IMMUNITY OF THE ADVOCATE AND SOLICITOR

An advocate and solicitor owes a general duty of care to her client. This duty arises under the law of contract as well as tort.[1] Once a client engages an advocate and solicitor to act on her behalf, the retainer of the advocate and solicitor by the client gives rise to a contractual relationship between the advocate and solicitor and the client. Consequently, an action based on contract may be brought by a client against an advocate and solicitor for failure to exercise due care in the conduct of the client's case.[2] Likewise, where an advocate and solicitor is engaged by a client, the law of torts imposes a duty of care on the advocate and solicitor towards her client. The case of *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[3] indicates that a duty of care is imposed on persons exercising professional skills. Liability for negligence arises from a professional relationship where there has been a breach of the duty of care by the professional.

Nevertheless, it has been accepted that in certain limited situations an advocate and solicitor enjoys immunity from liability for negligence. Such immunity from liability is based on grounds of public policy. The immunity of barristers from liability was established in the landmark decision of *Rondel v Worsley.*[4]

Rondel v Worsley

In the case of *Rondel v Worsley*, the accused was charged with causing grievous bodily harm to one Manning. He obtained the ser-

[1] See for instance *Ngeoh Soo Oh v G Rethinasamy* [1983] CLJ 663; *Ali bin Jais v Linton Albert* [1999] 6 MLJ 304; *Yong & Co v Wee Hood Teck Development Corporation* [1984] 2 MLJ 39.

[2] See for instance *Ali bin Jais v Linton Albert* [1999] 6 MLJ 304; *Yong & Co v Wee Hood Teck Development Corporation* [1984] 2 MLJ 39.

[3] [1964] AC 465.

[4] [1967] 3 All ER 993

vices of a barrister on a dock brief. It was undisputed that he seriously injured Manning. He said to the judge in chambers, "I tore his hand in half and bit part of his ear off." The accused apparently exulted in his ability to inflict such injuries without the aid of a weapon, and appeared to resent the allegation that he must have used a knife. The only defense suggested was self-defense. However, the accused himself did not suffer a scratch. He was convicted of the charge.

The accused then complained that his counsel had failed to reveal and prove in cross-examination that Manning's wounds were not caused by a knife. He also complained that his counsel had failed by cross-examination of the police, or by calling specific persons, to prove that the accused was not in the habit of using a knife. The accused further objected to his counsel's allowing his witness to be 'unjustly discredited and ridiculed'. When asked by the judge in chambers whether he was suggesting that he would have been acquitted if his counsel had conducted his case properly, he said, "No." Subsequently, the statement of claim was amended, the accused sought to say that but for his counsel's negligence, he would never have been convicted at all. The House of Lords took the view that for reasons of public policy, barristers should be immune from liability for negligence in respect of the conduct of a case in court.

Considerations of Public Policy

Among the grounds for immunity considered by the House of Lords was the barrister's overriding duty to the court. It is argued that the adversary system relies significantly on counsel exercising independent judgment in the conduct of a case. This independent judgment is crucial to the efficient administration of justice. It is clear that in situations where there may be a conflict between the barrister's duty to his client and his duty to uphold the administration of justice, he would be required to put his public duty before the apparent interest of his client. Potential liability for negligence, it is argued, may cause counsel to be overly concerned with avoiding liability, and may consequently influence counsel's exercise of independent judgment. Lord Reid also observed that barristers are often faced with questions such as whether in his client's interest he should raise a new issue, put another witness

in the box or ask further questions of a witness. Said Lord Reid of such matters:

> That is seldom an easy question but I think that most experienced counsel would agree that the golden rule is – when in doubt stop. Far more cases have been lost by going on too long than by stopping too soon. But the client does not know that. To him brevity may indicate incompetence or negligence and sometimes stopping too soon is an error of judgment. So I think it not at all improbable that the possibility of being sued for negligence would at least subconsciously lead some counsel to undue prolixity, which would not only be harmful to the client but against the public interest in prolonging trials.[5]

A second ground considered by their Lordships relates to the concern that an action against counsel in relation to in court negligence would amount to a collateral attack on the case. Scrutiny of the alleged negligent acts of counsel in conducting proceedings may seemingly amount to a retrial of concluded cases. In the words of Lord Morris:

> If someone has been tried on a criminal charge and has been convicted, it would not be of any purpose for him to assert that his counsel had been unskillful, unless he could prove that he would have been acquitted had his counsel conducted the case with due care and skill. He would have to prove that on a balance of probability. He would, however, only have been convicted if the jury had been sure that his guilt had been established. If he asserts that, had his counsel asked some more questions than he did ask, the jury in the criminal case or the magistrates would have acquitted him, would he be entitled in his negligence action to call as witnesses the members of the jury or the members of the bench of magistrates who had convicted him? I have no doubt that it would be against public policy to permit any such course.[6]

A retrial of cases would be particularly undesirable where criminal cases are concerned. Lord Morris continued:

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[5] [1967] 3 All ER 993, 999.

