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Feathering their own nests?

Should barristers and/or solicitors be sued

Winnie Ma, Postgraduate Fellow, Law School Bond University

Have you ever watched TV shows such as *Ally McBeal, The Practice, Law & Order, or Judge Judy?* What about movies such as *Philadelphia, The Firm, Devil's Advocate, Red China* and *Primal Fear?*

Most people have seen lawyers arguing in courts - that is, acting as an **advocate** or performing **advocacy work.** For many people, this seems to be the most challenging and rewarding aspect of being a lawyer. But what happens if the lawyer stuffs up and the client loses the case as a result? Can the client sue the lawyer for bad performance in court?

Advocates' Immunity

For more than two centuries, the short answer has been "no". Barristers have enjoyed **immunity from suit** (or immunity from litigation for professional negligence). Advocates are immune from liability in negligence for their conduct in court and certain conduct out of court that is connected with the court work.

However, in July 2000 the highest court in England (the House of Lords) removed advocates' immunity in ***Hall v Simons*** *(Arthur JS Hall v Simons* [2000] WLR 543). Will the High Court of Australia do the same in the future? Hopefully you can start crystal gazing after reading this article.

Overview of the Issues

1. Reasons for advocates' immunity - why do we have it?
2. Scope of advocates' immunity - who and what does it protect?
3. The continuing debate on advocates' immunity - should we keep it or remove it?

Before we start, we need to answer some preliminary questions.

Why should we learn about advocates' immunity?

Whether or not we want to study law or become lawyers, we should all know something about advocates' immunity.

- As the potential clients, we should know our rights so that we don't let our lawyers rip us off.
- As conscientious citizens, we should be interested in maintaining the integrity and quality of our legal system.
- The law on advocates' immunity may soon change in Australia. So why don't you show off by leading the debate?

What does the word "negligence" mean?

The "tort of negligence" means that, if you owe someone a duty to use reasonable skill and care, and if you fail to do so, then you will be liable for the loss or damage suffered by that person as a result of your negligence.

In our context, lawyers may be negligent in giving the wrong advice, raising the wrong arguments in court, or otherwise not doing their job properly. Without advocates' immunity, these lawyers can be sued by their clients in negligence.

But who does the immunity protect? Barristers, solicitors, or both?

How do "barristers" and "solicitors" differ?

"Lawyers" is the generic term covering barristers and solicitors. In Queensland, Victoria and New South Wales, we have a **"divided profession".** This means that the legal profession is divided functionally, with separate admission requirements, separate records, and separate codes of conduct.

Barristers have been touted as the "gladiators of the court room". They present their clients' cases in court, although they usually deal with their clients through their instructing solicitors. Barristers can also write opinions on any legal matter.

Solicitors, on the other hand, interview and advise their clients. They gather evidence and prepare briefs for their barristers. However, they can also appear in courts to present certain cases. In this sense, solicitors also act as "advocates". Therefore, advocates' immunity also protects solicitors to the extent of their advocacy work.

How do "civil proceedings" and "criminal proceedings" differ?

The table below summarises the main differences between these types of proceedings.

	Criminal	Civil
Terminology	The "accused" is "prosecuted", "convicted" and "punished" for his/her crime	The defendant is "liable" for compensation or damages after being sued by the "plaintiff"
Standard of Proof	"Beyond reasonable doubt"	"On balance of probabilities"
Consequences	Imprisonment etc	No imprisonment

In *Hall v Simons,* all judges in the House of Lords decided to remove advocates' immunity in relation to civil proceedings. However, only four out of the seven judges were in favour of removing the immunity in relation to criminal proceedings.

The Rise & Fall of the Immunity

- Back in 1860, the immunity was unrestricted.[1]
- However, since the 1930s, there was a series of negligence cases extending liabilities to professionals.[2] These cases queried why lawyers, as compared to other professions, are the only privileged group immune from litigation for negligence.
- In 1967 an English case called *Rondel v Worsely*[3] tested the scope of the immunity.
- Twenty years later, the High Court of Australia confirmed and adopted the English approach in *Giannarelli v*

Wraith.[4] The immunity was held to cover both work inside the court room, as well as work done outside the court room which is intimately connected with the court work.

- However in 2000, the House of Lords in England decided that the immunity should go away in *Hall v Simons.*

Arguments For the Immunity

Most of the reasons for the immunity are based on public policy.

1. Cab-rank principle

According to Lord Denning (who is one of the most famous and respected judges in England):

> *"A barrister cannot pick or choose his clients ... Provided that he is paid a proper fee ... he must accept the brief and do all he honourably can on behalf of his client."*[5]

2. Witness analogy

Advocates' immunity is consistent with the immunities enjoyed by other participants in the court process such as witnesses and judges.

3. Divided loyalty

Lawyers owe a dual duty - to their clients and to the court. However, their duty to the court is paramount in order to ensure the proper administration of justice. Again in Lord Denning's words:

> *"A barrister owes allegiance to a higher cause. It is the cause of truth and justice. He must not consciously misstate the facts. He must not knowingly conceal the truth ... He must produce all the relevant authorities even those that are against him."*[6]

4. Re-litigation of collateral proceedings

It is contrary to public interest for the courts to re-try cases which have already been decided by another court. People should use the appeal process instead of suing their lawyers.

