Expert Witness Immunity — Continuing Relevance

The Honourable Justice Peter Garling was born in 1952 in Malaya. He was educated at St Ignatius' College, Riverview. He was awarded the degrees of Bachelor of Arts (1974) and Bachelor of Laws (1977) by the University of Sydney.

His first admission as a barrister was in NSW in 1979. He was then admitted to practice as a barrister in all States and Territories and in New Zealand and has practised extensively on Norfolk Island. His appearances as a barrister ranged across a variety of common law and commercial litigation cases. He specialised in the areas of professional negligence and product liability law, public authority liability, insurance law and administrative law. He has appeared extensively in Royal Commissions and Public Inquiries.

From November 1989 to November 1991, he held an appointment as an Acting Judge of the District Court of NSW. From 2006 to 2008, he served as an elected member of the Council of the Bar Association of New South Wales. He is a member of the Legal Profession Review Council.

In 2008, he was appointed by the Government of New South Wales to conduct the Special Commission of Inquiry into Acute Care Services in NSW Public Hospitals. In November 2008, he delivered his Report to Her Excellency, Professor Marie Bashir, the Governor of New South Wales. The NSW Government has accepted 134 of the 139 recommendation. Implementation of those recommendations is well underway.

In June 2010, His Honour was sworn in as a judge of the Supreme Court of New South Wales. He sits in the Common Law Division. His Honour is a member of the Executive Committee of the Judicial Conference of Australia. He is a member of the Education Committee of the Supreme Court of NSW.

Introduction

The topic this evening is of relevance and importance to the members of the Society. I am honoured to be asked to speak tonight about it[i].

I propose first to shortly examine the definition of an expert witness for the purpose of the law and the obligations and duties of an expert when giving evidence in a Court or Tribunal because the particular role which an expert plays seems to me to strengthen the claim of an expert witness to an absolute immunity.

Then I will look at the immunity which a witness, including an expert witness, has in a number of different jurisdictions, which prevents civil and criminal proceedings being commenced against them, the basis for that immunity and the extent of it.

Lastly, I want to consider whether or not an expert witness enjoys any immunity from disciplinary proceedings.

An expert

An expert as a witness is permitted to give evidence of their specialised opinion providing that they are properly qualified. In New South Wales, s79 of the *Evidence Act* 1995 in effect provides that an expert is a person who "…has specialised knowledge based on the person's training, study or experience". Classically, the common law requirements for a witness to be regarded as an expert can be found in *Clark v Ryan*[ii] where Dixon CJ adopted these statements as indicating the nature of expert opinion which may be admissible:

> "…the opinion of witnesses possessing peculiar skill is admissible whenever the subject matter of inquiry is such that inexperienced persons are likely to prove capable of forming a correct judgment upon it without such assistance, in other words, when it so far partakes of the nature of a science as to require a course of previous habit, or study, in order to the attainment of a knowledge of it."
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> "No one should be allowed to give evidence as an expert unless his profession or course of study gives him more opportunity of judging than other people."

Codes of conduct for expert witnesses, which are essentially common to all the Courts and Tribunals in New South Wales, require that when giving evidence, an expert:

- owes and overriding duty to assist the Court impartially;
- owes this paramount duty to the Court and not to any party in the proceedings; and
- is not an advocate for a party.

As I will in due course suggest, the obligations of an expert witness to comply with a code such as this provide a strong argument in favour of an absolute immunity for expert witnesses.

The historical position

Nearly 250 years ago, Lord Mansfield, often described as one of the greatest common lawyers who ever lived, in *R v Skinner*[iii], concisely explained the principle of immunity of a witness from suit in this way:

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

This statement just post-dated Captain Cook's discovery of Australia, but not Governor Phillip's establishment of white settlement.

A hundred years later, in 1873, Chief Baron Kelly in a unanimous judgment of all ten judges of the Exchequer Chamber, when dealing with a witness's evidence at an Army Court of Inquiry, said this[iv]:

> "The authorities are clear, uniform and conclusive, that no action for 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 recognised by the law."

