SUPREME COURT OF QUEENSLAND

CITATION:	*Lewis v Hillhouse & Ors* [2005] QCA 316
PARTIES:	**TERENCE MURRAY LEWIS** (plaintiff/appellant) **v** **IAN BRUCE HILLHOUSE** (first defendant/first respondent) **DAVID ALAN BURROUGH** (second defendant/second respondent) **ESTATE OF RICK GLYNN WHITTON** (deceased) (third defendant/third respondent)
FILE NO/S:	Appeal No 2387 of 2005 SC No 2144 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	26 August 2005
DELIVERED AT:	Brisbane
HEARING DATE:	10 August 2005
JUDGES:	McMurdo P, Keane JA and Wilson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal dismissed** **2. The appellant is to pay the respondents' costs of, and incidental to, the appeal to be assessed on the standard basis**
CATCHWORDS:	PROCEDURE - SUPREME COURT PROCEDURE - QUEENSLAND - PRACTICE UNDER RULES OF COURT - PLEADING - STATEMENT OF CLAIM - where appellant commenced an action for negligence against the respondents - where the respondents had been engaged to act for the appellant as his solicitors during the course of the appellant's criminal trial on charges of corruption and any subsequent appeal - where the appellant was convicted after a trial by jury of 15 charges of corruption - where the appellant unsuccessfully appealed against these convictions - where the appellant alleged that he had instructed the respondents to conduct his appeal in conformity with a notice of appeal that included a ground relating to the wrongful admission of evidence at the appellant's trial - where the evidence

admission ground was not pressed on appeal - where appellant claimed that this failure to conduct his appeal in conformity with his instructions amounted to negligence on the part of the respondents - where respondents applied to have statement of claim struck out as an abuse of process on the grounds that it amounted to a collateral attack on the appellant's criminal convictions - where learned primary judge ordered that the appellant's statement of claim be struck out - whether the learned primary judge had been right to strike out the appellant's statement of claim as an abuse of process

TORTS - NEGLIGENCE - WHERE ECONOMIC OR FINANCIAL LOSS - CARELESS ACTS OR OMISSIONS - where appellant claimed that the failure of his solicitors to advance a particular argument on his appeal against conviction resulted in the loss of a chance of a successful appeal and retrial - whether the loss of a right of appeal or of a retrial can be said to be the loss of something of value - whether the appellant's claim for damages for a lost prospect inevitably relied on showing that he had lost the opportunity to have his convictions quashed

Arthur J S Hall & Co v Simons [2002] 1 AC 615, considered
D'Orta-Ekenaike v Victorian Legal Aid [2005] HCA 12; (2005) 214 ALR 92, applied
Giannarelli v Wraith (1988) 165 CLR 543, considered
Malec v J C Hutton Pty Ltd (1990) 169 CLR 638, cited
Rogers v The Queen (1994) 181 CLR 251, applied
Sellars v Adelaide Petroleum NL (1994) 179 CLR 332, applied

COUNSEL: R J Copley for the appellant
G J Gibson QC, with K F Holyoak, for the respondents

SOLICITORS: John Neive O'Donoghue for the appellant
Coyne & Associates for the respondents

[1] **McMURDO P:** I agree with Keane JA's reasons for dismissing the appeal with costs to be assessed.

[2] **KEANE JA:** The appellant is the plaintiff in an action for damages for negligence and/or breach of contract against the respondents, his former solicitors. The appellant's action was commenced on 4 March 2004. It arose out of the circumstance that on 5 August 1991 the appellant was sentenced to 14 years imprisonment after being convicted on 15 counts of official corruption. The respondents had been engaged by the appellant to conduct his defence at the trial and also to attend to any subsequent appeal. Pursuant to this arrangement, the respondents conducted an appeal against the appellant's convictions. The appellant alleges that his instructions to the respondents were that the appeal was to be conducted in accordance with a notice of appeal dated 13 August 1991 which included as a ground of appeal the contention that the trial had involved a

miscarriage of justice by reason of the wrongful admission by the trial judge of evidence of systemic corruption within the Queensland Police force ("the evidence admission ground"). The appeal against the appellant's conviction was heard by this Court in January and February 1992. On 3 August 1992 the appeal was dismissed.

