Dismantling Barristerial Immunity

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Much has already been written on the arguments for and against the judicial grant of immunity to barristers from negligence actions brought against them by their dissatisfied clients.[1] This article does not seek to recite these arguments; rather, it contends that the public policy reasons which have traditionally been given for justifying the immunity may be satisfied without the grant of the immunity. I shall argue that barristers do owe a duty of care to their clients in the conduct of their cases in court. However, by virtue of the public policy reasons which have hitherto been relied upon to justify barristerial immunity, barristers' conduct should be measured against a special standard of care formulated by their own peers. Should this proposal prove too radical for judicial adoption, an alternative suggestion is made which retains the immunity but greatly restricts its scope.

1. The Public Policy Reasons for Barristerial Immunity

To facilitate the ensuing discussion, it would be helpful here to briefly state and analyse the main public policy reasons for the immunity.[2] First is the "duty to the court" reason which asserts that, without the immunity, barristers would not properly discharge their duty to the court for fear of being sued by their clients. The barrister's duty to the court

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1 For example, see Law Reform Commission of Victoria Report No 48 *Access to the Law: Accountability of the Legal Profession* Melbourne 1992, pp44-50; S Ross *Ethics in Law: Lawyers' Responsibility and Accountability in Australia* 2nd ed Butterworths North Ryde 1998, pp263-265; M Oldham 'The Advocates' Common Law Immunity' (1996) 3 *Deakin Law Review* 55; M Newman 'The Case Against Advocates' Immunity: A Comparative Study' (1995) 9 *Georgetown Journal of Legal Ethics* 267; A Grant 'The Negligent Advocate' (1980) NZLJ 260.

2 Since the rebuttals to these reasons are not pertinent to this discussion, they are not presented here. However, they are found in the commentaries listed in n 1.

> epitomizes the fact that the course of litigation depends on the exercise ... of an independent discretion or judgment in the conduct and management of the case which [the barrister] has an eye, not only to [the] client's success, but also to the speedy and efficient administration of justice.[3]

This reason, by its very nature, limits the immunity according to the particular function performed by a barrister in representing her or his client in court. Consequently, the immunity covers a solicitor who acts as an advocate in court.[4]

Secondly, there is the "relitigation" reason which contends that the immunity is necessary to prevent issues determined in the principal proceedings from being undermined by relitigation in collateral proceedings for negligence.[5] It is noteworthy that this reason, by its very nature, limits the immunity to cases where there has been a contested hearing. This is because a claim in negligence against the barrister does not involve any allegation that the judgment was wrong.[6]

Thirdly, the immunity is justified on the ground that it is part of the general immunity from civil liability which the law grants to all participants in court proceedings. This general immunity is afforded to judges, court officials, witnesses, parties, barristers and solicitors alike in order "to ensure that trials are conducted without avoidable stress and tensions of alarm and fear in those who have a part to play in them".[7] Once again, it is observed that this reason, by its very nature, restricts the scope of the immunity to what a barrister says or does in court.[8]

This brief survey of the public policy reasons for barristerial immunity emphasizes the occasionally forgotten point that it is the barrister's role *in court* which justifies the granting of the immunity. The significance of this will become evident in the ensuing discussion. Another point to note is that, while all the reasons have as their common objective the efficient administration of justice, there is the competing public policy consideration which demands that every wrong should attract a remedy.[9] This consideration was regarded by Deane J in his dissenting judgment in *Giannarelli v Wraith* as outweighing the "largely pragmatic" reasons supporting the immunity.[10] The goal is therefore to devise an approach which, as far as possible, promotes the efficient administration of justice *and* compensates an unjustly aggrieved client.

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3 *Giannarelli v Wraith* (1988) 165 CLR 543 at 556 per Mason CJ. See also 573 per Wilson J.

4 *Ibid* at 559 where Mason CJ held that "[i]t is the function performed, not the label attached, which gives rise to the limited immunity".

