

Newsflash

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Are You in the Firing Line? The End of Expert Witness Immunity

With experts of all disciplines and their professional indemnity insurers potentially in the firing line, the Supreme Court decision in *Jones v Kaney*¹ has been awaited with baited breath.

The Supreme Court by a majority of 5 to 2 held that the long-established immunity from suit for breach of duty (whether in contract or in negligence) that expert witnesses have previously enjoyed in relation to legal proceedings no longer applies. This leaves expert witnesses open to claims in relation to both future work and work done in the past.

Background to *Jones v Kaney*

The following facts are not proved but asserted in the particulars of claim and were treated as true for the purpose of resolving the question as to whether or not an expert witness enjoys immunity from suit.

Mr Paul Wynne Jones sought damages in the underlying claim for personal injury. His solicitors instructed Dr Kaney as an expert witness. Her initial report suggested that Mr Jones was suffering from Post Traumatic Stress Disorder (PTSD). However, following a telephone conference with the opposing expert, Dr Kaney signed a joint statement agreeing that: (1) Mr Jones did not have PTSD; and (2) that she had found him “deceptive and deceitful”. Dr Kaney said that the joint statement had been prepared by the opposing expert and did not reflect what she had agreed but that she had felt under pressure to sign it but that she was happy for Mr Jones’ solicitors to amend it. Nevertheless, the claim eventually settled for a significantly lower sum than it would have had Dr Kaney not ‘switched sides’.

As a result, Jones commenced negligence proceedings against Dr Kaney in April 2009. Dr Kaney did not enter a defence on the merits and instead pleaded witness immunity under the principles in *Stanton v Callaghan*².

In the High Court Blake J held that he felt satisfied that the decision of the Court of Appeal in *Stanton* (discussed below) remained an accurate statement of the law as it presently stood and was binding upon him. He therefore struck out the claim. However, he stated that human rights considerations³ may question some of the policy assumptions behind a previous decision of a superior court. As *Stanton* would be equally binding on the Court of Appeal, Blake J granted a ‘leapfrog’ certificate under section 12 (1) of the Administration of Justice Act 1969 for leave to appeal directly to the Supreme Court, the appeal having been heard on 11 and 12 January 2011.

An expert who acts in civil litigation has always owed his client a duty to act with reasonable skill and care. That duty is owed in both contract⁴ and tort⁵. The client relies on the expert to give his advice in determining whether to bring or defend proceedings, in considering settlement values, in appraising the risk at trial and in him giving the court skilled and competent expert opinion evidence. This was rightly acknowledged by Chadwick LJ in the case of *Stanton*, even though immunity from suit was a practical barrier to bringing a claim for breach of those duties.

Stanton concerned a successful appeal to the Court of Appeal by Mr Callaghan, a structural engineer who had provided evidence in support of the Stantons' claim against their insurers and later dramatically revised his opinion after a joint meeting of experts, undermining the Stantons' case. The Stantons sued Mr Callaghan for breach of retainer and negligence. The Court of Appeal upheld Mr Callaghan's immunity from suit as an expert witness and reinforced that an expert's immunity from suit not only applied to the testimony in court but also pre-trial work.

In *Jones v Kaney*, Mr Jones argued that *Stanton*, which was decided in 1998, was no longer binding because the Court of Appeal's reason for applying absolute immunity to expert witnesses was predicated substantially upon the advocate immunity principle, which had subsequently been overturned by the House of Lords in *Hall v Simons*⁶.

Dr Kaney submitted that *Stanton* has never been criticised by the Court of Appeal nor the House of Lords. Indeed, when expert immunity was considered by the Court of Appeal in *Meadow v The General Medical Council*⁷ it was common ground that *Stanton* remained good law.

Supreme Court Decision

In the landmark decision handed down on 30 March 2011, the Supreme Court, by a majority of five to two, overruled the decision of the Court of Appeal in *Stanton*. Lord Phillips delivered the leading judgment in this case which was dissented by Lady Hale and Lord Hope. Lord Phillips at para 61 concludes:

"I conclude that no justification has been shown for continuing to hold expert witnesses immune from suit in relation to evidence they give in court or for the views they express in anticipation of court proceedings".

It was not disputed in the appeal that an expert witness owes a duty to the client by whom he has been retained. Breach of duty in the normal course gives rise to a remedy. The majority held that immunity had its roots at a time when it was not customary for experts to offer their services under a contract for reward and as such considered that there was no adequate justification for maintaining an immunity whose effect was to deny deserving claimants of an otherwise due remedy especially if the only possible reason for preservation was to preserve the longevity of the rule. The only form of immunity to survive is that against defamation.

