Hilary Term
[2011] UKSC 13
On appeal from: [2010] EWHC 61(QB)

JUDGMENT

Jones (Appellant) *v* Kaney (Respondent)

before

Lord Phillips, President
Lord Hope, Deputy President
Lady Hale
Lord Brown
Lord Collins
Lord Kerr
Lord Dyson

JUDGMENT GIVEN ON

30 March 2011

Heard on 11 and 12 January 2011

Appellant
Roger Ter Haar QC
Daniel Shapiro
(Instructed by Hill Dickinson LLP)

Respondent
Patrick Lawrence QC
Charles Phipps
(Instructed by Berrymans Lace Mawer LLP)

LORD PHILLIPS

Introduction

1. "A feature of the trial is that in the public interest all those directly taking part are given civil immunity for their participation…Thus the court, judge and jury, and the witnesses including expert witnesses are granted civil immunity. This is not just privilege for the purposes of the law of defamation but is a true immunity" - *Arthur JS Hall & Co v Simons* [2002] 1 AC 615, 740, per Lord Hobhouse of Woodborough. In *Stanton v Callaghan* [1998] QB 75 the Court of Appeal held that the immunity of an expert witness extended to protect him from liability for negligence in preparing a joint statement for use in legal proceedings pursuant to RSC, Ord 38, r 38. The claim in this case relates precisely to such negligence and was, for that reason, struck out by Blake J on 22 January 2010. He certified, however, that the case involved a point of law of general public importance and granted a "leapfrog certificate" under section 12 of the Administration of Justice Act 1969, so that this appeal is brought directly from his decision.

2. The narrow issue raised by this appeal is whether the act of preparing a joint witness statement is one in respect of which an expert witness enjoys immunity from suit. Mr Ter Haar QC for the appellant was careful to emphasise at the outset of his submissions that he was not concerned to do more than establish that an expert witness enjoyed no immunity in relation to this activity. Inevitably, however, his submissions have raised the broader issue of whether public policy justifies conferring on an expert witness any immunity from liability in negligence in relation to the performance of his duties in that capacity. Surprisingly, this immunity has never been challenged in the past. It has simply been accepted that an immunity which protects witnesses of fact applies equally to prevent a client from suing in negligence the expert that he has retained.

The facts

3. In so far as this statement of the facts describes conduct on the part of the respondent, the facts are not proved but asserted in the particulars of claim. They are to be treated as true for the purpose of resolving the question of whether this claim was properly struck out. Understandably, the respondent has not suggested that the facts asserted do not disclose a good cause of action if she is susceptible to liability in negligence.

4. The action has its origin in a road traffic accident that occurred in Liverpool on 14 March 2001. The appellant was stationary on his motorcycle, waiting to turn at a road junction, when he was knocked down by a car driven by a Mr Bennett. Mr Bennett was drunk, he was uninsured and he was driving while disqualified.

5. The appellant suffered significant physical injuries, but these were not of such severity as to dwarf the significance of the psychiatric consequences of his accident. These were post traumatic stress disorder (PTSD), depression, an adjustment disorder and associated illness behaviour which manifested itself in chronic pain syndrome.

6. On 20 March 2001 the appellant instructed solicitors ("Kirwans") to act for him in personal injury proceedings. Kirwans instructed a consultant orthopaedic surgeon who advised that an opinion from a clinical psychologist would be of help. The respondent is a consultant clinical psychologist. In May 2003 Kirwans instructed her to examine the appellant and prepare a report for the purposes of litigation. She prepared a report dated 29 July 2003 in which she expressed the view, inter alia, that the appellant was at that time suffering from PTSD. Kirwans issued proceedings on 26 September 2003 against Mr Bennett and the Motor Insurance Bureau. The latter was replaced by the relevant insurer ("Fortis"). Fortis admitted liability on 17 February 2004, so that only quantum remained in issue.

7. Pursuant to instructions from Kirwans, the respondent carried out a further examination of the appellant and issued a second report dated 10 December 2004. This stated that the appellant did not have all the symptoms to warrant a diagnosis of PTSD, but was still suffering from depression and some of the symptoms of PTSD. A subsequent report prepared by Dr El-Assra, a consultant psychiatrist instructed by Fortis, expressed the view that the appellant was exaggerating his physical symptoms. The district judge ordered the two experts to hold discussions and to prepare a joint statement. The discussion took place on the telephone and Mr El-Assra prepared a draft joint statement, which the respondent signed without amendment or comment.

8. The joint statement was damaging to the appellant's claim. It recorded agreement that his psychological reaction to the accident was no more than an adjustment reaction that did not reach the level of a depressive disorder of PTSD. It further stated that the respondent had found the appellant to be deceptive and deceitful in his reporting, and that the experts agreed that his behaviour was suggestive of "conscious mechanisms" that raised doubts as to whether his subjective reporting was genuine.

9. When taxed by Kirwans with the discrepancy between the joint report that she had signed and her earlier assessments the respondent gave what Blake J rightly described as an unhappy picture of how the joint statement came to be signed, summarised as follows:

> " i) She had not seen the reports of the opposing expert at the time of the telephone conference;
>
> ii) The joint statement, as drafted by the opposing expert, did not reflect what she had agreed in the telephone conversation, but she had felt under some pressure in agreeing it;
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> iii) Her true view was that the claimant had been evasive rather than deceptive;
>
> iv) It was her view that the claimant did suffer PTSD which was now resolved;
>
> v) She was happy for the claimant's then solicitors to amend the joint statement. "

10. Kirwans sought permission to change their psychiatric expert, but the district judge would not permit this. It is the appellant's case that Kirwans were then constrained to settle his claim for significantly less than the settlement that would have been achieved had not the respondent signed the joint statement in the terms in which she did.

The current state of the law

11. The immunity of expert witnesses, as propounded by the Court of Appeal in *Stanton v Callaghan*, has a long history. This dates back over 400 years – see *Cutler v Dixon* (1585) 4 Co Rep 14b; 76 ER 886. Thus the immunity was established long before the development of the modern law of negligence and, in particular, the recognition of the possibility of liability for negligent misstatement. It also dates back to an era long before it became common for forensic experts to offer their services under contracts for reward. The immunity has its origin in a reaction to an actual or perceived tendency on the part of disgruntled litigants, or defendants in criminal proceedings, to bring proceedings for libel or slander against those who had given evidence against them. Thus the immunity originally took the form of absolute privilege against a claim for defamation and it extended

to all who took part in legal proceedings. In *Dawkins v Lord Rokeby* (1873) LR 8 QB 255, 263 Kelly CB stated:

> "The authorities are clear, uniform and conclusive, that no action of libel or slander lies, whether against judges, counsel, witnesses or parties, for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognized by law."

12. This privilege was extended, in the form of immunity from suit, to other forms of action in tort. In *Hargreaves v Bretherton* [1959] 1 QB 45 a man who had been convicted of fraud sought to bring a civil suit for perjury. In striking out the claim as disclosing no cause of action Lord Goddard CJ cited the statement of Lord Mansfield in *R v Skinner* (1772) Lofft 55 that "neither party, witness, counsel, jury, or judge, can be put to answer, civilly or criminally, for words spoken in office". He commented:

> "That is a perfectly clear statement by one of the greatest common lawyers that ever lived, that for words spoken by a witness 'in office', which means, of course, for this purpose in giving evidence, he cannot be put to answer either civilly or criminally."

In *Marrinan v Vibart* [1963] 1 QB 528 an attempt to circumvent the immunity by framing a claim in conspiracy to defame was roundly rejected by the Court of Appeal.

13. The typical situation where the immunity was invoked was where a witness or party had given evidence hostile to the plaintiff. A similar protection was afforded to counsel in relation to defamatory allegations made against a party, or indeed anyone else, in the course of his conduct of legal proceedings. This immunity overlapped with a wider immunity enjoyed by a barrister from a claim by his own client for failure to exercise reasonable skill and care in the conduct of litigation on behalf of the client. That immunity was unsuccessfully challenged in *Rondel v Worsley* [1969] 1 AC 191. In *Hall v Simons* [2001] 1 AC 615 the House of Lords abolished it on the ground that it could no longer be justified. The barrister is, however, still protected by absolute privilege from a claim in defamation in relation to statements made in the course of the conduct of legal proceedings – see *Medcalf v Mardell* [2002] UKHL 27, [2003] 1 AC 120, 142, per Lord Hobhouse.

14. I now propose to consider the authorities in greater detail. My particular objects in doing so are first to identify the reasons for the immunity from suit,

secondly to examine the circumstances in which it was accepted that this immunity extended to expert witnesses and thirdly to identify the reasoning that was applied first in holding that this immunity extended to barristers and then in holding that it did not protect them from actions for breach of duty of care. In the light of the authorities I shall then turn to consider whether the immunity can be justified.

The authorities

The reasons for the immunity

15. In *Cutler v Dixon* the reason given for rejecting the claim was that

> "if actions should be permitted in such cases, those who have just cause for complaint, would not dare to complain for fear of infinite vexation."

The continuous theme that runs through the cases is, in modern parlance, the chilling effect that the risk of claims arising out of conduct in relation to legal proceedings would have. It would make claimants reluctant to resort to litigation. It would make witnesses reluctant to testify. If they did testify, it would make them reluctant to do so freely and frankly. The cases emphasise that the object of the immunity is not to protect those whose conduct is open to criticism, but those who would be subject to unjustified and vexatious claims by disgruntled litigants.

16. There is no need to cite the many early authorities that support these propositions, for the reasons for the immunity were considered relatively recently by the House of Lords in *Darker v Chief Constable of the West Midlands Police* [2001] 1 AC 435. The issue in that case was whether witness immunity extended to protect police officers who were alleged to have fabricated evidence, as opposed to having given false evidence, from claims of conspiracy to injure and misfeasance in public office. The plaintiffs had been indicted for serious offences, but their trial had been permanently stayed on the grounds of abuse of process on the part of the police. Their Lordships identified the following justifications for witness immunity:

> i) To protect witnesses who have given evidence in good faith from being harassed and vexed by unjustified claims: per Lord Hope of Craighead at p 446 and Lord Hutton at p 464;

ii) To encourage honest and well meaning persons to assist justice; in the interest of establishing the truth and to secure that justice may be done: per Lord Hope at p 447 and Lord Clyde at p 460;

iii) To secure that the witness will speak freely and fearlessly: per Lord Clyde at p 461.

17. A further justification was identified by Lord Hope at p 446, namely to avoid a multiplicity of actions in which the value or truth of the evidence of a witness would be tried all over again. This justification had been identified by Lord Wilberforce in *Roy v Prior* [1971] AC 470, 480. In *Darker* Lord Hope observed that this justification only applied to evidence given in court, so that it was not relevant to that appeal. He might have added that it only applied where the proceedings had culminated in a decision. In his judgment in this case, Lord Hope suggests that this justification is one that was relevant to barrister immunity, but which is not relevant to witness immunity. I do not wholly agree. A claim against a witness might well involve an assertion that, but for the false evidence, the trial would have had a different outcome, a matter with obvious implications for the measure of damages. I agree, however, that this was not one of the original justifications, nor the most cogent justification, for the general immunity.

The extension of the immunity to expert witnesses

18. A significant distinction between an expert witness and a witness of fact is that the former will have chosen to provide his services and will voluntarily have undertaken duties to his client for reward under contract whereas the latter will have no such motive for giving evidence. The question was raised, but not explored in depth, of whether an expert is normally in direct contractual relationship with his client, or whether his contract is with the solicitor who engages him on behalf of the client. I do not think that this is significant. In either event there is a marked difference between holding the expert witness immune from liability for breach of the duty that he has undertaken to the claimant and granting immunity to a witness of fact from liability against a claim for defamation, or some other tortious claim, where the witness may not have volunteered to give evidence and where he owes no duty to the claimant. It is notable that, before the present case, no one appears to have suggested that this difference called into question whether witness immunity should extend to protect the expert witness against a claim by his own client.

19. The Scottish case of *Watson v M'Ewan* [1905] AC 480 was a case where a claim was brought against a medical witness in respect of statements made in preparation of a witness statement and similar statements subsequently made in

court. It is a case of unusual facts. The appellant was a doctor of medicine who had been retained by the respondent ("the wife") in respect of proposed proceedings against her husband for separation and aliment. He was subsequently retained by the husband in the same proceedings. In preparing his witness statement he included some very damaging allegations based on matters that he had learned when acting for the wife, which included allegations of taking morphine and planning to procure an abortion. He subsequently gave oral evidence of these matters in the court proceedings. The wife brought an action against him for breach of confidence and for slander, relying on both what was said to the husband's lawyers and what was said in court. The head note to the report of the decision in the House of Lords suggests that the claim for breach of confidence did not proceed, and that the relevant issues that came before the House of Lords were whether the appellant was immune from a claim for slander in respect of what he said in court and, more pertinently, whether this immunity extended to what he had said when giving his witness statement ("the precognition"). I am however grateful to Lord Hope for his clarification of the nature of this rather confusing litigation. The House of Lords held that the appellant was immune. Giving the leading speech the Earl of Halsbury LC said, at pp 488-489:

> "I do not care whether he is what is called a volunteer or not; if he is a person engaged in the administration of justice, on whichever side he is called his duty is to tell the truth and the whole truth. If he tells the truth and the whole truth, it matters not on whose behalf he is called as a witness; in respect of what he swears as a witness he is protected – that cannot be denied – and when he is being examined for the purpose of being a witness he is bound to tell the whole truth according to his views, otherwise the precognition, the examination to ascertain what he will prove in the witness box, would be worth nothing."

This decision lends some support for extending witness immunity to experts, but it is right to observe that the focus of the House of Lords appears to have been the claim for slander and the case was not concerned with the duty of care that, under the modern law, is owed by an expert to his client, as to which see para 49 below.

20. *Evans v London Hospital Medical College (University of London)* [1981] 1 WLR 184 involved a claim against forensic scientists in negligence. The scientists had provided post mortem reports to the police that had led to the plaintiff being prosecuted for the murder of her small son. At trial the prosecution offered no evidence so that she was acquitted. She alleged that the defendants had been negligent in the conduct of the post mortem. Drake J held that the defendants were protected by witness immunity. He held that immunity given to a witness extended to cover statements he made prior to the issue of a writ or the commencement of a prosecution, provided that the statement was made for the purpose of a possible

action or prosecution and at a time when the possible action or prosecution was being considered.

21. There is no reported case where immunity was invoked against a claim for breach of a duty of care brought against a professional expert witness by his client before *Palmer v Durnford Ford* [1992] QB 483. In that case the plaintiffs had pursued a disastrous claim against both the supplier and a repairer of a lorry tractor unit. They subsequently sued an engineering expert on the ground that his incompetent report had led them to advance claims on a basis that was invalid, and their solicitors for negligence in engaging an incompetent expert. The expert persuaded the district judge to strike out the claim against him on the ground that he was immune from suit. On appeal the plaintiff did not challenge the proposition that the immunity that was enjoyed by witnesses in general protected a paid expert against a claim by his own client. The issue was the extent of that immunity. Mr Simon Tuckey QC, sitting as a deputy High Court judge, applied by analogy the decision of the House of Lords in relation to the advocate's immunity from suit in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 – a decision that I shall consider in due course. He held, at p 488, that immunity would only extend to what could fairly be said to be work which was preliminary to giving evidence in court, judged perhaps by the principal purpose for which the work was done. Work done principally for the purpose of advising the client was not covered.

