

ADVOCATES' IMMUNITY IN SCOTLAND

Wright v. Paton Farrell

LTL 29/8/2002 (unreported elsewhere)
(Outer House, Court of Session) (T. G. Coutts, Q.C.)

INTRODUCTION

The historic immunity from negligence suits enjoyed by advocates was abolished in England and Wales by the House of Lords in the case of *Arthur J. S. Hall*.¹ This case brought to an end the 200-year-old immunity, which prevented an advocate, whether solicitor or barrister, from being sued in negligence in respect of the conduct and management of a case in court, and the preliminary work connected with it. The immunity had no statutory basis, but its existence had been recognised by the House of Lords in 1967, in the case of *Rondel v. Worsley*,² and its extent and limits were considered in *Saif Ali v. Sidney Mitchell and Co* in 1978.³ Since that time, not only was the scope and extent of the immunity the subject of much case law, but the rule itself received a great deal of criticism. By abolishing it, the House of Lords recognised that the public policy justifications for it were no longer valid. It also brought England and Wales in line with other member states in the European Union, and with other common law jurisdictions.⁴ However, in Scotland, a recent case has confirmed that Scottish advocates are still covered by the immunity in criminal cases.

THE DECISION IN *WRIGHT v. PATON FARRELL*

The case concerned an allegation of negligence by Mr. Wright on the part of his former solicitor in relation to the way his defence was conducted in a criminal trial. The criminal trial concerned charges of driving while disqualified and theft, and his defence was one of alibi. Due to a misunderstanding by the sheriff, the procurator fiscal and Mr. Wright's solicitor, the trial was conducted on the misconceived basis that the events had taken place on a particular Friday morning. In fact, they had occurred in the early hours of the subsequent Saturday morning. Mr. Wright thought, and gave evidence on the basis, that the court was discussing Friday night into Saturday morning. He was convicted and sentenced to a term of imprisonment. His subsequent appeal was allowed on the grounds that the trial was conducted on a wholly misconceived basis, namely the date when the events took place. This mistake resulted in doubt being cast on Mr. Wright's credibility, which was particularly damaging as his defence rested entirely on alibi. The appeal court concluded that Mr. Wright had been badly prejudiced in giving his evidence to the jury, had not received a fair trial and that a miscarriage of justice had occurred. His conviction was quashed. Mr. Wright then

¹ *Arthur J. S. Hall & Co (A Firm) v. Simons; Woolf Seddon (A Firm) v. Barrett; Roberts & Hill (A Firm) v. Harris (conjoined appeals)* [2000] 3 W.L.R. 543; [2002] 1 A.C. 615. See Ter Kah Leng "The Demise of Advocates' Immunity" (2000) 9(2) Nott. L. J. 74-86; M. Seneviratne "The Rise and Fall of Advocates' Immunity" (2001) 21(4) *Legal Studies* 644-662.

² *Rondel v. Worsley* [1967] 3 All E.R. 993; [1969] 1 A.C. 191.

³ *Saif Ali v. Sidney Mitchell and Co* [1978] 2 All E.R. 1033; [1980] A.C. 198.

⁴ Australia, New Zealand and Singapore still have advocates' immunity.

sought to recover damages from his solicitors for the negligent way the criminal trial was conducted. The Court of Session however held that the solicitors were immune from negligence claims while acting as advocates in the criminal courts.

ADVOCATES' IMMUNITY

Advocates immunity had attracted a great deal of criticism⁵ before it was abolished in England and Wales, and thus the decision in *Hall* was perhaps not so remarkable. Indeed, what is surprising is that this "not very attractive defence"⁶ survived for so long. It is interesting therefore that the Court of Session in this case decided not to follow the lead set by the House of Lords in *Hall*, and confirmed that, in Scottish law, advocates still enjoyed immunity from suit in relation to the conduct of criminal proceedings during the course of a trial. The court was satisfied that the decision in *Hall* did not affect the Scottish position, on the basis that it was concerned with English law and English civil procedure. Scotland had different procedures.

One of the rationales for the immunity had been the dangers of re-litigation, vexatious claims and unmeritorious cases. In England, these types of cases can be controlled and disposed of, for example through wasted costs orders, and the use of court management of civil claims. Abolition of the immunity thus posed few problems in England. However, there are no such parallel procedures in Scotland, where wasted costs orders cannot be made. The court was of the opinion that there was therefore a real danger of re-litigation in Scotland, which is unlikely to occur in England. What was also persuasive for the court was that *Hall* did not expressly overrule *Rondel* as being wrongly decided. Rather, *Rondel* was declared not to apply because it no longer reflected public policy. *Rondel* therefore remained good law until the decision in *Hall* was pronounced, and the criminal trial, which was the subject of this negligence case, occurred before *Hall* was decided.

The court also stressed that *Hall* had been a claim for negligence arising out of the conduct of a civil case. This was a criminal case. The House of Lords had not been unanimous in their views about the abolition of the immunity in criminal cases.⁷ Although the majority agreed that the immunity should be abolished for criminal litigation, it was not necessary to decide on this in *Hall*, so their comments are *obiter*. Clearly, however, the views of the majority are of great persuasive authority, and it is unlikely that a future court in England would decide that there was justification for retaining advocates' immunity in relation to a criminal case.

