

The surveyor's role in dispute resolution: liabilities and immunities

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Surveyors bring their expertise to bear on litigation and other forms of dispute resolution in many different ways: as advisers, witnesses, experts appointed under a contract, arbitrators, mediators and advocates. This article looks at what happens when a mistake is made, or alleged to have been made, by a surveyor in one of those roles. Must the surveyor reach for his insurance policy, or may he claim an immunity which prevents him being sued?

The Duty of Care

The starting point is that a surveyor owes his client a duty to exercise reasonable skill and care in relation to the matters on which he is instructed. This duty of care arises from two independent sources. Where a surveyor acts for a client under a contract, in return for payment of a fee, the law will imply a term into that contract to that effect, if none is expressed ^[1]. At the same time, the professional relationship between the surveyor and client also gives rise to a duty of care in tort. Even where there is no contract, if the surveyor knows or ought to know that someone is relying on his advice, he will owe that person a tortious duty of care ^[2]. 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 1999^[3]. It is rare for a surveyor to owe a duty of care to the party with whom his client is in dispute, but it is not impossible. 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 valuation ^[4]. 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 misrepresentation ^[5].

Breach of Duty

Of course not every mistake will amount to a breach of the duty to exercise reasonable skill and care. Even though a duty of care is owed, a surveyor will not be liable for losses unless it can be shown that he fell below the minimum standard expected of reasonably competent surveyors. Where, for example, there is a range of valuations open to competent valuers, the surveyor is negligent only if his valuation falls outside that range.

Other Duties

In addition to his duty to his client or others to carry out his work with reasonable skill and care, the surveyor is bound by the rules of conduct of his profession and is subject to his professional body's disciplinary proceedings for a breach of those rules. A professional person who acts as an expert witness also owes duties to the Court, famously set out by Cresswell J in *The Ikarian Reefer*^[6] and now enshrined in CPR 35^[7]. His overriding obligation is to help the court on matters within his own expertise, and this obligation overrides any obligation to the person from whom he has received instructions or by whom he is paid.

Expert Witness Immunity

When a surveyor is instructed as an expert witness - whether on behalf of one party, or as a single joint expert - he gains the benefit of an immunity from civil proceedings¹⁹. 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"¹⁹.

There are said to be two reasons which underpin this rule of public policy. Firstly, the rule 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 say¹⁹. 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 again¹⁹. The immunity applies even though the witness acts in bad faith¹⁹, 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 it¹⁹.

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 trial¹⁹, an expert witness can claim immunity in respect of his report prepared for exchange with the opposite party¹⁹ 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 expert¹⁹. However, matters which cannot properly be characterised as preliminary to the giving of evidence do not attract immunity. So a surveyor 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 surveyor will be asked to be an expert witness as the case progresses¹⁹.

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 perjury. A serious failure to comply with his duties to the Court may amount to a contempt of court, which is susceptible of punishment¹⁹. 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 evidence¹⁹.

Meadows v General Medical Council

Recently the Court of Appeal 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 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.

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 Practise 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 or (as in the case of the RICS) royal charter.

Thus, applying the *Meadow* decision to surveyors, no immunity could be claimed in respect of complaints to the Professional Conduct Panel or Disciplinary Board of the RICS by virtue of the fact that the matters complained of occurred whilst the surveyor was acting as an expert witness.

Time for a Change?

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 proceedings^[221], but in 2000 the House of Lords swept that away^[222], 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 closely analogous to those which are said to provide the rationale for the immunity for witnesses. A few judges, for example, Chadwick LJ in *Stanton v Callaghan*^[23], have expressed scepticism about the reasons for the rule in relation to expert witnesses^[24]:

"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."

If expert witnesses were to cease to be immune from negligence claims, some difficult questions would arise, for example, as to the circumstances in which an expert instructed by one party could become liable to another party for negligently-given evidence accepted by the Court. As the law currently stands, however, a surveyor called or acting as a witness, either expert or factual, cannot be sued for negligence in relation to the evidence he gives in court or the steps taken in relation to the preparation of that evidence. It is otherwise if the surveyor acts as an advocate, 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 skill ^[25].

Third Party Determination

Many property documents contain dispute resolution clauses which refer disputes between the parties to the decision of an independent third party. Rent review clauses in leases are the classic example. A fair few of these documents are drafted without much thought having been given as to whether the third party should be an arbitrator or an expert, but the two roles are not the same and the consequences of an erroneous decision are quite different in each case.

The Surveyor as Arbitrator

If a surveyor is appointed as an arbitrator, then the position is simple. 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 faith ^[26]. 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 function ^[27]. 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.

The Surveyor as Expert

It is completely different if a surveyor is appointed as an expert to determine a question arising under a contract or lease, for example where a vendor and purchaser agree that the price for a property should be such sum as shall be determined by a valuer. That gives rise to a tri-partite contractual arrangement. Firstly, there is the contract between the vendor and purchaser, to which the valuer is not a party. Secondly, the vendor and purchaser each have a contract with the expert valuer into which a term is implied whereby he will exercise reasonable skill and care in giving his valuation. 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 determined ^[28]. But the valuer will be open to a claim in negligence by the party which has lost out as a consequence of the negligence. 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 determination ^[29]. Where the President of the RICS is to appoint an expert under a contract, he too is acting as an expert in making the appointment; he has a contractual relationship with the person applying for the appointment and may owe a duty of care to the other party, but in either case 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 lease^[30].

The Surveyor as Mediator

If a surveyor acts as a mediator, he 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.

Conclusion

As we have seen, in some roles in dispute resolution the surveyor 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. A short example will suffice to show the strange distinctions which the law currently draws. In case one, 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. In case 2, 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. A rational and principled distinction? Hardly.

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[1] Supply of Goods and Services Act 1982, s.13

[2] 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.

[3] 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.

[4] 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

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

[6] [1993] 2 Lloyd's Rep 68

[7] CPR 35.3 and paras 1.1 - 1.6 of CPR 35 Practice Direction

[8] 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 an 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?

[9] *Dawkins v Lord Rokeby* (1873) LR 8 QB 255 at 264

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

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

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

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

[14] *Watson v M'Ewan* [1905] AC 480

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

[16] *Stanton v Callaghan* [2000] QB 75

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

[18] 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

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

[20] *Meadow v GMC* [2006] EWCA Civ 1390; [2007] 1 All ER 1

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

[22] *Arthur JS Hall & Co v Simons* [2002] 1 AC 615

[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] *Arthur JS Hall v Simons*, above.

[26] 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

[27] Arbitration Act 1996, s.74

[28] *Campbell v Edwards* [1976] 1 WLR 403. The parties have very little scope for challenging the determination, which will be binding in the absence of fraud, collusion or a failure by the expert to follow his instructions: *Jones v Sherwood* [1992] 1 WLR 277

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

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