

## BURNING DOWN THE HOUSE TO ROAST THE PIG: THE HIGH COURT RETAINS ADVOCATES' IMMUNITY

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### I INTRODUCTION

In the not so distant past, one could quite confidently predict legal trends in Australia by following developments in other common law jurisdictions (particularly England), secure in the knowledge that Australia would follow suit sooner or later. However, Australia now seems set on doing exactly the opposite of other common law systems. One of the early signs of this shift involved the adoption of bills of rights. As Canada, New Zealand and the UK all enacted bills of rights in one form or another,<sup>1</sup> Australia steadfastly refused to follow suit – with the federal government denying the need for any legislative protection of human rights.<sup>2</sup>

The most recent evidence of the High Court's determination to 'walk alone' is its decision in *D'Orta-Ekanaike v Victorian Legal Aid*<sup>3</sup> ('*D'Orta*'). The High Court considered the House of Lords decision in *Arthur J S Hall v Simons*<sup>4</sup> ('*Arthur Hall*') where advocates' immunity<sup>5</sup> was abolished, but reached the opposite conclusion. Both the House of Lords and the High Court acknowledged the important role that maintaining the finality of court decisions played in the administration of justice. Both courts recognised that giving immunity to advocates assisted in achieving this objective. However, the House of Lords was of the opinion that to continue protecting barristers and solicitors in this way was 'burning down the house to roast the pig; using a broad-spectrum remedy when a

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1 *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) cl 11, Pt I (*Canadian Charter of Rights and Freedoms 1982*); *Bill of Rights Act 1990* (NZ); *Human Rights Act 1998* (UK) c 42.

2 Some Australian state and territory governments are, however, taking initiative in this regard. The Australian Capital Territory has enacted the *Human Rights Act 2004* (ACT), and the Victorian Government is currently engaged in community consultation to determine whether Victoria should enact a charter of rights.

3 (2005) 214 ALR 92.

4 [2000] 3 All ER 673.

5 Advocates' immunity refers to the common law doctrine under which barristers and solicitors (acting as advocates) are immune from liability, ie, they have a complete answer to claims of negligence, for work done in court, or work done out of court that is intimately connected with the court proceedings.

more specific remedy without side effects can handle the problem equally well'.<sup>6</sup> It seems the Australian High Court's demand for pork requires that the piggery be burnt down.

The High Court also considered the New Zealand case of *Lai v Chamberlains*,<sup>7</sup> ('*Lai*') but again the majority<sup>8</sup> elected to take a different path. They went against the global trend of abolishing the 200 year old doctrine of advocates' immunity, preferring to follow its own earlier decision in *Giannarelli v Wraith*<sup>9</sup> ('*Giannarelli*'). This paper argues that it would have been preferable for the High Court to adopt the modern reasoning of overseas courts and accept that public policy and changes in the law of negligence no longer justify the retention of advocates' immunity. The majority's decision to retain barristers' immunity from liability not only exposes them to criticism of protecting their own,<sup>10</sup> but also places Australia, once again, out of step with the majority of the common law world.

On one view, *D'Orta* can be seen as a case involving no more than a narrow question of statutory interpretation.<sup>11</sup> However, by far the more interesting aspect of the case is the High Court's discussion regarding the public policy surrounding advocates' immunity, and its interpretation of how such policy justifies its retention. In order to give context to the High Court's decision in *D'Orta*, it is necessary to begin with an analysis of the Court's earlier pronouncement on this issue in *Giannarelli*, as well as to examine how other jurisdictions have recently dealt with advocates' immunity.

Barristers have enjoyed a number of traditions that have, over time, been abolished, including their exclusive rights of audience in courts; clients being prohibited from directly briefing counsel; senior counsel being restricted from appearing in court without a junior; and barristers not being entitled to sue for their fees. The removal of each of these rules, while generally resisted by the Bar, did not lead to the disastrous consequences that it feared. This article argues that it is time for advocates' immunity, another arcane relic of a bygone era, to be similarly eradicated.

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6 *Arthur Hall* [2000] 3 All ER 673, 703 (Lord Hoffmann).

7 [2005] NZCA 37 (Unreported, Anderson P, McGrath, Glazebrook, Hammond and O'Regan JJ, 8 March 2005).

8 The majority consisted of Gleeson CJ, Gummow, Hayne and Heydon JJ; McHugh and Callinan JJ delivered separate concurring decisions; Kirby J dissented: *D'Orta v Victorian Legal Aid* (2005) 214 ALR 92.

9 (1988) 165 CLR 543.

10 See, eg, Barry Cohen, 'Why Lawyers are a Protected Species', *The Age* (Melbourne), 16 March 2005.

11 In particular the meaning of s 10 of the *Legal Profession Practice Act 1958* (Vic).

## II THE *GIANNARELLI* DECISION

Much has already been written about the High Court's decision in *Giannarelli*<sup>12</sup> so all that is required here is a brief refresher of that case.

*Giannarelli* involved three brothers convicted of perjury under s 314 of the *Crimes Act 1958* (Vic). The entire case against the accused was based on the sworn testimony they had given to the Commonwealth and Victorian Royal Commission into the Federated Ship Painters' and Dockers' Union. Their testimony was adduced by the prosecution at their trial without objection, notwithstanding that s 6DD of the *Royal Commissions Act 1902* (Cth) ('*Royal Commissions Act*') renders such evidence inadmissible in any subsequent criminal proceedings. On appeal, the High Court quashed the convictions in reliance on s 6DD, a defence raised for the first time in the High Court.<sup>13</sup>

Two of the brothers sued their barristers claiming that they were negligent in failing to raise s 6DD of the *Royal Commissions Act* as a defence. By a narrow majority of four to three<sup>14</sup> the High Court upheld advocates' immunity. While much of the decision turned on the interpretation of s 10 of the *Legal Profession Practice Act 1958* (Vic), both the majority and minority spent considerable time commenting on the public policy issues that attach to advocates' immunity.

Chief Justice Mason justified advocates' immunity on two grounds: advocates are unique in owing a duty not only to their clients but also to the court; and there would be adverse consequences to the administration of justice if collateral proceedings were allowed in order to determine whether there had been negligence in the principal proceedings.<sup>15</sup>

His Honour referred to the real risk that counsel's conduct of a case would be influenced by an exposure to potential liability in negligence and that some barristers would be inclined to 'act as mere agents of their clients to the detriment of the interests of the court and of the administration of justice generally'.<sup>16</sup> It is respectfully submitted that this argument has little merit. The vast majority of barristers take their responsibilities as officers of the court very seriously and are unlikely to conduct a case in a manner that would violate these responsibilities

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12 See, eg, George Hampel and Jonathan Clough, 'Abolishing the Advocate's Immunity from Suit: Reconsidering *Giannarelli v Wraith*' (2000) 24 *Melbourne University Law Review* 1016; Matthew Groves and Mark Derham, 'Should Advocates Immunity Continue?' (2004) 28 *Melbourne University Law Review* 80.

13 It is interesting to observe the remarkable similarities between the facts of *Giannarelli* and the recent High Court decision in *Fingleton v The Queen* (2005) 216 ALR 474, in which the High Court quashed the conviction of the former Queensland Chief Magistrate because of immunity which the appellant enjoyed pursuant to s 21A of the *Magistrates Act 1991* (Qld). As in *Giannarelli*, this defence had been missed by the appellant's legal advisors and was raised for the first time in the High Court. Like the *Giannarelli* brothers, Ms Fingleton will have no recourse against her legal team for negligence.

