

Time to jump?

Is the end in sight for expert witness immunity? **Dr Chris Pamplin** considers the evidence



A leapfrog certificate has once again brought the issue of expert witness immunity under the spotlight. Early next year, the Supreme Court will hear an appeal in *Jones v Kaney* [2010] EWHC 61 (QB), [2010] 2 All ER 649 on whether expert witness immunity should remain.

As a matter of public policy, all witnesses in legal proceedings are protected from claims for damages resulting from anything said or done in court. The policy justification for this immunity is not to provide a benefit to the witness, but to help the courts reach just decisions by encouraging witnesses to express themselves freely. It was given classic expression by Salmon J in *Marrinan v Vibart* [1963] 1 QB 234, [1962] 1 All ER 869: "This immunity exists for the benefit of the public, since the administration of justice would be greatly impeded if witnesses were to be in fear that any disgruntled and possibly impecunious persons against whom they gave evidence might subsequently involve them in costly litigation." And, with the advent of conditional fee agreement funded litigation, that statement applies even more today than it did then.

The immunity concept

The concept of immunity is not statute based, but has its origins in case law. The leading case on the question of expert witness immunity is undoubtedly *Stanton v Callaghan* [1998] 4 All ER 961, 62 ConLR 1, decided by the Court of Appeal in 1998.

In *Stanton* the appellant had sued his expert for negligence when, at a meeting of experts, the expert had revised his opinion so as to undermine the appellant's claim against the insurers for subsidence in the property. The Court of Appeal upheld the expert's claim to immunity. In doing so, the court reaffirmed the immune status of expert reports which "can be fairly said to be preliminary to giving evidence in court",

even in circumstances where the experts are not called upon to give oral evidence. It also established that expert witnesses are immune from suit in respect of any agreements they may reach at meetings of experts ordered by the court.

Immunity under attack

However, this new-found certainty was dispelled all too soon. Just two years later, in *Arthur J S Hall & Co v Simons* [2000] 3 All ER 673, [2000] 2 FLR 245, the House of Lords abolished an advocate's immunity on the grounds that the advocate owed a duty of care to his client(s), and that immunity was not needed to ensure he would respect his overriding duty to the court. However, it upheld immunity from suit for witnesses giving oral testimony because that testimony should be given "freely without being inhibited by the fear of being sued". In taking this view, the court did not distinguish between expert witnesses and other types of witness.

As many observers quickly pointed out, expert witnesses, like advocates, owe an overriding duty to the court and often also have a professional duty of care to the client. Consequently, the court left scope for an argument that, unlike witnesses of fact, expert witnesses do not require such immunity.

Having survived the removal of an advocate's immunity, two years later the Court of Appeal was once again considering expert witness immunity. In *Phillips & Others v Symes & Others* the Court of Appeal, applying similar principles to those considered in *Hall*, asked whether "expert witnesses need immunity from a costs application against them as a furtherance of the administration of justice". The court took the view that such a safeguard was not needed and allowed an expert witness to be joined as a respondent in an action for the express purpose of making a large adverse costs order against him.

While this represented a potentially serious contraction of the protection the courts give to expert witnesses, in practice such orders would only be made when the expert witness had acted in "flagrant, reckless disregard of his duties to the court".

Immunity outflanked

While expert witnesses have protection from civil actions for damages, they have always been open to investigation by their professional regulators. In 2006 in *Meadow v General Medical Council* [2006] EWHC 146 (Admin), [2006] 2 All ER 329, Collins J tried to curb what he saw as the ability of professional regulators to outflank witness immunity.

Collins J, sitting in the Administrative Court, took pains to set out the long history of the witness immunity rule, which goes back at least as far as *R v Skinner* (1772). It was clear he wished to leave no doubt as to why the rule exists and its fundamental importance in the proper administration of justice. He went on to decide that its reach encompasses all disciplinary proceedings.

As already noted, the often-missed principle underpinning witness immunity is that it exists to protect the public, not the witness. One should not necessarily expect professional regulators to understand this, but it is fundamental to the proper determination of whether any shortcoming in a witness is serious enough to warrant any action against that witness. This is why Collins J felt it appropriate for the court to make that judgment.