By 1901, the Irish regarded the matter as beyond argument. Palles CB said in *MacCabe v Joynt*[v]:

> "To refer to the words of Lord Mansfield, I find that they are quoted, and treated as settled law, in the considered and unanimous judgment of the Exchequer Chamber in *Dawkins v Lord Rokeby* … ; a judgment which, in my mind, precludes further discussion on the subject. It cannot be, and indeed is not denied that the rule, whatever it may be, is applicable equally to words written as to words spoken. In … many of the old cases, the words complained of were in affidavits; in other cases in pleadings; and the only reason why the language of Lord Mansfield applies the rule to words spoken only is that the application before him was in respect of such spoken words."

Nearly 75 years ago, the High Court of Australia put the position quite clearly when in *Cabassi v Vila*[vi], Starke J said at 140:

> "No action lies in respect of evidence given by witnesses in the course of judicial proceedings, however false and malicious it may be, any more than it lies against judges, advocates or parties in respect of words used by them in the course of such proceedings or against jurors in respect of their verdicts."

Williams J (with whom Rich ACJ agreed) said at 149:

> "It is clear law that a witness cannot be sued in a civil action in respect of anything which he has said in the course of his examination in the witness box."

With these rather strong statements, and what might be seen to be the clearest of articulated legal principle, it may be thought that there is little more to be said on the topic. However, decided cases over the last few decades tend to suggest otherwise.

In particular, although the position in Australia is that the immunity remains as a recognised and essential part of the common law, it seems (but only by a bare majority) that the immunity has been partly abolished in the United Kingdom: see *Jones v Kaney* [vii].

It is appropriate to examine first the basis in law for the existence of such an immunity, because then any proposed examination of the extent of the immunity may be more readily understood.

The basis for an immunity

In examining this question, a ready source for an understanding of the basis in law for the immunity is in decided cases.

The Court of Appeal in New South Wales dealt with the basis for the immunity in *Commonwealth of Australia v Griffiths*[viii]. According to Beazley JA, the rationale for the immunity is to be found in the promotion of two objects: first, ensuring that witnesses are able to give evidence freely in an atmosphere devoid of threats from disappointed litigants; and second, to avoid a multiplicity of actions in which the same evidence would be tried over and over again.

These rationales suggest to me that the principle of the need for the finality of litigation looms as a large and central thesis. It is to be remembered that the immunity was intended to cover the advocates in a case as well as the witnesses. The basis for the immunity will not differ between those two groups of beneficiaries.

The majority of the High Court of Australia (Gleeson CJ, Gummow, Hayne and Heydon JJ) in *D'Orta-Ekenaike v Victoria Legal Aid*[ix], a case about the advocate's immunity, said that the consideration which underlay the immunity principle was " … that determining whether the complaint made is baseless or not requires re-litigation of the matter out of which the complaint arises."

Lord Hutton, in *Darker v Chief Constable of West Midlands*[x], suggests something similar, namely, that it is a matter of public policy to protect a witness from being harassed and vexed by a civil proceeding.

Justice Salmon, in *Marrinan v Vibart*[xi], suggested that the immunity existed for the benefit of the public because they were the ultimate beneficiaries of the proper administration of justice. This broader base for the immunity has been embraced by others since then.

Personally, I have found the clearest statement of principle on this matter in a judgment of Justice Collins sitting in the Queens Bench Division in the matter of *Meadow v General Medical Council*[xii]. His Honour accepted a submission made to him by the Attorney-General of the United Kingdom, Lord Goldsmith QC, as to the basis of absolute immunity of an expert witness, in the following way:

> "I would accept the Attorney-General's submission that the underlying rationale for the immunity from civil suit is ordinarily expressed as promoting two objectives … Those two objectives are:
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> (i) ensuring that witnesses give evidence 'freely and fearlessly' (Darker per Lord Clyde at 456), 'in atmosphere free from threats of suit from disappointed clients' (*Staunton v Callaghan* [2000] QBE 75 per Otton LJ at 108F), with the corollary that 'persons who may be witnesses in other cases in the future will be deterred from giving evidence for fear of being sued for what they say in court'; and
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> (ii) 'to avoid multiplicity of actions in which the value or truth of their evidence will be tried over again" (*Roy v Prior* [1971] AC 470 at 480 per Lord Wilberforce)".

What is the extent of the immunity?

Although the immunity is an absolute one, a question has arisen in more recent times about what it actually extends to.

