In English law judges, barristers, solicitors, jurors and witnesses all enjoy immunity from civil action brought against them in respect of anything they may have said or done in court during the course of a trial. This is so for reasons of public policy. As Lord Salmon explained in 1974:

'It is of great importance that all [of them] shall perform their respective functions free from fear that disgruntled and possibly impecunious persons who have lost their case... may subsequently harass them with litigation... The law takes the risk of their being negligent and confers upon them [immunity from action] as to whether or not they have been so.'

For expert witnesses the same immunity attaches to any report that they may be instructed to prepare for the purposes of being a witness in litigation. It also extends to the preparation of the evidence they are to give, including the collection and analysis of material relevant to the case. This has to be so if the immunity to which witnesses are otherwise entitled is not to be circumvented by suing them on the documents they have prepared for use in court.

Now it is true, of course, that the great majority of civil cases are settled before they reach court. Moreover, Lord Woolf’s proposals for case management envisage that in future most of those that do go to trial will be allocated to the ‘fast track’, a procedure which precludes consideration of oral evidence from expert witnesses. It must be assumed, though, that all expert witnesses enjoy immunity from suit to the same degree, whether or not they are required, or allowed, to give their evidence in court.

Professional negligence
It will be apparent from the foregoing that civil actions against expert witnesses which allege negligence in respect of evidence submitted to the court are highly unlikely to succeed. What, though, of the other services experts perform on behalf of the litigants? They could well be asked, for example:

- to investigate the circumstances giving rise to the dispute
- to conduct experiments to determine their cause
- to advise on the strengths and weaknesses of the client’s case
- to identify technical weaknesses in the opposing side’s expert evidence
- to assist in negotiations to settle the dispute.

In all these additional roles an expert witness is as liable to be sued for negligence in their performance as would be any other professional adviser, notwithstanding that at the time the services were provided it was anticipated that the expert would be a witness at the trial if the litigation were to proceed.

The required standard
The relationship between an expert witness and the instructing solicitor is a contractual one, whether or not the contract exists in writing. In common with other contracts for the supply of professional services, it is an implied term that the expert will exercise reasonable care and skill in the performance of his or her duties. If the expert fails in this, then he or she is liable in negligence.

The test of what is reasonable is the one laid down 40 years ago in Bolam -v- Friern Hospital Management Committee and followed by the courts ever since. In his judgment in that case, Mr Justice McNair held that to establish negligence the standard to be applied is that of:

‘... the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest possible skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.’

That this test applies directly to expert witnesses may be inferred from the remark of Lord Fraser in another leading case in the field of medical negligence, when he defined the standard that a party is entitled to expect of an expert to be:

‘... the standard of skill expected from the ordinary competent specialist having regard to the experience and expertise that a specialist holds himself out as possessing’.

Case law
Case law in this area is sparse, but what little there is of it is highly instructive. As regards an advocate’s immunity from suit, the leading case is Saif Ali -v- Sydney Mitchell & Co., in which the House of Lords decided that immunity extends to pre-trial work, but only when it is so intimately connected with the conduct of the case as to have the effect of determining the way in which the case is to be conducted at trial.

That decision was followed last summer by the Court of Appeal in an action brought by a woman who in earlier matrimonial proceedings had sought ancillary relief from her husband. She subsequently sued her counsel for negligence in advising her to accept a settlement offered at the door of the court. Two of the three judges hearing the case in the Court of Appeal agreed that such advice, while it effectively precluded further conduct of the matrimonial cause, fully satisfied the required intimate connection laid down in Saif Ali to render the barrister’s advice immune from action.

Palmer -v- Durnford Ford
In Saif Ali the Court of Appeal was confirming the decisions of two lower courts on an application by the
defendant barrister to strike out the action for want of cause. In 1992 it fell to Mr Simon Tuckey QC, sitting as a Deputy High Court Judge, to consider a similar application made on behalf of a firm of solicitors and an expert witness. The plaintiff alleged negligence on the part of them both, and regarding the expert Mr Tuckey said in his judgment:

‘I can see no good reason why an expert should not be liable for the advice which he gives to his client as to 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... The problem is where to draw the line, given that there is immunity from evidence given in court and it must extend to the preparation of such evidence to avoid the immunity being outflanked and rendered of little use.’

After referring to the decision in Saif Ali, he continued:

‘I think a similar approach could be adopted in the case of an expert. Thus, the immunity would only extend to what can 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 be...’

**Landall -vs- Dennis Faulkner & Alsop and others**

This approach was followed 2 years later in the hearing of a claim against a firm of solicitors and two doctors, one of whom had been the plaintiff’s expert witness in an earlier action for personal injury. The latter had agreed with the medical expert for the other side that an operation to repair the plaintiff’s injury would have an 80% chance of success, and his final report was in those terms.

In the event, the operation was not a success, and the plaintiff sued for the difference between the sum assessed in anticipation of a favourable outcome and what he might have been awarded had the operation not been attempted. Unfortunately for him, though, the judge found that the doctor’s report was:

‘...pre-trial work so intimately connected with the conduct of the case in court that it could fairly be described as a preliminary decision affecting the way that the case was to be conducted when it came to a hearing’

and that, as such, it was immune from suit. 9

**Stanton -vs- Callaghan**

What, though, of an expert’s report prepared for use in litigation, but where the expert did not, in the event, give evidence at trial because the content of the report led to the abandonment of the action? Can the expert also be immune from suit in respect of the report’s content? That was the question the Court of Appeal had to consider in a case decided in July 1998.10

The plaintiffs were the owners of a house that had suffered subsidence damage. Partial underpinning had been carried out, but this was unsuccessful and further subsidence occurred. The defendant was a civil and structural engineer who had been engaged by the owners to report on the problem. He advised them that partial underpinning had been inappropriate: to restore the property to its full market value total underpinning of the building would be required. On the strength of this advice the owners made a claim under their buildings policy, and when this was rejected they initiated proceedings against the insurers. The engineer was to be their sole expert witness in this action.