HUMAN RIGHTS

It was argued on behalf of Mr. Wright, that the immunity was not compatible with the provisions of the European Convention on Human Rights, on the basis that such a bar on actions in negligence would be a breach of Article 6(1). This article states that: "In the determination of his civil rights and obligations . . . everyone is entitled to a fair

⁵ See T. Dugdale "Immunity for the Case plan – *Atwell v. Michael Perry & Co* (1998) 14(3) *Professional Negligence* 184; C. Miller "The advocate's duty to justice, where does it belong?" (1981) 97 L.Q.R. 127; R. Chandran "No Immunity for Counsel in Singapore" (1997) 13(4) *Professional Negligence* 116; K. Richards "Advocates' Immunity: justice delivered by the law" (1995) 5(5) *Consumer Policy Review* 161; A. Aurora and A. Francis *The Rule of Lawyers* (1998, Fabian Society Discussion Paper 42); M. Seneviratne "The Rise and Fall of Advocates' Immunity" (2001) 21(4) *Legal Studies* 644.

⁶ *Harris v. Manahan* [1997] F.L.R. 205 at 209, *per* Lord L.J.

⁷ Lords Hobhouse, Hope and Hutton gave dissenting judgments on this point.

and public hearing within a reasonable time by an independent and impartial tribunal established by law ...". The claim therefore is that the immunity from suit is a derogation from a person's fundamental right of access to a court, which has to be justified.⁸

Famously, the case of *Osman v. United Kingdom*⁹ had indicated that blanket immunities from negligence are not acceptable.¹⁰ This case proved to be very controversial,¹¹ attracting a great deal of criticism from senior judges and academics, and has been described as "deeply flawed".¹² Indeed, in a subsequent case, *Z. and others v. United Kingdom*,¹³ the European Court acknowledged that the right to have a question determined by a tribunal was not absolute and could be subject to legitimate restrictions. It was accepted that the view expressed by the court in *Osman* had been based on a misunderstanding of the law of negligence.

Thus, it is not inevitable that the mere fact of an immunity is sufficient to found a violation of Article 6(1). It is a matter of policy, and the court in this case was of the view that the immunity in Scotland, unlike in England, was based upon valid public policy reasons, and was therefore not inconsistent with the Convention. If the Scottish court were to decide that this public policy justification no longer applied, the immunity would go.

THE LOSS SUFFERED

It had been argued, on behalf of the defender solicitor, that the substantive case was irrelevant because the loss and damage was not of a type which could be compensated. There was no evidence that the outcome of the trial would have been different without the mistake about the date, and it was not a case where an assessment of "loss of chance" was appropriate. It was also argued that the loss claimed was speculative, as it could not be proved that there would have been a real chance of acquittal. Despite the fact that the case could not proceed because of the existence of the immunity, the Court of Session decided to pronounce on the issue of loss and damage, on the basis that a higher court might take a different view about the issue of immunity.

The court decided that what Mr. Wright had to show was that he had a real and substantial right, that this right had been lost, and that the loss had an ascertainable, measurable, non-negligible value. Mr. Wright had been deprived of a fair opportunity to present his defence to the jury, a defence which might have succeeded. His loss of right therefore was the loss of a fair trial. It was evident that he had lost the right to have his case presented to the jury in a manner in which his credibility could not be so obviously assailed. The assessment of damages for this loss may be difficult, but the fact of damage was not speculative.

The court accepted that in many of these types of cases, it is very difficult to prove causation. For example, it is difficult to show that there would have been a different outcome in the trial, if the case had been conducted differently. Without the necessary causal link, the negligence claim would fail. This causal link can be difficult to show

⁸ See *Golder v. United Kingdom* (1975) 1 E.H.R.R. 524.

⁹ (2000) 29 E.H.R.R. 245.

¹⁰ This case concerned the immunity of the police from a negligence claim in relation to actions taken in connection with the investigation and suppression of crime.

¹¹ See R. English "Forensic Immunity Post-*Osman*" (2001) 64(2) M.L.R. 300; C. Gearty "Unravelling *Osman*" (2001) 64(2) M.L.R. 159.

¹² C. Gearty "Unravelling *Osman*" (2001) 64(2) M.L.R. 159 at 159.

¹³ 10 B.H.R.C. 384.

in criminal trials because, unlike civil cases, there is no question of settlement, nor any prospect of some form of negotiated outcome which could be evaluated in cash terms. However, in this case there was no difficulty in establishing a causal link between the negligence and the loss. Although the negligence had not caused Wright to be convicted, it had caused him to lose his opportunity to advance his case to the jury. It was not necessary for him to prove that on the balance of probabilities he would have been acquitted. Only if it could be shown that he would have been convicted anyway, would there have been no loss. In this case, the conviction had been set aside, and that fact established the causal link between the negligence and the loss. Whether or not he was likely to be acquitted was a matter to be dealt with in the assessment of damages.

There would, therefore, have been a case to answer had there been no immunity. There had been a miscarriage of justice caused, perhaps only in part, by the negligence of the solicitor. Even though the fiscal and sheriff might also be responsible, there was at least a case of joint and several fault on the part of the solicitor. It may even be the case that the solicitor was solely at fault. Such questions could only be decided after taking evidence of the whole circumstances surrounding the negligence and the conviction. It would then be possible to arrive at an assessment of what, if anything, should be received in damages a result of any proven negligence.

CONCLUSION

Advocates' immunity is still in existence in Scotland, at least so far as criminal cases are concerned. It will be interesting to see if the same conclusion is reached if a civil case comes before the courts. It will also be interesting to see if a higher court takes a bolder stand, and brings Scotland in line with England and Wales, and other European states. Surely it is time for this anomalous immunity to be abandoned, and for such wrongs as appear to have occurred in this case to be given their appropriate remedy.

MARY SENEVIRATNE*

* LL.B., M.A., Ph.D., Solicitor, Research Professor in Law, Centre for Legal Research, Nottingham Law School.