

WHAT HAPPENS WHEN AN EXPERT MAKES MISTAKES?

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by

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The new Legal 500 says "The 'approachable' Joanne Wicks is 'an incredible fighter' and is rightly promoted; 'she gets to the bottom of things', 'effective, unflappable advocacy', 'proactive' with 'a very good court manner' and Joanne would particularly like to thank those members of the PLA who were so nice about her.

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1. Introduction

- 1.1 As property litigators we regularly encounter professionals of other disciplines: as advisers, witnesses, experts appointed under a contract, arbitrators and mediators. What remedy does your client have when a surveyor, or forensic accountant, or engineer gets it wrong? Can he sue or must he suffer his loss in silence?

2. The Adviser

- 2.1 If an expert acts only as an adviser to the client, the position is straightforward. A duty of care is implied into the client's contract with the expert and the nature of the professional relationship between client and adviser is sufficient also to give rise to a duty of care in tort. If the expert falls below the standard of the reasonably competent professional, he may be sued for his negligence.
- 2.2 Even in the absence of a contract – for example where an expert acts without being paid a fee - if the expert knows or ought to know that someone is relying on his advice, he will owe that person a tortious duty of care¹.
- 2.3 Both the contractual and the tortious duties of care may be modified or excluded by the use of contractual terms and disclaimers, but only to the extent permitted by the Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contracts Regulations 1999².
- 2.4 On rare occasions an expert adviser may owe a duty of care to the opposing party in a dispute. For example, if a valuer knows that his valuation for his client will be relied upon by the other side in settlement negotiations, he may owe the opposing party, as well as the client, an obligation to exercise reasonable care and skill in carrying out that valuation³. In any event he will owe the opposing party a duty to take care to ensure the accuracy of his statements, and will become liable to that person if he makes a careless or dishonest misrepresentation⁴.

¹ So, for example, a valuer valuing a property for a mortgagee will owe a duty of care to the purchaser who has applied for the mortgage, in circumstances where the valuer knows that it is likely that the purchaser will rely upon his valuation without obtaining his own: *Yianni v Edwin Evans* [1982] QB 438; *Smith v Eric S Bush* [1990] 1 AC 831; *Merrett v Babb* [2001] EWCA Civ 214; [2001] Lloyd's Rep PN 468.

² E.g. in *Smith v Eric S Bush*, above, the valuer was unable to rely upon a disclaimer in his valuation to prevent him being held liable to the purchaser of a modest house, because it failed the "reasonableness" test in the Unfair Contract Terms Act 1977.

³ By way of analogy, where an agent for a vendor takes it upon himself to advise a purchaser on re-sale values, he will be liable to the purchaser if that valuation is negligent: *Duncan Investments v Underwoods* [1998] PNLR 754

⁴ *McCullagh v Lane Fox & Partners* [1996] 1 EGLR 35

3. The Expert Witness

3.1 The position changes when the expert is instructed as an expert witness, whether on behalf of one party, or as a single joint expert. At that point he gains the benefit of immunity from civil proceedings⁵. This is a common law protection which applies to all witnesses, whether expert or not. As Kelly CB said in 1873:

“no action lies against parties or witnesses for anything said or done, although falsely and maliciously and without any reasonable or probable cause, in the ordinary course of any proceeding in a court of justice”⁶.

3.2 There are said to be two reasons which underpin this rule. Firstly, it is designed to encourage freedom of speech and communication in judicial proceedings by relieving persons who take part in the judicial process from the fear of being sued for something they say⁷. Secondly, it is designed to avoid a multiplicity of actions in which the value or truth of a witness' evidence is tried over and over again⁸. The immunity applies even though the witness acts in bad faith⁹, the rationale being that a blanket immunity is needed in order to encourage honest and well-meaning people to assist justice, even if that means that dishonest and malicious ones may on occasion benefit from it¹⁰. The immunity is granted as a matter of public policy, not primarily for the benefit of the particular witness concerned but in order to assist the administration of justice¹¹.

