Should Experts Receive Witness Immunity?

BY JOHN P. MCCAHEY

Twenty years ago, professionals retained as expert witnesses in litigation gave little thought that one of the litigants may later sue them. Suits against expert witnesses were rare, and it was generally assumed that they, like other witnesses, were shielded from civil liability under the witness immunity doctrine. Since then, there have been an increasing number of lawsuits brought against expert witnesses. These cases have included actions by plaintiffs who were adverse to the party who retained the expert (commonly referred to as suits against adverse experts), as well as those brought by the party who retained the expert (commonly referred to as suits against friendly experts).

Courts to date have agreed that the witness immunity doctrine bars those actions brought against adverse experts. A majority of courts also have concluded that the doctrine does not apply to those actions brought against friendly experts. There still remain, however, a large number of courts that have yet to address the doctrine's applicability to expert witnesses, particularly friendly experts. Undoubtedly, these courts in the future will look to the reasoning of their sister courts in deciding whether or not to afford witness immunity to adverse and friendly experts.

Witness Immunity Doctrine

Witness immunity, sometimes referred to as a privilege, is a common law doctrine.[1] Its original purpose was to provide a witness with freedom from defamation liability for testimony given at trial.[2] Over time, the immunity's scope has been expanded by most courts to include other theories of tort liability against witnesses. It does not, however, shield a witness from criminal prosecution for perjurious testimony. In federal courts, witnesses are provided an absolute immunity from subsequent damages liability for their role as a witness.[3] Many state courts have likewise provided a blanket immunity from civil liability to witnesses.[4] Witness immunity typically extends beyond those statements and opinions given by the witness at trial to include those rendered during the pretrial stages of litigation, including at depositions, in affidavits, and in reports.[5]

Immunity for witnesses is considered sound public policy.[6] It promotes full and frank testimony by witnesses, which is deemed essential to the truth-finding function of courts and juries. If witnesses had to fear that their testimony could subject them to civil liability to one of the parties, they may be reluctant to testify or, if they do testify, shade their testimony to avoid such liability. Granting civil immunity to witnesses is not perceived as detracting from the truthfulness and reliability of their testimony, which is otherwise ensured by the oath, rigorous cross-examination, and the threat of criminal prosecution of perjury.

Adverse Experts

Courts appear to be in agreement that civil suits against adverse experts are barred by the witness immunity doctrine. The doctrine has been applied to dismiss claims against an adverse expert alleged under various theories, including defamation, fraud, and negligence.[7] It has been found to preclude not only those claims based on the adverse expert's trial testimony, but also those premised upon his or her pretrial preparation.[8]

Extending witness immunity to adverse experts has been justified on at least two grounds. First, adverse experts typically owe no professional duties to the opposing party in a litigation and therefore no basis exists for that party to later assert a claim against an adverse expert based upon a breach of those duties.[9] Second, the rationale for witness immunity—promoting full and frank testimony—is considered particularly applicable to adverse experts. If they were not granted immunity from retaliatory suits by an adverse party, the fear of subsequent civil suits may make them hesitant or unwilling to testify.[10]

While courts agree that adverse experts are entitled to witness immunity, such immunity may not bar a claim against such an expert that arose separate from his or her role as witness. In two cases, the court dismissed certain witness-related claims against an adverse expert based on witness immunity but refused to dismiss other claims that arose outside of the expert's role as a witness.[11]

Friendly Experts

While only a handful of courts have yet to address the application of witness immunity to friendly experts, the majority of them have concluded that friendly experts are not entitled to immunity.[12] The

plaintiff in all of these cases alleged claims of negligence or malpractice against an expert it retained in an earlier litigation. The emerging majority view is that the policy considerations underlying the witness immunity doctrine are not served by immunizing a friendly expert from liability for his or her negligence or malpractice.

The Washington Supreme Court was one of the first courts faced with the issue of witness immunity for friendly experts.[13] In a 5-4 decision, the court adopted the now minority view that friendly experts are entitled to witness immunity. The plaintiff in that case had retained the expert to testify at trial as to the cost of property repairs that plaintiffs were claiming as damages. Plaintiffs were awarded the amount calculated by their expert, but the actual repair work when done cost twice that calculation. Plaintiffs' subsequent action against the expert for negligence was found to be barred by witness immunity.

