# Immunity of Advocates From Suit: The Unresolved Issue

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*The author examines the issue of whether a lawyer should be immune from suits for negligence in the conduct of litigation. He reviews existing authorities focusing on recent decisions of the House of Lords in* Saif Ali *v.* Sydney Mitchell & Co. (a firm) and others, P (third party) *and discusses whether, in Canada, such an immunity should exist, concluding that the arguments against immunity outweigh those in its favour.*

*Dans l'article qui suit, l'auteur examine la question de savoir si les avocats devraient bénéficier d'une immunité de juridiction en cas de faute commise dans la conduite d'un procès. L'auteur analyse la jurisprudence et plus particulièrement la récente décision de la Chambre des Lords dans l'affaire* Saif Ali *v.* Sydney Mitchell & Co. (a firm) and others, P. (third party). *Il examine ensuite si une telle immunité devrait être reconnue au Canada et conclut, après une analyse des arguments pour et contre, à la supériorité de la thèse en faveur de la suppression de l'immunité.*

## INTRODUCTION

In the last ten years the House of Lords has twice examined extensively the issue of a lawyer's liability for negligently performing his functions as a barrister: in *Rondel* v. *Worsley*[1] and in *Saif Ali* v. *Sydney Mitchell & Co. (a firm) and others, P (third party).*[2] Their Lordships discussed the policy considerations of granting an advocate[3] immunity from suit as well as the nature and scope of such immunity. At a time when the scope of liability for negligence is being continually expanded, it seems paradoxical to extend protection to the group primarily responsible for this trend. Ostensibly the conclusions of the House of

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[1][1969] 1 A.C. 191, [1967] 3 All E.R. 993 (H.L.). Hereafter all page references are to the All E.R. citation.

[2][1978] 3 W.L.R. 849, [1978] 3 All E.R. 1033 (H.L.). Hereafter all page references are to the All E.R. citation.

[3]As the paper develops it will be argued that, if any immunity is to exist, it should depend on the kind of work performed by a lawyer and not on, for example, whether the lawyer is a barrister, a solicitor or a member of a fused profession. Throughout the paper, therefore, the word "advocate" will be used to apply generally to any lawyer conducting litigation.

Lords are founded upon public policy considerations; however, as is often the case, such reasoning might be better characterized as judicial policymaking.

Essentially, the issue may be seen as a competition between two interests: the right of the individual to seek redress and the interests of the administration of justice. On the one hand, there is the obvious proposition that an individual who has suffered negligence at the hands of another should be compensated. On the other hand, there are arguments involving the administration of justice and the preservation of its integrity. These arguments urge that there are some functions of the advocate that are inextricably intertwined with the functions of the court itself; as a consequence, in order for the advocate to discharge these functions he must be in a position to make decisions unhampered by fear that he will be held responsible to his client. To grant an advocate immunity for this purpose permits him to discharge his duties in the best and most efficient way that is consistent with the requirements of our judicial system. To the House of Lords these considerations prevailed and, accordingly, a doctrine of advocate's immunity was articulated in *Rondel* v. *Worsley* and was subsequently refined in *Saif Ali.*

In Canada the issue of immunity is far from settled; indeed, it has never really been fully considered in a modern context. The decisions of the House of Lords have however focussed the issue and our courts must surely deal with it soon.

In *Saif Ali* it was alleged that a barrister had given negligent advice as to the parties who should have been joined as defendants to a claim for damages. The plaintiff, whose claim had become statute-barred, commenced an action against his former solicitors and they in turn commenced third party proceedings, claiming indemnity from the barrister. The barrister applied to have the third party proceedings struck out as disclosing no cause of action. The Court of Appeal granted the application, holding that the barrister was immune from an action for professional negligence.[4] When the case reached the House of Lords, the majority[5] took a quite different view, holding that, while an immunity existed, it did not apply in the circumstances of the case. Lord Salmon stated:

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[4][1978] Q.B. 95, [1977] 3 W.L.R. 421, [1977] 3 All E.R. 744 (C.A.).

[5]Lord Wilberforce, Lord Diplock, and Lord Salmon. Lord Russell of Killowen and Lord Keith of Kinkel dissented. The minority would have decided that the immunity did apply in *Saif Ali* and would have dismissed the action against the barrister.

For very helpful comments upon the case see Zander, "The Scope of an Advocate's Immunity in Negligence Actions", (1979) 42 *Modern L. Rev.* 319; Catzman, Comment, (1979) 57 *Can. Bar Rev.* 339; Hutchinson, Comment, (1979) 57 *Can. Bar Rev.* 346; Hughes, "Liability For Pre-Trial Negligence", [1979] *N.Z.L.J.* 81. See also: "Immunity — From Rondel to Ali", (1978) 128 *New L.J.* 1081; "The House of Lords and the Reduced Immunity of Barristers from Claims for Pre-Trial Negligence", (1979) 53 Aust. L.J. 1; "House of Lords Narrows Barristers' Immunity", (1979) 53 *L. Inst. J.* 175; Traviss, "A Barrister's Liability to Civil Suit in Ontario: A Case Comment on *Demarco* v. *Ungaro and Barycky*", (1979) 13 *L.S.U.C. Gazette* 262.

> It would, in my opinion, be a shocking reflection on the common law if, in the melancholy circumstances I have recited, Mr. Ali has no remedy against any of his advisers who are responsible for his present situation. It may be that the solicitors, having accurately instructed counsel about the facts, cannot be held to be negligent for having acted in accordance with counsel's advice. I cannot, however, find any reason or principle or sound authority to justify counsel's immunity from being sued for damages by clients who have suffered loss as a result of counsel's negligent advice. I have no doubt that, for the reasons I shall presently explain, the common law does give Mr. Ali a remedy against his advisers, whether solicitors or counsel, whose advice negligently caused his loss.[6]

The majority of their Lordships agreed, although they abstained from any conclusions whether the barrister had in fact been negligent.[7] The minority, on the other hand, held that the immunity did apply to these facts and would have struck out the action against the barrister. On the face of it, the decision is not remarkable, except to the extent that it confirmed that there is undoubtedly some activity for which a barrister is not immune. Indeed, Lord Wilberforce attempted to de-emphasize the importance of the case, describing it as a "fringe decision".[8] Nevertheless, what their Lordships said in *obiter dicta* about the immunity of a barrister merits close scrutiny since, while preserving the immunity, the House of Lords seems to have narrowed its scope appreciably. However, before discussing the case in detail, it will be convenient to comment on the state of the law prior to *Saif Ali.*

## DEVELOPMENTS PRIOR TO *SAIF ALI*

In England, until the judgment of the House of Lords in *Rondel* v. *Worsley,* it was considered that a barrister was immune from suit by his client. Whether or not his immunity was total,[9] it certainly extended to the conduct of a case in court:[10] "No action will lie against counsel for any act honestly done in the conduct or management of the cause".[11] In Canada, the position was different. Early cases considered the fact that

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[6]*Supra,* footnote 2, at 1048.

