IN HARMONY OR OUT OF TUNE?

IS ADVOCATES' IMMUNITY AN APPROPRIATE PRINCIPLE IN COMMON LAW COUNTRIES?

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INTRODUCTION

> Just as with an English oak, so with the English common law. You cannot transplant it ... and expect it to retain the tough character which it has in England. It will flourish indeed, but it needs careful tending. ... In these far off lands the people must have a law which they understand and which they respect. [1]

These words were expressed by Lord Denning in 1956, in relation to the African continent, but sound a warning extending to other parts of the globe. They highlight the inherent difficulty in applying the common law, developed over centuries in England, to foreign countries where very different circumstances prevail. The need to take these circumstances into account was recognised in the provisions applying the common law to new settings. In many countries it was expressed to apply, 'so far only as the circumstances [of the country] permit'.[2]

The article discusses the problems regarding the introduction of common law principles into an alien environment, with particular reference to the principle of advocates' immunity from suit.[3] It focuses on Papua New Guinea and the recent case of*Takai Kapi v Maladinas Lawyers and Another*,[4] where the application of immunity from suit to the circumstances of Papua New Guinea was discussed. The article commences with some information about those circumstances. It proceeds to explain the provisos on the common law that has been introduced and the relationship between the common law and other sources of law in Papua New Guinea. It then examines the rationale behind the principle or immunity from suit and whether it still applies in other common law countries.*Takai Kapi v Maladinas Lawyers and Another* is then analysed to illustrate the issues involved in deciding whether a common law principle, in this case immunity of suit, is applicable to the circumstances prevailing in a "far off" country. The fascinating issues surrounding the application of customary law are outside the scope of this paper, and are only mentioned briefly in the context of the relationship between common law and customary law.[5]

BACKGROUND

The Circumstances of Papua New Guinea

Papua New Guinea is a Melanesian archipelago in the far southwest corner of the Pacific. It has a land area of nearly 463,000 square kilometres and is made up of the eastern half of the island of New Guinea and over 1,400 smaller islands and atolls. It has a population estimated at 5.3 million, between them speaking over 700 different languages. Each of these languages signifies the existence of a unique culture,

with its own customs, norms and values. The indigenous population are Melanesian. Other ethnic groups are Papuan, Negrito, Micronesian and Polynesian. About 75% of the population live in rural areas and live a subsistence lifestyle. The per capita GDP was estimated at US$2,100 in 2002.[6] The country is rich in natural resources, but exploitation is made difficult by the mountainous and rugged terrain and the high cost of developing infrastructure. Notwithstanding this, the main industries are mining and logging. Coffee, copra and cocoa are also produced commercially.

About 34.7% of the population over 15 is illiterate and only 21% of children in the relevant age group attend secondary school.[7] Out of 1,000 members of the community only about 14 have a telephone and only about 57 have a computer. There are only about 50,000 internet users in the whole country.[8] In the legal sector, education and training needs for the judiciary were said in 1996 to be 'substantial'. The reasons given for this were, 'staff shortages, poor conditions of employment, and consequential low staff morale, coupled with the geographical and cultural dimensions'.[9]

The Common Law Inheritance

In the lead up to Independence in 1975, the Papua New Guinea Constitutional Planning Committee carried out a detailed investigation of the laws which should apply.[10] The committee received a number of submissions objecting to the introduced law and concluded that the introduced law was inappropriate to form the basis of the legal system in that country.[11] However, the Committee was not ready to discard introduced law completely, and the *Constitution of Papua New Guinea* embodies a compromise. The supreme law is the *Constitution* and *Organic Law*.[12] In addition to legislation, the other main source of law is 'underlying law'.[13] This is essentially common law, renamed to differentiate it from English common law.[14] It consists of customary law,[15] 'the principles and rules of the common law and equity in England'[16] and, where there is no existing rule on point, laws developed by the Supreme and National Courts.[17]

The *Constitution* provides that common law is only to apply if, and to the extent that:

1. It is consistent with the Constitution and statute law;
2. It is applicable and appropriate to the circumstances of Papua New Guinea; and
3. It is consistent with custom.[18]

In addition to these constitutional fetters, there are other provisos to the application of common law, which are discussed below.

The *Underlying Law Act*

Although the *Constitution* displays an intention to elevate customary law to a position superior to introduced common law,[19] the reality has been that the courts have largely favoured the source of law with which they are most familiar, that is, the common law.[20] One reason put forward for this approach is the failure of parliament to pass legislation giving detailed direction as to the development of the underlying law, as required by Sch 2.1(3) of the*Constitution*. In spite of a comprehensive working paper,[21] draft Bills and Report[22] produced by the Law Reform Commission of Papua New Guinea in the 1970's, the *Underlying Law Act* was not passed until 2000.[23] This Act imposes the most significant restriction on the application of common law by requiring the courts to embark on a creative exercise. [24] They are to develop the underlying law on a case-by-case basis, looking first to custom. Recourse may be had to the introduced common law only if no appropriate customary rule can be found.[25] The Act provides that each customary or common law principle which is adopted by a court becomes a rule of the

underlying law, which is the equivalent of a precedent, for use in later cases that have similar facts.[26] The Act also improves the procedure for identifying and proving custom.[27]

The Act is fraught with difficulties and it is outside the scope of this article to discuss all of these. The question which is relevant here is whether the substantial body of case law developed by the courts in Papua New Guinea between independence and the passing of the *Underlying Law Act* is still part of the law. Few of these decisions are based on custom.[28] If these cases are part of the law, will they be binding in all circumstances? If so, does this mean that the courts will only be required to embark on the creation of law under the *Underlying Law Act* in cases raising new questions? Alternatively, will decisions only be binding if reached in accordance with the approach laid down in the Act? The courts have not yet made it clear which, if any of these approaches is correct, and, until they do, a large portion of the law is of uncertain status.

English or Commonwealth Common Law

In Papua New Guinea, as in many other South Pacific countries, [29] the adopting provisions of the *Constitution* explicitly refer to the common law 'in England', clearly indicating that it is the law as applied in England that was introduced.[30] Theoretically, this means that the courts must apply the law as determined by courts in England, even though those English courts have no jurisdiction in Papua New Guinea. It also means that, where other common law countries have departed from the English common law, the courts are not free to choose between the different lines of authority, but must apply the English law, assuming it meets the other criteria discussed in this section. Another consequence of this is that decisions of the Papua New Guinea courts purporting to apply the common law of England, but which misapply that law, are open to appeal.[31]

The argument that the common law to be applied is that of England is further supported by schedule 2.2 (3), which provides that:

> The principles and rules of the common law and equity are adopted ... notwithstanding any revision of them by any statute of England that does not apply in the country by virtue of [this schedule].

In Solomon Islands, a similar provision has been interpreted as applying the common law and equity of England. The Court of Appeal pointed out that this paragraph would have no effect if this were not the case. [32]

Whilst the introduced common law would appear to be that applying in England prior to Independence, courts in Papua New Guinea are encouraged to look at decisions of any foreign court in formulating principles of underlying law.[33] However, the *Underlying Law Act* makes it clear that these foreign judgments are not persuasive, let alone binding.[34]

Applicability to Local Circumstances

In all countries of the South Pacific, the provisions applying or adopting the common law provide that they are to apply only so far as appropriate to the circumstances of the country. In Papua New Guinea, the relevant provision is contained in schedule 2.2, para (1), which states that:

[T]he principles and rules of the common law and equity in England are adopted, and shall be applied and enforced, as part of the underlying law, except if, and to the extent that ... they are inapplicable or inappropriate to the circumstances of the country from time to time ...

The operation of the sub-section is governed by Schedule 2.2(4) which states that:

> In relation to any particular question before a court, the operation of subsection (1)(b) shall be determined by reference, among other things to the circumstances of the case, including the time and place of any relevant transaction , act or event.

Schedule 2.2(1) allows the courts in Papua New Guinea to depart from a rule of common law or equity on the basis that it is inappropriate to the circumstances of that country.[35] Accordingly, in the situation discussed above, where other common law countries have departed from the English common law, the Papua New Guinea courts may choose to follow its neighbours, if the English law is inapplicable to the circumstances of the country.

However, apart from the exhortation to apply schedule 2.2(1)(b) by reference to 'the circumstances of the case, including the time and place of any relevant transaction, act or event', the *Constitution* gives no guidance on the factors to be taken into account when considering whether a particular rule of common law is 'inapplicable or inappropriate'. However, there is indirect guidance in the *Constitution* and in the *Underlying Law Act*. The *Constitution* provides that common law is not to apply if it is inconsistent with custom.[36] Obviously, then inconsistency with custom automatically renders the common law inapplicable. More obliquely, the constitutional mandate to the judiciary to develop the underlying law wherever there is 'no rule of law that is applicable and appropriate to the circumstances of the country', compels the court to have regard to a number of matters when carrying out this exercise. These are:[37]

- the National Goals and Directive Principles and the Basic Social Obligations set out in the Constitution;
- the Basic Rights, set out in Division III.3 of the Constitution;
- analogies to be drawn from relevant statutes and custom;
- legislation and judicial decisions of any country with a similar legal system;
- relevant decisions of courts with jurisdiction in any part of Papua New Guinea; and
- the circumstances of the country from time to time.

