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Abrogating the Witness Immunity Rule: How Fast? How Far?

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- by -

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INTRODUCTION

The witness immunity rule provides a broad inoculation against legal action for people who act as witnesses, either at trial or in earlier phases of litigation. These individuals are immune from actions (particularly in tort) which might arise from their participation in the legal process. The immunity itself is based on a strong common law tradition of protecting the operation of the legal process by barring otherwise lawful actions which might interfere with it. The rule operates essentially as a procedural defence, typically invoked in support of a motion to strike proceedings as disclosing no reasonable cause of action, or of a motion for summary judgment.

Witness immunity is one of those slight oddities in the various threads of civil litigation. It is similar and related to the rules regarding privilege and the implied undertaking of confidentiality, but it does not appear explicitly in civil procedure rules and is rarely on the front of anyone's radar. Yet it assumes great importance on those somewhat rare occasions when it is invoked on a defendant's behalf. It is a fairly old common law doctrine that emerged from the British courts and appears in the jurisprudence of Commonwealth and American courts, yet to my knowledge it is not

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taught in Canadian law schools,[1] bar courses or standard CLE instruction; litigators seem to learn it osmotically. There is some attention to it in the legal periodicals (though not much), but one rarely sees it in a textbook of any kind. It gets only scant attention in Canadian legal literature.[2]

It is not just the paucity of doctrinal writing that makes witness immunity worth focusing on in this volume, however; the time is ripe for re-examining it in the Canadian context for two reasons. First, despite the lack of academic attention, the rule has been given something of a workout in recent years, first in the leading case of *Elliott v. Insurance Crime Prevention Bureau*[3] (with reasons written by Cromwell J.A., as he then was), and more recently in the Ontario Court of Appeal's decision in *Reynolds v Kingston (Police Services Board)*.[4] *Elliott*, on the one hand, provided a detailed rationalization of the rule and a coherent analytical framework for applying it which has become very influential in the Canadian caselaw. *Reynolds*, on the other hand, stated and demonstrated that the law around the rule is "uncertain and constantly evolving"[5]—an interesting point in light of earlier judicial statements that the application of the rule is broader in Ontario than in other provinces.[6] The claim being dealt with in *Reynolds* was one in tort against disgraced former pathologist Dr. Charles Smith, whose negligent and unethical work led

[1] It might be taught in specialized courses on the law of defamation, but probably only as a minor aspect of the overall "absolute privilege" doctrine of which it forms a part (regarding which, see below).
[2] The increased attention on the role of expert witnesses in civil litigation in recent years has meant that the doctrine is referred to occasionally in articles which discuss experts more generally; see e.g. Paul Michell & Renu Mandhane, "The Uncertain Duty of the Expert Witness" (2005) 42 Alta. Law Review 635 at para. 60.
[3] 2005 NSCA 115 [*Elliott*].
[4] 2007 ONCA 166 [*Reynolds*], supplementary reasons (re costs) at 2007 ONCA 375.
[5] *Ibid*., at para. 19.
[6] *1522491 Ontario Inc v Stewart et al*, 2010 ONSC 727 at para 39, referencing *Moseley-Williams v Hansler Industries Ltd*, [2004] OJ No 5253, 2004 CarswellOnt 5827 (SCJ).

to numerous wrongful convictions,[7] which highlighted some of the perceived problems with the witness immunity rule in sharper relief.

Second, possibly the most noteworthy development in the history of this rule occurred in the 2011 case of *Jones v. Kaney*,[8] where the United Kingdom Supreme Court (formerly the House of Lords) carved an exception out of the rule which lifted the immunity for "friendly" experts who are retained by parties to litigation. The 5-2 split decision featured poignant dissenting reasons from two of the Justices of the Court, and was quite controversial. It sparked one recent debate in the Canadian literature as to whether Canadian law should follow suit.[9]

The remainder of this article will proceed in three parts. Part II will examine the development of and rationales for the rule and attempt to ascertain its overall parameters in Canadian law, focusing on the leading and noteworthy recent developments. Part III will scrutinize the decision of the UK Supreme Court in *Jones* and weigh the policy standpoints taken by the majority and dissenting judges. Part IV will evaluate whether a course similar to *Jones* should be taken in Canada, and whether perhaps even more expansive abrogation of the rule is worth contemplating. It will conclude that the draconian effects of the rule would certainly justify some recalibration; but that, while there may be room to move on changing the witness immunity rule even more broadly, this should only be done in a careful fashion with input from a number of involved stakeholders.

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[7] As detailed in Hon. Stephen T. Goudge, *Inquiry into Pediatric Forensic Pathology in Ontario* (Toronto: Ministry of the Attorney General of Ontario, 2008), which can be found online: < http://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/index.html >

[8] [2011] UKSC 13, [2011] 2 All ER 671.

[9] See Bradley E. Berg, "Immunity for expert witnesses in Canada: it's essential" (Winter 2011) 30 Advocates' J. No 3, 24-25; Kirsten Crain, "Time to end expert immunity in Canada" (Winter 2011) 30 Advocates' J. No 3, 22-23.

II. THE WITNESS IMMUNITY RULE IN CANADIAN LAW

A) The Rule in Context

The witness immunity rule in its current form is a specific application of the broader rule of "absolute privilege" which provides certain protections to all of the major participants in court proceedings, and indeed witness immunity is often referred to as "absolute privilege" in the case law. The absolute privilege is effectively described by Professor Brown:

> An absolute privilege or immunity attaches to those communications which take place during, incidental to, and in the processing and furtherance of, judicial or quasi-judicial proceedings. No action for libel or slander will lie for words spoken or written during the ordinary course of those proceedings. … The protection of this privilege extends to all the participants in the judicial or quasi-judicial proceeding including the judge, jury, witnesses, parties and their counsel.[10]

In *Jones* Lord Phillips noted the ancient provenance of the overall rule, which he dated back to the 1585 case of *Cutler v. Dixon*,[11] and described its underlying rationale in terms which might be surprisingly familiar to those who are currently facing the issues caused by self-represented or vexatious litigants in Canada:

> The immunity has its origin in a reaction to an actual or perceived tendency on the part of disgruntled litigants, or defendants in criminal proceedings, to bring proceedings for libel or slander against those who had given evidence against them. Thus the immunity originally took the form of absolute privilege against a claim for defamation and it extended to all who took part in legal proceedings.[12]

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[10] Raymond E. Brown, *The Law of Defamation in Canada*, Vol. 2 (Toronto: Carswell, 1999), at paras. 12.4(1) and 12.4(4)(a), as quoted in *Elliott*, above note 3 at para. 112.
[11] (1585) 4 Co Rep 14b; 76 ER 886.
[12] *Jones*, above note 8 at para 11.

