Rondel v W
[1966] 3 All ER 657

Categories:	PROFESSIONS; Lawyers
Court:	COURT OF APPEAL, CIVIL DIVISION
Lord(s):	LORD DENNING MR, DANCKWERTS AND SALMON LJJ
Hearing Date(s):	13, 14, 15, 16 JUNE, 20 OCTOBER 1966

Counsel - Negligence - Immunity - Whether an action for negligence can lie against a barrister acting as such.

Solicitor - Negligence - Advocacy - Whether an action for negligence as an advocate can lie against a solicitor.

On grounds of public policy (and, per Lord Denning MR and Danckwerts LJ by long-standing usage) an action cannot be maintained against a barrister for negligence on his part in the conduct of a criminal or civil cause, whether at first instance or on appeal (see p 667, letter *g*, p 668, letter *c*, p 671, letter *d*, p 672, letters *c* and *i*, p 674, letter *c*, and p 675, letter *f*, post); nor does an action lie against him for negligence in work of preparation for the conduct of a cause, such, for example, as drawing pleadingsa (see p 667, letter *g*, p 670, letters *b* and *h*, and p 679, letter *c*, post).

Swinfen v Lord Chelmsford ((1860), 5 H and N 890) followed.

Scott v Stansfield ((1868), LR 3 Exch 220), *Dawkins v Lord Rokeby* ([1874-80] All ER Rep 994) and *Munster v Lamb* ([1881-85] All ER Rep 791) applied.

Hedley Byrne & Co Ltd v Heller & Partners Ltd ([1963] 2 All ER 575) considered.

Per Lord Denning MR and Danckwerts LJ: (a) (Salmon LJ dissenting) the same applies to work in chambers in advising, settling documents and conveyancing in matters which may never come before the court (see p 667, letter *i*, and p 672, letter *a*, post; cf p 679, letter *d*, post).

Perring v Rebutter ((1842), 2 Mood and R 429) followed.

(b) (Salmon LJ not concurring) the immunity of a barrister from being sued for negligence as an advocate does not extend to a solicitor acting as advocate (see p 666, letter, *i*, and p 670, letter *g*, post; cf p 676, letter *i*, post).

The plaintiff, when employed by a landlord, one Rachman, as rent collector and caretaker of premises of the landlord, went to certain premises of his at 02.30 hours one morning on behalf, so the plaintiff said, of the landlord. A dance had been or was taking place at the premises. A doorkeeper was at the door, to whom the plaintiff spoke. There was violence. The doorkeeper's hand was torn by the plaintiff and the plaintiff bit part of his ear off. The plaintiff was charged with causing grievous bodily harm. At the trial, after the doorkeeper had given evidence-in-chief, the plaintiff was offered the services of counsel on a dock brief and chose the defendant to conduct his defence. The trial was adjourned until the following day. The defendant then cross-examined prosecution witnesses and called the plaintiff and his witness, Miss H. The plaintiff was convicted and sentenced. Leave to appeal was refused by the Court of Criminal Appeal. Nearly six years later the plaintiff issued a writ against the defendant claiming damages for alleged professional negligence in the conduct of his defence. He acted initially in person. His first statement of claim was unintelligible. An order was made by the master striking it out. On appeal to the judge he was given opportunity to amend it; he produced an amended statement of claim, which disclosed no cause of action. He was given further opportunity to amend but elected to stand on the amended statement of claim, telling the judge (though this he subsequently disputed) that it was no part of his case that, but for the defendant's negligence, he would have

been acquitted. His appeal to the judge was dismissed. At a late stage on appeal to the Court of Appeal the plaintiff, whom a solicitor then represented, produced a third statement of claim, prepared by the solicitor. This was in proper form and alleged, in essence, negligence on the part of the defendant (a) in failing to cross-examine prosecution witnesses to show that the plaintiff could not have used a knife to cause the doorkeeper's injuries, (b) in failing to elicit from Miss H that the doorkeeper had friends who could have helped him in the fight and (c) in failing to elicit that the plaintiff was employed as rent collector and caretaker and was authorised to go on the premises.

Held - (i) (by Danckwerts and Salmon LJJ) the statements of claim ought to be struck out and the action should be dismissed (see p 669, letter *i*, p 672, letter *i*, and p 673, letter *i* to p 674, letter *b*, post).

(ii) further, for the reasons stated at p 657, letter *c*, ante, the action for damages for negligence did not lie.

Decision of Lawton J ([1966] 1 All ER 467) affirmed, but a dictum reversed (see (b) at p 657, letter *e*, ante).

Notes

As to the immunity of a barrister from an action for negligence, see 3 *Halsbury's Laws* (3rd Edn) 46, para 66; and for cases on the subject, see 3 *Digest* (Repl) 376, *280-288*.

As to the liability of solicitors to their clients for negligence, see 36 *Halsbury's Laws* (3rd Edn) 99, 100, para 135.

Cases referred to in judgments

Batchelor v Pattison & Mackersy (1876), 3 R (Ct of Sess) 914, 13 Sc LR 589, 43 *Digest* (Repl) 119, * *450*.
Bean v Wade (1885), 2 TLR 157, 43 *Digest* (Repl) 108, *975*.
Candler v Crane, Christmas & Co [1951] 1 All ER 426, [1951] 2 KB 164, 36 *Digest* (Repl) 17, *75*.
Chorley v Bolcot (1791), 4 Term Rep 317, 100 ER 1040.
Clark v Kirby-Smith [1964] 2 All ER 835, [1964] Ch 56, [1964] 3 WLR 239, 3rd *Digest* Supp.
Clayton v Woodman & Son (Builders) Ltd [1962] 2 All ER 33, [1962] 2 QB 533, [1962] 1 WLR 585, *Digest* (Cont Vol A) 75, *486a*.
Davies v Lock (1884), 3 LTOS 125, 43 *Digest* (Repl) 116, *1048*.
Dawkins v Lord Rokeby [1874-80] All ER Rep 994, (1875), LR 7 HL 744, 45 LJQB 8, 33 LT 196, 40 JP 20, 16 *Digest* (Repl) 113, *2*.
Donoghue v Stevenson [1932] All ER Rep 1, [1932] AC 562, 101 LJPC 119, 147 LT 281, 36 *Digest* (Repl) 85, *458*.
Fell v Brown (1791), Peake, 131, 170 ER 104, 3 *Digest* (Repl) 376, *285*.
Goody v Odhams Press Ltd ante p 369, [1966] 3 WLR 460.
Groom v Crocker [1938] 2 All ER 394, [1939] 1 KB 194, 108 LJKB 194, 158 LT 477, 43 *Digest* (Repl) 117, *1058*.
Hargreaves v Bretherton [1958] 3 All ER 122, [1959] 1 QB 45, [1958] 3 WLR 463, 1 *Digest* (Repl) 28, *218*.
Hatch v Lewis (1861), 2 F & F 467, 3 *Digest* (Repl) 378, *300*.
Hedley Byrne & Co Ltd v Heller & Partners Ltd [1963] 2 All ER 575, [1964] AC 465, [1963] 3 WLR 101, *Digest* (Cont Vol A) 51, *1117a*.
Henderson v Broomhead (1859), 4 H & N 469, 28 LJEx 360, 33 LTOS 302, 157 ER 964, 32 *Digest* (Repl) 125, *1462*.
Hinds v Sparks (1964), unreported See The Times, 30 July 1964 and subsequently *R v Hinds*, The Times, 24 November 1965.
Howell v Young (1826), 5 B & C 259, 4 LJOSKB 160, 108 ER 97, 43 *Digest* (Repl) 110, *996*.
Hunter v Hanley 1955 SC 200, 33 *Digest* (Repl) 529, * *88*.
Kennedy v Broun (1863), 13 CBNS 677, 32 LJCP 137, 7 LT 626, 143 ER 268, 3 *Digest* (Repl) 370, *215*.

Le Brasseur & Oakley, Re [1896] 2 Ch 487, 65 LJCh 763, 74 LT 717, 3 *Digest* (Repl) 371, *236*.
Leslie v Ball (1863), 22 UCR 512, 3 *Digest* (Repl) 377, * *161*.
McLellan v Fuller (1915), 220 Mass 494.
Marrinan v Vibart [1962] 3 All ER 380, [1963] 1 QB 528, [1962] 3 WLR 912, *Digest* (Cont Vol A) 536, *4147a*.
Moor v Row (1629), 1 Rep Ch 38, 5 Car I fo 168, 21 ER 501, 3 *Digest* (Repl) 371, *232*.
More v Weaver [1928] All ER Rep 160, [1928] 2 KB 520, 140 LT 15, 32 *Digest* (Repl) 146, *1658*.
Mulligan v M'Donagh (1860), 2 LT 136, 5 Ir Jur 101, 3 *Digest* (Repl) 377, * *159*.
Munster v Lamb [1881-85] All ER Rep 791, (1883), 11 QBD 588, 52 LJQB 726, 49 LT 252, 47 JP 805, 32 *Digest* (Repl) 122, *1437*.
Olson v North (1934), 276 Ill App 457.
Perring v Rebutter (1842), 2 Mood & R 429, 174 ER 340, 3 *Digest* (Repl) 376, *282*.
Pippin v Sheppard (1822), 11 Price 400, 147 ER 512, 33 *Digest* (Repl) 530, *87*.
Purves v Landell (1845), 12 Cl & Fin 91, 8 ER 1332, 3 *Digest* (Repl) 376, *283*.
R v O'Connell (1844), 7 ILR 261, 14 *Digest* (Repl) 333, * *1880*.
R v Skinner (1772), Lofft 54, 98 ER 529, 16 *Digest* (Repl) 21, *152*.
Robertson v MacDonogh (1880), 6 LRIr 433, 3 *Digest* (Repl) 372, * *111*.
Robinson v Behan [1964] NZLR 650.
Scott v Stansfield (1868), LR 3 Exch 220, 37 LJEx 155, 18 LT 572, 32 JP 423, 32 *Digest* (Repl) 121, *1421*.
Scudder v Prothero & Prothero (1966), The Times, 15 March 16.
Shiells v Blackburne (1789), 1 Hy Bl 158, 126 ER 94, 3 *Digest* (Repl) 71, *111*.
Swinfen v Lord Chelmsford (1860), 5 H & N 890, 29 LJEx 382, 2 LT 406, 157 ER 1436, 3 *Digest* (Repl) 376, *284*.
Swinfen v Swinfen (1856), 18 CB 485, 25 LJCP 303, 27 LTOS 220, 139 ER 1459, *subsequent proceedings*, (1857), 1 CBNS 364, 24 Beav 549, 53 ER 470, (1858), 27 Beav 148, 54 ER 57, 3 *Digest* (Repl) 378, *308*.
Watts and Cohen v Wills (1909), 29 NZLR 58.