[6] [1967] 3 All ER 993, 1012.

> And supposing that after a criminal trial a person was convicted and then appealed unsuccessfully against his conviction and later brought a civil action against his counsel alleging negligence: if he succeeded, would any procedure have to be devised to consider whether or not it would be desirable to set aside the conviction. The conviction (as in the present case) might have taken place years before. Any sentence of imprisonment imposed might have been served (as in the present case) long before.[7]

Another consideration taken into account was the immunity afforded to other participants in court proceedings. No civil action may be brought against witnesses, however false or malicious they may be, in respect of evidence given in court. Similarly, parties to a case and judges are immune from civil liability for words spoken during court proceedings. A barrister's position is said to be one of 'utmost difficulty', and consequently, the protection given by immunity would likewise be advantageous.[8]

Their Lordships also regarded as important the rule that a barrister cannot pick and choose his clients. A barrister is bound to provide his services to a client who can pay his fee, or whose fees are paid by the public legal aid fund, if the case is one either in the courts or in the advisory sphere in which a barrister normally practices. This rule, which is also known as the 'cab rank rule', operates to the advantage of the courts and the public. The rule is applicable regardless of whether a client is unpleasant, unreasonable, disreputable or has a seemingly hopeless case. Such a client may be inclined to blame someone other than himself for his defeat. Similarly, such a client may sue his counsel in order to ventilate his grievance by a second hearing, if it is open to him to do so. Lord Pearce opined that it would be unfair and unreasonable to continue to compel a barrister to take such cases, and yet at the same time remove his immunity. A person, however unreasonable or undesirable, should be entitled to have counsel's advice.

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[7] *Ibid.*

[8] [1967] 3 All ER 993, 1014, *per* Lord Morris.

Solicitors' Immunity

The case of *Rondel v Worsley* was primarily concerned with the immunity of barristers. Nevertheless, Lord Pearson was of the opinion that a solicitor advocate should have the same immunity as a barrister, as the same reasons of public policy are applicable to both.[9] However, Lord Pearson noted that the principle of a barrister's incapacity to contract is not readily applicable to a solicitor. A solicitor enters into a contract with his client by accepting the client's instructions. Consequently, a solicitor has a duty under such a contract to exercise due care and skill. Lord Pearson observed:

> I am not aware of any decision or even dictum in a judgment to the effect that there is an exception relating to the solicitor's work as an advocate – that in respect of such work there is no legal right or legal obligation. If public policy requires that a solicitor must have immunity from legal liability in respect of his advocacy work, what is to be the contractual position? ...That is not an easy question to answer. There are problems involved. They are not necessarily insoluble; but I think that they would be more appropriately considered at length in a case where the question of a solicitor's liability for advocacy work was raised for decision.[10]

Lord Upjohn expressed the view that a solicitor acting as an advocate should also be entitled to the immunity available to barristers.[11] His Lordship noted that the immunity should be limited to situations where a solicitor is performing the acts which counsel would have performed had he been employed. A similar view was held by Lord Reid and Lord Pearce. [12] On this issue Lord Reid concluded:

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[9] [1967] 3 All ER 993, 1041.

[10] [1967] 3 All ER 993, 1042.

[11] [1967] 3 All ER 993, 1035.

[12] Lord Pearce remarked at [1967] 3 All ER 993, 1024:

> In my opinion, on the reasoning of that case which extended to a solicitor advocate on grounds of public policy the same immunity as counsel, a solicitor, while performing counsel's function in a court of law, would be entitled in spite of his contract to the same immunity from suits of negligence.

> So my present view is that the public interest does require that a solicitor should not be liable to be sued for negligence in carrying out work in litigation which would have been carried out by counsel if counsel had been engaged in the case.[13]

Extent of the Immunity

In *Rondel v Worsley*, their Lordships took the view that a barrister should be immune from actions for negligence in respect of the conduct of a case in court. The immunity, however, was not to be an all-encompassing one. Lord Morris, for instance, remarked:

> It follows from what I have said that, in my view, there is no sound legal principle which can support or justify the broad and sweeping statements that have in the past been made that barristers are in all circumstances immune from liability.[14]

Lord Upjohn considered the question of where the immunity of counsel engaged in litigation should start. His Lordship noted that the immunity should begin before counsel enters the doors of the court to conduct a case. Matters relating to litigation such as the pleadings, advice on the prospect of success, discovery as well as advice on evidence would have been dealt with prior to counsel's appearance in court.