5 *Ibid* at 573 per Wilson J; at 595 per Dawson J.

6 *Saif Ali v Sidney Mitchell & Co* [1980] AC 198 at 223 per Lord Diplock. However, if negligence was proven, the judgment may come under collateral attack.

7 *Ibid* at 222 per Lord Diplock. See also *Giannarelli v Wraith* (1988) 165 CLR 543 at 557-558 per Mason CJ; at 573 per Wilson J; at 595 per Dawson J.

8 *Ibid.*

9 *Giannerelli v Wraith* (1988) 165 CLR 543 at 575 per Wilson J.

10 *Ibid* at 588. See also *Demarco v Ungaro* (1979) 95 DLR (3d) 385 at 408 per Krever J.

2. Replacing the Immunity with a Barrister-determined Standard of Care

Such a goal can be achieved by drawing away from the barrister's duty of care to her or his client and focusing instead on the barrister's standard of care to the client. Under this approach, barristers do owe a duty of care to their clients in which case the immunity currently accorded to them is removed. This enables clients to obtain compensation from negligent barristers in certain circumstances. What then of the various public policy reasons contending that barristerial immunity is needed to promote the efficient administration of justice? The answer lies in devising a special standard of care for barristers, one which takes into account all these reasons. This standard of care and its relationship with the duty question might be expressed in the following terms:

> A barrister is not negligent if he or she acts in accordance with a practice accepted at the time as permissible by a responsible body of barristerial opinion even though other barristers may adopt a different practice. The law imposes the duty of care but the standard of care is a matter of barristerial judgment.[11]

This standard, or one closely similar to it, is currently applied in cases where the negligent conduct in question has been held not to be covered by the immunity. For example, in the Supreme Court of New South Wales case of *Hodgins v Cantrell*,[12] the plaintiff, a victim of a motor accident, received advice from the defendant barrister on the quantum of damages he could expect to receive if his claim was litigated. The plaintiff accepted this advice and settled out of court. Subsequently, the plaintiff brought an action in negligence against the barrister, alleging that the amount of damages was well below what he was legally entitled to receive. Having determined that the defendant's advice was not covered by the immunity, the court proceeded to hear four expert barristers who all concluded that the figure was not even close to a reasonable expectation of verdict and therefore the settlement figure was held to be unreasonable. Consequently, the court found the defendant barrister liable.

A somewhat similar test has also been applied in proceedings before the New South Wales Legal Services Tribunal hearing a case of unsatisfactory professional conduct against a barrister. For example, in one case, a barrister had represented the plaintiffs in equity proceedings who were engaged in a dispute with their

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11 This is an adaption of the *Bolam* principle contained in the English law of medical negligence and first pronounced in *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118: see further below, the main text accompanying n23. This proposed standard may be compared favourably with the position in Canada where the courts have traditionally referred to expert testimony on the state of law practice at the time the error was committed: see *Gauthier v Leclerc* (1 November 1985) Quebec 200-09-000751-831 (Que CA) and referred to in D Campbell and C Campbell (eds) *Professional Liability of Lawyers* Lloyd's of London Press Ltd London 1995, p52.

12 Unreported, NSW SC, Grove J, 1 October 1997.

neighbours over a boundary wall.[13] During an adjournment of the hearing before the Supreme Court of New South Wales, counsel for the plaintiffs and defendants drew up terms of settlement which were read to the court when it reconvened. The judge delivered a judgment noting that the matter had been settled. The complaint made by the plaintiffs before the Legal Services Tribunal was that they had not in fact agreed to the terms of the settlement and had informed the barrister that they disagreed with those terms when they were read to the court. The Tribunal, comprising two barristers and a lay member, held unanimously that the barrister's failure amounted to negligence which fell within the definition of "unsatisfactory professional conduct" under the *Legal Profession Act* 1987 (NSW).[14] One of the barrister members, however, held that the in-court negligence which had clearly transpired here was covered by the barristerial immunity. The other barrister member, with whom the lay member agreed, held that the immunity did not extend to professional disciplinary proceedings. In support of his view, the barrister member cited Brennan J who said in *Giannarelli v Wraith* that, while the immunity should be maintained in respect of civil suits, "disciplinary procedures [could be relied on] to prevent neglect in the performance of counsel's duty".[15]