At a preliminary hearing of the dispute directions were given that the expert evidence should be agreed if at all possible, and the experts for both sides duly met to discuss possible remedies. At this meeting the defendant engineer, departing from the advice he had previously given his clients, agreed with the insurers’ expert that another solution to the problem was feasible which would be substantially less expensive than that involving total underpinning. In a final report to the plaintiffs, submitted shortly before the trial date, the defendant provided costings for both options and ended by saying that either scheme would return the property to stability and full market value.

Not surprisingly the agreement reached by the experts at their meeting had an immediate impact on the owners’ claim, so much so that they felt constrained to accept an offer to settle which gave them less than a quarter of what they had been seeking. However, when they subsequently put the house up for sale, the most the owners could get for it was £50,000. This was reckoned to be its site value, whereas the full market value of the property, repaired, had been estimated to be £105,000. The owners then sued their expert for the difference between these two amounts, due allowance being made for the sum recovered from the insurers.

The plaintiffs contended that the defendant’s initial advice to them had been correct, and the basis of their claim against him was negligence or breach of duty in that (a) he had failed to inform them that he had substantially changed his mind as to possible remedies before entering into an agreement with the insurers’ expert, and (b) he had been unduly influenced into changing his mind by the other expert’s assertion that underpinning represented a degree of betterment outside the terms of the plaintiffs’ insurance policy.

The engineer’s lawyers twice applied to have the action struck out on the ground that, as a prospective witness, he was immune from suit, but in both instances the application was refused. On the second occasion the judge hearing it ruled that it was at least arguable that the engineer ought to have told his clients what he was intending to do before entering into an agreement which, in effect, abandoned a large part of their case.

The Court of Appeal, however, held otherwise, and it did so on grounds of public policy. The lead judgment stressed the importance for the administration of justice that trials take no longer than is necessary to do justice, and that, in particular, court time should not be expended on matters that were not truly in dispute. To that end experts, whose overriding duty is to the court, are to be encouraged to identify in advance those parts of their evidence on which they are, and those on which they are not, in agreement. Accordingly,

‘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. The immunity is needed to avoid the tension between a desire to assist the court and fear of the consequences of departure from previous advice.’

or, as Lord Justice Otten put it in his concurring judgment, ‘The expert must be able to resile fearlessly and with dignity.’

So far, so good. However, in the course of his judgment, Lord Justice Otten also suggested that not all experts might be immune from suit to the same extent. He drew a distinction between those who work for large professional firms, which have clauses in their terms of engagement designed to restrict or exclude liability for negligent advice, and others who act in an individual capacity without that degree of protection. On this point, though, his remarks were strictly obiter, and it remains to be seen whether disgruntled clients seek to develop an argument along these lines in future litigation alleging negligence on the part of expert witnesses.

**Hughes -v- Lloyd’s Bank plc**

In general, then, the appeal decision in *Stanton -v- Callaghan* is good news for experts. It has usefully reaffirmed the immune status of reports prepared by expert witnesses which (per the judgment in *Palmer -v- Durnford Ford*) ‘can be fairly said to be preliminary to [their] giving evidence in court’. It has also clarified once and for all that expert witnesses are immune from suit in respect of any agreements they may reach in court-ordered meetings of experts. However, as noted previously, there are plenty of other circumstances in which experts act as advisers to their clients rather than to the court, and for these they remain as liable to be sued in negligence as any professional adviser. The Court of Appeal provided a timely reminder of this in a case heard in November 1997.

This was an appeal against the decision of a lower court to strike out an action on grounds of immunity. The plaintiff had sought to sue the estate of her GP for negligence in a report written on her condition following a road accident. She had asked him to provide it to enable her solicitors to obtain compensation on her behalf from the third party insurance company. In the report the GP advised that his patient’s condition was not serious and would settle down in time, whereupon she accepted the insurer’s offer of £600 general damages. Unfortunately, though, her injuries turned out to be a good deal more severe than the GP had predicted, and she sued him for having prepared a report that was negligent in its prognosis and had led her, or so she maintained, to settle for less than she would otherwise have done or was entitled to recover.

The bank, as administrator of the doctor’s estate, applied to have the action struck out; and in this it succeeded, both at first instance and when that decision was appealed. At the latter hearing the judge ruled that the estate was immune from suit because the report the doctor had written was preliminary to his giving evidence in court. Not so, said the Court of Appeal. The report had been requested in the context of negotiations with the insurance company, not litigation against it. At no time had proceedings been issued, nor was there anything to show that the doctor’s report might have formed part of the pleadings had litigation ensued. On the facts of the case, he would not have been covered by witness immunity, and accordingly the action against his estate should be allowed to continue in the county court.

Here again the Court of Appeal was following the judgment in *Palmer -v- Durnford Ford*, and in particular Mr Simon Tuckey’s ruling that work done for the principal purpose of advising the client is not immune from suit. Since, as noted previously, expert witnesses can easily find themselves acting in that capacity, the Court of Appeal’s decision in this case only goes to show that their need for adequate professional indemnity cover remains as great as ever.

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**Footnotes**

4. Bolam -v- Friern Hospital Management Committee (1957) 2 All E.R. 118.
12. For a fuller discussion of the need that expert witnesses have for professional indemnity insurance see Factsheet 14 in this series.

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