

Jones v Kaney [2011] UKSC 13

Expert Witnesses: now liable for inexpert evidence

Daniel Shapiro represented the successful appellant, Mr Jones, with Roger ter Haar QC.

1. In Jones v Kaney [2011] UKSC 13 the Supreme Court has abolished the partial immunity from suit for negligence previously enjoyed by expert witnesses. Expert witnesses can now be sued for providing negligent expert evidence just as they could be sued for negligently providing any other service. The decision ends the previously absurd position that, for example, a consultant neurosurgeon could be sued for negligently conducting brain surgery, but in any proceedings for clinical negligence his fellow consultant neurosurgeons would have immunity for any negligence while acting as expert witnesses. There was the risk of liability for performing the operation but immunity for talking about it.
2. This article:
 - 2.1. Discusses the decision in Jones v Kaney; and
 - 2.2. Identifies some of the implications for expert witnesses.
3. Of course, just as for other professionals, most expert witnesses are competent, honest and conscientious. The majority already hold professional indemnity insurance. For such experts, the decision in Jones v Kaney will make little difference, just as the removal of advocates' immunity in Hall v Simons [2002] 1 AC 615 had little impact on advocates. However, where an expert has caused his client loss through incompetence then that client will no longer be left without a remedy.

Part 1: Jones v Kaney

The law as it stood prior to Jones v Kaney

4. Before the decision in Jones v Kaney, expert witnesses benefited from a partial immunity from suit for negligence. Experts were immune from suit in relation to their activities for the substantial purposes of litigation. However, they are liable for their preparatory advice or for advice which is not for the substantial purpose of litigation. This position was established by the cases of:
 - 4.1. Stanton v Callaghan [2000] 1 QB 75 where the Court of Appeal decided that expert witnesses were immune on the basis of public policy for their actions undertaken for the predominant purpose of the litigation; and in which the Court of Appeal approved the exception to the immunity established in
 - 4.2. Palmer v Durnford Ford [1992] QB 483, Simon Tuckey QC, that preparatory advice to a client was subject to an actionable duty of care.
5. Thus the previous position was similar to the state of the law delimiting the immunity of advocates in the 20 years before that immunity was overturned in Hall v Simons [2002] 1 AC 615. See Saif Ali v Sydney Mitchell & Co [1980] AC 198, HL. That was no coincidence: the Court in Stanton v Callaghan relied upon the House of Lords (then good) decisions in Rondel v Worsley and Saif Ali as providing a valid analogy for the immunity of expert witnesses.

The law has not changed in relation to defamation

6. Before discussing Jones v Kaney further, it should be noted that – just as for advocates – the immunity of expert witnesses to a suit for defamation is expressly unaffected by the decision. See Lord Phillips at para 62, Lord Collins at para 72, Lord Dyson at para 125 and Lady Hale at para 178.

Brief facts

7. The appeal proceeded on the basis of the assumed facts as alleged in the Particulars of Claim.
8. On 14 March 2001 Mr Jones was stationary on his motorcycle, waiting to turn at a road junction, when he was knocked down by a car driven by a Mr Bennett. Mr Bennett was drunk, he was uninsured and he was driving while disqualified. Mr Jones suffered significant physical and psychiatric injuries, in particular post-traumatic stress disorder (PTSD), depression, an adjustment disorder and associated illness behaviour which manifested itself in chronic pain syndrome.
9. Mr Jones brought proceedings for personal injury represented by Kirwans Solicitors. Kirwans instructed Dr Kaney, a consultant clinical psychologist. She concluded that, some two years after the accident, Mr Jones was at that time suffering from PTSD. 18 months later Dr Kaney carried out a further examination of Mr Jones and concluded that, while he did not have all the symptoms to warrant a diagnosis of PTSD, he was still suffering from depression and some of the symptoms of PTSD.
10. Liability was admitted by the relevant insurer ("Fortis") and only quantum remained in issue. Fortis instructed Dr El-Assra, a consultant psychiatrist, who expressed the view that the appellant was exaggerating his physical symptoms.
11. The experts were ordered to hold discussions and prepare a joint statement of matters agreed and not agreed. The discussion took place on the telephone. That same day Mr El-Assra prepared a draft joint statement, which the respondent signed without amendment or comment.
12. The joint statement was extremely damaging to Mr Jones' claim. It recorded Dr Kaney's purported agreement that his psychological reaction to the accident was no more than an adjustment reaction that did not reach the level of a depressive disorder or PTSD. It further stated that the respondent had found the appellant to be deceptive and deceitful in his reporting, and that Dr Kaney considered that his behaviour was suggestive of conscious mechanisms that raised doubts as to whether Mr Jones' subjective reporting was genuine.