Appeal

This was an appeal by the plaintiff from an order of Lawton J dated 21 December 1965, and reported [1966] 1 All ER 467, dismissing the plaintiff's appeal from an order dated 17 May 1965, made by Master Lawrence, that the statement of claim be struck out and the action be dismissed. The plaintiff claimed damages against the defendant, a barrister, for alleged professional negligence. A revised amended statement of claim was submitted during the hearing of the appeal, this document having been prepared by a solicitor on the plaintiff's behalf. This was in proper form and was accepted by the Court of Appeal as the plaintiff's statement of claim.

The plaintiff appeared in person.
G R Swanwick QC and *R J A Batt* for the defendant.
P M O'Connor QC and *L I Stranger-Jones* as amici curiae.

Cur adv vult

20 October 1966. The following judgments were read.

LORD DENNING MR. In stating the facts I have had recourse not only to the papers put before us by the parties but also to further papers which I have bespoken from the Court of Criminal Appeal.

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During the night of Saturday to Sunday, 5 April 1959, there was a dance at a house, 13, St Stephen's Gardens, W2. In the early hours, at 2.30 in the morning, a man named Manning was at the door. He was the doorkeeper. Norbert Fred Rondel, the plaintiff, went to the house. He went, he says, on behalf of Peter Rachman, the landlord. He spoke to Manning. There was an outburst of violence. Manning was severely injured. His hand was so damaged that it had to have nine stitches. And he lost the lobe of his right ear. The plaintiff admits that he did it, but he says that he was attacked by Manning. He was looking for prostitution and acted in self-defence. When it was suggested that he used a knife, he hotly denied it. He claims to be an expert in judo and karate. It would be degrading, he says, for him to use a knife. He told the judge in chambers: "I tore his hand in half and bit part of his ear off." Even before this court he exulted in his achievement. He said: "It sounds difficult in cold blood, but I can demonstrate it." We did not accept the offer.

On Thursday, 28 May 1959, the plaintiff was arraigned in the dock at the Old Bailey before the Recorder of London. He was charged with causing grievous bodily harm to Manning with intent so to do. He pleaded not guilty and was put in charge of the jury. At that stage he was not represented by counsel. Counsel for the prosecution opened the case and called the first witness, Manning. After Manning had given evidence-in-chief, the recorder told the plaintiff that he could cross-examine Manning. The plaintiff asked if he could have legal aid. The recorder refused his request, but told him that if he had £2 4s 6d he could have the services of any of the barristers then in the court. What we call a "dock brief". The plaintiff did not have £2 4s 6d but someone in the gallery found the money. The plaintiff then picked on the defendant, a barrister of nearly four years' standing. In accordance with the tenets of the Bar, the defendant accepted the task of defending the plaintiff. The recorder adjourned the case so as to enable the defendant to see the plaintiff and prepare his defence. The defendant saw the plaintiff. He heard his account of how the harm was done to Manning and of the witnesses available. On the next day the trial was continued. The defendant cross-examined the witnesses for the prosecution, including Manning himself, a doctor and a detective sergeant. The defendant called the plaintiff to give evidence on his own behalf and also a witness, Miss Hogan. He addressed the jury on the plaintiff's behalf. The recorder summed up. The jury found the plaintiff guilty of causing grievous bodily harm with intent to do grievous bodily harm. He was sentenced to eighteen months' imprisonment.

After his conviction the plaintiff applied to the Court of Criminal Appeal for leave to appeal. His grounds covered fifteen closely written pages. His main concern was to show that the injuries to Manning's hand were not caused by a knife but by his hands; but he also made complaints against the defendant, saying:

> "My court brief barrister actually got minor facts mixed up and his knowledge of some quite important facts was inadequate for cross-examination purposes . my idiotic counsel, all I wanted him for is to get me an adjournment to call witnesses and arrange for his (Manning's) hand to be examined. I gave these instructions to him in writing . I felt somehow my counsel did not believe in my complete honesty and therefore did not examine that night doctor. I would have examined him for hours if necessary . It seemed my barrister had another client waiting, for he seemed in a terrible hurry. He did not even ask Sergeant McCann whether he saw a bottle (broken) at entrance to porch. I can prove I was working for Rachman by ordering inspection of the firm's books."

If there was anything in these complaints-sufficient to suggest there might have been a miscarriage of justice-the Court of Criminal Appeal would no doubt have given leave to appeal; but they evidently thought there was nothing in them. They refused his application. So the conviction and sentence stood.

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After serving his sentence, the plaintiff was released. He soon got into trouble again. In September, 1960, he was sentenced to three years' imprisonment for causing grievous bodily harm. After serving that sentence he got work as a club doorman. Whilst so employed, on 15 February 1965, nearly six years after the original trial, the plaintiff issued a writ against the defendant claiming "damages for professional negligence". He acted in person and wrote out his own statement of claim. A few months later he was in trouble again. On 14 July 1965, he was sentenced to eighteen months' imprisonment for stealing. Whilst in prison he wrote out another statement of claim against the defendant, which the judge in chambers described as "well-nigh unintelligible". Eventually he was represented by a solicitor, Mr Zander, who prepared a draft statement of claim in proper shape. I will not read it in full. Summarised, it is a complaint that the defendant was negligent in the conduct of the case in three respects:

First, he failed to cross-examine the witnesses for the prosecution so as to show that it was impossible for the injury to have been caused by a knife. Secondly, he failed to elicit from Miss Hogan, one of the witnesses for the defence, that Manning had several friends who could have assisted him in the fight. Thirdly, he failed to elicit, or to call witnesses to prove, that the plaintiff was employed as rent collector and caretaker and was authorised to go on to the premises. The draft statement of claim also alleged that, in consequence of this negligence, the plaintiff was wrongly convicted and sentenced to eighteen months' imprisonment.

I desire to say at once that, if an action does lie against a barrister for negligence in the conduct of a case, the draft statement of claim does disclose a cause of action. The question is whether such an action does lie.

The Law as it stood before Hedley Byrne & Co Ltd v Heller & Partners Ltd

I will first consider the law as it was understood by the profession up till May of 1963 when the House of Lords decided the case of *Hedley Byrne & Co Ltd v Heller & Partners Ltd*. Beyond doubt the barrister was treated differently from other professional men. He could not sue for his fees. He could not even make a contract for them with his client. Nor with the solicitor who represented the client. The obligation to pay him was an obligation which was binding in honour, not in law. Such was the position of the advocate in the Roman law. Such was the position of the barrister in our English law. It was the tradition of centuries that what he received from the client was a gift or

honorarium, and not a stipulated wage. To this day his very robe bears witness. At the back of it there is still the flap of the little pocket where the client could place his gratuity. In the pretence that the barrister did not know that he was being given a reward! Over two hundred years ago Sir William Blackstone compared our serjeants-at-law and barristers with the ancient Roman orators:

> "These indeed practised gratis for honour merely, or at most for the sake of gaining influence: and so likewise it is established with us that a counsel may maintain no action for his fees; which are given not as locatio vel conductio, but as quiddam honorarium; not as a salary or hire, but as a mere gratuity, which a counsellor cannot demand without doing wrong to his reputation",

see Blackstone's Commentaries, Vol 3, p 28.

This statement of Blackstone was challenged one hundred years ago in the great case of *Kennedy v Broun*. Mr Kennedy was a "local" counsel practising in Birmingham. He was instructed by Mrs Patience Swinfen to recover for her a vast estate. He moved to London and took chambers in the Temple for the purpose. She promised him £20,000 if he won the estate for her. After years of endeavour he succeeded. She got the estate, which was valued at £60,000. And then she refused to pay him. He cited all the authorities on the subject,

both from the Roman law and from our English law. Yet he failed. He did not recover a penny for all the work that he had done. The Court of Common Pleas, consisting of Erle CJ Williams J Byles J and Keating J held that "the relation of counsel and client in litigation creates an incapacity for hiring and service as an advocate". That case was regarded as decisive. It was ever after accepted that a barrister could not sue for his fees. The reason given was because he was incapable of making a contract for them.