In a piece of drafting that defies the prohibition against using a double negative, the *Underlying Law Act* provides that the common law is not to be applied unless, 'its application and enforcement would not be contrary to the National Goals and Directive Principles and Basic Social Obligations'[38] or 'the basic rights guaranteed by Division III.3 (Basic Rights) of the Constitution'.[39] The remaining factors are not specifically stated to be relevant when considering the applicability of the common law. However, if they are relevant considerations in the development of new, underlying law which is 'appropriate', it is suggested that they are equally relevant considerations in deciding whether to discard old common law on the grounds that it is inappropriate.

There is surprisingly little case law on point.[40] This is mainly due to the fact that the courts have shown little enthusiasm for investigation of the common law's applicability, being content to assume that it is applicable, unless the point is called into question by one of the parties.[41] Apart from the questions surrounding the substantive effect of Schedule 2.2(1), the adjectival aspect of their application is uncertain. First, is there a presumption in favour of the applicability of common law or does it have to be proved by the party relying on it? Secondly, if proof is required, is the applicability of common law and equity to be determined on the basis of judicial notice or on the basis of evidence?

Prior to the passing of the *Underlying Law Act*, a presumption appears often to have been applied and courts frequently applied the common law without consideration of its applicability, unless this was put in issue by one of the parties.[42] There are odd exceptions, such as *Okuk v Fallscheer*.[43] In that case, Kapi J, as he then was, stated that, 'In considering the appropriateness or applicability of the common law

principles to the circumstances of this country, one must not take it for granted that these common law principles should apply'. However, he went on to state that 'on the other hand, care must be taken in rejecting these principles'. The *Underlying Law Act* changes the emphasis and requires a court applying the common law to give reasons for so doing.[44] Accordingly, a presumption does not apply, but the standard and method of proof remain uncertain. In *Vian Guatal v PNG*[45] the National Court held that judicial notice could be taken of circumstances rendering common law inapplicable. A similar approach was taken in *Takai Kapi v Maladinas Lawyers and Another*,[46] which is discussed below. However, in other South Pacific countries it has been held to be a matter of evidence.[47] This issue requires express judicial consideration, particularly in the light of the changes made by the *Underlying Law Act*.

The "Cut-Off" Date

Normally, the common law introduced into colonies had a "cut-off" date, that is, a date at which the received common law was fixed and after which it was left to the local courts or parliament to make any changes.[48] In Papua New Guinea the date is specified in the*Constitution* by reference to the date of Independence, that is 16 September 1975. Schedule 2.2, para (1) provides that:

> Subject to this Part, the principles and rules that formed, immediately before Independence Day, the principles and rules of the common law and equity in England are adopted, and shall be applied and enforced, as part of the underlying law ... .

This provision has been interpreted by the National Court in *The State v Pokia*[49] and in *Vian Guatal v PNG*.[50] It was held that decisions of English courts made after the cut-off date which were merely declaratory, for example, decisions overruling earlier incorrect decisions of lower courts made before the cut-off date, were part of the law of Papua New Guinea. On the other hand, English decisions made after the cut-off date, which introduced new principles, were not binding as part of the introduced common law. The distinction between cases which are merely declaratory, and those which make new law is not always easy to make. As stated by Miles J in *Vian Guatal v PNG*.[51]

> If the House of Lords [has] overruled its own previous decision it is not difficult to see that it may be taken to have changed the law; but when it makes a decision for the first time, a decision which is contrary to the decisions previously expressed in less exalted tribunals, the situation is not so clear.

Further, the distinction is premised on acceptance of the declaratory theory of judicial precedent,[52] a theory that does not sit well in Papua New Guinea, where the*Constitution*[53] and the *Underlying Law Act*[54] specifically empower judges to make law.

If a decision is not part of the introduced common law, surprisingly, it will not even be of persuasive value. Section 21 of the PNG *Underlying Law Act* provides that, whilst the courts may 'consider' the decisions of foreign or colonial[55] courts, such decisions 'are of no binding or persuasive effect'.

The common law applying in Papua New Guinea is also insulated from statutory changes made by the English parliament after independence.[56]

It is obvious from this discussion that the position of English common law in Papua New Guinea is unclear. Further, the position of common law developed in the courts of Papua New Guinea on the basis of English law is also unclear, since the passing of the *Underlying Law Act*. The effect of these uncertainties, in the particular context of the law relating to immunity from suit, is discussed below.

IMMUNITY FROM SUIT

Origins

Immunity from suit originated in the common law of England, although its origins cannot be fixed at any particular point in time. Rather, it appears to have arisen from an assumption that clients could not sue barristers. The first recorded attempt to obtain a remedy against a barrister occurred in 1791 in *Fell v Brown,*[57] where Lord Kenyon indicated his distaste for such proceedings, commenting that as far as he knew this was the first such action against counsel and he hoped it would be the last. Not surprisingly, the action failed.

Rationale for the Immunity

The rationale for advocates' immunity was originally thought to be, at least partly, based on the premise that there is no contractual relationship between barrister and client; hence a barrister could not be sued in contract.[58] In 1964, this basis for the immunity was undermined by the House of Lords' statement in *Hedley Byrne v Heller*[59]that a person giving professional advice might owe a duty of care in negligence. Five years later, the justification for the immunity was re-examined by the House of Lords in *Rondel v Worsley.*[60] In that case, the defendant barrister had accepted a 'dock brief'[61] to represent Rondel against a charge of inflicting bodily harm. Six years later, Rondel sued him for negligence. Aside from any claim to immunity, the court considered Rondel's claim to be 'unmeritorious and hopeless'.[62] One allegation by the client was that his barrister had not adequately pursued the client's 'defence' that he had used his teeth rather than a knife to inflict the injury. As Lord Pearce pointed out, had the barrister pursued such a line of questioning it might well have damaged the client's defence, by providing evidence of 'barbarous behaviour'.[63]

As *Hedley Byrne v Heller* had removed lack of contractual relations as a justification for immunity, the court was required to identify a new rationale, if the immunity was to be upheld. Lord Reid emphasised the need to protect and enhance the advocate's duty to the court.[64] Of lesser weight but also of concern to Lord Reid was the risk of inconsistent outcomes.[65] He was fortified in his view that the immunity should be retained by evidence that few negligence actions against solicitors for advocacy work had been successful, although his Lordship went on to argue that, 'the case for immunity of counsel appears to me to be so strong that I would find it difficult to regard [the differences between solicitors and barristers] as sufficient to justify a different rule for solicitors.'[66] Lord Pearce also relied on the existence of the cab rank rule as justifying immunity.[67]

The House of Lords acknowledged that the immunity might not always be justified in the circumstances prevailing at a particular time, stating that 'public policy is not immutable',[68] but held that on the facts of the case and in the circumstances of England in 1967, the immunity was necessary.

The Extent of the Immunity

One distinct change in circumstances that has had to be taken into account by courts when considering immunity from suit is the extended right of solicitors to conduct advocacy. In carrying out such work, are they permitted to claim the same immunity as barristers? In England, the question has been answered in the affirmative[69] and confirmed in legislation.[70] The modern tendency is therefore to refer to the immunity as an 'advocates' immunity' to emphasise the fact that it applies to the role of an advocate, whether that role is undertaken by a barrister or a solicitor.[71]

With regard to out of court work, the position is not so clear. *Obiter* comments in *Rondel v Worsley* led to

some confusion. For instance, Pearce LJ, noted that there had been absolutely no case in which a barrister had been found negligent,[72] thereby seeming to imply that the immunity extended to all work by a barrister. His Lordship quoted the sweeping statement of the immunity from *Swinfen v Lord Chelmsford:*[73] 'no action will lie against counsel for any act honestly done in the conduct or management of the cause'.[74] This led to His Lordship's conclusion that in applying the immunity, 'the law has not differentiated between the liability of a barrister in litigation and in his other non-litigious work.'[75]

The applicability of the immunity to out of court work was directly relevant in *Saif Ali v Sydney Mitchell and Co*[76] and the House of Lords was required to revisit a number of broad statements of the immunity made in *Rondel v Worsley* 11 years earlier. The House of Lords was anxious to draw clear boundaries as to the extent of the immunity. Saif Ali's claim of negligence against his barrister was as strong as Rondel's claim was weak. The conduct in question consisted of a failure to advise Saif Ali to join the driver of the vehicle in which he was a passenger when he was injured and/or the driver of the other vehicle involved in the accident. Instead, only the owner of the other vehicle was sued. The owner denied that the driver was acting as his agent and those proceedings were discontinued. By that time, any new claim was statute barred. In the words of Lord Wilberforce, 'the plaintiff, who started with an impregnable claim for damages, found after five years that he had nobody he could sue.'[77] Lord Salmon commented that it would be 'a shocking reflection on the common law if, in the melancholy circumstances [of the case] Mr Ali has no remedy against any of his advisers who are responsible for his present situation.'[78]

The oversight of the lawyers in failing to advise the plaintiff to join all relevant defendants clearly did not occur in court, but at a very preliminary stage. The court accepted that the duty to the court extended beyond the steps of the courtroom, and adopted a test for out of court work as suggested by the New Zealand Court of Appeal in *Rees v Sinclair*,[79] namely, that pre-trial work is only protected by the immunity if the work, 'is so intimately connected with the conduct of the case in court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing'[80] (the intimate connection test).

