34 pages.

COURT OF APPEAL 33,

Hearing Dates: 11th, 12th, 13th, 14th January, 1995.
Judgment reserved: 14th January, 1995.
Judgment delivered: 17th February, 1995.

Before: Sir Godfray Le Quesne, Q.C., President,
Sir Louis Blom-Cooper, Q.C., and
Sir Charles Frossard, K.B.E.

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Between T.A. Picot (C.I.) Limited. First Appellant
Vekaplast Windows (C.I.)Limited. Second Appellant

And Richard John Michel,
Geoffrey George Crill,
and
Francis Charles Hamon,
(exercising the professions of advocate and solicitor under the name and style of "Crills") Respondents

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Appeal by the Appellants (the Plaintiffs in the court below) against the Order of the Royal Court (Samedi Division) of 5th November, 1993, striking out their Order of Justice, and ordering the Appellants to pay the costs of the Respondents incidental to the defence of the action including the striking out application.

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Advocate W.J. Bailhache for the Appellants.
Advocate J.G. White for the Respondents.

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JUDGMENT

THE PRESIDENT:

1. This appeal is brought from an Act of the Royal Court of 5th November, 1993, by which the Court struck out the Appellants' amended Order of Justice as scandalous, frivolous or vexatious or otherwise an abuse of the process of the Court.

2. The two Appellant companies are controlled by Mr. T.A. Picot. The first is registered in Jersey and the second in Guernsey. They were engaged in the manufacture and supply in the Channel Islands of windows and doors. In January, 1983, the

first Appellants registered under the Registration of Business Names (Jersey Law, 1956, the business names 'Vekaplast Windows' and 'Veka Windows'. In 1984, a German company called Vekaplast Heinrich Laumann GmbH (to which I shall refer as VHL) issued an Order of Justice against the Appellants. In this Order of Justice, VHL claimed to be the owners of the trade names and trade marks 'Veka' and 'Vekaplast'. They claimed a declaration of their ownership of these names and marks, and an injunction requiring the second Appellants to remove the word 'Vekaplast' from their name.

3. The Appellants claimed to be entitled to the exclusive use in Jersey of the names 'Vekaplast Windows' and 'Veka Windows'. They instructed the first Respondent, Advocate Michel, to defend the action started by VHL's Order of Justice.

4. This action came on for trial in the Royal Court on 19th May, 1986. Advocate Michel appeared for the Appellants. The trial was adjourned on the 21st May, and was resumed on 19th August, 1986. On 20th August the trial was again adjourned, this time to give the parties an opportunity for discussion. They agreed the terms of an Order, and on 21st August the Court made this Order with the consent of the parties. The effect of the consent Order was that the Appellants acknowledged that VHL owned the trade marks and names 'Vekaplast', 'Veka' and 'Vekaplast Windows', and VHL were granted an injunction restraining the Appellants from claiming that either of them was the sole authorised supplier of 'Veka' products or the sole licensed manufacturer of 'Veka' windows, doors and shutters. VHL did not pursue their claim for an injunction requiring the second Appellants to remove the word 'Vekaplast' from their name.

5. Although the Appellants had consented to this Order, they became dissatisfied with it and wanted to appeal against it. Since the Order had been made with consent, there could be no appeal without the leave of the Royal Court (Court of Appeal (Jersey) Law, 1961, art. 13 (c)(i)). The Appellants applied for this leave, but on 15th August, 1989, the Royal Court dismissed their application.

6. The Appellants then instituted the action from which this appeal arises. The Defendants were Advocate Michel and two other lawyers who at the time were his partners in the firm of Crills. The Appellants alleged in the Order of Justice that Advocate Michel was negligent in his conduct on their behalf of the action brought against them by VHL. In the amended form which it had assumed by the time of the Royal Court's Order striking it out, the Order of Justice contained particulars of negligence extending to 27 paragraphs. These particulars alleged various acts and omissions of Advocate

Michel, ranging in time from the Appellants' original instructions to him to defend the action to the making of the consent Order.

7. Before the Royal Court Mr. Picot, who appeared there for the Appellants, conceded that the way in which the Order of Justice set out their case left something to be desired. Mr. Bailhache told us that, if the action proceeded, he would expect to be instructed to amend the Order of Justice again. The Judgment of the Royal Court reveals what the complaint of the Appellants is, viz.:

> *"The problem started at the very first meeting when Mr. Picot said that he made his views plain. Mr. Michel, he claimed, never bothered to understand from the beginning what the issue was, as Mr. Picot saw it; he just, said Mr. Picot, took charge and said he knew what to do. The result was that his case was not properly pleaded and never put to the Court. On what was before the Court, he conceded that the Judgment of August, 1986, was reasonable..... He does not therefore seek to attack the Judgment, but to pursue Advocate Michel for damages for failing to put his case as it should have been put, so that he was effectively shut out from the litigation as if the case had been conceded on the negligent advice of counsel, without his ever going to Court, because the issue, as he saw it, was not debated..... [the complaint is] that from the beginning Mr. Michel negligently failed to grasp the essence of the case, as described above, and that, consequently, the pleadings and other procedural steps en route to Court were thereby inevitably flawed, as was the conduct of the case in Court, the advice to settle, and the settlement itself".*

8. On 18th October, 1993, the Respondents issued a summons in the Royal Court to strike out the Order of Justice, under Rule 6/13 of the Royal Court Rules, 1992, or disclosing no reasonable cause of action, or being scandalous, frivolous or vexatious, or prejudicing, embarrassing or delaying the fair trial of the action, or otherwise being an abuse of the process of the Court, or alternatively under the Court's inherent jurisdiction. This summons came before Mr. Commissioner Le Cras, sitting alone, on 2nd, 3rd, 4th and 5th November, 1993. The principal submission of the Respondents was that Advocate Michel, as an advocate acting in the action between VHL and the Appellants, had been immune from suit for negligence. The answer of the Appellants was that the negligence fell outside the scope of this immunity.

9. The Commissioner delivered his Judgment on 5th November, 1993. He said the conduct of the case in Court was governed by, and was a consequence of, the initial view taken by Mr. Michel. If he could not be sued for the conduct of the case in Court, it was hard to see how the immunity could be lifted from conduct which led directly and inevitably to the result which occurred in Court. Every action of Mr. Michel after he was first instructed was so intimately connected with the conduct of the case in Court as to be covered by the immunity. This included the settlement, which was an integral part of the conduct and management of the case. Furthermore, since the settlement had been embodied in an Order of the Court, the present action was a collateral attack on that Order, and so an abuse of the process of the Court. In the result, the Order of Justice was struck out.

10. In this Court Mr. Bailhache, who appeared for the Appellants, made two principal submissions. The first was that in Jersey advocates have no immunity from suit. Mr. Bailhache submitted that the case of Rondel -v- Worsley (1969), 1 A.C. 191 might not be decided in England today in the same way as it was in 1967, but conceded that, in a field in which Jersey law follows the law of England, this Court would not depart from a decision of the House of Lords, or would do so only in exceptional circumstances. He contended, however, that circumstances bearing upon public policy in Jersey differed in certain respects from circumstances in England, and in Jersey there was no basis in public policy for advocates' immunity. The second principal submission made by Mr. Bailhache was that, if in Jersey advocates have immunity from suit within certain limits, the Royal Court misapplied those limits as set out by the House of Lords in Rondel -v- Worsley and Saif Ali -v- Sydney Mitchell & Co (1980) A.C. 198. The negligence alleged against Mr. Michel fell, Mr. Bailhache argued, outside the limits there set out.

11. I consider this second submission first, and consider it on the basis of the English law laid down in the two cases just mentioned. In Rondel -v- Worsley, Lord Reid, Lord Pearce and Lord Upjohn thought counsel's immunity extended beyond conduct in Court. Whether Lord Morris agreed with this is not clear from his speech. Lord Pearson's view is also uncertain, but, since he expressed doubt whether the immunity covered pure paperwork unconnected with litigation, it seems fair to infer that he did regard it as extending to conduct connected with litigation but not occurring actually in Court. None of their Lordships expressed a clear opinion of exactly how far the immunity extended to conduct outside Court, except Lord Pearce, who thought it covered all counsel's work done as a barrister.