This incapacity was considered by the lawyers of that time as carrying with it an important consequence. The coin had its obverse. They turned it over to see what was on the other side. On the one there was the obligation of the barrister to render services. On the other there was the obligation of the client to pay his fees. Just as the one obligation was binding in honour, but not in law, so was th other. Just as the reason of the one was rooted in an incapacity to contract, so was the other. Both were thought to stand or fall together. So we find that, just as the judges rejected the barrister's claim against his client for fees, so also they rejected the client's claim against the barrister for negligence or breach of duty. The first attempt was made in 1791 in *Fell v Brown*, when a barrister was engaged to settle a bill in Chancery. He put into it scandalous and irrelevant matter. So much so that it was ordered to be corrected and the client had to pay the costs. The client brought an action in the King's Bench against the barrister for unskilfully and negligently settling the bill. The client instructed Thomas Erskine, then at the height of his fame. He argued that a barrister should be liable for gross neglig nce, just as a physician. Lord Kenyon CJ however, expressed a strong opinion that the action could not be maintained. He said ((1791), Peake, at p 132):

> "that he believed this action was the first, and hoped it would be the last, of the kind."

Erskine thereupon gave up and submitted to a non-suit. The Chief Justice told Erskine that he would take a note of the case so that he could move for a new trial; but Erskine never did so. He accepted the ruling. Fifty years later in *Perring v Rebutter* a certificated special pleader, appropriately called Rebutter, drew the pleading in an action so badly that the defence failed. The client brought an action on the case against him for negligence. It came before Lord Abinger CB who as Sir James Scarlett had been one of the ornaments of the Bar. He said ((1842), 2 Mood & R at p 430):

> "Such an action was certainly not maintainable against a barrister, and in his opinion there was no distinction between the case of a barrister and that of a certificated special pleader."

In 1860 came the celebrated case of *Swinfen v Lord Chelmsford*, where counsel of great eminence was engaged, Sir Frederick Thesiger. He had been Attorney General and afterwards became Lord Chancellor under the title of Lord Chelmsford. Yet he made a serious mistake and was sued for damages. The facts are worth stating. So please bear with me. Old Mr Samuel Swinfen owned a large landed estate at Swinfen. He was aged eighty and getting senile. He had made a will leaving all the estate to his only son; but his son died suddenly, leaving a young widow, Mrs Patience Swinfen. Three weeks after the son's death the old man made a will of five lines in which he said: "I give to Mrs Swinfen, my son's widow, all my estate at Swinfen." A couple of weeks later the old man died. The will was challenged by the heir-at-law, Captain Swinfen, who was the old man's nephew, being his brother's son. Captain Swinfen said that the will was invalid because the old man was in such a bad mental state that he was incompetent to make a will, and that the estate should descend to him, Captain Swinfen, as heir-at-law. Sir John Romilly MR directed that the validity of the will

should be tried at law. The issue came on for trial by a jury at the Stafford Assizes. Young Mrs Patience Swinfen, through her solicitor, instructed Sir Frederick Thesiger to appear for her. The hearing began on a Saturday. After the first day Sir Frederick thought that the case was not going very well for Mrs Swinfen. He suggested a compromise. She would not accept it. She told Sir Frederick that she wished the case to go to the jury. On the Sunday she telegraphed to him: "The offer is refused." In the meanwhile, however, her solicitor received some information which made the case look worse for Mrs Swinfen. It was to this effect: one of their witnesses would have to admit, if asked, that on the very day that the will was signed, young Mrs Swinfen would not let the old man be seen by his sister-in-law. On the Monday morning at 8 am the solicitor saw Sir Frederick and gave him this information. He was so disturbed by it that he thought that the case should be settled at once. The solicitor declined to take responsibility for it. He wanted to wait until Mrs Swinfen arrived; but Sir Frederick thought that would be too late. He said that he would take on himself the responsibility. So, before Mrs Swinfen arrived, Sir Frederick agreed with the other side to settle the case. The terms were that Mrs Patience Swinfen was to covey the Swinfen Estate to Captain Swinfen, the heir-at-law, and he was to pay her £1,000 a year for life. Thereupon the case was with-drawn from the jury. To do this, by consent, a juror was withdrawn. A few minutes later Mrs Swinfen arrived. She was very

upset. She repudiated the compromise on the ground that it was made without her authority. The heir-at-law sought to enforce it against her. Twice he applied to put her in prison: but he failed: see *Swinfen v Swinfen*. Next he applied for specific performance. Sir John Romilly MR refused the application. He held that Sir Frederick had gone outside his authority altogether. He was instructed only to conduct the trial of the issue at Stafford and had no authority to dispose of the whole of the estate. Sir John Romilly MR said that Sir Frederick had no more authority than "a coachman, employed to drive a carriage, would have authority to exchange it". He directed that there should be a new trial as to the validity of the will. This decision was affirmed by the lords justices. The issue was retried before another jury at the Stafford Assizes. The jury on this occasion found in favour of the will. Captain Swinfen applied for a new trial but it was refused. So the will was upheld and Mrs Patience Swinfen succeeded to the whole estate. The events had proved Sir Frederick to be wrong.

Mrs Patience Swinfen then sued Sir Frederick for damages. The case raised many points, but the only point material for present purposes is that she had wished the issue to be tried by the jury, and Sir Frederick had prevented it. He had "consented to a juror being withdrawn and so prevented the case being tried". By so doing, he had wasted all the money expended by his client on the first trial. Sir Frederick was clearly guilty of a "neglect and violation of duty". He had no authority to stop the case, and he ought to have known it. Yet he was held not liable. The Court of Exchequer, consisting of Pollock CB, Martin B, Bramwell B, Channell B, and Watson B, held unanimously that ((1860), 5 H & N at p 923)

> ". no action will lie against counsel for any act honestly done in the conduct or management of the cause- including withdrawing a juror . "

The court gave as an illustration that ((1866), 5 H & N at p 921)

> "a counsel is not subject to an action for calling or not calling a particular witness, or putting or omitting to put a particular question, or for honestly taking a view of the case which may turn out to be quite erroneous. If he were so liable, counsel would perform their duties under peril of an action by every disappointed and angry client."

That was a direct authority. It was regarded as decisive. It was ever after accepted that counsel was not liable for negligence in the conduct of a suit.

The courts of Scotland followed the same course as the courts of England. In 1845 in *Purves v Landell* ((1845), 12 Cl & Fin 91 at p 103) Lord Campbell said:

> "Against the barrister in England, and the advocate in Scotland, luckily, no action can be maintained."

In 1876 in *Batchelor v Pattison & Mackersy* the Court of Session rejected a claim for negligence against an advocate. The Lord President (Lord Inglis) said ((1876), 3 R (Ct of Sess) at p 924):

> "What he does bona fide according to his own judgment will bind his client and will not expose him to any action for what he has done, even if the client's interests are thereby prejudiced."

The courts in Ireland too followed the same course. In *Mulligan v M'Donagh* ((1860), 2 LT 136 at p 137) Pigot CB ruled: "This is an action brought against a barrister for neglect of duty. Such an action cannot be maintained." In *Robertson v MacDonogh*, May CJ said it was admitted that

> "counsel could not maintain an action against his client for remuneration for his services as an advocate, nor, on the other hand, could a client sue his counsel for the non-performance of his duties as advocate, or for negligence in the performance of such duties."

Those authorities settled the law in these islands for one hundred years. The rule itself was an anomaly. No other professional man was exempt from liability. A medical man was liable for negligence. So was a solicitor. Only a barrister was exempt. In addition, the reason given for the rule was bad. Both judges and text-writers said it was because he could not sue for his fees: see *Re Le Brasseur & Oakley* ([1896] 2 Ch 487 at p 494), per Lindley LJ and 3 Halsbury's Laws of England (3rd Edn) 46, para 66. Yet in other professions it had been held ever since 1789 that, if a professional man undertook a task involving his skill, without any fee at all, he was liable if he performed it negligently: see *Shiells v Blackburne* ((1789), 1 Hy Bl 158 at p 162), per Lord Loughborough.

Although the rule was an anomaly, and the reason for it was bad, nevertheless it was regarded as so well settled that it could not be overturned. Professor Winfield in all the editions of his book on Torts from 1937 onwards said:

> "The reason for this exemption is that *in theory* his services are gratutious, and although that, by itself, is not a sufficient ground for preventing a legal duty from arising in other circumstances, *the rule with regard to a barrister is inveterate, whatever be its justification*."

That passage continued untouched even in the latest edition in 1963, p 185. Up till that year everyone accepted that the rule still stood. A barrister was not liable for negligence.

The Recent Case of Hedley Byrne

This brings me to *Hedley Byrne & Co Ltd v Heller & Partners Ltd* ([1963] 3 All ER 575; [1964] AC 465). The facts are far removed; but, the speeches the House enunciated a principle in which I take from the speech of Lord Morris of Borth-Y-Gest ([1963] 2 All ER at p 594; [1964] AC at p 502):

> ". If someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies on such skill, a duty of care will arise."

I need hardly say that I greatly welcome this principle, seeing that I said somewhat the same in *Candler v Crane, Christmas & Co* ([1951] 1 All ER 426 at pp 433-435; [1951] 2 KB 164 at pp 179-183).

As soon as the House in May, 1963, stated this principle, the profession were quick to see that it was wide enough to apply to a barrister in all his work, both in court and out of it. So at once they asked whether the barrister's immunity had gone. No-one suggested that the House had given any thought to it. The speeches contain no word about a barrister. Nevertheless the principle was there. It made plain that the immunity can no longer be justified on the ground that a barrister cannot sue for his fees. If the rule is to be justified, it must be on some better ground. I turn to see if it exists.

