September 2023

Case Note

NSW Supreme Court reaffirms expert witnesses are immune from suit

Hastwell v Parmegiani [2023] NSWSC 1016

In *Hastwell v Parmegiani [2023] NSWSC 1016,* the NSW Supreme Court reaffirmed the immunity of expert witnesses. In the following case note, we examine this decision more closely and provide further clarification on the witness immunity rule in Australian law.

Key Findings

- Even when it is alleged that an expert witness gave evidence or advice that was false, negligent or malicious in court proceedings or any matter that could have taken the form of court proceedings in the future, expert witnesses are immune from suit.

- Expert witness immunity was confirmed to not be contingent on the use of, or reference to, the expert's evidence or advice in court proceedings, provided that the expert was retained for the purpose of giving evidence or advice that may be, or could have been, used in court proceedings if they did, or were to, occur.

- If an expert witness gives evidence out of court, they remain strongly advised to be able to demonstrate that their evidence was produced on the basis that it may be used in court, and that it was retained in the context of active or anticipated litigation.

The Witness Immunity Rule in Australian Law

The witness immunity rule is a fundamental principle of Australian law that precludes an action against a witness for their conduct in or out of court when giving evidence, provided that their conduct had a functional connection to active or anticipated court proceedings. The rule operates so that even if a litigant in court proceedings alleges that a witness or expert witness gave negligent opinion, defamed the litigant, or mislead the court with malicious intent, that litigant cannot bring a civil claim against the witness.

The High Court of Australia (the **"HCA"**) has historically held that witness immunity is necessary to ensure that witnesses can give evidence in court without fear or favour (*Commonwealth of Australia v Griffiths & Anor* [2007] 70 NSWLR 268 at [43]). The immunity is also justified on the basis that if evidence has already had a functional connection with court proceedings, to consider that evidence again in a new action would

undermine the judgment of the former proceeding, which has already deemed that evidence to be admissible (*Cabassi v Vila* [1940] HCA 41 at [137]).

Witness immunity does not only apply to witnesses who give evidence before a court. Rather, it extends to protect expert witnesses, who are usually retained by the solicitors of parties to a proceeding to provide the court with expert opinion on matters relevant to the proceeding. Expert witnesses do not always speak before the court. They may produce written reports during or prior to the proceeding to give advice that may be used as evidence in future proceedings. As a result, the use of their report in court is not necessary for them to retain the immunity (*Giannarelli v Wrath* [1988] 165 CLR 543 at [6]).

In essence, the production of the evidence by the expert is what forms the *act* of serving the court as an expert witness. Therefore, even in the event that an expert witness gives evidence or advice in a matter that never evolves into active litigation, so long as the expert was instructed to produce *court-ready* evidence that would have influenced a proceeding if the proceeding had occurred, the expert remains immune from any claim arising in relation to their conduct (*D'Orta-Ekenaike v Victoria Legal Aid* [2005] HCA 12 at [25]).

The Plaintiff's Claim

While the existence of the immunity in Australian law itself was not in dispute in ***Hastwell v Parmegiani [2023] NSWSC 1016***, the plaintiff attempted to submit that its scope should be restricted to prevent an expert who produced a report that was never used in a matter from retaining witness immunity.

In 2016, a medico-legal psychiatrist (the **"defendant"**) was instructed by solicitors acting for the plaintiff, a West Australian solicitor, to produce a report in compliance with the Expert Witness Code of Conduct to assess a claim that the plaintiff was psychologically unfit for employment. This claim was made by the plaintiff's former employer, a law firm, but it was rejected by the plaintiff who alleged that his former employer had subjected him to ongoing discrimination and harassment.

The defendant's report did not find sufficient grounds to agree with the plaintiff's assertions, and diagnosed the plaintiff with a psychological condition. As a result, the plaintiff disagreed with the report and never served it in multiple proceedings against his former employer that were not on foot at the time of the production of the report, including:

1. A complaint lodged with the Australian Human Rights Commission (the **"AHRC"**) that was discontinued prior to any conciliation

2. Two stayed proceedings in the Human Rights Division of the Federal Court alleging discrimination and harassment by his former employer (*Hastwell v Kott Gunning (No 5)* [2020] FCA 621 and *Hastwell v Kott Gunning* [2021] FCAFC 70)

The plaintiff pleaded that the defendant's report relied on inaccurate evidence and only gave provisional advice when making a diagnosis of him, and that such negligence caused him loss in the form of reputational damage and psychiatric harm.

At [51] Justice Cavanagh (**"his Honour"**) observed that the plaintiff pleaded that:

> The defendant's report:
>
> 1) was for the dominant purpose of providing advice and investigation as to whether, in fact, there could be a claim against the plaintiff's former employer
> 2) was not prepared for court proceedings
> 3) was not prepared in contemplation of court proceedings
> 4) was prepared only in support of the AHRC conciliation

The plaintiff also argued that the HCA decision in *Atwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1 confirms that the scope of the immunity can be restricted in the event that the evidence in question provided by an advocate (such as an expert witness) involved advice that influenced a matter that never evolved into litigation.

