RECENT CASES

RONDEL v. WORSLEY[1]

The liability of barristers, and solicitors acting as advocates, for negligence in the conduct of a case; the undesirability of collateral re-trial of a criminal cause.

1. THE DECISION AND ITS PRIMARY RATIONALE

Norbert Fred Rondel—known to his Soho confreres as "Freddie the Ear" on account of his singular propensity for biting off ears—was convicted in 1959 at the Old Bailey of causing grievous bodily harm with intent to cause grievous bodily harm. He was sentenced to eighteen months' imprisonment, which he duly served. At his trial he had not been granted legal aid, but had been represented on a dock brief by the defendant barrister, Worsley. Apparently, Rondel was not satisfied with the way in which his defence had been presented, and almost six years after the trial he issued a writ alleging negligence by Worsley.

There were all sorts of difficulties about his statement of claim, however. Not to put too fine a point on it, it was gibberish; and even after Lawton J., on appeal from Master Lawrence,[2] had permitted it to be amended it was still 'well nigh unintelligible'.[3] Accordingly, the plaintiff sought further leave to amend, and in deciding whether or not to grant leave Lawton J. took as his criterion the answer to the problem of whether a barrister was capable, as a matter of law, of being sued for negligence in the circumstances alleged. Holding that he was not, he refused leave to amend. The appeal against this refusal was dismissed by the Court of Appeal, and further appeal taken to the House of Lords. It is with the dismissal of this latter appeal that this note is primarily concerned.

The first point which emerges from the judgments is that the ancient rule that a barrister cannot sue his client for fees, while still

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1 [1967] 3 All E.R. 993.

2 [1966] 1 All E.R. 467.

3 Id. at 469.

intact, has no bearing at all upon the problem.[4] In this respect Halsbury's interpretation of the line of cases illustrating immunity from suit is wrong:

> The principle which prevents a barrister from suing his client for fees, i.e. the mutual incapacity of counsel and client to contract with reference to the services of counsel, also prevents the client from suing counsel. If a barrister acts honestly in the discharge of his duty, he is not liable to an action by his client for negligence, or for want of skill, discretion or diligence in respect of any act done in the conduct of a cause, or in settling drafts, or in advising.[5]

This point is very important, for if it were conceded that inability to sue for fees were the correct and sole basis, immunity for negligence could not survive the doctrine of *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.*[6] It would further follow that solicitors, who are in a contractual relationship with their clients, could have no possible argument open to them that they should be immune from negligence actions in so far as they were doing work more usually done by a barrister.[7] On the other hand, a different basis of immunity might not necessarily be undermined by *Hedley Byrne*.

The Law Lords unanimously agreed that the true basis of immunity lay, and always had lain, in public policy.[8] The public policy reasons were as strong today as they had ever been, and were to be found in the special nature of the barrister's role. Though 'every

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4 See Lord Reid, [1967] 3 All E.R. 993, 1001; Lord Morris, id. at 1006; Lord Pearce, id. at 1020; and Lord Upjohn, id. at 1033.

5 3 HALSBURY'S LAWS OF ENGLAND 46 (3rd ed.).

6 [1964] A.C. 465.

7 Lord Pearson, because he never quite abandoned the inability to sue for fees approach, almost seems to accept that a solicitor still cannot claim any immunity. He said:

> Does a solicitor advocate have the same immunity as a barrister advocate from liability for negligence? Logically it seems right that he should, because the same reasons of public policy seem equally applicable to both of them. There are, however, some difficulties. The principle of a barrister's incapacity to contract is not readily, if at all, applicable to a solicitor. The existing position, as usually understood, is that the solicitor, by accepting instructions, makes with his client a contract, under which the solicitor has a legal right to remuneration and legal obligations to carry out the instructions and to exercise due care and skill in doing so. I am not aware of any decision or even dictum in a judgment to the effect that there is an exception relating to the solicitor's work as an advocate—that in respect of such work there is no legal right or legal obligation. If public policy requires that a solicitor must have immunity from legal liability in respect of his advocacy work, what is to be the contractual position?: [1967] 3 All E.R. 993, 1041-2.