Kennedy C.J. of the Nova Scotia Supreme Court recently provided a succinct but accurate rendering: "The core of witness immunity is well established. Essentially, an absolute privilege or immunity attaches to communications which take place during, incidental to, and in the processing and furtherance of, judicial or quasi-judicial proceedings.[13]" The witness immunity rule, then, bars proceedings being brought or continued against individuals in respect of their giving evidence in a judicial or quasi-judicial[14] proceeding, or regarding their activities or statements made in preparing for litigation. It is not limited to defamation proceedings but rather seems to apply to any cause of action in tort.[15]

Applications of the rule pop up in a variety of different settings. For example, anyone who complains to the Superintendent of Bankruptcy about the conduct of a trustee in bankruptcy is protected by the rule against proceedings by the trustee, "to ensure that complainants do not stay quiet for fear of being sued in defamation," and this applies "whether the complaint is successful or rejected."[16] While the focus here is on the civil courts, the rule is routinely applied in other quasi-judicial or administrative settings, such as human rights commissions.[17]

B) The *Elliott* and *Jones* Decisions

As noted above, Justice Cromwell's decision in *Elliott* provides the most comprehensive exploration of the rule to date, and given both its influence on the

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[13] *Dalhousie University v. Aylward*, 2010 NSSC 65 at para 90.
[14] E.g. a court-martial: *Dawkins v. Lord Rokeby* (1873), 42 LJQB 63.
[15] *Elliott*, above note 3 at para 113; *Jones*, above note 8 at para 12. See also *Horn Abbot Ltd v Reeves* (2000), 189 DLR (4th) 644 (NSCA); *Smith v Canadian Pacific Railway* (2003), 181 Man R (2d) 150 (QB Master).
[16] *Halsbury's Laws of Canada: Bankruptcy and Insolvency*, at §HBI-549, and see cases cited in fn 11.
[17] See *Ayangma v NAV Canada* (2001), 203 DLR (4th) 717 (PEI SCAD); *Ornelas v Casamici Restaurant*, 2011 HRTO 1531; *Bajouco v McMaster*, 2011 HRTO 569.

subsequent caselaw[18] and the fact that the Supreme Court of Canada has not weighed in on the rule in any substance for some time,[19] it is the front-runner for the status of "leading case" and is the best platform from which to explore the rule. Justice Cromwell's typical analytical thoroughness was particularly called for in *Elliott*, given that a fairly novel assertion of the immunity had been made by a number of the respondents, who were insurance adjusters, insurance investigators and fire investigators, some (but not all) of whom testified as fact and/or expert witnesses at the trial of the matter.[20]

Justice Cromwell began by emphasizing that the rule is meant to protect not people but the statements or activities of those people with regard to a particular event, the "protected occasion."[21] The paradigmatic protected occasion is the giving of testimony in court, but "extensions beyond that 'occasion' are made when necessary in order to make the immunity for testimony effective."[22] It is well-settled, he noted, that in order to maintain the effectiveness of the immunity it is necessary to extend its protection to various kinds of steps which were made in anticipation of, or in preparation for, litigation. As had been stated in one of the leading British cases, *Watson v McEwan*:

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[18] See, e.g., *Brown v Newton*, 2010 NSSM 28; *B.C. v Malik*, 2008 BCSC 1027; *Pearlman v. Critchley*, 2011 BCSC 1479; *Gravelle v Ontario*, 2012 ONSC 5149; *Merit Consultants International Ltd. v. Chandler*, 2012 BCSC 1868; *Michie v. Guthrie-Waters*, 2012 BCSC 793.

[19] Possibly since *Halls v Mitchell*, [1928] SCR 125.

[20] The underlying action involved a successful action by the appellants against their insurer for failure to provide coverage for fire damage to their house. The appellants had also brought claims in negligence against the various adjusters and investigators for failure to exercise proper care in investigating and reporting about the fire. These respondents argued, in part, that any activity undertaken by them which had the possibility of being relevant to litigation in the future attracted the protection of the witness immunity rule (a similar argument to that often made by insurers regarding litigation privilege). The breadth of scope this argument implied for the immunity was rejected by Cromwell J.A. (*Elliott*, above note 3 at para. 106). In the result, only two of the individual defendants were accorded witness immunity by the Court of Appeal, and the negligence claims were allowed to proceed against the others.

[21] *Elliott*, ibid. at para. 114.

[22] Ibid., at para. 116.

> It is very obvious that the public policy which renders the protection of witnesses necessary for the administration of justice must as a necessary consequence involve that which is a step towards and is part of the administration of justice…[23]

Similarly, as the Supreme Court of Canada had written with specific regard to expert communications that involved an individual who later became a litigant:

> …statements made by a witness as such, in court, are absolutely privileged, and that this privilege would become illusory, were it not applicable for the protection of a statement by an intending witness, as to the nature of the evidence the witness can give, made to professional persons preparing the evidence to be presented in court. As the protection by privilege of the testimony of witnesses in court is regarded by law as essential to the administration of justice, and as the extension of that protection to such preliminary statements is regarded as essential to the effectiveness of the substantive privilege, such preliminary statements are held to fall within the rule…[24]

However, it was clear from the authorities that "how far the immunity extends to things said and done out-of-court is a grey area."[25] Determining how to manage this grey area required explicit attention to the rationale for the rule, which Justice Cromwell distilled to "two main policy considerations":

> First, it is critical that witnesses be willing to tell the whole truth as they see it, free of concern about consequences to themselves. The need for both candour and cooperation means that witnesses should be protected from civil liability and the risk of vexatious litigation in relation to their testimony. The rigours of cross-examination and the risk of prosecution for perjury are seen as sufficient checks on the untruthful witness. Second, the immunity protects the substance of the evidence from collateral attack in other proceedings. As Lord Wilberforce put it in *Roy v. Prior*,…, the immunity exists "... to avoid a multiplicity of actions in which the value or truth of [the witness'] evidence would be tried over again."[26]

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[23] [1905] AC 480 at 487 (H.L.), as cited in *Elliott*, ibid. at para 146.
[24] *Halls v Mitchell*, above note 19 at 145-146, as cited in *Elliott*, ibid. at para 148.
[25] *Elliott*, ibid. at para 102.
[26] Ibid. at para 119, citation omitted.

In *Jones*, it might be noted, the UK Supreme Court distilled the rule's rationale similarly (though less efficiently) into four "justifications":

1. To protect witnesses who have given evidence in good faith from being harassed and vexed by unjustified claims
2. To encourage honest and well meaning persons to assist justice, in the interest of establishing the truth and to secure that justice may be done;
3. To secure that the witness will speak freely and fearlessly;
4. To avoid a multiplicity of actions in which the value or truth of the evidence of a witness would be tried all over again.[27]

In order to impose structure on ensuring that these justifications were served, Justice Cromwell formulated what is probably the most significant contribution of the *Elliott* case to judicial consideration of witness immunity, which is a four-part test for determining whether a particular defendant is entitled to the immunity. The test asks:

1. What is the conduct that forms the basis of the appellants' cause of action—that is, what is the "gist and essence" of the appellants' claim?
2. What is the scope of the claimed immunity and does the "gist and essence" of the appellants' claim fall within it?
3. Is the scope of the claimed immunity settled by authority?
4. If not, does the claimed immunity meet the test of necessity?[28]

The first two steps, regarding "gist and essence," are in my view essentially a screening mechanism designed to determine whether the conduct underpinning the impugned action could possibly be covered by the asserted immunity, and in turn whether the defendants are actually asserting the immunity over that conduct. If the answer to

[27] *Jones*, above note 8 at paras. 16-17.
[28] *Elliott*, above note 3 at para 120.

question 2 is negative, then the immunity and any proceeding in which it is argued can be dealt with expeditiously.