You will remember that the early definitions, to which I have already made reference, seem to speak only of the giving of evidence orally and in Court:

> "… words spoken in office …" (1772)
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> "… evidence given in the course of judicial proceedings"
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> "… [that] which he has said in the course of his examination in the witness box… " (1940)

But as we all know, there are now a variety of steps in which an expert witness will be involved which include the expression of his or her opinion before the giving of any evidence in a Courtroom. The issue is, whether or not, and if so to what extent, these actions are caught by, or else have the benefit of, the immunity.

In examining this question, it is appropriate to start by recognising the context in which immunity is found, and the nature of an immunity and its relationship to the common law.

Lord Cooke of Thornton said this in *Darker* at 453:

> "Absolute immunity is, in principle, inconsistent with the rule of law, but in a few, strictly limited cases, it has to be granted for practical reasons. It is granted grudgingly …"

In dealing with a question of whether a letter written to an Attorney-General was absolutely privileged on the basis of an immunity arising from statements made in the course of Parliamentary and judicial proceedings, the majority of the High Court of Australia (Brennan CJ, Dawson, Toohey and Gaudron JJ) in *Mann v O'Neill*[xiii], said this:

> "… the general rule is that the extension of absolute privilege is viewed with the most jealous suspicion, and resisted, unless its necessity is demonstrated." (references omitted)

In New Zealand, the same position applies. McCarthy P said in *Rees v Sinclair*[xiv]:

> "The protection should not be given any wider application than is absolutely necessary in the interests of the administration of justice."

The immunity has been extended beyond words spoken in a courtroom. Some examples may be of assistance.

In *D'Orta-Ekenaike*, the majority of the Court expressed the view that the immunity extends to "…preparatory steps"[xv].

McHugh J[xvi] described the immunity as one which "… extends even to out of court conduct that is intimately connected with the giving of evidence in Court".

Earlier English decisions such as *Watson v M'Ewan* [xvii]and *Marrinan* expressed views consistent with these phrases.

But the boundaries are not necessarily clear. In *Evans v London Hospital Medical College*[xviii], the plaintiff had been charged with the murder of her infant son, which was alleged to have been caused by morphine poisoning. She was arrested only following the results of toxicology tests that apparently confirmed the concentration of morphine in her son's body. The toxicology reports confirming the presence of morphine were prepared by three of the defendants who were employed by the hospital, the principal defendant in that proceeding.

The reports were given to the police and the prosecuting authorities. Subsequently further toxicological tests conducted by a pathologist acting for the plaintiff showed the organs to be entirely free from morphine.

The plaintiff, Ms Evans, brought proceedings claiming damages against the hospital and the three experts. The plaintiff argued that, whilst the defendants had immunity in respect of any negligence after the criminal proceedings had commenced, negligent acts or omissions which had occurred prior to the prosecution being commenced were not protected by the immunity.

The argument did not turn on whether or not the statements, which were prepared for the purposes of the proceedings, and which were ultimately tendered in court, were covered by the immunity because it was accepted by the plaintiff that the immunity extended that far. Rather, the question posed for decision was whether the acts or omissions of the expert witnesses (or as they were, potential witnesses), during the stage that the material was being collected or considered with a view to its possible use in criminal proceedings, were within the immunity.

Justice Drake held that the immunity did extend to the undertaking of these tests. His reasoning, relying principally on the proposition that the immunity existed for the benefit of the public and the effective administration of justice, included this:

> "If this object is to be achieved, I think it essential that the immunity given to a witness should also extend to cover statements he makes prior to the issue of a writ or commencement of a prosecution, provided that the statement is made for the purpose of a possible action for prosecution and at a time when a possible action or prosecution is being considered. In a large number of criminal cases the police have collected statements from witnesses before anyone is charged with an offence: indeed sometimes before it is known whether or not any criminal offence has been committed. If immunity did not extend to such statements, it would mean that the immunity attaching to the giving of evidence in Court or the formal statements made in preparation for the court hearing could easily be outflanked and rendered of little use. For the same reason I think that the immunity must extend also to the acts of the witness in collecting or considering material on which he may later be called to give evidence."

Although there was no appeal directly from that decision, the correctness of Justice Drake's decision arose in the case of *Taylor v Director of Serious Fraud Office*[xix]. There Lord Hoffmann[xx] expressly stated his agreement with what Drake J had said as to the appropriate test to be applied. Lord Hutton in *Darker*[xxi] also expressed his agreement with the test applied by Drake J.