Nevertheless, matters which are not done with a view to litigation were said to be beyond the scope of the immunity. For instance, the drafting of wills, settlements, conveyances, real property contracts and commercial contracts could not be described as pertaining to litigation. Instead, these matters are conducted with a view to defining the rights of parties and avoiding litigation.[15] Consequently, Lord Upjohn took the view that the immunity granted to counsel should not extend to such matters. Similarly, Lord Pearson observed that "it is at least doubtful whether barristers have any immunity from liability for negligence in

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[13] [1967] 3 All ER 993, 1001.

[14] [1967] 3 All ER 993, 1010.

[15] [1967] 3 All ER 993, 1036.

doing 'pure paper work'", meaning drafting and advisory work unconnected with litigation.[16]

The issue of a barrister's immunity from actions for professional negligence came before the House of Lords again in the case of *Saif Ali v Sydney Mitchell & Co*.[17] The question that arose in this case was whether a barrister's immunity covers pre-trial acts or omissions in connection with civil proceedings.

In *Saif Ali*, the plaintiff brought an action against the appellants claiming damages for professional negligence. The plaintiff's claim arose out of the appellants' conduct of the plaintiff's claim for damages for personal injury sustained as a result of a road accident. The facts of the case involved the plaintiff, Mr Saif Ali, who was a passenger in a van driven by his friend Mr Akram. The plaintiff was injured in a collision with a car driven by Mrs Sugden, to whose husband the car belonged. There was no doubt that Mrs Sugden was to blame. The barrister drafted a pleading against Mr Sugden, on the basis that, as Mrs Sugden was using the car to drive their children to school, Mr Sugden was responsible for her negligence. Subsequently, proceedings against Mr Sugden were dropped. The limitation period had elapsed, and consequently, it was too late to sue Mrs Sugden.

The plaintiff alleged that the barrister concerned had been negligent in advising that proceedings should be issued against Mr Sugden only. The barrister failed to advise the plaintiff that he should bring proceedings against Mr Sugden and/or Mrs Sugden and/or Mr Akram. It was also alleged that the barrister had been negligent in delaying until after the expiry of the limitation period to advise whether the proceedings should be resettled, in view of the non-admission by Mr Sugden that Mrs Sugden was driving as his agent and the possible negligence of Mr Akram.

The majority of the House of Lords took the view that the immunity afforded to barristers extends to work that is intimately connected to the conduct of the cause in court. Referring to *Rees v Sinclair*,[18] Lord Wilberforce, Lord Diplock and Lord Salmon were of the opinion that the immunity should cover work that is 'so intimately connected

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[16] [1967] 3 All ER 993, 1041.

[17] [1978] 3 All ER 1033.

[18] [1974] 1 NZLR 180.

with the conduct of the cause in court that it can fairly be said to be a preliminary decision affecting the way the cause is to be conducted when it comes to a hearing'.[19] Lord Russell and Lord Keith, in dissenting, remarked that the immunity should extend to all of a barrister's work in connection with litigation.

On the facts of *Saif Ali*, the majority of the House of Lords concluded that the barrister's advice could not be said to have been intimately connected with the conduct of the plaintiff's case in court. Therefore, it was not within the sphere of a barrister's immunity from suit for negligence. Nevertheless, Lord Keith and Lord Russell dissented. Their Lordships were of the view that the negligence took place in connection with the conduct of litigation.

Notably, the intimate connection test has been criticized as being difficult to apply.[20] It has also been said to have given rise to considerable uncertainty.

Other Common Law Jurisdictions

The issue of a lawyer's immunity from liability for negligence has been dealt with in differing ways in various common law jurisdictions. In Australia, the immunity of barristers and solicitors as espoused in *Rondel v Worsley* was adopted by the High Court of Australia in *Giannerelli v Wraith*.[21] In *Giannarelli v Wraith*, the majority of the High Court of Australia were of the opinion that barristers and solicitors are immune from liability for negligence in relation to work done in court or work which is intimately connected with work done in court. Mason CJ, Brennan, Dawson and Wilson JJ agreed with the decisions of the House of Lords in *Rondel v Worsley* and *Saif Ali*. Likewise, lawyers in New Zealand enjoy a similar immunity by virtue of *Rees v Sinclair*.[22]

Nevertheless, such immunity has been met with greater resistance in Canada. The question of whether a lawyer should be immune from liability for negligence in respect of the conduct of a case in court

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[19] [1974] 1 NZLR 180, 187.

