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[Commentary on Lawyer's Professional Negligence]

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Public policy is truly an unruly horse\(^1\) and even the most adept and experienced cannot ride it without some feeling for the dangers involved. One problem is that the rider may become saddle-sore and develop such a thick skin that he becomes insensitive to subtle and important changes in the applicability of prevailing policy considerations. Also, public policy is likely to carry the unwary off in directions that the rider did not anticipate or desire. An area of Anglo-Canadian law whose development has been strikingly dominated by the dictates of public policy is that of the possible immunity of the lawyer from actions for negligence in respect of the conduct of litigation. Unfortunately, the courts have proved poor horsemen in this respect. Not only are the recent developments in English law to be deplored, but any attempt to establish an immunity of any extent in Canada is to be strenuously resisted.\(^2\)

For over a century, it had been accepted that in English law, a barrister was "not responsible for any mistake or indiscretion or error of judgment of any sort".\(^3\) However, in 1964, with the introduction of liability for negligent statements by the House of Lords in *Hedley Byrne & Co. Ltd v. Heller and Partners*,\(^4\) the continued existence of such an immunity became questionable. Three years later in 1967 in *Rondel v. Worsley*,\(^5\) the House of Lords put such doubts to rest. Upholding the decision of Lawton J. at first instance\(^6\) and the Court of Appeal,\(^7\) it decided unanimously that a barrister was entitled to some immunity from actions in respect of professional negligence, specifically those arising from the conduct of proceedings in court although they could not agree upon the extent of such an immunity.\(^8\) Ignoring the customary rationale of the

\(^1\) *Richardson v. Mellish* (1824), 2 Bing. 252, per Burrough J.

\(^2\) Although Mr. Catzman gives no express indication of his particular stance on the issue, the general tenor of his comment is that, while the recent limiting of the scope of the immunity by the House of Lords is to be applauded, some immunity is appropriate. Furthermore, in an earlier comment, he stated: "It will not have escaped the reader's attention that substantially all of the considerations of public interest which the members of the House of Lords found so compelling are equally appropriate to the realities of Canadian litigation. In the writer's view, therefore, it is not unlikely that when a Canadian Rondel and a Canadian Worsley have the mutual misfortune to combine, our courts may well extend the immunity from action which the House of Lords saw fit to bestow upon Worsley to his hapless Canadian counterpart." See (1968), 46 Can. Bar Rev. 505, at p. 515.

\(^3\) *Swinfen v. Lord Chelmsford* (1860), 5 H. & N. 890, at p. 924, per Pollock C.B.


\(^8\) In brief, Lord Reid and Lord Morris believed that the immunity should only extend to work that was of a litigious nature and not to advisory work; Lord Upjohn
barrister's inability to sue for his fees, the House chose to base such immunity on overriding considerations of public policy. In short, it concluded that "the claim of an individual to a remedy for injustice suffered is held to be prejudicial to the sound administration of justice and, being a matter of overriding public interest, must prevail". Disregarding their own warning that public policy is "a very unstable and dangerous foundation on which to build", they relied upon three broad grounds of public interest:

(a) A barrister owes a duty to the court which must be carried out fearlessly and independently. It is superior to any duty he may owe his client.

(b) An action for negligence against a barrister would involve a re-trial of the original case which would only serve to increase and prolong litigation.

(c) A barrister is under an obligation to accept any client, however difficult or undesirable who seeks his services.

Almost a decade later, in 1978, in Saif Ali v. Sydney Mitchell & Co. the House of Lords were asked to rule on the extent of such an immunity; that is, "what is the extent of a barrister's immunity, if any, against a claim for damages for negligence in the performance of his professional duties out of court?" All five law lords were of the firm opinion, although for slightly differing reasons, that the decision in Rondel v. Worsley was conclusive on the question of the existence of an immunity and that the purpose of the present case was simply to provide "a fringe decision rather than a new pattern". By a slender majority, the House decided not to sanction
a blanket immunity and imposed a limit on the extent of such immunity. While the minority felt that, if there was a public policy basis to ground any immunity, that immunity should extend to all work done in every aspect of the civil litigation process, the majority maintained that these policy considerations lose much of their relevancy and cogency when "the scene of the exercise of the barrister's judgment . . . is shifted from the hurly-burly of the trial to the relative tranquility of the barrister's chambers". The majority adopted the test laid down by McCarthy P. in the New Zealand case of Rees v. Sinclair:

The protection exists only where the particular work is so intimately connected with the conduct of the cause in court that it can fairly be said to be a preliminary decision affecting the way the cause is to be conducted when it comes to hearing.

