The advocates' common law immunity

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1. Introduction

> Whatever the evidence may be, one thing is clear: Courts exist to solve in a civilised manner the disputes which one citizen has against another. To provide a satisfactory and successful alternative to self-help and revenge in the community, it is fundamental that the *Courts should give remedies to those who deserve them. To deprive an innocent litigant of a remedy against his negligent advocate* is to inflict a great deprivation on him. So great is it, that it *should not be done without the strongest justification.*[1] (emphasis added)

Grant's precis[2] of the cornerstone to those public policy arguments which weigh against a legal advocate's right to claim immunity[3] immediately focuses our attention on the merits or otherwise of an immunity shield which simultaneously:

(a) blunts the sword of liability for losses arising from negligent 'in court'[4] advocacy work; and
(b) strips the affected client of his/her ability to realise a legitimately expected remedy.

This focus has particular relevance in the wake of the Australian High Court decision in *Giannarelli v. Wraith.*[5] In that case, the Court revisited those public policy considerations which 'justify' the perpetuation of the immunity,[6] and in so doing excited, if not

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1 Grant, A., 'The Negligent Advocate' (1980) *NZLJ* 260 at 264.

2 While Grant's article refers specifically to the New Zealand approach to the 'advocates' immunity', it is submitted that his precis is equally relevant in Australia.

3 Hereinafter referred to as 'immunity'.

4 See below for a discussion of the phrase 'in court'.

5 (1988) 165 CLR 543 ("*Giannarelli*").

6 The 1964 decision of the House of Lords in *Hedley Byrne & Co. Ltd v. Heller & Partners Ltd* [1964] AC 465 unanimously determined that negligent misstatements may be actionable. As a result, clients of professionals, such as accountants and lawyers, are now able to sue the professional for losses caused by either breach of contract or negligent advice or both. As explained by Wilson J in *Giannarelli* (id at 565), the historical justification for the rule that clients could

invited, a critical evaluation of those 'policies' in the light of contemporary legal and societal values.

An examination of *Giannarelli,* literature on the issue and other cases dealing with the immunity reveals an underlying competition which seems both extraordinary and contradictory:

(a) on the one hand, proponents of the immunity recite the proper working of the courts and public confidence in the administration of justice[7] as the inspiration for public policy arguments favouring the retention of the immunity;
(b) on the other hand, opponents of the immunity claim to garner strength for their policy grounds from the fundamental legal tenet that courts should give remedies to those who deserve them.[8]

Clearly, these purported rubrics of clashing policy arguments should be interdependent, if not synonymous. Logic determines that such rubrics should not, and cannot, be at loggerheads. As a consequence, the challenge for an examiner of the immunity, in the Australian context, lies in:

(a) identifying and critically analysing the various policy grounds that the High Court in *Giannarelli* used to support the immunity; and
(b) playing those grounds off against the countervailing policy issues which support the abolition of the immunity.

Only then can we determine whether the respective sets of policy grounds really do support the particular rubrics which they claim as

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not sue barristers for 'in court' work was the absence of any contractual relationship between the two entities. However, the decision in *Hedley Byrne v. Heller* routed this justification. Accordingly, when the immunity issue subsequently came before the House of Lords in *Rondel v. Worsley* [1969] 1 AC 191, the House was forced to look elsewhere for some justification of the immunity. The House unanimously found justification for the immunity on public policy grounds. When the High Court of Australia came to consider the immunity in *Giannarelli* in 1988, a majority of four held that the common law immunity was operative in Australia and could be justified, to varying extents, on the public policy grounds cited in *Rondel* and later in *Saif Ali v. Sydney Mitchell & Co.* [1980] AC 198.

7 Law Reform Commission of Victoria, 1992, *Report No. 48—Access to the Law: Accountability of the Legal Profession,* Law Reform Commission of Victoria, Melbourne, 24.

8 Grant, fn. 1.

their own. Whichever set of policies fail to meet this criteria yield decisive ground to its opponent and, depending on which set of policy grounds gives strongest vent to both the rubrics highlighted above, we can decide whether the immunity should be retained or abandoned.

2. 'In court' advocacy work defined

As a preliminary matter, it is necessary to define the phrase 'in court'. Under *Giannarelli*, the expression 'in court' advocacy work encompasses:

(a) the advocacy work of barristers and solicitors in the courtroom;[9] and
(b) some legal work executed in anticipation of a court appearance.