These cases indicate that the proposed standard of care is workable. In addition, the standard is attractive because it satisfies the various public policy reasons justifying the immunity. Consider first the need for independent judgment on the part of the barrister in discharging the competing duties to the court and the client. This need is accounted for whenever the panel of barristers co-opted to determine whether the defendant barrister had breached the standard of care decides that the alleged negligence was permissible since it was really an error of judgment. The proposed standard of care therefore provides barristers with a fair margin for permissible misjudgment. Of course, there may be instances where a barrister's conduct was so "gross and callous in its nature"[16] that the panel of barristers would conclude that it went beyond an error of judgment and constituted negligence.[17] However, it is anticipated that this limited possibility of a successful negligence suit would generally do little to impede a barrister's independent judgment in the

13 "Unsatisfactory Professional Conduct in respect of a barrister: Report of the Determination" *Legal Profession Disciplinary Reports*, No 3 of 1998, 1.

14 Section 127.

15 (1988) 165 CLR 543 at 580. Under s171D(1)(d) of the *Legal Profession Act* 1987 (NSW), read with s171(2), the Tribunal may order a negligent legal practitioner to pay the aggrieved client up to $10,000 by way of monetary compensation.

16 *Giannarelli v Wraith* (1988) 165 CLR 543 at 588 per Deane J.

17 Contra Mason CJ in *Giannarelli v Wraith* (1988) 165 CLR 543 at 558-559 doubted whether this distinction between an error of judgment and a negligent error was easy to draw. He therefore thought that the distinction did not afford a substantial brake on a barrister's liability in negligence. In reply, it is submitted that the collective experience and judgment of a panel of barristers would be quite capable of drawing the distinction.

presentation of her or his client's case in court.[18]

As for the "re-litigation" reason, "[o]ne has to wonder how readily clients would take it upon themselves to sue a lawyer, particularly in face of advice ... that great deference will be given by the courts to an advocate's judgment of how a trial should have been run".[19] This observation would have even greater force should the courts permit a panel of barristers to replace the judge in deciding whether a defendant barrister had breached the requisite standard of care. At this juncture, the concern may be expressed that barristers might adopt a stance of protecting members of their own profession. However, that this is highly unlikely is evinced by the readiness of barristers presiding over professional disciplinary proceedings to pass averse judgments against their fellow barristers.[20]

Regarding the general immunity afforded to all participants of legal proceedings from civil liability, this remains intact insofar as barristers are privileged from being sued in slander for anything he or she says in court.[21] However, there are material differences between a barrister and the other participants which are pertinent to the issue of barristerial liability. A barrister, unlike the other participants, appears in court as a representative of a party to the proceedings. This representation stems from the barrister-client relationship which carries with it a duty owed by the barrister to the client. Another difference between a barrister and the other participants in legal proceedings is that he or she has carriage of the mode of presentation of a party's case. Matters such as what witnesses are called, what evidence should be led and what questions should be asked in cross-examination are solely within the province of the barrister. The need for the barrister, in making these decisions, to be unhampered by the stress and worry of possible litigation is accounted for by the distinction between a permissible error of judgment and a compensable negligent error mentioned earlier. The panel of barristers determining whether the standard of care has been breached would ensure that a defendant barrister was not made liable for the former type of error. However, were the panel to decide that the barrister's mistake or failure went beyond an error of judgment, the barrister's special position as the client's representative and the person having

18 Interestingly, if the majority decision of the New South Wales Legal Services Tribunal discussed above is correct, barristers have to contend with the possibility of disciplinary proceedings being brought against them for negligence. The majority was not persuaded that this might hamper a barrister's independent judgment in conducting her or his client's case in court.