Do the policy considerations that the English courts feel warrant the continued existence of an immunity, albeit limited to the conduct of litigation, have any relevance to the Canadian predicament and, in particular, should such an immunity be established in Canadian law? Such questions are no longer merely academic for in the recent case of Demarco v. Ungaro and Barycky, the Supreme Court of Ontario was faced with such a problem. In reaching his decision, Mr. Justice Krever did not duck any of the important policy matters raised, but, with admirable judicial fortitude and perspicacity, met the issues squarely and came to a commendable decision that left no doubt as to the stance he had taken.

The facts alleged by the plaintiff were quite straightforward. In July 1975, an action was brought against the plaintiff in the present case, Mark Demarco, for an unpaid debt of $6,000.00. He retained the services of the defendants, Guy Ungaro and George Barycky, who were partners in a Niagara Falls law practice. The plaintiff lost his action and had costs awarded against him. In September 1978,

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16 Although the opinions of Lord Russell and Lord Keith are likely to be ignored, they both make a couple of points worth repeating. For instance, Lord Russell remarks that, "there may be much to be said for denying immunity from claims for negligence by a barrister in the conduct of civil litigation in court. But while that immunity stands, as I think it does as involved in the decision of this House in Rondel v. Worsley, I see no escape from the extension to pre-trial alleged negligence so strongly supported (obiter) in that case;" ibid., at p. 1054.

17 Ibid., at p. 1043, per Lord Diplock.

18 [1974] 1 N.Z.L.R. 180, at p. 187 (C.A.). In the recent case of Biggar v. McLeod, [1978] 2 N.Z.L.R. 9, the New Zealand Court of Appeal held that the settlement of an action by compromise in court was work related to the conduct of litigation and, as such, was covered by the immunity of the barrister. It should be noted that the New Zealand legal profession is a hybrid of the English and Canadian professions. Certain lawyers can act as both barristers and solicitors whereas others are barristers alone and cannot act as solicitors.

19 (1979), 21 O.R. (2d) 673.
the plaintiff commenced an action against the defendants alleging that the earlier action had been lost due to the negligence of the defendants. In a catalogue of unfortunate events, the plaintiff's central claim was that the second defendant had failed to lead evidence which he knew was available and which would have supported the plaintiff's position. The defendants brought a motion to strike out that part of the plaintiff's statement of claim for disclosing no cause of action and for being frivolous and vexatious. With the agreement of the plaintiff and with the leave of the court, an order was made to hear the point of law involved. In bringing this motion, the defendants relied upon the principles and rationale adopted by the House of Lords in *Rondel v. Worsley* and submitted that such a decision was good law in Ontario. The question for the court, therefore, was, in the words of Krever J., quite blunt:

All that is involved is whether a dissatisfied client is without any right to sue his or her lawyer. Put another way, the question is whether a lawyer, in the conduct of a trial, or other proceeding in court, is, alone among all other professional persons, incapable of being sued by the client for negligence.

A brief glance at the case law in Ontario regarding the possible immunity of an advocate shows that such a suggestion has received a decidedly cool reception. As early as 1863, the Court of Queen's Bench in the Upper Canada case of *Leslie v. Ball*, on very similar facts to the Demarco case, was of the opinion that little could be gained from following English authority, since the fusion of the legal profession in Upper Canada resulted in there being policy considerations of a different character at work. This distinction was further articulated a couple of decades later in *R. v. Doutre* by Lord Watson who entertained serious doubts whether:

[j]n an English colony where the common law of England is in force, [considerations of public policy] could have any applicability to the case of a lawyer who is not a mere advocate or pleader, and who combines in his own person the various functions which are exercised by legal practitioners of every

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20 The plaintiff claimed that the defendants did not assist or confer with him in preparation for the examinations for discovery or the trial; that the defendants failed to proceed expeditiously with the defence and caused him unnecessary expense; and that the first defendant failed to appear at trial and sent the second defendant who was totally unprepared. The defendants conceded that such allegations revealed a proper cause of action.

21 Rule 126 (Ont.).
22 Rule 124 (Ont.).
23 Supra, footnote 5.
24 Supra, footnote 19, at p. 675.
class in England, all of whom, the Bar alone excepted, can recover their fees by an action at law.