[7]See, for example, the judgment of Lord Salmon, *supra,* footnote 2, at 1048:

> I hope that nothing in this speech will leave an impression that I hold a view, one way or another, as to whether the barrister who advised in 1968 was negligent. I have certainly formed no view on this issue; it is an issue which, if this appeal is allowed and the action is fought, will have to be decided by the judge who hears the evidence. It has, in my opinion, been rightly conceded at the Bar that, as the facts alleged in the third party claim are capable of constituting negligence, the only issue before this House is whether or not the barrister is immune from the claim made against him.

[8]*Supra,* footnote 2, at 1037.

[9]See the judgment of Lord Morris of Borth-y-Gest in *Rondel* v. *Worsley, supra,* footnote 1, at 1010-11, citing authorities suggesting that it was and, also, see the judgment of Lord Reid at 998 and the judgment of Lord Pearce at 1022.

[10]*Swinfen* v. *Lord Chelmsford* (1860), 5. H. & N. 890, 157 E.R. 1436 (Ex. Ct.), and see the judgment of Lord Pearce in *Rondel* v. *Worsley, supra,* footnote 1, at 1018.

[11]*Swinfen* v. *Lord Chelmsford* (1860), 5 H. & N. 890, at 923, 157 E.R. 1436 (Ex. Ct.), at 1450.

the Canadian profession is fused should, at least in some instances, produce a different result. In *Leslie* v. *Ball*[12] it was held that when a lawyer performed the functions of both solicitor and barrister in a case, any immunity that might exist in respect of his duties as a barrister could not be extended to his liability as a solicitor.[13] Furthermore, Adam Wilson J. went on to suggest that, in light of the differences between the two professions in Ontario and in England, it might be that a lawyer acting as counsel should not be immune in respect of any negligent acts:

> The joinder of the two professions of attorney or solicitor and barrister may, while they are united, be a sufficient reason for the distinction here; for it certainly must be in many cases, as the one now in court illustrates, an exceedingly difficult matter to separate the responsibility between the two professions exercised by and combined in the one person — to say where the responsibility of the attorney ends and that of the counsel might be supposed to begin; and therefore it may, while this united exercise of the two degrees or branches of the law exists, be better for the client that the attorney and counsel, while making a two fold profit in each of these capacities, should not be held to have a responsibility in but one of these characters, and a total exemption from accountability in the other, and perhaps the most profitable of them, and in which he might not have been employed at all if it had not been for his qualification and practice as an attorney.
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> I am not, therefore, prepared to say that a counsel in this country, even although he is not the attorney also, is exempt from liability to his client for such negligence on his part of the conduct of the cause as would make the attorney liable for negligence in his particular portion of it. But I think there is no doubt that a counsel who is also the attorney in the cause is certainly liable for his neglect as counsel, in like manner and to the same extent as an attorney is.[14]

Moreover, it did not appear from subsequent cases that Canadian courts recognized the existence of any such immunity.[15] However, this failure to recognize such immunity is not determinative since there have been few cases dealing with negligence of lawyers, particularly in their role as advocates.

There is one curious aspect of the observations that have been made in this country in respect of the advocate's immunity. It has sometimes been suggested that the fact that the Canadian legal profession is fused

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[12](1863), 22 U.C.Q.B. 512.

[13]*Ibid.*, at 515-516, *per* Hagarty J.

[14]*Ibid.*, at 518-19. See also the following early cases emphasizing the difference between the legal profession in England and in Canada: *McDougall* v. *Campbell* (1877), 41 U.C.Q.B. 332; *Wade* v. *Ball* (1870), 20 U.C.C.P. 302; *Robertson* v. *Furness et al.* (1879), 43 U.C.Q.B. 143; *The Queen* v. *Joseph Doutre* (1884), 9 A.C. 745, cited in Bastedo, "A Note on Lawyers' Malpractice: Legal Boundaries and Judicial Regulations", (1969) 7 *O.H.L.J.* 311, at 312, n. 6 (hereafter cited as Bastedo).

[15]Nightingale, "The Negligent Practice of Law in Canada: A Chronicle of Client Frustration", (1976-1977) 41 *Sask. L. Rev.* 47, at 50-51 (hereafter cited as Nightingale), citing *Hett* v. *Pun Pong* (1890), 18 S.C.R. 290; *Simpson* v. *Saskatchewan Government Insurance Office* (1967), 61 W.W.R. 741 (Sask. C.A.); *Page et al.* v. *A Solicitor* (1971), 20 D.L.R. (3d) 532 (N.B.C.A.), aff'd without reasons (1972), 29 D.L.R. (3d) 386 (S.C.C.). See also, Sgayias, "Liability of a Lawyer For Negligence in the Conduct of Litigation", (1977-78) 8 *Man. L.J.* 661, at 675.

should be a sufficient basis for rejecting any immunity in this country.[16] The observations in this respect have been brief and have never explained why the difference between a fused profession and a divided one should provide a basis for the recognition or rejection of the advocate's immunity. On the other hand, it has not been suggested by the House of Lords that the immunity should exist simply because a lawyer is a barrister. Indeed, pains have been taken to make clear that the immunity should exist not for a lawyer's benefit and protection but for the better administration of justice.

The House of Lords in *Saif Ali* clearly indicated that the existence and extent of advocates' immunity are to be judged on the basis of a functional test: that is, that there are some activities performed by advocates, including actual courtroom work, which are so closely connected with the court and its proceedings that the rights which clients would otherwise have against lawyers for negligence must be denied recognition. This kind of analysis is not in any way dependent upon a distinction between barristers and solicitors. On the contrary, the House of Lords stated explicitly that the matter turns on the particular function performed and that it is immaterial whether a barrister or solicitor is engaged in the task.[17] Accordingly, the observations that an immunity should be rejected because the legal profession is fused in Canada seem open to serious question. Rather it will be suggested that our courts must also consider the interests of clients, counsel, and the administration of justice in order to decide if immunity in some form should be granted to an advocate in this country.

In England, it was in the case of *Rondel* v. *Worsley*[18] that the matter was fully considered by the House of Lords. The case involved allegations of negligence against a barrister in handling the defence of a client who had been charged with causing bodily harm. In deciding the case, the House of Lords drew a distinction between a barrister's work in the conduct and management of litigation and work not directly related to such litigation. In respect of a barrister's work in the conduct and

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[16]*Banks et al.* v. *Reid* (1977), 18 O.R. (2d) 148, 81 D.L.R. (3d) 730 (C.A.), at 153 (O.R.), and at 735 (D.L.R.), reversing (1974), 6 O.R. (2d) 404, 53 D.L.R. (3d) 27 (H.C.); Laskin, *The British Tradition in Canadian Law* (1969), 25-26; Bastedo, *supra*, footnote 14, at 312; Fera, *"Harris* v. *Quain & Quain:* A Comment", (1978) 24 *McGill L.J.* 303, at 305 (hereafter cited Fera, *"Harris* v. *Quain"*); Fera, "Negligence of Solicitors", (1977) 25 *Chitty's L.J.* 325, at 326; Sgayias, *supra*, footnote 15, at 671.