Public Policy

There is in my judgment a sure ground on which to rest the immunity of a barrister. At any rate, so far as concerns his conduct of a case in court. It is so that he may do his duty fearlessly and independently as he ought, and to prevent him being harassed by vexatious actions such as this present one now before us. It is like the ground on which a judge cannot be sued for an act done in his judicial capacity, however corrupt (see *Scott v Stansfield*); on which a witness cannot be sued for what he says in giving evidence, however perjured (see *Dawkins v Lord Rokeby*; *Hargreaves v Bretherton*), and on which an advocate cannot be sued for slander for what he says in court, however malicious (see *Munster v Lamb*).

All the reasons given in those cases apply as well to a suit against a barrister for negligence. As an advocate he is a minister of justice equally with the judge. He has a monopoly of audience in the higher courts. No-one save he can address the judge, unless it be a litigant in person. This carries with it a corresponding responsibility. A barrister cannot pick or choose his clients. He is bound to accept a brief for any man who comes before the courts. No matter how great a rascal the man may be. No matter how given to complaining. No matter how undeserving or unpopular his cause. The barrister must defend him to the end. Provided only that he is paid a proper fee, or, in the case of a dock brief, a nominal fee. He must accept the brief and do all he honourably can on behalf of his client. I say "all he honourably can", because his duty is not only to his client. He has a duty to the court which is paramount. It is a mistake to suppose that he is the mouthpiece of his client to say what he wants: or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause. It is the cause of truth and justice. He must not consciously mis-state the facts. He must not knowingly conceal the truth. He must not unjustly make a charge of fraud, that is, without evidence to support it. He must produce all the relevant authorities, even those that are against him. He must see that his client discloses, if ordered, the relevant documents, even those that are fatal to his case. He must disregard the most specific instructions of his client, if they conflict with his duty to the court. The code which requires a barrister to do all this is not a code of law. It is a code of honour. If he breaks it, he is offending against the rules of the profession and is subject to its discipline; but he cannot be sued in a court of law.

Such being his duty to the court, the barrister must be able to do it fearlessly. He has time and time again to choose between his duty to his client and his duty to the court. This is a conflict often difficult to resolve; and he should not be under pressure to decide it wrongly. Mr Zander says that when a barrister puts first his duty to the court, he has nothing to fear. He has not been negligent and cannot be made liable; but that is too simple by far. It is a fearsome thing for a barrister to have an action brought against him. To have his reputation besmirched by a charge of negligence. To have the case tried all over again but this time with himself, the counsel, as the defendant. To be put to all the anxiety and, I would add, all the cost of defending himself. Even though

in the end he should win. Faced with this prospect, a barrister would do all he could to avoid it. Rather than risk it, he would forever be looking over his shoulder to forestall it. He would be tempted to ask every question suggested by the client, however irrelevant; to call every witness desired by the client, however useless; to take every point, however bad; to prolong the trial inordinately; in case the client should be aggrieved and turn round on him and sue him for negligence. If a barrister is to be able to do his duty fearlessly and independently, he must not be subject to the threat of an action for negligence.

Another ground of public policy is this. If a barrister could be sued for negligence, it would mean a retrial of the original case. Damage is the gist of an action for negligence. In order to succeed the plaintiff would have to show that he was wrongly convicted. See what this means. Illustrate it by this very case of the plaintiff. He has already been tried by a jury and been convicted. He has already put his complaint against his counsel before the Court of Criminal Appeal. If there had been any miscarriage of justice, the court would have taken steps to correct it. They were satisfied that there was none. They rejected his application. Is he to be allowed to canvass his guilt or innocence again in a civil court? And try the case afresh in an action against his own counsel? I cannot think that this would be right. Once a man has been convicted by a jury of a crime, and his appeal has been rejected, he should not be permitted to challenge it again in a civil court. He cannot sue the judge saying that he misdirected the jury. He cannot sue a witness saying that he committed wilful perjury. Nor should he be permitted to sue his own counsel, saying that he was negligent. Test it this way. Suppose he were to succeed, as between himself and his counsel, in showing that he was wrongly convicted. The Crown would not be bound by that decision. We should have a criminal court sentencing him to imprisonment on the footing that he was guilty, and a civil court awarding him damages on the footing that he was not guilty. No system of law could tolerate such a glaring inconsistency. The Home Secretary would be bound to refer the whole case to the Court of Appeal, as he did in *Hinds*' case[b]. The Court of Appeal might still affirm the correctness of the conviction, as they did in *Hinds*' case. So we would have the spectacle of a man, found affirmatively to be guilty, recovering damages on the footing that he was innocent. That should not be allowed.

Finally, on public policy, I would say this. If this action were to be permitted, it would open the door to every disgruntled client. You have only to read the applications made daily to the criminal division of this court. They are filled with complaints against the judge, against the counsel, against the witnesses, against everyone wh has had a hand in bringing the man to justice. If this action is to go for trial, it will lead to dozens of like cases. We have already had a foretaste in the libel actions by *Hinds*[c] and *Goody*[d]. Those gentlemen had to wait until someone published something about them. There would be no such waiting period here. Every convicted prisoner who blamed his counsel could at once bring an action for negligence. Rather than open the door to him, I would bolt it.

Position of a Solicitor

The position of a solicitor is quite distinguishable from that of a barrister. He is not bound to act for anyone who asks him. He can pick and choose. He can sue for his fees. He can, and does, make a contract with every client who employs him. He is under a contractual duty to use care; and this extends to his conduct of a cause as well as an advocate as anything else. If he is negligent he can be sued. The action lies in contract, not in tort (see *Groom v Crocker* ([1938] 2 All ER 394 at p 417; [1939] 1 KB 194 at p 228)). So damage need not be proved; but, even so, the two cases against solicitors do not

encourage the extension of them to barristers. One is *Hatch v Lewis*. The other is *Scudder v Prothero & Prothero*. Those cases serve as warnings to be heeded rather than as precedents to be followed. In each of them a man, who has been convicted and sentenced, turned round on his solicitor and blamed him for not calling witnesses. In each the case developed into a retrial of the criminal case. In each case the solicitor was technically at fault, because the witnesses should have been called; but in each case the man was only awarded nominal damages, because he was in fact guilty of the offence and had not suffered any damage by being convicted. So the solicitors were involved in the great expense of defending themselves at the suit of a guilty man-and a great deal of time taken up in retrying the case-all to the public disadvantage. Such cases may be unavoidable in the present state of the law when the solicitor makes a contract and is under a legal obligation to his client; but they should not be extended to a barrister who makes no contract and is not under a legal obligation.

Position in other countries

There is no assistance to be got from the law of other countries. In most of them the profession of a barrister is combined with that of a solicitor. The relationship between him and his client does give rise to legal obligations. He can and does make a contract for his fees. He can sue for them: and he is under a legal duty to use care, which can be enforced by action at law. See as to the United States of America *Olson v North*; *McLellan v Fuller*; as to Canada, *Leslie v Ball*; as to New Zealand, *Watts and Cohen v Wills*, and *Robinson v Behan*. But the claims have rarely succeeded when the charge is negligence in the conduct of the cause. The courts have done their utmost to discourage such claims against practitioners, because they appreciate the evil which would result if "every defeated litigant were able to retry in a suit against his attorney issues previously adjudicated": see an article on Attorney Malpractice in (1963), 63 Columbia Law Review 1292, at pp 1301, 1307.

Conclusion.

In my judgment a barrister is not liable for negligence in the conduct of a cause. There is no need to say more; but, as we have had so full an argument, I would add this. The principles here stated apply not only to the conduct of a criminal case but also to the conduct of a civil case. They apply not only to a trial at first instance, but also to an appeal to this court. They apply not only to work in the court itself but also to the preparatory work beforehand, in which I include not only the pleadings and advice on evidence, but also the opinion given before action brought.

The principles are, moreover, of particular importance in legal aid cases. In these the barrister has a special responsibility. He is asked to advise on the chances of success, with the very object that his opinion should be placed before the legal aid committee so as to see whether the taxpayer's money should be spent on it. He is engaged to conduct the litigation on behalf of the assisted person, with a trust that he will not abuse it at the expense of the taxpayer. He must be able to do this fearlessly and independently. He must be free to advise against unreasonable claims, to reject unjustifiable charges, and omit bad grounds of appeal-without being oppressed by the fear of an action for negligence.

Then there is the work done by a barrister in his chambers. Often he gives opinions or settles documents in cases which may never come before the court at all. In my opinion the same principles apply to these cases. Thus he may be asked to advise a client whether a proposed course is lawful or unlawful. He

should be able to give his opinion freely without being subject to the fear: "If I advise the client wrongly and he is prosecuted, he may sue me for negligence." Or he may be asked to settle a prospectus or a tax-avoidance scheme. He should be able to do this in calm of mind without being subject to the thought: "If I should make a mistake and the client is made liable, he may sue me for a million pounds." We all know that "counsel's opinion" is accepted generally as being reliable and authoritative; and that a draft "settled by counsel" is considered good to cover all contingencies. One of the reasons is because he is able to do his work without fear.

In the end I would apply this test: does the public interest require that a barrister should now be made liable for negligence? I do not think that it does. The rule for centuries has been that he is not liable for negligence. Every solicitor knows it and engages him on that footing. We ought not to depart from the usage of the profession so long established and so well settled-unless sufficient ground be shown. None has been. The rule still stands. I would dismiss the appeal.

DANCKWERTS LJ. This is an appeal from a judgment dated 21 December 1965, of Lawton J in an action brought by the plaintiff, Norbert Fred Rondel, against the defendant, a member of the Bar, in which the plaintiff claims damages against the defendant for professional negligence. Lawton J ordered the statement of claim in the action to be struck out and dismissed the action with costs, dismissing an appeal from a similar order made by Master Lawrence on 17 May 1965. The plaintiff has appeared throughout in person and has received an incredible amount of indulgence, including the attendance of leading and junior counsel instructed by the Official Solicitor to present the case on behalf of the plaintiff, which he was quite incapable of presenting himself. There must hardly ever have

been a litigant less worthy of such assistance.