Until the decision in *Rondel v. Worsley*, the question of a possible immunity did not come before the Canadian courts and, therefore, it seems reasonable to assume that no such immunity existed. Indeed, even after the decision in *Rondel v. Worsley*, it seemed agreed on most sides that the policy considerations that supported the continued existence of the immunity in England were "not germane to the Canadian milieu" and that the decision should be ignored. For instance, Laskin J.A., as he then was, speaking in a personal capacity, was unequivocal:

The rules of conduct that in England govern the relations between barristers and solicitors have no meaning in Canada. Lawyers here are generally both barristers and solicitors, and certainly belong to the same Law Society. It was possible in Ontario until 1964 to be admitted as a solicitor without being called to the Bar; since that date the rules of the Law Society of Upper Canada provide for admission in both capacities or not at all. In sum *Rondel v. Worsley* is based on considerations which have no Canadian relevance.

Such resolve and certainty were given a firm jolt by the decision of the Ontario High Court in *Banks v. Reid*. Involving a failure to amend pleadings within the stipulated limitation period, Henry J. indicated that had he been called to do so, he would "have dismissed the action on the principle confirmed by the House of Lords in *Rondel v. Worsley*". The Court of Appeal, although deciding the matter on other grounds, took time to comment on the trial judge's dictum. Delivering the judgment of the court, Brooke J.A. said that "if [an immunity] 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.

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27 *Supra*, footnote 5.
29 *Supra*, footnote 5.
Consequently, prior to the decision in the *Demarco* case, the question of whether a lawyer can be held liable for his conduct in court had been resurrected and become a matter of genuine concern for the legal profession and public alike.

This problem of lawyer's malpractice is of especial concern to the public at large for it puts into doubt the very efficiency and quality of the legal process: factors which are of critical importance in fostering and retaining the requisite degree of respect for the law and the legal system. Nevertheless, whatever rigorous standards or elaborate safeguards are maintained by the legal system, it would be naive and unrealistic to claim that there are no faultless lawyers and that all advocates are masters of their craft. The fact that most clients place themselves entirely within the control and discretion of their lawyer is to be weighed heavily in deciding on the course and measures to be taken when there is an occasional and inevitable breakdown in that relationship. In short, the continued integrity and well-being of the legal system demands that such instances be dealt with not by submerging them beneath a unique professional immunity and, in some way, pretending they do not exist, but by bringing them into the open and treating them in accordance with the procedures and standards designed to meet other types of professional negligence.

In the *Demarco* case, Mr. Justice Krever was clearly of the opinion that the immunity of a lawyer from action for negligence at the suit of his client by reason of the conduct of a case in court has no place in the law of Ontario:

> It has not been, is not now, and should not be, public policy in Ontario to confer exclusively on lawyers engaged in court work an immunity possessed by no other professional person. Public policy and the public interest do not exist in a vacuum. They must be examined against the background of a host of sociological facts of the society concerned. Nor are they lawyers' values as

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35 Lord Evershed M.R. stated, in *Kitchen v. R.A.F. Association*, [1958] 2 All E.R. 241, at p. 245, that "an action against a [lawyer] for alleged negligence ... is always a matter of special anxiety to the court: for to some extent, inevitably, our system and profession of law is impugned and its adequacy and competence challenged". Also, "Legal malpractice differs significantly from other torts, however, in its particularly close relationship to the functioning of the legal system. Lawyers' negligence constitutes a malfunction of the system through which society seeks to enforce its definition of justice. When an attorney's negligence deprives his client of property or rights to which he would otherwise be entitled under the applicable law, damage is done not only to that person but also to the societal objectives embodied in the substantive rule and to the capacity of the legal system as a dispute-solving mechanism.

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Improving Information on Legal Malpractice (1973), 82 Yale L.J. 590, at pp. 591-592.
opposed to the values shared by the rest of the community. In the light of recent developments in the law of professional negligence and the rising incidence of "malpractice" actions against physicians (and especially surgeons who may be thought to be physicians what barristers are to solicitors), I do not believe that enlightened, non-legally trained members of the community would agree with me if I were to hold that the public interest requires that litigation lawyers be immune from actions for negligence. I emphasize again that I am not concerned with the question whether the conduct complained about amounts to negligence. Indeed, I find it difficult to believe that a decision made by a lawyer in the conduct of a case will be held to be negligence as opposed to a mere error of judgment. But there may be cases in which the error is so egregious that a court will conclude that it is negligence.\(^{36}\)