[17]*Supra*, footnote 2, at 1039, 1046 and 1048. See also Klar, "Annotation on *Banks et al.* v. *Reid*", (1978) 4 *C.C.L.T.* 2, at 4.

[18]*Supra*, footnote 1. The case generated an extensive commentary. See, for example: North, "From *Hedley Byrne* to *Rondel* v. *Worsley*", (1968) 118 *New L.J.* 137; Roxburgh, *"Rondel* v. *Worsley:* The Historical Background", (1968) 84 *L.Q.R.* 178; Roxburgh, *"Rondel* v. *Worsley:* Immunity of the Bar", (1968) 84 *L.Q.R.* 513; Hunt, "The Ivory Tower", (1966) 83 *South African L.J.* 363; Wilkinson, "Public Policy and the Immunity of Advocates", (1968) 31 *Modern L. Rev.* 329; Heerey, "Looking Over the Advocate's Shoulder: An Australian View of *Rondel* v. *Worsley*", (1968) 42 *Aust. L.J.* 3; and see the list compiled in Catzman, Comment, (1978) 56 *Can. Bar Rev.* 116, at 116, n. 3.

For a South African article commenting upon *Rondel* v. *Worsley* which argues that there should be no immunity, see: Carey Miller, "Is the Ivory Tower Impregnable?", (1977) 94 *South African L.J.* 184.

management of litigation the House of Lords was unanimous that immunity should be granted. In respect of matters not directly connected with the case in court their Lordships were less clear.[19] Lord Pearce suggested that the immunity should be extended to such work. Those who took the opposite view did so in differing ways. Lord Pearson doubted whether the barrister's immunity extended to "pure paper work" such as drafting and advisory work unconnected with litigation. Lord Morris of Borth-y-Gest wished to confine the immunity to the actual conduct of a case in court. Lord Reid expressed the view that the immunity should extend to pleadings or the conduct of subsequent stages in a case. Lord Upjohn suggested that the immunity should be confined to the conduct of litigation in and out of court but should start in a civil case when the letter before action is sent. Thus, while the House of Lords was firm in its view that there should be immunity for actual courtroom work, their Lordships were much less clear as to the availability of the immunity in respect of other work performed by barristers. It was evident that the nature of the immunity and its boundaries would require clarification and refinement on a future occasion.

In *Rees* v. *Sinclair*[20] the New Zealand Court of Appeal considered the nature of the immunity and the limits that should be put upon its operation. The Court also considered whether the fact that in New Zealand lawyers can be both barristers and solicitors should make any difference in recognizing the immunity. The case involved a claim against the defendant for alleged mismanagement of litigation involving a family dispute. On the facts the Court held that there was no evidence of any negligence and the appeal was dismissed, but the Court went on to explore the nature of the immunity of an advocate.

Before discussing the test for determining the extent of the immunity as formulated by the Court of Appeal of New Zealand, one preliminary matter should be noted. The Court discussed whether the fact that the profession in England is completely divided into barristers and solicitors, while lawyers in New Zealand are frequently both barristers and solicitors, should make any difference in respect of the application of the immunity. MacArthur J. expressed a firm opinion that such a difference ought to play no part in deciding whether the advocate's immunity should exist and the area of work to which it should extend:

> The question that has to be decided is — having regard to the different conditions of practice operating in New Zealand should *Rondel* v. *Worsley* be applied here, and if so, to what extent? I have no doubt that a measure of

[19]See the judgment of Lord Wilberforce in *Saif Ali, supra,* footnote 2, at 1037-38 and the judgment of Lord Diplock in *Saif Ali,* at 1041 for summaries and comments on this point.

[20][1974] 1 N.Z.L.R. 180 (C.A.). The facts of the case are contained in the judgment of first instance; see, [1973] 1 N.Z.L.R. 236 and see the judgment of Lord Salmon in *Saif Ali, supra,* footnote 2, at 1052.

> immunity should, on the reasoning in that case, apply to a barrister who practises solely as a barrister. Moreover I can see no reason why a similar measure of immunity should not also apply to a barrister and solicitor in so far as he is acting qua barrister. Logically there is no difference between the positions of those two types of practitioner, as far as the question of immunity is concerned.[21]

The Court of Appeal of New Zealand adopted the position that advocates should be immune for any activity relating to conduct and management of a case in court, relying substantially upon the reasoning given by the House of Lords in *Rondel* v. *Worsley.* The Court also concerned itself with defining the extent of the immunity for work outside the courtroom. This, of course, had been the important issue that had been left undecided by the House of Lords. The Court of Appeal concluded that the immunity should exist "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 the cause is to be conducted when it comes to a hearing."[22] There are several difficulties with this "intimate connection" test. Since the whole purpose of a lawsuit is to be successful at trial and all steps in an action are taken in aid of that goal, it can be argued that almost anything done in the context of an action is intimately connected with the conduct of the trial. If, on the other hand, the test is to be interpreted more restrictively, extensive litigation will be necessary to determine what meaning is to be given the words "intimate connection": this test may encourage the very litigation it is designed to curtail. Would it include, for example, a pre-trial decision not to call a witness or a failure to add parties after discovery? Whatever the strengths or weaknesses of this test, however, its importance has been enhanced by its adoption by the House of Lords in *Saif Ali.*

Finally, before discussing *Saif Ali,* reference should be made to two Ontario cases predating that decision, which have briefly dealt with the immunity of an advocate: *Gouzenko* v. *Harris et al.*[23] and *Banks et al.* v. *Reid.*[24] In the *Gouzenko* case, the plaintiff alleged negligence in the

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[21]*Supra,* footnote 20, at 189-90. See also the judgment of McCarthy P., at 186, indicating that the immunity should apply to a lawyer who is both a barrister and solicitor:

> But I have been speaking of barristers simpliciter. What of the practitioner who practises both as a barrister and solicitor? Should a different result be arrived at in that case? I think not. The considerations which I have mentioned seem to apply with equal force to such a practitioner. The protection, I repeat, is not conferred for the benefit of the individual, but in the interests of the administration of justice. It may be argued that on this reasoning the protection should also be extended to solicitors, when they are appearing in Court or performing duties incidental to such appearances. Some of the members of the House in *Rondel* v. *Worsley* thought that that result followed. Perhaps that is also the situation in New Zealand, but the point is not before us, and has not been argued. So I do not decide it.

[22]*Supra,* footnote 20, at 187 *per* McCarthy P., and see the judgment of Macarthur J., at 190.

