THE REGULATION OF CONSTRUCTION EXPERTS AFTER *JONES v KANEY*

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Introduction

Experts have been involved in litigation for at least 450 years; in construction litigation since at least the mid-eighteenth century. As long ago as 1553, Saunders J said:

> 'If matters arise in our law which concern other sciences or faculties we commonly apply for the aid of science or faculty which it concerns. This is a commendable thing in our law. For thereby it appears that we do not dismiss all other sciences but our own, but we approve of them and encourage them as things worthy of commendation.'[1]

In 1782, the great Lord Mansfield said this of the famous engineer John Smeaton FRS (1724-1792), whom a party wished to call to testify as to whether an embankment had caused a harbour to silt up:

> 'Mr Smeaton understands the construction of harbours, the causes of their destruction, and how remedied. In matters of science, no other witnesses can be called … Handwriting is proved every day by opinion; and for false evidence on such questions a man may be indicted for perjury.'[2]

In modern construction litigation, it is so common to adduce experts' reports, analyses, agreements with other experts giving evidence in the same case and oral evidence, particularly cross-examination, that it is easy to lose sight of who an expert is in litigation terms, what his role is and should be in the litigation and whether he is answerable to anyone. These important questions are raised by the recently decided decision of the Supreme Court in *Jones v Kaney*.[3]

My intention in considering this important decision is to attempt, somewhat boldly, three analyses:

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1 *Buckley v Rice-Thomas* (1554) 1 Plowd 118 at 124.

2 *Folkes v Chadd* (1782) 3 Doug KB 157.

3 *Jones v Kaney* [2011] UKSC 13; [2011] 2 All ER 671; [2011] 2 WLR 823; [2011] BLR 283; 135 Con LR 1. The appeal, relying on the 'leapfrog' procedure under the Administration of Justice Act 1969 (as amended) ss12-13, was from a decision of Blake J [2010] EWHC 61 (QB). For further commentary on the case, see Marion Smith and Kate Grange, 'Trust Me; I'm an Expert', SCL Paper D131 (February 2012) <www.scl.org.uk>.

1. A summary of what the case decided;
2. An identification of who is affected by the decision and how the duties and liabilities of those affected have been changed;
3. A prediction as to how the duties and liabilities of construction professionals may develop more generally in the future.

Jones v Kaney is applicable to all experts giving evidence but I am confining my analysis to construction experts. This decision has occurred at a significant time, namely during the worst financial crisis that the United Kingdom has experienced since the Great Depression, possibly ever. The causes of that crisis are still being debated. In the United Kingdom, the consequences throughout the economy are dire, particularly for all forms and types of construction. In particular, construction has slowed alarmingly, few can afford to embark on construction projects of any kind and the consequences of completed projects are no longer affordable. An obvious example of the latter is in the field of Public Finance Initiative projects, the pay-back provisions of which are in danger of crippling the National Health Service and whose effects, in relation to completed projects, will be with us for three decades or more. These problems highlight, particularly, the role of quantity surveyors in construction and construction litigation. Quantity surveyors are the cost analysts, controllers, valuers and managers of the cost of most projects of all sizes. I intend, therefore, to narrow my predictions of the follow-up from *Jones v Kaney* to quantity surveyors since, as I hope to show, they are the most significantly affected by this decision.

The historical context

Traditionally, experts when giving evidence in court have been immune from liability to anyone affected by their words and opinions expressed in the trial, in the same way that counsel and other advocates and witnesses of fact were traditionally immune. This immunity extends back to the time when expert evidence was first admitted into a trial. In *Cutler v Dixon* in 1585, the claim against an expert witness was dismissed because, as the law report summary has it: 'if actions should be permitted in such cases, those who have just cause for complaint, would not dare to complain for fear of infinite vexation.'[4]

Similarly, in 1772, in *R v Skinner*, ten years before he dealt with Mr Smeaton's hydrological evidence, Lord Mansfield stated: '… neither party, witness, counsel, jury or judge can be put to answer, civilly or criminally, for words spoken in office.'[5]

These words were endorsed and explained by Lord Goddard CJ 187 years later in *Hargreaves v Bretherton*, when striking out a claim against a witness for allegedly committing perjury in an earlier trial where the defendant had been convicted of fraud, stated:

> '[*Lord Mansfield's*] statement is a perfectly clear statement by one of the greatest common lawyers that ever lived, that for words spoken by a

4 *Cutler v Dixon* (1585) 4 Co Rep 14b (76 ER 886, page 887) (KB).
5 *R v Skinner* (1772) Lofft 55 (98 ER 529) (KB).

> witness 'in office', which means, of course, for this purpose in giving evidence, he cannot be put to answer either civilly or criminally.'[6]

Construction professionals have historically had a unique position in being given almost absolute powers in construction contracts in relation to certification, managing the contract, resolving disputes and in acting as a construction expert. Thus, their immunity as an expert in giving evidence in court has to be seen in the context of their more general immunity and the impregnability of their decisions. In other words, the immunity of a construction professional in relation to his evidence in court went hand in hand with his general immunity when acting as a certifier under a contract between a building owner and the builder – even though he had been appointed by the building owner and acted as the building owner's agent.

