Legal Briefing

Jones v Kaney

[2011] EWHC UKSC 13, Lord Phillips, Lord Hope, Lady Hale, Lord Brown, Lord Collins, Lord Kerr and Lord Dyson

In this case the Supreme Court abolished the immunity from suit for breach of duty that expert witnesses previously enjoyed in relation to their participation in legal proceedings.

The Facts

Sue Kaney (the respondent) was a clinical psychologist who was instructed to act as the expert on behalf of Mr Jones (the appellant) in relation to his personal injury action following a road traffic accident. Liability had been admitted by the relevant insurer but quantum was an issue between the parties. In her initial report, the respondent expressed the opinion that the appellant was suffering from post traumatic stress disorder ("PTSD") and depression amongst other complaints. In her second report eighteen months later, the respondent concluded that he was still suffering from depression and had some, but not all, of the symptoms of PTSD.

The consultant psychiatrist instructed by the insurer expressed the view that the appellant had been exaggerating his physical symptoms. The experts were ordered to produce a joint statement. In that joint statement, the respondent apparently agreed with the other side's expert stating that the appellant's psychological reaction to the accident was no more than an adjustment reaction and that he did not have PTSD. The joint statement also indicated that the respondent had found the appellant to be deceptive and deceitful.

When questioned by the appellant's solicitors as to why there appeared to be a discrepancy between the joint statement and the respondent's earlier report, she explained that:

(i) She had not seen the report of the opposing expert at the time of the telephone conference;
(ii) The joint statement, as drafted by the opposing expert, did not reflect what she had discussed over the telephone but she had felt under some pressure in agreeing it;
(iii) Her true view was that the appellant had been evasive rather than deceptive;
(iv) She believed the appellant did suffer from PTSD which was now resolved; and
(v) She was happy for the appellant's solicitors to amend the joint statement.

The appellant failed to obtain permission to amend the joint statement or to rely upon another expert and the case was then settled.

In April 2009, the appellant brought proceedings against the respondent alleging that her negligence in agreeing the joint statement had forced him to settle for significantly less than he had been entitled to had the joint statement not been so agreed. The respondent applied to the High Court for summary judgment and/or strike-out of the claim on the basis of immunity from suit. The matter was referred to the Supreme Court.

The Issue

Whether, as a matter of public policy, expert witnesses should be immune from liability in negligence relating to activities conducted for the substantial purpose of litigation.

The Decision

The Supreme Court decided (by a majority of five to two) to abolish the immunity from suit for breach of duty that had previously been enjoyed by expert witnesses. The starting

point should be that every wrong should have a remedy. Any exception to this rule must be justified as being necessary in the public interest. Possible reasons put forward for why such immunity was in the public interest included:

(i) it might lead to a scarcity of experts;
(ii) it might prevent experts giving their honest and full opinion;
(iii) it may result in vexatious claims arising out of such evidence; and
(iv) it may encourage a multiplicity of actions in which the value or truth of the evidence of a witness was tried again.

In examining whether the immunity previously enjoyed by experts was in the public interest, the Supreme Court noted that there was a marked difference between an expert witness and a lay witness. It was not disputed that an expert witness owes his client a duty to act with reasonable skill and care both under contract and in tort. Expert witnesses undertake work for a party to litigation in return for payment. A witness may not have volunteered to give evidence and owes no duty to the parties.

It was often argued that removing immunity may make experts reluctant to testify. Lord Phillips noted, however, that all those who provided professional services which involved a duty of care were at risk of being sued for breach of their duty. In addition, they customarily insured against that risk. In his view, the argument that immunity was necessary to prevent a "*chilling effect*" on the supply of expert witnesses was not made out.

Further, the argument that an expert required immunity to allow them to act in accordance with their duty to the court was unconvincing. In Lord Dyson's opinion there is no conflict between the duty owed by an expert to his client and his overriding duty to the court. The duty owed to his client is to perform his function as an expert with the reasonable skill and care of an expert drawn from the relevant discipline. This includes a duty to perform the overriding duty of assisting the court. Although barristers had had their immunity removed following *Hall v Simons* [2002] 1 AC 615, this had not, in the Supreme Court's experience, inhibited them from performing their duty to the court. It was also noted that an expert has no immunity for their initial opinions given before court proceedings have commenced giving rise to the potential paradox that an expert may be reluctant to be depart from a previously expressed opinion.

Finally, it was made clear that the abolition of immunity from suit for expert witnesses for breach of duty to their clients did not extend to the absolute privilege that they enjoyed in respect of claims in defamation.

Comment

It remains to be seen whether the abolition of immunity from suit for expert witnesses will have a significant impact on their behaviour. However, experts will now need to be more careful to avoid pitching their initial views of the merits of their client's case too high or too inflexibly in case they are exposed and embarrassed by those views at a later date. In the words of Lord Brown, this can only be a "*healthy development*".

Claire King
June 2011