The first step is used to ascertain if the plaintiff's claim is "based on, or otherwise sufficiently connected to, some protected occasion."[29] Justice Cromwell used three case examples to illustrate. In the first, *Roy v Prior*,[30] it was determined that the gist and essence of the plaintiff's claim was the defendant's initiation of a malicious arrest and not, as the defendant claimed, with regard to his testimony in court that facilitated this, and thus the immunity could not apply. In *Carnahan v Coates*,[31] the Court found that an action by a party against an adverse expert was essentially based on negligent testimony, and therefore the immunity could apply. In *Martini v Wrathall*,[32] the action was based on an allegedly false affidavit, another setting where the immunity could apply.

The second part of the test seems purely procedural—have the defendants claimed an immunity which covers the "gist and essence" of the plaintiff's claim? In *Elliott* itself the respondents had asserted immunity over all of their activities related to the underlying litigation, which covered the plaintiff's claim that their investigation and reporting had been negligent.

The third and fourth parts of the test are the more substantial and would bear more of the analysis in any case where the test was applied. In the context of *Elliott* itself the respondents had claimed a broad immunity based on their status as investigators, experts or both, and presented a number of English and Canadian authorities in support. Their argument, essentially, was that their only connection to the appellants was that they had

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[29] Ibid. at para. 122.
[30] [1971] AC 470 (HL).
[31] (1990), 71 DLR (4th) 464 (BCSC).
[32] (1999), 180 NSR (2d) 38 (CA).

carried out activities related to the suspected arson, which eventually became the subject of the litigation. Accordingly, the veil of witness immunity should cover any of their impugned activities. In rejecting this argument Justice Cromwell engaged in a wide-ranging survey of case law regarding how the immunity is to be applied to such witnesses, and in particular to their out-of-court statements. He noted:

> the law has long recognized that it is necessary to protect some out-of-court statements of witnesses or intended witnesses in order to make the protection for witnesses effective. It has been held that the immunity applies to proofs of evidence given to a party's lawyer or other professionals engaged in preparing evidence for trial, to written reports required by statutes or rules of court as a condition for giving oral testimony and to other reports authored for the purposes of pending or contemplated litigation.[33]

Thus the case law revealed that the immunity applied to statements made by a physician to the Workers Compensation Board,[34] letters from prospective witnesses to the plaintiff's lawyer,[35] a doctor's independent medical examination in a personal injury case,[36] and reports regarding individuals being investigated under American laws that had links to Canadian litigation.[37] However, it did not necessarily apply to a demand letter from a lawyer asserting his client's rights against another individual, where no decision to commence litigation had been made.[38]

Justice Cromwell then reviewed a series of English authorities regarding the extent to which the immunity applies to statements and actions taken pursuant to investigations towards criminal prosecutions or pursuant to statutory duties. Most

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[33] *Elliott*, above note 3 at para 145.
[34] *Halls*, above note 19.
[35] *Foran v Richman* (1976), 10 OR (2d) 634 (CA).
[36] *Fabian v Marguilies* (1985), 53 OR (2d) 380 (CA).
[37] *Web Offset Publication Limited v Vickery* (1998), 40 OR (3d) 526 (Gen Div), aff'd 43 OR (3d) 802 (CA), application for leave dismissed [1999] SCCA No 460.
[38] *Moseley-Williams v Hansler Industries Ltd*, [2004] OJ No 5253 (Sup Ct), appeal quashed [2005] OJ No 997. Though, notably, this decision was made in a summary judgment motion.

important here was the House of Lords decision in *Darker v Chief Constable of the West Midlands Police*,[39] where several of the law lords "[drew] a distinction between investigation on the one hand and preparation of evidence on the other,"[40] applying the immunity to the latter but not necessarily to the former—there being "a distinction between the activities of a witness and of an investigator and that only things done for the purpose of preparing evidence for actual or contemplated proceedings fall within the ambit of the immunity."[41] In the end, it was clear that the claims pleaded against several of the respondents alleged negligence in the course of activities which were clearly geared towards pending litigation, and therefore the existing law provided that these respondents enjoyed the benefit of the immunity.[42]

With regard to the rest of the respondents, however, the authorities did not settle the issue and Justice Cromwell explained and applied the fourth, "necessity" step of the test. The central consideration for this step was how closely connected the impugned activity was to the litigation, which in turn had to be assessed in light of the dual rationales of encouraging witness cooperation and truthfulness and protecting the witness's contribution to the litigation from collateral attack.[43] The idea is that it must be "necessary" to impose the immunity in order to fulfill one or both of these rationales. The case law disclosed factors which made weight towards a finding of necessity, such as the out-of-court statements and activities being required by law as a precondition to testimony, or court-ordered, or emerging from information-gathering by professionals in

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[39] [2001] 1 AC 435.
[40] *Elliott* above note 3 at para 180.
[41] Ibid. at para 186.
[42] Ibid. at para 203.
[43] Or "flank attack," as Justice Cromwell put it at para 206 of the judgment, quoting English authorities. Regarding collateral attack, see *Garland v. Consumers' Gas Co.,* 2004 SCC 25 at para 72; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63; *Wilson v The Queen*, [1983] 2 SCR 594.

the face of pending litigation, or being made in discharge of a statutory or other public duty.[44] However, Justice Cromwell relied on *Darker* and some Canadian cases, including the decision of Wilson J. in *Teskey v Toronto Transit Commission*,[45] to distil one of the arguably more important aspects of the necessity test:

> It is clear, however, that immunity does not extend to all steps in the investigation of a matter that may result in litigation. There is a distinction between the functions of investigators and witnesses even though the same person may, in the end, be both. To decide whether the immunity applies, the case law has looked to whether the action is based on the "judicial phase" of the proceedings, whether it relates to "matters of advocacy" or whether the "principal purpose" was to prepare evidence for court. These are primarily questions of fact and the burden is on the parties claiming the immunity to prove facts which bring them within it.[46]

What emerges from *Elliott*, then, is an organized structure with which to deal with quite a powerful form of immunity that should, at least in principle, be restrictively applied. As Cromwell J.A. emphasized, the inquiry is a mostly factual one in the sense that the facts must be assessed in order to determine whether the justice system's interest in witness cooperation and/or preventing collateral attack on witness testimony justify imposing the heavy hammer of immunity in a given case. The overall inquiry is a somewhat abstract one, since the "witness cooperation" finding rests on certain assumptions either about whether a witness might reasonably have expected that they would be immune from any consequences or legal attacks arising from their participation in a particular case, or about whether prospective witnesses would be discouraged from participating if such liability were to be found. The "collateral attack" branch of the inquiry is prospective, an attempt to assess whether a particular proceeding is likely to

[44] *Elliott* above note 3 at para 210.
[45] [2003] OJ No 5314 (Sup Ct).
[46] *Elliott* above note 3 at para 211.

amount to some form of re-litigation of an individual's earlier participation in the litigation process.