Darker is also a case which bears examination. It is a decision of the House of Lords. Lord Hope of Craighead posed the relevant question in *Darker* in this way:

> "No challenge has been made … to what may be conveniently called the 'core immunity'. …The question that has been raised relates to the further extent of the immunity. Where are the boundaries to be drawn? It arises because there is another factor that must always be balanced against the public interest in matters relating to the administration of justice. It is the principle that a wrong ought not be without a remedy. Immunity is the derogation from a person's right of access to the court which requires to be justified."

The plaintiffs in *Darker* claimed that things done by police officers while they were engaged in the investigation of the relevant crime and during the process of preparing the case for trial, were actionable. The particular allegations were that:

(a) police officers, together with an informant, fabricated statements against the plaintiffs;
(b) two of the police officers conspired to charge the plaintiffs with offences they knew or believed to be false;
(c) one officer allowed or incited an informant to fabricate evidence. He also shared the reward obtained by the informant;
(d) police officers generally acted in the investigation contrary to codes of conduct, statutory orders or directions.

The police officers applied for the statement of claim to be struck out, claiming that the acts alleged were covered by the immunity. The primary judge struck out the statement of claim and dismissed the plaintiffs' action. The Court of Appeal dismissed the plaintiffs' appeal.

The House of Lords on appeal held that public policy did not require the immunity to be extended to things done by the police during the investigative process which could not fairly be said to form part of their participation in the judicial process as witnesses.

Lord Hutton's speech provides the explanation for this approach. He says[xxii]:

> "…there is no general principle that in order to prevent honest police officers from being vexed and harassed by unfounded actions brought by hostile persons whom they have arrested, they should be given absolute immunity in respect of their actions in carrying out their duties, and that in order to protect the many honest police officers from the vexation of rebutting unfounded allegations, the immunity should also extend to protect the few dishonest police officers."

Lord Hutton approved of Justice Drake's approach in *Evans* and drew what he had elsewhere had called a fine distinction in eliciting principle. He said that, in *Evans*, the pathologists' conduct was done "… *for the genuine purpose of making a report, which would constitute a statement of evidence for a possible prosecution*", whereas in *Darker*, his Lordship said that the steps there, were taken for "…*the wrongful purpose of fabricating false evidence which would be referred to in an untruthful statement of evidence, the immunity did not respond*."

He sharpened the fineness of the distinction when he went on to say this[xxiii]:

> "This view is not in conflict with the principle that immunity (where it exists) is given to a malicious and dishonest witness as well as to an honest witness, and I think that the honest (though negligent) examination of articles to enable a statement of evidence to be made, comes within the concept of the preparation of a statement of evidence, whereas the deliberate fabrication of evidence to be referred to in a statement of evidence, does not come within that concept."

The next case which warrants examination in this context is *Ollis v NSW Crime Commission*[xxiv], a decision of the NSW Court of Appeal.

The New South Wales Crime Commission sought orders for the making of a proceeds assessment order, under the relevant statute, requiring Mr Ollis to pay an amount assessed on the value of the proceeds derived by him from illegal activities. In order to obtain such an order, the Crime Commission needed to establish that Mr Ollis had, within the relevant time period, engaged in "serious crime-related activity".

The conduct which the Commission relied upon was the making, in a civil debt claim, of two false affidavits. Mr Ollis, in that civil debt claim, had applied to pay a $40,000 debt by instalments and, in affidavits in support of his application, he had stated that he was financially unable to pay the sum. Unfortunately for Mr Ollis, he did not disclose to that Court that he had, within the preceding weeks, made cash loans to other people totalling $7.5m and further, he did not disclose the existence of another $7.5m worth of assets.

Mr Ollis claimed the benefit of the absolute witness immunity in answer to the Crime Commission's claim. Beazley JA noted that, whilst the immunity was an absolute one, it was nevertheless subject to well-recognised exceptions. One such well-recognised exception was for what might be called "*substantive administrative of justice offences*" which would include perjury, contempt of court and perhaps, depending on the circumstances, perverting the course of justice.

Her Honour noted that the second category of exception was that described by the High Court of Australia in *Jamieson v The Queen*[xxv] as being "…*any clear statutory provision to the contrary*."

Beazley JA held that the statute which permitted the NSW Crime Commission to obtain the proceeds of crime, including by a proceeds assessment order, fell within this exception.

