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# EXPERT WITNESS INSTITUTE NEWSLETTER<sup>©</sup>

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Spring 2003

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## EXPERT WITNESS IMMUNITY FROM SUIT FROM ACTIONS IN NEGLIGENCE SHOULD BE ABOLISHED

*Jonathan Selby, barrister, contributed an article to The Times on 11 February entitled 'Why errant experts should face the music' in which he pointed out that a doctor who negligently performs an operation can be sued, but the doctor who negligently testifies against that doctor cannot.*

*The article followed an essay which won the inaugural Bar Law Reform Essay Competition, the full text of which appears below.*

### Introduction

Following the House of Lords' decision in *Hall v Simons* the only professional participants in the court process who enjoy immunity from suit from actions in negligence are judges and those who provide expert witness testimony to the court. While there remain strong policy arguments in favour of a judge's immunity, the policy arguments which underpin expert witness immunity are no longer tenable.

The blanket immunity under which experts presently shelter should be abolished and the expert's liability in negligence actions should be determined by reference to the standard negligence principles which apply to the other professional participants in the court process. Of particular relevance are the principles which determine the existence and scope of a duty of care and those which determine whether any duty has been breached.

### A preliminary distinction

At the outset, it is important to draw a distinction between two discrete concepts: immunity from suit from actions in negligence; and immunity from suit from actions in defamation.

Only the former immunity is the subject of this paper. It relates to the liability of the expert for negligent acts (such as forensic misjudgment or failure to comply with the court's directions). A claimant who alleges that the expert has been negligent is obliged to demonstrate that fact.

Immunity from suit from actions in defamation is a wholly separate creature. It is aimed at ensuring candour in court and protects the expert witness (as it protects witnesses of fact) from exposure to defamation proceedings. In defamation proceedings, once it is established that their evidence was defamatory, the expert witness is *prima facie* liable and the burden falls upon the expert to demonstrate that his evidence was justified.

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The relevant case law has often failed to make a clear distinction between these two immunities. Such a failure can create confusion and can lead to misguided policy arguments being relied upon. For the avoidance of doubt, this paper does *not* propose that the expert witness' immunity from suit from actions in defamation should be abolished. This immunity applies to all those who participate in the court process and provides an essential tool to the operation of the machinery of justice.

### The present position

There is nothing which states that an expert witness owes no duty to those who instruct him. Indeed, CPR, r 35.3(2) merely states that the expert's duty to the court simply overrides any obligation to the person from whom he has received instructions or by whom he is paid.

The present leading authority on the topic is the decision of the Court of Appeal

in *Stanton v Callaghan*. There it was held that experts' immunity from proceedings for professional negligence extends to evidence given by the expert in court and to work which is preliminary to giving such evidence. The production or approval of his or her report would thus be protected, as would the content of the experts' joint agreement. However, the immunity does not extend to work done for the principal purpose of advising the client as to the merits of their case, particularly if proceedings have not been started, or to advice as to whether the expert is qualified to advise at all: *Palmer v Durnford Ford*.

### Policy

The policy arguments which seem to underpin the expert's immunity include:

(1) immunity should only be given to an expert where to deny it would mean that he would be inhibited from giving truthful and fair evidence in court; and

(2) the immunity must be necessary for the orderly management and conduct of the trial.

In *Landall v Dennis Faulkner and Alsop*, Holland J commented on the purpose of the immunity, in the context of experts' meetings, as follows:

*"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."*

### Counter-policy

In *Stanton v Callaghan* the Court of Appeal certainly took into account the counter-policy. For example, Chadwick LJ stated:

*"For my part, however, I find it much more difficult to recognise an immunity founded on the need to ensure that witnesses are not deterred from giving evidence by the possibility of vexatious suits in a case where the witness is a professional man who has agreed, for reward, to give evidence in support of his opinion on matters within his own expertise - a fortiori, where the immunity is relied upon to protect the witness from suit by his own client, towards whom, prima facie, he owes contractual duties to be careful in relation to the advice which he gives. I think that there is much force in the observation of Mr Simon Tuckey QC: "... I do not think that liability for failure to give careful advice to his client should inhibit an expert from giving truthful and fair evidence in court."*

*He continued: "It is important to keep in mind that expert witnesses have the safeguard, in common with other professional men, that they will not be held liable for negligent advice unless that advice is such as no reasonable professional, competent in the field and acting reasonably, could give. I find it difficult to believe that the pool of those who hold themselves out as ready to act as expert witnesses in civil cases, on terms as to remuneration which they must find acceptable, would dry up if expert witnesses could be held liable to those by whom they are instructed for failing to take proper care in reaching the opinions which they advance. Indeed, I would find it a matter of some surprise if expert witnesses offer their services at present on the basis that they cannot be held liable if their advice is negligent."*

The further counter-policy is that experts' negligent acts can lose their client the case or at least cause the client to incur greater costs than they should have done. This can be demonstrated by reference to two recent decisions where the experts were in clear breach of their duty to the court (as well as of any duty which they may owe to their clients):

(1) In *Stevens v Gullis*, the defendant's expert breached several of the court's directions, as well as CPR, Part 35, Practice Direction. The judge therefore debarred the defendant from calling him and gave judgment against the defendant. On appeal, the Court of Appeal upheld the judge's orders and Lord Woolf MR commented that the expert had demonstrated by his behaviour that he had no concept of the requirements placed upon him by CPR.