However, it may be this very abstract, policy-oriented nature of the inquiry which creates analytical room for the common law courts to adjust the rule. This certainly seems to be the message that emerges from the Ontario Court of Appeal's decision in *Reynolds*. As noted above, *Reynolds* involved an action brought in part against Dr. Charles Smith, a pediatric pathologist, for negligent investigation and misfeasance in public office. The appellant, Lynn Reynolds, had been charged with the second-degree murder of her daughter. In the course of discharging his duties pursuant to a warrant under the Ontario *Coroners Act*, Dr. Smith initially opined that the fatal wounds suffered by the victim were inflicted by a knife. It became apparent that the child had been left alone with a pit bull and, as it turned out, the wounds had been inflicted by the dog. Dr. Smith maintained his opinion even as the facts regarding the dog emerged, and Lynn Reynolds was held in custody for 22 months until she was cleared of charges.

Smith's motion to strike the pleadings on the basis of the witness immunity rule was dismissed by a Master but allowed by a panel of the Ontario Divisional Court. The majority of the panel ruled that Smith's "post-mortem examination, his oral communication to the police of his opinion of the cause of death, his post-mortem report, and his testimony at the preliminary inquiry were all inextricably bound together such that it was not possible to distinguish between a claim for negligent investigation and a claim for negligent testimony."[47] However, Wilson J. provided a detailed and critical dissent, which highlighted "the tension between the basic principles that there should be

[47] *Reynolds v Kingston (City) Police Services Board*, [2006] OJ No 2039, at para 29. This finding was similar to one made by Cromwell J.A. in *Elliott* regarding several of the respondents, and indeed *Elliott* was cited heavily by the majority at this level of *Reynolds*.

no wrong without a remedy, and the public's interest in the administration of justice,"[48] as well as the distinction that had been drawn between investigation and preparation of evidence in *Elliott* and *Darker*,[49] and the heavily fact-dependent nature of the necessity inquiry.[50] Justice Wilson noted the unsettled nature of the law regarding witness immunity, particularly in Ontario, and underscored both that it was not clear whether witness immunity could apply to the tort of misfeasance in public office,[51] and that it was not at all clear that the rule would apply to these specific actions of Dr. Smith which were undertaken pursuant to a particular statutory regime for the provision of "an independent public investigation into the cause of death"[52]—a regime which had not previously been subject to this inquiry. The witness immunity rule itself, Justice Wilson opined, had to remain flexible in order to accommodate the evolution of tort law, which made it inappropriate to apply the rule to dismiss the action without the benefit of a full factual record.

A unanimous panel of the Ontario Court of Appeal allowed the appeal, expressing agreement with the reasons of Wilson J. in the Divisional Court. Justice Borins wrote for the Court:

> The essence of Ms. Reynolds' claims against Dr. Smith is in respect to his role as a public official investigating a suspicious death under the *Coroners Act*, and not to his role in testifying in her criminal prosecution. As Wilson J. has pointed out, this is a classic example of the type of case that should be allowed to proceed to trial to enable the court to make a decision on Dr. Smith's witness immunity claim, which he has the burden of establishing, on the basis of a complete factual record.[53]

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[48] Ibid., at para 72, citing *Carnahan*, supra.
[49] Ibid., at paras 77-81.
[50] Ibid., at paras 82-87.
[51] Ibid. at paras 96-100.
[52] Ibid. at para 114.
[53] *Reynolds*, above note 4 at para 23.

While one could view this decision by the Court of Appeal as being narrowly focused on the proper application of the "plain and obvious" test for the striking of pleadings, by agreeing explicitly with the reasons of Wilson J. the Court of Appeal itself was reflecting the tension between the witness immunity rule and the "no wrong without a remedy" principle.[54] Moreover, in a manner of speaking it puts the "necessary" in the "necessity" test articulated by Justice Cromwell in *Elliott*, emphasizing the factual nature of the necessity inquiry and implicitly adopting a restrictive approach. One could hardly imagine a set of facts that cried out for abrogation of the rule more than the many cases in which Dr. Smith was involved, but the Court's reasoning is not results-driven; rather, it uses well-settled procedural law to undergird a restrictive posture toward a remedy that would deprive an apparently deserving plaintiff of her cause of action, and maintains the burden of justifying this clearly and decisively upon the defendant. What weight should be given to the fact that Dr. Smith settled the claim rather than go to trial[55] is speculative, but some sense of restricting the application of the witness immunity rule is unavoidable.

C) Concluding Observations

Analytically speaking, it is interesting to note the commonalities and connections between the witness immunity rule, the "flank/collateral attack" aspect of the *res judicata* doctrine, the law of privilege[56] and the implied undertaking rule.[57] The Ontario Court of

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[54] See *Broom's Legal Maxims*, 10th ed. (London: Sweet & Maxwell, 1939) at 118: "*Ubi Jus Ibi Remedium*.- There is no wrong without a remedy" and "According to this elementary maxim, whenever the common law gives a right or prohibits an injury, it also gives a remedy."

[55] See H. Levy, "The Charles Smith Blog," online: < http://smithforensic.blogspot.ca/2011/07/charles-smith-compensation_24.html >

[56] See generally Linda R. Rothstein & Robert A. Centa, "Litigation Privilege in Canada" in Todd Archibald & Michael Cochrane, eds., *Annual Review of Civil Litigation* (Toronto: Carswell, 2007) 231.

Appeal noted in *Reynolds* that, in its modern form, the witness immunity rule acts more as a doctrine of substantive law than as a rule of evidence,[58] which is an attribute it shares with the rule against collateral attack.[59] The witness immunity rule in fact acts as a milder form of the collateral attack rule, in the sense that a court's findings with regard to a particular witness are not subject to unnecessary re-litigation. If a court in one proceeding found an opposing expert's evidence to be credible and persuasive, for example, little is gained by allowing (and much by preventing) a civil action against that expert by the earlier losing party.