Key Issues for Determination

1. Would the plaintiff's decision and/or intention to never serve the defendant's report cause the defendant to not have acted as an expert witness?

2. Is it a requirement that litigation must be on foot in a matter in which an expert gives evidence for the expert to be deemed to have produced expert evidence, as opposed to merely providing their client with unofficial advice?

3. What types of out of court conduct by an expert witness would have a sufficient functional connection to a proceeding for them to confer witness immunity on the expert?

4. Was the plaintiff correct to submit that *Atwells* restricted the scope of witness immunity to prevent its operation when an advocate's advice influences a matter that never evolves into litigation?

Decision

At [70] his Honour reasoned that to dispense with the immunity on the basis that the defendant's report was never served by the plaintiff would involve the error of determining if he was an expert witness according to whether his client used his report, as opposed to whether he was instructed by his client to act as an expert witness in the beginning. In this analysis, if an expert was instructed that their report *may* be used in court proceedings, or have some connection to such proceedings, what their client chooses to do with the report cannot displace the fact that the report was produced, and that it was required to be court-ready.

As His Honour observed:

> Plainly in this case, the plaintiff did not agree with the report and it was never served in any proceedings. There has been no case or judgment in which the report was considered. The existence

> of the immunity cannot depend on whether the opinion of an expert is favourable or unfavourable to the client who retained the expert, or any decision of the client as to the use of the report.

Therefore, it follows that if the only reason for the report never being served was that the plaintiff disagreed with it, an inference from this fact is that, absent his subjective disagreement with its contents, the plaintiff would have served it as if it was expert evidence. As a result, His Honour could not accept the plaintiff's submission that he *never* would have intended to serve the report.

His Honour also held that the fact that the plaintiff's matter had not progressed into litigation, and was only before the AHRC (which is not a court) at the time of the report, could not displace the operation of the immunity for the defendant.

At [75] His Honour observed that:

> Referral to the AHRC, in a case which he (the plaintiff) asserted involved discrimination against him, was only the first step in the process. It must be that his solicitors, a well-known employment law firm, were aware that the AHRC does not have the power to make orders or determine facts. They were seeking use of the conciliation process to see if the dispute could be resolved. They had already given notice of the plaintiff's intention to seek substantial damages.

Therefore, His Honour has confirmed that active litigation need not be on foot at the time of the report being produced in order for the immunity to apply. Instead, the necessary condition an expert witness must be able to establish to attract the immunity was that their report was produced on the basis that it *could* have been used in a proceeding if it were to occur, and that it must have been court-ready.

As His Honour observed at [79], the defendant was:

> Retained to examine the plaintiff and prepare a report as an expert witness in future court proceedings, should it have been necessary.

As a result, the fact that a matter is not yet before the courts at the time of the report is not relevant to the fact that the defendant was instructed to act as an expert witness, who would otherwise be producing evidence for a court, in the beginning.

His Honour argued that the fact that the defendant was instructed to sign and comply with the Expert Witness Code of Conduct (Rule 31.23 of the *Uniform Civil Procedure Rules 2005)* was highly persuasive in suggesting that the defendant's out of court conduct in producing the report could have only been produced in the capacity of an expert witness.

As His Honour observed at [76]-[79]:

> There is a clear distinction between an expert (of any discipline) giving advice about prospects of success, evidence or issues in the proceeding and an expert being retained in accordance with the Expert Witness Code of Conduct.

> In my view, the report is a type which is regularly commissioned by those seeking compensation or other orders. In circumstances in which the defendant was asked to confirm compliance with the Expert Witness Code of Conduct, he said that he complied with it and had been told that he may be required to give evidence in court.

At [83] his Honour found that there is no principle of law in the HCA judgment of *Atwells* to suggest that the immunity does not apply to out of court conduct by an expert for a matter where the expert was retained in compliance with the Expert Witness Code of Conduct, irrespective of whether the matter was litigated at the time of the report.

As His Honour observed:

> The immunity from suit is not dependent upon whether the author of the report actually gives evidence, or even whether there was any litigation.

It follows that, to retain witness immunity, an expert witness must only establish that they were instructed to act as an expert witness, produced evidence, and that their evidence would have had a functional connection with a proceeding if that proceeding were to occur.

Implications

1. Expert witnesses are strongly advised to clarify the purpose of their engagement and if they are to comply with an Expert Witness Code of Conduct. This applies if not stipulated in the letter of instructions when producing evidence or advice in any matter.

2. Expert witnesses who provide advice for matters that never evolve into litigation will retain witness immunity so long as their evidence would have been connected to the proceeding if that proceeding had occurred.

Note: The Plaintiff has filed a Notice of Intention to Appeal.

This case note was written by Principal Nevena Brown and Paralegal Joshua Jones. For further advice, please contact Nevena.

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