22. Until the present case I am not aware that the decision in *Palmer v Durnford Ford* has been questioned. It was referred to, with approval, in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633. One of the issues raised in that case was whether witness immunity protected a psychiatrist from liability in negligence to a child in respect of advice as to whether the likelihood of child abuse rendered it desirable for a child to be removed from her home. The argument was that if the psychiatrist's views were to lead to child care proceedings, the psychiatrist would have to present those views in court. In the Court of Appeal at p 661 Sir Thomas Bingham MR dismissed this argument. He observed that witness immunity had been treated as analogous to immunity accorded to those in the conduct of proceedings. If the immunity were as wide as that claimed, a barrister or solicitor advising a client on a factual question with a view to proceedings would be immune from an action for negligence. Such a result was inconsistent with authority. Mr Simon Tuckey had reached a correct conclusion in *Palmer v Durnford Ford.* In the House of Lords Lord Browne-Wilkinson disagreed at p 755, inasmuch as he held that the views expressed by the psychiatrist were protected by witness immunity. He found the reasoning of Drake J in *Evans v London Hospital* compelling, at least in relation to criminal proceedings. He expressed no view in relation to "ordinary civil proceedings" and said that he intended to cast no doubt on Mr Simon Tuckey's decision in *Palmer v Durnford Ford.*

23. *Stanton v Callaghan* [2000] QB 75 is the leading case on immunity conferred in respect of a claim brought by a litigant against his own expert witness. The case has features in common with those of the present case. The defendant was a structural engineer, retained by the plaintiffs to assist in a claim against insurers in relation to the costs of dealing with subsidence of the plaintiffs' house. He initially advised that total underpinning was required at a cost of some £77,000. Subsequently, in the course of preparing a joint report with the insurers' expert witness, the latter persuaded him to agree that infilling with polystyrene, at a cost of only some £21,000, would be a satisfactory remedy. The case was settled on that basis, but the plaintiffs then brought an action claiming that their expert's change of advice had been negligent. The master refused an application to strike out the claim and the judge upheld him, but the Court of Appeal reversed the decision. After a review of authority, including lengthy citation from *Palmer v Durnford Ford,* Chadwick LJ summarised their effect as follows, at p 100:

> "(i) an expert witness who gives evidence at a trial is immune from suit in respect of anything which he says in court, and that immunity will extend to the contents of the report which he adopts as, or incorporates in, his evidence; (ii) where an expert witness gives evidence at a trial the immunity which he would enjoy in respect of that evidence is not to be circumvented by a suit based on the report itself; and (iii) the immunity does not extend to protect an expert who has been retained to advise as to the merits of a party's claim in litigation from a suit by the party by whom he has been retained in respect of that advice, notwithstanding that it was in contemplation at the time when the advice was given that the expert would be a witness at the trial if that litigation were to proceed. What, as it seems to me, has not been decided by any authority binding in this court is whether an expert is immune from suit by the party who has retained him in respect of the contents of a report which he prepares for the purpose of exchange prior to trial – say, to comply with directions given under RSC, Ord 38, r 37 - in circumstances where he does not, in the event, give evidence at the trial; either because the trial does not take place or because he is not called as a witness."

24. Chadwick LJ's conclusion appears at pp 101-102:

> "In my view, the public interest in facilitating full and frank discussion between experts before trial does require that each should be free to make proper concessions without fear that any departure from advice previously given to the party who has retained him will be seen as evidence of negligence. That, as it seems to me, is an area in which public policy justifies immunity. The immunity is needed in

order to avoid the tension between a desire to assist the court and fear of the consequences of a departure from previous advice."

25. Otton LJ agreed. He drew an analogy between the position of an expert witness and the position of an advocate, and applied the reasoning of the House of Lords in relation to the position of barristers in *Rondel v Worsley* [1969] 1 AC 191, to which I shall shortly refer. Each had to be given full opportunity to discharge their duties to the court. Otton LJ's conclusion on the facts of the case before him were as follows:

> "On any basis the defendant when attending the meeting with his opposite number enjoyed the immunity. It is true that he did not do so pursuant to RSC, Ord 38, r 38 but the purpose of the meeting was to identify those parts of the evidence and the other's opinion which they could agree and those which they could not. It was in the public interest to do so. The duty to the court must override the fear of suit arising out of a departure from a previously held position. The expert must be able to resile fearlessly and with dignity. In the instant case both experts resiled from more extreme positions. In theory, at least, the defendants could have sued their expert for placing them in a more adverse position."

26. This is the extent of the relatively sparse authority in this jurisdiction which deals directly with the immunity of an expert witness to suit by his own client. Before considering whether this Court should allow the law to stand where it is I turn to consider what lessons are to be learned from the position of advocates, for the courts have both compared and contrasted the position of advocates with the position of expert witnesses.

The position of barristers

27. It had long been thought by many that barristers were immune from liability in negligence because they did not enter into contracts with their clients. They could not sue for their fees and thus they owed their clients no duty of care. This reasoning was thrown into question by the decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. The immunity of barristers was challenged in *Rondel v Worsley* [1969] 1 AC 191. No case could have been better designed to illustrate the dangers of being exposed to vexatious litigation. The defendant had accepted a dock brief for a man who was rightly convicted and sentenced to 18 months' imprisonment. His application for permission to appeal included complaints against his counsel. It was refused. He then commenced proceedings for negligence. It was at all stages found that his claim was hopeless. But the issue

of principle of whether an action for negligence could be brought against a barrister was pursued to the House of Lords. Their Lordships unanimously held that it could not. Barristers were immune from liability in negligence. This immunity did not stem from a barrister's inability to sue for his fees. It was to protect him from the risk of being sued for doing no more than his duty to the court. This would sometimes conflict with what appeared to be the personal interests of the client:

> "as an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public, which may and often does lead to a conflict with his client's wishes or with what the client thinks are his personal interests...." per Lord Reid at p 227.

This rendered counsel particularly susceptible to vexatious suits and immunity was necessary to protect against this. Without this immunity there would be a pressure on the advocate to subordinate his duty to the court to his duty to the client. This would lead him into undesirable prolixity – per Lord Reid at p 229, Lord Morris of Borth-y-Gest at p 251, Lord Pearce at pp 256 and 272, and Lord Upjohn at p 284.

28. Some of their Lordships were also concerned with the prospect of repeated litigation raising the same issues – having failed to prove by appeal that he was wrongly convicted, the defendant would seek to establish this by a claim against his counsel. This would lead to "a trial upon a trial", "speculation upon speculation", an "unseemly excrescence upon the legal system" per Lord Morris at pp 249-250.

29. Lord Reid, Lord Morris and Lord Upjohn expressed the view that public policy did not require that a barrister should be immune from negligence in relation to matters unconnected with cases in court. Lord Reid observed at p 229 that immunity was not the only way that the law protected counsel. They also shared with the judge and witnesses the absolute privilege with regard to what was said by them in court. At p 252 Lord Morris compared the immunity of the barrister with that accorded to witnesses in respect of the evidence given by them in court, an immunity which also attached to the parties and to the judge, albeit that the relationship between an advocate and the client differed from the relationship between the client and an adverse witness - p 253. Lord Pearce at pp 268-269 also drew an analogy between the position of advocates and the position of witnesses. He remarked that the reasons underlying the immunity of witnesses were first that there might be a series of retrials and secondly that an honest witness might be deflected by fear of the consequences. He asked at p 270 whether counsel alone of the five ingredients of a trial – parties, witnesses, judge, jurors and advocate – should be the only one to be liable to his client in damages. Lord

Upjohn at p 283 remarked that it was because of counsel's duty to the court in the public interest that immunity from defamation was granted, as it was to the judge and to witnesses. This immunity was just as necessary in respect of his general conduct of the case.

30. It is noteworthy that, in justifying the immunity from suit enjoyed by counsel, their Lordships compared the position of counsel with that of the others who took part in the trial process, including witnesses.

31. In *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 the issue was not whether barristers should have immunity from suit, but the scope of that immunity. The plaintiff brought an action against his solicitors for failure to sue the correct defendant in relation to a road traffic accident. The solicitors joined the barrister who had advised them. The issue was whether the barrister's immunity extended to his advice on whom to sue. The House of Lords, Lord Keith of Kinkel dissenting, held that it did not. Lord Wilberforce at p 214 distinguished this immunity from the privilege that attached to court proceedings, which protected equally judge, counsel, witnesses, jurors and parties, observing that this had nothing to do with a barrister's immunity from suit. The following test of immunity, laid down by McCarthy P in the New Zealand Court of Appeal in *Rees v Sinclair* [1974] 1 NZLR 180, 187 was approved:

> "the protection exists only where the particular work is so intimately connected with the conduct of the cause 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."

32. Lord Diplock commented at p 218 that the barrister's immunity from liability for negligence in the conduct of his professional work granted the Bar a privileged status which the common law did not accord to any other profession or skilled craft. He held that this immunity was justified by two considerations. The first was that the barrister's immunity for what he said and did in court was part of the general immunity from civil liability which attached to all persons in respect of their participation in proceedings before a court of justice; judges, court officials, witnesses, parties, counsel and solicitors alike – p 222. The second was the undesirability of re-trials of the same issues. Lord Salmon at p 230 remarked that public policy required the barrister to have the same immunity as the judge, juryman or witness for anything he said or did in court, but not for failing to join the right party. Lord Russell of Killowen, who also dissented, at p 233, on the other hand, said that the barrister's immunity was so that he could perform his public duty in relation to the conduct of litigation without worrying about the possibility of a claim for negligence. He did not consider that this immunity was connected with "a quite different" immunity of judges, witnesses and jurors.

33. It is not easy to trace a common thread in these judgments. The majority, however, come close to equating the position of the barrister with that of the others who take part in proceedings in court. The majority also held that, when a solicitor was acting as an advocate, he enjoyed the same immunity as a barrister.

34. In *Hall v Simons* the House of Lords swept away the advocate's immunity from liability in negligence, in court and out, albeit not their absolute privilege from claims for defamation. Counsel for the plaintiffs accepted that expert witnesses enjoyed immunity and did not seek to challenge this. Rather they sought to distinguish expert witnesses from advocates on the ground that the former owed no duties to their clients once they were in the witness box. Their sole duty was then to the court – p 671.

35. Lord Steyn does not seem to have accepted this argument. At p 679 he referred to the analogy of the immunity of those involved in court proceedings. He then referred to an argument in *Cane, Tort Law and Economic Interests*, 2nd ed (1996), p 237 that urged the case for removing immunity from paid expert witnesses. He was, however, persuaded by an argument that there was little connection between immunity from liability for things said in court and immunity from liability for negligent acts.

36. Lord Hoffmann accepted counsel's argument. He said at p 698:

> "Mr Scott invited your Lordships to apply by analogy the decision of the Court of Appeal in *Stanton v Callaghan* [2000] QB 75, in which it was held that an expert witness could not be sued for agreeing to a joint experts' statement in terms which the client thought detrimental to his interests. He said that this was an example of a general immunity for acts done in the course of litigation. But that seems to me to fall squarely within the traditional witness immunity. The alleged cause of action was a statement of the evidence which the witness proposed to give to the court. A witness owes no duty of care to anyone in respect of the evidence he gives to the court. His only duty is to tell the truth. There seems to me no analogy with the position of a lawyer who owes a duty of care to his client.
>
> Nor is there in my opinion any analogy with the position of the judge. The judge owes no duty of care to either of the parties. He has only a public duty to administer justice in accordance with his oath. The fact that the advocate is 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."

37. I shall shortly consider the extent to which there is a valid distinction between advocates and expert witnesses in the present context. It suffices to note that in *Hall v Simons* the House of Lords abolished immunity from liability in negligence in the case of the former without questioning the immunity of the latter.

Discussion

38. I propose to consider the following issues in relation to expert witnesses:

i) What are the purposes of the immunity?
ii) What is the scope of the immunity?
iii) Has the immunity been eroded?
iv) What are the effects of the immunity?
v) Can expert witnesses be compared to advocates?
vi) Is the immunity justified?
vii) Should the immunity be abolished?

What are the purposes of the immunity?

39. Mr Lawrence QC for the respondent did not seek to advance the danger of a multiplicity of proceedings in support of witness immunity. He accepted that that argument had been more cogent as a justification for the immunity from suit that had been accorded to advocates, and yet that argument had not prevailed in *Hall v Simons*. Rather, Mr Lawrence invoked the chilling factor that potential liability in negligence would introduce in respect of expert evidence. This, he submitted, would operate in two ways. First it would make expert witnesses more reluctant to provide their services at all. He drew attention to concerns expressed by Thorpe LJ in *Meadow v General Medical Council* [2006] EWCA Civ 1390, [2007] QB 462, paras 225-249, that, in relation to family justice, the demand for experts exceeded supply and that this was a field which was very sensitive to increasing or newly emerging disincentives. This was a theme that Wall LJ had underlined extra-judicially when delivering a paper on the use of experts in family cases at the annual Bond Solon expert witness conference on 6 November 2009.

40. Mr Lawrence placed more emphasis on the other aspect of the chilling factor. This was the reluctance that an expert witness would have to give evidence that was contrary to his client's interest if there was a risk that this might lead his client to sue him. This risk, he submitted, had become more significant since Lord Woolf, and the provisions of the CPR which gave effect to his recommendations, had emphasised the paramount importance of the duty of an expert to give frank and objective advice to the court. It was important that experts should have the

reassurance that, if they complied with this obligation to the possible disadvantage of their clients, they would not be at risk of being sued for failing to have regard to their clients' best interests.

41. I believe that Mr Lawrence has accurately identified the primary case for conferring immunity from liability in negligence on expert witnesses. As I explained in para 17 above, however, I would not wholly discount the argument that it is undesirable that one court, other than an appellate court, should be required to pass judgment on the correctness of the decision of another court, which is a possible consequence of permitting claims for negligence against expert witnesses.

What is the scope of the immunity?

42. The Court suggested to Mr Lawrence that the requirement identified by Otton LJ in *Stanton v Callaghan* that an expert must be able to resile fearlessly and with dignity from a more extreme position taken in an earlier advice could present a paradox. The expert might be reluctant to do this through fear of conceding that his earlier advice had been erroneous. In that event he needed protection, not in respect of his revised view, but in respect of his earlier advice. Yet, on the approach in *Palmer v Durnford Ford,* the earlier advice might not be covered by the immunity. Mr Lawrence's response to this was that any advice given in possible anticipation of litigation should be covered by the immunity. This would bring within the scope of the immunity a wider class of expert advice than those embraced by the test in *Palmer v Durnford Ford,* indeed any expert advice where there was a possibility of litigation.

43. Mr Lawrence's submissions lend support to a point made in opposition to the immunity by Mr Ter Haar. This is that it is difficult to draw the line that confines the immunity. The border is "fuzzy". It is clear, however, that if the immunity is to be effective in removing inhibitions on what the expert witness is prepared to say at the trial it must protect him in relation to his expression of views before the trial.

Has the immunity been eroded?

44. Mr Ter Haar submitted that the case for conferring immunity on expert witnesses has weakened because, in two respects, the immunity of expert witnesses has been eroded. In *Meadow v General Medical Council* [2007] QB 462 the Court of Appeal held that expert witnesses had no immunity against disciplinary proceedings before professional tribunals where fitness to practice was

in issue. In *Phillips v Symes (No 2)* [2004] EWHC 2330 (Ch), [2005] 1 WLR 2043 Peter Smith J held that expert witnesses were not immune from being held liable to wasted costs orders. Mr Lawrence accepted the validity of this argument to the extent of submitting that *Phillips v Symes (No 2)* had been wrongly decided. I do not consider that the susceptibility of expert witnesses to disciplinary proceedings or to wasted cost orders weakens the case for immunity from civil suit, in so far as this case exists. The principal argument advanced for immunity from civil suit is that the risk of being sued will deter the expert witness from giving full and frank evidence in accordance with his duty to the court when this conflicts with the interests of his client. In so far as a witness may be tempted to trim his sails to suit his client, I would expect the risk of disciplinary proceedings or of a wasted costs order to be a deterrent. The argument advanced in support of immunity from suit by the client does not extend to immunity from disciplinary proceedings or wasted costs orders.

What are the effects of the immunity?

45. It is common ground that if the immunity is to be effective it must apply to views expressed not only in court, but in contemplation of, or at least preparation for, possible court proceedings. The vast proportion of civil claims settle before they get to court. For this reason alone it will be in only a small minority of cases that views expressed by an expert will affect the client because of their impact on a hearing in court. In the vast majority of cases those views will impact, not on a judgment of the court, but on the client's decision whether or not to proceed with an action or on the terms on which he agrees to settle the dispute. It is no coincidence that both in the present case and in *Palmer v Durnford Ford* the claim has related to the effect of the expert's opinion on the terms of a settlement. Thus the effect of the immunity is to preclude the client from suing for breach of duty where the expert's negligence is alleged to have adversely affected such a decision. The question is whether this is necessary in order to ensure that his objectivity is not affected in the minority of cases that do result in court proceedings.

Can expert witnesses be compared to advocates?

46. In *Hall v Simons* at p 698 Lord Hoffmann, when comparing the position of an expert witness to that of an advocate, said that a witness owes no duty of care in respect of the evidence that he gives to the court. His only duty is to tell the truth. That statement may be true of a witness of fact, but it is not true of an expert witness. Lord Hoffmann was wrong to distinguish between the expert witness and the advocate on the basis that the latter is the only person who has undertaken a duty of care to the client.

47. In some circumstances the difference between an immunity from suit and an absence of legal duty can be readily appreciated. Diplomatic immunity, which can be waived, is an example. In this case the distinction is more elusive. There was a time when it might have been possible to argue that there was a difference between the duty owed by an expert witness to the client who retained him and a conflicting, and overriding, public duty owed by the expert when giving evidence in court; that the former obliged the expert to put forward the best case for his client whereas the latter involved a duty to be candid, even at the expense of his client. The existence of such a difference is implicit in the provision of CPR 35.3 which states that it is the duty of experts to help the court with matters within their expertise and that this duty *overrides* any obligation to the person from whom the experts have received their instructions or by whom they are paid. Such a distinction lends force to the argument that, once the expert is providing evidence to the court, or preparing to do so, he is no longer bound by a duty to his client and thus cannot be held liable for breach of such duty.