The 'out of court' work denoted in the latter is thought to be 'so intimately connected with the conduct of the cause in Court"[10] that the same public policy considerations apply to both forms of work listed above.[11] It would, therefore, be incongruous to exclude all 'out of court work' from the benefit of the immunity.

Unfortunately, the vagaries of the term 'so intimately connected' render difficult the practical operation of the immunity umbrella. Nevertheless Mason CJ attempted to provide some guidance with his explanation that:

> It would be artificial in the extreme to draw the line at the courtroom door. Preparation of a case out of court cannot be divorced from presentation in court. The two are inextricably interwoven so that *the immunity must extend to work done out of court which leads to a decision affecting the conduct of the case in court.*[12] (emphasis added)

9 *Giannarelli*, fn. 5 at 559 per Mason J.
10 Id at 560 per Mason CJ, citing with approval McCarthy P in *Rees v. Sinclair* [1974] 1 NZLR 180 at 187.
11 Id at 559-560 per Mason CJ.
12 Ibid. Hereinafter the term 'in court' shall also refer to 'out of court'.

3. Policy grounds espoused by the High Court: an analysis of their strengths, weaknesses and countervailing policy issues

Taking a holistic approach to the judgments in *Giannarelli*, the majority judges[13] disclose numerous policy grounds which impacted on their reasoning that barristers and solicitor advocates ought to be immune from a suit in negligence by their clients. Nevertheless, these grounds can be condensed and presented in the form of four key policy rationales:

Minimising the length, number and cost of trials: advocates' duties to client and court and the importance of 'positive advocacy'

(i) Public policy ground

Fundamental to the orderly, efficient and proper administration of justice is the advocate's duty to conduct trials with candour and integrity.[14] This duty is owed to the court and it transcends any duty which the advocate may have to his client. The imposition of a duty of care for 'in court' work might undermine the advocate's ability to carry out his duty to the court fearlessly and independently. If the immunity was lost, fearlessness and independence may be replaced by 'defensive advocacy', and perceived threats of litigation may cause an advocate to fetter his duty to the court in favour of his/her duty to a client.[15] Better to be subservient than sued!

The argument is that any inhibition of an advocate's duty to the court, by abrogation of the immunity, potentially has a three-fold effect, namely:

(a) a diminution of the assistance which the advocate can and should provide to the court;

(b) the prolongation of trials as 'defensive'[16] advocates, mindful of the importance of appearing 'conscientious and competent',[17] might call excessive numbers of witnesses, ask unnecessary questions and 'refrain from pruning [their cases] of irrelevancies'.[18] Also flowing from such influx of 'defensive advocacy' would be a marked increase in legal costs; and

(c) increased delays in the hearing of all other cases.

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13 Mason CJ, Wilson, Brennan and Dawson JJ.

14 *Giannarelli*, fn. 5 at 556 per Mason CJ.

15 Id at 572-3 per Wilson J.

16 This is not to be confused with 'defence advocates'.

17 Osborne, P., 'Barrister's Immunity in New Zealand' (1986) *NZLJ* 17.

18 Ibid.

All of these anticipated ramifications are clearly against the public interest.

(ii) Criticisms

The 'defensive advocacy' argument and the speculation as to consequent perils are largely quelled by the realisation that any client would, except in cases of gross negligence, have great difficulty in establishing the 'standard of care' requirement. This difficulty is well articulated by the Law Reform Commission of Victoria:

> An error in making a 'close call' would not be negligence, and nor would it be negligence for an advocate to err in favour of his or her duty to the court. The circumstances and pressures under which advocates have to make decisions can all be taken into account when deciding what constitutes a breach of duty.[19]

A more practical flaw in a policy driven by fear of increased numbers, costs and lengths of cases arises from the fact that there is no empirical evidence instructive of the actual impact that the threat of being sued for non-negligent conduct would have on the judgment of advocates.[20] In any case, opposing advocates are always ready to object to lines of questioning and witnesses which appear irrelevant. Beyond this, the presiding judge retains some power to query and discontinue such conduct.