14 The majority consisted of Mason CJ, Wilson, Brennan and Dawson JJ; Toohey, Deane and Gaudron JJ dissenting.

15 *Giannarelli* (1988) 165 CLR 543, 555.

16 *Ibid* 557.

and thus expose them to professional sanction.<sup>17</sup> While advocates can insure themselves against professional negligence, there is no insurance that will protect them against disbarment or other professional sanction. Furthermore, since the duty to the court always overrides the duty to the client, abiding by the former would never constitute a breach of the latter.

The majority in *Giannarelli* found support for their views in two House of Lords decisions, *Rondel v Worsley*<sup>18</sup> ('*Rondel*') and *Saif Ali v Sydney Smith Mitchell & Co*<sup>19</sup> ('*Saif Ali*'). It is interesting to contrast the readiness to follow the House of Lords that the majority of the High Court demonstrated in *Giannarelli* with the lengths that a differently constituted High Court went to in *D'Orta* to justify not following that same Court's jurisprudence. For example, in *Giannarelli*, Wilson J stated:

I draw support in this regard from the decision in *Rees v Sinclair*, where the Court of Appeal of New Zealand held the law enunciated in *Rondel* to be relevant and appropriate to New Zealand. ... Overall, I find the reasoning in *Rondel* more in tune with what the public interest in the due administration of justice required in Victoria in 1891 and with what it still requires in Australia today.<sup>20</sup>

Likewise, Dawson J stated that he had 'reached the conclusion that the reasoning upon which the two English decisions are based has a clear application here and that those cases ought to be followed'.<sup>21</sup>

When the High Court looked at the issue again some 17 years later, the majority declined to follow the more recent reasoning of the House of Lords, which as noted above, had abolished advocates' immunity:

This Court decided, as long ago as 1963, that it would no longer 'follow decisions of the House of Lords, at the expense of our own opinions and cases decided here' ... where a decision of the House of Lords is based, as is its decision in *Arthur J S Hall v Simons*, upon the judicial perception of social and other changes said to affect the administration of justice in England ... there can be no automatic transposition of the arguments found persuasive there to the Australian judicial system.<sup>22</sup>

As discussed below, the High Court's reason for not following the House of Lords' reasoning – the influence of European instruments and social changes – overstate these perceived differences and are, at best, a dubious justification for retaining advocates' immunity.

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17 Both formal sanction, eg, by the Ethics Committee of the Victorian Bar, which investigates complaints, and informal sanction which occurs when 'word spreads' about a barrister's conduct and briefs cease to be directed to that barrister.

18 [1969] 1 AC 191.

19 [1980] AC 198.

20 *Giannarelli* (1988) 165 CLR 543, 577–8.

21 *Ibid* 596.

22 *D'Orta* (2005) 214 ALR 92, [59]–[60] (Gleeson CJ, Gummow, Hayne and Heydon JJ) (references omitted).

### III THE *D'ORTA* DECISION

#### A Facts

Mr Ryan D'Orta-Ekenaike (the applicant) was charged with rape in February 1996. He retained Victoria Legal Aid (the first respondent) as his solicitor. Mr McIvor, the second respondent, a barrister practising at the Melbourne Bar, was retained by the first respondent to represent the applicant in the Magistrates' Court at the committal proceedings. At these proceedings, the applicant pleaded guilty. However, at his trial, he changed his plea to not guilty. The prosecution was allowed to lead evidence of his earlier plea of guilty, and the applicant was duly convicted and sentenced to three years imprisonment. Objection was taken to the admission of the guilty plea on the basis that it was made as a result of undue pressure by both respondents. However, the trial judge dismissed the objection, ruling that 'the Crown relies on the accused's plea of guilty at the Magistrates' Court as being an admission by him of every element of the offence, including that element relating to his state of mind'.<sup>23</sup> The accused was duly convicted and sentenced to three years imprisonment.

On appeal, the Victorian Court of Appeal set aside the verdict, quashed the conviction, and directed a new trial, on the ground that 'although the evidence of the applicant's guilty plea had been properly admitted in evidence, the trial judge had failed to give sufficient directions about the use that might be made of the plea'.<sup>24</sup>

On his re-trial, the applicant was acquitted after an objection to the admission of his guilty plea was upheld on a *voir dire*. The transcript of the retrial establishes that Duckett J ruled that the applicant had at all times asserted his belief that the complainant had consented to intercourse, and further, his solicitor admitted in evidence 'that she pressured [the accused] to plead guilty because, as she saw it, he would get the reward of a shorter term of imprisonment. ... She said that she was instrumental in the accused's failure to reserve his plea at committal'.<sup>25</sup>

Pausing here, it is submitted that advising clients to plead guilty at committal is a justifiable plea bargain tactic in cases in which there is clearly no defence, if only because it may result in a discount on sentence. However, a plea of guilty, being such a potent piece of evidence operating adversely against an accused, should rarely, if ever, be allowed into evidence if the case goes to trial on a plea of not guilty, since its prejudice is ineradicable. The belief that the impact on a jury learning of a revoked guilty plea can be undone by sufficient directions being given to a jury about the use that might be made of the plea is one of the less convincing fictions of the law.

Having been acquitted, the applicant commenced an action for damages in the County Court of Victoria against both respondents, alleging that by reason of his

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23 *R v D'Orta-Ekenaike* [1998] 2 VR 140, 147 (Winneke P), quoting *R v D'Orta Ekenaike* (Unreported, County Court of Victoria, Duckett J, 22 June 1998).

24 *R v D'Orta-Ekenaike* [1998] 2 VR 140, 146-7 (Winneke P; Brooking JA and Vincent AJA agreeing).

25 *D'Orta* (2005) 214 ALR 92, [234] (Kirby J), quoting *R v D'Orta Ekenaike* (Unreported, County Court of Victoria, Duckett J, 22 June 1998).

solicitor's breach of its retainer, and the barrister's breach of his duty of care, he suffered injury, loss and damage. Both respondents applied for a stay of the proceedings pursuant to r 23.01 of the County Court *Rules of Procedure in Civil Proceedings 1999* (Vic), which provides that a proceeding may be stayed 'if it does not disclose a cause of action, is scandalous, frivolous or vexatious, or is an abuse of the process of the Court'.

Judge Wodak, who heard the claim, acceded to the application on the basis that the claim did not disclose a cause of action. His Honour relied on *Giannarelli*, which he held decided that advocates – be they barristers or solicitors – were immune from actions for damages for negligently conducting cases in court, or making decisions out of court that were intimately connected<sup>26</sup> with conducting cases in court.

The applicant sought leave to appeal to the Victorian Court of Appeal.<sup>27</sup> That application was denied on the basis that it had not been shown that Wodak J was wrong, or attended by sufficient doubt to warrant a grant of leave. It was this order, dismissing the application for leave to appeal that came before the High Court by way of an application for special leave.

## B Majority Opinions

The majority in *D'Orta* consisted of the joint judgment of Gleeson CJ, Gummow, Hayne and Heydon JJ; McHugh and Callinan JJ each handing down separate judgments. The majority accepted that whether advocates should enjoy immunity from claims of negligence rested on considerations of public policy, but concluded that public policy justified retention of this immunity. The predominant public policy consideration relied upon by the majority related to the adverse consequence for the administration of justice that would flow from the relitigation, in collateral proceedings for negligence, of issues determined in the principal proceedings.