Similarly, the witness immunity rule shares with the law of litigation privilege and the implied undertaking rule a manifestation of the self-serving interest of the justice system: participants are protected from being "vexed," not out of some solicitous public policy impulse, but because this might discourage or inhibit their participation in the administration of justice. Litigation privilege protects trial preparation from premature and strategically harmful disclosure and encourages thorough investigation and planning; the implied undertaking rule relieves witnesses of some anxiety about being sued for their (compulsory) contributions to litigation. Witness immunity, too, greases the wheels of justice in this way as has been explored above. This being the case, these kinds of interests are protected more assiduously than other forms of immunity or privilege might be, and in its current form the witness immunity rule clearly draws hard lines and acts as a complete bar to what might otherwise be meritorious litigation.

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[57] The implied undertaking rule maintains confidentiality over any information compelled during pre-trial discovery, limiting its use to the litigation for which it was intended until the expiry (if any) of the need for confidentiality. See *Juman v Doucette*, 2008 SCC 8.

[58] *Reynolds*, above note 4 at para 14.

[59] See the cases cited in note 43, above, and see Donald J. Lange, *The Doctrine of* Res Judicata *in Canada*, 3rd ed. (Markham, ON: LexisNexis Canada, 2010). This is in historical contrast to solicitor-client privilege, which began as a rule of evidence and evolved into a substantive rule; see *Descoteaux et al v Mierzwinski*, [1982] 1 SCR 860.

However, there has always been a latent hostility to any rules, substantive or procedural, which seek to keep evidence or claims out of court which might otherwise belong there, and thus we see limits on all legal doctrines of this sort. Civil procedure rules regarding disclosure abrogate litigation privilege claims, sometimes at early stages of litigation, and the higher courts have articulated the modern tendency to wish to limit the scope of litigation privilege in order to facilitate settlement and overall justice.[60] The Supreme Court's approach to the implied undertaking facilitates its application, but imposes temporal and procedural limits which draw back the veil of confidentiality when the need for it is either spent or defeated by a more pressing objective of the justice system.[61]

Correspondingly, while courts have not shied away from giving full effect to the witness immunity rule, the approach has typically been to interpret the scope of its application fairly restrictively.[62] If modern trends (including *Reynolds*) are any indication, the courts may perhaps be even more hostile to this rule than to privilege or the implied undertaking because it not only restricts the disclosure or use of evidence but bars broadly entire causes of action. As noted earlier, it is a rule that infringes most directly on a competing principle: that there should be no wrong without a remedy. This was one of the major considerations in the *Jones* case, to which I will now turn.

III. THE UK SUPREME COURT'S DECISION IN *JONES*

[60] *General Accident Assurance Co. v Chrusz,* [1999] O.J. No. 3291 (ONCA).
[61] *Juman*, above note 57.
[62] See e.g. *Lincoln v Daniels*, [1961] 3 All ER 740 (CA) at 752: "….the privilege … ought not to be extended to matters outside those proceedings except where it is strictly necessary to do so in order to protect those who are to participate in the proceedings from a flank attack."

In the course of evaluating the respondents' immunity claims in *Elliott*, Justice Cromwell noted that the parties were *ad idem* that the witness immunity rule applied (at least formally) to actions against expert witnesses who had been retained by adverse parties in previous litigation. Accordingly, he noted, "it is not necessary to confront the issue raised in *Bruce* as to whether the immunity also applies to negligence actions by a party against its own expert."[63] His reference was to how the issue had been raised but expressly left open in the B.C. case of *Carnahan v Coates*,[64] which referred in turn to the divided 1990 decision of the Supreme Court of Washington in *Bruce v Byrne-Stevens and Associates Engineers, Ltd.*,[65] where the majority had found that "friendly" experts were protected by the immunity.[66]

This is the issue that came squarely before the UK Supreme Court in *Jones*, a personal injury case in which the plaintiff Jones had been struck by a drunk uninsured driver and suffered both physical injuries and a host of psychiatric problems, including PTSD. Jones' solicitors retained Kaney, a consultant clinical psychologist, to prepare an expert report. Kaney then participated in preparing a court-ordered joint statement with the defence expert, which was extremely damaging to the ultimate settlement of Jones' claim, and when confronted regarding the change in her findings Kaney resiled from many of the opinions expressed in the joint statement. She stated that she had not seen the

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[63] *Elliott*, above note 3 at para 140.
[64] (1990), 71 DLR (4th) 464 (BCSC).
[65] 776 P. 2d 666 (Wash. 1989).
[66] While a thorough review of the American jurisprudence is beyond the scope of this article, it appears that U.S. courts are divided on whether the "friendly" expert is entitled to the immunity. For decisions in support of an exception of this sort, see *Marrogi v. Howard*, 805 So. 2d 1118 (La. 2002); *Pollock v. Panjabi*, 781 A.2d 518 (Conn. Super. 2000); *Murphy v. A.A. Mathews, a Division of CRS Group Engineers, Inc.*, 841 S.W.2d 671 (Mo. 1992); *Mattco Forge, Inc. v. Arthur Young & Co.*, 5 Cal. App. 4th 392 (1992); against, see *Bruce*, above note 65; *Panitz v. Behrend*, 632 A.2d 562 (Pa. Super Ct. 1993). See also the cases cited in *Jones*, above note 4 at paras 78-80, and see generally Andrew W. Jurs, "The Rationale for Expert Immunity or Liability Exposure and Case Law since *Briscoe*: Reasserting Immunity Protection for Friendly Expert Witnesses" (2007-2008) 38 Univ. of Memphis L. Rev. 49.

opposing expert's reports before signing the joint statement and "had felt under some pressure in agreeing to it."[67] An action brought by Jones against Kaney was struck out at the lower court but proceeded directly on this point of law to the UK Supreme Court.[68]

The leading judgment of the 5-member majority of the Court was authored by Lord Phillips, who noted with surprise that the immunity of an expert from claims brought by a client "has never been challenged in the past."[69] Noting that the immunity itself developed well before the tort of negligence and prior to the advent of experts testifying in court as to their opinions,[70] His Lordship spoke to what he viewed as the underlying policy theme of the caselaw that supported the rule:

> the chilling effect that the risk of claims arising out of conduct in relation to legal proceedings would have. It would make claimants reluctant to resort to litigation. It would make witnesses reluctant to testify. If they did testify, it would make them reluctant to do so freely and frankly. The cases emphasise that the object of the immunity is not to protect those whose conduct is open to criticism, but those who would be subject to unjustified and vexatious claims by disgruntled litigants.[71]

Lord Phillips then pointed to the decision of the House of Lords in *Hall v Simons*,[72] which abrogated the traditional immunity of barristers for negligence to their clients, noting that within the duty of care owed by both barristers and experts is an obligation to the court to express views and otherwise act objectively. He raised this as a response to the defence argument that if experts were not immune to actions by their

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[67] *Jones*, ibid. at para 9.
[68] By way of a "leapfrog certificate"; ibid. at para 1.
[69] Ibid at para 2.
[70] Ibid at para 11, though this statement was subject to some controversy even among the concurring Justices, who felt it was too broad and that it was more accurate to say that only the broader absolute immunity principle was of such antiquity;
[71] Ibid at para 15.
[72] [2002] 1 AC 615.

clients they might feel apprehensive about changing their views to the client's detriment. In Lord Phillips' view, the duty to the court was essentially part of the duties owed to the client and thus "the witness of integrity" would not fear litigation by disgruntled former clients because of this.[73] Moreover, there was no reason to believe—and no evidence to support the argument—that the risk of being sued by clients for litigation matters would de-motivate experts to provide their services any more than the usual risk of being sued, an eventuality against which experts "customarily insure" in any event.[74] He portrayed as unrealistic the idea that many vexatious claims would be brought, since such litigation would be expensive and would undoubtedly require the services of another expert in any event.[75] While such claims might be more likely in criminal cases, most would be struck out as abuses of process unless there had been a wrongful conviction.[76] Accordingly, Lord Phillips concluded that "friendly" experts should not be immune from civil actions generally, though the absolute immunity against defamation claims should still apply.