Although Mr. Justice Krever did not comment at any great length on the policy considerations considered by English courts to be supportive of an immunity, there are at least six grounds on which those considerations can be challenged. In the first place, although the demands of justice and its efficient administration are of paramount importance, the advocate is in an entirely different position to other participants in the judicial process, such as the judge, jury and witnesses who are in general, immune from civil suit.\(^{37}\) He holds himself out as a professional man and is engaged by his client on the basis of his ability to conduct litigation with special skill, knowledge and experience. Furthermore, he accepts remuneration precisely on those terms. Accordingly, he should be treated in the same manner as other professionals and owe a similar duty of care to his clients. This "in no way seems inconsistent with him holding certain other privileges and immunities \textit{qua} participant in the judicial process".\(^{38}\)

Secondly, there is no evidence to suggest that the disastrous consequences anticipated by certain judges and commentators, namely, "a proliferation of disputes between accusing clients and accused barristers",\(^{39}\) would flow from the suspension of the immunity. The fear of a deluge of negligence actions is a groundless one and it is pure hyperbole to talk of the advocate being haunted by the daunting spectre of impending litigation.\(^{40}\) As Krever J. noted,

\(^{36}\) \textit{Supra}, footnote 19, at p. 693.

\(^{37}\) Such participants are immune from civil actions in respect of words spoken or acts done in the course of judicial proceedings. However, as Krever J. noted, "The privilege, a fundamental aspect of the law of slander, is not concerned with relationships among persons. It relates to legal proceedings in open court. The special relationship of lawyer and client is not involved as it is, of course, when one is considering the law of negligence"; \textit{ibid.}, at pp. 695-696.


\(^{39}\) M. Catzman, \textit{supra}.

\(^{40}\) \textit{Supra}, footnote 12, at p. 746, per Lord Denning M.R. In his recent book, Lord Denning reaffirms his belief in the need for a broad immunity to be bestowed on the barrister. Commenting on \textit{Saif Ali}, he gives implied approval to the opinions of
"between the dates of the decision in Leslie v. Ball (1863) and Rondel v. Worsley (1967), the immunity of counsel was not recognised in Ontario and negligence actions against lawyers respecting their conduct of court cases did not attain serious proportions".  
Also, while no immunity exists in the United States, there seems to be no reported cases in which an advocate has been successfully sued for his negligent conduct in court. Furthermore, while the prospect of re-litigating an action is not an attractive one, it is not, as Krever J. states, "a contingency that does not already exist in our law and [is] inherently involved in the concept of res judicata in the recognition that a party, in an action in personam is only precluded from litigating the same matter against a person who was a party to the earlier action".

A third point is that it is highly unlikely that the quality of a lawyer’s work would, in fact, deteriorate simply because of the possibility of his liability in negligence. The courts have not seen fit to extend such an immunity to other professions, such as surgeons and architects, who manage to carry out work of an equally vital nature to the community and to comply with exacting professional standards. Indeed, it can be forcefully argued that the threat of litigation will provide an extra incentive to improve the quality of work. As Dr. Johnson dryly observed: "Depend on it, Sir, when a man knows he is to be hanged in a fortnight, it concentrates his mind wonderfully."

Fourthly, the alleged reasons given for the existence of an immunity disregard the reality of insurance which now underlies the modern operation of the law of negligence. Accordingly, the

the minority. "In Saif Ali v. Sydney Mitchell, a new set of Law Lords disagreed with their predecessors. They restricted the immunity greatly. It was by a narrow majority of 3 to 2. They confined the immunity virtually to the actual conduct of a case in Court. Lord Keith of Kinkel, in a persuasive dissent, thought this went 'some length towards defeating the purpose of the immunity' and the considerations of public interest on which it was based.", The Discipline of Law (1979), p. 250.

41 Supra, footnote 19, at p. 694.

42 In short, "an attorney must exercise reasonable care, skill and knowledge in the conduct of litigation and must be properly diligent in the prosecution of the case"; see 7 C.J.S., pp. 982-984. See also, Wade, The Attorney's Liability for Negligence (1959), 12 Vand. L. Rev. 755; Gillen, Legal Malpractice (1973), 12 Washb. L.J. 281; and Haughy, Lawyers' Malpractice (1973), 48 Notre Dame L. Rev. 888.