48. In *Cala Homes (South) Ltd v Alfred McAlpine Homes East Ltd* [1995] FSR 818 Laddie J, at p 841, quoted from an article, "The Expert Witness: Partisan with a Conscience", in the August 1990 Journal of the Chartered Institute of Arbitrators by a distinguished expert who suggested that it was appropriate for an expert to act as a "hired gun" unless and until he found himself in court where

> "the earlier pragmatic flexibility is brought under a sharp curb, whether of conscience, or fear of perjury, or fear of losing professional credibility. It is no longer enough for the expert like the 'virtuous youth' in the Mikado to 'tell the truth whenever he finds it pays': shades of moral and other constraints begin to close up on him."

49. Laddie J was rightly critical of the approach of this expert. There is no longer any scope, if indeed there ever was, for contrasting the duty owed by an expert to his client with a different duty to the court, which replaces the former, once the witness gets into court. In response to Lord Woolf's recommendations on access to justice the CPR now spell out in detail the duties to which expert witnesses are subject including, where so directed, a duty to meet and, where possible, reach agreement with the expert on the other side. At the end of every expert's report the writer has to state that he understands and has complied with his duty to the court. Where an expert witness is retained, it is likely to be, as it was in the present case, on terms that the expert will perform the functions specified in the CPR. The expert agrees with his client that he will perform the duties that he owes to the court. Thus there is no conflict between the duty that the expert owes to his client and the duty that he owes to the court. Furthermore, a term is implied into the contract under section 13 of the Supply of Goods and Services Act 1982,

that the expert will exercise reasonable skill and care in carrying out the contractual services.

50. Thus the expert witness has this in common with the advocate. Each undertakes a duty to provide services to the client. In each case those services include a paramount duty to the court and the public, which may require the advocate or the witness to act in a way which does not advance the client's case. The advocate must disclose to the court authorities that are unfavourable to his client. The expert witness must give his evidence honestly, even if this involves concessions that are contrary to his client's interests. The expert witness has far more in common with the advocate than he does with the witness of fact.

Is the immunity justified?

51. In *Darker* Lord Clyde remarked, at pp 456-457:

> "since the immunity may cut across the rights of others to a legal remedy and so runs counter to the policy that no wrong should be without a remedy, it should be only allowed with reluctance, and should not readily be extended. It should only be allowed where it is necessary to do so."

With this principle in mind, I would adopt the approach advocated by Lord Reid in *Rondel v Worsley* at p 228, when considering the immunity from suit enjoyed by advocates:

> "the issue appears to me to be whether the abolition of the rule would probably be attended by such disadvantage to the public interest as to make its retention clearly justifiable."

It would not be right to start with a presumption that because the immunity exists it should be maintained unless it is shown to be unjustified. The onus lies fairly and squarely on the respondent to justify the immunity behind which she seeks to shelter. I turn to consider whether she can do so. I shall consider the various justifications advanced for the immunity that I have identified earlier in this judgment.

Reluctance to testify

52. Is Mr Lawrence right to submit that, if expert witnesses are liable to be sued for breach of duty, they will be discouraged from providing their services at all? I can see no justification for this assumption. All who provide professional services which involve a duty of care are at risk of being sued for breach of that duty. They customarily insure against that risk. In some circumstances the risk of suit and the cost of insurance may be so high that this is a discouragement to provision of those services. I understand that, in some parts of the world, this is true of the services of obstetricians. In *Meadow* Thorpe LJ drew attention to the shortage of medical experts who were prepared to provide forensic services in child care cases. He said, at para 227, of the family justice system:

> "Here most of the required experts are either medically qualified or otherwise qualified in the mental health professions. The majority will be employed under NHS consultant contracts. By contrast to the other justice systems this is a market in which demand exceeds supply. It is thus very sensitive to increasing or newly emerging disincentives. This factor is compounded by a paucity of incentives. The fee for the work will often be paid to the trust employer. The employer may be reluctant to release the consultant from other duties. Keeping up with the demands of the court's timetable may involve evening or weekend work."

53. Thorpe LJ was describing the position as it then was, notwithstanding that expert witnesses were immune from suit in relation to their evidence. It does not follow that removing this immunity would constitute a further significant disincentive to their provision of forensic services. Why should the risk of being sued in relation to forensic services constitute a greater disincentive to the provision of such services than does the risk of being sued in relation to any other form of professional service? Furthermore, as Thorpe LJ remarked, the supply of expert witnesses in other fields exceeds demand.

54. Mr Ter Haar referred the Court to a survey carried out at the Bond Solon Annual Expert Witness Conference in November 2010. 106 experts were asked whether they would continue to act as expert witnesses if expert immunity from suit were substantially reduced. 92 answered yes and 14 no. I do not consider that much weight can be attached to a survey of this type, but it does not suggest that immunity from suit for negligence is essential to secure an adequate supply of forensic experts. The case that immunity is necessary to prevent a chilling effect on the supply of expert witnesses is not made out.

Is immunity necessary to ensure that expert witnesses give full and frank evidence to the court?

55. The principal justification for immunity that Mr Lawrence urged was that this was necessary to ensure that the expert performed his duty to the court. This duty required him, whether when attempting to reach agreement with the expert on the other side, or when giving evidence to the court, to give his honest opinion, even if this proved adverse to the case of his own client. Mr Lawrence submitted that the expert would have some apprehension about taking such a course and that immunity from suit was necessary to allay this apprehension.

56. Mr Lawrence could produce no empirical evidence to support this thesis, nor could Mr Ter Haar produce any empirical evidence to disprove it. Research into the position in other common law jurisdictions was inconclusive. As expert witnesses have, to date, had the benefit of immunity, how they will behave if that immunity is removed must be a matter of conjecture or, more accurately, reasoning. But if reasoning is applied, I do not find that it supports Mr Lawrence's thesis. An expert's initial advice is likely to be for the benefit of his client alone. It is on the basis of that advice that the client is likely to decide whether to proceed with his claim, or the terms on which to settle it. The question then arises of the expert's attitude if he subsequently forms the view, or is persuaded by the witness on the other side, that his initial advice was over-optimistic, or that there is some weakness in his client's case which he had not appreciated. His duty to the court is frankly to concede his change of view. The witness of integrity will do so. I can readily appreciate the possibility that some experts may not have that integrity. They will be reluctant to admit to the weakness in their client's case. They may be reluctant because of loyalty to the client and his team, or because of a disinclination to admit to having erred in the initial opinion. I question, however, whether their reluctance will be because of a fear of being sued – at least a fear of being sued for the opinion given to the court. An expert will be well aware of his duty to the court and that if he frankly accepts that he has changed his view it will be apparent that he is performing that duty. I do not see why he should be concerned that this will result in his being sued for breach of duty. It is paradoxical to postulate that in order to persuade an expert to perform the duty that he has undertaken to his client it is necessary to give him immunity from liability for breach of that duty.

57. There is here, I believe, a lesson to be learnt from the position of barristers. It was always believed that it was necessary that barristers should be immune from suit in order to ensure that they were not inhibited from performing their duty to the court. Yet removal of their immunity has not in my experience resulted in any diminution of the advocate's readiness to perform that duty. It would be quite wrong to perpetuate the immunity of expert witnesses out of mere conjecture that

they will be reluctant to perform their duty to the court if they are not immune from suit for breach of duty.

Will the diligent expert witness be harassed by vexatious claims for breach of duty?

58. There is an overlap between this question and the last. The rational expert witness who has performed his duty is unlikely to fear being sued by the rational client. But unsuccessful litigants do not always behave rationally. I can appreciate the apprehension that, if expert witnesses are not immune, they may find themselves the subject of vexatious claims. But again I question the extent to which this apprehension is realistic. It is easy enough for the unsuccessful litigant to allege, if permitted, that a witness of fact who has given evidence against him was guilty of defamatory mendacity. It is far less easy for a lay litigant to mount a credible case that his expert witness has been negligent.

59. The present case is unusual in that, on the agreed facts, the respondent has admitted to putting her signature to a joint report that did not express her views. There is nothing vexatious about the present claim. Where, however, a litigant is disaffected because a diligent expert has made concessions that have damaged his case, how is he to get a claim against that expert off the ground? It will not be viable without the support of another expert. Is the rare litigant who has the resources to fund such a claim going to throw money away on proceedings that he will be advised are without merit? The litigant without resources will be unlikely to succeed in persuading lawyers to act on a conditional fee basis. A litigant in person who seeks to bring such a claim without professional support will be unable to plead a coherent case and will be susceptible to a strike out application. For these reasons I doubt whether removal of expert witness immunity will lead to a proliferation of vexatious claims. I am not aware that since *Hall v Simons* barristers have experienced a flood of such claims from disappointed litigants.

Will there be a risk of a multiplicity of suits?

60. For the reasons that I have already given I do not believe that there will. I have, however, been considering thus far the position of expert witnesses in civil cases. I believe that my conclusions hold good in the case of the duty owed by an expert witness to the client who retains him in a criminal trial. I concede, however, that the risk of vexatious claims from those convicted of criminal offences may be greater. Such claims will, however, be struck out as an abuse of process unless the convicted client first succeeds in getting his conviction overturned on appeal – see *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529.

61. For these reason I conclude that no justification has been shown for continuing to hold expert witnesses immune from suit in relation to the evidence they give in court or for the views they express in anticipation of court proceedings.

Should the immunity be abolished?

62. It follows that I consider that the immunity from suit for breach of duty that expert witnesses have enjoyed in relation to their participation in legal proceedings should be abolished. I emphasise that this conclusion does not extend to the absolute privilege that they enjoy in respect of claims in defamation. Accordingly, I would allow this appeal.

LORD BROWN

63. Being far from sure that I have anything of value to add to the judgments of the majority in favour of allowing this appeal, I shall state my central views on the matter very briefly indeed.

64. Expert witnesses are to be regarded as sui generis in the present context. There are profound differences between them and, on the one hand, witnesses of fact; on the other hand, advocates. (For the purposes of this brief judgment I mean by "an expert witness" a witness selected, instructed and paid by a party to litigation for his expertise and permitted on that account to give opinion evidence in the dispute. I am not referring, for example, to a treating doctor or forensic pathologist, either of whom may be called to give factual evidence in the case as well as being asked for their professional opinions upon it without their having been initially retained by either party to the dispute.)

65. It has long been established that witnesses of fact enjoy complete immunity – immunity, that is, from any form of civil action in respect of evidence given (or foreshadowed in a statement made) in the course of proceedings. It is no less clearly established, following *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 that advocates have no immunity from suit in respect of any aspect of their conduct of proceedings (save, of course, from defamation claims and the like pursuant to the absolute privilege attaching to court proceedings).

66. The absolute immunity rule which applies to witnesses of fact, as noted by Lord Hoffmann in *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177, 208:

> "is designed to encourage freedom of speech and communication in judicial proceedings by relieving persons who take part in the judicial process from the fear of being sued for something they say."

That aside, witnesses of fact are unlikely to owe the party calling them any duty of care whether in contract or in tort.

67. In stark contrast, not only do expert witnesses clearly owe the party retaining them a contractual duty to exercise reasonable skill and care but, I am persuaded, the gains to be derived from denying them immunity from suit for breach of that duty substantially exceed whatever loss might be thought likely to result from this. These pros and cons have been fully explored in the judgments of other members of the court. Suffice to say that in my opinion the most likely broad consequence of denying expert witnesses the immunity accorded to them (only comparatively recently) by the decisions in *Palmer v Durnford Ford* [1992] QB 483 and *Stanton v Callaghan* [2000] QB 75 will be a sharpened awareness of the risks of pitching their initial views of the merits of their client's case too high or too inflexibly lest these views come to expose and embarrass them at a later date. I for one would welcome this as a healthy development in the approach of expert witnesses to their ultimate task (their sole rationale) of assisting the court to a fair outcome of the dispute (or, indeed, assisting the parties to a reasonable pre-trial settlement).

68. The other signal advantage of denying immunity to expert witnesses is, of course, that in the no doubt rare case where the witness behaves in an egregious manner such as is alleged in the instant case or, indeed, otherwise causes his client loss by adopting or adhering to an opinion outside the permissible range of reasonable expert opinions, the wronged client will enjoy, rather than have denied to him by rule of law, his proper remedy. Such cases are to my mind likely to be highly exceptional and for my part I would urge the courts to be alert to protect expert witnesses against specious claims by disappointed litigants – not to mention to stamp vigorously upon any sort of attempt to pressurise experts to adopt or alter opinions other than those genuinely held.

69. Overall, I am satisfied that the balance of advantage here lies clearly in favour of allowing this appeal.

LORD COLLINS

70. I agree that the appeal should be allowed.

71. This appeal is concerned only with the liability of the so-called "friendly expert" to be sued by the client on whose behalf the expert was retained. The facts raise directly only liability to be sued for out of court statements, but any immunity in relation to such statements is a necessary concomitant of the immunity for things said in court, and the same principles must apply equally to each.

72. The early history of witness immunity is largely concerned with immunity from suit for defamation: see, e.g. *Dawkins v Lord Rokeby* (1873) LR 8 QB 255. It was of course extended to other causes of action, but absolute privilege of witnesses and other persons in the judicial process from defamation is at its core. The basis of the present decision is that where a person has suffered a wrong that person should have a remedy unless there is a sufficiently strong public policy in maintaining an immunity. The policy behind immunity from suit for defamation is that to allow the possibility of such an action would create a chilling effect, inhibit frankness and bring the trial process into disrepute. Thus there is nothing in the present decision which would enable a client to sue his handwriting expert for slander because in the witness box he changed his mind and expressed the view that the client's document was a forgery.

73. Nor of course is there anything in the present decision which affects the position of the adverse expert. It is not sufficient to say that the adverse expert presents no problem because the expert owes no duty to the client on the other side. There are wider considerations of policy which ought to prevent adverse experts from being the target of disappointed litigants, even if the scope of duty in tort were to be extended in the future. It is true, as McHugh J said in *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12, (2005) 223 CLR 1, para 100, that except for the purpose of classification it may not matter whether the lack of legal liability stems from characterising it as an immunity or as an absence of duty of care. But it would be preferable to treat it as an immunity to emphasise the strong element of policy involved.

74. Lord Phillips has referred in detail to the developments in the case law in England. Because this appeal raises questions of policy it is more than usually helpful to look at developments in other countries, and in particular at the rich jurisprudence which has developed in the United States in the last 20 years or so.

75. The tendency in the Commonwealth in recent years has been to uphold witness immunity for experts, although it has not been the subject of full discussion at higher appellate levels. General witness immunity has been re-affirmed by the High Court of Australia in *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12, (2005) 223 CLR 1, para 39; by the Supreme Court of New Zealand in *Lai v Chamberlains* [2007] 2 NZLR 7; and by the Ontario Court of Appeal in *Reynolds v Kingston (Police Services Board)* [2007] ONCA 166. The

immunity has been re-affirmed in relation to expert witnesses in Australia in *Sovereign Motor Inns Pty Ltd v Howarth Asia Pacific Pty Ltd* [2003] NSWSC 1120; *James v Medical Board of South Australia* (2006) 95 SASR 445 (South Australia); *Commonwealth v Griffiths* (2007) 245 ALR 172 (NSW C.A) and in Canada in *Carnahan v Coates* (1990) 71 DLR (4th) 464; *Varghese v Landau* [2004] Can LII 5084 (Ont SC) and *Deep v College of Physicians and Surgeons of Ontario* [2010] ONSC 5248 (Ont SC). But all of these other than *Sovereign Motor Inns v Howarth Asia Pacific* were cases of actions against adverse experts or independent experts.

76. It is highly desirable that at this appellate level, in cases where issues of legal policy are concerned, the Court should be informed about the position in other common law countries. This Court is often helped by being referred to authorities from other common law systems, including the United States. It is only in the United States that there has been extensive discussion in the case law of the policy implications of removal of immunity for actions by disappointed clients against their experts. On this appeal the appellant did not rely on the United States material, although it is helpful to his case. The respondent's counsel drew attention to some of the United States cases on the basis of research which (it was said) was "slightly hampered by the renovation of the Middle Temple's American room." But there is an outstanding collection of United States material in the Institute of Advanced Legal Studies in London University, and (provided the barristers or solicitors concerned are prepared to make the expenditure) all of the material is readily available on line. Lord Wilberforce said in *Buttes Gas & Oil Co v Hammer (Nos 2 & 3)* [1982] AC 888, 936-937: "When the judicial approach to an identical problem between the same parties has been spelt out with such articulation in a country, one not only so closely akin to ours in legal approach, the fabric of whose legal doctrine in this area is so closely interwoven with ours, but that to which all the parties before us belong, spelt out moreover in convincing language and reasoning, we should be unwise not to take the benefit of it." This is not, of course, as that case was, litigation between the same parties in the two countries, but the principle is the same.