Finally, it is apparent that the forgotten factor in the speculation and warnings of those who support the immunity is that the vast majority of clients who consult lawyers regarding the 'in court' negligence of former advocates will have their pursuit chastened by advice that 'great deference will be given by the courts to an advocate's judgement of how a trial should have been run.[21]

(iii) Countervailing policy ground

The desire for uniformity of liability among the professions is a most compelling and logical policy argument. It is both preposterous and abhorrent that in the face of a powerful social ethos centred on professional accountability,[22] the advocate remains precious and removed from the same levels of scrutiny encountered by other

19 Law Reform Commission, fn. 7 at 47.
20 Ibid.
21 Ibid.
22 Mason, A., 'Legal Liability & Professional Responsibility' (1992) 14 *Syd LR* 131 at 134.

professionals.[23] Only the semantics of the Bar Council[24] would purport to bar the idea that, just as a doctor can be tried in relation to his/her administration of health care, an aggrieved client ought be able to sue his/her advocate for negligence 'in court'—the courtroom being an 'advocate's operating theatre'.[25]

Public interest demands that the current anomalies and inequities, as between the professions, be redressed. Logic suggests that a desirable consequence of a renewed uniformity would be improved advocacy standards. Both the public and the profession would, and should, embrace this opportunity.

Finality of litigation

(i) Public policy ground

An action based in negligence against an advocate necessitates a 're-trial' of the original case, be it criminal or civil in nature. Here, in order to show damage, the client must prove that the original action would have been successful, or *more* successful, had the action been conducted with due care and diligence. Chief Justice Mason put the problem most succinctly by describing the outcome of a successful negligence claim as a 'collateral attack'[26] on the original judgment. The most repugnant aspect of this 'attack' is that, while it impugns the original judgment,[27] mental gymnastics are required for the public to understand why the original decision remains correct in the eyes of the law.

Such a process will inevitably erode the ideal that litigation be final and will 'bring the administration of justice into disrepute.'[28] Further, it is feared that this new avenue of 'litigation by re-trial' would nurture a proliferation of litigation. Like 'defensive advocacy', this proliferation must choke already congested court lists.[29]

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23 Carey Miller, D.L., 'The Advocates Duty to do Justice: Where does it Belong?' (1981) 97 *LQR* 121 at 138.

24 See Victorian Bar Council, *Victorian Bar's Response to the Law Reform Commission of Victoria's Discussion Paper No.24: Accountability of the Legal Profession,* Victorian Bar Council, Melbourne, 35-36.

25 Ibid.

26 Or 'collateral proceedings': *Giannarelli*, fn. 5 at 558 per Mason CJ.

27 Henning, T., 'Update—Evidence Law 1991' (1992) 11 *U Tas LR* 241 at 243.

28 *Giannarelli*, fn. 5 at 573-4 per Wilson J. See also, Mason CJ at 558 and Dawson J at 594-5.

29 Id at 557 per Mason CJ. Victorian Bar Council, fn. 24 at 33.

Ultimately, it is argued that the immunity must remain if the public is to muster and retain confidence in the decisions which courts make, especially in the criminal sphere. It is against the public interest to have issues 're-litigated' before a differently constituted court where a finding of negligence on the part of an advocate may be more a product of the lapse of time and different evidence than an accurate reflection on the decision at first instance.

(ii) Criticisms

While the 'finality of litigation' policy rationale for the immunity appears the most cogent and compelling of those grounds relied upon in *Giannarelli,* the real basis of a successful claim in negligence against an advocate is that the case was not properly presented to a judge or jury at the subject original hearing. This is not to be confused with the very different, and wrong, idea that a successful negligence claim by a client means that the prior judge or jury has erred. For this reason, and in order to maintain public faith in the administration of justice, it is vital that claims against negligent advocates be couched in terms which emphasise that the client's remedy is redress for negligence during 'in court' advocacy work and is not a blight on the decision at the original trial.

It is persuasive also to note that the decision in *Re Knowles*[30] brings into question the notion that re-litigation is alien to our legal system. For one, our legal system institutes a host of appeal mechanisms. More significantly, however, this decision of the Full Court of the Victorian Supreme Court demonstrates that criminal convictions can be set aside where a miscarriage of justice to a client flows from his/her advocate's negligence.[31] This is so, whether or not the overruling of the earlier decision occurs outside the normal time for appeal.

(iii) Countervailing policy grounds

Despite the relative strength of the public policy behind the 'finality of litigation' principle, it is submitted that to retain the immunity is to ignore the public interest in ensuring that those whose negligence causes harm to others are subject to claims for compensation. The latter policy base emerges as stronger than the former when coupled with the realisation that the continued failure to provide a remedy:

(a) causes enormous harm to public respect for the law;[32] and

30 [1984] VR 751.