(2) In *Pearce v Ove Arup*, Jacob J commented:

*"At the end of his report, Mr Wilkey [the claimant's expert] said he understood [his duty to the court]. I do not think he did. He came to argue a case. Any point which might support that case, however flimsy, he took. Nowhere did he stand back and take an objective view as an architect as to how the alleged copying could have been done. Mr Wilkey bears a heavy responsibility for this case ever coming to trial - with its attendant cost, expense and waste of time..."*

Post *Hall v Simons*, does the policy underpinning the immunity still hold good?

It is significant that many of the authorities from which the expert's immunity derives have found that the public policy underlying an advocate's immunity offers assistance in the context of an expert's immunity. This is because, in *Hall v Simons*, the House of Lords reconsidered the immunity of an advocate in court proceedings and decided by a majority of 4 to 3 that the advocate's immunity should be abolished. Those who dissented accepted that the immunity should be abolished for advocates who had acted in civil proceedings but not for those who had acted in criminal proceedings.

In *Hall v Simons*, Lords Steyn and Hoffmann (with whom Lords Browne-Wilkinson and Millett agreed) considered that the legal policy which seeks to encourage freedom of speech in court so that the court will have full information about the issues in the case has little, if anything, to do with any legal policy requiring immunity from actions for negligent acts. Indeed Lord Steyn, without saying whether he agreed or not, referred to Peter Cane who argues in *Tort Law and Economic Interests* that paid expert witnesses ought to be answerable to their clients for the way they perform their professional duties. Here Lords Steyn and Hoffmann were clearly acknowledging that there is a significant difference between immunity from suit from actions in negligence and immunity from suit from actions in defamation, and that the two concepts should not be treated together.

Lord Steyn then went on to consider whether removal of an advocate's immunity would undermine his overriding duty to the court. He concluded that it would not. In particular, he said that if the advocate's conduct was *bona fide* dictated by his perception of his duty to the court, there would be no possibility of the court holding him to be negligent.

#### **Consideration of *Stanton v Callaghan* in *Hall v Simons***

Lords Hoffmann and Hobhouse specifically referred to *Stanton v Callaghan*. Lord Hoffmann considered that the alleged cause of action in *Stanton v Callaghan* (contents of an experts' joint statement) fell within the "traditional witness immunity" in that a witness owes no duty of care in respect of the evidence he gives to the court. His only duty is to tell the truth and there is no analogy with the position of a lawyer who owes a duty of care to his client.

Lord Hobhouse stated:

*"It is illuminating to consider the conceptual basis in the trial process for the witness immunity. It is that the witness, although called by a party, is giving evidence to the court. The witness's duty is to tell the truth to the court regardless of the interests of the party who has called him or who is asking him questions. This same scheme is spelled out in the new Civil Procedure Rules regarding expert witnesses. An expert witness is in a special position similar to that of the advocate. He is selected and paid by the party instructing him. Part of his duties include advising the party instructing him. If that advice is negligently given the expert, like the lawyer, is liable. But once the expert becomes engaged on providing expert evidence for use in court... his relationship to the court becomes paramount as set out in the Civil Procedure Rules and he enjoys the civil immunity attributable to that function."*

However, Lord Hobhouse then concluded that (at least in the context of civil proceedings) the advocate's immunity could not be justified: the client alleges that the outcome was caused by the failure of his lawyer to provide the stipulated service. This is not different in kind to a client saying that the adverse tax treatment of a transaction was caused by the negligent advice or drafting of the lawyer he employed.

The comments of Lords Millett and Hobhouse in relation to *Stanton v Callaghan* are strictly *obiter* and they did not consider (nor need to consider) whether the expert's immunity was still justified. Although their comments

cannot be ignored, the differences between the role of the advocate and the role of the expert witness in court have to be properly considered in order to determine whether the *ratio* in *Hall v Simons* has any relevance to an expert witness' liability in negligence.

#### **Nature of an expert's evidence**

On the one hand the expert provides evidence to the court. That evidence should be independent and uninfluenced by the exigencies of the litigation. By contrast, the advocate presents evidence to the court and makes submissions on it. However, it has to be remembered that the expert's evidence is essentially opinion evidence, as opposed to evidence of fact. When a court considers opinion evidence, it is not looking for the truth of that evidence as such. The court is more concerned about whether the expert's conclusions are reliable and correct. When the expert's evidence is looked at in that light, there seems little distinction between what is expected of an expert and what is expected of an advocate.

#### **Nature of the expert's instruction/loyalty**

Further, there is the strong similarity that both the expert and the advocate are usually instructed (and paid) by their client simply in relation to the conduct of the particular piece of litigation. They have no first-hand experience of the initial facts which gave rise to the dispute. Once instructed by one party to the litigation, rules relating to conflicts of interest mean that it is very difficult for either an expert or an advocate to be instructed by another party to the litigation. By contrast, there is no property whatsoever in a witness of fact, nor does a witness of fact have any entitlement to be paid for giving evidence to the court.

#### **Nature of the current immunity provided to expert witnesses**

The current immunity requires a distinction to be drawn effectively between work done for the principal purpose of advising the client and work done for the principal purpose of fulfilling the expert's duty to the court. This distinction has a telling similarity with the advocate's immunity prior to *Hall v Simons*. Moreover, this distinction is artificial because the expert's advice to the client will often be translated into the expert's (written or oral) evidence to the court.

