation of the same issues except by means of an appeal. The Latin maxims often quoted are nemo debet bis vexari pro una et eadem causa and interest rei publicae ut finis sit litium. They are usually mentioned in tandem but it is important to notice that the policies they state are not quite the same. The first is concerned with the interests of the defendant: a person should not be troubled twice for the same reason. This policy has generated the rules which prevent relitigation when the parties are the same: autrefois acquit, res judicata and issue estoppel. The second policy is wider: it is concerned with the interests of the state. There is a general public interest in the same issue not being litigated over again. The second policy can be used to justify the extension of the rules of issue estoppel to cases in which the parties are not the same but the circumstances are such as to bring the case within the spirit of the rules. I shall give two examples. In *Reichel v Magrath* (1889) 14 App Cas 665 Mr Reichel, the vicar of Sparsholt, resigned. The Bishop of Oxford accepted his resignation. Then the vicar changed his mind. He brought an action against the Bishop and the Queen's College, Oxford, which had the right of presentation, for a declaration that his resignation had been void. The judge held that it had been valid and that the living was vacant. His decision was affirmed on appeal. The college appointed its Provost, Dr Magrath, as the new vicar. Mr Reichel refused to move out of the vicarage. Dr Magrath brought an action for possession. Mr Reichel pleaded in defence that his resignation had been void and he was still the vicar. The court struck out the defence as an "abuse of the process of the court". Although the parties were different, the case was within the spirit of the issue estoppel rule. Dr Magrath was claiming through the college, which had been a party to the earlier litigation.

In *Ashmore v British Coal Corpn* [1990] 2 QB 338 Ms Ashmore worked in the canteen of a coal mine in Nottingham. She complained to an industrial tribunal that she was paid less than men were being paid for similar work, contrary to the Equal Pay Act 1970. Over 1,500 other women employees of the corporation made similar complaints. The industrial tribunal decided to hear 14 sample cases, six selected by the employees and eight by the employers, to lay down general principles according to which the others could be decided. Ms Ashmore was aware of these arrangements. The tribunal decided all the cases adversely to the applicants on grounds which were equally applicable to Ms Ashmore's application. She then asked for a separate hearing of her case. The Court of Appeal decided that it should be struck out as an abuse of the process of the court. Ms Ashmore had not been a party to the sample proceedings but the sensible procedure there adopted would be undermined if all other members of the group were entitled to demand a separate hearing.

The leading case on the application of the power to dismiss proceedings on this ground as an abuse of the process of the court is *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529. It concerned the trial of the six men convicted of an IRA bombing in Birmingham in 1974. The defendants claimed that the police had beaten them to extract confessions. The trial judge held a voir dire and decided that the prosecution had proved beyond reasonable doubt that they had not been beaten. They were convicted. They applied for leave to appeal, but not on the ground that the confessions had been wrongly admitted. Leave to appeal was refused. In

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prison, the accused commenced proceedings against the policemen for assault, alleging the same beatings as had been alleged at the criminal trial. The House of Lords decided that it was an abuse of the process of the court to attempt to relitigate the same issue and that the actions should be struck out.

Criminal proceedings are in my opinion in a special category because although they are technically litigation between the Crown and the defendant, the Crown prosecutes on behalf of society as a whole. In the United States, the prosecutor is designated "The People". So a conviction has some of the quality of a judgment in rem, which should be binding in favour of everyone. As Lord Diplock pointed out in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, 223, this policy is reflected in section 13 of the Civil Evidence Act 1968, which provides that in an action for libel or slander, proof of the plaintiff's conviction is conclusive evidence that he committed the offence of which he was convicted.

But one should not exaggerate this argument. The policy reasons which justify making the conviction conclusive evidence in a defamation action do not necessarily apply to other actions. I said that a conviction has some of the quality of a judgment in rem but, as a matter of law, it remains a judgment between the Crown and the accused and that is often the right way to consider it. The Court of Appeal is generally thought to have taken the technicalities of the matter much too far when it decided in *Hollington v F Hewthorn & Co Ltd* [1943] 1 KB 587 that in civil proceedings a conviction was res inter alios acta and no evidence whatever that the accused had committed the offence. But when Parliament reversed this rule in section 11(1) of the Civil Evidence Act 1968, it did not say that the conviction should be conclusive evidence, so that the issue could not be relitigated. It said only that the conviction was admissible evidence for proving that he committed the offence.

Hunter v Chief Constable of the West Midlands Police [1982] AC 529 shows that, superimposed upon the rules of issue estoppel and the Civil Evidence Act 1968, the courts have a power to strike out attempts to relitigate issues between different parties as an abuse of the process of the court. But the power is used only in cases in which justice and public policy demand it. Lord Diplock began his speech, at p 536, by saying that the case concerned:

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

I, too, would not wish to be taken as saying anything to confine the power within categories. But I agree with the principles upon which Lord Diplock said that the power should be exercised: in cases in which relitigation of an

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A issue previously decided would be "manifestly unfair" to a party or would bring the administration of justice into disrepute. It is true that Lord Diplock said later in his speech, at p 541, that the abuse of process exemplified by the facts of the case was:

> "the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending
B plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made."

But I do not think that he meant that every case falling within this description was an abuse of process or even that there was a presumption to this effect which required the plaintiff to bring himself within some
C exception. That would be to adopt a scheme of categorisation which Lord Diplock deplored. As I shall explain, I think it is possible to make some generalisations about criminal proceedings. But each case depends upon an application of the fundamental principles. I think that Ralph Gibson LJ was right when, after quoting this passage, he said in *Walpole v Partridge & Wilson* [1994] QB 106, 116A that *Hunter's* case [1982] AC 529 decides "not that the initiation of such proceedings is necessarily an abuse of process but
D that it may be".

21. *The immunity and abuse of process by relitigation*

My Lords, the discussion in the last sections shows, first, that not all relitigation of the same issue will be manifestly unfair to a party or bring the administration of justice in to disrepute, and secondly, that when relitigation
E is for one or other of these reasons an abuse, the court has power to strike it out. This makes it very difficult to use the possibility of relitigation as a reason for giving lawyers immunity against all actions for negligence in the conduct of litigation, whether such proceedings would be an abuse of process or not. It is burning down the house to roast the pig; using a broad-spectrum remedy when a more specific remedy without side effects can
F handle the problem equally well.

Cases in which actions for negligence have been brought against solicitors without immunity illustrate this point. *Walpole v Partridge & Wilson* [1994] QB 106 is one. The plaintiff was convicted before the magistrates of a statutory offence by preventing a veterinary officer from inspecting his pigs. His appeal to the Crown Court was dismissed. He issued proceedings against his solicitors for negligence, claiming that he had wanted to appeal
G by way of case stated and had arguable grounds for success on a point of law, but that they had negligently failed to lodge an appeal. The solicitors applied for the action to be struck out as an abuse of process on the ground that it would involve trying the question of whether the Crown Court had been wrong in law. In a closely reasoned and admirable judgment, Ralph Gibson LJ decided that the claim would not be manifestly unfair to the solicitors or bring the administration of justice into disrepute. On the
H contrary, the denial of a remedy was more likely to do so.

It is easy to imagine a similar case in which the alleged negligence would have been within the immunity: failure on the part of counsel, for example, to take an obvious point of law in the Crown Court. (Compare *Atwell v Michael Perry & Co* [1998] 4 All ER 65.) In such a case the consequence of

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the immunity would be to deny a remedy for negligence although the collateral challenge argument had no application.

22. *Summing up the arguments*

My Lords, I have now considered all the arguments relied upon in *Rondel v Worsley* [1969] 1 AC 191. In the conditions of today, they no longer carry the degree of conviction which would in my opinion be necessary to sustain the immunity. The empirical evidence to support the divided loyalty and cab rank arguments is lacking; the witness analogy is based upon mistaken reasoning and the collateral attack argument deals with a real problem in the wrong way. I do not say that *Rondel v Worsley* [1969] 1 AC 191 was wrongly decided at the time. The world was different then. But, as Lord Reid said then, public policy is not immutable and your Lordships must consider the arguments afresh.

23. *Leave it to Parliament?*

Mr Sumption and Mr Scott said that even if your Lordships thought that the immunity could no longer be justified, you should not, in your judicial capacity, alter the law. It was something which Parliament had considered fairly recently, during the passage of the Courts and Legal Services Act 1990. A legislative decision had been taken not to abolish the immunity. For the judges now to do so would be to trespass upon a competence which had been assumed by the sovereign legislature.

My Lords, I acknowledge the need for sensitivity on the part of the judges in entering into areas of law which are properly matters for democratic decision. Recently in *Southwark London Borough Council v Mills* [2001] 1 AC 1, 9–10, I said:

> "in a field such as housing law, which is very much a matter for the allocation of resources in accordance with democratically determined priorities, the development of the common law should not get out of step with legislative policy."

But, my Lords, there has been no statement of legislative policy on the immunity for lawyers. Section 62(1) of the Courts and Legal Services Act 1990, which I have already quoted, was careful not to endorse the immunity. It merely said that whatever immunity barristers had should also extend to solicitors. It is true that during the debate in committee in the House of Lords Lord Allen of Abbeydale moved an amendment to abolish the immunity which he afterwards withdrew (Hansard (HL Debates), 5 February 1990, cols *570–578*). A similar amendment was moved but not voted on in Standing Committee D in the House of Commons (Hansard (HC Debates), 7 June 1990, cols *325–340*). It seems to me, however, that the government merely accepted what the judges had said in *Rondel v Worsley* [1969] 1 AC 191 at face value. It may be that even as recently as 10 years ago they were right to do so. A number of the changes to which I have referred earlier in this speech were a result of the 1990 Act itself (such as wasted costs orders) and later developments in civil procedure and the public funding of litigation. So I do not think that your Lordships would be intervening in matters which should be left to Parliament. The judges

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A created the immunity and the judges should say that the grounds for maintaining it no longer exist. Cessante ratione legis, cessat lex ipsa.

24. *The future of the Hunter doctrine*

If there is to be no immunity, there will be more cases in which it becomes necessary to examine the limits of the *Hunter* [1982] AC 529 doctrine of
B abuse of process. As I have said, the basic principles were clearly stated in that case. The House of Lords made it clear that the remedy should remain flexible and I cannot imagine that Parliament, if it legislated upon the subject of the immunity, would wish to give any more precise guidance as to how the abuse of process remedy should be used. It is peculiarly a matter of judicial application to the facts of each case. For the purposes of the present appeals, I therefore need say no more than that I agree with the Court of Appeal that
C the doctrine does not apply to any of them. If, as must for present purposes be assumed, the allegations made by the plaintiffs are correct, there seems to me nothing manifestly unfair to the solicitors in having to answer for them. Nor do I think it would bring the administration of justice into disrepute if the plaintiffs were allowed to claim that they would have got better terms if their solicitors had advised and acted for them with reasonable care.
D Although the two matrimonial cases involved approval of the settlement by a judge, that approval was given on the basis of the information put before him and, even more important, upon the basis that the parties, duly advised by solicitors, had agreed to the order. The judge was entitled to give weight to the fact that the parties themselves agreed that the order would make reasonable provision for both of them. The plaintiffs claim that if the judge
E had been given different information and if they had not been advised to agree to the order, they would have done better. That does not seem to me to involve any attack upon the judicial process.

I do not think, however, that I can entirely agree with the Court of Appeal's view that the question of whether a collateral challenge is an abuse of process depends upon the "weight" to be given to the judgment and that there is a scale of weighting according to the amount of judicial input, with a
F consent order at one end and a judgment after hearing full evidence at the other. I agree that, as a practical matter, it is very difficult to prove that a case which was lost after a full hearing would have been won if it had been conducted differently. It may be easier to prove that, with better advice, a more favourable settlement would have been achieved. But this goes to the question of whether, in the words of CPR r 24.2, the plaintiff has "a real
G prospect of succeeding on the claim". The *Hunter* question, on the other hand, is whether allowing even a successful action to be brought would be manifestly unfair or bring the administration of justice into disrepute. In my view, there will be cases (such as conviction on a plea of guilty) in which the *Hunter* principle may be engaged although there has been virtually no judicial input at all. The Court of Appeal accepted this. On the other hand, I can see no objection on grounds of public interest to a claim that a civil case
H was lost because of the negligence of the advocate, merely because the case went to full trial. In such a case the plaintiff accepts that the decision is res judicata and binding upon him. He claims however that if the right arguments had been used or evidence called, it would have been decided differently. This may be extremely hard to prove in terms of both negligence

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and causation, but I see no reason why, if the plaintiff has a real prospect of success, he should not be allowed the attempt.

There is, I think, a relevant difference between criminal proceedings and civil proceedings. In civil proceedings, the maxim nemo debet bis vexari pro una et eadem causa applies very strongly. Fresh evidence is admissible on appeal only subject to strict conditions. Even if a decision is based upon a view of the law which is subsequently expressly overruled by a higher court, the judgment itself remains res judicata and cannot be set aside: see *In re Waring (No 2)* [1948] Ch 221. An issue estoppel created by earlier litigation is binding subject to narrow exceptions: see *Arnold v National Westminster Bank plc* [1991] 2 AC 93. But the scope for re-examination in criminal proceedings is much wider. Fresh evidence is more readily admitted. A conviction may be set aside as unsafe and unsatisfactory when the accused appears to have been prejudiced by "flagrantly incompetent advocacy": see *R v Clinton* [1993] 1 WLR 1181. After appeal, the case may be referred to the Court of Appeal (if the conviction was on indictment) or to the Crown Court (if the trial was summary) by the Criminal Cases Review Commission: see Part II of the Criminal Appeal Act 1995.

It follows that in my opinion 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. The arguments of Lord Diplock in the long passage which I have quoted from *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, 222–223 are compelling. The proper procedure is to appeal, or if the right of appeal has been exhausted, to apply to the Criminal Cases Review Commission under section 14 of the 1995 Act. 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. *Walpole v Partridge & Wilson* [1994] QB 106 was such a case.

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 and the only contrary arguments which remain are those of divided loyalty, vexation and the cab rank, all of which I have already rejected. *Acton v Graham Pearce & Co* [1997] 3 All ER 909 is a good example of such an action in a case which lay outside the immunity and illustrates the point that bringing such a claim is not in itself an abuse of process. While it is true that there is a power for the Crown to pay compensation to the person wrongly convicted, there is no reason why public funds should be used to pay the accused compensation for loss caused by the negligence of the lawyers who were paid to defend him.

On the other hand, in civil (including matrimonial) cases, it will seldom be possible to say that an action for negligence against a legal adviser or representative would bring the administration of justice into dispute. Whether the original decision was right or wrong is usually a matter of concern only to the parties and has no wider implications. There is no public interest objection to a subsequent finding that, but for the negligence of his lawyers, the losing party would have won. But here again there may be exceptions. The action for negligence may be an abuse of process on the ground that it is manifestly unfair to someone else. Take, for example, the

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A case of a defendant who publishes a serious defamation which he attempts unsuccessfully to justify. Should he be able to sue his lawyers and claim that if the case had been conducted differently, the allegation would have been proved to be true? It seems to me unfair to the plaintiff in the defamation action that any court should be allowed to come to such a conclusion in proceedings to which he is not a party. On the other hand, I think it is equally unfair that he should have to join as a party and rebut the allegation B for a second time. A man's reputation is not only a matter between him and the other party. It represents his relationship with the world. So it may be that in such circumstances, an action for negligence would be an abuse of the process of the court.

I would suspect that, having regard to the power of the court to strike out actions which have no real prospect of success, the *Hunter* doctrine is C unlikely in this context to be invoked very often. In my opinion, the first step in any application to strike out an action alleging negligence in the conduct of a previous action must be to ask whether it has a real prospect of success. Hopeless cases like *Rondel v Worsley* [1969] 1 AC 191 are not a suitable vehicle for deciding important points of public policy.

D *25. Conclusion*

My Lords, I have said nothing about whether the immunity, if preserved, would be contrary to article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969). The question does not arise. Nor have I said anything about the distinction between those acts of lawyers which are "intimately connected" with the conduct of litigation and those which are not. The Court of Appeal, being E bound by *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, struggled with this distinction. Mr Sumption's submissions as to why they were wrong served only to convince me that the distinction is very difficult to apply with any degree of consistency. That is perhaps another reason why the immunity should be altogether abolished. I would therefore dismiss the appeals.

