House of Lords Overturns Barristers' Immunity

By Justin Gleeson

The House of Lords delivered judgment in the matter of *Arthur JS Hall & Co v Simons (A.P.)* on 20 July 2000. A bench of seven Law Lords held that the traditional immunity from suit conferred on barristers in respect to in-Court work should be abolished. The following points may be noted about the judgment:

(1) The facts of the case concerned a negligence claim against solicitors in respect to advice given on settlement of an action. The solicitors claimed immunity from suit because their advice was related to how the matter would run in Court. The Court of Appeal had rejected this on traditional grounds. However, the House of Lords considered the matter on the basis that it raised the more general question of immunity from suit of both barristers and solicitors when acting as advocates;

(2) The House of Lords gave leave to intervene to Counsel for the English Bar Council;

(3) The House of Lords conducted a wide ranging review of the policy reasons which were held in *Rondel v Worsley (1969)* 1 AC 191 and *Saif Ali v Sydney Mitchell & Co* (1980) AC 198 to justify the immunity. Those decisions were held not to have been wrongly decided at their time but to be incorrect at the present day;

(4) The major considerations leading to the reversal of the previous rule included:

(a) new rules had been introduced in England in 1990 entitling the Court to make cost sanctions against advocates, which rules had not produced any difficulty;

(b) there had been considerable criticism of the rule in *Rondel v Worsley* by academics and indeed by certain journal articles by individual barristers;

(c) the cab rank rule was not a particularly relevant consideration: it did not often oblige barristers to undertake work which they would not otherwise accept;

(d) the public policy against re-litigation could not support the present breadth of the immunity. In particular, it could not extend to cases where there was no verdict by jury or decision by the Court. In any event the public interest was sufficiently protected by independent powers of the Court to prevent abuse of process. Those powers included the power, in criminal cases, to strike out a negligence claim by an unsuccessful accused against the barrister on the basis that it was a collateral attack on the criminal verdict (*Hunter v Chief Constable of West Midlands Police* [1982] AC 529);

(e) the fact that barristers had a conflicting duty to the Court was not a sufficient reason to maintain the immunity. It would never be negligent to comply with any over-riding duty to the Court;

(f) some of the Lords relied upon the fact that there was no immunity from suit for advocates in the European Union (i.e. basically civil law systems) or in Canada and that, empirically, few problems had emerged there. It was noted that in Australia and New Zealand there was such an immunity;

(g) the prospect of vexatious suits against barristers could be dealt with by the Court's powers of summary dismissal;

(h) removal of the immunity would end an anomalous exception to the basic premise that there should be a remedy for a wrong.

(5) A minority of the Law Lords would have retained the immunity for criminal cases.

Without being exhaustive, some criticisms which might be levelled at the House of Lords decision include:

(1) Factually, the case was an inappropriate vehicle for consideration of removal of barristers' immunity. As some of the Law Lords recognised, the assertion by the solicitors that they were entitled to immunity from suit could have been rejected validly on traditional authority because there was not an intimate connection between their allegedly negligent advice on settlement and the conduct of proceedings in Court. A far reaching change such as removal of immunity would be better considered on the facts of a case clearly coming within the core ambit of the immunity such as, for example, a barrister taking a decision in the strategic conduct of a case where the balance of professional opinion was that the course was inappropriate;

(2) The House of Lords claimed to have acted on an empirical basis: that there were no problems in systems such as Canada or the United States where the immunity was lacking. However, so far as appears from the judgment, the evidential record which entitled these empirical conclusions to be drawn was remarkably thin. Further, the standard of negligence in Canada against advocates is far higher than the ordinary negligence standard adopted by the House of Lords. The Canadian advocate is liable only for 'egregious errors' or 'in a clear and exceptional case': See *De Marco v Ungaro* (1979) 95 DLR(3d) 385 at 405, *Karpenko v Paroian, Courey, Cohen & Houston* (1980) 117 DLR(3d) 383 at 397, *Pelky v Hudson Bay Insurance Co* (1981) 35 OR(2d) 97 at 113-114 and *Sherman v Ward* (1998) 10 WWR at 768.

(3) There was no detailed consideration by the House of Lords of the American legal experience where the immunity has never been established (except for prosecutors in criminal trials). It could be forcefully argued that to remove the immunity is to push English advocates closer to the American model of no cab rank rule, fusion of the profession, unlimited contingency fees and lesser duties to the Court;

(4) Although most of the Lords thought that the cab rank rule had little role to play in practice, this may understate its less overt effects: the rule has force not simply because the majority of barristers day in day out are consciously forced to accept a brief for an unpleasant cause or client, but rather because it underpins an accepted culture well-known to barristers and solicitors and explained to clients that the barrister acting for a client or solicitor one day may be acting against that client or solicitor another day; and that there will not usually be that intensely close relationship between barrister and client which inhibits objective judgment and advice and fearless performance of duties to the Court;

(5) The duty to the Court issue cannot be disposed of simply on the basis that it would never be negligent to obey an over-riding duty to the Court. What if there is doubt whether the duty to the Court in a particular case requires the barrister to take a course which is harmful to the clients interests? Can the barrister be held liable in negligence to the client if the barrister has mistakenly given preference to the duty to the Court? If so, does this not encourage lesser rather than full compliance with that duty?

