

### Expert witness immunity - is it still justified?

It is eight years since the House of Lords abolished advocates' immunity in deciding *Hall v Simons* [2002]. Now the issue of expert witness immunity is due to come before the Supreme Court for consideration when it hears the appeal in *Jones v Kaney* [2010].

The claimant in this case had been involved in a road traffic accident and subsequently brought personal injury proceedings. During the course of these the defendant, a psychologist, was instructed to provide an expert's report on the claimant's condition. This initial report suggested a diagnosis of Post Traumatic Stress Disorder. It was directed that the defendant and the expert for the other side were to produce a joint statement. The defendant, without any comment or amendment, signed the joint statement, which was very damaging for the claimant's claim. As a result the claimant achieved a considerably lower settlement than would otherwise have been the case.

The defendant applied for summary judgment on the basis that she had witness immunity. Mr Justice Blake granted the application on the basis that he was bound by *Stanton v Callaghan* [2000] which upheld this principle. The Supreme Court has now granted permission to appeal that decision. The matter has gone direct to the Supreme Court as *Stanton v Callaghan* is also binding on the Court of Appeal.

The current position is that an expert has immunity for evidence given in civil proceedings, but not for private advice given to the client. The immunity extends not only to evidence given at court, but also to expert reports, joint statements and experts' meetings. This position was most recently affirmed in the case of *General Medical Council v Meadows* [2006].

The rationale behind the rule is that it is important to preserve an environment in court in which participants in the proceedings are able to speak freely, are encouraged to come forward and are not influenced by anything other than their duty to tell the truth and assist the court. In particular expert witnesses should not be constrained by a fear of being sued by their client.

Before *Hall v Simons* the same broad justification was given in support of advocates' immunity. Advocates lost the immunity because the House of Lords felt that the position where someone could not recover damages against a negligent advocate could no longer be justified. The advocate owes a duty of care to his client in contrast to a witness, whose only duty is to tell the truth.

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The question therefore arises as to whether the position of the expert witness is more akin to that of a witness of fact or to that of an advocate.

The key distinction between witnesses of fact and experts is that factual witnesses do not hold themselves out as professionals in any given field and neither are they reimbursed for giving evidence. They do not owe any duties to either party; their only duty is to the court.

While experts continue to be appointed and remunerated by the parties, it is arguable that their role is closer to that of an advocate than that of a lay witness. Arguments for removing immunity may include:

- Experts are retained under a contract for reward. As such they owe a duty of care and the client may suffer loss if the expert is negligent. The ordinary rules which pertain to other professionals should therefore apply;
- Given that *Hall v Simons* held that fear of a claim should not affect an advocate's duty to the court, it can be argued that expert witnesses should similarly not be so affected;
- Whilst it is correct that expert witnesses owe duties to the court as well as to their clients, so do solicitors and barristers who do not have immunity from suit;
- There should be no difficulty in competent expert witnesses obtaining professional indemnity insurance to protect their position should a claim be made;
- Removing blanket immunity might improve the overall standard of expert witnesses.

The Supreme Court now has the opportunity to revisit the question of expert immunity and whether it can continue to be justified. It must be a real possibility that the court will find that it cannot.



**Mona Schroedel,**  
Solicitor, dispute  
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# Mediation tips - Top 10

Mediation is now commonplace and yet parties can often still be apprehensive about it. However, with the right preparation and mindset mediation can bring matters to an early and cost-effective resolution.

Here are our top ten tips to give you a head start at mediation:

## 1. Timing

Consider when the optimum time for the mediation is. Is disclosure necessary? Can a mediation take place during the protocol period? Don't be afraid to consider time limited mediation, eg 4 hours.

## 2. Mediator

Think carefully about the choice of mediator. Do you need someone who is prepared to share their views on the merits or someone who is purely facilitative? Choose a mediator who is approachable and efficient. Whether or not to use someone with experience in a particular area of law (or a lawyer at all) will depend on the specific circumstances.

## 3. Attendance

Consider who will attend the mediation. Wherever possible take your professional client as this demonstrates that they take the claim seriously. Don't automatically ask counsel to attend; a mediation is not a mini trial and the presence of counsel can affect the dynamics of the day.



**Andrew Crocombe,**  
Partner and  
accredited mediator

## 4. Bundles

Think carefully about whether a detailed mediation bundle is required. Often it is enough to provide the mediator with statements of case, position papers/opening statements, protocol letters and a few key documents such as contracts and agreements. This will save time and costs for the parties and preparation time for the mediator. Additional documents can be taken to the mediation to be referred to as and when required.

## 5. Essentials

Take essentials such as a calculator for settlement and interest calculations, post-it notes and highlighters. Ensure you have enough food and drinks and be prepared to break for air: it may be a long day.

## 6. Draft Agreements

Think about settlement options before the mediation and draw up draft orders to reflect the different options including provisions for costs. This will save time when it comes to drawing up a settlement agreement (which could be well into the evening).

## 7. Opening session and statements

Insist on an opening session, particularly if you have never met the other side before. Keep opening statements brief and to the point and above all be courteous to the other party. Consider asking the client to address the other side directly. Remind him that an apology from a professional can work wonders with lay clients.

## 8. Settlement parameters

Be clear in your own mind about the maximum offer level at the start. Parameters for any offers should be set reasonably, otherwise the negotiations may quickly fail and parties will become entrenched. Make sure someone with authority to revise settlement parameters is at the mediation or contactable throughout the day. Don't be afraid not to settle if the right terms are not on offer.

## 9. Keep an open mind

Discuss with the client what he wants to achieve at the outset, but bear in mind that mediation allows the parties to reach creative settlements. The cliché "think outside the box" should apply. Be prepared to listen to what the mediator has to say about the other side's case and adapt your views accordingly. Don't be afraid to challenge the mediator if you feel progress is not being made.

## 10. After the mediation

If the matter is not resolved during the mediation, be prepared to pick up the thread and continue with the negotiations the following day. A settlement can often be achieved in the aftermath of an apparently unsuccessful mediation.