F **LORD HOPE OF CRAIGHEAD** My Lords, the events with which these three appeals are concerned took place in 1991, when the parties on one side of the case ("the clients") were all engaged in civil litigation for the purposes of which they had appointed the other party to act as their solicitors. Mr Simons, who is a building contractor, was in dispute with the owner of a building about the work which he had carried out for the owner under a building contract. The proceedings were settled on 19 August 1991, which G was the day before the trial of his action was due to start. Mr Barratt was in dispute with his wife after their marriage had broken down. Her claim for ancillary relief was settled on 5 September 1991 when the judge approved a minute of order lodged by his solicitors and directed that it should stand as the court's order made by consent. Mrs Harris was also engaged in matrimonial proceedings following the breakdown of her marriage. In her case a consent order was made by the judge on 22 November 1991 following H advice which she received from counsel outside the court on the day of the ancillary relief hearing.

In each case the clients are dissatisfied with the outcome of their litigation and in particular with the terms of settlement. They have alleged that the solicitors were negligent in regard to things which they did or omitted to do

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outside the courtroom. The essence of the case made by Mr Simons against his solicitors is that they should have advised him at the outset that he should settle on the terms which he was ultimately forced to accept after much unnecessary delay and expenditure or that they should have prepared for trial so that he could pursue his case with unimpaired prospects of success. Mr Barratt's case is that his solicitors failed at any stage to obtain or advise the obtaining of a valuation of the family home which was eventually sold for much less than it had been assumed to be worth when they were negotiating the terms of settlement, that they lodged with the court a minute of order which inaccurately recorded the valuation of the property and that they failed to advise him that the settlement should provide for the parties to receive percentage interests in the property rather than that his wife should receive a guaranteed sum when it was sold. Mrs Harris alleges that her solicitors failed to brief competent counsel, to inform themselves properly of the facts and take proper instructions prior to the settlement and that they gave incorrect advice about the possibility of setting aside a consent order. The solicitors in each case claim that they are immune from suit in regard to the allegedly negligent conduct.

All three cases were listed and heard together in the Court of Appeal [1999] 3 WLR 873, as was a fourth case with which your Lordships are not now concerned. At the outset of their judgment the Court of Appeal (Lord Bingham of Cornhill CJ, Morritt and Waller LJJ) said that the following questions arose, at p 881: to what extent and in what circumstances does a lawyer's immunity from suit in relation to the allegedly negligent conduct of a case in court protect him against claims for allegedly negligent acts and omissions which take place out of court? Does a lawyer, if not otherwise immune from a claim in negligence by a client, become so when the court approves a consent order in any proceedings, but particularly in matrimonial proceedings in relation to ancillary relief? Is it in such circumstances an abuse of the process of the court to claim damages against a lawyer for alleged negligence leading to the making of a consent order?

The primary sources on which the Court of Appeal drew as to the advocate's immunity were the decisions of the House in *Rondel v Worsley* [1969] 1 AC 191 and *Saif Ali v Sydney Mitchell & Co* [1980] AC 198. After setting out four propositions which it derived from them, the court made these observations, ante, p 625C–E:

> "It may of course be that the House of Lords will hereafter choose to review and modify the rulings given in these two leading cases, and it is noteworthy that in the *Saif Ali* case [1980] AC 198 Lord Diplock, at p 223, expressed regret that counsel for the plaintiff had not made a more radical challenge to the authority of *Rondel v Worsley* [1969] 1 AC 191. We understand further that the European Court of Human Rights may be called upon to consider the compatibility of the decision in *Rondel v Worsley* with the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969). But we must treat these cases as binding authority for the four propositions we have set out. Those propositions do not, however, answer the first question posed above, which relates to the outer limits of forensic immunity, beyond the core immunity which protects an advocate against claims arising from the conduct of a cause in court. More particularly, the issue arises (in all four

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A appeals) whether forensic immunity . . . affords immunity to a lawyer who advises that a case be compromised, where the advice is accepted and the case is settled."

Now that the three remaining appeals have reached this House the opportunity has been taken to undertake the more radical challenge to the authority of *Rondel v Worsley* [1969] 1 AC 191 which was not undertaken B in the *Saif Ali* case [1980] AC 198. It is therefore open to your Lordships to dispose of them on grounds which were not available to the Court of Appeal.

I wish to say, however, before turning to this wider and more general argument, that I consider that the grounds which the Court of Appeal gave for its decision in each case were entirely sound, sufficient and satisfactory and that I would have dismissed each of the appeals for the same reasons C irrespective of the view that was taken about what the Court of Appeal has described as the core forensic immunity. In Mr Simons's case this is because the acts and omissions of which he complains were done or not done, as the case may be, when the solicitors were acting otherwise than as advocates. Even if they had been acting in the relevant respects as advocates, none of the allegations against them satisfy the "intimate connection" test described by McCarthy P in *Rees v Sinclair* [1974] 1 NZLR 180, 187: see the Court of D Appeal's judgment, ante, p 652A–C. In Mr Barratt's case the solicitors were not acting as advocates in relation to any alleged act of negligence, nor was their conduct said to be negligent in an area where the solicitors could say that they were acting where public policy as the rationale for immunity had any impact: p 911F. In Mrs Harris's case her solicitors were not acting in any way as advocates in the respects in which they were alleged to be E negligent, nor is there any public policy rationale for which immunity in their case could be said to be justified: pp 920–921. In short, I would regard the argument in each case for extending the immunity to the solicitors when they were negotiating the terms of settlement as entirely without merit on the existing state of the authorities. On this view it is unnecessary to examine the fundamental question whether the core forensic immunity can now—or, to put the question more accurately if it is to provide a ground for F our decision in these three cases, *could in 1991*—still be justified on grounds of public policy. Nevertheless I agree that your Lordships should accept the opportunity for reviewing the fundamental question, for the following reasons.

The first reason is that, as Lord Reid recognised in *Rondel v Worsley* [1969] 1 AC 191, 227, public policy is not immutable. Lord Wilberforce G was making the same point when he said in *Roy v Prior* [1971] AC 470, 480F that immunities conferred by the law in respect of legal proceedings need always to be checked against a broad view of the public interest. Doubts have once again arisen as to whether the existing rule is justified in present day conditions in this country, so it is proper to re-examine the whole matter now. The second reason is that there is now a greater appreciation of the importance which has to be attached in this context to the principles of H human rights law, especially in view of the imminence of the coming into force of the Human Rights Act 1998. The period which has to elapse before that Act comes into force in October 2000 is now very short. I think that it is appropriate in this case to anticipate that event by taking account of the relevant provisions of the European Convention for the Protection of

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Human Rights and Fundamental Freedoms ("the Convention") and the jurisprudence of the European Court of Human Rights in our determination of the question whether, and if so to what extent, the core forensic immunity can still be justified. The third reason is that, while I would not regard it as necessary in order to dispose of these appeals for your Lordships to say that any change as regards the immunity rule should operate retrospectively, I consider it to be a legitimate exercise of your Lordships' judicial function to declare prospectively whether or not the immunity—which is a judge-made rule—is to be available in the future and, if so, in what circumstances.

I believe that none of your Lordships would wish to go so far as to hold that *Rondel v Worsley* [1969] 1 AC 191 was wrongly decided and that it should be overruled. The issue is whether the decision which was reached in that case can now be justified. It seems to me to be preferable that we should address this issue by examining the circumstances relevant to this issue as we find them today, and that we should express our decision so that it applies only to the future—not to a period in the past as well, the commencement of which would be very difficult at this stage to identify.

The basic principle

Any immunity from suit is a derogation from a person's fundamental right of access to the court which has to be justified. This principle is found both in the common law and in the jurisprudence of the European Court of Human Rights. For the common law position it is sufficient to note the following observations. In *Rondel v Worsley* [1969] 1 AC 191, 228 Lord Reid said:

> "Like so many questions which raise the public interest, a decision one way will cause hardships to individuals while a decision the other way will involve disadvantage to the public interest. On the one hand, if the existing rule of immunity continues there will be cases, rare though they may be, where a client who has suffered loss through the negligence of his counsel will be deprived of a remedy. So the issue appears to me to be whether the abolition of the rule would *probably* be attended by such disadvantage to the public interest as to make its retention *clearly* justifiable." (Emphasis added.)

In *Rees v Sinclair* [1974] 1 NZLR 180, 187 McCarthy P said that the protection of the immunity should not be given any wider application than is absolutely necessary in the interests of the administration of justice. In the *Saif Ali* case [1980] AC 198, 214H Lord Wilberforce said that in fixing the boundary of immunity from an action, which depends on public policy, account must be taken of the principle that a wrong should not be without a remedy. As Kirby J said in *Boland v Yates Property Corpn Pty Ltd*, 74 ALJR 209, 236, 238, 239, paras 129, 137 and 140, an immunity from liability at law is a derogation from the normal accountability for wrongdoing which is an ordinary feature of the rule of law and fundamental civil rights.

In the field of human rights law the individual's right of access to the court for the determination of his civil rights is to be found in article 6(1) of the Convention. In *Golder v United Kingdom* (1975) 1 EHRR 524, 535–536, para 35 the European Court of Human Rights said:

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A "The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally 'recognised' fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice. Article 6(1) must be read in the light of these principles."

In *Fayed v United Kingdom* (1994) 18 EHRR 393, 429–430, para 65, in a B passage which was approved in *Tinnelly Sons Ltd v United Kingdom* (1998) 27 EHRR 249, 271, para 74, the court said:

"'(a) The right of access to the courts secured by article 6(1) is not absolute but may be subject to limitations; these are permitted by implication since the right of access "by its very nature calls for regulation by the state, regulation which may vary in time and in place according to C the need and resources of the community and individuals". (*Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252, 281, para 5.) (b) In laying down such regulation, the contracting states enjoy a certain margin of appreciation, but the final decision as to the observance of the Convention's requirements rests with the court. It must be satisfied that, the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the D right is impaired. (c) Furthermore, a limitation will not be compatible with article 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.' (*Lithgow v United Kingdom* (1986) 8 EHRR 329, 393 para 194.) These principles reflect the process, inherent in the court's task under the Convention, of striking a fair E balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights."

It is clear from the passage which I have quoted from Lord Reid's speech in *Rondel v Worsley* [1969] 1 AC 191, 228 that under the common law the presumption is strongly in favour of the right of the individual to a remedy. F Any immunity from suit must therefore be clearly justifiable. In terms of human rights law it will only be justifiable if it is designed to pursue a legitimate aim and then only if it satisfies the test of proportionality. If the restriction which the immunity imposes on the right of the individual is disproportionate to the aim sought to be achieved on grounds of public policy it will be incompatible with the right secured to the individual by G article 6(1) of the Convention. Although the common law and the human rights law tests are expressed in different language, they are both directed to the same essential point of principle that an immunity from suit is a derogation from a fundamental right which requires to be justified.

Summary

H I wish at the outset to summarise the main points with which I intend to deal in order to explain the position which I would adopt on the question of the immunity. I shall use the expression "the core immunity" to describe the immunity which attaches to the advocate, when engaged in conduct performed in court, from claims by his client for negligence. I am conscious of the fact that, if the immunity is to continue, the scope of its application

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may need to be defined more carefully in due course. (a) The sole basis for retaining the core immunity is the public interest in the administration of justice. (b) The public interest in the administration of justice is at its most compelling in the field of criminal justice. (c) The risks to the efficient administration of our system of criminal justice which would result from the removal of the core immunity greatly outweigh the benefits. (d) The principle in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 which treats collateral challenge as an abuse of process is not a satisfactory substitute in the field of criminal justice for the core immunity. (e) The risks to the efficient administration of justice are significantly less in the field of civil justice, so in that field the retention of the core immunity of the advocate from claims by his client for negligence is no longer justified.

Background

If, as I believe, your Lordships do not wish to go so far as to say that *Rondel v Worsley* [1969] 1 AC 191 was wrongly decided, it is appropriate to take note of some the events that have happened since then—and especially since the date of the decision in the *Saif Ali* case [1980] AC 198—which may throw light on the view that ought now to be taken as to the justification for the immunity on grounds of public policy.

The question whether the core immunity was in the public interest was considered by the 1979 Royal Commission on Legal Services. In its final report the Royal Commission concluded (Cmnd 7648, vol 1, p 333, para 24.6):

> "It happens that we first considered this topic before the most recent decision of the House of Lords"—the *Saif Ali* case—"was made known. We considered that, on balance, it was in the public interest that there should be immunity in respect of an advocate's work in court and reached a provisional conclusion as to the proper extent of that immunity which was close to that which has now been laid down. Accordingly we have no recommendation to make in regard to the extent of immunity which would go beyond the law as now stated."

Legislation consistent with this conclusion, and with the decision in the *Saif Ali* case, was introduced under the Supply of Goods and Services Act 1982. Section 13 of that Act implies a term of reasonable skill and care into contracts for the supply of a service where the supplier is acting in the course of a business. But the Supply of Services (Exclusion of Implied Terms) Order 1982 (SI 1982 No 1771), made under section 12(4) of the Act, provides that that section shall not apply to: "2 . . . (1) the services of an advocate in court or before any tribunal, inquiry or arbitrator and in carrying out preliminary work directly affecting the conduct of the hearing."

When the Conservative government came to power in 1989 the practices of the legal profession again came under close scrutiny. The aim was to bring to an end restrictive practices, such as those relating to rights of audience, that could no longer be justified. This resulted in the Courts and Legal Services Act 1990. That Act was preceded in 1989 by both a Green Paper "The Work and Organisation of the Legal Profession" (Cm 570) and a White Paper entitled "Legal Services: A Framework for the Future" (Cm 740) in which the view was expressed that the core immunity was justified in the public interest. The Green Paper stated in paragraph 6.2:

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A "The main reasons for this immunity are that the administration of justice requires barristers and solicitors to be able to carry out their duty to the court fearlessly and independently and that actions for negligence against barristers and solicitors in respect of advocacy work would make the re-trying of the original actions inevitable and so multiply litigation. The Government accepts the cogency of these arguments and considers that this immunity from actions in negligence should in the future extend to all recognised advocates."

During the progress of the Bill attempts were made in both Houses to abolish the immunity (Hansard (HL Debates), 5 February 1990, cols *570–578*); (HC Debates, Standing Committee D), 7 June 1990, cols *325–340*), but proposed amendments to that effect were withdrawn after debate. The Lord Chancellor said that the Government believed the immunity rule to be an appropriate one, and he emphasised that it had "placed it in the forefront of consultation right from the start" (Hansard (HL Debates), 5 February 1990, col 576). In the result what is now section 62 of the 1990 Act, which extended the immunity to a person who is not a barrister but is lawfully providing legal services in any proceedings, was enacted against the background of the existing rule, which it did not alter. A further opportunity arose in Parliament to abolish the immunity when parts of the Courts and Legal Services Act 1990 were amended by the Access to Justice Act 1999. It was not suggested in either House that the existing immunity was no longer in the public interest and should be abolished.

The fact that Parliament has not seen fit to abolish the core immunity does not, of course, mean that your Lordships should feel inhibited from taking that initiative. The position which Parliament has adopted is consistent with the view that the question whether the immunity should be retained is pre-eminently a matter for the judges. But the heart of the matter is whether the immunity is in the public interest. It is true, as my noble and learned friend Lord Steyn has pointed out, that a number of distinguished commentators including Sir Sydney Kentridge QC and David Pannick QC have expressed views to the effect that it cannot be justified. But it is notorious that views as to what is in the public interest may vary widely from one person to another, and that they are heavily dependent upon each person's background, focus of attention and experience. The judicial task is to gather the evidence from all the sources that are available and, having done so, to assess the weight of that evidence.