3.3 It is obvious that if the immunity is to be effective, it must extend to more than the words spoken from the witness box in the course of a trial. So, just as a witness of fact can claim immunity in relation to statements made when giving a proof of evidence to a solicitor before trial¹², an expert witness can claim immunity in

⁵ In *Arthur JS Hall & Co v Simons* [2002] 1 AC 615 at 698D-F, Lord Hoffman said that a witness – in context including an expert witness – “owes no duty of care to anyone in respect of the evidence he gives to the court. His only duty is to tell the truth...The fact is that the advocate is the only person involved in the trial process who is liable to be sued for negligence is because he is the only person who has undertaken a duty of care to his client.” This passage suggests that the reason why an expert witness cannot be sued for negligence in relation to his evidence is because he owes no duty of care, rather than that he owes such a duty but is entitled to immunity from suit. This, with respect, cannot be right. An expert witness who enters into a contract with a client to act as an expert witness renders himself liable to carry out the work under that contract with reasonable care and skill. His retainer does not terminate when he steps into court – otherwise how could he expect to be paid for appearing in court?

⁶ *Dawkins v Lord Rokeby* (1873) LR 8 QB 255 at 264

⁷ per Lord Hoffman in *Taylor v Director of the Serious Fraud Office* [1999] 2 AC 177 at 208

⁸ *Roy v Prior* [1971] AC 470 at 480 per Lord Wilberforce

⁹ See e.g. *Raiss v Paimano* [2001] 4 Lloyd's Rep PN 341

¹⁰ *Darker v Chief Constable of West Midlands* [2001] 1 AC 435 at 447

¹¹ *Stanton v Callaghan* [2000] 1 QB 75 at 107

¹² *Watson v M'Ewan* [1905] AC 480

respect of his report prepared for exchange with the opposite party¹³ and which is intended to stand as his evidence in chief - even if, in the event, no trial takes place. Immunity also attaches to a joint statement agreed with the other side's expert witness¹⁴.

3.4 However, matters which cannot properly be characterised as preliminary to the giving of evidence do not attract immunity. So an engineer advising as to whether a claim would be sustainable may be sued if that advice is negligent, even though litigation is in contemplation and it is expected that the engineer will be asked to be an expert witness as the case progresses¹⁵.

3.5 Although the immunity from suit is absolute, in the sense that it applies even if the witness is motivated by malice or acts in bad faith, it does not give complete protection against all forms of legal censure. An expert witness may be prosecuted for perjury¹⁶. A serious failure to comply with his duties to the Court may amount to a contempt of court, which is susceptible of punishment¹⁷. An expert witness who gives inaccurate evidence recklessly, in flagrant disregard of his duties, may be ordered to pay the costs of the parties which have been wasted as a consequence of his evidence¹⁸.

3.6 In *Meadows v General Medical Council*¹⁹ the Court of Appeal recently considered the question of whether and if so, to what extent, the immunity from suit could be claimed by an expert witness in relation to professional disciplinary proceedings²⁰. Professor Sir Roy Meadow, the eminent paediatrician, gave expert evidence at the trial of Sally Clark for the murder of her two sons. In the course of that evidence, he used statistics which purported to explain the likelihood of two natural deaths in one family. Although he honestly believed in the validity of his evidence when he gave it, his use of those statistics in that

¹³ *X (Minors) v Bedfordshire CC* [1995] 2 AC 633 at 754C-755H; *Landall v Dennis Faulkner & Alsop* [1994] 5 Med LR 268.