12. The extent of the immunity was defined further in the Saif Ali case. The majority of their Lordships (Lord Wilberforce, Lord Diplock and Lord Salmon) adopted the following view stated in the Court of Appeal of New Zealand by McCarthy, P. in Rees -v- Sinclair (1974), 1 NZLR 180 at p.187:-

> *"I cannot narrow the protection to what is done in Court; it must be wider than that and include some pre-trial work. Each piece of before-trial work should, however, be tested against the one rule; that the protection exists only where the particular work is so intimately connected with the conduct of the cause in Court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing. The protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice, and that is why I would not be prepared to include anything which does not come within the test I have stated".*

13. That is the test which has to be applied when a question arises whether counsel's immunity extends to some conduct outside Court. To quote from Lord Wilberforce's speech in Saif Ali (at p.215):

> *"I suggest that the passage, if sensibly, and not pedantically, construed, provides a sound foundation for individual decisions by the Courts, whether immunity exists in any given case".*

However, the making of the individual decision always involves the application of the test to the facts of the given case. There is not yet any line of cases to which one can turn for examples of the working of the test. There is consequently considerable scope for the exercise of judgment by the tribunal which has to decide, not merely whether the inculpated conduct is connected with the conduct of the case in Court, but whether it is so intimately connected that it can fairly be called a preliminary decision affecting the way the case is to be conducted in Court.

14. In England, the limitations to be observed in the exercise of the power to strike out a pleading as disclosing no reasonable cause of action have long been settled by familiar authorities. In Hubbuck & Sons -v- Wilkinson, Heywood & Clark (1899) 1 QB 86, Lindley, M.R. said (at p.91) that the procedure

> *"is only appropriate to cases which are plain and obvious".*

In Dyson -v- A.G. (1911) 1 KB 410, Fletcher Moulton, LJ said an action may be stopped by striking out

> *"if it is wantonly brought without the shadow of an excuse, so that to permit the action to go through its ordinary stages up to trial would be to allow the Defendant to be vexed under the form of legal process when there could not at any stage be any doubt that the action was baseless".*

He went on to say that a Plaintiff could be thus *"driven from the judgment seat"* only

> *"in cases where the cause of action was obviously and almost incontestably bad"* (at pp.418/9).

Only two months ago, the present Master of the Rolls reiterated the same axiom. The power to strike out a claim as scandalous, frivolous or vexatious, he said,

> *"cannot properly be exercised to strike out a claim which is unpromising or unlikely to succeed, only a claim which must fail".*
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> (Hourihane -v- Metropolitan Police Commissioner C.A. 19th December, 1994, not yet reported).

15. It would suffice to decide this appeal to say on that on these authorities the procedure of striking out is not appropriate to a case of the application to particular, and by no means straightforward, allegations of a test general in its terms and not refined by any series of authoritative examples. However, since this case will have to be tried and the trial, once the facts have been found, may involve the application of the Rees -v- Sinclair test, it will be useful for us to say a little more about the test's construction and meaning.

16. When McCarthy, P. stated his test in Rees -v- Sinclair, he added that the immunity from suit should apply only where it was

> *"absolutely necessary in the interests of the administration of justice".*

Lord Wilberforce, in adopting this test in Saif Ali said (at p.215) the words *"intimate connection with the conduct of the cause in Court"* might

> *"involve a narrowing of the test as compared with the more general words "conduct and management"[which were used in Rondel -v- Worsley]".*

He added that he thought this was right. Lord Diplock, who also adopted the Rees -v- Sinclair test, said (at p.224) a barrister's immunity should not extend to anything he did out of Court

> *"save for a limited exception analogous to the extension of a witness's protection in respect of evidence which he gives in Court to statements made by him to the client and his solicitor for the purpose of preparing the witness's proof for trial".*

Lord Salmon's view was (at p.231) that

> *"it can only be in the rarest of cases that the law confers any immunity on a barrister against a claim for negligence in respect of any work he has done out of Court".*

Referring to his Judgment in the Court of Appeal in Rondel -v- Worsley he said he might

> *"have put the case too high if I used words which might give the impression that counsel's immunity always extended to the drafting of pleadings and to advising on evidence. I should have said that the immunity might sometimes extend to drafting pleadings and advising on evidence".*

Lord Salmon also went on to adopt the Rees -v- Sinclair test.

17. It is obvious from these quotations that the author of that test and their Lordships who adopted it in Saif Ali all regarded it as a stringent test which in pre-trial work would allow the immunity only narrowly limited application. This is strikingly confirmed by the actual decision in Saif Ali. In that case the Plaintiff had been injured in a road accident. Counsel settled proceedings against the owner of the car which injured the Plaintiff, although it had been driven at the time not by the owner but by his wife. Counsel settled the proceedings in this form on the basis that the wife had been driving as her husband's agent. The husband's representatives suggested, shortly before the end of the limitation period, that the agency might be disputed. In the face of this suggestion counsel advised that no amendment of the proceedings was necessary. The husband's defence ultimately denied the agency. By then the limitation period had expired, so it was too late to sue the wife. Later, on the advice of leading counsel, the proceedings against the husband were dropped. The result of what Lord Salmon called these *"melancholy circumstances"* was stated by him (at p.232) thus:

*"The advice given made it impossible for the Plaintiff's unanswerable case to be heard in Court".*

This advice was manifestly part of the conduct and management of litigation. The majority of the House of Lords held nevertheless that it was not within the scope of counsel's immunity.

18. In my judgment, the key to the construction of the Rees -v- Sinclair test lies in the words 'conduct' and 'conducted'. It is to 'the conduct of the cause in Court' that pre-trial work has to be intimately connected if the immunity is to cover it; and it is by its effect upon 'the way that cause is to be conducted when it comes to a hearing' that the intimacy of the connection has to be assessed. The question is not whether the pre-trial work has affected the nature of the case to be presented to the Court. The nature of the case may be very significantly affected by advice given and decisions taken at a very early stage before proceedings are instituted. The relevant question is whether the pre-trial work has affected the way in which the case is to be conducted when it gets into Court. That question presupposes that the nature of the case has already been decided. What remain are questions of presentation, which arise when the conduct of the case in Court is being prepared. Pre-trial work cannot be covered by the immunity unless it is part of that preparation.

19. As I have said, the Appellant's pleaded allegations when this application came before the Royal Court covered numerous acts and omissions of Mr. Michel stretching right back to the first instructions given to him to defend VHL's action. Mr. Picot told the Royal Court that the real complaint of the Appellants was that, from his first discussion of that action with Mr. Michel, Mr. Michel never understood what the case was which Mr. Picot wished to make, with the result that that case was never properly pleaded and never put to the Court.

20. When these allegations are put to the Rees -v- Sinclair test, it is clear that the Appellants have an arguable contention that some of them fall outside the scope of counsel's immunity. In my judgment, it is impossible to say it is plain and obvious that negligence - if there was any - when Mr. Michel was first instructed in 1984 must have been intimately connected with the conduct of the case when it came before the Court in 1986. I accept Mr. Bailhache's submission, that the decision of the Royal Court on this point was based on a misapplication of the law governing the extent of counsel's immunity in pre-trial work.

21. The Respondents relied on two further submissions arising from the settlement of the VHL action. The first was that counsel is immune from suit for anything he does in settling an action or agreeing to settle it. The Royal Court upheld this submission, on the ground that the settlement of the VHL action had been "an integral part of the conduct and management of the case". This is not the Rees -v- Sinclair test. By that test, it is in my judgment not plain and obvious that what Mr. Michel is alleged to have done in settling the VHL action is within the scope of counsel's immunity.