This action arises out of events which occurred as long ago as 28 May 1959. On that occasion the plaintiff was charged before the recorder and a jury at the Old Bailey on two charges (i) causing grievous bodily harm to one Otto Conan Manning with intent to do him grievous bodily harm and (ii) with an assault occasioning actual bodily harm to the said Otto Conan Manning. On the conclusion of Manning's examination-in-chief the learned recorder, Sir Gerald Dodson, invited the plaintiff to cross-examine. The plaintiff intimated that this was beyond his capacity and asked for legal aid. This application was refused but the recorder informed him that he was entitled to a dock brief on payment of the customary fee. The plaintiff had no money, but the sum of £2 4s 6d was handed down from the gallery of the court to provide the fee. As a result of that, the defendant was selected to appear on the plaintiff's behalf.

The plaintiff's own account of the incidents which led to the charge was as follows. He said that he was employed by one Rachman (who was well known as an oppressive landlord) and was sent by Rachman to see whether certain of Rachman's premises were being used for prostitution or e8as he said before us) to keep proper order. The plaintiff had been a professional wrestler and was versed in judo and kindred sciences. On his own story, he bit off the lobe of Manning's right ear and broke Manning's left hand, tearing the ligaments and breaking the metacarpal bone. He suggested that this was done in self-defence but apparently what he really objected to was the suggestion of the prosecution that the injuries were caused by a knife. He regarded that as a degrading accusation because he did not need to use a knife. The plaintiff was duly convicted on the verdict of the jury and was sentenced to a term of imprisonment. He was in prison at the time of the hearing of the appeal, but that was in consequence of a sentence for another offence. We were not told what this offence was, but apparently it had nothing to do with the matter out of which the present action arose.

It is difficult to see how the plaintiff could have avoided conviction for the assault on Manning, and in answer to a question put to him by Lawton J he said that he did not allege that, but for the defendant's alleged shortcomings, he would have been acquitted. It is difficult to make out what the plaintiff's grievances in regard to the defendant's conduct of the case are, but it would seem that they were (i) an alleged failure to protect a Miss Hogan in the course of her cross-examination, and (ii) a failure to call two witnesses on the plaintiff's behalf, Rachman and Nash, who did not want to be called, but might have testified that the plaintiff was not in the habit of using a knife.

The writ in the present action was issued on 15 February 1965, nearly six years after the trial and conviction of the plaintiff in 1959. The appeal from the order of the learned master made on 17 May 1965, first came before Browne J on 16 June 1965. Browne J adjourned the further hearing into open court and asked for the the assistance of the Official Solicitor, who instructed Mr Patrick O'connor QC and Mr Stranger-Jones. Browne J not being available, the further hearing came before Lawton J.

The plaintiff's first effort at a statement of claim was wholly unintelligble. Lawton J allowed him to put in an amended statement of claim from which, however, Lawton J struck out the word "fraudulently". The description by Lawton J in his judgment of this second effort is as follows ([1966] 1 All ER at p 469):

> "The amended statement of claim is well nigh unintelligble. It would be impossible to try, on this pleading, any claim which the plaintiff may have; and it would be unjust to the defendant to call on him to deliver his defence to it; he would not know where to start. It follows that the amended statement of claim must be struck out as not complying in essential matters with the rules of court and being embarrassing both to the court and to the defendant."

Instead of dismissing the action forthwith, however, the learned judge gave the plaintiff a further chance (though he had refused the opportunity which the learned judge had offered him) to get a proper statement of claim drafted. Why the learned judge thought fit to adopt this course I cannot understand, but he managed to dig out of what he called ([1966] 1 All ER at p 469) "the plaintiff's messy verbiage" four complaints, two of which he thought might conceivably amount to claims of negligence, and on that basis he heard legal argument and finally delivered a twenty-four page judgment. This judgment appears to me to be largely obiter dicta.

There are two other matters on which I want to comment and which I trust will not be allowed to occur in future cases. The solicitor acting for the plaintiff was allowed to present to us a typewritten document of 116 pages, in which he set out the legal arguments on behalf of the plaintiff's case, something in the style of the briefs which are allowed under the quite different procedure of the courts in the United States of America. Secondly, at the conclusion of the arguments by counsel on behalf of the defendant, the plaintiff was allowed to read nine typewritten pages, in the form of a reply which had obviously been prepared for him, notwithstanding the arguments on his behalf had been presented by counsel instructed by the Official Solicitor, who were ready to make such arguments in reply as were proper. Both these matters were wholly irregular and contrary to the practice of the court and in my opinion should not be allowed as a precedent for future proceedings. It appears that counsel was in fact available to appear for the plaintiff without a fee, and the course mentioned above was deliberately adopted.

It is plain that in the circumstances the statements of claim in this action ought to be struck out, and the action should be dismissed.

As, however, we have been given great assistance by the arguments of counsel both for the Official Solicitor and for the defendant in regard to the position of a

barrister in regard to work which he does on behalf of a client, I think that we should give some indication of our views in regard to that question. My own view is that the law on the subject is perfectly clear and well established, and has been so for several hundred years. There may have been some confusion or doubt in early times before

barristers and attorneys emerged as separate professions, but after that severance took place, it is clear, on the support of the authorities, that a barrister cannot be sued by a client for negligent conduct of a case in court and also, so it would appear, in respect of work done out of court, such as advising or conveyancing.

There is the clear statement of Lindley LJ in *Re Le Brasseur & Oakley* ([1896] 2 Ch at p 494), where he said:

> "But I think that it is of the utmost importance that the court should not assist barristers to recover their fees. If they do so, the whole relation between a barrister and his professional client will be altered, and a door will be opened which will lead to very important consequences as regards counsel. The inevitable result will be to do away with that which is the great protection of counsel against an action for negligence by his client."

In *Swinfen v Lord Chelmsford* there are numerous passages which support this state of the law. During the same period, in contrast, attorneys were held to be liable for negligence. This may strike some people as anomalous, but the distinction is clear-cut and supported by a long series of authorities. The position of the two classes of practitioners in the law is in truth dissimilar, as shown in argument by counsel for the defendant.

By the conscientious industry of the counsel instructed by the Official Solicitor, every conceivable case which might help the plaintiff's action or be relevant to the position of a barrister was put before us. No counsel instructed on behalf of the plaintiff could have put the case on his behalf better or more thoroughly. On behalf of the defendant (who, in my opinion, has been treated abominably by the bringing of this action and the conduct of the plaintiff and those who have sought to embarrass the Bar for their own selfish and opinionated ends) the arguments on what is established law have been put forward admirably by counsel for the defendant. In my opinion, we are deeply indebted to counsel for their industry and their presentation of the arguments in this case.

Lawton J, I am sure, reached the right conclusion that a barrister could not be liable for negligence in his presentation of the case in court, but in my opinion he was wrong in the conclusions which he either reached or suggested in two other respects. The learned judge seems to have thought that the immunity of a barrister from proceedings in respect of advocacy in court extended to solicitor advocates as well as barristers. In this view in my opinion he was plainly wrong. The position of barristers is historically and legally completely different.

The learned judge also seems to suggest (See [1966] 1 All ER at p 470, letters *b* and *c*) that barristers are not immune from proceedings in respect of advice given in chambers or in respect of conveyancing matters. This, again, is in my opinion completely mistaken.

The truth is that in the period of several hundred years, barristers and solicitors (or attorneys) were never in the same position. Barristers could never contract with their clients and could not even enter into a special contract in regard to the payment of fees: see the misfortunes of poor Mr Kennedy, who gave up his apparently lucrative practice in the Midlands to conduct the case of Mrs Patience Swinfen and was promised a fee of £20,000 out of an inheritance of £60,000. He failed to get his reward (*Kennedy v Broun*). He failed to recover it, and I hope that the moral of this story is not-"never in business matters trust a woman"; but Mr Kennedy seems to have received very rough treatment from the Court of Common Pleas in banc.

The position is that in this period, when barristers were regarded as a superior

type who received honoraria and could not sue for their fees (as they cannot, indeed, now), and medical practitioners who bled patients were described as "leeches", and attorneys were despised by Dr Johnson, the attorneys were in a better position legally because they could sue their clients in contract. Consequently it has been held that an action against a solicitor for negligence even now lies in contract and not in tort: see *Groom v Crocker*; *Howell v Young*; *Davies v Lock*; *Bean v Wade* and *Clark v Kirby-Smith*.

The point is really clear beyond argument. Of course, a lot of suggestions can be made that it is anomalous that a barrister cannot be sued whereas a solicitor can be sued. This is not so illogical, having regard to the historical basis of the matter, and those who think that it should be altered must rely on legislative action, always supposing that such an alteration of the law is justified. That is not a subject for this judgment. I will only suggest that those in the profession of a barrister face hazards quite unknown in the profession of a solicitor.

In my view the law is clear. The question which remains for discussion is the reasons for the situation as it is. The reasons which have been advanced are really of two kinds: (i) public policy, and (ii) usage.