19 Law Reform Commission of Victoria, *supra* n1, p47.

20 In this regard, the New South Wales Law Reform Commission was impressed by the thoroughness of the Bar Association's investigations into alleged unsatisfactory professional conduct of its members: see Report 70 *Scrutiny of the Legal Profession: Complaints against Lawyers* Sydney 1993, paras 2.140-2.144. The investigations included seeking expert opinion in a particular field on the standards of practice generally expected of a barrister doing work in that field and whether the respondent barrister had met those standards of practice in the circumstances.

21 See *Demarco v Ungaro* (1979) 95 DLR (3d) 385 at 407-408 per Krever J. The general immunity does not, however, prevent a barrister from being subjected to disciplinary proceedings for words spoken in court: see *Clyne v New South Wales Bar Association* (1960) 104 CLR 186 at 200-201.

sole charge of the presentation of the client's case, demands that he or she be made liable in negligence to the client.

In sum, the proposed barrister-determined standard of care provides a viable approach which accounts for both the competing public policy considerations of promoting efficient administration of justice and compensating an unjustly aggrieved client. Where members of a barrister's own profession have determined that he or she was negligent by the profession's own standard of care, the administration of justice would be brought into public disrepute were the law to continue protecting the negligent barrister from civil liability.

The proposal to leave the determination of the standard of care to the profession of barristers runs counter to the law of negligence on the issue. Thus, it has been held that:

> The ultimate question, however, is not whether the defendant's conduct accords with the practices of his profession or some part of it, but whether it conforms to the standard of reasonable care demanded by the law. That is a question for the court and the duty of deciding it cannot be delegated to any profession or group in the community.[22]

Until recently, an exception was made to this ruling in respect of the medical profession. This was known as the *Bolam* principle[23] which left the standard of care expected of a medical practitioner to be determined by a responsible body of medical practitioners. However, the High Court has since rejected the principle and held that the above quotation applies with equal force to the medical profession.[24]

The civil liability of barristers has, for good reason, often been compared with that of the medical profession.[25] Both professions serve important public interests with the one effecting the proper administration of justice and the other providing efficient health services. The huge significance placed by the community on these two professions is evinced by the substantial amounts of government funding that is expended on public legal and health services. This being the case, sound reasons must exist to let barristers determine their own standard of care when this stance has recently been taken away from the medical profession.

It is submitted that there are good reasons for giving preferential treatment to barristers over medical practitioners. For a start, we should bear in mind that, unlike barristers, medical practitioners have never been immune from negligence suits. Accordingly, the proposed abolition of barristerial immunity is a significant extension

22 *F v R* (1983) 33 SASR 189 at 194 per King CJ.

23 So named after the English Court of Appeal case of *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 which propounded the principle. The principle remains good law in England: see the House of Lords case of *Sidaway v Governors of Bethlem Royal Hospital* [1985] AC 871.

24 *Rogers v Whitaker* (1992) 175 CLR 479 at 488-489.

25 For example, see the Law Reform Commission of Victoria, *supra* n1, pp48-49; New South Wales Law Reform Commission Discussion Paper 26 *Scrutiny of the Legal Profession: Complaints against Lawyers* Sydney 1992 paras 5.102-5.103.

of the liability of barristers. Seen in this light, depriving barristers of the power to determine their own professional standard of care may be taking too much away from them. Another reason for providing preferential treatment to barristers is because their work usually involves a greater degree of discretion and independent judgment compared to what medical practitioners do. In addition, barristers often have to contend with the competing duty to the court and their client's interests whereas the medical practitioners' professional duty of preserving life is entirely consistent with their patients' interest in being treated or cured. All told, there is much to be said for abolishing the barristerial immunity and, in its stead, leaving the liability of barristers to be assessed according to a barrister-determined standard of care.

