

E-ALERT | Commercial Litigation

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SUPREME COURT DEPRIVES EXPERT WITNESSES OF IMMUNITY FROM SUIT

The UK Supreme Court has recently deprived expert witnesses of their longstanding immunity from being sued for breach of duty in relation to their involvement in litigation in the case of *Jones v Kaney* [2011] UKSC 13. In a majority (5-2) decision, the court decided that there was no longer any justification for expert witnesses to be immune from suit for breach of duty.

THE FACTS

The facts of the case were simple. The appellant was involved in a road accident and suffered psychiatric consequences. He took proceedings against the motorist who had caused those injuries. His solicitors appointed the respondent, a consultant clinical psychologist, as an expert.

The parties' experts were ordered by the Court to prepare a joint statement and the respondent signed a statement prepared by the motorist's expert that contained various statements prejudicial to the appellant's case. It transpired that the joint statement did not reflect the respondent's true opinion, or what she had agreed in a telephone conversation with the opposing expert, but that she had nevertheless signed it. The appellant was then allegedly constrained to settle his claim for significantly less than the settlement that he would have achieved if the respondent had not signed the joint statement.

The first instance Judge considered himself bound to strike out the claim on the basis of existing Court of Appeal authority that made the expert witness immune from suit. The appellant appealed direct to the Supreme Court.

THE JUDGMENT

Lord Phillips, in his leading judgment, held that the immunity of expert witnesses from suit for breach of duty was unjustified. If the immunity were to be removed:

- there was no evidence that experts would be more reluctant to testify due to a concern about being sued;
- a witness of integrity would be unafraid of giving full and frank evidence, even if it might be adverse to his or her client; and
- it was unlikely that there would be a flood of vexatious claims against experts.

Lord Phillips also confirmed that the abolition of immunity from liability for breach of duty would not affect the immunity of expert witnesses from being sued for defamation as a result of giving evidence.

Four of the Supreme Court Justices agreed with Lord Phillips. One (Lord Brown) considered that removing the immunity would give experts a sharpened awareness of the risks of pitching their initial views of the merits of the case too high or too inflexibly, which would serve the interest of justice.

Of interest to US readers, Lord Collins expressed the view that it was very useful to look at other jurisdictions, as considerations of policy were involved, and in particular to review court decisions in the USA, where most States do not provide immunity for expert witnesses. Lord Collins also pointed out that expert witnesses had never been totally immune from suit, since they could be liable for prosecution for criminal offences including perjury, perverting the course of justice and contempt of court, or subject to disciplinary proceedings for unprofessional conduct.

Lord Hope, giving the principal dissenting opinion, expressed concern at the lack of evidence available to justify what he characterised as a retrospective change to the law in the present case. He considered that, in order to depart from the 1905 House of Lords case of *Watson v M'Ewan*, the Court was required to justify making an exception to the general rule that no witnesses could be sued, rather than requiring that the rule that expert witnesses could not be sued was itself justified. He was also of the view that the boundaries of the exception needed to be clear.

Lord Hope did not see that expert witnesses should be treated any differently to other witnesses, and he expressed concern that removing immunity from expert witnesses in civil proceedings would raise doubts about the position of expert witnesses in criminal actions or other types of proceedings. It also raised the question whether experts were immune from claims for other kinds of breaches, such as breach of confidence, as well as calling into question the position of court-appointed or joint expert witnesses. Lord Hope therefore concluded that the immunity of expert witnesses should only be removed by legislation. Such action would also deal with the position in Scotland, where expert witnesses will continue to have immunity, even after the Supreme Court judgment.

Lady Hale agreed with Lord Hope and echoed his concern that the limits of the removal of immunity should be made clear.

CONSEQUENCES OF THIS DECISION:

- A party that believes that its case has been prejudiced by its appointed expert is no longer barred from suing that expert.
- Persons agreeing to act as expert witnesses will now face the risk of being subject to later proceedings by the party that retained them, if that party believes that the expert has let them down.
- Professionals are likely to see higher professional liability insurance premiums for their work as experts.

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