22. The second of these further submissions was that, the VHL action having been concluded by an Order - albeit a consent Order - of the Royal Court, it would be an abuse of process to allow the Appellants now to make a collateral attack on the correctness of that Order. The Royal Court accepted this submission too. There is no doubt that when an issue is decided by a subsisting judgment of a Court, the law will not allow a collateral attack on the correctness of that judgment in a Court of co-ordinate jurisdiction. However, in my judgment this rule does not apply when the subsisting judgment is (as it is here) an order made by consent, based not on any decision of the Court but on agreement of the parties, and one of the parties alleges in the subsequent action that his agreement was obtained improperly: see the observations of Lord Diplock in Saif Ali at pp.222/3.

23. It follows from what I have said that the Order of Justice should not have been struck out and the appeal must be allowed, for nobody has suggested there can be an immunity in Jersey wider than that allowed in England. It is not necessary for the disposal of the appeal to consider Mr. Bailhache's submission that in Jersey advocates have no immunity from suit. This being so, the reasons against our trying to deal with that point on this appeal are, in my opinion, compelling.

24. In Torrell -v- Pickersgill & Le Cornu (1987/88), J.L.R. 702, the Royal Court was faced with an allegation against a solicitor of negligence both in conducting a case before the Petty Debts Court and in pre-trial work on that case. Mr. Bailhache appeared for the Plaintiffs in Torrell -v- Pickersgill. He asked the Court to 'distinguish' Rondel -v- Worsley. The Court declined to do so, and expressed its conclusion thus (at p.718).

> *"Jersey has a fused profession. Whether counsel is an advocate or a solicitor, in questions of his engagement in litigation, there is no doubt in our minds that we must adopt the findings of the House of Lords in both Rondel -v- Worsley and Saif Ali. When*

*counsel's public duty to justice and his duty to his client might conflict, then duty to justice must prevail. If it is to prevail at all it can only do so if counsel be he advocate or solicitor, is untrammelled by any consequences of his actions once the trial is ended. The immunity - like the immunity of witnesses - is absolute".*

25. The Royal Court's finding on the facts in Torrell -v- Pickersgill was that the Defendant had not been negligent either in his pre-trial work or in Court. The Plaintiffs appealed to this Court, where their appeal was heard after an extraordinary interval of nearly 5½ years. In its Judgment (delivered on 30th June, 1994, and not yet reported), this Court held that the Defendant in one respect had 'failed to exercise such care as is incumbent upon a professional lawyer undertaking to represent his client before the Petty Debts Court', but this failure had not caused any material loss to the Plaintiffs; the appeal therefore failed. The Court did, however, make the following reference to the legal position:

*"Advocate Fitz informed us that this is the first case in Jersey concerned with the liability of a solicitor for his preparation and conduct of proceedings in Court. she submitted that it was appropriate for the whole question of immunity to be considered, notwithstanding the position under English law long recognised and set out in the two House of Lords cases, Rondel -v- Worsley [1969] 1 A.C. 191 and Saif Ali -v- Sydney Mitchell & Co and others [1980] A.C. 198, which had been examined and followed by the Royal Court in the present case. Indeed her contention that such immunity does not apply in Jersey was, as this Appeal has been presented to us, an essential pre-requisite to its success. It was emphasised in the Judgment of the Royal Court that neither counsel in the case had been able to discover a single Jersey authority where an advocate or a solicitor had been actioned in negligence for work carried out in Court. It was submitted for the respondents that this was explainable because such immunity had in the past been taken for granted. Advocate Fitz pointed to distinctions which she said should be drawn between the separate positions in England and in Jersey, where the English "cab rank" rule does not apply and where there is no binding duty to act outside the allocation of Legal Aid cases. Public interest was at the heart of the matter; the principle of immunity encouraged a poor public image; and counsel would not be negligent if he followed his duty to the Court. In the course of further argument we were invited to*

*take notice of the contrasting situations in Australia and New Zealand as compared with that in Canada, and to examine the different interpretations of public interest which had developed historically in these separate jurisdictions. In addition to a number of decided cases and commentaries from those countries, we were prepared to look for assistance from such writers as Terrien, Pothier, Dalloz and Laurent Carey. However, in the light of the texts to which we were referred after encouragement from the Court we consider that there is a serious question, at present unresolved, as to whether under the common law of Jersey advocates are, or are not, immune from suit in respect of negligence in the presentation of a case in Court or in work intimately connected with the conduct of a case in Court. We are not satisfied that there has been placed before us material concerning either the historical position of Jersey advocates or other lawyers or current conditions in this Island relevant to matters of public policy sufficient to allow us to reach an informed view as to how the law of Jersey lies or ought to be declared on this important matter. We do not consider it necessary that this question of immunity should be further argued in the present case, and the parties thereby be put to possible further expense. Our findings of fact upon all the evidence render this inappropriate but we should have referred this matter for fuller consideration and argument if we had found that any failure by Mr. Pickersgill would have affected the Judge's decision".*

26. In that passage this Court said further consideration needed to be given to two matters, viz. 'the historical position of Jersey advocates or other lawyers' and 'current conditions in this Island relevant to matters of public policy'. No submission upon either matter seems to have been made to the Royal Court in this case, nor is either mentioned in the Judgment. In this Court Mr. Bailhache dealt briefly with the former matter, and cited passages of Le Geyt and Le Gros. He did not contend that these passages showed that there was no advocates' immunity, but cited them only because they did not say that there was. Mr. White did not refer to the point. Both sides discussed the second matter before us, Mr. Bailhache contending that conditions in Jersey bearing upon public policy differ from conditions in England, Mr. White that they do not.

27. The important factor here is that neither of the two matters received any attention in the Royal Court. It would, in my view, be most undesirable for this Court to make any pronouncement upon local customary law or local conditions

without the advantage of having the considered Judgment of the Royal Court. For that reason this appeal is not a suitable occasion for the 'fuller consideration and argument' which in Torrell -v- Pickersgill this Court said was desirable.

28. I have had the opportunity of reading the Judgment of Sir Louis Blom-Cooper, in which he advances the view that the appeal should be allowed because the decisions of the House of Lords in Rondel -v- Worsley and Saif Ali are no longer binding and counsel's immunity no longer exists in English law. In my judgment, we have no authority to review those decisions, and the question whether counsel's immunity still exists in English law is not open in this Court.

29. It is common ground that, excepting any point upon which a local rule has been established, on questions of liability for negligence the law of Jersey follows the law of England. This means that on these questions the Jersey Courts apply the whole law of England. It does not mean they are free, following not any local rules (of which *ex hypothesi* there are none) but their own preference, to accept some features of English law and reject others.

30. The House of Lords has decided that counsel is immune from liability for negligence in conducting a case in Court or in pre-trial work sufficiently connected with that conduct. That at present is the law of England. It could be reviewed by the House of Lords, or possibly by the Judicial Committee of the Privy Council, but not by any subordinate Court. Until it is so reviewed it has to be applied, as in England so in Jersey. It is true that the law has been declared by the House of Lords on the basis of public policy, and the House of Lords has itself stated that the requirements of public policy may change in time. In my view, however, when once the House of Lords has declared the requirements of public policy affecting a particular relationship, it is for the House of Lords alone to acknowledge any change of those requirements. It is not for lower Courts to give effect to their own - possibly differing - ideas of how public policy has changed or should change.

31. For these reasons, the matters discussed by Sir Louis are not, in my judgment, open for consideration in this Court, and it would be inappropriate for me to express my own view upon them. I will, however, comment upon two procedural points.

32. I do not overlook the regret expressed by Lord Diplock in Saif Ali (at p.223) that no argument had been addressed to the House that counsel's immunity should no longer be upheld. Lord Diplock was sitting in the House of Lords, and the House

is free to review its own decisions. His words give, in my opinion, no indication of the proper attitude of this Court to this appeal. Secondly, I agree, of course, that our system gives scope for judges to develop or change the law; but the scope is not unlimited. One of the limitations, as I understand them, is that judges are not free to develop the law in a manner inconsistent with decisions of the supreme tribunal binding upon them.