In the civil realm of expert witnesses, a good example of the application of the immunity is to be found in *X (Minors) v Bedfordshire County Council*[xxvi]. This is a case which is quite remarkable. Amongst other reasons why that is so, is that it occupied 12 hearing days in the House of Lords. Lord Browne-Wilkinson, with whose speech the other Law Lords agreed, expressed the view that he found the reasoning of Justice Drake in *Evans*:

> "…compelling, at least in relation to the investigation and preparation of evidence in criminal proceedings. In my judgment exactly similar considerations apply where, in the performance of a public duty, the local authorities investigating whether or not there is evidence on which to bring proceedings for the protection of the child from abuse, such abuse frequently being a criminal offence."

However, in what appears almost to be a back-handed endorsement of a decision of a deputy High Court Judge in a different case, his Lordship said:

> "I express no view as to the position in relation to ordinary civil proceedings, but nothing I have said casts any doubt on the decision of Mr Simon Tuckey QC in *Palmer v Durnford Ford* [1992] QB 483."

You will forgive me at this stage, if I merely give you a relatively brief summary of this case. The suit before Mr Tuckey QC, sitting as a Deputy High Court Judge, was a civil claim arising out of circumstances where an engineer was being retained as an expert to prepare a report on the cause of two breakdowns of a lorry tractor unit operated by a haulage contractor.

The plaintiffs, who lost their action when they abandoned their claims after the expert had given evidence, brought a further action against the solicitors and expert for breach of their contractual duties of care claiming, inter alia, that the expert was not sufficiently qualified to advise, that he should have advised from the outset that they had no claim against the vendor and that his persistence in an obviously wrong view about the repairer's work had resulted in their abandoning their case.

Mr Tuckey QC said this:

> "Considering whether the immunity is so far reaching, I approached the matter by noting first that experts are usually liable to their clients for advice given in breach of their contractual duty of care and secondly, that the immunity is based upon public policy and should therefore only be conferred where it is absolutely necessary to do so. Thus, *prima facie*, the immunity should only be given where to deny it would mean that expert witnesses would be inhibited from giving truthful and fair evidence in Court. Generally, 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.
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> Accordingly, I do not accept that the immunity can be as wide as that contended for. I can see no good reason why an expert should not be liable for the advice which he gives his client which is the merits of the claim, particularly if proceedings have not been started, and, *a fortiori*, as to whether he is qualified to advise at all.
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> …
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> Thus, 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. 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."

At this stage, it would be useful if I were to summarise what I see the position to be with respect to the extent of the immunity:

(a) all statements, whether oral or written, prepared for or else read in Court or a Tribunal are covered by the immunity;
(b) all statements in pleadings and other like documents are covered by the immunity;
(c) all statements made by potential witnesses in criminal proceedings, when proceedings were in contemplation but not yet commenced, are covered by the immunity;
(d) statements out of court which could fairly be said to be part of the process of investigating crime with a view to prosecution would be caught by the immunity;
(e) expert reports prepared for the giving of evidence and work principally and proximately leading to the reports and the evidence are caught by the immunity.

But this extent is limited by the following exclusions and limitations:

(a) the immunity does not extent to steps taken for the purpose of making an intentionally untruthful statement, or the fabricating of false evidence to be referred to in a statement presented in Court;

(b) substantive crimes involving the administration of justice are excluded form the immunity;
(c) specific statutory exclusions may mean that the immunity does not operate; and
(d) work done by an expert, the principal purpose of which is to advise a client prior to the commencement of proceedings, or else about the prospects of success of proceedings, which advice is not tendered in Court, would not be caught by the immunity.

I would wish to conclude this section by taking from the judgment of Gleeson CJ, Gummow, Hayne and Heydon JJ in *D'Orta-Ekenaike*, the words in paragraph 84, in order, by paraphrasing them, to adapt what their Honours there said about advocate's immunity to the application of witness immunity, because after all, these immunities stem from the same underlying public policy basis. Accepting that I am plagiarising their Honours' words, I would suggest that a fair way of describing witness immunity, and the basis and justification for it, would be this:

> "But the legal principle which underpins the conclusion is fundamental. Of course, there is always a risk that the determination of a legal controversy is imperfect. And it may be imperfect because of what a party's witness says or does not say. The law aims at providing the best and safest system of determination that is compatible with human fallibility. But underpinning the system is the need for certainty and finality of decision. The immunity of witnesses is a necessary consequence of that need."