### 1 Chief Justice Gleeson and Gummow, Hayne and Heydon JJ

The joint judgment considered, and rejected, a number of public policy arguments which, in the past, had been used to support advocates' immunity. In particular they held that:

- (a) There is no connection between a barrister's supposed inability to sue for professional fees and immunity. This is irrelevant, as is whether the advocate does or does not have a contract with the client.
- (b) The argument that immunity is required in order to protect advocates against potential conflict between duties owed to a client and duties owed to the court is flawed. This is because there is no conflict since the duty to the court is always paramount. Furthermore, the question is whether there is immunity from suit, not whether an advocate owes a duty of care to a client.

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26 The 'intimately connected' test is drawn from *Rees v Sinclair* [1974] 1 NZLR 180.

27 *R v D'Orta-Ekenaike* [1998] 2 VR 140.

- (c) The ‘cab rank’ rule does not provide a sufficient basis to justify the existence of the common law immunity. In any event, it is irrelevant to solicitor-advocates.<sup>28</sup>
- (d) The fact that advocates must often make quick decisions in court is irrelevant and distracting.<sup>29</sup>
- (e) The ‘chilling’ effect that the threat of civil suit might have on an advocate’s conduct, while important, does not provide a basis on which immunity can be justified.<sup>30</sup>

Since the majority neatly disposed of these arguments in support of immunity, one may well ask: just what public policy did they rely on to support the retention of advocates’ immunity? Their Honours compared the liability of advocates to the liability of others involved in the judicial process. They noted that witnesses are immune from liability for their testimony on the basis of absolute privilege.<sup>31</sup> Similarly, judges<sup>32</sup> and jurors<sup>33</sup> enjoy immunity. Their Honours held that the immunity of witnesses, judges and jurors is based on ‘a central and pervading tenet of the judicial system ... that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances’.<sup>34</sup> The majority held that just as controversies cannot be relitigated if a witness, judge or juror has acted improperly, so too should relitigation be prohibited if an advocate breaches his or her duty of care to a client. Their rationale for this position was that:

No argument was advanced to this Court urging the abolition of judicial or witness immunity. If those immunities remain, it follows that the relitigation could not and would not examine the contribution of judge or witness to the events complained of, only the contribution of the advocate. An exception to the rule against the reopening of controversies would exist, but one of an inefficient and anomalous kind.<sup>35</sup>

It is respectfully submitted that to equate the role of advocates with the role of judges, witnesses and jurors is flawed. Judges and jurors have responsibilities as decision-makers which mean they do not, and should not, owe a duty of care to the parties litigating before them. Similarly, witnesses perform a unique role in providing evidence to the court on which decisions are based. They are required to give sworn testimony and can be prosecuted for perjury if they fail to tell the truth. Of all these ‘players’, only the advocate has a client, only the advocate is paid a fee to provide a professional service,<sup>36</sup> only the advocate has the role of strenuously arguing for the client’s desired outcome, and only the advocate owes a duty of care to his or her client. The advocate’s situation is much more akin to

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28 Note however, that Callinan J in his separate judgment did consider that the ‘cab rank’ rule supported the retention of advocates’ immunity. See *D’Orta* (2005) 214 ALR 92, [377].

29 Again, far from considering this irrelevant, Callinan J went to great lengths in his judgment to explain why this was a significant factor in his decision to retain immunity: *ibid* [366].

30 *Ibid* [25]–[29].

31 *Ibid* [39].

32 *Ibid* [40].

33 *Ibid* [42].

34 *Ibid* [34].

35 *Ibid* [45].

36 With the limited exception of the expert witness.

that of other professional service providers than it is to the responsibilities (and therefore potential liability) of judges, jurors or witnesses.

## 2 *Justice McHugh*

His Honour concurred with Gleeson CJ, Gummow, Hayne and Heydon JJ to the extent that the preservation of finality was a compelling reason why it is not appropriate to reopen decided cases on the basis of a barrister's alleged negligence in the performance of his or her work. His Honour added that in any subsequent civil proceedings, the accused would bear the onus of proving that the advocate's negligence resulted in his or her conviction. This constituted a burden of proof that 'can only be discharged by guesswork'.<sup>37</sup>

With respect, this argument is disingenuous. All negligence cases, by their very nature, require courts to engage in some degree of guesswork. For example, 'was the defendant's negligence the cause of the plaintiff's injuries?' and/or 'did the plaintiff's own conduct contribute to the losses?'. Furthermore, the onus of proving negligence is on the party bringing the claim, and if the plaintiff cannot discharge that burden, then the claim must fail. Denying clients the opportunity to sue their advocate for negligence should not be justified on the basis that the onus of proof could only be discharged by guesswork.

Justice McHugh, while agreeing with the decision of Gleeson CJ, Gummow, Hayne and Heydon JJ, as outlined above, took a somewhat different approach. His Honour went to great lengths to give examples of other professionals who owe no *actionable* duty of care, including, for example:

- (a) auditors owe no duty of care to investors;<sup>38</sup>
- (b) journalists owe no enforceable duty of care;<sup>39</sup>
- (c) planning authorities owe no duty of care to developers for representations contained in a scheme;<sup>40</sup>
- (d) developers of commercial buildings owe no duty of care to subsequent purchasers for negligent construction;<sup>41</sup> and
- (e) medical practitioners and social workers employed by the state to examine children for evidence of sexual abuse owe no duty of care to persons suspected of being guilty of the sexual abuse.<sup>42</sup>

To compare advocates' immunity to the above examples is, again, disingenuous. In none of the instances cited by his Honour is the person injured by the negligent conduct a *client* of the negligent party. The scenarios that McHugh J gives in support of advocates' immunity are not in fact analogous and thus do not support his Honour's argument. A client retains a lawyer to provide

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37 *D'Orta* (2005) 214 ALR 92, [163].

38 *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241, cited in *D'Orta* (2005) 214 ALR 92, [98].

39 *D'Orta* (2005) 214 ALR 92, [98].

40 *San Sebastian Pty Ltd v The Minister* (1986) 162 CLR 340, cited in *D'Orta* (2005) 214 ALR 92, [99].

41 *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 78 ALJR 628, cited in *D'Orta* (2005) 214 ALR 92, [99].

42 *Sullivan v Moody* (2001) 207 CLR 562, cited in *D'Orta* (2005) 214 ALR 92, [99].



professional services, and it is this relationship which gives rise to a duty of care being owed by the lawyer to the client.

It is submitted that on this point, Justice Kirby's dissenting opinion is far more compelling. His Honour noted that '[t]here are few relationships that are closer, involving at once neighbourhood, proximity, reliance and vulnerability of the client than that with legal advisers in connection with litigation'.<sup>43</sup>

It is the absence of this relationship in Justice McHugh's analogies which renders them unhelpful, and indeed irrelevant. It is also this relationship which justifies the existence of an actionable duty of care being owed by an advocate to a client.