Public policy in my view really is the effective reason for the barrister's immunity as regards proceedings in court. Counsel for the defendant in his argument, I think, set forth the differences between the circumstances of a barrister's practice and the conditions of the profession of a solicitor very well. In the first place I think that counsel for the defendant was completely right in calling attention to the fact that for centuries situations must have arisen frequently which would call in question the position in law as to barristers, and that position has not been called in question; and as all attempts to call it in question as a proposition of law have failed, so that it had become accepted as part of the common law of England, it should not lightly be assumed that the accepted law had all along been wrong. On the contrary, a proposition of law which had achieved that status should stand unless it was plainly ill-founded. It is more than fifty- three years since I was called to the Bar, and some sixty years since I was first a student, and I think that my fellow students and brother barristers would have been surprised if they had been told that on receiving a brief, even a dock brief, they faced the liability of being sued for negligence in respect of their efforts. Counsel for the defendant pointed out that there is no single example in the law reports where a barrister has been sued successfully by a client.

The reasons of public policy seems to me to be sufficiently convincing in respect of proceedings in court. As counsel for the defendant said, it is the totality of the reasons which convinces and not the examination of each reason one by one. Counsel is required to be in an independent position, as has been said, master of the conduct of the case in court, so as to conduct it without fear and with complete independence, and so that the court can rely on him to present the case to the court, without hesitation calling to the attention of the court facts or decisions which may be adverse to the interests of his client and the case which counsel has to present. No judge who has

sat on the Bench will minimize the assistance which he has received from counsel in this respect. Indeed, the functions of the judges in the courts in England would not have reached the high standard with which they seem to be credited if it were not for the high standards of the Bar in presenting the cases which come before them. There can be few members of the Bar who have not on occasion been in difficulties with a client who could not understand why his counsel should present to the court facts or matters of law which seemed to the client to be damaging to his case. I fear that slick advocates as presented in fiction, such as "Perry Mason", and even "Mr Tutt", would last a very short time without disaster in the courts of this country.

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In the case of work in chambers, advising and conveyancing, the impact of public policy is not so obvious, but I am satisfied that the immunity from suit for negligence applies none the less. This is clearly established in the case of the special pleader (who, of course, never went into court) in *Perring v Rebutter*. In truth this, I think, is a matter of usage. If it were not so, barristers might be alarmingly anxious in giving an opinion and drafting a difficult document (so far matters of public policy). There is, however, in my opinion, not the slightest doubt that when counsel, sitting in the quiet contemplation of his chambers, receives a case to advise or instructions to draft a document, he accepts the papers on the footing that the result will not be open to proceedings by the client for negligence in respect of his opinion or his draft. This is a matter of experience. Such a threatening aftermath has never been suggested, so far as my knowledge goes, and why should there be such a claim? The barrister, by usage, cannot sue for his fee and only hopes for an honorarium for his services-no claim for pay, no liability to be sued is the basis.

Now when it is said: "Well, is it not inconsistent with the liability of a solicitor to be sued for negligence in his conduct of the case?", the answer is easy. Over the generations in the history of the profession of the law, it is found that the solicitor can and has been sued for negligence; but he can enter into a contract with his client, and when he is sued, his liability is due to the contract which he has made, involving skill, and his liability is not in tort, as the cases show. Moreover, unlike a barrister who cannot pick and choose his clients, a solicitor can refuse to act for an undesirable client and can, even if he accepts a client, get rid of him and cease to act for him in a way which is not open to a barrister in respect of his client. There must be many members of the Bar who have longed to be quit of a client and the undesirable effect on their practices which such a client brings. A solicitor's practice has advantages which the some-what precarious profession of a barrister does not possess. There is no real comparison between the two. Reference to the position of lawyers where the two professions are fused are irrelevant and of no assistance, because obviously the liability of attorneys there prevails.

On history and on the authorities the immunity of a barrister from actions for negligence is clear. It was argued, however, that the immunity grew up in times when actions for negligence rested on contract and since then it has been recognised by the courts, including the House of Lords, that the existence of a duty, apart from contract, may in case of failure to carry out the duty, involve an action for negligence, and reference has been made to *Hedley Byrne & Co v Heller & Partners Ltd*, where it was claimed that a bank was liable for a negligent reference in respect of a person, though the action was by a third person who was not the person applying for the information. In my view there is a short and conclusive answer to this. Whatever may be the weight which might be given to some observations of the learned lords of appeal, in fact the action failed simply because the bank had stamped the words "without responsibility" on their letter. The observations of the law lords were obiter.

In the case of barristers, who by etiquette are instructed, not by ignorant laymen, but by solicitors (presumed to know the law and matters of legal practice), it is perfectly well known that by usage existing over the centuries a barrister only accepts instructions on the understanding that the barrister is not to be liable to an action for negligence in respect of his efforts. So *Hedley Byrne*, so far as it has any application, is in fact an authority in favour of a barrister's immunity and not against it.

In my view, therefore, the appeal fails and should be dismissed. The order striking out the statement of claim or statements of claim and dismissing the action should stand; but this court should never have been troubled with the matter.

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On the application by the plaintiff for leave to appeal, this court was not informed that he had refused to apply for leave to re-amend the statement of claim with expert assistance and had told Lawton J that he was not alleging that, but for the supposed negligence, he would have been acquitted. If we had been told these facts, I do not think that the court would have given leave to appeal.

SALMON LJ. The facts have been fully stated by my lords and I need not repeat them. I would, however, emphasise the following matters:-The plaintiff has never denied, either at his trial at the Old Bailey in May, 1959, or in chambers before Lawton J or in this court that he caused and intended to cause grievous bodily harm to Manning. He has always proclaimed that with his bare hands he tore Manning's hand in half and then bit off the lobe of his ear. Indeed, he exulted in his ability to inflict such injuries without the aid of a knife or other weapon. He resented the allegation that he must have used a knife. This he considered a serious reflection on his prowess and accordingly on his ability to carry out his normal duties as a servant of the notorious slum landlord, Rachman. The only defence which he suggested at his trial was that he had used no more force than was reasonably necessary to defend himself. Yet he did not receive so much as a scratch from Manning. He sought to justify the shocking injuries which he inflicted by saying that several friends of Manning, who were present, might have helped him in the fight-but they made no move to do so. Perhaps they were discouraged by what they saw him do to Manning. It is quite apparent from these facts that in reality the plaintiff had no shred of a defence and must have been found guilty of the crime with which he was charged. It is not surprising, therefore, that when he was asked by Lawton J whether in the present action his case was that but for the defendant's alleged negligence he would have been acquitted, his answer was "No". He told Lawton J that his real complaint against the defendant was that he had failed (a) to

cross-examine the prosecution witnesses in order to show that Manning's wounds were not knife wounds and (b) to call Rachman and Nash who might have proved that the plaintiff was not in the habit of using a knife and was in Rachman's service-Rachman being the landlord of the premises on which Manning was wounded by the plaintiff. I do not understand, nor has the plaintiff sought to explain, how the evidence which he says should have been elicited by the defendant could have been of any help to him.

The original statement of claim was unintelligible. The learned judge gave the plaintiff an opportunity of amending it, and indeed helped him to do so by suggesting to him what the document should contain. After an adjournment the plaintiff produced an amended statement of claim which was almost as unintelligible as the original document and disclosed no conceivable cause of action. The learned judge then gave the plaintiff another chance. He offered him another adjournment to re-amend the document. The plaintiff, however, refused this offer and elected to stand on the amended statement of claim. It was at this stage also that he told the learned judge (although he now says that he was misunderstood) that it was no part of his case that, but for the defendant's alleged negligence, he would have been acquitted.

Accordingly, the fascinating points of law with which the learned judge dealt so thoroughly did not arise. If he answered these points against the plaintiff (as he did), the action would be dismissed. If he answered them in the plaintiff's favour, the action would still be dismissed, since the plaintiff had elected to stand on a hopelessly bad statement of claim. In these circumstances I am surprised that the learned judge thought fit to reserve judgment for clearly there was no course open to him other than to strike out the statement of claim and dismiss the action forthwith.

Had we been informed of the full facts at the time when the plaintiff applied for leave to appeal, it is unlikely that the application would have succeeded.

It was not until a late stage of the hearing of this appeal that the plaintiff produced a re-amended statement of claim prepared for him by his solicitor. I agree with Lord Denning MR that that document is technically in order. The question is whether having refused the opportunity offered him by Lawton J the plaintiff should now have leave to deliver it. I agree with Danckwerts LJ that it would be most unjust at this stage to allow this re-amended statement of claim to be delivered some seven and a half years after the plaintiff's claim is alleged to have arisen in an action which is clearly as devoid of merit as it is of any prospect of success.

That is really the end of the matter. Out of respect, however, for the most able arguments which have been addressed to us, I will now deal with the only point of law which could arise directly if leave were given to deliver the reamended statement of claim, namely, will an action lie against a barrister in respect of anything he says or does or fails to say or do in the conduct or management of a case in court? I have no doubt at all about the correct answer to that question. No such action will lie. This is not because the law puts the barrister in a unique position. He is in the same position as a judge, a witness and a juryman. It has been well settled law for generations that all these enjoy absolute immunity from any form of civil action being brought against them in respect of anything they say or do in court during the course of a trial. The law recognises that, on balance of convenience, public policy requires that they shall each have such an immunity. It is of great public importance that they should all perform their respective duties free from the fear that any disgruntled and possibly impecunious litigant or other person may subsequently involve them in costly litigation (*R v Skinner* ((1772), Lofft 54 at p 56), per Lord Mansfield CJ; *Henderson v Broomhead*; *Swinfen v Lord Chelmsford* ((1860), 5 H & N at p 921); *More v Weaver* ([1928] All ER Rep 160; [1928] 2 KB 520); and *Marrinan v Vibart*). This does not mean that the law confers a privilege on judges, counsel, witnesses and jurors to be careless or malicious in court. The law takes the risk of their being careless or malicious and confers on them the privilege from inquiry as to whether they have been so. It may be said that the barrister is in a different position from the judge, juror or witness, in that he appears for a fee on behalf of his client and that accordingly he owes a duty to his client. I have no doubt that he does owe a duty to his client, but it is not only to his client that he owes a duty. The duties of a barrister have never been better expressed than they were by Crampton J in *R v O'Connell* ((1844), 7 ILR 261 at pp 312, 313):

> "This court in which we sit is a temple of justice; and the advocates at the Bar as well as the judge upon the Bench are equally ministers in that temple. The object of all equally should be the attainment of justice; now justice is only to be reached through the ascertainment of the truth . . but we are all together concerned in this search for the truth . (The advocate) gives to his client the benefit of his learning, his talents and his judgment; but . he never forgets what he owes to himself and to others. He will not knowingly misstate the law. He will not wilfully misstate the facts, though it be to gain the cause for his client. He will ever bear in mind that if he be retained and remunerated for his services, yet he has a prior and perpetual retainer on behalf of truth and justice."