77. In the present context the American State courts have considered and dealt with precisely the same arguments of policy which have been argued before this court. In the last 20 years several State courts have considered the immunity of retained or so-called "friendly" experts, sued by the party which retained them. The respondent's counsel suggested that the Court would not derive much assistance from these cases, because (it is said) the culture relating to expert evidence is different in the United States. There are, it is true, many references to the expert (who, of course, will be giving evidence in jury trials) as a "hired gun" (e.g. *Blackwell v Wyeth*, 971 A 2d 235, 245 (Ct App Md 2009), quoting Judge Weinstein – "an expert can be found to testify to the truth of almost any factual theory, no matter how frivolous") and there have been well-known concerns about

the practice of shopping around for experts and the venality of some of them, and the lack of specific procedural guides to the conduct of experts by contrast with England, where the Woolf reforms have sought to entrench and give teeth to the principle. But the underlying principle is the same: the expert owes a duty to the client, but also owes a duty to the court, as a servant of the court, to present truthful and competent evidence: *Marrogi v Howard*, 805 So 2d 1118, 1132 (La 2002); and cf Federal Rules of Evidence, rules 102, 702.

78. In 1983 the United States Supreme Court re-affirmed the general principle of witness immunity in *Briscoe v LaHue*, 460 US 325 (1983). That was an action in which police officers were held to be absolutely immune from action arising out of their evidence in a criminal trial. Apart from a passing reference in a footnote (at p 341, n 27) the Supreme Court did not touch on the subject of expert witnesses. In the United States witness immunity has generally been applied to adverse and court-appointed experts: e.g. *Provencher v Buzzell-Plourde Associates*, 711 A 2d 251 (NH 1998); *Dalton v Miller*, 984 P 2d 666 (Colo Ct App 1999); *McNall v Frus*, 784 NE 2d 238 (Ill App Ct. 2002).

79. The question was first considered in the State of Washington, but its courts stand alone in recent years in upholding the immunity: *Bruce v Byrne-Stevens & Associates Engineers Inc*, 776 P 2d 666 (Wash.1989). The rationale of the decisions upholding immunity included these: that absence of immunity would lead to a loss of objectivity, and the threat of civil liability would encourage experts to assert extreme positions favourable to the client; it would run counter to the fundamental reason for expert evidence, which was to assist the court in a matter which was beyond its fact-finding capabilities; there is a need to promote finality of judgments by discouraging endless collateral litigation; and fewer experts would be willing to become involved in litigation if they could later be sued by the party who retained them.

80. Other States which have considered the matter have come to a different view: California, Missouri, Pennsylvania, Connecticut, Massachusetts, and Louisiana: *Mattco Forge Inc v Arthur Young & Co*, 6 Cal Reptr 2d 781 (Ct.App.1992) and *Lambert v Carneghi*, 70 Cal Reptr 3d 626 (2008); *Murphy v AA Matthews*, 841 SW 2d 671 (Mo.1992); *LLMD of Michigan Inc v Jackson-Cross Co*, 740 A 2d 186 (Pa. 1999); *Pollock v Panjabi*, 781 A 2d 518 (Conn.Super.Ct.2000); *Boyes-Bogie v Horvitz & Associates*, 14 Mass L Reptr 208 (Mass Sup Ct 2001); *Marrogi v Howard*, 805 So 2d 1118 (La.2002).

81. The policy reasons in these decisions included these: The reality is that an expert retained by one party is not an unbiased witness, and the threat of liability for negligence may encourage more careful and reliable evaluation of the case by the expert. Consequently, the threat of liability will not encourage experts to take

extreme views. The client who retains a professional expert for court-related work should not be in a worse position than other clients. The practical tools of litigation, including the oath, cross-examination, and the threat of perjury limit any concern about an expert altering his or her opinion because of potential liability. The risk of collateral litigation is exaggerated. There is no basis for suggesting that experts will be discouraged from testifying if immunity were removed – most are professional people who are insured or can obtain insurance readily, and those who are not insured can limit their liability by contract. See, for a critical analysis, Jurs, *The Rationale for Expert Immunity or Liability Exposure and Case Law since Briscoe: Reasserting Immunity Protection for Friendly Expert Witnesses* (2007-2008) 38 U Mem LR 49.

82. In England there has never been complete immunity for expert witness evidence, any more than there has been complete immunity for other witnesses. The general principle does not preclude prosecutions for perjury, or for perverting the course of justice, or for contempt of court, or liability for malicious prosecution, or misfeasance in public office: see, e.g. *Darker v Chief Constable of the West Midlands Police* [2001] 1 AC 435.

83. Any suggestion of a potentially unsatisfactory chilling effect on expert witnesses is inconsistent with the liability to a prosecution for perjury for untruthful evidence and with liability to disciplinary proceedings for unprofessional conduct in the preparation or presentation of expert evidence. The immunity has never prevented the possibility of prosecution for perjury of an expert witness who deliberately misleads the court although it would of course be very difficult to prove its elements. As Sir George Jessel MR said in *Lord Abinger v Ashton* (1873) 17 LR Eq 358, 373-374: "in matters of opinion I very much distrust expert evidence, for several reasons. ...[A]lthough the evidence is given on oath, in point of fact the person knows he cannot be indicted for perjury, because it is only evidence as to a matter of opinion. So that you have not the authority of legal sanction. A dishonest man, knowing that he could not be punished, might be inclined to indulge in extravagant assertions on an occasion that required it."

84. The potential effects of a sanction by a professional body are more serious than the effects of civil proceedings by a dissatisfied client (where the expert will usually, although not invariably, be insured). An expert may lose his livelihood and entire reputation as a result of an adverse ruling by a professional disciplinary body, but no suggestion has been made on this appeal that the Court of Appeal was wrong to decide that witness immunity does not protect an expert witness from disciplinary proceedings for unprofessional conduct in the preparation of, or giving of, expert evidence: *Meadow v General Medical Council* [2006] EWCA Civ 1390, [2007] QB 462.

85. There are no longer any policy reasons for retaining immunity from suit for professional negligence by expert witnesses. The danger of undesirable multiplicity of proceedings has been belied by the practical experience of the removal of immunity for barristers. A conscientious expert will not be deterred by the danger of civil action by a disappointed client, any more than the same expert will be deterred from providing services to any other client. It is no more (or less) credible that an expert will be deterred from giving evidence unfavourable to the client's interest by the threat of legal proceedings than the expert will be influenced by the hope of instructions in future cases. The practical reality is that, if the removal of immunity would have any effect at all on the process of preparation and presentation of expert evidence (which is not in any event likely), it would tend to ensure a greater degree of care in the preparation of the initial report or the joint report. It is almost certain to be one of those reports, rather than evidence in the witness box, which will be the focus of any attack, since it is very hard to envisage circumstances in which performance in the witness box could be the subject of even an arguable case.

86. For these reasons and those given by Lord Phillips and Lord Dyson, I would allow the appeal.

LORD KERR

87. I agree that this appeal should be allowed for the reasons given by Lord Phillips.

88. It has not been disputed that an expert witness owes a duty to the client by whom he has been retained. Breach of that duty should, in the normal course, give rise to a remedy. This is the unalterable back drop against which the claim to immunity must be made. Whether or not witness immunity has had a long history (and, as to that, I agree with Lord Dyson that this is far from clear) this court should not be deflected from conducting a clear-sighted, contemporary examination of the justification for its preservation. This is particularly required because the immunity has its roots in a time when, as Lord Phillips has pointed out, it was not customary for experts to offer their services under contract for reward.

89. Although the circumstances of modern litigation are substantially different from those which obtained when immunity from suit was extended to all who participated in litigation, many of the reasons that it is said to be necessary are strikingly similar to those which underlay its original recognition. These are given something of a modern twist by the suggestion that not only would witnesses be

deterred from giving evidence but that those who testified would be inclined to tailor their evidence to guard against the risk of being sued. Both these consequences are claimed to be the product of fear that would descend on potential witnesses faced with the daunting prospect of adverse litigation.

90. This line of reasoning can be traced back to the decision of Mr Tuckey QC, sitting as a deputy High Court judge, in *Palmer v Durnford Ford* [1992] QB 483 and the way that this decision influenced the outcome of the appeal in *Stanton v Callaghan* [2000] QB 75. It is to be noted that in *Palmer* it was not in dispute that witnesses enjoyed immunity from suit in respect of evidence given whether in civil or criminal proceedings. What was in issue in the case was whether that immunity should extend to work undertaken by the expert in advising the client whether he had a good case worthy of pursuit. At p 488H Mr Tuckey said this:

> "... the immunity would only extend to what could fairly be said to be preliminary to his giving evidence in court judged perhaps by the principal purpose for which the work was done. So the production or approval of a report for the purposes of disclosure to the other side would be immune but work done for the principal purpose of advising the client would not."

91. It is important to recognise that this approach was modelled on what Mr Tuckey described as "the analogous but not identical situation of the advocate's immunity from suit for what he does in court" considered by the House of Lords in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198. Of course, the decision in that case to the effect that an advocate was immune from suit for advocacy has been overtaken by the later decision in *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 where that immunity was swept away. In the meantime, however, the Court of Appeal in *Stanton* had to confront the question of whether an expert was immune from suit in respect of the contents of a joint statement to which he had contributed following a site meeting between the defendant and the insurers' expert witness. In deciding that immunity should attach to the contents of the report and relying on the decision in *Palmer*, Chadwick LJ said this at pp 100H-101A:

> "... the only ground of public policy that can be relied upon as a foundation for immunity in respect of the contents of an expert's report, in circumstances where no trial takes place and the expert does not give evidence, is that identified by Lord Morris of Borth-y-Gest in *Rondel v Worsley* [1969] 1 AC 191, 251G and referred to by Lord Diplock in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, 222B:

> 'It has always been the policy of the law to ensure that trials are conducted without avoidable strains and tensions of alarm and fear.'"

92. The rather incongruous outcome of this process of reasoning is that although initially an expert could be expected to be sanguine about the prospect of suit when giving preliminary advice, he would be overcome by fear and apprehension as the date for trial approached. It would also lead to the paradox articulated by Lord Phillips in para 42 of his judgment to the effect that a more convincing case for an immunity could be made, not at the stage of giving evidence, but at the earlier stage when advice that may subsequently prove inconvenient may have been given. When confronted with this, Mr Lawrence QC was prompted to suggest that the zone of protection should be extended backwards so as to comprehend advice given at the early stage.

93. I would have no hesitation in rejecting that suggestion firstly because it would be a wholly retrograde step and would involve reversing well established authority to contrary effect. More importantly, however, there is no evidence that witnesses would react in this way in anticipation of possible proceedings by disappointed clients. In particular, there is nothing to support the assumption that conscientious witnesses (which, if assumptions are to be made at all, professional witnesses must be presumed to be) would behave discreditably by modifying their opinions from those they truly held because they feared that an aggrieved client might unwarrantably seek redress against them. If an expert expresses an honestly held view, even if it differs from that which he may have originally expressed, provided it is an opinion which is tenable, he has nothing to fear from a disgruntled party.

94. Pitched against the arguments that witnesses might be influenced to distort their evidence is the fundamental consideration that breach of a duty owed by a witness to his client should, in the normal course, give rise to a remedy. Properly examined, the claimed chilling factors that would descend on expert witnesses if there was removal of the immunity are highly unlikely to materialise. In the final analysis, the only possible reason for preservation of the rule is its supposed longevity. Even if that could be established, it is in no sense an adequate justification for maintaining an immunity whose effect is to deny deserving claimants of an otherwise due remedy.

LORD DYSON

The duty owed by an expert witness

95. It is not in dispute that an expert who acts in civil litigation owes his client a duty to act with reasonable skill and care. He owes this duty in contract (section 13 of the Supply of Goods and Services Act 1982) and in tort (on the basis of *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465). He holds himself out as a skilled and competent person. The client relies on his advice in determining whether to bring or defend proceedings, in considering settlement values and in appraising the risks at trial. The client also relies on him to give the court skilled and competent expert opinion evidence. This was rightly acknowledged by Chadwick LJ in the leading case of *Stanton v Callaghan* [2000] QB 75, 88E:

> "Mr Callaghan was a professional man who undertook, for reward, to provide advice within his expertise. The expectation of those who engaged him must have been that he would exercise the care and attention appropriate to what he was engaged to do. I would find it difficult to accept that Mr Callaghan did not share that expectation."

96. But an expert witness who is retained to act for a client in relation to litigation also owes a duty to the court. CPR 35.3 provides: "(1) It is the duty of experts to help the court on matters within their expertise. (2) This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid."

97. The existence of this duty is affirmed by para 4.1 of the Protocol for the Instruction of Experts to give Evidence in Civil Claims 2005 which provides:

> "Experts always owe a duty to exercise reasonable skill and care to those instructing them, and to comply with any relevant professional code of ethics. However when they are instructed to give or prepare evidence for the purpose of civil proceedings in England and Wales they have an overriding duty to help the court on matters within their expertise (CPR 35.3). This duty overrides any obligation to the person instructing or paying them."

This Protocol was drafted by the Civil Justice Council with the assistance of work done by the Expert Witness Institute and the Academy of Experts. It was cited with approval by Sir Anthony Clarke MR in *Meadow v General Medical Council* [2007] QB 462, para 22.

98. The overriding duty of an expert to the court in relation to criminal proceedings is reflected in Part 33.2(1) of the Criminal Procedure Rules and in relation to family proceedings in para 3 of *Practice Direction (Family Proceedings: Experts)* [2008] 1 WLR 1027.

99. There is no conflict between the duty owed by an expert to his client and his overriding duty to the court. His duty to the client is to perform his function as an expert with the reasonable skill and care of an expert drawn from the relevant discipline. This *includes* a duty to perform the overriding duty of assisting the court. Thus the discharge of the duty to the court cannot be a breach of duty to the client. If the expert gives an independent and unbiased opinion which is within the range of reasonable expert opinions, he will have discharged his duty both to the court and his client. If, however, he gives an independent and unbiased opinion which is outside the range of reasonable expert opinions, he will not be in breach of his duty to the court, because he will have provided independent and unbiased assistance to the court. But he will be in breach of the duty owed to his client.

100. In saying that an expert who is engaged for reward by his client owes the client a duty of care both in contract and tort, I do not, of course, seek to prejudge the question raised on this appeal whether such an expert is immune from suit.

The present state of the law

101. The immunity of witnesses *as a general class* is long-established. But the particular question of whether expert witnesses retained for reward by their clients enjoy immunity from liability does not seem to have been considered until it arose in *Palmer v Durnford Ford* [1992] QB 483. In that case it was not in issue that it was "well settled that witnesses in either civil or criminal proceedings enjoy immunity from *any form of civil action* in respect of evidence given during those proceedings" (emphasis added). The issue in *Palmer* was to what extent that immunity extended to the activities of the expert at the pre-trial stage. Mr Simon Tuckey QC held that the immunity extended to work which was preliminary to his giving evidence (such as the production or approval of a report for the purposes of disclosure), but not to work done for "the principal purpose of advising the client". In drawing the line in this way, he avowedly followed the approach that had been adopted by the House of Lords in *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 in relation to the immunity of advocates.

102. The correctness of *Palmer* has not since been challenged. In *Stanton,* the Court of Appeal drew heavily on Mr Tuckey's judgment in *Palmer* (as well as the decisions of the House of Lords in *Rondel v Worsley* [1969] 1 AC 191 and *Saif*

Ali). It is important to note that the decision in *Stanton* pre-dated the decision in *Arthur J S Hall & Co v Simons* [2002] 1 AC 615.

103. There are several features of the current state of the law to which I would draw attention. First, the rationale given for the decision in *Palmer* was that there is a close analogy between the position of experts and that of advocates, so that the immunity/liability line in relation to experts should be drawn at a point which is analogous to the point at which it was drawn in *Saif Ali* in relation to advocates. As Mr Tuckey said at p 488F, the problem of where to draw the line was considered in *Saif Ali* "in the analogous but not identical situation of the advocate's immunity from suit for what he does in court". If the analogy is good, it should follow that since (following *Arthur Hall*) advocates no longer have the immunity, experts should not have it either. In other words, the reasoning in the case of *Palmer* leads to the inevitable conclusion that it would have been decided differently today.