The House of Lords was conscious that circumstances in England had changed since its decision in *Rondel v Worsley*: The general trend in the law of negligence since *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[81] was to protect consumers of services and ensure that every wrong attracted a remedy.[82] Their Lordships were therefore anxious not to allow advocates' immunity to frustrate this trend, except in very limited circumstances and for clear policy reasons.

Abandonment of the Immunity in England

Advocates' immunity has now been completely abolished in England by the House of Lords' decision in *Arthur JS Hall & Co v Simons.*[83] The case was a consolidation of three appeals by three firms of solicitors who had been successfully sued by their respective clients, Simons, Barrett and Harris. Simons alleged that his solicitors were negligent in failing to advise him to settle and to avoid lengthy and expensive litigation.

Barrett argued that his solicitors were negligent because they never obtained a valuation of the family home which was eventually sold for much less than what was thought to be its value and also allowed the wife to be guaranteed a set amount of money in the settlement rather than a percentage of the proceeds from the sale of the matrimonial home, to the disadvantage of Barrett when the house was sold for much less than he had expected.

Harris's case was that her solicitors were negligent because they had failed to brief competent counsel, to

become conversant with the facts, and because they gave incorrect advice about the possibility of setting aside a consent order.

In all three cases it could be said that the conduct of the solicitors was not "intimately connected" and hence failed the test for the immunity as established in *Rees v Sinclair* and adopted by the House of Lords in *Saif Ali.* Despite this opportunity to decide the case on narrow grounds,[84] the House of Lords dealt with the more fundamental question of whether advocates should continue to be immune from an action in negligence.

All seven members of the House of Lords agreed that there was no basis for the immunity to continue in relation to civil actions and a majority[85] held that the immunity should also be abolished in relation to criminal matters, provided that the criminal conviction was first overturned.

The reasons for abolishing the immunity can be considered under the following sub-headings:

- public perceptions and expectations
- changing nature of legal practice in England
- other methods of enhancing duty to court now existed
- membership of European Union
- experience in other jurisdictions

Public Perceptions and Expectations

A number of their Lordships were concerned as to the public's perception of the immunity in modern times, given that no other service provider had a similar immunity. Lord Steyn felt that the court should respond to a public expectation, which had heightened since 1976 when *Rondel v Worsley* was decided, that wrongs should attract compensation, stating that, 'the world has changed since 1967', ... 'we live in a consumerist society in which people have a much greater awareness of their rights'.[86]

His Lordship also thought that the ability to sue where there were demonstrated instances of incompetence at the Bar would strengthen rather than weaken the legal system and increase public confidence in that system.[87]

Changing nature of legal practice in England

Lord Hoffman indicated that, whilst the duty to the court was 'somewhat undefined' in 1967, both barristers and solicitors were now subject to detailed codes of conduct,[88] reducing the likelihood of a breach of the duty to the court. Similarly, barristers in England were now obliged to carry insurance, were allowed to advertise and the practice of law had generally become more commercialised.[89]

Other methods of enhancing the duty to court now existed

Some members of the court noted that other methods of enforcing the advocate's duty to the court had been reinforced since *Rondel v Worsley* was decided. These included an extension of the statutory power to make wasted costs orders against barristers as well as solicitors, introduced in 1990[90] and the introduction of the 'Woolf reforms'[91] requiring much closer case management.[92] Claims without merit could now be more readily struck out pursuant to the Civil Procedure Rules 1998.[93]

Membership of European Union

As England is now a member of the European Union, the House of Lords was required to consider

whether the immunity was in breach of article 6(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1953).[94]After considering the case law in relation to article 6(1), Lord Hope noted that, whilst couched in different language to the common law test of England, both acknowledged the fundamental right of access to the courts, of which the immunity was a derogation. It therefore required justification.[95] Some members of the House thought that the immunity did not breach article 6(1)[96] or that the Convention was irrelevant[97] and the House of Lords went on to abolish the immunity on other grounds.

Experience in Other Jurisdictions

Their Lordships noted that one of the strongest arguments for maintaining the immunity was the advocates' duty to the court, however they noted that there was no empirical evidence that this duty had been compromised in countries without the immunity, such as the United States, Canada and the European Union.[98] Lord Steyn noted that no such comparative data had been considered by the House of Lords when it decided *Rondel v Worsley*.[99]

The House of Lords concluded that there no longer existed sufficient policy reasons to justify the retention of the immunity.

The Current Position in other Common Law Countries

Australia

Immunity from suit has been a privilege of the legal profession in some, but certainly not all, other common law countries. The existence of immunity from suit for advocates in Australia was confirmed by the High Court in 1988 in *Giannarelli v Wraith*.[100] The Giannarellis had been convicted under the Victorian*Crimes Act* of perjury in relation to evidence which they gave to the Costigan Royal Commission. Those criminal convictions were eventually quashed on appeal to the High Court. The Giannarellis issued proceedings claiming negligence against a number of barristers who had acted for them at various stages of the criminal proceedings but the High Court found that the barristers were immune from such action.

In coming to its decision, the High Court followed the English decisions of *Rondel v Worsley* and *Saif Ali v Sydney Mitchell & Co.*[101] Importantly for the current discussion, the Australian court did not consider any of the policy factors applicable to the immunity in England to be inapplicable to the Australian legal system. Both Wilson J and Dawson J expressed the view that the fusion of the legal profession in Victoria, Australia did not warrant departure from the position adopted in countries with a divided profession, such as England.[102]

The High Court of Australia has not as yet been called on to decide whether it will follow the House of Lords decision in *Arthur JS Hall & Co v Simons*.[103] The most recent occasion upon which the members of the High Court had an opportunity to indicate their attitude to the immunity was in *Boland v Yates Property Corporation*[104] and their views were mixed.

In that case both solicitors and barristers were sued for alleged negligence for advising the use of a certain method of land valuation. The High Court determined that there had been no negligence, thereby avoiding the need to determine whether immunity should still be granted. However in a detailed discussion of the immunity, Kirby J indicated that he looked forward to a later opportunity to abolish the immunity.[105] His view was not supported by three other members of the bench who chose to express an opinion.[106] They appeared to approve of the decision in*Giannarelli v Wraith* and the New South Wales decision of *Keefe v*

Marks,[107] where the 'intimate connection' test was given a wide interpretation and the immunity extended to a failure to claim interest on a judgment. Gaudron J indicated a preference for dealing with any claim for immunity as a question of proximity.[108]

The High Court has been required to reconsider advocates immunity in the recent case of *D'Orta-Ekenaike v Victoria Legal Aid*[109] in which a client seeks damages from both his solicitor and barrister for negligent advice to plead guilty in criminal proceedings.[110] During the hearing of the case, counsel appearing for the applicant was cautioned against relying too heavily upon conditions prevailing in other countries, such as England, which do not necessarily prevail in Australia.[111] McHugh J went so far as to suggest that there was a 'spectre at the feast' when the House of Lords was deciding*Hall v Simons*, namely the need to pre-empt the imposition of reform by the European community.[112] Clearly, countries such as Australia are not exposed to similar pressure. While the court has reserved its decision, from a reading of the transcript, it cannot be presumed that it will follow *Arthur JS Hall & Co v Simons.*[113]

New Zealand

The existence of advocates' immunity in New Zealand was confirmed in 1974 in *Rees v Sinclair*.[114] That was also the case which established the 'intimate connection' test later adopted by the House of Lords in *Saif Ali v Sydney Mitchell & Co*[115] and by the High Court of Australia in *Giannarelli v Wraith*.[116]

However, since the House of Lords abolished the immunity in England in *Arthur JS Hall v Simons*, the High Court of New Zealand, in *Lai v Chamberlains*,[117] whilst bound by the New Zealand Court of Appeal decision in*Rees v Sinclair*,[118] has expressed its opinion that the immunity should now be read more narrowly in New Zealand. The court's decision was based on significant changes in the New Zealand legal system since 1974 when *Rees v Sinclair* was decided, including closer case management and use of written submissions, access to legal aid, the *New Zealand Bill of Rights Act 1990* and an increase in litigation in family and administrative law.[119] Obviously, these factors do not exactly mirror the changes to the English legal system, which encouraged the House of Lords to abolish the immunity, nor to the conditions prevailing in Australia in 1988 when the High Court in that country confirmed the existence of the immunity.[120]

Case management and retreat from the oral tradition

Laurenson J found that greater reliance on written submissions in civil matters and closer case management by the courts removed many of the justifications which an advocate may have previously had for making mistakes or for being taken by surprise in the course of a civil trial.[121] The reduction in these pressures made the immunity less necessary for the proper discharge of the duty owed to the court.[122]

Public perceptions in Family Law and Criminal Law matters

In *Hall v Simons*, the House of Lords had expressed the view that there was greater justification for immunity in criminal matters. Inconsistency between the outcomes in the criminal proceedings and the subsequent civil case against the advocate was more likely to lead to public disquiet about the legal system than was action based on an advocate's negligence in civil proceedings.