The court's plurality opinion concluded that witness immunity for experts was essential to ensure their objective testimony. It was immaterial in their view that the expert had been retained and compensated by plaintiffs because the underlying rationale of witness immunity extended to all witnesses, including friendly and adverse experts. Imposing civil liability upon expert witnesses was deemed "too blunt an instrument" to achieve more reliability or professional diligence in expert testimony, and instead may motivate experts to take extreme positions favorable to their clients to avoid a later lawsuit. Moreover, the potential of personal liability and the need for liability insurance may deter all but the expert who is a professional witness from accepting an engagement as an expert witness. The court thus concluded that denying immunity to experts would only serve to deprive the courts of the benefit of candid and unbiased expert testimony.[14]

All appellate courts (as well as all but one trial court) following the Washington Supreme court decision have rejected both its reasoning and conclusion as to friendly experts. While not disputing that adverse experts may be entitled to witness immunity, these courts draw a distinction between friendly and adverse experts. They typically focus on the commercial relationship between a friendly expert and the plaintiff (i.e., the friendly expert's client) and the friendly expert's role as a compensated advocate.[15] Friendly experts voluntarily undertake to provide professional services to their clients for a fee, and it is therefore inappropriate to shield them from civil liability for their failure to provide those services with the "care, skill and proficiency" expected of professionals.[16]

The courts taking this majority view also conclude that immunizing friendly experts from civil liability for their negligence or malpractice will not enhance the judicial process, and therefore cannot be justified as a matter of public policy.[17] To the contrary, the absence of immunity for friendly experts is viewed as benefiting the judicial process by both encouraging experts to exercise more care in that role and ridding the courts of incompetent experts.[18] At least one court has pointed out that permitting a client to bring a malpractice action against its expert is analogous to a client bringing a malpractice action against its attorney.[19]

Notwithstanding that they conclude that friendly experts are not entitled to witness immunity for their negligence, some courts suggest that friendly experts may be entitled to immunity from other claims. The Pennsylvania Supreme Court has stressed that it is imperative that an expert witness not be subject to litigation because the party who retained the expert is dissatisfied with the substance of the expert's opinion.[20] The court cited with approval to an earlier lower-court decision that extended witness immunity to dismiss a negligence claim against a friendly expert who changed her opinion at trial because she realized it was unsupportable.[21] Distinguishing claims based on the "substance" of an expert's opinion from those based on the expert's "negligence" in formulating that opinion, however, may prove difficult for courts in the future.[22]

The Pennsylvania Supreme Court has stressed that it is imperative that an expert witness not be subject to litigation because the party who retained the expert is dissatisfied with the substance of the expert's opinion.

Conclusion

Granting witness immunity to adverse experts is not only consistent with the rationale underlying the doctrine, but recognizes that such suits are typically

retaliatory and frivolous in nature. Conversely, the majority view that the doctrine cannot be invoked to protect friendly experts from their negligence or malpractice appears sound. What remains to be clarified in the future are the circumstances, if any, when a friendly expert may be entitled to witness immunity. ■

John P. McCahey is a partner at Hahn & Hessen LLP in New York City.

---

1. *See* Briscoe v. LaHue, 460 U.S. 325, 330–31 (1982).

2. *See* Murphy v. A.A. Matthews, 841 S.W.2d 671, 674 (Mo. 1992) (*en banc*).

3. *See* Briscoe, 460 U.S. at 334–35.

4. *See* Marrogi v. Howard, 805 So. 2d 1118, 1126 (La. 2002); Bruce v. Byrne-Stevens & Assocs. Eng'rs., Inc., 776 P.2d 666, 670–71 (Wash. 1989); *but see Murphy*, 841 S.W.2d at 675–76 (noting that Missouri and some other states have not extended immunity beyond defamation claims unless doctrine's underlying policies require extension).