¹⁴ *Stanton v Callaghan* [2000] QB 75

¹⁵ *Palmer v Durnford Ford* [1992] 1 QB 483

¹⁶ *Roy v Prior* [1971] AC 470 at 477

¹⁷ CPR 35 Practice Direction para. 2.5 draws attention to the prospect of proceedings for contempt of court being brought against an expert witness who signs a statement of truth, falsely stating that the report expresses his true and complete professional opinion, without an honest belief in its truth

¹⁸ *Phillips v Symes (No 2)* [2005] 1 WLR 2043

¹⁹ [2006] EWCA Civ 1390; [2007] 1 All ER 1

context was wrong and he failed to draw attention to his lack of expertise in statistics. The matter was referred to the Fitness to Practise Panel of the General Medical Council, which concluded that he was guilty of serious professional misconduct. On appeal to the High Court, the Judge allowed his appeal, holding that Professor Meadows was entitled to immunity from the GMC's proceedings but that, in any event, he was not guilty of serious professional misconduct. The Court of Appeal overturned the Judge's decision in relation to the issue of immunity but upheld it, by a majority, in relation to the question of serious professional misconduct.

- 3.7 The Court of Appeal accepted as given that at common law an expert witness has immunity from civil proceedings in respect of evidence which he gives in court. However, it refused to extend that immunity to the Fitness To Practice process of the GMC. This was because the purpose of those proceedings is different from the purpose of civil proceedings. Whereas civil proceedings are designed to compensate for losses caused to the claimant by past conduct, the purpose of the GMC's proceedings is to protect the public, by ensuring that those who are not fit to practise do not do so. It would be wrong for the common law to seek to qualify or cut across the duties of the relevant regulatory authority to protect the public as laid down by statute (as in the case of the GMC) or (as in the case of the RICS) royal charter.
- 3.8 Although the *Meadow* decision did not seek to question the general concept of immunity for expert witnesses from civil liability, it is highly likely that it will be reviewed by the House of Lords at some point in the future, and whether it would survive such a review must be considered doubtful. Historically, the immunity enjoyed by witnesses and judges was extended to advocates conducting court proceedings²¹, but in *Arthur JS Hall & Co v Simons*²² the House of Lords swept that away, holding that the reasons which had been used to justify the immunity for barristers and solicitor-advocates were no longer sound. Some of those reasons deemed unsound are very similar to those which are said to provide the rationale for the immunity for witnesses. A few judges, for example, Chadwick LJ

²¹ *Rondel v Worsley* [1969] 1 AC 191; *Saif Ali v Sydney Mitchell & Co* [1980] AC 198

²² [2002] 1 AC 615

in *Stanton v Callaghan*²³, have expressed scepticism about the reasons for the rule in relation to expert witnesses²⁴:

“There is, if I may say so, no difficulty in recognising the need for immunity in relation to the investigation and preparation of evidence in criminal proceedings – or in child abuse cases – in order to ensure that potential witnesses are not deterred from coming forward. For my part, however, I find it much more difficult to recognise an immunity founded on the need to ensure that witnesses are not deterred from giving evidence by the possibility of vexatious suits in a case where the witness is a professional man who has agreed, for reward, to give evidence in support of his opinion on matters within his own expertise – a fortiori, where the immunity is relied upon to protect the witness from suit by his own client, towards whom, prima facie, he owes contractual duties to be careful in relation to the advice which he gives. I think there is much force in the observation of Mr Simon Tuckey QC, when sitting as a deputy judge of the Queen’s Bench Division in *Palmer v Durnford Ford* [1992] QB 483, 488D: “...I do not think that liability for failure to give careful advice to his client should inhibit an expert from giving truthful and fair evidence in court.”

It is important to keep in mind that expert witnesses have the safeguard, in common with other professional men, that they will not be held liable for negligent advice unless that advice is such as no reasonable professional, competent in the field and acting reasonably, could give. I find it difficult to believe that the pool of those who hold themselves out as ready to act as expert witnesses in civil cases, on terms as to remuneration which they must find acceptable, would dry up if expert witnesses could be held liable to those by whom they are instructed for failing to take proper care in reaching the opinions which they advance. Indeed, I would find it a matter of some surprise if expert witnesses offer their services at present on the basis that they cannot be held liable if their advice is negligent.”²⁵

- 3.9 The rationale for immunity must also be brought into question by the existence of the current exceptions to the rule. Will an expert witness, who is willing to give evidence despite knowing that he may be liable to pay wasted costs or to the sanctions of his professional body, really be deterred from giving his evidence by the prospect of being sued by one of the parties? Might not it be said that there is in fact a public interest in expert witnesses being held accountable for their errors, in order to maintain standards?