33. I would allow the appeal, set aside the Order of the Royal Court striking out the Order of Justice, and remit the case to that Court.

BLOM-COOPER, J.A.: I, too, would allow this appeal, if only for the simple reason that the state of the pleaded claim in the amended Order of Justice is such that there is insufficient warrant for the court to take the extreme measure of striking it out. It is not possible, in my view, to gauge at this moment whether the Plaintiff will be able to establish a reasonable cause of action. If and when the Plaintiff's complaint is properly pleaded, it may be that a reasonable cause of action will emerge. But until then the justification for a strike-out can be arrived at only if there is nothing to investigate which could conceivably reveal a cause of action. A Statement of Claim can be struck out only where it is plain and obvious that it is presently unsustainable: Hubbuck -v- Wilkinson [1899] 1QB 86. It is not "plain and obvious" that the Plaintiffs' case, put at its highest, is so intimately connected with the conduct of the case in Court as to attract the immunity. I also agree that the decision of the Royal Court was based on a misapplication of the Law governing the extent of the advocate's immunity on pre-trial work. On these two grounds for allowing this appeal I gratefully adopt the reasoning in Sir Godfray Le Quesne's Judgment, and I agree with the Order proposed by him. I would add only this: a claim which attracts an absolute immunity based on public policy is singularly inappropriate for striking out, because it would be intrinsically difficult to apply the criteria for striking out, unless the court engaged in an elaborate exercise of scrutinising the whole case: which is inimical to interlocutory proceedings.

But I would allow this appeal on the fundamental point whether the immunity is still good Law. No court in any of the common law jurisdictions within the British Isles in 1995 - I stress, in 1995 - could, in my view, properly deny an aggrieved client the legal remedy against his/her legal representative who had acted negligently in the capacity of advocate or in the performance of a legal service connected with litigation. There is no longer any sustainable ground of public policy to outweigh the fundamental right of access to the courts, such as to throw the mantle of forensic immunity over the lawyer's shoulders. Like any other professional person holding himself or herself out to

exercise skill and judgment, the lawyer has a duty to take care in handling the client's case, for the breach of which there is a liability in tort or contract. I state my reasons for those concluded assertions.

For a quarter of a century now - and long before that, on the footing that the barrister functioned non-contractually on an honorarium - the litigant complaining of an advocate's incompetence has faced the impenetrable barrier of the House of Lords' decision in 1967 in Rondel -v- Worsley [1969] 1 A.C. 191, as expounded restrictively, but not questioned in the House of Lords' decision in 1978 in Saif Ali -v- Sidney Mitchell & Co (a firm) and others [1980] A.C 198. In that latter case Lord Diplock said:-

> *"I find it an unsatisfactory feature of the instant appeal, which has called for a re-examination of the speeches in Rondel -v- Worsley in the light of the subsequent development of the law of negligence by the decisions of this House that Your Lordships have not had the benefit of any argument from Counsel in support of a more radical submission that the immunity of the advocate, whether barrister or solicitor, for liability for negligence even for what he says or does in court ought no longer to be upheld.....Nevertheless, despite this handicap I have reached the clear conclusion that these two additional grounds of public interest which I have discussed [the barristers' immunity as part of the general immunity from civil liability for all participants in court proceedings, and the need to maintain the integrity of public justice] .....suffice to justify Your Lordships in accepting as a premise for the purpose of defending the instant appeal ,that the decision of this House in Rondel -v- Worsley upholding such immunity is still good law".* (p.221 and see the submissions of the appellant's counsel at p.201C).
>
> (I shall refer to the two additional grounds hereafter).

We have suffered no such handicap. We have been treated to a forensically attractive assault from Mr. William Bailhache upon the reasoning that supported the decision in Rondel -v- Worsley and a redoubtable response from Mr. Jonathan White. Indeed the submissions of both counsel were replete with citation of authorities throughout the common law systems and were both pronounced in the quality of their advocacy. There is, therefore, nothing procedurally to prevent us from examining the basis of the immunity today.

In Rondel -v- Worsley the House of Lords decided in 1967 that a barrister (in effect, every advocate) was immune from any action for professional negligence in respect of acts or omissions during

the trial of both criminal and civil proceedings involving his lay client. The immunity was an exception to the principle that a professional person who holds himself/herself out as qualified to practice that profession is under a duty to use reasonable care and skill: Hedley Byrne & Co Ltd -v- Heller & Partners Ltd [1964] A.C. 465. The exception was held not to be given any wider application than was absolutely necessary in the interests of the administration of justice. In Saif Ali -v- Sydney Mitchell & Co in 1978 - [1980] A.C. 198 - the immunity covered only those matters of pre-trial work which were so intimately connected with the conduct of the case in court that they could fairly be said to be preliminary decisions affecting the way that the case was conducted when it came to a hearing in court.

Lord Reid in Rondel -v- Worsley (p.227C) made it abundantly clear that the immunity was based on considerations of "public policy [which] is not immutable". In examining "the present day conditions in this country", Lord Reid concluded that the exception to the principle of a cause of action for professional negligence was justifiable in so far, at least, that it related to work in conducting litigation.

In concluding that Rondel -v- Worsley no longer sustains an immunity for counsel, I am mindful that, as counsel for the unsuccessful appellant in 1967, it is all too easy for me now, as a judge of this court, to adopt a radical posture in order to claim an advocate's belated, entirely Pyrrhic victory for the espousal of an erstwhile client's cause. Since the essence of the debate on the correctness of Rondel -v- Worsley is public policy, I have found comfort in my adopted radicalism in the speech of Lord Lowry in Spring -v- Guardian Assurance plc and others [1994] 3 W.L.R. 354, at p.376G where he said:-

> *"In marshalling my thoughts on public policy I have drawn freely upon the argument in Rondel -v- Worsley [1969] 1 A.C. 191, 203 of Mr. Louis Blom-Cooper (now Sir Louis Blom-Cooper QC) whose submissions, although not rewarded with success in that appeal, strike me as particularly appropriate in the context of the present case".*

Modesty compels me to say that the compliment does no more than hint that public policy considerations today might support, in Lord Lowry's eyes, the demise of the barrister's immunity. Indeed, I may be so bold as respectfully to repay the compliment, and to draw on Lord Lowry's approach to the court's application of public policy - that unruly horse which judges ride at their peril, particularly if it is employed to oust some fundamental right. Lord Lowry, in the context of careless mis-statements in an employer's reference said (at p.376):-

> *"The defendants' second argument (which in order that it may prevail, must be made to stand independently on its*

*own feet) is that, even if one concedes foreseeability and proximity and even if it would otherwise be just and reasonable for the plaintiff to recover under the head of negligence, public policy dictates that the person who has been the subject of a negligent mis-statement shall not recover. The argument is grounded on the proposition that the maker of the mis-statement, provided he has acted in good faith, must, even if he has been negligent, be free to express his views in the kind of situation (including the giving of any reference) which is contemplated by the doctrine of qualified privilege which is part of the law of defamation.*

*This argument falls to be considered on the assumption that, but for the over-riding effect of public policy, a plaintiff who is in the necessary proximate relation to a defendant will be entitled to succeed in negligence if he proves his case. To assess the validity of the argument entails not the resolution of a point of law but a balancing of moral and practical arguments. This exercise could no doubt produce different answers but, for my own part, I come down decisively on the side of the plaintiff.*