As noted, four of the Justices concurred with Lord Phillips, with several setting out detailed supplementary reasons for agreeing with this limited abrogation of the immunity. Lords Collins, Kerr and Dyson all rested a great deal of weight on the principle that there should be no wrong without a remedy,[77] and all essentially framed the analytical question as whether the rationales for the witness immunity rule trumped that principle. Lord Collins felt that allowing for liability would be likely to motivate experts—most of whom were insured—to make "more careful and reliable evaluation of

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[73] *Jones* above note 4 at para 56.
[74] Ibid at para 52.
[75] Ibid paras 58-59.
[76] Ibid at para 60.
[77] See ibid paras 72, 94 and 113, respectively.

the case," and characterized the possibility of collateral attack as "exaggerated."[78] Professional disciplinary proceedings would be far more serious to an expert's livelihood than civil actions, he stated, yet no witness immunity attached in that setting.[79] Lord Kerr noted that there was no evidence that allowing for friendly expert liability would have any chilling effect, opining: "If an expert expresses an honestly held view, even if it differs from that which he may have originally expressed, provided it is … tenable, he has nothing to fear from a disgruntled party."[80] Lord Dyson felt that the application of the immunity to bar the liability of experts *to their clients* in fact had only "shallow roots,"[81] and that in any event given the various factors that would go into the willingness of professionals to act as experts (of which liability would be only one) and the availability of indemnity insurance, there was an insufficient case to be made that the immunity was necessary or even needed.[82]

Lord Brown, while issuing only short reasons, rather acidly opined:

> …in my opinion the most likely broad consequence of denying expert witnesses the immunity…will be a sharpened awareness of the risks of pitching their initial views of the merits of their client's case too high or too inflexibly lest these views come to expose and embarrass them at a later date. I for one would welcome this as a healthy development in the approach of expert witnesses to their ultimate task (their sole rationale) of assisting the court to a fair outcome of the dispute (or, indeed, assisting the parties to a reasonable pre-trial settlement).[83]

Dissenting from the majority viewpoint were Lord Hope and Lady Hale, who clearly felt that their colleagues had jumped in where angels fear to tread. Lord Hope

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[78] Ibid at para 81.
[79] Ibid at para 84.
[80] Ibid at para 93.
[81] Ibid at para 111.
[82] Ibid at para 124.
[83] Ibid at para 67.

spoke powerfully to the overall benefits of the rule and the need for certainty in its application; "the rough is taken with the smooth," he opined, noting that the few cases where a genuine cause of action is cut off are outweighed by "the vast majority of cases" where the rule enables experts to speak freely without fear,[84] and supports the needs of the administration of justice. Moreover, he emphasized that to relax the rule vis-à-vis one particular class of expert would result in a certain fuzziness regarding "where to draw the dividing line," since, for example, the rationale for rolling back the rule could conceivably apply to joint or court-appointed experts, or to employees giving evidence on behalf of their employers.[85] Most pressing, however, was the lack of evidence regarding what the impact of the change might be:

> …I doubt whether it is right that we should proceed in this way only on the basis of assumptions, which is really all we have to go on in this case.
>
> I regret too the absence of any intervention in these proceedings by a body with experience across the whole range of this area of practice, such as the Academy of Experts, which could have provided us with evidence to inform our judgment. … I am unwilling to suggest that every witness who gives evidence as an "expert" belongs to a professional organization or engages regularly in court work. Some may be academics, and some may come forward to give expert evidence only once in a lifetime. It seems to me that it would be unwise to assume that they all have insurance cover against claims for negligence.[86]

[84] Ibid at para 144.
[85] Ibid at paras 169-172.
[86] Ibid at paras 128-129.

In her reasons Lady Hale picked up on the latter points, holding that "it would be impossible to confine any exception to run of the mill cases like the present,"[87] and raising the prospect that:

> If the exception is made, it will clearly have to apply between expert witnesses and their clients in all kinds of civil proceedings, before all kinds of courts and tribunals: the surveyor who gives valuation evidence in a leasehold enfranchisement case; the plasterer who gives quantum meruit evidence in a building dispute; the engineer who explains how a machine works in a factory accident; or the scientist who explains how DNA works in a patent case.[88]

Her Ladyship referred as well to public law proceedings, and both private family proceedings and child apprehension-type proceedings, among others, noting the possibility for disarray in the law: "…there will be some professional witnesses who enjoy immunity in respect of their evidence and some who do not. Some of those distinctions will appear arbitrary."[89]

Lady Hale also pointed out the possibility that experts would feel more pressure to stick to their initial opinions for fear of being sued if they changed them; that there could be chilling effect upon some experts in some fields; and that insurance premiums would rise, with a consequent increase to expert fees. "[I]t is possible that exclusion clauses may be introduced into contracts to give expert evidence, in which case we shall be back where we started."[90] Moreover, she agreed with Lord Hope that the major policy imperative was to protect non-negligent experts "against the understandable but usually

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[87] Ibid at para 180.
[88] Ibid at para 181.
[89] Ibid at para 187.
[90] Ibid at para 188.

unjustifiable desire of a disappointed litigant to blame someone else for his lack of success in court."[91]

IV. CONCLUSION: SHOULD CANADIAN COURTS ADOPT *JONES*?

A) The Prospects

Jones certainly presents a challenge to the ongoing vitality of the witness immunity rule, and displays an interesting diversity of approaches as to how, when and to what extent longstanding common law procedural/substantive rules should be changed.[92] While the actual exception carved out in the result of the case is fairly narrow, both the majority and dissenting positions acknowledge implicitly or explicitly that the principles at play are at least notionally applicable to a wider range of experts and other witnesses. There are fissures among the Justices of the UK Supreme Court as to what to do with these problems of principle, and the resulting split might be portrayed as being along "conservative" and "progressive" lines. The dissenting judges seem to take the conservative tack, in the sense of wishing to guard against abrogation of the rule without a compelling rationale for changing it. The majority Justices, on the other hand, question the application of the underlying rationales which has traditionally supported the rule, holding (in a rather bipolar manner) that they have been supplanted both by the competing traditional principle of "no right without a remedy" and overtaken by modern trends.

