

Professional Practice and Liability on the Net

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Testifying As A Witness: Immunity Revisited

In the August 2006 issue of *Professional Practice and Liability on the Net*, we examined the question of whether experts could be held liable for evidence that they give during the course of trials or hearings. The leading cases at the time suggested that all witnesses, including experts, are immune from lawsuits on the basis of evidence that they give in court. However, the Ontario Court of Appeal recently reversed one of those cases, which involved a physician who has recently attracted considerable media attention.

In *Reynolds v. The City of Kingston Police Services Board, et al*, [2007] O.J. No. 900, the court considered the case of Dr. Charles Smith, a pediatric pathologist, who conducted a *post mortem* examination on the body of a 7 year old girl to determine her cause of death. In his view, Sharon died from blood loss resulting from multiple stab wounds. It was on the basis of Dr. Smith's opinion that the police charged Ms. Reynolds with her daughter's murder.

Significantly, there was a pitbull terrier located in the basement of the Reynolds home where Sharon's body was found. Kingston Police did not advise Dr. Smith about the dog before he performed his autopsy, although he subsequently became aware of it during the investigation. However, he continued to take the position that Sharon's death resulted from multiple stab wounds. Dr. Smith in fact gave this evidence during the course of Ms. Reynolds' preliminary hearing.

After the preliminary hearing, the Crown obtained an order to perform a second autopsy, the result of which suggested that the dog was responsible for at least some of Sharon's injuries. Based on this result, the Crown withdrew second degree murder charges against Ms. Reynolds. She had been in custody for 22 months before being granted judicial interim release ("bail") on very stringent terms. Ms. Reynolds then commenced an action against, among others, Dr. Smith. Dr. Smith moved to dismiss the action on the basis of the traditional witness immunity rule. The motion's judge agreed that Dr. Smith enjoyed witness immunity and dismissed the action against him, and the Divisional Court agreed. However, on further appeal, the Court of Appeal reversed this decision.

While finding that the rule of absolute immunity of parties and witnesses exists, even for perjured testimony, the court shifted attention from Dr. Smith's role as a witness to his role as a public official investigating a death under the *Coroner's Act*, suggesting that there was no reason why he could not be sued for offering an incorrect opinion as part of the investigation into Sharon's death. The court also emphasized the importance of resolving the issue of Dr. Smith's liability on the basis of a full set of facts that could only be determined after a full trial.

Dr. Smith has apparently elected not to seek leave to appeal this case to the Supreme Court of Canada. Therefore, until this matter is dealt with at trial, it appears that there may be some basis to argue that expert witnesses may indeed be liable for their actions, particularly assuming that their personal involvement is what gives rise to their evidence. However, this case did not seem to suggest that so-called "fact witnesses", or even expert witnesses who are retained purely for purposes of a hearing or a trial, could be held liable for their evidence. Therefore, to the extent this case suggests that the absolute witness immunity rule is less than absolute, it still appears that the exceptions to this rule will be few and far between.

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