[20] Per Lord Hutton in *Arthur JS Hall & Co v Simons* [2000] 3 WLR 543.

[21] (1988) 81 ALR 417.

[22] [1973] 1 NZLR 236; affirmed [1974] 1 NZLR 180.

arose in the case of *Demarco v Ungaro*.[23] In that case, the court concluded that the public interest in Ontario did not require that their courts recognize an immunity of a lawyer from action for negligence by reason of the conduct of a civil case in court. Notably, the court confined its discussion on immunity to civil cases.[24] Krever J observed:

> Public policy and the public interest do not exist in a vacuum. They must be examined against the background of a host of sociological facts of the society concerned. Nor are they lawyers' values as opposed to the values shared by the rest of the community. In the light of recent developments in the law of professional negligence and the rising incidence of "malpractice" actions against physicians, I do not believe that enlightened, non-legally trained members of the community would agree with me if I were to hold that the public interest requires that litigation lawyers be immune from actions for negligence.[25]

Consequently, Krever J took the view that to deprive clients of recourse against their lawyers who are negligent would not appear to be consistent with public interest.

The grounds of public policy for the immunity in *Rondel v Worsley* were also canvassed in *Demarco v Ungaro*. The opposing considerations of the undesirability of relitigating an issue on the one hand, and depriving clients of recourse against their lawyers on the other, were also considered. It was thought that the right of clients to recourse against errant lawyers was the more pertinent of the two. Krever J also considered the argument that counsel would be tempted to prefer the interest of the client to the duty to the court in the absence of immunity. His Lordship remarked that there was no empirical evidence that the risk is so serious that an aggrieved client should be rendered remediless.

The position in Singapore is similar to that of Canada. The issue of a lawyer's immunity arose in *Chong Yeo & Partners v Guan Ming Hardware & Engineering Pte Ltd*.[26] The court concluded that

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[23] (1979) 95 DLR (3d) 385.

[24] (1979) 95 DLR (3d) 385, 386, 405, 409.

[25] (1979) 95 DLR (3d) 385, 405.

[26] [1997] 2 SLR 729.

the immunity as stated in *Rondel v Worsley* does not apply in Singapore. It was held that the cab rank rule is not applicable in Singapore. Even if it did apply, the court took the view that the acceptance of clients by barristers is not an involuntary assumption of a gratuitous responsibility. Barristers are paid for their services, and in return for payment, clients are entitled to expect some level of competence.

The Court of Appeal in *Chong Yeo & Partners* also took the view that the absence of immunity would not jeopardize the barrister's performance of his duty to the court. Where counsel does something against the interest of his client in furtherance of his duty to the court, the duty to the court operates as a justification for his breach of duty to the client. Referring to the judgment of Wilson J in *Giannarelli v Wraith*, it was noted that, 'Counsel could never be in breach of duty to the client by fulfilling the paramount duty'. In addition, liability would not be imposed in respect of errors of judgment unless the error was such that no reasonably well-informed and competent member of that profession could have made it. In relation to the privilege conferred on participants of a trial which exempts them from liability in respect of remarks made in court, Yong Pung How CJ also observed that the privilege protects freedom of speech rather than negligence.

The issue of relitigation was also discussed. The court noted that the difficulties of relitigation are not insurmountable. Further, as juries are no longer used in Singapore, some of the problems of relitigation would not arise. The court in *Chong Yeo & Partners* drew a distinction between claims of negligence in civil matters and in criminal matters. In particular, the court considered the reluctance of the court in *Rondel v Worsley* to permit a person who has been convicted, and exhausted all procedures for appeal, to seek to establish his innocence by asserting that he would not have been convicted but for his advocate's negligence. It was conceded that criminal convictions should be challenged as part of the criminal trial process. Yong Pung How CJ remarked:

> It would be invidious if the conviction of a criminal were to be found by a civil case to have resulted from the negligence of his advocate

> and solicitor, for it follows then that the conviction was wrong. A wrong conviction ought not to stand at all.[27]

Nevertheless, these considerations do not apply to civil matters. The Court of Appeal concluded that the *Rondel v Worsley* immunity did not apply to civil cases in Singapore. However, a claim in negligence in the conduct of a criminal case would be barred, not because of immunity, but because the action would be an abuse of the court process.