For my part, I would be inclined to attach considerable weight to that fact that neither the 1979 Royal Commission nor the consultation exercise which preceded the enactment of the Courts and Legal Services Act 1990 revealed that there is widespread dissatisfaction among members of the public with the core immunity. I would also be inclined, even now, to attach weight to the observations of the judges in *Rondel v Worsley* [1969] 1 AC 191 and the *Saif Ali* case [1980] AC 189 and, more recently, in *Giannarelli v Wraith*, 165 CLR 543 in the High Court of Australia with particular reference to the public interest in the efficient administration of criminal justice. Another factor to which I would attach some importance is the marked lack of litigation directed to this issue in this country. The list which is provided in the Court of Appeal's judgment of the decided cases in which lawyers have been held entitled to avail themselves of the protection afforded by the

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immunity contains only one case in which the complaint related to the conduct of the trial: *Bateman v Owen White* [1996] 1 PNLR 1 (failure to object to inadmissible evidence). The present cases, as I mentioned above, do not involve a challenge to the core immunity. They are concerned with the limits of its application. These factors suggest to me that the arguments for the abolition of the immunity are more finely balanced than some commentators have suggested, and that the case for abolition requires to be approached with caution and with careful regard to all the relevant factors.

The basis for the core immunity

My noble and learned friends, Lord Steyn and Lord Hoffmann, have analysed the arguments for the immunity under four headings: (1) the cab rank rule, (2) the analogy of the immunity of others who participate in court proceedings, (3) relitigation or collateral challenge and (4) divided loyalty or the duty of the advocate to the court. I am content to accept this analysis of the various reasons which have been advanced to support the immunity on grounds of public policy. But I would approach each of them in a different way, by asking myself in each case what bearing each of these arguments has on the administration of our systems of criminal justice. I think that it is also worth bearing in mind that these arguments are not of equal weight. As my noble and learned friend, Lord Steyn, has said, the critical factor is the duty of the advocate to the court. He has used the word "barrister", but I think that we are all agreed that the position of advocates in Scotland and of solicitor advocates in all three jurisdictions is the same in this respect as that of barristers and I shall use the word "advocate" to embrace all of them.

I do not wish to say much about the cab rank rule. Its value as a rule of professional conduct should not be underestimated, but its significance in daily practice is not great and the extending of the rights of audience of solicitor advocates who are not bound by the same rule has reduced such importance as it may once have had in the context of discussions about advocates' immunity. I do not think that there is any 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. The independent Bars have a long and honourable tradition in the field of criminal justice that no accused person who wishes the services of an advocate will be left without representation. This is a public duty which advocates perform without regard to such private considerations as personal gain or personal inconvenience.

I think that there is a little more, but not much, to be said for the analogy with the immunity of others who participate in the proceedings which take place in court. At best it is only an analogy. It is a make-weight argument. Its significance lies in the fact that the other immunities exist because they also can be justified on grounds of public policy. They are illustrations of the fundamental point that it is in the public interest that those who are called upon to give evidence in court or who have to perform duties there should be enabled to do so without the risk of being sued for defamation or for negligence. As Mason CJ said in *Giannarelli v Wraith* 165 CLR 543, 557 the exception in favour of counsel is in conformity with the privilege which the law has always conferred on those engaged in the adminstration of justice, whether as judge, juror, witness, party, counsel or solicitor in respect of what they say in court. In an appropriate case the public interest will prevail over

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A the private interest. But each of these immunities needs to be justified, and this can be done only on grounds which are relevant to the public interest in the efficient and impartial administration of justice.

This brings me to the two remaining arguments. In *Giannarelli v Wraith*, at p 555, Mason CJ said that, of the various public policy factors, they were the only two which warranted serious examination.

B The first of these two remaining arguments is the impact on the administration of justice of allowing court decisions to become the subject of collateral attack by means of actions raised against advocates by their clients for negligence. It is generally recognised that it is undesirable that collateral attacks of this kind should be permitted. The problem is that doubt will be cast on the soundness of the original decision, which may have been affirmed on appeal, if the later decision is in conflict with it. This problem is C particularly acute in the field of criminal justice, as public confidence in the administration of justice is likely to be shaken if a judge in a civil case were to hold that a person whose conviction has been upheld on appeal would not have been convicted but for his advocate's negligence. He would have a remedy in damages but no remedy against the conviction. It is undesirable that a civil action should be treated as an avenue of appeal outside the system D which Parliament has laid down for appeals in criminal cases. It is also undesirable that the same issue should be litigated time and again, and there is a strong public interest in the principle of finality.

On the other hand there are other ways of preventing challenges to convictions by collateral means and of ensuring that, if convictions are to be challenged, this must be done by means of an appeal to a criminal appeal court. In *Hunter v Chief Constable of the West Midlands Police* [1982] E AC 529 it was held that it was an abuse of the process of the court for a party to seek to litigate the same issue as that which had been the subject of a criminal trial. The power of the court to strike out a civil action on the ground that it is an abuse of process has not yet been recognised in Scotland. But in *Law Hospital NHS Trust v Lord Advocate*, 1996 SC 301 it was held that the Court of Session could not sit as a court of review over decisions of F the High Court of Justiciary as these two courts had exclusive jurisdiction in regard to all matters falling within their own spheres. On this ground a civil case which was brought in Scotland to challenge a criminal conviction would be dismissed as incompetent.

There remains the argument based on the advocate's duty to the court or, as it has been put, the issue of divided loyalty. But in order to appreciate the force of this argument it is necessary to appreciate the extent of that duty and G the extent to which the efficiency of our systems of criminal justice depends on it. The advocate's duty to the court is not just that he must not mislead the court, that he must ensure that the facts are presented fairly and that he must draw the attention of the court to the relevant authorities even if they are against him. It extends to the whole way in which the client's case is presented, so that time is not wasted and the court is able to focus on the issues as efficiently and economically as possible. He must refuse to put H questions demanded by his client which he considers unnecessary or irrelevant, and he must refuse to take false points however much his client may insist that he should do so. For him to do these things contrary to his own independent judgement would be likely to impede and delay the administration of justice.

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As Salmon LJ explained in *Rondel v Worsley* [1967] 1 QB 443, 517–518:

> "The Bar has traditionally carried out these duties, and the confidence which the Bench is able to repose in the Bar fearlessly to do so is vital to the efficient and speedy administration of justice. Otherwise the high standard of our courts would be jeopardised. This is the real reason why public policy demands that there should be no risk of counsel being deflected from their duty by the fear of being harassed in the courts by every litigant or, criminal who has lost his case or been convicted."

This point was made with equal force by Lord Morris of Borth-y-Gest in the House of Lords in the same case [1969] 1 AC 191, 251:

> "The quality of an advocate's work would suffer if, when deciding as a matter of discretion how best to conduct a case, he was made to feel that divergence from any expressed wish of the client might become the basis for a future suggestion that the success of the cause had thereby been frustrated. It would be a retrograde development if an advocate were under pressure unwarrantably to subordinate his duty to the court to his duty to the client. While, of course, any refusal to depart at the behest of the client from accepted standards of propriety and honest advocacy would not be held to be negligence, yet if non-success in an action might be blamed upon the advocate he would often be induced, as a matter of caution, to embark on a line of questions or to call a witness or witnesses, though his own personal unfettered judgment would have led him to consider such a course to be unwise."

He went on to say, at p 251, that in his view in respect of criminal cases the public advantages of the immunity outweighed the disadvantages overwhelmingly. Lord Upjohn said, at p 284A, that if the threat of an action was there counsel would be quite unable to give his whole impartial, unfettered and, above all, uninhibited consideration to the case, and that without that the administration of justice would be gravely hampered. Mason CJ enlarged upon the same point in this passage of his judgment in *Giannarelli v Wraith* 165 CLR 543, 556:

> "a barrister's duty to the court epitomises the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice. In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross-examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow. The administration of justice in our adversarial system depends in very large measure on the faithful exercise by barristers of this independent judgment in the conduct and management of the case."

In *Boland v Yates Property Corpn Pty Ltd* 74 ALJR 209, 241, para 148, Kirby J observed that it might be more appropriate to recognise further restrictions on the availability of proceedings against a practitioner in respect of the conduct of criminal rather than civil proceedings.

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A I consider that the risk is as real today as it was in 1967 in this country and it was in 1988 in Australia that, if advocates in criminal cases were to be exposed to the risk of being held liable in negligence, the existence of that risk would influence the exercise by them of their independent judgment in order to avoid the possibility of being sued. The temptation, in order to avoid that possibility, would be to pursue every conceivable point, good or bad, in examination, cross-examination and in argument in meticulous
B detail to ensure that no argument was left untouched and no stone was left uncovered. The exercise of independent judgment would be subordinated to the instincts of the litigant in person who insists on pursing every point and putting every question without any regard to the interests of the court and to the interests of the administration of justice generally. As for the objection that to accord advocates an immunity on this ground which is not available
C to other professionals, the answer to it is as true today as it always was. The exercise by other professionals of their duty to their clients or to their patients may require them to face up to difficult decisions of a moral or ethical nature. But they do not have to perform these duties in the courtroom, where the exercise of an independent judgment by the advocate as to what to do and what not to do is essential to the public interest in the efficient administration of justice.
D

The impact on the administration of criminal justice

It may be said that recent reforms to the system of civil justice in England and Wales have greatly reduced the risk of disruption to the administration of justice by the taking of unnecessary points and the development of unhelpful and time-wasting arguments by advocates. As my noble and
E learned friend, Lord Hoffmann, has pointed out, the new Civil Procedure Rules have given the judges a battery of powers to keep the resources which the court expends on a case proportionate to its value and importance. The jurisdiction of the courts in England and Wales to make wasted costs orders has been extended to barristers in both civil and criminal cases where costs have been wasted by reason of any improper, unreasonable or negligent act
F or omission on their part: Courts and Legal Services Act 1990, sections 4, 111 and 112.

But the opportunities for judicial intervention in the management of cases are significantly greater in civil cases than they are in criminal cases, where the liberty of the subject is at issue and everything depends on the accused having a fair trial. The system of pre-trial written pleading in civil cases in which both sides are required by the rules to participate assists the process of
G preliminary case management. In a criminal case written pleadings are largely absent. As the burden of proof throughout is on the prosecutor, very little is required of the accused by way of notice of the case which he wishes to present in his defence. It is much more difficult for the judge to determine when the boundary is reached between that which is necessary for a fair presentation of the defence and unnecessary questioning or time wasting. The power of the judge to make a wasted costs order in a criminal case in
H regard to the conduct of the case in court by the advocate will need to be exercised with great care once the Human Rights Act 1998 comes into force. It is one thing to penalise the advocate for wasting costs by failing to appear for the trial or for negligent conduct which leads to days being wasted or to the trial being aborted because he is dismissed by his client because of his

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conduct in the course of it. It is quite another to penalise him in this way for putting what the judge may regard as unnecessary questions or advancing what he may regard as unnecessary arguments. It would be unwise to make any assumptions at this stage as to its effectiveness as a means of reducing the risk of time-wasting by advocates in criminal trials as a result of the loss of immunity.

It is worth stressing in this connection the relevance to this issue of the coming into force of the Human Rights Act 1998. Article 6 of the Convention requires that the accused must receive a fair trial by an independent and impartial tribunal. It also requires that he is entitled to a fair and public hearing within a reasonable time. Both courts and prosecutors will require to observe these requirements. The efficiency of the criminal justice system will be severely tested, and the knock-on effects of delays as one trial follows on another should not be underestimated.

If one wishes to find some empirical evidence about the effects which the coming into force of the Act will have on the conduct of criminal trials in England and Wales it is to be found in Scotland, where compatibility with the Convention rights has been required of all acts of the Scottish Executive, including those of all those prosecuting under the authority of the Lord Advocate since 10 May 1999: Scotland Act 1998, section 57(2). It is no exaggeration to say that the whole climate within which the criminal process is being conducted has been transformed by the requirement of compatibility, especially with regard to the provisions of article 6 of the Convention. Any alleged incompatibility may be raised in any court or tribunal as a devolution issue. Almost without exception the many devolution issues which have been raised since the Scotland Act 1998 came into force relate to the conduct of criminal proceedings. Many of them have been raised by way of preliminary objections, with the inevitable result that delays have occurred in the conduct of criminal trials and substantial additional burdens have been placed on the appeal court. It is likely that similar consequences will be felt in England and Wales when the Act comes into force here. It would be unwise to do anything that might increase this burden unless this was clearly necessary in the public interest.

I would hold therefore that the core immunity pursues a legitimate aim in the field of criminal justice, which is to secure the efficient administration of justice in the criminal courts.

Assessment of risk

I have already described the risks to the administration of justice. As against that there is the principle that wherever there is a wrong there should be a remedy. How significant is the risk that accused are being deprived of a remedy by the existence of the immunity? Is the effect of the core immunity proportionate to the aim sought to be achieved by it?

The courts have been careful to point out that advocacy is a difficult art and that no advocate is to be regarded as having been negligent just because he has made an error of judgment during the conduct of the case in court. It may be said that the risk of their being subjected to findings of professional negligence is small and that they are adequately protected by the fact that the judges will not hesitate to strike out vexatious actions. But it seems to me that the relevant conclusion to be drawn from these considerations is that the quantity of unsatisfied claims is unlikely to be large.

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A Some guidance can also be obtained from the experience of the criminal appeal courts in both England and Scotland following the decisions in *R v Clinton* [1993] 1 WLR 1181 and *Anderson v HM Advocate* 1996 SC 29 which established the carefully defined circumstances in which these courts will uphold an appeal based on allegations of negligence in the conduct of the trial by the appellant's advocate. The point that the advocate has been negligent is not infrequently taken but is rarely successful. It is also B worth noting, as I said when delivering the opinion of the court in *Anderson v HM Advocate*, at p 45A, that difficult questions of professional practice may arise where allegations of this kind are made against counsel or a solicitor. My noble and learned friend, Lord Hobhouse of Woodborough, has drawn attention to the way in which this problem is currently dealt with in the Court of Appeal in England, and to the fact that to introduce into this C scheme of criminal justice a principle that the defendant should be free to sue his advocate in negligence will significantly alter the relationships involved and make the achievement of justice more difficult. Experience in Scotland since the decision in the *Anderson* case has been that the allegation that the advocate has been negligent has been introduced in a considerable number of cases, sometimes as a last resort after an attempt has been made to introduce fresh evidence. The introduction of this ground causes delay in the D disposal of the appeal, as the conflict of interest to which it gives rise renders a change in representation inevitable and the comments of those originally instructed must be obtained. This is because it was held in the *Anderson* case that, while it is essential that those against whom the allegations are made should be given a fair opportunity to respond to them, fairness also dictates that they should be under no obligation to do so at the stage when the matter E is before the criminal appeal court. Exposure of the advocate to a liability in damages as well as to the existing procedures for professional discipline would be likely to increase the difficulty which the court has already experienced in the conduct of this procedure, which tends to prolong appeals to no good purpose and deprives it of the direct assistance of those originally instructed in the case.

F How is one to balance the possibility that a small number of defendants in criminal trials are being denied a remedy against the benefits of maintaining the immunity in the public interest? This involves an assessment of the risks to which all those involved in criminal proceedings would be subjected if advocates were to feel bound to protect themselves in the way I have suggested. The time taken up by this activity would be likely to prolong trials to the inconvenience of members of the public such as jurors and G witnesses. The ordeal to which vulnerable witnesses, especially those in rape and sexual abuse cases, are exposed could be extended. Judges in criminal cases are well aware of the difficulty of controlling a line of questioning as they are conscious of the fact that to intervene too frequently or too firmly may provide a ground of appeal in the event of a conviction. The combination of advocates in criminal trials erring on the side of caution in their own interest and of judges erring on the side of caution in the interests H of a fair trial would be likely to impede rather than enhance the efficient administration of criminal justice.

On the other side of the balance there are the various mechanisms that are available in the field of criminal justice to prevent a miscarriage of justice if the effect of the advocate's negligence was to deprive the client of his right to

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a fair trial. Compensation for miscarriages of justice is available out of public funds in the circumstances provided for by section 133 of the Criminal Justice Act 1988, and in other cases ex gratia payments may be made. The advocate is also subject to the disciplinary procedures of his professional body should his conduct in court give rise to legitimate grounds for complaint by his client or at the instance of the trial judge. Your Lordships have not been shown any evidence that might suggest that those who rely on the services of advocates in criminal cases are placed at a significant disadvantage by the existence of the core immunity. On the contrary the removal of the core 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.

For these reasons I do not think that the existence of the core immunity in the field of criminal justice is disproportionate to the aims that are sought to be achieved by it.