[23](1976), 13 O.R. (2d) 730, 72 D.L.R. (3d) 293 (Ont. H.C.).

[24](1977), 18 O.R. (2d) 148, 81 D.L.R. (3d) 730 (Ont. C.A.), reversing (1974), 6 O.R. (2d) 404, 53 D.L.R. (3d) 27 (Ont. H.C.). For a comment upon *Gouzenko* v. *Harris et al.* and *Banks et al.* v. *Reid,* see Catzman, Comment, (1978) 56 *Can. Bar Rev.* 116.

prosecution of a libel action. In May 1970, the plaintiff retained the defendant firm to examine for discovery and to proceed with the trial. The defendant firm did neither, as a result of which a successful motion to dismiss for want of prosecution was brought. On these facts the Court held the defendant firm negligent. In referring to the applicability of *Rondel* v. *Worsley* the Court made this brief statement.

> I may say in this regard, that in my opinion, at this stage of the proceedings, [the defendant firm was] engaged in providing solicitors' services rather than those of a barrister. In England it has been held by the House of Lords, in the case of *Rondel* v. *Worsley* . . . that no action lies against a barrister based on his conduct of litigation for his client. Even if that decision is applicable to persons engaged in providing the services of a barrister in this Province, it is, in my opinion, of no assistance to the solicitors in this case.[25]

The discussion of *Rondel* v. *Worsley in Banks et al.* v. *Reid* in both the High Court and the Court of Appeal is almost as brief as that contained in *Gouzenko* v. *Harris et al.* It also lacks an analysis of the policy considerations for granting or refusing an immunity or the possible limits of such an immunity. The facts of *Banks* v. *Reid* are in some respects similar to those in *Saif Ali.* The plaintiffs were passengers in a car that had been struck by a second car. It was alleged that the lawyer Reid had negligently advised the plaintiffs in respect of their rights against the drivers of both cars. The trial court held that Reid had been negligent in his failure to re-assess the position of the plaintiffs in relation to the first driver when the second driver's statement of defence was delivered alleging that the first driver was the sole cause of the accident. Nevertheless, the Court held that the plaintiffs were gratuitous passengers and since the plaintiffs had not shown that the first driver had been grossly negligent,[26] they would not have recovered in any event. However, the Court went on to make this terse reference to the applicability of *Rondel* v. *Worsley:*

> [I] should in any event as at present advised have dismissed the action on the principle confirmed by the House of Lords in *Rondel* v. *Worsley*. . . . Without having heard the matter argued it appears to me that the plaintiffs would have considerable difficulty in overcoming the rationale of that judgement. The plaintiff's action is in respect of the framing of their original action on the pleadings. While fusion of the functions of solicitor and counsel in this Province tends to obscure those functions, it is as counsel (that is, as barrister) that the legal adviser takes responsibility for the settlement of the pleadings. For the reasons carefully elaborated in the House of Lords, in England no action lies against the barrister based on his conduct of litigation for his client. This principle is one of public policy. As at present advised, I do not see that this principle is not applicable in this Province.[27]

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[25]*Supra,* footnote 23, at 751-52 (O.R.), at 314-15 (D.L.R.).

[26]At that time it was necessary for a gratuitous passenger to demonstrate gross negligence on the part of his driver in order to recover from him: see *The Highway Traffic Act,* R.S.O. 1970, c. 202, s. 132(3). This provision has since been repealed: see *The Highway Traffic Amendment Act, 1977 (No. 3),* S.O. 1977, c. 54, s. 16.

[27]*Supra,* footnote 24, at 418-19 (O.R.), 41-42 (D.L.R.) (Ont. H.C.).

In the Court of Appeal it was held that the plaintiffs were not gratuitous passengers and that they could therefore have recovered from the driver of their car. Moreover, the Court held that the defendant was not immune from suit because, *Rondel* v. *Worsley,* whatever its relevance might be, did not apply on the facts in this case. The Court also referred to the English Court of Appeal's decision in *Saif Ali:*

> The respondent did not rely upon *Rondel* v. *Worsley*, . . . in argument before Henry, J. The learned trial Judge made this clear and prefaced his opinion by words of caution and qualification "as at present advised". In my opinion no immunity should be afforded negligence of the character found in this case by the principles in that one or as that case was applied in *Saif Ali* v. *Sydney Mitchell & Co. et al.*, . . . a judgment of the Court of Appeal reported since this case was argued. If it is applicable at all in this jurisdiction, where practitioners are both barristers and solicitors, *Rondel* v. *Worsley* should be confined to issues between a barrister and his client in the discharge of the barrister's duties before a Court and is dependent upon consideration of the barrister's duty to the Court and duty to his client. Reid's negligence was his failure to carry out duties of a different nature, being duties that were fundamental to the relationship between a solicitor and his client.[28]

It is regrettable that the Ontario courts did not take advantage of these opportunities to articulate more definitively the nature and scope of immunity available to an advocate and chose to remain silent on the competing policy interests and considerations involved. Moreover, in *Gouzenko* and *Banks,* the Ontario courts still seemed to indicate that the fact of a fused profession may, in itself, be the basis for resolving the problem. As has been suggested, this is not an appropriate basis for deciding that there should not be any immunity in this country. The resolution of such an important question requires a full analysis of all relevant considerations: the rights of clients, the duties of lawyers, and the requirements of the administration of justice. Since the decision in *Saif Ali* the High Court of Ontario has again faced the issue and has accorded it fuller treatment. The case, *Demarco* v. *Ungaro et al.,*[29] will be dealt with after the discussion of *Saif Ali.*

## *SAIF ALI* V. *SYDNEY MITCHELL & CO.*

Whatever one's view of the issues involved, one can admire the willingness of the House of Lords to discuss fully and frankly its concerns in resolving questions concerning the immunity of an advocate. In *Saif Ali* it displayed an acute awareness of the difficulties of creating for advocates a privileged position that no other profession or enterprise enjoys.

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[28]*Supra,* footnote 24, at 153 (O.R.), 735 (D.L.R.) (Ont. C.A.).

[29](1979), 21 O.R. (2d) 673 (Ont. H.C.).

To appreciate the reasoning of the jugments in *Saif Ali,* it is necessary to review briefly the four key reasons for the granting of the immunity formulated in *Rondel* v. *Worsley.*[30] First, the administration of justice requires that a barrister should be able both to perform his duty independently and to discharge fully his higher duty to the court.[31] Second, actions against barristers for negligence in performance of courtroom work would make the retrial of the original suit inevitable, thereby prolonging litigation contrary to the public interest.[32] Third, a barrister, unlike other professionals, is obliged to accept any client.[33] Fourth, a barrister must be able, in the interest of the efficient administration of justice, to prune his case and eliminate irrelevancies.[34] A fifth possible reason, the barrister's inability to sue for his fees, was not relied upon by the House of Lords.[35]

In *Saif Ali,* the House of Lords examined its decision in *Rondel* v. *Worsley* from two perspectives: in respect of the reasons for granting immunity to an advocate and in respect of the extent of that immunity. With regard to both perspectives the House of Lords refined substantially the analysis in *Rondel* v. *Worsley.* In *Saif Ali* the Court founded the immunity primarily on an advocate's duty to the court and the furtherance of the administration of justice and indicated that the scope of the immunity should be no greater than required to achieve these ends.