3. Limiting the Scope of Barristerial Immunity

Should the courts refuse to adopt the above approach and insist on retaining the barristerial immunity, they should be persuaded to greatly restrict the scope of the immunity. This could be done by ensuring that the immunity covered only such work as was strictly justified by the public policy reasons for the immunity. The suggestion is also made for the immunity to cover only work which had to be performed by a barrister without the opportunity for calm reflection.

Presently, the immunity applies to a barrister's conduct and management of a case in court plus certain out-of-court work which is sufficiently related to the conduct of the litigation. The leading statement on this issue was expressed by McCarthy P in the New Zealand Court of Appeal case of *Rees v Sinclair*:

> [T]he 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.[26]

The closing sentence expresses the judicial concern to confine strictly the scope of barristerial immunity "to those situations where the circumstances which justify the immunity are present".[27] Clearly, the "circumstances" comprise the public policy reasons which justify the granting of the immunity to barristers. Hence, while the test in *Rees v Sinclair* describes the type of work covered by the immunity, judges

26 [1974] 1 NZLR 180 at 187. This test was approved in *Giannarelli v Wraith* (1988) 165 CLR 543 at 571 per Wilson J; *Keefe v Marks* (1989) 16 NSWLR 713 at 719-720; *McCrae v Stevens* (1996) Aust Torts Reports 81-405 at 63,686-63,687 per Beazley JA. The test was also adopted by the House of Lords in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 at 215 per Lord Wilberforce; at 224 per Lord Diplock; at 232 per Lord Salmon; at 236 per Lord Keith.

27 *Donellan v Watson* (1990) 21 NSWLR 335 at 340-341 per Handley JA.

should not lose sight of the public policy reasons which underpin that test. As Mason CJ so accurately observed in *Giannarelli v Wraith*, the test has to be strictly applied since, "to take the immunity any further would entail a risk of taking the protection beyond the boundaries of the public policy considerations which sustain the immunity."[28]

Unfortunately, the courts have occasionally failed to determine the scope of the immunity by reference to these public policy reasons with the result that the immunity is extended too widely. For example, in the Court of Appeal of New South Wales case of *Keefe v Marks*,[29] a barrister had failed to advise the appellant to seek interest prior to and during trial. Gleeson CJ (with whom Meagher JA agreed) found that the work in question was inextricably interwoven with the presentation of the case in court so that it was covered by the immunity. The learned Chief Justice arrived at this decision by applying the test in *Rees v Sinclair* but without any consideration as to whether the public policy reasons justified protecting the work in question. Justice Priestley, in dissent, did not believe that a decision concerning an interest claim was so intimately connected with the conduct of the case in court.[30] Like the Chief Justice, however, he relied only on the test in *Rees v Sinclair*. By contrast, in *Donellan v Watson*,[31] the same court, differently constituted, refused to extend the immunity after perusing the alleged negligence in the light of the public policy reasons for the immunity. In that case, a solicitor[32] had made an error in the mention of a matter in court with the result that convictions were quashed but the appeals were not withdrawn. The hearing was uncontested and orders were made by consent. A majority of the court held that the immunity did not apply because the solicitor was not under attack for the manner in which he presented the case, there was no question of a collateral attack on the court's orders, nor was there a

28 (1988) 165 CLR 543 at 559-560. Contra Beazley JA in *MacCrae v Stevens* (1996) Aust Torts Reports 81-405 at 63,690 who said that the work in question neither fell "within the test enunciated by Mason CJ in *Giannarelli* [which was a paraphrase of the test in *Rees v Sinclair*] nor is required by any policy consideration based upon the proper and efficient administration of justice". This statement erroneously suggests that the test is separate from the said public policy considerations.

29 (1989) 16 NSWLR 713.

30 For another example, see the English Court of Appeal decision of *Kelly v Corston* (1997) *The Times* 20th August 1997 and commented on in (1997) NZLJ 351. In that case, Pill LJ (with whom Butler-Sloss LJ agreed) held that a matrimonial settlement reached by consent of the parties at the door of a court was very closely connected with conduct of the cause in court. The learned justices did not refer to the public policy reasons for the immunity. Lord Justice Judge arrived at the same decision but only after he had observed that the particular settlement required the approval of the court by law so that the immunity was justified on the basis of the "relitigation" reason.