Finally, and before leaving this part, I should make some observations specifically about expert witnesses.

All of the principles to which I have made reference are applicable to expert witnesses. But expert witnesses are, so it seems to me, in a much stronger position than any other witnesses, such as police officers, to obtain the benefit of an immunity.

First, because of the role which Courts now require of an expert, that is, to be primarily an impartial witness owing a duty to the Court and not an advocate for any party, there can be little doubt that expert witnesses fall well within the public policy dictates and, unarguably, are a part of the administration of justice.

Second, all of their out of court work in preparing a report, including making enquiries, site visits, conducting experiments or tests and writing draft reports, form part of the process of preparation for and the giving of evidence. These steps are intimately connected to the giving of evidence. The immunity would extend to these steps.

Third, Courts now regularly require expert witnesses to take part in joint conferences with other experts, in an attempt to identify and reduce where possible the difference between expert opinions. These too are clearly part of the process of preparing for and giving evidence.

In my view, all of the matters are well within the bounds of the immunity. What falls outside the bounds of the immunity is work that can be identified separately as being commissioned for a principal purpose *other than* the giving of evidence, such as advising about a particular issue when litigation has not been commenced or is not reasonably in prospect.

Disciplinary proceedings

I have so far discussed immunity as a form of protection for an expert witness in the context of an attack upon him or her through civil or criminal proceedings. But what is the position so far as disciplinary proceedings are concerned?

Disciplinary proceedings, whether for a legal or a medical practitioner, have at their core, the protection of the public. That is their purpose.

It is true that there is an element of punishment for individual practitioners when their right to practise is removed or suspended, but that is not regarded as an anathema to the central purpose. As Giles AJA said in *Law Society of NSW v Foreman*[xxvii]:

> "The jurisdiction… of this Court in disciplinary matters is exercised to protect the public, not to punish the solicitor. The object of protection of the public may require that a legal practitioner be removed from the Roll, be suspended from practice, or only be permitted to practise under particular circumstances… The public is protected by ensuring that those unfit to practise do not continue to hold themselves as fit to practise. But the object of protection of the public also includes deterring the legal practitioner in question from repeating the misconduct, and deterring others who might be tempted to fall short of the high standards required of them.… An element of deterrence is an assurance to the public that serious lapses in the conduct of legal practitioners will not be passed over or lightly put aside, but will be appropriately dealt with."

I think a single decision best illustrates why the immunity does not act to prevent disciplinary proceedings, and nor should it.

In November 1999, Mrs Sally Clarke, a solicitor in the United Kingdom, of impeccably good character, lived with her husband who was also a solicitor. Their first child died, or so it was thought, of Sudden Infant Death Syndrome at the age of 3 months.

A little over a year later, her second child, at about 2 months, also died suddenly. The pathologist, who had carried out the first *post mortem* examination, also carried out the second *postmortem*. On the second examination, he found injuries that he considered to be indicative of non-accidental injury consistent with episodes of shaking on several occasions over several days. He concluded that this shaking was the likely cause of death. He then re-examined the results of the earlier post-mortem and concluded that neither of the deaths was accidental.

Mrs Clarke was put on trial for the murder of her two sons and, in November 1999, was convicted by the majority of a jury. She appealed against her convictions, but that appeal was dismissed in 2000.

During the course of the trial, the prosecution called evidence from Professor Sir Roy Meadow, an eminent paediatrician, which evidence was intended to prove that the likelihood of there being two non-accidental deaths of young babies in the one family, which was Mrs Clarke's account, was remote.

After her convictions, further evidence became available by way of microbiological tests which had not featured in the evidence at trial. These tests were submitted to a new group of medical experts who formed the opinion that her second son may not have been murdered and that caused doubt to arise with respect to the death of her first son.

The Court of Appeal (Criminal Division), re-heard the appeal and received further evidence. It allowed the further appeal of Mrs Clarke and quashed her convictions. In so doing, the conduct of the expert, Professor Sir Roy Meadow, was severely criticised, as was the work of the pathologist, Dr Williams.

I am unable to tell you what became of Dr Williams, but in 2005, Professor Meadow was brought before a Fitness to Practise Panel to answer a complaint of serious professional misconduct brought against him by Mrs Clarke's father. The Panel found serious professional misconduct proved and ordered that his name be removed from the Register.