Laurenson J thought it important to recognise also the particular policy issues present in family law litigation. As in the criminal sphere, the administration of justice could be brought into disrepute if negligence proceedings cast doubt on the outcome of family law proceedings, without altering the result of those earlier proceedings. This was especially true if the family law proceedings involved children.[123] Laurenson J thought that the immunity in criminal law and family law representation could also be partly

justified because of the added pressures that a negligence claim could have on the victim and on children.[124]

Laurenson J observed that, at least in New Zealand, criminal appellants commonly put forward incompetence of their counsel as a ground for an appeal.[125] He also perceived that parties in family law litigation were prone to complain about the conduct of advocates.[126] He was concerned that, without an immunity, practitioners might be less willing to practise in family or criminal law.[127]

Out of Court Work

Salmon J adopted the view of Kirby J in *Boland v Yates*,[128] that it is difficult to justify the extension of the immunity beyond the immediate pressures of the courtroom and therefore, any immunity should stop at the door of the court.[129] Laurenson J agreed with this view.[130]

Thus, it was the view of the High Court of New Zealand in *Lai v Chamberlains*[131] that, whilst the immunity should continue to apply in relation to criminal and family law litigation, it should only apply to conduct by the advocate in court and no longer apply to any out of court work. The court was bound by the decision of the Court of Appeal in *Rees v Sinclair* and so, for the moment the full immunity exists in New Zealand to the same extent as in Australia, but *Lai v Chamberlains* demonstrates that the New Zealand judiciary is sensitive to changed circumstances in that country since the establishment of the immunity in 1974, and the Court of Appeal may well abolish the immunity when an appropriate case comes before it.

Canada

Advocates' immunity has never formed part of the Canadian legal system. It was considered but rejected in *Demarco v Ungaro*,[132] not only because the Canadian legal profession is undivided and all Canadian lawyers can sue for their fees, but also because Krever J found that there was no empirical evidence that liability in negligence had distracted Canadian lawyers from their duty to the court.[133]

Krever J also thought it would be difficult to introduce immunity into Canada at a time when the general trend was to extend rather than to limit the types of activity which could lead to liability in negligence.[134] He also noted that most Canadian lawyers were required to carry liability insurance, implying that any claims were more likely to be borne by insurers rather than lawyers themselves.[135] He also expressed concern about the quality of some of the 1,000 new lawyers entering the legal profession in Ontario each year, often without adequate training and supervision by more experienced and competent counsel.[136] Those clients who suffered loss at the hands of such negligent legal representation were entitled to compensation.

TAKAI KAPI v MALADINAS LAWYERS AND ANOTHER

The courts of Papua New Guinea were not called upon to consider the question of immunity from suit directly until early 2003, when the case of *Takai Kapi v Maladinas Lawyers and Another* [137] came before the National Court.[138] The case arose from a dispute surrounding the plaintiff's election to Wabag Open Seat. Daniel Kapi, the runner-up, challenged the result on the basis that the plaintiff was not qualified to nominate and stand, as he was not enrolled as a voter in that electorate at the time, as required by s103(2) and (3) of the*Constitution*. The petition was dismissed on the basis that the plaintiff was on the Common Roll for Wabag. Kapi successfully appealed to the Supreme Court. Although it is not spelt out in

the facts, this would appear to be on the basis that, although the plaintiff was on the Roll, the enrolment did not take place until after the required time. The Supreme Court ordered a by-election, which was lost by the plaintiff.

The plaintiff then commenced action in the National Court, alleging that Maladinas Lawyers were negligent in failing to act in accordance with his instructions and failing to lead evidence to show that he was on the roll at the required time. The defendants applied for the claim to be dismissed as frivolous.[139] The first ground in support of the application was that the defendants were entitled to immunity from suit, in accordance with English common law, adopted at independence.[140] The plaintiff argued that the principle of immunity should not be applied, as it was inappropriate to the circumstances of Paua New Guinea.

The Supreme Court refused the application for dismissal, holding that immunity from suit was not available to lawyers in Papua New Guinea. In doing so, the Court considered itself to be departing from the common law of England on the grounds that it was inappropriate to local circumstances. As discussed above, the courts of New Guinea are entitled to disregard common law of England which is inapplicable. In fact, they are required to do so.[141] However there are two queries arising from the decision in this case: first, was it necessary to 'depart' from the English common law; and secondly, were the reasons given for the inapplicability of the principle justifiable? These questions require separate consideration.

Was it Necessary to 'Depart' from the English Common Law?

The attention of the court in *Takai Kapi* was not drawn to the abrogation of advocates' immunity in *Arthur JS Hall v Simons*[142] and the court appears to have assumed that immunity from suit was still alive and well as a principle of English common law, citing both*Rondel v Worsley* and *Saif Ali v Sydney Mitchell & Co (a firm)*.[143] The court also cited the New Zealand decision of*Rees v Sinclair*,[144] which extended the immunity to some out of court work, but it did not consider the later New Zealand decision of *Lai v Chamberlains* or cases from other common law countries, such as the Canadian decision of *Demarco v Ungaro*[145] which, together with *Arthur JS Hall v Simons*, could have been relied on as persuasive authority supporting the court's decision to reject the principle of immunity.

When *Takai Kapi* was before the court *Rondel v Worsley* was clearly part of the law in Papua New Guinea, having been decided before the cut-off date for adopted common law, that is, 15th September 1975,. But the court also referred to *Saif Ali v Sydney Mitchell & Co*, which was decided after the cut-off date. The court cited *Saif Ali* for the proposition that the 'immunity is based on public policy considerations'[146] and used *Saif Ali* as its point of reference when considering the various public policy arguments in support of the immunity.[147] Thus the court in *Takai Kapi* did not appear to be overly concerned about the impact of the cut-off date or the *Underlying Law Act*.

According to the test in *Vian Guatal v PNG*, it could be said that *Saif Ali* did form part of the law of Papua New Guinea as it could be read as merely declaring the pre-existing limits of advocates' immunity, rather than creating any new law. It will be recalled[148] that in *Saif Ali* the court was required to determine the limits of the immunity to out of court work, an issue which had been left in an ambiguous state following *Rondel v Worsley*. It is also likely that the court in *Takai Kapi* wished to rely on *Saif Ali* in rejecting advocates' immunity, given that no immunity had been granted in that case.

Arthur JS Hall v Simons[149] was also decided after the cut-off date. The question again arises as to the weight that should have been given to the decision in the system of precedent operating in Papua New Guinea. At the very least, it was relevant as persuasive authority, but did it have any greater significance? As discussed above, this depends on whether the decision was declaratory or innovative.[150]*Arthur JS*

Hall v Simons[151] did not overrule *Rondel v Worsley*.[152] Instead, as discussed above, the House of Lords indicated that it was developing the law to bring it up to date with modern circumstances, stating that, 'the world has changed since 1967', and that, 'we live in a consumerist society in which people have a much greater awareness of their rights'.[153] Thus the decision was innovative rather than declaratory and prevented by the cut-off date from becoming part of the law of Papua New Guinea.

Even if *Rondel v Worsley* had been overruled, according to the distinctions drawn in *Vian Guatal* v *PNG,*[154] *Arthur JS Hall v Simons* would still have been tantamount to new law, as the House of Lords would have been overruling its own decision. In *Vian Guatal*, which is discussed above,[155] the court cited the House of Lords overruling its own previous decisions as a clear example of making new law.[156]

Clearly then, *Arthur JS Hall v Simons*[157] is not part of the common law of England adopted in Papua New Guinea. To that extent Kandakasi J was correct in stating that he was departing from the common law. However, he was clearly mistaken in his view that, '[t]here is also no argument that, these cases [that is, *Rondel v Worsley, Saif Ali v Sydney Mitchell and Co*, and *Rees v Sinclair*] correctly represent the law on immunity available to barristers'. Given that the common law potentially in force in Papua New Guinea includes the principle of immunity, it becomes relevant to discuss whether inapplicability was established.

Is Immunity from Suit Applicable to the Circumstances of Papua New Guinea?

As discussed above,[158] there is little direct guidance in the Constitution as to how applicability should be measured. Whilst the factors to be taken into account are now listed in the *Underlying Law Act*, the process and weighing of those factors is left to the court's discretion. In *Takai Kapi v Maladinas Lawyers and Another* the finding of inapplicability was based on two main grounds: the distinction between a fused and divided profession; and the total dependence on lawyers by their uneducated clients. The validity of these grounds will now be examined.

Inapplicability based on the nature of the legal profession in PNG

The first ground that the court took into account was that Papua Guinea had a fused legal profession. Whilst the presence of a fused profession has been used in other jurisdictions as a reason why an immunity would be inappropriate to that jurisdiction,[159] Kandakasi J relied on different aspects of a fused profession to those previously relied upon.

Firstly, Kandakasi J referred to the immunity as a 'barristers' immunity' and appears to have presumed that the immunity was not available to solicitors. However, in both English cases cited by His Honour, the House of Lords had clearly indicated that the public interest required that solicitors also be immune when performing work which would attract an immunity if carried out by a barrister.[160]

Apart from this general distinction Kandakasi J was of the view that this ground gave rise to three distinguishing factors:

- A direct relationship with the client;
- The duty to the client and the court;
- The 'cab rank' principle.