Hall's Case: *Rondel v Worsley* Revisited

The issue of a lawyer's immunity came before the House of Lords again when three appeals were made to the House. The cases involved a building case and two family cases. In these conjoined appeals, referred to as *Arthur JS Hall & Co v Simons*,[28] the House of Lords reconsidered the immunity established in *Rondel v Worsley*. It was observed that the decision in *Rondel v Worsley* was open to review, not because it had been wrongly decided, but because circumstances have changed since 1967.

The House of Lords unanimously agreed that the immunity should be abolished in civil cases. Their Lordships noted that public policy is not immutable. The grounds of public policy on which the immunity in *Rondel v Worsley* was based were scrutinized in the light of existing circumstances. The immunity was considered to be no longer justifiable in civil cases due to developments since *Rondel v Worsley*. In the words of Lord Hutton:

> However, notwithstanding the weight of the argument which can be advanced for preserving the immunity of advocates, I have come to the conclusion for two main reasons that in assessing the public interest the retention of the immunity in respect of civil proceedings is no longer clearly justifiable and that therefore the immunity should no longer be retained. The first reason relates to public perception. The principle is now clearly established that where a person relies on

[27] [1997] 2 SLR 729, 743-744.

[28] [2000] 3 WLR 543.

> a member of a profession to give him advice or otherwise to exercise his professional skills on his behalf, the professional man should carry out his professional task with reasonable care and if he fails to do so and in consequence the person who engages him or consults him suffers loss, he should be able to recover damages. This principle accords with what members of society now expect and consider to be just and fair, and I think that it is difficult to expect that reasonable members of society would accept it as fair that the law should grant immunity to lawyers when they conduct a civil case negligently, when such immunity is not granted to other professional men, such as surgeons, who have to make difficult decisions in stressful conditions.

Lord Hope remarked that the immunity in civil cases is disproportionate. It is a derogation from the right of access to the court which is no longer clearly justifiable on the grounds of public interest.

> Their Lordships also took into account the specific grounds of public policy on which Rondel v Worsley was based. Concerning the cab rank rule, Lord Hope was of the opinion that the removal of the immunity would not have the effect of depriving those in need of an advocate's services of the prospect of those services. As for the argument that the conduct of litigation is a very difficult art, it was observed that there are many professions which require delicate judgment, such as doctors. An advocate is not unique among professional men. The undesirability of relitigation was also considered, and it was noted that this is particularly acute in the field of criminal justice. Consequently, although their Lordships agreed that the immunity should be abolished in civil cases, the House of Lords was divided concerning the issue of whether immunity should be retained in respect of criminal cases.

Lord Steyn and Lord Browne-Wilkinson were of the view that the immunity should be abolished in criminal cases. Lord Browne-Wilkinson commented that an action claiming that an advocate has been negligent in criminal proceedings will be struck out as an abuse of process so long as the criminal conviction stands. The number of cases in which negligence actions are brought after a conviction is quashed is likely to be small. Accordingly, Lord Browne-Wilkinson concluded that there

is no need to preserve an advocate's immunity in criminal cases. Lord Hoffman appeared to prefer the view that a total immunity from actions for negligence in criminal cases would not be justifiable. His Lordship noted that once a conviction as been set aside, there can be no public policy objection to an action for negligence against the legal advisers.

In contrast, Lord Hope, Lord Hutton and Lord Hobhouse considered that immunity in criminal cases should be retained. Lord Hope was of the opinion that if advocates in criminal cases were exposed to the risk of being held liable in negligence, the existence of the risk would influence the exercise of their independent judgment in order to avoid the possibility of being sued. This risk was considered to be as real in the existing circumstances as it was in 1967. Lord Hope also noted that there are various mechanisms that are available in the field of criminal justice to prevent a miscarriage of justice if the effect of an advocate's negligence was to deprive the client of a fair trial. Consequently, Lord Hope took the view that the immunity should be retained in criminal cases. Similarly, Lord Hutton held that the public interest requires that the immunity of an advocate in respect of his conduct of a criminal case in court should continue. Likewise, his Lordship was of the view that the immunity should also continue in respect of pre-trial work intimately connected with the conduct of the criminal case in court. Lord Hobhouse noted that the present cases before the House of Lords did not concern criminal litigation. As such, arguments had not been advanced concerning the distinctions that might be made between civil and criminal cases. His Lordship also observed that there are essential differences between the civil and criminal justice systems. The primary remedy for a miscarriage of justice in a criminal case is a criminal appeal. The legitimate interest of a citizen charged with a criminal offence is not an economic interest, and the civil courts do not have any part to play in such matters.