We must start in Napoleonic times: construction contracts in standard form involving bills of quantities, interim payment provisions operated by interim certificates issued by the contract professional, usually an architect or a surveyor, were introduced in the early part of the nineteenth century as an adjunct to the great surge in infrastructure and factory construction when the industrial revolution gathered pace. These contracts required much measurement, taking off from drawings, arithmetical calculations and preparation by hand of lengthy bills (ie lists) of quantities. Architects began to hire out such work to those with experience and training in surveying, leading to the birth of the quantity surveying profession.

These early contracts invariably provided that the certifier's decision was final and conclusive. Moreover, the parties could not challenge the certifier's powers since they had no means of redress. A judicial remedy was excluded by the contractual device of making the contractor's entitlement to payment exclusively determined by the sum certificated by the architect or engineer and then providing that the issuing of a certificate was a condition precedent to payment. No other remedy was available since most contracts did not contain an arbitration clause. These immunities, at a time when the law of negligence had not developed, gave the architect or engineer enormous power. This power was described in this way in 1895 by Alfred Hudson in the second edition of his *Hudson on Building Contracts*:

> '… the architect or engineer – the agent of one side – is usually, by the terms of building contracts, put in the position of valuer and decider of all questions, to prevent disputes from arising out of the complications of building operations.
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> In this position his decision or valuation is unassailable except for fraud. He is more powerful than any judge, and may do practically what he pleases, and his negligent or incompetent decisions or valuations are binding on builder and employer. … To counteract in some measure this enormous power other clauses are often inserted to limit the powers of the architect, as for instance, by giving, in case of certain disputes, a

6 *Hargreaves v Bretherton* [1959] 1 QB 45 (QB).

right to refer to arbitration, this in some cases rather increasing than diminishing the complications.'[7]

The role of the architect or engineer as an autocrat immune from liability is graphically seen in the way that Isambard Kingdom Brunel acted when designing the Great Western Railway from Paddington to Bristol between in the 1830s. He did everything. He promoted the scheme, became a major shareholder in the company, surveyed the whole length of the potential line on horseback, advocated the necessary private Bill in Parliament over 40 parliamentary sitting days, designed the line and the rolling stock, personally appointed all the contractors, supervised the work and acted as the project manager and certifier throughout. He was ruthless with the contractors and the gangs of Irish navvies brought in to carry out the excavations, many of whom were killed excavating the Box tunnel.

Several contractors were bankrupted and all received insultingly reduced payment for their work. One, Ranger, had his employment terminated after he had successfully completed his stretch of the line near Maidenhead and received no further certificates of payment. He first attempted to recover his money by an ordinary suit but was repulsed by the absence of relevant certificates. He then attempted unsuccessfully to show that Brunel was biased due to his personal financial interest in the project, losing on the technicality that the engineer often had a shareholding in projects of this kind – although, as it transpired later, not to the extent that Brunel had. He finally had recourse to Chancery for accounts and, finally succeeded. The dispute was finally resolved by the House of Lords in *Ranger v Great Western Railway*, over 20 years after the contractor's entitlement to payment had arisen and after Brunel's death.[8] Ranger was awarded compound interest and nearly one million pounds – some going for 1854.

It has taken 150 years to erode this untrammelled power of the designer, valuer and project manager, being the modern equivalents of the three-in-one service previously provided by the architect or engineer. The starting point was the introduction of arbitration clauses into building contracts in the early part of the nineteenth century. However, this reform was only partially successful in alleviating contractors' financial difficulties. This was because the arbitration clause was ineffective once a final certificate had been issued or in allowing the arbitrator to go behind a certificate. Moreover, a party to an arbitrator's appointment was free to revoke his authority at any time before or after an award was published, so long as this revocation occurred before the parties had jointly made the submission to arbitration a rule of court, a procedure which was rarely adopted. The employer could, therefore, nullify the arbitration at any time.

The erosion of the architect's powers occurred gradually and in stages. The first step was in 1833, where by statute the appointment of an arbitrator was made irrevocable except by order of the court. This prevented the employer

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7 Alfred Hudson, *Hudson on Building Contracts* (2nd edition, jointly published by Waterlow & Sons Ltd and Stevens & Haynes, London 1895), page 2.

8 *Ranger v Great Western Railway Co* (1854) 5 HLC 72 (10 ER 824).

from avoiding the consequences of an unfavourable award by revoking the arbitrator's appointment.[9] This reform was only partly successful because the employer would nominate the architect and certifier to be the arbitrator. This practice was in turn largely stamped out as a result of the landmark decision of the House of Lords in *Dimes v Grand Junction Canal Co*.[10] The judges decided that the Lord Chancellor's shareholding in the defendant canal company should have led to his recusing himself from deciding its dispute with Mr Dimes.

The next step in this long process of reform was the redrafting of arbitration clauses in standard form construction contracts by adapting them to provide the arbitrator with the power to 'open up, review and revise the architect (or engineer's) certificate', a formula with which we are all now so familiar. This still left the contractor vulnerable to the non-issue of certificates, since a certificate was regarded as a condition precedent to payment and, hence, to a dispute arising about non-payment. The arbitration clauses in use did not give the arbitrator the power to resolve disputes about the alleged non-issue of a certificate and make a monetary award in the absence of a certificate. This led to the development of the doctrines of prevention, interference and the breakdown of contractual certification machinery. Where the employer could be shown to have initiated or been contractually responsible for these clogs on the issuing of valid and properly evaluated certificates, the contractor could recover without there having been proper prior certification.

