JONES v KANEY

THE IMPLICATIONS FOR EXPERT WITNESSES

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Jones v Kaney: The Implications for Expert Witnesses

A seven judge Supreme Court has abolished immunity from suit in negligence so far as it affects expert witnesses. The facts were extremely simple. The Defendant, a clinical psychologist, was instructed to report on post traumatic stress disorder symptoms suffered by a road traffic accident victim. It was alleged (but not proved, because the case proceeded as a strike out application on assumed facts) that she had negligently agreed the terms of a joint statement with the opposing expert without seeing her opponent’s report, under pressure to sign and despite the fact that it did not truly reflect her view. The Claimant applied, unsuccessfully, to appoint a new expert. As a result, it was alleged, the Claimant had to settle his claim for less than its true value.

Historically, the claim was bound to fail. Expert witnesses, like all witnesses, enjoyed complete immunity from suit not only from claims in defamation but from all claims including negligence. This was confirmed by the Court of Appeal as recently as 2000 in Stanton v Callaghan. Counsel for the Claimant in Jones v Kaney was careful to limit his case to the question whether an expert witness was immune from suit in relation to the preparation of a joint statement, but the Supreme Court dealt with the broader issue of whether an expert witness enjoyed immunity from suit in negligence in relation to the performance of his or her duties in that role.

The court considered why the historic immunity existed. It originated in a desire to protect all who took part in the trial process from the chilling effect of being exposed to vexatious claims after the event. Witnesses in particular needed the protection in order to ensure that they were willing to give evidence at all and that, when they did give evidence, they did so freely and frankly. This immunity had been extended to expert witnesses in order to overcome the reluctance which they might otherwise feel to give evidence and so that they might comply with their paramount duty to the court without fear of being exposed to action by their own client. Lord Phillips, giving the lead judgement, stated that there is no presumption that because an immunity exists it should be continued, but rather that the onus lies on the person claiming the immunity to justify it. In a two page review of all of the reasons advanced for the retention of immunity, Lord Phillips dismissed each of them and concluded

“It follows that I consider that the immunity from suit for breach of duty that expert witnesses have enjoyed in relation to their participation in legal proceedings should be abolished. I emphasise that this conclusion does not extend to the absolute privilege that they enjoy in respect of claims in defamation”.

Lord Brown agreed, pointing out that abolishing immunity would dissuade experts from pitching their opinion of a client’s case too high or too inflexibly, which he regarded as a healthy development in the approach of expert witnesses to their task. He also pointed out that in the rare cases where a client had been let down by egregious behaviour or by an expert who had advanced views outside of the permissible range of expert opinion, it was right that the client should have a remedy. Lord Dyson, also agreeing, observed that although it was not necessary to decide the point, he saw no reason to treat expert witnesses in family or criminal litigation any differently.

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Two judges dissented. Lord Hope said that the matter was one in which the Supreme Court should not have taken upon itself the task of changing the law without any intervention from an informed body such as the Academy of Experts. He was also concerned that, unlike a change effected by legislation, the limits of the change were uncertain. He argued, in a powerful passage, that if the immunity is to be abolished in civil proceedings, it would be difficult to find a principled basis for retaining it in criminal proceedings, yet a defence expert may well feel under pressure to colour his evidence in case he is sued by a disgruntled client if the defence fails. The prosecution expert would feel no such pressure. Experts on both sides in criminal cases should, observed Lord Hope, be immune from such pressure.

Lord Hope was also critical of the uncertainty as to the scope of any remaining immunity. Lord Phillips had said that expert witnesses remain immune only from suits in defamation, but what of claims for breach of confidence? In Watson v M’Ewan [1905] AC 480 an expert had been held immune in an action in which he was alleged to have communicated confidential information from his client to the other side. One can envisage cases however in which such information had to be disclosed to the court in order for the expert properly to discharge his duty to the court to tell the truth and give his honest opinion. Has that immunity now gone?

The decision also does nothing to define what is meant by an expert witness. Lord Hope cited the examples of the joint or court appointed expert, the company director who gives evidence for the company but makes an inexcusable error when giving evidence, the skilled employee who gives evidence and is said to have done so negligently, causing loss to his employer. At the margins there is no clear test for who is an expert witness. There are, too, difficulties in identifying to whom the duty is owed. Could an expert witness who carried out a medical examination of a party for the other side nevertheless be liable to that party for negligently carrying out the examination? Prima facie a professional person owes a duty to all who might be contemplated to be harmed by his failure to act with the minimum professional standard of care. Lord Hope would also have left the matter well alone, as one for the Law Commission and Parliament. Lady Hale followed Lord Hope with a compelling account of the difficulties which the abolition of immunity would create in family proceedings.
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For the time being the immediate outcome of the decision is clear. Expert witnesses no longer enjoy immunity from suit in negligence by those for whom they acted. They should insure accordingly, although it must be a matter of concern that some experts who give evidence only once or twice in a professional lifetime may be unaware of this. However, in the marginal cases discussed by Lord Hope and in family proceedings generally, as explained by Lady Hale, there is much more working out to be done. The decision has unsettled long established law in this area: it will be some time before it is settled again.