8 See Lord Reid, [1967] 3 All E.R. 993, 1000; Lord Morris, id. at 1012; Lord Pearce, id. at 1022; Lord Upjohn, id. at 1035; Lord Pearson, id. at 1038.

counsel has a duty to his client fearlessly to raise every issue, advance every argument, and ask every question, however distasteful, which he thinks will help his client's case', nevertheless 'as an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may, and often does, lead to a conflict with his client's wishes or with what the client thinks are his personal interests. Counsel must not mislead the court, he must not lend himself to casting aspersions on the other party or witnesses for which there is no sufficient basis in the information in his possession, he must not withhold authorities or documents which may tell against his clients but which the law or the standards of his profession require him to produce. By so acting he may well incur the displeasure or worse of his client, so that if the case is lost his client would or might seek legal redress if this were open to him.'[9] The 'implicit trust between Bench and Bar which does so much to promote the smooth and speedy conduct of the administration of justice'[10] springs from the confident expectation of the Bench that where counsel is in any doubt about some detailed mode of putting his client's case he will put his public duty before the apparent interests of his client.[11] 'To a certain extent every advocate is amicus curiae'[12] with 'a prior and perpetual retainer on behalf of truth and justice'.[13]

Fine as all this sounds, one wonders what it all adds up to. The House simply seems to be saying that a barrister cannot be sued for negligence where the "duty" which counsel has broken is one which involves misleading or conniving at the misleading of the court. Of course, there can be no such duty, so to avoid liability for its "breach" it is not necessary to confer general immunity from an action for negligence. For there could be many occasions where negligence in the conduct of a case in no way overlaps or interferes with a barrister's duty to the court, and the type of situation which occurred in this case—failure to ask certain questions of witnesses—is capable of being such an occasion.[14] Why should a barrister have immunity if

9 per Lord Reid, id. at 998.
10 Id. at 999.
11 Ibid.
12 per Lord Morris, at 1011.
13 Ibid., quoting Crampton J. in R. v. O'Connell, (1844) 7 I.L.R. 261, 313.
14 Some of the members of the House of Lords seem over-aware of the personal demerits of the plaintiff: see, e.g., Lord Pearce at 1017-8. There does seem to be a tendency for the House of Lords to let their view of the worth of the particular litigant influence their formulation of the general principle of law: see, e.g., Sykes v. D.P.P., [1961] 3 All E.R. 33.

the circumstances were clearly such that he had failed to bring out a point that could well have been crucial and that to bring out that point would not have breached his duty to the court? Lord Reid's answer would seem to be that the barrister owes a duty of brevity to the court, a duty which fortuitously overlaps with the interest of the client inasmuch as 'far more cases have been lost by going on too long than by stopping too soon.'[15] Laymen, Lord Reid thinks, may nevertheless not appreciate the virtues of brevity, 'so I think it not at all improbable that the possibility of being sued for negligence would at least subconsciously lead some counsel to undue prolixity, which would not only be harmful to the client but against the public interest in prolonging trials.'[16] The idea of barristers talking their way through an extra day or two to head off the possibility of a negligence action is more diverting, one suspects, than realistic; and the alleged public interest against prolonging trials seems too nebulous to be sensibly defended. All that Lord Reid's remarks seem to add up to is that, generally speaking, barristers know that brevity is a virtue. But occasionally it will not be so; and if it can be established on the facts that it is positively negligent to be as brief as the barrister concerned was, there seems no real public interest of the sort he refers to which needs protection by the denial of an action for negligence. As for Lord Pearce's policy justification for a blanket denial of an action, that the danger of permitting one is that it may make the barrister 'too keen to win',[17] it is one which would make the client blanche—and rightly so, unless, once more, he is trying to make his barrister liable for not having misled or connived at the misleading of the court.