It will be observed that *Rondel* v. *Worsley* involved allegations of negligence in the conduct of a criminal case whereas *Saif Ali* involved allegations of negligence in the conduct of a civil case. Their Lordships drew no distinction between criminal and civil cases for the purpose of deciding whether and to what extent an immunity should exist.[36] It might be argued that it is more important that no immunity exist for criminal trials because the liberty of an individual can be at stake. However, many criminal charges will not jeopardize the liberty of individuals and, by contrast, the disposition of civil cases can involve such important issues as custody disputes, allegations of fraud, and actions for compensation for incapacitating personal injuries. Accordingly, the granting or withholding of immunity should not turn on whether the alleged negligence occurred in a civil or a criminal case.

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[30]In this regard see the judgment of McCarthy, P., in *Rees* v. *Sinclair, supra,* footnote 20.

[31]*Rondel* v. *Worsley, supra,* footnote 1, at 998-99, *per* Lord Reid.

[32]*Ibid.*, at 1012-15, *per* Lord Morris of Borth-y-Gest.

[33]*Ibid.*, at 1033, *per* Lord Upjohn.

[34]*Ibid.*, at 999, *per* Lord Reid and at 1038 *per* Lord Pearce.

[35]*Ibid.*, at 1033 *per* Lord Upjohn and see the judgment of McCarthy P., in *Rees* v. *Sinclair, supra,* footnote 20, at 186.

[36]Indeed Lord Russell of Killowen in *Saif Ali, supra,* footnote 2, at 1053 expressly stated that there was no distinction. See also Hutchinson, *supra,* footnote 5, at 355 and the authorities therein referred to.

In *Saif Ali* their Lordships rejected any suggestion that the inability of a barrister to sue for his fees and his obligation to accept any brief, provided he is offered a proper fee, were reasons for according an immunity from suit. As Lord Salmon indicated, although a barrister cannot sue for his fees he can require that he be paid before he appears in Court. Moreover, the solicitor can sue the client for the barrister's fees and, if the barrister has any difficulty with the solicitor, though he cannot sue him, he can report him to the law society.[37] Lord Diplock doubted whether the duty of a barrister to accept a client would often result in counsel having to accept work unwillingly, but thought that if such instances did occur, they should not lessen the care the barrister is expected to exercise.[38] The arguments of the House of Lords for rejecting both of these reasons seem sound. Moreover, these reasons have little applicability in Canada, since lawyers performing courtroom work can sue for their fees and since it is doubtful whether a lawyer, at least in civil cases, must accept any client.[39]

The need to avoid re-litigating a suit, a reason given in *Rondel* v. *Worsley,* was relied upon in *Saif Ali* as a reason for confirming the immunity. Lord Diplock noted that there would be a need to re-litigate the case in order to demonstrate not only that the barrister was negligent but that his negligence resulted in loss of the suit. He stressed that this re-litigation would jeopardize the integrity of public justice since it would give one court of co-ordinate jurisdiction a great deal of power in reviewing the decision of another.[40] Lord Diplock recognized[41] that this objection would not be applicable in situations such as *Saif Ali,* where the negligence resulted in the claim never being tried. The objection also would have no application in the case of a missed limitation period, since it would not be necessary to find that the court of co-ordinate jurisdiction had reached a wrong decision on the merits, the negligence of the lawyer having prevented the plaintiff's claim from being tried at all. In those cases where the objection is applicable, it may be suggested that the client who has suffered because of an advocate's negligence might quickly conclude that the administration of justice is harmed more by depriving him of his remedy than by requiring that one court disagree with another in order to afford him relief. In any event, it is difficult to see what is unseemly about one court of co-ordinate jurisdiction disagreeing with another, if the reason for that

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[37]*Saif Ali* v. *Sydney Mitchell & Co., supra,* footnote 2, at 1051.

[38]*Ibid.,* at 1043-44. See also the judgment of Lord Salmon at 1051 and the dissenting judgment of Lord Keith of Kinkel at 1055.

[39]*Demarco* v. *Ungaro, supra,* footnote 29, at 694-95.

[40]*Supra,* footnote 2, at 1044-45. See also the dissenting judgment of Lord Keith of Kinkel, at 1055.

[41]*Ibid.,* at 1045.

disagreement is not the error of the first court, but the negligence of a lawyer who presented the case before it.[42]

The principal reason relied upon by the House of Lords in *Saif Ali* for upholding the immunity was the need to enable an advocate to discharge his duties to the Court and to the administration of justice in the context of court proceedings. The consideration that duties and obligations owed to clients should not be permitted to override these other duties of an advocate was conclusive. Lord Diplock suggested that the immunity existed "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."[43] For this reason, the House of Lords equated the position of a barrister in the courtroom with the immunity of judges and court officials for what they say or do in court. In regard to courtroom immunity their Lordships also referred to cases holding that witnesses cannot be sued for giving perjured evidence or for conspiracy to give false evidence,[44] and to a decision of the House of Lords that the witness' protection extended not only to the evidence given in Court but also to statements made by the witness to the client and to the solicitor in preparing the witness for trial.[45]

Since the House of Lords placed such great reliance on the cases dealing with protection of witnesses from suit for what they say or do in court and on the argument that the position of advocates should be equated with the immunity granted to judges and court officials,[46] it will be useful to further examine this protection and immunity. Startling as it may first appear the rule that a witness is immune from suit for anything said in evidence in court seems to be well established and subject to little qualification. Though a witness may be prosecuted for perjury, the fact that he has given evidence falsely and maliciously will not expose him to civil suit.[47] Nor can this rule be circumvented by alleging a conspiracy between witnesses to make false statements.[48] Similarly, a very broad immunity is granted to judges in the discharge of their obligations, though Lord Denning, on at least one occasion, has

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[42]See also the comments of Krever J., on this point in the *Demarco* case, *supra*, footnote 29, at 694.

[43]*Supra*, footnote 2, at 1044, referring to the judgment of Lord Morris of Borth-y-Gest in *Rondel* v. *Worsley*, *supra*, footnote 1, at 1014.

[44]*Merrinan* v. *Vibart and Another*, [1963] 1 Q.B. 528, [1962] 3 All E.R. 380 (C.A.).

[45]*Watson* v. *M'Ewan*, [1905] A.C. 480, [1904-7] All E.R. Rep. 1 (H.L.).