*On the one hand looms the probability, often amounting to a certainty, of damage to the individual, which in some cases will be serious and may indeed by irreparable. The entire future prosperity and happiness of someone who is the subject of a damaging reference which is given carelessly but in perfectly good faith may be irretrievably blighted. Against this prospect is set the possibility that some referees will be deterred from giving frank references or indeed any references. Placing full reliance here on the penetrating observations of my noble and learned friend, Lord Woolf, I am inclined to view this possibility as a spectre conjured up by the defendants to frighten your Lordships into submission. I also believe that the courts in general and your Lordships' House in particular ought to think very carefully before resorting to public policy considerations which will defeat a claim that ex hypothesi is a perfectly good cause of action. It has been said that public policy should be invoked only in clear cases in which the potential harm to the public is incontestable, that whether the anticipated harm to the public will be likely to occur must be determined on tangible grounds instead of on mere generalities and that the burden of proof lies on those who assert that the court should not enforce a liability which prima facie exists. Even if one should put the matter in a more neutral way, I would say that public policy ought not to be invoked if the arguments are evenly balanced: in such a situation the ordinary rule of law, once established, should prevail".*

In marshalling my thoughts on public policy in relation to the conduct of an advocate's conduct of the client's case, I begin by asserting the fundamental right of anybody to sue the professional person for negligence, without any legal hindrance to coming to court. In so reminding myself, I do not adopt a neutral stance. A citizen's right to unimpeded access to the courts can be taken away only by express enactment: Chester -v- Bateson [1920] 1 KB. 829; R & W Paul Itd -v- The Wheat Commission [1937] A.C. 139; Raymond -v- Honey [1983] 1 A.C.1, 14. And here there is no "express enactment", only judge-made law. What aspects of public policy in 1995 are so powerful as to supplant or negative this fundamental right? And can they survive the impact of Article 6 of the European Convention on Human Rights?

Two main grounds are advanced for upholding the exceptional immunity on the basis of public policy:

1. A barrister (advocate) owes a duty to the court as well as to his client and should not be inhibited, through fear of an action by his client, from performing it; and

2. The undesirability of re-litigation, as between barrister and client, of what was litigated between the client and his opponent.

I see an important distinction between the two grounds, the former being a specific aspect of the forensic process, the latter being a part of a wider principle of the public interest in finality in litigation.

Conflicting forensic duties

The issue was put succinctly by Lord Morris of Borth-y-Gest in Rondel -v- Worsley.

> *"It would be a retrograde development if an advocate were under pressure unwarrantably to subordinate his duty to the court to his duty to his client".*

Jackson and Powell on Professional Negligence (3rd Ed'n) paras 5-13, state the justification today for the immunity on the ground *"that the administration of justice required that a barrister should be able to carry out this duty to the Court fearlessly and independently, which may be affected if he owes a conflicting duty to his client".* Nothing should be allowed to detract one iota from that proposition. Indeed, it is the essence of high professional standards in the conduct of litigation that judges can rely upon advocates to subordinate their clients' interest to those owed to the court. But, having said that, I am aware of only very few instances where the advocate is put in the position of having calculatedly to choose whose interests shall

prevail. One example is where a client instructs his counsel to plead fraud, or other impropriety against his/her adversary, without supplying adequate material upon which the plea can be founded. The advocate is bound by the rules of etiquette not to deceive the court by advancing a line of questioning or argument unless satisfied there is a proper basis for it. The advocate in that instance properly declines to obey the client's instructions. If the client subsequently complains that the advocate was in breach of his duty of care by disobeying the client's instructions, which may ordinarily be the case, the advocate, in defence to an action for negligence, would justifiably plead that his actions or omissions were motivated by his duty to the court. That would be a complete defence to a claim in negligence.

The potential conflict of duties owed to the court and to the client involves, furthermore, a misunderstanding of the way in which a negligence suit against a barrister would arise. Where a barrister has a conflicting duty to the court, such as not to mislead it, or to inform the court of a binding decision which makes any argument on behalf of a client unsustainable, or to bring a procedural irregularity to the attention of the court, and the client were to complain that this was a breach of the duty of care owed to him in the circumstances, the claim would be frivolous and vexatious. It could be struck out as disclosing no prospects of success and an abuse of process. This problem thus provides no basis for pressing public policy as a ground for barring professional negligence claims against barristers as a class. Practice and procedure of the courts are wholly adequate to stifle unmeritorious actions.

Related to this ground is the proposition that barristers should not be put in a position where, as a result of a conflict between their duty to the court and their duty to the client, they adopt "defensive practices" to avoid the risk that a disappointed litigant will sue them. Lord Pearce in Rondel -v- Worsley put the point elegantly (p.272D-E):-

> *"This duty is of vital importance to the judicial process. Fortunately it does not very frequently occur in a glaring form, though in a minor degree it is fairly constant. When it does occur in a glaring form, it is very unpleasant for the advocate. It is hard for him to explain to a client why he is indulging in what seems treachery to his client because of an abstract duty to justice and professional honour. In the difficult borderline case it is undesirable that a man should be in danger of being influenced by the possibility of an action for negligence. The court has and must continue to have implicit trust in counsel.*
>
> *Prudence will always be prompting him to ask every question and call every piece of evidence that his client*

*wishes, in order to avoid the risk of getting involved in just such an action as the present. This is a defect which the possibility of an action for negligence would greatly encourage. It is difficult and it needs courage in an advocate to disregard irrelevancies which a forceful client wishes to pursue".*

While it is undeniable that barristers owe over-riding duties to the court, disciplinary sanctions by professional bodies have a far greater practical effect on the exercise of a professional's discretion, rather than the speculative possibility of a misconceived action for negligence. The incremental growth in the number of practising barristers, whose ranks will soon be swollen by solicitor-advocates, has tended towards the lessening of control by the Bench and Heads of Chambers, and hence has called for the formal mechanism of the disciplinary body to be called more actively into play.

The impact of disciplinary powers over barristers has been, in my view, in the debate ignored or discounted as the means of maintaining high standards of forensic conduct. One has only to record the case in 1874 - not to mention many less dramatic cases over the years - of Dr. Edward Kenealy QC, who was expelled from the mess of the Oxford Circuit, dispatented by the Lord Chancellor and disbenched and disbarred by his Inn of Court, Gray's Inn, in consequence of his scandalous behaviour in defence of the Tichborne claimant (see J.B. Atlay, The Tichborne case, 202, 206, 229 and Dictionary of National Biography Vol. I, p.1120. Moreover, discipline can operate instantly in face of the court: the barrister is liable for contempt of court, by insolence to the judge or by violent or abusive language to the jury: *Ex parte* Pater (1864) 9 Cox CC.544.

Furthermore, the House of Lords in Roy -v- Prior [1971] A.C. 470 held that an action in respect of an alleged abuse of the process of the court was not to be defeated, even though one step in the abuse involved the giving of evidence by a witness and as such absolutely immune from suit.

At the criminal trial, the accused's solicitor issued a witness summons requiring the attendance of a doctor to give evidence for the defence. A *subpoena* was not served, and the solicitor took the view that the doctor was evading service. Counsel for the defendant at trial was instructed to apply for the issue of a bench warrant to compel the doctor's attendance. The solicitor gave evidence to the trial judge in support of the application; a bench warrant was duly issued. The doctor was arrested and compelled to give evidence - unavailing for the defendant who was found guilty. The trial judge proceeded to dismiss the charge of wilful evasion by the doctor. Master Jacob and McKenna J, on appeal, refused to strike out the statement of

claim alleging negligence on the ground that it disclosed no reasonable cause of action.

The Court of Appeal set aside the Orders of McKenna J and Master Jacob, and struck out the statement of claim. Lord Denning, MR, said that the court should not allow the solicitor to be sued on his instructions to counsel to apply for a bench warrant. He said: *"No matter how an action is framed it cannot be used as a way of getting round the important principle that a witness is not liable to a civil suit for words which he says in the witness box".* The House of Lords restored the Orders of McKenna J and Master Jacob.