104. Secondly, Mr Tuckey recognised that it might be difficult to decide in any given case whether the expert's work can fairly be said to be (i) "preliminary to his giving evidence in court judged perhaps by the principal purpose for which the work was done" or (ii) "work done for the principal purpose of advising the client". He said at p 489A:

> "Each case would depend upon its own facts with the court concerned to protect the expert from liability for the evidence which he gave in court and the work principally and proximately leading thereto. I do not think that difficulty in drawing the line precisely should result in a plaintiff in a case such as this being denied all remedy against his expert."

105. But this uncertainty, generated by the difficulty of knowing where to draw the line in any given case, is inherently unsatisfactory, since the difficulty itself contains the seeds of potential litigation. Moreover, there should be a degree of certainty as to the existence of an immunity if it is to be fair and effective. The expert should know in advance whether what he or she says will or will not be protected. This point has been made on a number of occasions. Thus, for example, see per Lord Clyde in *Darker v Chief Constable of the West Midlands Police* [2001] 1 AC 435, 457C. In *Arthur Hall,* Lord Hope said at p 724F that a further reason for regarding the "core immunity" in the civil field as no longer justifiable was the difficulty of finding a satisfactory way of defining the limits of the immunity. Lord Hutton said at p 729D that the *Saif Ali* test had proved difficult to apply in practice and had given rise to considerable uncertainty. He agreed with the observation of Kirby J in *Boland v Yates Property Corpn plc Ltd* (1999) 74 ALJR 209, 238, para 137 that it was "obviously desirable that a clear line establishing the limits of an advocate's immunity should be drawn".

106. Thirdly, as Lord Phillips points out, the *Palmer* approach gives rise to the paradox which he explains at para 42 above.

107. I cannot agree with Lord Hope that there is a "formidable body of authority" in support of the *Palmer* approach. More important, however, is the fact that, as I have said, the very foundation that was identified by Mr Tuckey as the basis for that approach, namely the analogy with the position of advocates, now suggests that the immunity for experts should be removed as it has been for advocates.

The correct starting point

108. There are two possible views as to the correct starting point for a consideration of the question whether experts should have immunity. The first is that there is a general rule that every wrong should have a remedy and that any exception to this rule must be justified as being necessary in the public interest.

109. The second is that there is a different general rule, which is long established and founded on grounds of public policy, that witnesses may not be sued for anything said in court and that, if there is to be an exception to that rule, it too must be justified in the public interest. This is Lord Hope's approach. He acknowledges that the general rule that where there is a wrong there should be a remedy is a valuable guide in the right context. But he says that this rule cannot prevail in the present context because it runs contrary to long-established authority. In other words, the existence of a long-established exclusionary rule is itself a sufficient reason for holding that it is necessary to deny a remedy to those who have suffered a wrong.

110. I respectfully disagree with this approach for two reasons. First, upon close examination the rule that an expert witness retained for reward is immune from liability is not long-established. As Lord Wilberforce explained at p 214E in *Saif Ali*, it is necessary to disentangle three separate strands in relation to the immunity of barristers. The first is the privilege which "attaches to proceedings in court and protects equally the judge, counsel, witnesses, jurors and parties. It has nothing to do with a barrister's duty to his client". The second is that in the nature of things an action against a barrister who "acts honestly and carefully is very unlikely to succeed". The third is that the barrister enjoys "immunity from an action, which depends upon public policy. In fixing its boundary, account must be taken of the counter policy that a wrong ought not to be without a remedy."

111. Thus, the fact that there was a long standing rule that all who participated in a trial enjoyed absolute privilege was not because they did not owe a duty of care to those who might be adversely affected by what they said at the trial. As Lord Phillips points out, this rule was established long before the modern law of negligence and, in particular, long before liability for negligent misstatement was first recognised. There is no long-established rule that witnesses are immune from liability *to their clients* in respect of what they say at trial and in connection with litigation. As I have said, the distinct position of such witnesses does not seem to have received the attention of the courts until *Palmer*. It is true that *Palmer* has been approved on a few occasions, but in so far as the rule has been applied in relation to the liability of expert witnesses to their clients, it has shallow roots.

112. But secondly, even if there is such a long-established rule, it is based on policy grounds and cannot survive if the policy grounds on which it is based no longer justify the rule. The mere fact that the immunity is long-established is not a sufficient reason for blessing it with eternal life. Circumstances change as do attitudes to the policy reasons which underpin the immunity. The common law develops in response to these changes. The history of the rise and fall of the immunity of advocates provides a vivid illustration of the point. As Lord Reid observed in *Rondel v Worsley* at p 227C, public policy is not immutable and any rule of immunity requires to be considered in the light of present day conditions.

113. The general rule that where there is a wrong there should be a remedy is a cornerstone of any system of justice. To deny a remedy to the victim of a wrong should always be regarded as exceptional. As has been frequently stated, any justification must be necessary and requires strict and cogent justification: see, for example, per Lord Hoffmann in *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177, 214D; *Darker v Chief Constable of the West Midlands Police* per Lord Hope at p 446D, per Lord Clyde at p 456H and per Lord Hutton at p 468F. If the position were otherwise, the law would be irrational and unfair and public confidence in it would be undermined.

114. Furthermore, the justification for any exception to this general rule should be kept under review. That is what happened in relation to the immunity of barristers. Their immunity for all that they did was recognised by the House of Lords in *Rondel v Worsley*. It was based on the public policy grounds that the administration of justice required that a barrister should be able to carry out his duty to the court fearlessly and independently, and that actions for negligence against barristers would make the retrying of the original actions inevitable and so prolong litigation contrary to the public interest. In *Saif Ali* the immunity was limited (again on grounds of public policy) to what barristers did in court and to work that could fairly be said to affect the way that the case would be conducted if it came to a hearing. Finally, the immunity was swept away altogether in *Arthur Hall,* when it was decided that the public policy grounds previously relied on were

no longer sufficient to justify a departure from the general rule that where there was a wrong there should be a remedy.

115. It follows that the issue that arises on this appeal is whether there is a compelling need to continue the immunity enjoyed by expert witnesses from liability to their clients.

Is the immunity justified?

116. Two reasons have been advanced in support of the continued immunity. The first is that it is necessary to ensure that expert witnesses will be prepared to give evidence at all. Like Lord Phillips and Lord Hope, I am not impressed with this argument. From time to time, the court is called upon to make decisions on whether to grant or withhold immunity from suit in certain classes of case. It does not expect to be able to make decisions of this kind on the basis of empirical evidence. In my view, surveys such as that carried out at the Bond Solon Annual Expert Witness Conference in November 2010 are of very limited value. It is unrealistic to look for hard evidence in this area.

117. It is easy to assert that professional persons will refuse to act as expert witnesses if they cease to enjoy immunity. The court has to exercise its judgment in assessing the validity of such an assertion. Whether professional persons are willing to give expert evidence depends on many factors. I am not persuaded that the possibility of being sued if they are negligent is likely to be a significant factor in many cases in determining whether a person will be willing to act as an expert. Negligence is not easy to prove against an expert witness, especially in relation to what he or she says in the heat of battle in court. This is the second of the three strands identified by Lord Wilberforce at p 214E in *Saif Ali.* Professional indemnity insurance is available. Professional persons engage in many activities where the possibility of being sued is more realistic than it is in relation to undertaking the role of an expert in litigation. Thus, for example, it is a sad fact of life that births sometimes "go wrong" and when that happens, parents sometimes look for someone to blame. But that does not stop people from practising as obstetricians.

118. The second reason advanced in support of maintaining the immunity is that expert witnesses would be reluctant to give evidence against their clients' interests if there was a risk that they would be sued. This is the divided loyalty argument that was considered in relation to advocates in *Rondel v Worsley, Saif Ali* and *Arthur Hall.* The argument in those cases was that the advocate owes an "overriding duty" to the court and unless there was immunity from liability to the client, there was a danger that they would disregard their duty to the court. Lord

Hope suggests in the present case that the duties owed by the advocate to the court are not as far reaching as those owed to the court by the expert. But it is significant that in *Rondel v Worsley* and *Saif Ali* the House of Lords described the advocates' duty to the court as "overriding" and regarded that fact as one of the reasons for not withdrawing the immunity. In *Arthur Hall,* Lord Hoffmann recognised that the duty of the advocate to the court is "extremely important in the English system of justice". He described the divided loyalty argument as being that "the possibility of being sued for negligence would actually inhibit the lawyer, consciously or unconsciously, from giving his duty to the court priority to his duty to his client". That is precisely the argument advanced by Mr Lawrence in the present case.

119. It is therefore relevant to examine the way in which the divided loyalty argument was dealt with in *Arthur Hall.* The fullest treatment of it is in the speech of Lord Hoffmann at p 692F:

> "To assess the likelihood [of the removal of the immunity having a significant adverse effect], I think that one should start by considering the incentives which advocates presently have to comply with their duty and those which might tempt them to ignore it. The first consideration is that most advocates are honest conscientious people who need no other incentive to comply with the ethics of their profession. Then there is the wish to enjoy a good reputation among one's peers and the judiciary. There can be few professions which operate in so bright a glare of publicity as that of the advocate. Everything is done in public before a discerning audience. Serious lapses seldom pass unnoticed. And in the background lie the disciplinary powers of the judges and the professional bodies....
>
> Looking at the other side of the coin, what pressures might induce the advocate to disregard his duty to the court in favour of pleasing the client? Perhaps the wish not to cause dissatisfaction which might make the client reluctant to pay. Or the wish to obtain more instructions from the same client. But among these pressures, I would not put high on the list the prospect of an action for negligence. It cannot possibly be negligent to act in accordance with one's duty to the court and it is hard to imagine anyone who would plead such conduct as a cause of action."

120. Although the analogy between the advocate and the expert witness is not precise, it is sufficiently close for much of what Lord Hoffmann said in this passage to be equally applicable to expert witnesses. In particular, like advocates, they are professional people who can be expected to want to comply with the rules and ethics of their profession. Experts can be in no doubt that their overriding duty

is to the court. That is spelt out in the rules and they are reminded of the duty every time they write a report: rule 35.10(2) states that at the end of the expert's report "there must be a statement that the expert understands and has complied with their duty to the court". There is no reason to doubt that most experts are honest conscientious people who need no other incentive to comply with their duty and the rules and ethics of their profession. There may be a few experts (as there may be a few advocates) who behave dishonourably. But that is no more compelling a reason for retaining the immunity for experts than it was for retaining it for advocates.

121. As Lord Hoffmann said in relation to advocates, the prospect of an action for negligence is unlikely to tempt an expert to disregard his duty to the court. Experts can and almost always do obtain professional indemnity insurance to cover the risk of negligence. Most of them act honestly and conscientiously because that is what professional men and women do.

122. It follows from what I have said that I cannot agree with what Lord Hoffmann said at p 698D-G about expert witnesses. He said of *Stanton* that it was an example of a general immunity for acts done in the course of litigation which fell "squarely within the traditional witness immunity"; and that a witness "owes no duty of care to anyone in respect of the evidence he gives to the court". For the reasons that I have given, an expert engaged for reward does owe a duty of care to his client. The only question is whether there are sufficiently compelling policy reasons for according the expert immunity from suit.

123. It is in any event difficult to see how immunity would promote the discharge by experts of their duty to the court. The lesson of history suggests that it would not do so. Even before the Woolf reforms, it was well established that an expert witness owed a duty to be independent and assist the court: see *The Ikarian Reefer* [1993] 2 Lloyd's Rep 68, 81, and the cases cited there. But that did not dissuade the "hired gun", who all too often walked the stage before the Woolf reforms, from acting in a partisan way, even though at that time he enjoyed immunity from suit.

124. It follows that I am not convinced by either of the reasons advanced in justification of the immunity. I am even less persuaded that the immunity is *necessary* in the public interest or that there is a sufficiently compelling reason to justify continuing to deny a remedy to a person who has suffered loss as a result of his expert's breach of the duty of care owed in contract and tort.

Should the immunity of expert witnesses survive for any purpose?

125. Nothing that I have said is intended to undermine the long-standing absolute privilege enjoyed by other witnesses in respect of litigation. Although it is unnecessary to decide the point, as presently advised I can see no reason to treat expert witnesses who are engaged in criminal and family litigation any differently from those engaged in civil litigation.

Conclusion

126. For these reasons as well as those given by Lord Phillips, I would hold that the immunity of expert witnesses from liability to their clients for breach of duty (whether in contract or negligence) can no longer be justified. I would, therefore, allow this appeal.

LORD HOPE

127. The question in this case is whether an exception should be made to the rule that witnesses may not be sued in respect of evidence given in court, or things said or done in contemplation of giving evidence in court, where the witness is an expert who accepts instructions from the litigant to give evidence for reward. The respondent is said to have negligently signed an inaccurate joint statement which had been prepared as directed by the judge under CPR 35.12(3). She did not give evidence in court, as the case was subsequently settled. So it is her conduct when she agreed to the way the joint statement had been worded by the other side's expert that is the focus of attention. It is common ground that the immunity rule applies to things said or done, or omitted to be said or done, by an expert witness at that stage of the proceedings unless it is subject to the exception for which the appellant contends: see *Watson v M'Ewan* [1905] AC 480. In that case it was held that the privilege of a witness extends to statements made in a preliminary statement with a view to giving evidence.

128. I have not found this an easy question to answer, for a variety of reasons. The first is to be found in the nature and purpose of the rule itself, which must be the starting point for an inquiry as to whether an exception should be made to it. The second is to be found when an attempt is made to define the limits of the exception. The third is the lack of firm evidence, pointing either one way or the other, as to the need for the exception or as to the consequences if it were to be introduced. The question whether the rule continues to perform a useful function has been raised from time to time. Andrew Edis, "Privilege and immunity: problems of expert evidence" (2007) CJQ 40, suggested that compliance with the expert's duty to the court would be enhanced by its removal. But it is a very different thing for it to be removed retrospectively, as I assume it will have to be if

the appellant's claim is be given effect, by a decision of seven Justices in this Court, from which there would be no way back except by legislation enacted by Parliament. I doubt whether it is right that we should proceed in this way only on the basis of assumptions, which is really all we have to go on in this case.

129. I regret too the absence of any intervention in these proceedings by a body with experience across the whole range of this area of practice, such as the Academy of Experts, which could have provided us with evidence to inform our judgment. In *Arthur J S Hall & Co v Simons* [2002] 1 AC 615, in which the opportunity was taken to challenge the decision of the House of Lords in *Rondel v Worsley* [1969] 1 AC 191 on the question of the immunity given to advocates, the House had the benefit of argument from the Bar Council which was given leave to intervene. As Lord Steyn said at p 676, it played a particularly helpful part in the appeal. The House was, of course, dealing in that case with an issue which was within the personal experience of all members of the Appellate Committee, and it was known that advocates were already under a professional obligation to carry insurance: see Lord Steyn, p 682; Lord Hoffmann, p 691. In this case we are dealing with an area of practice with whose precise limits I suspect I am not alone in being less familiar. I am unwilling to assume that every witness who gives evidence as an "expert" belongs to a professional organisation or engages regularly in court work. Some may be academics, and some may come forward to give expert evidence only once in a lifetime. It seems to me that it would be unwise to assume that they all have insurance cover against claims for negligence.

130. I am also unimpressed by the line of argument that the rule should not be allowed to provide a shelter for the negligent expert who is in breach of the duty that he owes to the client from whom he has accepted instructions or by whom he is being paid. Of course, if the point is put that way round the immunity that the rule currently provides may seem objectionable. But, as I shall mention later, it was recognised long ago that it is not the purpose of the rule to protect those who are guilty of such transgressions. Its purpose is to ensure that witnesses are not deterred from coming forward to give evidence in court and from feeling completely free to speak the truth when they do so, without facing the risk of being harassed afterwards by actions in which allegations are made against them in an attempt to make them liable in damages.

131. It is important not to lose sight of this fundamental principle. To do so risks devaluing the rule. It diverts attention from the consequences for those who are wholly innocent of any transgression for which damages could properly be awarded, but are nevertheless exposed to harassment by the disgruntled or the unscrupulous. There has been no challenge to the policy justification as it applies to witnesses generally. So the question in this case is whether the reasons which justify an immunity for witnesses generally do not apply to expert witnesses. The grounds for making that exception by judicial decision need to be examined and

explained very carefully. This is because they may have implications for the immunity which is at present given to other kinds of witness against whom a breach of duty may be alleged. An incautious removal of the immunity from one class of witness risks destabilising the protection that is given to witnesses generally.