[46]*Supra*, footnote 2, at 1038, *per* Lord Wilberforce; at 1044, *per* Lord Diplock; at 1052, *per* Lord Salmon. This point was also discussed in *Rondel* v. *Worsley;* see, for example, the judgments of Lord Morris of Borth-y-Gest, *supra*, footnote 1, at 1014, and at 1025-26 *per* Lord Pearce.

[47]*Roy* v. *Prior*, [1970] 2 All E.R. 729 (H.L.), at 733 *per* Lord Morris citing *Dawkins* v. *Lord Rokeby* (1873), L.R. 8 Q.B. 255 and *Watson* v. *M'Ewan*, [1905] A.C. 480, [1904-07] All E.R. Rep. 1 (H.L.).

[48]*Ibid.*, at 733.

suggested there might possibly be circumstances where they could be liable in damages.[49]

In some respects equating the role of an advocate to that of a witness or judge seems sound. If a witness cannot be sued for damages for giving false evidence with malicious intent it seems reasonable that a lawyer ought not to be liable for a negligent act done in the conduct of a trial. If the administration of justice requires that all witnesses be given immunity from suit so that they will give their testimony freely and without reservation, it is tempting to suggest that the administration of justice also requires that a similar, albeit more limited protection, be granted to advocates so that they can discharge their obligations unhampered by the fear of suits by disgruntled litigants.

On the other hand, quite apart from the consideration that protecting a lying witness from civil suit in itself may be unwise, it can be argued that an advocate's role is to be distinguished from the role of judges and witnesses. While the advocate, like judges and witnesses, owes a duty to the court, he also owes a duty to his client. In order to discharge his duty to the court there should perhaps be a corresponding protection accorded to the barrister against suit from those other than his client who are involved in the proceedings. From this perspective, granting the advocate absolute immunity from defamation suits for what he says in court about witnesses or other parties, for example, is easily supported.[50] Nevertheless, it is arguable that the particular duty owed to a client should dictate a different result where there has been negligence on the part of an advocate. From this viewpoint, the existence of the peculiar relationship between advocate and client, far from being a factor that in combination with the advocate's duty to the court provides a basis for the immunity, is rather the foundation for the advocate's liability if negligent. In the event of a conflict between his duty to his client and his duty to the court, it cannot be argued that an advocate, if he chooses to do that which is consistent with his duty to the court, would necessarily be open to a charge of negligence. It is clear, for example, that an advocate cannot knowingly permit his client to lie under oath.[51] In this situation the advocate's duty to present his client's case with vigour and acuity clearly yields to his higher duty not to actively mislead the court. It cannot be negligence for a lawyer to refuse to let his client take the stand to lie. If a lawyer, however, did knowingly permit his client to lie on the stand the need to preserve the integrity of justice would not give him immunity against any disciplinary actions taken by the law society. A client might find it very strange that, on the

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[49]*Sirros* v. *Moore and others*, [1974] 3 All E.R. 776 (C.A.), at 784.

[50]24 *Halsbury's Laws of England* (1958, 3rd ed.) 49, para. 89; Williams, *The Law of Defamation* (1976), 73-74.

[51]For a recent paper dealing with ethical problems in the conduct of litigation, see Finlay, "The Conduct of Lawyers in the Litigious Process: Some Thoughts" in *Studies in Civil Procedure* (Gertner (ed), 1979).

one hand, the administration of justice dictated that the client could bring no action against an advocate for alleged negligence but that, on the other hand, the need to preserve justice and the reputation of the bar would require that disciplinary proceedings be brought against an advocate if he conducted his case unethically. It seems difficult to accept, therefore, that a barrister vis à vis his client should be placed in the same position as judges and witnesses in respect of courtroom proceedings, even assuming that the extent of the immunity granted to these other participants in the judicial process is otherwise sound.

The House of Lords in *Saif Ali* viewed immunity, not as existing for the protection of the lawyer, but as a means of ensuring the integrity of the judicial process during the trial of an action. The majority of the House of Lords, therefore, rejected any suggestion that the immunity should operate in any larger area than that which is strictly necessary to protect courtroom proceedings.[52] Accordingly, any speculation that *Rondel* v. *Worsley* would subsequently be given an expansive interpretation now seems not to have been well founded.

Their Lordships, particularly Lord Diplock, were aware that the "general trend in the policy of the law as developed . . . in recent years has been to extend to new areas of activity the notion that a man is liable for loss or damage to others resulting from his failure to take care"[53] and that the granting of immunity to barristers defied this trend. Similarly, while the Court readily conceded that a barrister sometimes had to perform under difficult circumstances and that an allegation of negligence as a result of such performance would be unpleasant, in their Lordships' opinions this was also true of other professions which were not conceded any immunity. This absence of immunity had not "disabled members of professions other than the law from giving their best services to those to whom they are rendered."[54]

Since the House of Lords would sanction the immunity of a barrister only to the extent it was necessary to preserve the administration of justice in respect of courtroom proceedings, they were also in a position to formulate a test that would confine the operation of such immunity in any particular instance. The test formulated by the New Zealand Court of Appeal in *Rees* v. *Sinclair,* discussed earlier,[55] commended itself to the majority. They, therefore, accepted that, unless pre-trial work could be said to be "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

[52]On this point see Klar, "Note on Barrister's Immunity From Suit", (1979) 7 C.C.L.T. 21.

[53]*Supra,* footnote 2, at 1041.

[54]*Ibid.*, at 1043, *per* Lord Diplock. See also the judgment of Lord Salmon at 1049.

[55]*Supra,* footnote 20.

when it comes to a hearing,"[56] immunity from suit would not be extended to such work.[57]

As might be expected, the Court did not attempt to define the kinds of work that would be protected. They did, however, provide some examples. The majority, for instance, unhesitatingly rejected the submission that the immunity would cover such negligent acts as indicated by the facts in *Saif Ali.* The conduct of the barrister "manifestly"[58] fell outside the scope of the immunity and was "not even remotely connected with counsel's duty to the court or with public policy."[59] In addition, if counsel refused prior to trial to call a witness because his client wished him to do so only to prejudice his opponent, he would be immune from suit. Such immunity would also apply if the counsel refused to call the witness at the trial for the same reason.[60] Similarly, counsel's protection from liability for negligence in the conduct of the case at trial could not be circumvented by charging him with negligence in advising the course of conduct that was subsequently carried out at trial of the case.[61] The immunity conferred at trial probably extends to any interlocutory or pre-trial proceedings.[62]

A recent New Zealand case, *Biggar* v. *McLeod,*[63] gives a further indication of what work would be protected. *Biggar* v. *McLeod* was decided before the House of Lords decision in *Saif Ali* but it appears to be consistent with the decision[64] and its interpretation of the test in *Rees* v. *Sinclair.* In *Biggar* v. *McLeod* the defendant, a barrister and solicitor, was acting for the plaintiff in matrimonial proceedings. After all the evidence had been given the defendant advised the plaintiff that the matter could be settled upon certain terms. The proceedings were settled upon these terms. Later the plaintiff brought an action against the defendant, claiming that he had misinformed her. The Court of Appeal confirmed that the action should be struck out, holding that the test for immunity in *Rees* v. *Sinclair* covered the circumstances of the case.

