expert matters

KordaMentha

Experts: Immune from the law?

Jones v Kaney [2010] EWHC 61 (QB) and Ingot Capital Investments & Ors v Macquarie Equity Capital Markets & Ors [No 6] [2007] NSWSC 124

Expert witnesses often provide opinions that are invaluable in assisting Courts reach fair judgments. Unfortunately, there are instances where the impartiality and independence of an expert is challenged.

As a result of both their contributions and failures, the role of experts has changed, and will continue to change, as time, the law, and public opinion evolves. This issue of *Expert Matters* considers two recent cases that suggest that the days of special protection being afforded to experts may be numbered.

Introduction by Andrew Ross

On 1 March 2000, the *Supreme Court Rules (NSW)* were amended to include divisions that dealt with expert witnesses. Along with these rules "Schedule K – Expert Witness Code of Conduct" was introduced. These rules were introduced, *inter alia*, to ensure that experts observed their overriding duty to the court.

Ten years on, and the role of experts continues to evolve.

In this inaugural edition of KordaMentha's *Expert Matters* newsletter I examine two recent cases that highlight the increased scrutiny being placed on experts and their conduct when assisting Courts[1].

For more than a decade I have been reviewing and discussing legal judgments in an effort to keep abreast of the emerging issues relevant to both experts and the legal practitioners who engage them. *Expert Matters* continues this tradition. I hope that it will be a useful reference for you.

Regards,

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"...it is very difficult to see, why an expert who owes a duty of care to a claimant when first advising and preparing reports, should not continue to owe that duty when signing a joint statement."

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Jones v Kaney [2010] EWHC 61 (QB)

In England, experts have immunity from prosecution by the party that appoints them in relation to their actions when preparing a joint expert statement and appearing at trial. This immunity arose from the basis of public interest, "which transcends the need to provide a remedy in the individual case"[2].

However, that immunity has been challenged after a judge granted leave for it to be reconsidered by the Supreme Court. Justice Blake stated that there is a "substantial likelihood" that "the public policy justification for the rule cannot support it"[3].

Background

In May 2003, Dr K was instructed to prepare a report in relation to a personal injury claim expressing her professional opinion on whether an individual, Mr J, was suffering post-traumatic stress disorder (PTSD). In her opinion, he was. Another expert disagreed, stating that Mr J was exaggerating his physical symptoms.

In October 2004, the Court ordered a joint statement to be produced. In November 2005, the experts held a telephone discussion which resulted in a draft report being sent to Dr K. Dr K signed this report, apparently without comment or amendment.

In the joint report the experts stated:

> *"Both experts agree that Mr J's psychological reaction... was no more than an adjustment reaction that [was not]... post traumatic stress disorder.*
>
> *Dr K has found Mr J to be very deceptive and deceitful... and would raise doubts of whether his subjective reporting was genuine."*

Dr K's instructing solicitors realised that this represented a major departure from her previous opinion and investigated. They submitted to the Court that:

- Dr K had not read the other expert's report.
- Dr K felt the joint report did not reflect her telephone discussion with the other expert but felt under some pressure to sign the joint report.
- Dr K's true view was that Mr J's actions were evasive, rather than deceptive, and that Mr J had suffered from PTSD which had now been resolved.
- Dr K had not been instructed in relation to certain facts, and had forgotten others at the time of the joint report.
- Dr K felt the joint report should be amended.

The presiding (District Court) judge was not convinced that Dr K should be removed from the proceedings. The case settled for an amount "considerably less" than it would have had Dr K not signed the joint report[4].

Negligence claim

Mr J commenced an action against Dr K on the grounds of negligence, acknowledging the precedent of expert immunity but claiming, inter alia, that he also had a right to a fair trial.

Dr K did not dispute the facts or that, if proved, that these facts could constitute evidence of a failure to adhere to a professional's duty of care. However, she relied on the doctrine of witness immunity as the basis for her defence.