At any rate, for better or worse public policy is the basis relied upon by the House of Lords to justify a denial of liability for negligence. Certain further implications follow logically from this. First, because the duty to the court rationale cannot be relevant, the House holds, reversing the majority of the Court of Appeal, that a barrister is not immune from suit for negligence in pure paper work. By this the majority[18] seem to mean work in drafting or revising documents and other advisory work. But paper work preceding litigation does seem to be included in the immunity:

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15 [1967] 3 All E.R. 993, 999.

16 Ibid.

17 [1967] 3 All E.R. 993, 1027.

18 Lords Reid, Morris, Upjohn and Pearson. Lord Pearce thought that a barrister was still immune with regard to all work which he did: [1967] 3 All E.R. 993, 1030.

> The second question is whether counsel acting in non-litigious work would be immune for giving advice negligently; but first, perhaps, I should, however tentatively, suggest where I think that the immunity of counsel engaged in litigation should start. Clearly it must start before counsel enters the doors of the court to conduct the case. He will have had to give fearlessly to his client advice on the prospects of success; he will have settled the pleadings; and on discovery and in his advice on evidence and on many other matters he may have had to refuse to adopt his client's wishes. As a practical matter, I do no more than suggest that the immunity of counsel in relation to litigation should start at the letter before action where, if my recollection is correct, taxation of party and party costs starts.[19]

The other members of the majority, while not being as specific on this point, do not dissent from Lord Upjohn's view.

Second, the duty to the court rationale can also apply to solicitors performing court work. Lord Morris put it as follows:

> The statement of the court in *Swinfen v. Lord Chelmsford*[20] that an advocate takes on himself a duty in the discharge of which the client and also the public had an interest was a statement made in reference to litigation. The context in which the words I have quoted were spoken was that of 'the conduct or management of the cause'. The words were spoken in reference to an advocate at the English bar because only such an advocate could have conducted the case in the court in which the first cause of *Swinfen v. Swinfen*[21] was tried. The reasoning of the decision . . . would seem to me to apply to the advocate in litigation whether he be either a barrister or a solicitor.[22]

The fact that they are in a normal contractual relationship with their clients cannot circumvent this immunity. But those functions in the litigation process which can only be carried out by solicitors whether or not counsel has been retained—for example, lodging notice of appeal, making enquiry about possible witnesses, making arrangements for the attendance of witnesses—are not to be treated as the subject of immunity in cases where the solicitor actually appears in court and conducts the case himself.[23] In these matters he remains potentially liable, as he always has been.

2. AN ALTERNATIVE RATIONALE

Lord Reid and Lord Morris both stressed that to permit a barrister

19 per Lord Upjohn, id. at 1036.
20 (1860) 5 H. & N. 890, 920.
21 (1856) 18 C.B. 485.
22 [1967] 3 All E.R. 993, 1008-9.
23 See, e.g., per Lord Upjohn, id. at 1035.

to be sued for negligence was to permit the possibility of a re-trial of the merits of the original case. There is a point, they seem to say, where finality in litigation is a more important and useful part of a legal system than ultimate rightness of every decision. Lord Morris put it as follows:

> The civil jury would in effect be required to be engaged in a re-trial of the criminal case. That would be highly undesirable. . . . The procedure regulating criminal trials and the machinery for appeals in criminal cases is part of the structure of the law. . . . The judges who preside at criminal trials do what they can to ensure that the case of an accused person, whether he is represented or whether he is not, is fairly and adequately represented. If there is an appeal there are rules which regulate the approach of the appeal court, and which apply to such matters as whether evidence will be heard on appeal or whether a new trial will be ordered. In practice it is unlikely that, owing to some want of care, counsel would refrain from calling at the trial a witness who was thought to be dependable and whose testimony would certainly secure an acquittal. It is to be remembered also that an accused person is at liberty to give evidence on his own behalf. A system which is devised so as to provide adequate and reasonable safeguards against the conviction of innocent persons and to provide for appeals must nevertheless aim at some measure of finality. If the system is found not to be adequate then it can be altered and modified: it can be kept continually under review. . . .
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> Many of these considerations have parallel validity in regard to complaints of lack of care and skill in a civil action. It is true that the courts must not avoid reaching decisions because there are difficulties involved in reaching them. It may not be impossible in certain circumstances for one civil court to decide that an earlier case in a civil court . . . would have had a different result had some different course been pursued. . . . It would, in my view, be undesirable in the interests of the fair and efficient administration of justice to tolerate a system under which, as a sort of by-product after a trial of an action and after any appeal or appeals, there were litigation on litigation with the possibility of a recurring chain-like course of litigation.[24]