Malaysia: The Advocate and Solicitor's Immunity

A pertinent difference between the legal profession in England and the profession in Malaysia is the fact that Malaysia has what is commonly known as a fused profession. Lawyers in Malaysia practise as advo-

cates and solicitors. In contrast, the legal profession in England is a divided profession. This difference was acknowledged in the decision of the Federal Court in *Miranda v Khoo Yew Boon.*[29]

In *Miranda,* the Federal Court referred to the judgment of the Court of Appeal in *Rondel v Worsley*, and in particular to the judgment of Lord Denning MR. Azmi CJ made reference to Lord Denning's remark that the position of a solicitor is distinguishable from that of a barrister. A solicitor can choose his client and has a contractual duty to use care, and can be sued if he is negligent. It was noted that:

> [O]n appeal to the Court of Appeal the court held that only a barrister as such should be protected and not a solicitor irrespective as to whether the negligent act was in reference to the conduct of a trial or elsewhere.[30]

Nevertheless, Azmi CJ observed that as the legal profession in Malaysia is a fused profession, the question of the immunity of lawyers must be dealt with differently. His honour took the view that the position of an advocate and solicitor in Malaysia is exactly that of a solicitor in England. His honour also noted that it is immaterial whether the act of negligence committed by a practitioner is an act normally done by a solicitor or a barrister in England.

The facts of Miranda differed significantly from *Rondel v Worsley* in that the negligence complained of did not concern the conduct of a case in court. The facts related to the failure by an advocate and solicitor to file the memorandum of appeal within the required time. As such, it was arguably not intimately connected with the conduct of a case in court. The question of immunity was not actually in issue.

The position of advocates and solicitors as stated in *Miranda* was reiterated in *Ali bin Jais v Linton Albert.*[31] The facts of *Ali bin Jais* were similar to the facts of *Miranda.* In *Ali bin Jais*, the plaintiff alleged that his solicitor had been negligent in failing to file a memorandum of appeal within the required period of time. The plaintiff also contended that his solicitor had filed an appeal at the Sessions Court

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[29] [1968] 1 MLJ 161.

[30] [1968] 1 MLJ 161, 164.

[31] [1999] 6 MLJ 304.

when it was not the appropriate time to file such an appeal. The court found that the solicitor had been negligent. Accordingly, the solicitor was liable both in tort and in contract to the client. As in *Miranda*, the negligence complained of in this case fell outside the confines of the immunity.

A litigation case involving allegations of negligence relating to the conduct of a case in court is *Mohd Nor Dagang Sdn Bhd v Tetuan Mohd Yusof Endut.*[32] In this case, the client complained that the advocate and solicitor had neglected to make reasonable preparation for the defence of the plaintiff's case. In particular, it was alleged that the lawyer's failure to adduce documentary evidence and to call witnesses at the trial amounted to negligence. The client also alleged that the advocate and solicitor had failed to ensure that the client had sufficient notice of the hearing date.

The High Court found that the client had been informed verbally and in writing of the trial date. Consequently, there was no need to remind the plaintiff of the hearing date. Subsequent failure to remind a client of the hearing date did not amount to negligence. As for the allegation that the advocate and solicitor had been negligent in failing to adduce documentary evidence, it was found that the client had not provided the necessary documents to the lawyer. The court concluded that the advocate and solicitor had done all that was reasonable in the defence of the plaintiff's case in the circumstances. Consequently, the advocate and solicitor had not been negligent in the conduct of the plaintiff's case.

In relation to the question of immunity, Abdul Hamid Embong J noted that the Federal Court in *Miranda* did not address the public policy grounds for the immunity of advocates and solicitors. Referring to *Rondel v Worsley* and *Saif Ali*, Abdul Hamid Embong J took the view that public policy requires that advocates and solicitors be given a limited immunity in respect of their conduct of proceedings in court. His honour considered the following public policy grounds as the basis for this view. Firstly, his honour noted that the proper administration of justice may not be achieved if barristers are inhibited by the fear of being sued for negligence by a disgruntled client. Secondly, it would

[32] [2001] 5 MLJ 561.

be undesirable to permit relitigation of concluded cases in negligence suits between clients and their barristers. Thirdly, there is presently a general immunity attached to all other participants in proceedings before the courts. Accordingly, Abdul Hamid Embong J took the view that the defence of limited immunity was available to the defendant. On the facts, it was concluded that the acts complained of were acts preparatory to and intimately connected with the actual conduct of the case in court.