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[91] Ibid at para 189.

[92] Jurisprudentially speaking, this debate among the Justices is one of the most interesting aspects of the case, quite aside from the witness immunity issue. None of the judges disagree that this common-law, judge-made rule is capable of being changed by the Court. However, the majority, led by Lord Dyson (at paras 108-114, essentially hold that every common law rule is continuously open to the courts "conducting a clear-sighted, contemporary examination of the justification for its preservation" (para 88, per Lord Kerr). The dissenting justices, on the other hand, emphasized that "it is the proposed exception to the rule, not the rule itself, that needs to be justified" (para 161, per Lord Hope).

While the witness immunity rule has a number of different applications in Canadian litigation, its main use currently is inquiries regarding the potential liability of experts or expert-like witnesses such as investigators. Despite a decade or more of civil procedure reform and continuing admonitions from the Supreme Court of Canada against trials devolving to a "battle of the experts," there can be no doubt that experts are going to continue to play a major role in litigation at every stage. The witness immunity rule, for all its important policy justifications, produces results which can fairly be described as draconian in some situations. Given such a major shift by a court which traditionally exerts some persuasive influence over the development of Canadian common law, as well as the fact that the U.S. courts are divided on the issue, it may be worth examining reform or modification of the rule in Canada. Indeed, in the *Elliott* decision we have a comprehensive and principled structuring of the rule and its application, and *Reynolds* is at least modestly pointing the way to restricting its effect. While the policy imperative of ensuring immunity for the giving of in-court testimony does not seem subject to any serious question, perhaps the time is ripe for re-examination, at least with regard to applying the rule to the out-of-court activities of experts, whether friendly or adverse, and/or professional witnesses.

B) The Debate

What seems inevitable is that powerful cases can be assembled both for and against the application of the rule. On the pro side, it seems beyond question that the prospect of being sued as a result of one's participation in judicial proceedings is likely to have some effect on any individual's behaviour, and that being immunized from suit

certainly creates a comfort zone wherein that participation can be as principled and fearless as the operation of the justice system requires it to be. Also, even if there is appetite for carving up the application of the rule as was done in *Jones*, in an era of civil procedure reforms which place limits on experts, provide for joint or court-appointed experts, and even set up situations of "hot-tubbing,"[93] making the changes in a principled manner would be difficult.

Moreover, the prospect of collateral attack on a court's findings or a witness's testimony is unattractive and merits attention in the form of some rule-based response. The majority Justices in *Jones* seemed content to express confidence that such prospects were unlikely to materialize in great numbers, and that the court system was able to deal with them where they did. To my mind, and from the Canadian perspective, this seems to blithely ignore the problems presented by self-represented litigants that are being grappled with throughout the country. By all accounts, their numbers are growing and in some respects are threatening to overwhelm the courts. Without wanting to seem condescending to those who are involuntarily representing themselves, it is important not to underestimate the additional clog to the justice system that could be produced if self-represented litigants had an additional avenue of opportunity to bring actions against other participants in litigation where they were unsuccessful.[94] The point is not, as some of the *Jones* majority court seemed to feel, that such litigation would be unmeritorious,[95] but that it is worth preventing it entirely. As Lord Hope pointed out, "the purpose of the rule was to protect persons acting bona fide who under a different rule would be liable,

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[93] I.e. "witness conferencing," a method by which evidence can be received from several experts jointly. See Randy Pepper, "Testifying in the 'tub'" *The Lawyers Weekly*, vol. 31 no. 30 (December 9, 2011) (QL).
[94] Which is not to say that such claims do not already happen, only to acknowledge that they are dealt through application of the *res judicata* rule and vexatious litigant rules and legislation.
[95] E.g. *Jones* above note 4 at para 56, per Lord Phillips.

not perhaps to verdicts and judgments against them, but to the vexation of defending actions."[96]

On the con side, however, is the nagging and very real prospect that meritorious litigation is being unnecessarily confounded by the rule; if *Reynolds* and other cases arising from the work of Dr. Smith indicates nothing else, it is that. While in *Jones* Lord Hope was at great pains to point out the "public interest" served by the witness immunity rule,[97] there is a great deal of public interest residing in the "no wrong without a remedy" principle. It is offensive to basic notions of fairness that litigants like Dr. Smith or Ms. Kaney should escape civil liability. While there may be some negligence de-motivators present in professional disciplinary proceedings and the availability of perjury or contempt charges, the former will not attach to every kind of expert who gets involved in litigation,[98] the latter are very rarely laid, and neither option helps to compensate the deserving plaintiff for injury suffered by negligent investigation or case preparation. Moreover, as all of the majority justices in *Jones* pointed out, there was no evidence that creating exceptions to the rule would de-motivate or harm the interests of experts.

In my view, however, the latter point that leads down the most compelling track; to wit, the debate itself may be premature because the evidentiary base is lacking. What emerges quite powerfully from the split in the *Jones* decision is the exposed undergirding of the witness immunity rule, which is almost entirely made up of assumptions,

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[96] Ibid. at para 136.
[97] Ibid at para 151.
[98] Consider, for example, the case of *R v Rayner*, 2000 NSCA 143, where the Court of Appeal ruled that two fisheries officers, with over 25 years' experience between them, but no degrees or "scientific" education, could offer expert opinion on the sex of crabs unlawfully possessed by a lobster fisherman under the Atlantic Fishery Regulations. Needless to say, neither was a member of a professional organization.

speculation and judicial notice.[99] We say, allegedly on the basis of centuries' worth of experience, that the smooth functioning of the judicial system requires witness immunity, that witnesses would be intimidated, that expert witness participation in proceedings would be distorted—and yet, as Lord Hope and other members of the *Jones* court point out, there is very little in the way of actual evidence one way or the other. While the experience of senior lawyers who have been appointed to the bench should not by any means be discounted (to say nothing of the experienced counsel who appear before them), it is noteworthy that each side of the debate in *Jones* uses the absence of evidence to support their diametrically opposed arguments. This might not be the most fertile ground from which to grow law reform.

C) The Final Analysis

The title of this article, referring to the possibility of abrogating the witness immunity rule, poses the questions "how far?" and "how fast?" These questions implicitly assume that some abrogation of the rule should take place, and on balance the various concerns raised above do support this proposition. However, the questions themselves may be premature—the correct query may not be "how far?" or "how fast", but rather "how?"