The present cases demonstrate that there are grounds for concern that the boundaries of the core immunity are at risk of being enlarged, in civil cases, beyond the limits that require to be set to it in the public interest. But, having examined the careful summary of the decided cases since *Rondel v Worsley* [1969] 1 AC 191 which is set out in paragraphs 29–31 of the Court of Appeal's judgment, ante, pp 635–640, I have concluded that there is no evidence that the core immunity is exposed to the same risk in criminal cases. Furthermore the Court of Appeal were careful to say in paragraph 41 of their judgment, at p 644, that it was not open to them to question the existence of the core forensic immunity upheld in *Rondel v Worsley* [1969] 1 AC 191, nor to doubt the limited extension recognised in the *Saif Ali* case [1980] AC 198. They recognised that it was plain from the tenor of the majority speeches in the *Saif Ali* case that any extension beyond the core immunity must be rigorously scrutinised and clearly justified by considerations of public policy; see also paragraph 48(6), at p 647, where the same point is made. But there is no indication in the judgment that the core immunity itself was being called into question. While these observations can be taken to indicate that in their view there was a case for a re-examination of the immunity, I do not read them as amounting to an invitation to your Lordships to abolish entirely the core immunity. A critical re-examination need not go that far. A redefinition of the core immunity so that it is strictly confined within its proper limits may be a satisfactory alternative. Abolition should not be resorted to unless it is plain that it is clearly the only practicable alternative.

It is also worth noting that in two recent cases in Scotland involving allegations of negligence against a solicitor and an advocate following the settlement of a civil case on terms which the client regarded as unsatisfactory the opportunity to plead the immunity was not taken: *Crooks v Lawford Kidd & Co* 1999 GWD 14–651; *Crooks v Haddow* 2000 GWD 10–367. I have not detected any signs, other than the arguments which were advanced by the defendants in the present cases, that the core immunity in criminal cases would be likely to be pressed beyond the limits which can properly be set for it on grounds of public policy. I am not aware of any

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A cases in Scotland where the application of the core immunity in criminal cases has given rise to concern on this ground.

Comparative jurisprudence

I have already mentioned the cases from Australia and New Zealand in which on grounds of public policy in those countries the decisions in
B *Rondel v Worsley* [1969] 1 AC 191 and the *Saif Ali* case [1980] AC 198 have been followed and applied. The question is whether any useful guidance can be gained from the position in other jurisdictions, notably the United States, other countries within Europe and Canada. My immediate response to it is to note Lord Reid's observation in *Rondel v Worsley*, at p 228E, that he did not know enough about conditions in any other country apart from England and Scotland to express any opinion as to what public policy there may
C require.

In regard to the United States it is necessary to distinguish between prosecuting and defence attorneys and between the position in federal law and that in each state. It has long been recognised that judges and prosecuting attorneys should be protected by immunity in relation to their conduct of legal proceedings. In *Imbler v Pachtman* (1976) 424 US 409 the
D 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. On the other hand, in *Ferri v Ackerman* 444 US 193, the court held that the federal law of judicial immunity which protected prosecutors and grand jurors did not extend to the defence attorney, since he owed nothing more than a general duty to the public and was required to serve the undivided interests of his client. But the court also
E held in that case that each state had the right to determine for itself the extent and scope of any immunity acting on the basis of empirical data available to the state. Counsel for the Bar Council have drawn your Lordships' attention to the fact that some states have fashioned rules of immunity 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, from which an
F analogy may be drawn as to the considerations of public policy which favour of immunity for advocates who provide services in this country under criminal legal aid—bearing in mind the existence of the cab rank rule and the constraints on legal aid fees in criminal cases. While Connecticut (*Spring v Constantino* (1975) 362 A2d 871) and Pennsylvania (*Reese v Danforth* (1979) 406 A2d 735) have not adopted such an immunity, the more recent trend in other states has been to uphold legislation granting immunity to
G public defenders: eg Nevada (*Morgano v Smith* (1994) 879 P2d 735); Delaware (*Browne v Robb* (1990) 583 A2d 949); Vermont (*Bradshaw v Joseph* (1995) 666 A2d 1175); and New Mexico (*Coyazo v State of New Mexico* (1995) 897 P2d 234).

The position in continental Europe is that advocates who undertake criminal cases in those countries do not have the benefit of immunity. But
H the role and duties of the advocate in those countries differ in significant respects from those of advocates under our systems of criminal justice. Many of the functions of the advocate under our systems of identifying and investigating the facts are performed by the judge in those countries, who does have immunity so long as he is exercising judicial functions in good faith. In that respect there is no inconsistency with the availability of the

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core immunity under our systems to the defence and prosecution advocate. Beyond that, the much wider scope which is accorded to the judicial function under the continental systems makes it very difficult to draw any useful comparisons.

The position in Canada is quite different. There never was a rule of immunity at common law in that country, and when the matter came up for review in the light of *Rondel v Worsley* [1969] 1 AC 191 in *Demarco v Ungaro* 95 DLR (3d) 385 the court declined to introduce such a rule. 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.

My noble and learned friend, Lord Steyn, has said that he would regard the Canadian experience as the most relevant but I do not see, with great respect, why that should be so. I should have thought that the Australian and New Zealand experience was the more relevant, as their jurisprudence is more closely modelled on that of our own jurisdictions and the way in which law is practised there is closer to the way law is practised here than it is in Canada. I also think that the distinction which has been drawn in the United States by the Supreme Court between the position of the prosecutor and that of the defence attorney is worth noting in our own jurisdiction. Whatever may be said about the position of defence advocates, it is plainly essential to the administration of justice that prosecuting advocates should continue to be protected by the absolute immunity from action in respect of their conduct of the prosecution case.

The conclusion which I would draw from the comparative material is that, taken as a whole, it does not suggest that we would be falling into a serious error if we were to hold on grounds of public policy that the core immunity against claims by their clients for negligence should continue to be available to advocates in criminal cases.

The Hunter principle

The Court of Appeal, ante, p 643C–D said that it seemed to them that the first question to be asked on any application to strike out or dismiss a claim for damages against lawyers based on their allegedly negligent conduct of earlier proceedings was whether the claim represented an abusive collateral challenge to an earlier decision of the court, that if it did represent such a challenge it should be dismissed or struck out and that this principle applied to claims against lawyers whether or not they were acting as advocates. But it was suggested in the argument in this case that the principle was itself a sufficient protection against unmeritorious claims and that for this reason the core immunity can now be discarded as unnecessary.

I am not persuaded that the principle which was applied in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 provides the protection which is needed to serve the public interest in the field of criminal justice. I accept that all cases which can be treated as amounting to a collateral challenge to a subsisting conviction will be dismissed or struck out on this ground. But the pattern of the protection is incomplete. There are various events which may arise in the course of a criminal trial, such as things done or not done which may cause delay or continued detention in custody, which may operate to the client's disadvantage irrespective of the

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

C A further problem about the *Hunter* case is that on its own facts it was directed to a different issue than that which will arise where the client seeks to recover damages from his advocate on the ground that his conduct of his defence was negligent. It was possible without much difficulty to say that the allegations which were made in that case were simply a repetition of allegations which had been made and disposed of in the course of the trial. But the position of the advocate is different. The question whether his conduct of the defence was negligent is something which arises outwith the trial process. There may be cases where it can be said that the question whether the conviction was attributable to the advocate's negligence is designed simply to cast doubt on the conviction. If so, it will fall within the category of a collateral attack. But I am not satisfied that that will be so in all cases. The *Hunter* principle, if it is applied too widely to deny the client a remedy in damages, seems to me to be vulnerable to attack on the ground that it is inconsistent with the client's fundamental right of access to a court for the determination of his civil rights. The justification for the core immunity rests upon factors which are directly related to the role of the advocate and his duties to the public and to the court in the interests of the administration of justice. The range of considerations which may lead to the conclusion, in the exercise of the court's discretion, that there is an abuse of process are much more loosely defined and are thus likely to be more difficult to justify if challenged on the ground that they are inconsistent with the client's rights under the Convention.

I would therefore hold that the *Hunter* principle does not provide a sound basis for discarding the core immunity in criminal cases.

My Lords, the issue which divides us is whether it is in the *public* interest that advocates should no longer have the benefit of the core forensic immunity in criminal cases. As I see it, the answer to this question lies in an assessment of the risk of adverse consequences, which must then be compared with the benefits. The experience which I can bring to bear when assessing the risk is that which I gained when for seven years, as Lord Justice General, I was the senior judge in Scotland with duties and responsibilities in regard to the administration of the criminal justice system which extended well beyond the appeal court over which I was required to preside. I start from the proposition that the removal of the immunity would be bound to have *some* effect on the performance of their functions by advocates. The concern that I have in this respect was very well expressed by my noble and learned friend, Lord Steyn, when, as Steyn LJ, he was balancing the

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arguments for and against the recognition of a duty of care owed by the Crown Prosecution Service to those it prosecutes in *Elguzouli-Daf v Comr of Police of the Metropolis* [1995] QB 335. He said, at p 349:

> "In my view, such a duty of care would tend to have an inhibiting effect on the discharge by the CPS of its central function of prosecuting crime. It would in some cases lead to a defensive approach by prosecutors to their multifarious duties. It would introduce a risk that prosecutors would act so as to protect themselves from claims of negligence."

Of course, these observations were made in a quite different context, but the fundamental point is the same. It is the risk that the removal of the immunity would in some cases lead to a defensive approach by advocates that I too take as my starting point. And it is the effect of this on our criminal justice system both at first instance and in the appeal courts, which in its various respects I have tried to identify, that causes me such concern. I am unable to agree that it would be in the public interest that the immunity should be removed.

Civil cases

As I have already indicated in my discussion of the position as it affects the system of criminal justice, the public policy considerations are significantly different in civil cases. I do not think that this is to be attributed simply to the changes which have taken place as a result of the introduction of the Civil Procedure Rules. The whole atmosphere in a civil case is different, as so many of the decisions as to what is to be done in the courtroom are taken out of court when the pressures and constraints which affect proceedings in court are absent and there is time to think and to assess the implications of what is being done or not done. It is also much easier for the judge in a civil case to exercise control over the proceedings than it is for a judge in a criminal trial. The risks to the administration of justice which would flow from the removal of the immunity of the advocate against claims by his client for negligence are far less obvious, and the continuation of the immunity is for this reason that much more difficulty to justify.

A further reason for regarding the core immunity in the civil field as no longer justifiable is the difficulty of finding a satisfactory way of defining the limits of that immunity. The test which was identified by McCarthy P in *Rees v Sinclair* [1974] 1 NZLR 180 is whether the particular work on which the advocate was engaged was so intimately connected with the conduct of the case in court that it can fairly be said to be a preliminary decision affecting the way the case was to be conducted when it came to a hearing. But experience has shown that it is not an easy test to apply in regard to civil proceedings, especially in regard to allegations made about negligence in agreeing the terms of settlement: see, e g, *Kelley v Corston* [1998] QB 686. It has not proved possible to devise a satisfactory alternative test for use in the field of civil justice, bearing in mind the overriding need to ensure that the protection given must not be any wider than is absolutely necessary.

I have come to the conclusion therefore that, while the core immunity may still be said to have a legitimate aim in civil cases, its application in this field is now vulnerable to attack on the ground that it is disproportionate. It is a derogation from the right of access to the court which is no longer clearly justifiable on the grounds of public interest. But here again I would stress the

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A point which I have already mentioned several times, that the immunity to which I refer is the advocate's immunity against claims by his client for negligence. I would retain the immunity of the advocate against claims for negligence by third parties. For example, it is desirable that it should be retained where the position of the advocate in a civil case is analogous to that of the prosecutor—as where he is representing a professional body in disciplinary proceedings which have been brought against one of its B members. The tort of malicious prosecution is a sufficient protection for the individual if the proceedings have been brought against him without reasonable and probable cause: see *Martin v Watson* [1996] AC 74; *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177.

The advocate's duty

C I do not think that it would be appropriate to bring to an end the application of the core immunity to work done by advocates in civil cases without saying something about the duty which the advocate owes both to his client, to the public and to the court. A proper understanding of the nature and scope of these duties will help to distinguish between claims which are unmeritorious and those where the advocate may properly be held D liable in damages for negligence.

In *Batchelor v Pattison and Mackersy* (1876) 3 R 914, 918 the Lord President, Lord Inglis, in a passage which was quoted by Lord Morris of Borth-y-Gest in *Rondel v Worsley* [1969] 1 AC 191, 241 and which laid down the foundations for the rules relating to the professional practice of advocates in Scotland, said:

E "An advocate in undertaking the conduct of a cause in this court enters into no contract with his client, but takes on himself an office in the performance of which he owes a duty, not to his client only, but also to the court, to the members of his own profession, and to the public. From this it follows that he is not at liberty to decline, except in very special circumstances, to act for any litigant who applies for his advice and aid, and that he is bound in any cause that comes into court to take the F retainer of the party who first applies to him. It follows, also, that he cannot demand or recover by action any remuneration for his services, though in practice he receives honoraria in consideration of these services. Another result is, that while the client may get rid of his counsel whenever he pleases, and employ another, it is by no means easy for a counsel to get rid of his client. On the other hand, the nature of the G advocate's office makes it clear that in the performance of his duty he must be entirely independent, and act according to his own discretion and judgment in the conduct of the cause for his client. His legal right is to conduct the cause without any regard to the wishes of his client, so long as his mandate is unrecalled, and what he does bona fide according to his own judgment will bind his client, and will not expose him to any action for what he has done, even if the client's interests are thereby prejudiced."

H There are a number of points in this passage which require either explanation or closer analysis when it is being applied to the position of the advocate today, and plainly it requires to be modified in its application to advocates such as the solicitor advocate who enter into contracts with their client. The case was one in which the client had sued both his solicitor and

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his advocate in the sheriff court for damages for loss and damage which he claimed to have sustained due to what he averred was their negligent conduct of the proceedings on his behalf in a civil action and their disregard of his instructions. His action was dismissed in the sheriff court on the ground that his averments were irrelevant. He then appealed to the Court of Session, where he appeared on his own behalf. It is plain from the judgment that the court was satisfied that there was no substance in the allegations of negligence. The real issue in the case was whether counsel was obliged to obey every instruction of his client or whether, as the court held, the conduct of the case was in the hands of counsel who was entitled to decide what was to be done for the benefit and advantage of his client in the exercise of his own judgment.

For present purposes it is unnecessary to dwell on those sentences in which the Lord President was explaining the basis of the cab rank rule. As for the proposition in the opening sentence that an advocate on undertaking the conduct of a civil case takes on himself an office, this terminology is no longer in keeping with the modern view of his position, which—especially in the light of the decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465—places a greater emphasis on the duty owed by the advocate to the client.

But it remains the case that duty which the advocate undertakes to his client when he accepts the client's instructions is one in which both the court and the public have an interest. While the advocate owes a duty to his client, he is also under a duty to assist the administration of justice. The measure of his duty to his client is that which applies in every case where a departure from ordinary professional practice is alleged. His duty in the conduct of his professional duties is to do that which an advocate of ordinary skill would have done if he had been acting with ordinary care. On the other hand his duty to the court and to the public requires that he must be free, in the conduct of his client's case at all times, to exercise his independent judgment as to what is required to serve the interests of justice. He is not bound by the wishes of his client in that respect, and the mere fact that he has declined to do what his client wishes will not expose him to any kind of liability. In the exercise of that judgment it is no longer enough for him to say that he has acted in good faith. That rule is derived from the civil law relating to the obligations arising from a contract of mandate which is gratuitous: see *Stair, Institutions of the Law of Scotland*, I.12.10 He must also exercise that judgment with the care which an advocate of ordinary skill would take in the circumstances. It cannot be stressed too strongly that a mere error of judgment on his part will not expose him to liability for negligence.

Concluding summary

I would hold that it is in the public interest that the core immunity of the advocate against claims by his client for negligence should be retained in criminal cases. I would however hold that it can no longer be justified in civil cases. But I consider that this is a change in the law which should take effect only from the date when your Lordships deliver the judgment in this case. I also would dismiss these appeals. But I would do so for the same reasons as those given by the Court of Appeal, and not on the ground that by 1991 it was already clear that the core immunity did not extend to work done by advocates in civil cases.