43 Supra, footnote 19, at p. 694. See also, Wade v. Ball, supra, footnote 25, at p. 304, per Magarty C.J.


46 Boswell's Life of Johnson (1792), vol iii, p. 167.
suggested advantages to be gained from immunity are completely disproportionate to the potential loss suffered by the client, especially when the ease, availability, relative cheapness and tax deductibility of insurance is taken into account. Moreover, insurance reduces the pressure on the lawyer, which seems to trouble a number of judges, yet would not leave the dissatisfied client without a remedy. In fact, all Ontario lawyers are required to have professional liability insurance which would amply cover the negligent handling of a case in court. 47

Fifthly, without such immunity, it would be entirely erroneous to imagine the lawyer as vulnerable and exposed, without any defence against the disgruntled client. The advocate would not be liable for the smallest mistake or error of judgment. His conduct would not be adjudged against some absolute standard, but would be measured against that of a prudent and ordinarily competent lawyer, following the customary practise adopted by the profession. 48 This notion was correctly articulated by Lord Diplock: 49

Those who hold themselves out as qualified to practise . . ., although they are not liable for damage caused by what in the event turns out to have been an error of judgment on some matter upon which the opinions of reasonably informed and competent members of the profession might have differed, are nevertheless liable for damage caused by their advice, acts or omissions in the course of their professional work which no member of the profession who was reasonably well-informed and competent would have given or done or omitted to do.

Finally, the reliance on the fact that a lawyer is obliged to accept any client is unwarranted for, whatever its significance in English criminal law, it forms no part of the practise of civil litigation in Ontario. Furthermore, Lord Diplock in Salf Ali was not persuaded by the force or validity of such a supporting ground. 50

When all these considerations and concerns are weighed together, it is submitted that the advantages and benefits accruing from the existence of an immunity are insufficient to balance the hardship and injustice that the client would have to suffer. In effect, the client has to bear the whole cost of a state of affairs that was no fault of his own. Furthermore, the reputation of the whole legal system is tarnished and respect for that system is unwarrantedly endangered. Despite fervent claims to the contrary, the immunity

47 At a present premium of $450.00 a year, an Ontario lawyer receives cover up to $100,000.00 for "any act or omission . . . arising out of the performance of professional services . . . as a lawyer".
49 Supra, footnote 12, at p. 1041, per Lord Diplock.
50 Ibid., at pp. 1043-1044.
appears to be nothing more than the Bench granting a special status and privilege, not to be enjoyed by others, to an emanation of its own. Consequently, the decision of Mr. Justice Krever in the Demarco case is to be applauded and commended for its good sense and wise appreciation of the contemporary dictates of public policy.

Finally, it would seem appropriate to consider briefly the implications of a lawyer being found civilly liable for the negligent handling of a criminal case. Although there already exist provisions whereby the issue of the lawyer's incompetence can be raised as a ground of appeal, the Canadian courts have taken an unduly formalistic approach to the problem and have been extremely reluctant to rely on the ineffective performance of counsel as forming a cogent reason for a successful appeal. While the courts have been rightly concerned to guard against encouraging the unscrupulous defence counsel, their restrictive attitude has caused them to give insufficient effect to other equally valid policy considerations. Nevertheless, the attempt to utilise the decision of a civil court on the negligence of counsel as a possible ground of appeal runs across problems of a slightly different nature. Firstly, the fact that a decision in a civil action will often not be given until several years after the criminal case in question presents an obvious difficulty in that the sentence given may have been completed. Secondly, a decision in a civil case cannot be admitted in a criminal case as proof of the facts relied on therein. Accordingly, if the convicted person is still completing his sentence, then, it is suggested that a civil finding of incompetence should be sufficient to warrant leave to appeal being granted under section 607 of the Criminal Code regarding application for appeal out of time, or that such a finding would represent appropriate grounds for a reference to the Court of Appeal by the Attorney General under section 605 of the Criminal Code.

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52 There is no special procedure, but the ordinary process of appeal from conviction or a sentence can be utilised.
53 For a survey of the approach of Canadian case law to the problem, see Asher D. Grunis, Incompetence of Defence Counsel in Criminal Cases (1973-74), 16 Crim. L.Q. 288.
54 It is conceivable that defence counsel might deliberately neglect a weak case in order to secure a quashing of conviction by raising his own incompetence on appeal or he might omit relatively important evidence, use this as a ground of appeal and have a second chance at obtaining an acquittal before the appeal court; see People v. Mitchell (1952), 104 N.E. 2d 285 and R. v. Cutter, [1944] 2 All E.R. 337.
56 R.S.C., 1970, c. C-34, as am.

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