Thus, in *Brunsden v Beresford* in 1883, Watkin Williams J charged the jury in a civil claim being tried by a jury as follows:

> 'If you think that the architect, acting upon his judgment, withheld his certificate, you must find a verdict for the defendant. If, however, you are of opinion that the withholding of the certificate was due to the improper interposition of the defendant, and that he prevented the architect from giving his certificate, you must find a verdict for the plaintiff.'[11]

There matters stood, so far as the immunity of the construction professionals was concerned, until the development of the law of negligence, particularly *Hedley Byrne v Heller* in 1964, which allowed the possibility of a claim for negligent advice giving rise to financial loss;[12] and the abolition in *Sutcliffe v Thackrah* in 1974 of the immunity from legal action enjoyed by certifiers.[13]

For at least a century prior to *Sutcliffe*, and certainly since 1902 in *Chambers v Goldthorpe*,[14] the courts had upheld the doctrine that an architect, when acting as a certifier in a construction contract, was immune from liability for

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9 The Civil Procedure Act 1833 s39, re-enacted by the Arbitration Act 1989 s1 and then by the Arbitration Act 1950 s1. The power was not re-enacted in the Arbitration Act 1996 because s23 confirms that the joint appointment of the arbitrator by both parties cannot subsequently be revoked by only one of them.

10 *Dimes v Grand Junction Canal Co* (1852) 3 HLC 759 (10 ER 301).

11 *Brunsden v Beresford* (1883) 1 Cab & Ell 125 (QB).

12 *Hedley Byrne v Heller* [1964] AC 465 (HL).

13 *Sutcliffe v Thackrah* [1974] AC 727 (HL).

14 *Chambers v Goldthorpe* [1901] 1 KB 624 (CA).

negligent performance of his work because, in that role, he was a 'quasi-arbitrator' and, like real arbitrators, was immune. The House of Lords found this analogy with the role of an arbitrator erroneous. Lord Reid put the true position with his usual clarity:

> 'The RIBA form of contract sets out the architect's functions in great detail. It has often been said, I think rightly, that the architect has two different types of function to perform. In many matters, he is bound to act on his client's instructions, whether he agrees with them or not; but in many other matters requiring professional skill he must form and act on his own opinion.'[15]

The next step in the journey relates to barristers' and solicitors' liability to their clients when negligently performing their role as advocates in court. For similar reasons to those that granted expert witnesses immunity, the House of Lords initially upheld their immunity in *Rondel v Worsley* in 1969,[16] but then narrowed it in *Saif Ali v Sydney Mitchell* in 1980,[17] finally overruling itself and removing their immunity in *Hall v Simons* in 2002.[18] Initially, too, expert witness immunity was upheld by the courts. In *Palmer v Durnford Ford* in 1992,[19] a claim against a motor engineer was struck out. He had given allegedly negligent advice that had led to a claim against a car manufacturer later being abandoned at considerable cost to the plaintiff. Then in *Stanton v Callaghan* in 1998,[20] the Court of Appeal struck out a claim against a surveyor whose alleged negligence in preparing a report before trial recommending an extensive underpinning solution to a subsidence-damaged property was followed by his agreeing with his opposite number to a much more limited solution. This led to the claim being compromised at a sum of £16,000 (having originally been for £70,000), since it was based on the more expensive scheme on which the surveyor had originally advised. The claim was based on the extensive additional costs that the plaintiff had incurred by pursuing the action almost to trial, when it could and should have been settled long beforehand.

Jones v Kaney: factual and legal setting

The action arose out of a late-night road traffic accident in Liverpool caused by a drunk, uninsured, disqualified driver colliding with the claimant, who was a stationary motorcyclist waiting to turn into a road junction. The claimant suffered physical injuries and significant psychiatric consequences including post-traumatic stress disorder, depression, an adjustment disorder and chronic pain syndrome. A clinical psychologist was instructed in connection with his claim against the driver and the Motor Insurance Bureau in the Liverpool County Court. Liability was admitted. This psychologist, later the defendant, reported on the claimant's psychological and stress-related conditions on two occasions. Following the opposing expert's report that the claimant was

15 *Chambers v Goldthorpe*, note 14, page 737.
16 *Rondel v Worsley* [1969] 1 AC 191 (HL).
17 *Saif Ali v Sydney Mitchell & Co* [1980] AC 198 (HL).
18 *Arthur JS Hall & Co v Simons* [2000] UKHL 38, [2002] 1 AC 615 (HL).
19 *Palmer v Durnford Ford* [1992] QB 483 (QB).
20 *Stanton v Callaghan* [2000] QB 75 (CA).

exaggerating his physical symptoms, the two psychologists held a 'without prejudice' joint experts' discussion on the telephone, pursuant to a court order; and prepared a draft joint statement. This was very damaging to the claimant's claim, in that it agreed that his psychological reaction was no more than an adjustment reaction and that he had no depressive disorder or PTSD. Indeed, the statement reported the defendant's views as being to the effect that the claimant was deceptive and deceitful in his reporting. Both experts considered that there were doubts as to the genuineness of his subjective reporting of his condition. The claimant attempted to obtain leave to change his expert but this application was refused. He then settled the claim at a significantly reduced figure than he considered he could and should have received, had the defendant not signed the joint statement in the terms she did.

The defendant informed the claimant's solicitor that she had signed the joint statement without seeing the reports of the opposing expert. It had been drafted by her opposite number and did not reflect the agreement she had reached over the telephone, but she signed it because she felt under some pressure to agree it. Her true view was that the claimant was evasive and not deceptive and that he had suffered from PTSD, which was now resolved.