31 (1990) 21 NSWLR 335.

32 The court regarded the solicitor as a solicitor-advocate who could be covered by barristerial immunity. See further *Giannarelli v Wraith* (1988) 165 CLR 543 at 559 per Mason CJ; at 592, 593 and 596 per Dawson J.

problem of the ability of an advocate to speak freely.[33]

The discussion so far points to the need to restrict barristerial immunity by reference to the public policy reasons justifying the immunity and not just by invoking the test in *Rees v Sinclair*. It is therefore insufficient for a court to merely consider whether the particular conduct in question was or was not so intimately connected with the conduct of the case in court. Rudimentary as this observation might be, many judges appear to have ignored it in their deliberations over whether a particular type of work was covered by the immunity. [34]

Given that the courts have decided to determine barristerial immunity according to the test in *Rees v Sinclair*, they might have been expected to catalogue the out-of-court work which is covered by the immunity. Unfortunately, this has not really happened. One reason for this judicial resistance may be that the dividing line between out-of-court work that is covered by the immunity and out-of-court work which is not so covered can be very difficult to draw. This is exemplified by the different conclusions reached by Gleeson CJ and Meagher JA on the one hand and Priestley JA on the other in *Keefe v Marks*.[35] The problem is compounded in jurisdictions having a fused profession since there is often no clear demarcation between a solicitor's work and a counsel's work.[36]

A way out of these difficulties is to add a further rider to the test in *Rees v Sinclair*. Besides the need for the work to be so intimately connected with the case in court, the law could insist that the immunity will lie provided the work was performed in circumstances which required an immediate response from counsel. Such responses are needed most when the barrister is representing the client's case at a hearing. This reaffirms the point made earlier that it is the barrister's role *in court* which justifies the granting of the immunity. Judicial support for this rider may be found in the judgment of Lord Diplock *in Saif Ali v Sydney Mitchell & Co*. His Lordship there justified the granting of the immunity on the ground that "a barrister has to exercise his judgment as to where the balance lies between [the competing duties to the court and to his client] immediately and without opportunity for calm

33 (1990) 21 NSWLR 335 at 337 per Mahoney JA (with whom Waddell AJA agreed). The third judge, Handley JA, applied the law of agency and found that the agent solicitor had negligently acted in excess of his authority. In Handley JA's view, the question of immunity did not arise in these circumstances.
See *Yates Property Corporation (in liq) v Borland* [1998] 926 FCA (5 August 1998 for a recent case where the court correctly applied the test in *Rees v Sinclair* and considered the public policy reasons underpinning it.

34 A recent example of this unfortunate oversight is the Federal Full Court decision in *Yates Property Corporation v Boland* (1997) 145 ALR 169.

35 For another example, see the decision of the trial judge on the one hand and the appellate judges on the other in *MacCrae v Stevens* (1996) Aust Torts Reports 81-405.

36 The courts have themselves recognised this problem: see, for example, *Feldman v A Practitioner* (1978) 18 SASR 238 at 239 per Bray CJ. For the view that the immunity of a solicitor advocate is not co-extensive with that of a barrister, see *Donellan v Watson* (1990) Aust Torts Reports 81-066 at 68,377 per Handley JA.

reflection as the trial inexorably proceeds".[37] Applying this proposition to the case before him, Lord Diplock held as follows:

> The kind of judgment which a barrister has to exercise in advising his client as to who should be made defendant to a proposed action and how the claim against him should be pleaded, if made with opportunity for reflection, does not seem to me to differ in any relevant aspect from the kind of judgment which has to be made in other fields of human activity, in which prognosis by professional advisers plays a part.[38]

Accordingly, his Lordship concluded that the work in question fell outside the scope of the immunity.