13. When taxed by Kirwans with the discrepancy between the joint report that she had signed and her earlier assessments, Dr Kaney gave what Blake J described (in Lord Phillips' view "*rightly*") as an unhappy picture of how the joint statement came to be signed, summarised as follows:
- 13.1. She had not seen the reports of the opposing expert at the time of the telephone conference;
 - 13.2. The joint statement, as drafted by the opposing expert, did not reflect what she had agreed in the telephone conversation, but she had felt under some pressure in agreeing it;
 - 13.3. Her true view was that the claimant had been evasive rather than deceptive;
 - 13.4. It was her view that the claimant did suffer PTSD which was now resolved;
 - 13.5. She was happy for the claimant's then solicitors to amend the joint statement.
14. Kirwans sought permission to change their psychiatric expert, but the district judge would not permit this. Mr Jones was then constrained to settle his claim for significantly less than the settlement that would have been achieved had Dr Kaney not signed the joint statement in the terms in which she did.

The decision of the majority

15. The majority of the Justices of the Supreme Court (Lords Phillips, Lord Brown, Lord Collins, Lord Kerr and Lord Dyson) were in favour of allowing the appeal and removing immunity for negligence from expert witnesses. Indeed, Lord Phillips expressed some surprise that the immunity had not been previously challenged. See para 2. The majority's decision to remove expert immunity was for the following reasons.
16. The position of expert witnesses was analogous to that of the advocate, from whom, immunity from negligence suits had been removed. Indeed, as the reasoning of the Court of Appeal in Stanton v Callaghan had relied upon the House of Lords' then decisions in

Rondel v Worsley and Saif Ali it could hardly stand unaffected by the House of Lords' contrary decision in Hall v Simons. See Lord Phillips paras 27-37 and 46-50, Lord Kerr para 91, and Lord Dyson para 103.

17. There was a marked difference between expert witnesses and lay witnesses. See Lord Phillips at para 18:

"there is a marked difference between holding the expert witness immune from liability for breach of the duty that he has undertaken to the claimant and granting immunity to a witness of fact from liability against a claim for defamation, or some other tortious claim, where the witness may not have volunteered to give evidence and where he owes no duty to the claimant"

18. The first rule of the law is that a wrong should have a remedy and there should be compelling reasons to maintain any immunity. As there are no compelling reasons to keep it the immunity should be removed so that clients who suffer loss can recover the same from the expert who caused it. See Lord Phillips para 521, Lord Brown at para 68 and Lord Dyson paras 108 and 113-114.
19. Removing immunity was unlikely to have any chilling effect in deterring expert witnesses from giving evidence at all. See Lord Phillips paras 52-54, Lord Collins at para 81 and Lord Dyson at paras 116-117. In part, this was because experts were already at risk of professional disciplinary proceedings as a result of incompetent evidence and such proceedings had a far more chilling effect as they could result in an expert losing his livelihood. See Lord Collins at paras 83-84.
20. Removing immunity was unlikely to have any chilling effect causing an expert to tailor their evidence. The removal of immunity had not caused barristers to cease to comply with their duty to the court and there was no reason to think that experts would. See Lord Phillips paras 55-57 and Lord Dyson at para 118-121.
21. The risk of a diligent expert being harassed by vexatious claims was particularly low because, generally, further expert evidence would be required to make good the suggestion that the previous expert had been negligent. It would not be easy to obtain expert evidence to support a vexatious claim. See Lord Phillips paras 58-59, Lord Collins para 85.
22. The suggestion that immunity from suit for breach of a duty to the court was required in order to ensure that the expert would comply with that duty to the court was nonsensical.

See Lord Dyson at para 123. It was, per Lord Phillips at para 56, *“paradoxical to postulate that in order to persuade an expert to perform the duty that he has undertaken to his client it is necessary to give him immunity from liability for breach of that duty.”* Further, there was no conflict between the duty to the court and the duty to the client, as Lord Dyson explained at para 99:

“There is no conflict between the duty owed by an expert to his client and his overriding duty to the court. His duty to the client is to perform his function as an expert with the reasonable skill and care of an expert drawn from the relevant discipline. This includes a duty to perform the overriding duty of assisting the court. Thus the discharge of the duty to the court cannot be a breach of duty to the client.”

23. Experts had no immunity for their initial opinions. This could lead to the paradox where the partial immunity actually made an expert reluctant to resile from his previously expressed opinion, rather than encouraging an expert to resile as intended by the supporters of the immunity. See Lord Phillips para 42, Lord Dyson para 106, and Lord Kerr at para 92, who commented,

“The rather incongruous outcome of this process of reasoning is that although initially an expert could be expected to be sanguine about the prospect of suit when giving preliminary advice, he would be overcome by fear and apprehension as the date for trial approached. It would also lead to the paradox articulated by Lord Phillips in para 42 of his judgment to the effect that a more convincing case for an immunity could be made, not at the stage of giving evidence, but at the earlier stage when advice that may subsequently prove inconvenient may have been given.”

24. *“The client who retains a professional expert for court-related work should not be in a worse position than other clients.”* Lord Collins at para 81.
25. Lords Kerr and Dyson also felt that expert witness immunity actually had a comparatively short history which weighed lightly compared to the first rule of the law that a wrong should have a remedy. See Lord Kerr at para 88 and Lord Dyson at paras 110-141.