After undertaking the above analysis of liability (or lack thereof) of other professionals, in order to demonstrate that advocates' immunity is not exceptional, McHugh J seems to contradict himself by saying:

Advocacy in the courts is a unique profession. Advocates play an indispensable part in the administration of justice. No valid analogy can be drawn between the exercise of the calling of advocacy in the common law context and the exercise of other professions.<sup>44</sup>

Justice McHugh's reference to the 'calling' of advocacy suggests that advocates are similar to priests, nuns or other religious personnel in having some kind of divine mission. It is submitted that his Honour's language and reasoning imply that barristers are superior to other professionals, and reinforces the public perception that judges (selected predominantly from the ranks of barristers) are anxious to maintain this sense of superiority.

It is argued that advocates are essentially no different from other professionals and accordingly should be subject to the same standards and liability when it comes to negligent conduct. Justice McHugh's view that advocates are in some way unique is not compelling, and indeed, is somewhat offensive. Advocates, like other professionals are required to undertake rigorous professional training,<sup>45</sup> and the legal profession, like other professions, is highly regulated<sup>46</sup> and often highly stressful.<sup>47</sup> There is nothing so unusual about the way an advocate 'is called' to or practises his or her profession that justifies the advocate, alone amongst professionals, being granted immunity from negligence. Advocates perform their services in a courtroom rather than an operating theatre, and are part of the justice system rather than the health care or other system, but they are nevertheless providing a service to a client for a fee, and should be liable if they fail to exercise reasonable care in so doing.

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43 *D'Orta* (2005) 214 ALR 92, [335].

44 *Ibid* [104].

45 For example, barristers undertake the Bar Reader's Course; solicitors do articles of clerkship, College of Law or some equivalent, doctors complete a year of residency in a hospital; and accountants can do the Chartered Practising Accountants program.

46 For example, in Victoria, lawyers are regulated by the *Legal Profession Act 2004* (Vic), architects by the *Architects Act 1991* (Vic), and doctors by the *Medical Practice Act 1994* (Vic).

47 Justice Kirby noted that the pressure on advocates to make instantaneous decisions during court proceedings is no more demanding than the instantaneous decisions expected of a surgeon during an operation or a pilot flying a large passenger aircraft: *D'Orta* (2005) 214 ALR 92, [321].

### 3 *Justice Callinan*

Justice Callinan is the member of the High Court with the most recent experience of being a barrister, having been appointed directly to the High Court from the Bar, with no prior judicial experience.<sup>48</sup> It is perhaps not surprising that he is the most vocal of the High Court judges regarding the need to retain immunity because of the unique role that barristers perform. In a commentary that members of the medical profession will read in disbelief, his Honour stated:

Cross-examination requires of counsel careful preparation but it is still both a technical skill and an art. Decisions with respect to it have often to be made instantaneously, and, accordingly, in part at least, intuitively ... Despite what other professions may claim, the practice of advocacy is unique ... True it is that surgeons for example, have to make instantaneous judgments, and that the materials upon which they are working do not always respond predictably, but there are only a certain number of procedures or courses which may be taken.<sup>49</sup>

In a somewhat patronising manner, Callinan J went on to say:

The truths to which I have referred are regrettably not fully understood, and, it must also be observed, are often not accurately represented. This in part at least, explains the suspicion that abounds in some sections of the public ...<sup>50</sup>

It is excerpts like these from the judgment of Callinan J which give rise to claims that, when considering advocates' immunity, the High Court is primarily concerned with protecting the members of the profession from whence they came, and that their Honours are out of touch with society's expectations.

Like McHugh J, Callinan J drew analogies between advocates and others who escape liability for negligence, including, for example, journalists and auditors. However, his Honour went even further by drawing support for advocates' immunity from the immunity enjoyed by bodies such as the Australian Crime Commission, the Australian Securities and Investment Commission and the Australian Competition Tribunal.<sup>51</sup> With respect, these comparisons are problematic. First, because it is Parliament, rather than the common law, that has deemed it appropriate to give these organisations statutory immunity; and second, because the tasks that these bodies perform bear no similarity to the role that advocates perform, that is, they are not professionals providing a service to a client for a fee. It is this absence of a professional–client relationship, giving rise to a duty of care, which renders these analogies fatally flawed.

Finally, it should be noted that Callinan J, unlike the rest of the majority, was influenced by the fact that advocates, without the protection of immunity, might be tempted to conduct litigation more cautiously, thereby leading to delay and extra expenses. He noted that:

The fact that decisions holding professionals liable in negligence may have produced unnecessarily defensive practices is to be regretted, but provides no sufficient basis to treat advocates in the same way as other professionals.<sup>52</sup>

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48 Justice Callinan joined the High Court from the Queensland Bar in February 1998.

49 *D'Orta* (2005) 214 ALR 92, [366].

50 *Ibid* [371].

51 *Ibid* [360].

52 *Ibid* [374].

That advocates are somehow unique, and therefore should be treated differently from all other professionals, is a recurring theme throughout Justice Callinan's judgment. It is however a line of reasoning which does not stand up to close scrutiny as demonstrated in the following section.

### C The Dissenting Opinion

In a powerful dissent, Kirby J cited the numerous decisions of the High Court dealing with alleged negligent acts of architects, civil engineers, dental surgeons, electrical contractors, persons providing financial advice, police officers, builders, pilots, ophthalmic surgeons, gynaecologists and anaesthetists. In all these cases, liability was decided by the application of the general principles of the law of negligence:

None of the defendants in any of [those] cases claimed, still less received, the benefit of an absolute immunity from liability. So why are the lawyers in this case entitled to be treated in such a special way? Is this truly the law of Australia, applicable to the case? If so, what is the justification?<sup>53</sup>

His Honour began his judgment with a consideration of the Court's earlier decision in *Giannarelli*. Unlike the majority, he did not find this decision persuasive. In particular, he noted that it was a sharply divided decision – four to three – and that the judges in the majority gave significantly different reasons for their decisions, making it difficult, if not impossible, to ascertain a clear ratio. Furthermore, the issues were very different, in that the claims related solely to conduct in court and did not extend to out of court conduct, and there were no claims before the Court against solicitors. His Honour concluded that in deciding the questions raised in *D'Orta*, *Giannarelli* was of little or no precedential value.

Justice Kirby specifically rejected the foundation on which the majority based their determination, namely the need for finality and certainty of court decisions. In doing so, his Honour noted that any action for legal professional negligence would revolve around entirely different facts and law than those that were earlier litigated and decided.<sup>54</sup> It would also of course involve different parties. Thus, Mr D'Orta did not seek to overturn or impugn his conviction; this had already been attended to in the appeal process. What he wanted was the right to be heard on whether his lawyers had been negligent, and if so, whether that negligence led to, or contributed to, him being imprisoned and suffering damage.

In concluding this analysis of the judgments in *D'Orta*, the author submits that Justice Kirby's reasoning is the most compelling. As his Honour noted:

If this Court ... upholds the immunity for barristers ... it will, once again, be approaching basic legal doctrine in a way rejected virtually everywhere else. Such disparity in a matter of legal principle does not necessarily mean that this Court is wrong. But it certainly suggests the need for justification by reference to identified errors of so many other courts and legal systems or proof of such local divergencies as warrant Australian law taking its own peculiar direction.<sup>55</sup>

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53 Ibid [210].

54 Ibid [333].

55 Ibid [216].

It is respectfully submitted that the majority in *D'Orta* failed to justify why Australia should adopt an approach completely contrary to that taken in other common law jurisdictions.