Somewhat surprisingly, this rider to the test in *Rees v Sinclair* appears to have been entirely ignored by subsequent decisions both in England and elsewhere including Australia and New Zealand. The adoption of the rider would certainly limit the types of work covered by the immunity and would also make the task of determining what work is covered by the immunity much easier.

Conclusion

Cogent reasons have been given elsewhere for the barristerial immunity to be abolished. Probably the easiest way by which this may be achieved is through legislative fiat. The closest to this being accomplished was the recommendation to this effect by the Law Reform Commission of Victoria. However, any hopes of that recommendation becoming law were dashed when the recently enacted *Legal Practice Act* 1996 (Vic) stipulated that nothing in the Act "abrogates any immunity from liability for negligence enjoyed by legal practitioners".[39]

Legislative intervention aside, there is much to be said for the abolition of barristerial immunity being overseen by the courts themselves. As the courts have recognised, there is a likely perception in the community that "barristers, with the connivance of the judges, [have] built for themselves an ivory tower and have lived in it ever since at the expense of their clients".[40] In Australia, the dismantling of this tower must inevitably be done by the High Court, with its own decision in *Giannarelli v Wraith* posing the major obstacle. However, that may not be too great

37 [1980] AC 198 at 219. See also his Lordship's comment at 220 that "the argument founded upon the barrister's competing duties to the court and client ... loses much of its cogency when the scene of the exercise of the barrister's judgment as to where the balance lies between these duties is shifted from the hurly-burly of the trial to the relative tranquillity of the barrister's chambers."

38 *Ibid* at 220.

39 Section 442. Efforts to abolish the immunity in New South Wales also took a backstep when the New South Wales Professional Advisory Council, at its November 1997 meeting, recommended to the Attorney-General that the immunity should be preserved: see New South Wales Society Reports, "Advocates Immunity from Civil Action to Continue" (1998) 36 LSJ 80.

40 *Rondel v Worsley* [1967] 1 QB 443 at 468 per Lawton J and noted in *Giannarelli v Wraith* (1988) 165 CLR 543 at 575 per Wilson J.

an obstacle given the 4-3 split of the judges in that case and the disparity of reasoning of the majority judgments.[41] Furthermore, every one of the judges who were in the majority has since retired from the bench and it is noteworthy that no member of the High Court, as presently constituted, has made a ruling (in their capacity as members of that court) on barristerial immunity.[42]

This article has suggested two alternative ways by which the High Court could alter the present law governing the immunity afforded to barristers. The first is for the court to decide that barristers do owe their clients a duty of care and to leave the matter of liability to be determined at the standard of care stage of the negligence inquiry. To meet the various public policy reasons justifying the immunity, the suggestion has been made for the standard of care to be determined by the barristerial profession rather than the courts. Should the abrogation of the immunity be untenable to the High Court, it could confine the scope of the immunity to work performed without the opportunity for calm reflection. The impetus behind either of these suggested reforms to the present law is that "[i]t is in the public interest that a barrister be not only independent, but competent as well".[43] Australian barristers do not need the immunity or else they need it to a very limited extent especially since they are now all required to carry liability insurance.[44] In conclusion, the tort of negligence should be given a role to play in encouraging our barristers to live up to the standards set by their own profession, besides serving members of the public who are represented by barristers in court proceedings.

41 See M Mills "Professional Negligence: the Expanding Liability of Lawyers (1992) 9 ABR 1 at 31.

42 Gaudron J is the only remaining member of the present High Court who sat in *Giannarelli v Wraith*. Her Honour decided the case on the basis that the immunity had been abolished by statute. Accordingly, she did not proceed to decide whether the common law recognised such an immunity.

43 L Klar in (1978) 4 *CCLT* 2 at 5 and cited in *Demarco v Ungaro* (1979) 95 DLR (3d) 385 at 408.

44 See Trade Practices Commission *Study of the Profession: Legal: Final Report* Canberra 1994, para 11.2.