The existence of this artificial distinction was one of the reasons that the House of Lords abolished the advocate's immunity. There is no reason that this artificiality should be preserved for the benefit of expert witnesses.

#### **Nature of the protection required to protect expert witnesses in performing their duty to the court**

If the expert needs protection only in his duty to tell the truth, the expert simply needs protection from actions in defamation. **Defamation (at least in this context) is all about truth. Negligence is all about whether the expert has done his job properly.** This is why it is important to draw the distinction between immunity from suit from actions in negligence and immunity from suit from actions in defamation. Fear of suit in negligence ought not, whether as a matter of principle or, fact, prevent an expert from providing an honest opinion. Indeed, it is submitted that it would be negligent to provide a dishonest opinion to the court!

*[Continued on page 8]*

## From the Secretary's Desk.....

### CPR-OK?

One might have expected that as we approached the fourth anniversary of the Civil Procedure Rules the procedure should have bedded down and everyone, solicitors and experts alike should know what they are doing. In the majority of cases this is probably true. However, from the number of calls we continue to receive on the Helpline, it would appear that there are still many out there who have not yet caught up with the current requirements.

Take, for example, our member who had been appointed as a party expert in a personal injury case. He produced his report for the instructing solicitors and was surprised some time later to receive a communication direct from the solicitors on the other side raising questions on his report and on another expert's report which they supplied. The expert asked, quite sensibly to whom should he respond: to the other solicitors or his own instructing solicitors who appeared to be ignorant of this development. Further, given that the new report contained medical information that had been denied to him initially, if he now produced an amended report should his original report be recovered from the court, and who was going to pay him for the additional time in preparing the second report?

Another member involved as a single joint expert in a case in the Family Division completed her report, in which she recommended that the child concerned should be considered for adoption, and filed her report with the court. Subsequently solicitors acting for the father complained that she had exceeded her instructions and requested that the recommendation be deleted from the report. Her original instructing solicitors seemed to have gone along with this. What was she to do given that she felt her recommendation was the most appropriate in the circumstances of the case?

In this instance the paper by Dame Elizabeth Bulter-Sloss, President of the Family Division, which was reproduced in the Autumn/Winter 2002 Newsletter, was very helpful, particularly her comment:

*"Proceedings relating to children are in a special category of litigation. In most cases the court's paramount consideration is the welfare of the child, and expert witnesses must adopt the same approach."*

It is clear that there is still considerable scope for instructing solicitors and expert witnesses not to see eye to eye. So if you do have problems of this nature, please use the Helpline.

### Fees

For those members who still have difficulty in recovering their fees from instructing solicitors, and the volume of calls we receive on this subject confirms this as still the number one issue, help is at hand from another debt collection service: Dovestones. They recognize that following changes in the Income Tax Regulations, tax is now payable for the tax year when the fee note is raised instead of as previously when the fee is collected, so that a pro-active credit control is now very important. The service provided by Dovestones includes the following benefits:

- No collection no fee
- No subscription or enrolment fee
- Fees can be offset against tax
- Improved cash flow
- Discretion and confidentiality assured

If any member is interested in this service, please call Paul Markham on 0161 337 9669 or send him a message on 'info@dovestones.fsbusiness.co.uk.'

*See also the letter from Charles Fortt on page 8*

### The errant expert witness

In the previous issue of the Newsletter Mr Justice Jacob considered what should be done about the expert witness who failed to understand his duties under the Civil Procedure Rules. This has provoked a response from some of our members and we are very happy to publish contrary views and comments. The issue has been raised in another recent case, which also came before Mr Justice Jacob, and Joanna Hughes features it, the case concerning the Colt Telecom Group, in the *Case Notes* in this issue. While this appears to be a landmark judgment, in that previously there does not appear to have been any objection from the court that an insolvency practitioner preparing a report under Rule 2.2 of the Insolvency Rules in a contested petition should not also propose himself as the administrator, the judge made it clear that such a person should be classified as an expert witness and should be fully cognizant of his duties and obligations under CPR Part 35, its Practice Direction and the Code of Guidance on Expert Evidence. The judge commented that it was unfortunate that the instructing solicitors did not make those documents available to their expert witness.

However, in the earlier case of *Pearce v Ove Arup* (see *Case Notes* in Spring 2000 issue) the Professional Conduct Committee of the Architects' Registration Board decided that the expert witness was not guilty of unacceptable professional conduct or serious professional misconduct. While this may appear somewhat surprising given the judge's detailed and

extensive criticisms of the expert it does bear out Mr Justice Jacob's own caveat in his paper:

"What if the reported expert is made the subject of disciplinary proceedings and says in the course of these: "Look I did not get it wrong; it was the judge who did"?..... Does this mean that the disciplinary body finds itself re-trying the original case but on inadequate evidence?"

The issue is still unresolved and it is interesting that the barrister Jonathan Selby has reopened the debate as to whether expert witnesses should lose their immunity from suit. In *Hall v Simons* (2000) the House of Lords abolished the advocate's immunity from suit from actions in negligence in respect of his conduct of court proceedings. Insofar as an expert offers his services for hire and reward would it not be reasonable for him to put his money where his mouth is? Dr Stephen Castell takes a different view in this issue of the Newsletter (page 8) and members may like his 'conceptual' invitation to sit in court beside the judge.