#### **D Extension of the Immunity**

Before moving on to an analysis of the jurisprudence on this issue in other jurisdictions, it is worth noting that the High Court did not just retain advocates' immunity in *D'Orta* – it actually expanded the concept. The Court held that the immunity is not limited to advocates, but also applies to the solicitors who instruct them. As the name of this doctrine suggests, it is an immunity that pertains to those acting as advocates. While barristers still do the majority of advocacy work, solicitors are increasingly making use of their rights of audience in the courts, and it is therefore fair and appropriate that any immunity available to barristers when acting as advocates should be equally available to solicitors acting as advocates. However, in *D'Orta* only the second respondent was an advocate, the first respondent was, at all material times, including when the allegedly negligent advice was given, the instructing solicitor. At no time was the first respondent an advocate, yet the majority had no hesitation in extending the immunity to the instructing solicitor, Victorian Legal Aid.

It is difficult to comprehend how, at a time when other jurisdictions are abandoning advocates' immunity, Australia is not only retaining it, but expanding its operation. Those in favour of the decision in *D'Orta* argue that for the Court to abolish such a long-standing doctrine as advocates' immunity would be unjustifiable judicial activism.<sup>56</sup> However, they are silent when it comes to judicial activism that expands the doctrine. Such a position is hypocritical; critics of judicial activism cannot be seen to support the expansion of the doctrine by the High Court at the same time as claiming that 'judges have no business reforming the law'.<sup>57</sup>

### **IV FOREIGN JURISPRUDENCE ABOLISHING ADVOCATES' IMMUNITY**

All the High Court judges in *D'Orta* examined the position of the legal profession with respect to liability in negligence in other parts of the world. The majority were acutely aware that their decision to retain advocates' absolute immunity ran against the global tide. It is therefore worthwhile examining in some detail exactly what the situation is in other jurisdictions.

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56 'Parliament's Role to Raise the Bar', *The Australian* (Sydney), 16 March 2005. On this issue of judicial activism, it is also worth noting the paper written by Heydon J before he was appointed to the High Court, in which he was strongly critical of the practice of judicial activism, as is evident from the title: Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) *Australian Bar Review* 110.

57 'Parliament's Role to Raise the Bar', *The Australian* (Sydney), 16 March 2005.

## A United Kingdom

The case which was examined in the most detail was the House of Lords decision in *Arthur Hall* in which their Lordships unanimously departed from their earlier decisions in *Rondel* and *Saif Ali* holding that public policy justified the abolition of the immunity. Their Lordships all concluded that advocates' immunity could no longer be sustained in respect of a suit for alleged negligence in the conduct of civil proceedings, albeit three members of the House would have retained the immunity in relation to criminal proceedings.<sup>58</sup>

The case of *Arthur Hall* actually consisted of three joint appeals, all of which were civil cases. One was a building case, and two involved Family Court proceedings. All the claims of negligence were against firms of solicitors, although the Bar Council was given leave to intervene and thus its submissions were heard.

The Law Lords considered the argument that immunity should be retained in order to avoid relitigation of a decision of a court, ie, the public policy argument relied on by the High Court in *D'Orta* that there must be finality of court judgments. Lord Steyn dismissed this argument noting that the immunity being sought applied to *all* advocacy, regardless of whether there was a decision or verdict by a court. The immunity would therefore also cover cases where the issue of finality was irrelevant. As such, this public policy argument could not 'justify the immunity in its present width'.<sup>59</sup>

Lord Hoffmann, whose analysis was the most comprehensive of all the Law Lords, devoted some time to addressing the argument that the immunity was necessary in order to avoid collateral challenges of court decisions. His Lordship analysed a variety of cases where a party had sought to collaterally attack another court's decision and concluded that:

not all relitigation of the same issue will be manifestly unfair to a party or bring the administration of justice into disrepute, and ... when relitigation 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.<sup>60</sup>

Lord Hoffmann concluded that denying an injured party a remedy was more likely to bring the administration of justice into disrepute, than allowing a collateral challenge to be made.

Before leaving *Arthur Hall*, it is worthwhile considering some of the reasons which the majority in *D'Orta* adopted to justify not following the House of Lords. First, it was suggested that their Lordships were influenced by factors not relevant to Australia, for example the imminent coming into operation of the *Human Rights Act 1998* (UK) c 42, which incorporates the *European Convention for the Protection of Human Rights and Fundamental Freedoms* into English law. However, this was not pivotal to their Lordships' decisions. Lord Hoffmann

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58 It is interesting to note that the two cases where the High Court upheld immunity, *Giannarelli* and *D'Orta*, both involved conduct in *criminal* proceedings.

59 *Arthur Hall* [2000] 3 All ER 673, 680.

60 *Ibid* 703.

stated: 'I have said nothing about whether the immunity, if preserved, would be contrary to art 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* ... The question does not arise'.<sup>61</sup> Lord Hutton considered it to be relevant but 'that the continuation of the immunity of defence counsel appearing in criminal cases would not constitute a breach of art 6(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*'.<sup>62</sup> In other words, the European human rights regime was not a basis for abolishing the immunity.

Lord Hope, on the other hand, did find human rights to be a factor, noting that '[a]ny immunity from suit is a derogation from a person's fundamental right of access to the court which has to be justified'.<sup>63</sup> However, he went on to observe that: 'This principle is found both in the *common law* and in the jurisprudence of the European Court of Human Rights'.<sup>64</sup> It is submitted that the common law in England in this regard is no different from the common law in Australia, and the High Court's attempt in *D'Orta* to distinguish *Arthur Hall* on the basis of the House of Lords' reliance on the *Human Rights Act 1998* (UK) c 42 does not stand up to scrutiny.

Another ground on which the High Court sought to justify its departure from the approach taken by the House of Lords was that the organisation of the legal profession in the various Australian states and territories is different from the way it is organised in the UK.<sup>65</sup> With respect, this seems to be a dubious distinction, if only because the different organisation of the profession between the UK and Australia was not an issue in 1988 when the High Court in *Giannarelli* adopted the House of Lords reasoning in *Rondel*. The way the profession is organised in Australia does not appear to have changed significantly in the ensuing years, which leaves one wondering why this difference is an issue now, but was not a consideration 17 years ago.

## B New Zealand

The New Zealand authority abolishing advocates' immunity is the Court of Appeal decision in *Lai*.<sup>66</sup> Notwithstanding that this case was decided just two days before the High Court handed down its judgment in *D'Orta*, it was still referred to in all the judgments, albeit not in great detail. Predictably, the majority found the decision unhelpful, while Kirby J relied upon it to support his position.

In *Lai*, the appellants, Mr and Mrs Lai, were directors of a company involved in the horticulture industry. The company and Mr and Mrs Lai were all sued by the plaintiffs. After three days of trial the question arose as to whether it was appropriate for Mr and Mrs Lai to consent to judgment being entered against

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61 Ibid 707.

62 Ibid 733.

63 Ibid 710.

64 Ibid (emphasis added).

65 *D'Orta* (2005) 214 ALR 92, [60] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

66 [2005] NZCA 37 (Unreported, Anderson P, McGrath, Glazebrook, Hammond and O'Regan JJ, 8 March 2005).

them personally in the event that the court entered judgment against the company. The Lais' barrister advised the court, by way of a written memorandum, that his clients would personally guarantee the payment by the company of any judgment entered against it in the proceedings. Judgment for a significant sum was subsequently entered against the company, and as a consequence of counsel's representation to the court, judgment was also entered against Mr and Mrs Lai personally. Mr and Mrs Lai sued their law firm alleging negligence in the advice given to them during the trial in respect of guaranteeing payment of any judgment that may be entered against the company.