31 Law Reform Commission, fn. 7 at 49.

32 Cf Victorian Bar Council, fn. 24 at 33.

(b) fosters the perception that 'barristers, with the connivance of judges, [have] built for themselves an ivory tower and have lived in it ever since at the expense of their clients'.[33]

The injustice involved in denying a client his/her usual rights to compensation must outweigh the public interest in judgements being final.

The 'cab-rank' principle

Whilst the 'cab-rank' principle and 'privilege'[34] were referred to in *Giannarelli*, they assume far less import than those policy issues debated above. Perhaps this lack of emphasis is a concession on the part of the High Court to the inherent weakness of the 'cab-rank' principle and 'privilege' as policy bases. Whatever the reason for this lack of emphasis, they are deserving of some attention, if only for their persistent appearance in immunity cases since *Rondel v. Worsley*.[35]

(i) Public policy ground

The 'cab-rank' principle has application only to barristers.[36] In essence, it imposes an obligation on barristers to accept the brief of any client who is capable of meeting the barrister's fee. A common sense proviso does, however, apply so that the barrister need not accept the brief if it is not 'in a field in which the counsel ordinarily practises',[37] or if he/she is 'otherwise committed'.[38] The obligation holds firm irrespective of the unpopularity, obstinacy and/or offensiveness of the person seeking representation.[39] Further, the obligation stands regardless of the fact that the client may be the type of person to engage in a vexatious negligence claim against the barrister.[40]

The basis of this 'principle' is not entirely clear, though it appears to be premised on the idea that without it, 'it would be

33 *Giannarelli*, fn. 5 at 575 per Wilson J, quoting from *Rondel v. Worsley* [1967] 1 QB 443 at 468.
34 Examined below.
35 Fn. 6.
36 Solicitor advocates are not harnessed by any such obligation.
37 *Giannarelli*, fn. 5 at 580 per Brennan J.
38 Ibid.
39 Ibid. Grant, fn. 1 at 262.
40 Veljanovski, C.G. and Whelan, C.J., 'Professional Negligence and the Quality of Legal Services—An Economic Perspective' (1983) 46 *MLR* 700 at 712.

difficult to bring unpopular causes to court and the profession would become the puppet of the powerful.'[41] What is objectionable to barristers is that if the immunity were removed, an enforceable duty of care would be imposed, as regards the client, despite the fact that the barrister has not voluntarily entered into the relationship. Barristers therefore rely on the policy that they should not be involuntarily exposed to a duty of care, especially in the case of clients who demonstrate a likelihood, or even eagerness, to sue the barrister for any negligence.

(ii) Criticisms and countervailing policy grounds

The key criticism of the 'cab-rank' justification for a retention of the immunity is the countervailing policy ground that barristers represent themselves to the public as having special knowledge and skill in the practice of advocacy. In view of such representations, it is sensible, and not unduly onerous, to demand that barristers act with reasonable competence towards all clients.[42] The fact that a barrister may be 'obliged' to represent some clients is irrelevant.

Absolute privilege: freedom of judgement and decision making

(i) Public policy ground

Finally, and perhaps least convincingly, the common law immunity is proclaimed as the keeper of what the Victorian Bar calls 'a higher interest'.[43] Allegedly at stake here is the largely intangible notion of 'the advancement of public justice',[44] with this 'advancement' only being possible if advocates are accorded the same protection for decisions made 'in court' as those made by judges and jurors. The supposed 'higher interest' can only be properly realised and served if those advocates who form an integral part of the system of justice, together with judge, jury and witnesses, are granted 'freedom of judgement'.[45]

In claiming this policy ground, the proponents of the immunity draw an analogy with the 'freedom of speech' privilege which is afforded to judges, witnesses, jurors and advocates alike. Just as this privilege assists in the administration of justice by allowing participants in court proceedings to 'speak and act freely, within the rules laid down',[46] without being diverted or impeded in the

41 *Giannarelli*, fn. 5 at 580 per Brennan J.
42 Osborne, fn. 17 at 18.
43 Victorian Bar Council, fn. 24 at 29.
44 Ibid.
45 Ibid.
46 *Giannarelli*, fn. 5 at 595 per Dawson J.

performance of their primary duties by the threat of private litigation,[47] it is both imperative and congruous that a like privilege be extended to an advocate's judgments and decisions.