[3] The appellant now claims in his action against the respondents that the evidence admission ground was abandoned without his consent, contrary to his instructions and without affording him the opportunity to ensure that the evidence admission ground was presented to the court. In the action the appellant claims $470,000 damages for negligence and/or breach of contract. The respondents applied, pursuant to r 171 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR"), to strike out the appellant's statement of claim.

[4] The learned primary judge acceded to the respondents' application. His Honour held that the appellant's case for substantial damages inevitably involved the proposition that, had the evidence admission point been advanced on appeal, the appellant's conviction would have been quashed and he would not have been convicted on a retrial of the charges.[1] The learned primary judge concluded that this contention involved a collateral attack on the convictions, which had been upheld on appeal. It was, therefore, an abuse of the process of the court.[2] His Honour also held that the unfairness to the respondent in seeking to litigate these issues after the great lapse of time, and death of relevant witnesses, justified the conclusion that the action was an abuse of process. His Honour also concluded that the evidence admission ground was properly abandoned by the appellant's counsel at the appeal having regard to its poor prospects of success.[3]

The appeal

[5] On appeal the appellant attacks these conclusions of the learned primary judge.

[6] As to his Honour's conclusion in relation to the propriety of the abandonment of the evidence admission ground, the appellant contends that this conclusion depended upon issues of fact which were not ripe for determination in the proceedings before his Honour. The respondents, on the other hand, sought to maintain the judgment below on the basis that the evidence admission point was bound to fail and that, in any event, no breach of duty could have been involved in its abandonment. The respondents also sought to amend their notice of contention to argue that the appellant's action was bound to fail because of the advocate's immunity from suit. The appellant objected to the respondent's attempt to amend their notice of contention in this regard. In my opinion, it is not necessary to determine any of these issues because it is clear that the learned primary judge was correct in regarding the appellant's claim as an abuse of process.

[7] The appellant argues that the learned trial judge erred in regarding the appellant's case against the respondents as involving the proposition that the appellant would have been acquitted had the evidence admission point been pressed. The appellant contends on appeal that his case against the respondents does not involve this proposition, it being conceded by the appellant that such an argument would be "irrelevant and conjectural". Whether or not the basis given for the appellant's concession is sound, a claim based on the contention that the appellant's convictions

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1 *Lewis v Hillhouse & Anor* [2005] QSC 020; SC No 2144 of 2004, 23 February 2005 at [23].
2 *Lewis v Hillhouse & Anor* [2005] QSC 020; SC No 2144 of 2004, 23 February 2005 at [49].
3 *Lewis v Hillhouse & Anor* [2005] QSC 020; SC No 2144 of 2004, 23 February 2005 at [17].

were wrongly sustained on appeal is clearly an impermissible collateral attack upon convictions which have not been set aside.[4] Recognizing these difficulties no doubt, the appellant sought to advance a narrower case in his argument on appeal. This case was that the respondents' breach of duty caused the loss of the "prospect" of the quashing of his convictions. Before I consider this argument further, I should set out the relevant paragraphs of the appellant's statement of claim.

[8] Paragraph 24 of the appellant's statement of claim alleges that, by reason of the respondents' failure to ensure that the appellant had the opportunity to present the evidence admission ground to the Court of Appeal:

> "(a) the appeal failed;
> (b) the conviction was not quashed;
> (c) alternatively, the Plaintiff lost the prospect of a successful appeal with either the quashing of his conviction or the right to a trial on evidence properly admissible against the Plaintiff;
> (d) the Plaintiff thereby suffered loss and damage as particularized in paragraph 25 hereof."