#### Expert witness books

The Membership & PR Committee has been considering a proposal by Dr Hugh Koch to produce a book on evidential certainty in medico-legal assessment. With the need for greater independence of expert witnesses under the Civil Procedure Rules it is clear that there is an increasing requirement for experts to have expertise in enhancing the reliability of their opinions and being able to detect deception in those they interview. Dr Koch's concept is to focus on various clinical specialties and the important contribution they have to make in increasing the level of 'evidential certainty' in reports and expert opinions. It would be very much a 'hands on' text.

The specialties for which contributions would be sought have been identified as: orthopaedics, neurology, general medicine, rheumatology, pain management, neuro-psychology, clinical psychology, psychiatry, obstetrics and gynaecology and general medical practice. The Membership & PR Committee also felt that this could be the precursor to an Expert Witness series. The first draft of *Evidential Certainty in Medico-Legal Assessment* is envisaged as being ready by October 2003. If any members are interested in participating in this project please contact the Secretary.

**Brian Thompson**  
Secretary

## Dates for your diary

### EWI Events (in London unless specified)

**26 March 2003** AGM: Sixth Sir Michael Davies Lecture & Annual Dinner at Gray's Inn

**10 April 2003** Joint Conference: The Forensic Science Society, CRFP & EWI

**10 October 2003** Annual Conference: "Expert evidence at home and abroad"

We also intend to run some seminars outside of London from March onwards

Please contact the EWI office for details or booking forms for any of the events above

## EWI Course Dates 2002/03

**Basic Law for Expert Witnesses** (Cost to EWI members £225)

28 March 2003

2 May 2003

5 September 2003

## EWI Approved Training

**Excellence in Report Writing** (Cost to EWI members £310 + VAT)

14 May 2003

9 June 2003

3 July 2003

3 September 2003

11 November 2003

**The Courtroom Skills Training** (Cost to EWI Members £355 + VAT)

7 April 2003

15 May 2003

10 June 2003

13 August 2003

4 September 2003

14 October 2003

12 November 2003

10 December 2003

Please contact the EWI office for booking forms or further details

## Membership numbers

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Professional body / association members	12
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Individual members	940
Retired	24
Sabbatical	3
Applicants	1
<b>Total members &amp; applicants</b>	<b>1019</b>

# Correspondence

## Enforcing the Overriding Duty

Dear Sir,

Further to the address by Hon. Mr. Justice Jacob 'How is the Overriding Duty to the Court Enforceable?'.

Mr. Justice Jacob believes that an expert who in his opinion has failed to give an independent report, should not be given a second chance, but deprived of his right to practise.

I believe this must be wrong not only under the Human Rights Act 1998 but as a matter of common justice.

What is even more of concern is that Mr. Justice Jacob appears to suggest that it should be the judge at the trial who decides whether or not the ultimate sanction of a lifetime ban is imposed and not an independent tribunal, and furthermore appears to suggest that an appeal process should not present.

This matter was explored in the case of *Preiss v The GDC*. The Privy Council decided that it was important to divide the roles of the President of the GDC. They believed that it was wrong in principle for the President to hear the initial case and then sit on the tribunal that decided the sanction that was applied.

Expert witnesses can and do make errors of judgment, and I would say with respect that if the judges also did not sometimes make their own errors of judgment, appeal courts would not exist.

The suggestion that the expert gives an undertaking not to accept instructions without giving a copy of the judgment criticising him is unreasonable. Should judges tell defendants when their rulings have been overturned on appeal?

Solicitors are fully aware of which experts are competent and impartial, and must be given credence for using experts who will not only support the case in court, but do so on their own firmly based belief and evidence.

The sanction for the expert, is that solicitors will not use experts who they find are lacking in these qualities.

Yours faithfully

Dr. Anthony R. Halperin  
B.D.S. L.D.S. R.C.S. (ENG) M.C.I. (ARB) MEWI

## Immunity for the Expert Witness

Dear Sir,

It is certainly not true that there is "no reason to distinguish between advocate and expert" ("Why errant experts should face the music", Jonathan Selby, *The Times Law Supplement*, 11 February 2003). If it is one thing that an expert must *not* do, it is to (attempt to) act, or pass himself off, as an advocate, and there are other profound distinctions between expert and Counsel. For example, an expert

- does not have conduct of the case;
- gives opinion only, not advice;
- has a responsibility to (find) the truth;
- owes an overriding duty to the court.

The expert must provide an unbiased and (wherever possible) objective opinion, based on diligent, rational investigation and analysis. On the basis of his special expertise, he must provide an independent view to the judge in order to assist the court in determining the issues in the case. Unlike an advocate he does not, and must not, argue his client's case.

Conceptually, therefore, the expert may be said to sit in court 'beside the judge', not beside his client. It follows that, if anyone is to question the expert's standard of work it should surely be the court alone: the court is, at it were, the only 'party' entitled to say if it considers that the expert's discharge of his primary duties to that party has been 'negligent'.

And in fact, judges have not been shy to use this sanction. In recent cases they have gone out of their way to put on record their castigation of the stance of, and quality of the opinions given to the court by, expert witnesses, with dire consequences for the experts involved. Any expert who values his reputation should continue to go more in fear of this wrath of his equally independent 'partner', the trial judge, than the merely partisan view of clients or instructing lawyers. (Incidentally, when was the last time a judgment recorded any misconduct of a barrister?).

If experts are going to continue to have fundamental duties and responsibilities to the court (as they clearly should), they must be able to carry out their considered investigations and analyses, and provide their independent opinions, untrammelled by any possibility of being on the thick end of an action in negligence brought by a disgruntled (and biased) party to the proceedings, or its legal advisors. This immunity, if it is uncertain in law at present (is it?), should be officially ratified and made unequivocally clear to all.