The claimant's claim against the defendant psychologist was started in the Liverpool County Court but was transferred to the High Court. Blake J heard the defendant's application for summary judgment to strike out the claim, on the grounds that she was immune from action since she was acting as an expert witness when signing the joint statement in the extraordinary circumstances that she had recounted. The judge, considering himself bound by the decision of the Court of Appeal in *Stanton v Callaghan*,[21] struck the claim out. With the consent of both parties, he then adopted the little-used procedure of certifying that the appeal from his decision was fit to be leapfrogged direct to the Supreme Court, because the point of law was of general public importance and was one in respect of which he was bound by a fully considered decision of the Court of Appeal.

The appeal was accepted for hearing by the Supreme Court and seven justices were assigned. It is noticeable that the Supreme Court, which has been sitting for nearly two years, has sat with a bench of nine justices on several occasions, with a bench of seven on several more and with a bench of five for the remaining appeals it has heard. The House of Lords on a very limited number of occasions sat as a committee of nine Law Lords, usually when a prior decision of its own was being challenged. It would be helpful, if not desirable, if the Supreme Court could publish guidelines indicating when it considers it appropriate to adopt a composition of nine or seven justices. Presumably, this case was considered to be of great importance and as challenging long-established practice and precedent. As we shall see, it also had to meet head on, and overrule, a long-standing decision of its predecessor. A bench of nine might therefore have been more appropriate.

21 *Stanton v Callaghan*: note 20.

Jones v Kaney: the views of the majority

The Court, by a majority of five to two, allowed the appeal and reinstated the action against the psychologist. All five of the majority delivered full judgments. They agreed that an expert witness was different from a witness of fact, in that he or she was employed by the party who had instructed him or her, who owed the party instructing him a duty of care (hitherto subject to an immunity) in order to give opinion evidence as to significant matters that were in issue in the case. That distinguished the expert from a witness of fact who was called, if necessary by compulsion under a witness summons, without being employed or, even if employed, without reference to the contract of employment, to give evidence of fact and without owing any duty of care to the party calling him.

The justices in the majority supported the outcome by reference to the overarching principle that every wrong should have a remedy and that any exception to that rule must be justified as being in the public interest. Expert witnesses, like barristers, owe a duty to their clients. This duty of care has developed as a result of the development of the modern law of negligence which occurred long after the immunity granted to all witnesses was first developed. It followed that the essential question was whether the immunity afforded expert witnesses should apply in relation to liability for failure to comply with their duty of care owed to their client. The immunity was not being challenged in relation to any other party or to any other basis of claim since, in respect of those situations, there was no duty of care owed by virtue of their professional retainer.

In applying that approach, the majority justices had to consider whether the immunity was nonetheless necessary in the public interest. Two particular possible justifications for the immunity were considered in detail. The first was that it is necessary to ensure that expert witnesses are prepared to give evidence at all. However, the majority considered that this justification was not made out in the modern age. Lord Dyson explained why:

> 'The court has to exercise its judgment in assessing the validity of such an assertion. Whether professional persons are willing to give expert evidence depends on many factors. I am not persuaded that the possibility of being sued if they are negligent is likely to be a significant factor in many cases in determining whether a person will be willing to act as an expert. Negligence is not easy to prove against an expert witness, especially in relation to what he or she says in the heat of battle in court. This is the second of the three strands identified by Lord Wilberforce in *Saif Ali*. Professional indemnity insurance is available. Professional persons engage in many activities where the possibility of being sued is more realistic than it is in relation to undertaking the role of an expert in litigation. Thus, for example, it is a sad fact of life that births sometimes 'go wrong' and when that happens, parents sometimes

look for someone to blame. But that does not stop people from practising as obstetricians.'[22]

The second reason advanced in support of maintaining the immunity is that expert witnesses would be reluctant to give evidence against their clients' interests if there was a risk that they would be sued. This is the divided loyalty argument that was considered in relation to advocates in the advocates' immunity cases. The argument there was that the advocate owes an 'overriding duty' to the court and unless there was immunity from liability to the client, there was a danger that they would disregard their duty to the court. In *Rondel v Worsley*[23] and *Saif Ali*[24] the House of Lords described the advocates' duty to the court as 'overriding' and regarded that fact as one of the reasons for not withdrawing the immunity.

In *Hall v Simons*, Lord Hoffmann recognised that the duty of the advocate to the court is 'extremely important in the English system of justice'.[25] He described the divided loyalty argument as being that 'the possibility of a claim for negligence might inhibit the lawyer from acting in accordance with his overriding duty to the court'.[26] This argument was reiterated by counsel for the defendant in *Jones v Kaney*. Lord Hoffmann dealt with this argument in *Hall v Simons* in this way:

> 'To assess the likelihood [*of the removal of the immunity having a significant adverse effect*], I think that one should start by considering the incentives which advocates presently have to comply with their duty and those which might tempt them to ignore it. The first consideration is that most advocates are honest conscientious people who need no other incentive to comply with the ethics of their profession. Then there is the wish to enjoy a good reputation among one's peers and the judiciary. There can be few professions which operate in so bright a glare of publicity as that of the advocate. Everything is done in public before a discerning audience. Serious lapses seldom pass unnoticed. And in the background lie the disciplinary powers of the judges and the professional bodies. […]
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> Looking at the other side of the coin, what pressures might induce the advocate to disregard his duty to the court in favour of pleasing the client? Perhaps the wish not to cause dissatisfaction which might make the client reluctant to pay. Or the wish to obtain more instructions from the same client. But among these pressures, I would not put high on the list the prospect of an action for negligence. It cannot possibly be negligent to act in accordance with one's duty to the court and it is hard to imagine anyone who would plead such conduct as a cause of action.'[27]

22 *Jones v Kaney*, note 3, para [117].
23 *Rondel v Worsley*: note 16.
24 *Saif Ali*: note 17.
25 *Hall v Simons*, note 18, page 692D.
26 *Hall v Simons*, note 18, page 686F.
27 *Hall v Simons*, note 18, page 692F.