The witness immunity rule and the absolute immunity principle in which it resides are common law doctrines, invented and refined by courts to deal with perceived problems. Accordingly, they may certainly be adjusted, evolved, devolved or abrogated by the senior courts in line with traditional common law principles. However, while like

[99] That is, if it is even fair to call the underlying rationale of this point of law "judicial notice," since that doctrine allows finding of fact based on "what everyone knows," which is hardly the nature of the material being discussed here (see *R v Spence*, 2005 SCC 71).

the law of privilege the witness immunity rule is meant to help the smooth functioning of the judicial system, it is different in that the needs it serves also involve the interests of significant numbers of outside parties—the witnesses, particularly the experts, about whose behaviour much has been said and speculated as the rule has been applied. As Lord Hope and Lady Hale pointed out in *Jones*, a great deal of the reasoning around this topic proceeds on the basis of conjecture and not evidence.

This being the case, it may be that the best way to "fix" the witness immunity rule is for judicial findings to rest on a more wide-ranging, carefully-calibrated and evidence-based approach, both to the effects of the rule and to the potential effects of any reform efforts. There are a number of ways in which this could be accomplished, but the closing words of Lady Hale's reasons in *Jones* suggest a good solution: "This seems to me self-evidently a topic more suitable for consideration by the Law Commission and reform, if thought appropriate, by Parliament rather than by this Court."[100] Of course, in the Canadian context, the Law Commission of Canada was de-commissioned by the Harper government in 2006.[101] However, this issue is primarily the concern of courts with jurisdiction over civil matters, which are in turn within the legislative competence of the provinces and the jurisdiction of the provincial superior courts. Accordingly, the law reform commissions of the various provinces[102] would be well-positioned to engage in wide-ranging consultation with expert and professional groups, the practicing bar and the public. This would allow a more informed perspective to be formulated on the whys and

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[100] *Jones* above note 4 at para 190.
[101] See Patricia G. Bailey, "Law Reform Commission of Canada" in *The Canadian Encyclopedia*, online: < http://www.thecanadianencyclopedia.com/articles/law-reform-commission-of-canada >
[102] There are currently law reform commissions/agencies in six provinces: British Columbia, Alberta, Saskatchewan, Manitoba, Ontario and Nova Scotia. See the website of the Federation of Law Reform Agencies of Canada, online: < http://www.folrac.com/index.html >

wherefores of the witness immunity rule, and to determine what the public interest requires of it, or whether the public interest requires its abrogation or abolition. Until that time, it may be that the mood of cautious retraction from the rule that was seen in the *Reynolds* case may produce slow and incremental change.

On the latter point, however, short of the large-scale law reform effort proposed above, how might the rule be changed? If one accepts, as I do on the whole, that the traditional application of the witness immunity rule produces results which are inconsistent with the overall interests of justice, then how might it be pushed in a fairer direction? In my view, a great deal can be accomplished by making procedural and evidentiary changes, without attacking the core rationales of the legal doctrine. A law reform wish list might look like the following.

First, the core of the absolute immunity rule should stand: witnesses (including experts) should remain absolutely immune for testimony given in court,[103] in defamation or for any other cause of action. This is one part of this overall doctrine where the mischief to be avoided is obvious; even a skilful cross-examination might lead a witness into potential liability, through no fault of the witness him/herself. This reserves to the trial its traditional, sacrosanct focus in the administration of the justice system.

Second, while the first two steps of the *Elliott* test (what is the "gist and essence" of the claim? Does the gist and essence of the claim fall within the scope of the claimed immunity?) should be maintained, the third and fourth steps should be combined into a more robust "necessity" inquiry. The significant change here is that the presumptive applicability of the rule to certain kinds of claims and witnesses is done away with—the immunity should not be imposed simply because a particular claim and defendant fall

[103] Or anything else the witness does in court, such as demonstrations.

into a recognized common law "category" to which the rule applies. Rather, every defendant claiming the immunity must demonstrate that the application of the rule in this particular case is "essential for the administration of justice."[104] The historical rationales for, and applications of, the rule should naturally remain persuasive; for example, if it can be shown that a particular claim amounts to a collateral attack, then that could be given significant weight. However, the motions judge is free to dispense with the precedents if the harm the rule seeks to forestall would not arise in a given case, or would not outweigh the damage to the interests of justice that extinguishing an apparently meritorious claim would wreak.

Third, the burden of proof logically remains on the party claiming it, but commensurate with abandoning the third *Elliott* step, that burden is a complete one; the defendant must demonstrate not only that the plaintiff's case is the kind of claim that usually attracts the protection of this procedural defence, but that imposing the defence will produce the best result in this case.

Fourth, and taking a page from the Ontario Court of Appeal's dictum in *Jones* that the application of the rule best arises from a robust fact-finding exercise, the determination should preferably be made in a motion for summary judgment. Summary judgment is to be preferred (particularly to other modes of pre-trial resolution) because it combines the need for the fairly thorough evidentiary record that cannot be mustered on a motion to strike pleadings, with the reasonable desire of a defendant to have the matter of the defence litigated so as to possibly prevent a trial on the merits of the case. The summary judgment hearing would allow as full an airing of the evidence supporting or attacking the application of the rule as the parties can bring, including expert evidence

[104] *Halls v Mitchell*, above note 19 at 145-146, as cited in *Elliott* at para 148.

about the impact of liability upon particular groups or classes of expert.[105] In appropriate cases it would also have the advantage of applying the rule to some of the plaintiff's claims while allowing others to go forward. Where even summary judgment is insufficient in this way, then litigating the issue at trial is always available.

This approach may be a more litigation-heavy one, but I would suggest it is not unduly onerous. Most such motions would likely produce results similar to those of the past, since the substantive law regarding the rule itself would not be changed fundamentally. Vexatious claims would still most likely be stopped at an earlier stage, albeit not at the pleadings phase of a case which is more economically desirable. The advantage of such a change, however, may be that it would orient this branch of procedural law in the direction the Supreme Court of Canada has taken with the law of evidence: a "principled approach,"[106] in which the reasons both for and against applying the rule to particular facts are openly weighed and determined on their merits in the overall context of a case.

To be sure, even this mostly procedural change to the rule would produce, or at least increase, uncertainty as to liability, and there is some prospect that there may be a chilling effect on some experts or other witnesses. That, however, is the trend in any event, particularly with cases like *Jones* and the developing distinction between investigation and preparation of evidence. Moreover, while this approach is broader in some respects than the UK Supreme Court's individualized "friendly experts" exception in *Jones*—in that the rule is presumptively inapplicable unless the defendant can bring

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[105] Which might, eventually and incidentally, provide some of the evidence that would be needed for the more general law reform effort proposed above.

[106] See generally Robert J. Currie, "The Evolution of the Law of Evidence: Plus Ça Change…?" (2011) 15 Can. Crim. L. Rev. 213.

itself under the rule's umbrella—it is procedurally cautious and imposes an evidence-based approach. No balancing of public interests will ever be perfect, but a more careful exercise in picking out meritorious claims which should not be prevented from going forward is, in my view, the better public policy. *Ubi Jus Ibi Remedium*, *redux*.