The New Zealand Court of Appeal held by a majority of four to one<sup>67</sup> that the doctrine of advocates' immunity was no longer part of the common law in New Zealand. The Court allowed the New Zealand Law Society and the New Zealand Bar Association to make submissions as to why immunity should be retained, but ultimately rejected their arguments.

On 13 June 2005, the New Zealand Supreme Court granted leave to appeal the decision of the Court of Appeal.<sup>68</sup> At the same time the Supreme Court also granted leave to the New Zealand Law Society and New Zealand Bar Association to intervene. The Supreme Court was satisfied that the question of whether advocates' immunity should be retained as part of the common law of New Zealand was a matter of 'general or public importance' and therefore fit within the criteria for granting leave to appeal.<sup>69</sup> The appeal was heard over three days from 18–20 October 2005 and the decision was reserved. Only after the Supreme Court hands down its decision in that appeal will the position in New Zealand be settled.

## C Canada

The position in Canada has been clear ever since the Ontario High Court of Justice decision in *Demarco v Ungaro*.<sup>70</sup> In that case Krever J referred to the 19<sup>th</sup> century authority of *Leslie v Ball*<sup>71</sup> to establish that advocates' immunity was not part of the common law in Canada, at least until 1967. This was the year that the House of Lords decided, in *Rondel*, to retain advocates' immunity on public policy grounds. The question before the Court was therefore whether the decision in *Rondel* should prompt Canada to re-examine its position on advocates' immunity in the same way that New Zealand did in *Rees v Sinclair*<sup>72</sup> when it was held that *Rondel* reflected the law in New Zealand.

Much of the judgment is devoted to directly quoting the Law Lords in *Rondel* and *Saif Ali* for the purpose of distinguishing those cases from the situation in Canada. The Court noted the Law Lords' public policy concerns that without immunity there was a significant risk that judgments which should be final (all appeal rights having been exhausted) would be re-examined and that this would

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67 The majority consisted of McGrath, Glazebrook, Hammond and O'Regan JJ; Anderson P dissented: *ibid.*

68 *Chamberlains v Lai* [2005] NZSC 32 (Unreported, Elias CJ and Gault J, 13 June 2005).

69 *Supreme Court Act 2003* (NZ) s 13.

70 (1979) 95 DLR (3d) 385.

71 (1863) 22 UCQB 512.

72 [1974] 1 NZLR 180.

lead to a flood of litigation, placing an unreasonable burden on the judicial system. Justice Krever's response to this was simple:

Between the dates of the decisions in *Leslie v Ball*, 1863, and *Rondel v Worsley*, 1967, immunity of counsel was not recognized in Ontario and negligence actions against lawyers respecting their conduct of Court cases did not attain serious proportions.<sup>73</sup>

In all probability, the same would be true in Australia. As one author noted 'it is unlikely that most people would have the will, finance, or time, to go through the court process a second time'.<sup>74</sup> Only cases involving the most egregious conduct by an advocate, and which resulted in significant loss or harm, would likely be pursued. Further, if unsubstantiated claims were pursued, the courts have already demonstrated that they are willing to dismiss such actions summarily.<sup>75</sup>

The Canadian Court weighed up the risk of having to reopen the original case against the risk that a client of a negligent lawyer would be left with no recourse, and held the latter to be the more compelling consideration. His Honour cited with approval the writing of Professor Lewis N Klar who stated:

Other professional groups, such as doctors and engineers, whose decisions are as crucial to the well-being of society, as are the decisions of lawyers, must conduct themselves reasonably or else be subject to legal liability. One can ask no less of lawyers.<sup>76</sup>

The position in Canada on this issue should have been the most persuasive for the Australian High Court. The majority in *D'Orta* were clearly alarmed at the prospect of relitigating matters and almost obsessed with maintaining the finality of decisions. Yet Canada, which has never had advocates' immunity, provides strong evidence that making lawyers accountable to their clients for their in-court conduct does not result in the flood of litigation feared by the High Court.

## D United States

Like Canada, the United States has never had advocates' immunity. The authoritative legal encyclopedia, *Corpus Juris Secundum*, states that: 'An attorney must exercise reasonable care, skill and knowledge in the conduct of litigation ... and must be properly diligent in the prosecution of the case'.<sup>77</sup>

There have been attempts to argue that trial attorneys should be immune from liability but these have been soundly rejected by the courts. For example, in *Ferri v Ackerman*<sup>78</sup> ('*Ferri*'), a Federal District Court appointed the respondent attorney to represent an indigent defendant accused of participating in a conspiracy to construct and use a bomb. After a 12-day trial the client was

73 *Demarco v Ungaro* (1979) 95 DLR (3d) 385, 406.

74 Simon Brookes, 'Time to Abolish Lawyers' Immunity from Suit' (1999) 24(4) *Alternative Law Journal* 175.

75 *General Steel Industries v Commissioner for Railways (NSW)* (1964) 112 CLR 125, 129-130 (Barwick CJ).

76 *Demarco v Ungaro* (1979) 95 DLR (3d) 385, 408.

77 7 *Corpus Juris Secundum*, 982-4, § 146.

78 444 US 193 (1979).



convicted and sentenced to 20 years on the bomb related counts and a further 10 years on charges relating to violations of the *Internal Revenue Code* 26 USC (1986). He sued the respondent for alleged malpractice in his conduct of the trial. The lower court held that the attorney was immune from liability, on the basis that judicial immunity extended to prosecutors, grand jurors and defence counsel appointed by the court. The US Supreme Court rejected this argument, saying:

There is, however, a marked difference between the nature of counsel's responsibilities and those of other officers of the court ... As public servants, the prosecutor and the judge represent the interest of society as a whole. The societal interest in providing such public officials with the maximum ability to deal fearlessly and impartially with the public at large has long been recognized as an acceptable justification for official immunity ...<sup>79</sup>

It is interesting to observe that while the High Court in *D'Orta* relied on the immunity of judges, jurors and witnesses to support advocates' immunity, the US Supreme Court expressly rejected this contention. For the reasons elaborated on above, the author maintains that the US Supreme Court's line of reasoning is the more compelling.

The US Supreme Court also considered the possible impact that the threat of a negligence claim may have on a lawyer's conduct of a case, and concluded that such a threat could be a positive influence. Justice Stevens, who handed down the majority judgment, stated:

The fear that an unsuccessful defense of a criminal charge will lead to a malpractice claim ... provides ... incentive ... to perform that function competently. The primary rationale for granting immunity to judges, prosecutors, and other public officers does not apply to defense counsel sued for malpractice by his own client.<sup>80</sup>

*Ferri* involved a claim arising out of a trial in the federal jurisdiction and thus it was decided according to federal law. The majority of states in America have also had to consider the issue of advocates' immunity, and while none provide immunity for attorneys in private practice, some states have mandated that state-employed public defenders should have immunity.

One would expect that without advocates' immunity, the United States – one of the most litigious countries in the world – would have an extensive history of malpractice suits against attorneys for negligence in the conduct of cases in court. However, this is simply not the case. The reason for this appears to be that a jurisprudence has developed which makes proving negligence in these circumstances difficult.