Lord Wilberforce said:

> *"My Lords, I have had the benefit of reading in advance the opinion prepared by my noble and learned friend, Lord Morris of Borth-y-Gest. That opinion demonstrates that a man cannot be debarred from bringing an action for unlawful arrest by reason only of the fact that a step in procuring the arrest consisted of evidence given in court in the course of another person's trial. I agree with this proposition but wish to add that I would disagree with the striking out of this action on another broader ground. Even if one concentrates attention upon the evidence given by the defendant Mr. Prior in the Central Criminal Court, I can see no reason of public policy for basing immunity from civil action upon this circumstance. The reasons why immunity is traditionally (and for this purpose I accept the tradition) conferred upon witnesses in respect of evidence given in court, are in order that they may give their evidence fearlessly and to avoid a multiplicity of actions in which the value or truth of their evidence would be tried over again. Moreover, the trial process contains in itself, in the subjection to cross-examination and confrontation with other evidence, some safeguard against careless, malicious or untruthful evidence.*
>
> *But none of this applies as regards such evidence as was given in support of the application for a bench warrant. It was given ex parte: Dr. Roy had no means, and no other party any interest, in challenging it: so far from the public interest requiring that it be given absolute protection, that interest requires that it should have been given carefully, responsibly and impartially. To deny a person whose liberty has been interfered with any opportunity of showing that it was ill-founded and malicious, does not in the least correspond with, and is a far more serious denial than, the traditional denial of the right to attack a witness to an issue which has been tested and passed upon after a trial. Immunities*

*conferred by the law in respect of legal proceedings need always to be checked against a broad view of the public interest. So checked, the present case provides no justification for protecting absolutely what the solicitor said in the court".*

This case illustrates the way in which the courts will, in certain circumstances, investigate the conduct of counsel and solicitors in face of the court, particularly if the conduct is not inextricably bound up with the trial process. Absolutism in legal power can be just as corrupting of the public interest as in political activity; it requires judicial vigilance of the kind envisaged by Lord Wilberforce.

Lord Reid in Rondel -v- Worsley did not attach too much weight to this fear of a lowering of standards if negligent actions were permitted. He said (at p.228C): *"So the issue appears to me to be whether the abolition of the rule would probably be attended by such disadvantage to the public interest as to make its retention clearly justifiable. I would not expect any counsel to be influenced by the possibility of an action being raised against him to such an extent that he would knowingly depart from his duty to the court or to his profession",* although he did say in a later passage (p.228F) that *"it would be a grave and dangerous step to make any change which would imperil in any way the confidence what every court rightly puts in all counsel who appear before it".* There is, to my knowledge, no evidence that barristers would become any more defensive than doctors have become in the United Kingdom as a result of the imposition of liability for their professional negligence. This is because the test for professional negligence provides a margin of appreciation for the relevant professional: Bolam -v- Friern Hospital Management Committee [1957] 1 W.L.R.582; Whitehouse -v- Jordan [1981] 1 W.L.R.246; Maynard -v- West Midlands R.H.A. [1984] 1 W.L.R.634; Sidaway -v- Bethlem Royal Hospital [1985] A.C.871; In Re F (Mental Patient: Sterilisation) [1990] 2 A.C.1. In making decisions about the care and treatment of their patients, doctors must act in accordance with a responsible and competent body of relevant professional opinion. So, too, advocates would not be liable for negligence so long as they acted in accordance with the precepts of the Bar Council and the Law Society.

Where, infrequently as I would suppose, conflicts of duties arise, the proper way to deal with them is in the ensuing legal process. There seems no warrant for turning the problem into an issue impacting on public policy, and hence substantiating, even in part, an exception to the established principle of professional negligence. Immunity could not be justified on so slender a thread of the sound administration of justice.

Finality in Litigation

The second ground does, in my view, raise a vital aspect in the administration of the English legal system. If every disgruntled or aggrieved client could re-open his lost cause by the device of a writ against his hapless legal representative, there might be no end to the stream of litigiousness. Better, it is said, to stop up the floodgates by putting a complete barrier to the rushing, muddying waters. Is this, in fact, a sound policy for the courts to adopt? In resorting to the immunity, are they actually doing anything more than protecting themselves by legal policy? Or is there really a wider public policy to frustrate any attempt to rehearse the litigated issues?

The availability of an action in private law for professional negligence is not to be confused with the Law's attitude towards the avoidance of undesirable litigation against those negligently performing statutory duties, which are susceptible to challenge by way of judicial review. Thus the courts have recently held that it is just and equitable in the public interest to deny private law suits against social workers by mothers whose children were wrongly taken into care, or actions against social security adjudication officers, against lawyers employed by the Crown Prosecution Service for negligent prosecutions or police officers for negligent charging (although actions for false imprisonment and malicious prosecution still lie). All these situations, involving social relationships, arise from the performance of statutory duties and give rise to considerations beyond the acceptance of a duty to take care by an individual holding himself or herself out to exercise skill and judgment: (see R. -v- Newham Borough Council and R. -v- Bedfordshire County Council [1994] 2 W.L.R.554; Kumar -v- Police (31st January, 1995) Court of Appeal of England, unreported.

Whatever the strength of the argument for preventing re-litigating issues between lawyer and client - and it is undeniably strong - both these grounds of public policy for sustaining the immunity have been undermined by a development in statutory law introducing the novel concept of a wasted costs order against an advocate. The new section 51 of the Supreme Court Act 1981, substituted by section 4 of the Courts and Legal Services Act 1990, provides:

> *"(6)...the court may disallow, or (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with rules of court.*
>
> *"(7)...'wasted costs' means any costs incurred by a party - (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such representative; or (b) which, in the light of any such act or omission occurring after they were incurred, the court*

*considers it is unreasonable to expect that party to pay....*

*"(13)...'legal or other representative' in relation to a party to proceedings means any person exercising a right of audience or right to conduct litigation on his behalf".*

The new section 51(6) was extended to civil proceedings in the Crown Court. Section 111 of the 1990 Act made a similar amendment to the Prosecution of Offences Act 1985, applicable to criminal proceedings in the Court of Appeal, the Crown Court and the Magistrates' Court, and section 112 amended the Magistrates' Courts Act 1980 to similar effect.

These provisions were fully considered by the Court of Appeal in Ridehalgh -v- Horsfield [1994] Ch.205. Two features of the Judgment of Bingham MR are relevant for present purposes. While the immunity established in Rondel -v- Worsley remains the law, where negligence is found under section 51(6), the latter overrides the common law principle. Indeed the public policy considerations that led their Lordships in Rondel -v- Worsley to proclaim the immunity are all subsumed in any inquiry for a wasted costs order.

Sir Thomas Bingham MR said (at p.236E-H):-

*"We referred above to an important qualification. It is this. Although we are satisfied that the intention of this legislation is to encroach on the traditional immunity of the advocate by subjecting him to the wasted costs jurisdiction if he causes a waste of costs by improper, unreasonable or negligent conduct, it does not follow that we regard the public interest considerations on which the immunity is founded as being irrelevant or lacking weight in this context. Far from it. Any judge who is invited to make or contemplates making an order arising out of an advocate's conduct of court proceedings must make full allowance for the fact that an advocate in court, like a commander in battle, often has to make decisions quickly and under pressure, in the fog of war and ignorant of developments on the other side of the hill. Mistakes will inevitably be made, things done which the outcome shows to have been unwise. But advocacy is more an art than a science. It cannot be conducted according to formulae. Individuals differ in their style and approach. It is only when, with all allowances made, an advocate's conduct of court proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order against him".*

and (at 237E-F):-

*"As emphasised in In re A Barrister (Wasted Costs Order) (No.1 of 1991) [1993] Q.B.293 the court has jurisdiction to make a wasted costs order only where the improper, unreasonable or negligent conduct complained of has caused a waste of costs and only to the extent of such wasted costs. Demonstration of a causal link is essential. Where the conduct is proved but no waste of costs is shown to have resulted, the case may be one to be referred to the appropriate disciplinary body or the legal aid authorities, but it is not one for exercise of the wasted costs jurisdiction".*

The second feature of the wasted costs order is that, while the court might itself initiate the inquiry whether an order should be made - and in straightforward cases there is no reason why it should not do so - the courts will leave it to the aggrieved party to make the application, if so advised. The Master of the Rolls said (p.238E) that ***"save in the most obvious cases, courts should in our view be slow to initiate the inquiry".*** While the statutory provision is designed to make the lawyer for one party pay the wasted costs of the other party, or to deprive the lawyer of one party of costs which the other party would have to pay under a general costs order, it will allow a client to claim his wasted costs from his own lawyer. Thus the issue of wasted costs may be an *inter partes* contest between the client and his advocate. Parliament has thus declared, in effect, that the courts will have to engage in a forensic exercise which Rondel -v- Worsley says that the courts may not. The functional reality is that the wasted costs order has cut a deep swathe into the advocate's immunity from suit for negligence. The client cannot get damages for negligence at common law, but he can get his wasted costs paid by the advocate through statute law. In policy terms, the result if the same. The courts may, at the instance of a disgruntled client, be required to examine the conduct of the client's advocate, even though it does not follow that Parliament favours putting in issue the result of the litigation: see Civil Evidence Act 1968, sections 11 and 13.

