

Experts lose immunity

The Supreme Court's decision in *Jones v Kaney* [2011] UKSC 13 has removed the immunity from negligence claims that expert witnesses previously enjoyed in relation to their reports and evidence given in court.

Dr Kaney was the Claimant's expert, who, together with the Defendant's expert, signed a joint statement which stated that the Claimant was "very deceptive and deceitful". The claim was settled for less than would have been awarded, had the joint statement not been submitted, and the Claimant then sued Dr Kaney.

The claim against Dr Kaney was struck out because of expert's immunity but the case then made its way to the Supreme Court, whose decision was that an expert witness has:

- A duty to act with reasonable skill and care;
- A duty to the court which can coexist with a duty to a client; and
- No blanket immunity to a claim for negligence and can be sued for negligent advice.

The Supreme Court said that "every

wrong should have a right" and immunity leaves the victim with no remedy, however serious the negligence.

David Woodward, head of the Private Business Group at TLT comments; "One wonders whether the expert's new exposure to the possibility of being sued will result in experts refusing instructions; increasing their fees or being the subject to vexatious negligence claims by aggrieved former clients? Only time will tell, but I do not think it will have a dramatic effect. I believe it will:

- Cause an expert to check the instructions are firmly within his/her field of expertise;
- Lead to the expert's terms of business attempting to limit their liability and negligence to the maximum level of their personal indemnity cover; and
- Encourage the expert to be more restrained in their evidence which may make it easier to achieve an agreement."

What advice do you give a client who believes that an expert has been negligent? Before *Jones v Kaney* the client could not sue the expert, so their only recourse would be to sue their solicitor. As the client agreement will be between the solicitor and expert, the solicitor would perhaps

try to negotiate non-payment or a reduction in experts fees.

After *Jones v Kaney* the client is now able to sue the expert, who may well join the instructing solicitor in the action. Alternatively, the solicitor could become a witness. At trial the Judge will have to apportion liability and determine what loss has flowed from the particular negligence.

David continues; "As the incidents of negligence are, hopefully, rare, the impact on both experts and solicitors is unlikely to be significant. I would, however, encourage a careful consideration of the expert's terms of business to ensure that the expert accepts his responsibility towards the client, before the expert is officially instructed."

David Woodward is head of the Private Business Group at TLT, National Secretary of Resolution and a member of the Law Society's Family Law Committee. He specialises in complex financial matters, particularly involving businesses.



David Woodward
Partner

T: +44 (0)117 917 7501
david.woodward@TLTsolicitors.com

Capital Gains Tax

It is worth remembering that the end of this tax year is only a few months away. If parties separated after 5 April 2011 then they have until 5 April this year to make transfers of assets to each other without incurring potential CGT.

Shared home – shared rights?

Cohabitation is the fastest growing family type in the UK. Almost two million dependent children are living in cohabiting couple families. It is predicted that by 2031, one in four couples will be cohabiting and not married or in a civil partnership. Yet, despite these figures and the notable decline of marriage, the law governing property rights for cohabiting couples takes no account of family needs on breakdown of the relationship nor does it consider contribution in anything but financial terms.

In practice this means that when there is a dispute the court will look at the evidence of the couple's intentions when their property was purchased. If the property is registered in the couple's joint names there is a presumption that they are entitled to equal shares. If only one of them appears on the title documents the presumption is that he or she is solely entitled. These presumptions can be rebutted. There may be a trust deed which sets out how the sale proceeds are to be divided.

So far so good, but what if there has been a change in circumstances which would make the division permitted by the title documents or trust deed unfair? The answer is that the court can find that there was a "common intention" to vary the arrangement in order to achieve a fair outcome. How does the court do that? First, there will be a wide-ranging enquiry into the background and the conduct of the couple during the course of their relationship. In some cases it will be clear that there was a common intention to vary the terms of ownership and the court will find accordingly. In others there will be no such evidence and it will be for the court to make its own determination of what is a fair outcome. This process has been explained and clarified by the Supreme Court in the case of *Jones v Kernott* [2011] UKSC 53.

Jones v Kernott

The facts of *Jones v Kernott*, whilst unremarkable in themselves, are a clear example of how focusing exclusively on the title documents can produce an unfair outcome.

Ms Jones and Mr Kernott met in 1980. They had two children together. In 1985 they purchased a house in their joint names. The purchase price was £30,000. Mr Kernott provided the deposit of £6,000 from the sale of his previous home. The balance of the purchase price was raised by an interest only mortgage. There was no trust deed. Ms Jones and Mr Kernott made an equal contribution to the mortgage, outgoings and upkeep of the property.