This justification for immunity, though more convincing than the duty to the court rationale, seems weaker for civil cases than for criminal cases. For the point of civil litigation is to put the parties as nearly as possible back in to the position they would have been in if the defendant had not broken some duty imposed upon him by law. If a barrister had conducted a case negligently, a money judg-

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[24] Id. at 1012-3.

ment against him for the loss caused to his client (prima facie the amount he failed to recover or had awarded against him in the previous action, plus the costs) restores that client to the position he ought to have been in. The third party, i.e. the successful party in the original litigation, is not collaterally affected by this second judgment; it remains a thing of the past for him. But where a barrister is sued for negligence in his conduct of the defence in a criminal case there are two targets—the barrister himself and the Crown. From one the plaintiff seeks money to compensate for his wrongful conviction and sentence; from the other an acknowledgment that he was wrongly convicted. This truly is to re-open litigation in a way that to sue one's barrister for negligence in a civil cause is not. And it is to re-open it against an unrepresented party who has not denied the plaintiff, at the time of the original trial, any of the facilities available to any other accused. Moreover, it is to re-open it in an arena where the burden of proof is less onerous on the plaintiff than it was originally on the Crown.

The policy against allowing the re-trial of criminal cases by collateral means is, of course, an old one in the common law. One form which the policy took was to deny that the prerogative writs, more particularly habeas corpus and certiorari, were available to raise in a different context the issue of whether the original conviction was correct. In 1860 it was said that

> a writ of habeas corpus . . . is not grantable in general where the party is in execution on a criminal charge, after judgment, on an indictment according to the course of the common law. . . . And it could only be useful as ancillary to an accompanying writ of error, . . . for until the judgment is reversed the prisoner ought not to be discharged.[25]

In *Re Featherstone*[26] Lord Goddard said:

> The court does not grant, and cannot grant, writs of habeas corpus to persons who are in execution, i.e. persons who are serving sentences passed by courts of competent jurisdiction. Probably the only case in which the court would grant habeas corpus would be if it were satisfied that the prisoner were being held after the term of the sentence passed upon him had expired.[27]

A year later, Lord Goddard, more exasperated, re-iterated the principle in a slightly different context:

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25 Ex parte Lees, (1860) 120 E.R. 718, 721.
26 1953) 37 Cr. App. R. 146.
27 Id. at 147.

> Persons serving sentences passed upon them by a competent court of summary jurisdiction should understand that habeas corpus is not a means of appeal. If they complain that they are wrongfully convicted they should appeal to Quarter Sessions. . . . It is perfectly clear that, unless the conviction was set aside by a court of appeal, . . . he is lawfully in custody serving a lawful sentence.[28]

A parallel branch of the same policy can be seen in the case of *Hargreaves v. Bretherton*.[29] The plaintiff, who had been convicted under the Prevention of Fraud Act 1939 and sentenced to eight years preventive detention, brought an action against the chief prosecution witness at his trial alleging that he had committed perjury which led to his conviction. His claim was struck out by the Master as disclosing no cause of action, and on appeal this decision was affirmed. Lord Goddard said:

> Half the prisoners in England would be trying to bring actions in these days where the welfare state provides legal aid, and there would be an abundance of these matters in these courts, which would be a most unfortunate procedure.[30]