Justice Blake found that:

- "[A]t the starting point, there is such a duty of care to give accurate and reliable advice that is accurately and reliably reflected in reports that will be relied upon by a party in the subsequent litigation."[5]
- "[It] is very difficult to see, why an expert who owes a duty of care to a claimant when first advising and preparing reports, should not continue to owe that duty when signing a joint statement".[6]
- However, the decision in *Stanton v Callaghan*[7] provided blanket immunity to experts in relation to negligence claims resulting from their conduct in a joint meeting of experts.

Counsel for Mr J submitted that the authority of *Stanton v Callaghan* had been eroded based on:

- *Phillips v Symes No 2* (2004) EWHC 2330 (Ch), [2005] 1WLR 2043, which concluded that an expert was liable for costs when his "evidence causes significant expense to be incurred and does so in flagrant, reckless, disregard of his duties to the court".
- *Meadow v General Medical Council* (2006) EWCA (Civ) 1390 [2007] QB 462, which "concluded that professional disciplinary proceedings did not infringe the principle of witness immunity."

Justice Blake found that recent cases that may have "narrowed or undermined the policy basis for expert witness immunity"[8] did not deprive the decision in *Stanton v Callaghan* of its binding effect. As such, the appeal was dismissed.

However, Justice Blake added that "if the Claimant's allegations are right, he has suffered a particularly striking injustice on which the first call on public policy is that there should be a remedy".[9] He therefore found that there was sufficient public interest to grant the plaintiff the right to refer the point of law to the Supreme Court for re-consideration.

Immunity in Australia

Although the *Jones v Kaney* case identifies a potential change in the attitude towards experts in England, this is unlikely to have a direct effect on Australian experts.

England removed barristers' immunity in 2000[10], which had previously been considered to be the paradigm case for immunity. However, in Australia, barrister and expert immunity from suit continues to apply in relation to their activities in connection of conduct before the Court.

In *Coshott v Barry [2007] NSWSC 1094*, a barrister's immunity was considered a successful defence. This was re-examined on appeal in *Coshott v Barry [2009] NSWCA 34*, which confirmed barristers' immunity whilst noting that immunity might not apply when an event "occurred too long before a trial to be regarded as involving a decision affecting the conduct of the case in court"[11]. In particular it was noted that "the period from the time the retainer commence[s] to the trial itself [is] too long for the requisite connection to the conduct of the case in court to be established" [12].

James v Medical Board of South Australia and Keogh [2006] SASC 267 reaffirmed that experts have a similar immunity. Justice Anderson stated[13]:

> *"Witness immunity exists because there is a public policy in ensuring that witnesses give evidence in an uninhibited way and also to avoid multiplicity of suits".*

Ingot Capital Investments & Ors v Macquarie Equity Capital Markets & Ors [No 6] [2007] NSWSC 124

A recent case in the New South Wales Supreme Court also highlights the responsibilities of experts to act appropriately and the consequences of failing to do so.

In *Ingot Capital Investments & Ors v Macquarie Equity Capital Markets & Ors [No 6] [2007] NSWSC 124*, Justice McDougall commented on the credibility of an expert providing evidence[14].

The expert prepared a report on the responsibilities of a competent chartered accountant in relation to a number of transactions and roles. The expert's expertise was challenged, and he provided additional evidence of various engagements that he had undertaken in the past that (he said) qualified him to express the opinions in question.

Justice McDougall stated that the expert conducted himself more like an advocate than a witness, citing examples relevant to the case such as:

- On occasion, the expert attempted to justify opinions by reference to legislation or standards, only to concede in cross-examination that these were inapplicable.
- The expert did not concede some points under cross-examination even when the bases of his statements were shown to be unsubstantiated.
- Evidence that the expert had counselled parties on the strength of their claims.
- It appeared the expert was acting to advocate a particular alternative rather than set out the available alternatives.

Justice McDougall also commented that:

- Aspects of the expert's evidence in these proceedings were not consistent with his earlier advice; and
- A further question over the expert's credibility related to his attempt to qualify himself to give evidence on certain procedures.