Yours faithfully,

Dr Stephen Castell, IT Consultant,  
Mediator and Arbitrator

## Fees

Dear Sir,

I have just seen your piece on fees in the latest EWI Newsletter. I thought you might be interested to know of my experience trying to recover long overdue fees from a solicitor who jointly instructed me. After the usual letters and telephone calls, which were either ignored or met with empty promises, I finally gave up and went for what I considered to be the last resort. I used MoneyClaims Online and found it quite straightforward except that after I had submitted the claim I realised I had made a typographical error in the particulars of claim. It would have cost a further fee to make an amendment but the person I spoke to helpfully suggested I could immediately withdraw the claim and they would reimburse the fee paid online. I could then resubmit it duly corrected. This I did but found to my dismay that the court had overlooked my request to withdraw the first incorrect submission and issued the claim. Nevertheless the fee was reimbursed by cheque in due course.

In the meantime, I heard from the defaulting solicitor that before they received the claim from the county court they had obtained an interim order and placed matters in the hands of an insolvency practitioner, thereby blocking any court action by creditors.

The insolvency practitioner tells me that I might get 20p in the pound over 12 months, if that's what's agreed by the bigger creditors.

In my case, the solicitor had a cashflow problem, which seems to mean she went broke but wouldn't tell me what the problem was before it was too late to take court action. I think in theory the other parties to the joint instructions are still responsible for the unpaid portion of my fee but they are no more likely to get reimbursed than I am and I feel disinclined to upset good customers. I've referred the matter to the Office for the Supervision of Solicitors but as far as I can tell, the unpaid portion of my fee is a write-off.

Perhaps the moral of this story is if you're going to go to the county court over unpaid fees, do it sooner rather than later, and double-check anything you submit to MoneyClaim Online as mistakes are not easily rectified.

Yours sincerely,

Charles Fortt  
(Member no. 621)

## Expert Evidence: Looking For Reliability

Dear Sir,

I do wish that we could inject a little realism into this whole question of expert witnesses, following Lord Woolf's changes. There seems to be a pervading impression that, since the Civil Procedure Rules came into force, all experts have become paragons of virtue and expertise, masters of neutrality, interested only in achieving the overall ends of justice, with no regard for the source of their instructions. I have lectured many times about experts, to experts, and I shall never forget one such talk, given at a well-

known spinal and orthopaedic hospital, at the request of a good friend of mine. I sent him a copy of the talk in advance, for checking. I started by reading out to the audience what was said in one well-known case about the expert; "Mr A ... submits ... that the Learned Judge was not justified, on the evidence, in finding that the first defendant had **deliberately dictated a false operation note** within minutes of the conclusion of surgery...". I amplified on the facts of the case, and generally spread myself about a bit. At the end of the talk a very nice man introduced himself to me as the expert in that case! My good friend had failed to tell me that this expert would be in the audience!

Here are a couple more quotes from judges in cases in which I was involved in 2002.

In a diving case, in which the claimant had broken his neck (and therefore damages would be very substantial) the trial judge said this of the defence expert, a Mr Pat Parkinson from a company called Symonds:

"His evidence on this matter had been given with conviction and authority, he stating that he had a clear recollection of the wording. When he had to admit that he was wrong and to accept that he had been misleading the court, he stated that he had made an assumption. This conduct can only be castigated as both disgraceful and dishonest. It clearly casts doubt upon the remainder of his evidence and the independence of his opinions."

In another case, where damages are likely to be between £5 and £10 million on full liability, the judge said this about the defence expert's evidence: "Dr Ninham's failure to consider it (ie the overtravel of the fire appliance after the impact) further, even as a check on other perhaps less reliable methods of assessing speed, casts doubt on the rest of his evidence and on the conclusions he expressed."

These two extreme examples are from cases which have come to trial in a short space of time, in my practice. In other words, they are taken from a small section of personal injury litigation. Most cases never come to trial, and so the defective experts are never found out. If my experience is representative, which it may well not be because I am so narrowly specialised (claimants' brain and spine only), it suggests that there are many poor quality 'experts' writing reports for claimants and defendants which may appear respectable, and which may put the opponents off, but which are in reality misleading.

This is as it has always been, and I make no complaint in general, other than to say that it would be nice if all experts, both for claimants and defendants, could always be relied on to act in accordance with the Code of Guidance on Expert Evidence:

'13) Experts must neither express an opinion outside the scope of their field of expertise, nor accept any instructions to do so. Experts must not accept instructions if they are not satisfied they can comply with any orders that have been made. Where an expert has already been instructed, the expert should notify those instructing him/her immediately if the expert considers s/he may not be able to comply with an order.

14) In preparing their reports, experts a) should maintain professional objectivity and impartiality at all times.'

What I find difficult, in fact positively upsetting, is the wide assumption, particularly amongst the judiciary, who are taught this on their training courses, that all experts are now fair, competent and reliable. Only the other day I came across a case in which the court order that there should be a joint expert on care (which on one valuation could amount to £5 million). That expert has been criticised significantly in two separate cases in which she appeared. Nevertheless, the judge felt that it was appropriate to have this expert jointly instructed, even though care is rarely dealt with by joint experts, and even though such a large sum was involved. Ironically, the figures suggested by this expert were sufficiently high to provoke the defendant's lawyers into attacking the expert's approach, and suggesting that they would seek to cross-examine her!