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[56]*Rees* v. *Sinclair, supra,* footnote 20, at 187 *per* McCarthy P., and at 190 *per* Macarthur J.

[57]*Saif Ali* v. *Sydney Mitchell & Co., supra,* footnote 2. See the judgments of Lord Wilberforce at 1039, Lord Diplock at 1046, and Lord Salmon at 1052, quoting the judgment of McCarthy P., in *Rees* v. *Sinclair, supra,* footnote 20, at 187.

[58]*Ibid.*, at 1046, *per* Lord Diplock.

[59]*Ibid.*, at 1052, *per* Lord Salmon.

[60]*Ibid.*, at 1051-52, *per* Lord Salmon.

[61]*Ibid.*, at 1046, *per* Lord Diplock.

[62]*Ibid.*, at 1039, *per* Lord Wilberforce and at 1044 *per* Lord Diplock.

[63][1978] 2. N.Z.L.R. 9 (C.A.).

[64]Though see Hughes, *supra,* footnote 5, where it is suggested that the court in *Biggar* v. *McLeod* took a wider approach to the immunity than taken in the House of Lords in *Saif Ali. Biggar* v. *McLeod* was not mentioned in the judgment of the House of Lords.

Finally, the House of Lords in *Saif Ali* was clear that the immunity and the extent to which it operates would apply equally to solicitors acting as advocates where they are able to do so.[65]

## THE EXISTENCE OF THE IMMUNITY IN CANADA

The existence and the limits of the advocate's immunity from suit in Canada are still unsettled questions. Ontario decisions before *Saif Ali,* it is suggested, are not definitive since they did not consider the varying policies for and against such immunity. Moreover, the fact that both the House of Lords in *Saif Ali* and the New Zealand Court of Appeal in *Rees* v. *Sinclair* made it clear that such immunity depended on the function being performed and did not depend on whether the lawyer was a barrister as opposed to solicitor, weakens any suggestion that the issue can be disposed of by the simple fact that a fused profession exists in this country. The real issues are whether lawyers acting as advocates ought to be granted some immunity from suit, and if so, what the limits of it are to be.

At first impression, it is difficult to see how any immunity can be justified. The House of Lords seems right in observing that the difficulties an advocate may have in carrying out his duties are really not distinguishable from those of a variety of other professions and skills, because they all must be performed under pressure and difficult circumstances. Moreover, the vast difference between immunity from suit and actually being found negligent is clearly recognized. The advocate is no insurer and, as with any other profession, his performance, in most circumstances, is to be judged against what reasonably should have been done: there should be a real difference between error of judgment and negligence.

In the recent Ontario case *Demarco* v. *Ungaro et al.,*[66] Krever, J. held that immunity for advocates should not exist. In *Demarco* the plaintiff was alleging that the defendant Barycky had failed to lead evidence at trial that he knew was available and would have supported the plaintiff's position. In holding that no immunity for advocates should exist, Krever J., after discussing *Rondel* v. *Worsley, Rees* v. *Sinclair,* and *Saif Ali,* accepted as conclusive both the need to compensate victims of lawyers' negligence and the fact that the advocates' duties could not be distinguished from the duties of other professionals. In addition, the Alberta District Court, in a recent and very brief decision, has also indicated that an immunity should not be available. In *Beckmat Leaseholds*

[65]*Supra,* footnote 2, Lord Wilberforce at 1039, Lord Diplock at 1046 and Lord Salmon at 1048. Compare Sgayias, *supra,* footnote 15, at 674 *et seq.,* where pre-*Saif Ali* cases involving solicitor's negligence when acting as an advocate are discussed.

[66]*Supra,* footnote 29, at 673.

*Ltd.* v. *Tassou*[67] the Court refused to strike out an allegation against a lawyer of negligence in the conduct of litigation involving a custody dispute.

In contrast, the arguments in favour of some form of immunity are more subtle and in some respects at least more difficult to defend. Yet, unless one is determined to dismiss them as merely the self-serving posturings of a group intent upon its own interests, they are worthy of careful consideration. It seems an unhappy fact of life that litigation is on the increase and is becoming enormously costly to the parties, the court system and the public.[68] While this is undesirable, it is to a certain extent tolerable as a by-product of, for example, the creation of new substantive rights, and the recognition of the capacity of the courts to resolve newly framed issues. Nevertheless, the court must be mindful of these conditions when dealing with new questions put before them for resolution.

Allowing lawyers to be sued for negligence in the conduct of litigation will surely not generate so many cases that immunity from suit should be granted on that basis alone, but the cases which do arise will likely raise many complex issues. For example, how will the impact of the negligently conducted case upon the first trial judge be assessed by the second judge? What will be the effects of the first case being appealed or not being appealed? If the negligence is alleged to have occurred in the arguing of an appeal, does the second trial judge have to then decide what an appellate court would have done if the appeal had not been negligently argued? It is no answer to suggest that the rule in this country that advocates could be sued has not led to much litigation or caused much difficulty in administration. The reality is that cases like *Rondel* v. *Worsley* and *Saif Ali*, taken in combination with a new consciousness that wrongs should not go unremedied, may very well lead to more lawsuits against lawyers for their conduct of litigation, if it is at last clearly determined that such actions are available in Canada.

It is hard to assess the impact upon conscientious lawyers of the decision to allow advocates to be sued for negligence in the conduct of litigation. Those in favour of immunity will argue that such things as lengthy pleadings containing allegations not thought tenable but included as protection against the later complaints of disgruntled clients, expanded discoveries, additional motions and appeals from these motions, more expert reports, witnesses called to give evidence on essentially the same points, and arguments pressed and maintained,

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[67](1978), 14 A.R. 468 (Alta. Dist. Ct.).

[68]For recent remarks of the Chief Justices and Chief Judges of the various courts of Ontario see, "Reports on the Administration of Justice in Ontario on the Opening of the Courts for 1979", (1979) 13 *L.S.U.C. Gazette* 3.

though of dubious merit, are likely to be by-products of this new rule.[69] This would hardly lighten the burden under which litigation lawyers must operate but that, in itself, is not the point. The more important consideration is the effect all of this will have in terms of cost to both the clients and the court, and in terms of consuming the time and resources of the court which in future years will probably have to be allocated with an increasing awareness of limitations.