## V TORT REFORMS THAT SUPPORT THE ABOLITION OF ADVOCATES' IMMUNITY

The rationale relied upon by the courts in the United Kingdom, New Zealand, Canada and the United States for rejecting advocates' immunity more than justifies the removal of this antiquated doctrine in Australia. However, if one

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79 Ibid 203 (Stevens J).

80 Ibid 204.

looks at recent tort reforms in Australia – both common law and statutory – one finds even more reasons why advocates' immunity should be abolished. An examination of recent developments in the law of negligence reveals that the High Court's decision in *D'Orta* is very much out of sync with the direction in which the law of negligence appears to be heading.

### A Common Law Developments

The most relevant tort reform case is the High Court decision in *Brodie v Singleton Shire Council*<sup>81</sup> ('*Brodie*'). Mr Brodie drove his truck across a 50 year old wooden bridge which collapsed, resulting in the fall of the truck to the creek bank below. Mr Brodie sued the council for damages for his personal injuries, alleging negligence on the part of the Council. Evidence was led that the timber beams supporting the decking on the bridge had deteriorated as a result of either dry rot or a white ant infestation. The New South Wales Court of Appeal held that the cause of the bridge's collapse was the Council's failure to inspect and repair the beams. This was non-feasance, rather than misfeasance, and as such the Council was immune from liability pursuant to highway authority immunity, which states that those responsible for care, control and management of public roads owe individual road users a duty of care when they exercise their powers, but are not liable in respect of a mere failure to act.

The majority,<sup>82</sup> in a radical departure from well-established principles, held that the issue was not whether the Council's conduct amounted to misfeasance or non-feasance, but rather whether the Council was liable under the ordinary test of negligence. In reaching this decision the High Court abolished the non-feasance indemnity that highway authorities had enjoyed for over 200 years.

The willingness of the High Court to abolish highway immunity in *Brodie* is difficult to reconcile with their Honours' refusal to abolish advocates' immunity in *D'Orta*. The inconsistency becomes even more puzzling when the judgments in *Brodie* are scrutinised. The following aspects are particularly worthy of note.

#### 1 Other Jurisdictions

As in *D'Orta*, the majority in *Brodie* referred to the manner in which this area of the law had developed in other common law jurisdictions. In particular, it was noted that highway immunity had been abolished in Canada, the United States and England.<sup>83</sup> Furthermore the abolition of the immunity in the UK occurred in 1961 'yet the floodgates do not appear to have collapsed'.<sup>84</sup> It seems somewhat contradictory that the majority in *Brodie* was quick to rely on the abolition of highway immunity in other jurisdictions to support the abolition here, yet three years later the majority in *D'Orta* considered the abolition of advocates'

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81 (2001) 206 CLR 512.

82 The majority consisted of Gaudron, McHugh and Gummow JJ; Kirby J agreed in a separate judgment; Gleeson CJ, Hayne and Callinan JJ dissented: *ibid*.

83 *Ibid* 547–9.

84 *Ibid*.

immunity in other jurisdictions to be irrelevant when it came to deciding whether it should be abolished in Australia.

## 2 Public Policy

In *Brodie*, the majority considered whether public policy justified the retention of the immunity, asking whether there are ‘sufficient reasons of public policy for denial of a remedy against the respondent’.<sup>85</sup> In answering this question Gaudron, McHugh and Gummow JJ cited with approval<sup>86</sup> Barbara McDonald’s analysis of highway immunity:

First, being absolute, it can produce harsh results. Secondly, it has become increasingly anomalous, against the background of the general law of negligence under which bases for liability have expanded rather than decreased. Thirdly, well-meant efforts to contain or avoid the harsh results of the immunity have led to highly technical and difficult distinctions being drawn, which in turn have had the effect of increasing litigation, and uncertainty and unpredictability of outcome.<sup>87</sup>

It is submitted that this passage can be applied just as appropriately to advocates’ immunity as it can to highway immunity.<sup>88</sup> So why then was the result in *D’Orta* so different from the result in *Brodie*? Why was the High Court willing to abolish one form of immunity but not another? The answer may lie in the empathy the judges have with barristers, which they do not share with highway authorities.

Interestingly, only three of the judges in *D’Orta* made any reference to *Brodie*, namely McHugh,<sup>89</sup> Kirby<sup>90</sup> and Callinan JJ.<sup>91</sup> Of these, only Kirby J recognised any correlation between *Brodie* and *D’Orta*. The others seemed blind to the similarities between the two cases, and the inconsistency of the two decisions.

There can be no doubt that the decision in *D’Orta* represents a retreat from the position the High Court took in *Brodie*, where the majority favoured a simplification of the law of negligence, free from the complications of historical immunities that could no longer be justified in a contemporary society.

*D’Orta* is also out of step with the recent High Court case of *Cattanach v Melchior*<sup>92</sup> (*Cattanach*). In that case the High Court had to decide whether parents could recover as damages the cost of raising a healthy child born as consequence of medical negligence relating to a sterilisation operation. In a four to three decision, the majority<sup>93</sup> held that there was no basis for denying the parents the reasonably foreseeable damages, which included child-rearing

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85 Ibid 557.

86 Ibid.

87 Barbara McDonald, ‘Immunities Under Attack’ (2000) 22 *Sydney Law Review* 411, 420.

88 Particularly the reference to ‘highly technical and difficult distinctions being drawn’: *Brodie* (2001) 206 CLR 512, 557. This is extremely relevant to the debate about where the line should be drawn in relation to advocates’ negligence outside of the court, but which is covered by the immunity because it is conduct ‘intimately connected’ with the court proceedings.

89 *D’Orta* (2005) 214 ALR 92, [96].

90 Ibid [317], [334], [342], [345].

91 Ibid [367].

92 (2003) 215 CLR 1.

93 The majority consisted of McHugh, Gummow, Kirby and Callinan JJ and Gleeson CJ; Hayne and Heydon JJ dissented: *ibid*.

expenses until the child reached the age of 18. The significance of this case for present purposes is that the Court was asked to depart from ordinary tortious rules as to causation and economic loss, and to deny the claim for damages on the basis of public policy considerations. In particular, it was argued that there should be immunity to prevent the recovery of certain types of damages, namely the cost of raising a healthy child, on the basis that such an award of damages would be disruptive of family life and inconsistent with the sanctity of human life.<sup>94</sup>

In rejecting this argument, Callinan J referred to the decision in *Brodie*, which he thought was indicative ‘of an increasing judicial aversion to the enjoyment of special privilege or advantage in litigation unless strong reason for its creation or retention can be demonstrated’.<sup>95</sup> Thus, in *Cattanach*, the High Court once again shied away from granting or upholding special protection in negligence cases. The underlying rationale on which the majority based their decision was one of equality before the law, and that no wrong should be without a remedy. Yet these ideals seem to have gone out the window when it comes to victims of advocates’ negligence recovering compensation.

Anyone reading the High Court’s pronouncements on negligence in the lead up to *D’Orta* would have been justifiably confident that the Court would reject arguments in favour of retaining advocates’ immunity. The decisions in *Brodie*, *Cattanach* and *D’Orta* demonstrate a striking lack of consistency in the High Court’s recent approach to issues of tortious liability. It seems that in Australia these days, the answer to the question ‘who, then, in law is my neighbour?’<sup>96</sup> is ‘just about everybody except advocates and their instructing solicitors’!