My own feeling has long been that the adversarial system may require some modification in order to render it more suitable for complex personal injury claims. An enormous amount of time and money can be spent on medical and other expert reports, sometimes on both sides, and I have wondered in the past (before Lord Woolf's changes) whether this could be avoided in part by the joint instruction of an independent expert known to be both fair and knowledgeable. Real expertise, coupled with honesty, fairness and integrity, might reduce the ability of the

lawyers to argue. I used to canvas this possibly when I gave talks on experts, and I have to acknowledge that this is precisely what Lord Woolf was trying to achieve in the CPR. I applaud his motives, but worry that the assumption is now being made that his well-intentioned rules have changed the way of the world.

In my opinion, lawyers for both claimants and defendants should still be careful of the apparently respectable expert on the other side. It is so easy to be daunted or dissuaded by firm opinions given by such experts, but part of the expertise of personal injury litigation is to know the experts, and to perceive when they are not giving respectable opinions. Personal injury litigators now commonly keep databases of experts, gathering together their own personal experience, and this may be symptomatic of the continuing worry that nothing has really changed since 1999.

These comments apply equally to both sides, of course, because each is entitled to feel satisfied at the end of the case that their client has had a fair hearing of all relevant issues. That, I believe, is the function of the courts, and personal injury litigators should not allow judges to prevent fair argument between experts on issues of significant value and importance.

Bill Braithwaite Q.C., who specialises in catastrophic brain and spine injury.

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## EXPERT WITNESS IMMUNITY FROM SUIT FROM ACTIONS IN NEGLIGENCE SHOULD BE ABOLISHED

[Continued from page 3]

Moreover, the failure on the part of an expert to comply with his duty to the court would, it is submitted, amount to compelling evidence of negligence. Conversely, if the expert's conduct was *bona fide* dictated by his perception of his duty to the court, there would be no possibility of the court holding him to be negligent. Protection from suit from actions in negligence is therefore neither necessary nor conducive to the expert's fulfilment of his duty to the court. The law of tort should require the expert witness to focus on doing the job properly.

### A footnote

Three months after the House of Lords gave judgment in *Hall v Simons*, Eady J struck out a negligence claim against an expert in respect of his evidence in court: *Raiss v Palmano*. In doing so, he held that a witness is entitled to immunity for reasons of public policy even in respect of evidence that turns out to have been dishonest. Eady J's judgment made no reference at all to *Hall v Simons* and simply relied on *Stanton v Callaghan*. *Hall v Simons* may not have even been cited in argument. Therefore, *Raiss v Palmano* has therefore no bearing on the views expressed in this paper.

### Conclusion

There is no valid reason to treat expert witnesses differently from advocates. The principles which underpin their immunity from suit from actions in negligence no longer hold any weight, particularly in light of the House of Lords' decision in *Hall v Simons*. Their immunity should therefore be abolished. The liability of an expert witness, like the liability of any other professional, can be adequately dealt with by the law of negligence.

The options for reform are either to abolish the immunity by a simple statute or by waiting for a suitable case to go to the House of Lords. The former option is the more appropriate. Disputing parties to legal proceedings ought not be required to pay for law reform. Moreover, who knows when the appropriate case may come along?

Jonathan Selby, Barrister, Keating Chambers, 15 Essex Street, WC2R 3AU

*The EWJ is grateful for the kind permission of the Bar Law Reform Committee to publish this essay.*

*(For a differing view see the letter from Dr Stephen Castell on page 6)*

# The Rise and Rise of Arbitration in Asia

*The enhanced significance, since the inception of CPR, of the role of the expert witness in legal proceedings has raised issues which were perhaps not originally anticipated. One such issue is the very nature of the forum in which disputes are determined.*

*In this article, the first of an occasional series examining the role of the expert in a variety of fora, Peter Gallagher of Ernst & Young, Singapore, assesses the increasing role of arbitration in South East Asia.*

## The rise of arbitration

Arbitral awards are enforceable in multiple jurisdictions and the awards rendered in Singapore are enforceable in more than 120 countries and territories. Also, parties are bound to arbitral awards by virtue of contract law; therefore parties may enforce decisions of the arbitral tribunal more effectively than court judgements in a cross-border situation

Arbitration is playing an increasingly important role in various dispute resolution systems which are used in Asia. The number of arbitration cases heard in Asian arbitration centres and the number of international arbitration cases involving Asian parties has increased significantly in the last ten years.

This growth has been attributed to increased foreign investment in Asia. Quite simply the more business there is, the more disputes will arise. Cultural reasons have also contributed to increased arbitration in Asia.

## Why the trend?

Traditionally Asian businesses prefer to settle disputes among themselves to save face. The reputation of Asian businesses is highly valued and most businesses are hesitant to jeopardise their relationships (or "guanxi") with other businesses by resolving their differences in the courts. These particular cultural characteristics and sensitivities are especially apparent in China, and those countries with a high population of overseas Chinese and in countries like Thailand and Japan. Arbitrations offer a flexible alternative to the formal legal system, as proceedings are held in private.

If past trends are any indication, we will see more arbitrations in Asia in the next few years; the number of disputes that are referred to

resolution processes will potentially increase as Asia plays a larger role in the global economy. This is particularly the case due to events such as China fast-tracking its economy for entry into the WTO.