Section 62 of the Courts and Legal Services Act 1990 provides:-

*"(1) A person - (a) who is not a barrister; but (b) who lawfully provides any legal services in relation to any proceedings, shall have the same immunity from liability for negligence in respect of his acts or omissions as he would have if he were a barrister lawfully providing those services.*

*(2) No act or omission on the part of any barrister or other person which is accorded immunity from liability for negligence shall give rise to an*

*action for breach of any contract relating to the provision by him of the legal services in question".*

While this can be interpreted as a recognition of the existence of the immunity, it is a negative provision which simply accords solicitors the same immunity as barristers, insofar as the latter do have such immunity at common law. It does not put the immunity rule in relation to barristers - and solicitors for that matter - on a statutory basis; the immunity remains (if at all) a creature of the common law. Section 62 also prevents a litigant bringing a claim in contract against solicitors - one which can lie against a barrister in contract only where the profession is fused (as in Jersey) - to circumvent any existing immunity rule in respect of negligence actions. At most it nods acceptance of the law as stated in Rondel -v- Worsley, without any statutory declaration of the common law ruling. In Ridehalgh -v- Horsfield Sir Thomas Bingham MR was adamant that the wasted costs jurisdiction over barristers for the first time could not be construed as exempting them from liability in respect of their most characteristic activity - namely, conducting cases in court and advising in relation to such cases (235H and 263C):-

*"There is nothing in section 62 to suggest that it is intended to qualify the apparently unqualified effect of the other sections [including the new section 51]....."*

The amplitude of power to give effect to judicial concern at the wholly unacceptable manner in which a handful of barristers conduct themselves was reinforced by the Practice Direction: Case Management, issued by the Lord Chief Justice and the Vice-Chancellor on 24th January, 1995. This stated:-

*"Failure by practitioners to conduct cases economically will be visited by appropriate orders for costs, including wasted costs orders".*

Lord Diplock's two additional grounds

Lord Diplock in Saif Ali said (p.221F-G): *"In the light of the developments in the law of negligence which have taken place since 1967, I could not find readily today in the reasons that I have so far discussed convincing ground for holding that a barrister ought to be completely immune from liability for what he does in court in conducting criminal or civil proceedings".* The two grounds were:

First, Lord Diplock said (p.222) the advocate's immunity is part of the general immunity from civil liability for all participants in court proceedings. The example is that counsel cannot be sued for defamatory statements about the opposing party, just as judges cannot be. It is easy to invoke public policy in order to sustain freedom of speech in court, by erecting a barrier

to legal actions resulting from what is said by all those directly engaged in the process of justice. But it has little or nothing to do with the alleged public policy which requires immunity from legal action for negligent acts; see Lord Russell of Killowen in Saif Ali (p.233C) that immunity from negligence has no part to play in furthering freedom of expression in the courtroom. Indeed, as much was said by the House of Lords in Spring -v- Guardian Assurance plc [1994] 3 W.L.R.452 where their Lordships held that defamation and negligence were different torts. The principles of liability were different and distinguishable. Immunity in the one did not automatically mean immunity in the other. Inferentially, the first of Lord Diplock's points is invalid.

Second, Lord Diplock deployed the need to maintain the integrity of public justice. Yet the mere existence of the immunity contributes to the cynicism and distrust expressed by laymen for lawyers. Perpetuating an anomalous privilege may even erode the layman's confidence in the legal system, for it is almost impossible to find anyone who can be persuaded of the desirability of the immunity. Public policy in fact demands an acceptance of nothing more than a recognition that the peculiar characteristics of the professional work of lawyers are relevant to the issue: what standard of duty of care does the law impose? The characteristics do not constitute, either singly or cumulatively, any denial of the existence of the duty to take care.

In composing my thoughts I have eschewed overloading this judgment by citation from the many cases cited to us in the course of argument, from other jurisdictions based on the English common law. The jurisprudence from North America (the United States and Canada) has rejected Rondel -v- Worsley outright; by contrast, in the Antipodes (Australia and New Zealand) Judges have on the whole adopted the qualification in Saif Ali -v- Sydney Mitchell & Co, prompted in fact by the New Zealand case of Rees -v- Sinclair [1974] 1 NZLR 180, as Sir Godfray Le Quesne has amply demonstrated in his judgment. But I cannot resist citing the words of Deane J in the High Court of Australia in Giannarelli -v- Wraith (1988) 81 ALR 417, who in four sentences of a short, dissenting Judgment encapsulated the citizen's outrage at the suggestion of any immunity. He said (at pp.445-446):-

> *"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 [1969] 1 AC 191 at 244, 280-1, 289; Saif Ali -v- Sydney Mitchell & Co [1980] AC 198 at 212, 219, 230-1, 233, 235). In that regard, however, I do not consider that the considerations of public policy which are expounded in Rondel -v- Worsley (at 227-31, 247-54, 267-76, 281-4) 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".*

Given the present climate of public opinion in the British Isles, which I venture to think has changed perceptibly in favour of all professions being equally accountable and answerable to the law at the instance of the aggrieved client, is a court in 1995 simply to declare that the law stands still, and is not ambulatory such as to reflect contemporary public policy? The words of Judge Jerome Frank in his "Courts on Trial" (1950) are apt: "*An intelligent judiciary must be alert to discern the difference between stability and paralysis.*"

The starting point for an answer to that question is to recognise that the advocate's immunity from suit is the creature of the common law, developed by the judges over the years to meet changing social conditions. Parliament has not spoken directly on the subject, save for equating the law about legal professional negligence (whatever it may be from time to time) as between the two branches of that profession. In Director of Public Prosecutions -v- Lynch [1975] A.C.653 - a case about the defence of duress to a charge of aiding and abetting murder - Lord Wilberforce said (p.684H):-

*"I have no doubt it is open to us, on normal judicial principles, to hold the defence admissible. We are here in the domain of the common law: our task is to fit what we can see as principle and authority to the facts before us.....".*

In his dissenting speech in Lynch (which triumphed when Lynch was over-ruled in R. -v- Howe [1987] A.C.417) Lord Simon of Glaisdale said (p.695H-696A):-

*"I am all for recognising frankly that judges do make law. And I am all for judges exercising this responsibility boldly at the proper time and place - that is, where they can feel confident of having in mind, and correctly weighed, all the implications of their decision, and where matters of social policy are not involved which the*

*collective wisdom of Parliament is better suited to resolve".* (recalling to mind the salutary caution from Lord Reid in Shaw-v-D.P.P. [1962] A.C. 220,275, when he said: *"Where Parliament fears to tread, it is not for the Courts to rush in."*)

To which Lord Lloyd of Berwick in R. -v- Clegg (19th January, 1995) House of Lords, unreported, added:-

*"Like Lord Simon, I am not averse to judges developing law, or indeed making new law, when they can see their way clearly, even where questions of social policy are involved".*

The main reason for their Lordships not acceding to an argument to change the law of murder, in respect of the use of excessive force by a member of the armed forces in that case, was the impact such a change would have both generally on the law of homicide and the mandatory life sentence for murder.