The relationship broke down and they separated. Ms Jones stayed in the property with the children after Mr Kernott left in 1993. A joint insurance policy was surrendered and divided equally enabling Mr Kernott to purchase another house which he bought in his own name. From that time Ms Jones met all the outgoings on the property including the mortgage and the endowment policy premiums. She supported the children with little assistance from Mr Kernott.

In 2008 Ms Jones brought proceedings to define her interest in both properties. By that time the jointly owned property was valued at £245,000. The county court judge HHJ Denman found that the property had been purchased as a home for the family and that the intention had been to share it equally. That common intention had changed in 1993 when Mr Kernott left and no longer made any contribution to the mortgage or upkeep of the property. He found that Ms Jones was entitled to a 90% share in the jointly owned property but had no interest in the property that Mr Kernott had purchased.

Although Mr Kernott's appeal to the High Court was dismissed, his subsequent appeal to the Court of Appeal was successful, the court directing that the interests in the

property remained equal.

The Supreme Court decision

The Supreme Court roundly rejected the approach of the Court of Appeal. The Justices found that there had been a common intention to vary the terms of ownership when Mr Kernott left. Using a figure of £60,000 for the value of the property in 1993 and £245,000 as the value in 2008, Mr Kernott's share was determined as half of the 1993 value leaving Ms Jones with £215,000 or 88% of the total value. This figure was broadly in line with what had been decided in the county court and so the original order was restored.

What does the future hold?

On the facts this was clearly the right decision and it does provide a solution for clients in Ms Jones' position. But it also highlights the lack of certainty in this area of the law. Best advice for unmarried couples will be to ensure that what they have agreed about ownership of their property is clearly recorded. If there are changes they should be incorporated in their agreement. But this will not always be possible. The Law Commission's proposal to introduce legislation to regulate cohabitants' rights on separation will not be implemented leaving many vulnerable to unfairness and injustice.

David Wheeler is an accredited specialist in private law children, advanced financial provision and child abduction. He is also a contested probate specialist.



David Wheeler
Associate

T: +44 (0)117 917 8467
david.wheeler@TLTsolicitors.com

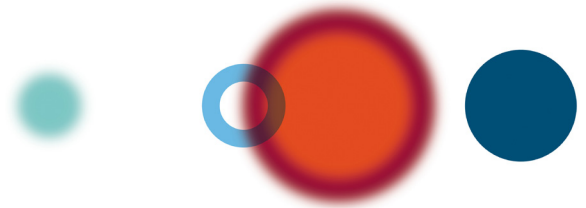
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“Much appreciation and respect... you have been my backbone through this nightmare I have endured”.

- Client quote

“Beyond the call of duty”

- Client quote



Marriage - the “gold standard”?

The number of divorces in England and Wales has risen by almost 5% according to figures recently released by the Office of National Statistics.

The number of civil partnerships being dissolved has also increased, although the number being formed has also risen, in contrast to the number of marriages, which has dipped to 230,000 in 2010 (some 120,000 less than 20 years ago). Last year also saw an increase in the number of divorces amongst the over 60s.

Perhaps then, it comes as no surprise that, at what is traditionally the busiest time of year for divorce enquiries, one senior High Court judge is calling for a re-think on the nation’s attitude to the institution of marriage.

Under the slogan “mend it, don’t end it”, Sir Paul Coleridge began the New Year with calls for Brits to re-think their attitude of “recycling” relationships. He announced that, with the support of several senior figures in the world of family law, he is launching a new “Marriage Foundation” aimed at promoting marriage as the “gold standard”, especially where there are children are involved.

The recession is, perhaps predictably, associated with the increase in divorce, albeit perhaps with a delayed impact. With the inevitable financial strain, changes in employment and impact on lifestyle, social researchers are unsurprised that divorce is on the up. However, research suggests that couples are delaying reaching financial settlement in the hope that economic

recovery will lift the value of their assets.

Currently in its initial stages, it will be interesting to see how the Marriage Foundation develops and exactly how it plans to rescue the institution of marriage and put a halt on the increase in divorce.

Although Coleridge thinks it is time for the legal profession to “put something back in” to prevent marital breakdown, in reality, relationships are not destroyed by the solicitors or courts. The world of family relationships is a constantly changing landscape. Whilst for many, the promotion of marriage, as the most stable environment within which to bring up children, is to be encouraged; the decision to stay married must be for the right reasons.

Whilst Coleridge is concerned at the number of children who are exposed to marital breakdown, in reality, many argue that the nuclear family is now a thing of the past, and what serves the best interests of an individual family is a matter of subjectivity. Indeed, plenty of children are able to thrive within less traditional family structures and many of those in the court system come from parents who have never been married and sometimes never even cohabited.