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A **LORD HUTTON** My Lords, two principal issues have been debated in the three appeals before the House. One issue is whether immunity should continue to be granted to an advocate against an action for negligence in respect of his conduct of a case in the course of a trial and in respect of pre-trial work intimately connected with the conduct of the case in court as held in *Rondel v Worsley* [1969] 1 AC 191 and further considered in *Saif Ali v*
B *Sydney Mitchell & Co* [1980] AC 198. The second issue is the scope of the principle barring a collateral attack on an earlier judgment and the extent of the doctrine stated in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529. I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Hoffmann, and on the second issue, viewed as a matter separate and distinct from the immunity given to an advocate, I am in agreement with the views expressed by him, and I propose
C to confine my observations to the issue of the advocate's immunity.

The immunity recognised by the judgments of their Lordships in *Rondel v Worsley* was grounded upon considerations of public policy. But the primary requirement of public policy, as has been observed in many authorities, is that a person who has sustained loss by the negligence of another who owes him a duty of care should recover damages against the
D latter. This primary requirement was stated as follows by Lord Simon of Glaisdale in *Arenson v Arenson* [1977] AC 405, 419:

> "There is a primary and anterior consideration of public policy, which should be the starting point. This is that, where there is a duty to act with care with regard to another person and there is a breach of such duty causing damage to the other person, public policy in general demands
E that such damage should be made good to the party to whom the duty is owed by the person owing the duty. There may be a supervening and secondary public policy which demands, nevertheless, immunity from suit in the particular circumstances (see Lord Morris of Borth-y-Gest in *Sutcliffe v Thackrah* [1974] AC 727, 752). But that the former public policy is primary can be seen from the jealousy with which the law allows any derogation from it."

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When this House in *Rondel v Worsley* [1969] 1 AC 191 considered the long established immunity of advocates after the rule could no longer be supported on the ground that the advocate could not be sued because he had no contract with his client, Lord Reid observed, at p 228C: "the issue appears to me to be whether the abolition of the rule would probably be attended by such disadvantage to the public interest as to make its retention clearly
G justifiable." The House held that the public interest required the existing rule of immunity to be retained. A number of reasons were given for this decision which have been fully set out in the judgment of my noble and learned friend, Lord Hoffmann, but I consider that the essential grounds for the decision were those stated by Lord Wilberforce in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, 212:

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> "mainly upon the ground that a barrister owes a duty to the court as well as to his client and should not be inhibited, through fear of an action by his client, from performing it; partly upon the undesirability of relitigation as between barrister and client of what was litigated between the client and his opponent."

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In *Rondel v Worsley* [1969] 1 AC 191, 227C, Lord Reid observed that public policy is not immutable and that the rule of immunity required consideration in present day conditions in this country. Therefore, like all your Lordships, I consider that it is right for this House to reconsider the immunity in the light of modern conditions and having regard to modern perceptions. Nevertheless, I do not think that conditions have changed so greatly in the thirty or more years which have passed since the judgments in *Rondel v Worsley* and in the twenty years which have passed since the judgements in *Saif Ali v Sydney Mitchell & Co* that the views of the eminent judges in those cases can be completely discounted as relating to conditions and circumstances which were markedly different from those which exist today. I would be slow to dismiss the opinions of the members of the Appellate Committee in the former case that counsel could be subconsciously influenced to deviate from his duty to the court by the concern that he might be sued in negligence by his client—particularly as this view was also taken by Mason CJ in the High Court of Australia in *Giannarelli v Wraith* 165 CLR 543, 557.

However, notwithstanding the weight of the argument which can be advanced for preserving the immunity of advocates, I have come to the conclusion for two main reasons that in assessing the public interest the retention of the immunity in respect of civil proceedings is no longer clearly justifiable and that therefore the immunity should no longer be retained. The first reason relates to public perception. The principle is now clearly established 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 and if he fails to do so and in consequence the person who engages him or consults him suffers loss, he should be able to recover damages. This principle accords with what members of society now expect and consider to be just and fair, and I think that it is difficult to expect that reasonable members of society would accept it as fair that the law should grant immunity to lawyers when they conduct a civil case negligently, when such immunity is not granted to other professional men, such as surgeons, who have to make difficult decisions in stressful conditions. I consider that there is much force in the observation of Krever J in the Ontario High Court of Justice in *Demarco v Ungaro* 95 DLR (3d) 385, 405 in relation to immunity in civil proceedings:

> "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. Nor are they lawyers' values as opposed to the values shared by the rest of the community. In the light of recent developments in the law of professional negligence and the rising incidence of 'malpractice' actions against physicians (and especially surgeons who may be thought to be to physicians what barristers are to solicitors), I do not believe that enlightened, non-legally trained members of the community would agree with me if I were to hold that the public interest requires that litigation lawyers be immune from actions for negligence."

The second reason which leads me to the conclusion that the immunity should no longer be retained in civil proceedings relates to the difficulty

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A which arises in drawing a distinction between that part of the work of an advocate which is entitled to immunity and that part of his work which is not. The work which fell to be considered in *Rondel v Worsley* was the advocate's conduct of the case in court, and the claim to immunity was upheld in relation to such work. But their Lordships also expressed the opinion that some work done in preparation for a trial was also entitled to
B immunity. Referring to these expressions of opinion in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, 214 Lord Wilberforce said:

> "none of these expressions is precise, in the nature of things they could not be, but they show a consensus that what the immunity covers is not only litigation in court but some things which occur at an earlier stage, broadly classified as related to conduct and management of litigation."

C In that latter case, where the alleged negligence by counsel occurred at an early stage before trial when counsel was instructed to settle a draft writ and statement of claim, the House was concerned to define more precisely the circumstance in which immunity did not apply to pre-trial work and it did so by adopting the test stated in the New Zealand decision of *Rees v Sinclair* [1974] 1 NZLR 180 and holding that the protection only applies where a
D particular work was so intimately connected with the conduct of the cause in court that it could fairly be said to be a preliminary decision affecting the way that the cause was to be conducted when it came to a hearing.

However this test has proved difficult to apply in practice and has given rise to considerable uncertainty, and I am in respectful agreement with the observation of Kirby J in the High Court of Australia in *Boland v Yates Property Corpn plc Ltd* 74 ALJR 209, 238, para 137:
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> "It is obviously desirable that a clear line establishing the limits of an advocate's immunity should be drawn. No bright line can be derived from the test borrowed in *Giannarelli* from that propounded by McCarthy P in *Rees v Sinclair*. That test is expressed in terms of the 'intimate connection' of the particular pre-trial work for which immunity
F is claimed with the conduct of the cause in court. The phrase is capable of being expanded to include a large proportion, perhaps most, of the advice given by many barristers and this demonstrates its potential overreach. This is evidenced in a number of cases since *Giannarelli*. Tradition may sustain those decisions. So may an understanding for the occasional mistakes of the particular profession involved. But the proper accountability of advocate advisers, the protection of the public and a
G non-discriminatory application of general principles of legal liability to the law's own profession suggest to my mind that the immunity has been pushed far beyond its essential ambit."

Because of the difficulty of drawing a clear line to fix the boundaries of the immunity and because in civil proceedings the error which is alleged to constitute negligence, even though committed in court, will often be
H attributable to a decision taken, as Lord Diplock put it in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, 220, in the relative tranquillity of barristers' chambers and not in the hurly-burly of the trial, I consider that, when this is linked to the public perception to which I have referred, the balance falls in favour of removing the immunity in civil matters.

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However I am of opinion that the public interest requires a different result when consideration is given to the immunity of counsel who defend persons charged with criminal offences. As I have stated, I am in respectful agreement with the opinion of my noble and learned friend, Lord Hoffmann, that the principle stated in *Hunter's* case [1982] AC 529 should ordinarily prevent a convicted person from suing his counsel for negligence unless and until his conviction is quashed on appeal. Therefore the issue of immunity arises in relation to an action brought against defence counsel by a person who has been convicted of a criminal offence but whose conviction has subsequently been quashed or (because the *Hunter* principle would probably not apply) by a person like the plaintiff, Rondel, who does not claim that the alleged negligence has led to a wrongful conviction. In respect of actions brought by such persons I am of opinion, applying Lord Reid's test, that the abolition of the rule would probably be attended by such disadvantage to the public interest as to make its retention clearly justifiable.

It has been recognised that the argument for retention of the immunity is stronger in criminal cases than in civil cases. In *Rondel v Worsley* [1969] 1 AC 191 Lord Morris of Borth-y-Gest stated, at p 251G: "In my view, the public advantages [of the immunity] outweigh the disadvantages. They do so overwhelmingly in respect of criminal cases and considerably so in respect of civil cases." In *Boland v Yates Property Corpn Pty Ltd* 74 ALJR 209, 241, para 148 Kirby J stated:

> "*Giannarelli*, 165 CLR 543 concerned criminal proceedings. More stringent safeguards are adopted in criminal cases to prevent a miscarriage of justice. The highly developed rules and practices established to consider a suggestion of wrongful conviction may make it more appropriate to recognise further restrictions on the availability of proceedings against a practitioner in respect of the conduct of criminal rather than civil proceedings."

It is the duty of counsel who carry on a criminal practice to defend persons charged with criminal offences. The performance of this duty is of fundamental importance to the proper administration of the criminal law. Many defendants in criminal cases are highly unscrupulous and disreputable persons and I consider that some of them would be ready to sue their counsel if they knew that it was open to them to do so. I consider that the observations of Lord Pearce in *Rondel v Worsley* [1969] 1 AC 191, 275 are still valid today and apply with particular force to persons charged with criminal offences:

> "It is easier, pleasanter and more advantageous professionally for barristers to advise, represent or defend those who are decent and reasonable and likely to succeed in their action or their defence than those who are unpleasant, unreasonable, disreputable, and have an apparently hopeless case. Yet it would be tragic if our legal system came to provide no reputable defenders, representatives or advisers for the latter. And that would be the inevitable result of allowing barristers to pick and choose their clients. It not infrequently happens that the unpleasant, the unreasonable, the disreputable and those who have apparently hopeless cases turn out after a full and fair hearing to be in the right. And it is a judge's (or jury's) solemn duty to find that out by a

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careful and unbiased investigation. This they simply cannot do if counsel do not (as at present) take on the less attractive task of advising and representing such persons however small their apparent merits. Is one, then, to compel counsel to advise or to defend or conduct an action for such a person who, as anybody can see, is wholly unreasonable, has a very poor case, will assuredly blame some one other than himself for his defeat and who will, if it be open to him, sue his counsel in order to ventilate his grievance by a second hearing, either issuing a writ immediately after his defeat or brooding over his wrongs until they grow greater with the passing years and then issuing the writ nearly six years later (as in the present case)?"

On the occasions when a conviction is quashed on appeal, there will often be no valid ground for alleging that the conduct of defence counsel amounted to negligence. If an error has been made in the course of the trial it may have been made by the trial judge in his ruling on a point of law or on the admissibility of evidence or in his summing up to the jury. In such circumstances I consider that it would be contrary to the public interest to remove the existing immunity from the advocate (including the solicitor advocate) of the defendant whose conviction has been quashed. In relation to the advocate in a criminal case I consider that the argument that he should not be vexed by an action for negligence is a strong one and that the countervailing arguments which I think, on balance, prevail in respect of an action for the negligent conduct of civil proceedings, do not prevail where the allegation relates to the conduct of a criminal trial.

There is no suggestion that the clearly established immunity of a judge in respect of an action for negligence brought against him for his conduct of a trial, whether criminal or civil, should be abrogated; that rule is essential for the proper administration of justice and immunity against action is expressly given to the judges of the European Court of Justice.

The argument that the public interest requires that counsel appearing in a criminal trial, like a judge, should not be vexed by unmeritorious actions for negligence (even though this necessarily means that meritorious claims, which I think would be relatively few, would be struck out) consists, in my opinion, of two strands and not one. One strand is that a judge or counsel must be protected because otherwise he may be consciously or subconsciously influenced to deviate from his duty by fear of being sued by a litigant. But a second strand is that it is not right that a person performing an important public duty by taking part in a trial should be vexed by an unmeritorious action and that such an action should be summarily struck out. In the authorities which discuss this matter emphasis is placed on the first strand, but I think it is clear that the authorities also recognise the second strand. The first strand is referred to in the judgments in *Munster v Lamb* 11 QBD 588 but I think that the second strand is implicit in the judgment of Sir Baliol Brett MR, at p 604:

> "If the rule of law were otherwise, the most innocent of counsel might be unrighteously harassed with suits, and therefore it is better to make the rule of law so large that an innocent counsel shall never be troubled, although by making it so large counsel are included who have been guilty of malice and misconduct."

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See also in the judgment of Fry LJ, at p 607:

> "It must always be borne in mind that it is not intended to protect malicious and untruthful persons, but that it is intended to protect persons acting bona fide, who under a different rule would be liable, not perhaps to verdicts and judgments against them, but to the vexation of defending actions."

In *Sutcliffe v Thrackrah* [1974] AC 727, 736 Lord Reid, when considering the judicial functions of arbitrators, refers specifically to the two strands:

> "But a party against whom a decision has been given that is generally thought to be wrong may often think that it has been given negligently, and I think that the immunity of arbitrators from liability for negligence must be based on the belief—probably well founded—that without such immunity arbitrators would be harassed by actions which would have very little chance of success. And it may also have been thought that an arbitrator might be influenced by the thought that he was more likely to be sued if his decision went one way than if it went the other way, or that in some way the immunity put him in a more independent position to reach the decision which he thought right."

I think that in *In re McC (A Minor)* [1985] AC 528, 541 Lord Bridge of Harwich had in mind the second strand when he said:

> "If one judge in a thousand acts dishonestly within his jurisdiction to the detriment of a party before him, it is less harmful to the health of society to leave that party without a remedy than that nine hundred and ninety nine honest judges should be harassed by vexatious litigation alleging malice in the exercise of their proper jurisdiction."

The American Supreme Court has also recognised the two strands in relation to judges and prosecutors. In *Imbler v Pachtman* 424 US 409, 422–424 Powell J stated:

> "The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust. One court expressed both considerations as follows: 'The office of public prosecutor is one which must be administered with courage and independence. Yet how can this be if the prosecutor is made subject to suit by those whom he accuses and fails to convict? To allow this would open the way for unlimited harassment and embarrassment of the most conscientious officials by those who would profit thereby. There would be involved in every case the possible consequences of a failure to obtain a conviction. There would always be a question of possible civil action in case the prosecutor saw fit to move dismissal of the case . . . The apprehension of such consequences would tend toward great uneasiness and toward weakening the fearless and impartial policy which should characterise the administration of this office. The work of the prosecutor would thus be

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A impeded, and we would have moved away from the desired objective of stricter and fairer law enforcement.' (*Pearson v Reed* (1935) 6 Cal App 2d 277, 287.)"

In the United States the federal law of immunity has not been extended to defence counsel, although the laws of some states do grant immunity to public defenders.

B I respectfully differ from the view of my noble and learned friend, Lord Hoffmann, that the second strand of the argument that counsel, like a judge, should be protected from vexatious actions is derived from the concept of "divided loyalty" or from the concept that the conduct of litigation is "a difficult art" In my opinion the argument flows from the recognition by the law that those discharging important public duties in the administration of
C justice should be protected from harassment by disgruntled persons who have been tried before a criminal court. A judge is given protection against an action for negligence although he has no divided loyalty, and he is not given immunity because judging is a difficult art A judge is given immunity because the law considers that it is in the public interest that he should not be harassed by vexatious litigation. The law does not give immunity to a surgeon who performs very difficult and important work for the benefit of
D the public. But the reason for this difference is that the administration of criminal justice gives rise to problems and difficulties of the nature described by Lord Pearce in *Rondel v Worsley* [1969] 1 AC 191, 275 which differ from those which arise in the practice of surgery. In my opinion counsel, like a judge, is also entitled to protection in the performance of his public duty to defend persons charged with criminal offences.

E There is, of course, an obvious distinction between a judge and defence counsel in that the judge owes a duty to the community to ensure that justice is done in a trial which he conducts and he does not owe a special duty of care to the defendant of the same nature as that of defence counsel who is instructed to appear on behalf of the defendant to represent his interests. There is also a similarity between defence counsel and a surgeon in that each owes a duty of care to his particular client or patient. But in my opinion
F these considerations are outweighed by the consideration that in representing his client counsel is performing an important public duty which is essential for the proper administration of justice.