²³ See above, at 91C-F

²⁴ But see also Thorpe LJ’s identification of the problems faced by the family justice system in getting sufficient numbers of medical or mental health professionals to act as expert witnesses: *Meadow v GMC*, above, at [225]-[249]

²⁵ But see the interesting discussion in the judgment of Thorpe LJ in the *Meadows* case highlighting the difficulties faced by the family courts by virtue of a lack of suitable medical experts.

3.10 If expert witnesses were to cease to be immune from negligence claims, some interesting questions would arise. Fears about a conflict between an expert witness' duty to his client and his duty to the Court are misplaced: an expert witness will not be held negligent for doing something required by his duty to the Court, although it is contrary to his client's interest, any more than a barrister or solicitor would be. To my mind the more interesting question is the extent to which the expert witness' "duty to the Court"²⁶ might itself become a legally enforceable obligation. If an expert witness gives evidence for the claimant, might it not be argued that he undertakes a duty to the defendant at least to comply with his duties under CPR 35? Certainly a single joint expert would be capable of being sued by either side, since he undertakes a contractual duty of care to each party.

4. The Advocate

4.1 Occasionally we see experts of other disciplines encroaching on our own territory and acting as advocates, for example as surveyors sometimes do in specialist tribunals or arbitrations. There the surveyor is no better off than the barrister or solicitor-advocate: all face a claim from their clients if they fall below the standard of reasonable care and skill²⁷.

5. The Mediator

5.1 A mediator has a contract with each party into which the law again will imply a duty to exercise reasonable care and skill. Although no immunity is conferred on a mediator, it is very difficult to see how a claim in negligence could ever succeed. The claimant would have to show, not only that the mediator fell below the standard to be expected of a reasonably competent mediator, but also that he has suffered loss as a consequence. This would generally involve the claimant proving on the balance of probabilities that if the mediator had done his job properly a settlement would have resulted. The evidential difficulties are manifest.

²⁶ Famously summarised in *The Ikarian Reefer* [1993] 2 Lloyd's Rep 68 and now enshrined in CPR 35

²⁷ *Arthur JS Hall v Simons*, above.

6. The Arbitrator

- 6.1 By s.29 of the Arbitration Act 1996, an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith²⁸. Equally, a person designated or requested by the parties to appoint an arbitrator – such as the President of the RICS – has a similar immunity in relation to the discharge of that function²⁹. If an arbitrator gets something wrong, the remedy for the parties is to seek to challenge the award on the grounds of serious procedural irregularity under s.68 of the 1996 Act, or to appeal on a point of law under s.69.

7. The Independent Expert

- 7.1 It is completely different if an expert is appointed to determine a question arising under a contract or lease, for example on a rent review or by way of compromise of a boundary dispute. This gives rise to a web of contracts, each of which needs separate consideration. Firstly, there is the contract between the parties, to which the expert is not a party. Secondly, the parties to the main contract each have their own contract with the expert. Thirdly, if the contract requires the expert to be appointed by another person or body, such as the President of the RICS, there will be another contract between that person and the person applying for the appointment.
- 7.2 Say a contract provides that the price for a property will be such sum as shall be determined by an independent valuer. If the parties agree on a valuer and he proceeds to give a valuation, that valuation is binding as a matter of contract between them. It can only be set aside – or more accurately ignored as having no contractual effect – if the valuer has failed to do what the main contract requires of him (e.g. he has valued the wrong property)³⁰ or is guilty of fraud or

²⁸ At common law, there was a similar immunity for “quasi-arbitrators” but whether the modern law recognises such a category of person is doubtful: see *Sutcliffe v Thackrah* [1974] AC 727; *Arenson v Casson Beckman Rutley & Co* [1977] AC 405