For the vast majority of our clients, divorce is not something that is entered into lightly; rather it is a decision arrived at after many months of agonising. Whilst we encourage couples to consider mediation and reconciliation, the reality is that no couple should be forced to stay together for the wrong reasons. From the outset, we always encourage

the client to think in terms of what is in the best interests of the children. The welfare of any child is a key consideration of the court, and parents are encouraged to set their own disputes to one side to ensure that the interests of the child are always at the forefront of their minds. In practical terms this may often require expert input in the form of Parenting after Parting classes or assistance from family therapists and coaches.

There are various ways of protecting a child as far as possible upon breakdown of a relationship, and perhaps arguably therefore Coleridge’s focus should be promoting the interests of the child, rather than seeking to preserve an institution which, whilst still vitally important for many, is just one of the different family structures alive in our society today.

The Family team at TLT are Resolution-accredited lawyers, and commit to resolving disputes in a constructive, non-confrontational manner. For more information on how we can assist upon relationship breakdown and in relation to children issues, please contact any member of the team directly.

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An English judge and a French prenuptial agreement

In the recent matter of *Z v Z (No2) [2011] EWHC 2878 (Fam)* Mr Justice Moor was tasked with considering the efficacy of a French prenuptial agreement in a 14 year marriage. This case comes in the wake of 2010's *Radmacher v Granatino [2010] UKSC 42* where 8 of 9 of the panel of Supreme Court Judges held that a German prenuptial agreement should be upheld.

In *Z v Z*, the parties were French and had entered in to a Separation de Biens in 1994, days before their marriage. The agreement provided for the wife to surrender any right to share in the couple's assets in the event of separation. However, the agreement did not make any provision for maintenance. The couple have three children and the assets totalled £15 million. Over 90% of the assets were in the husband's name.

Although the wife had no independent legal advice and there had been no disclosure of the parties' assets prior to the signing of the agreement, before the hearing the wife accepted that she had understood the meaning of the agreement and that she was aware of the husband's financial position.

The husband argued that because the couple had willingly entered into a prenuptial agreement, the sharing principle should not apply and that 35% of the assets, (£5.2 million) would be enough to meet the wife's maintenance and housing needs. In contrast, the wife's position was that she was entitled to 50% of the assets (£7.5 million). By the time of the

hearing, it had been agreed that if the Separation de Biens had not been in place, a 50/50 division of the assets would have been inevitable.

At the final hearing, Mr Justice Moor found that the wife should be held to the prenuptial agreement. The Judge rejected her contention that the parties had only entered into the agreement to protect the wife from the possibility of the husband's business debts. There was also much discussion about several drafts of a piece of paper the wife had made the husband sign in 2008 which attempted to exclude the prenuptial agreement. It was found that in any event, a letter between the parties would not have the effect of altering the Separation de Biens as under French law, any amendments to the way that matrimonial property is held must be by a subsequent notarised agreement. Taking account of the wife's needs, the wife was awarded 40% of the assets.

Similarly, the recent case of *V v V [2011] EWHC 3230 (Fam)* also placed greater weighting on a prenuptial agreement which historically would have failed the test. In that case, the agreement was not only fairly brief in content but also the wife was not advised on the terms of the same nor was there detailed disclosure in respect of some of the husband's assets at the time.

Despite this, the court felt there was clearly a common understanding as to the purpose of the agreement when the parties entered into it and the court should not interfere with the autonomy of the parties. Although the needs of the wife and the children had to be met, the pre-nuptial was not ignored, and the husband's eventual share was greater than 50% as a result.

Are you pro or anti prenuptial agreements?

For those that may worry that all this talk of contracts and finances prior to marriage is rather unromantic, consider the words of Katrin Radmacher on the day that the Supreme Court upheld the prenuptial agreement in her favour: "I know some people think of prenuptial agreements as being unromantic, but for us it was meant to be a way of proving you are marrying only for love".

If you are thinking of entering into a pre-marital agreement or would like advice on protection of your assets at any stage in your relationship, please contact Natalie Drew. Natalie is an associate in TLT's Family team who acts for a wide range of clients in areas including premarital agreements, divorce, separation, cohabitee disputes, harassment issues and domestic violence. She has particular expertise in cases involving children.



Natalie Drew
Associate

T: +44 (0)117 917 7506

natalie.drew@TLTsolicitors.com

If you require this information in an alternative format, such as audio, large print or Braille, please contact Natasha Volk on 0117 917 8948.



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