[9] Paragraph 25 of the appellant's statement of claim is in the following terms:

> "In the premises, the Plaintiff has suffered loss and damage by reason of the Defendants negligence and/or breach of contract which the Plaintiff claims as follows:
> (a) $450,000 being the value of the loss of a right to a trial as aforesaid based upon the amount charged to the Plaintiff by the Defendants for assisting the Plaintiff to exercise such right;
> (b) $20,000 being the fees paid to appellant counsel for the incomplete appeal."

[10] It is apparent from these paragraphs of the appellant's pleaded case that, notwithstanding the protests in the appellant's submissions on appeal, it is indeed at least a part of the appellant's case that the neglect of duty with which the appellant now seeks to charge the respondents caused the appeal to fail with the result that the appellant's convictions were not quashed. This part of the appellant's case is necessarily concerned to establish that the appeal would have succeeded and his conviction would have been quashed had the evidence admission point not been abandoned. That is clearly a collateral attack on the decision of the Court of Appeal and of the decision of the jury. Strong reasons of public policy support the view that such an attack is an abuse of process. On appeal the appellant did not seek to argue otherwise.

[11] As I have said, the appeal was focused on that part of the appellant's case concerned to assert that the appellant lost "the prospect" or "the chance" of a successful appeal, and a fair trial. This narrower focus is said to avoid the objection that the appellant's action is a collateral attack on the convictions.

[12] In my respectful opinion, however, this way of formulating the appellant's case is confronted by two obstacles. The first is that the public policy against collateral attack on a judgment is also offended by the prosecution of a claim that an earlier decision which has not been set aside is **likely** to have been wrong so as to found a

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[4] *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 536, 541 - 542; *Rogers v The Queen* (1994) 181 CLR 251 at 273; *D'Orta-Ekenaike v Victorian Legal Aid* [2005] HCA 12 at [80]; (2005) 214 ALR 92 at 110 - 111.

claim for unlawfully inflicted damage. The second obstacle is that the principles which permit the recovery of damages for loss of a chance or loss of an opportunity have no application here. If the appellant cannot show that he remained wrongly convicted because the evidence admission point was not pressed on his behalf, he was not adversely affected by reason of the point not being taken. In short, unless the appellant can show that he remained wrongly convicted, he cannot show that he has suffered any loss at all.

The scope of public policy

[13] As to the first of these points, because the evidence admission point was not pursued, we are not here concerned with the immunity of an advocate from civil action in relation to the conduct of litigation. The legal rationale of that immunity is, however, relevant for present purposes. The authorities show that the immunity is a manifestation of a more fundamental public policy in favour of public confidence in the administration of justice and finality in litigation. That public policy precludes a final decision which has not been set aside being "called into question" in subsequent proceedings. Thus in *Giannarelli v Wraith*[5] Mason CJ said that it was unacceptably "destructive of public confidence in the administration of justice" to permit "litigation by unsuccessful litigants anxious to demonstrate that, but for the negligence of counsel, they would have obtained a **more favourable outcome in the initial litigation** . . . If the plaintiff were to succeed, [that] . . . would **undermine the status of the initial decision**." (emphasis added)

[14] In the same case Wilson J said:[6]

> "The situation is not to be compared with a case where an appeal is allowed, a decision set aside and a re-trial ordered. Such a course of events merely portrays the normal course of appellate review. It is altogether different where a disappointed litigant institutes a civil proceeding in a court of co-ordinate jurisdiction with a view to proving that the original decision was wrong by reason of counsel's negligence. If the negligence action succeeds, then **the original decision**, notwithstanding that it may have been affirmed on appeal, is **necessarily tarnished by the later inconsistent decision. Yet nothing can correct the record or interfere with the original judgment**. Furthermore, the result will have come about without the successful party to the original action being a party to the negligence action, which will fall to be determined in his or her absence. **These situations clearly have a capacity to bring the administration of justice into disrepute** . . ." (emphasis added).

