The Law Reform Commission ("LRC") have recently launched their report on aspects of evidence, part of which specifically dealt with Expert Evidence.

As part of the Report, the LRC examined the status of immunity for expert evidence. It is their recommendation that immunity should be abolished and that it be replaced by a statutory provision that an expert be capable of being sued only if the evidence is given in a grossly negligent manner, that is, falling below the standard of care to be expected from that expert.

The existence of immunity for witnesses has been recognised in this jurisdiction on numerous occasions. The Courts in Re Haughey¹ expressly acknowledged the immunity and explained the reasons for this;

"The immunity of witnesses in the High Court does not exist for the benefit of witnesses, but for that of the public and the advancement of the administration of justice and to prevent witnesses from being deterred, by fear of having actions brought against them, from coming forward and testifying to the truth.

There has been continued judicial endorsement of witness immunity in this jurisdiction and that the immunity to witnesses extended to expert witnesses, subject to the same limitation where the evidence given is seen to be malicious and irrelevant to the issues to the Court.

England and Wales

Although the Courts of England and Wales have similarly recognised immunity for witnesses, the scope of the immunity with regard to experts was more qualified than that in the Irish Courts. The Court acknowledged immunity for expert witnesses but specified circumstances where experts could or could not rely upon the immunity. The test essentially was that immunity would only apply to that which could fairly be said to be preliminary to an expert giving evidence in Court, which would be judged by the principal purpose for which the work was done. It was further argued that although the public policy

¹ [1971] I.R. 217
arguments underlying the immunity were still important, more emphasis was being placed on a competing public policy argument, namely that every wrong should have a remedy.

In the case of *Jones v Kaney*², the Supreme Court of England and Wales, abolished immunity from civil liability for expert witnesses. The Court held that there was no explanation for the supposition that if an expert witness was liable to be sued for breach of duty, they would be disinclined from giving evidence. The Court opined that the quality of the evidence given by the expert might actually be enhanced by the lack of such immunity. The Court went on to state that the fact that such claims against experts would require an opinion on liability of another expert, claims of a vexatious nature would be improbable, and any claim would likely only arise as a result of the expert’s negligence.

**Prospective Irish Approach**

The above decisions set out the reasoning for both the abolition and retention of immunity. English and Welsh jurisprudence have abolished immunity. Immunity for expert witnesses in this jurisdiction has been unequivocally endorsed whereas the approach in the England and Wales was qualified and not as far reaching even before the *Jones* decision. Whether this approach stems from the small pool of expert witnesses that are available in this jurisdiction and the possibility that it would prohibit experts from acting or whether it is because the Irish Courts put a larger emphasis on the public policy arguments is unclear.

However, it must be noted that this issue has not been before the Irish Courts in some time and a challenge on this point may be overdue. It could be argued that Irish Courts would also place additional emphasis on the public policy argument that every wrong should have a remedy and this coupled with the English approach with regard to the improvement of the quality of experts may sway the approach to be taken.

S.I. 254 of 2016 was introduced last year and introduced many new rules relating to experts and to the evidence they provide. There are many new aspects to the new rules, which are too extensive to be incorporated into this article, so it is likely that the development and utilisation of these rules will have an effect on any prospective Irish approach to expert immunity.

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² [2011] UKSC
Abolition or Retention

Experts will be hoping that if this matter comes before the Courts, that the immunity offered to experts will be retained. Alternatively, they will be hoping that the LRC recommendation that a statutory provision abolishing immunity will not come to pass. There are strong justifications in favour of its retention, chief among them being that a witness owes no duty of care to anyone in respect of the evidence he gives to the Court. His only duty is to the Court and to tell the truth.

The arguments regarding abolition of immunity are extensive. One of the main reasons for the removal of immunity was the vast number of high profile cases of deception and negligence on the part of expert witnesses that led to miscarriages of justice. It must also be acknowledged that even in the above mentioned cases where immunity of expert witnesses was affirmed, the judgments have all warned against extending the immunity and all highlighted the need to guarantee that it is restricted to that which is essential for the effective administration of justice and the need to guarantee that there is the requisite justification for its application.

One of the chief policy arguments for keeping immunity is to make sure that witnesses are not discouraged from giving evidence out of a fear of litigation. However, it has been queried if expert witnesses are more likely to be discouraged from providing evidence, considering they are professionals who are compensated for their services. Other distinctions can also be made which sustain the supposition that they should be governed by different rules to other witnesses, such as the fact that experts can pick their cases and lay witnesses normally do not, and that experts are likely to be in some form of contractual arrangement with the instructing party.

Also, experts are only likely to be put off from acting as expert witnesses if there were an extensive amount of claims made against expert witnesses. As the definition of an expert requires them to be highly skilled and knowledgeable in their area, it is unlikely that there would be a large volume of cases where this skill and knowledge would be found to be wanting.

As mentioned above, the LRC are recommending that immunity be abolished be replaced by a statutory provision that an expert be capable of being sued only if the evidence is given in a grossly negligent manner.
Conclusion

Most expert witnesses are highly qualified, conduct themselves in a very professional way and will have little to fear if the UK approach and that recommended by the LRC is adopted in Ireland. However, in practice it is possible they may face an increase in professional indemnity insurance premiums to cover the added risk of being sued. In order to limit their exposure, experts should be confident of their advice, be very vigilant in formulating and presenting their evidence and be aware of their responsibilities to the Court and their clients. Experts should also limit their advice within specific areas of their specialisation. It will also be vital that they have and maintain the proper qualifications, experience and expertise.

If immunity is abolished in Ireland, it is doubtful that there will be a plethora of claims against experts. We would not expect that the number of professionals willing to be expert witnesses will reduce dramatically. However, additional costs may eventually need to be passed on to clients. Experts will need to mitigate any additional exposure arising from the lack of immunity and it is clear that various practical implications will arise for expert witnesses.

Consultants acting as expert witnesses should ensure that they have professional indemnity insurance and those that have professional indemnity insurance should ensure that their expert work is covered by their policy.

It remains therefore to be seen how the Irish Courts will approach immunity or whether it will be legislated for as recommended by the LRC. In the meantime, we would recommend that experts retain all documentation relating to their instructions and otherwise, be absolutely sure in relation to the evidence that they are providing, work within the scope of their retainer and ensure they have a professional indemnity policy in place that covers expert work in order to protect their position.

We would caution that policy could adapt in a way separate from the recommendations of the LRC and to the approaches taken in the UK. We would also assess that we are some time away from any such implementation if such was to come to pass.

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