(ii) Criticisms

The claim that the immunity should follow from the immunity awarded to judges, witnesses and jurors at trial is a tenuous one. While on one hand an advocate has the 'opportunity' to be negligent in his/her investigative and decision making role, on the other, a judge has no such investigative role and a wrong decision will invariably be due to an error of judgment, rather than negligence.[48] It is not consistent or desirable for the privilege to protect negligent investigations and decisions on the part of counsel which later lead to a 'wrong' decision by the trier of fact.

(iii) Countervailing policy grounds

Again, it is more desirable that the immunity be rescinded on the basis that it runs contrary to the public policy of uniform accountability as between the professions. Just as representations of special skill, knowledge, training, and the preservation of a client's best interests, bind other professionals,[49] public interest mandates that similar representations by an advocate should furnish an enforceable duty of care.[50]

4. Conclusion

Public policy has been variously described as equating with 'an unruly horse'[51] and 'shifting sands'.[52] The ominous quality which these characterisations share is no doubt generated by the fear of judicial uncertainty which rides with a decision making vehicle whose framework may change from time to time and from society to society. Nevertheless, with respect to the advocates' immunity, the apparent 'unruliness' and pliability of public policy may prove a critical weapon in combating the advocates' shield against client remedies for negligent 'in court' work.

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47 Victorian Bar Council, fn. 24 at 28-9.

48 Osborne, fn. 17 at 18.

49 Ibid.

50 Glover, G., 'Barrister's Immunity' (1979) 9 *Family Law* 31 at 32.

51 Hutchinson, A., 'Negligence—Barrister—Immunity from Action for Negligence at the Suit of his Clien—Extent of Immunity—Another Swing of the Pendulum' (1979) 57 *Can Bar Rev* 333 at 346.

52 Grant, fn. 1 at 264.

The 'great deal of public controversy'[53] fuelled by the *Giannarelli* decision has facilitated the formulation and articulation of numerous public policy arguments which run contrary to those policies which the majority of the High Court saw as vindicating the immunity. This in turn has necessitated an analysis, comparison and contrast of the policy considerations which spring from the immunity issue. Each policy ground emerges from the conglomerate, bearing its own particular merit proportional to its relevance in the present social, legal and economic climate. Such is the nature of 'public policy'.

When balanced against the merits of the countervailing policy grounds, it is submitted that the public policy bases relied on in *Giannarelli* assume such an inferior position that it is very difficult to justify the continuation of the immunity.

Returning to Grant's precis,[54] it is certainly not possible to satisfy his demand for 'the strongest justification'[55] for 'depriv[ing] an innocent litigant of a remedy against his negligent advocate'.[56] Hence, while it would be both rash and disrespectful to completely dismiss the views of either those High Court judges who found in favour of the immunity in *Giannarelli,* or the protesters at the Victorian Bar, their views manifest as more of an apology than a 'strong justification' for the 'deprivation'[57] lamented by Grant.

We can conclude, therefore, that the legal rubrics:

(a) there must be proper working of the courts and public confidence in the administration of justice; and
(b) the courts should give remedies to those who deserve them,

do, in fact, enjoy a symbiotic existence. However, in the context of an advocate's liability for losses arising from negligent 'in court' advocacy work, this interdependence will not function until the common law immunity is expressly removed by legislative intervention or up-ended by the High Court itself.

Interestingly, a hint that the High Court might entertain at least some amendment to the immunity rule can be found in Brennan J's foreboding:

53 Law Reform Commission, fn. 7 at 25.
54 See 'Introduction' to this article.
55 Grant, fn. 1 at 264.
56 Ibid.
57 Ibid.

> If counsel generally were to fail to adhere to the standards of advocacy which the courts expect and on which they rely, there would be no justification for the immunity ...[58]

The departure of two of the four majority judges in *Giannarelli*, namely Mason CJ and Wilson J, from the High Court, and Brennan's appointment as the new Chief Justice provides new hope that the immunity will be altered or abandoned when the issue next comes before the High Court. It is hoped that both *Giannarelli* and the immunity will be buried by the shifting sands of public policy.

58 *Giannarelli*, fn. 5 at 579-580 per Brennan J.