To similar effect, Dawson J said:[7]

> "To allow the courts to be used to undermine [the court's] decision in other proceedings is clearly not in the public interest."

[15] In *Rogers v The Queen*[8] Deane and Gaudron JJ (with whom Mason CJ agreed),[9] in a passage cited with approval in the joint judgment in *D'Orta-Ekenaike v Victorian Legal Aid*,[10] referred to the Latin maxim *res judicata pro veritate accipitur* as

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5 (1988) 165 CLR 543 at 558.
6 *Giannarelli v Wraith* (1988) 165 CLR 543 at 573 - 574.
7 *Giannarelli v Wraith* (1988) 165 CLR 543 at 595.
8 (1994) 181 CLR 251 at 273.
9 (1994) 181 CLR 251 at 255.
10 [2005] HCA 12 at [77]; (2005) 214 ALR 92 at 110.

expressing the need, as a matter of public policy which is part of the common law, for "decisions of the courts, unless set aside or quashed, to be accepted as **incontrovertibly** correct" (emphasis added). Deane and Gaudron JJ went on to say: "That principle is not only fundamental, it is essential for the maintenance of public respect and confidence in the administration of justice".

[16] In the House of Lords in *Arthur J S Hall & Co v Simons*,[11] Lord Hoffman addressed "the possibility of apparently conflicting judgments which could bring the administration of justice into disrepute" in terms which comprehend arguments of the kind advanced by the appellant in the present case. His Lordship said:

> "A client is convicted and sent to prison. His appeal is dismissed. In prison, he sues his lawyer for negligence. The lawyer's defence is that he is not negligent but that, in any case, the client has suffered no injustice because whatever the lawyer did would not have secured an acquittal. In seeking to establish the latter point, the lawyer may or may not be able to re-assemble the witnesses who gave evidence for the prosecution. The question of whether the client should have been acquitted is then 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 finds, on a balance of probability, that the lawyer was negligent and that if he had conducted the defence with reasonable skill, the client would have been acquitted. Or perhaps that he would have had a 50 [per cent] chance of being acquitted. Damages are awarded. But what happens then? Does the client remain in prison, despite the fact that a judge has said there was an even chance that he would have been acquitted? Should he be released, notwithstanding that the prosecution has had no opportunity to say that his conviction was correct? Should it be referred back to the Court of Appeal, and what happens if the Court of Appeal, on the material before it, takes a different view from the civil judge? The public would not understand what was happening. So it was said that to allow clients to sue for negligence would allow a "collateral challenge" to a previous decision of another court. Even though the parties were different, this would be contrary to the public interest."

[17] The public policy favouring the preservation of confidence in the due administration of justice is, in my view, engaged by claims which are apt to diminish that confidence by undermining the status of the original decision which has not been set aside. To contend that the person adversely affected by that decision should be entitled to compensation on the footing that the decision is not "incontrovertible", but likely to have been wrong, is to offend public policy in this regard. The pursuit of that contention has "a capacity to bring the administration of justice into disrepute", at least while the earlier convictions stand.

[18] In *Arthur J S Hall & Co v Simons*, the House of Lords rejected the concept of an advocate's immunity from suit, but did so on the clear basis that the advocate's immunity was not necessary to preserve the public interest in preventing litigation which called into question the correctness of earlier decisions of the courts because the power of the courts to prevent abuse of their process was a sufficient means of

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11 [2002] 1 AC 615 at 687.

achieving that result. Further in this regard, Lord Steyn[12] and Lord Browne-Wilkinson[13] expressly said that an action for damages for negligence against an advocate in criminal proceedings may be allowed to proceed only where the conviction has been set aside. This is because it is only when the conviction has been set aside that the risk of conflicting judgments capable of bringing the administration of justice into disrepute can be avoided.[14]