Direct relationship with the client

With regard to the first factor, His Honour considered that, in Papua New Guinea:[161]

> [A] barrister has no opportunity to hear directly form the client as to his instructions but [is

> obliged] to act only on his brief from the instructing solicitor. ... [W]here there is a single system such as ours, the immunity may lose its justification because a lawyer can be both a solicitor and a barrister in terms of the kind of work that he has to do. He deals directly with his client. It would thus, really matter what instructions a client gives to his lawyer.

This ground is less than convincing. Kandakasi J appears to believe that, when briefed by a solicitor, barristers in other jurisdictions rely solely on the brief as supplied by the instructing solicitor. This is not the case and, 'In almost every case in which a barrister is instructed to represent a client, the first and extremely important step is the client conference.'[162]

His Honour expressed the view that it was this difference which had led the Supreme Court and National Courts to urge parties to take action for professional negligence, which they had done on several occasions.[163] Whilst the cases cited do not, on closer examination, support the view that the variance in approach is based on the fusion of the profession, they do present a firm view that action against lawyers is available in Papua New Guinea for negligence. However, even if these remarks were not*obiter*, there is doubt as to whether cases decided between Independence and the passing of the *Underlying Law Act* form part of the law. Even if they do, these particular cases can be distinguished on the basis that the negligence referred to did not occur in the course of advocacy.[164] For example, in *Rabaoul Shipping Ltd v Ruru*,[165] the negligence consisted of a failure to file and serve a notice of appeal within time, filing a notice of entry of appeal without being ready to proceed and failure to proceed expeditiously. These tasks were not 'intimately connected' with the way in which the case was to be presented in court and did not require any balancing of the duty to the client against the duty to the court, the traditional justification for the immunity. Thus, even in those countries where the immunity remains intact, these failures would not have been protected by the immunity.

Duty to the client and to the court

With regard to the second factor, as part of his distinction between a fused and divided profession, Kandakasi J implied that solicitors in a divided profession and lawyers in a fused profession, such as in Papua New Guinea, did not owe as strong a duty to the court as did barristers. He said,

> [A] lawyer in Papua New Guinea has a duty both to his client who he deals with directly and the Court. That is to be contrasted with a barrister in jurisdictions elsewhere where the duty is owed to the Court fearlessly and independently'.[166]

From a historical perspective, solicitors have a strong association with the court. During the 16th and 17th centuries, when the differences between the two branches of the professions were still developing, barristers were admitted to practice and disciplined by the Inns of Court whereas 'attorneys' were admitted and subject to discipline by the court. As stated by Holdsworth:

> The attorney was never allowed to forget that he was an officer of the court and subject to its discipline. The barrister, on the other hand, was in no sense an officer of the court, and was much less directly under its control ... .[167]

In the 1939 decision of *Myers v Elman*[168] the Privy Council was in no doubt that English solicitors owed a duty to the court and that, where this was in conflict with the duty to the client, it was the duty to the court which must prevail.[169] Kandakasi J's comments may have referred to the lack of a contractual duty of care owed by barristers to clients, but this basis for the immunity had been dispelled in *Rondel v Worsley*.[170] Similarly, in the other English case to which his Honour referred,*Saif Ali v Sydney Mitchell & Co*,[171] the House of Lords had confirmed that a barrister did owe a duty of care in negligence in

relation to non-advocacy work. Thus, in relation to the immunity and the duty to the court, it is not valid to draw distinctions between barristers and solicitors.

The courts in Papua New Guinea have taken the opportunity to emphasise the duty to the court in several cases. In *the State v Sasoruo*,[172] for example, Sevua, J, stated that, 'Apart from their duty to their clients, [lawyers] also have a duty to the court.'[173]

There is no doubt that the duty to the court endures in a fused profession. The *Lawyers Professional Conduct Rules 1989* (PNG) provide that the lawyer's duty of fidelity to the client is subject to the duty to the court. The rules go on to specify in detail some of the main elements of that duty.[174] As discussed above, the fact that lawyers are subject to a detailed code of conduct, reducing the likelihood of a breach of the duty to the court, was one of the factors influencing the abolition of the immunity from suit in England.[175] Further, lawyers in Papua New Guinea are now obliged to take out professional indemnity insurance, another factor considered relevant by the House of Lords.[176] However, other changes of circumstance, considered influential in the decision to change the law in England, such as the introduction of case management and wasted costs orders against lawyers in civil cases, have yet to be introduced in Papua New Guinea,.

Cab rank principle

The third factor that the court took into account under this ground was that the cab rank principle did not apply in Papua New Guinea. Kandakasi J points out that:

> [A] lawyer [in Papua New Guinea] always has the right to decide whom to act for and on what terms. If he decides to accept instructions from a client, then he holds out to that client that he has the necessary expertise, skills and time to attend to his case and [that] he will do that to the best of his abilities.

This appears to overstate the effect of the cab rank rule, which has always been subject to the barrister having the time and expertise to deal with the case in question.[177] In any event, if the compulsion to take clients involves a risk that they will not be represented by someone with the necessary expertise, that is surely an argument against adopting the cab rank rule in Papua New Guinea rather than for the inapplicability of the principle of immunity from suit.

Inapplicability based on the dependence on lawyers by uneducated clients

The second ground taken into account has the widest implications. His Honour stated that:

> [M]ost people in the country are illiterate. Their level of knowledge and understanding of the law is very limited except for lawyers. This is even the case for some well to do Papua New Guineans but not trained in the law. There is hence, a case of total dependence on lawyers for proper legal advice and representation of their client's interest in the Courts or in any transaction that involves a lawyer.[178]

The general level of education and understanding of matters such as law and commerce in developing countries are obviously very different from the level prevailing in England and Wales.[179] The question is whether this difference makes certain common law principles, '*inapplicable or inappropriate to the circumstances of the country'*. Regional courts have discussed the relevance of the levels of educational and sophistication in sentencing cases.[180] However, as mentioned above, there is surprisingly little discussion of this in the application of substantive common law principles by courts of the South Pacific region.[181]

One case where the question was explored, albeit in a different context, is *Maeaniani v Saemala,*[182] which arose in Papua New Guinea's neighbour, Solomon Islands. There it was also asked whether illiteracy and lack of business acumen were grounds for departing from the common law. In this case, the defendant signed a document stating that he had received money from the plaintiff as full settlement for his land. He later refused to execute the transfer document and the plaintiff sued for specific performance. The defendant sought to set up a plea of *non est factum* on the basis that he had not read the document as he was illiterate and that it had been explained to him as being a document concerning a loan by the plaintiff to the defendant to purchase tools and equipment to build a house on the land as a joint enterprise. Daly CJ held that the principles were still appropriate but that local circumstances would be taken into account when the evidence was assessed. The Chief Justice stated that:

> At the early stages of development to which we have attained we still have many people who are not familiar with the written word or with the implications of signing documents. Nevertheless the words with which Lord Wilberforce [in *Gallie v Lee* [1970] 2 WLR 1078] ends the passages cited above remain entirely apt to our circumstances. On the facts of an individual case a court may be more ready in Solomon Islands to conclude that the consent of a man from, for example, a rural area was truly lacking and that nevertheless he acted responsibly and carefully according to his own circumstances in signing or affixing his mark to the document. But the test remains the same; it is the evidence and circumstances which differ. I venture to suggest that a Solomon Islands Court would always approach the evidence as befits this nation rather than as befits a country at a different stage of development. [183]

In this case the plea of *non est factum* was not established. Daly CJ took account of the fact that the defendant was a carpenter and builder, who had lived and worked in the capital for twenty-five years, before returning to Malaita Island. He operated a number of taxis in the capital, was articulate and intelligent, and could be described in the broader sense as a business man.

A less obvious example is *Australia and New Zealand Banking Group Limited v Ale,*[184] which arose in Samoa. The court raised the question of whether common law doctrines were applicable to the South Pacific. In that case the plaintiff bank sought to recover an overpayment made when it had miscalculated the exchange rate for AUD800, paid to it by the defendant's daughter. Instead of WST1,496, the daughter received in exchange a bank draft for WST17,506, which she sent to the defendant. The question arose whether this sum could be recovered in quasi-contract or whether all civil disputes had to fall within contract or tort. In the Supreme Court Ryan CJ considered that this dispute,[185]

> [M]ust be rather bemusing for the pragmatic bystander in the South Pacific half a world away from the esoteric discussions taking place in the Courts of England. ... It is a pity that English law does not take a ... realistic approach. For my part I am quite satisfied that that the courts of Western Samoa should not be bogged down by academic niceties that have little relevance to real life.

Whilst His Lordship did not mention the level of education directly, he obviously had this in mind when referring to the irrelevance of academic niceties and the bemusing effect of esoteric legal points. The need to keep things suitably simple seems to have been uppermost in his mind in adopting the United States approach and proceeding on the basis that there had been an unjust enrichment, without distinguishing between the form and nature of the gain received.[186]

These cases, one confirming the applicability of English common law and the other denying it, do not convey any real guidance on when or how different levels of education and business acumen should be taken into account when considering whether to apply common law. However, it is clear that these are relevant factors, the significance of which will depend on the context of the case. Hence it was certainly

open to Kandakasi J to take this into account in the present case. A case by case approach accords with the dictates of schedule 2.2(4), but is unhelpful for predicting the outcome of disputes which are referred to the courts.