The rule

132. The rule that affords immunity to witnesses when giving evidence in court, or with a view to giving evidence, is not itself in doubt. But I think that it is important, before deciding whether an exception should be made to it in the case of expert witnesses, to examine the origins of the rule and the grounds of policy on which it is based.

133. The rule is of very long standing, perhaps as early as the 16th century: see *D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12, (2005) 214 ALR 92, para 39. It was recognised in the 17th century that judges, with whose immunity that which is given to witnesses there is an affinity, should not be exposed to action, at least in dubious cases where just and rational men might be of different judgments: "otherwise no man but a beggar, or a fool, would be a judge": *Stair, Institutions of the Law of Scotland* (2nd ed, 1693), IV, 1, 5. Two centuries later, in *Dawkins v Lord Rokeby* (1873) LR 8 QB 255, 264, Kelly CB declared:

> "no action lies against parties or witnesses for anything said or done, although falsely and maliciously and without any reasonable or probable cause, in the ordinary course of any proceeding in a court of justice."

That this principle had long been recognised in English law can be seen from Lord Mansfield's statement in *R v Skinner* (1772) Lofft 55 that:

> "neither party, witness, counsel, jury, or judge, can be put to answer, civilly or criminally, for words spoken in office."

As Lord President Inglis observed in *Williamson v Umphray and Robertson* (1890) 17 R 905, 910-911 where the claim was one of libel, the rule that gives that privilege to judges, jurors, counsel and witnesses is founded on obvious grounds of public policy:

> "It is essential to the ends of justice that persons in such positions should enjoy freedom of speech without fear of consequences, in discharging their public duties in the course of a judicial inquiry. But the motive of the law is not to protect corrupt or malevolent judges, malicious advocates, or malignant and lying witnesses, but to prevent persons acting honestly in discharging a public function from being harassed afterwards by actions imputing to them dishonesty and malice, and seeking to make them liable in damages."

134. The Lord President referred in support of this explanation of the purpose of the rule to the following passage in the speech of Lord Penzance in the House of Lords in *Dawkins v Lord Rokeby* (1875) LR 7 HL 744, 755-756:

> "If by any process of demonstration, free from the defects of human judgment, the untruth and malice could be set above and beyond all question or doubt, there might be ground for contending that the law of the land should give damages to the injured man. But this is not the state of things under which this question of law has to be determined. Whether the statements were, in fact, untrue, and whether they were dictated by malice, are, and always will be, open questions, upon which opinions may differ, and which can only be resolved by the exercise of human judgment. And the real question is, whether it is proper on grounds of public policy to remit such questions to the judgment of a jury. The reasons against doing so are simple and obvious. A witness may be utterly free from malice, and may yet in the eyes of a jury be open to that imputation; or, again, the witness may be cleared by the jury of the imputation, and may yet have to encounter the expenses and distress of a harassing litigation. With such possibilities hanging over his head, a witness cannot be expected to speak with that free and open mind which the administration of justice demands."

135. Commenting on that passage in *Primrose v Waterston* (1902) 4 F 783, in which an action for slander was brought against a magistrate, Lord Moncreiff said at pp 793-794 that the reason for the wideness of the protection was that experience showed that, although the judge might after trial succeed in clearing himself of the imputation, he would be exposed to being called on to answer what ex facie of the summons was apparently a relevant charge:

> "Now, if that were once permitted the protection of absolute privilege would disappear; and therefore the only sound rule is to grant that protection unless it can be demonstrated – that is, shewn so clearly that no man of ordinary intelligence and judgment could

> honestly dispute it – that the words used had no connection with the case in hand. The result of this, no doubt, is that in an exceptional case like that which we have before us, of a judge who is unable to restrain himself, hardship is inflicted on the person to whom the remarks are addressed. But on the other hand it is to be remembered that, thanks to the protection afforded by the privilege, ninety-nine out of a hundred judges are enabled to discharge their duties without fear or favour and without the dread of an impending action."

136. Although Lord Moncreiff was there speaking of the rule in its application to judges, his point applies with equal force to the position of witnesses. There will, of course, be some who may abuse the privilege and against whom allegations might reasonably be made that what they said in the witness box was malicious and defamatory. But the privilege exists for the protection of all witnesses, not just the few against whom successful actions might otherwise be brought for an award of damages: see also *Munster v Lamb* (1883) 11 QBD 588, 607 where Fry LJ said that the purpose of the rule was to protect persons acting bona fide who under a different rule would be liable, not perhaps to verdicts and judgments against them, but to the vexation of defending actions.

137. In *Watson v M'Ewan* [1905] AC 480 the Lord Chancellor, the Earl of Halsbury, said that the privilege of a witness, the immunity from responsibility in an action in which evidence has been given by him in a court of justice, was too well established then to be shaken. He described it as one of the necessities of the administration of justice. In that case a medical practitioner, whom the pursuer had employed as her professional adviser with a view to an action she proposed to bring against her husband for separation and aliment, then gave evidence for the husband in that same action. This was said to have come about because he expressed views to the husband's solicitors that made it evident that his opinion was adverse to the position that the wife wished him to adopt. This led to his being requested by those acting for the husband to give evidence on his behalf. He agreed to do so, and in the course of his evidence referred to matters which he had learned on the occasion of his professional visit to the wife relevant to her state of health which, so it was alleged, impressed the judge unfavourably to the wife's case and without which, it was said, she would have been successful. An action of damages was then raised by the wife against him for slander and breach of confidentiality. The wife's father raised an action of damages against him on similar grounds. In both cases the question whether the medical practitioner was entitled to witness immunity was raised as a preliminary issue.

138. Reversing the judgment of the Court of Session (see *AB v CD* (1904) 7 F 72; reported also in the Scots Law Times as *M'Ewan v Watson* (1905) 12 SLT 599), the House of Lords held that the protection that the medical practitioner undoubtedly had as to what he had said in the witness box should be given also to

his preliminary examination by those acting for the husband to find out what he could prove if called to give evidence on his behalf. As to that, the Lord Chancellor made this observation:

> "It may be that to some extent it seems to impose a hardship, but after all the hardship is not to be compared with that which would arise if it were impossible to administer justice, because people would be afraid to give their testimony."

139. The facts of that case are of particular interest, especially because this appears to have been the first case that the immunity was invoked in response to a claim other than one for slander. They are best explained in the report of the judgment of the Court of Session at (1904) 7 F 72, in which the averments for both sides are set out. Sir Patrick Watson was a hospital surgeon and clinical teacher with an unrivalled reputation for his operative skill and teaching powers. He accepted instructions from Mrs McEwan with a view to his giving evidence as an expert witness on her behalf. In the event the evidence which he was said to have given, when he appeared as a witness for her husband, was unfavourable to her and in support of the case that was being made against her. He was said in the course of his evidence to have read out notes which he had made during a professional visit when he examined her. They contained entries to the effect that it seemed to him that both the wife and her father were bent on inducing her premature labour (in other words, an abortion) with a view to freeing her from any permanent reminder of the marriage and, if possible, to obtain a separation. This is an early example of the protection being given to an expert witness against an allegation that his evidence to the court was contrary to the interests of the person by whom he had originally been instructed for reward. It was also alleged that what he said was defamatory of her and her father. There was no suggestion that the fact that he may have owed duties to them, such as the duty of confidentiality, made any difference. He was entitled to the protection in the same way as any other witness.

140. The reports of the case in the House of Lords, which describe the case in the head-note as one of slander, give the impression that the claim for breach of confidence did not proceed and that the relevant issues before the House were concerned only with the claim for slander. But the report of the case in the Court of Session in the Session Cases shows that the pursuer had proposed four issues for trial: *AB v CD* (1904) 7 F 72, 76-77. Issue (1) was whether giving the precognition amounted to breach of confidence; issue (2) was whether giving the evidence in court amounted to breach of confidence; issue (3) was whether giving the precognition amounted to slander; and issue (4) was whether giving the evidence in court amounted to slander. The Lord Ordinary disallowed issues (2) and (4), as they related to evidence given in court which attracted the immunity. But he allowed issues (1) and (3), on the view that witness immunity did not extend to giving a precognition. In the Inner House it was argued that the fact that an expert

gave evidence by choice and was not compelled to do so meant that he did not require the protection of the immunity. This argument was rejected, and the Inner House agreed with the Lord Ordinary that issues (2) and (4) should be disallowed. But it also disallowed issue (1). Watson then appealed to the House of Lords against the decision of the Inner House that issue (3) should go to trial. This was the issue as to slander in the precognition. The Session Cases report of the case in the House of Lords states that Mrs McEwan cross-appealed against the disallowance of the first issue: *Watson v M'Ewan* (1905) 7 F (HL) 109, 110. This was issue (1), the issue as to breach of confidentiality in the precognition.

141. The appeal was heard together with an appeal in the action raised by Mrs McEwan's father, in which the issues were almost the same. The father's case has not been separately reported, but the names of both cases appear in the Scots Law Times report at (1905) 13 SLT 340. The Lord Chancellor said that it was impossible to say that any different question arose in the one appeal from that which arose in the other: [1905] AC 480, 485. Both claims as to what was said in the precognition were before the House and, as the outcome of the appeal was that Mrs McEwan's case was remitted to the Court of Session to dismiss her action, its ruling that Watson was entitled to the immunity at the precognition stage must be taken to have extended to her claim against him for breach of confidence as well as her claim for slander. That this is how the Lord Chancellor saw the matter appears from the second paragraph of his speech, at p 486, where he said that he was not disposed to express an opinion either way as to the confidential nature of the relationship, which might raise very serious and difficult questions, because he had no difficulty at all in their solution on other grounds:

> "The broad proposition I entertain no doubt about, and it seems to me to be the only question that properly arises here; as to the immunity of a witness for evidence given in a Court of Justice, it is too late to argue that as if it were doubtful."

I think that this passage makes it clear that, in his opinion, there were no grounds for distinguishing between the claims that were being made in the action. The immunity extended as much to a claim of damages for breach of a duty of confidence as it did to a claim for slander, or indeed any other claim. The question whether an expert witness was in a different position from an ordinary witness had been raised and dealt with in the Inner House.

142. The decision in *Watson v M'Ewan* [1905] AC 480 that the protection extended to the preparation of evidence was applied in *Marrinan v Vibart* [1963] 1 QB 528. The plaintiff in that case was a barrister who brought an action in damages for conspiracy to make false statements defamatory of him as a barrister against two police officers. They had given evidence against him at a criminal trial

and in disciplinary proceedings at an inquiry before the Benchers of Lincoln's Inn. His action was held to be barred by the rule of public policy. Sellers LJ, with whom the other members of the Court of Appeal agreed, said at p 535:

> "*Whatever form of action* is sought to be derived from what was said or done in the course of judicial proceedings must suffer the same fate of being barred by the rule which protects witnesses in their evidence before the court and in the preparation of the evidence which is to be so given." [Emphasis added]

Salmon J said of the immunity in the same case at first instance, at [1963] 1 QB 234, 237:

> "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."

143. In *Roy v Prior* [1971] AC 470, 480 Lord Wilberforce said that the reasons why immunity is conferred upon witnesses in respect of evidence given in court are in order that they may give their evidence fearlessly and to avoid a multiplicity of actions in which the value or truth of their evidence would be tried over again. This appears to have been the first mention of the second of these two reasons in the context of witness immunity. Lord Wilberforce's formulation was adopted by Mr Simon Tuckey QC in *Palmer v Durnford Ford* [1992] QB 483, 487 and by Simon Brown LJ in *Silcott v Commissioner of Police of the Metropolis* (1996) 8 Admin LR 633, 637. It was referred to also by Drake J in *Evans v London Hospital Medical College (University of London)* [1981] 1 WLR 184, 189 when he was discussing the reasons for the immunity in the context of criminal proceedings. He accepted that one of the reasons was to prevent disgruntled prisoners from seeking to have their cases retried in civil suit. But he said that the reason was in fact more broadly based than that. In *Stanton v Callaghan* [2000] QB 75, 93-94, Chadwick LJ pointed out that Lord Wilberforce's second reason, which he appears to have derived from the reasons for the immunity given to barristers in *Rondel v Worsley* [1969] 1 AC 191, was said by Lord Diplock in *Saif Ali v Sidney Mitchell & Co* [1980] AC 198, 223 to have overlooked the possibility that the action had been dismissed or judgment entered without a contested hearing so that there was no possibility of restoring the action and proceeding to trial. We are left then with the first reason, which has been the only true basis for the rule from the very beginning.

144. In *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177 Lord Hoffmann said that the policy of the immunity is to enable people to speak freely without fear of being sued, whether successfully or not. Once again there is a recognition of the fact that the rule exists for the protection of all witnesses, not just the few against whom successful actions might otherwise be brought. Lord Hoffmann added these words at p 214:

> "If this object is to be achieved, the person in question must know at the time he speaks whether or not the immunity will attach. If it depends upon the contingencies of whether he will be called as a witness, the value of the immunity is destroyed."

It is the need for certainty that also makes it necessary to extend the protection of the rule to all witnesses and to all causes of action that may be brought against them. The rough is taken with the smooth. There will be some cases where a genuine cause of action is excluded by it. But in the vast majority of cases it is the assurance of the protection that enables people against whom no action could reasonably be brought to speak freely without facing the prospect of being harassed by those against whose interests they have spoken. It is an important part of the protection that, as Sellers LJ said in *Marrinan v Vibart* [1963] 1 QB 528, 535, it extends to whatever form of action is sought to be derived from what was said or done in the proceedings. That had been settled law since the decision of the House of Lords in *Watson v M'Ewan* [1905] AC 480, where it was held that the witness was protected by the immunity against a claim for breach of confidence: see para 141, above.

145. In *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 it was argued for the Bar Council that witness immunity provided a useful analogy to that given to advocates: p 669. For the clients, on the other hand, it was argued that no relevant parallel could be drawn, as the duties that a paid witness owed to his client were subject to the overriding duty to the court to tell the truth: p 671. Lord Hobhouse of Woodborough said at p 741 that the expert witness was in a special position similar to that of the advocate. But Lord Hoffmann at pp 697-698 rejected the expert witness analogy. He said that it was not enough to explain the immunity relating to court proceedings by saying, as Lord Diplock did in *Saif Ali v Sidney Mitchell & Co* [1980] AC 198, 222, that people involved in litigation should be free from avoidable "stress and tensions of alarm and fear". It was necessary to go further and explain *why* the public interest requires that a *particular* participant should be free from the stress created by the possibility that he might be sued. The witness rule, he said, depends on the proposition that without it, witnesses would be more reluctant to assist the court. Referring to *Stanton v Callaghan* [2000] QB 75, in which it was held that an expert could not be sued for agreeing to a joint experts' statement in terms which the client thought detrimental to his interests, he said:

> "that seems to me to fall squarely within the traditional witness immunity. The alleged cause of action was a statement of the evidence which the witness proposed to give to the court. A witness owes no duty of care to anyone in respect of the evidence he gives to the court. His only duty is to tell the truth."

146. The question which this case raises is whether Lord Hoffmann was right to declare that the case of the expert witness fell within the traditional witness immunity.

The expert witness

147. The observations of Lord Hoffmann and Lord Hobhouse in *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 indicate that they did not think that the fact that expert witnesses owed a duty of care to their clients was a reason for excluding them from the immunity that is available to witnesses generally. In *Watson v M'Ewan* [1905] AC 480 the fact that Sir Patrick Watson may have owed a duty in confidence to his former client made no difference to the result: see paras 139-141, above. Lord Browne-Wilkinson made it clear in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, 755 that nothing that he had said in that case about the investigation and preparation of evidence by the psychiatrist in proceedings for the protection of a child from abuse was intended to cast doubt on the ruling by Mr Simon Tuckey QC in *Palmer v Durnford Ford* [1992] QB 483, 488-489 that the protection should be extended to the production or approval of an expert's report for the purposes of disclosure to the other side, but not to work done for the principal purpose of advising the client. In the Court of Appeal in *X (Minors) v Bedfordshire County Council* Sir Thomas Bingham MR too said that in his opinion Mr Simon Tuckey QC reached a correct conclusion in *Palmer*: [1995] 2 AC 633, 661. There was a difference of view between the Court of Appeal and the House of Lords in that case as to whether there was a sufficiently immediate link between the investigations carried out by the psychiatrist to attract the immunity. But it was common ground that the psychiatrist was in the same position in regard to the immunity as any other witness.

148. This is a formidable body of authority which should not be lightly disregarded. The decision of Drake J in *Evans v London Hospital Medical College (University of London)* [1981] 1 WLR 184 lends further support to it. In *Hughes v Lloyds Bank Plc* [1998] PIQR P98 the Court of Appeal assumed that expert witnesses were immune from suit for negligence. In *Raiss v Palmano* [2001] PNLR 21 a claim for negligence against a surveyor was struck out at first instance but allowed so far as it alleged deceit because he conceded in cross-examination that he did not have the qualification claimed in his expert report. On appeal the entire claim against him was struck out.

