

# Expert Witness Immunity: No, You Cannot Sue Your Own Expert For Negligence!

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The absolute immunity of parties and witnesses from subsequent liability for their testimony in judicial proceedings developed in early English cases and is well established at common law. Any communication, even perjured testimony, made in the course of a judicial proceeding, cannot serve as the basis for a suit in tort. The rationale for witness immunity, which has become less an evidentiary rule than a rule of substantive law, is that the proper administration of justice requires full and free disclosure from witnesses unhampered by fear of retaliatory lawsuits.

*Reynolds v Kingston (City) Police Services Board* (2007), 84 O.R. (3d) 738 (Ont. C.A.)

Every day, experts prepare reports for lawyers so that they can be qualified to give expert opinion evidence at trial. Almost all these experts are insured under errors and omissions policies. Many of these experts are indirectly retained by insurance companies. Most of the experts never give evidence at trial. But their reports are relied on to settle cases. What if the expert makes a mistake or their client thinks they made a mistake? Can the expert be sued by their client for the error or is the expert and their report protected by witness immunity?

That was the question posed in *Paul v. Sasso et al.*, 2016 ONSC 7488.<sup>[1]</sup> In this precedent setting case, Justice Dunphy held, on a motion for summary judgment, that a party cannot sue their own expert with respect to their report or their trial evidence.

It is long standing law that a party cannot sue the expert for the other side.<sup>[2]</sup> However, in previous decisions, Ontario courts had never explicitly found that the privilege extends to a party's own expert witness.<sup>[3]</sup>

Justice Dunphy found that there was no principled reason to make an exception to the witness immunity privilege for one's own expert witness. The intention of the immunity is to ensure that

witnesses provide testimony without fear of retaliatory law suits. As the law recognizes, even the duty of one's own expert is primarily to the court and not to the client.

In Ontario, before giving evidence at trial, an expert witness must sign an acknowledgement that their duty to the court to provide "opinion evidence that is fair, objective and non-partisan" prevails over any obligation to anyone else.<sup>[4]</sup>

In the *Paul* case, the plaintiffs were unhappy with the trial result and the expert opinion evidence given by their real estate appraiser at trial. The trial judge preferred the evidence of the other party's experts. The plaintiffs subsequently brought an action for breach of contract and negligence against their appraiser. In her reasons for judgment, the trial judge had been critical of the appraiser and questioned his objectivity.

Nonetheless, Justice Dunphy found that this was not sufficient reason to set aside the immunity. He stated:

The harm that could follow from allowing parties to pursue their own experts for alleged breaches is amply illustrated by the facts of this case. Nolan J. has made a binding determination of the value of the shares of 1433295 formerly owned by the plaintiffs. That decision is binding upon them and has not been set aside or reversed on appeal. Substantially the entire subject matter of the plaintiff's case amounts to a de facto appeal of the decision of Nolan J. . . . Her determinations bind the plaintiffs and cannot be questioned through the back door by means of a subsequent civil suit.

By way of counterclaim, the appraiser also sought payment of his fees for the evidence he gave at trial. Justice Dunphy found that, while the immunity protected him from the negligence claim, the appraiser could not use the immunity as a sword to collect his fees. He found that the appraiser would need to prove his entitlement to fees at trial and that the issue could not be resolved on summary judgment. His client was not prohibited from raising the issues of breach of contract and negligence as a defence to the payment of the fees.

The *Paul* case is an excellent precedent that insurers can use against plaintiffs who bring claims for negligence and breach of contract against their insureds based on expert reports prepared for trial and on trial evidence.

It is also a good precedent that insurers can use against experts who prepare shoddy reports and still want to be paid. The larger lesson is that one must be careful in the retention of experts. Both the expert and the client need to be clear on their respective duties to each other. Needless to say, it is always good policy to challenge questionable conclusions in an expert's report before it is served!

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<sup>[1]</sup> Roger Horst successfully argued for the immunity in this case.

[2] *Fabian v. Margulies*, 1985 CanLII 2063 (ON CA).

[3] In *Reynolds*, which was a law suit against, among other parties, the notorious coroner, Dr. Smith, the court limited its holding to finding that Dr. Smith could not strike out the plaintiff's claim on a pleadings motion, and that the plaintiff should be allowed to prove that the actions and duties of Dr. Smith went beyond being an expert witness at trial.

[4] Form 53, Acknowledgment of Expert's Duty, under the Rules of Civil Procedure.