The dissent of the minority

26. Lord Hope and Lady Hale both dissented and would have dismissed the appeal.
27. Lord Hope began from the starting point that the immunity had been of longstanding and that there should be a compelling reason to remove such a longstanding immunity. As he saw no compelling reason to do so then the immunity should remain. In particular, Lord

Hope was concerned that there was an absence of firm evidence as to the effects of a change in relation to experts' immunity. See Lord Hope paras 128-130. Lord Hope was concerned that a longstanding immunity was being rejected by the Supreme Court when it was more a matter for Parliament.

28. It should be noted Lord Hope's view is that the Law of Scotland has not been altered by the decision in Jones v Kaney. There was a disagreement between Lord Phillips and Lord Hope both as to the nature of the Scottish case of Watson v M'Ewan [1905] AC 480 and its import and effect. See Lord Phillips at para 19 and Lord Hope at paras 140-141. Lord Hope placed considerable reliance upon Watson v M'Ewan in his reasoning, before concluding at para 173 that Watson v M'Ewan remained binding in Scotland, where witness immunity was a devolved matter. Lord Hope did, however, express the view that the Law Commission of Scotland should consider the question of reform as soon as possible.
29. Lady Hale also relied upon Watson v M'Ewan and considered that the Supreme Court should follow that previous decision. In her view the basis for removing expert immunity was not so strong that the Supreme Court should remove it. Like Lord Hope, Lady Hale considered it was a matter for Parliamentary reform. See para 189. Lady Hale was also particularly concerned about the potential impact of removing expert immunity on family proceedings. See paras 183-186.

Part 2: implications

Expert witnesses should obtain professional indemnity insurance

30. The first and most important implication of the end of immunity is that expert witnesses should obtain appropriate professional indemnity insurance or should ensure that their present PI insurance provides appropriate cover for their activities as expert witnesses.

Expert witnesses should consider limiting their liability

31. Second, the corollary of the first implication is that in appropriate cases experts should consider limiting or excluding their liability by contractual terms. Such limitation or exclusion will, of course, need to comply with the relevant legislation on contractual fairness to be effective. It may be that in certain areas – for example, family work, where

there is apparently limited expert availability – limitations or exclusions of liability are more likely to be upheld by the Courts.

32. It is suggested that in most instances clients are unlikely to be willing to accept exclusions of liability, but that limitations of liability to the extent of a reasonable amount of insurance cover might be more acceptable. It may be that in areas such as family work, clients are more willing to accept such limitations or exclusions in order to secure the services of their desired expert.

Experts can be sued alongside lawyers

33. Sometimes it can be difficult to disentangle alleged negligence by the solicitor, the barrister and the expert. Each party may suggest they were simply relying on the others. Previously, the immunity of the expert caused a problem to the claimant, in addition to disentangling who might be responsible for what. (For an example, albeit one where none of the solicitor, the barrister and the expert were found to be negligent, see *Leonard v Byrt* [2008] EWCA Civ 20).
34. Following *Jones v Kaney*, the problem of the lawyers hiding behind the immune expert no longer exists.

Less tailored evidence?

35. There are occasions when an expert has acted as a hired gun. However, such occasions are relatively limited. The more common situation is that an expert tends to provide overly-helpful or “bullish” views and opinions at an early stage before resiling from them at a later stage of the litigation.
36. It may be that potential liability in negligence is of no effect on experts in giving evidence. A barrister writing an opinion is concerned to get the answer absolutely right but (at least in my personal opinion) does not consider the possibility of negligence liability. I suspect that the possibility of negligence liability will not greatly affect expert opinion.
37. Insofar as potential liability in negligence does affect experts’ behaviour, it may well be that the instances of providing overly-helpful views and opinions at an early stage may

decrease. As Lord Phillips stated at para 49: “*The expert agrees with his client that he will perform the duties that he owes to the court. Thus there is no conflict between the duty that the expert owes to his client and the duty that he owes to the court.*” If negligence liability has any effect it may be that experts are more concerned to ensure that they give accurate opinions at all stages of proceedings, so that their earlier opinions are consistent with their later opinions. See also Lord Brown at para 67 and Lord Collins at para 85.

38. (Although experts already had liability for earlier opinions pursuant to Palmer, but this tended to be forgotten because the line between what was immune and what was not was so blurred.)

The supply of experts

39. There has been some suggestion made that the supply of experts, at least in certain areas, may decrease. It remains to be seen whether this is actually so. Few, if any, barristers hung up their wigs following Hall v Simons. However, in this regard, only time will tell.

Wronged clients will have a remedy

40. The most important implication of Jones v Kaney is also the most basic. Where an expert acts negligently or dishonestly such that a client suffers loss then that client will now be able to obtain appropriate redress. Particularly where the client has paid substantial fees to the expert, this is no more than the client will rightly expect and it is in accordance with the first call on the law, which is that a wrong should have a remedy.

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