It is now the position under the new Civil Procedure Rules that an action which has no real prospect of success can be summarily dismissed more easily than in the past. But this procedure does not give as effective
G protection against the harassment and vexation of blameless counsel as does immunity; it does not enable the action against counsel to be stopped at once, which is what Sir Baliol Brett MR thought requisite in *Munster v Lamb* 11 QBD 588, 605.

Therefore in my opinion the arguments against retaining immunity to protect counsel in criminal proceedings against vexatious actions are markedly weaker than those advanced against retaining immunity for the
H conduct of civil proceedings. The matter can only be viewed as one of perception, but my own perception would be that counsel who defend in criminal proceedings are at greater risk of harassment from vexatious actions than counsel who appear in civil proceedings because the unpleasant, unreasonable and disreputable persons, to whom Lord Pearce

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refers, are more likely to be defendants in criminal cases than parties in civil cases. Moreover, for this reason, I think that public perception would be more disposed to accept that it is reasonable and not a ground for criticism to protect counsel from actions by a person who has been charged with a criminal offence as opposed to a person who is a party to a civil dispute. For example, I think that few members of the public would have been critical of Mr Worsley being granted immunity in order to protect him from being vexed by the action alleging that he had been guilty of negligence for failing to cross-examine to establish that the victim's injuries had been caused by biting or by the use of the accused's hands and not with a knife. There will, no doubt, be some cases in which there has been serious negligence by counsel representing an accused person and where members of the public would feel strongly that the accused person should be able to recover damages, but for the reasons which I have given I consider that it is less harmful to the public interest that such a person should not recover than that in other cases (which I think would be larger in number) blameless counsel should be harassed by vexatious actions.

I consider that the continuation of the immunity of defence counsel appearing in criminal cases would not constitute a breach of article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms In *Fayed v United Kingdom* 18 EHRR 393, 429, para 65, the European Court of Human Rights, quoting from *Lithgow v United Kingdom* (1986) 8 EHRR 329, 393, para 194, stated the relevant principles as follows:

> "'(a) The right of access to the courts secured by article 6(1) is not absolute but may be subject to limitations; these are permitted by implication since the right of access "by its very nature calls for regulation by the state, regulation which may vary in time and in place according to the needs and resources of the community and of individuals." (*Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252, 281, para 5.) (b) In laying down such regulation, the contracting states enjoy a certain margin of appreciation, but the final decision as to observance of the Convention's requirements rests with the court. It must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. (c) Furthermore, a limitation will not be compatible with article 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.' These principles reflect the process, inherent in the court's task under the Convention, of striking a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights."

In my opinion the granting of immunity to defence counsel in criminal proceedings is in conformity with these principles. The immunity is in pursuit of the legitimate aim of advancing the administration of justice and of protecting from vexation and harassment those who perform the public duty of defending accused persons so that a criminal court will come to a just decision. The immunity is also proportionate to that aim as it is no wider than is strictly necessary to facilitate the proper administration of justice. Article 6 would clearly not prohibit the domestic law from granting absolute

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A immunity to judges and, for the reasons which I have sought to state, defence counsel is entitled to the same protection.

Therefore I am of opinion that the public interest requires that the immunity of an advocate in respect of his conduct of a criminal case in court and in respect of pre-trial work intimately connected with the conduct of the case in court should continue, notwithstanding the difficulty of drawing a B clear line in respect of pre-trial work.

As the present appeals relate to claims for immunity in civil proceedings I consider for the reasons which I have given that they should be dismissed.

LORD HOBHOUSE OF WOODBOROUGH My Lords,

The decision necessary for these appeals

C All of your Lordships are in favour of dismissing the appeals; the solicitors are not entitled to the immunity which they claim in the present cases. Your Lordships agree that on any view the immunity claimed in these cases falls outside the recognised immunity afforded to advocates. The Court of Appeal arrived at the right conclusion. Further, all your Lordships would be prepared to arrive at the same conclusion on the basis that there is D no longer an adequate justification for continuing to recognise a general immunity for advocates engaged in civil litigation.

But that is the limit of the unanimity. Some of your Lordships would be prepared to declare that the immunity should also no longer be recognised for advocates engaged in criminal litigation. Other of your Lordships, among whom I number myself, would not be prepared to take that step on the present appeals. These cases, unlike *Rondel v Worsley* [1969] 1 AC 191 E (but like *Saif Ali v Sydney Mitchell & Co* [1980] AC 198), do not concern criminal litigation and your Lordships have not heard any argument upon the distinctions that might, still less, should, be made between civil and criminal litigation beyond the generalised discussion arising from *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529. That there is room for a difference of opinion on this point cannot be doubted. Further, it F is clear that it is not necessary for this difference to be resolved for the purpose of deciding the present appeals. In my judgment, that resolution will have to await a case in which it does arise for decision.

Therefore, it is with the intention of assisting and informing the argument which I consider will have to take place in a later case that I enter upon this subject. Since the question of public policy is based not upon some higher G moral imperative but upon a pragmatic assessment of what is justifiable in our society, that assessment may change as circumstances change. The answer that I would give today is not necessarily the same as that which I would give at a later date. I can give two examples of why that might be so. First, lessons may be learnt from the abrogation of the advocacy immunity in civil litigation which will better inform the consideration of the immunity in criminal litigation and the consequences, favourable or adverse, which H would follow from its being abrogated as well. Secondly, a new regime of legal representation by quasi-public defenders operating under strict monetary limits is proposed for criminal litigation and it is possible that such a change will so alter the role of the defending advocate as to favour (or even necessitate) unrestricted civil liabilities along the American pattern.

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The advocacy immunity

Since the passing of section 62 of the Courts and Legal Services Act 1990, nothing now turns upon the distinction between solicitors and barristers. This parity has been reinforced by section 42 of the Access to Justice Act 1999 confirming the paramount duty to the court owed by all those exercising a right of audience. It is accepted that the current immunity (if any) is an advocacy immunity attaching to an advocate exercising his or her rights of audience. It is not a general litigation immunity. The appellants, the solicitors, sought to rely upon the formulation drawn by the House of Lords in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 from the New Zealand case *Rees v Sinclair* [1974] 1 NZLR 180 that the immunity covers what is done in court and preparatory work which is "intimately connected" with the conduct of the case in court. Counsel for the Bar Council argued for a narrower formulation being an immunity confined to conduct in the face of the court but covering any allegation concerning conduct out of court designed simply to evade that immunity.

It is also accepted that any immunity must be justified as being necessary in the public interest, otherwise it cannot survive. Before the 1960s it was thought that a contract was essential to the existence of a duty of care to avoid economic loss and that a barrister did not by accepting instructions enter any contractual or other legal relationship with his lay or professional client. There was simply a mutual absence of legal liability which required no justification. *Rondel v Worsley* [1969] 1 AC 191 for the first time had to consider whether any immunity was justified and if so its extent. Various justifications for a limited immunity were accepted in that case as justified. The extent of the immunity has been revisited in *Saif Ali v Sydney Mitchell & Co*. There is no dispute as to the criterion to be applied: the dispute is as to the result.

Counsel for the Bar Council submitted that the rule was in truth a statement that no duty of care existed within the "immune" area, apparently as an application of the public policy third leg of the "Wilberforce" test. I do not accept that submission. What is in issue is a true immunity. But in any event, the submitted exclusion of a duty of care was based upon the same criterion as the immunity. Its relevance was to the human rights aspect of the debate. If it were a question of a blanket public policy limitation on the scope of the duty of care, *Osman v United Kingdom* [1999] 1 FLR 193 would be directly in point whereas if it is a question of an immunity the criteria laid down *Ashingdane v United Kingdom* (1985) 7 EHRR 528 would govern. These criteria are similar to and no more rigorous than those to be applied under English law to justify the immunity: the immunity must "pursue a legitimate aim" and there must be "a reasonable relationship of proportionality between the means employed and the aim sought to be achieved": pp 546–547, para 57.

Rondel v Worsley

It is of the nature of a rule the continued existence of which has to be justified by the public interest that the balance of public interest may change. A decision such as *Rondel v Worsley* [1969] 1 AC 191 is therefore open to review, not because it was wrong when it was decided, but because circumstances have changed since 1967 and it is appropriate that the rule

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A should be reviewed and, if no longer justified, changed or abrogated. It is not a question of whether to overrule previous authority but of declaring the law in current conditions.

However, the role of Parliament must also be taken into account. Parliament is the primary guardian of the public interest. In most areas of public policy, Parliament will be the sole arbiter and the courts should not allow themselves to trespass into them. But in the present appeals the B relevant area is the system of justice and the administration of justice in the courts. In this area the judges have a legitimate competence to declare where the public interest in the achievement of justice lies and what is likely to be the impact of one rule or another upon the administration of justice.

It is also the case that Parliament has quite specifically refrained from intervening in this matter. Section 62 of the 1990 Act disclosed no C disapproval of the existence of an immunity for barristers and others performing a similar function; indeed, it could be argued that section 62 assumes that there is such an immunity and that it will continue in being. Other statutes, such as the Access to Justice Act 1999, have likewise refrained from abrogating or qualifying the immunity even though such a provision would have been well within the purview of the statute. There are other statutory provisions to which I will refer in the course of this speech D which are relevant to the consideration of the broader policy of the legislature and therefore to the existence of the immunity and which should accordingly be taken into account before reaching a conclusion. The leading role of Parliament must be recognised and any decision at which your Lordships were to arrive would have to be one which is consistent with the guidance to be gained from the acts of the legislature.

E Inevitably, *Rondel v Worsley* deployed a number of reasons for recognising an immunity. These were commented on by Lord Diplock in the *Saif Ali* case [1980] AC 198. Some are more apt than others and they have already been rehearsed and criticised by several of your Lordships. However it is necessary to analyse some of them further. Some factors which seemed important 30 years ago have ceased to be so now and others which received only a passing reference then can now be seen to be essential to making the F right evaluation of where the public interest lies. Likewise, in conducting now a re-examination of the cogency of the various factors, it is necessary to set them in the appropriate current context. The observations which follow are not exhaustive and are merely designed to make some of the points which I consider need to be made.

G *The protection of the advocate*

The advocate, independently of any immunity, has certain protections. The standard of care to be applied in negligence actions against an advocate is the same as that applicable to any other skilled professional who has to work in an environment where decisions and exercises of judgment have to be made in often difficult and time constrained circumstances. It requires a H plaintiff to show that the error was one which no reasonably competent member of the relevant profession would have made. This is an important element of protection against unjustified liabilities. Similarly, there now exist improved procedures to enable obviously unsustainable claims to be brought to a conclusion at an early stage of any litigation. The availability of these protective features and their value in discouraging and limiting

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unmeritorious litigation is relevant when questioning the need for any immunity. The position was not the same in 1967.

I consider that it is not an argument that the immunity is needed to protect advocates against excessive liabilities. There is no evidence that any liabilities to which advocates would be subjected if not immune would be unsustainable or disproportionate. They are in this respect in the same position as any other professional. Such risks are insurable and advocates are now professionally required to carry liability insurance. There is no evidence that satisfactory insurance is not available. Indeed, the aspects of legal practice most obviously liable to give rise to large claims fall outside the scope of any immunity being contended for or, at the least, are likely to do so.

But, in any event, no case is being made—nor can it be made—that lawyers should as a profession be given any special protection. The immunity, if any, must exist for the benefit of the public not the lawyers. Thus, the element of protection only comes in collaterally and consequentially. The immunity, if upheld, would have the effect of protecting advocates from being harassed by unmeritorious claims: the justification would, on this basis, be that to require them to be subjected to such harassment and to have to guard against the risk of it would have a deleterious effect upon the administration of justice: *Munster v Lamb* 11 QBD 588; *Roy v Prior* [1971] AC 470. It is the exposure to the risk which does the damage. It inevitably distorts professional practices and professional judgments, likewise the distribution of resources, and, where, as is the case with the practice of advocacy, the existing system is on the whole working well, this distortion will be adverse and will not assist the general good. A comparison of benefit (to the individual litigant) and detriment (to the public as a whole including litigants as a class) has to be made and a balance struck. This is not to devalue the rights of the individual but to recognise that in any communal society such a balance has to be struck. For others involved in the justice system the balance is judged to favour immunity. The question is whether the same judgment should be made for advocates as well.

Before leaving this aspect of protecting the practitioner, there is a difference between the solicitor's profession and that of the barrister which has in the past been of major relevance and is still not irrelevant. A solicitor who feels uncertain about his position can always take the advice of counsel and, provided that the counsel chosen was competent and the advice not manifestly wrong, that will protect the solicitor. The barrister has no equivalent protection, nor in practice does the advocate. The fact that solicitors have in the past successfully operated in a no immunity environment must be evaluated in this context before the same assumption is made for the advocate.

Conflict of duty

The argument based upon owing a paramount duty to the court (reinforced by section 42 of the 1999 Act) is of only limited impact and needs further analysis. The relevant argument has to be based upon a *conflict* of duty. If the duty owed by the advocate to the court is no more than a duplication of his duty to his client, the existence of the duty presents no problem for the advocate: he must simply do his duty. (I will have to come

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back to other consequences of this later.) However where there is a conflict of duty he may have to make choices which are contrary to the wishes of his client. A threat by a client to sue the advocate may put the advocate in a difficult position particularly where the extent of his duty to the court and precisely what it entails may be itself a matter of judgment or disagreement. Thus the potential for a conflict of duty is a relevant, but far from dominant, factor in the assessment of the need for an immunity.

I am not impressed by the counter-argument that other professional men also owe duties which may conflict with the wishes of their client or patient. Typically these are ethical duties or obligations not to breach the criminal law. Such constraints upon conduct are of a character common to virtually all citizens. They do not as such raise the same potential problem as the conflicts faced by an advocate. The impressive counter-argument is that competent advocates are well able to cope with such conflicts and are confident that, where they adopt a particular view of their duty to the court in good faith, their judgment will be upheld by the court.

There is no evidence that the lack of immunity where it exists causes difficulties with the discharge of the lawyer's duty to the court. The most striking example of this is the duty in civil litigation to give discovery of all material unprivileged documents to the opposing side. Such documents include those of which the only relevance is that they damage the disclosing party's case or support the other side's case. It is contrary to the client's interest that the other side should see them yet it is the solicitor's task and duty to disclose them. Solicitors have for over a century performed this task without immunity from being sued by their clients. (However, as I warned in the previous section of this speech, it is an oversimplification to extrapolate from the position of the solicitor to a dismissal of any problem for the advocate.) Any threat of corruption of the lawyer comes not from the fear of being sued but rather the wish not to lose a valuable client by being over-zealous. (Cf the position of an auditor.) In general the client appears to understand that he is employing the solicitor to perform his, the client's, duty and is content that he should.

This also illustrates the further point that there are two types of duty involved. There are those which are equally duties of the client (e g see CPR r 1.3) and there are those which are solely duties of the lawyer and personal to him. The advocate's duties which are relevant under this head come into the latter category and require the advocate to be prepared, in relation to the court, at times to stand apart from his client.

The duty to act for any client

This is a duty accepted by the independent bar. No one shall be left without representation. It is often taken for granted and derided and regrettably not all barristers observe it even though such failure involves a breach of their professional code. It is in fact a fundamental and essential part of a liberal legal system. Even the most unpopular and antisocial are entitled to legal representation and to the protection of proper legal procedures. The European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969) confirms such right. It is also vital to the independence of the advocate since it negates the identification of the advocate with the cause of his client and therefore assists

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to provide him with protection against governmental or popular victimisation.

The principle is important and should not be devalued. But the relevant question is whether it provides a justification for the immunity. In my judgment it is properly taken into account as a factor since it restricts the freedom of action of the advocate and casts light upon the true nature of his role. (In the procedure of criminal courts, it goes hand in hand with the restrictions upon the ability of the defence advocate to withdraw during the trial.) But it does not in itself justify an immunity. The medical profession would normally accept an ethical obligation to provide medical care without discrimination without seeking any immunity in return. Historically the adoption of a common calling has carried both an obligation to accept all custom and an absolute liability. A common carrier had to accept and carry goods entrusted to him and was absolutely liable for their loss or damage subject to only very narrow exceptions.

The trial process and appeal

This is, or should be, at the centre of this debate and is in my judgment the critical factor which must be evaluated. How does the role of the advocate and any immunity relate to the trial and appeal process? It is the fact that different answers are to be given to this question for the civil process and the criminal process that leads to the conclusion that for one the immunity may no longer be justified but for the other it should be retained.