Other Grounds for Retaining Immunity

In making his decision on immunity, Kandakasi, J was concerned to dispose of one other public policy consideration discussed in *Rondel v Worsley*. This was the suggestion that allowing action for negligence against advocates would result in a retrial of the original action, and that this would, 'prolong litigation and create the risk of inconsistent decisions, which would bring the administration of justice into disrepute.'[187] His Honour did not think that this would be the case and pointed out that there were two separate claims; the result in the case against the lawyer for negligence would not effect the original decision. Rather than bringing the system into disrepute, Kandakasi, J thought the threat of court action might improve the standard of lawyers' diligence, a point also made in*Arthur JS Hall v Simons*,[188] the House of Lords decision abolishing the immunity, which does not appear to have been brought to the court's attention.

Another point worthy of mention is that *Takai Kapi v Maladinas Lawyers and Another* [189] answers one of the two questions regarding adjectival law, which was discussed above. His Honour clearly felt entitled to take judicial notice of circumstances which he considered relevant to the applicability of common law, rather than requiring evidence to be adduced on point.

The reluctance to sue lawyers, evidenced by the lack of previous action, in spite of the encouragement given by the courts to litigants to do so,[190] perhaps reflects the status of lawyers as "Big Men" and the mystique of the law. These factors may also have bred the myth of immunity, which eventually became a reality, in England.

CONCLUSION

It is ironic that the gesture of independence by the National Court of Justice, in departing from what it considered to be the English common law, in fact led to the same conclusion as the House of Lords; that the immunity was no longer appropriate in the circumstances of the local society. However, the National Court of Justice did so for very different reasons, relying on the nature of the local profession and the high levels of illiteracy and lack of legal understanding in Papua New Guinea, which led to a "total dependence" of clients upon their lawyers as justification for making lawyers liable in negligence.

The House of Lords did not rely on actual client vulnerability but preferred to emphasise the increasing client and public *expectation* that every wrong should attract a remedy. The House of Lords was also reassured by empirical evidence from other common law jurisdictions without the immunity that the advocate's duty to the court would not be compromised if it were abolished.

The future of immunity from suit in other Commonwealth countries where it is applied is uncertain. Whilst there is some indication that New Zealand will at least restrict the immunity to in-court work, and perhaps further restrict it to family and criminal law matters, the same cannot be said of Australia. Apart from different local circumstances, the High Court has recently indicated that it has no intention of slavishly following the decision of the House of Lords in *Hall v Simons*.[191] Whilst the High Court appears to remain cautious about removing the immunity from suit of advocates, it is clearly unwilling to extend the principle to other professions. When recently considered the question of immunity from suit for doctors, in the context of whether damages are recoverable for wrongful birth,[192] Hayes J pointed out that to accede to the argument that damages were not recoverable would give doctors immunity from suit in this type of case. His Honour considered that this sounded, 'a warning note that care was required

before reaching the conclusion' that damages were not recoverable. In the event, the High Court held that damages were recoverable.

Circumstances surrounding lawyers and their relationship with the client have changed radically since the time of *Fell v Brown.*[193] In particular, there has been a relaxation of restraints on lawyers which reflect a more commercial approach to the practice of law. In the context of changes such as the legitimisation of multidisciplinary practice,[194] allowing the immunity to continue appears to be a case of allowing lawyers to have the best of both worlds. It is of course arguable that abolition of the immunity by the courts could have an unforeseen retrospective affect. It may be better left to the relevant legislature, allowing time for prior consultation with interested parties, the proper examination of local circumstances and time for advocates to arrange additional indemnity insurance.[195] A legislative scheme could also provide for specific areas of immunity, if any are to be allowed.

Papua New Guinea has made its position on immunity clear. It is yet to be seen whether other South Pacific countries will follow this lead. It may be some time before the courts have an opportunity to decide the point because there is, generally, no culture of suing for negligence. Suing a "Bigman", such as a lawyer is an even more remote possibility. However the position regarding other common law principles is less certain. It is clear that different levels of education and business acumen are factors to be taken into account by the court in assessing applicability of English common law. The precise significance of that factor will depend on the context of the case. A case by case approach accords with the dictates of schedule 2.2(4), but is unhelpful for predicting the outcome of disputes which are referred to the courts.

Countries of the South Pacific and other former colonies are searching for their own law and jurisprudence. The ability to discard the English common law on the grounds of inapplicability is an important factor in this. It permits the courts to take advantage of principles based on 'manifest justice and good sense which can be applied with advantage to peoples of every race and colour all the world over' whilst discarding the 'off-shoots' incorporating 'refinements, subtleties and technicalities which are not suited to other folk'.[196] The flexibility of the common law, referred to in the opening quotation to this article, is also an important factor. Where a principle of common law is applicable, but not totally in keeping with local circumstances, it may be moulded to fit its new surroundings.

Care must be taken if the common law is to be used to best effect in these developing legal systems. In 1973, in the lead up to Independence in Papua New Guinea, the then Chief Minister, Michael Somare, threw out the following challenge:[197]

> We want to build a framework of laws and procedures that the people of Papua New Guinea can recognise as their own – not something imposed on them by outsiders. There is great scope for imagination and creativity in making the law responsive to the needs of the people and I put this challenge to all of you concerned about the future of our nation: how can we build a legal system that will truly serve the people's needs.

Over twenty years later, this challenge has yet to be met.

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[1] Per Denning, LJ in *Nyali Ltd v Attorney General* [1956] 1QB 1 at 16-17, cited in *Okuk v Fallscheer* [1980] PNGLR 274 at 286.

[2] See, eg, *Western Pacific (Courts) Order 1961* (UK), s 15(1).

[3] For discussion of the applicability of the common law in the context of breach of promise, see Owen Jessep, 'Compensation for Breach of Promise to Marry in Papua New Guinea' (1997) 25 *Melanesian Law Journal* 1.

[4] Unreported, National Court, Papua New Guinea, Civ Cas N2323, 20 January 2003.

[5] For further discussion on the role of customary law in South Pacific legal systems see Kenneth Brown, 'Customary Law in the Pacific: An Endangered Species?' (1999) 3 *Journal of South Pacific Law* 2, accessed via www.vanuatu.usp.ac.fj/journal_splaw/Articles/Articles_main.html on 30 September 2004.

[6] The World Fact Book, accessed via www.cia.gov/cia/publications/factbook/geos/pp.html on 15 April 2004.

[7] World Development Indicators Database, August 2003, accessed via http://devdata.worldbank.org /external/CPProfile.asp?CCODE=PNG&PTYPE=CP on 14 April 2004. See the comments on lack of education in *In Re Willingal* [1997] PGNC 7 (10 February 1997), from www.paclii.org

[8] Ibid.

[9] Richard Grimes, A *Report on the Findings of the Judicial Training Needs Feasibility Study for the Chief Justices of the South West Pacific*, November 1996, Suva: USP, p 27.

[10] For a discussion of the work of the Constitutional Planning Committee, see Bernard Narakobi, 'History and Movement in Law Reform' in David Weisbrot (ed), *Social Change in Papua New Guinea, Australia*: (1982)14 to 16; Eric Kwa, *Constitutional Law of Papua New Guinea* (2001)chap 2.

[11] *Report,* 1975, Port Moresby: Government Printing Office. See further, David Weisbrot, 'The Impact of the Papua New Guinea Constitution on the Recognition and Application of Customary Law' in Peter Sack (ed) *Pacific Constitutions* (1982) p271 at 271.

[12] *Constitution of Papua New Guinea 1975*, s 11.

[13] *Constitution of Papua New Guinea 1975*, s 9(g).

[14] For a commentary of the status of common law under the *Constitution of Papua New Guinea*, before the passing of the *Underlying Law Act 2000*, see JK Gawi, 'The Status of the Common Law Under the Constitution', in Ross De Vere, Duncan Colquhoun-Kerr, and John Kaburise (eds), *Essays on the Constitution of Papua New Guinea* (1985) 1.

[15] *Constitution of Papua New Guinea 1975*, Sch 2.1 (1).

[16] *Constitution of Papua New Guinea 1975*, Sch 2.2 (1). The rules of practice of English courts are not part of the received common law: *Pierce v Motor Vehicles Insurance (PNG) Trust* [1988-89] PNGLR 480.

[17] *Constitution of Papua New Guinea 1975*, Sch 2.3 (1).

[18] *Constitution of Papua New Guinea 1975*, Sch 2.2 (1).

[19] Common law is only to apply if it is consistent with custom: Sch 2.2(1)(c). See further the conflicting views of Sir Mari Kapi, DCJ and Miles J in *In the Matter of M.T. Somare* [1981] PNGLR 265, 285 to 286 and 303 to 304; Jean Zorn and Jennifer Corrin Care, 'Everything Old is New Again: the Underlying Law Act of Papua New Guinea' (2003) *LAWASIA Journal*, 61.

[20] But see *Madaha Resena v PNG* [1991] PNGLR 171, where it was confirmed that custom is to be given preference in the development of the common law and the courts and the legal profession were reprimanded for applying 'adopted English common law' as the 'sole legal source', at p 190. For a discussion of the reasons that have been advanced for the courts' reluctance to promote customary law, see Jean Zorn and Jennifer Corrin Care, *Proving Customary Law in the Common Law Courts of the South Pacific* (2001) Monograph No. 2, British Institute of International and Comparative Law pp1 to 3; David Weisbrot, above n 11, 278.