In carrying out these paramount duties, a barrister may well imperil his client's case. He is bound to draw the court's attention to the relevant facts, documents and authorities, even if they are against him. He cannot be dictated to as to how the case should be conducted. This is a matter about which he must exercise his own independent judgment; eg, he must refuse his client's instructions to put forward a charge of fraud, unless he is satisfied that it is genuine and

has a sound basis. If an order for discovery has been made, he must insist on his client disclosing every relevant document in his possession or power, however damaging it may be to his case. He must refuse to put questions which he considers irrelevant or to take false points, for to do so would greatly impede and delay the administration of justice. The Bar has traditionally carried out these duties and the confidence which the Bench is able to repose in the Bar fearlessly to do so is vital to the efficient and speedy administration of justice. Otherwise the high standard of our courts would be jeopardised. This is the real reason why public policy demands that there should be no risk of counsel being deflected from their duty by the fear of being harassed in the courts by every litigant or criminal who has lost his case or been convicted. At a time such as this when in some quarters at home denigration seems

to be so fashionable, it is perhaps permissible to point out that our system of justice has gained the admiration of the whole civilised world. There is of course no system which is incapable of improvement. Improvement is and always will be both possible and desirable. There is no country, however, in which justice is administered more impartially, efficiently or speedily. Nowhere are actions heard so quickly after they are set down or criminals tried so soon after they are arrested. In this country appeals are heard and finally disposed of within a few months of the trial at first instance; in most other countries often not for years. One of the bastions on which our system is built is the privilege of judges, juries, counsel and witnesses to do their duty fearlessly, free from the risk of being harassed by litigation. This has been well recognised in our courts for years. Lawton J's researches into the Year Books ([1966] 1 All ER at pp 470-472), which seem to cast some doubt on the matter, are of great interest but of historical interest only. By the middle of the fifteenth century the Bar had not emerged as a separate branch of the legal profession. It did not do so until at least one hundred and fifty years later. Its traditions had not crystallised and the common law was but embryonic. The views then taken of the roles and duties of "men learned in the law" are accordingly no guide for today. I base my opinion about immunity entirely on the consideration of public policy which I have stated and which is to be found in the authorities to which I have referred. I would stress that the purpose of the immunity is not to confer a benefit on the Bench or Bar, jurors or witnesses, but to protect the public interest.

There are two other matters which I regard as subsidiary but which may also, on grounds of public policy, support counsel's immunity from any form of civil action for what he says or does in the conduct or management of a case in court.

1. It would be very inconvenient if every disappointed litigant or criminal could in effect have his case re-opened, perhaps many years after it had been heard and the appeal dismissed, by bringing an action alleging that he had lost it by reason of his counsel's negligence. Since there can be no contract between counsel and client (a matter to which I will presently refer), the cause of action would lie necessarily in tort; and damage is an essential element in the tort of negligence. Therefore, the averment that the case had been lost by negligence would usually be an essential part of the cause of action. Having lost the action for negligence, a further action might be brought alleging that this too had been lost by the negligence of counsel; and thus in the third action, not only the first action but also the second action would have to be re-opened. There would be no end to the litigation, until perhaps the client was declared a vexatious litigant; and it is in the public interest that there should be an end to litigation. Whilst this alone would not be sufficient to justify counsel's immunity in respect of his conduct or management of a case in court, it supports the reason stated earlier in this judgment which, by itself in my view, not only justifies but demands the immunity on the grounds of public policy.

2. A barrister cannot pick and choose his clients. He is by the etiquette of the

Bar obliged to appear, certainly in the criminal courts, for anyone prepared to pay his normal fee. In Erskine's celebrated words:

> "From the moment that any advocate can be permitted to say that he will or will not stand between the Crown and the subject arraigned in the Court where he daily sits to practise, from that moment the liberties of England are at an end."

But for this, innocent men might go undefended. Accordingly, it is very much in the public interest that this professional duty should be maintained. It might be difficult to maintain it if counsel were liable to be sued by the client whose retainer he was obliged to accept. This again would not by itself be sufficient to justify the immunity but it supports, if any support be needed, what I conceive to be the overwhelming reason for the immunity to which I have already referred.

I would point out also that the immunity of counsel for what he says or does in court cannot materially prejudice his client. If it be said that counsel needs the fear of an action to inhibit negligence, it should be remembered that counsel's duties in court are carried out in public. His livelihood depends on his public reputation. Accordingly, apart from the high traditions of the Bar, strong materialistic motives are always acting as a sharp spur for him to take great care to do his very best. Moreover, no professional man can be sued merely for making a mistake or an error of judgment or not being so astute as his fellows, but only for failing to show the care and competence which may reasonably be expected of him (*Hunter v Hanley*). Advocacy is not an exact science. It is an art. Whether a question should or should not be asked, what witnesses should be called, what points should be taken and how they should be taken are all matters about which able and experienced counsel may differ. It does not by any means follow that the view which in the end turns out to be wrong was arrived at negligently or incompetently.

It is clear, therefore, that negligence in respect of the conduct or management of a case in court could only in the rarest circumstances be established. Even when it could, it might be even more difficult to show that it made any difference to the ultimate result. The fact that such actions would be most unlikely to succeed does not mean, however, that many might not be brought for the purpose of reopening cases, airing supposed grievances and harrying counsel. The present is perhaps the prototype of such an action. Accordingly what an individual client may lose as a result of being unable to bring such an action is, on balance, as nothing to what the public gains by his inability to do so.

I have carefully examined the Commonwealth and the USA authorities to which our attention has been called on behalf of the plaintiff. Although these cases are of great interest, I doubt whether in connexion with the problem which confronts us much help can be derived from cases decided in countries where there is fusion of the two branches of the legal profession. It may well be that some of the advantages of our system of administering justice, to which I have referred, derive in part from the fact that the two branches of the profession are here separated. Certainly, I think, they are due in part to the immunity of counsel from any civil action in respect of what they say or do in the conduct or management of a case in court.

It is unnecessary to express any concluded view as to whether this immunity extends to solicitors. I am not at

present convinced that the learned judge's view ([1963] 2 All ER at p 480) was wrong on this point. I prefer, however, to reserve that question until such time as it arises for decision.

There is another most important question which, although it could not, I think, have arisen directly for decision in this case, has been much debated at the Bar-namely, whether the immunity of counsel extends to advisory work which is quite separate from the conduct and management of a case in court. Since,

however, my lords have dealt with this matter and I have the misfortune to disagree with their conclusions, I must express my own. I agree that it has been well settled for years that a barrister cannot sue for his fees *(Moor v Row*; *Kennedy v Broun*). In the latter case it was also held that he was incapable of entering into a contract with his client. Whether this latter point was rightly or wrongly decided is perhaps of little consequence. In order for parties to enter into a contract there must be an animus contrahendi. Ever since 1863 at any rate, barristers and solicitors must have known of the decision in *Kennedy v Broun*. Accordingly, no solicitor in delivering a brief or counsel in accepting one can have intended to enter into a contract because each must have believed that he could not do so. I do not, however, accept that the immunity, with which I have already dealt, springs from or has anything to do with counsel's inability to sue for his fees or to enter into a contract with his client. If it did, it would of course extend equally to all his professional activities.

Prior to 1858 no physician could sue for his fees (*Chorley v Bolcot*). The Medical Act, 1858 (replaced by the Medical Act, 1886) abrogated this rule, but provided that any College of Physicians might lawfully make a rule prohibiting its members from suing for their fees. The Royal College of Physicians in London made such a rule. Throughout the years physicians have, however, on occasion been sued for negligence in the courts, sometimes successfully. It has never at any time been suggested that they enjoy immunity from such actions. Indeed, it has for long been accepted that they are liable in negligence (*Pippin v Sheppard*). If inability to sue for fees confers no immunity on physicians, why should it do so on barristers? Although they cannot sue, barristers are not entirely without protection in regard to their fees. Indeed, they are certainly in no worse position in this respect than are physicians. A barrister may ask for his fees in advance and refuse to act until he receives them. Normally a solicitor is put in funds by his client before counsel is briefed. If in these circumstances he does not pay counsel, he is subject to severe disciplinary action by the Law Society, which would be of far greater financial consequence to him than paying over the fees to counsel. If counsel has not been paid in advance and the solicitor has not been put in funds and the lay client refuses to pay, it is true that counsel cannot sue, but the solicitor can. Eventually if the lay client is good for the money it will be recovered and paid over to counsel. However true it may have been in Roman times, it is at any rate today somewhat illusory to suggest that counsel works merely for an honorarium. He works for a well earned fee. And I do not think that, happily, there is any higher incidence of bad debts at the Bar than there is in any other profession.