Clearly, the decision in *Rondel v. Worsley* accords with the spirit of this line of cases. But the possibility of re-trying criminal guilt in a civil action has not been completely expunged, because of the existence of the doctrine in *Hollington v. F. Hewthorn & Co. Ltd.*[31] That case established that, for the purposes of the law of defamation, proof of conviction is not proof of guilt. Accordingly, a convicted person who is fortunate enough to have a newspaper state that he was guilty of the crime for which he was convicted can raise again, in a suit for libel, the problem of whether or not he was really guilty of the crime. Conversely, someone who alleges that a person who was found not guilty of a crime actually committed it may attempt to justify his statement by bringing evidence to show that that person actually did so. The latter was, in fact, the case in *Loughans v. Caswell*.[32] There Joshua Caswell, Q.C., in writing his memoirs for "The People", stated that "Fingers" Loughlan, who had been found not guilty of murder at his trial in 1943, had in fact committed the crime. Loughlan brought an action for libel, and the defence of justification —only, let us remember, having to be established on a balance of probabilities—was successfully advanced.

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28 Ex parte Corke, [1954] 2 All E.R. 440.
29 [1958] 3 All E.R. 122.
30 Id. at 124.
31 [1943] 2 All E.R. 35.
32 (1960) Unreported.

Relying on the same doctrine, Alfred George Hinds, the man who escaped from gaol three times and who endeared himself to the newspaper-reading public for all time by locking two prison warders in a lavatory at the Law Courts in the Strand, was able to get the issue of his guilt raised again. The policeman who had arrested him originally, Detective Inspector Sparks, wrote in the "Sunday Pictorial" as follows:

> There is nothing the "superior" criminal—the crook who prides himself on his brains—hates more than being caught out by the police after what he considered was a neatly planned masterpiece. . . . Though Hinds was picked up within three days of the crime, he couldn't bring himself to admit that he had been out-thought by the police. I should think that by this time he has convinced himself that he really is innocent. . . . I think that it is a great pity that Alfie did not take his medicine manfully like Bill [an admittedly guilty participant in the robbery].[33]

Hinds, who had never ceased to protest his innocence and had unsuccessfully tried in various ways to raise the issue of his guilt in collateral proceedings,[34] immediately issued a writ for libel, and was awarded substantial damages. Following this Hinds was released from gaol, but he was not granted a pardon. Instead his case was referred by the Home Secretary to the Court of Criminal Appeal, which then refused to quash his conviction. The reason for this is almost certainly a technical one, that at that time the Court of Criminal Appeal in a reference could only here *new* evidence. This was no help to Hinds, because what had been crucial to his conviction was that the trial jury had believed the three policemen, including Sparks, who had given evidence of his alleged verbal confessions, even though Hinds protested that they were fabricated, and what had been crucial about his successful libel action was the collapse of Sparks' credibility. But the breakdown of credibility is not new evidence; credibility is something for the jury at the trial to assess, not for the Court of Criminal Appeal.

The chronicle of Hinds neatly illustrates the problems and virtues of permitting collateral re-trial. By giving conflicting verdicts the legal system seems to have made a monkey out of itself; but by being prepared to make a monkey out of itself it has permitted an innocent man finally to assert his innocence successfully.

Is the confusion and contradiction produced in the legal system by such a case, is the anomaly which permits collateral re-trial by a

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33 This passage is quoted in HINDS, CONTEMPT OF COURT 200 (Bodley Head, 1966).