The majority in effect adopted this reasoning. They accepted that the analogy between the advocate and the expert witness is not precise, but that it is sufficiently close for much of what Lord Hoffmann said to be equally applicable to expert witnesses. In particular, like advocates, they are professional people who can be expected to want to comply with the rules and ethics of their profession. Experts can be in no doubt that their overriding duty is to the court. That is spelt out in the rules and they are reminded of the duty every time they write a report. Thus, rule 35.10(2) of the Civil Procedure Rules states that at the end of the expert's report 'there must be a statement that the expert understands and has complied with their duty to the court'. Furthermore, there is no reason to doubt that most experts are honest conscientious people who need no other incentive to comply with their duty and with the rules and ethics of their profession. Although there may be a few experts (as there may be a few advocates) who behave dishonourably, that is no more compelling a reason for retaining the immunity for experts than it was for retaining it for advocates.

Lord Collins, with characteristic thoroughness, considered the position of expert witnesses in the courts of the Commonwealth and the United States. Before dealing with that position, he somewhat mischievously highlighted what for him were deficiencies in the arguments presented by both counsel in what might be said to be an object-lesson in appellate advocacy:

> 'It is highly desirable that at this appellate level, in cases where issues of legal policy are concerned, the court should be informed about the position in other common law countries. This court is often helped by being referred to authorities from other common law systems, including the United States. It is only in the United States that there has been extensive discussion in the case law of the policy implications of removal of immunity for actions by disappointed clients against their experts. On this appeal the appellant did not rely on the United States material, although it is helpful to his case. The respondent's counsel drew attention to some of the United States cases on the basis of research which (it was said) was 'slightly hampered by the renovation of the Middle Temple's American room'. But there is an outstanding collection of United States material in the Institute of Advanced Legal Studies in London University, and (provided the barristers or solicitors concerned are prepared to make the expenditure) all of the material is readily available on line.'[28]

Lord Collins's investigation of the relevant authorities in Australia, New Zealand, Canada and in the courts of various states in the United States showed that, in the jurisdictions which had considered the issue of expert witness immunity, the great majority no longer maintained that immunity. This was particularly so in six of the seven state courts in the United States that had considered the issue. Lord Collins concluded:

> 'The policy reasons in these decisions included these: The reality is that an expert retained by one party is not an unbiased witness, and the threat of liability for negligence may encourage more careful and reliable

28 *Jones v Kaney*, note 3, para [76].

> evaluation of the case by the expert. Consequently, the threat of liability will not encourage experts to take extreme views. The client who retains a professional expert for court-related work should not be in a worse position than other clients. The practical tools of litigation, including the oath, cross-examination, and the threat of perjury limit any concern about an expert altering his or her opinion because of potential liability. The risk of collateral litigation is exaggerated. There is no basis for suggesting that experts will be discouraged from testifying if immunity were removed – most are professional people who are insured or can obtain insurance readily, and those who are not insured can limit their liability by contract.'[29]

I should like to amplify the reference to the expert's duty to the court. It is only in recent years, and only clearly since the advent of the Civil Procedure Rules and the enhanced procedure governing the admission of expert evidence enshrined in rule 35 that there has been express reference to this duty. The duty is one of candour and objectivity and is expressed in the Protocol for the Instruction of Experts in this way:

> '4.1 Experts always owe a duty to exercise reasonable skill and care to those instructing them, and to comply with any relevant professional code of ethics. However, when they are instructed to give or prepare evidence for the purpose of civil proceedings in England and Wales they have an overriding duty to help the court on matters within their expertise. This duty overrides any obligation to the person instructing or paying them. Experts must not serve the exclusive interest of those who retain them.'

Thus, the duty to the court, or as I would prefer to say, to the court or tribunal, is the same duty as that owed to the client when the expert is acting for the client in a litigious situation. However, that duty is the same as the duty to exercise reasonable skill and care since the expert is required to provide all his services in accordance with the established and accepted standards of his profession and area of expertise. The only difference occurs if the client instructs the expert to advise or act in a way that does not accord with his duties of candour and objectivity which, in turn would entail acting in a way that departs from the relevant professional standards governing his area of professionalism. That would normally involve the expert in acting in contravention of the code of professional conduct and ethics to which he is bound. If, notwithstanding that, the expert accepts instructions to act in what is, essentially, an unprofessional manner, that expert cannot subsequently act as an expert witness in a dispute arising out of the same matter without transgressing the further rule of professional conduct except, perhaps, by revealing his previously unethical behaviour to all parties and the tribunal and then reverting to his overriding duties of candour and objectivity.

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29 *Jones v Kaney*, note 3, para [81]. Lord Collins also referred to what he described as the critical analysis by Andrew Jurs, 'The Rationale for Expert Immunity or Liability Exposure and Case Law since *Briscoe*: Reasserting Immunity Protection for Friendly Expert Witnesses' (2007-2008) 38 U Memphis LR 49.