In contrast, in *Lim Soh Wah v Wong Sin Chong*,[33] a decision of the Court of Appeal, Gopal Sri Ram JCA remarked that advocates and solicitors in Malaysia have never enjoyed immunity from negligence suits. His Lordship referred to *Miranda* and *Ali bin Jais* as authorities. The facts of this case involved an advocate and solicitor who delivered a defence but failed to appear in court on the day fixed for the trial of the action. He also did not inform his clients of the trial date. Judgment was then entered against the clients. However, it was noted in the judgment of Gopal Sri Ram JCA that the case did not involve wider policy questions relating to immunity.

Conclusion

As seen above, the issue of the immunity of advocates and solicitors has arisen in a number of Malaysian cases. Nevertheless, the question of immunity does not appear to have been decisively settled. In *Miranda*, the negligence complained of did not come within the ambit of the immunity in *Rondel v Worsley*. Questions relating to the immunity of advocates and solicitors did not arise from the facts of the case. Any remarks relating to the question of immunity appear to be persuasive rather than binding authority.

With respect, it is also noted that there is some ambiguity in the remark that the position of an advocate and solicitor in Malaysia is the same as that of a solicitor in England, but that it is immaterial whether the act in question is one normally done by a solicitor or a barrister in England. In the decision of the House of Lords in *Rondel v Worsley*, a number of their Lordships were of the opinion that solicitors should

[33] [2001] 2 CLJ 364.

have the immunity accorded to barristers, when solicitors are carrying out work in litigation which would have been carried out by a barrister.[34] As such, the issue of whether the act was one normally carried out by a barrister was considered by their Lordships to be relevant to the question of a solicitors' immunity. In stating that it is immaterial whether the act is one normally done by a barrister, the position taken in *Miranda* would appear to be somewhat inconsistent with that in England.

Notably, the remarks on the immunity of solicitors in *Rondel v Worsley* have been said to be *obiter dictum* as the facts in issue concerned a barrister's immunity.[35] Likewise, Wilson J in *Giannerelli v Wraith* made a similar observation.[36] His honour considered authorities on the position of solicitors in England. His honour noted that although nineteenth century writers made no suggestion that solicitors, when acting as advocates, were immune from suit for in court negligence, none of the writers can be said to have focused precisely on the liability of a solicitor for in court negligence whilst acting as an advocate. His honour concluded that whilst it is argued that the remarks in *Rondel v Worsley* on solicitors may have been *obiter dictum*, they were strong evidence of the law in England with respect to the immunity of solicitors from liability for in court negligence at that time.

The question of immunity was more relevant to the case of *Mohd Nor Dagang Sdn Bhd v Tetuan Mohd Yusof Endut* as it concerned allegations of in court negligence. However, the abolition of immunity in civil cases in *Hall* was not discussed in *Mohd Nor Dagang*. Both *Mohd Nor Dagang* and *Lim Soh Wah* involved the negligence of lawyers in litigation cases. The High Court in *Mohd Nor Dagang* took the view that the negligent acts were intimately connected with the conduct of the case in court. The question of whether the negligence complained of in *Lim Soh Wah* was likewise either in court negligence or intimately connected with the conduct of the case in court was not discussed, as the court took the view that advocates and

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[34] Refer to the section on solicitors' immunity above.

[35] See comment by Gopal Sri Ram JCA in *Lim Soh Wah v Wong Sin Chong* [2001] 2 CLJ 364.

[36] [1988] 165 CLR 543, 568-570.

solicitors in Malaysia are not immune from negligence even in those circumstances.

With respect, in the light of *Miranda*, which is persuasive authority, it would seem difficult to accept the position that advocates and solicitors in Malaysia have never enjoyed immunity from negligence suits. Should the issue of an advocate and solicitor's immunity arise in future, there would appear to be compelling reasons for allowing advocates and solicitors to be sued for negligence. The reasons for the abolition of a barrister's immunity in civil cases in *Hall* are particularly pertinent.

As noted in decided cases of other common law jurisdictions, the variations in legal systems as well as notions as to what constitutes public interest in other countries may at times lead to different conclusions on the question of immunity. Two of the grounds of public policy canvassed in *Rondel v Worsley* are deserving of particular attention in this context. The first of these is the undesirability of relitigation of concluded cases in an action for negligence against lawyers. Any potential relitigation is likely to be less complicated as a consequence of the abolition of jury trials in Malaysia. Jury trials were abolished in Malaysia by the enactment of the Criminal Procedure Code (Amendment) Act 1995 (Act 980). As noted in the Singaporean case of *Chong Yeo & Partners*, some of the problems of relitigation as envisaged in *Rondel v Worsley* would not arise as a result of the abolition of jury trials.

