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MFL Professional Partnerships Barlow House Minshull Street Manchester M1 3DZ
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The Supreme Court has delivered a landmark decision in the case of Jones v Kaney, effectively abolishing the immunity previously afforded to expert witnesses from claims for negligence arising out of evidence prepared for the purposes of, and in connection with, legal proceedings.

The background

- in a road traffic accident in March 2001, suffering significant physical and psychological injuries. He instructed solicitors to bring a claim and they in turn instructed Dr Kaney to examine Mr Jones and prepare an expert psychological report for the purposes of the claim.

- Dr Kaney prepared a report stating that at that time Mr Jones was suffering (amongst various other conditions) from Post-Traumatic Stress Disorder (PTSD). Proceedings were subsequently issued. Liability was admitted and only quantum remained at issue.

- After the defendant's expert alleged exaggeration of symptoms, the district judge directed the experts to meet and prepare a joint statement. The joint statement was drafted by the defendant's expert and allegedly signed without amendment by Dr Kaney. The statement was very damaging to Mr Jones' claim, denying that he was suffering from PTSD, describing him as deceptive and deceitful and reporting that his behaviour was suggestive of "conscious mechanisms" that raised doubts as to whether his symptoms were genuine.

- It is alleged that when challenged by Mr Jones' solicitors, Dr Kaney admitted that she had signed the statement without reading it and said that it did not reflect her views. However, Mr Jones was refused permission to change experts, and his claim had to be settled for far less than originally expected. The appellant contends that this reduced settlement is largely the result of the joint statement signed by Dr Kaney.

- Proceedings for negligence were issued against Dr Kaney.

First instance judgement

At first instance, Blake J struck out the claim on the basis that expert witnesses are immune from civil suit as confirmed in the Court of Appeal's decision in Stanton v Callaghan (2000) QB 75 CA (Civ Div). However, in Blake J's view, the case involved a point of law of general public importance so he granted a leapfrog certificate under section 12 of the Administration of Justice Act 1969, and the case was referred straight to the Supreme Court.

The Supreme Court

The Supreme Court sitting as a bench of 7 Supreme Justices held, by a majority of 5 – 2 (with Lord Hope and Lady Hale dissenting), that public policy could no longer justify the continued immunity of expert witnesses and allowed Mr Jones' appeal. Lord Phillips, delivering the lead judgment of the majority, set out a number of arguments in favour of removing immunity for expert witnesses (whilst keeping it in place for witnesses of fact), which the remainder of the majority supported:

- Expert witnesses will have chosen to provide their services and will voluntarily have undertaken to assume duties towards the client for reward under contract whereas witnesses of fact will not;

- The vast majority of expert witnesses carry professional indemnity insurance to cover them against actions for negligence;

- The removal of immunity for barristers in Arthur JS Hall & Co v Simons [2002] 1 AC 615 had not led to a huge wave of negligence actions against barristers, as had been suggested might happen with expert witnesses by counsel for the respondent, Patrick Lawrence QC;

- Expert witnesses are (usually) retained on terms that they will perform the duties specified in the CPR, which include an overriding duty to the court (CPR 35.3(2)).#

- Therefore, as the expert has been instructed by the client on that basis, there can be no conflict of interest between the duty which an expert owes to his client and that owed to the court.

- Expert witnesses had more in common with barristers than with witnesses of fact, and as immunity had been removed for barristers there was little or no justification for keeping it in place for expert witnesses; Other than for very niche specialisms, supply of expert witnesses exceeds demand so it was unlikely that justice would be impeded by expert witnesses becoming reluctant to give evidence; and

- Removal of immunity may actually have a positive effect by deterring experts from being overly optimistic in preliminary advice and unrealistically increasing clients' expectations, which in turn may lead to an increase in the early resolution of disputes.

Lord Hope, in his dissenting judgment, pointed out that many experts do not regularly act as expert witnesses and thought "…it would be unwise to assume that they all have insurance cover against claims for negligence…".

He further pointed out that "…an incautious removal of the immunity from one class of witness risks destabilising the protection that is given to witnesses generally…", reflecting that it was only 10 years since barristers still enjoyed such immunity until removed by Arthur JS Hall & Co v Simons.

As he put it: "There is a warning here, to repeat the old adage, that one thing leads to another. Removing just one brick from the wall that sustains the witness immunity may have unforeseen consequences."

In Lord Hope's view the majority had failed to set out a secure principled basis for stripping immunity from experts.

He also thought that expert witnesses in criminal proceedings should retain their immunity, as well as those in cases involving child protection.

Those views were reflected by Lady Hale, who concluded her judgment by stating: "To my mind it is irresponsible to make such a change on an experimental basis.

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This seems to be self-evidently a topic more suitable for consideration by the Law Commission and reform, if thought appropriate, by Parliament rather than by this Court. "

The Impact Of The Supreme Court Decision

Whilst the Court considered that the removal of immunity from barristers had not opened the floodgates, claims against barristers are certainly now more common. It therefore appears inevitable that claimant solicitors will seize upon this as a new field for litigation and advance claims against experts in cases where clients have not achieved the success they had expected as a result of an expert having unfavourably modified, or tempered, advice previously given. It remains to be seen whether, as suggested by Lord Kerr, an expert would normally be able to defend such a claim on the grounds that they had simply changed their mind and then complied with their overriding duty to the court by reporting this.

Insurers will need to consider carefully the potential ramifications of this decision. In particular, they will need to monitor new claims notified as a result of expert witness work (hitherto considered low risk in view of the immunity previously in place) and consider whether to exclude expert witness work from standard professional indemnity policies and/or create specific endorsements to cover such work, possibly at extra premium, depending upon the perceived risk. Claims against medical experts are likely to constitute the majority of claims advanced, given the predominance personal injury litigation, but no expert witness is now safe from the risk of a claim.

Thank you to Jason Nash, Partner at Berrymans Lace Mawer Solicitors, for producing this article.

For further information, contact MFL Professional Partnerships

Direct dial: 0161 236 2532
Fax: 0161 236 2583
Email: info@m-f-l.co.uk
Web: www.m-f-l.co.uk/pp