The trial is where the advocate finally exercises his right of audience and practises his advocacy. It is a process which is unique in that it is conducted before the court or judge. It is under the direct supervision and control of the court or judge. The advocate is subject to a discipline judicially imposed. It is normally conducted in public. The purpose of a trial is to achieve finality and lead to a decisive adjudication.

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

A feature of the trial is that in the public interest all those directly taking part are given civil immunity for their participation. The relevant sanction is either being held in contempt of court or being prosecuted under the criminal law. Thus the court, judge and jury, and the witnesses including expert witnesses are granted civil immunity. This is not just privilege for the purposes of the law of defamation but is a true immunity: *Roy v Prior* [1971] AC 470, especially per Lord Morris, at pp 477–478. This rule exists in the interests of the trial process, i e in the public interest. Under *Rondel v Worsley* [1969] 1 AC 181 and the *Saif Ali* case [1980] AC 198 the advocates have a similar immunity.

It is illuminating to consider the conceptual basis in the trial process for the witness immunity. It is that the witness, although called by a party, is giving evidence to the court. The witness's duty is to tell the truth to the

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court regardless of the interests of the party who has called him or who is asking him questions. This same scheme is spelled out in the new Civil Procedure Rules regarding expert witnesses. An expert witness is in a special position similar to that of the advocate. He is selected and paid by the party instructing him. Part of his duties include advising the party instructing him. If that advice is negligently given the expert, like the lawyer, is liable. But once the expert becomes engaged on providing expert evidence for use in court (CPR r 35.2; *Stanton v Callaghan* [2000] QB 75) his relationship to the court becomes paramount as set out in the Civil Procedure Rules and he enjoys the civil immunity attributable to that function.

If the advocate is to be treated differently, he alone of these participants in the trial will be being held civilly liable for what he does and does not say in court. This anomaly will require justification. The anomaly is not without further significance in that, if the advocate is to be held civilly liable for some adverse outcome of the trial, he will have to bear the whole loss even though other participants may have been equally, or more seriously, at fault. From the point of view of the aggrieved party, if some fault can be found with the performance of the advocate, he recovers in full from the lawyer; but, if only other participants were at fault, he recovers nothing at all. It is necessary to be very cautious before correcting one perceived anomaly by creating another.

A further feature of the trial process is its finality (subject to appeal). Some judgments establish a status in private or public law, others do no more than establish a liability, or non-liability between one individual and another. There are developed rules governing those who are bound by judgments and under what circumstances they can be challenged. A civil judgment itself creates rights which are distinct from, and in which may merge, rights which existed before. It is thus important to consider the relationship between the original trial which has given rise to the client's complaint and the subsequent litigation between the client and his advocate. Does the subsequent litigation challenge or affirm the outcome of the previous trial? If it affirms it, no problem arises. If on the other hand, the substance of the later litigation is to challenge the outcome of the previous trial, then a question of finality can arise. It may be a challenge to the status of the previous decision. This is a point to which I will have to return and is a cardinal point of distinction between the criminal and civil process.

This in turn ties in with the consideration of the interest of the client which the law of tort, if available, would serve to protect. The law of negligence exists to provide monetary compensation for losses capable of being valued in monetary terms. Where the loss suffered by the client is financial, the remedy is appropriate and effective. Where the complaint has a different character, as for example that the client has been convicted of a crime which he says he did not commit, an action in tort does not remedy that grievance and can at most provide a solatium or some means of visiting punishment upon the advocate alleged to have failed to secure an acquittal. Such a complaint also has the necessary character of challenging the conviction; it involves saying that an innocent man has been wrongly convicted.

To permit actions which involve a re-examination of a trial that has already occurred and a judgment already given inevitably must trespass on the finality of that trial and judgment and the appeal procedure and involve

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some duplication of the previous process. Accordingly such permission requires justification.

Another point which emerges from this discussion is that the oft resorted to analogy with the medical profession and its lack of immunity breaks down. The advocate's conduct is already public and within the purview of the judicial system both at the trial and on appeal. It is not necessary to permit negligence actions to be started in order to achieve this judicial control; nor is it necessary in order bring the advocate's conduct into the public domain.

Finally, in connection with the litigation process, one of the remedies it provides to the dissatisfied client is the ability to challenge the fees and expenses charged by the lawyer to the client. It is possible for the client to procure that those charges are disallowed or reduced on taxation. It is not necessary for him to bring an action for damages to achieve this result. Similarly the court has the power to make wasted costs orders against a litigator or advocate which consequentially benefit the litigants: *Ridehalgh v Horsefield* [1994] Ch 205.

Abuse of process: collateral attack

The ability to stay or strike out an action as an abuse of the procedure of the court is a long standing remedy, an inherent power of the court, and is reflected in the Civil Procedure Rules and their predecessors. Its essence is the use of civil litigation for an improper purpose, i e without a legitimate purpose. Where a client is seeking to recover damages from his former advocate for some breach of duty, this is clearly a proper purpose if the advocate is not immune. It is important to stress this at the outset as it has been submitted by the respondents that abuse of process provides a satisfactory solution to any problems arising from denying the existence of the immunity. It is not a substitute for the immunity. It is rather one of the existing features of the law, like the standard of care applied in professional negligence cases, against which to test the necessity of having the immunity. Another point to stress at the outset is that "collateral attack" only comes into the picture when it discloses an abuse of process. It is a distinct concept and challenging a previous decision does not necessarily connote an abuse of process.

Rondel v Worsley [1969] 1 AC 191 was a case where the claim could in any event have been struck out as disclosing no reasonable cause of action. Rondel did not suggest that his advocate caused him to be convicted; his grievance was that the advocate had not pursued sufficiently forcibly his allegation that he had used his hands and teeth to inflict the relevant injuries. It was not a case where there was any attack, collateral or direct, upon the jury's verdict. Neither that principle nor the decision in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 would have caused the action to be halted.

A similar point is to be made in relation to the *Hunter* case. In that case the plaintiffs had been convicted of a terrorist offence substantially on the basis of their admissions to the police. At the criminal trial they contended that the confessions were involuntary as they had been beaten by the police. The trial judge, after a voir dire, rejected their evidence and preferred that of the police. The jury convicted them. Subsequently they sued the police for assault. They were trying to relitigate in a civil court the same issue as had

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A been in dispute at the criminal trial and had been decided against them beyond reasonable doubt. It was a case of a collateral attack both on the trial judge's finding and upon the verdict of the jury. The courts and your Lordships' House held that the civil action was an abuse of process and should be struck out. It was not however an action against their lawyers. If they had had a bona fide complaint against their lawyers and had sued them, B there would have been no reason why, subject to the immunity point and presenting a reasonable case on breach of duty, their action should not have gone ahead. The immunity point and the abuse of process point are distinct and separate. They do not serve the same purpose.

The "collateral attack" point is a species (or "sub-set") of abuse of process. There is no general rule preventing a party inviting a court to arrive at a decision inconsistent with that arrived at in another case. The law of C estoppel per rem judicatem (and issue estoppel) define when a party is entitled to do this. Generally there must be an identification of the parties in the instant case with those in the previous case and there are exceptions. So far as questions of law are concerned, absent a decision specifically binding upon the relevant litigant, the doctrine of precedent governs when an earlier legal decision may be challenged in a later case.

D A party is not in general bound by a previous decision unless he has been a party or privy to it or has been expressly or implicitly covered by some order for the marshalling of litigation (*Ashmore v British Coal Corpn* [1990] 2 QB 338). This overlaps with the concept of vexation where the same person is faced with successive actions making the same allegations which have already been fully investigated in a previous case in which the E later claimant had an opportunity to take part. This reasoning does not apply to an action against a lawyer alleging that he has mishandled a previous case.

The case of *Hunter* is not apt or adequate to deal with cases brought by aggrieved clients against advocates alleged to have been negligent.

F *Summary*

My Lords, it is convenient to summarise the position thus far. (1) The immunity of the advocate, if it is to be upheld, must be justified as necessary in the public interest. (2) *Rondel v Worsley* [1969] 1 AC 191 represented the assessment of where the public interest lay at the time it was decided in 1967. (3) Parliament has not sought to abolish the immunity and has G implicitly left it to the courts to consider whether the immunity should survive. (4) Statutes have however not been silent upon relevant aspects of the public interest and such guidance must be respected and followed. (5) There is a balance to be struck. There are factors to be placed on either side of the scales. (6) The most important factors are the assessment of the role of the advocate in the court process and whether the interest of the client would be appropriately protected by the tort remedy. (7) To substitute one H anomaly for another is not the right answer. (8) The abuse of process tool is no more than a relevant part of the existing law and does not address the same question as the immunity and does not provide a substitute for it. (9) I consider that the balance of the public interest needs to be examined separately for the civil and the criminal process.

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The civil process

The civil process includes most of the factors to which I and others have referred. The question is how potent they are and whether they still suffice to justify the immunity of the advocate in civil litigation. My Lords, in agreement with your Lordships, I consider that they do not.

The character of civil litigation is that it involves the assertion by one party that the other has infringed his rights; he seeks a remedy, normally a monetary remedy but sometimes a remedy of declaration of right or specific implement. The court, therefore, has essentially to make a decision between two conflicting parties and determining their respective rights inter se. It is primarily the provision by the state of a service similar to the provision of arbitration services. The public interest does not normally come into it save in so far as the provision of a system of civil dispute resolution and the enforcement of civil rights is a necessary part of a society governed by the rule of law not by superior force.

It is a system of relative justice. It exists in economic terms. The plaintiff complains that he has suffered loss and damage; he claims that the defendant should be required to pay monetary damages to compensate him; the remedy is a redistribution of wealth between the parties. Or he may assert a property right and ask that the court should assist him enforce it against the defendant. If something goes wrong in the litigation, the court does not simply ask whether the party directly affected will suffer an injustice if not assisted by the court, e g by having his time for doing some act extended, or by being allowed to amend his case. It asks whether assisting one party will cause an injustice to the other. Where the mishap has resulted from some act or omission of a party's lawyer, that party may be left to his remedy against his own lawyer rather than to allow the mishap to prejudice the other party. If all potential for a liability of the lawyer to his client is excluded, this will make it more difficult to do justice between the plaintiff and the defendant not less difficult.

The same applies on an appeal. The primary concern is not the fairness of the trial but its outcome; can the appellant show that he not the respondent was entitled to succeed? Complaints by an appellant against his own advocate will rarely advance his case because they will not normally impinge upon the case of the respondent. New evidence is only admitted under very restricted circumstances: *Ladd v Marshall* [1954] 1 WLR 1489. The reasoning is that the unsuccessful party is not entitled to deprive the other of his judgment without showing cogent reasons as against that other.

If a party has suffered a loss, either by being held liable to the other party or through failing to recover from the other, that financial loss represents the starting point of the claim of the client against his lawyer and the remedy he claims from his lawyer, an award of damages expressed in monetary terms is the appropriate remedy for the wrong complained of. The dominant relationship is that of the lawyer and his client. The introduction of conditional or contingent fees gives the lawyer a financial interest in the litigation which only serves further to emphasise the commercial character of the relationship and the commercial enterprise in which they have joined.

A successful claim against the lawyer does not attack the position of the other party to the original litigation. It affirms that outcome of the original litigation as having established conclusively, as between those parties, their rights inter se. The client alleges that that outcome was caused by the failure

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A of his lawyer to provide the stipulated service. This not different in kind to a client saying that the adverse tax treatment of a transaction was caused by the negligent advice or drafting of the lawyer he employed. It will not be cured by an appeal in the litigation.

In the preceding paragraphs I have simply referred to the client's lawyer because what I have said is equally true of both the in-court advocate and out-of-court litigator. It assists the doing of justice between plaintiff and
B defendant in civil litigation that the client's rights against his lawyers of any kind be preserved in full and the economic remedy is the right remedy. The appeal process is not apt to provide the remedy.

One of the problems of any immunity is determining its boundaries. In civil litigation, defining the boundaries of what constitutes advocacy and would therefore qualify for the advocacy immunity is a serious problem not
C capable of satisfactory solution. The position has been made more difficult by the Civil Procedure Rules. There is not a single moment of confrontation. The exercise of advocacy extends over a series of processes of which the trial is only one and the advocacy may be conducted as much in writing as orally. Counsel for the appellants signally failed to provide a satisfactory definition or categorisation of the functions to which, in civil procedure, the immunity would attach. This is a telling argument against the recognition of an
D immunity for advocates for civil procedure and has assisted to convince me that the immunity is not necessary or appropriate. In civil litigation the immunity is anomalous and the arguments in its favour, although they exist, do not suffice to justify its continued existence.

The criminal process

E 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. The criminal law and the criminal justice system exists in the interests of society as a whole. It has a directly social function. It is concerned to see that the guilty are convicted and punished and those not proved to be guilty are acquitted. Anyone not
F proved to be guilty is to be presumed to be not guilty. It is of fundamental importance that the process by which the defendant is proved guilty shall have been fair and it is the public duty of all those concerned in the criminal justice system to see that this is the case. This is the public interest in the system.

The criminal trial does not exist to protect private interests. It exists as part of the enforcement of the criminal law in the public interest. Those who
G take part in the trial do so as a public duty whether in exchange for remuneration or the payment of expenses. The purpose of all is, or should be, to see justice done and to play their appropriate part in achieving that end. 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
H 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 same applies to criminal appeals: the purpose and the roles of the participants are the same.

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It follows from these fundamentals that the salient features of this procedure exist to serve the public interest, not to serve any private interest. The defendant is entitled to skilled professional representation and, if he cannot provide it for himself, it will be provided for him at public expense, as happens in virtually all cases. It is likewise necessary that the advocate having the task of representing the defendant shall be independent and fearless. If he is not he will not be equipped to discharge the public duty entrusted to him to see that the defendant has a fair trial and that he is not convicted unless proved guilty. 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.

The other participants have a similar public duty to perform their role. They take part in the trial as a public duty. All must be concerned to see that the defendant has a fair trial. Thus the judge and the prosecuting counsel will join in seeing that errors of fact or law are not made. It is the judge's duty to direct the jury on defences available on the evidence and to exclude inadmissible or unfair evidence. It is the duty of both counsel to draw the judge's attention to any errors he may have made. All witnesses are under a duty impartially to assist the court and give honest evidence. If the defence advocate is to be exposed to a civil liability in respect of his discharge of his public duty and the role he has to perform in the criminal trial process, he will be unique among the participants. All the others are in the public interest immune; the same logic applies to the defence advocate whose role derives from the same public interest and is just as important to the public interest as that of the other participants. As previously observed, if he alone is to be subjected to civil liability, he will be unable to obtain a contribution from any other participant although they may be equally blameworthy for what went wrong. The scheme is that the participants are subject to the jurisdiction of the court and the court has appropriate disciplinary powers to control the proceedings and the conduct of the participants. In cases of serious misconduct, it is the criminal law which intervenes not the civil law.

The appellate procedure follows the same logic. The only question on an appeal against conviction is whether the conviction was unsafe. If it was, then the appeal must be allowed: in all other cases the appeal must be dismissed: the Criminal Appeal Act 1968, section 2 (as amended by section 2 of the Criminal Appeal Act 1995). A whole variety of factors may affect the safety of a conviction—error of law, the admission of evidence which ought to have been excluded, some unfairness in the trial or the summing up, relevant evidence not adduced at the trial. The powers of the Court of Appeal to admit fresh evidence or extend the time for appeal are wide; they are not constrained by the consideration of the interests of any other person. They are to be exercised whenever it would serve the interests of justice. Pleas, admissions and concessions can where it is just to do so be withdrawn.

The Court of Appeal will also listen to criticisms of the conduct of the defence and give effect to them when they have merit. It is hard to visualise a case where the criticism would (in the absence of immunity) be sufficiently substantial to justify a claim against the advocate but not give a ground of appeal which the Court of Appeal would have to evaluate. Similarly, when, at a later time, new factors arise which justify the reconsideration of the safety of the conviction, the case can be referred back to the Court of Appeal under the

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A Criminal Appeal Act 1995, section 9. The duty of the advocates appearing before the Court of Appeal are the same as at the trial, the achievement of a just outcome. Their role is adversarial but their duty is not partisan.

