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No 340

House of Representatives

Supplementary Order Paper

Thursday, 17 March 2005

Lawyers and Conveyancers Bill

Proposed amendments

Stephen Franks, in committee, to move the following amendments:

Clause 104
To add, as subclauses (2) to (5) (after line 38 on page 107), the following subclauses:

(2) The principle known as barristerial immunity, which protected a lawyer from liability to clients for negligence in respect of acts or omissions in the conduct of a case in court or so intimately connected with such conduct that they could fairly be said to be a preliminary decision affecting the case, is not among the privileges of a barrister under **subsection (1)** in respect of causes of action arising after the date of commencement of this Act.

(3) Nothing in this Act limits the right of a lawyer to contract out of liability for negligence with a fairly informed client.

(4) Neither the law of tort, nor any regulation, rule, or ruling made under this Act may materially limit the effectiveness of the right preserved by **subsection (3)**, except so far as may be necessary to prevent clients of diminished capacity from entering contracts that clients of full capacity would not generally consider appropriate.

(5) The decision of the Court of Appeal given on 8 March 2004 in the case known as *Lai v Chamberlains* is vacated.

Explanatory note

These amendments abolish barristers' automatic immunity to negligence lawsuits, for cases arising after the commencement date for this Bill. The amendments would replace a recent court decision on the topic.

On 8 March, by a 4 to 1 majority the Court of Appeal abolished law of over 200 years standing by eliminating a rule that stopped disappointed litigants from turning around and suing their barristers. That rule was blessed by Parliament in section 61 of the Law Practitioners Act 1982, and reflected in s40(3) of the Consumer Guarantees Act 1993.

The Judges' change of the law is retrospective, because it applies to events in November 1995. The lawyers newly exposed to liability could have reasonably assumed then that they did not need to insure, or to charge a risk premium for the risk of litigation against them if their clients lost in court.

It is bad in principle for Judges to overturn long settled law, especially retrospectively. The Court of Appeal in *R v Pora* had much to say about the evils of retrospective law changes (albeit in criminal law) when they invalidated Parliament's intended backdated increase in sentences for home invasion.

In this case the Judge speaking for the majority dismissed retrospectivity as follows *There remains the issue of whether this Court should indicate whether this development of the law is to be retrospective or prospective. I think that problem to be more apparent than real, and like their Lordships in Hall, I prefer not to pronounce upon it at this time.* This is a bad precedent. If the Judges now don't seem to care about retrospectivity, nor will MPs.

Parliament has recently debated whether Judges should expressly change the law, instead of applying it. Such changes may usurp the role of the elected representatives who can be sacked by the people. Academic writers offer more support for Judges' law changes when there is no likelihood of convenient legislative attention. In this case it is plainly convenient for Parliament to consider the policy pros and cons. When the Court decided, this Bill was awaiting its committee stage debate. Clause 104 deals with the powers, privileges, duties and responsibilities of barristers.

The amendments also do something the Court could not do, that is, protect the opportunity for parties in the fiercely competitive legal market to choose whether or not they want to rely on (and pay for) barristers' professional indemnity insurers. The amendments would allow choice between "all care no liability", or "all care, no liability except for recklessness or gross negligence" or any other arrangement that suits the risks in the litigation, and the amount the client wants counsel to spend on gold plating the case. Contracting out may be especially important for poor clients who can't pay for all the precautions that some court might say were desirable in cool hindsight.

Disappointed parties are convinced of the rightness of their cause, and look for reasons why the Court has not accepted what seems to them to be obvious. They are often hurt and barely comprehending. Encouraging more litigation may seem a good idea to the Judges, but much of it is likely to be at taxpayer (legal aid) cost, with no assurance that any benefits in terms of higher quality

lawyering will outweigh the cost of extra back-covering steps lawyers will take to protect themselves.

In something as chancy and expensive as litigation, "all care- no responsibility" is possibly the most efficient allocation of risk. Mandatory exposure to negligence suits could just mean more rebound litigation, and consequentially higher professional indemnity insurance premiums to Lloyds. Everyone pays for the inevitable unmeritorious claims when the lawyer is the last accessible deep pocket.

Accordingly the amendment would at least ensure that automatic immunity is not replaced with automatic exposure to new litigation.

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