Ability or inability to enter into a contract seems to me irrelevant from the point of view of immunity from being sued in negligence. Even if counsel could enter into a contract with his client which contained an obligation to take care, there is no reason why he should not enjoy immunity on the grounds of public policy from being sued under the contract in respect of what he says or does in court. As far as I know, no sane adult suffers from a legal inability to enter into a wagering contract. It is not a void or illegal bargain. If anyone pays up under such a contract, the money cannot be recovered. On the other hand each party to the contract is immune on grounds of public policy from being sued on it by the other. I can, however, well understand why it has been thought in the past that counsel's inability to contract makes it impossible for him to be sued successfully for damages for negligence. In all other professions, the relationship between the client and the professional man is normally governed by contract-and where there is a contract, it would seem that it is to the contract alone that one must look for the legal obligations of the relationship-including the obligation to take reasonable care (*Davies v Lock*; *Groom v Crocker*). Accordingly, it was

easy to fall into the error of thinking that if there was no contract, there could be no obligation to take care. This was particularly true before the modern development of the law relating to the tort of negligence. A client can hardly be more dependent on anyone than on his counsel, nor can their relationship be closer. And we now know that a legal obligation to take care may spring from what is sometimes called proximity quite apart from contract (*Donoghue v Stevenson*). Before *Hedley Byrne & Co Ltd v Heller & Partners Ltd*, it was not recognised that in the absence of a contractual or fiduciary relationship, negligent but honest advice could, in any circumstances, give rise to an action for damages for financial loss (see *Candler v Crane, Christmas & Co*). *Hedley Byrne* overruled *Candler v Crane, Christmas & Co* and established that the law will imply a duty of care when a party seeking information or advice from a party possessed of a special skill entrusts him to exercise due care and that party knew or ought to have known that reliance was being placed on his skill and judgment-see the speeches of Lord Reid, Lord Morris of Borth-Y-Gest and Lord Hodson ([1963] 2 All ER at pp 583, 594, 601; [1964] AC at pp 486, 502, 514). There is in my view nothing to the contrary in the speeches of Lord Devlin and Lord Pearce. Indeed, Lord Pearce said ([1963] 2 All ER at p 617; [1964] AC at p 539):

> "To import such a duty the representation must normally, I think, concern a business or professional transaction whose nature makes clear the gravity of the inquiry and the importance and the influence attached to the answer."

When counsel is asked to advise, can anyone doubt the gravity of the inquiry and the importance attached to his answer? It may be, as Danckwerts LJ points oute, that the observations to which I have referred in *Hedley Byrne* were obiter. They are, however, of the highest persuasive authority and I respectfully agree with every word of them. *Hedley Byrne* sounded the death knell of a rule of law which, as I ventured to suggest in *Clayton v Woodman & Son (Builders) Ltd*, was contrary alike to principle, reason and justice. It had nothing to support it except certain authorities which may have been binding on this court, but which fortunately were not binding on the House of

Lords. It is also to be observed that the duty to take reasonable care laid down in *Hedley Byrne* may arise even in cases where the person who owes the duty receives no payment from the person to whom he owes it.

There is a passage in the speech of Lord Devlin ([1963] 2 All ER at p 611; [1964] AC at p 530) in which he states that the relationship, in order to create a duty to take care, must be such that the person on whom the duty is imposed must be taken voluntarily to have accepted it. In my judgment this exactly fits the relationship between counsel and client. It seems to me unthinkable that a barrister should not consider that he undertakes responsibility to his client to use reasonable care. I have no doubt that all barristers accept such a responsibility. I cannot agree that this is a responsibility in honour only. I do not believe that barristers any more than any other professional men would write "Without legal responsibility for negligence" above their doors. Nor do I believe that the Bar would wish to claim any such immunity. The duty to take care is as well recognised as it is scrupulously observed. Although in my judgment the general duty exists, nevertheless on the grounds of public policy, to which I have already referred, the law confers an immunity on the Bar from being sued for any alleged breach of duty in respect

of what is said or done in the conduct or management of a court case. None of these grounds of public policy operates, however, when counsel is engaged to advise on matters which have nothing to do with court work: eg when counsel is asked to advise or draft documents relating to a contract or will or tax liability, company flotation and many other matters. The question, as I see it, is not whether public policy demands that an action for breach of duty to exercise reasonable care and skill shall lie against counsel. The question is whether public policy demands that, in certain circumstances, the law should confer immunity from such actions. There are such circumstances, as I have shown; but advisory work unconnected with the management of a case in court is not one of them. It may sometimes be difficult to draw the line-to know whether or not an opinion or draft is in reality part of the management or conduct of a civil or criminal action. In the great majority of cases, however, no such difficulty exists, eg advising on evidence, drafting a pleading or notice of appeal is clearly part of the management of a court case. I can well understand the view that it might be better if no professional men could be sued for negligence; but this view is not accepted by the law. I cannot understand, nor can I agree with the view that in relation to matters unconnected with the conduct or management of a case in court the duty of a barrister to take reasonable care and his liability to be sued for breach of that duty should be any different from that of an accountant, architect, solicitor or surgeon. The distinction based on the fact that all these can sue for their fees and make contracts with their clients seems to me to be unreal since, as I have shown, the duty to take care may arise out of the relationship with the client quite independently of contract and the right to receive remuneration. No doubt this relationship can be restricted so that it does not impose liability; the professional man may expressly state that he is prepared to advise only without responsibility-like the bank in *Hedley Byrne*. For a bank or anyone else giving a reference without remuneration to make such a stipulation is one thing-for a professional man to do so when he acts for a substantial fee (whether he can sue for it or not) is quite another. In the absence of any express reservation, I can see no reason why the law should imply one. I do not accept that solicitors and counsel must be taken to act on the basis that there shall be no legal responsibility on counsel to take reasonable care. I think that prior to *Hedley Byrne* they may mistakenly have supposed that in law no such responsibility could exist. This, however, was a mistake of law and cannot in my view affect the present position.

I wish to make it plain that I do not mean that counsel underwrites his opinion. It may turn out to be wrong in the sense that when it is tested in the courts, the judges, or a majority of them, may not accept the view expressed in the opinion. This of course imposes no liability on counsel. He is not liable for a mistake unless it can be established that he has failed to exercise the ordinary care and skill that can reasonably be expected of him-and then only if this failure has caused damage to his client.

I have not lost sight of the reported cases which may seem inimical to the views which I have expressed. In *Fell v Brown*, an action was brought against a barrister for negligence in settling a bill in chancery. According to the attenuated report of the case, there was no argument and no judgment. Lord Kenyon CJ expressed a strong opinion at an early stage and Erskine apparently threw in his hand. The Chief Justice's view may have been based solely on the immunity of a barrister for what he does in the management of a case. In any event the action may have been settled on terms which were not disclosed. It does not seem to me to be a helpful authority. The same considerations apply to *Perring v Rebutter*. In *Swinfen v Lord Chelmsford*, as Lawton J points

out ([1966] 1 All ER at p 477, letter *c*), the court never addressed its attention to the problem of negligence in the modern sense. Moreover, the action was concerned with the management of a court case. The Irish cases of *Mulligan v M'Donagh* and *Robertson v Mac-Donogh*, concerned claims against counsel who, having accepted a brief, failed to appear in court. Here again each action had to do with the management of a court case. In any event these decisions which are not binding on us may be attributed to the principle that anyone who undertakes to do work gratuitously (and this was the current view about counsel) cannot be sued if he fails to do the work but only if he does it negligently. No doubt, however, they do contain dicta which would support a general immunity. In *Purves v Landell*, which was a Scottish appeal to the House of Lords concerning the liability of a writer to the signet for improperly conducting a suit, Lord Campbell expressed the opinion that counsel in England and advocates in Scotland enjoy an immunity from actions for negligence even in respect of advising. In *Re Le Brasseur & Oakley*, that great lawyer, Lindley LJ expressed the view that counsel were immune from actions for negligence because of their inability to sue for their fees. Both Lord Campbell's and Lindley LJ's pronouncements were, however, obiter and made without hearing argument on the point, and made moreover, when the modern law relating to negligence was in a very early stage of development-certainly upwards of seventy years before *Hedley Byrne* was decided in the House of Lords.

Accordingly in my judgment there is no decision contrary to the conclusion at which I have arrived, namely, that in

law a barrister owes the same duty of care to his client as does any other professional man, but is immune solely in the public interest from any form of civil action in respect of what he says or does in the conduct or management of a case in court. This conclusion seems to me to be supported alike by principle, authority, reason and justice.

I would dismiss this appeal.

Appeal dismissed. Leave to re-amend the statement of claim refused. Leave to appeal to the House of Lords refused.

Solicitors: *M Zander* (for the plaintiff); *Forsyte, Kerman & Phillips* (for the defendant); *Official Solicitor*.

F Guttman Esq Barrister.

Footnotes

a There is not concurrence of view on advice as to prospect of success in an action, as distinct, eg, from advice on evidence (compare p 667, letter *g*, and p 679, letter *c*)

b Unreported; see *Hinds v Sparks*, The Times, 30 July 1964, and subsequently, *R v Hinds*, The Times, 24 November 1965

c Unreported; see *Hinds v Sparks*, The Times, 30 July 1964, and subsequently, *R v Hinds*, The Times, 24 November 1965

d *Goody v Odhams Press Ltd* ante p 369

e See p 672, letter *h*, ante