149. Lord Phillips says that the immunity of expert witnesses from liability in negligence has never been challenged but has simply been accepted. It is true that none of the earlier cases addressed the question of immunity from liability for negligence, and it was accepted in *Palmer v Durnford Ford* [1992] QB 483 and *Hughes v Lloyds Bank Plc* [1998] PIQR P98 that in general the paid expert witness is protected by the immunity. But I think, with respect both to him and Lord Dyson, that this view does not do justice to what the authorities, properly understood, reveal to us. The immunity was challenged in *Watson v M'Ewan* [1905] AC 480 but held to apply to a claim by a client for breach of the expert's duty of confidence. The universality of the rule was declared in that case, and it has been asserted and applied repeatedly since then. Its application to claims for breach of duty by their clients against expert witnesses was expressly recognised by both Lord Hoffmann and Lord Hobhouse in *Arthur J S Hall & Co v Simons* [2002] 1 AC 615. The fact must be faced that what we are being asked to do in this case is to remove an immunity which until now has been accepted as falling within the universal principle. This is not just a fringe decision of the kind to which Lord Wilberforce referred in *Saif Ali v Sidney Mitchell & Co* [1980] AC 198, 211 where, as he saw it, the extent of the immunity then given to advocates was in need of being clarified.

150. The leading modern authority on the position of expert witnesses is *Stanton v Callaghan* [2000] QB 75. In that case too, after reviewing the authorities, the Court of Appeal saw no reason to disturb the ruling in *Palmer*. Chadwick LJ said at p 101 that he was not persuaded that experts who, as part of their professional practice and for reward, offer their services as potential witnesses on matters within their expertise are prone to "strains and tensions of alarm and fear" at the stage at which they are preparing their reports for exchange. But the basis in fact for this observation is unclear, and the other members of the Court did not agree with him on this point.

151. Otton LJ said at p 104 in *Stanton* that there was clear authority that, provided the test of "principal and proximate connection" is satisfied, the pre-hearing work of an expert will be within the protective circle of the witness immunity principle. What remained to be considered was whether it was appropriate to draw the circle narrower so that some experts are admitted and some are not. His conclusion was that, while the need to grant immunity may be more obvious in some cases than others, the courts ought not to rush to draw a rigid boundary between situations where immunity is automatically granted to some and not to others. He reminded himself at p 107 that the immunity is not granted primarily for the benefit of the individuals who seek it. They are the beneficiaries of the public interest to ensure that the administration of justice is not impeded, which is the consideration that should be paramount. Although Nourse LJ was prepared to acknowledge that the rule could not be quite the same for experts as for other witnesses as the expert usually has the dual capacity of advising the client

as well as giving evidence in support of his case, he saw no justification for distinguishing between an expert and a lay witness either on the ground that the expert is usually remunerated for his services or on the ground that he may be less likely than a lay witness to be deterred from giving evidence.

152. The proper administration of justice depends frequently on evidence given by expert witnesses. As Otton LJ observed in *Stanton* at p104, witnesses who claim to be and are treated as experts come from many disciplines and appear in ever widening areas of litigation, ranging from accident reconstruction experts to veterinary surgeons – and it might also be said – to zoologists. The proceedings in which they are engaged range across the board, from criminal trials at one extreme to professional disciplinary hearings at the other, with a wide variety of civil proceedings in between. And they range from those whose profession is to give expert evidence and who are very familiar with the court process to those who appear once only in a particular case and who are least likely to have protected themselves against the risk of a claim for negligence.

153. Mr Ter Haar QC for the appellant was careful to confine his argument to the facts of this case. His proposition was that an expert in civil cases should no longer have immunity from suit in relation to negligent work performed for the substantial purpose of giving evidence in court. He said that it was no part of his argument that his proposition should be applied to expert witnesses in criminal cases or in family law cases either. Nor was it part of his argument that it should be applied to what the expert witness said when giving evidence in court. But I do not think that, if there are good grounds for removing the immunity from that stage of the proceedings, it would be possible to retain it for the stage when the expert gives evidence in court. And it would be difficult to defend its retention where the expert witness gives evidence, or prepares for the giving of evidence, for his client in other tribunals. The underlying duty of care is the same in all cases.

154. In his report, *Access to Justice* (1996), Lord Woolf referred in chapter 13, para 3 to the recommendation in chapter 23 of his interim report that the calling of expert evidence in civil cases should be under the complete control of the court. His concern was that a more economical use should be made of this type of evidence by narrowing the issues between opposing experts as early as possible. Among the points that he made about the way expert evidence was being used was a concern that experts sometimes took on the role of partisan advocates instead of neutral fact finders or opinion givers. In chapter 13, para 25 of his report he said that there was wide agreement that the expert's role should be that of an independent adviser to the court, and that lack of objectivity could be a serious problem. In para 27 he said that it was important that each opposing expert's overriding duty to the court was clearly understood. In para 30 he said that there was widespread agreement that an expert's report intended for use as evidence in court proceedings should be addressed to the court. These observations formed the

basis for the rules that are now set out in CPR Part 35 and for Practice Direction 35 which supplements them. CPR Part 35 and the Practice Direction are designed for use in civil cases only. They do not apply to criminal cases, and they do not apply in Scotland either. But it seems to me that the principles which they express are of universal application – in criminal cases arguably even more so, in view of the overriding public interest in securing the ends of justice in proceedings of that kind.

155. CPR 35.2(1) states that a reference to an "expert" in the Part is a reference to a person who has been instructed to give or prepare expert evidence for the purpose of proceedings. CPR 35.3 states:

> "(1) It is the duty of experts to help the court on matters within their expertise.
>
> (2) This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid."

In *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)* [1993] 2 Lloyd's Rep 68, 81 Cresswell J said, of the duties and responsibilities of experts in relation to the party and to the court, that expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to the form or content by the exigencies of litigation, and that an expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. He referred, in support of these propositions, to Lord Wilberforce's observations in *Whitehouse v Jordan* [1981] 1 WLR 246, 256 and those of Garland J in *Pollivitte Ltd v Commercial Union Assurance Company Plc* [1987] I Lloyd's Rep 379, 386 and Cazalet J in *In re J (Child Abuse: Expert Evidence)* [1991] FCR 193.

156. There is, then, an obvious conflict between the duties that the expert owes to his client and those that, in the public interest, he owes to the court. Lord Hoffmann was perhaps overstating the position when he said in *Arthur J S Hall & Co v Simons* [2002] 1 AC 615, 698, in the context of a discussion about expert witnesses, that a witness owes no duty of care to anyone in respect of the evidence he gives to the court, as his only duty is to speak the truth. This may be true of witnesses generally, but it is plain that the paid expert owes duties to the client by whom he is being paid. If he agrees for a reward to prepare a report and to present himself in court to give evidence, he is obliged to do those things and to take reasonable care when he is doing so. He must make the necessary investigations and preparations for the giving of that evidence. Nevertheless when it comes to the

content of that evidence his overriding duty is to the court, not to the party for whom he appears. His duty is to give his own unbiased opinion on matters within his expertise. It is on that basis that he must be assumed to have agreed to act for his client. It would be contrary to the public interest for him to undertake to confine himself to making points that were in the client's interest only and to refrain from saying anything to the court to which his client might take objection.

157. Do these considerations reduce, or remove, the need in the case of the expert witness for the protection of the immunity? As Justice Stevens observed in *Briscoe v LaHue* (1983) 460 US 325, 335-336, when a police officer appears as a witness he may reasonably be viewed as acting like any other witness sworn to tell the truth. He may be regarded as an official performing a critical role in the judicial process, in which event he may seek the benefit afforded to other participants in the same proceeding. At p 345 he recognised that the absolute witness immunity bars a path to recovery by defendants who have been convicted on the basis of false testimony:

> "But we have recognised, again and again, that in some situations, the alternative of limiting the official's immunity would disserve the broader public interest."

There would seem then, as a starting point, to be a strong case for treating an expert in the same way as any other witness when it comes to the giving of sworn evidence in court. If that is so, the case would seem to be just as strong for treating him in the same way when, on the directions of the court, he is agreeing a joint statement with the opposing expert – and for treating him in the same way when he is preparing his own report with a view to giving his evidence. Lord Phillips does not see why an expert should be concerned that performance of his duty to the court will result in his being sued for breach of duty to his client: para 56. But this assumption contradicts the justification for the immunity that is extended to witnesses generally, which is that there are grounds from time to time for believing that the fear of suit exists. If he is right, there are seeds here for challenging the whole concept of witness immunity.

Pros and cons

158. Various arguments have been advanced in favour of removing the immunity from expert witnesses and for not doing so. I shall deal first with those that have been advanced for removing it.

159. *Where there is a wrong there must be a remedy.* This may be a valuable guide in the right context. Lord Wilberforce said in *Saif Ali v Sidney Mitchell & Co* [1980] AC 198, 214 that account had to be taken of this principle in fixing the boundary of the advocate's immunity, which until then was unclear. But we are not dealing with fringe issues in this case, and in the present context it seems to me that little weight can be attached to it. Removal of the immunity runs counter to long established authority. The question whether it was more important to right wrongs was considered and rejected by Lord Penzance in the House of Lords in *Dawkins v Lord Rokeby* (1875) LR 7 HL 744: see para 133, above. It was considered again and rejected by Lord President Inglis in *Williamson v Umphray and Robertson* (1890) 17 R 905, by Fry LJ in *Munster v Lamb* (1883) 11 QBD 588 and by the Lord Chancellor in *Watson v M'Ewan* [1905] AC 480. Nothing that has been said in any of the later authorities casts doubt on the policy choice that was made in these early cases. Lord Hoffmann's declaration in *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177 that the policy of the immunity is to enable people to speak freely without fear of being sued, whether successfully or not, is a restatement of exactly the same point.

160. Lord Wilberforce's view in *Saif Ali* was that this consideration showed that the area of the immunity must be cautiously defined. By that I think he meant that the immunity should not be extended any further than necessary. That test can be applied without too much difficulty when one is setting limits to the context in which things said or done will attract the immunity. It will then follow that the protection will extend to all claims of whatever nature that fall within that context. Those which fall outside it of whatever nature will not have that protection. It is more difficult to apply the idea that where there is a wrong there must be a remedy to include some wrongs within the scope of the immunity and exclude others that fall within the same context. If it is necessary to give the protection against some claims to enable witnesses to speak freely, why should it not be given to them all? Why should a claim for a breach of duty be treated differently from a claim for defamation? If the claim is well founded, a wrong was done in either case which ought to be remedied.

161. *Any immunity has to be justified.* This too is a sound argument in the right context. But in this case we are dealing with a long established principle which extends the immunity to everyone who gives evidence to the court. Any extension of that principle would, of course, have to be justified. That was the problem that was faced up to and answered in *Watson v M'Ewan* [1905] AC 480 and more recently in *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633. But in this case we are being asked to make an exception to it. We are being asked to remove the immunity for a category of witness which until now has been given the benefit of it. *Watson v M'Ewan* [1905] AC 480 is a case in point as, of course, is *Stanton v Callaghan* [2000] QB 75. It seems to me to be that it is the proposed exception to the rule, not the rule itself, that needs to be justified.

162. *Analogy with the removal of the immunity from advocates.* It was said that, as the decision in *Arthur J S Hall & Co v Simons* [2002] 1 AC 615 that the advocate's immunity from liability for a breach of duty to his client had not given rise to any problems, the assumption could be made that the same could be said for the removal of the immunity from experts. I am not convinced that this is so. The witness and the advocate perform different functions. The duties that the advocate owes to the court are not as far reaching as the overriding duty to the court that rests on the expert. His principal duty is to his client, not to the court.

163. Lord Phillips makes another point: see paras 46-50. He says that the expert witness can be compared with the advocate, as both undertake a duty to their client. In that respect he has much more in common with the advocate than he does with the witness of fact. Lord Dyson addresses the same issue when he is discussing the problem of divided loyalties: para 120. His conclusion is that the fact that the expert's overriding duty is to the court is no more compelling for retaining the immunity for experts than it was for retaining it for advocates. These observations use the fact that the immunity has been withdrawn from the one as an argument for withdrawing it from the other. I find this disturbing. I do not think that anyone who sat in *Arthur J S Hall & Co v Simons* foresaw that removing the immunity from advocates would be taken as an indication that it should be removed from expert witnesses too. Lord Hoffmann's remarks indicate that, rightly or wrongly, he saw no such analogy. Only Lord Hobhouse disagreed with him. Yet here we are a decade later contemplating taking just that step. There is a warning here, to repeat the old adage, that one thing leads to another. Removing just one brick from the wall that sustains the witness immunity may have unforeseen consequences.

164. *Wasted costs orders and disciplinary proceedings against experts.* It was also said that, as it was now clear that an expert witness was not immune from the sanction of compensating by a wasted costs order those who had suffered by evidence given recklessly in flagrant disregard of his duties to the court, and that he was not immune from disciplinary proceedings for professional misconduct at the instance of the professional body to which he belongs, a sufficient inroad had been made into his immunity for it to be but a short step for it to be removed as regards his duties to his client too. The suggestion was that the protection of the immunity had been significantly eroded by these developments.

165. I am not convinced by this argument either. The decisions in *Phillips v Symes (No 2)* [2004] EWHC 2330 (Ch), [2005] 1 WLR 2043 and *Meadow v General Medical Council* [2006] EWCA Civ 1390, [2007] QB 462 are not inconsistent with the continued existence of the general immunity. But there is a more fundamental point. It is one thing to be liable to a wasted costs order at the instance of the court itself or to proceedings by a professional body for professional misconduct. It is quite another to be at risk of worthless but possibly

embarrassing and time-consuming proceedings by a disgruntled and disaffected litigant in person. Insurance cover, if available, is not a universal remedy. And here again one must be careful not to lose sight of the policy choice that was made long ago that, to be effective, the immunity must be for the protection of all, not just those who might otherwise be liable.

166. *Experts can look after themselves.* Some experts may be robust enough to withstand the risks and in most cases, no doubt, the risks they face will be minimal. But one cannot assume that this will be so for everyone. And it is not the robustness of the witness that is the problem. It is the risk of the expense and distress of a harassing litigation at the instance of an aggressive client which in some cases, given the vagaries of human nature, may be quite obvious. Lord Penzance thought in *Dawkins v Lord Rokeby* (1875) LR 7 HL 744 that, with such possibilities hanging over his head, a witness could not be expected to speak with that free and open mind which the administration of justice demands. I would find it hard to say that he misdirected himself on this point or that what he said then does not still hold true today, even in the case of experts who regularly give evidence but certainly in respect of those who do not.

167. As against those points, there are various arguments that have been put forward in support of retaining the immunity for expert witnesses.

168. *Chilling effect on the availability of witnesses.* Mr Lawrence QC for the respondent said that it was a relevant consideration whether abolition of the immunity would deter a significant number of potential experts from giving evidence. Otton LJ made this point in *Stanton v Callaghan* [2000] QB 75, 106 and Thorpe LJ raised the same concern in *Meadow v General Medical Council* [2006] EWCA Civ 1390, [2007] QB 462, para 227. I would not, on present information, attach much importance to this argument. In any event, without hard information, it is not possible to assess how much weight should be given to it. Experts can usually expect to be paid for their work, and there are no doubt other considerations that will incline them to continue to make themselves available. I would not, however, discard this point as entirely irrelevant. There may be some situations – some kind of case, some kinds of client – where the expert would be reluctant to become involved at all. If that were to happen it would raise questions as to whether access to justice for the disadvantaged was being inhibited. This is a reason for wishing to be cautious before taking a step which, for all practical purposes, would be irretrievable.

169. *Fuzzy edges: where to draw the dividing line.* This is a much more important point. Although Mr Ter Haar was careful to confine his submissions to civil cases and to the relationship between the expert and his own client only, it is hard to see how one could justify removing the immunity in that respect but

keeping it for all the other tribunals which hear evidence for experts. This would be a matter of particular concern in the criminal jurisdiction. The expert for the prosecution would continue to enjoy the immunity from proceedings at the instance of the defendant. The expert for the defence would have it removed from him. One cannot discount the fact that exposure to the risk of incurring the expense and distress of a harassing litigation at the client's instance should the defence fail, however unlikely, will colour his evidence. The public interest surely demands that experts who give evidence on either side in criminal proceedings are free from pressures of that kind.