Over recent years, development of the Asian legal system has increased in momentum. To attract foreign capital and investment and to gain the confidence of foreign investors, there is a need for Asian countries to exhibit more structure and transparency in their legal and dispute resolution systems. Hence a number of governments have actively tried to improve transparency and visibility in their legal systems, as well as reducing the costs of businesses by promoting alternative dispute resolution mechanisms such as arbitrations.

The Singapore government is one such example. In its budget delivered in May 2002, the Singapore government announced that foreign arbitrators will no longer be subject to the 24.5 per cent withholding tax on their fees earned in Singapore. More recently the Economic Review Committee Working Group (Legal Services) has made recommendations to the Singapore legal industry to promote Singapore as a regional arbitration centre and a regional dispute resolution service centre. The Singapore International Arbitration Centre (SIAC) has responded to the government's initiatives promptly by reducing fees by 40 per cent for arbitration services, in an attempt to strengthen Singapore's position as a regional arbitration hub.

We have also seen the Asian regional office of International Chamber of Commerce ("ICC") International Court of Arbitration relocate from Hong Kong to Singapore in June of this year.

Undoubtedly, Singapore is increasingly becoming the location of choice for arbitration and alternative dispute resolution. Despite all

these developments in the Singapore arbitration industry, China International Economic and Trade Arbitration Commission (CIETAC) and Hong Kong International Arbitration Centre (HKIAC) still remain important centres in the South East Asia region. These centres are more established and traditionally have a higher caseload than SIAC. However SIAC may have the advantage of neutrality in cases involving Chinese parties, whereas CIETAC and HKIAC may not have that perception. On that basis, parties may choose Singapore as a neutral locale. Furthermore parties frequently quote the cultural and language diversity of Singapore as advantages in choosing a place for arbitration.

### **Why choose arbitration as the method of dispute resolution? What are the advantages of arbitration?**

International businesses may seriously consider choosing arbitration as a method of dispute resolution due to its many advantages.

Parties can maintain confidentiality and preserve their reputations if cases are heard via arbitration rather than in the courts. Only parties to the contract and their representatives and experts are entitled to participate in an arbitral proceeding. Even in successful court proceedings companies may suffer from adverse publicity and loss of reputation at the end of the day.

Cases dealt with by arbitration can have potential cost and time savings as most arbitrators can make interim awards under the local arbitration legislation. Further, arbitration proceedings may be customised and expedited to suit the needs of the parties.

Arbitral awards are enforceable in multiple jurisdictions. Singapore acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1986. This means that arbitral awards rendered in Singapore are enforceable in more than 120 countries and territories. In addition, parties are bound to arbitral awards by virtue of contract law; therefore parties may enforce decisions of the arbitral tribunal more effectively than court judgements in a cross-border situation.

Finally the arbitral panel can be composed in such a way as to allow flexibility and to include specialists who have expertise in the matters under dispute. The inclusion of industry experts

as arbitrators can assist the parties to the dispute in ways that a judge in Court cannot.

### **What are the disadvantages?**

Prior to choosing arbitration as the method of dispute resolution, parties should consider very carefully the possible disadvantages associated with arbitrations.

One possible disadvantage is cost. The cost of an arbitration case may escalate, as direct costs ordinarily include arbitrators' fees, expenses for arbitrators' travel, rental of the hearing room, cost of site inspections and legal fees. The costs may also be high when they involve hearing multiple parties, experts and complex financial transactions.

Parties to an arbitration can partially overcome this by engaging, separately or jointly, expert witnesses who specialise in their industry, who are capable and experienced as resolving complex commercial transactions. Experts with an international network can be cost effective yet credible, as the travelling expenses can be kept to a minimum in an international dispute. Local expertise and an understanding of business can be utilised for the benefit of the parties.

### **Other relevant factors**

There are other factors affecting cost that parties to a dispute should consider, such as the location or the place of arbitration, the language of the arbitration proceeding and the composition of the arbitration panel. The location of the case will affect the relative convenience and expenses, the enforceability of the arbitration award and the operative law to be applied. The language of the arbitration proceeding can complement or hinder the relative degree of participation by the parties.

## Case notes: Joanna Hughes, Allen & Overy



Since the last set of case notes we have seen yet three more examples of the courts criticising experts who do not comply with their duties under the CPR

### Highway design

In the first case, *Carpenter v Pembrokeshire County Council* (1 October 2002) McKinnon J criticised the claimant's civil engineer expert for "taking up the cudgels as an advocate" of his client's case when presenting evidence on highway design.

Having signed a joint memorandum of agreement with the other side's expert, the claimant's expert then submitted an additional statement backtracking on the matters agreed and incorporating as part of his report a document drafted by the claimant. The judge found that the expert had been pressed by the claimant that the memorandum of agreement was unacceptable to her and that the circumstances in which the additional statement arose cast doubt on the independence of the expert's opinions. In summary, he "abandoned his role as an independent expert."

### Intellectual property

The second case emphasising 'experts' duties was *Cairnstores Limited v Aktiebolaget Hassle* (22 October 2002) where the Court of Appeal upheld the decision of Laddie J. The judge had criticised the defendant's expert in an intellectual property case for acting as an advocate rather than as independent expert witness. The judge accepted the claimant's argument that the defendant's expert's evidence had to be treated with caution and ultimately found against the defendant.