[19] The joint judgment of Gleeson CJ, Gummow, Hayne and Heydon JJ in *D'Orta-Ekenaike v Victorian Legal Aid*[15] identified that public confidence in the administration of justice requires that justiciable controversies, once finally decided, are "not to be reopened except in a few narrowly defined circumstances" and reiterated that this was a fundamental consideration of public policy. In concluding that the advocate's immunity was fully supported by this consideration, rather than being rendered superfluous by it, their Honours in the majority in the High Court, differed from the conclusion of the House of Lords in *Arthur J S Hall & Co v Simons*. It is clear, however, that both decisions have affirmed the continuing and fundamental importance of the public policy which preclude a litigant from "calling into question" the outcome of earlier criminal proceedings while the final result, ie the conviction, stands.[16]

[20] In my opinion public policy, as elaborated in the authorities to which I have referred, precludes the prosecution of the appellant's action, even if it be limited to the claim that the appellant lost only the "prospect" of a successful appeal and subsequent acquittal, so long as the convictions stand. The making of such a claim necessarily calls into question the justice of the appellant's convictions.

The loss of a prospect

[21] In any event, I am of the opinion that the appellant's claim for substantial damages for negligence cannot be pursued on the basis that the appellant confines his claim to recover the value of a lost chance of a successful appeal and retrial.

[22] In order to establish a claim for the recovery of substantial damages for breach of duty in tort or contract, it must be shown on the balance of probabilities that the breach caused actual loss of something of value. It seems to me that in this case this means that the appellant must accept and discharge the burden of showing that if the evidence admission point was persisted in, it would have led to the quashing of the convictions and the appellant's acquittal. If the appellant cannot show that it is more probable than not that he would have had his convictions quashed and a verdict of acquittal had the point been taken, he cannot show that he suffered loss of anything of value flowing from the failure of his lawyers to persist with the evidence admission point.

[23] The appellant relied upon decisions such as *Malec v J C Hutton Pty Ltd*.[17] These cases are concerned with claims for damages where what has been lost as the result

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12 *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 at 679.
13 *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 at 685.
14 *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 at 706.
15 [2005] HCA 12 at [34]; (2005) 214 ALR 92 at 100.
16 *D'Orta-Ekenaike v Victorian Legal Aid* [2005] HCA 12 at [77], [162] - [165], [331] - [332]; (2005) 214 ALR 92 at 110, 132 - 133, 174.
17 (1990) 169 CLR 638.

of a breach of duty is an opportunity to receive a valuable benefit. The value of the chance which has been lost represents the quantification of the claimant's loss.

[24] In the present case, unless the appellant is able to show that the evidence admission point was a good point, ie that it would have been accepted and acted upon by the Court, he will have failed to show that he has lost anything of value. An opportunity to litigate, considered in the abstract and without regard for the prospects of a favourable outcome, is not something of value. Rather, it is an occasion of confrontation, conflict and expense. No litigant suffers any real loss by losing the opportunity to run up dry gullies. It cannot sensibly be said that the loss of "a right to an appeal" or "a right to a trial", without more, is a loss of something valuable. In the context of a claim for substantial damages, the loss of a right to an appeal or trial of criminal charges is, of itself, nothing more than the loss of the opportunity to be in peril of a conviction and to spend money to avoid that peril. It is only if the result of the appeal or trial was likely to be favourable in some sense that anything of value has been lost by the litigant. The client may suffer a loss in terms of wasted costs expended in the process of pursuing hopeless contentions, but such loss is plainly not what is claimed by the appellant in this case. It may indeed be the way in which the value of the appellant's loss is quantified in his statement of claim, but this is merely to recognize an inconsistency in the appellant's approach to the formulation of his claim, and hence another deficiency in the appellant's pleaded case.

