nity also extends to statements made out of court in the course of preparing evidence to be given in court. Accordingly a similar immunity against claims based on negligence is necessary to enable advocates to conduct litigation properly.

Collateral challenge

For a client to successfully sue his lawyer for negligence in conducting his litigation would imply proving that he would have won a case which he in fact lost. This gives rise to the possibility of apparently conflicting judgments which could bring the administration of justice into disrepute. In criminal matters, this could especially lead to results which could bring the administration of justice into disrepute. For example, a convicted criminal sues his lawyer based on the latter's negligence. In seeking to disprove the claim, the lawyer may or may not be able to reassemble the witnesses who gave evidence for the prosecution. However, the question of whether the client should have been acquitted will be tried on evidence which is bound in some respects to be different, before a different tribunal and in the absence of the prosecution. The civil court may find, on a balance of probability, that the lawyer was in fact negligent and that, had he conducted the defence with reasonable skill, the client would have been acquitted. Damages may be awarded – but what happens then? Does the successful client remain in prison despite the fact that a judge has said that there was an even chance that he would have been acquitted? What about the fact that the prosecution has had no opportunity to say that his conviction was correct? Accordingly, it is said that two allow clients to sue for negligence would allow a 'collateral challenge' to a previous decision of another court.

The House of Lords considered the above arguments in the light of the principle of equal treatment. In terms of this principle it should be taken as a point of departure that in general, English law provides a remedy in damages for a person who has suffered an injury as a result of professional negligence. Members of other professions, and the public in general, are therefore bound to view with some scepticism the claim that the public interest requires of lawyers to have special immunity from liability for negligence.

With reference to the divided loyalty argument (the duty owed by advocates to both client and the court) the House of Lords remarked that both branches of the legal profession are nowadays governed by detailed codes of conduct. It cannot therefore possibly be negligent to act in accordance with one's duty to the court and should an advocate decide that he ought to tell the judge about some authority, which is detrimental to his case, this cannot conceivably amount to negligence.

The cab rank argument (see above) was summarily dismissed by the court as being intuitive, incapable of verification and without any real substance. In most cases, clients find advocates to represent them whilst the latter act without any professional compulsion.

The witness analogy was also dismissed on the basis that neither a witness nor a judge owes a duty of care to anyone in respect of court proceedings. The judge only has a public duty to administer justice in accordance with his oath. The fact that the advocate may be the only person involved in the trial process who is liable to be sued for negligence is because he is the only person who has undertaken a duty of care to his client.

Referring to the argument of conflicting judgments, the House of Lords was of the opinion that not all re-litigation of the same issue will be manifestly unfair to a party or bring the administration of justice into disrepute. It is pointed out that when re-litigation is for one or other of these reasons an abuse, a court will have the power to strike it out. Accordingly, the possibility of re-litigation cannot be argued as a reason for giving lawyers immunity against all actions based on their negligence in the conduct of litigation. In the words of Lord Hoffman, to grant immunity in all actions would be tantamount to burning down the house to roast the pig.

In conclusion, according to Lord Steyn, there could be no reason to fear a flood of negligence suits against advocates. The mere doing of his duty to the court by the advocate to the detriment of his client could never be called negligent. Also, it will not be easy to establish negligence against an advocate. The courts can be trusted to differentiate between errors of judgment and true negligence. Also, a plaintiff who claims that poor advocacy resulted in an unfavourable outcome, will face the very great obstacle of showing that a better standard of advocacy would have resulted in a more favourable outcome. Unmeritorious claims against advocates will be struck out.

Finally, one of the functions of tort law is to set external standards of behaviour for the benefit of the public. Even though standards at the Bar are generally high, in some respects there is room for improvement. Exposure of isolated acts of incompetence at the bar will strengthen rather than weaken the legal system. More importantly, public confidence in the legal system is not enhanced by the existence of the immunity. The appearance is created that the law singles out its own for protection, no matter how flagrant the breach of the barrister. Today the practice of law has become more commercialised: barristers may now advertise; they may now enter into contracts for legal services with their professional clients; they are now obliged to carry insurance; the basis of the immunity of barristers has gone.

Judiciary in Zimbabwe

Statement on Zimbabwe by the President of the Constitutional Court and the Acting Chief Justice

Individual members of the South African judiciary are being approached by journalists to comment on events in Zimbabwe. In order to avoid individual judges being placed in this position to the invidious exclusion of others, we consider it appropriate to state that, as we have both indicated previously, we are deeply concerned about the disrespect for the rule of law in Zimbabwe and for the position of our Zimbabwean judicial colleagues and indeed all of the people of Zimbabwe whom the rule of law is designed to protect. All South African judges have taken an oath of office to uphold our Constitution which includes the rule of law. We believe that all South African judges are concerned when the rule of law is eroded, particularly in a neighbouring country. The escalating attacks on Chief Justice Gubbay and his colleagues in Zimbabwe have increased such concern.

Judges do not ordinarily make statements about events which are subject to political debate in their country. The fact that most judges have remained silent during the course of the debate on Zimbabwe should not be understood as evincing a lack of concern on their part for the independence of the judiciary, the rule of law or its erosion in Zimbabwe. We trust that in the light of this statement there will be an understanding of this fact, and no further pressure on individual judges to make public statements on this matter.