Professor Meadow appealed to the Queens Bench Division of the High Court where Collins J heard his appeal. Neither party, that is to say, neither Professor Meadow nor the General Medical Council, had taken any point before the Panel, or before Collins J, about whether or not the proceedings were prevented by reason of the immunity from suit of an expert witness in respect of any evidence he had given in a court of law.

Justice Collins, having raised the point himself, found himself persuaded, after careful consideration, that it was a very good one. He held that the absolute immunity for an expert witness giving evidence should apply to disciplinary proceedings. However, his Honour carved out an exception which he thought preserved all features of the applicable public policy concerns. He concluded that the immunity would apply to disciplinary proceedings where complaints to the disciplinary authorities were made by

anyone other than the judge who presided over the civil or criminal trial where the evidence was given. He reasoned that this would provide a sufficient break against any inappropriate or unnecessary vexation. Accordingly, he allowed the appeal because he found that he was satisfied that the proceedings before the Panel ought not to have proceeded.

The General Medical Council were not pleased and accordingly appealed to the Court of Appeal from the decision of Justice Collins. The Attorney-General for the UK, Lord Goldsmith QC, intervened in the public interest, and appeared himself. The appeal was heard and determined in 2006. The principal judgment was given by Sir Anthony Clarke, the Master of the Rolls. I commend the decision to you[xxviii]. It is a fine piece of writing.

The Master of the Rolls held that there was no reason in principle for the immunity to apply to disciplinary proceedings. He said this:

> "45. The Courts have shown a marked reluctance to extend the immunity from civil suit at all. To my mind there is no principled basis for extending the immunity to all [disciplinary] proceedings.… I have already expressed the essential reasons. It is that the purpose of [disciplinary] proceedings is distinct from the purpose of civil proceedings. It is to ensure, so far as reasonably possible, that those who are not fit to practise do not do so. If the conduct or evidence of an expert witness at or in connection with a trial, whether civil or criminal, raises the question whether that expert is fit to practise in his particular field, the regulatory authorities or [disciplinary tribunal] should be entitled [and may be bound] to investigate the matter for the protection of the public.
> 46. … In general the threat of [disciplinary] proceedings is in the public interest because it helps to deter those who might be tempted to give partisan evidence and not to discharge their obligation to assist the Court by giving conscientious and objective evidence. It helps to preserve the integrity of the trial process and public confidence both in the trial process and in the standards of the professions from which expert witnesses come. As stated earlier, the purpose of [disciplinary] proceedings is the protection of the public."

The other members of the Court, Lord Justice Auld and Lord Justice Thorpe, agreed with the Master of the Rolls' decision in this respect.

However, curiously, the Court divided 2-1 in their decision as to whether Professor Meadow's evidence, in which he had opined that the risk of two deaths in the same family from Sudden Infant Death Syndrome, where the parents did not smoke, at least one had a waged income, and in which the mother was over the age of 26 (all of which applied to the Clarke family), was 1 in 73 million.

It was accepted before the Panel that this figure was grossly flawed. Professor Meadow's expert opinion at trial had been expressed rather strongly. He told the jury that the odds of these two children both dying from Sudden Infant Death Syndrome were the same as an outsider winning the Grand National at the odds of 80 to 1 in four consecutive years. Professor Meadow concluded his evidence with a flourish to the jury " … *you have to say two unlikely events have happened and together it's very, very, very unlikely*.".

Auld LJ and Thorpe LJ saw no misconduct in this evidence. The Master of the Rolls differed.

In Australia, there have been a number of cases in professional tribunals where an expert witness has been brought to task for the reports which they have written, or for the evidence they have given. Most of these are not readily available[xxix].

One which is relatively accessible involves a hearing by the Psychologists Registration Board of Victoria[xxx] into allegations that a psychologist had failed to maintain adequate patient confidentiality whilst giving evidence and that he had expressed views which the Board described as "heterodox" without disclosing that fact. In other words, he had pretended, without proper disclosure, that "junk science" views were mainstream and had not revealed this divergence to the Family Court. Ultimately,

the Board concluded that he was guilty of unprofessional conduct for failing to display the hallmarks of even-handedness, scientific rigour and fair-mindedness which were necessary for an expert in a forensic role. No suggestion was made that the immunity was available to protect him from such disciplinary consequences.