Justice McDougall rejected the evidence of the expert, commenting that he regarded these matters as extremely serious. Notwithstanding this, Justice McDougall did not suggest or recommend any further action.

Professional disciplinary proceedings

As a response to Justice McDougall's comments, the ICAA's Professional Conduct Tribunal recently publically announced that it had issued a reprimand to the expert involved in this case[15].

This treatment follows the High Court's dismissal in *James v Medical Board of SA & Anor [2007] HCATrans 103* of an application to prohibit a professional body from conducting disciplinary proceedings in relation to actions of an expert witness in court proceedings. In that case the High Court held that the relevant professional body had:

> *"its own statutory right and duty to determine whether its processes have been engaged for a vexatious or frivolous purpose... The functions of the [professional body] are for the protection of the public and the maintenance of professional standards. When its jurisdiction and powers are properly engaged it is for the [professional body], at least in the first instance, to discharge its functions without interruption by the [Court]"*

In *James v Keogh [2008] SASC 156*, Justice Debelle found that notwithstanding this right, the professional body must have regard to the adversarial nature of the trial and the specific circumstances of the case when considering the actions of an expert witness. This context is commonly argued as the rationale for the continued immunity of experts. However, Justice Debelle noted "that context does not absolve the expert from professional or forensic impropriety."

In its announcement the ICAA noted that:

> *"[The expert's] duties were as to his conduct as an expert witness in the proceedings before the Supreme Court of New South Wales, proceedings to which he was not a party, hence he was not represented by legal counsel at the proceedings, he had no entitlement to call evidence or to make submissions about what other parties may have said about his evidence or any comments which may have been made by McDougall J about him".*

Notwithstanding this disclaimer, the ICAA found the comments of Justice McDougall to be an adverse finding against the expert and, having regard to the circumstances of the case, imposed a reprimand.

Summary

These two cases present an interesting view on the current responsibilities of experts and the impact of a failure to perform these responsibilities appropriately.

Importantly for experts, these cases highlight that:

- There is likely to be a duty of care in relation to advice provided before the commencement of litigation.
- An expert may liable for costs where their conduct is found to be unreasonable.
- Any immunity granted under common law has no bearing on professional disciplinary proceedings.

These cases also suggest a growing trend towards general liability tempered by judicial discretion, which is eroding any expert immunity. Justice Blake suggests that it may be more appropriate to rely on a "carefully reasoned and judicial conclusion of whether it is fair just and equitable to impose a duty of care", rather than rely on a blanket immunity which may raise more issues that it solves.

Endnotes

1. Ben Mahler, a Manager at KordaMentha, assisted with the preparation of this article.
2. Stanton v Callaghan [2000] QB 75
3. Jones v Kaney [2010] EWHC 61 (QB)
4. This issue was not disputed.
5. Jones v Kaney [2010] EWHC 61 (QB), paragraph 39
6. Jones v Kaney [2010] EWHC 61 (QB), paragraph 40
7. Op. cit. (Note 1)
8. Jones v Kaney [2010] EWHC 61 (QB), paragraph 36
9. Jones v Kaney [2010] EWHC 61 (QB), paragraph 41
10. Arthur JS Hall v Simons [2000] WLR 543
11. Coshott v Barry [2009] NSWCA 34, paragraph 77
12. Coshott v Barry [2009] NSWCA 34, paragraph 62
13. James v Medical Board of South Australia and Keogh [2006] SASC 267, paragraph 66
14. Ingot Capital Investments & Ors v Macquarie Equity Capital Markets & Ors [No 6] [2007] NSWSC 124, paragraph 246. Justice McDougall noted that in respect of "credibility", he does not refer to the thoroughness, or logical power, of the reasoning of the expert.
15. ICAA Professional Conduct Tribunal – November, published 19 November 2009

Whatever the factual, accounting, financial or e-discovery issues that arise, KordaMentha Forensics' expertise and experience can bring clear thinking, objectivity and effective communication of ideas to help find the facts, understand the relevant issues and clarify the financial and other impacts in a cost-effective way.

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