question should be whether there was a decision of the High Court upon the specific point. Apparently the Supreme Court of Canada has now, too, refused to follow a decision of the House of Lords. (see note in 40 A.L.J.281.)

In view of the recent Australian cases, and now the statement by the House of Lords that they will not treat prior decisions of the House as necessarily binding, there seem to be grounds for suggesting that in New Zealand, decisions of the House of Lords, at least in the future, should be regarded as highly persuasive but not binding on New Zealand courts. The freedom which the House has given itself to deviate from its previous decisions will undoubtedly mean that it will adapt this approach more to suit contemporary conditions in England and the principles it lays down may become more particularly applicable to English conditions and less to conditions in Commonwealth countries such as Australia, Canada or New Zealand. In these circumstances it would be unrealistic for New Zealand Courts to continue to hold themselves necessarily bound by the House of Lords.

A. H. Young, M.A.

TORT

Ever since the famous judgment of Lord Atkin in *Donoghue* v. *Stevenson* [1932] A.C.562, the test of foreseeability as to who may be a neighbour has been considered by the courts. In *Candler* v. *Crane, Christmas & Co.* [1951] 2 K.B.164, the Court of Appeal held that in the absence of any contractual or fiduciary relationship between the parties, a negligent mis-statement causing financial loss was not actionable. This case was later overruled by the House of Lords in *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.* [1964] A.C.465, and the "neighbour" principle was extended to an action in tort for negligent mis-statement. That there may be a neighbour where a negligent mis-statement results in financial loss is now certain, what remains uncertain, is the question as to who may be that neighbour.

The English Court of Appeal in *Rondel* v. *W.* [1966] 3 All E.R. 657, has now answered the question in part. A barrister does not have a neighbour. The Court of Appeal (Lord Denning, M.R., Danckwerts and Salmon L.JJ.) unanimously held that on the grounds of public policy (and, per Lord Denning, M.R., and Danckwerts L.J., by long-standing usage) an action cannot be maintained against a barrister for negligence on his part in the conduct of a criminal or civil cause, whether at first instance or on appeal; nor does an action lie against him for negligence in work or preparation for the conduct of a cause, such, for example, as drawing pleadings.

The Court also held, Salmon L.J. dissenting, that the same applies to work in chambers in advising, settling documents and conveyancing in matters which may never come before the Court.

The court further held, Salmon L.J. not concurring, that the immunity of a barrister from being sued for negligence as an advocate does not extend to a solicitor acting as advocate.

The facts of the case are of small significance. The plaintiff had been convicted and sentenced nearly six years previously on a charge of causing grievous bodily harm. The present action alleged negligence

on the part of the defendant (who had represented the plaintiff on a dock brief) in (a) failing to cross-examine prosecution witnesses to show that the injuries were not caused by the use of a knife, (b) failing to elicit from another witness that the injured man had friends present who could have helped him in the fight and (c) failing to elicit that the plaintiff was employed as a rent collector and caretaker and was authorised to go on the premises where the assault took place. The court was of the opinion that, if an action did lie against a barrister for negligence in the conduct of a case, the plaintiff's claim did not disclose a cause of action. The question to be answered was whether or not an action *could* lie.

The barrister's immunity against an action has been accepted for many years whereas no such immunity has been extended to any other professional man. The reason for such favour is to be found in a fiction derived from that traditional period where an advocate was compared with an ancient Roman orator who practised for honour, with any reward being merely gratuitous. The fact that a barrister could not maintain his reputation, and sue for his fees, led to the position where he was deemed to be incapable of making a contract for such fees. The fiction extended itself to the obverse — if the barrister could not sue his client, then the client was not permitted to succeed in an action against his counsel for negligence or breach of duty.

There are several instances throughout the years where the courts have expressed the fiction. In 1860 the celebrated case of *Swinfen* v. *Lord Chelmsford* (1860) 5 H & N 890. The Court of Exchequer unanimously held that,

> . . . no action will lie against counsel for any act honestly done in the conduct or management of the cause. . .

and in *Kennedy* v. *Brown* (1863) 13 C.B.N.S.677, the Court of Common Pleas held that the relation of counsel and client in litigation creates an incapacity for hiring and service as an advocate.

The law remained settled in that there was no access to counsel for negligence by way of contract. Then in 1964, in *Hedley Byrne & Co. Ltd.* v. *Heller & Partner Ltd.* [1964] A.C.465, the House of Lords enunciated a new principle of law, which can be taken from the speech of Lord Morris of Borth-y-Guest at p.502.

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

The facts of this case did not concern or even refer to a barrister, yet the principle was sufficiently wide to circumnavigate the fiction of an inability to contract.

This was the case before the Court of Appeal in *Rondel* v. *W.* and unanimously the Court held that liability in tort, as opposed to contract, did *not* extend to a barrister. The reasoning of the court is positive and concrete when compared to the historical fiction of an inability to contract. The fiction was not entirely displaced by Lord Denning M.R., and Danckwerts L.J., but now appears under the head of long-standing usage or custom and is secondary to the more logical and readily accepted principle of public policy.

The principle of public policy is stated by Lord Denning to be based on two distinct grounds, first, the barrister's allegiance to a cause of truth and justice, a duty in honour and not in law, and, secondly,

the necessity of what would amount to a retrial of the original offence under the auspices of a civil trial determining whether or not counsel had been negligent in his conduct of that original case. This would possibly lead to the position stated by Lord Denning at p.666,

> We should have a Criminal Court sentencing him . . . to imprisonment on the footing that he was guilty, and a Civil Court awarding him damages on the footing that he was not guilty. No system of law could tolerate such inconsistency.

The law in England in respect of a barrister's immunity from an action in tort or in contract has now been settled. The position in New Zealand is however still subject to confusion, with the profession in the majority performing a dual role of a barrister and solicitor. In an early New Zealand case of *Watt & Cohen* v. *Willis* (1910) 29 N.Z.L.R. 615, the Court of Appeal unanimously held that where a solicitor, appearing as counsel in an action for specific performance, had not satisfied himself that his client's title (in fact a sub-lease) was one which could be enforced on an unwilling purchaser then that solicitor was guilty of actionable negligence.

Rondel's case has not changed the law, as can be seen by the unequivocal statement by Lord Denning at page 666

> . . . He [a solicitor] is under a contractual duty to use care; and this extends to his conduct of a cause as well as an advocate as anything else.

and, further, a statement by Danckwerts L.J. at p.670 in considering the judgment of Lawton, J. in *Swinfen* v. *Lord Chelmsford* (*supra*)

> The learned judge seems to have thought that the immunity of a barrister from proceedings in respect of advocacy in Court extended to solicitor advocates as well as barristers. In this view in my opinion he was plainly wrong.

The profession within New Zealand was considered by Perry J. in *Robinson & Morgan-Coakle* v. *Behan* [1964] N.Z.L.R.650, wherein the learned judge held that there was no fusion of the professions but a dual role, and that, where a person acted both as a solicitor and counsel, he could maintain an action to recover his fees. The obverse — that a barrister and solicitor can be sued in contract — may be inferred.

The importance of *Rondel* v. *W.* is therefore restricted in New Zealand by the existent circumstances, for in this sparsely populated country there are indeed very few practising barristers who are not also solicitors. It is perhaps relevant here to state s.13 of the Law Practitioners Act 1955:

> Barristers of the Court shall have all the powers, privileges, duties and responsibilities that barristers have in England.

A person practising solely as a barrister in New Zealand can therefore pray immunity from an action founded in either tort or contract.

I. McN. Douglas.