34 See generally HINDS, CONTEMPT OF COURT.

libel action but not by any other action too high a price to pay for the occasional righting of the occasional individual injustice? It is a very hard dilemma, but one about which Lord Denning, at any rate, is decisive in his views. Giving judgment in *Goody v. Odham's Press*,[35] a case in which a person convicted of complicity in the Great Train Robbery sued for libel, he said:

> There is a strange rule of law which says that a conviction is no evidence of guilt, not even prima facie guilt. That was decided in *Hollington v. F. Hewthorn & Co. Ltd.*[36] I argued that case myself and did my best to persuade the court that a conviction was evidence of guilt. But they would not have it. I thought that decision was wrong at the time. I still think that it was wrong. But in this court we are bound by it. It means that when anyone publishes a story about a crime, he is in peril of being sued for libel. In the action he cannot rely upon the conviction as proof of guilt. He has to prove it all over again, if he can. Witness the recent case of Mr. Hinds against Detective Inspector Sparkes.[37]

Perhaps Lord Denning is right, but if his view is taken lawyers and legislators must not become complacent about the system of criminal justice. The criminal legal system does not seem to have produced the right answer in the Hinds case, even at the final reference stage, and from this one may properly infer that it was in some way inadequate. In Lord Morris' words, quoted earlier, 'it can be altered and modified; it can be kept continually under review'. Only when this is done effectively can the policy against collateral re-trial of a criminal case be fully justified.

3. THE POSITION IN WESTERN AUSTRALIA

The Western Australian legal profession is organised differently from the English one. It is unified; all legal practitioners qualify in the same way, have to pass the same examinations, are liable to serve the same length of time in articles. Once qualified a practitioner is admitted as a "barrister, solicitor, and proctor" of the Supreme Court, and he may undertake all types of legal work including the conduct of cases in the Supreme Court (and thus in the High Court of Australia). But of recent years a semi-separate bar has begun to establish itself. The members of this bar have qualified in the same way as all other members of the profession, and most have practised generally

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35 [1966] 3 All E.R. 369.
36 [1943] 2 All E.R. 35.
37 [1966] 3 All E.R. 369, 371-2.

for some time before joining the bar. To join, a legal practitioner will leave his firm and announce to the next sitting of the Full Court that he intends to practice as a barrister, and, as a further practical step, he will announce this in the Law Society's monthly bulletin. The step is in no way irrevocable; by another announcement he could return to general practice. Members of the bar do not, as a matter of convention, deal directly with clients, but are, like English barristers, briefed by general legal practitioners. Discipline of members of the bar and general legal practitioners alike is carried out by the Barristers' Board;[38] but this is a body which pre-dates the formation of the bar and which is drawn from both "branches" of the profession, and there is no distinct organisation to which members of the bar must belong or which has any power over them.

The first problem which arises is whether, for the purposes of the doctrine in *Rondel v. Worsley*,[39] members of the bar and general legal practitioners should be treated on the same analytical basis. It is difficult to give a confident answer when faced with such a fast-developing situation as the growth of the bar, but it would seem correct to say that they should be. The different role of the bar in the legal system, proceeding from voluntary convention, is not confirmed by any statutory arrangement or assumption. It is certain that members of the bar, like general legal practitioners, remain officers of the Supreme Court, so that they could, for example, (and unlike barristers in the English sense) be ordered to pay personally costs incurred through their default. At this stage it would seem correct to say that any protection they derive from *Rondel v. Worsley*[40]they derive not because they are "barristers" but because they are "legal practitioners" of the Supreme Court of Western Australia.

That being so, how do "legal practitioners" fit within the doctrine? Does one have to assign them a primary nature, and relate their immunity to this? The significance of this question is that if the primary nature of legal practitioners is found to be that of a solicitor, their immunity is not *established* by the case, but merely assumed

38 On joining the bar, members also agree to be bound by the rules of the Bar Association; but at present there seems no reason why a legal practitioner should not practice solely as a barrister without joining the Bar Association. The rules of the Bar Association merely represent voluntary limitations on conduct—e.g. members agree to accept work only through solicitors—and breach of the rules cannot be attended by any sanction which affects the member's right as a legal practitioner.

39 [1967] 3 All E.R. 993.