It is significant that the majority effectively overruled a long-standing decision of the House of Lords in a Scottish appeal, *Watson v M'Ewan* from 1905.[30] In that case, Sir Patrick Watson, a hospital surgeon and clinical teacher with an unrivalled reputation for his operating skill and teaching powers accepted instructions from Mrs M'Ewan with a view to his giving expert evidence on her behalf in an action for separation and aliment (ie alimony and maintenance). He did not in fact give evidence for her, apparently because he expressed to her solicitors views that were adverse to her case. He was then retained by Mrs McEwan's husband and, in giving evidence, referred to matters which he had learnt from her during a professional consultation with her, to the effect that he had formed the impression that both she and her father had attempted to induce her abortion with the intention of obtaining a separation. This evidence was alleged to have so impressed the judge that he dismissed Mrs M'Ewan's case in circumstances that, but for Sir Patrick's evidence of his views formed during his consultation, she would have won. Mrs M'Ewan and her father separately sued him for slander and breach of confidentiality. Witness immunity was relied on as a defence. In the House of Lords, the Lord Chancellor and the other Law Lords remitted the case to the Court of Session for it to be dismissed because both Mrs M'Ewan's and her father's claims in their entirety infringed the expert witness immunity that Sir Patrick was entitled to.

As Lord Hope clearly showed, this decision is a clear authority in favour of the rule of expert witness immunity. The first cause of action, in slander, is one for which Sir Patrick was entitled to immunity, since the Supreme Court in *Jones v Kaney* reaffirmed the immunity from defamation proceedings that all witnesses enjoy in relation to anything said by them when giving evidence. However, that immunity did not extend, and did not need to extend, to breach of confidentiality proceedings, so the House of Lords in *McEwan v Watson*, in directing the dismissal of the entire action, must clearly have decided to maintain a general expert evidence immunity.

This decision in *Watson v M'Ewan*,[31] which has stood for over a century, was one of the grounds on which Lord Hope dissented, since he did not consider that there was any good reason to overrule it. Very little was said about this decision by the majority save for Lord Phillips, who stated that the case appeared to been concerned with the claim for slander and was not concerned with the duty of care that, under the modern law, is owed by an expert to his client. That explanation is not satisfactory since the case was also concerned with breach of confidentiality; there is nothing otherwise in the reasoning of the majority that confines the lifting of immunity to claims in negligence.

The reality is that the *M'Ewan* case had been largely overlooked in recent years and had also been mistakenly thought to apply only to slander actions. It was only the industry and erudition of Lord Hope that showed clearly the full extent of the decision. It is also clear that, had the Supreme Court faced up to *M'Ewan*, the majority would have overruled it. No doubt because the appellant had not raised the possibility, they were somewhat reluctant to do so

30 *Watson v M'Ewan* [1905] AC 480; (1905) 12 SLT 599 (HL).
31 *Watson v M'Ewan*: note 30.

expressly. However, since it is not realistic to confine the withdrawal of immunity to negligence actions, I conclude that expert witness immunity has been removed from all causes of action except those involving defamation occurring during the giving of evidence or in the reports prepared for that evidence; and that the *M'Ewan* case, in relation to breach of confidentiality immunity, has in fact been overruled.

Jones v Kaney: the views of the dissenting minority

Lord Hope and Lady Hale, who dissented, both thought that a reform of this significance should be made by the legislature after its ramifications had been fully worked out, perhaps by the Law Commission. They also considered that additional questions should be answered which would be left unanswered by the decision of the majority. In Lord Hope's case:

> 'What about the joint or the court appointed expert? And what about witnesses who, although not experts, can be said to owe duties to a party to the litigation or those who may be affected by what they say? Is the immunity to be removed from the company director who owes a duty to the company to promote its interests but is said to have made an inexcusable error when giving evidence on its behalf? What about the employee with specialist skills who gives evidence on his employer's behalf and is said to have caused loss to his employer because of the negligent way he presented his evidence? How does one determine who, for the purposes of the removal of the immunity, is an expert and who is not? And how is one to identify those to whom the duty is owed? In *Carnahan v Coates*,[32] Huddart J drew attention to the fact that *prima facie* a professional person who gives evidence owes a duty of care towards all who might be contemplated to be harmed by his failure to conduct himself with the minimum standard of care dictated by his profession. In *E O'K v DK*,[33] the unsuccessful party to an action of nullity of marriage sought damages against a witness whom the court had appointed to carry out a psychiatric examination of her, alleging that he had been negligent.'[34]

In Lady Hale's case, she was concerned that the proposed change in the law should be examined in all situations in which it would apply, including family and children's cases, civil and criminal law and in all courts and tribunals. She said:

> '181 … [*Leading counsel*], for the appellant claimant, was at pains to exclude consideration of the liability of expert witnesses in other contexts. But I do not think that we can exclude it. If we are to change the law, we must do so in a principled way. 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

32 *Carnahan v Coates* (1990) 71 DLR (4th) 464, 471-472 (Supreme Ct of British Columbia).

33 *E O'K v DK* [2001] 3 IR 568 (Supreme Ct of Ireland).

34 *Jones v Kaney*, note 3, para [172].

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.