My own experience suggests that the notion that the immunity which an advocate enjoys would prevent an advocate being disciplined for what he or she said in Court has not ever been embraced. This is not unimportant as a comparator when considering the issue of expert witness immunity in the context of disciplinary proceedings because both immunities derive from the same public policy base.

The infamous barrister, Peter Clyne, was disciplined in the late 1950s for what he said in Court when acting as counsel in opening a case for his client at the preliminary hearing before a Magistrate.

The High Court in *Clyne v NSW Bar Association*[xxxi], was unanimously of the view that Mr Clyne's conduct was appropriately the subject of disciplinary proceedings and it declined to overturn the decision of the NSW Court of Appeal that Mr Clyne be removed from the Rolls.

At 200, the High Court noted that a barrister had an absolute privilege with respect to what he said he in Court. Their Honours acknowledged that they did not wish to say anything or do anything which might be thought to *"…curtail this freedom of speech which public policy demands*". However, their Honours noted that where such privilege was abused, *"…grave and irreparable damage might be unjustly occasioned …*" and so, as it seems to me, their Honours concluded that it was appropriate for disciplinary proceedings to follow.

Time does not permit me to continue this self-indulgent excursion through other disciplinary cases. I think it fair to say that it is well established that the disciplinary proceedings do not attract, in favour of the professional expert, an immunity with respect to anything which he or she does in preparing to give evidence and in giving evidence itself.

Continuing relevance

In *Jones v Kaney*, a case to which I earlier made brief reference, a majority of the Supreme Court of the United Kingdom held that a retained expert witness was not entitled to the benefit of an immunity from actions by his or her own clients for professional negligence. However, an immunity from actions for defamation remained, as did an immunity from action brought by an opposing party (or a party in an opposing interest). As well, the majority expressly stated that the immunity remained for witnesses of fact, including expert witnesses such as a treating doctor.

Lord Collins, who was in the majority, said[xxxii]:

> 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.

In significant part, the reasoning of the majority called upon the experience in that jurisdiction with claims against barristers since the House of Lords abolished the advocates' immunity in *Hall v Simons*[xxxiii]. Quite what the effect of this decision will be in Australia is unknown.

In considering the continuing relevance of the immunity, I would wish to say that whilst the absolute immunity for witnesses who give evidence has been, historically, rooted in the common law, it will, in my opinion, only last for as long as the conduct protected by it can be seen to be in need of its protection. Put a little differently, if expert witnesses regularly put themselves in breach of Codes of Conduct by the things which they say in Court, and by the attitudes which they adopt, then they will have a far less convincing argument that they are in need of the public policy protection of immunity.

I, and I am sure each of you, will watch further developments with interest.

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[i] I have been much assisted in the preparation of this paper by the diligent research and thoughtful insights of my tipstaff, Lucy Blair.
[ii] (1960) 103 CLR 486 at 491
[iii] (1772) Lofft 54 at 56; 98 ER 529 and 530
[iv] *Dawkins v Lord Rokeby* (1873) LR 8 QB 255 at 263
[v] [1901] 2 Ir Rep 115 at 127
[vi] (1940) 64 CLR 130
[vii] [2011] UKSC 13
[viii][2007] 70 NSWLR 268 at [43]
[ix] (2005) HCA 12; 223 CLR 1 at [41]
[x] [2001] 1 AC 435 at 464
[xi] [1963] 1 QB 234 at 237
[xii][2006] EWHC 146 (Admin)
[xiii] [1997] HCA 28; 191 CLR 204
[xiv] [1974] 1 NZLR 180 at 187
[xv] at [39]
[xvi] at [99]
[xvii] [1905] 8 AC 480
[xviii] [1981] 1 All ER 715
[xix] [1999] 2 AC 177
[xx] at 214-215
[xxi] at 471
[xxii] at 470
[xxiii] at 472
[xxiv] [2007] 177 A Crim R 306
[xxv] (1993) 177 CLR 574 at [6]
[xxvi] [1995] 2 AC 633
[xxvii] (1994) 34 NSWLR 408
[xxviii] It is to be found in [2007] 1 All ER 1
[xxix] *Mustac v Medical Board of Western Australia* [2004] WASCA 156 is an exception to this
[xxx] Re Peter James Noble [2002] PRBD (Vic) 6; see also Re Watson-Munro [2000] PRBD (Vic) 4
[xxxi](1960) 104 CLR 186
[xxxii] at [85]
[xxxiii] (2002) 1 AC 615