170. The same point could be made where proceedings are brought for the protection of children, where the interests of the child must be the paramount consideration and it is undesirable that anything should be done that might discourage the expert from giving full and frank evidence. What is the basis in principle that would justify the removal in civil cases but retaining it in all the others? And what if the removal is to be extended to family proceedings and public law proceedings where children are involved? Lady Hale's compelling treatment of this subject in paras 182 and 183 of her judgment illustrates the problems. It would be unwise to leave the position outside the civil jurisdiction in a state of uncertainty.

171. *Other duties giving rise to the risk of liability.* The argument in favour of removing the immunity concentrated on the duties of care that arise from the contractual relationship and, in tort, from the relationship of reliance on the services of the professional. There are however other circumstances that need to be considered that might give rise to liability from which, as matters stand, experts enjoy immunity. There is the duty of confidentiality which was the subject of the proceedings against the expert in *Watson v M'Ewan* [1905] AC 480. Is the immunity to be removed in cases of that kind too, where the expert agrees to give evidence for the other side or feels himself bound when giving evidence for his own side to reveal information which the court needs if it is to be told the truth but which his client maintains was confidential?

172. What about the joint or the court appointed expert? And what about witnesses who, although not experts, can be said to owe duties to a party to the litigation or those who may be affected by what they say? Is the immunity to be removed from the company director who owes a duty to the company to promote its interests but is said to have made an inexcusable error when giving evidence on its behalf? What about the employee with specialist skills who gives evidence on his employer's behalf and is said to have caused loss to his employer because of the negligent way he presented his evidence? How does one determine who, for the purposes of the removal of the immunity, is an expert and who is not? And how is one to identify those to whom the duty is owed? In *Carnahan v Coates* (1990) 71 DLR (4^{th}) 464, 471-472 Huddart J drew attention to the fact that prima

facie a professional person who gives evidence owes a duty of care towards all who might be contemplated to be harmed by his failure to conduct himself with the minimum standard of care dictated by his profession. In *E O'K v DK* [2001] 3 IR 568 the unsuccessful party to an action of nullity of marriage sought damages against a witness whom the court had appointed to carry out a psychiatric examination of her, alleging that he had been negligent. The different ways in which Lord Phillips, Lord Brown and Lord Dyson describe the extent to which the immunity is to be removed suggest that the boundaries are, and are likely to remain, unclear.

Conclusion

173. The lack of a secure principled basis for removing the immunity from expert witnesses, the lack of a clear dividing line between what is to be affected by the removal and what is not, the uncertainties that this would cause and the lack of reliable evidence to indicate what the effects might be suggest that the wiser course would be to leave matters as they stand. The Law Commission has recently completed a project in which it addressed the admissibility of expert evidence in criminal proceedings in England and Wales: see Law Com No 325 (HC 829, 21 March 2011). The question of immunity was not raised at any stage during its consideration of this issue. If there is a need to reform the law in this area, it would be better to leave it to be dealt with by Parliament following a further report by the Law Commission. As *Watson v M'Ewan* [1905] AC 480 remains binding in Scotland and witness immunity in Scotland is a devolved matter, the question whether it is in need of reform deserves attention by the Scottish Law Commission as soon as practicable. In this way all the various problems could be addressed after proper consultation and debate.

174. For these reasons, and for those given by Lady Hale, I would dismiss the appeal.

LADY HALE

175. On 26 July 1966, the Lord Chancellor made the following statement, *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234, on behalf of himself and the Lords of Appeal in Ordinary:

> "Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon

> which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.
>
> Their Lordships nevertheless recognise that too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law. They propose therefore to modify their present practice and, while treating former decisions of this House as normally binding, to depart from a previous decision when it appears right to do so."

In *Austin v Southwark London Borough Council* [2010] UKSC 28, [2010] 3 WLR 144, at para 25, Lord Hope (with whom all other members of the court agreed) stated that this "has as much effect in this court as it did before". However, this case illustrates how hard it is to apply that wise guidance in practice.

176. Lord Hope has demonstrated, to my mind convincingly, that there is House of Lords' authority, in the shape of *Watson v M'Ewan* [1905] AC 480, for the general proposition that no cause of action of any kind lies against any witness in respect of the evidence he gives to a court. The rule was first developed as a protection against suits in defamation, but there is no reason in principle to limit it to these. If the purpose is to ensure that witnesses can prepare and give their evidence freely to the court, irrespective of whether it might otherwise constitute a tort or a breach of contract against someone else, then it should not matter what the source of that liability might be: whether saying or writing something which is defamatory of someone else; or saying or writing something in breach of a duty of confidence owed to someone else; or saying or writing something in breach of a contractual duty owed to someone else; or saying or writing something in breach of what would otherwise be a tortious duty owed to someone else. The rule has been taken for granted by courts at all levels for a very long time.

177. I therefore agree with Lord Hope that we are here concerned with whether we should carve out an exception to that long established rule. There are, of course, existing exceptions. The most important is perjury, but among the others are contempt of court, professional misconduct (assuming *Meadow v General Medical Council* [2006] EWCA Civ 1390, [2007] QB 462 to be correctly decided), and liability for the wasted costs of the other side (assuming *Phillips v Symes (No 2)* [2004] EWHC 2330 (Ch), [2005] 1 WLR 2043 to be correctly decided). It has been suggested that these exceptions, and in particular the last two, make such inroads into the rule that they call its whole purpose into question. In my view they do no such thing. These exceptions are all, in their different ways, in support of the courts' interest in witnesses behaving properly: telling the truth, obeying court orders or respecting the undertakings given to the court, behaving professionally so as to justify the courts' confidence in their expertise and not wasting the time of

the court or the other parties. In short, they are there to encourage, indeed to oblige, the witness to perform her duty to the court. They are not there to protect the interests of the witness's client. The exception which we are being asked to make is to protect the interests of the client. That is a significant departure from existing principles.

178. The rule may have been established before certain developments in law and practice – in particular the modern evolution of the law of negligence and the practice of paying expert witnesses to give their opinions in civil or criminal cases. But these are not new developments in the way that, for example, email and the internet are new developments which the existing law must find ways of accommodating. A professional person has always owed her client a contractual duty to exercise reasonable care and skill: its statutory recognition in the Supply of Goods and Services Act 1982 was not intended to change the law. It has never, so far as I am aware, been contrary to public policy for a party to litigation to pay an expert for her advice in connection with the litigation. The development is one of quantity not quality.

179. If an exception is to be made, the boundaries of that exception must be logical and clear. As I understand it, there is no question of removing the absolute privilege which all witnesses enjoy against defamation, whether or not the person defamed is their client. As I also understand it, there is no question of erecting a duty of care where none would otherwise exist, and thus of rendering an expert witness liable to the other side or to anyone else involved in the litigation apart from her own client. The rationale for the proposed exception is that, without the rule, an expert witness would owe a duty of care to her own client and there is no reason why she should not be liable if she has caused her client loss through the breach of that duty. I am unclear whether the exception would apply only in a case where there was a contractual duty or whether it would apply in a case where there was no contractual duty but there might be a duty owed in tort. Or is it to be assumed that the two are co-terminous? I doubt that because there may be situations where there is no contractual duty, for example because the contract was made with the party's legal advisers, but where there could be a duty in tort were it not for witness immunity.

180. I ask these questions because, as it seems to me, it would be impossible to confine any exception to run of the mill cases like the present. The present case is a classic personal injury action. The claimant was injured in a road traffic accident. There is a variety of medical evidence available. Some of it comes from the doctors who have been treating him for his injuries. Some of it comes from doctors, and in this case a clinical psychologist, who have been instructed by one side or the other to give their expert opinion purely for the purpose of the litigation. These last are the paradigm case on which the rationale for the proposed exception is based. They have been called in to give their opinion for the purpose

of the litigation. They are paid a fee for doing so. They would ordinarily owe a contractual duty to exercise reasonable care and skill, either directly to the client or through the client's legal advisers. Why should they not be held liable to the client if they fail to exercise that care and skill? After all, as professionals, they will only fail in their duty if they fail the *Bolam* test (*Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582); and as witnesses, they will be excused much in the hurly-burly of the trial.

181. These are powerful arguments indeed in the context in which they are deployed. Mr Ter Haar QC, for the appellant claimant, was at pains to exclude consideration of the liability of expert witnesses in other contexts. But I do not think that we can exclude it. If we are to change the law, we must do so in a principled way. If the exception is made, it will clearly have to apply between expert witnesses and their clients in all kinds of civil proceedings, before all kinds of courts and tribunals: the surveyor who gives valuation evidence in a leasehold enfranchisement case; the plasterer who gives quantum meruit evidence in a building dispute; the engineer who explains how a machine works in a factory accident; or the scientist who explains how DNA works in a patent case.

182. All of this may sound straightforward. But even in ordinary civil cases, it is not completely so. A doctor who has treated the patient after an accident or for an industrial disease may be called upon, not only to give evidence of what happened at the time, but also to give an opinion as to the future. Sometimes there may be a fee involved and sometimes not. Is the proposed exception to cover all or only some of her evidence? In many civil cases, there are commonly now jointly instructed experts on some issues. A jointly instructed expert owes contractual duties to each of the parties who instruct her. A party who is disappointed by her evidence will often find it difficult to persuade the court to allow a further expert to be instructed to enable her evidence to be properly tested. But the disappointed party does not have to ask the court's permission to find an expert who will enable him to launch proceedings against the jointly instructed expert. Because such an expert is extremely likely to disappoint one of those instructing her, she may be more vulnerable to such actions than is the expert instructed by one party alone.

183. How far beyond ordinary civil proceedings is this exception to go? I have already suggested that it would have to apply to essentially private law proceedings in tribunals as well as in courts – thus to proceedings between landlord and tenant in leasehold valuation, service charge, rent assessment and other such disputes; or between employer and employee in unfair dismissal, redundancy, discrimination and breach of contract cases. But what about cases which are essentially public law proceedings? Should the "independent" psychiatrist who is instructed on behalf of the patient in tribunal proceedings under the Mental Health Act 1983 be covered by the proposed exception? Should the educational psychologist or child psychiatrist instructed by the parents of a child

with special educational needs to give evidence in tribunal proceedings under Part 4 of the Education Act 1996? These are sensitive and often highly fraught cases in which performing the expert's duty to the tribunal may well be perceived by the client patient or parent as a breach of her duty towards him.

184. This brings me to family proceedings, in which all of these various situations can arise. The most obvious analogy with an ordinary civil case is ancillary relief proceedings between husband and wife. Expert valuation or forensic accountancy evidence is common. If such experts may be held liable to their clients in other civil proceedings, it is hard to see why they should not be so liable in ancillary relief proceedings. The next example is proceedings between mother and father (or other relatives) about the future of their children. Often, the court will be assisted by a welfare report from a Cafcass officer. That officer is not instructed by either party and so will presumably run no risk of liability to either of them. But sometimes the parties will jointly instruct a child psychiatrist or psychologist to assist the court. Is such an expert to be potentially liable to the disappointed parent even though it is generally accepted that her principal duty is owed, not to the parents, but to the child? And sometimes, even in these private law disputes, the child will be separately represented. Such cases are so difficult and sensitive that it is quite likely that an expert will be instructed on behalf of the child. Is such an expert to be potentially liable to the child?

185. Then there are public law proceedings between a local authority, the child and the parents. There will often be a great deal of expert evidence. Some of the evidence will come from social workers employed or instructed by the local authority. Some of these will be simple witnesses of fact. Some will have carried out expert risk assessments. Many will do both. Are they to be potentially liable to the local authority in respect of all or only some of their evidence? Some of the evidence will come from doctors, nurses and other health care professionals who have treated or looked after the child at critical times. They may be called as witnesses by any party to the proceedings but are usually called by the local authority. I do not know, but it may be that they are sometimes paid a fee for giving an expert opinion to the court. Are they to be potentially liable to whoever called them as witnesses in respect of all or only some of their evidence? Some of the evidence will come from health care professionals who have not treated the child, but have been called in to make an assessment for the purpose of potential or actual care proceedings. They may be instructed by the local authority, the parents or the child's guardian. Are they to be potentially liable to whoever instructed them? Should any of this depend upon whether the expert is paid a fee specifically for her appearance in court, or provides her assessment as part of her ordinary duties to the health or social care services, who may not be party to the proceedings, or provides it as part of a special arrangement between the agencies?

186. In *M (A Minor) v Newham London Borough Council* [1995] 2 AC 633, 661, Sir Thomas Bingham MR (with whom Staughton LJ agreed) held that a psychiatrist who interviewed a child in the course of investigating suspected child sexual abuse was not covered by witness immunity: she must have known that if she concluded that the child had been abused by someone living in the household, proceedings to remove the child were likely, but she had never in fact become involved in proceedings about the child. When the case went to the House of Lords, as one of those reported as *X v Bedfordshire County Council* [1995] 2 AC 633, at pp 754-755, Lord Browne-Wilkinson pointed out that this was factually incorrect: the psychiatrist had made a report which was relied upon in the proceedings. He also concluded that there should be no liability for investigations which had such an immediate link with possible proceedings. But this was in the context of the case as a whole, where it was held that there was no duty of care owed to a child by the professionals involved in deciding whether or not to institute proceedings to protect him from abuse. In *D v East Berkshire Community NHS Trust* [2003] EWCA Civ 1151, [2004] QB 558, the Court of Appeal held that both doctors and social workers did owe a duty of care to the child when conducting child protection investigations. Discussing the impact of witness immunity, at paras 113-117, Lord Phillips of Worth Matravers MR compared the approach of Lord Browne-Wilkinson in *X v Bedfordshire* with the "more detailed consideration" of witness immunity in *Darker v Chief Constable of the West Midlands Police* [2001] 1 AC 435. There Lord Hope had said, at p 448:

> "The actions which the police take as law enforcers or as investigators may, of course, *become* the subject of evidence. . . . But there is no good reason on grounds of public policy to extend the immunity which attaches to things said or done by [police officers] when they are describing these matters to things done by them which cannot fairly be said to form part of their participation in the judicial process as witnesses. The purpose of the immunity is to protect witnesses against claims made against them for something said or done in the course of giving or preparing to give evidence. It is not to be used to shield the police from action for things done while they are acting as law enforcers or investigators."

Lord Phillips went on to say that it may not be easy to draw the line between investigation and preparation of evidence in cases of suspected child abuse but the Court clearly held that that was where the line should be drawn. To that extent, therefore, the view taken in *X v Bedfordshire* has been superseded by later authority. There was no appeal to the House of Lords against that aspect of the decision of the Court of Appeal in *D v East Berkshire NHS Trust*. There may, therefore, be a relatively clear dividing line between conducting the examinations and investigations, on the one hand, and preparing for and giving evidence, on the other.

187. But what these examples also make clear is that in many family cases, if the law is to be changed, there will be some professional witnesses who enjoy immunity in respect of their evidence and some who do not. Some of those distinctions will appear arbitrary. Whereas in the past, all enjoyed the same immunity, in the future only some will do so. This will introduce a dimension to the interactions between the experts, and between the experts and the courts, which was not there before. To what extent will the court, in evaluating an expert's evidence, take account of that expert's potential liability to a client or the lack of it?

188. These demarcation problems might have to be suffered if it were clear that the benefits of making the exception outweighed the risks. But it is impossible to say what effect the removal of immunity will have, either on the care with which the experts give their evidence, or upon their willingness to do so. It is certainly possible that it will reduce any tendency to act as a "hired gun" and that would be a very good thing; but it is also possible that it will increase the pressure on an expert to stick to her previous opinion for fear of being sued if she retracts or modifies it. It is possible that it will have no effect at all upon the willingness of experts to give evidence; it is also possible that, in certain fields at least, it will reduce their willingness to do so, or even to become involved in the particular field of practice at all. It is possible that professional indemnity insurance premiums will rise and that fees for giving expert evidence will also rise to take account of this; it is possible that exclusion clauses may be introduced into contracts to give expert evidence, in which case we shall be back where we started.

189. The major concern, however, is not about the effect of making the exception upon expert witnesses. If they are truly expert professionals, they should not allow any of this to affect their behaviour. The major concern is about the effect upon disappointed litigants. I agree with Lord Hope that the object of the rule is to protect all witnesses, the great majority of whom are trying to do a professional job and are well aware of their duties to the court, against the understandable but usually unjustifiable desire of a disappointed litigant to blame someone else for his lack of success in court.

190. For these reasons, it does not seem to me self-evident that the policy considerations in favour of making this exception to the rule are so strong that this Court should depart from previous authority in order to make it. To my mind, it is irresponsible to make such a change on an experimental basis. This seems to me self-evidently a topic more suitable for consideration by the Law Commission and reform, if thought appropriate, by Parliament rather than by this Court.