[21] Law Reform Commission of Papua New Guinea, *Declaration and Development of Underlying Law*, Working paper 4, September 1976.

[22] Law Reform Commission of Papua New Guinea, *The Role of Customary Law in the Legal System*, Report No 7, November 1977.

[23] In the interim, the pre-independence *Native Customs (Recognition) Act 1963* was reenacted as the *Customs Recognition Act* [Cap 19]. However, whilst dealing with the subject matter referred to in Sch 2.1(3), the Act treats custom as fact rather than law and fails to promote customary law in preference to common law. For views on the reasons why it took so long for the Underlying Law Act to be passed see Bernard Narakobi, above n 10, 18.

[24] For a criticism of this approach see Jean Zorn and Jennifer Corrin Care, above n 19. See also Derek Roebuck, D, 'Custom, Common Law and Constructive Judicial Lawmaking' in Ross De Vere, Dencan Colquhoun-Kerr and JoHn Kaburise,(eds), *Essays on the Constitution of Papua New Guinea* (1985) 127 at p 128 to 129, commenting on the law making power conferred on the courts by Sch 2.3 of the *Constitution*.

[25] *Underlying Law Act 2000*, No. 13 of 2000, ss 4, 6 and 7.

[26] *Underlying Law Act*, s 16.

[27] Ibid, ss 16 and 17.

[28] As at 1 November 2003, PngInLaw, the PNG Legal information network published by Niu Media Pacific Pty Ltd, lists 6 cases in the Judgments Catchwords Index under 'Customary Law' as opposed to 132 under 'Damages for Personal Injuries', 74 under 'Criminal Evidence' and 26 under 'Contract'.

[29] Cook Islands, Fiji, Kiribati, Nauru, Niue,Tokelau and Tonga. In some of these countries, the phrase, 'in force in England', is used: for example, Custom and Adopted Laws Act 1971 (Nauru), s 4(2).

[30] *Constitution of Papua New Guinea*, Sch 2.2 (1).

[31] For an example of this see *Hart v O'Connor* [1985] AC 1000 where the Privy Council overturned a judgment of the New Zealand Court of Appeal on the basis that it had misunderstood and misapplied settled rules of common law and equity with regard to the contractual capacity of a mentally disabled person; see also *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank* [1986] 1 AC 1.

[32] *Cheung v Tanda* [1984] SILR 108.

[33] *Underlying Law Act*, s 7(5)(d).

[34] Section 21.

[35] See, for example, *Australia and New Zealand Banking Group Ltd v Ale* [1980-93] WSLR 468.

[36] Sch 2.2(1)(c).

[37] Sch 2.3(1).

[38] Section 4(3)(d).

[39] Section 4(3)(e).

[40] For criticism of the courts insistence on applying the common law rather than developing the underlying law see, eg, David Weisbrot, Papua New Guinea's Indigenous Jurisprudence' and the Legacy of Colonialism' (1988) 10 *University of Hawaii Law Review* 1.

[41] Exception may be found as, for example, in *Okuk v Fallscheer* [1980] PNGLR 274 at 286; approved in *Resena v PNG* [1991] PNGLR 174 at 182.

[42] This is the approach which has been taken in Solomon Islands: see *Tanda v Cheung* [1984] SILR 108. In *Vian Guatal v PNG* [1980] PNGLR 97 the court appears to have considered that the normal standards of proof applied.

[43] [1980] PNGLR 274 at 285 to 286.

[44] Section 4(4)(b).

[45] [1981] PNGLR 230.

[46] Unreported, National Court, Papua New Guinea, Civ Cas N2323, 20 January 2003.

[47] *Tanda v Cheung* [1984] SILR 108.

[48] See further, Jennifer Corrin Care, Don Paterson & Tess Newton, *Introduction to South Pacific Law* (1999) 72 to 74.

[49] [1980] PNGLR 97.

[50] [1981] PNGLR 230. See also *Cheung v Tanda* [1984] SILR 108, interpreting a similar provision in Solomon Islands.

[51] [1981] PNGLR 230 at 242.

[52] This theory is sometimes referred to as the 'Blackstonian' approach. It was rejected in *The State v Allan Woila* [1978] PNGLR 99 at p103.

[53] Sch 2.4.

[54] 2000, s 16.

[55] Colonial is used here to describe what is referred to in the Act as, 'decisions of any courts exercising jurisdiction in Papua New Guinea before Independence': s 21.

[56] Sch 2.2(3).

[57] (1791) 1 Peake 131 at 132.

[58] *Swinfen v. Lord Chelmsford* (1860) 5 H. & N. 890 (157 ER 1436); *In re Brasseur and Oakley* [1896] 2 Ch 487; *Rondel v Worsley* [1969] 1 AC 191, 232.

[59] [1964] AC 465.

[60] [1969] 1 AC 191.

[61] A dock brief is similar to the duty lawyer scheme which operates in some countries where a lawyer attends at court to represent otherwise unrepresented defendants who are to appear at court that morning. No instructing solicitor is involved.

[62] Ibid, 258.

[63] Ibid, 255.

[64] Ibid, 228.

[65] Ibid, 230.

[66] Ibid, 232.

[67] Ibid, 274-6

[68] [1969] 1 AC 191, 227 (Lord Reid).

[69] *Rondel v Worsley* [1969] 1 AC 191, 232 (Lord Reid), 267 (Lord Pearce); *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, 215 (Lord Wilberforce), 224 (Lord Diplock), 227 (Lord Salmon).

[70] *Courts and Legal Services Act 1990* s62(1).

[71] *Rondel v Worsley* [1969] 1 AC 191, 232 (Lord Reid), 267 (Lord Pearce); *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, 215 (Lord Wilberforce), 224 (Lord Diplock), 227 (Lord Salmon); *Giannarelli v Wraith* (1988) 165 CLR 543, 559.

[72] [1969] 1 AC 191, at 258.

[73] (1860) 5 H & N 890, 923.

[74] [1969] 1 AC 191, at 259.

[75] Ibid, 265.

[76] [1980] AC 198.

[77] Ibid, 211.

[78] [1980] AC 198, 226.

[79] [1974] 1 NZLR 180.

[80] Ibid 187, adopted in *Saif Ali v Sydney Mitchell and Co* [1980] AC 198 at 215 (Lord Wilberforce), 224 (Lord Diplock), 232 (Lord Salmon), 236 (Lord Keith)

[81] [1964] AC 465.

[82] [1980] AC 198, at 218 to 219 (Lord Diplock), 229, 231 (Lord Salmon).

[83] [2002] AC 615.

[84] Justice Stephen Charles, 'The Immunity of the Advocate' (2003) 23 *Australian Bar Review* 1, 6.

[85] Lord Steyn, Lord Browne-Wilkinson, Lord Hoffman and Lord Millett.

[86] [2002] AC 615, 682.

[87] *Ibid*.

[88] *Ibid*, 692.

[89] *Ibid*, 682 (Lord Steyn).

[90] *Supreme Court Act 1981* (UK) s 51, as substituted by *Courts and Legal Services Act 1990* (UK) s 4, which had been held to be applicable to both barristers and solicitors: *Ridehalgh v. Horsefield* [1994] Ch. 205.

[91] Lord Woolf, Master of the Rolls, 'Final Report to the Lord Chancellor on the Civil Justice System in England and Wales' 1996.

[92] Introduced through the *Civil Procedure Rules 1998.*

[93] Section 3.4(2)(a), 682 (Lord Steyn).

[94] Article 6(1): 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and

impartial tribunal established by law. ...'

[95] Ibid, 711.

[96] Ibid, 734 (Lord Hutton, as it sought to advance the administration of justice).

[97] Ibid, 707 (Lord Hoffmann).

[98] Ibid 680-1 (Lord Steyn).

[99] Ibid 681.

[100] (1988) 165 CLR 543.

[101] [1980] AC 198.

[102] (1988) 165 CLR 543, 576 (Wilson J), 596 (Dawson J). Wilson J spent more time comparing the position in Australia with that in Canada, where no immunity existed but he declined to rely on the empirical evidence from Canada which questioned the need for an immunity: 578.

[103] [2002] 1 AC 615.

[104] (1999) 167 ALR 575.

[105] (1999) 167 ALR 575, [148].

[106] (1999) 167 ALR 575, Gleeson CJ [96-97], Callinan J [361-362], Gummow J [112-4].

[107] (1989) 16 NSWLR 713.

[108] (1999) 167 ALR 575, [107]. Her Honour is now retired from the bench.

[109] [2004] HCA Trans118 (20 April 2004); 119 (21 April 2004), from www.austlii.org

[110] The legal advisers had told the client accused of rape that he, 'had no defence to the charge'. On the basis of that advice he pleaded guilty at the committal hearing. At the trial he pleaded not guilty, but the evidence of his earlier guilty plea was admitted. On appeal, to the Court of Criminal Appeal the conviction was overturned and at a retrial the client was acquitted.