## B Statutory Developments

Recent legislative reforms were largely ignored by the High Court in *D’Orta*, yet in many ways can operate to alleviate the Court’s concerns. The majority expressed unease that advocates sued for negligence would be unfairly disadvantaged because only the advocate’s conduct would be on trial – judges, witnesses and jurors all having immunity. Chief Justice Gleeson, Gummow, Hayne and Heydon JJ described this as ‘litigation of a skewed and limited kind’.<sup>97</sup>

This might be a valid concern if tortfeasors were still jointly and severally liable.<sup>98</sup> However, recent legislative changes introducing proportionate liability in

94 For the sake of completeness, it should be noted that Parliaments in various jurisdictions have legislated to overcome the decision in *Cattanach* (2003) 215 CLR 1. See, eg, s 49A(2) of the *Civil Liability Act 2003* (Qld) which provides: ‘A court can not award damages for economic loss arising out of the costs ordinarily associated with rearing or maintaining a child’.

95 *Cattanach* (2003) 215 CLR 1, 106.

96 *Donoghue v Stevenson* [1932] AC 562, 580 (Lord Atkin).

97 *D’Orta* (2005) 214 ALR 92, [45].

98 Note that the UK retains joint and several liability and the House of Lords in *Arthur Hall* considered this but did not think it justified retention of the immunity. Lord Hobhouse, noting that others involved in trials, eg, judges and witnesses, have immunity, stated: ‘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’: *Arthur Hall* [2000] 3 All ER 673, 739.

cases of economic loss and property damage mean that a wrongdoer will only be liable for his or her share of responsibility for the loss.<sup>99</sup> As such a negligent advocate will not be liable for 100 per cent of a client's losses if there are others who contributed to the wrong, even if they are not a named party to the action. In Victoria, where the *D'Orta* case originated, the relevant provision states:

- 1) In any proceeding involving an apportionable claim –
  - (a) the liability of a defendant who is a concurrent wrongdoer in relation to that claim is limited to an amount reflecting that proportion of the loss or damage claimed that the court considers just having regard to the extent of the defendant's responsibility for the loss or damage; and
  - (b) judgment must not be given against the defendant for more than that amount in relation to that claim.<sup>100</sup>

It is argued that the abolition of joint and several liability supports the abolition of advocates' immunity, since there is no longer any possibility that a negligent advocate is going to be held liable for damages that are not entirely due to his or her negligent conduct.

## VI CONCLUSION

The proponents of advocates' immunity frequently generate fear and trepidation about what will happen if the immunity is abolished, including for example: 'great mischief would result';<sup>101</sup> 'public confidence in the administration of justice would be undermined';<sup>102</sup> and 'there would at least be a grave risk of consequences much against the public interest'.<sup>103</sup> There is, of course, no empirical evidence to support this scaremongering. On the contrary, as New South Wales Attorney-General, Bob Debus puts it: 'It is simply not possible, in the face of developments elsewhere, to argue that the sky will fall if advocates' immunity is significantly constrained'.<sup>104</sup>

What is clear, however, is that the cost of barristers' professional indemnity insurance will increase if the immunity is abolished. The Victorian Bar wasted no time in advising its members (the day after the High Court's decision) that:

Following negotiations last year between the Bar and the current insurer ... the Master Policy for ... professional indemnity insurance for Victorian barristers ... provided that in the event of a favourable decision of the High Court in the above case [*D'Orta*] ... there would be a reduction in premiums payable for that year by barristers.

99 See, eg, *Trade Practices Act 1974* (Cth) s 87CD; *Civil Liability Act 2002* (NSW) s 35; *Wrongs Act 1958* (Vic) s 24AI.

100 *Wrongs Act 1958* (Vic) s 24AI.

101 *Giannarelli* (1988) 165 CLR 543, 557 (Mason CJ).

102 Cameron Ford, 'Advocate's Immunity Refined – *D'Orta-Ekenaike v Victoria Legal Aid*' (2005) 20(6) *Insurance Law Journal* 92.

103 *Rondel* [1969] 1 AC 191, 230 (Lord Reid).

104 Alex Mitchell, 'Debus Set on Ending Lawyers' Immunity', *Sydney Morning Herald* (Sydney), 19 March 2005 <<http://www.smh.com.au/news/National/Debus-set-on-ending-lawyers-immunity/2005/03/19/1111086065245.html>> at 19 April 2005.

As a result, the Bar has asked ... [the insurer] to pay Victorian Bar Inc by 24 March 2005 the amount of the reduction ... Once these funds come to hand the Bar will remit a pro rata refund to all Victorian barristers ...<sup>105</sup>

Statements like this in publicly accessible documents make it difficult to accept observations from some barristers that 'it is one of the most common misunderstandings; advocates' immunity is not for the benefit of lawyers, but exists for the higher principle of the finality of litigation'.<sup>106</sup>

Clearly barristers have a strong financial incentive in seeing their immunity retained. They would not be happy if their professional indemnity insurance premiums went up to the level that other professionals such as obstetricians and gynaecologists (who do not have immunity) are forced to pay. It is obvious therefore that in Australia any abolition of advocates' immunity will have to come from Parliament, rather than from the courts, and this may indeed happen. At the Standing Committee of Attorneys-General meeting held in Brisbane on 21 March 2005, state Attorneys-General endorsed plans to examine the issue of advocates' immunity and detail options in response to the *D'Orta* decision.<sup>107</sup>

This solution would no doubt appeal to those who argue that any change to the immunity enjoyed by lawyers should come from Parliament and not the courts.<sup>108</sup> This argument was considered by the House of Lords in *Arthur Hall* and firmly rejected. Lord Hoffmann expressed it most cogently and succinctly when he said:

I do not think that your Lordships would be intervening in matters which should be left to Parliament. The judges created the immunity and the judges should say that the grounds for maintaining it no longer exist. *Cessante ratione legis, cessat lex ipsa*.<sup>109</sup>

Despite this, it is now clear that if advocates' immunity is to be abolished in Australia in the foreseeable future it will have to be by way of legislative change, since the High Court has indicated in the strongest terms that it is not willing to get rid of the immunity.

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105 Ross Ray QC, *Circular to Members: Advocates' Immunity* (2005) The Victorian Bar <[http://www.vicbar.com.au/3\\_10\\_9.html](http://www.vicbar.com.au/3_10_9.html)> at 13 June 2005.

106 Ian Harrison, cited in Malcolm Stewart, *The Great Debate: In-Court Immunity* (2005) Speed and Stracey Lawyers <[http://www.speedandstracey.com.au/publications\\_news\\_detail.cfm?id=10](http://www.speedandstracey.com.au/publications_news_detail.cfm?id=10)> at 13 June 2005.

107 Standing Committee of Attorneys-General, *Advocates Immunity from Legal Suit: Options Paper* (2005) Tasmania Department of Justice, Office of Legislation Development and Review <[http://www.justice.tas.gov.au/legislationreview/whats\\_new/advocates\\_immunity\\_options\\_paper](http://www.justice.tas.gov.au/legislationreview/whats_new/advocates_immunity_options_paper)> at 12 October 2005.

108 Hampel and Clough, above n 12, 1026.

109 *Arthur Hall* [2000] 3 All ER 673, 704–5. The Latin maxim means: 'the rationale of a legal rule no longer being applicable, that rule itself no longer applies'.