Collins J's proposals meshed perfectly with the central tenets of the Better Regulation Executive's Principles of Good Regulation, www.bis.gov.uk/policies/better-regulation/better-regulation-executive, of being proportionate, accountable, consistent, transparent, and targeted. His proposals seemed so sensible because they stated that the authority granting the immunity, ie the court, was the only authority competent to remove it. It also seems natural that, since the decisions

of professional regulatory bodies, such as the General Medical Council (GMC), are appealed to the Administrative Division of the High Court, the regulatory tribunals are inferior courts. It is, therefore, logical that matters of expert witness performance arising in the civil and criminal courts might be referred down to the regulatory tribunals by those courts.

On a case-by-case basis, the court could determine whether an expert witness's performance, in the context of the litigation, had slipped so badly as to warrant referral down to the appropriate professional body. It would no longer be possible for dissatisfied parties in litigation, often at no cost to themselves, to do a side-run around witness immunity and engage experts in professional disciplinary proceedings.

Nothing in Collins J's decision left professional regulators impotent to deal with seriously flawed experts. Collins J simply stated that the court, ie the authority granting the immunity, should be the only gatekeeper competent to remove that protection.

However, the GMC was not to be cowed by a mere High Court judge. It went off to the Court of Appeal *General Medical Council v Professor Sir Roy Meadow* [2006] EWCA Civ 1390, [2007] 1 All ER 1, and was soon joined by the big guns in the form of the attorney general, who asked the court for permission to intervene. It was a matter of regret to many experts that the master of the rolls (Sir Anthony Clarke) delivering the lead judgment, and supported by Auld LJ and Thorpe LJ (heads of the criminal and family divisions respectively), completely overturned the proposals put forward by Collins.

Each of these cases chipped away at the principle of expert witness immunity. Then, in January 2010, in *Jones v Kaney*, Blake J considered whether a negligence claim against an expert witness should be struck out summarily on the basis of *Stanton*. In this case, just like in *Stanton*, the expert witness's opinion had changed at the meeting of experts. The action was settled for considerably less than it might have done but for the expert signing off on the joint statement in the terms that she did.

Leapfrogging

The claimant commenced negligence proceedings against the expert, seeking damages. The expert entered no defence on the merits but pleaded immunity under the principle in *Stanton*. Blake J held that *Stanton* was binding on both him and the Court of Appeal. Accordingly, he granted the claimant a "leapfrog certificate", enabling the claimant to apply for permission to appeal the question directly to the Supreme Court. Permission was granted and the date of the hearing has been fixed for early January 2011.

We shall have to wait to see what arguments the appellant puts forward. But in the lower court it was argued that *Stanton* was no longer binding law because the House of Lords decision in *Hall* undermined the reason for the policy

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of expert witness immunity. Given the frequency with which a supposed analogy between advocate and expert immunity is raised, this view is clearly an attractive line of argument for many lawyers. But it doesn't really hold, and not simply because the one thing an expert must not do is advocate. The logic of Collins J's judgment in *Meadow* is that conceptually the expert sits in court beside the judge, not beside those who instruct him. The duty is one owed to the court, so it should be the court that has a notional cause of action in negligence, rather than the litigant.

Future gameplan

If an expert witness has failed in this duty, he should be called to account, but by the court not the litigant. If the expert's position alongside the judge is accepted, then the logical course would be for the Supreme Court to permit claims of negligence against

expert witnesses to be heard as an appeal against the original trial. The outcome of such an appeal, where negligence is found, should be that the applicant has grounds for a retrial and the court can refer the expert to the appropriate professional regulator.

If, however, the Supreme Court does curb expert immunity to claims for damages, it will have to be mindful of how the greater public good of the proper administration of justice (through a ready supply of expert witnesses) can remain protected. If expert witnesses have their immunity to suit for damages removed, they—and their insurers—will need to be ready to deal with actions brought against them by disgruntled, possibly impecunious, litigants who lose their cases. How many professionals will trouble themselves to assist the court in such a situation?

Some have become inured to the claims of a dramatic reduction in the pool of experts if immunity is removed. But such people must reflect on the fact that expert witnesses are not the same as lawyers. Lawyers are part of the legal system, but expert witnesses are simply guests in it. Taken together with current efforts at the Ministry of Justice to cap expert witness fees and the potentially very serious consequences to an expert's livelihood of a professional disciplinary hearing arising from his occasional forensic work, loss of immunity to claims for damages will inevitably reduce the supply of experts to the court as experts use their time for better paid and less contentious work.

One step the Supreme Court might prudently take, if it removes immunity, is to adopt Collins J's approach and make the court the gatekeeper—only with the court's permission could any action in damages be initiated. That would strike the necessary balance between the right of the litigant to seek redress and the needs of the public to have access to experts. NLJ

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