182 All of this may sound straightforward. But even in ordinary civil cases, it is not completely so. A doctor who has treated the patient after an accident or for an industrial disease may be called upon, not only to give evidence of what happened at the time, but also to give an opinion as to the future. Sometimes there may be a fee involved and sometimes not. Is the proposed exception to cover all or only some of her evidence? In many civil cases, there are commonly now jointly instructed experts on some issues. A jointly instructed expert owes contractual duties to each of the parties who instruct her. A party who is disappointed by her evidence will often find it difficult to persuade the court to allow a further expert to be instructed to enable her evidence to be properly tested. But the disappointed party does not have to ask the court's permission to find an expert who will enable him to launch proceedings against the jointly instructed expert. Because such an expert is extremely likely to disappoint one of those instructing her, she may be more vulnerable to such actions than is the expert instructed by one party alone.

183 How far beyond ordinary civil proceedings is this exception to go? I have already suggested that it would have to apply to essentially private law proceedings in tribunals as well as in courts – thus to proceedings between landlord and tenant in leasehold valuation, service charge, rent assessment and other such disputes; or between employer and employee in unfair dismissal, redundancy, discrimination and breach of contract cases. But what about cases which are essentially public law proceedings? Should the 'independent' psychiatrist who is instructed on behalf of the patient in tribunal proceedings under the Mental Health Act 1983 be covered by the proposed exception? Should the educational psychologist or child psychiatrist instructed by the parents of a child with special educational needs to give evidence in tribunal proceedings under Part 4 of the Education Act 1996? These are sensitive and often highly fraught cases in which performing the expert's duty to the tribunal may well be perceived by the client patient or parent as a breach of her duty towards him.

184 This brings me to family proceedings, in which all of these various situations can arise. The most obvious analogy with an ordinary civil case is ancillary relief proceedings between husband and wife. Expert valuation or forensic accountancy evidence is common. If such experts may be held liable to their clients in other civil proceedings, it is hard to see why they should not be so liable in ancillary relief proceedings. The next example is proceedings between mother and father (or other relatives) about the future of their children. Often, the court will be assisted by a welfare report from a Cafcass officer. That officer is not instructed by either party and so will presumably run no risk of liability to either of them. But sometimes the parties will jointly instruct a child psychiatrist or psychologist to assist the court. Is such an expert to be

potentially liable to the disappointed parent even though it is generally accepted that her principal duty is owed, not to the parents, but to the child? And sometimes, even in these private law disputes, the child will be separately represented. Such cases are so difficult and sensitive that it is quite likely that an expert will be instructed on behalf of the child. Is such an expert to be potentially liable to the child?

185 Then there are public law proceedings between a local authority, the child and the parents. There will often be a great deal of expert evidence. Some of the evidence will come from social workers employed or instructed by the local authority. Some of these will be simple witnesses of fact. Some will have carried out expert risk assessments. Many will do both. Are they to be potentially liable to the local authority in respect of all or only some of their evidence? Some of the evidence will come from doctors, nurses and other health care professionals who have treated or looked after the child at critical times. They may be called as witnesses by any party to the proceedings but are usually called by the local authority. I do not know, but it may be that they are sometimes paid a fee for giving an expert opinion to the court. Are they to be potentially liable to whoever called them as witnesses in respect of all or only some of their evidence? Some of the evidence will come from health care professionals who have not treated the child, but have been called in to make an assessment for the purpose of potential or actual care proceedings. They may be instructed by the local authority, the parents or the child's guardian. Are they to be potentially liable to whoever instructed them? Should any of this depend upon whether the expert is paid a fee specifically for her appearance in court, or provides her assessment as part of her ordinary duties to the health or social care services, who may not be party to the proceedings, or provides it as part of a special arrangement between the agencies?'

Answers to Lord Hope and Lady Hale

Who is an expert?

There is, surprisingly, no clear definition of who is subject to the expert witness provisions of the Civil Procedure Rules, save that an expert means 'an expert instructed to give or prepare expert evidence for the purpose of proceedings'.[35] However, it is clear that an expert must be someone who is qualified by training, professional qualification or experience to express opinions about a subject which cannot be dealt with by witnesses of fact or from the uninformed knowledge of the tribunal. The evidence must be opinion evidence, that is evidence whose content is based on facts provided to or ascertained by the expert as a result of his expertise in the relevant field of enquiry and which involves an interpretation of the facts or deductions from the facts of a technical nature.

35 Civil Procedure Rules, rule 35.2(1).

Does the immunity extend to arbitrations and adjudications?

There is, surprisingly, very little authority as to the extent to which witness immunity extends to arbitrations or adjudications. Some contend that there is no such thing as an 'expert witness' in such settings, since the formal rules of evidence are not applicable. However, the immunity, or rather the lack of immunity, applies to 'expert witnesses' when giving evidence to a court and is a rule of substantive law. Furthermore, it is irrelevant that arbitrators and adjudicators do not require professional evidence to be subject to the same detailed rules of procedure as are applicable in court. In reality, many arbitral institutional rules make provision for the preparation and giving of expert evidence and an adjudicator will invariably receive expert reports and valuations as part of the submissions placed before him by each party. Expert evidence is regularly received in the many different tribunals that are now in place. It is clear that expert evidence immunity applied to arbitrations and adjudications previously: both are set up to resolve disputes by a professional who is independent of the parties.