5. *See* Kahn v. Burman, 673 F. Supp. 210, 212 (E.D. Mich. 1987), *aff'd w/o op.*, 878 F.2d 1436 (6th Cir. 1989); Dalton v. Miller, 984 P.2d 666,668–69 (Colo. App. 1999); Panitz v. Behrend, 632 A.2d 562, 565 (Pa. Super. 1993).

6. *See Briscoe*, 460 U.S. at 332–33; Pollock v. Panjabi, 781 A.2d 518, 524–28 (Conn. 2000).

7. *See* Gilbert v. Sperbeck, 126 P.3d 1057 (Alaska. 2005) (dismissing claims of fraud and misrepresentation against adverse expert in earlier arbitration); Wilson v. Bernet, 625 S.E.2d 706 (W. Va. 2005) (dismissing claim of tortious interference); *Kahn*, 673 F. Supp. 210 (dismissing claims of negligence, fraudulent and innocent misrepresentation, defamation, and intentional infliction of emotional distress); Moity v. Busch, 368 So. 2d 1134 (La. App. 1979) (dismissing claims of defamation and malicious prosecution).

8. *See* Provencher v. Buzzell-Plourde Associates, 711 A.2d 251 (N.H. 1998) (immunity extended to prelitigation communications); *Kahn*, 673 F. Supp. 210 (immunity extended to both adverse witness's deposition testimony and reports); Middlesex Concrete Prods. & Excavating Corp. v. Carteret Indus. Ass'n, 172 A.2d 22 (N.J. Super. Ct. App. Div. 1961) (immunity extended to report).

9. *See* Murphy v. A.A. Matthews, 841 S.W.2d 671, 675 n.11 (Mo. 1992) (*en banc*).

10. *See Wilson*, 625 S.E.2d at 712 (citation omitted).

11. *See* James v. Brown, 637 S.W.2d 914 (Tex. 1982) (expert immune from defamation claim but not claim for medical malpractice); Darragh v. Superior Court, 900 P.2d 1215 (Ariz. App. 1995) (immunity barred all claims except RICO claim).

12. *See* Marrogi v. Howard, 805 So. 2d 1118, 1118 (La. 2002); Pollock v. Panjabi, 781 A.2d 518, 518 (Conn. 2000); LLMD of Mich., Inc. v. Jackson-Cross Co., 740 A.2d 186 (Pa. 1996); *Murphy*, 841 S.W.2d at 671; Mattco Forge, Inc. v. Arthur Young & Co., 6 Cal Rptr. 2d 781 (Cal. Ct. App. 1992); Boyes-Bogie v. Horvitz, 14 Mass. L. Rep 208 (Mass. Super. 2001); *but see* Bruce v. Byrne-Stevens & Assocs. Eng'rs., Inc., 776 P.2d 666, 666 (Wash. 1989); Panitz v. Behrend, 632 A.2d 562, 562 (Pa. Super. 1993) (providing immunity to friendly experts).

13. *See Bruce*, 776 P.2d at 666.

14. *See id.* at 667–73.

15. *See* Murphy v. A.A. Matthews, 841 S.W.2d 671, 681 (Mo. 1992) (*en banc*).

16. *See LLMD of Mich.*, 740 A.2d at 191.

17. *See Pollock*, 781 A.2d at 525–27.

18. *See* Marrogi v. Howard, 805 So. 2d 1118, 1131–33 (La. 2002).

19. *See* Mattco Forge, Inc. v. Arthur Young & Co., 6 Cal Rptr. 2d 781, 789–90 (Cal. Ct. App. 1992).

20. *See* LLMD of Mich., Inc. v. Jackson-Cross Co., 740 A.2d 186, 191 (Pa. 1996); *see also Murphy*, 841 S.W.2d at 680 n.7 (limiting denial of immunity to pretrial activities and not reaching the issue of whether immunity would extend to friendly expert's trial testimony).

21. *See* Panitz v. Behrend, 632 A.2d 562, 562 (Pa. Super. 1993).

22. *See LLMD of Mich.*, 740 A.2d at 192 (dissenting opinion).