There are recent examples where Judges have engaged in deliberate law reform. In R. -v- R. [1992] 1 A.C.599 two trial judges, Mr. Justice Simon Brown (as he then was) and Mr. Justice Owen were upheld by the Court of Appeal (Criminal Division) and the House of Lords, in deciding that a man can be guilty of raping his wife. Lord Lane CJ said (p.611):-

*"This is not the creation of a new offence, it is the removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it".*

In the House of Lords, Lord Keith of Kinkel, quoting Lord Lane's words, said (p.623):-

*".....in modern times the supposed marital exemption in rape forms no part of the law of England".*

The decision has been given statutory blessing in Section 142 of the Criminal Justice and Public Order Act 1994; thus the judiciary have simply anticipated parliamentary action.) The principle, which the courts rejected, was founded on dubious legal reasoning.

In C (a minor) -v- Director of Public Prosecutions [1994] 3 W.L.R. 888, a case reversing the rule of presumption that a child between the ages of 10 and 14 are *doli incapax*, Laws J (with whom Mann LJ agreed) said that there were three arguments for not abolishing the rule. He said (p.896-7):-

*"(1) The court's decision would have retroactive effect, since our law has not yet developed a practice of*

*prospective rulings. Accordingly, by holding that this presumption is no longer part of our criminal jurisprudence we should be changing the legal rules effective at the time of the defendant's actual or putative crime, and doing so retrospectively. In many cases this argument is a powerful inhibition upon the extent to which the common law courts may with justice alter the scope of the criminal law..."*

*(2) The presumption is of such long standing in our law that it should only be changed by Parliament, or at least by a decision of the House of Lords. But antiquity of itself confers no virtue upon the legal status quo. If it did, that would assault one of the most valued features of the common law, which is its capacity to adapt to changing conditions. The common law is not a system of rigid rules, but of principles, whose application may alter over time, and which themselves may be modified. It may, and should, be renewed by succeeding generations of judges, and so meet the needs of a society that is itself subject to change. In the present case the conditions under which this presumption was developed in the earlier law now have no application. It is our duty to get rid of it, if we properly can.*

*(3) We are bound by the doctrine of precedent to adhere to the presumption. This is the most important argument, because the rules as to stare decisis provide a crucial counterpoint to the law's capacity for change: apparently established principles are not to be altered save through the measured deliberation of a hierarchical system. First instance courts do not, on the whole, effect root and branch changes to legal principle, since if they were permitted to do so legal certainty, which is at least as important as legal adaptability, would be hopelessly undermined. But the Divisional Court is in a peculiar position. In point of hierarchy, it is a first instance court, an arm of the Queen's Bench Division. But it is also an appellate court for cases like the present; and in such cases there is no appeal from its decisions save to the House of Lords".*

I would adopt, *mutatis mutandis*, the approach of Laws J., but that in no way implies that the Divisional Court was right in that case to sweep away the presumption that children between the ages of 10 and 14 are incapable of knowing that what they are doing is seriously wrong. (The case is under Judgment in the House of Lords.)

Is this court bound, under the doctrine of precedent, loyally and unquestioningly to apply the legal principles developed and explained by the House of Lords in Rondel -v- Worsley and Saif Ali

-v- Sydney Mitchell & Co? The question is not susceptible of an easy answer. And I have had the benefit of reading in draft the persuasive remarks of Sir Godfray Le Quesne QC about the propriety of this court reviewing the twin decisions of the House of Lords.

The courts of Jersey as a general rule decide questions of tortious liability by direct reference to the development of the common law of England: Macrae -v- Jersey Golf Hotels Ltd (1973) JJ 2313; Mitchell -v- Dido Investments Ltd (1987-88) JLR 293, Torrell -v- Pickersgill, (30th June, 1994) Jersey Unreported CofA., to which Sir Godfray makes reference. That would seem to import the decisions within the hierarchy of English courts. I acknowledge, along with Sir Godfray, that this court cannot pick and choose which bits of English Law it incorporates. Yet, the final court of appeal for this Island is the Judicial Committee of the Privy Council, which will normally follow a decision of the House of Lords: Abbott-v-The Queen [1977] A.C. 755, 763. So far as I am aware, there has been no decision emanating from the Board to the like effect of Rondel -v- Worsley. And on the question of an application to strike out a claim, this court is effectively the final Court of Appeal, subject only to the special leave to appeal procedure, grantable only by the Judicial Committee. This court is free to decide whether, in 1995, there is any immunity for advocates from suits of negligence.

It goes without saying that this court will invariably accord the highest persuasive force to any decision of their Lordships in the House of Lords, particularly in the field of tortious liability. It is not unknown for an appellate court, quite exceptionally, to anticipate the reversal of an outdated rule of law by the House of Lords.

In Schorsch Meier GmbH-v-Hennin [1975] QB 416, the majority of the Court of Appeal anticipated the reversal by the House of Lords of a previous decision of the House in 1961, by departing from a rule that Judgments of an English court could be given only in English currency. The contemporary instability of Sterling and other overwhelming considerations, however, rendered the rule obsolete (Lawton J., who alone declined to overlook the binding effect of the 1961 House of Lords decision, described the rule as an "injustice to a foreign trader, founded on archaic, legalistic nonsense".)

In Miliangos-v-George Frank (Textiles) Ltd (1976) A.C. 443, the House of Lords agreed that judgments could properly be given in a foreign currency. In so holding, it reversed its own previous decision. The anticipation by the majority of the Court of Appeal did not, however, escape strictures from Their Lordships on the grounds of the abandonment of the strict application of *stare decisis*. The binding force of precedent seems, however, not universally to command absolute obedience, like some ligature strangulating at birth the instant demands of justice.

Where the decision rests on judicially recognisable, mutable considerations of public policy, the compulsion to follow suit is lessened, if not removed. It also seems to me not right for any Court to opt out of doing what is right and just, on the ground that the resolution of a problematical legal principle must await the arrival of the day - may be, far distant - when the length of an aspiring litigant's purse or the resources of the legal aid fund, are to hand, sufficient to finance the costs of litigation all the way up to the final Court of Appeal. Rondel -v- Worsley was indubitably binding on English courts in 1967 (and would coincidentally at that time have been followed in Jersey). A court, nearly 30 years later, which finds that society in its attitude to professional negligence has moved on, cannot properly be unmindful of, or lacking in respect for the Judgments of ten (twice times five) Law Lords. They stand impressively, for their day and age. But they cannot indefinitely bind a future generation, or await their Lordships' review of their own previous decision. My assessment is that the common law of England (as adapted to Jersey) can survive without conferring any special privilege on lawyers. Indeed, public respect for the law - particularly where it is made and sustained by judges and lawyers rather than by the elected representatives in Parliament at Westminster or in the States of Jersey - will be enhanced by an acknowledgement from the courts that lawyers are no different from other professionals when it comes to accountability for their professional services to the public.

Conclusion

Is not the real question which the court must ask itself, on an application to strike out a claim for negligence against an advocate: not, whether the facts pleaded, capable of giving rise to a cause of action for professional negligence, are defeated by the imposition of a blanket immunity; but rather, can the defendant establish a public interest defence? If it is the latter, there is no basis for striking out the claim, except where the action is an abuse of process and can be struck out on well-defined principles of civil procedure. That forensic weapon should stem any opened floodgate of litigation at the instance of disaffected clients of the legal profession otherwise the public interest defence must abide by the result of the legislation.

Lord Kenyon CJ in Fell -v- Brown (1791) Peake 131, 132, dismissed a claim for negligence brought against a barrister. He expostulated that he *"believed this action was the first, and hoped it would be the last, of the kind"*. Such a judicial indulgence in wish-fulfilment could profitably now, two centuries later, be consigned to a footnote in legal history.

FROSSARD, J.A.: I have had the berefit of reading both the Judgments. I agree with the Judgment of Sir Godfray Le Quesne.

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