When expert witnesses give evidence, whether by way of report, agreement, orally or in meetings summoned by the tribunal and whether on oath or unsworn, the entirety of their evidence is to be regarded as expert evidence. It is neither possible nor appropriate to separate fact from opinion and grant them immunity when giving factual evidence and no immunity when giving opinion evidence. The test is this: does the evidence that is given, even if it is evidence of what has been seen, heard, read or experienced, have added value because it was obtained or interpreted by the witness using or relying on his training, professional qualifications or experience? Only if the entirety of the evidence that is given is purely factual – with no expert added value – would the witness be regarded as a witness of fact rather than an expert.

Duty to the tribunal

The expert will owe the same duty to an arbitrator or adjudicator as he would have owed to a judge or other tribunal, had the dispute and his evidence been heard in that different forum. It would otherwise mean that the nature of the evidence that is given and the duty of care owed would vary depending on the tribunal yet the rules of professional conduct and the applicable professional standards are the same throughout.

This can be seen by considering the excellent Practice Statement and Guidance Note published by the RICS.[36] This clearly and expressly covers all tribunals in which a member of the RICS might be instructed to appear in, including both arbitrations and adjudications. The Practice Statement sets out unequivocally the duty of a surveyor in providing expert evidence:

> '*Your overriding duty as an expert witness surveyor is to the tribunal to whom the expert evidence is given.* This duty overrides the contractual duty to your client. The duty to the tribunal is to set out the facts fully

36 Royal Institution of Chartered Surveyors, *Practice Statement and Guidance Note: Surveyors acting as expert witnesse*s (3rd edition, 2008).

> and give truthful, impartial and independent opinions covering all relevant matters whether or not they favour your client. This applies irrespective of whether or not the evidence is given on oath or affirmation. Special care must be taken to ensure that expert evidence is not biased towards those who are responsible for instructing or paying you. The duty endures for the whole assignment. Opinions should not be exaggerated or seek to obscure alternative views or other schools of thought, but should instead recognise and, where appropriate, address them.' [*emphasis added*]

The entirety of the Practice Statement sets out with admirable clarity the full range of an expert witness's duties, obligations and functions; although prepared for surveyors, it could readily be adopted by all construction professionals.

Joint and court appointed experts

These experts owe duties to all parties who appointed them or who are parties to the court or tribunal who appointed them. They are, therefore, in principle capable of being sued by such parties, who will have a contractual or statutorily imposed obligation to remunerate them.

Employees

If an employee is asked to give evidence and has the relevant experience and expertise, and if the evidence is of an expert nature and is relevant, that employee may give expert evidence. This is subject to any objection sustained by the tribunal that that expert is either lacking in impartiality or may be perceived to be lacking in sufficient independence, such that the tribunal rules that the witness may not give expert evidence. That is a matter of procedure and not one relating to the admissibility or immunity of the witness. The matter is well covered by the RICS Practice Statement:

> '2.5 You are entitled to accept instructions from your employer to give expert evidence on behalf of that employer. Prior to accepting such instructions, you must satisfy yourself that your employer understands that your primary duty in giving evidence is to the tribunal and that this may mean that your evidence will conflict with your employer's view of the matter or the way in which your employer would prefer to see matters put.'[37]

The future: quantity surveyors

There are now about 50,000 practising members of the RICS and many more surveyors who are members of other surveyors' professional bodies. As we all know, quantity surveyors act for clients through the whole range of functions involved in matters of cost and value in a large range of contracts. They also act as contract managers, building surveyors and valuation surveyors. The RICS has produced, in addition to the Practice Statement

37 *RICS Practice Statement*: note 36.

above, a library of standards, practice and guidance notes, methods of measurement and pricing guides. For example, there is world-wide acceptance of the Red Book (covering valuations of all types of properties in all types of user situations), the Standard Methods of Measurement, for which the RICS has a part responsibility, and the New Rules of Measurement.

It follows that all these are relevant in defining the content of a quantity surveyor's duty of care and of the standards that are expected of him, whether in advising on tendering procedures and appropriate forms of contract, in preparing tender and contract documents, in evaluating tenders, in measuring and valuing the work in all stages, in certifying and negotiating rates, prices and extensions of time and disruption claims, in preparing final accounts, in managing the project, in preparing claims, reports, agreements and in giving evidence. These standards have a number of interlocking objectives, including the setting and maintaining high quality service to clients with regard to cost control, accurate and reliable cost assessments and obtaining the best value for a client, being a value which is fair, contractually based and transparent. In surveying quintessentially, it is possible readily to ascertain the appropriate professional standard for each of these phases of a quantity surveyor's work. The modern quantity surveyor is, or is capable of being, a modern Brunel, that is, the provider of an inclusive service that is transparent and accountable and provides value for money. If time allowed, I am confident that an audit of other construction professionals' standards would provide a similar bill of health.

Conclusions

The real benefit of *Jones v Kaney* is not that it increases the potential liability of construction professionals but that it enhances the uniform nature of their professional duties, whether as contract professionals or as participants in dispute resolution procedures. The preparation of rates or tender documents must be undertaken with the same degree of professionalism and with the use of the same professional standards as the preparation of an expert's report, a final account or an experts' agreement. It is my belief that this will lead, with time, to a significant reduction in disputes and of the overall transaction costs of construction projects of all kinds. Thank goodness for the drunken Scouser who so unkindly ran into the unfortunate Mr Jones.

His Honour Judge Thornton QC is a judge of the Technology and Construction Court.

'The object of the Society
is to promote the study and understanding of
construction law amongst all those involved
in the construction industry'

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