There are likely to be consequences resulting from this decision for experts and their insurers. In his leading decision, Lord Phillips discusses some of the justifications advanced for immunity and why these should not apply.

Will expert witnesses be reluctant to testify?

If witnesses are liable to be sued for breach of duty, does it follow that they will be discouraged from providing their services? In his decision, Lord Phillips considered that the risk of being sued would not create a greater disincentive than it would in other professional services, and therefore did not accept that a lack of immunity would have a "chilling" effect on the supply of expert witnesses.

Is immunity necessary to ensure that expert witnesses give full and frank evidence to the court?

CPR 35.3 states that it is the duty of experts to help the court with matters within their expertise and that this duty *overrides* any obligation to the person from whom the experts have received their instructions or by whom they are paid. As expert witnesses have always been given the protection of expert immunity, the question of how they will now behave without this immunity is as Lord Phillips⁸ states a matter of “*conjecture or, more accurately reasoning*”.

Lord Phillips considered the position of advocates by way of analogy, and commented that the decision in *Hall v Simons* which removed advocates’ immunity from suit has not resulted in advocates being unwilling to perform their duty to the court.

Will the diligent expert be harassed by vexatious claims for breach of duty?

The most potentially worrying consequence for expert witnesses and their insurers is the prospect of unmeritorious claims. Unsuccessful litigants often feel aggrieved and look for someone to blame, but it still takes time, energy and money (both of experts and their insurers) to rebut such claims. Lord Phillips in his judgment again referred to *Hall v Simons* and commented that advocates have not received a flood of claims from disappointed litigants.

He also suggested that disappointed clients would find it difficult to bring unmeritorious claims, given that they would need to employ lawyers and experts (neither of whom would enter into a CFA in a poor case) to be able to prepare a case that could survive a strike out application. Lord Brown⁹ in his judgment urges courts to:-

“protect expert witnesses against specious claims by disappointed litigants – not to mention to stamp vigorously upon any sort of attempt to pressurise experts to adopt or alter opinions other than those genuinely held”.

In reality however, cases that reach the courts are often only the tip of the iceberg, and it is likely that experts and their insurers will have to spend considerably more time rebutting or compromising negligence allegations in the future.

Conclusion

The decision of the Supreme Court decision in *Jones v Kaney* that immunity from suit does not apply to expert witnesses is likely to have a significant impact on both expert witnesses and their insurers. This is especially so given that, unlike when a statute is repealed, this decision may leave expert witnesses open to claims relating to all previous work that is not already time-barred under the Statute of Limitations. In practical terms, expert witnesses may now face claims in respect of work done up to six years ago.

The judgment may have some positive results over time, such as the ‘weeding out’ of those experts who do not demonstrate the high level of professionalism required for litigation work. However, in the shorter term the judgment is likely to be of significant concern to many expert witnesses, not least because of the “*uncertainties*” it creates for experts in knowing, “*what is to be affected by the removal [of the immunity] and what is not*” mentioned by Lord Hope and Lady Hale in their dissenting judgments.

The impact of its abolition will be closely monitored by all those affected, especially as the position for jointly instructed experts or those appointed by the court is not yet clear. Potentially, the burden for joint or court-appointed experts could be multiplied, as all the parties to the litigation may be able to bring a claim against the expert.

In the meantime, expert witnesses may need to review their professional indemnity arrangements to ensure that they have adequate cover for their future work and work done within the last six years. Document retention may also be a practical difficulty for experts. It will be more important than ever to retain both electronic and hard copy documentation relating to all instructions for at least six years, in case the evidence is needed to rebut a claim. Many experts may find that they need to adjust their fee structure to help absorb any increased premiums and the cost of long-term document archiving.

- 1 Jones (Appellant) v Kaney (Respondent) [2011] UKSC 13 on appeal from Paul Wynne Jones v Sue Kaney [2010] EWHC 61 (QB)
- 2 Stanton and another v Callaghan and others [1998] EWCA Civ 1176
- 3 See Osman v United Kingdom 23452/94 [1998] ECHR 101
- 4 Section 13 of the Supply of Goods and Services Act 1982
- 5 on the basis of Hedley Byrne & Co Ltd v Heller & Partnerships Ltd [1964] AC 465
- 6 Arthur J S Hall v Simons [2000] UKHL 38
- 7 [2006] EWCA (Civ) 1390
- 8 Paragraph 56
- 9 Paragraph 68

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