The prosecuting advocate is not in practice subjected to any consideration of personal liability for his conduct of the case. (Indeed, a general non-liability in negligence of the Crown Prosecution Service has been upheld by the Court of Appeal on policy grounds: *Elguzouli-Daf v Comr of Police of*
B *the Metropolis* [1995] QB 335.) If he has to revisit what occurred at the trial, it will be solely to provide further assistance to an appellate court or other similarly placed body. The defending advocate will normally conduct any appeal from a conviction (or sentence). He will do so in the same interest as before, the interests of justice. If some question arises about his conduct of the trial, this will probably make it inappropriate that he represent, or
C continue to represent, the defendant on the appeal. But he will remain under a duty to assist the Court of Appeal. Normally the defendant will waive his privilege and a full and frank written account of what occurred and the reasons for it will be given by the advocate to the Court of Appeal. It will readily be appreciated that to introduce into this scheme of criminal justice a principle that the defendant should be free to sue his advocate for damages in
D negligence will significantly alter the relationships involved and make more, not less, difficult the achievement of justice within the criminal justice system which is its purpose and is also the public interest.

My Lords, I make no apology for emphasising the position on criminal appeals: the reason why the question of immunity arises is because of the argument that a defendant who has been the victim of a miscarriage of justice should have a remedy. On any view the primary remedy must be the
E criminal appeal. Therefore the primary inquiry must be how the abrogation of the immunity would affect the effectiveness of the Court of Appeal in rectifying such miscarriages. If its existence facilitates such rectification, that is a very strong argument indeed in justification of the immunity. (Contrast the position in the civil justice system where the position is the reverse.) To displace this justification needs some significant counter-
F argument. However, the evaluation of the other available arguments support rather than undermine the justification for the immunity.

The legitimate interest of the citizen charged with a criminal offence is that he should have a fair trial and only be convicted if his guilt has been proved. It is not an economic interest. His interest like his potential liability under the criminal law stems from his membership of the society to which he belongs—his citizenship. If the charge against him has not been proved, he
G should be acquitted. If he has been wrongly convicted, his appeal against conviction should be allowed. If he has been wrongly or excessively sentenced, his punishment should be remitted or reduced. His only remedy lies within the criminal justice system. This is appropriate. The civil courts do not have any part to play in such matters. The relevance of what the advocate does during the criminal trial is to the issues at that trial, not the
H remoter economic consequences of the outcome of that trial.

Any involvement of the citizen in the criminal justice system may have adverse consequences. There are adverse consequences for witnesses which they in the public interest have to accept. There are certainly adverse consequences for those suspected of or charged with criminal offences. They may be held in custody. They normally have to attend their trial. They may

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be arrested and subjected to interviews or searches or tests which would otherwise be an infringement of their civil liberties. They may be acquitted after a long and traumatic trial. They may be convicted but have their conviction overturned on appeal. Thus they will to a greater or lesser extent suffer disadvantage and loss including loss of liberty and reputation.

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

An unsafe or wrong conviction may have occurred for any of a number of reasons. Someone may be to blame or there may have been no fault on anybody's part. It may arise from something that happened at the trial, e g erroneous expert evidence, or outside court, e g undiscovered evidence. There may have been some defect in the conduct of the trial like the failure of the judge or counsel to anticipate a restatement of the law by an appellate court. There is no need to proliferate examples; the diverse and various possibilities will be well within the experience of any one actively engaged in the criminal justice system. It will also be readily appreciated that some of these factors may be apparent at the conclusion of the trial; others may only come to light much later.

The payment of monetary compensation is something upon which Parliament has spoken. The statutory policy is set out in section 133 of the Criminal Justice Act 1988 (as amended by section 28 of and Schedule 2 to the Criminal Appeal Act 1995). This provides, under the sidenote "Compensation for miscarriages of justice":

> "(1) Subject to subsection (2) below, when a person has been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows beyond reasonable doubt that there has been a miscarriage of justice, the Secretary of State shall pay compensation for the miscarriage of justice to the person who has suffered punishment as a result of such conviction or, if he is dead, to his personal representatives, unless the non-disclosure of the unknown fact was wholly or partly attributable to the person convicted.
>
> "(2) No payment of compensation under this section shall be made unless an application for such compensation has been made to the Secretary of State.
>
> "(3) The question whether there is a right to compensation under this section shall be determined by the Secretary of State. "(4) If the Secretary of State determines that there is a right to such compensation, the amount of the compensation shall be assessed by an assessor appointed by the Secretary of State.
>
> "(4A) In assessing so much of any compensation payable under this section to or in respect of a person as is attributable to suffering, harm to reputation or similar damage, the assessor shall have regard in particular to—(a) the seriousness of the offence of which the person was convicted

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A and the severity of the punishment resulting from the conviction; (b) the conduct of the investigation and prosecution of the offence; and (c) any other convictions of the person and any punishment resulting from them.

"(5) In this section 'reversed' shall be construed as referring to a conviction having been quashed—(a) on an appeal out of time; or (b) on a reference—(i) under the Criminal Appeal Act 1995 . . .

B "(6) For the purposes of this section a person suffers punishment as a result of a conviction when sentence is passed on him for the offence of which he was convicted."

The statute distinguishes between those factors which come to light in time to be considered on a normal first appeal to the Court of Appeal (no compensation) and those which only come to light later (potential C compensation). Similarly it distinguishes between new (or newly discovered) facts and errors of law or other non-factual matters. There is a statutory policy, reflected also in the way in which the Home Secretary exercises his discretion, which strikes a balance between those encounters with the criminal justice system which the state should compensate and those which it should not. The discretionary element is similar to that contained in the criminal injuries compensation scheme. Those who have D encounters with criminal activity are not all equally meritorious. The policy of the legislature (and executive) is not to provide indiscriminate compensation for erroneous convictions. To do so would be unacceptable in a liberal democratic society. My Lords, we should respect that assessment of the public interest and the needs of our society.

To provide a tort based liability to pay compensation in respect of the role E of only one of the participants in the criminal justice system would not only destroy this balance but also produce a capricious distribution of compensation between ultimately acquitted defendants. If a defendant could say that *a* (I stress, *a*) cause of his conviction was the fault of his advocate, he would recover full civil damages; if it was the fault of anyone else involved in the trial, he could not recover anything unless he came within the scope of section 133. From the defendant's point of view, it F would be an arbitrary lottery and produce anomalies between one defendant and another. As a matter of statutory policy, it would provide a route by which the statutory limitations and safeguards built into section 133 could be avoided. From the point of view of the administration of justice it would expose the professional advocate to a risk of litigation which would handicap him in performing his duty under the criminal justice system and G disinterestedly assisting, particularly at the appellate level, in the correction of errors and remedying miscarriages of justice. To argue for a higher need for a supposed redistributive justice to enable the defendant to recover civil damages from his advocate, begs the question where the greater justice lies in relation to criminal litigation as well as the question whether such a need is indeed higher than the need to facilitate as far as possible the rectification of miscarriages of justice within the criminal justice system.

H

Conclusion

In summary, there are essential differences between the civil and criminal justice systems. In the civil justice system, the nature of the advocate's role in the whole process, the nature of the subject matter, the legitimate interest of

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the client, the appropriateness of the tort remedy and the absence of clear or sufficient justification all militate against the recognition of an advocate immunity. It is not necessary: in certain respects it is counterproductive.

In the criminal justice system, the position is the reverse of this. The advocate's role, the purpose of the criminal process, the legitimate interest of the client, the inappropriateness of the tort remedy, the fact that it would handicap the achievement of justice, the fact that it would create anomalies and conflict with the statutory policy for the payment of compensation for miscarriages of justice, all demonstrate the justification for the immunity in the public interest and, indeed, the interests of defendants as a class.

To put it at its lowest, strong arguments exist for making a distinction between the civil and criminal justice systems and the respective need for advocate immunity within them. Because these appeals did not raise this question it was not specifically examined either orally or in written submissions before your Lordships or before any lower court. In my judgment there would be significant consequences of what would be a radically new approach to the administration of criminal justice and (without prejudging the outcome) these potential consequences call for a focused evaluation with the assistance of judgments of lower courts.

One of the consequences of the limited issues raised by these appeals has been that your Lordships have not heard argument upon the definition of what would be the scope of some limited immunity applying to criminal advocacy only. The questions of definition are certainly not of the same order as the problems which would exist for the civil advocacy immunity. It is clear that the same difficulties of delimitation do not exist in the criminal justice system as in the civil justice system. The distinction between civil and criminal proceedings is already well established and used but a view would have to be taken about judicial review proceedings relating to the criminal courts. As regards what comes under the heading of advocacy, there is a clear point of focus being the trial at which the guilt of the defendant is sought to be established. There are existing authorities (e g, *Somasundaram v M Julius Melchior & Co* [1988] 1 WLR 1394 and *Acton v Graham Pearce & Co* [1997] 3 All ER 909) which consider the scope of the immunity in the criminal justice system. Unlike in the civil system, the questions of delimitation are not such as to provide a reason for rejecting the immunity in the criminal system. But it is right that any necessary refinement and redefinition, whether by your Lordships or the Court of Appeal, should only result from a properly informed and considered argument directed to those points. The hearing of the present appeals has not been such an occasion.

The Hunter "solution"

Finally, I should refer to the suggestion that the *Hunter* principle [1982] AC 529 (sic) provides an adequate answer to any problem arising from the absence of an immunity in relation to criminal advocacy and therefore renders the immunity unnecessary and disproportionate. As I have explained already the *Hunter* argument does not address the relevant question or relate to the justification for the immunity in the criminal justice system. It is simply irrelevant and fails to understand the justification for the immunity. The immunity exists and should be maintained because it serves the public interest by making a significant contribution to the working of the criminal justice system and not because it provides protection to lawyers.

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A The suggestion has been developed into the formulation of a rule that would be a novel rule of public policy: that no civil action in negligence for breach of professional duty can be brought against an advocate in respect of the conviction of his client unless the conviction had first been set aside by an appellate court. That this would be a novel rule cannot be disputed. It would create an anomalous judge-made bar to a negligence action which B does not at present exist. The relevant concepts for the law of negligence are causation foreseeability and mitigation. It would need to be assimilated with the statutory law governing the limitation of actions in a way that it is probable that only Parliament should carry out (with or without the assistance of the Law Commission).

Hunter v Chief Constable of the West Midlands Police was a wholly exceptional case which had nothing to do with advocate liability. In the C *Hunter* case there was an abuse of the civil process by using it for the improper purpose of mounting a collateral attack on an adverse criminal decision. But a client suing his lawyer would argue that it was proper for him to use the civil process for the purpose of recovering compensation from his lawyer for breach of duty; indeed that is the only way in which he could enforce the civil obligation to pay such compensation under the law of tort. D Provided that the action was not wholly without merit and was bona fide brought for the stated purpose and there was no immunity upon which the lawyer was entitled to rely, the lawyer would have difficulty in sustaining an argument that the action was an abuse of process. To challenge in later litigation an earlier non-binding decision between different parties is not in itself abusive, provided there are grounds for doing so. So far as questions of law are concerned, the doctrine of precedent contemplates this. So far as E questions of fact are concerned, each court has to try and decide questions of fact upon the evidence adduced before it. Judicial comity and common sense take care of most of these situations in practice but the law does tolerate the possibility of apparently inconsistent decisions. The element of vexation is an aspect of abuse, the use of litigation for an improper purpose, trying to have repeated bites at the same cherry. The objectionable element is not the F risk of inconsistency.

The suggested new rule would give a status in the civil law to a criminal conviction which at present it does not have. Under the rule in *Hollington v F Hewthorn & Co Ltd* [1943] KB 587, the decision of a criminal court was not evidence of the truth of the facts upon which it was based. This principle applied to any decision of another court or tribunal which did not come G within the principles of res judicata as between the parties to the later action. Parliament modified this rule in relation to criminal convictions but it has not gone to the length proposed by the suggested new rule. Under section 11 of the Civil Evidence Act 1968 the person concerned is only to "be taken to have committed that offence [of which he was convicted] unless the contrary is proved". In other words, the conviction is not conclusive: cf section 13 relating to defamation actions. The relevant person (or anyone else with an H interest in doing so) is at liberty to prove that he did not commit the crime of which he was convicted. The suggested new rule would have, either expressly or by implication, to contradict this provision. If the existing law is to be changed in this way, it would again be a matter for Parliament and the Law Commission.

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The *Hunter* "solution" is not a solution and provides no argument for not continuing to recognise the existing advocate immunity in the criminal justice system.

Accordingly, my Lords, I would dismiss the appeals. The claims disclose causes of action against the appellants. The appellants are not entitled to an immunity in respect of the claims made against them in these actions.

LORD MILLETT My Lords. I have had the advantage of reading in draft the speeches of my noble and learned friends, Lord Steyn and Lord Hoffmann, with which I am in full agreement.

I understand that all your Lordships would abolish the advocate's immunity in civil proceedings, but that some of you would retain it in criminal cases. I readily acknowledge that the case for abolition is stronger in civil litigation, and given my lack of experience of the criminal justice system I have given anxious consideration to the views of those of your Lordships who would retain the immunity in criminal proceedings. I have, however, come to the conclusion that such a partial retention of the immunity should not be supported.

My reasons for this conclusion are twofold. In the first place, I think that to 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. There is a wide variety of cases tried before the magistrates which are for all practical purposes civil in character, and in which the retention of the immunity would be anomalous, but which are commenced by information or summons and which are classified as criminal proceedings. Conversely disciplinary proceedings before professional bodies are classified as civil proceedings but are criminal or quasi-criminal in character. Here the abolition of the immunity would be anomalous but its retention difficult to justify.

In the second place, even if the immunity were retained only in criminal cases tried on indictment, in which the liberty of the subject is at stake (and which is probably the kind of case your Lordships primarily have in mind), 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. The more thoughtful members of the public might well consider that we had got it the wrong way round.

These considerations persuade me that we ought not to retain the immunity in criminal proceedings in the absence of compelling reasons to do so. I acknowledge that there is a particularly high public interest in the efficient administration of criminal justice, that the need to ensure that the accused has a fair trial makes it difficult for the judge to intervene, and that both judge and defence counsel are likely to err on the side of caution. But that is the position today, despite the existence of the immunity. I have some scepticism in accepting the proposition that its removal will make matters significantly worse, and I observe that two of your Lordships with experience of criminal trials do not think that it will.

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A In my opinion the defending advocate in a criminal trial will retain formidable safeguards against vexatious attack even if he no longer enjoys a formal immunity from suit. His former client will not be allowed to challenge the correctness of the conviction unless and until it is set aside, and a claim which does not challenge the correctness of the conviction, like that in *Rondel v Worsley* [1969] 1 AC 191 itself, should normally be struck out as an abuse of the process of the court. The withdrawal of legal aid combined B with the new powers of the court to strike out hopeless claims even though they plead a good cause of action should make the great majority of unmeritorious claims still-born. But if the immunity from suit is retained for the moment in criminal cases alone, then sooner or later a case is bound to arise in which the House will be called on to reconsider the question. It will be a bad case involving a clear miscarriage of justice, for otherwise the C immunity will not be engaged. It will be a case in which the accused was plainly innocent but was wrongly convicted and served a term of imprisonment as a result of the gross incompetence of his counsel. The conviction will have been quashed on appeal, perhaps accompanied by severe criticism from the court of the conduct of the counsel who was responsible. And by the time the civil claim reaches the House, the public will have become accustomed to read of cases where advocates have been D successfully sued for incompetence in the course of civil proceedings even though far less than their client's liberty was at stake. Moreover, the Human Rights Act 1998 will be in force, and the House will have to reconsider the question in terms of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969)

I would grasp the nettle now. I believe that the general public would find E the proposed distinction indefensible. In the absence of compelling reasons to support it based on more than instinct or intuition, of which I can find none, I find it hard to disagree. I also think that it is difficult to defend a blanket professional immunity in terms of the European Convention for the Protection of Human Rights and Fundamental Freedoms. I would dismiss these appeals and declare that the advocate has no immunity from suit in relation to his conduct of proceedings whether civil or criminal.

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Appeals dismissed.

Solicitors: Weightmans, Liverpool; Hill Dickinson, Liverpool; Biddle.

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