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LIABILITY OF EXPERTS - A BRAVE NEW WORLD? OR BUSINESS AS USUAL?

The decision of the Supreme Court in *Jones v Kaney* [2011] UK SC13 has excited a great deal of comment and concern on the part of experts, their insurers and those who use their services. Traditionally, experts have enjoyed immunity from negligence claims in respect of their expert functions in legal proceedings. In *Jones v Kaney*, the Supreme Court removed that immunity.

The apparent radicalism of the legal decision should, however, be viewed against the facts of the case, the increasing anachronism of experts' immunity in the modern legal landscape, particularly as advocates' immunity was removed in 2002, and the evolution of the experts' role in modern litigation. The main consequence of the case is that experts who are incompetent are likely to face the consequences of their incompetence and it is hard to argue that this should not be the case. However, there are likely to be other consequences such as making it more time consuming and costly to instruct experts and making it more difficult to find experts in obscure areas.

Summary of the facts

Mr Jones was knocked off his motorbike in 2001 by Mr Bennett, who was not only drunk but also driving while disqualified and uninsured. Mr Jones sustained significant physical and psychiatric injuries including post traumatic stress disorder and depression.

Mr Jones started legal proceedings in respect of his injuries, in which he instructed a consultant clinical psychologist, Dr Kaney, to report upon his psychiatric illness.

Liability was admitted but quantum was disputed. The Defendant instructed its own expert, a consultant psychiatrist, Dr El-Assra. The two experts disagreed as to the extent of the physical and psychiatric injuries sustained by Mr Jones. Dr Kaney felt that the psychiatric injuries were more severe than Dr El-Assra.

The experts discussed matters on the telephone in accordance with the directions of the Court and Dr El-Assra prepared a joint statement purporting to record those discussions. The statement was highly damaging to Mr Jones' case and included a statement that he was deceptive and deceitful and that he did not have post traumatic stress disorder.

Dr Kaney signed the joint statement without having read Dr El-Assra's initial report and despite the fact that it did not reflect what she had agreed in the telephone discussion, the fact that she had not said that Mr Jones was deceptive and that she did think he had suffered from post traumatic stress disorder.

Mr Jones tried to change experts but was not allowed to do so by the Court and ultimately he was obliged to settle for a much lower sum than he would otherwise have achieved in the absence of the prejudicial joint statement. He sued Dr Kaney and alleged negligence.

The facts of the case are fairly stark and extreme and played an important part in the thinking of the Supreme Court.

The decision

The Court analysed the history of immunity of expert witnesses, which dates back over 400 years. Its origins were the absolute privilege against a claim for defamation for parties

participating in court proceedings. This was extended over the centuries to include other forms of action in tort and for example to include acts done with a view to giving evidence including the preparation of reports.

Barristers long enjoyed immunity from claims in negligence in the conduct of litigation but this was removed in a landmark case in 2002.

Of the seven Law Lords who heard the appeal, five came down in favour of abolishing expert immunity and two were against it. The majority carried the day.

While each judge had their own particular reasons for reaching their decisions, some common themes emerged.

The principle that most strongly influenced the judges in favour of abolition was that a wronged client must be able to enjoy a proper remedy. Immunity deprives the wronged client of any remedy. An expert witness is after all employed and paid by a party to legal proceedings and owes that party a duty of care. The clear wrong that Mr Jones had suffered in this case was influential in the judges' thinking. It is difficult to argue against the proposition that if an expert is negligent, then the expert must face the consequences of that negligence.

The judges also looked at the policy reasons for justifying immunity and considered that many of the reasons commonly cited for maintaining immunity no longer apply.

For example, the Court was of the view that there was no evidence that people would be unwilling to act as experts if immunity was removed, particularly in view of the availability of professional indemnity insurance to cover potential claims. Experts are generally professional people who have professional indemnity insurance to cover their professional liabilities, and the Courts saw no reason why this should not be extended to cover liability for acting as an expert.

The Court was of the view that the risk of vexatious claims against experts is low, particularly as it would be necessary to get further expert evidence to get such a claim off the ground and this would not be straightforward.

Two Judges, however, disagreed with the majority. The overwhelming factor in their decision was the importance and value of precedent, which has clearly established that expert immunity is a stable principle of English law. The two judges saw no overwhelming reasons why the clear legal precedent upholding immunity should be overridden. If the law was to be reformed they felt that the appropriate forum was via a report of the Legal Commission and legislation in Parliament.

The implications

The Supreme Court downplayed the impact of its decision, clearly considering, with the exception of Lady Hale, that little or no impact on the role of expert witnesses would result. However, is this optimistic view likely to be the outcome in practice?

Case law is littered with examples of judges criticising the conduct of experts. A prime example in the construction field is in *Great Eastern Hotel v John Laing* [2005] 99 Con LR 45 TCC where many commentators considered the judge's criticism of the expert to be unfair. Where a judge is critical of an expert that is likely to be a green light to a negligence claim.

As experienced litigation lawyers will tell you, even the most competent and conscientious professional can occasionally become unstuck.

All experts will now need to obtain professional indemnity insurance and indeed this is likely to be insisted upon by those instructing them. While it will be relatively easy for professional experts or experts who have professional indemnity insurance already as part of their general professional life, this will be more difficult for occasional experts or experts in unusual areas or where disputes are uncommon. For example, this firm recently had to engage an expert witness in meat importation and trading in the UK, not a common area for expert witnesses.

Experts are now likely to want to limit their liability and the standard Part 35 Letter of Instruction is going to be insufficient. Insurers will now want to get involved in the negotiation of the instruction of expert witnesses. Appointing experts will inevitably become more expensive and time consuming.

Occasional experts will undoubtedly be more reluctant to act.

The best that can be said is that the impact of the decision of the Supreme Court is uncertain. The rosy view of the absence of claims against expert witnesses is, however, unlikely to be borne out.

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