The defendant appealed against the decision of Laddie J, arguing that the judge's interventions during the cross examination of the expert would lead the informed observer to think that the judge was biased, and that the defendant had an unfair trial. It claimed that there had been "judicial brow-beating." The Court of Appeal held that the judge's part in the action did not render the trial unfair and that he was entitled to take the view he did of the expert.

### Insolvency

The third case is *In the matter of Colt Telecom Group plc* (20 December 2002), which concerned an application for an administration order where Jacob J criticised the petitioner's expert witness, an insolvency practitioner.

The judge criticised the expert in question, who was an insolvency partner in one of the big four accounting firms for simply saying that he had a general knowledge of the duty of experts. The judge said that insolvency practitioners giving reports under Rule 2.2 of the Insolvency Rules are subject to Part 35 of the CPR and that the expert ought to have considered very carefully, specifically for the purposes of this case, Part 35, its Practice Direction and the Code of Guidance on Expert Evidence of the Working Party of the Civil Justice Council. The judge further noted that the expert was 'not helped' by his instructing solicitors who failed to send him a copy of Part 35, the Practice Direction or the Code of Guidance. Specifically, the expert was criticised since he and his firm were prepared to act for the petitioner even though the firm had recently acted for the company which the petitioner was seeking to put into administration - this created a conflict of interest.

Furthermore, his firm stood to make a lot of money if his expert evidence was accepted and he did not bring this out in his report. Jacob J said that in contested petitions insolvency practitioners asked to give expert evidence to support a case should not propose themselves as administrators. Otherwise the court is faced with an expert giving contested evidence in a case where he has a direct interest in his evidence being accepted.

Thirdly, the expert inappropriately set himself up as an expert valuer when he had no expertise in the relevant area (FRS 11) and simply gave evidence second-hand.

Finally (although the judge made no finding on this point) Jacob J felt he needed to point out that accountants should never allow clients publicly to misrepresent their opinions in order to gain the publicity they are seeking.

The judge concluded: *"I regret to say that I conclude, without hesitation however, that [the expert] failed in his duties to the court. Unconsciously I think he espoused his clients' cause."* The findings by Jacob J that a person preparing a Rule 2.2 report should be classified as an expert witness and that such a person should not propose himself as an administrator in a contested petition are particularly interesting since we are not aware of this having been previously suggested by the courts.

### **Inadequate reasons for replacing expert: procedure**

Lindsay J in *Stephen Hill Partnership Ltd v Supaglazing Ltd* (16 October 2002) was faced with the decision of whether to allow the defendant to disinstruct its accountant expert witness late in the proceedings and to replace him with another expert. The defendant's expert and the claimant's expert had already met to reach agreement on issues when the defendant informed the claimant that the defendant's expert had discussed his reply to the draft experts' joint statement with employees of the defendant and *"in so doing has acted inappropriately as an independent expert"*. In addition, the defendant referred to the fact that it had recently been discovered that the expert was also assisting the defendant to make representations to the VAT authorities.

The claimant was both suspicious of the defendant's reasons for the replacement and concerned about delay and additional costs, and brought the matter before the court. The judge said it was difficult to see how either reason could be an adequate reason for replacing the expert and that there may have been an abuse of process by the defendant. However, the judge ordered that the

replacement expert could be used.

In order to ensure that the defendant did not profit from its possible abuse, the judge *"had in mind a plan"* under which the claimant would be at liberty to ask the defendant's original expert for a witness statement setting out the reason for his disinstruction, if necessary under a witness summons. The judge suggested that the expert could perhaps have been procured to be the witness of the court and capable of being cross-examined by both sides. However, this plan was rejected by the claimant since it would add to the costs of the action.

### **Inappropriate information to single joint expert**

In *Elmfield House Ltd v Fenston* (18 January 2003) District Judge Madge said that the test adopted by the Court of Appeal in *Daniels v Walker* and the guidance given by Neuberger J in *Cosgrove v Pattison* on the issue of whether to allow an expert in addition to a single joint expert were not appropriate in this case. The difference here was that the judge was satisfied that there had been *"impropriety"* - a property consultant assisting the defendant had breached CPR r35.8(2) because he had not sent a copy of his *"highly partisan letter"* to the single joint expert to the other instructing party. The judge said that the question he had to ask in this case was whether a fair-minded and informed observer would conclude that there was a real possibility, or a real danger, that the single joint expert was unable to make an objective and impartial appraisal of the evidence before him. On the facts, the judge concluded that there was such a danger since the expert referred to the letter several times in his report. The expert was dismissed, the claimants were told they could not rely on their own expert given the relatively small amount in question and the judge directed the instruction of a further single joint expert.

## **The Expert Witness Institute**

Africa House, 64-78 Kingsway, London WC2B 6BD

Tel: 0870 366 6367

Fax: 0870 411 2470

E-mail: [info@EWI.org.uk](mailto:info@EWI.org.uk)

Web: [www.EWI.org.uk](http://www.EWI.org.uk)

Company Secretary

**Brian Thompson, MA FCII FCIS**

E: [ThompsonB@ewi.org.uk](mailto:ThompsonB@ewi.org.uk)

Administration Manager

**Vicky Bartlett**

E: [BartlettV@ewi.org.uk](mailto:BartlettV@ewi.org.uk)

Membership Secretary

**Brigid Lohrey**

E: [LohreyB@ewi.org.uk](mailto:LohreyB@ewi.org.uk)



Please send any comments, news and articles to the editor, **John Finch** at [charleskimbell@btconnect.com](mailto:charleskimbell@btconnect.com)