[111] *D'Orta-Ekenaike v Victoria Legal Aid* [2004] HCATrans 118 (20 April 2004), 12 (McHugh J), from www.austlii.org

[112] Ibid.

[113] [2002] 1 AC 615. For instance, in addition to McHugh J's reference to the 'spectre of the feast', Gummow J appeared to question the practicalities of the decision in *Hall v Simons*, commenting that their Lordships did not appear to have engaged in too much, 'nitty-gritty hands-on analysis based on experience of what actually happens in court. It does seem, with respect to them, to be rather rarefied in the committee room where they sit overlooking the Thames.': *D'Orta-Ekenaike v Victoria Legal Aid* [2004] HCATrans 118 (20 April 2004), 33, from www.austlii.org

[114] [1974] 1 NZLR 180.

[115] [1980] AC 198, 215 (Lord Wilberforce).

[116] (1988) 165 CLR 543.

[117] [2003] 2 NZLR 374.

[118] [1974] 1 NZLR 180.

[119] [2003] 2 NZLR 374, Laurenson J at [91].

[120] *Giannarelli v Wraith* (1988) 165 CLR 543; Justice Stephen Charles, above n 84, 18.

[121] Ibid, [95], [96].

[122] Ibid, [107].

[123] Ibid, [104].

[124] Ibid, [122-3].

[125] Ibid, [122].

[126] [2003] 2 NZLR 374, [105].

[127] Ibid [111].

[128] (1999) 167 ALR 575.

[129] *Lai v Chamberlains* [2003] 2 NZLR 374, [60], citing *Boland v Yates Property Corporation* (1999) 167 ALR 575, [136-7] per Kirby J.

[130] *Boland v Yates Property Corporation* (1999) 167 ALR 575, [135].

[131] [2003] 2 NZLR 374.

[132] (1979) 95 DLR (3d) 385 (Ontario High Court of Justice). Although this case was only a single judge decision by Krever J, it is cited in case law and academic debate as reflecting the position in Canada: Simon Potter, 'The Barrister Immunity Rule: The Canadian Perspective', paper presented at the 13th Commonwealth Law Conference, Melbourne 13-17 April 2003, 11, http://www.liv.asn.au/conferences /submit_paper.html.

[133] Ibid, 396-7.

[134] (1979) 95 DLR (3d) 385, 402.

[135] Ibid, 405.

[136] Ibid, 405.

[137] Unreported, National Court, Papua New Guinea, Civ Cas N2323, 20 January 2003.

[138] Sitting as the Court of Disputed Returns.

[139] Under O12 r40, National Court Rules.

[140] As to the meaning of 'common law' adopted under Sch 2.2 of the Constitution of Papua New Guinea see *Mount Kare Holdings Pty Ltd and Another v Akipe and Others* [1992] PNGLR 60. The second ground of the application was that there was no evidence of negligence on the facts, and is not relevant to this discussion.

[141] Constitution of Papua New Guinea, 1975, sch 2.2, para (1).

[142] [2002] AC 615.

[143] [1980] AC 198.

[144] [1974] 1 NZLR 180

[145] (1979) 95 DLR (3d) 385, discussed above.

[146] Unreported, National Court, Papua New Guinea, Civ Cas N2323, 20 January 2003, at 5.

[147] Ibid, at 8.

[148] See above under heading, 'The Extent of the Immunity'.

[149] [2002] AC 615.

[150] See above, *The State v Pokia* [1980] PNGLR 97; *Vian Guatal* v *PNG* [1981] PNGLR 230.

[151] [2002] AC 615.

[152] [1969] 1 AC 191.

[153] [2002] AC 615, at 682, per Lord Steyn.

[154] [1981] PNGLR 230. See also *Cheung v Tanda* [1984] SILR 108, interpreting a similar provision in Solomon Islands.

[155] See under the heading, 'The Cut-Off Date'.

[156] *Vian Guatal* v *PNG* [1981] PNGLR 230 at 242.

[157] [2002] AC 615.

[158] See under the heading, 'Applicability to Local Circumstances'.

[159] *Demarco v Ungaro* (1979) 95 DLR (3d) 385 (Ontario High Court of Justice).

[160] *Rondel v Worsley* [1969] 1 AC 191, 232 (Lord Reid), 267 (Lord Pearce); *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, 215 (Lord Wilberforce), 224 (Lord Diplock), 227 (Lord Salmon). As mentioned previously, the modern tendency is therefore to refer to the immunity as an 'advocates' immunity' to emphasise the fact that it applies to the role of an advocate, whether that role is undertaken by a barrister or a solicitor.

[161] At 5 to 6.

[162] Inns of Court School of Law, *Conferencing Skills* (1997).

[163] See *Kia Temai v Motor Vehicles Insurance (PNG) Trust* [1994] PGNC 1 (1 February 1994), from http://www.paclii.org and other cases cited in *Takai Kapi v Maladinas Lawyers and Another,* unreported, National Court, Papua New Guinea, Civ Cas N2323, 20 January 2003 at 6 to 7.

[164] *Busina Tabe v The State* [1983] PNGLR 10, which involved failure to adduce relevant evidence at trial.

[165] Unreported, National Court, PNG, N2022, 8 December 2000.

[166] Unreported, National Court, Papua New Guinea, Civ Cas N2323, 20 January 2003 at 8.

[167] William Holdsworth, *A History of English Law*, Vol VI (1966 reprint), at 433.

[168] *Myers v Elman* [1940] AC 282, 319.

[169] *Ibid* 293.

[170] [1969] 1 AC 191.

[171] [1980] AC 198.

[172] [1997] PNGLR 676, at page

[173] See also *Curran v the Independent State of Papua New Guinea and Others* [1994] PNGLR 230; *The State v Sheekiot* [1986] PGNC 3 (16 May 1986), from http://www.paclii.org

[174] Rule 15, paragraphs (1) to (17).

[175] *Arthur JS Hall & Co v Simons* [2002] AC 615 at 672.

[176] *Takai Kapi v Maladinas Lawyers and Another,* unreported, National Court, Papua New Guinea, Civ Cas N2323, 20 January 2003 at 7 to 8.

[177] In *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 at 222 to 223, Lord Diplock doubted whether, in practice, the cab rank rule often compelled a barrister to take work that he was otherwise unwilling to accept. This view was endorsed by Dawson J in *Giannarelli v Wraith* (1988) 165 CLR 543 at 594.

[178] Unreported, National Court, Papua New Guinea, Civ Cas N2323, 20 January 2003 at 7.

[179] See the literacy statistics set out above. The ignorance of most Papua New Guineans about contracts

was seen by the Law Reform Commission as an important factor in requiring amendment of the principles of freedom of contract by statute: *Fairness of Transactions,* Working Paper No 5, October 1976, at 1.

[180] The *Customs Recognition Act* [Cap 19] permits cultural factors to be taken into account as a mitigating factor but has been held not to permit the formulation of qualatively different punishments: in sentencing: *State v Uname Auname* , unreported, Supreme Court, Papua New Guinea [1980] PNGLR 510. The *Criminal Law (Compensation) Act 1991* (PNG) formalises the use of customary compensation in criminal sentencing.

[181] Exception may be found as, for example, in *R v Noboi-Bosai* [1971-72] PNGLR 271;*Okuk v Fallscheer* [1980] PNGLR 274 at 286; approved in *Resena v PNG* [1991] PNGLR 174 at 182.

[182] [1982] SILR 70.

[183] Ibid, at 75.

[184] [1980-3] WSLR 468 at 469.

[185] Ibid, at 469.

[186] Ibid.

[187] Unreported, National Court, Papua New Guinea, Civ Cas N2323, 20 January 2003 at 5.

[188] [2002] AC 615.

[189] Unreported, National Court, Papua New Guinea, Civ Cas N2323, 20 January 2003.

[190] Ibid.

[191] *D'Orta-Ekenaike v Victoria Legal Aid* [2004] HCATrans 118 (20 April 2004), 119 (21 April 2004), from www.austlii.org.

[192] *Cattanach and Another v Melchior and Another* [2003] HCA 38 at paras 244 to 246.

[193] (1791) 1 Peake 131 at 132.

[194] On 7 August 2003 the Standing Committee of Attorneys-General of Australia agreed to model legislation for multi-disciplinary and national legal practice. Multi-disciplinary practice is already allowed in New South Wales: Solicitors' Rules 39 and 40. The Canadian Bar Association is also in favour of allowing multi-disciplinary practice: *The Report of the International Practice of Law Committee on Multi-Disciplinary Practices and the Legal Profession* (1999). The British government has recently launched a wide-ranging review of the legal profession, including review of the prohibition from practicing with non-lawyers.

[195] This was the view of Kirby J in *Boland v Yates Property Corporation Pty Ltd* (1999) 167 ALR 575, 607. Conversely, the House of Lords felt that, as it was the courts which had created the immunity, it should be the courts which abolished it: *Arthur JS Hall v Simons* [2002] 1 AC 615, 704 (Lord Hoffmann).

[196] Per Denning, LJ in *Nyali Ltd v Attorney General* [1956] 1QB 1 at 16-17, cited in *Okuk v Fallscheer* [1980] PNGLR 274 at 286.

[197] PNG Government Paper, 1974, p 14, cited in David Weisbrot, above n 11, 271.