Expert Witness’ Immunity Abolished

Jones v Kaney [2011] UKSC 13

In a landmark decision handed down on 30 March 2011, a majority of the Supreme Court has decided that the immunity from suit for breach of duty enjoyed by expert witnesses instructed in legal proceedings, which dates back over 400 years, should be abolished.

**Background**

The appellant, Jones, had suffered injuries when he was knocked down by a drunk, uninsured, disqualified driver, and subsequently brought claims for personal injury.

The respondent, Kaney, a consultant clinical psychologist, was instructed by Jones’ solicitors to examine the appellant and prepare a report for the purposes of litigation. In her report, Kaney expressed the view that the appellant was at that time suffering from post traumatic stress disorder (PTSD). The defendant’s expert alleged that the appellant was exaggerating his symptoms.

Kaney had discussions with her opposite number, who then prepared and sent to her a joint statement which Kaney signed without amendment or comment. The statement was damaging to Jones’s claim. It is Jones’ position that his solicitors were then constrained to significantly under settle the claim. Jones issued proceedings against Kaney alleging that Kaney was negligent in signing a joint statement.

That claim was struck out at first instance on the basis that, as an expert, Kaney was immune from suit. Given that the case involved a point of law of general public importance, leave to appeal direct to the Supreme Court was granted by way of a “leapfrog certificate”.

**The decision to remove expert immunity**

An expert who acts in civil litigation owes his client a duty to act with reasonable skill and care. Experts had, until 30 March 2011, enjoyed immunity from suit in respect of evidence given in court and work done in contemplation of or preparation for legal proceedings. The Supreme Court, by a majority of 5-2, has clearly stated that this immunity has now been removed, (however the abolition of immunity does not extend to the absolute privilege that expert witnesses enjoy in respect of claims in defamation).

The majority of the Court dismissed fears that the eradication of immunity would prevent experts from providing the Court with full, frank and objective advice to the court. They also rejected concerns that increased litigation against experts would ensue, and fears that the decision would have a “chilling effect” on the supply of expert witnesses by making potential experts reluctant to act due to the risk of being sued and the cost of insurance. Furthermore, the majority considered that the abolition of immunity would ultimately lead to better quality evidence.

The minority of the Court were concerned with the uncertain boundaries of the decision, for example, the position regarding jointly instructed experts and court appointed experts, who may have several “clients”, is not clear. The minority were perturbed that the decision could increase the pressure on an expert to stick to their initial opinion, and considered that the increase in risk could deter potential experts from acting; resulting in a shortage of experts in certain specialised fields.
Implications of the decision

- **Quality of evidence**
  This case increases the importance of an expert exercising caution from the outset to ensure accurate and consistent advice is given. Experts must comply with their duty to the court, their client, and any rules prescribed by their professional body. Instructions should be carefully assessed, and further clarification should be requested if necessary prior to providing a report or any views as to the merits. Notes of expert discussions should always be carefully checked and amendments should be requested where necessary.

  Lord Brown of the majority considered that the most likely consequence of the decision will be “...a sharpened awareness on the part of experts of the risks of pitching their initial views of the merits of their client’s case too high or too inflexibly...” Lady Hale of the minority stated that the decision may also have the welcome effect of reducing the practice of recruiting experts to act as a “hired gun”.

- **Policy cover and effect on premiums**
  Although expert witnesses now face the risk of being sued for breach of duty, some comfort may be taken in that the abolition of advocate immunity in 2002 did not open the floodgates for claims against advocates.

  Experts who hold cover should review this to ensure that it is suitable for the work that they undertake. Experts who do not currently hold cover for expert witness work should consider obtaining this in light of this decision. Premiums for cover are likely to increase to take account of the new risk and potential exposure.

  Furthermore, this decision is likely to have retrospective effect, and as such experts should be aware that they could potentially be faced with claims dating back several years but which are still within the relevant limitation period. Consideration should be given as to whether it is necessary to make a notification of any such claims / circumstances.

- **Exclusion / limitation of liability**
  Experts should seek to exclude or limit their liability in their terms of appointment with clients for claims brought against them for breach of contract / negligence, although it is not clear how effective such provisions will be.

For further information contact Joe Eizenberg on +44 (0)117 311 7472 or at j.eizenberg@beale-law.com or Kristina Vongas on +44 (0)20 7420 8667 or at k.vongas@beale-law.com.

April 2011