Many other skills and professions labour under the threat of lawsuits and yet it has never been seriously argued that they should not be liable for negligence. It is probable that practitioners of these skills and professions sometimes take extra measures that add costs and are essentially for the purpose of protecting them from civil suits at a later date. The distinction may be that the additional time expended by advocates will often impose additional cost not only upon the client but also upon the administration of justice. Moreover, in litigation, the advocate does have two masters: the court and the client. Fear of later reprisals by the client may create pressure to fulfill in unsatisfactory ways the duty to the court. Indeed the extra effort may not in the end be in the least helpful to the client's case. As Lord Reid observed in *Rondel* v. *Worsley,*[70] more cases have been lost by going on too long than by stopping too soon.

The courts of Canada will no doubt face these issues soon, and should realize that the choice need not be between unqualified immunity and no immunity at all. The House of Lords in *Saif Ali* seemed eager to attempt some workable compromise and because of this they favored the test in *Rees* v. *Sinclair.* The test is vague and indefinite and there would have to be litigation to clarify its ambit, but its weakness may to some extent be its strength. Whatever else falls within its ambit it does protect work done in court which if any should be protected. This is where the court's time and energies are most directly engaged and where the advocate must make some of the most difficult judgments including those involving potential conflicts between duty to court and client. What other work would be said to be intimately connected with courtroom work would be sufficiently undefined to serve as a deterrent to bringing actions against litigation lawyers. This proposition seems valid compared to the situation if there were no immunity. On the other hand, in situations of obvious negligence the courts would likely strain to exclude the act in question from protection: the majority of the House of Lords had little difficulty in excluding the situation in *Saif Ali* even though the minority and the Court of Appeal thought that the barrister ought to have been immune. Lord Wilberforce, in advancing the test in *Rees* v. *Sinclair,* recognized that it would require interpretation but suggested that it was workable "if sensibly, and not pedantically, construed."[71]

[69]See (1979), 53 *Aust. L.J.* 1, *supra,* footnote 5, at 2 and Traviss, *supra,* footnote 5, at 268-69.

[70]*Supra,* footnote 1, at 999.

[71]*Saif Ali, supra,* footnote 2, at 1039.

Alternatively, the courts could adopt a more restrictive test and confine the immunity exclusively to courtroom proceedings. This test would have the advantage of being more definite and would also be more restrictive, but at the same time would confer immunity in the situation where the need for it is greatest. In a recent Quebec case, *Harris* v. *Quain & Quain,*[72] the Court of Appeal held that while an advocate is master of the case in court, he can be found negligent if he fails to produce evidence that could have been procured before trial and was central to the litigation. On the basis of an immunity only for courtroom proceedings it is unlikely that the negligence in the *Harris* case would have been protected, though it is possible to suggest that it might have been protected under the intimate connection test of *Rees* v. *Sinclair.* The obvious disadvantage of an immunity confined exclusively to courtroom proceedings is that it would fail to protect work that, while done outside the courtroom, was an essential extension of the courtroom proceedings. For example, the lawyers' action in settling the case in *Biggar* v. *McLeod*[73] might not be protected if the immunity were so limited.

The basic question of whether there should be any immunity, however, is in the end a value judgement. There seems to be no empirical evidence one way or the other concerning the effect immunity or a lack of it has upon the conduct of litigation.[74] Since barristers have never been subject to suit in England the effect of the threat of suit against them cannot be tested. On the other hand, advocates in the United States have always been subject to suit in their work as advocates.[75] Those favouring immunity might point to the increasingly burdensome costs of litigation in the United States and might suppose that the threat of suit by the client must contribute to these costs. There are many other factors contributing to this high cost, however, besides the threat of a negligence suit. In Canada advocates have been subject to suit and this appears not to have caused difficulty. It seems, however, that the new consciousness that encourages suits against professionals for perceived wrongs, and cases like *Rondel* v. *Worsley* and *Saif Ali* that draw attention to the responsibility of advocates for the conduct of litigation, are factors that may significantly alter both the types and numbers of suits against lawyers.

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[72]C.A.M. No. 09-000297-747, July 12, 1977. A description of the case and a comment upon it is found in Fera, "*Harris* v. *Quain*", *supra,* footnote 16.

[73]*Supra,* footnote 63.

[74]See the comments of Mr. Justice Krever on this point in the *Demarco* case, *supra,* footnote 29, at 694.

[75]For a recent article discussing this issue generally, see Friend and Hartzler, "New Developments in Legal Malpractice", (1977) 26 *Amer. U. L. Rev.* 408 and see the reference to the availability of suits against attorneys in the United States for negligence in the conduct of litigation by Krever J., in the *Demarco* case, *supra,* footnote 27, at 697. See also, Sgayias, *supra,* footnote 15, at 670 and the authorities therein cited and at 677 and the authorities therein cited. For a very recent decision of the United States' Supreme Court holding that an attorney appointed by a federal judge to represent an indigent defendant in a criminal trial is not, as a matter of federal law, entitled to absolute immunity in a state malpractice suit, see *Ferri* v. *Ackerman* (1979), 48 L.W. 4054.

Because the effect of immunity or lack of it is difficult to establish empirically those arguing against immunity can forcefully suggest that the balance be tipped in favour of clients. While the cost, if any, to the administration of justice if counsel are permitted to be sued is difficult to ascertain, it must follow that if counsel are immune, clients will be denied the right to bring suit and will in some instances be denied redress for what would otherwise be negligent behaviour. Indeed, those arguing against immunity may even suggest that, far from inhibiting advocates from performing their functions, exposure to suits for negligence will be an impetus to do a better job.[76] Negligence in this area of the law presumably will, and should, function as in any other: compensation for plaintiffs based upon fault for conduct falling below an acceptable norm. Thus, it can strongly be maintained that those wishing to establish an immunity should have to demonstrate the negative effects upon the administration of justice if such immunity is not recognized. Failing this, those who wish to impose liability can argue that the need to provide redress for a wrong should prevail and clients should have a remedy. These arguments should be successful and there would, therefore, on this basis, be no immunity recognized.

Whatever one's conclusion may be, the immunity of an advocate is unquestionably a matter of public policy which vitally affects both the public and the legal profession. It is necessary, therefore, that both lawyers and the public be able to fully comprehend and appreciate why the courts of this country recognize, or decline to recognize, a special immunity for advocates. This is an issue too important for anything less than full and reasoned discussion.

[76]See, for example, Linden, *Canadian Negligence Law* (1977), at 42, and Klar, "Annotation on *Banks et al.* v. *Reid*, (1978) 4 *C.C.L.T.* 2, both cited by Krever J., in the *Demarco* case, *supra*, footnote 29, at 696. See also Hutchinson, "The Barrister's Immunity", (1978) 128 *New L.J.* 144, and Hutchinson, *supra*, footnote 5, at 353. See also *The Globe & Mail*, Monday, March 12, 1979, p. 6 for an editorial reaction approving the decision in the *Demarco* case and see also Pitch, "When Counsel Errs: The Court Says You May Sue", (1979) 3 *Can. Lawyer* 14.