40 Ibid.

obiter. It would need a further decision to clarify the existence and extent of immunity. But if—and this is much less likely—their primary nature were that of barristers, the situation would seem to be clear. It is probably a mistake, however, to approach the problem from the point of view of the primary and secondary nature of legal practitioners. Each practitioner potentially has the primary nature of a barrister, and always has under the Western Australian arrangement of the legal profession. Surely the right approach, therefore, should be that whilst acting as barristers legal practitioners should be protected to the extent of barristers. For legal practitioners do not simply have a limited right of appearing in certain courts, overlapping with that of barristers; they are entitled to appear in any court and when they do so they *are* barristers for that occasion. If this approach were to be taken, a decision denying immunity to solicitors for negligence in court work would still leave the immunity of legal practitioners, while acting as barristers, unimpaired. No decision on the immunity of solicitors would be needed to confirm or clarify the position of legal practitioners in this State.

There is one small difficulty in this approach. The Legal Practitioners Act 1893-1966 provides that 'written agreements as to costs shall not exempt the practitioner from liability for negligence'.[41] Obviously the legislature of the time contemplated that, as a matter of law, legal practitioners could be liable for negligence. But that is not to say that it contemplated that they could be liable for negligence in all matters. It is not to strain the language of the statute at all to construe it as meaning "to the extent that he can be liable for negligence at common law, written agreements as to costs shall not exempt the practitioner from liability for negligence". The extent to which they could be liable at the time the Act was passed was the extent to which they were solicitors; to the extent that they were liable as solicitors they were not to be allowed to contract out; to the extent they are liable today as solicitors they are not to be allowed to contract out. The only significant change made by *Rondel's* case in the liability of solicitors was as regards their court work, but as Western Australian "solicitors" have always done their court work as barristers they are not affected because of this change.

R. W. HARDING

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41 s. 59. This section appeared in the original Act of 1893.

ANCHOR PRODUCTS LTD. v. HEDGES;[1] NOMINAL DEFENDANT v. HASLBAUER[2]

The effect of calling evidence as to the true facts upon the operation of the doctrine of res ipsa loquitur.

In *Mummery v. Irvings Pty. Ltd.*[3] the High Court commented on the application of the doctrine of res ipsa loquitur in situations where evidence is adduced as to the cause of the accident. In a joint judgment Dixon C.J., Webb, Fullagar and Taylor JJ. said:

> But what is the position where the plaintiff, instead of relying on mere proof of the occurrence, himself adduces evidence of the cause of the accident? It is, of course, beyond doubt that the doctrine of res ipsa loquitur will have no place in the case. This, of course, is precisely the same situation when the explanatory matter is proved by the defendant. If his evidence is acceptable to the jury the question will be whether, upon that evidence, the jury is satisfied that he was negligent.[4]

Eight years later in *Priest v. Arcos Enterprises Pty. Ltd.*[5] the Full Court of the Supreme Court of New South Wales held that a plaintiff may not rely upon the doctrine and at the same time adduce evidence of the cause of the accident. The plaintiff, a carpenter engaged in the construction of concrete floors, was injured when the structure on which he was standing collapsed. He led evidence intended to show that there was negligence in the construction of the building in certain respects. The trial judge directed the jury that, if they disregarded that evidence and came to the conclusion that it was more probable than not that the fall itself showed a lack of reasonable care, the plaintiff was entitled to succeed. It was on this direction that the matter went to appeal. The Chief Justice, Sir Leslie Herron, upheld the appeal. Relying on *Mummery v. Irvings*[6] and decisions of the New South Wales courts, he said:

> The situation is that the plaintiff cannot, as it were, have the best of both worlds. He cannot rely upon the rule of res ipsa loquitur and at the same time adduce evidence of the cause of the accident. If he does, then the doctrine of res ipsa loquitur will have no place in the case. The res ceases to speak, and the jury is to decide the case on the affirmative evidence.[7]

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1 (1967) 40 A.L.J.R. 330.
2 (1967) 41 A.L.J.R. 1.
3 (1956) 96 C.L.R. 99.
4 Id. at 122.
5 [1964] N.S.W.R. 648.
6 (1965) 96 C.L.R. 99.
7 [1964] N.S.W.R. 648, 651.