Magrath LLP
solicitors

Expert Witness Immunity Removed

dispute resolution

A 400 year old rule that expert witnesses enjoy immunity from any form of civil action arising from the evidence they give in the course of Court proceedings has been overturned by the UK Supreme Court.

The decision given on 30 March 2011 in an appeal in the case of Jones v Kaney arose from a personal injury action after the appellant, Paul Jones, was hit by a car driven by a drunk, disqualified and uninsured driver. The only issue in the case was the level of damages.

Dr Sue Kaney, a consultant clinical psychologist, reported to Mr Jones' Solicitors that he was suffering from post-traumatic stress disorder (PTSD). A consultant psychiatrist instructed by the Defendant driver expressed the view that Mr Jones was exaggerating his symptoms. The District Judge ordered the two experts to hold discussions and to prepare a joint statement to assist the Court at the trial. The joint statement as signed by Dr Kaney recorded that she agreed that Mr Jones had not suffered PTSD and that she had found him to be deceitful in his reporting.

Mr Jones alleged that Dr Kaney was negligent in signing a statement in those terms and that he was obliged to settle for a significantly lower sum in damages than he might have otherwise been able to achieve.

The Judge in the High Court was bound by a previous decision in the Court of Appeal in the case of Stanton v Callaghan in 2000 to hold that Dr Kaney as an expert witness, was entitled to immunity from such a claim. Mr Jones was given leave to appeal direct to the Supreme Court as it was considered that this was a point of general public importance. By a 5-2 majority of the Lord Justices, the Supreme Court allowed the appeal, holding that the immunity from being sued for breach of duty (whether in contract or negligence) that expert witnesses have enjoyed in relation to their participation in

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Summer 2011

Super injunctions – where did they come from and where are they going?

As we reported in February 2010, Super Injunctions are news. (See Super Injunctions – John Terry and the Super Injunction that was wide of the mark February 2010).

With the much publicised Super Injunctions of Ryan Giggs, the famous Welsh footballer playing for Manchester United who is now alleged to have had a number of extra marital affairs, and Sir Freddy Goodwin "Fred the Shred", formerly of the Royal Bank of Scotland, who apparently has also acted outside of his official duties, and a number of other celebrities, Super Injunctions are news.

That this is so is rather counterintuitive, because a Super Injunction is supposed to be a double gagging order which prevents the publication of press articles as well as even mentioning that a Judge has prevented the article from being published in the first place. Why therefore are Super Injunctions "news"?

Where do they come from?

Injunctions have been around for many years and they are part of the weaponry of litigation across many fields of practice. Injunctions generally prevent things happening and restrict the freedom of a party in the action to do something that they would otherwise wish to do which might be harmful to the claimant or the person applying for the injunction.

The relatively recent development of Super Injunctions is to be traced to the bringing into English law of the Human Rights Act in 1998 and the specific introduction into English law of a right to respect for private and family life (Article 8). Under this Article everyone has the right to respect for his or her private and family life, his/her home and his/her correspondence. It is this right that is used to justify applications for Super Injunctions because (it is argued on behalf of various claimants) that the publication of articles which detail the claimant's private life is an infringement of their Article 8 rights.

However, the Human Rights Act also brought into English law a specific law of freedom of expression under Article 10, which provides that everyone has the right to freedom of expression. This right includes the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

The exercise of the freedom of expression carries with it duties and responsibilities and may be subject to formalities, conditions, restrictions or penalities as are prescribed by law and are necessary in a democratic society; in the interests of national security, territorial integrity or public safety; for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others and for preventing the disclosure of information received in confidence or for the maintaining of the authority and impartiality of the judiciary.

Why should Ryan Giggs' alleged extra martial relationships attract publicity? Why also the alleged extra martial relationship of Sir Freddy Goodwin?

Ryan Giggs is a footballer of immense reputation as a footballer and a member of perennially successful Manchester United teams dating back to 1992. He has traded on his football skills and reputation to

endorse various quality products such as Citizen Watches, Givenchy, Fuji, Patek Phillipe and Reebok and the question is whether customers who are interested in purchasing such products should be made aware of the fact that the person who is endorsing them is, allegedly, an adulterer many times over.

The information may be of interest to the public but is it in the public interest?

One thing is sure and that is both Ryan Giggs and Sir Freddy Goodwin have plenty of money to spend with their lawyers in order to try and keep certain selected details of their private lives private. The legal costs associated with a contested Super Injunction process can be calculated in the hundreds of thousands of pounds.

Moving on to the side show of the apparent battle between backbench members of parliament (Mr John Hemming MP named Ryan Giggs in the House of Commons, protected by parliamentary privilege) and the Judiciary, the fact of the matter is that the battle lines were drawn when the Human Rights Act came into power.

It is for the judiciary to interpret the law and it is for parliament to make the law. The Human Rights Act creates conflicting interests and it is a difficult balancing act for the Courts to ensure that Article 8 rights of various individuals and Article 10 rights of our free press are both protected. If members of parliament do not like what the Courts are doing, the law should change and parliament has the power to do that.

Are Super Injunctions going to justify the revocation of the Human Rights Act in the interest of commonsense and the freedom of the press?

Watch this space.

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legal proceedings should be abolished. It was held that the immunity rule overlapped with the wider immunity formerly enjoyed by an advocate (whether this be a solicitor or barrister) from negligence claims by his own client, before that immunity was abolished by the House of Lords in 2001 on the grounds that it could no longer be justified.

The general rule was that every wrong should have a remedy and that any exception to this rule had to be justified as being necessary in the public interest and kept under review. The primary rationale for the immunity was a concern that an expert witness might be reluctant to give evidence contrary to his client's interest, in breach of his duty to the Court, if there was a risk that this might leave his client to sue him. In common with advocates, however, there was no conflict between the duty that the expert has to provide services to his client with reasonable skill and care, and the duty he owed to the Court. The evidence did not suggest that immunity was necessary to secure an adequate supply of expert witnesses.

Removing immunity from advocates had not diminished their readiness to perform their duty, nor had there been a proliferation of vexatious claims or multiplicity of actions. The majority of the Supreme Court concluded that no justification had been shown for continuing to hold expert witnesses immune from suit for breach of duty in relation to the evidence they gave in Court or for the views they expressed in anticipation of Court proceedings.

The Lord Justices added that their decision did not affect the continued enjoyment by expert witnesses of absolute privilege from claims in defamation, nor did it undermine the long standing immunity of other witnesses in respect of litigation. Although the decision was based upon a 5-2 majority of the Lord Justices, the two dissenting Lord Justices were of the view that the topic was more suitable for consideration by the Law Commission and reform, if thought appropriate, should be considered by Parliament rather than the Supreme Court.

magrath LLP solicitors 66/67 Newman Street London W1T 3EQ
tel 020 7495 3003 fax 020 7317 6766 www.magrath.co.uk

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