²⁹ Arbitration Act 1996, s.74

³⁰ This is referred to in the cases as “failing to follow instructions”, but that phrase can be confusing, since an expert is usually given his “instructions” in his contract of appointment. If the expert adopts a wrong construction of the main contract, that may or may not amount to a ground on which the valuation may be set aside, depending on whether the main contract puts the question of construction into the exclusive

collusion³¹ or, perhaps, procedural unfairness³². There is no term implied in the main contract that the valuer will carry out his valuation with reasonable skill and care and so, if the valuation is negligently given, it will nevertheless be binding as between vendor and purchaser, who will be obliged to sell and buy the property at the price which has been determined³³. However, the valuer owes both parties a contractual duty of care under his contracts of appointment and will be open to a claim in negligence by the party which has lost out as a consequence of his mistake. He is neither an expert witness nor an arbitrator, and cannot claim any immunity in relation to his acts or omissions in relation to his expert determination³⁴.

- 7.3 Say now that the valuer in the above contract must be a chartered surveyor with at least 10 years' qualification and experience in valuing properties of the nature of the subject property, to be appointed by the President of the RICS in default of agreement, and the parties fail to reach agreement on the identity of the valuer. In such a case the President of the RICS is also acting as an expert in making the appointment. If he appoints someone who clearly does not fulfil the qualities required by the main contract – for example he appoints a solicitor rather than a surveyor – his appointment is of no effect and may be ignored. On the other hand, the question of whether a particular chartered surveyor has the necessary qualifications and experience is a matter for the President, and the appointment will be valid if he asks himself the right questions, unless he reaches a decision which no reasonable person in his position could reach. He has a contractual relationship with the person applying for the appointment and may also owe a duty of care to the other party, but those duties will not be construed in such a way as to conflict with the provisions in the main contract: he will not be liable for breach of contract or duty of care if he makes an appointment which is valid under the terms of the main contract³⁵.

jurisdiction of the expert: *Norwich Union Life Assurance v P & O Property Holdings Ltd* [1993] 1 EGLR 64; *National Grid v M25 Group* [1999] 1 EGLR 65; *Nikko Hotels (UK) Ltd v NEPC Ltd* [1991] 2 EGLR 103

³¹ *Jones v Sherwood* [1992] 1 WLR 277

³² In *Worrall v Topp* [2007] EWHC 1809, Kitchen J was prepared to imply a term into the main contract that the expert (there a surveyor determining a boundary) should act fairly between the parties

³³ *Campbell v Edwards* [1976] 1 WLR 403

³⁴ *Palacath Ltd v Flanagan* [1985] 2 All ER 161

³⁵ *Epoch Properties Ltd v British Home Stores (Jersey) Ltd* [2004] 3 EGLR 34 (Court of Appeal of Jersey)

8. Conclusion

8.1 As we have seen, in some roles in dispute resolution the expert will be liable if he makes a negligent mistake; in others he can claim to be immune from civil proceedings. Whether this will remain the case for much longer is doubtful.

8.2 A short example will suffice to show the strange distinctions which the law currently draws:

8.2.1 In the first case, parties are in dispute over the rent payable for a new lease under the Landlord and Tenant Act 1954; the landlord arguing for £50,000 per annum and the tenant for £20,000. A single joint expert is appointed and gives a report stating that the rental value, applying the test required by the Act, is £20,000 per annum. The landlord reluctantly concludes that his case has no prospect of success in light of the single joint expert's opinion and agrees that the new rent will be £20,000 per annum. It later transpires that the single joint expert made a negligent mistake, the true rental value was indeed £50,000, but the landlord has no remedy against the single joint expert, and no right to appeal.

8.2.2 In the second case, a landlord and tenant in dispute over the rent payable for a new lease under the Landlord and Tenant Act 1954 agree to compromise that dispute by entering into an agreement under which the rent will be determined by an expert valuer. The expert duly appointed determines that the rent shall be £20,000 per annum. When his negligent mistake is discovered, the landlord can sue and recover damages representing the difference between the rent as determined and the £50,000 per annum it should have been.

The landlord in the first case could be forgiven for thinking that something has gone seriously wrong with a legal system which differentiates between these two cases.

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