[25] In *Sellars v Adelaide Petroleum NL*[18] after an exhaustive review of the authorities, the joint judgment of Mason CJ, Dawson, Toohey and Gaudron JJ concluded:

> "Notwithstanding the observations of this Court in *Norwest*, we consider that acceptance of the principle enunciated in *Malec* requires that damages for deprivation of a commercial opportunity, whether the deprivation occurred by reason of breach of contract, tort or contravention of s 52(1), should be ascertained by reference to the court's assessment of the prospects of success of that opportunity had it been pursued. The principle recognized in *Malec* was based on a consideration of the peculiar difficulties associated with the proof and evaluation of future possibilities and past hypothetical fact situations, as contrasted with proof of historical facts. Once that is accepted, there is no secure foundation for confining the principle to cases of any particular kind.
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> On the other hand, the general standard of proof in civil actions will ordinarily govern the issue of causation and the issue whether the applicant has sustained loss or damage. Hence the applicant must prove on the balance of probabilities that he or she has sustained **some** loss or damage. However, in a case such as the present, the applicant shows **some** loss or damage was sustained by demonstrating that the contravening conduct caused the loss of a commercial opportunity which had **some** value (not being a negligible value), the value being ascertained by reference to the degree of probabilities or possibilities. It is no answer to that way of viewing an applicant's case to say that the commercial opportunity was valueless on the balance of probabilities because to say that is to

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18 (1994) 179 CLR 332 at 355 (emphasis in original).

> value the commercial opportunity by reference to a standard of proof which is inapplicable."

[26] The appellant must, therefore, show that he suffered the loss of a "prospect" or "chance" or "opportunity" of **some** value. The only valuable opportunity identified in his pleading is the opportunity to have his conviction quashed. In the nature of things, being dependent upon a decision of the courts, that is something which either would or would not have happened. If the evidence admission point was good, it would have had beneficial consequences for the appellant, in terms of the quashing of his conviction and a new trial with the consequent likelihood of an acquittal. If it was a bad point, that is if it is more likely than not that it would have made no difference to the outcome of the prosecution, then the appellant lost nothing by reason of the point not being run. In saying that in the criminal proceedings in the present case nothing of value was lost by the failure to run a bad point, I mean to emphasize that the appellant is not seeking damages by way of compensation for costs wasted by reason of the failure to persist with the evidence admission point, and that this is not a case where the appellant's pleaded case sets up the possibility of some other beneficial result which might have ensued simply by reason of that point being persisted with. It is not alleged, for example, that had the point not been abandoned, the appellant and the Crown could, or would, have entered into some sort of plea bargaining negotiation in which an outcome could have been achieved which would have been "beneficial" to the appellant,[19] at least in comparison to that which did ensue. It is not alleged that, if the evidence admission point had been taken successfully on appeal, the Crown would not have pursued the prosecution of the appellant upon a retrial. It is doubtful that allegations of this kind could have responsibly been made, having regard to the public interest in achieving a final resolution, one way or the other, of the criminal charges against the appellant.

[27] In my opinion, if the appellant disclaims the burden of showing that the evidence admission point would more probably than not have led to the success of the appeal and the quashing of the conviction, then he disclaims an essential element of any case to recover substantial damages. In my opinion, the narrow case advanced by the appellant on appeal falls on the horns of a dilemma. To the extent that the appellant does not assert that the evidence admission point, if pressed, would have been effective, he does not accept the minimum burden required by law to show that he suffered the loss of anything of value. To the extent that he seeks to show the evidence admission point would have been effective, he plainly seeks to mount a collateral attack on his convictions without having first been successful in having those convictions set aside.

Conclusions and order

[28] These conclusions make it unnecessary for me to consider the other grounds on which the appellant's statement of claim were struck out by the learned primary judge.

[29] The appeal should be dismissed on the basis that the appellant's claim is an abuse of process. The appellant should be ordered to pay the respondents' costs of and incidental to the appeal to be assessed on the standard basis.

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19 Cf *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 637.

[30] **WILSON J:** I have read the reasons for judgment of Keane JA. I respectfully agree with the orders he proposes for the reasons he has given.