Another of the grounds of public policy considered in *Rondel v Worsley* was the cab rank rule. Notably, their Lordships in *Hall* took the view that the cab rank rule should no longer stand in the way of the abolition of immunity. In Malaysia, the consideration of the cab rank rule does not arise, as such a rule does not apply to advocates and solicitors. Rule 2 of the Legal Profession (Practice and Etiquette) Rules 1978[37] provides that advocates and solicitors have the discretion to refuse to accept a brief in special circumstances.

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[37] Rule 2 of the Legal Profession (Practice and Etiquette) Rules 1978 provides:

> An advocate and solicitor shall give advice on or accept any brief in the Courts in which he professes to practise at the proper professional fee dependent on the length and difficulty of the case, but special circumstances may justify his refusal, at his discretion, to accept a particular brief.

Even in Australia where barristers and solicitors are still immune from liability for negligence, three of the seven High Court justices in *Giannerelli v Wraith* dissented. Deane J, with whom Toohey and Gaudron JJ agreed, observed:

> There is no decided case which requires this Court to treat a barrister or other legal practitioner acting professionally in court for a client as beyond the reach of the modern common law of negligence. Nor, in my view, is any convincing justification of such an immunity to be found in general principle; plainly enough, the traditional view that the relationship between a barrister and his client is non-contractual does not provide one. If the recognition of such an immunity can be justified, it must be by reference to largely pragmatic considerations of public policy: cf. Rondel v Worsley; Saif Ali v Sydney Mitchell & Co. In that regard however, I do not consider that the considerations of public policy which are expounded in Rondel v Worsley and in the majority judgments in the present case outweigh or even balance the injustice and consequent public detriment involved in depriving a person, who is caught up in litigation and engages the professional services of a legal practitioner, of all redress under the common law for 'in court' negligence, however gross and callous in its nature or devastating in its consequences.[38]

The cases in which the immunity of lawyers has been rejected or abolished have concerned negligence in civil cases. In criminal cases there are stronger public policy grounds for retention of the immunity. As noted by Lord Hobhouse in *Hall*, there are significant differences between the civil and criminal justice systems. Prudence would require an in-depth examination of the potential consequences of allowing civil actions for negligence in criminal cases before permitting such actions to be brought.

The arguments for allowing claims to be brought against advocates and solicitors for negligence in civil cases are convincing. In the event that the issue of the immunity of advocates and solicitors is considered by the Malaysian courts in the near future, it is anticipated that the many arguments in favour of the abolition of such immunity in civil cases will be taken into account - not because a significant number of

[38] [1988] 165 CLR 543, 588.

other common law jurisdictions have taken steps to abolish the immunity in civil cases, but because it is in the interest of the public. It has also been suggested that Parliament may be the more appropriate arm of government to address the question of the immunity of advocates and solicitors.[39] The considerations of public policy as well as other related issues such as the sufficiency of existing measures to strike out unmeritorious claims and to avoid relitigation may be more effectively and extensively examined by a law reform body than by the courts.[40]

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[39] G Hampel, J Clough, 'Giannarelli v Wraith; Abolishing the Advocate's Immunity from Suit Reconsidering Giannarelli v Wraith' (2000) 24 *Melbourne University Law Review* 1016.

[40] *Ibid.*

DUTIES OF INSURANCE INTERMEDIARIES: CONFRONTING THE LEGAL ISSUES

Introduction

This article will present briefly the legal relationship of an insurance intermediary with his/her principal. An understanding of this legal relationship will put into perspective many issues that are faced by both parties. The duties that are owed by one party to the other depend on this very basis. Thus, the remedies available when there is a breach of such duties are also similarly affected.

An 'agent' is defined as a person employed to do any act for another or represent another in dealings with third persons.[1] This other person is the 'principal' to the agent. In the context of insurance contracts, there are two types of intermediaries – an insurance agent and a broker.

An insurance agent is the agent for the insurer.[2] The role of insurance agents is mainly to procure business for the insurer. This they do by soliciting or obtaining new proposals for insurance and the renewal or continuance of existing policies. The principal for the insurance agent is the insurer i.e. the insurance company. This is despite the fact that many insurance agents may behave as if they represent their 'clients' who are in actual fact the proposers to the insurance contracts. The agent is not a party to the insurance contract.

The insurance broker[3] on the other hand, is the agent for the proposer/insured. The main function of the broker is to obtain the 'best deal' for the proposer by getting quotations from several insurers pertaining to the plan required by the proposer. Hence the principal to the broker is the 'client' i.e. the proposer. The broker acts on behalf of the

[1] Section 135 of the Contracts Act 1950.

[2] Section 2, Insurance Act 1996.

[3] Section 2, Insurance Act 1996.