

The Hong Kong Institute of Surveyors

"Expert – Role and Liability"

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Need for Experts

Citibank v Noble Treasure, CFI, 23 December 2010

- admissibility

 - S58 Evidence Ordinance

 - opinion on relevant matter
 - qualified to give expert evidence
 - not qualified but convey relevant personally perceived

- relevance

 - assist the Court

- leave granted if clearly relevant or "not clear"

- fact vs opinion



Suitability of Experts

- party's choice respected unless:
 - clearly irrelevant
 - clearly unsuitable
- challenge on qualifications,
e.g. not practising, no working experience on the subject, no published paper, etc
- weight vs suitability

Role of Expert Witness

- a "witness" selected, instructed and paid by a party to litigation
- for his expertise
- permitted on that account to give opinion evidence
- vs witnesses of fact
- vs non-party experts, treating doctor
- vs advocates

Duties of Expert Witness

Two main duties:

1. To the Court:
 - overriding duty
(Hong Kong Civil Procedure, Order 38 rule 37C and Code of Conduct)
 - impartial and independent
 - not an advocate
2. To the client
 - reasonable care and skill
 - put forward the best



Expert Immunity – The Rule

- dates back over 400 years, *Cutler v Dixon* (1585)
- originally absolute privilege against claim for defamation extended to all who took part in legal proceedings
- extended to other forms of tort action, *Hargreaves v Bretherton* (1959)
- extended to expert work preliminary to giving evidence, *Palmer v Durnford Ford* (1992)
- extended to negligence in preparing a joint statement by expert witness, *Stanton v Callaghan* (1998)
- barrister's immunity abolished already
Arthur JS Hall v Simons (2002) HL

Jones v Kaney

UK Supreme Court, 30 March 2011

The facts

- C suffered physical and psychiatric injuries in a road traffic accident
- D clinical psychologist, examined him and reported "post-traumatic stress disorder"
- proceedings issued and D became C's expert
- liability admitted and quantum in issue
- D signed a "joint statement" with opposing expert that:
 - C had no psychiatric disorder
 - C was deceptive and deceitful

Why?

- questioned about discrepancy by C's solicitors
- D felt "pressurised" to sign it
- did not reflect what she had agreed
- C forced to settle for significantly less
- C sued D in negligence
- claim struck out by Judge but granted a "leap frog" certificate to appeal to UKSC
- key issue for UKSC: immunity for expert witness to be retained?



The Support

- long established rule
- full and frank evidence to Court
- reluctance to testify
- vexatious claims
- multiplicity of suits



The starting position

- conflicting policy : "*no wrong should be without a remedy*"
- whether retention clearly justifiable
- no presumption of retention because of existence
- not long-established anyway
- expert immunity first arose in *Palmer v Durnford Ford* (1992)



Conflicting duties

- no longer scope for conflict
- expert's statement in his report of his duty to the Court
- agreement with client to perform duties to the Court
- reasonable skill and care implied by statute, Supply of Goods and Services Act
- cf position of barristers
 - may involve concessions contrary to client interest

Reluctance to testify

- no empirical data of supply and demand
- not happened with barristers
- may insure against risks
- no different from any other professional services not involving legal proceedings



Vexatious claims and multiplicity of suits

"The rational expert witness who has performed his duty is unlikely to fear being sued by the rational client."

per Lord Phillips

- for the irrational, difficult to prove negligence
- expert support and financial resources required
- not happened with barristers
- not satisfied there will be a proliferation of vexatious claims or multiplicity of suits
- immunity abolished
- not affect absolute privilege in respect of defamation

Changing minds?

- not pitching initial views too high or too inflexibly
- may expose and embarrass them at a later stage
- "hired gun"
- "cold feet"
- bad for clients
- good for settlement



Changing sides?

Meat Corp of Namibia v Dawn Meats, 7 March 2011 UK Ch

The facts:

- Meat industry expert
- MC in negotiation with Mrs B
- MC told Mrs B:
 - offers made to DM
 - strengths and weaknesses of the respective cases
 - tactics for mediation and settlement



Changing sides? (Cont'd)

- Mrs B eventually not accept MC's instructions and said:
"... Please be assured that I have no involvement with your case and would not discuss it with anyone."
- Mrs B then accepted instructions to act for DM
- Mrs B had a consultancy agreement with DM to sponsor her to attend meetings at the International Meat Trade Association (IMTA)
- Mrs B may have involved in some of the transactions in dispute

The Challenge

MC applied for permission to call her be refused on the grounds that:

- she is in possession of confidential and privileged information passed to her by MC
- she lacks independence



Conflicting policies

Policy 1: No property in a witness

"The reason is because the Court has a right to every man's evidence. Its primary duty is to ascertain the truth. Neither one side nor the other can debar the Court from ascertaining the truth either by seeing a witness beforehand or by purchasing his evidence or by making communication to him."



per Lord Denning in *Harmony Shipping v Saudi Europe Line Limited* (1979)

Policy 2: Confidential and privileged information to be protected

Privilege and Confidentiality

- DM agreed the information should remain confidential
- Mrs B undertook to the Court not to disclose it
- strict test for solicitors or accountants providing litigation support, *Prince Jefri Bolkiah v KPMG* (1999)
- a client should be able to have complete confidence that what he tells his lawyer will remain secret
- should not expose former client to any risk of its confidential information coming into the hands of someone with an adverse interest
- unless the risk is "*merely fanciful or theoretical*"

The test

- test for solicitors not appropriate
- whether confidentiality and privilege adequately maintained:
 1. undertaking sufficient
 - Q: her promises not to act or discuss case
 - not contractually bound
 - not what she admitted or said



The test (Cont'd)

2. information irrelevant to her functions as an expert and uninteresting to DM
 - offers known to DM
 - merits of case and approach to settlement (covered by undertaking)
- not engaged yet
- information provided to her in the course of enquiries
- express refusal to receive privileged information not necessary

Lack of independence

General principles:

- desirable not to have actual or apparent interest in outcome
- existence of interest does not automatically render evidence inadmissible; nature and extent of interest or correction that matters
- determined as soon as possible in the course of case management
- matter of fact and degree; test of apparent bias not relevant
- questions : (i) relevant expertise; (ii) aware of primary duty to Court despite the interest
- weigh alternative choices if evidence excluded
- interest may affect weight of evidence

Relationship with a party

- friend
 - not apparent bias test
- employee
 - no overriding objection
 - may affect weight
- consultant
 - limited role
 - matters remote from issues



Other "connections"

- fine to promote interest of DM in meetings
- talk to witnesses not a problem if content okay
- involvement in transactions could be a problem but no sufficient evidence
- could be subject to cross-examination about her independence

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