5. Other reasons

In the past, dignity of the Bar, difficulty of advocacy, and the assumption that barrister cannot sue for their fees have also been used to justify advocates' immunity.

Arguments Against the Immunity

Changes in social, economic and professional circumstances demand reconsidering the justifications for the immunity.

The **cab-rank principle** has been rejected because in practice, this principle doesn't require barrister to undertake work which they wouldn't otherwise accept. In any event, this principle can't justify depriving all clients of a remedy for negligence.

The **witness analogy** doesn't apply because lawyers differ from witnesses. For instance, lawyers are the only people involved in the court process who have undertaken a duty of care to their clients.

With respect to **divided loyalty,** *Hall v Simons* decided that lawyers shouldn't be unique among professionals. Comparison was made with doctors, who often engage in activities requiring delicate judgment and divided loyalty. Thus the question should be, whether removing the immunity would undermine lawyers' duty to the court. If not, then the immunity shouldn't stay.

The law already has rules for preventing **re-litigation** or **collateral challenge.** In any event, floodgate litigation after abolishing the immunity appears unlikely in light of the English and American experiences.

Furthermore, there are benefits from abolishing the immunity. First, **justice & fairness** - it will end an anomalous exception to the general rule that there should be a remedy for a wrong. Second, lawyers' exposure to incompetence may improve the standard of legal services and thereby strengthen the **legal profession.** Third, the removal of immunity may enhance **public confidence** in the legal system. This is because immunity creates the impression that the law allows lawyers to feather their own nests. According to Iustice Wilson in *Giannarelli v Wraith:*

> *"Barrister with the connivance of the judges have built for themselves an ivory tower and have lived in it ever since at the expense of their clients."*[7]

Lawyers aren't that popular after all.

Scope of the Immunity

The above debate shows that we need to weigh up the risks and benefits of removing the immunity. It also explains why the immunity does not (and cannot) cover everything that lawyers do. So what does the immunity cover?

- It covers **"in-court work"** - that is, participation in court proceedings. Examples include the opening and closing speeches, examination and cross-examination of witnesses.
- It also covers **"out-of-court work"** - that is, work which is "intimately connected" with in-court work. For examples, drafting of court documents, selection of witnesses and parties, gathering of evidence, choice of causes of action and defences.

Since advocacy work is often done inside the court, it remains controversial as to how much and what type of work done outside the court is covered by the immunity. Some judges don't like the "intimate connection" test and may strike out the "out-of-court work" altogether. For instance, Justice Kirby has said:

> *"I would confine the scope of the immunity ... in respect of in-court conduct during proceedings before a court ... The 'intimate connection' test is impermissibly vague ... it extends immunity to situations where it is clearly as unjust as it is unjustifiable."*[8]

Where is Australia heading?

Apart from England, the US and Canada have also abolished or limited advocates' immunity. The High Court of Australia doesn't have to follow *Hall v Simons*. But it may choose to do so. *Boland v Yates Property Corporations Pty Ltd* is the latest High Court case which examined whether immunity should continue without deciding the question. 9 Although this case predates *Hall v Simons,* Iustice Kirby foreshadowed most of the arguments against the immunity raised by the House of Lords. In addition, his Honour also pondered whether the immunity should be confined to criminal proceedings.

The latest Australian case after *Hall v Simons* also confirms that, until the High Court reconsiders the issue, the Australian law will remain the same as that laid down in

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Giannarelli v Wraith.[10]

For the moment, we can at least be confident that the Australian courts will not expand advocate's immunity any further. The immunity, if any, must exist for the benefit of the public and not for the lawyers. In light of the following warning by Sir Brennan (the former High Court Chief Justice) in *Giannarelli v Wraith,* lawyers will no longer be able to feather their own nests under the guise of advocates' immunity - assuming they have even been doing so.

> *"If lawyers 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. That hasn't happened. Hopefully it never will."*[11]

Questions for Discussion

1. *Should Australia continue to have advocates' immunity?*
2. *If yes, what should be the scope of the immunity? For examples, should it cover (a) conduct of civil trial? (b) conduct of criminal trial? (c) failure to present evidence through the witness? (d) failure to raise a defence? (e) failure to include another party?*

[1]*Swinfen v Lord Chensford* (1860) 157 ER 1436.

[2]For examples, *Donoghue v Stevenson* [1932] AC 562; *Hedley Byne v Heller* [1964] AC 465.

[3][1969] 1 AC 191.

[4](1988) 81 ALR 417.

[5]*Rondel v Worsely* [1969] 1 AC 191.

[6]Ibid.

[7]*Giannarelli v Wraith* (1988) 81 ALR 417.

[8]*Boland v Yates Property Corporation* Pty Ltd [1999] HCA 64.

[9]Ibid.

[10]*Tache v Abbond* [2002] VSC 42.

[11]*Giannarelli v Wraith* (1988) 81 ALR 417 at 439.

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