(6) The Law Lords gave little practical analysis to the problems of re-litigation which will emerge in proving damages in negligence suits against barristers. Where the alleged negligence of the barrister had the effect that a witness was not cross-examined in a particular way or a particular submission was not put to a judge, the best evidence in the barrister's defence may be to call that witness or judge in the negligence trial. That would present all sorts of difficulties with the immunity which judges and witnesses now share for their participation in legal proceedings. It is no ready answer to say that the issue is not what that particular judge would have done but rather what an objective rational judge would have done. What of the situation where the advocate is sued for negligence in relation to advice given during the conduct of proceedings that settlement is reasonable, such settlement being subsequently approved by the Court? The barrister accused of negligence would not be in a position to call the judge to demonstrate reasonableness of the settlement: see *Kelley v Corston* [1998] QB 686 at 701-2;

(7) In the criminal context, the majority of the Law Lords thought that there was sufficient protection against the evils of re-litigation by the abuse of process doctrine which ordinarily would require the disappointed accused to exhaust appeal rights before bringing a negligence action against the barrister. However even assuming a successful appeal is brought, is the accused to be permitted to seek damages for, say, the extra two years spent in detention between the date of the allegedly negligent conduct of the criminal trial and the date of their successful appeal? How are those damages to be assessed? Does not the assessment of those damages of itself bring the system into disrepute?

(8) There is no analysis in the House of Lords judgment of the consequences of unlimited liability in civil matters where large sums are involved. Take a purely hypothetical case of a former contractor suing a bank for a vast sum of damages arising out of an alleged breach of contract. If the contractor fails in whole or in part, the contractor may then sue the barristers asserting, for example, that the heads of damage were not presented in a proper fashion; or that there was a failure to advise on particular risks in the litigation which the barrister should have known were relevant to that client (compare *Rogers v Whitaker* (1992) 175 CLR 479). The contractor then sues on a loss of opportunity basis seeking the amount of damages which would have been recovered but for the alleged negligence, discounted by a factor to allow for the possibility that the case may have failed for other reasons. Such claims may far exceed the limits of any available insurance policy. Is the barrister still required to take the case under the cab rank rule? Is the barrister permitted, under ethical standards, to set a fee vastly in excess of what is currently considered to be reasonable, to take into account a risk of such magnitude? Will the barrister engage in the most defensive form of lawyering in order to minimise that risk? Will there be an endless cycle of re-litigation of the claim (first the client suing the bank, then the client suing the barrister, then the client suing the second barrister for the negligence of the first barrister, etc)? Will not the economic pressure on the barrister be to transfer the risk to a firm (or corporation) of lawyers, posing a threat to an independent Bar?

(9) Perhaps ironically, a somewhat differently constituted House of Lords in the subsequent decision of *Darker v Chief Constable*, delivered 27 July 2000, has affirmed that all witnesses have absolute immunity from suit from all claims for things said or done by them in the ordinary course of Court proceedings or in the prior preparation of their evidence, including proceedings on the ground of negligence. It was thought that the policy reasons supporting this immunity remained sound. Those reasons included avoiding a multiplicity of actions and encouraging freedom of speech and communication in judicial proceedings by relieving witnesses from the fear of being sued for something they say. So, in the UK, if a party's case goes off the rails because of, say, careless rulings on evidence by the judge, careless presentation of evidence by the witness and the barrister failing to meet the ordinary standard of care and skill in preventing or remedying the careless conduct of the other participants in the proceedings, all those matters can be raked over in a second suit but with only one of the actors liable to pay damages. The barrister has no right to obtain contribution from the careless witness or judge. If this disparity is to remain as a matter of general law, would it be objectionable to public policy for the advocate to contract with the client that the advocate will have the same immunity as the law confers on the witnesses and the judge in the proceedings?

Counsel in Australia should proceed on the basis that there is a real risk that the High Court might grant special leave in a future case so as to reconsider the immunity. The High Court might be persuaded to follow the English lead. There is also the question, touched on briefly in *Boland v Yates* (1999) 167 ALR 575, whether in any event Counsel may have a liability for misleading conduct under section 42 of the *Fair Trading Act 1987 (NSW)* or its interstate equivalents, which is not the subject of the common law immunity.

In this uncertain climate, barristers should give further consideration to matters such as providing (or ensuring the solicitor has provided) the client with a written disclosure of the inherent risks and uncertainties of litigation, including the need to make various decisions on the run, not all of which can be explained to the client beforehand and some of which the client will not have the ultimate say in; improved note taking practice in respect to advice given or strategic decisions taken during the course of litigation; and further consideration of exemption or limitation of liability clauses.